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IN THE ARBITRATION UNDER THE ARBITRATION RULES OF THE UNITED  
NATIONS COMMISSION ON INTERNATIONAL TRADE LAW  
AND  
THE NORTH AMERICAN FREE TRADE AGREEMENT

----- -x  
:
In the Matter of an Arbitration :
Between: :
:
CHEMTURA CORPORATION :
(formerly Crompton Corporation), :
:
Claimant/Investor, :
:
and :
:
THE GOVERNMENT OF CANADA, :
:
Respondent/Party. :
:
----- -x Volume 1

HEARING ON THE MERITS

Wednesday, September 2, 2009

Government Conference Centre  
2 Rideau Street  
Centennial Conference Room  
Ottawa, Ontario

The hearing in the above-entitled matter came on,  
pursuant to notice, at 9:04 a.m. before:

PROF. GABRIELLE KAUFMANN-KOHLER, Presiding Arbitrator

THE HON. CHARLES N. BROWER, Arbitrator

PROF. JAMES R. CRAWFORD, Arbitrator

Secretary to the Tribunal:

DR. JORGE E. VINUALES

Court Reporter:

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1 P R O C E E D I N G S

2 PRESIDENT KAUFMANN-KOHLER: Good. Are we ready to  
3 start? It looks like we are.

4 Can I ask someone to close the door in the back.  
5 Thank you very much.

6 So, I'm pleased to welcome you all here and open this  
7 hearing in this NAFTA arbitration Chemtura, formerly Crompton,  
8 versus the Government of Canada.

9 We thank the Government of Canada for hosting us here  
10 and having made the arrangements for this hearing room.

11 We have in attendance that I'll need to introduce my  
12 co-Arbitrators, Judge Brower on my left and Professor Crawford  
13 on my right.

14 We have the Secretary of the Tribunal, Mr. Vinuales,  
15 and the Court Reporter, Mr. Kasdan.

16 Can I turn to Claimant to introduce who is with you,  
17 please.

18 MR. SOMERS: Thank you, Madam Chair. I'm Greg Somers,  
19 representing the Claimant, currently Chemtura Corporation,  
20 formerly Crompton, formerly Uniroyal.

21 To my right is Mr. Ben Bedard, to his right, Alison  
22 Fitzgerald; to her right, Renée Thériault; and to her right,  
23 Heather Cameron, all for the Claimant. Thank you.

24 PRESIDENT KAUFMANN-KOHLER: Thank you.

25 Can I then turn to Canada, Mr. Douaire de Bondy.

08:59 1 MR. DOUAIRE de BONDY: Thank you, Madam Chair. On  
2 behalf of the Government of Canada I introduce Sylvia Tabet  
3 Director of Investment Services at the Trade Law Bureau;  
4 myself, Christoph Douaire de Bondy, Stephen Kurelek, Yasmin  
5 Shaker, Carolyn Elliott-Magwood, Mark Luz, Christina Beharry,  
6 Jennifer George, and our esteemed assistant, Sarah Basile.

7 I'd also like to note the presence in the room of  
8 Mr. Mark Feldman of the U.S. State Department, and our client  
9 representative Mr. John Worgan.

10 PRESIDENT KAUFMANN-KOHLER: Thank you.

11 I have seen on the list that there was a  
12 representative of Mexico attending. Is this right?

13 MR. DOUAIRE de BONDY: I had noticed, Madam Chair,  
14 that Carlos Pineira and Alejandro Rojas from Mexico's NAFTA  
15 office in Ottawa were to attend today. They may be appearing  
16 at some later moment.

17 PRESIDENT KAUFMANN-KOHLER: Fine. We will see later  
18 in that case.

19 And I went around the room to say hello to everyone,  
20 and some on this side were not there, so I apologize if I did  
21 not greet you personally.

22 Would you know the schedule, you know, the rules. Let  
23 me just repeat briefly what we have agreed on. We will work on  
24 the schedule that the Parties have prepared with the few  
25 additions that the Tribunal made.



09:01 1 Today, we will have the Opening Statements, two hours  
2 each. We will, of course, start with Chemtura, and you will  
3 see when you want to have a break in the middle, a short break,  
4 or whether you want to go through two hours, and then late  
5 morning we will start with yours and go on after the lunch, and  
6 later in the afternoon we will hear Mr. Ingulli; is that right?

7 Then in general we have agreed on time allocations, 16  
8 hours for the Claimant, 20 for the Respondent, and the  
9 Secretary will keep the time, and I will try to remember to  
10 give you the time regularly. And if you have questions, you  
11 can always, of course, ask the Secretary.

12 We will have a schedule, daily schedule of 9:00 until  
13 approximately 5:30, but, of course, we will need to be  
14 flexible, depending on where we stand in an examination. We  
15 have a lunch breaks of one hour and then hopefully other breaks  
16 as well during the morning and in the afternoon.

17 You have exchanged, I understand, demonstrative  
18 exhibits yesterday for--to be used today, and I see that we  
19 have received the Opening Statement of Chemtura in hard copy;  
20 right?

21 MR. SOMERS: That's right, Madam Chair. The opening  
22 Statement of Chemtura comprises documents, copies taken from  
23 the record of documents in the record only. There is no  
24 demonstrative exhibit for our part. We have received  
25 Mr. Douaire de Bondy's, for Canada, demonstrative exhibits that

09:02 1 we expect him to review later in his Opening Statement this  
2 morning.

3 MR. DOUAIRE de BONDY: Yes, and I'd simply note that  
4 we will be providing to the Tribunal a hard copy of our Opening  
5 Statement later in the morning.

6 PRESIDENT KAUFMANN-KOHLER: That's fine. Thank you.

7 The hearing is held in camera, so we have in  
8 attendance only persons who are authorized under the  
9 Confidentiality Order, and every Party should monitor this  
10 because, obviously, the Tribunal would have difficulty doing  
11 it.

12 Fact witnesses, and this does not apply to Expert  
13 Witnesses, should not attend before their own testimony, but  
14 that does not apply, if I understand the rule correctly, to the  
15 oral arguments. Obviously, they can be present during your  
16 openings and your closings as well.

17 Then we have received a consolidated chronological  
18 list of contemporaneous documents. We have received a hearing  
19 bundle. We have received an index of consolidated legal  
20 annexes, all this in the last days, and hard copies, I  
21 understand, of the hearing bundles today, and of the other  
22 documents actually as well.

23 Did I forget something that we should have?

24 MR. DOUAIRE de BONDY: Madam Chair, we simply wish to  
25 notice the presence in the room--you were asking earlier about

09:04 1 Mexico's representation, and I believe Mr. Carlos Pineira and  
2 Alejandro Rojas have arrived.

3 PRESIDENT KAUFMANN-KOHLER: Fine. Good morning.

4 Before we start with the Opening Statements, are there  
5 any comments, questions about the proceedings?

6 MR. SOMERS: None here, no.

7 PRESIDENT KAUFMANN-KOHLER: Mr. Somers, no? Thank  
8 you.

9 Mr. Douaire de Bondy?

10 MR. DOUAIRE de BONDY: No.

11 PRESIDENT KAUFMANN-KOHLER: Thanks.

12 Then I can turn to Mr. Somers and give you the floor  
13 for your Opening Statement, please.

14 MR. SOMERS: Thank you, Madam Chair. On the point of  
15 technology, I trust that the PowerPoint presentation, which is,  
16 as I said, a cull of documents from the record, appears on your  
17 screens before you?

18 PRESIDENT KAUFMANN-KOHLER: Right now it doesn't, but  
19 maybe it will.

20 (Pause.)

21 MR. SOMERS: Thank you. That looks good.

22 PRESIDENT KAUFMANN-KOHLER: Fine.

23 OPENING STATEMENT BY COUNSEL FOR CLAIMANT

24 MR. SOMERS: In Claimant's review of the record, there  
25 was--we had difficulty in finding that the issues in this case

09:05 1 had been adequately joined. It seemed as though the Parties  
2 were, to some extent, talking past each other, and so in my  
3 Opening Statement what I wanted to devote my time to--

4 PRESIDENT KAUFMANN-KOHLER: Could I ask you to speak a  
5 little bit closer to the microphone.

6 MR. SOMERS: Certainly. I beg your pardon.

7 And so, in our Opening Statement, what we wanted to do  
8 was focus very much on the facts as we understand them as  
9 opposed to legal argument. We will reserve our--the  
10 preponderance of our comments on the legalities of things for  
11 our closing statements after the Tribunal has had a chance to  
12 verify these facts by hearing the witnesses through the course  
13 of the hearing.

14 And so, what the Claimant's Opening Statement is is  
15 primarily an exposition of what Claimant asserts are the key  
16 facts as reflected in documents in the record itself. Before I  
17 turn to those--and I might add, all of the documents in this  
18 presentation, in our Opening Statement, are present in the  
19 joint hearing bundle as well for--merely for convenience.

20 Before I begin, just some comments on what it is that  
21 we will be talking about, and I suppose our mascot for this  
22 would be these chaps here, flea beetles.

23 The flea beetle eats the seed leaves of the canola  
24 plant. It's a serious pest, as you can see from the bite marks  
25 in those seed leaves. Those little chaps are only upwards of

09:07 1 three millimeters long, but they create a huge problem.

2           They're a problem in North America primarily because  
3 of agronomic reasons that are reflected in the detail in the  
4 record and that escape me but having to do with climate, having  
5 to do with the way canola is grown in North America as opposed  
6 to other parts of the world.

7           Now, a problem in Canada for canola is a very serious  
8 problem, indeed. Canola is second only to wheat in terms of  
9 the acreage planted and the economic importance to Canada and  
10 to the industry. There is upwards of 12 million acres or  
11 5 million hectares planted in Canada of canola. A large amount  
12 of it is destined for the export trade. Obviously that's too  
13 large an amount for Canada to consume.

14           The Claimant had a very successful business in Canada  
15 with a line of pesticides that adequately addressed, that fully  
16 addressed, and very thoroughly addressed, this flea beetle  
17 problem. In fact, it was so successful that the Claimant had  
18 upwards of three quarters of the market in Canada for flea  
19 beetle treatment.

20           Now, the way that the Claimant's products were used to  
21 treat flea beetles was as a seed treatment. There are many  
22 ways to apply pesticides to plants, including spraying these  
23 little devils directly, or spraying the leaves on which they  
24 prey, and therefore eradicating them that way, but with modern  
25 developments in pesticide treatment applying the pesticide to

09:09 1 the seed itself, and then when that seed is planted, exposing  
2 the predators to the pesticide, is found to be the least  
3 environmentally impactive and the most effective way to event  
4 flea beetle damage as opposed to waiting until the fellows are  
5 feasting on your crop and then trying to eradicate them at that  
6 time, as well as preventing dissemination of the pesticide into  
7 the environment to the maximum extent possible.

8           And so, the Claimant's success partly turned on having  
9 this seed treatment product whereby the seeds before planting  
10 are coated with a minimal amount of the pesticide, but an  
11 effective amount planted, and then left to grow unmolested by  
12 the flea beetle.

13           The Claimant's business was primarily to sell the seed  
14 treatment to companies that are established for this very  
15 purpose, to treat the seeds, as opposed to individuals or  
16 growers who had also applied. There were some businesses as  
17 well, and sales to the growers and the farmers, but the very  
18 large preponderance, 80 to 90 percent of its business, was to  
19 seed treaters, which are by equipment and by training  
20 particularly enabled to treat seeds with mechanized equipment  
21 and in an economic and safe fashion.

22           In order to sell pesticides in Canada, including seed  
23 treatment pesticides, Canada, by law requires pesticides to be  
24 registered, not only as to the particular chemical which is  
25 involved in the pesticide or the combination of chemicals in

09:10 1 the pesticide, but also the end use for which that pesticide is  
2 destined, and so it's not enough to have one's lindane  
3 formulation registered as a pesticide. It is registered as a  
4 pesticide for use on crop A, crop B, crop C.

5 The events leading up to this Claim began as a  
6 deregistration of the Claimant's pesticide products for use on  
7 canola, and this will come up routinely throughout my  
8 presentation and, indeed, throughout the hearing. It began as  
9 that, but it spread, as you will see, to the pesticide, the  
10 same pesticides registered for use on all other crops as well.

11 As I mentioned, the Claimant had a very successful  
12 seed treatment business, for canola business as well as seed  
13 treatment for other products, but canola was the center of that  
14 business with a product line of eight different pesticides.  
15 These were combination pesticides. There are many pests that  
16 attack plants, including canola, and insects is but one, which  
17 is what the lindane component of the pesticide was addressed  
18 to. There were also--in the Claimant's pesticide line were  
19 also fungicides, and so they were combined together, and when  
20 applied to the seed would prevent both funguses and insects  
21 from preying on the plant.

22 As I mentioned, the Claimant had a very successful  
23 business for many years in Canada, marketing lindane/fungicide  
24 products in Canada. In the space of five years, though,  
25 beginning in 1998, that business was essentially destroyed. It

09:12 1 was taken from the Claimant.

2 Now, we will see that the reason for this was at least  
3 ostensibly the lindane constituent, the lindane component of  
4 the Claimant's pesticide line, and that it represented a marked  
5 change in Canada's position on lindane.

6 And turning to the next slide, which focuses on  
7 Canada's--the next series of slides will focus on Canada's  
8 position in regard to lindane as a pesticide before the events  
9 complained of here.

10 We see here, at Slide 4 something entitled--it's  
11 Exhibit 17 to the Claimant's Reply--"A Draft Briefing on  
12 Technical HCH for the UNECE LRTAP, Long-Range Transport  
13 Abstract Pollutants," and there will be a lot of acronyms in  
14 this, and I will ask you to bear with me on that, "Persistent  
15 Organic Pollutants Protocol."

16 Now, you will see that it refers to Technical HCH. A  
17 little bit of chemistry unfortunately is called for here.  
18 Lindane is something called an isomer, which is one arrangement  
19 of a possible many arrangements of the atoms in a molecule.  
20 Hexachlorocyclohexane, HCH, is the chemical name for a group of  
21 isomers. Lindane is but one. For convenience or to baffle the  
22 laity, chemists distinguish between various shapes of the  
23 molecule with the same composition by using Greek letters.  
24 Alpha, beta, and gamma in this case are the three isomers of  
25 lindane--I'm sorry, the three isomers of hexachlorocyclohexane.



09:14 1 Lindane is only one of those. It is the effective pesticide.  
2 It is also the least environmentally harmful of the three.  
3 Alpha and beta isomers of hexachlorocyclohexane, by contrast,  
4 are not effective pesticides and are environmentally very  
5 harmful.

6           At various points in the record we will see sometimes  
7 references to lindane and other isomers of HCH, and/or isomers  
8 of lindane, indeed, which is a misnomer. And, in fact, when a  
9 person--when an analysis is wanting to focus directly on the  
10 impact of lindane and not confuse it with the impact of those  
11 other isomers, they will refer to lindane or the gamma isomer.  
12 When they are used as a group, lindane and other isomers or  
13 Technical HCH or similar terms, it lumps together the  
14 environmental and harmful impacts of all of those isomers, and  
15 tends to put a thumb on the scale of the impact that's  
16 perceived because it lumps in along with the gamma isomer  
17 lindane itself, alpha HCH and beta HCH, and we can see that  
18 Canada itself makes this observation--now, this is in 1997,  
19 under the title Justification, "We support attempts," it says,  
20 "to distinguish very clearly between lindane and Technical  
21 HCH."

22           And then jumping gown down to the next paragraph, "By  
23 focusing on lindane specifically, we are omitting the specific  
24 HCH isomers which are of greater concern. It is, in fact, the  
25 use of Technical HCH to which can be more reasonably attributed

09:15 1 the levels of HCH isomers found in the Arctic."

2           Historically and internationally, various versions of  
3 HCH were used. In some countries, Technical HCH, all of the  
4 isomers in a salad were thrown into a pesticide. In Canada,  
5 and by the Claimant, however, only the gamma isomer, only  
6 lindane itself, was used, and that was a much more focused and  
7 much less environmentally burdensome way to apply the pesticide  
8 and use of the pesticide. Technical HCH being alpha, beta, and  
9 gamma, caused various forms of environmental fallout, as we'll  
10 see from the record throughout the week and on the paper.

11           So, I'm sorry, that was a little peroration on the  
12 chemistry of HCH, but we can see, and I'm turning to the next  
13 slide now, that Canada wanted to clarify, as it defended  
14 lindane in the international fora that it wanted to focus on  
15 lindane itself and not confuse the issue by adding the alpha  
16 and the beta because, for example, those isomers, alpha and  
17 beta, were not used in Canada. The gamma isomer was purified,  
18 sourced by that way by the Claimant and formulated into the  
19 pesticide to ensure that alpha and beta contaminants were not  
20 present.

21           Here, we see an internal PMRA E-mail from the person  
22 who was apparently responsible, and they won't be appearing as  
23 a witness in these proceedings, I understand, but who was  
24 charged with at least some of the international activities in  
25 relation to Canada and lindane, again from 1997, in August.

09:17 1 And I have indicated just by an arrow there that the text I  
2 would like to focus on in the third paragraph. "We would like  
3 to ensure that if lindane does make its way into the protocol,  
4 current Canadian uses of lindane are not compromised."

5 It was recognized that lindane was a very important  
6 and registered use in Canada, and it would be highly  
7 inappropriate for Canada under the international fora to  
8 support the eradication of lindane while it had legally  
9 registered its use in Canada and entitled Canadian investments  
10 or investors to formulate and market that product here.

11 On the next slide, in Exhibit to our reply as well, we  
12 can see the progress--this is later on in the year 1997, where  
13 Canada observes, "As a result of extensive rewriting of the  
14 protocol text, the proposed commitments allow the use of HCH  
15 mixed isomers as an intermediate"--so, this is only at the  
16 manufacturing stage--"in chemical manufacturing only, and allow  
17 products containing lindane to be used for the following  
18 purposes: (1) seed treatment," which is the issue at the  
19 center of this dispute, as well as five other uses. Five other  
20 uses incidentally with much more environmentally troubling  
21 aspects, including tree plantations, indoor and outdoor nursery  
22 stock. I say that because use in those--those types of uses  
23 would involve more than just coating a seed and planting it in  
24 the ground using minuscule quantities, but also, for example,  
25 direct application by spraying to leaves, dusting the product,

09:19 1 whatever. In any event, Canada supported all of these six uses  
2 as late as October '97.

3           Next paragraph, "It should be noted that Canada was  
4 the only country asking that the uses in (5) and (6)"--that's  
5 tree plantations and indoor use--"be among those permitted  
6 under the protocol," and then various other countries speaking  
7 about their positions on those things.

8           At this point, as far as Claimant was concerned,  
9 Canada was defending the uses of lindane internationally, and  
10 sometimes in isolation, in fact, but because these Agreements  
11 work on international consensus, one country is enough to  
12 prevent, and can and does prevent, for example, the addition of  
13 a pesticide or a chemical to a restriction list or a  
14 prohibition list.

15           Further, in that third paragraph of that slide, "We  
16 have explained," Canada says, "that we cannot commit to such a  
17 deadline," the deadline being a reassessment by 2005, "and we  
18 require that all of the aforementioned uses remain acceptable  
19 under this protocol. The reassessment of existing uses by 2005  
20 under the protocol is seen as a compromise whereby the concerns  
21 associated with lindane would be addressed. Through the  
22 Executive Body, Parties would have a say in the kind of  
23 assessment that's necessary. And Parties would have  
24 flexibility in determining the degree of participation in that  
25 reassessment."

09:20 1           In other words, the compromise allows Canada much  
2 wiggle room. Even if it commits to a reassessment, the degree  
3 to which it reassesses, the way it reassesses, and so forth  
4 remain in Canada's discretion.

5           After--immediately after this, and, in fact, in 1997  
6 itself, as the record shows, an independently managed  
7 subsidiary of the Claimant in the U.S. was marketing a  
8 competing product to the Claimant in Canada. It was marketing  
9 a different kind of seed treatment for canola. As I explained,  
10 canola was an very important crop in Canada, and primarily in  
11 Canada. In fact, canola is virtually a Canadian invention, but  
12 its success spread, and in the United States, by the end of the  
13 nineties, it was becoming successful there as well. They were  
14 needing treatments there against flea beetles as well.

15           Because Canada had been so important and the canola  
16 crop had been so important, the Claimant addressed that need in  
17 Canada by registering its lindane-based pesticides here. There  
18 hadn't been a financial need, and, in fact, a market demand for  
19 that because the canola crop before the late nineties was  
20 insignificant in the United States. It's still much smaller  
21 than in Canada. It was less than 10 percent.

22           And the independently managed subsidiary, called  
23 Gustafson, Inc., in the United States, wanting now to capture  
24 that growing canola market in the United States, complained to  
25 the EPA or observed to the EPA, I should say, that

09:22 1 pesticide-treated seeds were being imported into the United  
2 States with a pesticide that wasn't registered in Canada  
3 because the Claimant hadn't registered that in the U.S. yet.  
4 There had been, as I said, formerly no market demand, but it  
5 was growing. The EPA simply responded to that letter by  
6 saying, well, U.S. law is, if you treat a seed with an  
7 unregistered pesticide out of the country and try to bring it  
8 in the country, it falls under the pesticide rules of the  
9 United States, and it cannot be done. In order to have that  
10 pesticide-treated seed brought into the United States, that  
11 pesticide would also have to be registered in the United States  
12 as well. Logical and simply an expression of U.S. law.

13           Accordingly, the EPA now advised of this in effect by  
14 a U.S. company, couldn't turn a blind eye, as frankly it had  
15 been, or a negligent eye to the fact that Canadian registered,  
16 Canadian only registered pesticide-treated seeds were being  
17 brought into the United States, and so it went out to the trade  
18 and in various forms, of which this slide is one, and announced  
19 that this is prohibited.

20           Now, this complaint occurred in '97, and what we can  
21 see from this slide here is that--a little background first.

22           What happened was the EPA announced it would close the  
23 border to those imports but not on an urgent basis. The  
24 complaint happened in '97, and the EPA gave fair warning to the  
25 trade by saying by June '98, we're going to close the border to

09:24 1 this material.

2           We can see from the slide that I'm showing now,  
3 Slide 8, that, in fact, because access to that valuable  
4 pesticide was going to be cut off in the United States by the  
5 EPA, there was a competition issue, a trade issue, that arose  
6 between the two countries. That pesticide was a fraction of  
7 the cost of the alternatives. U.S. growers wanted access to  
8 that treated--that pesticide in order to be competitive with  
9 the Canadian imports, the Canadian imports of canola product.

10           So, you can see there that this is a letter from--an  
11 extract of a letter from Lynn Goldman, who will appear as a  
12 witness in these proceedings, to the Commissioner of  
13 Agriculture for North Dakota, who had obviously complained to  
14 her, and this letter is in response.

15           Looking at the first paragraph, where Lynn Goldman  
16 reiterates a meeting that happened between them in North Dakota  
17 on August 5th, "At our meeting in North Dakota on August 5, you  
18 raised the issue of differential registrations for lindane in  
19 the U.S. and Canada. You requested EPA to establish a 'level  
20 playing field' for lindane either by quickly establishing a  
21 tolerance in the U.S.", in other words, permitting it in,  
22 letting it in, "or persuading Canada to discontinue lindane."  
23 In other words, North Dakota farmers, represented by their  
24 Commissioner of Agriculture, wanted either access to that same  
25 wonderful pesticide or stop Canada from using it and bringing

09:25 1 it into the country so that they would have a level playing  
2 field. This is a trade issue, obviously. It had nothing to do  
3 with health or environment or anything else. It wasn't a  
4 concern that they wanted to stop lindane because of some health  
5 issue.

6 Canada has consistently represented--I'm sorry? Yes,  
7 Mr. Crawford.

8 ARBITRATOR CRAWFORD: You said there were two  
9 alternatives. One was tolerance, and the other was the phasing  
10 out of lindane in Canadian. Why was there not a third  
11 alternative, which is registration of lindane for use in the  
12 United States, which would, I understand, have allowed the  
13 product in?

14 MR. SOMERS: In fact, the use of the word tolerance  
15 here is a shorthand for exactly the point you make. It is what  
16 it is. Tolerance itself would not have been permanently enough  
17 because with a registration, that would have--that would  
18 actually have been required as well eventually. Tolerance  
19 would have been--for example, a time-limited tolerance would  
20 have been an immediate measure that would have allowed it to  
21 come in, but ultimately and eventually, registration would be  
22 allowed in. I will get to that later on in my presentation,  
23 but your point is well-taken, that this is a use of by the  
24 Commissioner, here is a bit of sloppiness that I have repeated  
25 in my submissions. In fact, it would be a tolerance and



09:26 1 registration that would have been required.

2           The reason I'm emphasizing this and spending maybe so  
3 much time on it is because Canada has emphasized the health and  
4 environmental issues stretching back even into days before this  
5 in the submissions that we have seen. In fact, the inception  
6 of this issue, the germination of it, if I can say so, the  
7 gestation of it, is a trade issue. It became something else  
8 and quickly, but it began and was understood by the Claimant  
9 and by other industry players as strictly a trade issue. It is  
10 level playing field. It is competition in terms of access to  
11 an economical and very effective pesticide, and nothing more.

12           And I'm jumping down to the next highlighted section  
13 of that middle paragraph on Slide 8, "In light of the confusion  
14 over the U.S. policy on treated seed, EPA made the decision to  
15 place a low priority on enforcement of its requirements for the  
16 '98 growing season."

17           This is not a matter for urgency. This is not  
18 trousers on fire. This is the EPA saying yes, we recognize  
19 that this stuff has been coming in. It should have been  
20 regulated, bit of embarrassment, and not wishing to completely  
21 block the imports immediately because there was no pressing  
22 need to do so. It was simply a competitive fight by North  
23 Dakota, and Canada and North Dakota is notorious for being very  
24 vigilant about its trade rights and competitive matters.  
25 That's just editorializing. I'll stop now.

09:28 1           Next slide, which is Slide 9, as this trade issue  
2 materializes, Claimant says, and this is our case, that the  
3 EPA--I'm sorry, the PMRA, saw this as an opportunity to advance  
4 a separate agenda. As we can see there, this is an E-mail, an  
5 internal E-mail at PMRA from Wendy Sexsmith, who will also be  
6 appearing, to another chap at PMRA, Mr. Ormrod. In it Wendy  
7 Sexsmith says, "I have not received lindane email yet, but  
8 spoke to Tony Zatylny," who will also be appearing, "and am now  
9 trying to get in touch with EPA.

10           "Gustafson is considering and IPCO is in favor of  
11 removing lindane. I am now going to try to sell this to EPA,  
12 with a go ahead from Tony as a way to stop the fuss."

13           It's not clear from this because of the abbreviations  
14 and the inside references being made, but, in fact, it's about  
15 withdrawing, having the industry withdraw from the market  
16 lindane-based canola seed treatment.

17           Another slide in relation to this trade issue, this is  
18 a letter from Lynn Goldman to the USTR, U.S. Trade  
19 Representative, a trade issue where Ms. Goldman explains the  
20 issue in terms of the border dispute about whether Canadian  
21 registered pesticide-treated seeds coming into the United  
22 States should be allowed and what to do about it. At the  
23 indicated section of the text, "We are told that these  
24 pesticide issues are exacerbating the dispute over trade  
25 practices. EPA is prepared to take specific actions which are

09:30 1 consistent with our already significant bilateral  
2 harmonization," et cetera.

3           Jumping to the next emphasis, "One of the most  
4 pressing issue for our northern state growers is the greater  
5 availability in Canada than the U.S. of approved pesticides for  
6 canola, flax," and other crops.

7           We believe it exists--skipping ahead--"we believe it  
8 exists primarily as a result of private marketing decisions,"  
9 and I mentioned that before, canola, as an important crop in  
10 Canada and a diminutive one until recently in the United  
11 States, didn't warrant the expense and trouble and data  
12 requirements of a U.S. registration, until, of course, the EPA  
13 was alerted to this and it became a trade issue.

14           As you can see from the last line in that slide, "the  
15 market for pesticides used on these crops, particularly canola,  
16 is substantially greater in Canada than the U.S."

17           Accurate. Absolutely so.

18           As I mentioned, though, it quickly became behind the  
19 scenes not a trade issue, but, in fact, an agenda to remove  
20 from the market all lindane products, not just canola treated  
21 seed destined, but all.

22           This is a communication from the PMRA, I believe, to  
23 the EPA. There were some--in any event, it's definitely a PMRA  
24 document. There was some question as to where it lay in the  
25 record from Canada, and I'm sure we'll have submissions related

09:31 1 to that, but it is in any event, a PMRA lindane, as you can  
2 see, seed treatment update, October '98.

3 We can see as jumping down to the third paragraph  
4 before the bullets, "The resulting proposal has emerged"--this  
5 is a proposal--"after follow-up to this issue with both the  
6 Canola Council of Canada and EPA staff," and then the third  
7 bullet, "commitment between EPA and PMRA to work together to  
8 phase out all uses of lindane."

9 Now, from a trade issue that concerned canola seed  
10 treatment, an unregistered use in the United States, it's  
11 become a proposal to get a commitment between the two agencies  
12 to phase out all uses of lindane. This is a PMRA-inspired  
13 proposal.

14 I hadn't mentioned before, but lindane in various  
15 pesticide formulations, was registered in the United States,  
16 just not for canola. It was registered for upwards of 19 other  
17 seed treatments, so there was no particular concern or  
18 animosity or targeting by the EPA of lindane.

19 The next page of that exhibit, in the next Slide 13,  
20 "Next steps," it says, "for PMRA internal use," and I wanted to  
21 emphasize this. It will become relevant later on. The third  
22 bullet again, "If registrants commit to provide submissions for  
23 formulation changes for the lindane canola seed treatments"--in  
24 other words, a formulation change that includes the removal of  
25 lindane and a substitution with some other insecticide to kill

09:33 1 that flea beetle--"PMRA will commit to short time lines for  
2 registering the formulation changes." So, PMRA was interested  
3 in expediting the removal of lindane and putting its money, as  
4 it were, where its mouth is by offering to produce replacement  
5 products because as I said, that flea beetle, while three  
6 millimeters long, is a very serious problem, and so it's not a  
7 matter of just withdrawing lindane and then letting the  
8 industry fend for itself. The PMRA, as the gatekeeper of  
9 pesticides, had to ensure there was something that could  
10 seamlessly replace a lindane-based pesticide.

11 And the next slide, the idea of withdrawing lindane  
12 was floated to the industry. The record will show that. I'm  
13 jumping ahead here to a reaction of Gustafson.

14 Now, Gustafson, you can see in the second--well, the  
15 first sentence, "The PMRA today received a faxed copy of the  
16 document from Gustafson," and Gustafson was on the Canadian  
17 side of things. Gustafson at this time was the marketing arm  
18 for the lindane products of the Claimant, of the Claimant's  
19 investment in Canada. It was merely a business unit at this  
20 date.

21 And so, what the PMRA internal note is commenting on  
22 in the second paragraph is, "Our interpretation of this letter  
23 is that Gustafson is stating they will not participate in the  
24 Canadian canola grower's plan to have lindane removed  
25 voluntarily as an insecticide." And so, at this point the PMRA

09:34 1 was obviously aware that there was not industry consensus. The  
2 most important player in the industry with three quarters of  
3 the lindane canola seed treatment market wasn't playing ball.  
4 They weren't interested in simply walking away from that very  
5 valuable business.

6 As part of PMRA's efforts to advance with the Canola  
7 Council, with the growers and the canola industry's trade  
8 associations, to advance this withdrawal of the lindane use, it  
9 had communicated to the market an impression that all  
10 Registrants had to agree. Now, since the Claimant had more  
11 market and more invested and more to lose than all of the other  
12 Registrants for lindane or the other three put together, they  
13 were the person to get. They were the Agreement that was  
14 really needed by PMRA if it wanted an orderly and rapid  
15 withdrawal of this product from the market. This letter  
16 indicates PMRA knows that the Claimant was not or through its  
17 Gustafson unit, was not willing to do so.

18 In the comments at the bottom of the page, it's  
19 commenting again on the Gustafson letter. The Gustafson  
20 impression was that everybody had to agree. In fact, PMRA  
21 states there, it did not made unanimous agreement among all  
22 Registrants a condition with the voluntary removal. This will  
23 become a little more meaningful later on, but I'm trying to  
24 deal with the issues as they come chronologically.

25 The next slide, another letter from Lynn Goldman to

09:36 1 EPA writing to Tony Zatylny. This was--this letter reflects  
2 the PMRA and their opposite number Agency in the United States  
3 working together to attempt to get a voluntary removal of  
4 lindane on the Canadian side. We recall that prior slide where  
5 the Commissioner of Agriculture for North Dakota was saying  
6 either give us a tolerance, tolerance/registration, or remove  
7 it from the Canadian side, but one way or another, remove that  
8 tilt from the playing field. It gives the Canadian canola  
9 growers such an advantage.

10           It's clear that the way the EPA has come down on this  
11 is to go along with Canada's desire to actually remove lindane.  
12 And we saw that with complete phase-out of lindane products in  
13 that previous slide that was from PMRA, and the slide from  
14 Wendy Sexsmith saying I'm going to try to sell this to EPA.  
15 This was the Canadian agenda being cooperated with by the EPA.

16           This letter here, Slide 15, is the EPA responding to  
17 Anthony Zatylny, who will also appear as a witness in this  
18 proceeding, at the time I believe the Secretary of the Canadian  
19 Canola Council, which is a trade association of the canola  
20 industry which, for example, uses canola crop to processing the  
21 product. We can could see from the highlighted section there  
22 that the U.S. and Canadian Government hoped to announce the  
23 Registrants were voluntarily removing. Through these voluntary  
24 efforts there could have been a level playing field, so Lynn  
25 Goldman is responding to her constituency in North Dakota.

09:38 1           However, what you can see from the accented text at  
2 the bottom of the page of the last paragraph, "I'm optimistic  
3 many of these trade issues can be resolved," and then she  
4 reiterates the rule that if it's not registered in the U.S., it  
5 cannot come in.

6           I'm jumping back up to the first paragraph just to  
7 complete that thought. It says, "Since these voluntary actions  
8 do not appear possible at this time"--in other words, everyone  
9 was aware that there was not a agreement, even as late as  
10 November '98. There was attempts to get that agreement by that  
11 PMRA and working through the Canola Council, but it hadn't  
12 materialized.

13           At this point, this is a month later, Canada and the  
14 U.S. meet and come to what's called a Record of Understanding.  
15 It's not a treaty. It's not a binding, any binding commitment,  
16 but it's an expression of cooperation, various aspects of  
17 agricultural trade, as you can imagine, very important, between  
18 the two countries. One of the provisions in it is this one  
19 here that I have excerpted, 13, Pest Control Products: "To  
20 avoid future disruption in bilateral trade, Canada and the U.S.  
21 agree to the following initiatives." Again, we are still  
22 squarely in, as far as the public record is concerned, a trade  
23 issue. So far, the silence on health and environmental impact  
24 and lindane, this and that is deafening.

25           I'm going to the next slide, where the pertinent



09:39 1 section is. I emphasized there that first bullet on that page,  
2 "Canadian canola growers have requested"--now, these are the  
3 growers--"have requested Canadian Registrants," says Canada,  
4 "to agree voluntarily to remove canola/rapeseed claims from  
5 labels of registered canola seed treatments containing lindane  
6 by December 31. All commercial stocks," et cetera. This is  
7 contingent on Registrants requesting voluntary removal. Again  
8 we are in December here of '98. There is no agreement. The  
9 request has been made, and we'll see who actually was behind  
10 that request, but the request has been made. There isn't for  
11 Canada to report here to the United States any existing  
12 agreement to do so or it would have done so.

13           Next slide is an exhibit to our reply as well. It's  
14 Wendy Sexsmith marking up a copy of a draft news release by the  
15 Canadian Canola Council. We can see obviously that behind the  
16 scenes the PMRA is managing the message. It is ushering  
17 through the Canola Council the message that lindane is going to  
18 be voluntarily removed from canola seed treatments. We can see  
19 from the edit that the edits on the document, the positioning  
20 of the message that PMRA is trying to accomplish. For example,  
21 I won't go through them all, but for example, in the first  
22 paragraph, first full paragraph of that new release, and  
23 apologize for the size of the print, "The Canadian Canola  
24 Growers Association today announced that," and deleted is  
25 "Canadian and U.S. Pest Management Regulatory Agencies," at

09:41 1 hand--that's taken out--and what's remaining is announced that  
2 suppliers of crop-protection products such as the Claimant,  
3 have agreed to develop new seed treatments for canola. Talk  
4 about putting a positive spin on it. This is really about  
5 walking away or being forced to leave lindane and with a  
6 commitment to get replacement products for it. It's styled as,  
7 let's obtain some new seed treatment products. Oh, by the way,  
8 I guess that means we won't need lindane anymore.

9           Other edits in the document are equally instructive as  
10 to PMRA's actual role in what this is. It's been styled by  
11 Canada as an industry-led withdrawal. And, in fact, Claimant  
12 says it is a PMRA-managed and -orchestrated withdrawal. You  
13 can see the comments there. They're annotated Tony comments,  
14 Wendy. We propose to put this document to Wendy Sexsmith when  
15 she appears as a witness, but that's the attribution.

16           Again, the next slide, another internal E-mail from  
17 Wendy Sexsmith, who played a key role in all these  
18 developments, and it's fortunate that she will be appearing in  
19 these proceedings to clarify these things.

20           The part I have emphasized there, just as a note, some  
21 comments, timing on the demise of lindane. In communications  
22 to the trade there was no talk of demise of lindane. There was  
23 no talk of removal of lindane on anything but to level the  
24 playing field in relation to canola seed treatments. It's  
25 become from a trade issue to basically removal of lindane as

09:43 1 that prior document we saw, phase-out of all uses in the space  
2 of one year. You will recall--this is the beginning of '99--we  
3 will recall the '97 documents where Canada cannot agree to  
4 restriction on these uses, on these six uses and so forth in  
5 the space of one year.

6 Behind the scenes, this is occurring. As far as  
7 publicly, this is what is occurring, as we see on the next  
8 Slide 20. This is a letter from the Executive Director of PMRA  
9 to the Canadian Canola Growers Association. The association is  
10 being responded to about the proposal to remove the  
11 registration for canola seed treatment by lindane.

12 I have emphasized this, too, and it will become  
13 pertinent a little later on under Bullet 3 or under point 3 in  
14 that agreement, the Pest Management Regulatory agency and the  
15 U.S. EPA will continue to work with Registrants to facilitate  
16 access to lindane replacement products, and so we will see that  
17 sort of initially general commitment and later commitment to  
18 the Claimant itself not come to fruition.

19 There is also dispute in this record, and another  
20 place the Parties don't seem to agree as to where and when an  
21 agreement occurred for the voluntary withdrawal of canola seed  
22 treatment. You will see in the highlighted section of the  
23 second paragraph there, Gustafson Uniroyal--that's us--Zeneca,  
24 IPCO, and Rhône-Poulenc, those are the four companies that had  
25 lindane products of which Gustafson Uniroyal was, of course,

09:44 1 the most important, have indicated in writing and in discussion  
2 with staff their agreement in principle with the above three  
3 components. Agreement in principle meaning a framework for an  
4 agreement detailed later.

5           Again, at the last page--last paragraph of that slide,  
6 "PMRA and EPA committed to continue to work with growers and  
7 registrants to facilitate access to replacement products."  
8 It's not enough to take off lindane. We have to have a  
9 replacement product both for the both market demand, and also  
10 for the damage to the crop that would occur without one.

11           This is the next page of that letter, in fact. "I am  
12 very pleased that all four registrants have agreed in  
13 principle." And again, the PMRA even is careful to say that  
14 there is not an agreement. There is no concluded. It was  
15 agreement in principle, let's discuss it. This sounds like  
16 something we can work with. As late as February '99, still no  
17 agreement, no concluded one.

18           Next slide, also a letter from the Executive Director  
19 to Uniroyal itself, repeating the Canadian Canola Growers  
20 Association terms of withdrawal. And I go to the next page of  
21 that same document, which is the next slide, "Given recent  
22 clarifying discussions with staff and your written input, my  
23 understanding is that Uniroyal/Gustafson agrees in principle to  
24 the above." And again, its commitment to facilitate access to  
25 replacement products. So, again, by the PMRA's hand, in

09:46 1 February, there is no concluded agreement. This is the third  
2 page of that same document, where PMRA understands in the last  
3 part of the highlight, it will be important to respond to all  
4 of these requests in an equitable manner. And that will become  
5 pertinent as we see how PMRA, in fact, dealt with registration  
6 of replacement products of the Claimant and of its competitors.

7           And again, at the bottom of that page, "I am very  
8 pleased that all four registrants have agreed, in principle."  
9 No one believes that there is a concluded agreement at this  
10 point.

11           The Claimant, as the most important player in the  
12 pesticide market, wanted to negotiate terms of withdrawal that  
13 it could accept. It wasn't enough that others had come to  
14 certain understandings with their relatively trivial, for  
15 example, sales of these lindane-based products. It wanted to  
16 ensure that not only its, but its customers and growers'  
17 interests were adequately protected. It was at this point it  
18 may have had 80 percent of the treatment market.

19           There is certainly lots of other correspondence on the  
20 record back and forth between PMRA and the Claimant in 1999,  
21 but they came down to this. This was the short strokes. On  
22 October 27, 1999, Al Ingulli for the Claimant wrote that these  
23 were his conditions under which the Claimant would withdraw its  
24 products.

25           Bear in mind, there has not been any condemnation or

09:48 1 any sort of indictment of the product. This is not something  
2 where the Minister of Health or any of his delegates could come  
3 along and deregister the product for safety concerns. There  
4 were none, none that were scientifically based in any event in  
5 Canada, and it is--so the voluntary withdrawal harks back to  
6 that trade issue, and it's taken a year, year and a half to get  
7 to this.

8           The conditions, which will become important later on,  
9 as they are systematically breached by PMRA, are the ones  
10 enumerated here. Condition 2: "PMRA and EPA shall coordinate  
11 and collaborate on the timely review and re-evaluation of new  
12 lindane data already submitted or to be submitted in accordance  
13 with any data call in," the routine means by which these  
14 agencies call in data from the companies who are active  
15 participants in the evaluation and safety of pesticides or  
16 regulatory requests and provide a scientific assessment of  
17 lindane by the end of 2000.

18           Behind the scenes, PMRA had been preparing a  
19 scientific review of lindane. The trade was aware of that, as  
20 we shall see.

21           And the Claimant's concern here was that it will  
22 withdraw, but PMRA must go ahead and do the science and provide  
23 a report on a timely basis, and the Claimant was confident that  
24 it would be passed. It would succeed and not be indicted by  
25 such a special review, but it was important that it be done on

09:49 1 a timely basis so that the Claimant could return to market  
2 without a gap in coverage occurring.

3 Third condition, obviously that if both government  
4 agencies had determined that lindane had reversed toxicological  
5 effects, then the Claimant would go away. It wouldn't ask for  
6 reinstatement of a toxic product.

7 Next page, next slide, continuation of the conditions.  
8 The fourth condition, "In the event that PMRA determines  
9 lindane is safe to be used on canola as a seed treatment or EPA  
10 should issue a canola tolerance or determine that lindane is  
11 exempt from requiring a tolerance in canola, Uniroyal shall  
12 request from PMRA the reinstatement," et cetera, and PMRA will  
13 comply.

14 Now, this is extraordinary. This condition is that  
15 either PMRA finds it safe or EPA allows it into the country.  
16 This exemplifies that it was a trade issue. With PMRA, if PMRA  
17 agreed to this, is it dead? It would mean that if the EPA  
18 grants a tolerance, allows Chemtura or lindane-treated canola  
19 seed to come into the U.S., if that alone happens, PMRA will  
20 reinstate it. This is a trade issue. This is something--in  
21 other words, if the obstacle is removed, I don't care if it's  
22 by the PMRA side or the EPA side, Claimant is saying you will  
23 let it in.

24 Under condition 5, all of our other lindane-based  
25 products will stay registered because this is a canola seed

09:51 1 treatment trade issue. This isn't a lindane, oh my gosh, scary  
2 issue.

3           Bullet 6, "All stocks of Uniroyal's products  
4 containing lindane for use on canola are allowed to be used up  
5 to and including July 1, '01." Stocks are pesticide products.  
6 Used means applied to canola seeds. We can do that until  
7 July 2001, and this had been worked out with the industry as  
8 well. That was considered the cutoff date for using the  
9 pesticide products and treating the seed.

10           The additional condition doesn't become pertinent  
11 because of subsequent events.

12           The next slide is PMRA's agreement to those  
13 conditions. Clearly says, "I am confirming PMRA's agreement  
14 with your stated commitment to voluntary remove," and then  
15 jumping down, by December 31, cease production by December 31,  
16 '99, and the provisions that are outlined in the October 27  
17 letter received from you by fax, so here we have a meeting of  
18 the minds. PMRA agreed to those conditions.

19           The balance of my statement is primarily a litany on  
20 how several of those conditions were breached to the detriment  
21 and, in fact, to the destruction of the Claimant's lindane  
22 business in Canada.

23           As we saw one of those conditions, the pesticide  
24 products could continue to be used, in other words applied to  
25 seed, until July 2001. Now, if you apply a pesticide product



09:52 1 to the seed before the day of July 2001, there is no point in  
2 doing that unless you are allowed to plant it in July or  
3 August. And, in fact, planting is done in April, May, in  
4 Canada, when the ground finally thaws out, and so to apply a  
5 pesticide product until July to someone in the business would  
6 imply, well, I can plant that seed. No one would treat a seed  
7 in order to throw it away.

8           Terms that the PMRA had worked out with other  
9 companies or had agreed to with the Canola Council were that  
10 you cannot apply the pesticide, and you cannot treat a seed,  
11 and you cannot plant the seed after July '01, but those were  
12 not the terms with the Claimant. Those were the terms with  
13 other players who had far less at stake with the Canadian  
14 canola growers, who had an assurance that they would get a  
15 replacement product anyway, and so on.

16           And so, after--see, this is in December 2000 when the  
17 time is coming for the deadline, which is going to come in  
18 July 2001, for use, in other words, for treating the seed.  
19 PMRA makes it known to the trade that not only can you not  
20 treat a seed in July 2001, you cannot plant that seed. So,  
21 any--no one can reply exactly the number of--treat exactly the  
22 number of seeds they know they will need. They treat enough  
23 for the year, and if there is left over, they plant it the next  
24 the year. The canola has a life expectancy of a couple of  
25 years, as does the pesticide. So there's carryover invariably

09:54 1 every year. No one wants to undertreat. And they know they  
2 will have to treat it eventually, so there is a little bit of  
3 conservative estimation, a little bit of overtreatment, a  
4 hangover of leftover seed that is treated that will not only  
5 plant it. If you allowed to apply pesticide until July 2001,  
6 you apply it, for example, in anywhere from March-April prior  
7 to planting of 2001. There is leftover, and you want to plant  
8 that in 2002 because that's your investment.

9 But this Fast Facts Fax is a communication from the  
10 trade to the trade that fines as big as 200,000 will happen to  
11 you.

12 Now, you can imagine what that would happen--what  
13 would happen if in December 2000 this happened. Sales are  
14 coming up for the 2001 year. If anyone is caught with a  
15 treated seed after July 2001, they get hit with a substantial  
16 fine. Would you treat a seed under these circumstances?  
17 Unlikely. Not with lindane. The impact on the Claimant's  
18 sales was substantial and immediate.

19 There is correspondence I'm going to pass quickly  
20 through, as our time is, but correspondence throughout this  
21 section of the statement on the effect of this and whether  
22 PMRA, in fact, will enforce this or will allow the planting of  
23 treated seed.

24 At the end of the day--and it was a long day--at the  
25 end of the day, PMRA allowed it, but not before making very

09:55 1 well-known to the trade the fines and the penalties that would  
2 accrue if seeds--if treated seeds were not disposed of but were  
3 planted after July 1, 2001.

4           Moving to the next slide, this reflects the PMRA in  
5 32. The PMRA is gathering inventory to ensure that the  
6 manufacturing cutoff date of December '99 was kept in good  
7 faith by the producers and that they didn't overproduce, for  
8 example, to use up leftover stock or to have more leftover  
9 stock and overtreat seed as well as--and they're policing the  
10 Voluntary Withdrawal Agreement.

11           We can see at the bottom of that page, Page 32, at  
12 GP's January distributor--GP is Gustafson Partnership--by this  
13 point, the Gustafson business unit in Canada of the Claimant  
14 had become a 50/50 partnership with another company with Bayer.  
15 It still continued to market the products, the pesticide  
16 products, on behalf of the Claimant. At GP's January  
17 distributor meeting, customers with firm orders--this is  
18 January '01, so immediately after that Fast Facts Fax we saw  
19 trumpeting those fines and other warnings by PMRA in the field  
20 that fines would accrue to anyone who used treated seed, who  
21 used planted treated seed after July 2001. So, here we see the  
22 distributing customers with firm order started to, next slide,  
23 renege. They're losing sales. No one wants to treat a seed.  
24 They are afraid they're going to be hit with a quarter million  
25 dollar fine for planting it later that year.

09:57 1           This is a communication from the PMRA. You can see  
2 the distribution list. It's going to the trade. At the bottom  
3 of the page, Slide 34, it's going to the Canola Council, Seed  
4 Trade Association, the Registrants, and so forth, and PMRA is  
5 here as late as June 15, 2001, the deadline is two weeks away,  
6 canola-rape seed and the use of lindane, this is the text of the  
7 second arrow that I've put in. The use of lindane treated  
8 canola seed are to end by July 1, 2001. So, the ability to use  
9 it as a pesticide and apply it to a seed to July 1, 2001 was  
10 illusory. No one can treat a seed on June 30th. In fact, it  
11 was way past the planting season and then plant the thing. In  
12 other words, they're reiterating that stipulation.

13           There follows correspondence that between the company,  
14 and this is with JoAnne Buth, who will be appearing on behalf  
15 of the Claimant, but where the Canadian Canola Council is  
16 saying please let us plant these seeds. We have all these  
17 carryover seeds. What are we supposed to do with them? They  
18 cost a fortune to dispose of. The pesticide Regulations in  
19 Canada recognize themselves, as does the Agency, that the most  
20 environmentally safe way, not to mention economical way, to use  
21 up pesticide stocks is to use them, is to plant them. If you  
22 can't plant them, you have them concentrated in a barrel or a  
23 bag, and you have to get rid of them somehow. This is routine  
24 in the trade. In fact, it's reflected in the Regulations that  
25 normally this is how discontinued pesticides will be disposed

09:59 1 of. So, this is the Canadian Canola Council itself asking PMRA  
2 to see reason and to allow these treated seeds to be planted.

3 PMRA's, this is a letter in the next slide, 36, a  
4 letter from Wendy Sexsmith, first line, "For the reasons stated  
5 above, the PMRA is not in a position to offer a final decision  
6 on your request at the present time. However, we fully  
7 appreciate." So, as late as January 2002, they're still not  
8 allowing them to. Planting season now is coming.

9 More correspondence, more difficulties from PMRA to  
10 not face this issue and issue a clear response and a fair and a  
11 reasonable one. I won't go into detail with it because of  
12 time, but it repays reading.

13 Moving ahead to more correspondence on this issue,  
14 this is not the Claimant. This is a competitor of the Claimant  
15 but in the same dilemma because everybody has withdrawn under  
16 their own terms at this point. This is as late as  
17 January 2002. The competitor as well, Aventis, which also has  
18 customers, also has treated seed issues that its customers are  
19 holding and cannot plant yet because of the PMRA restriction  
20 and is asking for a reasonable reading of that restriction.  
21 And we can see at the bottom line of that sentence there, "The  
22 underlying reason for the CCC position has been constant," to  
23 the Canadian Canola Council--fear of trade issues with the U.S  
24 Is it still about canola seed on the surface and in the public  
25 eye it is a trade issue, and it is a trade issue around canola,

10:00 1 not around lindane.

2           Next slide, it's Page 40, which is a continuation of  
3 that same Aventis letter. They're saying there in the second  
4 sentence, "Our position is clearly stated. We support the use  
5 of treated seed. We did not comment on the use of formulated  
6 products." This is where the PMRA is saying if we don't have  
7 an undertaking by everyone to not use the product, then we  
8 won't give you permission to plant that--that already treated  
9 seed. In fact, there was no such issue. It was synthesized by  
10 the PMRA.

11           We can see Aventis's conclusion. This is not the  
12 Claimant. This is a competitor of the Claimant. The last  
13 sentence or the second to last sentence of that letter, where  
14 the arrow indicates, "The inaction and indecision by PMRA on  
15 this issue has and will result in significant economic losses  
16 within the canola industry." This is in relation to just  
17 planting the treated seed.

18           As I mentioned earlier, the PMRA behind the scenes was  
19 planning to Special Review lindane. It was a condition of the  
20 Claimant's withdrawal of the canola seed treatment lindane  
21 products from the market that the lindane review would be  
22 conducted and concluded by December 2001. In time, in other  
23 words, for lindane to be exonerated, and for the Claimant to  
24 return to the market. If I misspoke, it was December 2000,  
25 which was the Claimant's condition for withdrawing, and which

10:02 1 PMRA agreed to.

2           These documents concerned the buildup and the fallout  
3 from the PMRA's conduct of the lindane Special Review. This  
4 was an ostensibly scientific review of the uses of lindane to  
5 reassess it under international commitments that Canada had  
6 made.

7           We can see here some notes here on an internal PMRA  
8 meeting on lindane. Some of them are obscure. I take from the  
9 notation of the computer shorthand or signature at the bottom  
10 of the page where it says "person Wendy" that this is a  
11 document by Wendy Sexsmith, and it proposed to put the document  
12 to her when she appears as a witness, but in any event it is an  
13 internal PMRA lindane agenda document. And I apologize again  
14 for the size of the thought. At this point I only want to turn  
15 to the third page of it.

16           I'm sorry, the second page. It's Slide 43, where we  
17 can see where the arrow indicates Special Review, not re-eval,  
18 not a re-evaluation, and that the third bullet under that, no  
19 Data Call-In, those words come to mean that PMRA is not  
20 interested in data. The PMRA is conducting a Special Review  
21 without a Data Call-In. It will come to the conclusions it  
22 comes to, and they were announced internally by the PMRA in  
23 that document we saw where we were going to phase out all uses  
24 of lindane. In fact, this is a spoiler. At the end of the  
25 Special Review, lindane is out.

10:04 1           We can see the last bullet on that page, words with  
2 maximum coverage. In other words, PMRA, as I interpret this,  
3 and obviously the witness will confirm or clarify, the PMRA is  
4 debating how to start the Special Review, what it's going to be  
5 about, and what they're going to tell the trade because this is  
6 January 1999. They haven't yet begun the Special Review. It  
7 will begin in March. They're planning it. So, what's it going  
8 to be? Is the Special Review going to be a review of lindane,  
9 or is it going to be about sort of the health factors or the  
10 exposures or the doses or the environment or whatever?

11           And so, what they're choosing to do is words with  
12 maximum coverage. This is speculation on my part. The  
13 document is not clear. The witness will help.

14           One final note on this document, this was a fairly  
15 sinister note, the very last one, "close the door on all." You  
16 can take, I suppose, wait for the witness to tell us what that  
17 means, but we know what happened, and that's what happened.

18           The next slide is the actual announcement, excerpts  
19 from the actual announcement, as it went out, the Special  
20 Review. We are now in March 1999. This is the PMRA conducting  
21 an extraordinary, frankly, Special Reviews are not something  
22 that the PMRA has done very often. The record reflects a  
23 couple of times in history.

24           What's the rationale for the Special Review? Well,  
25 the notice told us its persistence, potential for long range



10:05 1 transport, widespread occurrence in the environment,  
2 unconsidered questions with a potential impact on humans, and  
3 wildlife of various isomers, so now whereas Canada wanted  
4 clarity in '97 about those isomers, it only confuses the debate  
5 to talk about isomers with lindane. In fact, apparently the  
6 Special Review is going to or is founded on concern about  
7 various isomers of lindane. That's a misnomer. Lindane has no  
8 isomers. Lindane is an isomer. It is the gamma isomer. If  
9 they mean various isomers of HCH, of hexachlorocyclohexane,  
10 perhaps, but in any event, confusion is already introduced by  
11 the very document announcing this review.

12           Again, on the next page, we can see throughout. I  
13 won't elaborate or dilate on this, but there are environmental  
14 concerns throughout. This is what--the announced basis for the  
15 Special Review, its scope. We can see again in the last  
16 highlighted portion on that Slide 46, we will examine the  
17 chemistry of existing lindane products and the extent to which  
18 these products may contribute to levels of isomers in the  
19 environment. And that's the basis of the Special Review.

20           Subsequent to the announcement of the Special Review,  
21 the PMRA had a meeting with various industry players. We can  
22 see that the attendance of that meeting in May at the top of  
23 that page, CIEL, a lobby group for lindane, participants, both  
24 manufacturers of the raw material, pesticide formulators, and  
25 so forth, Uniroyal is there. That is the Claimant, and PMRA is

10:07 1 well represented.

2           Now, on the notes, these are notes of Ed Johnson, who  
3 will be appearing in these proceedings as a witness as well  
4 reporting on what PMRA is stating. In all negotiations in the  
5 international fora, lindane is not being considered for ban or  
6 phase-out. It's being considered instead for restricted uses.  
7 Seed treatment is a restricted use. It's one of the least  
8 impactful and consuming, sort of lindane using ways to use it.  
9 It's not crop dusting or spraying or leaf or what we call  
10 foliar application.

11           Second, the second point there just under that where  
12 the arrow indicates just like the notice said, R. Aucoin of the  
13 PMRA outlined the concerns leading to the Special Review,  
14 they're predominantly based on international treaties ongoing  
15 and residue in the Arctic. In other words, environmental type  
16 issues.

17           So, as far as the trade was concerned, the Special  
18 Review is looking at environmental aspects. There was no word  
19 as well from the PMRA for data, no additional requests as there  
20 would be if the product and its use in the field were going to  
21 be examined. There was this.

22           The top of the next slide, Page 48, Canada apparently,  
23 according to PMRA, contains hot spots for organic compounds in  
24 the environment, and the issue of Indian health could make this  
25 a major political issue. So, this is the cast or the color

10:09 1 that's being put on the role, function, and intent of the  
2 Special Review.

3 On to the next slide.

4 This is a Claimant employee as opposed to Mr. Johnson  
5 of TSG, Claimant's own employee at the same meeting also  
6 commenting. The notes are similar, of course. They're at the  
7 same meeting. The politics is very strong to push for  
8 reassessment. They will be advising Registrants what data they  
9 would need. In fact, the Registrants were never asked for any  
10 data because the Special Review didn't depend on data. It  
11 turned on other things.

12 The observation, at least of the Claimant, Rob Dupree,  
13 an employee of the Claimant, is in the next slide. Wendy  
14 Sexsmith of PMRA made a brief appearance at our meeting and was  
15 clearly not interested in the canola residue data that was  
16 presented. I suspect she will try to do whatever she can  
17 politically to derail momentum to maintain uses of lindane.

18 So, the body language and the interaction with PMRA at  
19 the time was that they weren't being receptive to any data from  
20 the industry about any real concerns about the actual use of  
21 these actual pesticides in the field.

22 The next slide relates to another one of the  
23 conditions of the Claimant's conditional withdrawal with PMRA.  
24 We can see if we go to the bottom of that page, it's an E-mail  
25 from Roy Lidstone of PMRA to Wendy Sexsmith. Wendy is

10:10 1 obviously asked, and we will put this document to the witness  
2 as well, but I think it speaks for itself, at least to this  
3 degree. If Registrant, says Mr. Lidstone of the PMRA, wanted  
4 to re-add canola to lindane product labels, they would  
5 certainly have to apply--i.e., put in a submission. I do not  
6 think that we would require any supporting data since the use  
7 has already been approved.

8           So, this is if the Special Review were to permit the  
9 use of lindane in Canada, then for the mere payment of the fee  
10 without any further submissions or applications, indeed, that  
11 condition of Chemtura's, of the Claimant, could be met.

12           Mr. Lidstone concludes, "If we refuse to register, we  
13 would need a good reason." Now, in other words, none are  
14 apparent yet, and, therefore, the Claimant says that this was  
15 obviously the agenda of the Special Review. They would need a  
16 reason to refuse to register.

17           The next slide reflects minutes of an internal PMRA  
18 meeting, and showing the status of the lindane review. By now  
19 we are in January 2000. We are nine months into the Special  
20 Review process. Completed tasks at the bottom of the page,  
21 lists of data gaps compiled by each section was prepared but  
22 will not be sent to Registrants at this time. Why? I'm not  
23 sure, if there was--in a normal re-evaluation, data gaps would  
24 be addressed promptly to the industry, and it would be given an  
25 expected time to respond because the industry, as is customary,

10:12 1 cooperates with the Agency in its own interests to make sure  
2 that the Agency has the proper data in order to decide whether  
3 a pesticide is registerable, safe or not.

4           The next page of those same meeting notes where  
5 various aspects of the study of lindane for the Special Review  
6 are being enumerated, we can see that--the concern there is, on  
7 the highlighted section, will address gamma isomer only, that's  
8 lindane. Obviously if you're looking at lindane, you would  
9 look at the gamma isomer. And discuss lack of evidence of  
10 interconvertibility of the gamma isomer.

11           One of the allegations that have been made against  
12 lindane--this is a little background--is that while the gamma  
13 isomer is put on the crop and obviously has to dissipate into  
14 the environment somehow, that would be okay in reasonable  
15 quantities that can degrade over time without harming the  
16 environment. But some suggestions have been made, and it's in  
17 the record as well, that because of the effect of natural  
18 forces, changes in temperature or sunlight, that gamma isomer  
19 we talked about before, which is lindane, can change into the  
20 alpha and the beta isomers that are harmful.

21           In fact, though, we see from internal notes from the  
22 PMRA that they don't have any evidence of that, and so the  
23 concern that if you use lindane, well, lindane might be all  
24 right or might be sanctified. However, if it converts into  
25 alpha or beta, you've got a problem. And if sunlight does that

10:14 1 or if temperature change does that, then we shouldn't use  
2 lindane either because we are effectively salting the earth  
3 with alpha and beta, the bad isomers.

4           On occupational exposure, this is as far as the  
5 documents go. A new theme. We saw from the announcement of  
6 the Special Review that it was all environmental concerns,  
7 trans boundary, indigenous people's diets and so forth that was  
8 of concern, but, in fact, occupational exposure relates to the  
9 people who treat seed and the people who handle the treated  
10 seed. In other words, in the course of their occupations, they  
11 come into contact with the pesticide itself.

12           Industry wasn't aware that this would be until later  
13 on, that this would be a focus of the Special Review, and  
14 obviously we are in a position to talk about that because they  
15 work with seed treaters on a daily basis. They know how the  
16 seed is treated, and they know what happens and what measures  
17 can be taken to prevent a seed treater or a farmer from being  
18 exposed to the pesticide. There's a logical person to go to,  
19 and they weren't gone to in the case.

20           There was some discussion in Canada's material as well  
21 that, of course, it would rely on sister agencies like the EPA  
22 or the U.K. pesticides agencies' data because it makes sense  
23 they are looking at the same thing. However, we see here that  
24 although there was a U.K. Report which was unfavorable on  
25 occupational exposure in regards to lindane, it was of limited

10:15 1 use because their methods of estimating risk are very  
2 different. Therefore, HED considers completion of this section  
3 for the inner report not possible with the information. In  
4 other words, they thought they had something on occupational  
5 exposure, but they didn't have anything that was usable. As we  
6 shall see, occupational exposure becomes the reason, the sole  
7 reason, that lindane products get withdrawn by the PMRA from  
8 the Canadian market.

9           Here we are on the next slide, November 5th, 2001.  
10 These are notes of a meeting where the outcome of the Special  
11 Review is being announced to the industry, the industry being  
12 including that you can see a list of participants. The  
13 Claimant was part of them. But these are internal meeting  
14 notes by the PMRA.

15           Second bullet, "Registrants were informed the key  
16 driver for the risk assessment was the Occupational Exposure  
17 Assessment." Now, I can't say that the Claimant was completely  
18 blindsided by that, but they weren't consulted at all. It was  
19 only late in the process that they even found out that  
20 occupational exposure was an issue. We saw it from the notice.  
21 It was all environmental concerns, so to say they were not  
22 consulted is an understatement.

23           And yet we see here occupational exposure was  
24 considered to be the key area of concern.

25           Later on, in the next slide, we see the continuation

10:17 1 of those notes. Participants were informed that the findings  
2 of the risk assessment would warrant regulatory action,  
3 suspension of registration with the possibility of limiting use  
4 could be permitted for one additional season. So, we have gone  
5 from international support, sometimes even in isolation,  
6 international support for this product. Legitimate expectation  
7 would be that Canada would defend the uses internationally, as  
8 it had, because it registered domestically, to an outright ban  
9 on the basis of a 15-month Special Review, which, as we shall  
10 see, came under serious criticism.

11 Further to that, we can see where the second arrow on  
12 Slide 55 indicates, after taking--recall that one of the  
13 conditions of the Claimant was that the Special Review would be  
14 completed by December 2000. We are in November 2001. The  
15 market is not only not going to get its canola seed treatment  
16 back, it's not going to get any seed treatments lindane-based  
17 back, and the industry is given a one-week period to comment on  
18 this assessment, which they received no notice--minimal notice  
19 of later in the day and no interaction with or no communication  
20 on or no Data Call-In in regards to. That deadline was  
21 subsequently extended to a few weeks. Both sides' materials  
22 reflect the exact number of four, five weeks that were allowed.

23 The industry, of course, didn't take this well, and  
24 this slide, more as a marker for the Tribunal, indicates, as  
25 you can see at the bottom of the first paragraph, not the



10:19 1 arrow, but above that, we are submitting consolidated comments.  
2 The industry got together and put together comments criticizing  
3 that Special Review. It usefully points out many of the  
4 deficiencies in the Special Review. We can see that they're  
5 itemized there and given in much greater detail in document  
6 that's attached to this.

7 And indeed, the definitive word on the Special  
8 Review's deficiencies was given by the Lindane Board of Review,  
9 which we will also turn to in a minute.

10 Now, we will recall that another one of the conditions  
11 of the Claimant's voluntary withdrawal was maintenance of  
12 registrations on other crops. The lindane issue, and the  
13 withdrawal related to only canola seed treatment. But in fact  
14 because of this very flawed special review, PMRA terminated all  
15 of the registrations, not just for canola. Anything with  
16 lindane in it was done. This slide here shows the letter from  
17 PMRA in regards to those listed products at the top, where PMRA  
18 is looking for--these are all the lindane-containing products  
19 of the Claimant.

20 We can see where the arrow indicates. As a result,  
21 the Agency is determined that termination of lindane products  
22 is warranted. Such termination could be effected through  
23 phase-out by suspension of registrations or voluntary  
24 withdrawing. This is quickly on the heels. They're not  
25 dragging their feet anymore the way they were with the Special

10:20 1 Review being a year late. This is within a month of the  
2 Special Review result, and they are moving fast. They want to  
3 terminate it all. They are demanding.

4           They offer in the next slide. You can see that they  
5 offer the Claimant, and this letter went to all Registrants,  
6 the Claimant's competitors as well, "You were informed that the  
7 PMRA's completed an assessment of lindane," as noted in the  
8 beginning of the letter, and determined that termination is  
9 warranted. They were invited to voluntarily withdraw, failing  
10 which they would be terminated. So, obviously, the  
11 voluntariness of that withdrawal is illusory.

12           You can see that at the same conclusion of that same  
13 letter on the next page. If the requested information is  
14 submitted on time, ask that you confirm your intention to  
15 voluntarily discontinue. The company does not. This was the  
16 letter that they were to use in order to do so, a form letter,  
17 no slippage. They chose not to.

18           So, we can see that the arrow indicated in that letter  
19 of February 11, 2002, that five other products are Pest Control  
20 Products containing lindane are being terminated. This is not  
21 just in relation to canola. This is all of the registrations  
22 of these products terminated cannot be used basically anymore  
23 in Canada.

24           This is the termination of the next three. I  
25 mentioned at the outset that there were eight products,

10:22 1 lindane-containing products by the Claimant.

2           At the conclusion of that letter in Slide 64, it's  
3 apparent that that's what that's about. Under Canadian law,  
4 the pesticide Registrant, whose registrations are suspended or  
5 terminated, has a right to an objective review of that decision  
6 in view of the rights and the economics at stake. The Claimant  
7 invoked that right and invoked that right on multiple occasions  
8 and asked for a Board of Review to review the Special Review.  
9 There was--it had to ask four times. It took years to get that  
10 Board of Review established. When there was any movement after  
11 the Claimant's request on that, and again there are  
12 chronologies and the records reflect that all of those requests  
13 and the lack of response from PMRA, from the Minister of Health  
14 to which the PMRA Reports on that issue. When any movement was  
15 given by the Minister of Health on that issue, it was to ask  
16 PMRA to appoint the Special Review Board or to constitute it  
17 and therefore be a completely illusory form of review, where  
18 the reviewer itself is reviewing its own behavior, and the  
19 outcome is fairly predictable.

20           We can see from the next slide at 66 the Claimant had  
21 to go to Federal Court in Canada in order to prevent the PMRA  
22 itself from appointing its own Review Board, to require the  
23 Minister to afford the Claimant its rights to a Review Board.  
24 That's Point C, but the second arrow that indicates on that  
25 slide, this is a Court document, Federal Court notice of

10:24 1 application that was filed in the matter after the Claimant's  
2 extensive and prolonged efforts to get a normal right it had to  
3 have the Minister appoint an independent Review Board and to  
4 scrutinize that Special Review to see whether it was flawed or  
5 not.

6           The third bullet, Applicant's costs. Costs obviously  
7 in Canada, as in most jurisdictions, are awarded to the  
8 successful Parties, as everyone of course knows, and there has  
9 been suggestion in Canada's material that Chemtura, the  
10 Claimant, was bringing multiple claims and dropping them  
11 randomly, and the purpose of them was unclear, but so I wanted  
12 to exemplify with this one that it was, in fact, the difficulty  
13 it was having by getting responses from the agency and from the  
14 Minister to have its rights addressed that was behind some of  
15 these.

16           This is the order of the Court, indicating that--I'm  
17 going to the next page, which is the actual terms of the order,  
18 where the judge of the Federal Court requires the Parties to  
19 Report to him on the progress that's being made because of the  
20 extraordinary delays in appointing the Board of Review by the  
21 Minister. So he's calling them to account, in essence. You  
22 come to my office and tell me what progress you have made on  
23 this. Obviously the implication being there hasn't been any  
24 progress, and you are going to have to answer to me if this  
25 Board is not constituted promptly.

10:25 1           Canada has also made assertions that the Claimant  
2 would bring Court actions only to discontinue them, but--and  
3 this document is put in for your consideration to show that  
4 while they discontinue, they were discontinued because in this  
5 case, in this proceeding, it was a discontinuance because the  
6 Review Board was finally appointed. Nevertheless, you can see  
7 that there is a cost Award there in favor of the Claimant by  
8 the Court in recognition of the extraordinary efforts that it  
9 had to get to receive its entitlement to a Review Board.

10           Finally, on October 2003, we recall that the results  
11 of the Special Review came out in November of 2001.

12           And in October of 2003, the Review Board was  
13 established by the Minister of Health according to--in terms  
14 that didn't involve for the PMRA staffing of the Review Board,  
15 in other words, reviewing its own decision.

16           We jump ahead now to the end of the Review Board  
17 proceeding with the conclusions and recommendations of the  
18 Board. The Tribunal, in the material, has seen, and no doubt  
19 will hear in the course of the hearing conflicting accounts of  
20 whether the Review Board is critical or not. The Claimant  
21 relies on the very words of the Review Board which, while  
22 making statements such as "the generally acceptable" or  
23 "principles were applied" and this sort of thing, came out with  
24 very precise and very pointed criticisms of that. In  
25 particular, I want to turn to one in particular. First of all,

10:27 1 the Board, as you can see on that Page 71, "the Board feels  
2 that the PMRA should have informed interested Parties when its  
3 focus shifted to occupational risk." Its focus shifted, as we  
4 saw from the change from the announcement to the result. There  
5 was no--in the result, there was no discussion of environmental  
6 impacts, indigenous diets, or anything like that. They stopped  
7 at the occupational risk indictment and went no further.

8           Then the next page, the highlighted section, "In the  
9 context of the Special Review, the lindane Special Review, the  
10 Board feels that the opportunity allowed by PMRA for interested  
11 Parties following the release of the risk assessment"--that was  
12 the occupational risk assessment--"was less than sufficient to  
13 allow for adequate consideration of mitigations--mitigation  
14 measures." Mitigation is obviously what measures can be taken  
15 if there is an occupational exposure issue in terms of a  
16 pesticide, what measures can be taken to put protective  
17 equipment on the handler to address those concerns. It's the  
18 obvious approach, and it's the routine one in pesticide  
19 evaluations.

20           Since that was the reason the Special Review condemned  
21 lindane, and the only reason, this criticism by the Board of  
22 Review, by the independent scientists reviewing the Special  
23 Review, is fundamental. It is saying the only leg that the  
24 Special Review stands on to terminate lindane is flawed, and  
25 therefore the condemnation of lindane is flawed. Whether there

10:29 1 is general statements in the Board of Review saying you're a  
2 nice Agency, you did a nice general scientific job, doesn't go  
3 to the very point that the only use of the Special Review for  
4 the PMRA to terminate lindane was in the very section--there  
5 were others, but the core one was in the very Section that was  
6 used by the PMRA to indict lindane.

7 I'm going to jump ahead to Slide 74. The whole  
8 Lindane Review Board section on recommendations repays reading  
9 because of the analysis it does. One of the--one of the things  
10 Claimant wanted to avoid in this hearing is relitigating the  
11 toxicology around lindane. I know less than would fit on a  
12 flea beetle's back about toxicology, and in any event, better  
13 people than me have spoken in the Lindane Review Board and in  
14 the various documents in the record as to the science on  
15 lindane. This is not what this is about. This is about due  
16 process and fair and equitable treatment. This is about  
17 property being taken away without good reason.

18 Be that as it may, we let the Lindane Review Board  
19 conclusions speak for themselves.

20 One of the most harsh criticisms by the Lindane Review  
21 Board of the PMRA Special Review was the use of uncertainty  
22 factors. Uncertainty factors are multipliers of risk that are  
23 used obviously where in cases of uncertainty, as they should,  
24 agencies want to err on the side of caution, and so if they are  
25 unsure about something, they multiply the potential risk. The

10:31 1 number you use to multiply that risk determines the outcome.  
2 If you multiply it by a small number, it doesn't magnify the  
3 risk, and therefore the danger or apparent or perceived danger  
4 significantly. The larger the number you use, the more you  
5 make likely the condemnation by increasing the likely risk for  
6 those unknowns or for those possible risks or possible dangers  
7 of the given pesticide. We can see here from the highlighted  
8 section that Canada used an uncertainty factor, and we don't  
9 need to go into more detail at this point in the technique on  
10 that, but application of the additional--an additional 10 acts,  
11 10 times, tenfold uncertainty factor by PMRA was the driver  
12 that took the MOE, the margin of exposure, the allowable  
13 exposure to that product to 1,000 times effectively rendering  
14 lindane unacceptable for use.

15           If applying an additional 10 X uncertainty factor  
16 without fully understanding what that means, but if applying  
17 that made lindane available for use, it predetermined the  
18 outcome. If the selection of that additional 10 X was a fair  
19 thing to do, fine. Lindane Review Board thought otherwise.  
20 The EPA thought otherwise, and the PMRA in the Lindane Review  
21 Board proceedings itself admitted otherwise. But it's using  
22 that 10 X basically condemn lindane from the start, ab initio,  
23 as the lawyers say.

24           Further condemnation in regards to toxicological end  
25 points on Slide 75. They are manifold. They are repeated at



10:32 1 length in the Claimant's submissions, and I won't belabor them  
2 here.

3           So, Canada is faced with--under Canadian law, if the  
4 Lindane Review Board does not trump and cannot overrule  
5 directly the PMRA, it can only recommend, but its  
6 recommendation--an Agency flaunting its recommendations would  
7 have to have a reason and would be exposed for questionable  
8 motives if it didn't respond. So, as we see--as we will see,  
9 Canada did respond to that, the criticisms of the Lindane  
10 Review Board. To the extent Canada will take a position that  
11 the Lindane Review Board didn't criticize them, we will have to  
12 wonder why they revisited the whole Special Review thing in  
13 response. In any event, they did.

14           The record shows, as on Slide 77, that Canada's  
15 response to the Lindane Review Board was one, though, of not  
16 good faith. It was not a scientific inquiry revisiting, oops,  
17 the mistakes in the Special Review to restore science as the  
18 determinative whether the lindane pesticide products should be  
19 used or not.

20           We can see from the indicated portion of that  
21 memorandum to the Associate Deputy Minister, the senior  
22 official in the Department of Health, that Crompton filed  
23 Notice of Claim under Chapter 11 of the NAFTA, and here we are,  
24 involving similar issues with the Lindane Decision. The timing  
25 and substance of the response of the Review Board Report could

10:34 1 have an impact on the NAFTA Claim.

2           So, the PMRA does not have its eye. We can see that  
3 this is from the PMRA, Health Canada/PMRA, on the upper left.  
4 It does not have its eye on the science. It does not have its  
5 eye on a good faith re-evaluation of lindane science, lindane  
6 chemistry, lindane even occupational exposure. What it has is  
7 an eye on us in this room today.

8           Again, internal document from the PMRA from John  
9 Worgan, who we will be fortunate to be able to speak to later  
10 in this hearing as well. Moving to the second page of that,  
11 Mr. Worgan asked for recommendations from counsel about what to  
12 do, should we respond to the Board or not to assess the impact  
13 the next steps of re-evaluation could have on the Registrant  
14 claims to the Federal Court and the NAFTA Tribunal. The  
15 recommendation of both the Trade Law Bureau and Justice is to  
16 complete the assessment. This would substantiate, clarify and  
17 substantiate the position taken by PMRA in 2001. This wasn't a  
18 re-inquiry to see if there was science. This was a fixer upper  
19 to confirm what they had already found but what had already  
20 been criticized by--I beg your pardon. It was merely seen by  
21 the PMRA that to affirm something they had already found.

22           The conclusion, again, was a foregone conclusion is  
23 the bottom line on that: Support the government's position in  
24 Court. Claimant said--

25           ARBITRATOR CRAWFORD: When do you say the breach

10:36 1 occurred in this case?

2 MR. SOMERS: The claim is about two separate claims.  
3 One is under Article 1105 of the NAFTA, which is regarding the  
4 minimum standard of treatment. The other is under  
5 Article 1110, regarding expropriation or measures tantamount to  
6 expropriation. Given the different focuses of each of those  
7 heads that are alternatively pleaded by Claimant, we would say  
8 that termination of the business in terms of the Article 1110  
9 Claim would have been--in other words, in February of 2002,  
10 would have been the breach in regards to that. That ended the  
11 sales of all Lindane Products, so by then certainly it was game  
12 over for the investment for the business, the lindane products  
13 business.

14 In terms of the 1105, your question is apposite and  
15 difficult. It is a pattern of conduct which in the Opening  
16 Statement I'm skimming the surface of to show that fair and  
17 equitable treatment at every turn was denied the Claimant. It  
18 began as a trade issue, a PMRA managed voluntary withdrawal for  
19 a specific product, specific destination, was converted into an  
20 all-out indictment of lindane. It became--it was reviewed, the  
21 science was flawed, it was objectively condemned as flawed, yet  
22 satisfaction was never obtained. The conditions under which  
23 the Claimant withdrew were clearly laid out, clearly agreed to  
24 by the agency, and many clearly breached.

25 As far as the exact moment of when a breach occurred,

10:38 1 when fair and equitable treatment is denied, I hope you will  
2 find this position by argument, by legal argument, but because  
3 it's a pattern of conduct, I would again have to go back to  
4 when the business was terminated, even though--and never  
5 allowed to be cured, so the standard of treatment which is  
6 afforded the Claimant was--because it was a continuing pattern,  
7 it never afforded the relief that ending the ability to sell in  
8 Canada would have required, had two or three years--this was in  
9 2002--had two or three years passed, obviously, and then  
10 business would have been restored to the degree adequate or  
11 satisfactory to the Claimant, we wouldn't be here. So, it's  
12 not to say that a breach didn't occur under 1105 or even that  
13 it's not identifiable, but the injury certainly occurred in  
14 2002.

15           The lack of effective recourse to the Claimant is the  
16 foundation for the Claim, but the injury we would have to say  
17 is 2002.

18           I might just add as well that--I don't want to use up  
19 my Opening Statement time, but as my friend observed earlier at  
20 the opening of this hearing, we obtained the  
21 opening--demonstrative exhibits of Canada on a timely basis  
22 yesterday morning at 10:30. In it, we saw reference to an  
23 event in a document that are not in the record. They are the  
24 re-evaluation notice of PMRA, which only came out, I don't even  
25 know, actually, but it was on their Web site yesterday, and

10:40 1 reference is made to that in the chronology provided by my  
2 friend.

3           The Re-evaluation Note is a message to the public for  
4 comment on where the PMRA is as a result of exactly the things  
5 we are looking at now, which is the Lindane Review Board sends  
6 PMRA back to say do your Special Review again. We recommend  
7 you do that. John Worgan talks to his lawyers, and they say,  
8 oh, okay, we better do this and substantiate what we said in  
9 2001, because it will help this case.

10           And the re-evaluation note is now--which my friend has  
11 averted to in his demonstrative exhibit--is the publication and  
12 the notice to the public that this is what the PMRA is going to  
13 come out with, and please, let's have your comments from the  
14 public at large.

15           And so, we would actually say, given the content of  
16 that re-evaluation notice, which we read late yesterday, that  
17 the pattern of conduct, which is evidence the breach of the  
18 minimum standard of fair and equitable treatment of the  
19 Claimant is ongoing. It's ongoing today.

20           I hope that is at least a partial answer, and I hope  
21 my legal argument is a little more coherent.

22           ARBITRATOR CRAWFORD: We will undoubtedly come back to  
23 it.

24           MR. SOMERS: Thank you.

25           As we saw from the documents that I was putting in

10:41 1 earlier in the Opening Statement, part of the undertakings of  
2 the PMRA to the world, to the industry, were that they would  
3 facilitate access to replacement products. They are the  
4 gatekeeper. They control access to replacement products. They  
5 control access to pesticides. Without their blessing, a  
6 pesticide manufacturer is out of business.

7           This portion of my Opening Statement goes to the  
8 discriminatory and the difficulty, the discrimination and the  
9 difficulty that Claimant had in getting its replacement product  
10 registered with PMRA. The slide I'm turning to here is, I  
11 guess--I'm going to the second page of it because that's the  
12 operative part. On Page 82, this is a document for  
13 November 26, '98. We'll recall that that was the time the  
14 canola seed treatment issue was in full flower as a trade  
15 issue, and the industry discussions were ongoing about can we  
16 reach a Voluntary Withdrawal Agreement, and what will the terms  
17 be for the industry at large? We can see on the highlighted  
18 section there, stakeholder meetings to be scheduled for June  
19 and October 1999 to review progress toward the approval of  
20 lindane replacement products. Subject to the approval of  
21 Registrants, stakeholders will discuss progress in the  
22 following areas.

23           Now, jumping, I'm sorry, to the next page--I'm sorry,  
24 no, I'm going to stay on that one. These are definitional  
25 issues. A, B, C, and D are the various types of replacements

10:43 1 that are going to be considered for potential approval by PMRA.  
2 One is approval of seed treatments in which lindane is removed  
3 and contain fungicides only. I'd explained before that  
4 pesticide products of the Claimant and also of its competitors  
5 contain both fungicide and pesticide both for the fungus and  
6 for the bugs that greatly facilitates application, speed,  
7 economy, and safety, so the combination is the important one,  
8 and, indeed, was the profitable business line of the Claimant.

9           The second category of replacement products--I'm  
10 sorry, in the first category, just take the lindane out, and  
11 we've got just a fungus product. The registration of  
12 pesticides is a very precise science. If the combination of  
13 two things are approved, you take one out, you need a separate  
14 approval. It's not enough that something has been approved or  
15 even approved for that use in combination with something else.  
16 If you take something out, you still need a separate approval.  
17 Every single formulation requires its own, for every use  
18 requires its own blessing.

19           So, it's not as simple as taking a lindane out and  
20 then relabeling it and putting it back on the market. PMRA  
21 would have to approve that. And here it undertakes to do so.

22           Second, approval of seed treatments in which lindane  
23 is removed and replaced with active ingredients that are  
24 currently approved as seed treatments for other crops or  
25 currently approved for other uses such as foliar applications,

10:45 1 leaf applications in canola.

2           So, to an industry person, that would be understood as  
3 lindane, the insecticide, is removed and replaced with another  
4 insecticide that is already being used as a seed treatment on  
5 another crop. It's not a brand-new insecticide that somebody  
6 just invented. So, presumably that would be easier to approve  
7 of as a replacement product because the science, the chemistry,  
8 the toxicology of it has already been reviewed in relation to  
9 cabbage seeds, just not canola seeds, for example.

10           The third one, approval of new active ingredients  
11 which will replace lindane in canola seed treatment, so there  
12 it's not something that has been approved for another cabbage  
13 use, a brand-new molecule, insecticide, where lindane is taken  
14 out of the cocktail and this new one is put in.

15           And then the fourth category is where PMRA and EPA can  
16 manage to work together and jointly review. Saves each Agency  
17 work, one can concentrate on one and one on the other.

18           But so the replacement products were understood to be,  
19 if you take out the first replacement, you take out the  
20 lindane, you just register the remaining fungicides that are in  
21 the product. The second one, existing approved but not  
22 approved for canola insecticides, replace the lindane. The  
23 third one, brand-new molecule, brand-new insecticide, replaces  
24 the lindane.

25           Now, these were the understandings of the industry



10:46 1 about what a replacement product was. And we heard all of the  
2 commitments and we saw them all as far as facilitating access  
3 to replacement products. So there wasn't any ambiguity about  
4 what a replacement product is. It was one of those things, and  
5 if it's needed, the next slide, 83, the highlighted section,  
6 "PMRA is committed to working with growers and Registrants to  
7 facilitate"--I'm sorry for the speed again--"to facilitate  
8 access to alternatives." Facilitating, it is a gatekeeper, for  
9 access at all, so its facilitation is crucial, particularly not  
10 to leave a gap in the market.

11 This is a competitor of the Claimant also concerned  
12 with this issue, not where the highlighted section is, but  
13 where the arrow points to. "We trust we can rely on the PMRA  
14 to render a regulatory decision promptly to enable us to supply  
15 this replacement product to our customers for the treating  
16 season." People are concerned not only to lose their foothold  
17 in the market, but to leave their customers and their  
18 customers' customers, seed treaters and then the growers in  
19 jeopardy without an effective replacement product.

20 And this is a letter from the Executive Director of  
21 the PMRA to the Claimant. The Claimant is asking for expedited  
22 review of its product, and we are in June of 2000. The PMRA  
23 writes back, "The consideration for special priority review  
24 within Canada for lindane replacements for canola seed  
25 treatments was a onetime opportunity, not an ongoing situation.

10:48 1 That is why your product, not having been part of the original  
2 opportunity, falls within normal management of submissions  
3 policy time lines, 12 months." This is in June of 2000 that  
4 this is written. PMRA had already secured the voluntary  
5 withdrawal. It had promised before that to the trade, to the  
6 world at large, that it would facilitate access numerous times  
7 to replacement products. For the first time the Claimant gets  
8 to hear that, oops, that was a onetime opportunity. We have  
9 your voluntary withdrawal, and now as far as the  
10 representations that we have made to the industry consistently  
11 since 1998, that was a onetime opportunity, the first time you  
12 will see these words in this record certainly that I have. I  
13 may have missed them, grateful as someone would point that out.

14           The reason the PMRA was writing in that slide to the  
15 Claimant was because this submission, as you see it in front of  
16 you on Slide 86, had gone in in March. Gaucho CS Flowable.  
17 That was a replacement product of the B type that we had just  
18 seen in the definition. It was--these products had been  
19 approved for other uses. There were no new invented active  
20 ingredients here, but they hadn't been used in this combination  
21 for canola seed treatment, and so Gustafson, on behalf of the  
22 Claimant, was submitting an application for registration of  
23 this lindane replacement product.

24           It points out there, and you can see that in the  
25 subject matter, lindane replacement for Vitavax RS Dynaseal.

10:49 1 Vitavax RS Dynaseal was one of the lindane products that had  
2 been peremptorily terminated by PMRA.

3           Also indicated that it is a Category B.2.6 submission.  
4 One of the Claimant's witnesses and no doubt Canada's will be  
5 able to speak to what that means in terms of the jargon as far  
6 as what one would expect the time of such a submission to take,  
7 why it's that category, and how it differentiates itself from  
8 simpler or more complex applications.

9           In Canada's materials you will see reference to  
10 Gaucho, Gaucho 75, Gaucho 480. That is to be distinguished  
11 from Gaucho CS Flowable because Gaucho CS Flowable is the  
12 replacement product that contains both the insecticide that  
13 lindane used to do and the fungicide combination, and therefore  
14 has all of those benefits and those market advantages that I  
15 described.

16           Canada, in the materials and in its pleadings, points  
17 out that it approved Gaucho in the previous year, but that was  
18 a different product. Gaucho 75 is nothing like Gaucho CS. It  
19 doesn't contain a fungicide. It is an insecticide only. And  
20 as we saw from the replacement product definitions, it is not a  
21 replacement product. It's an insecticide. The replacements  
22 again were fungicide only with the lindane-removed.  
23 Insecticide-fungicide combinations of pre-approved for other  
24 use as molecules, and new insecticide with fungicide. Those  
25 were replacements. The Gaucho that had been approved in 1999

10:51 1 for export purposes by the PMRA was just an insecticide. It  
2 wasn't ever understood as a replacement product. Important  
3 distinction because obviously not only is the Claimant ejected  
4 from the market within two years here for all products, but  
5 stop manufacture of the lindane product under its Voluntary and  
6 take it for canola own use by 1999, so predating this  
7 application in front of you here. That's been taken away from  
8 it, and it needs a replacement. It needs a replacement to  
9 service its customers, to keep its customers, and because  
10 that's its business. As it turns out, it doesn't get one for  
11 many, many months. We will see that this is the continuation  
12 of that previous letter on Slide 87. Gaucho CS Flowable is a  
13 lindane replacement product as per the definition understood by  
14 everyone. One would have expected this product as well to not  
15 pose as many obstacles as a brand-new active ingredient  
16 insecticide because as we can see later in that letter on that  
17 page, the product is a joining of two separate Liquid Seed  
18 Treatments Gaucho 480, an insecticide, Vitavax RS Fungicide,  
19 into one, but those had been approved for other uses already.  
20 These were no strangers to the PMRA. Their combination and  
21 their use as canola was the novelty, was the only novelty here.  
22           The next two slides are a comparison of the time line  
23 it took for--that was required for the approval of the Gaucho  
24 CS product and approval of the competitor. On this slide  
25 here--I'm running out of time to go into detail on these more

10:53 1 opaque areas, but what we see is the actual, the standard types  
2 of time lines that are required for the PMRA to produce  
3 statistically to approve products. We can see at the top of  
4 the columns Helix Xtra, Helix, those are competitor products  
5 that I'll turn to in a minute, and then Gaucho CS and its  
6 standard. What you would have expected based on average  
7 performance by the PMRA and approval times, depending on the  
8 priority or the category of submission that each were, A, B, we  
9 recall from the letter for over Gaucho it was a B.2.6, that's  
10 why it's under that B column. For purposes of Opening  
11 Statement, I'm going to turn to the second page, which was the  
12 actual result, how long it took based on the normative standard  
13 for the approval of both Gaucho CS and a competitor. The  
14 competitor called Helix Xtra and Helix, the same product that's  
15 just twice as dose in the Xtra, was by a manufacturer called  
16 Syngenta that didn't even have a lindane product, so it wasn't  
17 in any sense a replacement, a lindane replacement that was  
18 being--it was a lindane replacement because it was used for  
19 flea beetle on canola seed treatment in that sense, but it  
20 wasn't a replacement in the sense of any obligation or  
21 undertaking that PMRA had to the company because that company  
22 did not have any lindane products.

23           In any event, we see there actual days for approval,  
24 745 for the Helix Xtra, 378 for Helix, 848 for Gaucho CS. What  
25 we would have expected, given the different category, Helix

10:55 1 contained--it was that third category of replacement product  
2 for a brand-new insecticide that hadn't been approved for other  
3 uses. We can see that the standard approval time if standard  
4 practice and policies of PMRA had been followed, and that's  
5 sort of the third cell from the bottom, would be double the  
6 amount of time that Helix Xtra actually took, 1449 compared to  
7 745. It would have taken twice as long. If we go over to the  
8 right as far as Gaucho goes, 848 to 462 because it's so close  
9 to double the time for Gaucho, so half for one and double for  
10 the other, and one can appreciate that if your product, your  
11 lindane product has been taken off the market and you're  
12 waiting that long for the replacement, damages ensue, economic  
13 injury ensues, and it certainly did.

14           Not only would the first person up have an obvious  
15 advantage, but the longer you're the first person into the  
16 market with the replacement product now that lindane, the  
17 industry standard and the growers and completely standard  
18 product, by far, has been removed, the first player in will  
19 have the cat bird seat as far as subsequent events. And the  
20 longer that first player, that first mover is in there by  
21 itself, the more security its first place position would be.

22           The various calculations on that slide I won't have  
23 time to go into now, but the witness for Claimant, John Kibbee,  
24 will be able to speak to when the time comes.

25           I had mentioned earlier that I was going to talk about

10:57 1 this. This issue arose as far as the public consciousness, as  
2 far as the Claimant's consciousness as a trade issue. It was  
3 the advantage the Canadian canola farmers had with access to  
4 the Claimant's products primarily and its competitors in Canada  
5 that was not available in the United States. The canola demand  
6 grew in the United States faster than the canola registrations  
7 could grow or were pursued by all of the players involved, and  
8 so that tilted in the perception of the U.S. growers, the  
9 playing field.

10 As we recall from the Commissioner of Agriculture of  
11 North Dakota, he said give us a tolerance or stop the Canadians  
12 from using this material, and so there were efforts in the U.S.  
13 at the EPA by the industry, both the manufacturers of lindane  
14 and the pesticide formulators like the Claimant, to have a  
15 tolerance and a registration issued by the EPA and make this  
16 problem go away in that way. In other words, to give access to  
17 the U.S. growers. Either they could import seed treated in  
18 Canada with a pesticide for planting in the U.S., or they could  
19 source that pesticide themselves, treat their own seed, and  
20 plant them themselves. But in any event, it would be a level  
21 playing field because access to that cheap and effective  
22 pesticide would be available on both sides of the competing  
23 border.

24 The Claimant's case is that Canada was pursuing an  
25 agenda for the phase-out of lindane. I think the documents

10:58 1 sort of point to that as we saw at the outset of the Opening  
2 Statement. PMRA and EPA were in communication. They came to  
3 different results on the science, but that wasn't for lack of  
4 PMRA trying. The PMRA--and we will see monitored what the EPA  
5 was doing, worried about what the EPA was doing, and tried to  
6 influence what the EPA was doing in order to keep that border  
7 closed because that trade issue was a good opportunity to phase  
8 out lindane entirely. It was never confined to just let's stop  
9 canola seed treatment use of lindane. As we saw back in '98,  
10 it was, in principle, a complete phase-out of all uses of  
11 lindane.

12           Canada has also represented that this was an industry  
13 led voluntary withdrawal, but we can see from the documents and  
14 the correspondence back and forth, and from that document here,  
15 the Uniroyal letter to canola growers has been sent to the U.S.  
16 by me. This is a note from Mary Jane Kelleher, whose name  
17 appears. She's not appearing as a witness, but she's a key  
18 player in the PMRA as far as relations and communications with  
19 the EPA. Her name appears routinely in the documents around  
20 this time to another individual in the PMRA.

21           The Uniroyal letter to canola growers has been sent to  
22 the U.S. by me, and the PMRA coached response of the Canola  
23 Council was sent to them by Wendy. In other words, we saw that  
24 letter from Goldman to the Canadian Canola Council, and there  
25 were communications between the Canadian Canola Council and the



11:00 1 EPA, and the PMRA was managing the Canola Council's  
2 correspondence with the EPA behind the scenes. As we can see  
3 here, the EPA has been receiving Uniroyal inspired letters  
4 pressuring them to make a decision on registering lindane for  
5 use on canola. As Mr. Crawford pointed out, there were efforts  
6 not just to get a tolerance, but to get a registration on the  
7 U.S. side. Yes, Uniroyal, the Claimant, was pressing the EPA  
8 for registration. That would make the problem go away. That  
9 would remove the excuse that PMRA--although the Claimant wasn't  
10 aware of it at the time, it would remove the excuse that the  
11 PMRA had to deploy its resources towards banning lindane  
12 outright, using the trade issue as a cover to withdraw it from  
13 the important crop canola first and then peremptorily  
14 terminating after a flawed Special Review.

15           This is a TSG letter to Lois Rossi and James Jones of  
16 the EPA. TSG was a--Mr. Johnson of the TSG will appear here to  
17 testify later in the week to speak to as a lobbyist  
18 representing the interests of lindane manufacturers and lindane  
19 pesticide manufacturers to the EPA.

20           PRESIDENT KAUFMANN-KOHLER: Mr. Somers, sorry for  
21 interrupting, you have about five minutes left. I mean, I will  
22 not cut you off precisely after the five minutes, but so you  
23 have, you know where we stand.

24           MR. SOMERS: I appreciate that. Thanks.

25           In February '01, TSG on behalf of lindane

11:02 1 manufacturers, manufacturers in other words of the chemical  
2 lindane, but also subsequently of the Claimant and other  
3 manufacturers of the formulated pesticides, was pressuring the  
4 EPA to issue it a registration, and it was effective at doing  
5 so, as we will see, up to a point.

6           As you can see there, TSG is writing on behalf of our  
7 client Inquinoso, manufacturer of the lindane active  
8 ingredient. Indeed, we seek issuance of the canola tolerance  
9 in spring 2001 so that lindane products can be formulated and  
10 distributed in time for canola planting season in Canada. And  
11 so if that were to issue, there would never be a gap in the  
12 ability of the Canadian industry to use lindane canola seed  
13 treatments because that excuse that they will be stopped at the  
14 border would go away by this time.

15           These are the requests that TSG makes in order to get  
16 EPA tolerance and approval. Canola seed treatment be included  
17 in the re-registration of assessment. Lindane was undergoing a  
18 re-registration assessment at that time for the existing  
19 registered uses, and I'd mentioned earlier it was registered  
20 already for 19 uses. PSG is asking, well, piggyback canola  
21 onto that, and then we won't have to go through this process  
22 again. As you are automatically ordinarily reassessing lindane  
23 anyway, do it with the canola use added with these other ones  
24 we don't use removed, and we will get it all sooner. We are in  
25 a hurry here because of events up in Canada.

11:03 1           Second point at the bottom of the page, we further  
2 request that if the risk evaluation is favorable for canola  
3 use, canola tolerance be issued immediately following such risk  
4 evaluation and not after finalization of the lindane  
5 Re-registration Eligibility Decision, and so again they're  
6 looking for a stopgap measure, a temporary tolerance, so that  
7 the border will not be shut to them so that Canada will not  
8 invoke that as an excuse to withdraw lindane on the Canadian  
9 side.

10           The third bullet, upon issuance of the canola  
11 tolerance, and this goes to his to Mr. Crawford's question, we  
12 request that the pending registration applications for the two  
13 end use products be processed. So, first give us the--I'm  
14 sorry. Upon issuance of the canola tolerance, we request that  
15 the pending registration applications for the two end use  
16 products be processed. So, give us the tolerance so that we  
17 can continue to trade into Canada, and then process those  
18 registrations to sort of close the circle and complete the  
19 requirement, but with the tolerance in place the Boarder will  
20 not be closed to us.

21           We can see there as well in this day issuance of the  
22 U.S. canola tolerance, the reason they want it, and the fact  
23 that it is a trade issue and it's a competitive issue. That's  
24 what it was about.

25           This is the response, and they're saying, as you see

11:05 1 at bottom of the page, while the decision need not wait until  
2 the re-registration eligibility decision is issued, we must  
3 finalize the risk assessment, so we will not give you a  
4 tolerance before the risk reassessment is finalized is  
5 basically what they're saying there, but they're responding and  
6 they're willing to do what Mr. Johnson requested.

7 Conference call between PMRA and EPA. I'm very close  
8 to the end of my submissions here, so we can see that in these  
9 PMRA notes under Roman numeral three--well, under the objective  
10 first to discuss major differences in the outcome of PMRA EPA  
11 assessments. We saw the PMRA assessment in the Special Review.  
12 This is July 30, 2001. The EPA has a major difference in that  
13 it found ultimately that there is no Occupational Exposure  
14 Assessment risk of concern. If there are any, they can be  
15 mitigated. In other words, put gloves on or put a mask on.  
16 And whereas in Canada that was the very reason for terminating  
17 all lindane registrations of the Claimant. So, they have got a  
18 problem because the other Agency, which has some credibility,  
19 is not finding the same thing they are, and that's what this is  
20 about.

21 Going on ahead. I'm jumping here to Inquinosa, to EPA  
22 abandoning various uses. Routine. Inquinosa is saying we are  
23 not going to support uses on crop X, Y, Zed. That reduces the  
24 environmental burden. That reduces the risk that the EPA would  
25 have to build in because it's only being used in smaller

11:07 1 quantities on certain selected crops and there's no chance of  
2 it coming in on the broccoli U 8, it's only in the canola, and  
3 therefore your exposure to it is lower, and therefore the risk  
4 is less, and therefore so on, it's much more likely to be  
5 registered. This happens all the time. As new pesticides are  
6 created, uses, older uses like this are simply abandoned by the  
7 manufacturers. They're too expensive to maintain in any event.  
8 We can see the large number of crops that were being walked  
9 away from by Inquinosa.

10           This is the 2002 RED, which is a matter of the dispute  
11 as well going to--I'm sorry, going to Page 102, EPA has  
12 determined, this is a conclusion of the EPA, this a year after,  
13 the year after the Special Review of Canada which condemned  
14 lindane for occupational exposure.

15           I'm just jumping to the last sentence, Mr. Aidala for  
16 the Claimant will be able to speak to this more fully later,  
17 but in summary, EPA finds that the currently registered lindane  
18 seed treatment products would be eligible for re-registration  
19 if the Registrants make the changes to the terms and conditions  
20 specified in this document and provide required data, and EPA  
21 will be able to establish all required tolerances for residues  
22 of lindane in food.

23           As it happened, an addendum was published with this in  
24 2006. The addendum was published after the manufacturers of  
25 lindane pesticides in the U.S. had voluntarily withdrawn on

11:08 1 that side. The Claimant's interest in getting this was for  
2 Canada. It was in order to be able to some to continue to sell  
3 in Canada. By 2006 when the Claimant walked away from its U.S.  
4 registrations or from its U.S. application for registration I  
5 should say and its registration, the market in Canada had been  
6 destroyed. We had the 2002 terminations. We had the voluntary  
7 withdrawal with conditions in 2001, the breach and breach and  
8 breach of conditions, 2002 terminations under the flawed  
9 Special Review, delays in establishing a review of that in the  
10 Lindane Board of Review. Finally an outcome in 2005, the  
11 Lindane Review Board vindicating our concerns about that  
12 Special Review.

13           The reevaluation for substantiating the 2001 decision  
14 by the PMRA, the market for the Claimant's pesticide products  
15 was long dead. There was no point in pursuing the lindane  
16 registration on the U.S. side. Its bread and butter had been  
17 the canola industry in Canada. It had other uses as well, but  
18 the core that was the Canadian canola industry with its  
19 millions of acres of product, and that's our story, in a  
20 nutshell, in a two-hour nutshell, with your indulgence. As I  
21 said in response to Mr. Crawford's question, our claims are  
22 twofold, 1105 and 1110 of the NAFTA, minimum standard of  
23 treatment breaches, expropriation or measures tantamount  
24 thereto. It was the pattern of conduct exemplified by the  
25 material that I have very rapidly run through on the surface

11:10 1 over the last two hours which, in Claimant's Submission  
2 establishes the breach of that fair and equitable treatment  
3 standard. Canada was bound to afford to the Claimant's lindane  
4 business in Canada.

5 We will be elaborating on this both on Legal  
6 Authorities and on how these facts support our claims of fair  
7 and equitable treatment in our closing statement, but absent  
8 questions, that is the Claimant's Opening Statement from this  
9 morning.

10 Thank you.

11 PRESIDENT KAUFMANN-KOHLER: Thank you.

12 Do my co-Arbitrators have questions at this stage?

13 (No response.)

14 PRESIDENT KAUFMANN-KOHLER: No, neither do I. There  
15 will certainly be questions later.

16 I suggest we take a break now. Let's take 20 minutes  
17 and start again with Canada's opening argument.

18 (Brief recess.)

19 PRESIDENT KAUFMANN-KOHLER: Fine, so we can resume.

20 I made a mistake when I mentioned the time allocations  
21 over the entire hearing, just for the record. You have not  
22 corrected me, but you have noted that I made a mistake. I saw  
23 it on your faces, but I didn't know what was wrong.

24 Anyway, the Claimant has 20 hours, and the Respondent  
25 has 16, just so there is no confusion on that, and I apologize.

11:34 1 Now, Mr. Douaire de Bondy, you have the floor.

2 OPENING STATEMENT BY COUNSEL FOR RESPONDENT

3 MR. DOUAIRE de BONDY: Thank you, Madam President.

4 I'm tempted to start my Opening Statement with a quote  
5 from Haydn, who said in one of his oratorios, (speaking in  
6 German), which is air yields and fair order takes its place,  
7 and that's a bit the sense I have right now of having listened  
8 to the Claimant this morning.

9 I'm going to begin my statement with a very brief  
10 overview and summary of the basic facts. I will then consider  
11 the Claimant's case and Canada's response from the perspective  
12 case of Article 1105.

13 I will make short remarks on Article 1103 and the  
14 issues relevant to 1110, and finally I will finish with a word  
15 on damages.

16 So, first, with my brief overview.

17 PRESIDENT KAUFMANN-KOHLER: Before you start, I should  
18 have said that earlier. Do you want to break in the middle for  
19 the lunch break, or do you prefer going two hours?

20 MR. DOUAIRE de BONDY: I think that a break in the  
21 middle might work. Would you mind--

22 PRESIDENT KAUFMANN-KOHLER: You have to decide what is  
23 a good time in your structure, of course.

24 MR. DOUAIRE de BONDY: Yes, yes. So, it might be a  
25 little bit more than an hour; it might be a little less.



11:36 1 PRESIDENT KAUFMANN-KOHLER: Okay.

2 MR. DOUAIRE de BONDY: So perhaps if I get to about an  
3 hour from now and we can--

4 PRESIDENT KAUFMANN-KOHLER: Then you see where you  
5 stand?

6 MR. DOUAIRE de BONDY: Yes.

7 PRESIDENT KAUFMANN-KOHLER: Absolutely.

8 MR. DOUAIRE de BONDY: All right. So, first with my  
9 brief overview.

10 On May 9th, 2009, over 160 states met and confirmed  
11 unanimously that lindane should be added to Schedule A of the  
12 Stockholm Convention on Persistent Organic Pollutants.  
13 Schedule A lists those pollutants, which due to their toxicity,  
14 long range transport and persistence have been specifically  
15 designated for elimination internationally. Lindane in this  
16 way joined the ranks of the original "dirty dozen."

17 May 2009 capped off 40 years of mounting domestic and  
18 international action to address the risk lindane poses to human  
19 health and to the environment. Over this period, lindane use  
20 has been progressively restricted and eliminated around the  
21 world.

22 The measures at issue in this arbitration are those of  
23 Canada's Pest Management Regulatory Agency, or PMRA, and  
24 they're concerning lindane. The PMRA is Canada's national  
25 pesticides regulator. No pesticide may be used in Canada

11:37 1 without PMRA's approval.

2 PMRA's primary mandate is to ensure that pesticides  
3 used in Canada are safe in that their use doesn't present  
4 unacceptable risks to human health and the environment. Every  
5 pesticide registration granted in Canada is conditional upon  
6 PMRA's continuing belief that its use does not present  
7 unacceptable risk. Apart from risk, the PMRA is mandated to  
8 register pesticides on the basis of their merit and value; in  
9 other words, whether their use is of benefit to Canadian  
10 agriculture and, by extension, to Canadians.

11 The Claimant's allegations in this matter relate to  
12 two sets of events:

13 First, PMRA's determination through a scientific  
14 review that lindane use poses unacceptable health risks;

15 And, second, the determination of Chemtura's main  
16 client, lindane clients, Canadian canola farmers, that they no  
17 longer wish to use this pesticide due to the risks it presented  
18 to its business.

19 Canada submits that a NAFTA Claim arising out of  
20 either of these events is improperly founded and must fail. In  
21 brief, here are the reasons why Chemtura's claims should be  
22 rejected by the Tribunal.

23 The Article 1105 Claim must fail because Chemtura has  
24 relied on an incorrect legal standard. Its arguments ignore  
25 the law applicable under Article 1105, which is the customary

11:38 1 international minimum standard of treatment of aliens. In any  
2 event, Canada will demonstrate that its treatment of Chemtura  
3 has been fair and equitable throughout. As Canada has  
4 demonstrated in its submissions and as its witnesses will  
5 confirm in this hearing, the PMRA's review of lindane was  
6 prompted by legitimate scientific concerns, was conducted  
7 through a legitimate scientific process, and reached  
8 scientifically legitimate conclusions.

9           The evidence of our witnesses will also confirm in  
10 terms of the industry-led voluntary withdrawal, that the  
11 agreement was, indeed, voluntary, that the PMRA took an  
12 appropriate role, that the PMRA treated the Claimant fairly in  
13 relation to this agreement, and that the Claimant took the  
14 benefit of that agreement.

15           The Article 1103 Claim must fail because Chemtura  
16 argues for an interpretation of the most-favored-nation  
17 provision that is unprecedented in the context of NAFTA and  
18 wrong at law. There is no difference between NAFTA Article  
19 1105, that standard, and the fair and equitable standard found  
20 in Canada's post-NAFTA BITs. In any event, the same fair and  
21 equitable treatment has resulted for Chemtura.

22           Finally, the Article 1110 Claim must fail because the  
23 Claimant has not been substantially deprived of its investment.  
24 The investment, in this case, Chemtura Canada, has not been  
25 rendered useless, it has not been brought to a standstill, it

11:40 1 has not been neutralized. The Claimant is fully able to use,  
2 enjoy, and dispose of its investment. In any event, this  
3 Article 1110 Claim fails because the Claimant cannot claim an  
4 expropriation in connection with a voluntary industry phase-out  
5 to which it consented and from which it took the benefit.

6 Finally, PMRA's deregistration of lindane, based on a  
7 finding that its use poses unacceptable risks to human health  
8 and the environment, is a valid exercise of Canada's police  
9 power. As a result, there is no violation of Article 1110 in  
10 this case.

11 I will now turn to a very brief summary of some key  
12 facts.

13 Here, my point is that the main story regarding  
14 lindane concerns the science. It was science that prompted  
15 PMRA to engage in a review of lindane. It was science that  
16 remained PMRA's primary preoccupation and action relating to  
17 lindane. The specific events relating to lindane use on canola  
18 arose in this context and were fundamentally an industry  
19 process. The role that PMRA took in relation to these events  
20 was prompted, in all events, by considerations of fairness. In  
21 the meanwhile and subsequently, PMRA pursued its scientific  
22 review, and like regulators around the world, reached a  
23 negative result.

24 The Claimant would have this Tribunal believe that all  
25 of PMRA's dealings relating to lindane flow from a trade

11:42 1 problem that arose over the course of 1998. In the Claimant's  
2 view of the world, the PMRA forced the Claimant to withdraw  
3 lindane at the time simply to resolve a trade issue.

4 It is also suggested that this morning, I believe, for  
5 the first time, that PMRA needed some sort of cover to conduct  
6 a scientific review of lindane, but that is, in fact, the core  
7 of PMRA's mandate.

8 The Claimant would also have this Tribunal believe  
9 that all of PMRA's scientific review of lindane and, indeed,  
10 all of the international efforts since--concerning lindane  
11 since 1998 are simply a sham, meant to give a veneer of science  
12 to an improper political decision. This seems to be the main  
13 basis of its Claim under Article 1105.

14 As Canada has demonstrated in our own written  
15 submissions and will reiterate at this hearing, the Claimant  
16 has the tail wagging the dog. As of the late 1990s, when the  
17 trade issue relating to lindane arose, lindane had come under  
18 increasing negative scrutiny since the 1970s. Canada and  
19 several other countries, including the Claimant's home  
20 jurisdiction, the United States, had either initiated or had  
21 committed to conducting a review of remaining permitted uses.  
22 By the late 1990s, uses of lindane in Canada had already been  
23 limited to only a few below-ground treatment uses allowed only  
24 because it was thought at the time before science advanced that  
25 such uses didn't lead to the release of the pesticide into the

11:43 1 atmosphere.

2 Lindane had, by the 1970s, been recognized as a toxic,  
3 a disruptor of the nervous system like many organochlorines,  
4 such as DDT, in fact, 9 out of the 12 pesticides listed among  
5 the original dirty dozen at the Stockholm Convention are  
6 organochlorines; so lindane, joining them in May 2009, is in  
7 good company.

8 Like other chemicals of its class, lindane, when  
9 released into the air, travels by condensation and ends up in  
10 the Arctic. Because it's a Persistent Organic Pollutant,  
11 lindane tends to get into the food chain. It tends to  
12 accumulate in the body fat of animals and ends up in people's  
13 diets. Contrary to what the Claimant would have you believe,  
14 this was a problem with lindane itself and not with only  
15 related chemicals.

16 The Claimant's view of the relevant facts is  
17 fundamentally skewed. The fundamental issue with lindane is  
18 not trade. The fundamental issue with lindane is that by the  
19 late 1990s, even the few remaining uses of lindane including  
20 its seed treatment use, were being recognized as hazardous.

21 The many serious questions surrounding lindane use by  
22 1997 prompted PMRA to launch a scientific review called a  
23 "special review" of remaining lindane registrations. The  
24 PMRA's attention to lindane began with science, was pursued  
25 through multiple scientific reviews and continues to be

11:45 1 science-based.

2           Given the precarious status of lindane, it's not  
3 surprising that, as of the late 1990s, the single largest  
4 remaining users of lindane in Canada, the Canadian canola  
5 farmers, decided to phase out their use of this active or  
6 pesticide and transition to alternatives. All of the  
7 challenges they were facing from their continued use of lindane  
8 reflected this precarious status. The U.S., as you've heard  
9 this morning, had no registration for lindane use on canola and  
10 was unlikely to grant one. In fact, we have demonstrated in  
11 our submissions the Claimant, in fact, tried very hard, indeed,  
12 to get a lindane registration or tolerance in the United States  
13 and failed.

14           The farmers were also being affected by negative  
15 scrutiny by environmental groups due to their use of lindane,  
16 and they knew that lindane was slated to be reviewed in Canada  
17 and the U.S., so they decided to organize an orderly industry  
18 phase-out and transition to new products.

19           To assist the Tribunal in understanding this sequence,  
20 we set out a summary chronology. Our intention here is simply  
21 to give a framework for a few key events. What this chronology  
22 shows in the first place is that by the late 1990s, lindane had  
23 either been banned or severely restricted not only in Canada  
24 but around the world, and I will come to a map on this shortly.

25           Moreover, it shows that by 1997, Canada was already

11:46 1 committing to reviewing its remaining restricted uses of  
2 lindane. The Claimant this morning showed you a portion of a  
3 slide, the portion of a text. We will go back to those texts  
4 and show that Canada, in fact, committed in the Aarhus Protocol  
5 negotiations to reviewing its remaining registered uses.

6 This is particularly relevant to the Claimant's  
7 allegation that the Special Review was prompted by a trade  
8 concern. In fact, the PMRA had committed to reviewing lindane  
9 before the canola industry withdrawal agreement was even  
10 proposed.

11 The next step of this chronology from March 1999 to  
12 October 2001 are the dates of Canada's Special Review of  
13 lindane. As Canada will demonstrate in this hearing, that  
14 review was a legitimate scientific process, not a fraud or a  
15 political sham that the Claimant would have you believe. By  
16 October 2001, PMRA's scientific team had determined that  
17 lindane use poses unacceptable health risks to workers exposed  
18 to the product during seed treatment.

19 I would also note at this point that PMRA was  
20 conducting multiple lines of review and had at that point draft  
21 conclusions that demonstrated that lindane use as a seed  
22 treatment leads to environmental contamination.

23 The dates thereafter are of the Board of Review  
24 process. Chemtura challenged the results of the Special Review  
25 as of 2002, leading to a Board of Review. You've heard this



11:48 1 morning that PMRA was dragging its heels in appointing the  
2 Board of Review. In fact, if you look at record, and as Canada  
3 demonstrated, Canada acted promptly in response to Claimant's  
4 request for a Board of Review. It was only the fact that  
5 Claimant sued PMRA and Canada objecting to the appointment  
6 process for the Board of Review that that Board's appointment  
7 was actually delayed. And a year after starting that action,  
8 in May 2003, in open Court, the Claimant's representatives  
9 acknowledged that the PMRA could, as had been originally  
10 arranged, participate, advise the Minister in the appointment  
11 process for the Board. There was never any question of PMRA  
12 employees sitting on the Board. The Minister of Health was  
13 simply asking the PMRA to assist it in identifying appropriate  
14 candidates, and the Claimant in May of 2003 agreed that that  
15 was a fair and appropriate process.

16           The dates thereafter on this brief chronology are of  
17 the Board of Review process. Chemtura challenged the results,  
18 as we said, and the Board took place between 2004 and 2005.

19           Now, the point of this is that the Board's process  
20 could hardly have proceeded if PMRA's scientific review of  
21 lindane was merely some kind of sham. In the second place, it  
22 demonstrates the due process Chemtura received. In the third  
23 place, the Claimant has attempted to avoid admitting this  
24 morning, the Board's fundamental conclusion is that PMRA  
25 reached acceptable scientific conclusions.

11:49 1            Yet, that's not all the science because Canada took  
2 the Board's recommendations and implemented them in a further  
3 full de novo review of lindane. This again confirmed PMRA's  
4 scientific good faith and full due process to the Claimant.  
5 This review took place between 2006 and 2008, during which the  
6 Claimant was offered the chance to make still further  
7 submissions. By April 2008, the PMRA's new scientific team,  
8 and I will emphasize that the teams that worked on the original  
9 Special Review, were not involved--were involved to a very  
10 limited degree in the second scientific review. This de novo  
11 review had concluded by April 2008 that lindane use as a seed  
12 treatment leads to unacceptable health risks, and that was  
13 despite that the PMRA took into account the recommendations of  
14 the Board concerning potential mitigation measures, and had  
15 taken into account the additional data that the Claimant  
16 submitted during the course of that Board of Review proceeding,  
17 and in the course of the lindane Re-evaluation Note.

18            That REN, or second de novo review, was released to  
19 the Claimant and other stakeholders in draft in April of 2008  
20 and there followed a full year of consultations with the  
21 Claimant, including face-to-face meetings with the Claimant--a  
22 face-to-face meeting with the Claimant, during which the  
23 Claimant was again able to make its representations.

24            Now, Mr. Somers had mentioned that, we noted in our  
25 chronology that the lindane REN was released to the public and

11:51 1 suggested we should not have mentioned that in our chronology.  
2 Mr. John Worgan, in his second Affidavit, I believe, notes that  
3 the lindane REN was pending and about to be released, and so  
4 it's on that basis we included that in the chronology because  
5 that has, indeed, been confirmed. I would be surprised to know  
6 why the Claimant would not want the Tribunal to know that the  
7 lindane REN has been released to the public.

8           So, again, what does this chronology suggest? The  
9 PMRA's review was prompted by legitimate scientific concerns,  
10 was conducted through a legitimate scientific process that gave  
11 the Claimant ample due process, and it reached scientific  
12 conclusions.

13           I will now turn to the subsidiary set of events  
14 concerning the industry withdrawal of lindane use on canola.  
15 Here the chronology demonstrates that the issue was in the  
16 first place prompted, as Claimant notes, by Chemtura's own  
17 subsidiary, which rather casts a pall on its argument that PMRA  
18 was somehow singling out lindane for action.

19           The chronology also shows that what was at issue was  
20 the application of U.S. pesticides legislation, which barred  
21 the import of products containing non-U.S. registered  
22 pesticides such as lindane.

23           So, by 1998, prompted by Chemtura's subsidiary, the  
24 U.S. Government suggested it would take action against  
25 lindane-treated canola.

11:52 1           What the chronology next establishes is that the  
2 Canadian canola industry, alarmed by the potential application  
3 of U.S. pesticides legislation, had, by the summer of 1998,  
4 begun to organize a voluntary industry withdrawal of lindane  
5 use from canola. The Claimant has consistently, in its  
6 submissions, tried to omit the fact that the Canadian Canola  
7 Council, the Canadian Canola Growers Association were actively  
8 seeking this Voluntary Withdrawal Agreement, a fact that's  
9 extensively documented in contemporaneous documents, which we  
10 will come to in a bit.

11           The important thing to note also here with regard to  
12 chronology is by this time PMRA had already begun to organize  
13 its Lindane Special Review, as you can see in the yellow boxes  
14 above. So much for the notion that the PMRA was--that the  
15 Special Review was simply a condition of this Voluntary  
16 Withdrawal Agreement. The PMRA does not need a trade concern  
17 to conduct a scientific review when it believes there are  
18 issues with the use of a pesticide.

19           What the next stages of the chronology show is the  
20 canola industry achieving agreement of lindane--with lindane  
21 Registrants by November '98, by November 1999, we see the PMRA  
22 taking steps pursuant to that agreement to review replacement  
23 products as requested by the Registrants. Indeed, the first  
24 registered lindane replacement products were Claimant's Gaucho  
25 products, showing the Claimant taking the benefit of the

11:54 1 Voluntary Withdrawal Agreement, and we will come back to that  
2 point as well.

3           The chronology next shows all four Registrants,  
4 including Chemtura, voluntarily removing canola from their  
5 lindane product labels by December, 1999. No one forced them  
6 to do this--not the PMRA, not the CCC. The Claimant has  
7 alleged that the PMRA somehow threatened them. It's shown  
8 absolutely no proof of that.

9           And the last date is the last date of sale and use of  
10 lindane for use on canola, July 1st, 2001, including the use of  
11 lindane-treated seeds. This simply shows that stakeholders  
12 were granted a full three year phase-out, and given the trade  
13 issue that the Claimant references, given the potential  
14 application of U.S. pesticides legislation, what the Voluntary  
15 Withdrawal Agreement actually allows the lindane manufacturers  
16 is a full further three years of use of their product instead  
17 of, as was a potential outcome, as one of our witnesses said,  
18 cold-turkey move away from lindane as of 1998 to avoid the  
19 border issue.

20           What Canada's submissions have demonstrated with  
21 regard to this subsidiary set of events and what our witnesses  
22 will confirm this week is that the VWA was, indeed, voluntary;  
23 that the PMRA took an appropriate role in connection with this  
24 industry agreement that made sense; that the PMRA treated all  
25 Parties equally, and that the Claimant took the benefit of that

11:55 1 agreement.

2           The facts I invoke here in Canada's case in general  
3 are not based on bare allegations. You've seen the Claimants  
4 string together this morning a series of partial quotations  
5 from documents and selected references to the record, omitting  
6 much of what Canada is telling you here. That's consistently  
7 been the Claimant's approach to proving it's the case in the  
8 matter. Much of Canada's job in this matter has been to tell  
9 this Tribunal what the Claimant didn't want the Tribunal to  
10 know, including the now near worldwide ban on lindane use in  
11 agriculture.

12           The Claimant's selective reference to the record is  
13 only one problem. Another is its reliance on the speculations  
14 of its own employees to allegedly prove very serious  
15 allegations, the kind one would expect to be made only on the  
16 basis of extensive documentary proof. Based on such  
17 speculations, the Claimant would have this Tribunal ignore the  
18 massive evidence of PMRA's good-faith scientific review of  
19 lindane.

20           The Claimant bears the burden of proving its  
21 allegations, yet Canada has sought to provide this Tribunal  
22 everything it needs to properly understand what PMRA did in  
23 relation to lindane, the steps the Claimant itself was taking,  
24 and why the Claimant's position simply cannot be squared with  
25 the facts.

11:57 1 I will walk through some of the key documents in  
2 relation to the tests we think that each Tribunal should  
3 consider, but I wanted first to recall the battery of factual  
4 and Expert Witnesses Canada has submitted to the scrutiny of  
5 this Tribunal, and from whom the Tribunal will hear over the  
6 course of this week, with one exception.

7 First of all, in response to the Claimant's  
8 allegations regarding the alleged improper scientific review of  
9 lindane, Canada has put forward the evidence of Ms. Cheryl  
10 Chaffey, a senior PMRA scientist who took a leading role in  
11 PMRA's special review of lindane and a test to the good faith  
12 of this scientific review. Dr. Peter Chan, another senior PMRA  
13 scientist from the PMRA's second de novo re-evaluation of  
14 lindane, attests to the independence of this second review.

15 John Worgan, PMRA's current Director General of  
16 re-evaluation practice, attests to the even-handed application  
17 in this review of PMRA re-evaluation policy.

18 Canada has also put forward a series of witnesses in  
19 response to Claimant's allegation that PMRA somehow forced it  
20 to enter into the Voluntary Withdrawal Agreement or somehow  
21 violated Claimant's expectations in connection with this  
22 agreement. Here, Canada has put forward Mr. Tony Zatylny, the  
23 Canola Council of Canada Vice-President, who will confirm that  
24 the Voluntary Withdrawal Agreement was, indeed, industry led,  
25 sought a voluntary phase-out to address a pressing concern.

11:58 1           We put forward Ms. JoAnne Buth, the current Canola  
2 Council of Canada President, who took over from Mr. Zatylny in  
3 1999 and saw the VWA through to its conclusion.

4           We put forward Ms. Wendy Sexsmith, the PMRA's former  
5 Chief Registrar and Acting Executive Director, who will attest  
6 to the PMRA's role in connection with the Voluntary Agreement,  
7 confirming that its involvement was within its mandate based on  
8 voluntary participation by industry stakeholders, and that the  
9 PMRA treated all with an even hand.

10           We've also put forward Ms. Suzanne Chalifour, a senior  
11 PMRA scientist involved in the evaluation of new products.  
12 Ms. Chalifour will attest to PMRA's efforts to review lindane  
13 replacement products and treat all Registrants fairly in this  
14 regard, including in the registration of two versions of the  
15 Claimant's Gaucho or lindane replacement product a full year  
16 before any other replacement product was registered.

17           We have also submitted the Affidavit of Mr. Jim Reid,  
18 who could not be with us this week, but whose well-documented  
19 statement attests that PMRA issued no threats with regard to  
20 the last date of phase-out as the Claimant alleges.

21           We put forward Dr. Claire Franklin, the PMRA's  
22 Executive Director at the time of the events in question, who  
23 will speak to a few process issues in this Special Review,  
24 notably that she met with the Claimant's senior executive in  
25 the course of the Special Review a full year before the Special



12:00 1 Review was completed in October of 2000 and raised specifically  
2 the occupational health concern that the Claimants reference  
3 this morning.

4 Canada has also, on the Expert front, put forward the  
5 evidence of Dr. Lucio Costa, an eminent toxicologist whose  
6 confirmed scientific validity of both PMRA review--lindane  
7 review process and its conclusions and of the REN. We note  
8 that Dr. Costa's evidence is uncontradicted in this matter.

9 As the Tribunal will also be aware from the comments  
10 at the end of Mr. Somers's comments this morning, the Claimant  
11 has based its damages analysis on allegations that if Canada  
12 had not withdrawn support for lindane, it would have pushed  
13 harder for a parallel registration or tolerance for lindane use  
14 on canola in the United States, and that this would have  
15 addressed the canola industry's border concerns. In response  
16 to this, Canada has called Dr. Lynn Goldman, the former  
17 Assistant Administrator of the EPA with responsibility for  
18 pesticides, who has reviewed the Claimant's efforts to obtain a  
19 U.S. approval for lindane on canola. What she's found is the  
20 Claimant actually tried very hard, indeed, and failed.

21 Finally, Canada has put forward the evidence of  
22 Mr. Brent Kaczmarek. He confirms that the Claimant's damages  
23 analysis depends on ignoring not just Canada's alleged measure,  
24 but just about every documented fact about lindane since--and  
25 the canola industry from 1999 onwards.

12:01 1           The evidence of all of these witnesses will confirm  
2 that, on the one hand, in terms of the scientific review of  
3 lindane, PMRA's review was prompted by legitimate scientific  
4 concerns, was conducted through a legitimate scientific  
5 process, and reached scientifically legitimate conclusions.

6           Their evidence will also confirm in terms of the  
7 industry-led voluntary withdrawal that the Agreement was,  
8 indeed, voluntary, that the PMRA took an appropriate role in  
9 connection with that agreement, that the Claimant treated--the  
10 PMRA treated the Claimant fairly, and that the Claimant took  
11 the benefit of the VWA, or Voluntary Withdrawal Agreement.

12           I will now turn away from this brief overview to  
13 Article 1105 allegations. I'll first briefly comment on the  
14 standard itself. I will then consider the questions this  
15 Tribunal may ask in considering Canada's conduct in light of  
16 this standard.

17           One of the fundamental problems with the Claimant's  
18 allegations in this matter is that it has misstated the  
19 Article 1105 standard. The Tribunal will be excused for  
20 wondering if it confused the room in which it was wandering  
21 into this morning and ended up in some kind of domestic  
22 administrative law court review board of first instance. The  
23 first thing to recall with regard to Article 1105 is that the  
24 Claimant is called to uphold under this Article the  
25 international customary minimum standard of treatment of

12:03 1 aliens, or MST. What the Claimant has done is applied the  
2 wrong standard, as I said, in two ways: First, it  
3 significantly lowers the threshold for breach of customary MST.  
4 Second, it introduces novel elements that do not form part of  
5 this customary standard. In the result, the Claimant would  
6 have this Tribunal apply the wrong standard under Article 1105.

7 Canada's Statement on Implementation of the NAFTA  
8 issued in 1994 stated that Article 1105 was intended to assure  
9 a minimum standard of treatment of investments of NAFTA  
10 investors and provides for a minimum absolute standard of  
11 treatment, based on long-standing principles of customary  
12 international law. The three NAFTA Parties confirmed the  
13 applicability of customary MST in their Note of Interpretation  
14 of 2001, which reads: Article 1105 prescribes the customary  
15 international law minimum standard of treatment of aliens as  
16 the minimum standard of treatment to be afforded to investments  
17 of investors of another Party. The concepts of "fair and  
18 equitable treatment" and "full protection and security" do not  
19 require treatment in addition to or beyond that which is  
20 required by the customary international law minimum standard of  
21 treatment of aliens.

22 We will come back to this in our comments on the law  
23 at the end, but it is striking that Mr. Somers at no point this  
24 morning mentioned the minimum standard of treatment. Spoke  
25 exclusively in terms of fair and equitable treatment.

12:04 1           Now, as we will also discuss in our comments on the  
2 law, since the issuance of the Note of interpretation, NAFTA  
3 Chapter 11 tribunals applying Article 1105 have consistently  
4 upheld the high threshold for breach of customary MST. NAFTA  
5 tribunals have characterized this standard in a variety of  
6 ways, but the principle running through all of these cases is  
7 that MST presents a high threshold. A breach of the customary  
8 minimum standard has been described as treatment in such an  
9 unjust or arbitrary manner, that the treatment rises to a level  
10 that is unacceptable from an international perspective. That  
11 was the Myers Tribunal, even before the Note of interpretation  
12 was issued.

13           The purpose of the clause is to serve not as a  
14 springboard for consideration of any and all complaints about a  
15 State measure, such as, for example, did the Minister respond  
16 within 6 days or 11 days to a letter requesting clarification  
17 on the appointment of a Board of Review? No, but, rather, as  
18 the name implies, a minimum floor for treatment below which  
19 treatment of foreign investors must not fall.

20           The Claimant in this arbitration has essentially  
21 ignored the note of interpretation and sought to import into  
22 the NAFTA content that tribunals have devised when applying  
23 principles of treaty interpretation to other differently worded  
24 treaties rather than applying customary international law.

25           As we've said, the Claimant's approach results in two

12:06 1 main errors of law; that is, one significantly lowering the  
2 threshold for what is required to breach that minimum standard;  
3 and, two, by incorporating into customary MST novel content  
4 that is not recognized as part of the customary standard.  
5 Rather than treatment that would be deemed clearly improper and  
6 discreditable from an international perspective, the Claimant  
7 alleges this Tribunal should determine whether there was a lack  
8 of sufficient evidence to support the PMRA's decision to  
9 withdraw lindane or whether the PMRA based its scientific  
10 decision on irrelevant considerations rather than a gross  
11 denial of justice, it suggests that it is sufficient for the  
12 Tribunal to find the Claimant should have been granted a longer  
13 comment period at the end of the first Special Review. It  
14 suggests contra the findings of previous NAFTA Tribunals such  
15 as Mondev that the Tribunal should determine from the  
16 perspective of domestic Canadian law whether the PMRA acted  
17 within the scope of its statutory authority, not as MST would  
18 truly hold whether such acts led to treatment that was grossly  
19 unfair or inequitable.

20           As I mentioned at the outset, the Claim is essentially  
21 trying to transform this Tribunal into a supranational Court of  
22 Domestic Administrative review.

23           Rather than addressing Canada's conduct from the  
24 perspective of customary international law, the Claimant  
25 applies novel tests which do not form part of the customary

12:07 1 standard. The Claimant does so having failed to discharge its  
2 obligation of demonstrating an expansion of customary  
3 international law by consistent State practice and by state  
4 sense that this practice, by this practice they are acting  
5 legally, what is known as opinio juris. Canada submits the  
6 Claimant's approach is simply wrong at law and must be  
7 rejected. The Claimant invites this Tribunal to engage in a  
8 level of scrutiny of Canada's Domestic Regulatory Affairs that  
9 is legally incorrect.

10           What this Tribunal should be considering under  
11 Article 1105 is whether from a fairness perspective PMRA's  
12 administrative actions in relation to lindane led to a  
13 conclusion that PMRA acted in a manner that was clearly  
14 improper and discreditable, amounting to a breach of the  
15 international customary minimum standard of treatment. I will  
16 come to the specific questions we think that should be  
17 considered under the standard in a moment.

18           But, first, a related comment which picks up on  
19 Professor Crawford's this morning--question this morning, on  
20 what might constitute a breach. The Claimant has adopted a  
21 kitchen sink approach to Article 1105. It's evidently  
22 calculated that if it complains long enough about enough things  
23 under enough headings, surely somewhere in all of this morass  
24 of complaints that the Tribunal might conceivably find  
25 something that could be worthy of censure.

12:09 1           In response to this, Canada would point out two  
2 things: First, none of the Claimant's alleged  
3 measures--alleged breaches constitute a breach of customary  
4 MST, either taken individually or taken together.

5           But, second, any allegation of breach must be  
6 considered in light of the entire record; thus, for example,  
7 the Tribunal may believe that Canada should have granted a  
8 longer comment period at the end of Special Review of lindane.  
9 Canada does not believe that this sort of administrative law  
10 question is properly before this Tribunal.

11           But even if it were, the Tribunal's job would not stop  
12 there, because this Tribunal would have to consider this issue  
13 in light of the multiple subsequent opportunities Canada  
14 thereafter gave Chemtura to raise its complaints and to make  
15 further submissions. In other words, the Tribunal must also  
16 consider the remedies Canada provided to alleged breaches of  
17 conduct.

18           Those are my brief comments on the law. I will now  
19 turn to questions that the Tribunal--we think the Tribunal may  
20 assist this Tribunal in considering the evidence over the  
21 course of this coming week under Article 1105. This is because  
22 in Claimant's Submissions of necessity in our reply, the  
23 allegations popped up under repeatedly under different  
24 headings, making the job of following them somewhat repetitive.

25           We have organized the Claimant's broad ranging

12:10 1 allegations, therefore, in relation to the two main factual  
2 themes of this matter: One, the PMRA's scientific review of  
3 lindane; and, two, the voluntary industry phase-out of lindane  
4 use on canola. They can be summarized in relation to seven  
5 questions which we propose the Tribunal should consider this  
6 week.

7           In the first place, in relation to the scientific  
8 review of lindane, the three questions are:

9           One, has the Claimant proved that PMRA's scientific  
10 review was undertaken based on improper and illegal  
11 considerations? No.

12           Has the Claimant proved that PMRA conducted a  
13 scientific review that was manifestly without scientific basis  
14 and biased, leading to the conclusion that Claimant was  
15 subjected to unfair treatment? Again, no.

16           Has the Claimant proved that PMRA's review was  
17 shockingly lacking in due process? No. The evidence of all of  
18 Canada's witnesses will confirm that PMRA's review was prompted  
19 by scientifically legitimate concerns, was conducted in  
20 accordance with scientifically legitimate practices through a  
21 fair process and reached scientifically legitimate conclusions.

22           In relation to the industry-led withdrawal of lindane  
23 use on canola, the Claimant's allegations can be formulated in  
24 the following terms:

25           One, was the Claimant unfairly or unlawfully forced to



12:11 1 enter into the VWA by PMRA?

2 Two, was the PMRA's agreement to facilitate this  
3 Voluntary Agreement a repudiation of its statutory mandate,  
4 exposing the Claimant to fundamental unfairness? No.

5 Three, did the PMRA, in facilitating this agreement,  
6 expose the Claimant in particular to grossly unfair treatment?  
7 No.

8 Four, did the Claimant have any legally enforceable  
9 expectations in relation to this Voluntary Agreement? If so,  
10 did the PMRA act in violation of these expectations? Again,  
11 no.

12 The evidence will also confirm, in terms of this  
13 industry-led withdrawal, that the Agreement was, indeed,  
14 voluntary; that PMRA took an appropriate role in relation to an  
15 industry agreement that made sense; that PMRA treated all  
16 Parties fairly; and that Claimant agreed to and took the  
17 benefit of the Agreement.

18 I would note that I have worded these questions in  
19 light of the high threshold required to find a breach of  
20 customary MST. However, it's Canada's position that its  
21 measures were not in breach even of the lower threshold the  
22 Claimant wants this Tribunal to substitute for customary MST.

23 As I've said, we will first consider the allegations  
24 in relation to the scientific review. In the first place, has  
25 the Claimant proved that PMRA's scientific review was

12:13 1 undertaken based on improper considerations egregiously outside  
2 of its legal mandate? No. Canada's review of lindane was  
3 prompted by proper considerations squarely within its legal  
4 mandate.

5           The Claimant makes it seem like the decision to  
6 re-evaluate lindane as of 1998 was some kind of shock or  
7 surprise. It suggested that, in its submissions, that the use  
8 of lindane since the 1930s proceeded unhindered until Canada  
9 improperly decided to conduct a Special Review based on trade  
10 considerations relating to this industry withdrawal. And, in  
11 fact, suggesting this morning, I would think, for the first  
12 time that Canada somehow needed the cover of a trade issue to  
13 conduct a scientific review of lindane. To the contrary,  
14 Canada's decision to review lindane in the late Nineties was  
15 taken on the basis of precisely the scientific concerns that  
16 are at the core of the PMRA's mandate. The decision was taken  
17 in a context in which lindane had long been giving rise to  
18 serious scientific doubt. I have noted this briefly--the  
19 withdrawal of lindane since the 1970s. Canada itself began  
20 limiting the use of lindane in 1970, when it withdrew support  
21 for foliar, i.e. above ground uses of the chemical on a variety  
22 of uses. By the late 1990s, most uses of lindane had already  
23 been withdrawn, based on concerns about its toxicity and  
24 persistence in the environment.

25           And Canada wasn't alone in these concerns. The first

12:14 1 map I'd show you is that of bans or severe restrictions on  
2 lindane from the late 1960s to about 1998.

3           The point of this map is that Canada's own Special  
4 Review of lindane wasn't being launched in a vacuum. The  
5 decision to review lindane uses was part of a specific  
6 historical trend. Moreover, there were many specific events  
7 around 1997-98 that emphasized the need for a review. One was  
8 accumulation of country-specific bans and reviews in leading  
9 jurisdictions. France, for example, banned agricultural uses  
10 in 1998, despite the fact that it was historically one of the  
11 biggest users of lindane. The U.K. began its review in 1998,  
12 and by 1999, had suspended seed treatment due to concerns about  
13 occupational exposure risk.

14           The E.U. rapporteur country, Austria, launched a  
15 review in 1998 leading to a European phase-out as of 2000, and  
16 the U.S. in 1998 launched its own lindane review. The Claimant  
17 this morning suggested that the PMRA was trying to get the U.S.  
18 EPA on the lindane, the anti-lindane bandwagon. In fact, the  
19 U.S. EPA launched its review--reregistration eligibility  
20 decision of lindane a year before the PMRA's decision--Special  
21 Review began rather in--theirs began in 1998, and the PMRA's  
22 planning began in 1998 and was publicly launched in March 1999.

23           Moreover, as of 1997-98, Canada joined over 30 nations  
24 in signing the Aarhus Protocol on Persistent Organic  
25 Pollutants, pursuant to which lindane uses were restricted, and

12:16 1 these restrictions subject to a scientific review.

2 I will return to this latter point about the Aarhus  
3 Protocol in a moment, but I also wanted to show you what  
4 happened during the period when Canada was conducting its  
5 scientific review. Let's return to the map to show the state  
6 of play as of 2006. Here, we see the number of worldwide bans  
7 has only increased.

8 Moreover, since May 2009, the world view on lindane  
9 has become nearly unanimous under the Stockholm Convention.  
10 So, these are the States around the world that have committed  
11 to banning existing uses of lindane under the Stockholm  
12 Convention by putting it on Schedule A, which is the schedule  
13 for products targeted particularly for elimination.

14 I would note that the Claimant's witnesses suggest to  
15 this Tribunal they see no reason why, as of 2002, a  
16 registration might not have been granted in the United States  
17 and that registrations in Canada should have been--would not  
18 have been maintained through the 2022, when this is the  
19 situation already in 1997, in 2006, and 2009.

20 So, this was the context in which lindane, Canada's  
21 lindane measures have taken place. Was Canada motivated by  
22 improper considerations in its lindane review? Clearly not.  
23 Let's return to Canada's Aarhus Protocol commitments in 97-98.

24 The Aarhus Protocol sought to put in place specific  
25 commitments regarding restriction and progressive elimination

12:18 1 of Persistent Organic Pollutants by member states. Lindane was  
2 listed as a restrictive substance in Annex 2 of the Protocol.  
3 Products in which 99 percent of HCH isomer is a gamma form,  
4 i.e., lindane, are restricted to the following uses, and they  
5 are listed. And this is conditional upon the reassessment  
6 under the Protocol no later than two years after the date of  
7 its entry into force. The Claimant's counsel this morning  
8 said, when people mean lindane, they say lindane. Clearly,  
9 here they mean lindane and they say lindane, and you will note  
10 that the Article above lindane on this list is HCH proper,  
11 which is just completely banned.

12 Canada therefore made a specific commitment under  
13 Aarhus, informally in late 1997 and then confirmed in a  
14 signature of the Convention in June 1998. That commitment was  
15 fulfilled by PMRA's 1999-2001 Special Review.

16 Now, Claimant has tried to counter this evidence by  
17 mischaracterizing Canada's position in the Aarhus negotiations.  
18 It suggests that Canada was refusing to include lindane in the  
19 Protocol because it didn't see a problem with the pesticide.  
20 This thesis is false. As Dr. Franklin, the PMRA's Executive  
21 Director, will explain, Canada couldn't commit internationally  
22 to ban a product in the absence of a domestic scientific  
23 review, whatever concerns might have been expressed. What you  
24 see in these negotiations is Canada doing two things: Taking  
25 note both of international and domestic concerns; and

12:19 1 committing to restrict lindane to currently registered uses,  
2 therefore not being in violation of its domestic legal  
3 structure, but also with a commitment to conduct a scientific  
4 review of even these remaining registered lindane uses.

5           Ironically, what the Claimant misconstrues as some  
6 kind of smoking gun is, in fact, evidence of Canada trying to  
7 act responsibly and legally rather than by simply banning  
8 lindane in the absence of review.

9           Canada's support for this Protocol is  
10 reflected--reflected its understanding of the then-current  
11 scientific concerns regarding lindane, which were evolving over  
12 the course of 1997-98, so recall by the late 1990s, the main  
13 uses of lindane were below-ground uses, and there was  
14 uncertainty at the time about whether these uses might lead to  
15 further environmental pollution. And over the course of these  
16 negotiations, more evidence was coming to light.

17           So, if you look at the negotiating text again, we'll  
18 take a look at the part of the document the Claimant didn't  
19 want to you see. This is what Canada was saying about lindane  
20 in the context of these negotiations.

21           On a more technical level, the following should be  
22 noted: Lindane is subject to long-range atmospheric transport  
23 to remote regions. There is monitoring data demonstrating  
24 this, the Canadian CACAR Report, and lindane clearly meets the  
25 numerical criteria for long-range atmospheric transport

12:21 1 established by this protocol. Lindane is persistent in the  
2 environment, as evidenced by the Arctic monitoring data. There  
3 is evidence of bioaccumulation, particularly in aquatic  
4 organisms. Information provided the Parties shown in January  
5 shows evidence of significant aquatic toxicity.

6           And then down at the bottom of the page, they mention  
7 again the issuance of these two new important Reports, the  
8 Canadian Arctic Contaminants Assessment Report, describing the  
9 results of Arctic monitoring programs released in June 1997.  
10 Results show that HCH, including the gamma isomer, which is  
11 lindane, is the most abundant Persistent Organic Pollutant in  
12 air, seawater, and rivers in the North.

13           So, this is the pesticide for which the Claimant this  
14 morning was suggesting there were only trade concerns, which  
15 arose in 1998.

16           If we go on to look at PMRA's initial planning process  
17 for the scientific review of lindane, we see again a direct  
18 link made between--to PMRA's international commitments and its  
19 scientific motivations. Here is one of the initial project  
20 sheets in June 1998, when Canada was signing the Aarhus  
21 Protocol, the goal to undertake a reassessment of all existing  
22 uses of lindane, as required for compliance with the provisions  
23 of UNECE LRTAP POPs Protocol, which is the Aarhus Protocol.

24           Now, you see that reassessment has been crossed out  
25 with Special Review. Under the PMRA's re-evaluation policy,

12:22 1 which the Claimant must certainly know of, where there have  
2 been specific concerns raised about the use of a pesticide,  
3 that is the condition for pursuing a special review as opposed  
4 to a cyclical re-evaluation. So, before any trade issue or  
5 before any proposed agreement of voluntary withdrawal was even  
6 put forward later in the summer, Canada was already committing  
7 to conducting a special review of lindane.

8           Now, if we--if Cheryl Chaffey has confirmed, and you  
9 will hear from her in a few days that in the spring of 1998,  
10 the PMRA had already begun preparing its scientific review of  
11 lindane. It was announced in March of 1999, but you will see  
12 in the record a number of memoranda which PMRA was generating  
13 at the time to see what data it had available.

14           It's also worth noting that the Claimant was well  
15 aware of the very serious scientific concerns about lindane as  
16 of the late 1990s. One of the main industry representatives,  
17 the Centre Internationale d'Etudes du Lindane, or CIEL, which  
18 the claimed referred to this morning, I believe, as a lobbyist  
19 for the lindane industry, certainly an organization that was  
20 seeing itself as a leader in lindane research to promote the  
21 use of lindane, this is what it had to say in 1998: Following  
22 the use pattern of lindane and in understanding the concerns of  
23 UNECE regarding Persistent Organic Pollutants and transboundary  
24 air transport, we have decided to limit ourselves to only  
25 support such uses of lindane that do not release undue



12:24 1 quantities in the atmosphere.

2           Now, if you're not worried about a pesticide from a  
3 health and environmental point of view, you're not going to say  
4 we will only support those uses that don't release undue  
5 quantities.

6           Now, the Claimant will respond to this, well, they are  
7 saying they are supporting their below-ground uses, but the  
8 Claimant's own advisors noted in a lindane meeting of July  
9 21st, 1998, which will be up on the screen in a moment, that  
10 even its below-ground use will cause pollution. As we say  
11 here, lindane is volatile when applied to the soil, and this is  
12 precisely one of the scientific conclusions which was confirmed  
13 by countries around the world, including by Canada.

14           In November 1998, 1 of the Claimant's main  
15 representatives in Canada at the time, Bill Hallatt, whom the  
16 Claimant has failed to call in this arbitration, commented on a  
17 Chemtura response to international lindane reviews that were  
18 then ongoing. He had the following to say: I got your fax on  
19 the CCC statement on lindane and Persistent Organic Pollutants.  
20 Unfortunately, the heading--the exclusion of lindane from the  
21 list of Persistent Organic Pollutants is inaccurate. Lindane  
22 is not on the top 12 list for banning, but Persistent Organic  
23 Pollutants cover a lot of ground beyond the initial 12,  
24 including radioactive materials, heavy metals, industrial  
25 chemicals and lindane. Lindane is still a Persistent Organic

12:25 1 Pollutant. I can see where JLM was misled.

2 This is what Claimant's internal documents were saying  
3 in November of 1998.

4 The Claimant, as I've mentioned, has failed to call  
5 Mr. Hallatt in this matter.

6 We've included in our presentation a more detailed  
7 chronology, setting out the lead-up to the Special Review.  
8 What this chronology confirms is that the Special Review had  
9 multiple tipoffs and a sound scientific motivation. From the  
10 perspective of Article 1105 and the question before this  
11 Tribunal, the point of all this is that it simply puts to the  
12 lie the Claimant's allegation the PMRA engaged in the special  
13 review to give a veneer of science to an improper phase-out.  
14 The special review was planned before the specific canola  
15 industry phase-out was even considered and was motivated by  
16 sound scientific considerations. The PMRA in these  
17 circumstances did not need a trade issue to pursue lindane. It  
18 had very good scientific reasons to do so.

19 The Special Review also wasn't some sort of condition  
20 Chemtura imposed in relation to the industry phase-out. The  
21 Special Review would have gone ahead in any event. There is no  
22 violation of Article 1105 here, either under the proper  
23 customary international test or under the incorrect test the  
24 Claimant would have this Tribunal apply.

25 I will next turn to the second of the three points

12:27 1 under Article 1105. What about the conduct of the Special  
2 Review itself? Has the Claimant proved that PMRA conducted a  
3 scientific review that was manifestly without scientific basis  
4 and biased, leading necessarily to the conclusion that Claimant  
5 was suggested to unfair treatment? No.

6 As this Tribunal has seen in affidavits submitted by  
7 Canada with its Counter-Memorial and Rejoinder Memorial, and as  
8 it will hear from Cheryl Chaffey, Dr. Peter Chan, John Worgan,  
9 Dr. Lucio Costa, both of PMRA's original special and the  
10 subsequent lindane Re-evaluation Note, or REN, were conducted  
11 in accordance with scientifically legitimate procedures by PMRA  
12 scientists who were given no particular instructions as to  
13 outcome.

14 The Claimant's suggestions that the scientific review  
15 of lindane was not a proper scientific process where its  
16 outcome was pre-judged have no basis in evidence. The burden  
17 of proof, as I've mentioned in this case, is on the Claimant.  
18 It has failed to discharge that burden, relying solely on  
19 partial misquotes from documents and speculations of its own  
20 witnesses. Canada has in response put forward to this Tribunal  
21 extensive evidence permitting the Tribunal to appreciate the  
22 very substantial efforts Canada's scientific teams have taken  
23 in good faith in their repeated reviews of lindane.

24 In the first place, as Cheryl Chaffey will confirm,  
25 PMRA's original Special Review took place between 1999 and 2001

12:28 1 by a full scientific team. That team pursued its review over  
2 hundreds of person hours. It pursued the review on all of the  
3 fronts of the product's re-evaluation, in particular,  
4 environmental behavior, carcinogenicity, toxicity, exposure  
5 assessments and value. The PMRA Special Review also applied  
6 general re-evaluation policy as applied at that time within the  
7 PMRA. There is no singling out of lindane for a  
8 particularly--for particular treatment. The PMRA applied its  
9 re-evaluation policy.

10           Indeed, the Claimant has sought to impugn the  
11 credibility of PMRA's scientific review by suggesting that  
12 there was something strange about conducting a re-evaluation at  
13 all. In fact, and as Canada has shown in its submission, the  
14 Special Review of lindane took place as part of a general  
15 historical shift in Canadian pesticide policy, away from a near  
16 exclusive focus on evaluating new pesticides, towards a general  
17 reassessment of over 400 old active, including lindane. Far  
18 from being singled out, the review of lindane reflected this  
19 general historical trend.

20           The U.S. was also reviewing lindane because it was  
21 going through exactly the same process of general reevaluation  
22 of old pesticides and had begun its own review of lindane only  
23 a year before. Now, the Claimant has suggested this morning  
24 that the PMRA was not interested in any data. That's simply  
25 false. The PMRA was able to rely on the very extensive

12:30 1 database that the EPA had set up only a year before the PMRA  
2 began its review of lindane in the context of its own parallel  
3 review. PMRA's reliance on the U.S. database was part of a  
4 series of policies adopted by the Agency to help it deal  
5 efficiently with the enormous re-evaluation task facing it as  
6 of the late 1990s.

7           The Claimant has, of course, relied heavily on  
8 critiques put forward by the Board of Review regarding various  
9 aspects of the PMRA's Special Review conclusions. It's  
10 important to recall about the Board of Review from the  
11 perspective of Claimant's Article 1105 allegations, the Board  
12 of Review process could never have gone forward if the PMRA  
13 Special Review was some kind of scientific fraud. The Board of  
14 Review received three rounds of written testimony, multiple  
15 Witness Statements and expert reports, and heard over a week of  
16 oral submissions regarding the Special Review process,  
17 including from the three senior scientific--PMRA  
18 scientific--PMRA scientists directly involved in the review.  
19 It could hardly have done so if PMRA scientific review was  
20 something--was nothing more than a facade.

21           Moreover, as Canada has pointed out, while the Board  
22 of Review and PMRA had good-faith, scientific differences of  
23 view, the Board's fundamental conclusion was that the risk  
24 assessment conducted by PMRA and the conclusions reached were  
25 generally within acceptable scientific parameters.

12:31 1           Now, from the perspective of Article 1105, Canada  
2 would submit that this Tribunal could just stop there. Canada  
3 would recall that this Tribunal is not required to consider  
4 PMRA's results on the basis of correctness. It should be  
5 sufficient from the perspective of Article 1105 that the  
6 Special Review was a prima facie scientific process. The  
7 science was not so faulty that it would lead necessarily to the  
8 inference the process was a sham. From that point of view, the  
9 Board's conclusions are dispositive in Canada's favor.

10           We also know that the Board of Review did make various  
11 recommendations. The Board would have been less conservative  
12 than the public regulator. The Board knew that the Claimant  
13 had submitted certain data over the course of the hearing, data  
14 it had not generated previously, and suggested various  
15 litigation measures which it had failed to suggest--or to  
16 propose to PMRA in 2001, and suggested--the Board suggested the  
17 PMRA should take these into account.

18           So, in case there was any doubt regarding the  
19 scientific legitimacy of its result, PMRA thereafter took the  
20 Board of Review's recommendations and conducted a full de novo  
21 review of lindane between 2006 and 2008. That review again  
22 involved hundreds of hours of PMRA's scientific time. Even  
23 having taken into account the Board's recommendations, PMRA  
24 again reached a negative conclusion. Lindane use not only  
25 posed unacceptable risk to workers exposed to the product

12:33 1 during seed treatment, it was also a possible carcinogen.  
2 Moreover, its use as a seed treatment leads to environmental  
3 contamination, and that was something that PMRA determined in  
4 draft already by the Fall of 2001.

5 From the perspective of Article 1105, Claimant has  
6 again sought to suggest the second review was simply another  
7 sham, biased and improper. One of the allegations is that the  
8 same people involved in the Special Review were involved in the  
9 REN, but as I have noted, this is without substance because  
10 Canada put forward a new team.

11 And also the very fact that Canada's--that the fact  
12 that Canada's counsel suggested that PMRA should pursue this  
13 second review does not call into question the independence or  
14 the legitimacy of that review itself.

15 In case all of this is not enough on the face of the  
16 record, Canada has provided the Tribunal with the expert views  
17 of a third party, Dr. Lucio Costa. Dr. Costa has examined the  
18 Special Review's process and conclusions, the Board of Review's  
19 conclusions and the subsequent lindane re-evaluation note.  
20 What he has found in each case is that both the PMRA's process  
21 and its conclusions were in accordance with sound--with  
22 scientific practice. He has also confirmed that the Board's  
23 comments on the Special Review reflected a reasonable  
24 scientific difference of view with the PMRA within the four  
25 corners of a scientific debate.

12:34 1 I would note again here that Dr. Costa's evidence in  
2 this matter is uncontradicted.

3 The best the Claimant has been able to do is suggest  
4 that Dr. Costa's opinions were somehow inappropriate. The only  
5 inappropriate thing in them from the Claimant's perspective is  
6 that they demonstrate that its complaints are baseless. We  
7 again attached to this section a more detailed chronology,  
8 setting out relevant dates in the Special Review from 1999 to  
9 2001.

10 Bringing this debate back to the question posed at the  
11 beginning, was the Special Review some kind of improper sham  
12 process, grossly biased, reaching scientifically baseless  
13 conclusions? Not even close. The Claimant's case on this  
14 question fails on the basis of customary international MST, but  
15 it fails under the incorrect standard the claimant would  
16 instead have you apply. The correctness of Canada's scientific  
17 decision-making should not be at issue in this proceeding, but  
18 both Canada's own extensive domestic process and the  
19 concurrence of Canada's--of countries around the world, place  
20 its results squarely within a reasonable scientific result.

21 I will turn now to the third point under the Special  
22 Review of lindane, the suggestion that the scientific review  
23 was somehow flawed from a process point of view. Again, this  
24 is the Claimant trying to turn the Tribunal into a domestic  
25 administrative review tribunal.



12:36 1           But here again the Claimant has no case either under  
2 proper MST, customary MST, or under the incorrect test the  
3 Claimant would have this Tribunal apply. Not only do its  
4 complaints not amount to a violation of the international  
5 minimum standard, the Claimant has received more due process  
6 with regard to the review of lindane than most people could  
7 ever hope to receive in 50 lifetimes.

8           The Claimant's main allegation of unfairness with  
9 regard to the Special Review is that PMRA allegedly failed to  
10 consult with the Claimant and, in particular, failed to  
11 disclose to the Claimant the so-called "focus of the Special  
12 Review," that its focus would be occupational risk. In fact,  
13 PMRA engaged in exchanges with Chemtura from the start of the  
14 Special Review concerning the nature and focus of its process.  
15 Moreover, the Claimant was aware from the start that  
16 occupational exposure was a significant issue in the review.

17           The Special Review announcement itself of March 15,  
18 1999, was open-ended, noting that there was considerable  
19 scientific uncertainty surrounding lindane, and that as the  
20 review proceeded, the scope of the review might change. After  
21 the Special Review was launched on March 15, by May '99, the  
22 PMRA had participated in a two-day-long meeting with the  
23 Claimant's technical representative, as the Claimant said this  
24 morning, lobbyist TSG, and with the Claimant's Canadian  
25 representative Rob Dupree, whom the Claimant has failed to

12:37 1 present in this arbitration.

2           Mr. Johnson, one of the Claimant's witnesses you will  
3 hear from this week, was in attendance at this meeting. During  
4 this meeting the PMRA went over all aspects of its intended  
5 review. The PMRA specifically signaled as early as the May  
6 10-11, 1999, meeting that it intended to consider exposure  
7 issues, as we see on the screen. Their schedule is to focus on  
8 the chemistry aspects now and health and environmental issues  
9 in the Fall.

10           Now, a sophisticated Registrant would know that health  
11 issues necessarily include the potential health implications of  
12 exposure to the chemical during the most common use, which was  
13 seed treatment.

14           And then as the Claimant's own witness, Edwin Johnson  
15 noted, summing up this two-day meeting with PMRA: At the  
16 outset of the Special Review, in summary, PMRA staff was very  
17 open in the discussion and interested in our presentations on  
18 data and the canola tolerance. We will be able to maintain an  
19 open relationship and dialogue with them as the Special Review  
20 proceeds. And they go on to make a few notes.

21           It's also worth noting with regard to this issue of  
22 notification that occupational exposure might be an issue, as  
23 Cheryl Chaffey has noted, at the time of the May 10th meeting,  
24 Chemtura's representatives had been extensively involved in  
25 discussions with the PMRA's U.K. equivalent, the Pesticide

12:38 1 Safety Directorate. By May 1999, the PSD was about to ban  
2 lindane in the U.K. related to--in the seed treatment use.

3           The decision was announced less than a month later in  
4 June 1999. As you can see here, the U.K.'s document said: The  
5 government has listened to the concerns raised about lindane  
6 and has acted on scientific findings of the Advisory Committee.  
7 We asked the committee to consider all the health and  
8 environmental issues raised by lindane. On the basis of their  
9 advice, we plan to take urgent action to ban the use of lindane  
10 in the seed treatment process.

11           As a sophisticated registrant, Chemtura can hardly  
12 have expected PMRA to ignore this decision, including the basis  
13 of this decision by a significant equivalent regulator. Now,  
14 the Claimant had said this morning, well, at the end of the day  
15 it turned out that the U.K.'s was based on a different  
16 calculation, and therefore it didn't become--at the end of the  
17 day it wasn't relevant. Irrespective of that point, the point  
18 is that this flagged that a major equivalent regulator has  
19 found that lindane was of concern for occupational exposure,  
20 and this was in 1999.

21           If this weren't enough notice that PMRA was conducting  
22 an Occupational Exposure Assessment and indeed that this was an  
23 issue of concern to PMRA, PMRA's executive director, Dr. Claire  
24 Franklin, from whom you'll hear this week, also met with the  
25 Claimant over a year before the release of the Special Review

12:40 1 in October 2000. Mr. Ingulli, one of Claimant's main  
2 witnesses, was present at that meeting. His notes of the  
3 meeting state PMRA concern--concerns of PMRA, worker exposure.

4           Within days of this meeting, the Claimant sent the  
5 PMRA a letter encouraging PMRA to rely on its Occupational  
6 Exposure study. During our meeting of October 4th to  
7 Dr. Franklin, Ms. Sexsmith and yourself, the issue of worker  
8 exposure was discussed. Dr. Franklin indicated that the worker  
9 exposure was an area that PMRA had some concerns about, and at  
10 the bottom of the letter she notes rather--this is Rob Dupree,  
11 who will not be here this week, the Claimant has failed to  
12 call--if the PMRA has not already done so, I would encourage  
13 them to review this study to gain a better understanding of the  
14 exposure profile that workers can expect when treating canola  
15 seed with a seed treatment containing lindane. The claimant's  
16 counsel this morning suggested that PMRA did not consult with  
17 the Claimant about worker exposure issues. Here's the  
18 Claimant--and that if they had, they would have gotten the real  
19 story. Well, here is the Claimant a year before the Special  
20 Review results were released being specifically asked at the  
21 highest level of the organization, the Executive Director, with  
22 the senior executive of Chemtura, please provide us data on  
23 this issue, and this is what Chemtura delivered two days later.

24           Now, a year later in October-November 2001, when it  
25 became clear that the PMRA had relied on this study, Chemtura

12:41 1 suddenly decided that this study was worthless, and why hadn't  
2 you come to us for further data.

3           Now, again, the Claimant has heavily relied on the  
4 Board of Review's comments in support of its allegation that  
5 the Special Review was unfair. This is again a classic case of  
6 partial citation syndrome. Here is what the Board of Review  
7 had to say about Claimant's own participation in the Special  
8 Review: In the Board's opinion, there was a lack on Crompton's  
9 part--Crompton, the predecessor name of Chemtura--to make  
10 efforts to inquire and consult with the regulator. Chemtura  
11 did not engage PMRA in any meaningful way in respect of updates  
12 on the process, interim findings, or potential data gaps.

13           Finally, at the end, Crompton Chemtura made no attempt  
14 to update or replace the study at the time to better reflect  
15 what it considered to be the current use practices, nor did  
16 Crompton propose label changes that reflected modern use  
17 practices for all of the current uses.

18           So, that's what the Board had to say about Chemtura's  
19 participation in the process.

20           Now, the Claimant has also criticized PMRA for  
21 providing too short a comment period at the end of the Special  
22 Review. It has pointed to the Board of Review's own critique  
23 of PMRA in this regard. As John Worgan has noted, the comment  
24 period at the end of the Special Review was adapted to the  
25 purpose of that period, for Registrants to bring to PMRA's

12:43 1 attention any errors or to note any studies that had been left  
2 out. As Mr. Worgan has noted, PMRA's policy and re-evaluations  
3 was to rely on existing data. This was to avoid delay in the  
4 review of pesticides which, in the Claimant's case, were in  
5 current use and which might have current health or  
6 environmental impacts.

7 PMRA policy was plainly stated and was applied across  
8 the Board not just for lindane. For these purposes, the  
9 comment period at the end of the Special Review was entirely  
10 sufficient.

11 Be that as it may, a complaint that the Claimant  
12 should have been given more time to respond at the end of the  
13 Special Review does not, in Canada's view, constitute a  
14 violation of the international minimum standard of treatment,  
15 nor should it constitute a violation even of the Claimant's  
16 incorrect test. But the process story doesn't even stop there  
17 because as Wendy Sexsmith notes, when the Claimant challenged  
18 the outcome of the Board of Review--of the Special Review, it  
19 was offered a full scientific hearing to review its objections.  
20 And the next slide simply shows the Board of Review process.  
21 As it noted, Claimant was able to make three rounds of written  
22 submissions, present fact and Expert Witnesses, and enjoyed  
23 nine full days of hearing. This is yet another fatal stake  
24 driven in the heart of Chemtura's process complaints.

25 Yet even this is not all, as John Worgan has

12:44 1 confirmed, the Claimant was offered a full, further extensive  
2 opportunity to be heard and to submit evidence in the course of  
3 the lindane REN, the de novo review of lindane which took place  
4 between 2006 and 2008, and then to participate in comments on  
5 that draft review from April 2008 to 2009.

6 Obviously, the Claimant was never going to be  
7 satisfied with anything but a positive outcome to the PMRA's  
8 REN, however unreasonable that expectation may have been. As  
9 Dr. Costa points out, the record of these exchanges shows the  
10 Claimant progressively abandoning different aspects of its  
11 objections. In any event, from a process point of view, the  
12 Claimant has no legitimate complaint.

13 It also bearing noting in connection with the due  
14 process complaint that the Claimant launched and subsequently  
15 abandoned, nine applications for a Judicial Review before  
16 Canada's federal courts, all relating to the facts at issue in  
17 this matter. Simply to comment on the one Federal Court  
18 proceeding the Claimant mentioned this morning, that proceeding  
19 was--did ultimately become moot because the very issue that the  
20 Claimant had raised--it's very interesting, if you look at the  
21 letter--if you look at the record, the Claimant in the  
22 beginning of June of 2002 wrote to the Minister asking the  
23 question about the appointment process for the Board of Review  
24 and within less than two weeks, I think it's maybe seven  
25 business days, had launched its application, calling in

12:46 1 question the appointment process, so, before the Ministry even  
2 had a chance to respond, and then a year later, in open Court,  
3 admitted that its process issue with regard to the appointment  
4 of the Board was moot by saying it had no objection to PMRA  
5 assisting in finding appropriate candidates for the Board of  
6 Review process.

7 Sure.

8 ARBITRATOR CRAWFORD: What do you say about the costs  
9 order in relation to the settlement of that Federal Court  
10 proceeding?

11 MR. DOUAIRE de BONDY: My understanding is that was  
12 done to avoid the nuisance value of the continuing litigation,  
13 and it was far cheaper to pay \$5,000 than to proceed with these  
14 or even to contest this. And as we know from sitting here,  
15 that was a far cheaper decision than pursuing litigation.

16 All in all, consideration of the record leads back to  
17 the inevitable conclusion the PMRA's decision to conduct a  
18 special review was motivated by proper scientific conclusions,  
19 it reached considerations, reached the result through a wholly  
20 legitimate scientific process, and it did so in a manner that  
21 did not violate international due process.

22 The Tribunal President had mentioned at the beginning  
23 we might take a pause. I think this would be an appropriate  
24 pause because then I will be able to go on after the pause to  
25 the issues relating to the Voluntary Withdrawal Agreement.



12:47 1                   PRESIDENT KAUFMANN-KOHLER: That's perfect. So, we  
2 take an hour now and start again--well, my watch doesn't have  
3 the same time like this clock, so anyway, one hour, and then we  
4 start again. Thank you.

5                   (Whereupon, at 12:48 p.m., the hearing was adjourned  
6 until 1:55 p.m., the same day.)

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1 AFTERNOON SESSION

2 PRESIDENT KAUFMANN-KOHLER: Are we ready to start  
3 again? I think so.

4 Can I again ask someone to close the doors. Thank  
5 you.

6 Mr. Douaire de Bondy, you can continue.

7 MR. DOUAIRE de BONDY: Thank you, President.

8 I will now turn to the Claimant's allegations  
9 regarding the Voluntary Withdrawal Agreement. Having put to  
10 rest Claimant's Article 1105 complaints in relation to the  
11 scientific review of lindane, here we have four questions, as I  
12 said earlier. The first of these questions is: Did PMRA  
13 violate the international customary standard of treatment by  
14 allegedly forcing the Claimant to enter into the VWA?

15 The evidence in this matter overwhelmingly  
16 demonstrates that the Agreement of voluntary withdrawal was  
17 industry led, pursued for very good reasons, and in all events  
18 remained entirely voluntary.

19 Add of 1998, major end-users of lindane in Canada, the  
20 Canadian canola industry, determined that their reliance on  
21 lindane was an enormous business liability. Since lindane use  
22 was by 1998 coming under sustained negative scrutiny both in  
23 Canada and internationally, the decision was hardly surprising  
24 or unreasonable.

25 Canada has put forward the evidence of two key Canola

13:52 1 Council witnesses, Mr. Tony Zatylny and Ms. JoAnne Buth. Both  
2 of them have attested and will attest to the fact that the VWA  
3 was the Canola Council's deal.

4 In the immediate term, use of lindane was, as you  
5 heard this morning, threatening to cut off U.S. markets to  
6 Canadian canola predicts. Lindane was not registered in the  
7 U.S. for use on canola, and indeed never was. Its presence on  
8 canola imports from Canada to the U.S. was therefore illegal.

9 The greatest irony of this entire matter is that the  
10 Claimant itself brought this issue to the U.S. Government's  
11 attention. In late 1997, one of Chemtura's subsidiaries,  
12 Gustafson, was seeking to promote the sale of lindane, its  
13 lindane alternative Gaucho in the United States. It therefore  
14 wrote to the U.S. EPA requesting that imports of  
15 lindane-treated canola be declared--canola seed be declared  
16 illegal.

17 This September 1997 letter, a tipoff to the U.S. EPA  
18 asking it to take immediate action, prompted the USA--U.S. EPA  
19 to note that it would close the border to canola-treated seed  
20 by June 1998, a very short time line, indeed.

21 The U.S. EPA also came under domestic pressure to  
22 prevent the import of canola grown from lindane-treated seed on  
23 the basis that it contained illegal lindane residues. Given  
24 lindane's properties as a Persistent Organochlorine Pollutant,  
25 the presence of lindane residues in Canadian canola was likely.

13:54 1 The Claimant this morning--Claimant's counsel this morning  
2 mentioned the U.S. couldn't turn a blind eye to this, and it  
3 was an issue relating to U.S. legislation.

4 As the canola growers themselves immediately  
5 recognized, Gustafson's action had put at risk the entire  
6 canola market--export market to the U.S. The President of the  
7 Canadian Canola Council of Canada wrote back to Gustafson in  
8 January 1998 raising concern about this tipoff, and the CCC  
9 began pursuing harmonization initiatives with the U.S. EPA.  
10 The Claimant in its submissions has entirely ignored all the  
11 efforts of the CCC over the course of 1998.

12 The U.S. border problem was just one of the  
13 Canadian--canola industry's lindane concerns. As of 1998,  
14 Canadian canola growers were also under pressure domestically  
15 from environmental groups to phase out their dependence on  
16 lindane or face negative publicity. Canola was sold on the  
17 basis that it was a healthy product. If the product had been  
18 stopped at the border based on the presence of an unregistered  
19 pesticide or if environmental groups denounced the lindane  
20 presence on canola, this could have had devastating impacts.

21 The canola industry itself wanted to promote a  
22 responsible use of pesticides and was uncomfortable with its  
23 relies on a pesticide increasingly thought to pose unacceptable  
24 risks, and they also knew that there were reviews already  
25 ongoing in the U.S. and pending in Canada pursuant to the

13:55 1 Aarhus Protocol commitments.

2 In all of these circumstances as of 1998, Canadian  
3 canola farmers sought to organize an orderly transition away  
4 from their reliance on lindane. And as I say, the Claimant  
5 tries to entirely ignore the CCC's central role.

6 I'd also note that they spoke this morning; Mr. Somers  
7 mentioned this morning that this is entirely a trade issue, but  
8 there were strong health and environmental issues already in  
9 1998.

10 The Canola Council tried to organize this withdrawal  
11 as of late summer 1998 by calling on lindane Registrants to  
12 voluntarily amend their lindane Product Labels, removing canola  
13 use from the lindane seed treatment products.

14 Canola growers also asked PMRA at this time as the  
15 national pesticides regulator to process registered request for  
16 partial label changes to allow a phase-out period for lindane  
17 use on canola over three years, and by considering replacement  
18 products during this phase-out period.

19 Canola growers further asked PMRA to pursue  
20 harmonization initiatives with U.S. EPA, and to convince U.S.  
21 EPA that in light of this three-year phase-out,  
22 canola-containing lindane residues would not be immediately  
23 stopped at the U.S. border. In absence of this orderly  
24 transition, Canadian Canola Associations were seriously  
25 contemplating an immediate stop to their use of lindane as of

13:57 1 1998.

2           This state of affairs was summarized in an internal  
3 Chemtura E-mail. This is the Claimant's document of  
4 September 22nd, 1998. "I met with a Tony Zatylny of the Canola  
5 Council of Canada, who has been working on tolerance  
6 harmonization between the U.S. and Canada. He has a very  
7 negative opinion regarding the future of lindane and has gone  
8 as far as suggesting a withdrawal to PMRA and EPA."

9           What is clear again and again from the documentary  
10 record is that the Canola Council of Canadian was prompting  
11 this voluntary industry phase-out. After initial discussions  
12 led to an apparent understanding between canola industry  
13 stakeholders, the President of the Canadian Canola Growers  
14 Association wrote to the PMRA as follows. This is a letter of  
15 October 19, 1998: "On behalf of the Canadian Canola Growers  
16 Association, I would like to indicate that CCGA members have  
17 been in discussions with lindane Registrants for a voluntary  
18 removal of lindane from canola seed treatments." Commenting on  
19 the Claimant's comments of this morning, we recognize the  
20 environmental and health issues that surround lindane as well  
21 as the potential for negative perception about the healthiness  
22 of canola because of lindane. To avoid any market impact  
23 growers have decided that they no longer wish to use this  
24 product. This is the product that the Claimant claims in its  
25 damages calculation canola growers would have continued using

13:58 1 until 2022, and this is the view that's being expressed in  
2 1998.

3           The Claimant itself acknowledged again and again in  
4 contemporaneous internal documents that it was the canola  
5 industry that was seeking the withdrawal agreement. This is a  
6 document that was generated at the end of October of 1998 by  
7 the Claimant's Canadian business unit Gustafson. Gustafson and  
8 other Registrants of canola seed products have recently been  
9 contacted by the Canola Council of Canada and by the CCGA  
10 regarding expressed concern over the threat of potential trade  
11 restrictions and negative controversy relating to seed  
12 protectants use in the production of canola. As a response to  
13 this threat, both the CCC and CCGA have requested that all  
14 Registrants of canola seed protectants participate in a plan to  
15 voluntarily remove lindane as an insecticide for control of  
16 flea beetle.

17           Moreover, Claimant's allegation that PMRA forced it or  
18 anyone else into this voluntary industry-sponsored phase-out is  
19 flatly contradicted by the Claimant's own contemporary  
20 documents. Here we have an E-mail of 1998. Again, this is  
21 Bill Hallatt, who the Claimant has not called in this  
22 arbitration, talking about his discussion with the Canola  
23 Council in October of 1998.

24           Tony Zatylny, at the Canola Council of Canada has  
25 expressed concerns regarding the potential trade issues with

14:00 1 the U.S. for canola that has been grown from seed treated with  
2 lindane. He has met with the EPA and the U.S. Canola Producers  
3 Association and with PMRA in Canada to negotiate what he views  
4 as a solution. He has come to us and asked that all  
5 Registrants, including ourselves, agree to voluntarily remove,  
6 withdraw lindane-based products registered on canola from the  
7 market.

8           And this led to--yes, as you see at the end of this,  
9 the Claimant, again in its own document in October of 1998, is  
10 saying PMRA will not act without our agreement. Voluntary  
11 withdrawal must be by unanimous agreement of all Registrants.  
12 All Registrants with the exception of ourselves have apparently  
13 agreed.

14           And again at the end of this document, note that this  
15 is not a regulatory action by PMRA, but rather the expressed  
16 wish of a grower group. This is how we lost Alar and Omite in  
17 Canada, primarily due to actions in the U.S. and the  
18 reaction/fears of grower groups who export to the U.S., of new  
19 trade barriers being raised, and the wholesomeness of their  
20 commodity being questioned both at home and abroad.

21           And as you see above there, it says if industry is  
22 adamant in requesting voluntary withdrawal, there may be no  
23 alternative. This is their customers asking them to do  
24 something to protect the entire industry.

25           If we move on to the next document, we'll see the



14:01 1 terms of the Agreement that was established in November, on  
2 November 24th, 1998, between the Registrant, the four  
3 Registrants including Chemtura, and the members of the Canola  
4 Council of Canada. There are three elements to this agreement.

5 One, the Registrants will voluntarily remove canola,  
6 again voluntarily, from labels of registered canola seed  
7 treatments containing lindane by December 31, 1999. All  
8 commercial stocks of products containing lindane for use on  
9 canola and lindane-treated canola seed cannot be used after  
10 July 1, 2001, so they are contemplating a three-year phase-out.

11 And then the third point, the PMRA and U.S. EPA will  
12 continue to work with Registrants to facilitate access to  
13 lindane replacement products. And that reflects the  
14 facilitating and supportive role that PMRA and--that PMRA was  
15 proposing to take if, indeed, this agreement was voluntary.

16 If there was any doubt whether Chemtura agreed to this  
17 plan, on November 26, 1998, Bill Hallatt of Claimant's Canadian  
18 business unit Gustafson wrote back to the CCC providing  
19 comments on a draft press release announcing the VWA.  
20 Mr. Hallatt's version of that press release, so this is the  
21 first title, Mr. Hallatt's version of that Press Release, we  
22 move to the next document, states, "Manufacturers of  
23 lindane-based canola seed treatments have agreed to a request  
24 by Canadian Canola Growers Association for a voluntary removal  
25 of the insecticide lindane from its use in seed treatments for

14:03 1 canola."

2 PRESIDENT KAUFMANN-KOHLER: Can I just ask you what  
3 exhibit number this is.

4 MR. DOUAIRE de BONDY: Yes. This is Exhibit R-363.

5 PRESIDENT KAUFMANN-KOHLER: R-363. Thank you.

6 MR. DOUAIRE de BONDY: And just to show again the  
7 approach the Claimant was taking in relation to this Voluntary  
8 Agreement, if we move to the next document, this is a  
9 memorandum from the Claimant of the 21st of December, 1998.

10 And if we look to the second paragraph of this  
11 document, it first says: "Gentlemen, please find attached a  
12 copy of a letter provided to PMRA regarding voluntary  
13 withdrawal of lindane. This letter is not to be shared with  
14 industry. We have requested several regulatory concessions and  
15 do not wish to share this with our competitors. The position  
16 we are taking publicly is, we have agreed to the voluntary  
17 withdrawal of lindane by January 31, 1999, at the request of  
18 the canola growers."

19 And I think what you will see when you look at the  
20 record is that there was an agreement in place, and the  
21 Claimant took this as an opportunity to seek to extract  
22 concessions from the PMRA improper regulatory concessions,  
23 including a concession that the PMRA commit to registering  
24 products that the PMRA had not even yet received, let alone  
25 reviewed.

14:04 1           As the Claimant's Rob Dupree noted in an internal  
2 E-mail of February 8, 1999, "The conversation I had with Wendy  
3 Sexsmith, PMRA, last Friday indicated that all Registrants of  
4 canola seed treatments containing lindane were on board for a  
5 voluntary withdrawal of these products. I expect these dates  
6 to be confirmed in the letter PMRA plans to issue to all  
7 Registrants. PMRA is not taking any action to cancel these  
8 registrations. This is a Voluntary Agreement by all  
9 Registrants."

10           The Claimant did continue to assert conditions that it  
11 was trying to impose in relation to this agreement through to  
12 the end of October 1999, and what you will see when you look at  
13 that last letter was that those conditions were actually  
14 consistent with the terms of the Voluntary Withdrawal  
15 Agreement, and otherwise were referred to things to which the  
16 PMRA already committed to do or referenced the potential that  
17 lindane might pass review, positive review, in both Canada and  
18 the United States, and get a tolerance in the United States,  
19 and those things never happened.

20           There are a few more documents following on this,  
21 which again show the Claimant consistently mentioning the  
22 voluntary nature of this agreement. Here, an E-mail of the  
23 sixth--the 28th of June, 1999, "Follow-up meeting planned for  
24 October 5th to assess if all Registrants are still on board for  
25 voluntary withdrawal. If any Registrant backs out, all

14:06 1 Registrants will back out." This is what the Claimant actually  
2 understood at the time about the nature of this agreement, and  
3 the Claimant this morning, Claimant's counsel mentioned, well,  
4 this was an agreement in principle. Of course, over the course  
5 of 1999, replacement products were being considered. This was  
6 the first year of the phase-out, and the actual date for the  
7 change of the labels removing canola was to be announced as of  
8 the beginning of or, rather, the label requests were to be  
9 filed November 1st, 1999, so up to that date, and especially in  
10 October of 1999, the Claimant sought to change terms and  
11 extract concessions. But that doesn't change the fact that  
12 there was an agreement in principle as of November 1998.

13           We will just go on to one further document of this  
14 nature. Here is Rob Dupree of the Claimant referring to an  
15 agreement of stakeholders in June of 1999. In general,  
16 everyone is still on Board. Additional meeting planned for  
17 October 5th to reassess if stakeholders are still committed.  
18 This is an all-or-nothing agreement. If one company bails out  
19 and decides to continue selling the product, the deal is off,  
20 and all stakeholders will pull out of the Agreement."

21           In the end, the Claimant sent in its request for  
22 voluntary label changes along with the other Registrants as of  
23 November 1st, 1999. It did so not because PMRA forced it to do  
24 this, but because it recognized that the step was in its own  
25 best interests and, indeed, in the best interests of the entire

14:07 1 industry.

2           As a result of the VWA, rather than facing an  
3 immediate cessation of the use of their product, Chemtura  
4 gained an additional full three years of lindane product sales.  
5 Moreover, during these three years the PMRA registered two  
6 versions of the Claimant's replacement product Gaucho a full  
7 year before that of any of its competitors. Nothing in this  
8 narrative demonstrates a violation either of the customary  
9 minimum standard of treatment nor, indeed, of the incorrect  
10 test the Claimant substitutes for the customary minimum  
11 standard.

12           I will next move to the second question under this  
13 issue of the Voluntary Withdrawal Agreement. Was the PMRA's  
14 agreement to facilitate this voluntary industry agreement a  
15 repudiation of its statutory mandate, exposing the Claimant to  
16 fundamental unfairness? Here, again, the Claimant has failed  
17 to make out any case.

18           The steps PMRA was asked to undertake to facilitate  
19 this plans were all consistent with its mandate. What was it  
20 asked to do? One, it was asked to process voluntary changes to  
21 lindane Product Labels removing canola. This was consistent  
22 with its regulatory role. It was asked to allow a phase-out  
23 period for lindane use over three years. This is also  
24 consistent with the proper exercise of Common Law ministerial  
25 discretion, enforcement discretion.

14:09 1           It was, third, asked to consider replacement products  
2 during the phase-out period. The consideration of pesticides  
3 for registration is part of PMRA's core mandate.

4           As for PMRA's contacts with the U.S. EPA, there was  
5 again nothing improper here. To the contrary, the PMRA in  
6 contacting EPA was acting responsibly to help manage a crisis  
7 in Canadian agriculture, whose outcome always depended in the  
8 end on the Voluntary Agreement of the growers and of the  
9 Registrants. The PMRA and EPA's contact principally addressed  
10 not the specific issue of lindane, which was being managed  
11 through this industry-led voluntary withdrawal, but rather the  
12 systemic need to harmonize pesticide Regulations more generally  
13 for seed treatment. Rather than just focusing on this  
14 immediate issue, they focused on the systemic issue that  
15 lindane was pointing to. That is what governments do.

16           If you go back to that October 2nd, 1998, memo, where  
17 the Claimant has pulled out one extract, you will see that much  
18 of that memo actually focuses on these harmonization  
19 initiatives. The other thing the Claimant didn't draw your  
20 attention to this morning on that October 2nd, 1998 memo, which  
21 was never issued in a final version, was with regard to the  
22 withdrawal of lindane, in a previous paragraph PMRA says it  
23 cannot commit to that withdrawal or if that withdrawal is to  
24 take place, it is to take place within the context of the  
25 Commission on Environmental Cooperation process for considering

14:10 1 multilateral movements or actions with regard to pesticides.  
2 I'm sorry, I don't have it in front of me right now, but in any  
3 event that leads to a process of the nomination of lindane for  
4 a North American Regional Action Plan, and that North American  
5 Regional Action Plan was adopted in November of 2006. In other  
6 words, what that document is pointing to is a process which  
7 took place between 1998 and 2006 to eventually see if lindane  
8 could be proposed for this kind of a plan. This was a public  
9 process with input from multiple stakeholders, not some kind of  
10 pact between the EPA and the PMRA to get rid of lindane.

11 Far from being a violation of PMRA's mandate, what  
12 PMRA was being asked to do under the VWA was perfectly  
13 consistent with that mandate. It concerned some of its core  
14 responsibilities and showed no intrinsic unfairness to the  
15 Claimant. This can hardly be considered a violation of the  
16 customary minimum standard of treatment, which would require  
17 for a violation an outright repudiation of a State Agency's  
18 mandate and legislation resulting in gross unfairness to the  
19 Claimant.

20 It is also not a violation under the Claimant's much  
21 lower threshold of acting outside of statutory authority,  
22 which, in any event, does not reflect the customary standard.

23 My next point is--and this is the third of four  
24 questions under the VWA, if the Agreement was voluntary, and if  
25 it was proper for the PMRA to support it, was the Claimant

14:12 1 singled out under these measures for some specially unfair  
2 treatment? Here again, the Claimant has made out no case. As  
3 a result of the voluntary withdrawal of lindane, the industry,  
4 including the Claimant, enjoyed a three and, indeed, four-year  
5 extension of lindane use on canola, rather than the immediate  
6 cessation of use threatened by canola in--which would have  
7 arisen out of the canola industry response to potential U.S.  
8 application of its pesticides legislation.

9           Furthermore, a year into the phase-out period,  
10 transition period, in 1999, PMRA registered the two submitted  
11 versions of the Claimant's lindane replacement product Gaucho.  
12 That was the same product Chemtura subsidiary Gustafson, Inc.,  
13 was seeking to promote in the United States. And what you see  
14 on the screen are the two announcements that the product  
15 submitted is eligible for registration, July 27, 1999. So, as  
16 I have noted, the PMRA registered Chemtura's Gaucho a full year  
17 before it registered any other competitor's product.

18           The Claimant has in relation to this allegation  
19 suggested that PMRA acted unfairly not by treating it unlike  
20 other Registrants, but precisely because it was treated the  
21 same. The Claimant has suggested that PMRA should have acted  
22 in a manner that preserved its market share. In essence, the  
23 Claimant is saying it is more equal than other Registrants.  
24 This was reflected in its attempts to extract particular  
25 concessions from PMRA after the Agreement was reached and



14:13 1 behind the backs of its competitors.

2           The PMRA has no duty as a public regulator to preserve  
3 any particular Registrant's market share and to be dictated in  
4 its actions by that consideration. Rather, it is up to the  
5 Registrants themselves to develop and seek registration for and  
6 market products. Failing to regulate to preserve market share  
7 does not constitute a violation of the international minimum  
8 standard of treatment.

9           I will note that the Claimant's replacement product  
10 that it says all-in-one replacement product, Gaucho CS FL was  
11 actually not submitted to the PMRA until a year later, in March  
12 of 2000. And even that application was incomplete. It was not  
13 completed actually until April of 2001, if memory serves. In  
14 any event, in 2001. And this is the product which the Claimant  
15 says should have been registered before Syngenta's Helix  
16 product, which was submitted to the PMRA in November of 1998.

17           Chemtura was not exposed to any particular unfairness  
18 as between itself and other Registrants. Canada would note  
19 that any Claim regarding alleged failure to grant national  
20 treatment or MFN treatment with regard to replacement product  
21 registrations has not even been pleaded by the Claimant, and  
22 would have been--would have arisen under 1102 or 1103.

23           But in any event, as Suzanne Chalifour will attest,  
24 the Claimant's replacement products were not treated with any  
25 particular disfavor in the registration review. Indeed, the

14:15 1 very fact that Chemtura's product was registered a year before  
2 that of any of its competitors should be answer enough. The  
3 Claimant says, well, those products we submitted were not  
4 all-in-one. They only had the insecticide, and that wasn't  
5 enough. It was the Claimant that failed to develop an  
6 all-in-one version of its products in time to have it submitted  
7 in 1998, as had been discussed in the November 1998 meeting.  
8 And I will come back to this point because with regard to the  
9 voluntary withdrawal, the PMRA made no commitment that any  
10 product would be registered at all. It needed to review these  
11 products to determine if they were safe.

12 In short, Chemtura was not treated by PMRA unfairly in  
13 connection with the VWA. Its conduct would breach neither the  
14 customary minimum standard nor the incorrect test the Claimant  
15 has wrongly substituted for MST.

16 I will now move to the last point under the Voluntary  
17 Withdrawal Agreement. Did the Claimant have any legally  
18 enforceable expectations in relation to this Voluntary  
19 Agreement? If so, did PMRA act in violation of these  
20 expectations? The answer is in both cases, no. From the  
21 perspective of Article 1105, all of the Claimant's allegations  
22 concerning the violation of its alleged legitimate expectations  
23 are strictly speaking irrelevant. To the extent the doctrine  
24 of legitimate expectations has been recognized at all, and it  
25 is not part of the customary minimum standard, it has been in

14:17 1 connection with objective representations made by a country at  
2 a time an investment was being contemplated, representations  
3 which induced the prospective Investor to invest, and which the  
4 country in question violated.

5 By contrast, the Claimant here is seeking to rely on  
6 its subjective impression of alleged conditions made over 30  
7 years after its initial investment in Canada. This reflects no  
8 known standard. Indeed, this entire episode of so-called  
9 "conditions" reflects very badly on the Claimant. What is  
10 amply clear from the record is that after agreeing among  
11 stakeholders that it would support the VWA, the Claimant  
12 repeatedly attempted to go behind the backs of industry to seek  
13 to extract preferential terms of the PMRA. And this was in  
14 relation to a situation that was not even of the PMRA's making.  
15 PMRA does not draft U.S. pesticides legislation. It does not  
16 apply U.S. pesticides law. This was a situation the canola  
17 industry was facing and was trying to find some way to manage  
18 with the support of the Registrants, or so it hoped.

19 And the Chemtura took this opportunity to seek to  
20 extract concessions from the PMRA, failing which it repeatedly  
21 threatened to scupper this entire deal.

22 The PMRA's consistent response was that it could not  
23 grant the Claimant any special concessions. From the PMRA's  
24 point of view, the most objectionable of those demands was that  
25 the PMRA guarantee in advance of any review that Chemtura's

14:18 1 lindane replacement products would receive registration by a  
2 specific date, or at all.

3           What does the Claimant describe as the conditions it  
4 imposed relating to the Voluntary Withdrawal Agreement? It  
5 argues, one, that the date for last use of its lindane seed  
6 treatment products was not July 1st, 2001, but that its  
7 products be used thereafter with no time limit.

8           Two, it argues that PMRA guarantee an expedited review  
9 of its lindane replacement products.

10           Three, it argues that PMRA undertook to complete its  
11 scientific review of lindane in collaboration with EPA and to  
12 complete its review by the end of 2000.

13           Four, it argues that PMRA undertook to maintain its  
14 other lindane-based products.

15           Five, it argues that PMRA undertook to reinstate its  
16 registration for lindane use on canola if U.S. EPA granted  
17 lindane a registration or a tolerance for canola.

18           I will add that Claimant seems to change its position  
19 on this again this morning because the other proviso to this  
20 was if both PMRA and EPA found lindane to be safe. And that's  
21 the last condition.

22           A quick review of the record confirms that Claimant's  
23 alleged conditions are either misstated or never materialized.  
24 Canada has extensively briefed this issue because the  
25 Claimant's entire Claim was built around the mistaken legal

14:20 1 notion that it had legally enforceable legitimate expectations  
2 arising out of these alleged conditions, so I will hit only a  
3 few highlights here.

4           Regarding the July 1st deadline, July 1st, 2001, was  
5 expressly stated as part of the VWA from the very beginning and  
6 repeated again and again thereafter. There is no doubt the  
7 Claimant understood the July 1st, 2001, deadline was to apply  
8 both to the sale and to the use of lindane seed treatment  
9 products. This is confirmed again and again in internal  
10 communications to the Claimant.

11           But without even going to those communications, we  
12 will look at one, the Claimant's own letter of October 28th,  
13 1999--I'm sorry, October 27th, 1999, upon which it has so much  
14 relied, plainly states that the last date for use of the  
15 products is July 1st, 2001. All stocks of Uniroyal's products  
16 containing lindane for use on canola-rape seed are allowed to be  
17 used up to and including July 1st, 2001.

18           Now, this was a canola lindane seed treatment. If it  
19 was going to be used, it was going to be used as a canola  
20 lindane seed treatment. It wasn't going to be used as a mixer  
21 in cocktails parties in Connecticut. It was a canola seed  
22 treatment, lindane seed treatment, allowed to be used up to and  
23 including July 1st, 2001.

24           In an E-mail of June 28th, 1999, the Claimant's Rob  
25 Dupree reporting on a recent meeting of VWA stakeholders

14:21 1 confirmed that stocks of carryover product and seed have 'til  
2 July 1, 2001 to be used up. If small quantities are still  
3 entering marketplace after that, PMRA is unlikely to take  
4 action.

5           The Claimant's related allegation that PMRA issued  
6 threats against growers in 2001 relating to lindane use,  
7 thereby affecting its lindane sales in the final year of the  
8 phase-out is also not made out. The Claimant's allegations  
9 that PMRA threatened end-users effectively scaring them away  
10 have no more credibility. As Rob Dupree noted in this same  
11 E-mail based on his meeting with PMRA, a question was raised  
12 about enforcement of production cutoff after December 31, 1999,  
13 PMRA has no mechanism to enforce and is relying on honesty of  
14 Registrants, and I would commend you to the Affidavit of Jim  
15 Reid, who reviews the very limited steps that PMRA took at the  
16 end of the July 2001 phase-out period simply to determine how  
17 much of the product was left in the market. The Claimant spoke  
18 at length this morning about the extension of the use of the  
19 treated seed into the 2002 season. At the end of the day, PMRA  
20 did allow that to take place because it realized it was the  
21 best way to get rid of the end, the last of the treated seed  
22 rather than dumping it all in one place and creating an  
23 environmental hazard.

24           ARBITRATOR CRAWFORD: It says PMRA has no mechanism to  
25 enforce. Elsewhere they're talking about substantial fines.

14:23 1 I'm not sure I understand.

2 MR. DOUAIRE de BONDY: What happened was there was a  
3 meeting of November of 2000, at which I believe it was one of  
4 the seed treatment representatives asked what was the  
5 legislation, what did the legislation provide, and the PMRA  
6 representative, Jim Reid, said this is what the legislation  
7 provides. But there are also other documents to which we have  
8 referred in our submission--in the first place, in that regard,  
9 if a national regulator and if a Compliance Officer of a  
10 national regulator is asked what does the law provide, the  
11 national regulator will say, well, this is what the law  
12 provides. It's not going to say, well, don't worry about that.  
13 We are not going to apply it. However, there are many  
14 references in the record to PMRA confirming that, or members of  
15 the seed treatment and the growers and the Registrants'  
16 understanding that it was only in the case if a grower was  
17 stockpiling treated seed, was flagrantly trying to violate the  
18 last date for use, that any action might potentially be taken,  
19 but it was also well understood in the industry that PMRA has  
20 very limited compliance, takes very limited compliance steps at  
21 the level of fines. At most five people might be prosecuted in  
22 a year. Again, I would refer you to the Affidavit of Jim Reid,  
23 who reviews this in detail.

24 And so, there is no credibility to the notion that  
25 either growers or seed treaters were walking around in a fear

14:25 1 of 200,000-dollar fines. And, in fact, Ms. Buth will speak to  
2 this issue when she testifies later this week.

3           The other condition regarding the registration of a  
4 replacement product has been--I have already spoken to this.  
5 The PMRA repeatedly confirmed that registration of replacement  
6 products could not be guaranteed and that there was no  
7 unlimited fast track for this process. At the November 24th,  
8 1998, meeting, at which there was an agreement regarding the  
9 VWA, Wendy Sexsmith of PMRA made no specific commitment as to  
10 the timing or the number of reviews. This was reflected in the  
11 fact that the November 26, '98, confirmation of that meeting  
12 spoke of replacement products only in general terms.

13           If we could move to the next document, please.

14           The Pest Management Regulatory Agency and the U.S.  
15 Environmental Protection Agency will continue to work with  
16 Registrants to facilitate access to lindane replacement  
17 products. There is no commitment there as to time or as to the  
18 number of products that will be reviewed.

19           If we go to the next document, the PMRA knew that  
20 reviewing new replacement actives was a substantial undertaking  
21 and would have to be managed in light of all other competing  
22 demands on its limited resources. It therefore made only the  
23 following general commitment in a letter of 23rd February,  
24 1999. The Agency currently has registration submissions on  
25 hand for three active ingredients that may emerge as viable



14:27 1 alternatives for lindane on canola seed dressing applications.

2           As stated in the lower end of the letter, this will  
3 entail priority review of each of the three current candidates  
4 and continue to advance only those that have a complete and  
5 reviewable submission, with a view to having at least one  
6 lindane alternative available for the 2000 crop year. The  
7 agency will not entertain additional candidates within these  
8 time frames. To do so would jeopardize the chances of having  
9 any candidate emerge successfully and on time to be of value  
10 for the year 2000.

11           Now, at this point, which products did the PMRA have  
12 in light of these or with reference to these three products?  
13 The three current candidates. Chemtura had submitted the two  
14 versions of its Gaucho product. Syngenta had submitted Helix,  
15 and Zeneca was proposing to submit a third product, which, at  
16 the end of the day, was never successful, did not receive  
17 registration because I think they didn't--weren't able to pull  
18 together all the data.

19           And so, those two replacement products which were  
20 actually submitted to the PMRA in November 1998 were registered  
21 both on--the announcement was made July 27, 1999, as I said  
22 earlier. The PMRA repeated to Chemtura specifically in a  
23 letter of March 25th, 1999, "The Agency cannot establish the  
24 outcome of an assessment in advance of the review process, and  
25 therefore cannot predict whether Uniroyal and Gustafson will

14:28 1 have a registered product replacement."

2           The PMRA at no time made any open-ended commitment to  
3 review every and all replacement product whenever they might be  
4 submitted.

5           ARBITRATOR CRAWFORD: May I ask, approximately how  
6 many pesticide applications did the PMRA get in a year?

7           MR. DOUAIRE de BONDY: Well, that is a good question.  
8 I don't know as I sit here, but I'm assuming it's in the  
9 hundreds, if not thousands.

10           This is part of the problem, is that the Claimant  
11 thinks it can continuously jump the queue. Even to review  
12 these two replacement products in 1999, the PMRA was certainly  
13 giving them priority over other products that were already in  
14 the queue. The Claimant then comes along in March 2000 and  
15 says, well, we want to jump the queue again, and the PMRA at  
16 that point says, well, we're sorry. I mean, it has a  
17 responsibility not only to the Registrants of lindane  
18 replacement products, but to the potential Registrants of a  
19 huge variety of products, as your question suggests. And the  
20 question is how to balance all of those demands on the PMRA's  
21 limited resources.

22           If we could go on to the next document, the Claimant  
23 was suggesting earlier today that the registration of these two  
24 replacement products did not actually count for purposes of the  
25 Voluntary Withdrawal Agreement. This is an E-mail from

14:30 1 Mr. Ingulli of the 13th of July 1999, who is saying to Rob  
2 Dupree again, who hasn't been called, my interpretation of the  
3 mail which follows is that Gaucho will be registered for canola  
4 before the 30th of December '99, causing us to proceed with a  
5 voluntary cancellation of canola uses. Is this correct?

6 Rob Dupree. This is correct. I was contacted by PMRA  
7 yesterday, and they informed me the review of the two Gaucho  
8 formulations is nearing completion. The two products will be  
9 granted a full registration for one year which will have to be  
10 reviewed. A full registration will be approved once the  
11 residue data from Canada has been reviewed.

12 And he says, Gustafson will be in a position to sell  
13 product once the certificate of Registration has been granted.  
14 The process should take six to eight weeks to complete. In  
15 fact, the announcement was made on the 27th of July 1999. The  
16 first of these two products was registered on the 26th of  
17 October, a temporary registration on the 26th of October 1999,  
18 and the second in November of 1999. So the Claimant itself  
19 here is admitting that the registration of these two products  
20 will satisfy this condition.

21 I would also note that the letter of October 27, 1999,  
22 upon which the Claimant so much relies makes no reference at  
23 all to the registration of replacement products. It says that  
24 letter is the contract between itself and PMRA, and that letter  
25 makes no mention of the registration of replacement products.

14:31 1           The Claimant's related allegations regarding--relating  
2 to alleged preferential treatment of Helix have no more merit,  
3 and I have referred to these--to the reasons why before. The  
4 PMRA registered. Chemtura submitted Gaucho products a full  
5 year before Helix. In order to obtain registration, Helix was  
6 required to submit an entirely new and expensive study. And  
7 the review of Helix ultimately took two years, which is hardly  
8 fast-tracking a registration.

9           As Canada has showed, the length of time taken to  
10 register the Claimant's all-in-one version of Gaucho--this is  
11 the one that they partially submitted in March of 2000, in  
12 large substantial part resulted from the Claimant's own delays.

13           What the Claimant's internal documents have also  
14 revealed is that Chemtura's product was, by its own admission,  
15 outperformed in the marketplace, not due to any failing on the  
16 part of the PMRA, but due to the Claimant's own failure to  
17 compete. I realize I have about 10 minutes left.

18           I will just deal with these few other conditions, what  
19 the Claimant reviews as conditions very quickly.

20           Third, regarding the scientific review of lindane, as  
21 we said earlier, this was not a mere condition of the Voluntary  
22 Withdrawal Agreement or this letter of October 27th, 1999, but  
23 something which was already in the--already in the works, or  
24 had already been committed to by Canada and had begun in June  
25 of 1998, so it was hardly a condition of that agreement alone.

14:33 1           The other thing that struck me this morning about the  
2 Claimant's counsel's comments was the expectation that the  
3 outcome of that review would be positive. In the situation  
4 where many equivalent regulators had already taken the decision  
5 against this product, that was hardly a reasonable expectation.  
6 In fact, there are documents in the record that show that the  
7 Chemtura knew that this could very likely fail upon review,  
8 which it did for legitimate safety reasons.

9           With regard to the other named products, the Claimant  
10 is suggesting that PMRA committed to maintain those products  
11 irrespective of the outcome of the Special Review, which is an  
12 absolutely unreasonable understanding of what the PMRA was  
13 stating. The PMRA had stated in its 15th March 1999  
14 letter--rather announcement of the Special Review--that all  
15 registered products will be subject to the outcome of the  
16 Special Review. The Claimant is suggesting PMRA was committing  
17 to maintain the registration, irrespective of whether it found  
18 in its scientific review that the product was unsafe.

19           And regarding the potential reinstatement of the  
20 Claimant's lindane products on canola, the simple response to  
21 this alleged condition is that it never materialized. Canada's  
22 Special Review reached a negative finding about lindane use on  
23 canola, and the U.S. EPA never granted either a registration or  
24 tolerance for lindane use on canola. As I mentioned earlier,  
25 the Claimant misstated the nature of that condition. What the

14:34 1 PMRA at best agreed to was if pending the outcome of its own  
2 Special Review, the Claimant happened to get a tolerance from  
3 the United States, it would allow the registration on canola to  
4 be used to be reinstated through an administrative process, but  
5 that was also always subject to the ultimate outcome of the  
6 Special Review, and so it was at best a very tiny window which  
7 never materialized.

8           The PMRA never committed to maintaining the Claimant's  
9 canola product, lindane product registrations, irrespective of  
10 the outcome of the Special Review.

11           I would also add that Claimant's attempt to portray a  
12 deep gulf between the U.S. EPA and the PMRA on lindane is  
13 itself exaggerated. And I have mentioned this morning that we  
14 put forward the evidence of Dr. Lynn Goldman, who is the U.S.  
15 EPA's Assistant Administrator for Toxic Substances from '93 to  
16 '98. Dr. Goldman has looked at the U.S. EPA's review of  
17 lindane after her departure from the organization. She has  
18 concluded that U.S. EPA's interim decision, 2002 decision, was  
19 not the green light the Claimant suggests. Instead, it removed  
20 formulations, imposed new protective requirements, required  
21 further data, and made specific negative findings about  
22 occupational exposure on canola.

23           She's also detailed how the Claimant tried and failed  
24 to obtain a lindane registration or tolerance for canola on the  
25 U.S., and as you will see from the record, as of 2006, the U.S.

14:36 1 EPA had determined that the registration of no products could  
2 be maintained, and prompted the Claimant to withdraw its  
3 registrations, failing which it would cancel those  
4 registrations, and that took place in the summer of 2006.

5 To sum up on this point, the Claimant's entire case of  
6 legitimate expectations is in the first place based on an error  
7 of law. The doctrine is not recognized under customary minimum  
8 standard of treatment. And even to the extent it's been  
9 recognized under different standards, it is with regard to  
10 objective undertakings that induced an investor to invest  
11 rather than in relation to statements made 30 years after the  
12 investment was made.

13 Moreover, from a factual point of view, the Claimant  
14 has either misstated the alleged conditions or the PMRA  
15 substantially lived up to any undertakings it made in  
16 connection with the VWA. Canada's conduct under this question  
17 cannot conceivably violate either customary MST or the  
18 incorrect standard this Claimant would have this Tribunal  
19 apply.

20 I will come to the end of my Opening Statement with  
21 just a few brief words on the 1103 standard, and after that  
22 1110. With Article 1103, which the Claimant didn't even  
23 mention this morning, our simple submission on this is that the  
24 Claimant has used Article 1103 improperly as an attempt or as a  
25 means to try to get around the Note of Interpretation, and the

14:38 1 minimum customary standard imposed under or that is upheld  
2 under Article 1105, and we will come back to this in our legal  
3 submissions.

4           With regard to 1110, here we see there are three  
5 questions. The first question is whether the Claimant has been  
6 deprived of its investment. If the Tribunal agrees with Canada  
7 that the answer to this question is no, Chemtura's case fails  
8 on this basis alone. Chemtura's Article 1110 Claim also fails  
9 for two other reasons:

10           First, the voluntary character of the Voluntary  
11 Withdrawal Agreement prevents the Tribunal from making a  
12 finding of expropriation, since the coercion necessary to a  
13 breach of Article 1110 is lacking.

14           Second, the PMRA's decision to otherwise phase out  
15 remaining registered uses of lindane, based upon its scientific  
16 review, is a valid exercise of Canada's police powers.

17           And I will just come to a final word about damages.  
18 Here, I would simply note that the Claimant's damages Claim are  
19 premised on a kind of fantasy in which lindane remains  
20 registered around the world and in all international--and all  
21 international and North American efforts to restrict and  
22 eliminate lindane use are ignored. The Claimant would have  
23 this Tribunal assume away not only Canada's alleged measure,  
24 but every step taken against lindane over the past decade.

25           Our three points here with regard to their damages



14:39 1 assessment are that the damages expert has improperly accepted  
2 a series of counterfactual and speculative assumptions. The  
3 damages analysis assumes away not just Canada's measures, but  
4 all unfavorable developments affecting the market for lindane.  
5 Real facts that introduce overwhelming market uncertainty, such  
6 as the international ban on lindane and the rejection of the  
7 product by growers.

8           Third, the damages analysis also entirely lacks  
9 proximate cause to Canada's alleged measures in that it is  
10 entirely dependent on the actions of another national  
11 regulator, the EPA. The Claimant started this morning with  
12 comments on the EPA and U.S. pesticides legislation. Canada is  
13 hardly responsible for the application of that legislation or  
14 the fact that without a tolerance or registration,  
15 lindane-treated products could not enter into the United  
16 States.

17           And as you will hear from JoAnne Buth this week of the  
18 Canola Council of Canada, Canadian canola farmers, having lived  
19 through the situation in 1998, were not interested in using  
20 lindane if it did not have a registration or a tolerance on  
21 both sides of the border, and Claimant's damages analysis  
22 accepts that assumption.

23           I have now concluded Canada's opening remarks.  
24 Subject to any questions at this point from the Tribunal, I now  
25 cede the floor to Claimant's witnesses of fact.

14:41 1 Thank you.

2 PRESIDENT KAUFMANN-KOHLER: Thank you.

3 Any questions at this stage?

4 Yes, please.

5 ARBITRATOR BROWER: I want to take you back to the  
6 Aarhus Protocol, just so I can understand Canada's position.

7 Your slides are not numbered, so at least not  
8 everything has been put before us, but what I'm referring to is  
9 Exhibit WS-9, Annex 2, substances scheduled for restriction on  
10 use. That was among your papers towards the beginning.

11 MR. DOUAIRE de BONDY: WS-9, yes.

12 ARBITRATOR BROWER: It comes right after all those  
13 colorful maps on worldwide end of lindane.

14 Annex 2, is this the list of items to the Protocol  
15 which effectively are to be addressed by Parties to the  
16 Protocol?

17 MR. DOUAIRE de BONDY: That's right. If you look on  
18 the screen now, you see Annex 2, substances scheduled for  
19 restrictions on use. There was an Annex 1, which was products  
20 scheduled for I think the word is elimination. This one is  
21 restrictions, and so you see that there is an entry for HCH  
22 above the one for lindane. Technical HCH is restricted to use  
23 as an intermediate in chemical manufacturing, so it's not for  
24 direct use by Registrants.

25 And then under that, you see products in which at

14:43 1 least 99 percent of the HCH isomer is the gamma form; i.e.,  
2 lindane. Mr. Somers talked at some length this morning about  
3 isomers, so the gamma isomer.

4 ARBITRATOR BROWER: I understand that, but it's  
5 lindane we're talking about, and it says it's restricted to  
6 seed treatment which is largely what this case is about--

7 MR. DOUAIRE de BONDY: That's right.

8 ARBITRATOR BROWER: --it seems.

9 So, am I to understand this to mean that under the  
10 Aarhus Protocol seed treatment was not to be further addressed  
11 or abolished?

12 MR. DOUAIRE de BONDY: No, actually when you see--it's  
13 unfortunate the pop-up eliminates, but these restricted uses  
14 are subject to certain conditions, and the conditions are the  
15 column on the right, which is all restricted uses of lindane  
16 shall be reassessed under the Protocol no later than two years  
17 after the date of entry into force.

18 ARBITRATOR BROWER: Okay. So, that's reassessment,  
19 but that does not imply a result?

20 MR. DOUAIRE de BONDY: No, not at all. And that  
21 was--Canada fulfilled that in commitment to reassessment in the  
22 Special Review. The same month that this Aarhus Protocol was  
23 signed by Canada, that's the few documents on, and we can  
24 certainly provide numbering for this bundle, and sirlox (ph.)  
25 it as well. My apologies for that. A few documents on you see

14:44 1 Exhibit WS-91, a planning sheet from the PMRL tentative  
2 Strategies and Regulatory Affairs, and that's June 1998, and it  
3 says Special Review of Lindane to undertake a reassessment of  
4 all existing uses of lindane as required for compliance.

5           And as I have said, PMRA began a Special Review of  
6 Lindane with no, you know, particular view as to the outcome.  
7 The scientists were involved in that review were not dictated  
8 you shall find this or that. They were not the unit involved  
9 in this subsidiary Voluntary Withdrawal Agreement issue. They  
10 reviewed the pesticide, and like scientists around the world  
11 found that its use led to unacceptable health risks.

12           ARBITRATOR BROWER: We were taken by your colleague  
13 across the room this morning to certain documents indicating  
14 that the position of Canada at the time effectively was to  
15 protect and maintain the use of lindane for seed treatment, and  
16 the document you showed us, which has 021 in the lower  
17 left-hand corner and is just the next one I think after the one  
18 I just took you to, has October 1997 at the top, appears to be  
19 an internal Canadian note with respect to its position in  
20 regard to the what became the Aarhus Protocol, the last  
21 sentence reads, "Canada has not supported the inclusion of  
22 lindane in the Protocol." In other words, do I understand the  
23 position of Canada going into the Aarhus Protocol meetings and  
24 throughout the Aarhus Protocol meetings was that lindane should  
25 not be subject to reassessment within two years?

13:48 1           MR. DOUAIRE de BONDY: The initial view of Canada  
2 under the Aarhus Protocol, I mean, where they started was, I  
3 have noted Canada knew that there were existing registered uses  
4 of lindane in Canada, and therefore did not wish to--couldn't  
5 commit legally to eliminating these uses.

6           ARBITRATOR BROWER: But it was a reassessment.

7           MR. DOUAIRE de BONDY: Yes.

8           And so what I think these documents show, as I  
9 mentioned, there was scientific uncertainty as of 1997 about  
10 the volatility of lindane when used as a seed treatment, and  
11 there were--but there was new information that was being  
12 released.

13           If you look at the entirety of the document, I  
14 apologize if the entire thing isn't there, if you look on the  
15 next page, Canada already taking note of this new information  
16 and coming to a position where it could agree to the  
17 Reassessment of Lindane both on the basis of the very strong  
18 views of its counterparts in those negotiations, but also  
19 because of elements which under Canadian legislation would  
20 prompt a review in Canada.

21           If you look to the next page, at the bottom of the  
22 page, it is also important to recognize that two new reports  
23 describing the results were released in June. Results show  
24 that HCH, including the gamma isomers, was the most abundant  
25 POP in the air, seawater and rivers in the North.

14:48 1           ARBITRATOR BROWER: We don't know what the next page  
2 is.

3           MR. DOUAIRE de BONDY: This page is part of the  
4 Briefing Note.

5           ARBITRATOR BROWER: Right.

6           MR. DOUAIRE de BONDY: We were not opposing the  
7 reassessment. I think what we had to determine is how could we  
8 do this in a manner that was consistent with domestic Canadian  
9 legislation.

10          ARBITRATOR BROWER: Well, the position was Canada has  
11 not supported the inclusion of lindane in the Protocol.

12          MR. DOUAIRE de BONDY: Because the inclusion was, at  
13 least initially proposed, as a proposal for inclusion for  
14 restriction.

15          And it's difficult to present this on the basis of the  
16 one sole document because I think if you look in the suite of  
17 documents relating to, which are in the hearing bundle, if--you  
18 will see new information coming to light, Canada responding to  
19 that information, and suggesting, well, if we can't agree  
20 to--we certainly can't agree to eliminate because that would be  
21 contrary to domestic legislation, but we can--recognize the  
22 concerns that are being raised.

23          And if you look--if you look above the next page, the  
24 second paragraph, second-to-last paragraph, "It is important to  
25 note that during the June negotiation session agreement was

14:49 1 reached on reaching numerical bioaccumulation as guidance  
2 rather than a strict criteria. In light of this, the argument  
3 that lindane is borderline should not be included in the  
4 initial list is weakened."

5 So, Canada was taking note of the new information that  
6 was being presented, the new approaches. And again, to go back  
7 to the idea that this was Canada trying to act responsibly, not  
8 having a settled position about lindane, but agreeing there  
9 were a lot of concerns being raised and we should review this,  
10 and going into a special review based upon these commitments.

11 ARBITRATOR BROWER: Would I be wrong to think that up  
12 to the time of the Aarhus Protocol, Canada was not interested  
13 in having it addressed by the Aarhus Protocol, in part, because  
14 of the substantial canola production in Canada largely exported  
15 I assume in what appeared at the time to be the importance of  
16 lindane to the prosperity of that sector of the economy?

17 MR. DOUAIRE de BONDY: I have honestly seen no  
18 evidence of Canada's position being dictated by the need to  
19 support this. What they do note is this is a registered  
20 product and it's in use, and we can't simply eliminate--agree  
21 to eliminate a product without a review, but...

22 ARBITRATOR BROWER: I was wondering if it was simply a  
23 question of reassessment, and everything that was going on in  
24 the world that you have taken us to is going on in the world,  
25 why would Canada oppose a reassessment within two years?

14:51 1 MR. DOUAIRE de BONDY: I don't think Canada did oppose  
2 reassessment in two years. In fact, it was--you know,  
3 proposing a longer phase--longer time line for that  
4 reassessment in the first place. I think in first place it's  
5 proposed 2005, and then the final compromise was that it would  
6 be done within two years of the final ratification of the  
7 Protocol.

8 The other thing to keep in mind is that by the late  
9 1990s we are not talking about smooth sailing for lindane in  
10 Canada since the 1930s. Most of uses of lindane had already  
11 been withdrawn. The remaining few uses beyond this seed  
12 treatment for use were minor, and--so it wasn't like Canada had  
13 been promoting lindane for years.

14 ARBITRATOR BROWER: Your point was the statement in  
15 the negotiating paper, negotiating instructions was related to  
16 restriction rather than reassessment.

17 MR. DOUAIRE de BONDY: I'm sorry--well, the  
18 restriction--they could not agree to restrict in the sense--

19 ARBITRATOR BROWER: Right.

20 MR. DOUAIRE de BONDY: In fact, if you look at that  
21 list on Schedule 2, or Annex 2, the restrictions or restricted  
22 uses are, to my knowledge, the remaining registered uses.

23 PRESIDENT KAUFMANN-KOHLER: Does that answer your  
24 question?

25 ARBITRATOR BROWER: Yes, I'm done on that one.



14:53 1           Apart from the fact that I'm slightly bemused, but  
2 that's life, that what is referred to initially as a trade  
3 issue is being dealt with in the PMRA, which is in the Canada  
4 Health. These things happen.

5           One question: I understood we are talking about three  
6 Gaucho products, and you have repeatedly referred to the two  
7 that were submitted as being very quickly approved, and I just  
8 want to understand the difference between the two because we  
9 were advised this morning that what they were really interested  
10 in was a third Gaucho product, and that took a long time.

11           The distinction from the position of the PMRA is the  
12 first two were products from which lindane was removed and  
13 otherwise were the same, whereas the one they're interested in  
14 was a new application?

15           MR. DOUAIRE de BONDY: No, actually, all three  
16 products were products that were based upon, if memory serves,  
17 the active thiamethoxim--imidacloprid, right, and this is a  
18 pesticidal agent within--and the issue was simply that only the  
19 first two had been submitted to the PMRA. They were submitted  
20 to the PMRA in late 1998. One had already been registered in  
21 Canada for use for export, and then the other was a new  
22 formulation. So, those two Gauchos, which are both based on a  
23 lindane replacement, which is another pesticide, imidacloprid,  
24 were Gaucho 75ST and Gaucho 480.

25           And then there was a third version of Gaucho, which

14:55 1 was an all-in-one, it was insecticide plus fungicide, which was  
2 only submitted to PMRA in March 2000, and even then that was an  
3 incomplete application. Further data was submitted in  
4 September 2000 and again into 2001.

5           And I could tell you one of the issues for a national  
6 regulator would be a registrant submitting an application with  
7 not everything in the application, and then going around and  
8 complaining to all who cared to listen that the PMRA hasn't  
9 registered our product for X number of years when, in fact, the  
10 elements that are required to assess the application haven't  
11 all been submitted.

12           But going back to your first point, the two Gaucho  
13 75ST and Gaucho 480 were insecticide-only based on imidacloprid  
14 submitted late 1998, and both PMRA confirmed were eligible for  
15 temporary registration. The confirmation was sent July 27,  
16 1999, and then the actual temporary registration granted  
17 October and November 1999.

18           And the temporary registration was granted simply  
19 because that's contingent upon the submission of the data that  
20 arises out of the use of the product, so that can't be--you  
21 know...

22           And the further version, Gaucho CS FL, which is the  
23 all-in-one insecticide-fungicide, which was submitted partially  
24 in November--March of 2000. From PMRA's perspective, you're  
25 asking us to jump the queue, jump the queue again, and you are

14:57 1 blaming the PMRA for the fact it took another two years to  
2 develop this formulated product, and indeed don't even have all  
3 the data.

4 So, to say that PMRA treated the Claimant unfairly  
5 with regard to a product it hadn't even submitted, it was  
6 saying that it should register for use before Syngenta's Helix  
7 product which was submitted in November 1998.

8 ARBITRATOR BROWER: I understand. If you would in  
9 some way be able to add the exhibit references to what's in  
10 your bundle we have been going through, to the extent that  
11 they're not there, it would be helpful because these are  
12 obviously things you want us to focus on mostly, and it's  
13 helpful to have the road map to find them.

14 MR. DOUAIRE de BONDY: We would be happy to do so.  
15 What we could do is take the bundle, add references and deliver  
16 them to you tomorrow.

17 ARBITRATOR BROWER: That's fine.

18 I had a couple of other questions to the other side.

19 PRESIDENT KAUFMANN-KOHLER: Of course.

20 ARBITRATOR BROWER: For this point, there was  
21 considerable emphasis on your part on bad faith or had a  
22 long-standing plan to get rid of lindane and so forth.

23 Does it make any difference really what the state of  
24 mind or the internal motive was on the part of Canadian  
25 authorities if, in fact, their science is sound, and lindane,

14:58 1 as a scientific matter, properly has been--received the  
2 treatment of which you complain?

3 MR. SOMERS: There are a number of elements in the  
4 Claimant's case about the behavior of the Agency in question  
5 here. In terms of where science was in question and the  
6 validity of the science was in question obviously, that's not  
7 what your inquiry goes to.

8 We would say, yes, that the state of mind of the  
9 regulator is an important question. Were the science in any  
10 event properly done, and you assign full meaning of the word,  
11 justifies measures, then no, that's the simple exercise of the  
12 State's regulating authority. And fairness and equity don't  
13 enter into it, but that's what the proviso that the science  
14 is--has all of the integrity that that word is supposed to  
15 carry.

16 In this case, though, there are more elements than  
17 merely science and more elements than merely lindane. There is  
18 the access to replacement products with the State as the  
19 gatekeeper in which science is not the only arbiter. There is  
20 various administrative and policy decisions that a State will  
21 take that have nothing to do with science that will allow it or  
22 prevent it from issuing permission, for example, for  
23 replacement products.

24 In this case, the competitive product that was  
25 approved, and we saw in the material provided by my friend at

15:00 1 least one replacement product will hit the market, that will be  
2 enough for the Agency at least at a minimum, also was an  
3 incomplete submission. So, that wasn't a science-based  
4 decision that the Agency made. It was an administrative one,  
5 it was a due process one, it was a fairness one, and a balance  
6 one. If the science objectively carried out and searchingly  
7 performed condensed lindane, we do not say a fairness or equity  
8 issue in customary international law arising from that.

9 ARBITRATOR BROWER: Okay. But you obviously have what  
10 I might refer to as a timing issue. Your position is that they  
11 treated Helix in a favorable fashion and effectively deprived  
12 you of market access to the timing.

13 MR. SOMERS: That's correct.

14 And we recognize, of course, as the record shows, that  
15 submission submitted on X date will--that's in para materia and  
16 subsequent ones will issue sooner if it's submitted in advance  
17 or completed in advance. So, that's why we do the calculation  
18 on the basis of days it took, not obviously the date--of  
19 absolute date of the issue of the Agency's response.

20 ARBITRATOR BROWER: Based on what you said, I suspect  
21 I know the answer to the next question, but we best hear it  
22 from you. Canada has taken the trouble to provide an expert  
23 opinion of Dr. Costa, which, as I understand it, basically says  
24 they got the science right, so--and they did it the right way.  
25 You have not submitted an expert statement taking the opposite

15:02 1 position. Is that because you simply feel whether or not the  
2 science is right is irrelevant to your case?

3 MR. SOMERS: No. Quite the reverse. We submit that  
4 Canada put a witness to editorialize on those three scientists  
5 in the Lindane Review Board exactly because they felt they had  
6 something to explain away in relation to that Review Board. We  
7 are content to take the Review Board scientists' conclusions  
8 and many days of hearings and these thousands of pages that our  
9 friend took us through on its face. We do not need to  
10 editorialize it or qualify it away or point to various sections  
11 where certain of the Special Review conduct was found to be  
12 generally acceptable. We rely on the Review Board decision  
13 itself.

14 ARBITRATOR BROWER: Okay. My last question relates to  
15 the canola growers. One could gain the impression that you  
16 were going to lose out on using lindane in Canada because the  
17 growers no longer wanted it because they felt it put them in a  
18 disadvantageous position in the market, so whatever happened,  
19 you would have been out of business in any event. It's partly  
20 an issue of causation and partly an issue of damages. What do  
21 you have to say on that point?

22 MR. SOMERS: We hope to get further information from  
23 the witnesses in the hearing onto the record, but at the  
24 outset, at least the record does show that the industry  
25 continued to use lindane to the last second that it was

15:04 1 available and then requested extensions beyond that last second  
2 in order to, for example, plant previously treated seed into  
3 2002. So, for the Claimant's case, you know, that seems to me  
4 that the growers were voting with their wallets and with their  
5 actions in favor of lindane.

6           Sorry, I can't give you an exhibit number immediately,  
7 but there are documents on the record that we will be putting  
8 in evidence as well to show that canola growers were, in the  
9 words of their association, were willing to return to lindane  
10 if it was given a favorable tolerance. This isn't something  
11 that somehow had tarnished or tainted the reputation of lindane  
12 to the extent that the growers wouldn't touch t.

13           We also ask why the Voluntary Withdrawal Agreement, if  
14 the growers, as a group, didn't want to use lindane? No one  
15 had a gun to their head to do so. All they had to do is vote  
16 with their wallets again and pick alternate products which had  
17 the blessing of the market and so forth.

18           For the Claimant's part, this was not a grower in the  
19 sense of salt of the earth or actual people who used the  
20 product decision. This was the conjunction of the PMRA working  
21 with the counsel as ostensibly representative of the growers.  
22 But the actions of the growers themselves and of the market  
23 tell a different story.

24           ARBITRATOR BROWER: Those are my questions.

25           PRESIDENT KAUFMANN-KOHLER: Thank you.

15:05 1 Professor Crawford, any questions at this stage?

2 ARBITRATOR CRAWFORD: There was a separate canola  
3 growers association, I understand. What position did they take  
4 on the Withdrawal Agreement?

5 MR. SOMERS: Was that question directed to me,  
6 Professor Crawford?

7 ARBITRATOR CRAWFORD: Yes. That arises from the  
8 discussion you just had with my colleague.

9 MR. SOMERS: Yes. There is the Canadian Canola  
10 Growers Association, and it was as the name implies; and the  
11 Canadian Canola Council, which as I understand it, was not the  
12 growers themselves but predominantly those who bought off the  
13 growers and produced canola products from there. They are  
14 distinct associations. I won't pretend to know exactly their  
15 constitution or their raison d'etre, but there was some  
16 considerable overlap in membership. For example, the Secretary  
17 of one was the Director of the other in the person of  
18 Mr. Zatylny, that we will see later.

19 The record is--because of that overlap in  
20 administration, the record is confused or similarly overlapping  
21 in terms of the positions of these organizations on the issues  
22 in this dispute.

23 MR. DOUAIRE de BONDY: I'm sorry, could I pop in with  
24 a clarification?

25 PRESIDENT KAUFMANN-KOHLER: Yes.



15:07 1 MR. DOUAIRE de BONDY: Simply that the Canadian Canola  
2 Growers Association and Canola Council both supported an  
3 agreement of voluntary withdrawal, and the Canadian Canola  
4 Council also represents all stakeholders of the Canadian canola  
5 industry, including the canola growers themselves who at the  
6 time represented about 65,000 growers in Canada.

7 PRESIDENT KAUFMANN-KOHLER: Any other questions? No?  
8 Thank you.

9 I have no questions at this stage. I want to hear the  
10 witnesses.

11 So, we will now hear Mr. Ingulli; right? Let's take  
12 just a 10-minute break to give him time to get here and you get  
13 organized.

14 (Pause.)

15 PRESIDENT KAUFMANN-KOHLER: So, can we start? Good.

16 Good afternoon, Mr. Ingulli.

17 ALFRED F. INGULLI, CLAIMANT'S WITNESS, CALLED

18 THE WITNESS: Good afternoon.

19 PRESIDENT KAUFMANN-KOHLER: Before we start, can I  
20 have some time estimates from you, how long will you be for the  
21 direct examination?

22 MR. SOMERS: Except to ask the witness to adopt his  
23 statement, we have no direct examination.

24 PRESIDENT KAUFMANN-KOHLER: Good.

25 How much time for the cross-examination? Of course,

15:21 1 an estimate. You will not be bound by it, just for us to have  
2 some idea.

3 MR. DOURAIRE de BONDY: We are estimating an  
4 hour-and-a-half.

5 PRESIDENT KAUFMANN-KOHLER: Fine. Thank you.

6 Mr. Ingulli, for the record, you're Alfred Ingulli?

7 THE WITNESS: Yes, I am.

8 PRESIDENT KAUFMANN-KOHLER: You're retired since 2005?

9 THE WITNESS: January 1st, 2005, that's correct.

10 PRESIDENT KAUFMANN-KOHLER: And you act now as a  
11 consultant to Chemtura?

12 THE WITNESS: Yes.

13 PRESIDENT KAUFMANN-KOHLER: During the years that we  
14 are interested in here specifically, you were Executive Vice  
15 President, and you were in charge of the Crop Protection  
16 Division; is that correct?

17 THE WITNESS: That's correct.

18 PRESIDENT KAUFMANN-KOHLER: You're heard as a witness  
19 in this arbitration. As a witness, you are under the duty to  
20 tell us the truth, and I would like to ask you to confirm that  
21 you understand being under such duty by reading into the record  
22 the Witness Declaration that should be on the table in front of  
23 you, that is in front of you.

24 THE WITNESS: I'm aware that in my examination I must  
25 tell the truth. I'm also aware that any false testimony may

15:23 1 produce severe legal consequences for me.

2 PRESIDENT KAUFMANN-KOHLER: Thank you.

3 Now, I see you have some documents in front of you.

4 Can you just tell us what it is.

5 THE WITNESS: Yes. I have some handwritten notes that  
6 I have made from some of the documents that I've read. I have  
7 my own Witness Statement, also statements from other witnesses  
8 of the Claimant, Memorial Replies.

9 PRESIDENT KAUFMANN-KOHLER: Fine.

10 So, what I would suggest is that you, of course, are  
11 entitled to look at your Witness Statement, and otherwise we  
12 will--you will tell us what document you are looking at, and  
13 probably you will be asked questions with respect to specific  
14 documents that will be shown to you.

15 THE WITNESS: Yes.

16 PRESIDENT KAUFMANN-KOHLER: With respect to the  
17 Tribunal, will we look at the hearing bundle, or how do you  
18 intend to proceed when you refer the witness to a document?

19 MR. DOURAIRE de BONDY: For the purpose of this  
20 examination, I intended to refer to the electronic version of  
21 the document, so it will appear for the witness up above the  
22 screen. It could be enlarged, and the Tribunal will be able to  
23 see the document on the screens.

24 PRESIDENT KAUFMANN-KOHLER: That is fine. You simply  
25 have to then make sure that we know for the transcript the

15:24 1 exhibit number.

2 ARBITRATOR CRAWFORD: Would you also give us the  
3 hearing bundle number when you do that since sometimes it's  
4 useful to annotate it.

5 MR. DOURAIRE de BONDY: Yes.

6 PRESIDENT KAUFMANN-KOHLER: Fine.

7 Anything else, Mr. Douaire de Bondy, you would like to  
8 raise?

9 MR. DOURAIRE de BONDY: I'm just wondering about Mr.  
10 Ingulli's mentioning him having some personal notes with him on  
11 the witness table, and I'm wondering if that should be part of  
12 the accouterments of the witness.

13 PRESIDENT KAUFMANN-KOHLER: That's what I meant when I  
14 was saying that Mr. Ingulli should refer to his Witness  
15 Statement. Of course, you are entitled to do this at any time,  
16 and otherwise to the documents that you will be specifically  
17 pointed to, but not to other notes or other documents that we  
18 don't know of.

19 So, then, Mr. Somers, you can start with your direct.

20 MR. SOMERS: Thank you.

21 THE WITNESS: May I ask a question? Would it be  
22 helpful if my notes were entered into the record?

23 PRESIDENT KAUFMANN-KOHLER: It would not.

24 THE WITNESS: Okay.

25 DIRECT EXAMINATION

02:00 1 BY MR. SOMERS:

2 Q. Thank you, Mr. Ingulli.

3 I would simply like to ask you to adopt and affirm the  
4 truth of the statements that you have filed in this proceeding,  
5 being the Confidential Statement of Evidence of Alfred Ingulli  
6 and the second Confidential Statement.

7 A. I'm the author, and I adopt them.

8 Q. Thank you, Mr. Ingulli.

9 MR. SOMERS: Madam Chair, just on the point of the  
10 manner in which my friend intends to cross-examine Mr. Ingulli,  
11 by using electronic documents, we just--I would like the  
12 assurance that the witness will be able to see the entire  
13 document and not merely whatever extract is chosen to be shown  
14 electronically to him. He's nodding in assent, and I  
15 appreciate the significance of that.

16 PRESIDENT KAUFMANN-KOHLER: And we will make sure that  
17 Mr. Ingulli has the time to review the document, if he wants to  
18 look at the full document.

19 MR. SOMERS: Thank you.

20 PRESIDENT KAUFMANN-KOHLER: Sure.

21 So, if that is all on your side, then we can proceed  
22 with the cross-examination.

23 MR. SOMERS: Yes, thank you.

24 CROSS-EXAMINATION

25 BY MR. DOURAIRE de BONDY:

15:26 1 Q. Hello, Mr. Ingulli. My name is Christoph Douaire de  
2 Bondy. I represent the Government of Canada, and I'm going to  
3 ask you a few questions.

4 Mr. Ingulli, in the first place, could you confirm  
5 that Chemtura has been selling lindane products in Canada since  
6 the 1970s?

7 A. Yes. I believe it was first registered in 1978.

8 Q. And this was the use of lindane as a canola seed  
9 treatment?

10 A. Yes, I believe that's the case.

11 Q. Now, you will agree that in the 1970s that Canada's  
12 Pest Control Act, in 1978 specifically Canada's Pest Control  
13 Products Act was in force?

14 A. I'm not knowledgeable of the Pest Control Act in the  
15 1970s.

16 Q. In any event, there was Canadian pest control  
17 legislation in place?

18 A. Are you asking me if there was?

19 Q. Yes.

20 A. I assume there was, but I have no knowledge of that.

21 Q. So, you confirm that in the 1970s Chemtura couldn't  
22 just start selling a pesticide in Canada without some form of  
23 government approval?

24 A. I would expect that, Canada being a sophisticated  
25 developed country, that would be the case.

15:27 1 Q. So, you would first have to receive a registration for  
2 use from the Canadian Government?

3 A. Again, I'm making the assumption. I was not running  
4 the business at that time, but I was making the assumption that  
5 that would be the case.

6 Q. And the same is for lindane as for any other  
7 pesticide?

8 A. Yes. I would expect that lindane would be treated the  
9 same as other pesticides.

10 Q. And you would agree that Chemtura received no  
11 assurances in the 1970s that lindane would be registered  
12 indefinitely in some formulated product?

13 A. I have no knowledge of that.

14 Q. Do you expect that the Government of Canada at the  
15 time would have given you that kind of assurance?

16 A. It's not likely.

17 Q. In fact, pesticide--you would agree that pesticides  
18 registered in the first place where a government determines its  
19 use doesn't present unacceptable risk?

20 A. Yes.

21 Q. And that risk could be either to human health or to  
22 the environment?

23 A. Yes.

24 Q. And the registration is always on sufferance. That's  
25 to say, it's always subject to government's continuing view

15:28 1 that the use of a pesticide doesn't present unacceptable health  
2 or environmental risks?

3 A. Yes.

4 Q. And you would agree that over time science can  
5 advance?

6 A. Yes.

7 Q. The scientific understanding of a pesticide can  
8 evolve?

9 A. Yes.

10 Q. And if--as scientific understanding evolves, new  
11 safety standards can be put in place?

12 A. Yes.

13 Q. So, new information about the effects of a pesticide  
14 can come to light?

15 A. Yes.

16 Q. So, a pesticide registration is always at risk of such  
17 developments?

18 A. Yes.

19 Q. And this is true of all the pesticides Chemtura would  
20 have sold--sells and sold in Canada?

21 A. It would be true of all the pesticides that any  
22 company sells.

23 Q. Right.

24 And the same applies in the United States, in your  
25 home jurisdiction?



15:29 1 A. Yes.

2 Q. And you would agree that it's part of PMRA's  
3 legislative responsibility to re-evaluate registered  
4 pesticides?

5 A. If that's what the law of Canada requires, I would  
6 agree with that.

7 Q. So, if PMRA determines that a registered pesticide  
8 presents unacceptable risk, it has the legislative authority to  
9 suspend that use?

10 A. Yes, provided it's gone through a rigorous scientific  
11 review while using recognized scientific principles.

12 Q. In fact, if PMRA reaches a conclusion based on a  
13 scientific review that you present unacceptable risk, it  
14 actually has a legislative duty to withdraw the use--the  
15 support for that particular pesticide?

16 A. Yes.

17 Q. Now, Chemtura sells its pesticide for use on specific  
18 crops, and you would agree that the label of the product  
19 formulation confirms what crops the pesticide could be used on?

20 A. Yes.

21 Q. So, the pesticide must be sold for the crops that are  
22 identified on the Product Label.

23 A. Correct.

24 Q. And if it's not on the label, you don't have the right  
25 to sell the product for use on a particular crop.

15:30 1 A. Yes.

2 Q. And it's also PMRA's duty to ensure that products are  
3 used only for registered uses?

4 A. Yes.

5 Q. Now, Chemtura sells its agricultural pesticides for  
6 use by growers, doesn't it? Ultimately, I mean, agricultural  
7 pesticides.

8 A. We generally don't sell to growers. We generally sell  
9 to--in the case of seed treatment, to seed treating companies.

10 Q. Right. There might be intermediates?

11 A. Yes, there might be intermediaries.

12 Q. But the growers are the ultimate end-users of your  
13 pesticides?

14 A. Yes.

15 Q. And it's up to growers to decide whether or not they  
16 want to use your pesticide?

17 A. Yes.

18 Q. They can choose between different formulations?

19 A. Yes.

20 Q. And they could choose between different pesticides?

21 A. Yes.

22 Q. And that's really up to the growers?

23 A. Yes, influenced by professionals who advise growers,  
24 influenced by manufacturers, just those people are influenced  
25 by car--one car as to over another.

15:31 1 Q. So, you can't force growers to use a pesticide if they  
2 decide they don't want to use it?

3 A. No, that's correct.

4 Q. And there might be all sorts of reasons why growers  
5 wouldn't want to use a pesticide?

6 A. I imagine, yes.

7 Q. And the growers are ultimately your customers. I  
8 mean, they're ultimately through the seed treaters. If the  
9 pesticide--if the growers don't want a product, the seed  
10 treaters aren't going to buy it from you?

11 A. Yes, but with a qualification. If there are no  
12 alternatives to the product that a company is offering, which  
13 is--was the case with lindane, then the grower pretty much  
14 would have no choice but to use the product that was being  
15 offered by the manufacturer.

16 Q. When you say that there was no alternative to lindane,  
17 in fact, there was an alternative. You mean in 1998? Are you  
18 referring to that?

19 A. I'm talking preregistration of Helix.

20 Q. Oh, preregistration of Helix.

21 But, in fact, Gaucho 75ST and Gaucho 480 had already  
22 been registered for use at that time?

23 A. They were registered, but they were not being sold.

24 Q. Were they not being sold because Chemtura was not  
25 promoting them?

15:32 1 A. They were not true replacement products for lindane.

2 Q. Well, they were used to kill--the same pesticide with  
3 the same pests, weren't they?

4 A. Right, but there were issues around using the  
5 products.

6 Q. And those issues were the fact that they needed to be  
7 formulated with a fungicide?

8 A. That was--that was the primary issue, yes.

9 Q. But it was possible to formulate the insecticide with  
10 a fungicide and use them on canola products?

11 A. Not without registration from the PMRA.

12 Q. That's right.

13 But they were registered by PMRA in October and  
14 November 1999?

15 A. But you can't mix one formulation--for instance, an  
16 insecticide formulation--with a fungicide formulation and sell  
17 the mixture without the mixture being registered.

18 Q. But you're talking about an all-in-one formula. I'm  
19 talking about the fact that one could independently buy the  
20 insecticide and the fungicide and use them together. That's  
21 possible, isn't it?

22 A. Not likely, for the simple reason that the primary  
23 customer for the all stand-alone insecticide and the  
24 stand-alone fungicides were the seed treating companies, and  
25 the combination of those two products contain so much liquid

15:34 1 that the seed treating equipment that the seed treating  
2 companies had could not handle the volume of liquid from the  
3 combined products.

4 I say that in a general sense. There were a few  
5 exceptions, but generally speaking, the liquid load was for the  
6 two products you put together by the seed treating company  
7 overwhelm the equipment.

8 Q. But it's true that as of November 1998 Chemtura was  
9 contemplating selling the submitted registered pesticides?

10 A. You're referring to the Gaucho pesticides?

11 Q. Yes.

12 A. Those products--Chemtura anticipated a situation where  
13 the grower was going to be left with absolutely nothing to  
14 control flea beetle, which would be a devastating situation for  
15 the Canadian growers. So, as a stopgap measure, it rushed to  
16 bring forward a product that could be used to control flea  
17 beetles, never with the expectation that that was going to be  
18 the lindane replacement product, but offering the growers an  
19 opportunity for something to get them through until a true  
20 lindane replacement product was registered.

21 Q. Now, Chemtura is responsible for developing its own  
22 product, isn't it?

23 A. Yes, well--

24 Q. It's up to Chemtura to develop its own formulations?

25 A. Yes.

15:35 1 Q. It's up to Chemtura to work out effective products?

2 A. I'm sorry--

3 Q. It's up to Chemtura to work to develop effective  
4 products?

5 A. Yes.

6 Q. That's not up to the PMRA?

7 A. I would agree, yes.

8 Q. So, if Chemtura delays in developing a formulation,  
9 that's not PMRA's fault?

10 A. I would agree with that.

11 Q. And PMRA isn't responsible for marketing Chemtura's  
12 products?

13 A. Correct.

14 Q. And PMRA isn't responsible for maintaining Chemtura's  
15 market share?

16 A. Correct.

17 Q. All right. I will come back to some of the issues  
18 you've raised, but I would like to discuss the Special Review  
19 process for a moment.

20 Now, Chemtura, you would agree, is a sophisticated  
21 registrant?

22 A. Yes.

23 Q. As a sophisticated registrant, Chemtura would be  
24 expected to know and understand PMRA practices?

25 A. Yes, I would say that's correct.

15:36 1 Q. And Chemtura is generally familiar with PMRA  
2 re-evaluation policy?

3 A. Yes.

4 Q. Now, we have seen that the Special Review announcement  
5 was March 15, 1999. Chemtura's representative at TSG as well  
6 as Chemtura and CIEL, you agree they were invited to a meeting  
7 with PMRA in May of 1999 to discuss the Special Review?

8 A. I would have to see the documentation. I'm assuming  
9 you wouldn't be bringing it up if it wasn't correct, but I  
10 don't have specific knowledge of that meeting.

11 Q. All right. We could go to Exhibit CF-9, which is in  
12 the hearing bundle at 93.

13 ARBITRATOR CRAWFORD: Volume?

14 MR. DOURAIRE de BONDY: I'm sorry, Volume 93 is which  
15 volume of the hearing bundle?

16 (Off microphone: Volume 2.)

17 BY MR. DOURAIRE de BONDY:

18 Q. So, now we are at this meeting of 11th of May 1999,  
19 and Chemtura's own Rob Dupree was also present at this meeting,  
20 wasn't he?

21 A. Yes, I see that.

22 Q. Yeah.

23 You, yourself, weren't present at this meeting?

24 A. I was not.

25 Q. And Mr. Edwin Johnson was your TSG representative?

15:38 1 A. Yes.

2 Q. Mr. Johnson has been a consultant--

3 A. Well, he was a CIEL representative at that time.

4 Q. He's been a consultant for Chemtura on lindane for a  
5 number of years?

6 A. Yes.

7 Q. And he's one of Chemtura's witnesses at this hearing?

8 A. Correct.

9 Q. And at that May 1999 meeting, which lasted over two  
10 days, Chemtura's representatives could ask all the questions  
11 they liked about the Special Review process.

12 A. I wasn't there to see--experience how the meeting was  
13 conducted, but I would assume that it was an open meeting.

14 Q. In fact, Mr. Johnson reported back on that meeting,  
15 didn't he, and this is part of that Report? Let's look at what  
16 Mr. Johnson had to say on the next page. It's up at the top of  
17 this page, "In summary, PMRA staff was very open in the  
18 discussion and interested in our presentations on data and the  
19 canola tolerance. We will be able to maintain an open  
20 relationship and dialogue with them as the Special Review  
21 proceeds."

22 So, you have no reason to doubt that this is the  
23 impression that Ms. Johnson had from the meeting?

24 A. I had no reason to doubt that that was the impression  
25 at the time, but as events developed, that isn't what happened



15:39 1 in terms of the open relationship and dialogue with the PMRA.

2 Q. In fact, the Board of Review found that the Claimant  
3 failed to take any advantage of any opportunities to pursue  
4 discussions with PMRA, didn't it?

5 A. I would turn that around to say that the Claimant, on  
6 many occasions, offered data to the PRMA and was rebuffed.

7 Q. Well, you know, that--let's consider that data issue  
8 for a moment.

9 You agree that EPA started its own review of lindane  
10 the year before Canada Special Review was launched, so it began  
11 an RED, a Re-registration Eligibility Decision review in 1998?

12 A. I don't remember the exact year, but it was  
13 approximately then, yes.

14 Q. And EPA, in connection with that re-registration  
15 eligibility review, had assembled the database of all available  
16 data?

17 A. I assume that's correct.

18 Q. And you know that the PMRA had in connection with its  
19 own Special Review full access to this database?

20 A. Yes.

21 Q. And you're aware that PMRA did rely on the EPA  
22 database?

23 A. Perhaps it relied on the EPA database, but it didn't  
24 rely on the EPA's findings and interpretation of the data.

25 Q. But that's a different thing. They did rely on the

15:40 1 EPA data. You have no reason to dispute that?

2 A. I have actually no reason to agree with it, either. I  
3 don't know what interaction took place between the EPA and the  
4 PMRA relative to the database.

5 Q. And you're aware that having relied on the EPA  
6 database, the PMRA didn't have to engage in a full Data Call-In  
7 in its Special Review?

8 A. I'm not aware of that.

9 Q. Well, the PMRA--so you're not aware of the fact that  
10 PMRA had the EPA database and, therefore, a full Data Call-In  
11 became redundant in its own Special Review?

12 A. Well, I think that statement makes the assumption the  
13 EPA had a full database. If the database was not full and  
14 complete, then either Agency could have initiated a Data  
15 Call-In.

16 Q. But the EPA had, in fact, initiated the Data Call-In.  
17 Are you aware of the fact that EPA had, in fact, measured a  
18 Data Call-In and had a full and complete database?

19 A. My impression was that they judged the database to be  
20 complete and that the PMRA judged the database to be not  
21 complete.

22 Q. The PMRA judged the database to be not complete?

23 A. That's the testimony of Lynn Goldman, in her  
24 testimony.

25 Q. I think we will talk to Lynn Goldman about that when

15:42 1 she's here.

2 Now, you know that PMRA has a policy relying on  
3 existing data in its reevaluations?

4 A. I'm not aware of that.

5 Q. And so you're not aware that this reflected PMRA's  
6 general policy to promote the efficiency of its re-evaluations?

7 A. Can I ask you a question? Is that proper?

8 PRESIDENT KAUFMANN-KOHLER: If you need an explanation  
9 or specification of the question, of course you can.

10 THE WITNESS: Are you saying that if the PMRA, in its  
11 review of data, discovers that there is data gap that it  
12 doesn't make a Data Call-In? Just works whatever it has? I  
13 mean, if that's the case, it sounds like not a very good  
14 system.

15 BY MR. DOURAIRE de BONDY:

16 Q. I think what the PMRA finds is--I think that we will  
17 return to this issue with Cheryl Chaffey when she's here, and  
18 she will discuss the data issue.

19 But, in any event, the policy is generally to  
20 promote--the PMRA has a policy of relying on existing databases  
21 to promote the efficiency of its re-evaluations. I'm just  
22 wondering if you're aware this policy wasn't just applied in  
23 the case of lindane.

24 A. I wasn't aware of the policy, so I can't really  
25 comment, one way or the other.

15:43 1 Q. All right. Just a few questions about the Special  
2 Review.

3 Are you--I just wanted to confirm, you weren't one of  
4 the scientists involved in the Special Review of lindane?

5 A. That's correct.

6 Q. Your comments on the Special Review aren't based on  
7 any direct knowledge of that scientific process?

8 A. I mean, I have some general knowledge of the process,  
9 but I was not a scientist involved in inputting data or  
10 interacting with the PMRA. In fact, we had very little, if  
11 any, interaction.

12 Q. I'm talking about the PMRA itself.

13 So, you didn't conduct the toxicology review?

14 A. No, I did not.

15 Q. Or the exposure assessment?

16 A. No.

17 Q. Or the environmental assessment?

18 A. No.

19 Q. Or the carcinogenicity assessment?

20 A. No.

21 Q. You didn't conduct the value assessment?

22 A. No.

23 Q. You didn't assess the Reports?

24 A. No.

25 Q. You didn't engage in discussions with the EPA?

15:44 1 A. No.

2 Q. Now, you know that Ms. Chaffey was one of the senior  
3 scientists involved in the Special Review, and she's provided  
4 testimony in this matter on the Special Review process. Are  
5 you aware Ms. Chaffey has confirmed that PMRA spent hundreds of  
6 hours in review of lindane?

7 A. I have heard that. That seems like a trivial amount  
8 of time, 40 hours in a week. That wouldn't be very many weeks  
9 on the submission as important as this.

10 Q. So, you wouldn't think--it's a--

11 A. Five man weeks on reviewing data of this magnitude  
12 seems like not a very substantial effort, to me.

13 Q. Yeah, she mentioned about the toxicology review in  
14 particular, but similar amounts of time were spent in relation  
15 to every aspect of the Special Review.

16 A. Um-hmm.

17 Q. And you're aware that Ms. Chaffey has confirmed that  
18 the Special Review proceeded on several fronts in parallel?

19 A. I have vague recollection of reading that in her  
20 testimony.

21 Q. Right.

22 And these included toxicology, exposure assessment,  
23 carcinogenicity, environmental behavior and value?

24 A. I don't have a specific recollection of that group of  
25 studies.

15:46 1 Q. And this reflected the PMRA's announcement in March of  
2 1999 that the scope of the Special Review was potentially  
3 broad?

4 A. Special Review announcement did say it could be broad.  
5 It didn't say anything about--excuse me, if I may.

6 Q. Sure.

7 A. That there was no mention of worker exposure  
8 whatsoever, although I suppose you could say worker exposure  
9 would be included under the broad category.

10 Q. In fact, PMRA confirmed to Chemtura and to TSG in May  
11 1999 that it would be looking into a broad range of concerns  
12 into health and environmental?

13 A. I don't--you will have to produce an exhibit, if you  
14 would like me to confirm that.

15 Q. It's actually the exhibit we were just looking at, if  
16 we could go back to it. Number 2, R. Aucoin. And if you look  
17 at the second paragraph down, their schedule is to focus on the  
18 chemistry aspects now and health and environmental issues in  
19 the fall.

20 A. Um-hmm.

21 PRESIDENT KAUFMANN-KOHLER: Again we are at CF-9;  
22 right?

23 MR. DOURAIRE de BONDY: Yes.

24 PRESIDENT KAUFMANN-KOHLER: Which was hearing bundle--

25 MR. DOURAIRE de BONDY: 93.

15:47 1 PRESIDENT KAUFMANN-KOHLER: Ninety-three, Volume 2.

2 BY MR. DOURAIRE de BONDY:

3 Q. Now, it says here the schedule is to focus on the  
4 chemistry aspects now and health and environmental issues in  
5 the fall.

6 You would agree that a health issue with regard to the  
7 use of a pesticide would include the health effects of being  
8 exposed to the pesticides during seed treatment?

9 A. Yes.

10 Q. And I'm not sure if you recall, but the Special Review  
11 announcement also notes that lindane is predominantly used as a  
12 soil or seed treatment to protect crops. So, based on that, it  
13 would be expected--reasonable to expect that a broad-ranging  
14 Special Review would consider the predominant use of the  
15 product?

16 A. Yes.

17 Q. The evaluation of the exposure to the pesticide is a  
18 standard part of re-evaluation, isn't it?

19 A. Yes.

20 Q. And in the case of lindane, one of the most likely  
21 exposure routes is when workers are actually applying the seed  
22 treatment to canola seed?

23 A. Yes, but exposure can be controlled in many ways, and  
24 it is controlled in many ways.

25 Q. Now, that's a different question. I'm asking whether

15:48 1 they were considering exposure?

2 A. Yes, I'm sure they were considering exposure, but  
3 unbeknownst to us that was the main focus of the Special  
4 Review.

5 Q. I think Cheryl Chaffey will attest to the fact that it  
6 was not, in fact, the main focus, but it was one of many  
7 focuses, and that the PMRA simply achieved that result first.  
8 But we will get to that.

9 You're aware that at the time the PMRA reached its  
10 negative occupational exposure result, it had other aspects of  
11 the review ongoing?

12 A. I'm not aware of that.

13 Q. And these aspects included a review of  
14 carcinogenicity, of environmental fate, of product value?

15 A. I'm not aware of that.

16 Q. Now, you are aware that once the PMRA had reached its  
17 negative result on occupational exposure, it suspended other  
18 ongoing aspects of the Special Review?

19 A. Yes.

20 Q. And this was because, for the PMRA, unacceptable risk  
21 to workers was reason enough to suspend the use of the product?

22 A. Yes.

23 Q. So, if PMRA concludes that the product poses  
24 unacceptable health risks to workers, it didn't also need to  
25 know that the product causes cancer or is a possible



15:50 1 carcinogen?

2 A. Of course, we contested the worker exposure findings  
3 of the PMRA, and that's why we wanted a full evaluation.

4 Q. From the PMRA's perspective, if it felt based upon its  
5 science it had unacceptable health risks to workers, it  
6 could--it didn't need to pursue the other aspects of the review  
7 from a purely academic point of view?

8 A. Yes. From our point of view, the flawed science of  
9 the PMRA would have justified in its own mind the cessation of  
10 the other investigations.

11 Q. But if the pesticide is found unsafe on one major  
12 front, that was enough?

13 A. Enough for what?

14 Q. Enough to determine that the use of the product could  
15 no longer be pursued. This is--the registration of the product  
16 had to be suspended.

17 A. Yes.

18 Q. Now, I'm not sure you would be aware of these things,  
19 but you're aware that PMRA reached the result of its  
20 occupational exposure by combining the results on toxicology,  
21 on the one hand, with the results on exposure?

22 A. It's my understanding from what I know of the Review  
23 Board presentations that the PMRA did what you just said,  
24 "combine," but applied safe margins of safety factors that were  
25 way out of line with what the EPA was applying, and also what

15:52 1 the Review Board felt was reasonable.

2 Q. But the PMRA applied its own safety standards?

3 A. Yes.

4 Q. Are you aware that actually PMRA applies a factor 10  
5 to the safety factors for pesticides in general in its  
6 re-evaluations?

7 A. I think there is one factor of 10 for interspecies.

8 Q. Yes.

9 A. But that's not the factor of 10 that's of concern to  
10 our company. It's the extra factor of 10 that I think brought  
11 the total safety factor up to a thousand and is the item of  
12 concern to our company.

13 Q. And you're aware that PMRA actually applies that same  
14 factor 10 to a variety of pesticides in its re-evaluation of  
15 these pesticides?

16 A. Which factors of 10?

17 Q. The additional factor of 10.

18 A. The interspecies factor?

19 Q. The additional factor of 10.

20 A. To get to a thousand?

21 Q. Yes.

22 A. I don't think anything would pass registration if  
23 everything had a safety factor of a thousand applied to it.

24 Q. But you're aware that this is not the only case in  
25 which lindane has been--which PMRA has applied a factor of

15:53 1 1,000?

2 A. No, I'm aware of that.

3 Q. Now, Chemtura's lindane products were existing  
4 registrations in 1999, weren't they?

5 A. Yes.

6 Q. They were already on the marketplace in that year?

7 A. Yes.

8 Q. And they were already in use?

9 A. Yes.

10 Q. And that meant that people were being exposed to these  
11 products in the sense of, for example, workers being exposed to  
12 lindane in seed treatment?

13 A. The seed treating practice in Canada at that time more  
14 than adequately protected workers from exposure to lindane  
15 during the application of seed treatments to seed in the modern  
16 Canadian seed treatment factories.

17 Q. That's Chemtura's view of adequate protection?

18 A. That's our view, and I think that view is upheld by  
19 the worker exposure study done that was done by Sygenta on  
20 Helix.

21 Q. In fact, worker exposure has been the reason for the  
22 withdrawal of lindane in many countries, hasn't it? It has  
23 been the reason for withdrawal of lindane for seed treatment in  
24 U.K., for example, since 1999?

25 A. The treatment practices in the U.K. were totally

15:54 1 different than the treatment practices in Canada. U.K. did not  
2 use closed systems, whereas Canada uses closed systems that  
3 minimize or eliminate worker exposure. So, we are not  
4 comparing apples to apples at all.

5           And, in addition to that, the U.K., after banning the  
6 seed treatment uses of lindane, went on to allow continued use  
7 of far more risky uses of lindane, including such uses as  
8 orchard sprays and home use, where the exposure is many times  
9 greater than one would have, even in the U.K. seed treatment  
10 situation, and certainly much more than in the Canadian seed  
11 treatment situation.

12       Q.   When you say "continued," U.K. is also a member of the  
13 European Union? You would agree that U.K. is part of the  
14 European Union?

15       A.   I thought the U.K. was not part of the European Union.

16       Q.   I think some people in the U.K. think that.

17           In any event, you're aware that the E.U., as of 2000,  
18 also announced a ban on withdrawal of lindane use?

19       A.   Yes.

20       Q.   And one of the concerns that the E.U. cited in its ban  
21 was occupational exposure?

22       A.   I'm not aware of that.

23       Q.   And those concerns in the U.K. and in the E.U. were  
24 despite having taking into account potential mitigation  
25 measures?

15:56 1 A. I'm not aware of that.

2 Q. But you would expect that in reviewing a product  
3 major--that these countries would have taken into account  
4 mitigation measures?

5 A. I don't know. I mean, certainly you can--

6 Q. Are you suggesting that the U.K. wouldn't have taken  
7 into account mitigation measures?

8 A. Well, certainly Chemtura was not afforded the  
9 opportunity to present the mitigation measures in its rebuttal  
10 to the Special Review that the PMRA did, so I have no knowledge  
11 of whether they took that into consideration or not.

12 Q. Actually, in October 2001, when the PMRA released its  
13 draft results on occupational exposure and consulted with the  
14 Claimant for the next several weeks, there was no reference at  
15 that point to mitigation measures, was there?

16 A. I don't know.

17 Q. Well, I'm asking you did Chemtura--

18 A. I'm sorry, please repeat--

19 Q. That Chemtura proposed mitigation measures in that  
20 period--

21 A. Which period?

22 Q. End of October, November, early December 2001.

23 Did Chemtura say, "We are going to change the  
24 formulation, for example, to remove a powder formulation"?

25 A. Chemtura, at the time of the Review Board, proposed

15:57 1 removing the powdered formulations and adding personal  
2 protection equipment.

3 Q. Right.

4 And my question is: Did you propose these  
5 modifications to the PMRA in October, November, or  
6 December 2001, when the--

7 A. We really had no reason to because we had no idea that  
8 the main focus of the PRMA's Special Review was worker exposure  
9 and that it had serious issues with worker exposure.

10 Q. No, wait a minute.

11 Sorry, go ahead.

12 A. I mean, you can't correct the problem unless you know  
13 you have a problem.

14 Q. But by that time you knew they had reached a  
15 conclusion based on occupational exposure risk--

16 (Simultaneous conversation.)

17 Q. You certainly knew by November 2001 that PMRA had  
18 reached a negative conclusion in its Special Review based on  
19 occupational--

20 A. Yes. I'm sorry, I didn't catch the right date.

21 Q. So, you knew that this was the concern, at least one  
22 of the concerns, of the PMRA, and you didn't propose any  
23 mitigation measures at that point?

24 A. I know that we presented a position paper on the  
25 results of the Special Review in the short time that we had to

15:58 1 do that. I believe that mitigation measures were proposed, but  
2 I'm not positive of that. I would suggest you ask that  
3 question of one of the technical people who are witnesses.

4 Q. In fact, I'm just wondering if you know that that  
5 Report that Chemtura proposed didn't include--sounds like you  
6 don't know that that Report didn't include any reference to  
7 mitigation measures and, indeed, simply took the same data that  
8 PMRA relied on and applied a lower safety standard.

9 A. I'm not aware of that.

10 Q. I just want to go back for a moment to this issue of  
11 the review of a product that's already on the market, and I was  
12 noting that when PMRA conducts the re-evaluation of a product  
13 that's on the market that's already registered, the product  
14 remains in use; correct? And subject to any--as long as PMRA  
15 hasn't reached a decision on its re-evaluation, the product  
16 remains in use; you would agree?

17 A. To the best of my knowledge, yes.

18 Q. So, subject to any other events, so long as PMRA  
19 hadn't reached a decision on lindane, for example, lindane  
20 remained in use?

21 A. Yes.

22 Q. And the review had been undertaken because, among  
23 other things, they said in May of 1999 there were health  
24 concerns associated with lindane?

25 A. The Special Review, I thought, focused more on

16:00 1 environmental concerns.

2 Q. In fact, it said that the issues were broad-ranging  
3 and that there was uncertainty.

4 (Witness shrugs.)

5 Q. Now, in any event, by the late 1990s, lindane was  
6 known to be toxic to humans?

7 A. There was scientific debate over that issue.

8 Q. Scientific debate. You don't think it caused nervous  
9 disorders, for example?

10 A. I'm aware of our Expert Witnesses at the Board of  
11 Review refuting many, if not all, of the toxic effect claims of  
12 lindane that were being reported and reported in that  
13 literature.

14 Q. So, by--you're not aware the fact that WHO, as of  
15 1975, had already identified a variety of toxic effects of  
16 lindane?

17 A. I am not.

18 Q. And since 1975, science has certainly advanced?

19 A. I would agree with that.

20 Q. So, when you have a product that was known to be toxic  
21 and is on the market, there might be an incentive to complete a  
22 review within a re-evaluation within a reasonable time.

23 A. I think that's a leading question. You're starting  
24 out with the premise that the product is toxic. I think the  
25 product, like all products, are subject to re-review by the



16:01 1 PRMA and EPA as part of the re-registration process. I would  
2 acknowledge that.

3 Q. And when the PMRA is conducting a special review, it's  
4 conducting that Special Review because there are identified  
5 health or environmental concerns?

6 A. Not necessarily.

7 Well, I can only comment on the USA process. The USA  
8 process requires the EPA to re-review or re-register products,  
9 I think it's every 10 years, or perhaps it's 15, whether or not  
10 there are any concerns.

11 Q. Right.

12 Well, in the case of a special review, that's a  
13 cyclical review, whereas in the case of a special review in  
14 Canada, a special review is undertaken where there are  
15 demonstrated health or there are suspected health or  
16 environmental concerns, and that's--you're aware that was the  
17 case of the Special Review of lindane?

18 A. I suspect that the PMRA may have had concerns about  
19 lindane.

20 Q. Now, I want to briefly compare the situation with that  
21 of a product that's not on the market, a new product. So, in  
22 the case of review of a new product, you would agree there are  
23 no concerns that's not on the market. There is no concern  
24 about exposure during the evaluation of that product?

25 A. Yes.

16:03 1 Q. So, the PMRA can take additional time to review a  
2 product that's being proposed for registration to determine  
3 whether it's safe?

4 A. I don't think that that's what determines the time  
5 line for review. I think, and depending on the complexity of  
6 the review, the category of review, that's what determines the  
7 time line.

8 Q. But you would agree that there would be no current  
9 concern about, for example, exposure if a product was not yet  
10 introduced on to the market?

11 A. Oh, I would agree with that, yes.

12 Q. So, it would be reasonable to distinguish between the  
13 consideration for registration of a new product and a product  
14 that was under Special Review, in terms of the timing of the  
15 review process?

16 A. I don't see a connection between the two. In fact, I  
17 would expect that a new product would have a longer time line  
18 because it's a new product, and there is certainly more data to  
19 review on a new product than there is on an existing product.

20 Q. The point is simply that there is a distinction to be  
21 made between the re-evaluation of an old product, which is in  
22 continued use and which could be causing immediate health and  
23 environmental effects, and a new product that's not yet on the  
24 market that the review process in the latter case does not have  
25 concerns about current exposure.

16:04 1 A. Certainly, a new product that's not on the market  
2 would not create any concern for exposure, but just because a  
3 product is under review doesn't mean there is an imminent  
4 concern for health. In fact, in the case of lindane, I think  
5 it remained on the market for three or four years after the  
6 Special Review was issued, so obviously there was no limiting  
7 concern about health or the PMRA would have stopped,  
8 immediately stopped, the use of the product.

9 Q. You're aware that the decisions about phase-out are  
10 based upon a notion of incremental risk?

11 A. No, I'm not.

12 Q. And if you are removing a product from the market, you  
13 know it's going to be removed from the market. The overall  
14 risk is lowered in the sense that it's not--you know it's not  
15 going to be registered indefinitely. You know it's going to be  
16 registered for a specific amount of time.

17 A. Yes, that makes sense, but your prior question talked  
18 about imminent danger, and that's inconsistent with imminent  
19 danger, a long phase-out period.

20 Q. But the issue is that the incremental risk will be  
21 reduced by the fact that there is a specific cut-off date for  
22 use of the product.

23 A. I'm not familiar with what "incremental risk" means.  
24 Could you elaborate on that.

25 Q. The incremental risk is the total amount of risk that

16:06 1 a product represents. If a product has been used for 50 years,  
2 there is a certain amount. If we know it's going to be in use  
3 for another 10 years, that's adding to the risk. If we know  
4 it's going to be registered for only an additional six months  
5 after that 50 years, that six months is only a small increment  
6 in relation to the total risk, and, therefore, pesticide  
7 regulators allow for phase-out periods.

8           You would agree with the fact that the phase-outs are  
9 common in pesticide regulation?

10       A. I think perhaps they're even required, unless there is  
11 imminent risk.

12       Q. Now, I would just like to go to the issue of PMRA and  
13 EPA's separate reviews. We know PMRA is Canada's national  
14 pesticides regulator, and U.S. EPA is the U.S. national  
15 pesticides regulator. You'd agree that each has a specific  
16 national jurisdiction?

17       A. Yes.

18       Q. And within that jurisdiction, each agency has a  
19 responsibility to review pesticide safety?

20       A. Yes.

21       Q. And in order to conduct such reviews, each agency has  
22 to develop review policies?

23       A. Yes.

24       Q. And those review policies will include acceptable  
25 standards of risk?

16:07 1 A. Yes.

2 Q. So, each agency will develop a standard for acceptable  
3 use of a pesticide?

4 A. Yes.

5 Q. And each agency will apply that standard within its  
6 own jurisdiction.

7 A. Yes.

8 Q. Now, you agree that these standards may not be  
9 identical from one jurisdiction to the other.

10 A. That's possible.

11 Q. And one jurisdiction might adopt a more conservative  
12 approach to pesticide regulation--registration?

13 A. Yes.

14 Q. These differences reflect differences of views on the  
15 risks?

16 A. Yes.

17 Q. So, we could start from a particular dataset and apply  
18 to that dataset a particular threshold of risk; right? Let's  
19 say based on the threshold the Agency in question determines  
20 the risks of use are acceptable, you agree another agency could  
21 take that same database and apply to it its own standards of  
22 risk?

23 A. Within certain boundaries, yes, I would agree with  
24 that. I think that there certainly can be honest difference of  
25 opinions between scientists, but I wouldn't characterize honest

16:08 1 difference of opinions when we are talking about factors of  
2 hundreds and perhaps even thousands, which was the case in the  
3 differences between the evaluations of the EPA and the PMRA on  
4 lindane as evidenced by Lynn Goldman's iteration, I think, of  
5 four different areas of disagreement between the USA and Canada  
6 on the 10X safety factor. There was a 333 percent difference  
7 of opinion between scientists, which to me is enormous. I  
8 don't remember the other three, but I remember one of them was  
9 a thousand percent difference in opinion between scientists,  
10 and to me that's not attributable to just routine differences  
11 in policy between countries.

12 Q. You, yourself, are not a scientist involved in  
13 re-evaluation?

14 A. I'm not.

15 Q. You don't develop re-evaluation standards?

16 A. I do not.

17 Q. You don't consult with a variety of stakeholders to  
18 determine what safety standards is appropriate?

19 A. I do not, but I can read witness reports.

20 Q. Now, with regard to EPA, you're aware that EPA in  
21 2002, in fact, reached a negative finding on occupational risk  
22 for canola?

23 A. I'm aware that they reviewed a study, worker exposure  
24 study that was submitted by the company. They went on to  
25 resource other sources of information on worker exposure and

16:10 1 concluded that worker exposure was not an issue to the EPA on  
2 lindane in 2002, and that was communicated by me to Claire  
3 Franklin and Wendy Sexsmith in October of 2000 when I met with  
4 them.

5 Q. You're talking about something communicated to Wendy  
6 Sexsmith and Claire Franklin in October that the EPA determined  
7 in 2002?

8 A. The EPA had under review lindane and had concluded at  
9 the time of my meeting in October of 2000 that worker exposure  
10 was not an issue.

11 Q. The EPA had concluded as of October 2000--

12 A. That's my understanding, yes.

13 Q. So, you're not aware of the fact that, in the  
14 EPA's--the Lindane Risk Assessment issued in June 2002, the EPA  
15 actually made a specific negative finding about lindane risk,  
16 occupational exposure risk for lindane use on canola?

17 A. I haven't read the RED, and I would appreciate it if  
18 you would address that question to our technical experts, John  
19 Kibbee and Paul Thomson.

20 Q. Now, just to go back to this point of the October 2000  
21 meeting, you know--you say met with PMRA in October 2000. In  
22 fact, it was a meeting with PMRA's Executive Director,  
23 Dr. Franklin?

24 A. That's correct.

25 Q. Is it fair to say you don't meet with Dr. Franklin

16:11 1 every day?

2 A. Yes.

3 Q. So, it's fair to say if PMRA agreed to arrange a  
4 meeting between you and its Executive Director, it was taking  
5 Chemtura's concerns seriously?

6 A. Yes.

7 Q. So, it's fair to say if you and Dr. Franklin were  
8 meeting, that was a high-level meeting?

9 A. That was a high-level meeting, yes.

10 Q. And if PMRA raised an issue at the meeting, it was  
11 signaling concern from the highest level of the organization?

12 A. I would say that that's the case.

13 And I can anticipate where you're going, but the issue  
14 of worker exposure was mentioned by Dr. Franklin, and I  
15 indicated to Dr. Franklin that it was my understanding that the  
16 EPA had reviewed worker exposure and found it not to be an  
17 issue. And since we were told at that meeting that the PMRA  
18 was going to rely on EPA reviews, I made the assumption that  
19 the PMRA would confer with EPA or confirm what I had told them,  
20 and agree with the EPA that there was no problem, since that  
21 was my understanding of the EPA's position. And when we didn't  
22 hear back from the PMRA on worker exposure, we assumed that  
23 that's what happened.

24 Q. In fact, two days after that meeting, you submitted to  
25 PMRA a worker exposure study, which had Rob Dupree sent it?



16:13 1 A. Rob Dupree did.

2 Q. Right.

3 And that worker exposure study was Chemtura's internal  
4 worker exposure study?

5 A. That's right.

6 Q. And that's--Rob Dupree in his letter said--and we  
7 could go to this. This is Exhibit CF-10, which is in the  
8 hearing bundle at Document 154, and it's the paragraph at the  
9 bottom of the page.

10 If the PRMA has not already done so, I would encourage  
11 them to review this study to gain a better understanding of the  
12 exposure profile that workers can expect when treating canola  
13 seed with a seed treatment containing lindane."

14 So, it's fair to say Mr. Dupree was suggesting that by  
15 reviewing the study, PMRA could gain a better understanding of  
16 expected worker exposure during lindane seed treatment?

17 A. This study had been submitted for the first time to  
18 the PMRA in 1992 and was resubmitted, as you correctly point  
19 out, shortly after the meeting. It was clear to me that Rob  
20 Dupree did not realize that the conditions under which canola  
21 is treated in the year 2000, in modern seed treating plants,  
22 was quite different than the conditions that were used in 1992.  
23 And that study should not have been submitted to the PMRA for  
24 it to rely on.

25 However, that same study was reviewed by the EPA, and

16:14 1 that study, along supplemental information that we did not  
2 submit but the EPA evidently found on their own, led the EPA to  
3 conclude that worker exposure was not a problem.

4 Q. You're referring to EPA conclusions prior to  
5 October 2000?

6 A. As of 2000, as of October 2000. That was my  
7 understanding that the EPA was indicating to Chemtura that  
8 worker exposure was not a problem. And again, I would much  
9 prefer these questions to be addressed to the people who have  
10 the most knowledge about them, and that would be Paul Thomson  
11 and John Kibbee.

12 Q. Given the fact that you have suggested PMRA Special  
13 Review was improper in your Witness Statements, I think it  
14 still remains a question that I can properly put to you.

15 So, you're not aware of the fact that, as of  
16 April 2001, the EPA was actually raising new occupational  
17 exposure concerns regarding lindane in its own review?

18 A. I'm not.

19 Q. And so you weren't involved in any of those subsequent  
20 discussions with the EPA?

21 A. I was not.

22 Q. Now, I just wanted to point out, you appeared before  
23 the Lindane Board of Review, didn't you?

24 A. Yes.

25 Q. And you addressed this October 4th, 2000, meeting

16:16 1 before the Board of Review?

2 A. Yes.

3 Q. And you will confirm that Dr. Franklin wasn't called  
4 before the Board of Review, was she?

5 A. I don't remember her being there.

6 Q. She wasn't before the Board of Review?

7 A. I said I don't recall her being there.

8 Q. So, the Board only heard your side of the story about  
9 this meeting, didn't they?

10 A. I don't even recall discussing that meeting at the  
11 Board of Review, but I may have. It's possible that I did.

12 Q. You're aware that Dr. Franklin is going to testify in  
13 this hearing?

14 A. Yes, I am.

15 Q. And she will be able to tell the Tribunal her side of  
16 the story about what was said about occupational exposure?

17 A. I'm sure she will. I would be very interested in  
18 hearing it, too.

19 Q. I would just like to move on to the Voluntary  
20 Withdrawal Agreement issues.

21 You're aware, or we know that the issue on the use of  
22 lindane on Canadian canola arose in September '97 with the  
23 Gustafson letter and the EPA's January 8, 1998, response.

24 You're aware that, in January 1998, when Canadian  
25 canola farmers heard of this, they took up the issue with

16:18 1 Gustafson?

2 A. Yes, I believe there was communication between the  
3 associations and Gustafson.

4 Q. As of January 1998, they were expressing concerns  
5 about the implications of Gustafson's letter for their access  
6 to U.S. markets?

7 A. Yes, the trade implications.

8 Q. They were concerned that they may not be able to  
9 import Canadian canola that had lindane residues in it?

10 A. Actually, the communication between Gustafson and EPA  
11 dealt with lindane-treated seed being exported from Canada into  
12 the United States. It did not deal with canola oil and canola  
13 meal. And the EPA's response to the Gustafson letter merely  
14 stated USA law that unregistered pesticides cannot be imported  
15 into the United States, and the EPA response to Gustafson did  
16 not even mention lindane.

17 And it's my impression that the Canola Council and the  
18 Canola Growers Association blew this up into something much  
19 beyond what the EPA intended. In fact, there aren't residues  
20 of lindane in canola oil, and there was no real reason or need  
21 to be concerned about the EPA or the FDA who had been  
22 presumably testing canola oil that had been shipped for 20  
23 years or more--at that point, it was 20 years, I guess, into  
24 the United States and not found any residues of lindane in  
25 canola oil. So, this thing got blown, in my view, completely

16:20 1 out of proportion to what it originally was, and that was  
2 limited to the improper importation of lindane-treated seed  
3 meant for planting into the United States.

4 Q. But in your understanding, the growers took this very  
5 seriously. The growers were concerned about potential border  
6 action to stop the imports of their canola--because of the  
7 lindane residues?

8 A. They may have, but in my view without basis.

9 And when we talk about the growers, we really should  
10 be talking about the associations that represent them. I doubt  
11 that 65,000 canola growers in Canada were concerned about  
12 border action. This was something that was at the association  
13 level, in my view.

14 Q. You mentioned that the EPA's response was not specific  
15 to lindane. Would you agree that Gustafson, in its  
16 September 1997 letter, was referring specifically to lindane as  
17 an illegal pesticide on Canadian canola oil?

18 A. I believe that's the case.

19 Q. So, the EPA was responding to a letter about lindane?

20 A. The EPA was responding in general about the illegality  
21 of importing unregistered pesticides into the United States.

22 Q. Right.

23 Could we look at that letter. Actually, this is the  
24 letter of January 12, 1998. It's Exhibit WS-2. It's number 23  
25 in the hearing bundle.

16:21 1           So, the U.S. EPA is responding to Mr.--this letter by  
2 Gustafson's subsidiary, or Chemtura's subsidiary Gustafson.

3       A.    Yes.

4       Q.    And it's saying EPA, in second paragraph, EPA's Office  
5 of General Counsel has reviewed your letter and has concluded,  
6 based on the limited information you have provided, that  
7 importation of canola seed such as you described would not be  
8 permissible under the Federal Insecticide, Fungicide and  
9 Rodenticide Act. The seed in question has been treated with  
10 pesticides that are not registered for use.

11           So, the EPA is talking about the application of U.S.  
12 pesticides legislation.

13       A.    Yes.

14       Q.    And under that legislation, a seed that's treated with  
15 an unregistered pesticide cannot be used in the United States.

16       A.    That's correct.

17       Q.    Now, you're saying the focus was on seed. Could we  
18 look at the paragraph at the bottom of that letter.

19       A.    No, the focus is on the unregistered pesticide. If  
20 I've left you with that impression, I apologize.

21       Q.    Okay.

22           The last paragraph in the letter, "Moreover, even  
23 assuming the seed was treated by a registered pesticide and the  
24 treated article exemption could apply, a pesticide tolerance  
25 (maximum residue limit) or exemption from a tolerance could be

16:23 1 necessary to avoid adulteration of food produced from such  
2 treated seed. EPA requires tolerances to be established on the  
3 amount of pesticide residues that can lawfully remain in or on  
4 each treated food commodity. Canola seed treated with a  
5 registered pesticide cannot be legally imported or otherwise  
6 distributed in the U.S. unless a tolerance or exemption from a  
7 tolerance has been established to cover residues from the  
8 pesticides that could be remain from the grown from the seed.

9           So, there they're talking about a different issue,  
10 aren't they? They're talking about the issue of residue on  
11 food or feed.

12         A. Well, I think we have to distinguish between seed  
13 being planted--seed coming into the United States with an  
14 unregistered pesticide on it, that seed being planted in the  
15 United States, and food being--and canola seed, which  
16 eventually winds up in canola oil, being crushed in the United  
17 States. I'm not sure the same standard applies if the seed is  
18 treated in Canada with a legally registered pesticide and then  
19 ultimately converted from that lindane-treated seed into  
20 lindane's crop into canola oil that the same standard applies.

21         Q. But here the EPA is not talking about imports. It's  
22 talking about residues on food grown from treated seed.

23         A. Except there were no residues.

24         Q. In your view there were no residues, but if there were  
25 residues, there would be a problem?

16:24 1 A. If there were residues, there would be a problem, but  
2 there were no residues. And the FDA had been presumably  
3 inspecting importation of canola oil for 20 years and hadn't  
4 once found a residue of lindane in canola oil.

5 Q. But under the U.S. Federal Food, Drug and Cosmetic  
6 Act, without a residue tolerance, without an MRL, any amount of  
7 the pesticide in that food or feed product would be technically  
8 illegal; correct?

9 A. I think we are talking by each other. I agree with  
10 what you just said, except there were no residues.

11 Q. Right.

12 But if there were residues--

13 A. If there were residues, it would be illegal.

14 Q. Now, just to confirm--

15 ARBITRATOR CRAWFORD: I don't like to interrupt your  
16 cross, but I'm slightly puzzled. I can't find in the EPA  
17 letter of 12 January 1998 any discussion about residues in  
18 product as distinct from seed.

19 MR. DOURAIRE de BONDY: If you look at the paragraph  
20 that's highlighted, canola seed treated with registered  
21 pesticides cannot be legally--unless a tolerance or exemption  
22 from a tolerance has been established to cover residues of the  
23 pesticides that could remain in the canola grown from the seed.

24 So, that issue is the residue on the food or feed  
25 product. What happens is that a seed is treated with the



16:26 1 pesticide. The plant grows. Whatever food product is  
2 extracted from that plant, it's transformed, but there could  
3 still be amounts of pesticide residue in that food or feed.

4           And there isn't--what the EPA is referencing here is  
5 the requirement under the Federal Food, Drug and Cosmetic Act  
6 for what's called an MRL, or maximum residue limit. Canada has  
7 a policy or a standard of I think it's 0.1 parts per million of  
8 lindane--of pesticide residue being acceptable, whereas in the  
9 United States, under that legislation, if there isn't a residue  
10 level in place, then it's in effect a zero tolerance regime.

11           Now, this is what this second paragraph in the letter  
12 is referring to. And our Expert, Dr. Goldman, actually talks  
13 about this in both of her Reports.

14           THE WITNESS: Could I address the Tribunal with a  
15 comment?

16           PRESIDENT KAUFMANN-KOHLER: Yes, of course.

17           THE WITNESS: What we are talking about, at least in  
18 my view, is this hypothetical. We are talking about a single  
19 canola seed being planted--canola seed treated with lindane  
20 being planted, growing a canola plant which has tens of  
21 thousands of seeds on it and expecting to find in those seeds  
22 residue that is going to wind up in canola oil. Theoretically,  
23 it's possible, but very unlikely.

24           BY MR. DOURAIRE de BONDY:

25           Q. Could I please turn to Exhibit WS-29, which is an

16:28 1 update on the Voluntary Withdrawal Agreement from June 24th,  
2 1999.

3 If we turn to the second page of this--

4 MR. SOMERS: I'm sorry, Mr. Douaire de Bondy, could we  
5 have hearing bundle.

6 ARBITRATOR CRAWFORD: Volume 3, Tab 99.

7 BY MR. DOURAIRE de BONDY:

8 Q. So, it's simply if we go to the next page, and the  
9 next page again, the Al Gwilliam comment, Al Gwilliam providing  
10 a lindane update. Now, if we look there, we see the second  
11 point, "no detectable lindane in refined oil, some residue  
12 found in first crush, some residue in canola meal."

13 So, Mr. Ingulli, you may not have been aware of this,  
14 but, in fact, as of the summer of 1999, lindane residue had, in  
15 fact, been found in canola meal and first crush canola oil,  
16 which would be the unrefined canola oil.

17 A. But not in the refined canola oil.

18 Q. But there were exports of canola oil unrefined and  
19 exports of canola meal to the United States; correct?

20 A. There were, but unrefined is not a food product.

21 Q. And so the--so, lindane residues were detectable in  
22 these forms of canola oil?

23 A. If Al Gwilliam is correct, I would have to agree with  
24 that. I had been told that there were no detectable residues  
25 in lindane--in canola food products coming into the United

16:30 1 States from Canada.

2 Q. Now, I want to go back to what the canola farmers were  
3 doing. You are aware that CCC began to hold industry meetings  
4 in the spring of 1998 about lindane?

5 A. Spring of '98, probably.

6 Q. So, the meetings were to discuss the canola industry's  
7 reliance on lindane?

8 A. I don't know.

9 Q. You don't know that they met to discuss the threat  
10 Gustafson's tipoff posed to--

11 A. I suspect--yes, I suspect they did, yes.

12 Q. And the potential for enforcement action under U.S.  
13 pesticides legislation?

14 A. Again, my opinion is the enforcement action would have  
15 been against the lindane-treated seed as opposed to food  
16 products coming in from Canada.

17 Q. But you know that that was a canola grower concern?

18 A. It was a concern, yeah.

19 Q. And you're aware that Canola Council of Canada began  
20 seeking industry approval for a voluntary phase-out of lindane  
21 use on Canadian canola?

22 A. There was--there was that effort made. My  
23 understanding that the PMRA and the Canola Council devised a  
24 proposed withdrawal plan, and that plan was presented to  
25 Registrants in November--in November of 1998.

16:32 1 Q. Well, actually, you're aware that it was the Canola  
2 Council that came to meet the Chemtura Canada in September of  
3 1998, not the PMRA?

4 A. I--I--I don't know.

5 Q. Now, I just wanted to talk a bit about the CCC's  
6 concerns about lindane. You heard us talk this morning about  
7 mounting restrictions on lindane use as of the late 1990s.  
8 Canadian canola farmers were aware of these mounting concerns,  
9 weren't they?

10 A. I know Canola Council was concerned about it. I don't  
11 know what the 65,000 grower level that there was a great deal  
12 of concern.

13 Q. Would you expect a large agricultural industry  
14 association to be concerned about the status of the pesticides  
15 its growers used?

16 A. I would, although I think there is quite an  
17 inconsistency that the growers and the associations that  
18 represented them would have this great concern, and yet fully  
19 subscribed to using the product for three, four more years.

20 Q. And that was use of the product during the voluntary  
21 phase-out?

22 A. Yes.

23 Q. So, you don't know what they would have done if the  
24 Voluntary Agreement hadn't been put in place?

25 A. I don't know what they would have done. I think it

16:33 1 was mentioned by Mr. Somers that perhaps they would have spoken  
2 with their pocketbooks and stopped using lindane, although I  
3 think that's highly improbable.

4 Q. So, Mr. Somers is giving evidence in this matter?

5 A. I'm just quoting his Opening Statement.

6 Q. Presumably that was supposed to be based on some form  
7 of evidence; I'm not sure about that.

8 A. I will listen to the Opening Statement again.

9 Q. Canola farmers were aware that the existing lindane  
10 registrations were at risk in the scientific reviews?

11 A. Well, they were aware that there was a scientific  
12 review going on. I don't know that they were in a position to  
13 predict the outcome.

14 Q. You're not aware--are you aware of the fact that the  
15 World Wildlife Fund was planning on issuing a report on canola  
16 in the fall of 1998 that would single out the canola industry's  
17 reliance on lindane?

18 A. I had heard that World Wildlife Fund was involved.  
19 That's their business.

20 Q. And you're aware that canola is primarily marketed as  
21 a healthy product?

22 A. Yes.

23 Q. So, public perception that canola contained a toxic  
24 chemical could affect that image?

25 A. It could affect that image, but I don't see that has

16:35 1 any bearing on the Special Review process.

2 Q. Well, I'm not talking about that. I'm talking about  
3 the motivations of the Canadian canola farmers.

4 A. Um-hmm.

5 Q. And you would agree that the effect of using a toxic  
6 pesticide, or a public perception that oil contained a toxic  
7 chemical would affect the image of their product, and that  
8 would be of concern to the Canadian canola farmers?

9 A. It's a concern, yes, but it's a concern that could be  
10 addressed as the toxic pesticide, as you call it, wasn't  
11 present in the food product.

12 Q. I would just like to consider some issue--aspects of  
13 the PMRA's legislative authority. You would agree that PMRA  
14 has the legislative authority to process pesticide label  
15 changes.

16 A. Yes.

17 Q. In fact, when a Registrant writes saying it wishes to  
18 remove a certain use, PMRA has the duty to process that  
19 request?

20 A. Yes.

21 Q. You would agree that PMRA also has regulatory  
22 responsibility in Canada to process new product registrations?

23 A. Yes.

24 Q. And you understand PMRA has common law discretion to  
25 determine appropriate enforcement targets?

16:36 1 A. Yes.

2 Q. And PMRA also has the ability to seek to work with  
3 other national regulators to promote harmonization of  
4 registration standards?

5 A. Yes.

6 Q. Now, one of the things that the Claimant has suggested  
7 is that growers stopped buying lindane because some sort of--of  
8 some sort of threat of fines by PMRA, but Chemtura's own  
9 documents confirm there was no fear of any threat, don't they?

10 A. I'm only aware of a document that was put out by the  
11 CSTA, I believe, the seed treatment association, Fact Facts  
12 alerting members to possible finds of, I think, the Fast Facts  
13 of \$200,000, which is inconsistent with the 250 that has been  
14 reported elsewhere. But no, I'm not aware of internal  
15 documents that say there was no threat.

16 Q. All right. Well, perhaps we could take a look at  
17 that. Let's take a look at Annex B-32, which is Document  
18 Number 166. And if I can--it turns out in Volume 5 of the  
19 hearing bundle. Sorry, B-32. It would be an exhibit to Mr.  
20 Ingulli's first Affidavit. B-32.

21 Right, this is it.

22 So, this is an e-mail from Mr. Vaughan of Gustafson.  
23 He was an employee of Gustafson; is that correct?

24 A. I don't know him personally.

25 Q. But--

16:38 1 A. I assume that.

2 Q. His email says "gustafson.com," doesn't it?

3 A. So, I would acknowledge that he was an employee.

4 Q. Right.

5 And it's dated Friday, January 12, 2001.

6 A. Yes.

7 Q. And Mr. Vaughan is reporting about a conversation with  
8 Ross Pettigrew.

9 You're aware that Mr. Pettigrew was a PMRA enforcement  
10 officer. Are you aware of that?

11 A. I'm aware of that he's an enforcement officer, yes.

12 Q. Or Compliance Officer?

13 A. Excuse me. Compliance Officer.

14 Q. Right.

15 And he's reporting back, "I finally spoke to Ross  
16 Pettigrew about this, and he told me the following: The PMRA  
17 does have the authority to impose fines, but they probably  
18 would not. Generally, they only take people to court over  
19 things that intentionally cause harm or are dangerous."

20 Were you aware of this when you were suggesting that  
21 PMRA was threatening fines?

22 A. I wasn't--you mean today?

23 Q. Or when you made those statements in your affidavits,  
24 in your Witness Statements.

25 A. My view is that what Mr. Vaughan and what



16:40 1 Mr. Pettigrew think is not what's important here. What's  
2 important here is what the canola seed treating companies think  
3 and what the Councils think, and they think there is a threat  
4 of fines, or they wouldn't be putting out publications to their  
5 members saying they think there is a threat of fines.

6 Q. Mr. Pettigrew is a PMRA enforcement officer; you  
7 agreed? Or Compliance Officer.

8 A. Compliance Officer, yeah.

9 Q. Okay. So, the threat is not coming from the PMRA  
10 Compliance Officer, is it?

11 A. The threat is attributed to Mr. Reid, I believe, who  
12 you're not going to be producing as a witness. He was the  
13 Compliance Officer who made the comment that fines could be  
14 levied up to \$250,000, is my understanding.

15 Q. You're aware that, when asked what Canadian  
16 legislation provided, Mr. Reid explained what that legislation  
17 provided?

18 A. I'm not aware--I wasn't at the meeting where he made  
19 these statements. I don't know that the question was put to  
20 him, "What is the law?" I don't know in what context the  
21 threat of fines came up.

22 Q. All right. Why don't we look at five, point five, on  
23 this e-mail. Already at point two you see they will be  
24 focusing on making sure there are no stockpiles of product and  
25 that nobody is intentionally treating and stockpiling seed for

16:41 1 2002.

2           So, you don't have any reason to disbelieve that this  
3 is what PMRA was actually focusing on?

4           A. I'm sure that the PMRA was interested in having  
5 people, especially the manufacturers, not overproduce and  
6 stockpile for use beyond the cut-off date of July 1, 2001, so I  
7 would agree.

8           Q. Right.

9           And number five of this e-mail, the 200,000-dollar  
10 number probably came from someone asking the question, "What  
11 are the potential fines that PMRA could administer for a  
12 violation of the PCP Act?" He felt that the 200,000-dollar  
13 number was put out as a motivation to get lindane used up and  
14 is not realistic.

15           And Mr. Vaughan goes on to say, "My general feeling  
16 from talking to Ross is that there won't be a big problem if  
17 everyone does their best to get the lindane used up. There may  
18 be a problem if it looks like anyone is stockpiling product or  
19 treated seed."

20           So, in fact, Chemtura knew at the time, it was quite  
21 clear that PMRA wasn't going to take enforcement action unless  
22 seed treaters or growers deliberately hoarded or stockpiled  
23 lindane seed treatment past the date of the phase-out?

24           A. It appears to me from reading number five that  
25 Mr. Pettigrew was speculating. He says the number 200,000

16:42 1 probably came from someone asking the question. He wasn't at  
2 the meeting. And while I don't doubt this is what the man  
3 said, I think he's speculating on what went on at that meeting.

4 Q. And you weren't at that meeting, either?

5 A. I wasn't at that meeting, either.

6 And again, I repeat, in my view, it doesn't matter  
7 what Mr. Pettigrew said--thinks or what Gustafson thinks.  
8 It's--what matters is what the growers and the associations  
9 that represent the growers think, and they think there is a  
10 threat of fines, and that resulted in substantial reduction in  
11 the sale of Lindane Products specifically attributable to the  
12 threat of fines because the seed companies did not want to wind  
13 up at the cut-off date with an inventory of treated seed that  
14 they would then have to dispose of as hazardous waste.

15 Q. Mr. Ingulli, you're aware of the fact that there was a  
16 drop in acreage between 1999 and 2001?

17 A. I'm aware that there was a drop from approximately  
18 12 million acres to 9 million acres, which is a 25 percent  
19 drop.

20 Q. And that drop--sorry.

21 A. And over that same period, Chemtura's or Crompton's  
22 lindane sales dropped by 70 percent.

23 So, almost three times--our sales dropped almost three  
24 times as much as the acreage drop, and I attribute that  
25 directly to the threat of fines.

16:44 1 Q. Now, when you are talking about a drop in the amount  
2 of sold product, you're talking about in the 2001 period  
3 specifically?

4 A. Right.

5 Q. But, in fact, in the 2001 period, you're aware that  
6 all of the Canadian canola was still treated with lindane?

7 A. Yes.

8 Q. And so the product that was actually put in the ground  
9 in that year was treated with lindane?

10 A. Yes.

11 Q. So, when you talk about a drop in the amount of seed  
12 sold, you're talking about seed for use in 2001?

13 A. For use in 2001.

14 Now, I think the issue has to do with the drop--part  
15 of the issue has to do with the drop in acres, and the  
16 purchases of the seed companies anticipating--well, I guess I'm  
17 getting confused in my thinking.

18 Go ahead with your questioning.

19 Q. Well, just going back to your response, the--

20 A. Unless sales fell off also in 2000 to some extent, but  
21 go on.

22 Q. You're aware that Chemtura in its submissions said  
23 that they have suffered no loss of sales in 2000?

24 A. I'm not. I thought our sales declined somewhat in  
25 2000.

16:45 1 Q. And, in 2001, what was planted in the ground was  
2 treated with lindane?

3 A. Yes.

4 Q. So, the amount of acreage in 2001 declined from as  
5 between 1999 and 2001 because of two issues--drought and the  
6 worldwide decline in canola prices--didn't it?

7 A. Yes, but drought is something that--seed is treated  
8 prior to the beginning of the season and prior to a grower's  
9 knowledge that there is going to be a drought. The drought  
10 happens during the growing season, so I don't--I don't see that  
11 drought could be responsible for drop in sales because no one  
12 could predict the drought until it actually happened, and by  
13 then the seed companies would have already treated the seed.

14 Q. I would just like to go to another document in the  
15 record, which is Annex R-339. It's number 148 in the witness  
16 bundle, which turns out to be Volume 4.

17 So, Annex R-339.

18 PRESIDENT KAUFMANN-KOHLER: Before you go into this,  
19 could I ask a clarification on the previous document.

20 You said that there was a 25 percent drop in acreage  
21 between '99 and 2001. You said your sales dropped by  
22 70 percent--

23 THE WITNESS: Yes.

24 PRESIDENT KAUFMANN-KOHLER: --in that period.

25 When was Helix registered? Later?

16:48 1 THE WITNESS: I don't recall the exact date. I'm  
2 sorry.

3 MR. DOURAIRE de BONDY: Helix was registered in  
4 November of 2000.

5 PRESIDENT KAUFMANN-KOHLER: 2000.

6 Now, you said earlier, in connection with another  
7 question, you needed to have an alternative product if one is  
8 terminated, and so it is unclear to me how you can explain the  
9 70 percent drop in your sales, must have been replaced by the  
10 sales of another product. Now we have understood the two  
11 Gauchos that are not the CS FL but the two other ones were not  
12 replacement products you told us, so what did the growers do to  
13 compensate for the 70 percent drop?

14 THE WITNESS: It sounds like they switched to Helix,  
15 if Helix was registered in 2002.

16 PRESIDENT KAUFMANN-KOHLER: Yes, but then we would  
17 have to see exactly how we get the chronology--whether we can  
18 get the chronology right. But we can check this with the  
19 actual dates.

20 MR. DOURAIRE de BONDY: Going back to that, Madam  
21 Chair.

22 BY MR. DOURAIRE de BONDY:

23 Q. You said, Mr. Ingulli, your understanding is the crop  
24 planted in 2001 was planted--was treated with lindane.

25 A. I guess--when I said that, I was under the impression

16:49 1 the only registered product was lindane. But if Helix was  
2 registered prior in time to be used for the 2001 season, then  
3 obviously the growers could have switched to Helix.

4 And I'm sure that John Kibbee, when he is here, will  
5 have much more--will present much more clearly the situation  
6 that I'm struggling with right now.

7 PRESIDENT KAUFMANN-KOHLER: We will ask him, then.  
8 Why don't you carry on with the question you were about to ask.

9 MR. DOURAIRE de BONDY: Sure.

10 BY MR. DOURAIRE de BONDY:

11 Q. I wanted to go to Annex 399, which is document 148 of  
12 the witness bundle. This is another Gustafson document from  
13 2000. And if you would look to--I'm sorry. I think it's the  
14 next page of the same document. Yes.

15 It's the part that says, "The canola market is also in  
16 serious trouble in Western Canada. There are some analysts  
17 predicting acreage to be as low as 9 million acres in 2001. If  
18 this is the case, the entire treated acreage will be covered  
19 with lindane-based treatments. We are completely sold out of  
20 our inventory primarily as a result of getting our key  
21 distributors to commit to the 2001 season back in 1999. As you  
22 know, we did this by forward-selling our product at 1999  
23 pricing and by providing extra incentives such as extended  
24 credit terms and allowances. If the acreage reduction scenario  
25 holds true, this will have turned out to be a wise decision."

16:52 1           So, in fact, this document is confirming that Chemtura  
2 didn't lose any lindane product sales at all in that 2001  
3 season because those sales were forward-booked, weren't they?

4       A.    That's what that document says.

5       Q.    And that's a Chemtura internal document?

6       A.    Yes.

7       Q.    And you have no reason to dispute the validity or  
8 veracity of that document?

9       A.    I don't have sales data here in front of me, so I  
10 can't dispute or agree with it.

11      Q.    Thank you.

12      A.    But I agree it is an internal document.

13      Q.    I just wanted to go back to another of the conditions  
14 of the Voluntary Withdrawal Agreement, what you have termed as  
15 "conditions." It's something in your October 27th, 1999,  
16 letter. And one of those stated--one of those you stated was  
17 that Chemtura would be granted administrative reinstatement of  
18 this product. Is that correct?

19      A.    Yes.

20      Q.    And this was conditional upon EPA issuing a tolerance  
21 for lindane use on canola.

22      A.    Yes.

23      Q.    And this was also conditional upon PMRA confirming it  
24 would--or achieving a clean result in the Special Review.

25      A.    Yes.



16:53 1 Q. Now, as of 1999, had the U.S. EPA issued a tolerance  
2 for lindane use on canola?

3 A. No, no.

4 Q. And as of 2000, had the U.S. EPA issued a tolerance  
5 for lindane use on canola?

6 A. No.

7 Q. How about 2001?

8 A. No.

9 Q. So, as of 2001, Chemtura was aware there was no  
10 tolerance?

11 A. Yes, that's correct.

12 Q. So, this condition or you stated condition for  
13 administrative reinstatement, in fact, had not been fulfilled?

14 A. That's correct.

15 Q. In fact, EPA never did issue a tolerance for lindane  
16 use on canola, did it?

17 A. No. We didn't because we abandoned our petition for  
18 registration.

19 Q. And you abandoned your petition for registration  
20 because the U.S. EPA said, "If you don't submit a voluntary  
21 withdrawal, we are going to cancel your product"?

22 A. I saw that in Lynn Goldman's testimony, but that's not  
23 my impression. My impression is that we had already lost the  
24 Canadian lindane market, which was the main driver for our  
25 attempting to get a tolerance in the United States. The EPA,

16:54 1 in their REN, was looking for additional data that would have  
2 been expensive to generate, and there was no point in  
3 generating that--incurring that expense in generating that  
4 data, particularly in light of the fact that through an  
5 acquisition of a company called Trace Chemicals, we picked up a  
6 series of products that acted as replacements for lindane in  
7 the United States where we had registrations on many crops for  
8 lindane.

9 So, the registration and tolerance became a moot  
10 point.

11 Q. And that was in 2006?

12 A. That was, I believe, 2005 or 6.

13 Q. So, as of that point you neither had registration nor  
14 tolerance lindane use on canola in the U.S.?

15 A. That's correct.

16 Q. And that was despite the fact you were seeking that  
17 registration or tolerance since 1999?

18 A. We were not focusing great resources on getting that  
19 tolerance. Our focus was getting reinstatement in Canada.  
20 There were some effort--I don't deny that--but our main focus  
21 was getting reinstatement in Canada.

22 Q. Were you involved directly in the Chemtura's efforts  
23 for seeking a registration or a tolerance in the U.S.?

24 A. Not particularly.

25 Q. So, you don't have any direct knowledge of what the

16:56 1 U.S. EPA was saying about the prospects for the Chemtura  
2 applications?

3 A. I do not, beyond what I read in Lynn Goldman's  
4 testimony.

5 Again, I would urge you to address your questions  
6 relating to the EPA registration and their position on lindane  
7 to Paul Thomson, who will have much more knowledge than I do.

8 Q. All right. I will not pursue my questions. Thank  
9 you. I'm finished with my questions.

10 PRESIDENT KAUFMANN-KOHLER: Does this end your  
11 cross-examination?

12 MR. DOURAIRE de BONDY: Yes, thank you.

13 PRESIDENT KAUFMANN-KOHLER: I thought it was just the  
14 end of one question.

15 MR. DOURAIRE de BONDY: No.

16 PRESIDENT KAUFMANN-KOHLER: Do you have any redirect  
17 questions, or would you like to confer about it?

18 MR. SOMERS: Yes, if I could just a moment, Madam  
19 Chair.

20 (Pause.)

21 MR. SOMERS: No redirect by the Claimant. Thank you,  
22 Madam Chair.

23 PRESIDENT KAUFMANN-KOHLER: Thank you.

24 Do my co-Arbitrators have questions?

25 ARBITRATOR BROWER: No.

16:58 1 ARBITRATOR CRAWFORD: Yes.

2 PRESIDENT KAUFMANN-KOHLER: Please.

3 QUESTIONS FROM THE TRIBUNAL

4 ARBITRATOR CRAWFORD: Thank you, Mr. Ingulli, for your  
5 very clear and, if I may say so, fair answers.

6 Would you characterize the PMRA's attitude to your  
7 requests in relation to lindane as basically dishonest?

8 THE WITNESS: I would characterize the process that  
9 they used as not being scientifically rigorous. I would  
10 characterize them as having a predetermined outcome for the  
11 scientific review, the predetermined outcome being the  
12 cancellation of the registrations of lindane. I would support  
13 that statement with the comment that the study that the PMRA  
14 relied on, worker exposure study, the famous Rob Dupree worker  
15 exposure study that was submitted to the PMRA after my meeting  
16 with Claire Franklin and Wendy Sexsmith, the PMRA had to  
17 know--had to know--that that study did not reflect current seed  
18 treating practice in Canada, and that the exposures that would  
19 have been reflected in that study tremendously exceeded the  
20 exposures that, in reality, were being experienced by workers  
21 in seed treatment plants in Canada, and I think it was  
22 disingenuous of the PMRA not to do a Date Call-In, saying to  
23 Crompton, "The study you have submitted is not acceptable, and  
24 please go out and generate another study."

25 Does that answer your question? If not--

17:00 1           ARBITRATOR CRAWFORD: Well, it's responsive to my  
2 question--let me put it that way--but I think I'm allowed to  
3 ask you questions.

4           THE WITNESS: Excuse me. I apologize.

5           ARBITRATOR CRAWFORD: No need.

6           No, I have no further questions.

7           ARBITRATOR BROWER: The question just asked provokes  
8 this one from me.

9           The Dupree study was submitted by your company.

10          THE WITNESS: That's correct.

11          ARBITRATOR BROWER: And you say it was outdated.

12          THE WITNESS: The study was conducted in 1992.

13          ARBITRATOR BROWER: Right.

14          THE WITNESS: And for whatever reason, the person who  
15 submitted it must not have been aware of the fact that that  
16 study did not reflect current seed treating practices in Canada  
17 as of the year 2000, when it was submitted.

18          ARBITRATOR BROWER: So that somehow your company did  
19 not realize this and, therefore, failed to call its outdated  
20 character to the attention of the PMRA to carry out an  
21 additional study?

22          THE WITNESS: We did not realize it until the Special  
23 Review was completed and we found out that occupational  
24 exposure was the focus of the Special Review and the sole basis  
25 for canceling the product. And at that point, then we began to

17:01 1 look at internally with our own scientists the findings of the  
2 PMRA to see if we agreed with those findings, and that's when  
3 we realized that the study that they base their conclusions on  
4 were--was outdated.

5 ARBITRATOR BROWER: Right, but that was all submitted  
6 by Crompton.

7 THE WITNESS: No, it isn't. Another study was  
8 submitted, called the "Korpalski study," which, again I would  
9 appreciate it if you direct these questions to the technical  
10 people, but my impression is that the PMRA applied the same  
11 excessive margin-of-safety factor in that study and came up  
12 with the same conclusion.

13 It's also my conclusion that the EPA also looked at  
14 that study and vindicated lindane as far as worker exposure is  
15 concerned, but please ask those questions to the technical  
16 people.

17 ARBITRATOR BROWER: Okay. Thank you.

18 PRESIDENT KAUFMANN-KOHLER: Maybe that's also a  
19 question for the technical people, you will tell me, but can  
20 you just explain to us what the seed treatment practices are,  
21 because you said in particular they were very different in the  
22 U.K., and you said that makes a difference with respect to the  
23 protection of the workers.

24 THE WITNESS: Yes.

25 PRESIDENT KAUFMANN-KOHLER: Can you tell us in terms

17:03 1 for nonspecialists so we understand what these treatment  
2 practices are, and what type of protections are used.

3 THE WITNESS: I will do the best that I can, but again  
4 the right person to ask that question to would be John Kibbee,  
5 who is a specialist in the--in that area.

6 PRESIDENT KAUFMANN-KOHLER: I save it for him.

7 THE WITNESS: Please don't forget.

8 PRESIDENT KAUFMANN-KOHLER: You want to try to answer  
9 it nevertheless, now you're sorry that you said that. Can you  
10 say it in a few words.

11 THE WITNESS: Yes.

12 There are open systems, and there are closed systems.  
13 In an open system, the seed treatment formulation is open to  
14 the atmosphere and available to come in contact with the  
15 worker. In a closed system, everything is enclosed, as the  
16 name implies, and the seed treatment chemical is much less  
17 likely to come in contact with the worker.

18 In addition to that, it's common practice  
19 for--throughout the chemical industry, not just in seed  
20 treatment, for workers to wear gloves, to wear protective  
21 clothing, long sleeves, rubber boots, to avoid--masks to avoid  
22 dermal contact or inhalation of the chemicals.

23 And this was not a requirement, as far as I know, back  
24 in 1992, but it is a requirement now.

25 And again, please, don't forget the ask the question

17:05 1 because I think you will get a very good answer from John  
2 Kibbee.

3 PRESIDENT KAUFMANN-KOHLER: Thank you.

4 If I read in particular Mrs. Sexsmith's Affidavit, she  
5 gives her version of the facts--of many of the same facts that  
6 you have testified on, either orally or in writing. And in  
7 particular on the question of the Voluntary Withdrawal  
8 Agreement and whether the relevant terms were agreed upon in  
9 November '98 or rather in October '99, and she in particular  
10 writes that in December '98, so that's the months following  
11 this meeting on 24th of November '98 that was then confirmed by  
12 a letter of 26 of November that we have seen several times  
13 today, so in December '98 she says, "Chemtura began what turned  
14 into a year-long campaign to unilaterally change or add to the  
15 terms agreed on November 24."

16 What can you say to us about--this is one of the  
17 important issues we have to resolve here; right?

18 THE WITNESS: Uniroyal, or Crompton, the Claimant,  
19 contends that no agreement was reached at the November 24th  
20 meeting. I personally questioned Rob Dupree, who was one of  
21 the attendees from our company at that meeting, whether or not  
22 he or the other attendee agreed to anything at that meeting.  
23 His response was, "No, we did not agree to the terms and  
24 conditions of the Voluntary Withdrawal Agreement as proposed by  
25 the CCGA."



17:07 1           Furthermore, no one at that meeting from my company,  
2 from Crompton, was authorized to agree to withdraw the  
3 company's most profitable product in Canada. There were only  
4 two people in the entire corporation with the authorization to  
5 make that decision: That was me and the CEO of the company.

6           As early as two days after the November 24th meeting,  
7 a letter was sent, outlining conditions under which Crompton  
8 would consider a voluntary, quote-unquote, voluntary  
9 withdrawal. So, only two days after that meeting, already  
10 conditions were being surfaced. Neither side, neither the  
11 plaintiff or the defendant in this case has produced any  
12 documents, any signed document, demonstrating that the  
13 company--that Crompton agreed on November 24th to anything.

14           And, to me, it only makes sense that a company that is  
15 being asked to surrender its most profitable product for no  
16 compensation would only agree to do that under the terms and  
17 conditions that was satisfactory to it as opposed to terms and  
18 conditions that were manufactured by an industry association or  
19 by the PMRA.

20           So, our view is that absolutely no agreement was  
21 reached. There are many references from the PMRA in the record  
22 that show that, for instance, the term that "the company agreed  
23 in principle," which to me implies there is yet more to come,  
24 if it's just an agreement in principle.

25           PRESIDENT KAUFMANN-KOHLER: Yet the principle is

17:09 1 agreed when you have an agreement in principle. The rest is  
2 not agreed, but the principle is agreed. How should I  
3 understand this?

4 THE WITNESS: Perhaps the principle of voluntary  
5 withdrawal was recognized, but not without terms and conditions  
6 that had to be agreed to. And if the terms and conditions  
7 weren't agreed to, there was no agreement. Even in the ROU,  
8 which refers to this Voluntary Withdrawal Agreement, it talks  
9 about the Registrants being asked to voluntarily withdraw, not  
10 that they agreed to voluntarily withdraw, but that they were  
11 asked to voluntarily withdraw.

12 PRESIDENT KAUFMANN-KOHLER: We have seen a number of  
13 documents where they raised this.

14 THE WITNESS: There was no final agreement. There was  
15 no final agreement until I put my signature to it in October of  
16 1999, and that agreement was acknowledged in writing by  
17 Dr. Franklin in a letter to me, saying, "We accept the terms  
18 and conditions of your withdrawal agreement."

19 PRESIDENT KAUFMANN-KOHLER: That was the letter of 28  
20 October, yes.

21 I'm sorry, but I have to make sure that my questions  
22 have been asked.

23 (Pause.)

24 PRESIDENT KAUFMANN-KOHLER: There is this argument on  
25 Chemtura to say that the Voluntary Agreement is not a Voluntary

17:11 1 Agreement as a forced--not a forced agreement but an  
2 imposition.

3 I have difficulty with that when I read your letter of  
4 October 27th, of October '99, and then see an answer that says,  
5 "We agree from the PMRA." Can you explain to me what is meant  
6 by this forced agreement.

7 THE WITNESS: Let me try to explain.

8 We were dealing with the Agency that basically  
9 controlled the fate of our registration, and it was my firm  
10 belief that the PMRA had an agenda to eliminate lindane--all  
11 lindane registrations and take the product completely off the  
12 market. And with that anticipation, I felt that we were better  
13 off withdrawing the product under our own terms and conditions  
14 rather than have it canceled by the PMRA, and in turn we would  
15 get the benefit of the terms and conditions that were in the  
16 withdrawal letter. As it turned out, we didn't get the benefit  
17 of the terms and conditions in the letter. For instance, the  
18 accelerated review of the replacement product, Gaucho CS, that  
19 registration request went in only four months after I signed  
20 that withdrawal letter--four months--and yet it took roughly  
21 double the normal amount of time for it to be registered.

22 We lost the registrations on the non-canola crops,  
23 which was part of the conditional withdrawal. Just about every  
24 term and condition in the Withdrawal Agreement was violated by  
25 the PMRA.

17:13 1           But the reason why we ultimately agreed to,  
2     quote-unquote, voluntarily withdraw the registration is the  
3     anticipation if we didn't, they would be gone anyway, and we  
4     would rather have them go under our terms and conditions than  
5     the PMRA's terms and conditions.

6           PRESIDENT KAUFMANN-KOHLER: So, it was not really  
7     forced to agree, but you were actually choosing between two  
8     evils and choosing the lesser evil?

9           THE WITNESS: The lesser of two evils.

10          PRESIDENT KAUFMANN-KOHLER: Fine. I think I have no  
11     further questions.

12          Yes, Judge Brower.

13          ARBITRATOR BROWER: We were referring to your letter  
14     October 27, 1999. You just mentioned one of the benefits of  
15     that that you did not get was accelerated review hopefully  
16     approval of replacement or substitute products. Can you show  
17     me where that is in that letter.

18          THE WITNESS: Actually, it isn't in that letter. It's  
19     not in that letter. I apologize.

20          ARBITRATOR BROWER: Okay, because I don't see it.

21          THE WITNESS: The expectation for an accelerated  
22     review was based on correspondence and discussions with the  
23     PMRA that preceded this letter, and I apologize. I misspoke  
24     when I said it was in the letter. It's not.

25          ARBITRATOR BROWER: Okay. Well, that leaves us with a

17:15 1 question of what is the status of the situation on that point.  
2 You feel that is a legitimate expectation, although not an  
3 agreement, or how would you describe it?

4 THE WITNESS: The accelerated registration?

5 ARBITRATOR BROWER: Right.

6 THE WITNESS: It wasn't a point that was acknowledged  
7 in writing by Claire Franklin when she accepted the letter that  
8 I wrote, but there is much documentation in the materials that  
9 you have where the PMRA commits to facilitate accelerated  
10 registrations of replacement products. There must have been  
11 enormous pressure on the PMRA to register a product to replace  
12 lindane. They were going through a process where they were  
13 asking Registrants to withdraw their products that were needed  
14 by canola growers in Canada to treat a devastating pest, the  
15 flea beetle, without having a registered product to hand the  
16 growers so that they could protect themselves from the damage  
17 of the flea beetle.

18 So, there must have been enormous pressure, and I can  
19 understand why. They would say they would facilitate the  
20 registration of replacement products. They would have  
21 been--there would have been tremendous pressure, political  
22 pressure, from representatives of the growing Provinces to get  
23 those registrations through as quickly as possible.

24 ARBITRATOR BROWER: And you say the request for  
25 registration of the Gaucho 01 product, if I could call it that,

17:16 1 was submitted within four months of October 27?

2 THE WITNESS: That's right. I think it was--was it  
3 March? I think it was March, I think, so the letter was  
4 written in October, so it was little more than four months.

5 ARBITRATOR BROWER: And when was Helix approved again?

6 THE WITNESS: Helix, what was the date? It was 2000,  
7 I think. You had said the date previously.

8 MR. DOURAIRE de BONDY: It was approved after having  
9 been submitted in November 1998. It was approved--it was  
10 submitted in 1998 and approved in November of 2000.

11 ARBITRATOR BROWER: All right. And--okay. All right.  
12 I think I understand the situation.

13 THE WITNESS: Thank you.

14 PRESIDENT KAUFMANN-KOHLER: Fine. So, if there are no  
15 further questions, I would like to thank you very much for your  
16 answers.

17 THE WITNESS: Thank you for the opportunity.

18 PRESIDENT KAUFMANN-KOHLER: That closes your  
19 examination.

20 THE WITNESS: Thank you.

21 (Witness steps down.)

22 PRESIDENT KAUFMANN-KOHLER: We need to have the times  
23 for each Party before we suspend.

24 SECRETARY VINUALES: So far, the Claimant has used one  
25 minute, and the Respondent has used one hour and 27 minutes.

17:18 1               PRESIDENT KAUFMANN-KOHLER:  So, you still have plenty  
2 of time.

3               Tomorrow morning, we will start with Mr. Thomson, then  
4 we will hear Mr. Kibbee, and in the afternoon Mr. Johnson and  
5 Mrs. Chaffey.  Is that right?  Fine.

6               So, we can close for the day.  Thank you very much.

7               MR. DOURAIRE de BONDY:  Thank you.

8               (Whereupon, at 5:18 p.m., the hearing was adjourned  
9 until 9:00 a.m. the following day.)

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## CERTIFICATE OF REPORTER

I, David A. Kasdan, RDR-CRR, Court Reporter, do hereby certify that the foregoing proceedings were stenographically recorded by me and thereafter reduced to typewritten form by computer-assisted transcription under my direction and supervision; and that the foregoing transcript is a true and accurate record of the proceedings.

I further certify that I am neither counsel for, related to, nor employed by any of the parties to this action in this proceeding, nor financially or otherwise interested in the outcome of this litigation.

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DAVID A. KASDAN