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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

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:
In the Matter of an Arbitration :
Between: :
:
CHEMTURA CORPORATION :
(formerly Crompton Corporation), :
:
Claimant/Investor, :
:
and :
:
THE GOVERNMENT OF CANADA, :
:
Respondent/Party. :
:
----- -x Volume 6

HEARING ON THE MERITS

Tuesday, September 8, 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 9:00 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 morning.

3 MANUEL ABDALA and ANDRES CHAMBOULEYRON, CLAIMANT'S WITNESSES,

4 CALLED

5 PRESIDENT KAUFMANN-KOHLER: Can I ask someone to close  
6 the door, as usual.

7 Will there be two or three of you testifying?

8 THE WITNESS: (Mr. Abdala) Yes.

9 THE WITNESS: (Mr. Chambouleyron) Two.

10 PRESIDENT KAUFMANN-KOHLER: Yes? Two? No, because I  
11 have three people on the Reports.

12 THE WITNESS: (Mr. Abdala) Yes, but Professor Pablo  
13 Spiller could not be here today.

14 PRESIDENT KAUFMANN-KOHLER: Good.

15 So, is everybody ready to start, then? Yeah?

16 Good. For the record, can I ask you to confirm that  
17 you're Manuel Abdala?

18 THE WITNESS: (Mr. Abdala) That's right. My name is  
19 Manuel Abdala.

20 PRESIDENT KAUFMANN-KOHLER: And can I ask you to  
21 confirm that you're Andres Chambouleyron?

22 THE WITNESS: (Mr. Chambouleyron) Yes, I am.

23 PRESIDENT KAUFMANN-KOHLER: Thank you.

24 You have given two Expert Reports, and as Experts you  
25 are under a duty to make only such statements that are in

09:01 1 accordance with your most sincere belief.

2 Can I ask one of you to read into the record the  
3 Expert declaration that is in front of you, and you will do  
4 that--the one who does it on behalf of the two of you. Is that  
5 acceptable?

6 THE WITNESS: (Mr. Chambouleyron) Yeah, sure.

7 I'm aware that I'm heard as an expert witness in this  
8 arbitration and that I'm under a duty to make only such  
9 statements which are in accordance to my sincere belief.

10 PRESIDENT KAUFMANN-KOHLER: Thank you.

11 And Mr. Abdala, you confirm this?

12 THE WITNESS: (Mr. Abdala) Yes, I confirm this.

13 PRESIDENT KAUFMANN-KOHLER: Good.

14 You have been signing the Report with three  
15 signatures? Now, how will you answer the questions? Have you  
16 divided up certain issues, or will you decide as we go along?

17 THE WITNESS: (Mr. Abdala) No, we have done a joint  
18 Report in both our cases, both the first and the second  
19 Reports, so we are prepared to testify jointly. We have not  
20 any division of labor here in the Reports.

21 PRESIDENT KAUFMANN-KOHLER: And in the examination?

22 THE WITNESS: (Mr. Abdala) And in--for examination as  
23 well.

24 PRESIDENT KAUFMANN-KOHLER: Good. So, whoever wants  
25 to answer will answer. Is that acceptable to everyone here?



09:02 1 MS. SHAKER: Madam Chair, I'm the one who is going to  
2 be cross-examining these gentlemen. I'm wondering if it may be  
3 more efficient and more effective for the Tribunal as well as  
4 me being able to conduct this cross if one of the Experts  
5 responds to the questions primarily, and if that Expert feels  
6 that he can't respond to a particular question, he can defer it  
7 to the other, but I think it may make it much easier for the  
8 cross to proceed effectively and efficiently if I'm dealing  
9 with one person only, especially since so many of the questions  
10 follow from the previous one and there is a flow to my  
11 questions.

12 PRESIDENT KAUFMANN-KOHLER: Let's see what is your  
13 view.

14 THE WITNESS: (Mr. Abdala) My recommendation would be  
15 that when you do cross-examination that you can ask us  
16 questions, and the one that is best prepared will respond, and  
17 you can continue with that Expert if you have like the same  
18 line of questioning. I think that should be practical for  
19 everybody.

20 PRESIDENT KAUFMANN-KOHLER: It's not the first time I  
21 hear you, so maybe what you could do, Mr. Abdala, is take the  
22 lead; and, if you're not the one to answer, you can defer to  
23 your colleague. Would that be acceptable?

24 THE WITNESS: (Mr. Abdala) That would be acceptable on  
25 our end as well.

09:03 1 PRESIDENT KAUFMANN-KOHLER: Thank you.

2 So, then, I would like to turn to Mr. Somers for your  
3 introductory questions, please.

4 MR. SOMERS: Thank you, Madam Chair.

5 DIRECT EXAMINATION

6 BY MR. SOMERS:

7 Q. Good morning, gentlemen. My only question for you  
8 this morning is, do you affirm and adopt the statements the  
9 expert reports that you filed in these proceedings?

10 A. (Mr. Abdala) Yes.

11 A. (Mr. Chambouleyron) Yes.

12 Q. Thank you.

13 PRESIDENT KAUFMANN-KOHLER: Fine. So now I can turn  
14 to you, please.

15 CROSS-EXAMINATION

16 BY MS. SHAKER:

17 Q. Good morning. I'm counsel for Government of Canada.  
18 My name is Yasmin Shaker, and as you know, I will be asking you  
19 a few questions, so my understanding is I will be primarily  
20 addressing my questions to Mr. Abdala.

21 MR. SOMERS: With apologies, I'm sorry to interrupt,  
22 my fault. I have omitted to submit an errata sheet in  
23 connection with the two Reports, a brief two-page document. I  
24 just wanted to make sure counsel had those before they began  
25 their examination.

09:05 1           PRESIDENT KAUFMANN-KOHLER: Should you not ask the  
2 Experts whether they confirm these corrections, which I  
3 understand this sheet is about.

4           Do we have more copies?

5           BY MR. SOMERS:

6           Q. Further to my previous question to you, gentlemen, I  
7 just wanted to ask you whether you affirm the Reports as  
8 corrected, obviously, by the errata sheet that has just been  
9 circulated.

10          A. (Mr. Abdala) Yes. I apologize. I forgot to mention  
11 that we had detected in preparation for these hearings some  
12 clerical errors in the first Report, and one minor mistake on  
13 the second Report as well, and so we have prepared these errata  
14 sheets for the record. These are corrections that have no  
15 impact on our conclusions on damages, but we just wanted to get  
16 the record straight for those mistakes.

17           PRESIDENT KAUFMANN-KOHLER: Thank you.

18           So, now, it is really your turn.

19           BY MS. SHAKER:

20          Q. Mr. Abdala, when were you first retained to work on  
21 this case?

22          A. (Mr. Abdala) We were approached in May 2007, and we  
23 were retained in November 2007.

24          Q. So, when did you begin first conducting your work on  
25 this case?

09:07 1 A. (Mr. Abdala) We began mostly in first week of  
2 December, last week of November of 2007.

3 Q. And you produced your first Report on June 2nd, 2008?

4 A. (Mr. Abdala) That's correct.

5 Q. I should ask that you--you do have both of your  
6 Reports in front of you to access as well as the witness  
7 bundle?

8 A. (Mr. Abdala) I don't have them here.

9 Q. Can we get a copy of both of the Reports, please.  
10 And, in fact, it would be useful to have Navigant's  
11 Reports, as well.

12 Are they all there?

13 A. (Mr. Abdala) Yes, they are right now.

14 Q. Okay. So, you produced your first Report on June 2nd,  
15 2008; correct?

16 A. (Mr. Abdala) Yes.

17 Q. And the second Report on May 15, 2009?

18 A. (Mr. Abdala) That's correct.

19 Q. And there are three authors of these Reports?

20 A. (Mr. Abdala) Yes.

21 Q. And they are yourself, and I apologize for not being  
22 able to pronounce Andres Chambouleyron?

23 A. (Mr. Chambouleyron) Yes, that's correct.

24 Q. And Pablo Spiller?

25 A. (Mr. Abdala) Yes.

09:09 1 Q. And so you all contributed to the Report?

2 A. (Mr. Abdala) Yes.

3 Q. And you all had a role in writing the Report?

4 A. (Mr. Abdala) Yes.

5 Q. And what role did Mr. Spiller have in writing the  
6 Report?

7 A. (Mr. Abdala) The same role as Dr. Chambouleyron and  
8 myself. We conducted our analysis jointly, and we wrote the  
9 Report jointly.

10 Q. Mr. Spiller is not testifying at this hearing; is that  
11 right?

12 A. (Mr. Abdala) That's correct.

13 Q. Despite his role in writing the Report?

14 A. (Mr. Abdala) Yes.

15 Q. Is there any particular reason he's here to testify?

16 A. (Mr. Abdala) No, no particular reason he couldn't be  
17 here today.

18 Q. But you'll be able to respond to all the questions  
19 regardless?

20 A. (Mr. Abdala) Absolutely.

21 Q. Okay. You based your Damages Assessment on a series  
22 of assumptions given to you by the Claimant; is that correct?

23 A. (Mr. Abdala) No, that's not correct. We were given  
24 instructions, not assumptions. These are different things.

25 Q. Okay. We can look at the choice of that word in a

09:10 1 moment.

2 Can you turn to Tab 1 of your Witness Bundle, please.

3 Is this the letter that sets out your instructions?

4 A. (Mr. Abdala) Yes.

5 Q. Although I'll note that it says in the third line, "We  
6 have asked you to make the following assumptions."

7 Do you see that?

8 A. (Mr. Abdala) Yes, I see that.

9 Q. This--

10 A. (Mr. Abdala) If I can explain that, we take the whole  
11 letter as an instruction letter.

12 Q. Sure, which includes some assumptions to me.

13 A. (Mr. Abdala) The difference is that sometimes for  
14 economists there were assumptions mean things that we assume  
15 from our field of expertise for valuation damage purposes. For  
16 us this is an instruction letter with the legal instructions as  
17 to the legal aspects of the case.

18 Q. Okay. Now, this letter is by Claimant's counsel to  
19 you, and it's dated May 28, 2008.

20 A. (Mr. Abdala) Yes.

21 Q. And when was the first Report completed again?

22 A. (Mr. Abdala) It was June 2, 2008.

23 Q. So, this letter dated May 28, 2008, was given to you  
24 five days before the first Report was completed?

25 A. (Mr. Abdala) Yes, that's correct.

09:11 1 Q. But I'm assuming it didn't take you five days to do  
2 all the work in the first Report?

3 A. (Mr. Abdala) No, Obviously not. And if you read the  
4 first paragraph of the letter, it indicates that since  
5 November 7, 2007, counsel to Claimant has been--asked us to  
6 provide an independent--an objective Assessment of damages, and  
7 all these instructions we had received and we had been  
8 discussed with counsel since the beginning of our engagement.

9 Q. And so, why is this letter dated just five days before  
10 the Report if these instructions have been coming to you at a  
11 much earlier time?

12 A. (Mr. Abdala) Well, the instructions that we receive  
13 were just put in written form because, although we had been  
14 instructed verbally, we asked counsel specifically to put down  
15 all the instructions that they were given throughout the course  
16 of our engagement in a written letter, and so they did it at  
17 the very last moment.

18 Q. "At the very last moment." Were they clarifying the  
19 instructions then?

20 A. (Mr. Abdala) I'm sorry? What do you mean by  
21 "clarify"?

22 Q. Were they clarifying instructions that you had been  
23 given over the course of several months?

24 A. (Mr. Abdala) I'm not sure I understand the question.

25 Q. I'm just wondering why you needed them to be written

09:13 1 down at the very last minute.

2 A. (Mr. Abdala) Well, I didn't ask for them to be written  
3 down at the very last minute. It happened that it was at the  
4 very last minute because we, as Experts, thought that for this  
5 case it was important to have it in a document what were the  
6 instructions that we had been receiving throughout the course  
7 of the engagement.

8 Q. Is it typical that you ask for such a letter so close  
9 to the deadline of a report?

10 A. (Mr. Abdala) Sometimes I ask for them much sooner, but  
11 sometimes I get them sooner. Sometimes I get them close to the  
12 date of the Report.

13 Q. Did you provide counsel with any content for this  
14 letter?

15 A. (Mr. Abdala) No.

16 Q. So, they gave you these instructions themselves?

17 A. (Mr. Abdala) Absolutely.

18 Q. Do you feel the instructions were unclear before the  
19 letter, just to clarify?

20 A. (Mr. Abdala) No.

21 Q. Okay. Let's look at this letter a little bit more  
22 closely, Tab 1 once again. I want to go through it quite  
23 carefully because it's a pretty dense document, so bear with me  
24 here.

25 So, point one asks you to assume liability for all the



09:14 1 alleged breaches; correct?

2 A. (Mr. Abdala) Yes.

3 Q. And then on the other side, points two to six of the  
4 letter deal with the but-for assumptions you were given in this  
5 case; is that correct?

6 A. (Mr. Abdala) Well, again, I would call it  
7 instructions, but, yes, they do have an impact on the but-for  
8 scenario.

9 Q. And point two asks you to assume that absent Canada's  
10 measures, the PMRA would have completed the Special Review by  
11 late 2000, and Chemtura would have exercised the option to  
12 reintroduce Lindane Products into the market. Correct?

13 A. (Mr. Abdala) Yes.

14 Q. So, first, there is the assumption that the Special  
15 Review would have been positive; is that right?

16 A. (Mr. Abdala) Yes, that's the underlying instruction.  
17 Yes.

18 Q. And secondly, that it would have been completed by  
19 late 2000; is that right?

20 A. (Mr. Abdala) That's correct.

21 Q. Okay. Let's look at number three. Now, it's a long  
22 one, so I'm going to go through it sentence by sentence.

23 The first sentence, you're asked to assume that state  
24 that, absent Canada's measures, Chemtura would not have  
25 voluntarily discontinued its efforts to pursue registration for

09:15 1 Lindane Products for canola use in the U.S.; correct?

2 A. (Mr. Abdala) Yes.

3 Q. And the second line that follows gives an explanation  
4 as to why this discontinuance occurred by saying, "Chemtura  
5 withdrew its application for registration of lindane for canola  
6 and re-registration of other lindane uses in the U.S. because  
7 of PMRA's decision to terminate lindane use on canola seed  
8 altogether in early 2001, and on all other crops in 2002."

9 Is that right?

10 A. (Mr. Abdala) Yes.

11 Q. And the sentence that follows states, "In the absence  
12 of Canada's measures, Chemtura would have successfully obtained  
13 a tolerance for lindane for canola products from the U.S. EPA."

14 Correct?

15 A. (Mr. Abdala) Yes.

16 Q. So, here you were asked to assume two further points,  
17 really, the first being in the absence of Canada's measures  
18 Chemtura would have continued its attempts to get a tolerance;  
19 correct?

20 A. (Mr. Abdala) Yes.

21 Q. And, secondly, that this continuation of efforts would  
22 have resulted in the U.S. EPA actually granting such a  
23 tolerance; correct?

24 A. (Mr. Abdala) That's correct.

25 Q. And this assumption goes further and tells you when

09:16 1 that would have happened by early 2003, and the full  
2 registration or continued tolerance by 2007; correct?

3 A. (Mr. Abdala) Yes.

4 Q. And, finally--this is a long one--this point ends with  
5 the assumption that this, in turn, would have allowed Crompton  
6 to resume sales of Lindane Products to Canadian canola growers  
7 in time for the 2003 seeding season.

8 Is that right?

9 A. (Mr. Abdala) Yes, I guess.

10 Q. So, those are all the assumptions related to point  
11 three, or the "instructions" as you'd like to call them?

12 A. (Mr. Abdala) That's correct.

13 Q. Okay. Point number four asks you to assume that  
14 PMRA's completion of a fair and unbiased Special Review by late  
15 2000 would have allowed Chemtura to continue to manufacture and  
16 sell Lindane Products for non-canola crops as these crops  
17 involve no trade disputes with the U.S.

18 Right?

19 A. (Mr. Abdala) Yes.

20 Q. Okay. Let's turn to point five, which reads, "EPA's  
21 July 2006 Addendum to its 2002 RED, Re-registration Eligibility  
22 Decision, followed a voluntary withdrawal from the U.S.  
23 registration process by lindane product Registrants."

24 Is that right?

25 A. (Mr. Abdala) Yes.

09:17 1 Q. And then Chemtura's withdrawal was occasioned by, A,  
2 the termination of the lindane product in Canada, and B, the  
3 relative cost of continuing to comply with information requests  
4 within the registration process.

5 Is that right?

6 A. (Mr. Abdala) Yes.

7 Q. And then you were asked also to assume, but-for this  
8 termination, Chemtura would have pursued registration and/or  
9 tolerance.

10 A. (Mr. Abdala) Yes.

11 Q. And that when Chemtura did pursue this registration,  
12 it should have resulted in the issuance of lindane product  
13 registrations or lindane tolerances; correct?

14 A. (Mr. Abdala) That's correct.

15 Q. And then finally, in point six, you were asked to  
16 assume that such a registration or tolerance would have lasted  
17 for 15 years with the EPA; correct?

18 A. (Mr. Abdala) That's correct.

19 Q. So, that would take it to the year 2022?

20 A. (Mr. Abdala) Yes.

21 Q. Okay. So, these are all the assumptions/instructions  
22 that you based your Damages Assessment on?

23 A. (Mr. Abdala) Yes, that's correct.

24 Q. Okay. Thank you for your patience with that.

25 Before I continue exploring these assumptions a little

09:19 1 bit more, I want to clarify one point first. Can you turn to  
2 Paragraph 44 of your first Report, please.

3 The second sentence here reads, "We find that the  
4 ability of Crompton and Gustafson Partnership to continue their  
5 lindane seed treatment business in Canada hinges mainly around  
6 two key factors."

7 You see that there?

8 A. (Mr. Abdala) I do.

9 Q. "A, regulatory clearance by PMRA to reintroduce  
10 Lindane Products in Canada; and, B, Resolution of any concerns  
11 Canadian canola growers would have had about the U.S. imposing  
12 import restrictions on lindane-treated canola products."

13 Is that still your position?

14 A. (Mr. Abdala) Absolutely, yes.

15 Q. Okay, and then Footnote 20 of that same paragraph adds  
16 some additional information: "We assume that without  
17 resolution of trade concerns with the U.S., Canadian canola  
18 growers would have been reluctant to switch back to Lindane  
19 Products, even if the PMRA had authorized their reinstatement  
20 in Canada by late 2000."

21 You see that as well?

22 A. (Mr. Abdala) I see that as well.

23 Q. And this, in fact, was confirmed by Mr. Zatylny in  
24 testimony in this arbitration a few days back, and you will see  
25 that if you turn to Tab 2 in your Witness Bundle, begins at

09:20 1 Line 14. He was asked a question: "Can you clarify whether or  
2 not the Canadian canola growers would have been interested in  
3 using lindane-treated seed if you were not able to export your  
4 product to the American market?"

5 And Mr. Zatylny answers: "No, they would not be  
6 interested in using the product."

7 Could you turn to Paragraph 46 of the same Report we  
8 were reading from, the first Report.

9 So, here you state, "Thus, even if Canada had fully  
10 complied with the conditions of the October 1999 Agreement, we  
11 assume that Claimant would have not been able to sell Lindane  
12 Products for canola in Canada until the U.S. EPA had either  
13 registered Crompton's Lindane Products for canola or set  
14 tolerance limits for these products so as to dissipate any  
15 potential trade concerns on the part of Canadian canola  
16 growers.

17 And I'm assuming you still agree with that as well?

18 A. (Mr. Abdala) Yes, do.

19 Q. So, the Canadian growers would have only used the  
20 product if there was also registration or tolerance for it in  
21 the U.S.; correct?

22 A. Could you repeat that question, please.

23 Q. So, having just read the previous paragraphs and  
24 Mr. Tony Zatylny's testimony, can you agree, then, that the  
25 Canadian growers would have only used the lindane product if

09:22 1 there was also registration or tolerance for it in the U.S.?

2 A. (Mr. Abdala) Yes, and that was our assumption for the  
3 period of time between July 1, 2001, and February 2003, when we  
4 were instructed that Lindane Products would be reinstated in  
5 Canada, so we have a period of time in which we had to make a  
6 decision whether even if there was, say, a positive review by  
7 the PMRA in late 2000, but yet no tolerance or registration in  
8 the U.S., what would be the reactions of the market in Canada,  
9 basically the growers and the distributors of seed treatment,  
10 to what extent they would be willing to buy Lindane Products  
11 for this particular period of time between July 1, 2001, and  
12 February 2003 for the canola business. And we had assumed that  
13 for that period of time they would not have been willing to  
14 switch back to lindane until the U.S. trade concern was  
15 dissipated.

16 Q. And that's exactly what your paragraphs say, so I  
17 appreciate that.

18 And your paragraphs also say that this would be true  
19 even if the PMRA had fully complied with its alleged  
20 commitments to the Claimant through the October 1999  
21 Agreements, as they call it?

22 A. (Mr. Abdala) Sorry, which paragraph are you referring  
23 to?

24 Q. I'm referring back to Paragraph 46.

25 A. (Mr. Abdala) Yes.

09:23 1 Q. Okay. Thank you.

2 I'm going to turn back to the instruction letter again  
3 at Tab 1, and just to focus on point number three, so here  
4 again is the assumption that absent Canada's measures, Chemtura  
5 would have continued its attempts to get a tolerance in the  
6 U.S. and that these efforts would have resulted in the U.S. EPA  
7 granting a tolerance for canola products by early 2003.

8 So--and you, in fact, at Paragraph 45 in your first  
9 Report refer to that assumption. If you turn to it, it says in  
10 the last sentence, "Thus, upon instructions by counsel to  
11 Claimant, we have assumed that, absent Canada's measures,  
12 Chemtura would have been able to obtain a tolerance for Lindane  
13 Products on canola in the U.S. by early 2003 at the latest."

14 And that's still your position, I'm assuming?

15 A. (Mr. Abdala) Yes.

16 Q. And if you turn to Paragraph 70 of your Report, here  
17 you have concluded that as a result of this assumption, damages  
18 for the canola line do not begin to materialize until January  
19 2003; is that correct?

20 A. (Mr. Abdala) That's for the canola business.

21 Q. Sorry, the canola business.

22 And you still agree with that?

23 A. (Mr. Abdala) I do.

24 Q. Now, instead of what you were instructed to assume in  
25 point three of the instruction letter, I'm going to give you a



09:25 1 new assumption to consider, all right?

2 A. (Mr. Abdala) Fair enough.

3 Q. Assume that no U.S. tolerance for lindane use on  
4 canola was possible between the years 2002 and 2006, okay?

5 A. (Mr. Abdala) I'm with you.

6 Q. And if you turn to Tab 3 of your Witness Bundle, here  
7 we have Mr. Johnson testifying in this arbitration, and if you  
8 start at Line 20, question is, "Okay. So, in other words,  
9 given the three studies, the Plant Metabolism Study, the  
10 Anaerobic Aquatic Metabolism Study, the Seed Leaching Study,  
11 this FQPA issue, no tolerances were actually possible between  
12 2002 and 2006; is that right?"

13 And Mr. Johnson answers, "Yes, it is for full  
14 tolerances."

15 So, based on this new assumption, I'm asking you if  
16 Chemtura could have resumed sales for Lindane Products to  
17 Canadian canola growers in 2003.

18 A. (Mr. Abdala) Let me clarify that, what your  
19 assumptions are. I mean, you are asking me first to have a  
20 hypothetical that would there would be no registration or  
21 tolerance in the U.S. during 2002 and 2006. Is that your  
22 assumption?

23 Q. That's right.

24 A. (Mr. Abdala) Well, we have not conducted such a  
25 Report. I mean, obviously we discussed it and analyzed it

09:27 1 internally, but we have not tried to analyze exactly what would  
2 have happened to the lindane business in Canada if there would  
3 not be any registration. I mean, our first analysis on that  
4 when we discussed internally among the Experts was that it  
5 would be difficult for canola growers to feel safe using  
6 lindane if the U.S. market, which represents a significant  
7 portion of their Experts for both canola seed, canola meal, and  
8 canola oil would be jeopardized, and the first conclusion that  
9 we found that we still support is that even U.S. trade irritant  
10 issue would not be resolved, then they would be reluctant to  
11 switch back to lindane, and I think that we have an agreement  
12 among the three Experts on that conclusion.

13           Now, what we also discuss internally is that there  
14 would be alternative ways for the Canadian growers to organize  
15 themselves through a certification system. If they wanted to,  
16 say, take advantage of the lower costs that represents use of  
17 lindane in pesticides as opposed to other more expensive  
18 alternatives in a way that they could try to separate the U.S.  
19 market from the domestic market and from other markets that are  
20 having tolerance for Lindane Products, and that's part of the  
21 discussions that we had. We don't have a complete  
22 understanding as to whether that was feasible, whether that  
23 alternative was something workable.

24           Obviously we thought that if Canadian growers were  
25 really trying to--willing to keep that cost advantage, they may

09:29 1 try to pursue that, but that solution may be complicated as  
2 well.

3 So, that's--so, that's where we stop our analysis  
4 because our but-for scenario was different from the  
5 hypothetical that counsel to Canada is asking us right now.

6 Q. So, you have recognized, though, earlier that the  
7 Canadian canola growers weren't interested in using the  
8 product, and that's come directly from a former VP of the CCC,  
9 if there is no registration for it in the U.S.; correct?

10 A. (Mr. Abdala) Sorry, you lost me with the second part  
11 of your question.

12 Q. It's the exact same assumptions that you've listed in  
13 your Report that I've just reviewed with you, as well as  
14 Mr. Tony Zatylny's testimony, that the Canadian canola growers  
15 would not be interested in using lindane-based products if they  
16 could not export canola to the U.S.?

17 A. (Mr. Abdala) That's right. And as I explained, for  
18 the purposes of our damage analyses, that situation would have  
19 happened only from June 1, 2001, to February 2003, on the  
20 canola business.

21 Q. I understand that, but I'm giving you a new  
22 assumption.

23 A. (Mr. Abdala) Can I complete my answer, please?

24 Q. Sure.

25 A. (Mr. Abdala) And now counsel is giving me a newer

09:30 1 hypothetical which is suppose you never get registration in the  
2 U.S. Well, that's part of the exercise that we have not fully  
3 analyzed and we have not fully conducted because that's not our  
4 instructions for the but-for scenario. I'm just trying to tell  
5 the panel that we have discussed this internally and that we  
6 have not been able to come to a conclusion as to what would be  
7 the long-term solution if lindane was reinstated in Canada but  
8 not allowed in the U.S., and what I'm saying is that, from an  
9 economic perspective, we know that in other markets there are  
10 certification systems that you can sort out, but we don't know  
11 to what extent that is feasible in Canada, so we stop the  
12 analysis there, the internal analysis, and also obviously it  
13 was not required for the purposes of our Report.

14 Q. Okay. And that point you just made which you just  
15 made earlier as well, that is speculation on your part;  
16 correct?

17 A. (Mr. Abdala) No, it's not a speculation. It's  
18 analysis that we have done, and I'm telling the panel how far  
19 we went into that analysis and what my opinion on your  
20 hypothetical that you're asking me today.

21 Q. The transcript says, "but we don't know to what extent  
22 that would happen in Canada." I'm just wondering then, or  
23 whether it's feasible. So, you're speculating as to whether or  
24 not the Canadian canola growers would have been interested in  
25 using this product if it was banned in Canada--in the U.S.,

09:31 1 Sorry, in the U.S. I shouldn't say Canada.

2 A. (Mr. Abdala) That's not a speculation. I'm telling  
3 exactly the panel how far we could go to the analysis of your  
4 hypothetical.

5 Q. I understand the two facts that we understand, then,  
6 from your perspective is that the Canadian canola growers  
7 weren't interested in using this product unless it also had a  
8 tolerance for lindane in the U.S.; correct?

9 A. (Mr. Abdala) That's correct. And to clarify that for  
10 the purposes of our analysis, that was required for the period  
11 July 1st, 2001, and February 2003--

12 Q. That's right.

13 A. (Mr. Abdala) --on the canola business.

14 Q. That's right. That's the first point. And then I  
15 asked you to assume that no registration was possible between  
16 2002 and 2006, and then the other point you came up with was  
17 your speculation that the Canadian canola growers might have  
18 been able to do something that would have allowed them to use  
19 it, regardless of them not having registration in the U.S.

20 So, we have one fact initially. Are you suggesting or  
21 you agreeing with the premise that it was impossible or the  
22 Canadian canola growers didn't want to use it unless it had a  
23 registration in the U.S.; and then, secondly, your speculation  
24 that there may have been a possibility, but you're not sure if  
25 it was feasible to have the Canadian canola growers still use

09:33 1 lindane in Canada, even though there was no registration in the  
2 U.S.? So, we have one fact and one speculation; correct?

3 A. (Mr. Abdala) No. I mean, I disagree with your  
4 terminology of the speculation.

5 What I'm saying here is that this--what you call the  
6 fact is our conclusion and assumption of what would have  
7 happened during the very short period of time between July 1st,  
8 2001, and February--sorry, and early 2003 in the canola  
9 business. We sustain that growers for that period of time  
10 would not have switched back until the U.S. trade irritant  
11 would have been resolved.

12 Now, your hypothetical is completely different. It is  
13 a scenario where on a long-term basis basically, you're saying  
14 well, there would not be registration in the U.S. In that  
15 particular scenario, you're calling it speculation. I'm  
16 being--trying to be helpful with the panel to let the panel  
17 know up to what extent we can opine on that or not. And in  
18 your hypothetical, if you're asking me for my opinion, I'm just  
19 telling exactly how far along we went, and that we are aware  
20 that there are other options. We don't know whether that  
21 options would be workable or feasible. And we sustain that  
22 until those U.S. trade irritants were dissolved. We don't see  
23 incentives for growers to switch back, but we are aware that  
24 since there are other options, those options we have not fully  
25 analyzed, and so we cannot come to any conclusion as to what

09:34 1 would that hypothetical scenario would look like.

2 Q. Okay. So, you just said that you hadn't analyzed that  
3 hypothetical scenario or the feasibility of that, that option,  
4 that the Canadian canola growers could continue, regardless of  
5 whether or not there was a registration in the U.S.?

6 A. (Mr. Abdala) and the question is...

7 Q. In other words, having a separate system that you were  
8 applying for the Canadian canola growers, you haven't done a  
9 feasibility study at all as to whether or not that was viable?

10 A. (Mr. Abdala) No, I have not.

11 Q. Okay. So--or the costs of that?

12 A. (Mr. Abdala) No, we have not.

13 Q. So, I'm still going to ask you to assume that between  
14 2002 and 2006, there was no registration or tolerance for  
15 lindane in the U.S. I'd like you to work with that assumption,  
16 if that's all right.

17 And moving forward, then, so now we are in the year  
18 2006, and lindane has been off the market for four years.  
19 Would replacement products taken their place during that time?

20 A. (Mr. Abdala) Would replacement products--I'm sorry?

21 Q. If lindane has been off the market for four years  
22 between 2002 and 2006 in Canada because the growers didn't want  
23 to use it, would replacement products have taken their place?

24 A. (Mr. Abdala) What do you mean by taking their place?  
25 If you could be more specific.

09:36 1 Q. If there's no--sorry.

2 If there's no Lindane Products being used in Canada, I  
3 presume that some other product would have had to have been  
4 used, and we have been calling those products replacement  
5 products in this arbitration.

6 A. (Mr. Abdala) Well, yes, absolutely, and you can see  
7 that in what we call the actual scenario. I mean, in the  
8 actual scenario you have replacement products such as Helix,  
9 Prosper, to a lesser extent Gaucho, obviously taking market  
10 shares, and those are the products that the growers are using  
11 today.

12 Q. Okay. And so, in this scenario, the farmer would  
13 become in these four years accustomed to these replacement  
14 products, I assume?

15 A. (Mr. Abdala) Absolutely.

16 Q. And during these four years, technology would continue  
17 to advance in the industry, most probably?

18 A. (Mr. Abdala) Probably.

19 Q. And other new products would have been launched on to  
20 the market at this point as well?

21 A. (Mr. Abdala) That's always a possibility.

22 Q. And they would probably be competing with each other  
23 as well?

24 A. (Mr. Abdala) Yes.

25 Q. Okay, so now we are in 2006, and based on the



09:37 1 assumption I gave you on the EPA--sorry, gave you, the EPA has  
2 still has not issued a tolerance for lindane use on canola, and  
3 I'm going to give you one more assumption to work with here.

4 Assume as of mid-2006 it was unclear when and if the  
5 U.S. would ever issue a tolerance for lindane use on canola.  
6 And just to show you that this is Mr. Johnson's opinion, if you  
7 turn to Tab 4 of the Witness Bundle, Line 15, I'm going to read  
8 it. "Question: Okay. I just want to--you said a lot of  
9 information. I just want to make sure that you answered my  
10 question or heard my question. You can't say for sure if and  
11 when the EPA would have ever granted a tolerance for lindane  
12 use on canola in the United States; is that right?

13 "Yes, that's right," is the response of Mr. Johnson.

14 And Mr. Abdala yesterday confirmed this as well.

15 So, based on this assumption, would it be possible to  
16 assess damages in 2007?

17 A. (Mr. Abdala) If you give me any set of assumptions as  
18 to exactly the timing of registration, yes, it's always  
19 possible to assess damages.

20 Q. Okay. We are in 2006, and the product has been off  
21 the market for four years, and you have agreed that farmers  
22 probably have become accustomed to replacement products, and  
23 now we are in 2006 and it's still unclear whether or not the  
24 U.S. EPA would ever grant a registration or tolerance, and you  
25 think it's possible to ascertain damages for 2007 with any

09:39 1 reasonable certainty?

2 A. (Mr. Abdala) Well, if there is the possibility--if  
3 there is still open possibility that lindane would get a  
4 registration in the U.S., and as a consequence that it would be  
5 reinstated in Canada, what we would have is a scenario in which  
6 the reinstatement of lindane in Canada would come late--I mean,  
7 would not start, say, in February 2003, would start later on.  
8 And although growers are getting used to, say, products such as  
9 Helix, Prosper, and others, if the Lindane Products are  
10 reintroduced, say, by 2007, given that there is such a  
11 significant cost advantage and that lindane also is a product  
12 that--products such as Vitavax are products that growers are  
13 still familiar with, even though they are not using it for four  
14 or five years, I'd certainly see the possibilities of the  
15 Lindane Products to regain part of the market share that they  
16 have, and I don't see any issues with that. I think that's  
17 clearly a possibility.

18 Q. Would it be possible to ascertain damages with any  
19 reasonable certainty at that point, though, if they have been  
20 off the market for four years, they have no cash flows at all  
21 at this point?

22 A. (Mr. Abdala) Yeah--absolutely, yes. You can ascertain  
23 damages. There is always uncertainties or risks when you're  
24 trying to assess damages moving forward because nobody has  
25 market share for granted. I mean, you have to compete for the

09:41 1 market. But in this particular case, obviously what you have  
2 to assess is what would be the competitive outcome in a  
3 scenario in which you have products that are well-known for  
4 Canadian growers, both lindane and lindane replacements, and  
5 then you have to see how this competition will take place.  
6 Would it take place through a price competition, would it be  
7 product differentiation, so you have to be able to assess how  
8 the competitive outcomes would be.

9           And although in your forecast up to the future, you  
10 may be more or less accurate, there is uncertainly, but there  
11 is discount rates. There is ways to adjust for that, those  
12 uncertainties. Damage Assessment is perfectly possible in your  
13 hypothetical.

14       Q. How would you calculate or predict when the EPA would  
15 grant a tolerance?

16       A. (Mr. Abdala) How would I do it?

17       Q. Yes.

18       A. (Mr. Abdala) Well, the same way we have done our  
19 analysis. You try to assess exactly what is the competition  
20 outlook for this market. You have to see by what prices the  
21 products are going to be offered, how differentiation, product  
22 differentiation would look like, whether there is any advantage  
23 in distribution change, whether there is any particular  
24 efficiency of products that may be more effective or more  
25 efficient than others, and then you try assess, well, how many

09:42 1 players you have in the industry. You have three, four  
2 competitors, and you try to project exactly how market shares  
3 are going to look like into the future.

4 Q. I don't think you answered my question. My question  
5 was about calculating or how you would predict whether the EPA  
6 would grant tolerance.

7 A. (Mr. Abdala) I'm sorry, I thought we were still in  
8 your hypothetical that there would be eventually registration  
9 after 2007.

10 Q. No. The hypothetical is actually, it was unclear  
11 whether or not the EPA would ever grant a registration or  
12 tolerance.

13 A. (Mr. Abdala) All right. That's a different  
14 hypothetical.

15 Q. Oh, then I'm sorry you weren't clear on that when I  
16 gave you the assumption and went through Mr. Johnson's  
17 testimony. That was confirmed by Mr. Abdala. I could read it  
18 to you again, if you would like.

19 A. (Mr. Abdala) Okay.

20 Q. I will just read from Mr. Johnson's testimony. "You  
21 can't say for sure if and when the EPA would have ever granted  
22 a tolerance for lindane use on canola in the United States; is  
23 that right?"

24 "Yes, that's right."

25 So, we are talking about it's unclear when and if this

09:44 1 would ever happen as of 2006.

2 A. (Mr. Abdala) I think you follow up with a question  
3 asking me what would happen if you didn't get a registration as  
4 of 2006, but there would be possibilities in 2007.

5 Q. No, I was asking about damages, how you would predict  
6 damages in 2007, based on this assumption.

7 A. (Mr. Abdala) Okay. Well, if I had this assumption,  
8 then that, say, by 2006, I do not have a registration in the  
9 U.S., and I don't know when I'm going to get it, then what you  
10 would normally do is, if you are the owner of the business on  
11 Lindane Products, you probably do what we call an  
12 option-valuation approach; that is, you have the option that  
13 certain event would happen in the future with certain  
14 likelihood of probability, and you assign a likelihood for that  
15 to happen. In this case then you are uncertain as to how  
16 registration or when registration in the U.S. is going to  
17 happen, so you assign probabilities for different scenarios,  
18 and then you do a weighted Assessment of different likelihood  
19 for different scenarios either being timing or whether the  
20 event happens or does not happen. That's how you would value  
21 your business at that point in time.

22 Q. Would you buy a business that is contingent on  
23 something that may or may not happen in the future and has been  
24 out of the market for four years?

25 A. (Mr. Abdala) Would I personally buy it? Well, it

09:45 1 depends on the outcome of that probability assessment. I mean,  
2 it's like taking some risks on some investments. There's  
3 plenty of investors out there that take risks on start-up  
4 projects and startup and things and also in this case whether  
5 I'm going to be able to obtain a regulatory permission or not.  
6 It depends on your likelihood and your probabilities and how  
7 risk averse, risk neutral you are. There is always a price for  
8 those events.

9 Q. And it's unclear here, though, what the probability is  
10 or what the chances are of getting this registration or  
11 tolerance. It's completely unclear.

12 A. (Mr. Abdala) In your hypothetical, yes.

13 Q. And in Mr. Johnson's testimony.

14 A. (Mr. Abdala) Well, I'm not aware of Mr. Johnson's  
15 testimony, other than what you just presenting me in front of  
16 here, so...

17 Q. Okay. Did you assign probability that the EPA would  
18 register--were you told?

19 I'm just--to confirm that in your Report you just  
20 assumed that this EPA registration would occur. You didn't  
21 assign any possibility risks to it not occurring; is that  
22 correct?

23 A. (Mr. Abdala) Yes, again I would use the word that we  
24 were instructed to make that assumption on regulatory issues  
25 that otherwise we would not be able to opine on.

09:47 1 Q. Okay. So, just to be clear, based on the assumption I  
2 have given you, which is based on the testimony of Mr. Johnson  
3 and Mr. Aidala, it would be difficult to assess damages for  
4 2007.

5 A. (Mr. Abdala) No, that's not what I said. I didn't say  
6 it was difficult.

7 Q. You said you can do it--

8 A. You can do it--you can do it through different  
9 instruments. What I say is that you can do it. You would use  
10 different method, you would use option valuation methods, you  
11 would assign probabilities. It's for a valuation Expert to do  
12 that job. I mean, you can always find a value that some  
13 investors maybe feel comfortable under those circumstances.

14 Q. Remind me again what you said about whether or not  
15 this would be a business that you would buy under these  
16 circumstances?

17 A. (Mr. Abdala) Okay. Again, what I said is it depends  
18 on the likelihood of the event. It depends on how risk averse  
19 would be, whether risk neutral. It depends on what the  
20 prospects are for this market, and I also gave you examples of  
21 investors for start-ups, whether they think that it would  
22 succeed or not or not succeed, and in this case whether you  
23 were going to get a regulatory permit or not, then you would  
24 have to assess that likelihood and then decide on how much  
25 you're willing to pay for that.

09:49 1 Q. Now, would you pay less for such a business that has  
2 clearly a risk attached to it, the risk being that you're not  
3 sure if you will ever be able to sell your product in the  
4 United States, the only important market, according to the  
5 Canadian canola growers?

6 A. (Mr. Abdala) Less compared to what?

7 Q. Less compared to whether or not there was no risk of a  
8 U.S. EPA registration.

9 A. (Mr. Abdala) Oh, absolutely. I mean, if I had to--the  
10 more risk I have, the less I would pay.

11 Q. Okay. Thank you.

12 I'm going to ask you--I'm going to leave the  
13 instruction letter now and ask you a few questions on the other  
14 assumptions that you make in your Report. Can you turn to  
15 Paragraph 17 of your Supplemental Report, please.

16 Are we there?

17 A. (Mr. Abdala) You said Paragraph 17?

18 Q. Paragraph 17 of the Supplemental Report.

19 So, here you're assuming the canola growers' negative  
20 perception of lindane use did not translate into lower demand  
21 for Lindane Products for canola use; correct? I think that's  
22 actually in the title right above Paragraph 17.

23 A. (Mr. Abdala) Yes, that's the title.

24 Q. And in that respect you conclude that canola growers  
25 were willing to continue buying and using lindane products in



09:50 1 the future as long as both Canada and the U.S. agreed on their  
2 approval; correct?

3 A. (Mr. Abdala) Yes.

4 Q. Okay. Have you heard of the Canadian Canola Council?

5 A. (Mr. Abdala) Yes.

6 Q. And then you know that it's an organization that  
7 represents growers, exporters, and crushers in Canada?

8 A. (Mr. Abdala) That is correct.

9 Q. And with respect to growers, it represents about  
10 75,000 of them?

11 A. (Mr. Abdala) Okay. I don't know the number.

12 Q. Are you aware that the CCC initiated the Voluntary  
13 Withdrawal Agreement of lindane?

14 A. (Mr. Abdala) Well, although I have read the records,  
15 I'm a little bit unclear exactly who initiated what, but, yeah,  
16 I have seen the correspondences.

17 Q. So, you would say, then, though, that the CCC--there  
18 was a Voluntary Withdrawal Agreement? You're aware of that?

19 A. I'm aware that on the record what is called a  
20 Voluntary Agreement. It's a document that was, I think, signed  
21 in October 1998 or so, and then there is a another  
22 co-contingent or condition on the Voluntary Agreement between  
23 Chemtura and PMRA in October 1999.

24 Q. That's a little bit--I think that's a point that's on  
25 dispute a little bit in this case, but at any rate you agree

09:52 1 that there was a Voluntary Withdrawal Agreement?

2 A. (Mr. Abdala) well, I don't know about the terminology,  
3 but I have seen the records.

4 Q. Are you aware that the CCC--sorry.

5 Are you aware that the CCC position on the VWA was  
6 supported by its membership?

7 A. (Mr. Abdala) I'm not aware of that.

8 Q. If you turn to Tab 5 of your Witness Bundle, this is  
9 Mr. Zatylny's testimony. If you look at Line 1, or actually  
10 Line 3 is more precise.

11 In your view--here we are talking about the Voluntary  
12 Withdrawal Agreement. "In your view, was the position taken by  
13 CCC and CCGA supported by the farmers, all your membership,  
14 essentially?"

15 And he answers, "Yes."

16 So, it looks like that the farmers that were  
17 represented by the CCC agreed to the Voluntary Withdrawal  
18 Agreement.

19 A. (Mr. Abdala) Well, I cannot tell from what you are  
20 showing me right now whether this position refers to the  
21 Voluntary Agreement or to something else.

22 Q. Okay. Then 'I'm just going to have to ask you to  
23 assume that, based on--I will just ask you to assume that.

24 A. (Mr. Abdala) Are you asking me for another  
25 hypothetical?

09:53 1 Q. No, no, not yet.

2 Are you aware that according to the CCC, one of the  
3 two primary reasons for the VWA was the growing negative press  
4 and concern surrounding lindane?

5 A. (Mr. Abdala) The question is...

6 Q. According to the CCC, one of the primary reasons for  
7 the VWA was the growing negative press concerns surrounding  
8 lindane. Are you aware that that's the case?

9 A. (Mr. Abdala) Well, no. From what I have seen in the  
10 records, I don't think that's the main motive, and I think  
11 there's lots of correspondence that we have seen, and it is our  
12 understanding that their main concern was the U.S. trade  
13 irritant, and they wanted that to be solved. They were very  
14 concerned about not being able to export to the U.S. market,  
15 and we have seen some concerns about what you call the negative  
16 perception, as well, and so there is probably both elements.

17 But I think the way you just phrased it as being the  
18 main concern, I don't think that that was--in our opinion, that  
19 was not their main concern. Their primary concern was the U.S.  
20 market.

21 Q. I think you may just not have heard my question. I  
22 said one of the two primary reasons, but we can look at Tab 6  
23 of your Witness Bundle, where you have a question by President  
24 Kaufmann-Kohler, Line 15. She asked quite directly, "Was this  
25 entire withdrawal issue a question of trade or a question of

09:55 1 health and environmental risk?"

2 And Mr. Zatylny responds, "Both played a part in it."

3 So, clearly trade was part of it, but he goes on to  
4 talk about the health and environmental risk. "Canola has  
5 always been sold as a healthy product, the healthiest oil.  
6 It's still sold as that. It won the health food of the year in  
7 the U.S. Procter & Gamble got that award for canola oil.

8 "Having connections to lindane found in breast milk  
9 and the healthiest oil was just not compatible. It was just  
10 not the imagery we wanted to see for our oil. It was--that had  
11 a big role to play in it. And I think Jean Dextrose, in many  
12 comments through this, said it's not just trade. It's the  
13 public perception about the healthiness of our products. So,  
14 the image of canola is important."

15 And then he goes on to explain about the passion of  
16 the growers in Canada, so here we have the Chair of this  
17 arbitration asking Mr. Zatylny quite directly whether or not  
18 the issue is one of trade or health in the environment. Do you  
19 agree that according to the CCC, health and environmental  
20 concerns around lindane were one of the major reasons they  
21 pursued the VWA?

22 PRESIDENT KAUFMANN-KOHLER: Mrs. Shaker, the Tribunal  
23 has some hesitations here. These are issues of fact that we  
24 must assess on the basis of the evidentiary record; that is,  
25 the documents and the witnesses of fact.

09:56 1           Now, the Expert have made assumptions or have got  
2 instructions on the facts, but they have not made their own  
3 opinion, and it's not their job about the facts. So, I'm not  
4 certain this is very helpful to us. We understand that you're  
5 challenging the "assumptions," and then the question is what  
6 happens if they're wrong or if one of them is wrong and what  
7 impact does this have on the Damages Assessment. That is more  
8 the questions we are interested in.

9           So, if you can either rephrase your question or go to  
10 another one...

11           MS. SHAKER: I think the Report, the assumptions we  
12 are talking about here, LECG relies on evidence in the record  
13 to make their point, and I'm trying to--

14           PRESIDENT KAUFMANN-KOHLER: Yeah, but we are the ones  
15 who have to assess the evidence, and with all due respect to  
16 these gentlemen, how they have assessed the record I don't  
17 think is what we need to look at.

18           MS. SHAKER: Okay. Then I will try to rephrase here.

19           BY MS. SHAKER:

20           Q. If this negative publicity that is linked that the  
21 canola growers appear to be concerned about was international  
22 rather than just Canadian or American--assume that--do you  
23 think that that pressure would have dissipated if there was a  
24 registration for lindane in both Canada and the U.S.?

25           A. (Mr. Abdala) Yes, and I will probably also defer to

09:59 1 Dr. Chambouleyron. He may want to add things on this, but,  
2 yes, our--in our Damage Assessment, as long as you have a valid  
3 registration both in Canada and the U.S., basically that would  
4 dissipate the concerns of the growers. I mean, a valid  
5 registration means that the product is safe that can be used,  
6 and that even though there might be negative perceptions around  
7 the world and on the particular pesticide, I mean, if the  
8 growers have a valid--I mean, if growers had to buy a product  
9 that is valid in Canada and in the U.S., which are the main  
10 markets, then we don't see any impact on market shares or  
11 market demand at all.

12 I don't know if Dr. Chambouleyron wants to add  
13 anything.

14 A. (Mr. Chambouleyron) We also see in the evidence that  
15 during the nineties you will see that demand for Lindane  
16 Products continues to increase despite this alleged negative  
17 image of lindane on canola, and that demand continues to  
18 increase, despite the fact of also that there were starting to  
19 appear replacements in the market.

20 So, what Dr. Abdala just said is, basically the bottom  
21 line here is, if your regulatory authority registered the  
22 product, it means that the product is safe to be sold, and  
23 there shouldn't be any concerns about health or bad image.

24 Q. The World Wildlife Fund, which is a concern that  
25 Mr. Zatylny brings up consistently in his testimony and in his

10:01 1 affidavits, was concerned about--was pressuring the Canadian  
2 canola growers while lindane was registered in Canada; is that  
3 right? Do you recall that?

4 A. (Mr. Abdala) I have seen some references in the  
5 records, but I have not seen any particular evidence or  
6 document on how this pressure eventually went on to the growers  
7 and what the reactions of the growers or what actions.

8 Obviously what we see is if this was going on, I don't  
9 know, since the beginning of the nineties, what we see is  
10 what's going on in the market, and the market, as  
11 Dr. Chambouleyron just expressed, they are still buying the  
12 lindane product. Lindane products have a substantial market  
13 share of the market, and there doesn't seem to be any change in  
14 the pattern of behaviors on growers during this time, and even  
15 during the Voluntary Agreement period between 1998 and 2001,  
16 when the growers continued to use Lindane Products up to the  
17 depletion of their stocks and the stocks of the distributors.

18 Q. I guess my question is, if the World Wildlife Fund was  
19 putting pressure on the CCC while it was registered in Canada,  
20 can you assume that they clearly didn't take any comfort in the  
21 fact that it was registered in Canada?

22 A. (Mr. Abdala) Who would take any comfort? I'm sorry.

23 Q. The growers represented by the CCC. Maybe I will just  
24 call it the CCC.

25 Mr. Chambouleyron was saying that if a regulatory body

10:03 1 considers it safe, then these sort of pressures would  
2 disappear, and I'm asking whether or not that would really be  
3 the case considering the WWF was pressuring the CCC while it  
4 was registered in Canada. So, clearly, it didn't take any  
5 comfort in that fact that it was registered.

6 A. (Mr. Abdala) Well, it's okay for the WWF--World  
7 Wildlife Fund.

8 Q. The World Wildlife Fund.

9 A. (Mr. Abdala) Yeah. Well, if it's okay for them to  
10 keep insisting, but what we are saying is that we don't see in  
11 the records any evidence that, despite this pressure, there is  
12 no change in pattern on consumption. And the demand behavior  
13 of the growers is exactly the same, regardless of this  
14 pressure.

15 Q. Okay. I'm going to move on.

16 In your but-for scenario you assume that Canadian  
17 growers would have continued to use lindane-based products if  
18 the trade irritant disappeared. That's what we were just  
19 discussing?

20 A. (Mr. Abdala) Correct.

21 Q. Can you turn to Paragraph 18 of your Supplemental  
22 Report, please. Here it says, "Furthermore, growers would have  
23 been willing--would have willingly continued buying lindane  
24 products to treat their canola and non-canola crops because as  
25 canola growers themselves acknowledged, lindane products were



10:04 1 less expensive and more effective than their non-lindane  
2 replacements."

3 Do you still agree with that statement?

4 A. (Mr. Abdala) Yes.

5 Q. So, you include that assumption in your Damages  
6 Assessment?

7 A. (Mr. Abdala) Yes.

8 ARBITRATOR CRAWFORD: Can I ask a question?

9 PRESIDENT KAUFMANN-KOHLER: Yes, sure.

10 ARBITRATOR CRAWFORD: Looking at the situation in,  
11 say, 2000, before regulatory decisions have been made there was  
12 clearly a risk that lindane would become problematic in terms  
13 of the marketplace, for whatever reason.

14 Did you factor that risk in any way into your Damages  
15 Assessment?

16 THE WITNESS: (Mr. Abdala) Well, our Damage Assessment  
17 is based on a very specific set of instructions that lindane is  
18 reinstated in Canada and has a tolerance and registration in  
19 the U.S., so what we have done is conducted a Damages  
20 Assessment using what we call an ex post analysis, taking into  
21 consideration these instructions. So, we assume that these  
22 damages that recall that for the canola business, they start in  
23 February 2003, and for the non-canola they start in  
24 February 2002. And they are based on the fact that lindane was  
25 for certain going to be allowed and reinstated and reintroduced

10:06 1 in Canada. So, we have not attempted to conduct any valuations  
2 dated back in the year 2000 and see what the value or situation  
3 would be there under the assumptions that there would be still  
4 regulatory risks or uncertainty as to the approval in either  
5 Canada or the U.S.

6 ARBITRATOR CRAWFORD: So, the answer is no?

7 THE WITNESS: (Mr. Abdala) Short answer is no.

8 ARBITRATOR CRAWFORD: Okay.

9 PRESIDENT KAUFMANN-KOHLER: Can I just follow up so we  
10 don't have to come back to this question.

11 Your ex post approach is ex post for a number of  
12 years, but since your computation goes on until 2022, it's ex  
13 ante for all the rest of the time and the question is for this  
14 part of the time that is still in the future, you have not  
15 factored in a risk element, either, for let's say a general ban  
16 of lindane worldwide.

17 THE WITNESS: (Mr. Abdala) Okay, there's two aspects  
18 to your questions. The first one, we would still call our  
19 approach an ex post approach, and by ex post what we mean is  
20 that we take all information, all hindsight information as we  
21 have available as of the date that we produce our Report, and  
22 that was June 2008. Obviously we don't have information as to  
23 how the world would evolve into the future, and for that we  
24 need to make assumptions.

25 And the assumptions here first fall in line with the

10:07 1 instructions of how registration would evolve in the U.S.

2           And the second part of your question, the answer is  
3 yes. I mean, we have not taken into account any potential  
4 risks of the lindane ban in the U.S. or Canada which would be  
5 the relevant market for the growers, as we assumed there would  
6 be valid registrations in both countries until 2022.

7           PRESIDENT KAUFMANN-KOHLER: Thank you. That's clear.  
8           Sorry for the interruption.

9           MS. SHAKER: That's okay.

10          BY MS. SHAKER:

11          Q. So, we were just looking at a quote.

12           I'm going to deal with the issue of effectiveness  
13 first in talking about the effectiveness of Lindane Products in  
14 Paragraph 18.

15           Paragraph 18 cites in a footnote Paragraphs 58 to 62  
16 of JoAnne Buth's first Witness Statement, I think; is that  
17 correct?

18          A. (Mr. Abdala) Yes.

19          Q. Can you turn to Tab 11 of your Witness Bundle. Here  
20 it says, "The perception among Canadian canola growers was that  
21 Gaucho, Chemtura's replacement product"--

22          A. (Mr. Abdala) I'm sorry, Counsel, could you identify  
23 where you are?

24          Q. I'm sorry, Paragraph 59, right at the bottom of the  
25 page.

10:09 1 A. (Mr. Abdala) Could you also identify what document  
2 this is?

3 Q. This is JoAnne Buth's Witness Statement.

4 A. (Mr. Abdala) Thank you.

5 Q. That's what you cite in your footnote.

6 Paragraph 59, "In any event, as I have mentioned, the  
7 perception among Canadian canola farmers was that Gaucho,  
8 Chemtura's lindane replacement product, was not as  
9 effective--was not an effective insecticide, particularly in  
10 the dry climate like that of Western Canada."

11 So, here the perception is, among Canadian canola  
12 growers, that Gaucho isn't a very strong product; correct?

13 A. (Mr. Abdala) Yes.

14 Q. Can you now turn to Paragraph 62, which is on the next  
15 page, the bottom.

16 When she says in the year that followed, she's talking  
17 about 2001. "Syngenta's effective marketing strategies and  
18 effectiveness of its replacement product allowed it to build up  
19 significant market share."

20 Does it say anywhere in this paragraph that Helix is  
21 not an effective replacement product?

22 A. (Mr. Abdala) No, it doesn't.

23 Q. Do you recall somewhere else in evidence that suggests  
24 that Helix was not an effective replacement product?

25 A. (Mr. Abdala) No, I don't.

10:11 1 Q. Would it surprise you to learn that Helix was just as  
2 effective as the Lindane Products?

3 A. (Mr. Abdala) That lindane was obviously at the time in  
4 2001, 2002, when the first replacements on a more massive scale  
5 were getting to the market was considered still a superior  
6 product because it was tested, and also there was certain  
7 discomfort to what extent the replacement products such as  
8 Helix, Gaucho would work. So, it took some time for growers to  
9 realize that eventually Helix was also an effective product.

10 So, what I think we are referring to in Paragraph 18  
11 was that canola growers would not obviously have any problem in  
12 switching back to lindane because it was a tested product, it  
13 was less expensive, and it was in general considered more  
14 effective than the replacements, in particular replacements  
15 such as Gaucho, which did not work very well or was not so  
16 convenient for use as there was not a Dual Purpose until 2002.

17 Q. For now I was just referring to your Paragraph 18,  
18 where you assume that Lindane Products were more effective to  
19 their non-lindane replacements. I'm assuming when you say  
20 non-lindane replacements, you were talking about Gaucho and  
21 Helix?

22 A. (Mr. Abdala) And others as well.

23 Q. Okay. Can you turn to Tab 12 of your Witness Bundle,  
24 Page--sorry, Line 6. This is a question put to Mr. Zatylny in  
25 this arbitration. "So can you clarify you're saying that Helix

10:13 1 is an effective product?

2 "Answer: Helix is an effective product. Question.

3 "Question: And vis-à-vis if you compared to lindane,  
4 would you say--

5 "Answer: It has different qualities, but it's as  
6 effective and potentially has some features that would make it  
7 more effective in the long term."

8 Do you see that?

9 A. (Mr. Abdala) Yes.

10 Q. So, Mr. Zatylny is saying that Helix, a replacement  
11 product, is as effective as Lindane Products. Do you agree  
12 with that? That's what he's saying?

13 A. (Mr. Abdala) I agree that's what he's saying.

14 Q. And in that--in some respects it may even be  
15 considered even more effective than Lindane Products?

16 A. (Mr. Abdala) That's apparently his opinion, yes.

17 Q. Would that affect your assessment at all, considering  
18 you based it on the fact that you were assuming that  
19 non-lindane replacements were less effective?

20 A. (Mr. Abdala) No. That's a good question, but the main  
21 driver of competition in our but-for scenario is price. The  
22 but-for scenario clearly would have both Lindane and Lindane  
23 replacement products available for growers. But since price is  
24 such a big difference in this case, I mean, even if you have  
25 both products equally effective, price competition, we are

10:14 1 assuming that that's what would give lindane products a  
2 significant advantage over others. And even if, say, by  
3 February--sorry, early 2003, when lindane would be reinstated  
4 in Canada in the but-for scenario, Helix would have had only a  
5 very short period of time for growers to get used to it and to  
6 get accustomed and test its effectiveness. We would think that  
7 Lindane Products would have also some advantage in terms of  
8 familiarity with the product. But that's not necessarily what  
9 has driven our but-for scenario. Our but-for scenario is  
10 mainly based on price competition, and on price competition  
11 Lindane Products would have a substantial advantage.

12 Q. We will get to cost in a moment, but for now I just  
13 wanted to--so, you're saying that effectiveness didn't play  
14 into your assessments at all or the growers' concerns about the  
15 image of the product?

16 A. (Mr. Abdala) what We said is that it played only a  
17 very minor role eventually in the first years, but basically  
18 our but-for scenario is driven by price competition.

19 Q. Okay. Let's turn to the issue of costs, then. If you  
20 can turn to Paragraph 18. You state that Lindane Products were  
21 considerably less expensive than their replacement products;  
22 correct?

23 A. (Mr. Abdala) Yes.

24 Q. And that because of this, the Canadian growers would  
25 have continued to use lindane even when replacement products

10:16 1 were on the market; is that right?

2 A. (Mr. Abdala) That's right.

3 Q. Now, when a farmer buys a product, he or she would  
4 take into account the reputation of a company; correct?

5 A. (Mr. Abdala) Well, no, not so sure, really. The  
6 reputation effects may or may not play a role. There are many  
7 cases in which there's demand for a product, and you don't even  
8 know who the manufacturer is. It's a very general and vague  
9 statement, so in the purchasing decision you may or may not  
10 play this reputation effects into account.

11 Q. But it possibly could influence whether or not a  
12 product is bought or not?

13 A. (Mr. Abdala) In theory you could, yes.

14 Q. And the same would go for, say, some other factors  
15 like recommendation of a dealer?

16 A. (Mr. Abdala) Sure, of course. There are many  
17 dissensions on decisions into--

18 Q. Health risks--

19 A. (Mr. Abdala) In purchasing a product.

20 Q. Some of the others might be the health risks  
21 associated with the product?

22 A. (Mr. Abdala) Sure.

23 Q. The warranty attached to a product?

24 A. (Mr. Abdala) Yes.

25 Q. Efficacy?



10:17 1 A. (Mr. Abdala) of course.

2 Q. Which I think we already dealt with.

3 And there are probably other factors as well?

4 A. (Mr. Abdala) Yes.

5 Q. Could you turn to Tab 13 of your Witness Bundle,  
6 please. This is a little bit more of Mr. Zatylny's testimony  
7 in this case. At Line 21 at the bottom, he states, "And  
8 generally, I don't agree with the statement that farmers always  
9 buy the cheapest product. There is no evidence to support  
10 that. There's lots of factors that go into decision making,  
11 including warranty that comes with the product."

12 And then I believe Mr. Bedard asked, "The efficacy?"

13 And he responds, "The services, the efficacy, the  
14 recommendation of a dealer, another farmer, an influencer,  
15 quality, the reputation of a company, the health risks  
16 associated with using a product.

17 "So, I don't think it's a simple question to say  
18 farmers will always choose the cheapest product available."

19 So, Mr. Zatylny mentions quite a few other factor,  
20 doesn't he?

21 A. (Mr. Abdala) That's what we are seeing in the record,  
22 yes.

23 Q. And there are probably even more that Mr. Zatylny  
24 didn't mention?

25 A. (Mr. Abdala) Well, of course. These are theoretical

10:19 1 questions, and is practical as well. I mean, you take into  
2 consideration many dimensions when you do a purchasing  
3 decision.

4 Now, how it plays in our but-for scenario is different  
5 because you're assuming basically same level of efficacy, same  
6 level of distribution channels available, familiarity with the  
7 products. And all things considered equally, price is the main  
8 driver, definitely.

9 Q. I don't think Mr. Zatylny says that.

10 A. (Mr. Abdala) I'm saying that.

11 Q. You're saying that. Okay.

12 How can you assume that all these other factors would  
13 be--should be considered as equal?

14 A. (Mr. Abdala) Well, very simple. Gustafson and  
15 Crompton Canada, but through Gustafson has a well established  
16 distribution channel, so it would be, by 2003, in a much better  
17 position, and the distribution level than any competitor  
18 because they had already like between 70 to 80 percent of  
19 market share. So, they know the market, they know their  
20 customers, their product is completely tested, where the other  
21 products are the newcomers, the ones that have to compete in  
22 terms of trying to show whether they have similar efficacy  
23 quality and that they can eventually supply. So, in those  
24 dimensions, Lindane Products would have an advantage over the  
25 others.

10:20 1           And even so, if you assume that the products, the  
2 replacement products such as Helix would eventually be able to  
3 as well develop a distribution chain, reputation effects,  
4 familiarity, well, all things considered equally, then you have  
5 one product that is approximately one third of the price of the  
6 other, so price eventually becomes the main driver of  
7 competition.

8           Q.    We will deal with a few of the other, I think you  
9 called them product differentiations or dimensions that may be  
10 taken into account a little bit later, but for now I just want  
11 to make one other point about cost.

12           So, you're saying, then, that the price differential  
13 in this case was large enough that it would probably heavily  
14 influence the decision, regardless of all these other factors?

15           A.   (Mr. Abdala) That's right.

16           We do not ignore completely these other factors. I  
17 mean, we obviously had to project into the future damages, and  
18 therefore we had to project market shares into the future.

19           Now, going into the future, we recognize that  
20 competitors could eventually get new devices as to try to  
21 further differentiate their products and to eventually improve  
22 their quality or do things that would attract customers, and to  
23 allow for that we had a decline in market share for Lindane  
24 Products at a rate of 2.5 percent per year so that lindane  
25 products I think in our model start with a 82.7 percent market

10:22 1 share and eventually end up with a 58 percent market share by  
2 2022.

3           So, in our but-for scenario, although price is the  
4 main driver of competition, we allow for these type of things  
5 that may happen, such as quality differentiation and recognize  
6 that others such as Helix or others, newcomers that may come  
7 into the future may gain some market share in the market.

8           Q.    Okay. You're just assuming here then that despite  
9 what Mr. Zatylny said and all these other factors, cost would  
10 still trump these other factors?

11          A.    (Mr. Abdala) No. There is nothing antagonist between  
12 what this witness has said and what I just said. I mean, I'm  
13 saying that price is the main driver, factor for competition.  
14 Other factors may play a role. And the way we accounted for  
15 that in our damage exercise is through reduction of lindane's  
16 products' market share from 82.7 percent to 58 percent until  
17 the end of the valuation period.

18          Q.    Just to clarify, that 2.5 percent starts in 2009;  
19 right?

20          A.    (Mr. Abdala) That's correct.

21          Q.    Okay. So, cost, then, for you is the primary driver.  
22 I want to just ask you to look at--if you turn to Table 4,  
23 Page 25 of your first report.

24                Okay. So, here we have a chart of Helix, Helix Xtra,  
25 Gaucho, Canola System, and Prosper, and their market share and

10:24 1 price per acre from 2001 to 2006. And if you look at Helix,  
2 it's Helix Syngenta starts 3.5 percent and makes it up all the  
3 way to almost 50 percent by 2006.

4 And then Helix Xtra doesn't do as well. It starts at  
5 .2 percent and works its way up to 12.2 percent in 2006.

6 Do you see that?

7 A. (Mr. Abdala) Yes.

8 Q. Now, would it surprise you to know that Helix Xtra was  
9 nearly two times the price of Helix?

10 A. (Mr. Abdala) No, it doesn't surprise me. I know that  
11 for a fact.

12 Q. So, then, I'm assuming there are clearly other factors  
13 that influenced the farmers' decision here other than cost to  
14 choose Helix rather than Helix Xtra?

15 A. (Mr. Abdala) Yes.

16 Q. Would you agree that two times the cost is quite  
17 considerable?

18 A. (Mr. Abdala) Yes, but Helix Xtra has other features.

19 Q. Yes, other features that would go into a decision on  
20 the farmers--

21 A. (Mr. Abdala) It's a different product.

22 Q. Yeah.

23 So, cost may not have been the main driver in these  
24 particular--in this particular scenario for farmers?

25 A. (Mr. Abdala) Let me have Dr. Chambouleyron expand on

10:25 1 the differences between Helix Xtra and Helix.

2 Q. I think he can do that, but--go ahead. Go ahead.

3 A. (Mr. Chambouleyron) No, no. Different products, if  
4 there are different products, differentiated, different  
5 efficacy, I think Helix Xtra has twice the concentration as the  
6 Helix, so obviously, you know, it should be twice as expensive  
7 as Helix because it's more concentrated.

8 So, in fact, they don't have that price difference  
9 because Helix Xtra is twice as concentrated. So, the price, I  
10 think, should be more or less the same.

11 Q. We can get Navigant to speak to that as well.

12 A. (Mr. Abdala) I think it would be useful for the panel  
13 to clarify; although we are listing these products as being  
14 substitutes, the products are not identical. Each of these  
15 products had a different what we call yield efficacy, so some  
16 of these products, as Dr. Chambouleyron explained, Helix Xtra  
17 by being more concentrated has a higher yield than Helix, and  
18 therefore, you cannot make just a simple comparison on prices  
19 by saying, well, this is more expensive. Yeah, it's more  
20 expensive, but it also has a higher productivity in their use.  
21 So, if you want to have a product-by-product price comparison,  
22 you would have to do some adjustment.

23 Now, on a general level though, we will accept that,  
24 yeah, there are some room for price differentiation because of  
25 these product differentiation issues, but overall for products

10:27 1 that are closer substitutes such as Helix against Lindane  
2 Products or such as Helix against Gaucho, Canola System or such  
3 as Helix against Prosper, then prices are the main driver.

4 Q. So, you would say, though, then that Gaucho, when you  
5 compare lindane to other products, it also wouldn't be  
6 identical. There would be other dimensions that would  
7 differentiate it as well?

8 A. (Mr. Abdala) There are dimensions that would  
9 differentiate. These that are listed here are very similar  
10 with the exception of Helix Xtra that has a different  
11 concentration level.

12 Q. Okay. I will have to get Navigant to speak to that as  
13 well.

14 Can you turn to--

15 ARBITRATOR CRAWFORD: While we are on that chart, you  
16 said earlier that you made an assumption as to the market share  
17 of Claimant's lindane-based products over the relevant time  
18 period, which is I think is up until 2022. But looking  
19 at--this is a real market. It doesn't contain lindane-based  
20 products, but it contains products directed at what the  
21 lindane-based products did.

22 There is very considerable variability even for  
23 successful products over relatively short periods of time. So,  
24 is your assumption that something would retain such a market  
25 lead over a long period of time a realistic one?

10:29 1           THE WITNESS: (Mr. Abdala) Well, yes, we think it is  
2 realistic because what you have here in the actual scenario is  
3 competition between products that have similar viable cost, and  
4 therefore, there is price competition, they are competing at  
5 the same price level. They're all very similar with the  
6 exception of Helix Xtra.

7           So, in this case, what you have is, say, for instance,  
8 Prosper. If you look at Prosper, Prosper was launched in 2004  
9 and was able to gain almost 22 percent market share by 2006.  
10 But Prosper was competing at the same price level as Helix and  
11 as Gaucho Canola System. In our but-for scenario, competition  
12 is different because Lindane Products have such a substantial  
13 cost advantage that they would be able to retain that  
14 leadership that they had in the past. And that's something  
15 that the past itself can provide you support for that because  
16 in the past, there were other products that could have been  
17 introduced to the Canadian market, and the reason they were not  
18 introduced is because they could not sustain such a price  
19 differential in variable cost and they could not compete  
20 effectively.

21           For instance, Gaucho was available in Canada in 1998  
22 for export purposes. They could have sought a registration for  
23 domestic use as well, but obviously will not be probably  
24 commercially wise because of the price differential.

25           The same thing, Gaucho was available even sooner in



10:30 1 the U.S., since 1994. Other products would have developed in  
2 the nineties as well, but the reason is that technical lindane  
3 is so much cheaper than the other chemicals. That's why  
4 competition for entrants would be so difficult in the but-for  
5 scenario.

6 MS. SHAKER: May I continue?

7 ARBITRATOR CRAWFORD: Yes.

8 BY MS. SHAKER:

9 Q. Would you turn to Paragraph 25 of your Supplemental  
10 Report, please. Here you're saying that cutting prices would  
11 not have been an effective marketing strategy for Helix because  
12 it was considerably more expensive than Lindane Products, which  
13 we've already discussed; correct?

14 A. (Mr. Abdala) Yes.

15 Q. So, you postulate that Syngenta would have had to  
16 differentiate its products based on other dimensions such as  
17 qualify, effectiveness, reliability, distribution channel,  
18 et cetera; correct?

19 A. (Mr. Abdala) Yes.

20 Q. Would those dimensions include, for example, the  
21 health concerns of the growers not wanting to buy particular  
22 product?

23 A. (Mr. Abdala) Yes, there was any. But obviously in  
24 this scenario there should be no health concerns since they  
25 have valid registration both in the U.S., and Canada.

10:32 1 Q. So, you did include those concerns in your calculation  
2 or not? I'm not clear.

3 A. (Mr. Abdala) Yes, they are implicit. I mean, there is  
4 no health concerns or health image as long as you have a valid  
5 registration.

6 Q. Okay. Assume again, then, that those health concerns  
7 would exist, regardless of a valid registration in Canada and  
8 the U.S. I'm just wondering if this kind of concern is taken  
9 into account in your Damages Assessment.

10 A. (Mr. Abdala) It is taken. We do not believe there is  
11 any health issue or reputation issue related to the demand of  
12 growers.

13 Q. Okay.

14 A. So you can take the presence of--we have the presence  
15 of the valid registration, we don't see an issue, so we have  
16 taken that into account, and we don't see any commercial  
17 reasons for growers not to buy the product as long as they have  
18 a valid registration.

19 Q. So, you have taken it into account, but it  
20 doesn't--it's not reflected in your--it doesn't change your  
21 damages calculation because you don't think it's an issue?

22 A. (Mr. Abdala) It's already in our damage calculation.  
23 We have considered this factor, and we won't see any impact for  
24 that as long as there is a valid registration.

25 Q. Is marketing included in the other dimensions you take

10:33 1 into account?

2 A. (Mr. Abdala) Marketing?

3 Q. Yes.

4 A. (Mr. Abdala) Yes.

5 Q. Which would include advertising?

6 A. (Mr. Abdala) Yes.

7 Q. And do you agree that effective marketing and  
8 advertising contributes to the success of a product?

9 A. (Mr. Abdala) To some extent.

10 Q. Okay. Can you turn to Tab 14 of your Witness Bundle,  
11 please. This is a Canada Business Plan of Gustafson from  
12 June 27, 2002. It's a pretty long document.

13 If you go to the second paragraph of--second paragraph  
14 of the second page, so here--it's under competition.

15 "Unfortunately, Syngenta and Aventis became very active and  
16 aggressive in the Canadian market. Not only did they bring new  
17 products into the market, both companies took aggressive  
18 marketing and price strategies in cereals and canola,  
19 essentially offering free seed treatment if the grower  
20 purchased other products the company marketed."

21 Can you also turn to Page 3, the bottom paragraph.

22 I'm going to read out a couple more sentences here: "Syngenta  
23 heavily promoted Helix while the market was predominantly  
24 Lindane Products in anticipation of the market change.  
25 Millions of dollars were spent on advertising in the first two

10:35 1 years of registration. They also targeted the major customers  
2 with individual strategies."

3 Do you see that?

4 A. (Mr. Abdala) Yes.

5 Q. And then on Page 5, the last paragraph under farm use,  
6 "This sector is highly influenced by the grower product  
7 bundles, dealer incentives, and distributor relationships."

8 And then if you just go to the last page of this  
9 exhibit, under special consideration, under the "Summary,"  
10 "Syngenta used other levers such as lawsuits, special  
11 programming, protection of lindane treated seed, et cetera,  
12 whatever it took to get the order." I'm going to turn you to  
13 also Tab 15 of your Witness Bundles which is a paragraph from  
14 JoAnne Buth's second Witness Statement.

15 "If Chemtura is compared to their competitor Syngenta,  
16 the differences are clear. Syngenta proactively sought to  
17 bundle its product Helix with the seeds sought after by  
18 farmers, which had a strong impact on Helix sales. This  
19 practice developed around 2001-2002, another example of  
20 Syngenta simply outmarketing the Claimant. Syngenta also is,  
21 and was, much more proactive in ensuring that the Canola  
22 Council and growers know what they are working on. They  
23 provide regular updates on progress, and often invites the CCC  
24 and others to see field trials. Not only does Syngenta engage  
25 in significantly more outreach with the CCC than Chemtura, it

10:37 1 also works more closely with agronomists, dealers, and  
2 researchers.

3 And, in fact, this was confirmed in her testimony in  
4 this arbitration.

5 So, are these the sort of dimensions you're talking  
6 about?

7 A. (Mr. Abdala) We are talking about for what? Sorry.

8 Q. On Paragraph 25 you're talking about other dimensions  
9 that Syngenta would have had to utilize in order to gain market  
10 share.

11 A. (Mr. Abdala) These are some. They are not exclusively  
12 the only ones that they can use, but you have to know that many  
13 of those that you are mentioning here are basically the actual  
14 scenario between Syngenta trying to get into the market, being  
15 very aggressive to compete with products such as Gaucho. So,  
16 much of the description that you just went through is the  
17 competition between Gaucho and Helix, and some of these actions  
18 such as a free seed treatments are appropriate when you are  
19 trying to start up and when you are trying to get into the  
20 market, but they are certainly not appropriate on a long-term  
21 sustained basis and in the type of but-for scenario that we had  
22 done in our damage calculation, which is a different  
23 competition in the sense that first the products are not Gaucho  
24 against Helix, but rather Lindane Products against substitutes  
25 such as Helix in which price competition for Syngenta would

10:39 1 have limits given by the variable cost of producing Helix,  
2 which is two or three times more expensive than lindane.

3           So, these types of actions, although you can see them  
4 in the market and they may have some result which you have  
5 accounted for through the reduced market shares would be very  
6 limited in scope and in terms of success when you have such a  
7 significant price gap between the two products, which is a  
8 completely different situation between Helix and Gaucho where  
9 prices are basically the same.

10       Q. Does it appear to you, based on this document that one  
11 company seems to be much more aggressive or its marketing and I  
12 mean as a corporate culture issue rather than Chemtura?

13       A. (Mr. Abdala) Well, I don't think you can generalize  
14 that because this is specifically to what you are looking at in  
15 2002 as the competition between Gaucho and Helix. If Chemtura  
16 and Gustafson had the lindane products to compete with, well  
17 the situation would be clearly quite different because Lindane  
18 Products were already established products. Lindane Products  
19 were tested. And Gustafson had already the largest market  
20 share, so it would be very difficult--the entrant here would be  
21 Syngenta trying to gain market share out of Gustafson in a  
22 product that is already well-known and tested.

23           So, the challenge would be for Syngenta to capture  
24 that market share.

25       Q. Do you think these aggressive marketing techniques

10:40 1 would have had any impact at all, even if lindane was on the  
2 market?

3 A. (Mr. Abdala) They may have some temporary effect, but  
4 on a sustained basis, on a long-term basis, they are very  
5 difficult when the products are basically the same both as  
6 effective and the prices are so different.

7 Q. You mentioned earlier that certain techniques like  
8 bundling, for example, are often used when a product is being  
9 launched to try to gain market share; is that right?

10 A. (Mr. Abdala) Yes.

11 Q. But you do know that product bundling is still  
12 something that's occurring at the moment in the industry, and  
13 replacement products have been on the market for some time now?

14 A. Yes, but product bundling has some limits. I mean,  
15 product bundling you can do as a strategy to get--users get  
16 familiar with your products. Typically firms do this bundlings  
17 as a mean to try to get users know their products and buy their  
18 products, but product bundling, unless there is  
19 cross-subsidization between one product and the other in a way  
20 that is profitable, that is, you would have to assume here that  
21 Syngenta has another product that is so profitable and has such  
22 a leadership on the other product that it is willing to  
23 cross-subsidize to Helix so that it could be able to sell  
24 Helix, say, at one-third its price, and that we have not seen  
25 any evidence that Syngenta would have been willing to do or

10:42 1 able to do so on a long-term basis.

2 Q. Still to get back to my question, these are the  
3 dimensions, the kind of dimensions, though, you would take into  
4 account in your assessment. There are examples of these  
5 dimensions; is that right?

6 A. (Mr. Abdala) Yes.

7 Q. And as a result, according to LECG, Helix would have  
8 had 17 percent of the market. I think you referred to this in  
9 the end of Paragraph 25.

10 A. (Mr. Abdala) Yes.

11 Q. And that would be for the years 2003 to 2008?

12 A. (Mr. Abdala) That's right.

13 Q. So, the 17 percent wouldn't change at all between 2003  
14 and 2008?

15 A. (Mr. Abdala) That would be roughly our approximation  
16 for Helix potential, yes, for this short period of time.

17 Q. Despite the apparent aggressive marketing techniques  
18 of this particular company?

19 A. (Mr. Abdala) Yes.

20 Q. So, you wouldn't say that the 17 percent is too low at  
21 all?

22 A. (Mr. Abdala) No, I would say it's actually quite a  
23 substantial number, given the price differentials in the  
24 market.

25 Q. Did you take the--earlier on you were saying--we



10:44 1 started out this line of questioning by talking about efficacy,  
2 and you had assumed that there was an efficacy deficit with  
3 Helix. Do you recall that?

4 A. (Mr. Abdala) I recall that, but we did not assume that  
5 efficacy deficit. That was a general statement in Paragraph 18  
6 that, by the time in 2001-2002, there would be the--the Lindane  
7 Products would be considered more effective. But as we move  
8 along, we wouldn't assume that there would be any differences  
9 in efficacy between Helix and lindane products.

10 Q. Okay. So, that statement in your paragraph you didn't  
11 rely on at all, the earlier paragraph?

12 A. (Mr. Abdala) I explained to you that price was a main  
13 driver of competition and that efficacy in that particular case  
14 of Helix was not necessarily a significant factor going  
15 forward.

16 Q. Okay. I'm going to move on to export markets for a  
17 moment. Now, you rely on export markets beyond the U.S. in  
18 your Damages Assessment; is that right?

19 A. (Mr. Abdala) We do have a projection of exports as  
20 well. The canola oil, meal, and seeds in Canada have a  
21 substantial export market; and to the extent that seeds that  
22 needs to be treated and related to those market, yes, total  
23 size of seeded area the potential for products such as Lindane  
24 Products to reach to those markets, rely on the growth from  
25 2008 onwards of both productions sought to be sold domestically

10:45 1 and to export markets.

2 Q. Let's look at Mexico for a second. What percentage of  
3 exports do you attribute to Mexico?

4 A. Let me refer to Dr. Chambouleyron. He would be able  
5 to answer this.

6 Q. Okay.

7 A. (Mr. Chambouleyron) It's around 7 percent of--in seed  
8 7 percent over total production in year 2007.

9 Q. Okay. Please turn to Paragraph 67 of your second  
10 Report.

11 So, it says, "As it relates to Mexico, the country  
12 would have certainly harmonized its policies with the U.S. and  
13 Canada, thus setting an MRL in imports of lindane-treated  
14 products."

15 Is that still your position?

16 A. (Mr. Chambouleyron) Yes, it is.

17 Q. What did you base that assumption on?

18 A. (Mr. Chambouleyron) Well, basically it's in our  
19 but-for scenario. They both, Canada and the U.S., would have  
20 granted tolerances or registrations for lindane on canola  
21 products, and we assumed that within the framework of NAFTA,  
22 Mexico would have harmonized its policies with those of U.S.  
23 and Canada. It seemed like a natural and safe assumption to  
24 make.

25 Q. So, sorry--were you going to continue?

10:47 1 A. (Mr. Chambouleyron) No, no.

2 Q. Did Claimant's counsel instruct to you make that  
3 assumption?

4 A. (Mr. Chambouleyron) No, no, it didn't.

5 Q. So, you made it on your own.

6 Now, are you an expert in the regulatory process of  
7 Mexico?

8 A. (Mr. Chambouleyron) No.

9 Q. Are you aware that there is something called a NARAP  
10 on lindane between Canada, the U.S., and Mexico?

11 A. (Mr. Chambouleyron) I'm aware of its existence, yes.

12 Q. And it was agreed by all three countries in 2006?

13 A. (Mr. Chambouleyron) Right, yes, yes.

14 Q. And that under the NARAP Mexico committed to phasing  
15 out all agricultural uses of lindane?

16 A. (Mr. Chambouleyron) I believe so, yes.

17 Q. I'm going to move on to Japan now.

18 A. (Mr. Abdala) Counsel, if I may add something on  
19 Mexico, clearly this NARAP 2006 agreement that we see is  
20 incompatible with the but-for scenario. In the but-for  
21 scenario, if you had registration in Canada and the U.S., this  
22 2006 NARAP agreement that we actually see would have not  
23 happened. So, for that we did not need any instructions. I  
24 mean, it's obvious that that would have not happened, and that  
25 Mexico not only would have an interest in harmonizing

10:49 1 regulatory policies, but also we have evaluated that Mexican  
2 crushers and Mexican manufacturers of canola oil would not have  
3 been able to source canola seeds from other countries other  
4 than Canada who is a main supplier of Mexicans' imports of  
5 canola seed. It would be very, very difficult for Mexico to  
6 obtain, say, 1.2, 1.3 million tons of seeds that they import  
7 per year from other countries. So, clearly Mexico's industry  
8 would be, even if they try, say, regulatory to get something  
9 different from what Canada and the U.S. is doing in a lindane  
10 friendly world, it would be very, very difficult for them to  
11 obtain those seeds from our countries.

12 Q. Just on Mexico, is it safe to assume that the  
13 regulatory body in Mexico would have to go through its own  
14 scientific process to determine whether or not lindane was  
15 safe?

16 A. (Mr. Abdala) sounds like a reasonable assumption. And  
17 it would be also probably reasonable to assume that Mexico's  
18 regulatory authorities would be also looking at what other  
19 leader countries such as the U.S. would be doing in this area.

20 Q. So, you're assuming, then, that the NARAP just would  
21 never have happened?

22 A. (Mr. Abdala) Well, no, because in the but-for  
23 scenario, you would have had lindane registration in both  
24 Canada--it would not because you would have registration and  
25 tolerance sets in the U.S. and Canada, so with that it seems

10:50 1 quite incompatible to have that actually 2006 NARAP as we have  
2 seen it.

3 Q. Okay. But just to clarify, you're just assuming that  
4 this would happen without any particular reason, just based  
5 on--

6 A. (Mr. Abdala) Based on common sense of this case.

7 Q. On common sense that Mexico would decide to do  
8 something as an independent country?

9 A. (Mr. Abdala) We are assuming that Mexico, for both  
10 commercial and regulatory reasons, would have harmonized its  
11 policies.

12 Q. I'm going to move on to Japan.

13 You also assume exports to Japan in your assessment?

14 A. (Mr. Abdala) Yes.

15 Q. And approximately what percentage is attributed to  
16 exports in Japan, or to Japan I should say?

17 A. (Mr. Chambouleyron) Japan imports around 2 million  
18 tonnes of seed from Canada.

19 Q. Can you give me an approximate percentage.

20 A. (Mr. Chambouleyron) Well, you know, for the production  
21 of seed, total production of seed in Canada is around  
22 10 million tonnes., so, 2 million tonnes go to Japan.

23 Q. So, you don't know percentage offhand?

24 A. (Mr. Chambouleyron) Well, two divided by 10 would  
25 be...

10:52 1 Q. Okay.

2 A. (Mr. Abdala) 20 percent.

3 Q. So, it's 20 percent.

4 Can you turn to Page 10 or paragraph 4(h) of your  
5 second Report. About halfway through the paragraph it states  
6 that at the different--you state here that the current maximum  
7 residue level for lindane use on canola is .03 parts per  
8 million; is that correct?

9 A. (Mr. Abdala) That's correct.

10 Q. So, you're assuming that the lindane residue on  
11 Canadian canola would be less than .03 parts per million; is  
12 that right?

13 A. (Mr. Abdala) That's right.

14 Q. And on what basis did you make that assumption?

15 A. (Mr. Abdala) Well, basically you have a history to  
16 start with. I mean, you had Japan importing under this  
17 tolerance limit before lindane was suspended in Canada, so you  
18 have the actual evidence that that was not a problem in Japan.

19 Second, we have seen as well some references in this  
20 case as to some of the tests on evidence, and apparently  
21 lindane resides from canola oil and canola meal are  
22 substantially below that limit as well.

23 Q. Are you aware that the .03 parts per million is a new  
24 MRL introduced in 2006 in Japan?

25 A. (Mr. Abdala) Yes.

10:54 1 Q. You are aware of that?

2 A. (Mr. Abdala) Yes.

3 Q. Do you know that the MRL was--do you know what the MRL  
4 was for lindane use on canola when one existed in Canada?

5 A. (Mr. Abdala) For Japan?

6 Q. No, for Canada, what the limit was in Canada.

7 A. (Mr. Abdala) I don't recall.

8 Would you recall?

9 I don't recall.

10 Q. So, you weren't aware that it was set at .1 parts per  
11 million?

12 A. (Mr. Abdala) I don't know.

13 Q. Assume that it was for a moment.

14 So, we have .03 parts per million in Japan, and this  
15 is a new MRL that is stricter than the old MRL.

16 Now, based on that, is it--can you assume that  
17 Canadian canola would have met the strict Japanese MRL post  
18 2006?

19 A. (Mr. Abdala) Well, I don't know how stricter this new  
20 Japan is compared to the old one. Basically, what we have seen  
21 in the evidence doesn't seem that this would be--this would  
22 exceed the limit. But that's--

23 Q. But you can't say with certainty?

24 A. (Mr. Abdala) No, because we don't have actual  
25 evidence. I mean, since this new limit has been set, obviously

10:56 1 we don't have the actual test to see if that's the case.

2 Q. Let's talk about China for one minute.

3 Approximately what percentage of your Damages  
4 Assessment relies on exports to China?

5 A. (Mr. Abdala) Yes.

6 Q. Sorry, approximately what percentage?

7 A. (Mr. Abdala) Oh, what percentage, sorry. Can you  
8 tell?

9 A. (Mr. Chambouleyron) Not of damages. I can tell you  
10 how much canola goes to China. China has, if you look at the  
11 history, is a very erratic market. The latest data that we  
12 have on China is about 600,000 tonnes of seed per year, but  
13 it's been quite erratic over time. But the latest number is  
14 600,000 tonnes of seed per year of canola seed to China from  
15 Canada.

16 Q. So, the percentage would be--

17 A. (Mr. Chambouleyron) The percentage of that over the  
18 total, okay, 600,000 divided by 10 million.

19 Q. Okay. So, around 12 percent?

20 A. (Mr. Chambouleyron) Yes.

21 Q. Okay. Please turn to Paragraph 4(h), Page 10 of your  
22 second Report, then.

23 PRESIDENT KAUFMANN-KOHLER: Is it not 6 percent?

24 MS. SHAKER: 6 percent?

25 THE WITNESS: (Mr. Abdala) 6 percent.



10:57 1 BY MS. SHAKER:

2 Q. My fault, sorry.

3 Can you clarify whether or not this is part of your  
4 Damages Assessment?

5 A. (Mr. Chambouleyron) Exports to China?

6 Q. Yes.

7 A. (Mr. Chambouleyron) Yes.

8 Q. Okay. So, in your second Report, here you seem to  
9 concede, though, that China's imposed restrictions on  
10 lindane-treated products since 2003, and the last sentence of  
11 your paragraph, "Finally, exports to China would have imposed  
12 restrictions on lindane-treated products since 2003, and would  
13 have been diverted to other countries with tolerance on imports  
14 on canola seeds and canola oils."

15 A. (Mr. Chambouleyron) Where is that? I'm sorry.

16 Q. Page 10, the first paragraph, last sentence.

17 A. (Mr. Chambouleyron) Page 10?

18 Q. Yes, of your second Report.

19 A. (Mr. Abdala) And the question is...

20 Q. Here, it seems to say that you are saying that exports  
21 to China, which have been--which has imposed restrictions on  
22 lindane-treated products since 2003 would have been diverted to  
23 other countries with tolerance on imports of canola seeds and  
24 canola oils.

25 So, as of 2003, are you assuming that there are

10:59 1 exports to China, or not?

2 A. (Mr. Abdala) Well, the situation with China, I think,  
3 we need to also clarify here that we may have made a mistake.  
4 It's quite unclear whether they have a tolerance or they have  
5 restrictions, and we have looked for the evidence, and we found  
6 that Hong Kong actually had restrictions, and I think we  
7 wrongly attributed the same restrictions to China, although  
8 China may have a different regulatory restriction separately  
9 from that of Hong Kong.

10 So, the situation of the regulatory situation in China  
11 to us is unclear, and we are not able to say. What we are  
12 saying is that for the purposes of our damage calculation, yes,  
13 we realize that China has been an erratic market, and in our  
14 projections has a component of exports. We think that the  
15 Canadian growers eventually would have been able to either find  
16 similar markets similar in size to Canada or would have the  
17 possibility of rather than exporting canola seed to China,  
18 transforming that into canola oil and canola meal and therefore  
19 expanding the markets on the other products, so we don't see  
20 any significant impact on damages, even if China really has  
21 restrictions on lindane as of today.

22 Q. So, if these exports went to other countries, do you  
23 have any proof of what countries talking about?

24 A. (Mr. Abdala) Well, let me try to recollect. There are  
25 some other countries that are assumed in our Report. They

11:00 1 don't have a destination, but there's other countries I think  
2 such as the United Arab Emirates. Other countries supply  
3 Pakistan, I think, Bangladesh. There are some exports that go  
4 to Europe as well.

5 Q. So, you're not certain alcohol what countries. You're  
6 just sort of speculating right now?

7 A. (Mr. Abdala) I can't recall right now by memory.  
8 Maybe Dr. Chambouleyron can recall some names.

9 A. (Mr. Chambouleyron) Turkey is another one, for  
10 example.

11 But in the event of, say, a ban, those seeds could  
12 have stayed here in Canada and be turned into oil, sent to the  
13 crushing plants, be turned into oil or meal and be exported to  
14 countries with MRLs on lindane, such as the U.S. and Canada, in  
15 our but-for scenario.

16 Q. Just on that point of the U.K., are you aware that we  
17 haven't--that Canada has not been exporting canola to the U.K.  
18 due to the fact that it is genetically modified?

19 A. (Mr. Abdala) I don't think we mentioned the U.K.

20 Q. I'm sorry, I thought your colleague just did.

21 A. (Mr. Abdala) Turkey.

22 Q. He did mention, Europe, I think, and I'm talking about  
23 Europe, I shouldn't say the U.K. The Europe--the European  
24 market has rejected the Canadian canola based on the fact that  
25 it was genetically modified.

11:02 1 A. (Mr. Abdala) That's right. On some of the European  
2 countries, yes.

3 Q. Have you heard of the Stockholm Convention?

4 A. (Mr. Abdala) Yes.

5 Q. Are you aware that on May 9, 2009, under the Stockholm  
6 Convention more than 150 countries agreed to eliminate all uses  
7 of lindane?

8 A. (Mr. Abdala) Yes, we became aware of that after the  
9 production of our Reports, yes.

10 Q. Can you turn to Tab 16 of your Witness Bundle.

11 Okay, so, here is the world of lindane post-Stockholm  
12 Convention. Just wondering if you think there is many markets  
13 left over for lindane when you look at this map.

14 A. (Mr. Abdala) As I said before, the Stockholm  
15 Convention ban, I don't know how to interpret to begin with,  
16 and it wasn't public knowledge to us before the production of  
17 our Reports.

18 Q. Would it make it more difficult to assess damages  
19 until 2022?

20 A. (Mr. Abdala) No, probably, what it would make us is to  
21 consider whether some of the export markets eventually would  
22 have changed, according to our assumptions.

23 Q. Would you agree that the export markets would be  
24 shrinking if there is no--nothing, there is no products to  
25 export because it's banned in so many countries?

11:03 1 A. (Mr. Abdala) Well, it's difficult to assess for us  
2 also whether the Stockholm Convention ban in 2009 would have  
3 happened under the but-for scenario. I mean, if Canada and the  
4 U.S. would have a valid registration, I cannot tell whether  
5 this RED map that you're presenting here would still stand  
6 because I don't know how in the but-for scenario that decision  
7 on Stockholm Convention would have hold.

8 Q. Are you suggesting the Stockholm Convention wouldn't  
9 occur because of in your but-for scenario you're assuming  
10 Canada and the U.S. would have decided to keep lindane  
11 registered?

12 A. (Mr. Abdala) Well, I'm suggesting that it might be  
13 different because obviously there is two countries now that  
14 would have a valid registration for lindane use, so I don't  
15 know how that would play into the outcome of but-for the  
16 Stockholm Convention.

17 Q. Do you know that the Stockholm Convention isn't  
18 negotiated by Canada and the U.S.; right?

19 A. (Mr. Abdala) I don't know how that may have an impact.  
20 In any case, I mean, the fact they would have different outcome  
21 in our but-for scenario, I'm saying I don't know whether this  
22 outcome would have--be the same or not. I don't know.

23 Q. I have another question. Do you really see this map  
24 entirely red or orange except for Canada and the U.S. being  
25 white?

11:05 1 A. (Mr. Abdala) I don't know, because I don't know how  
2 this map was produced. I don't know.

3 MS. SHAKER: Okay. I have no further questions.

4 PRESIDENT KAUFMANN-KOHLER: Thank you. Would this be  
5 a good time for a break, I think, before you start with  
6 redirect questions?

7 MR. SOMERS: Yes, thank you.

8 PRESIDENT KAUFMANN-KOHLER: So, let's take 20 minutes  
9 now, and you, of course, aware of the rule that you should not  
10 speak to anyone about your testimony during the break.

11 THE WITNESS: (Mr. Abdala) Very good.

12 PRESIDENT KAUFMANN-KOHLER: Thank you.

13 (Brief recess.)

14 PRESIDENT KAUFMANN-KOHLER: So, we are ready to start  
15 again, Mr. Somers.

16 MR. SOMERS: Thank you, Madam Chair. Just a couple of  
17 questions.

18 REDIRECT EXAMINATION

19 BY MR. SOMERS:

20 Q. In the course of your cross-examination, you were  
21 asked, I'll say, several questions in connection with Canadian  
22 canola growers being ostensibly concerned about the healthy  
23 image of canola and would be moving away as rapidly as possible  
24 from purchases of lindane-based pesticides.

25 Based on your review of the sales data and your

11:31 1 Report, was it not based on growers continuing to purchase  
2 lindane-based pesticides until they no longer could because the  
3 suppliers ceased to supply it?

4 A. (Mr. Abdala) That's correct. The data that we see  
5 from 1991 to 2001 indicates that there is sustained strong  
6 demand for Lindane Products, and in particular during 1999 to  
7 2001, during this transition period of what we will call  
8 Voluntary Agreement, lindane was--lindane inventories were  
9 trying to be exhausted at the level of distributors and seed  
10 treaters and what we see on the evidence is that they were  
11 trying to maximize their purchases of Lindane Products.

12 Q. All right. I'm looking at Paragraph 32 of your  
13 supplementary or second Expert Report, and that's a discussion  
14 there of market share.

15 As I understand that paragraph--I will wait until you  
16 have it in front of you--

17 A. (Mr. Abdala) I'm sorry, in Paragraph 2?

18 Q. 32.

19 A. (Mr. Abdala) 32, sorry.

20 Yes.

21 Q. Your market share calculations, you built in an annual  
22 reduction in market share to take into account, for example,  
23 presence of competitors, market shifts to other products and so  
24 forth; is that right?

25 A. (Mr. Abdala) That's correct.

11:33 1 Q. When--in the--not in the counterfactual, not in the  
2 but-for scenario, but in the actual scenario, Syngenta's  
3 success with Helix occurred after lindane was gone from the  
4 market; is that correct?

5 A. (Mr. Abdala) That is correct.

6 Q. On the contrary, in Paragraph 32, in the  
7 counterfactual, you take into account Helix's competitive  
8 presence in the market in arriving at your market share  
9 numbers; yes?

10 A. (Mr. Abdala) Yes.

11 Q. Thank you.

12 PRESIDENT KAUFMANN-KOHLER: Thank you.

13 Do my co-Arbitrators have questions?

14 Professor Crawford, please.

15 QUESTIONS FROM THE TRIBUNAL

16 ARBITRATOR CRAWFORD: Mr. Abdala, one of the claims  
17 made by the Claimant in relation to the breach of NAFTA or--let  
18 me rephrase that.

19 One of their claims in relation to the arrangements  
20 for the phase-out of lindane-based products was that their  
21 replacement products would be given accelerated processing by  
22 the EPRM. I have got that acronym wrong after all these times.

23 MS. TABEL: PMRA.

24 ARBITRATOR CRAWFORD: PMRA.

25 And there is a question between the parties, which we



11:34 1 don't have to go into here as to whether Gaucho CS FL was  
2 entitled to that accelerated treatment.

3           Let's assume that the Claimant is right on it in its  
4 Claim that Gaucho CS FL was entitled to the accelerated  
5 treatment and let's assume further that it got accelerated  
6 treatment and was registered for use in Canada, let's say, 12  
7 months before it was registered. Would that have made a  
8 difference to its market performance on the basis of the market  
9 analysis you've done?

10           THE WITNESS: (Mr. Abdala) Well, it's a good question  
11 and a difficult one to assess. Fortunately, in our but-for  
12 scenario, we did not have to go through this analysis very much  
13 because in our but-for scenario, it's basically Lindane  
14 Products that would be reinstated, and once Lindane Products  
15 are reinstated, then there is not a commercial interest for--no  
16 longer such a big commercial interest for pushing Gaucho CS.  
17 So, in our but-for scenario, we did not have to worry that much  
18 about whether Gaucho CS would have had any better performance  
19 because the but-for scenario; it's a lindane reinstatement  
20 scenario.

21           Now, in a different scenario, then you'd have to  
22 think, well, in the actual world, if it was only competition  
23 between Gaucho CS and Helix, to what extent it would have made  
24 a difference, and we have not really analyzed that because  
25 it--but for our but-for scenario it was quite different.

11:36 1 ARBITRATOR CRAWFORD: Thank you very much.

2 PRESIDENT KAUFMANN-KOHLER: We have spoken at length  
3 about the different "assumptions" that you made that you do not  
4 consider assumptions strictly speaking but simply instructions  
5 on fact, and you have done your Damages Assessment on the basis  
6 of these instructions.

7 Now, what is unclear to me is--these are all facts  
8 that the Tribunal must assess. Let's assume we say yes, these  
9 facts are established and these other facts that you've also  
10 used as a basis for your Damages Assessment are not  
11 established.

12 How do I then apportion the damage? How do I--how do  
13 I determine what a specific fact pattern that is part of what  
14 you have assumed, what impact this has on your damage  
15 calculation. Can I do this at all with what I have here, or  
16 can I not do it?

17 THE WITNESS: (Mr. Abdala) Well, I would say that you  
18 may not be able to do it for certain because if you read our  
19 letter of instructions, there's several directions there as it  
20 relates not to only what's going on in Canada but also in the  
21 U.S.

22 So, if you say, well, I accept fact number one or  
23 Claim number one but then not Claim number two or fact number  
24 two, we have not conducted such analysis, so you are not going  
25 to be able to find any number on Damage Assessment on our own

11:38 1 that has a partial claims or partial facts, and--but it's--I  
2 would say you will need to probably ask as well, if this  
3 changed, then how would your Damage Assessment change if  
4 certain instructions are not supposed to be there.

5 PRESIDENT KAUFMANN-KOHLER: That's clear.

6 And then a similar question, though different. There  
7 are different breaches alleged.

8 THE WITNESS: (Mr. Abdala) Um-hmm.

9 PRESIDENT KAUFMANN-KOHLER: You have listed those  
10 somewhere, but then you have done an assessment that does not  
11 divide the impact of the damage depending on what breach.

12 Now, let's assume, for instance, that we take one  
13 breach, we don't take the others, one breach, for instance,  
14 that alleges that the Special Review was flawed. Let's assume  
15 we think that the Special Review was flawed but that the other  
16 allegations are not established.

17 So, what do we do then? How do we decide on the  
18 causation of the specific breach? What damage has this caused?  
19 You are, of course, aware that Navigant has criticized your  
20 Damages Assessment for these reasons, saying you have done kind  
21 of an overall assessment without a division of the different  
22 impacts of the different breaches.

23 THE WITNESS: (Mr. Abdala) That's right. And we would  
24 agree that we have not attempted to set damages individually  
25 for each breach. And from reading our Report, you're not going

11:40 1 to be able to find a single number for each of the breach  
2 because we took all the breaches as a bundle. So, if you ask  
3 us for any Damage Assessment for any individual breach, we  
4 would have to think through that and do the analysis, and we  
5 would be happy to do it, but we have not done that exercise.  
6 Our exercise is, okay, these are the set of instructions, and  
7 some of them play a role of interaction with each other, like  
8 the one that Professor Crawford just asked about, the delay on  
9 Gaucho CS. Well, that's kind of overridden by the fact that  
10 Lindane Products would be reinstated. So, therefore, in  
11 conjunction they work differently than if we were to treat  
12 individually each Claim.

13 PRESIDENT KAUFMANN-KOHLER: So, it would change your  
14 Damages Assessment, if I understand it correctly.

15 THE WITNESS: (Mr. Abdala) It will have different  
16 answers, I mean, if we have to individualize each Claim  
17 separately.

18 PRESIDENT KAUFMANN-KOHLER: There is a debate also  
19 between Navigant and you about the ex post/ex ante approach.  
20 You have used what you called an ex post approach, and the  
21 criticism is that you somehow factor out all the risks that one  
22 would have had at a certain time, which would be the critical  
23 date for the Damages Assessment, taking into account what  
24 occurred later.

25 THE WITNESS: (Mr. Abdala) Um-hmm.

11:42 1           PRESIDENT KAUFMANN-KOHLER: How do you justify the use  
2 of the ex post approach?

3           THE WITNESS: (Mr. Abdala) Okay, that's a nice  
4 question.

5           There's really not disagreement, I would say, in  
6 approaches, ex ante versus ex post. We could have conducted an  
7 ex ante approach and probably would have reached similar  
8 conclusions. I think what Navigant's Expert is pointing out is  
9 a different issue, is to what extent the regulatory risks, if  
10 we were to choose, say, a valuation date as of an earlier date,  
11 would have been factored in into our calculation, and that's  
12 not really a difference between ex ante and ex post as I see  
13 it, but basically a difference to what extent I have to conduct  
14 damages under the instructions that certain events that did not  
15 happen such as registration in the U.S. and reinstatement in  
16 Canada would have happened or not.

17           So, under those assumptions, the regulatory risks are  
18 not there because the instructions are clearly, well, you have  
19 to accept that there would be the successful registration.

20           So, I think the bottom line difference between what  
21 Mr. Kaczmarek and we are talking about here between ex ante and  
22 ex post is not so much an issue of methodology and which one is  
23 the more appropriate but rather this regulatory risk which is  
24 an important component of the case should have been present in  
25 our assessment or not.

11:43 1           Our answer is that, well, look, regulatory risk is not  
2 there because the legal--our understanding of the legal Claim  
3 is these would have been the registrations, and tolerance would  
4 have been successful obtained, and, therefore, the trade  
5 irritant would have been dissipated.

6           So, the ex post approach--in addition, I would say  
7 that the ex post approach, we consider it superior to the ex  
8 ante in the sense that it allows us to incorporate all the  
9 actual data that we have already seen in the marketplace from  
10 2002 to 2008, such as the seeded area, such as the size of the  
11 market, such as macroeconomic conditions, interest rates, et  
12 cetera. So, all that--what it does is incorporates that actual  
13 information into the calculation of the damage analysis, and  
14 therefore the purpose of that is now that you have in our  
15 Report a 78 million period of damage that you can separate out,  
16 and you can see what we call the historical portion of damages,  
17 which is from 2002 to 2008, which I don't think it's mentioned  
18 in our Report, but 30 million out of the 78.6 million is  
19 damages accruing during that historical period of time for  
20 which you have much more certainty and accuracy in the sense  
21 that we have used all actual information for that historical  
22 period. And then you have the rest, which is about 48 million  
23 in damages, which are damages that are accruing from 2000--mid  
24 2008 or 2009 until 2022. So, the ex post approach, I think,  
25 should provide more comfort as to the historical portion of

11:45 1 damages that uses as much information as we have seen with a  
2 hindsight view.

3 PRESIDENT KAUFMANN-KOHLER: Where do I see the detail  
4 of what is historical losses and what is projection? Because  
5 when I see your Table 1 in your second Report, I see updated  
6 damage estimate. I don't see the breakdown.

7 THE WITNESS: (Mr. Abdala) I don't think we have a  
8 table in the Report with such a distinction. You'd have to go  
9 to the exhibits on the--I think it's Tab 31 on our DCF model to  
10 find that difference, but that's exactly then amount of damages  
11 that are accruing historically as opposed to going forward--30  
12 versus 48--but I don't think we have produced a table  
13 separating that out.

14 PRESIDENT KAUFMANN-KOHLER: Let me just see whether I  
15 have other questions.

16 Yes. There is another debate about discount rate  
17 between Navigant and you. You have taken WACC, and you  
18 explained that it's not Crompton's actual WACC but what you  
19 consider as the WACC--an acceptable WACC for a similar company;  
20 that's what I understand. And Navigant says you should take  
21 cost of equity. Can you explain why you have taken WACC.

22 THE WITNESS: (Mr. Abdala) Yes, sure. The issue of  
23 WACC versus cost of equity is relatively simple. Our approach  
24 is that damages accrue to the company that operates in Canada,  
25 to Crompton Canada in this case. And since we are looking at

11:47 1 bottom line cash flows that accrue to Crompton Canada, we opine  
2 that the appropriate discount rate in this case is to look at  
3 the cost of capital of a company, chemical company, operating  
4 in Canada that would have similar characteristics as Crompton  
5 Canada.

6           And that's kind of standard in all our damage  
7 calculations. I mean damages normally do not accrue directly  
8 to the investors or the equity holder, but rather goes through  
9 a company. So, the opportunity costs for these lost cash  
10 flows, we think it's appropriate to value them at the  
11 opportunity cost of the company that is operating in Canada.

12           Then, as a second step, obviously, you have to realize  
13 that it's not Crompton Canada who is Claimant in this case, but  
14 rather Chemtura, so then we translate those lost cash flows of  
15 both Crompton Canada and Gustafson. We say, well, in  
16 Gustafson, Claimant had 50 percent equity stake, whether those  
17 lost cash flows will eventually translate into lost profits to  
18 the Claimant in the proportion of their equity holdings, and  
19 that's why we think the WACC is appropriate because damages  
20 accrue to the companies and not directly to Claimant.

21           PRESIDENT KAUFMANN-KOHLER: Thank you. I have no  
22 further questions, no follow-up questions.

23           Yes?

24           MS. SHAKER: Am I permitted to ask one question?

25           PRESIDENT KAUFMANN-KOHLER: Of course.



11:49 1 RE-CROSS-EXAMINATION

2 BY MS. SHAKER:

3 Q. When you were just talking about historical  
4 information up to 2009, would you agree that you haven't  
5 included the following things: One, the suspension of the  
6 registration in Canada as of 2002; secondly, the absence of a  
7 registration--first of all, have you taken into account that  
8 first point?

9 A. (Mr. Abdala) The suspension of registrations?

10 Q. Of the registration in Canada in 2002.

11 A. (Mr. Abdala) of which products?

12 Q. Lindane.

13 A. (Mr. Abdala) Lindane Products for all uses?

14 Q. Yes.

15 A. (Mr. Abdala) Well, that we have taken in the actual  
16 scenario but not obviously in the but-for. The but-for  
17 scenario is different. In the but-for scenario, there would be  
18 no such suspension because, in particular for non-canola  
19 products, we were instructed that there will be no suspension;  
20 therefore, there they could be reinstated.

21 So, in the actual scenario, yes, we took them into  
22 account. In the but-for scenario, they are not there.

23 Q. Is your ex post approach based on the but-for  
24 scenario?

25 A. (Mr. Abdala) The ex post approach applies to both the

11:50 1 actual and the but-for scenario. So the use of hindsight  
2 information is useful for both the actual scenario because  
3 basically you are--in the actual scenario, you take all the  
4 information as the performance of the company and the cash  
5 flows of the company as it happened. And in the but-for  
6 scenario you build into the knowledge of that actual  
7 information but control only for the actions that--of Canada  
8 has been allegedly claimed for in this case, and therefore you  
9 control for those but-for actions. You need to make an  
10 assessment of what would be the reality of the work in the  
11 absence of that.

12           For instance, I'll give you an example. In the  
13 but-for scenario, we do not attempt to forecast what the seeded  
14 area would have been in the absence of Canada's measures. You  
15 don't have to because you already have what the actual seeded  
16 area was, and therefore since the measures are not directly  
17 impacting the seeded area, well, that's one useful piece of ex  
18 post information that you use both in the but-for and the  
19 actual scenario.

20           Q.    Correct me if I'm wrong: The ex post scenario  
21 requires you to take into account actual or known facts that  
22 occur after the alleged breach; is that correct?

23           A.    (Mr. Abdala) The ex post approach, what it does is  
24 allows you to incorporate all information that is useful for  
25 your valuation analysis, even if they happen after the

11:52 1 measures. It does not ask you to incorporate all facts,  
2 because I see where your question is going. One question is  
3 well, did you take into account that the fact that Canada, as  
4 you just asked, has a ban or restricted the use of Lindane  
5 Products in 2002? Well, I know that's a fact, but obviously  
6 that's not a fact that is consistent with the but-for scenario.  
7 In the but-for scenario, that's part of the Claim, so that fact  
8 I need to think about what would have been the situation in the  
9 absence of such fact.

10 Q. Did you take into account the absence of a  
11 registration or tolerance in the U.S. up to 2009?

12 A. (Mr. Abdala) Not in the but-for scenario. In the  
13 but-for scenario there's clear instructions that there would be  
14 tolerance since 2003 and full registration at least by 20007.

15 Q. And the introduction of the NARAP?

16 A. No, not as well. We clarify in this hearing that  
17 there's been--obviously the 2006 NARAP agreement didn't have  
18 any common sense to be there in the but-for scenario.

19 Q. So--and the introduction of the Stockholm, I'm  
20 assuming then as well with--

21 A. (Mr. Abdala) Well, we haven't opined on that because  
22 at the time we wrote the Reports we did not--we were not aware  
23 of that, and we don't know--as I testified today, we don't know  
24 what the implications would have been.

25 Q. Okay. Well, just backing up to the Stockholm

11:53 1 Convention, then, so I'm just wondering how it could be a  
2 historical assessment if you didn't take into account known  
3 facts that occurred, like the NARAP.

4 A. (Mr. Abdala) Like the NARAP?

5 Q. Historical, looking back, looking back at reality.

6 A. (Mr. Abdala) Well, the NARAP we take into account in  
7 the actual scenario, but we do not take into account in the  
8 but-for scenario. In the but-for scenario, I mean, the NARAP  
9 doesn't make any sense.

10 Q. Okay. Thank you.

11 PRESIDENT KAUFMANN-KOHLER: No further questions?

12 MR. SOMERS: Nothing arising, no. Thank you, ma'am.

13 PRESIDENT KAUFMANN-KOHLER: Fine. Then I thank you  
14 very much for your explanation.

15 THE WITNESS: (Mr. Abdala) Thank you.

16 (Witnesses step down.)

17 PRESIDENT KAUFMANN-KOHLER: And we can go over and I  
18 think we can do this immediately with hearing Mr. Kaczmarek; is  
19 that fine?

20 BRENT KACZMAREK, RESPONDENT'S WITNESS, CALLED

21 PRESIDENT KAUFMANN-KOHLER: Good morning.

22 THE WITNESS: Good morning.

23 PRESIDENT KAUFMANN-KOHLER: Can you clarify you are  
24 Brent Kaczmarek. I don't know where to place the emphasis of  
25 your last name, so you will correct me.

11:55 1 THE WITNESS: Kaczmarek is correct.

2 PRESIDENT KAUFMANN-KOHLER: Kaczmarek, good.

3 You're Managing Director of the Washington office of  
4 Navigant Consulting?

5 THE WITNESS: That's correct.

6 PRESIDENT KAUFMANN-KOHLER: You have given two expert  
7 reports.

8 THE WITNESS: Correct.

9 PRESIDENT KAUFMANN-KOHLER: You're under a duty as an  
10 expert testifying in these arbitration proceedings to make only  
11 such statements that are in accordance with your sincere  
12 belief. Can I ask you to confirm this by reading the Expert  
13 Declaration, please.

14 THE WITNESS: Certainly.

15 I'm aware that I'm heard as an expert witness in this  
16 arbitration, and that I am under a duty to make only such  
17 statements which are in accordance with my sincere belief.

18 PRESIDENT KAUFMANN-KOHLER: Thank you.

19 So, now I will turn to Respondent's counsel.  
20 Ms. Shaker, would you ask the introductory questions.

21 DIRECT EXAMINATION

22 BY MS. SHAKER:

23 Q. I just have one introductory question. Do you affirm  
24 and adopt the contents of your two expert reports?

25 A. Yes, I do.

11:56 1 Q. Thank you.

2 PRESIDENT KAUFMANN-KOHLER: Mr. Somers.

3 MR. SOMERS: Thank you, Madam Chair.

4 CROSS-EXAMINATION

5 BY MR. SOMERS:

6 Q. Good morning, Mr. Kaczmarek. My name is Greg Somers,  
7 and I represent the Claimant in these proceedings. Just a few  
8 questions for you this morning.

9 A. Sure.

10 Q. I may be making brief reference to your two expert  
11 reports, and I see you have probably the attachments there to  
12 it as well. So, we're in good shape.

13 First, I wanted to--were you here for the  
14 cross-examination of the LECG witnesses earlier today?

15 A. Yes, I was.

16 Q. Part of their examination, and it began with the list  
17 of instructions containing assumptions that were given to LECG  
18 in order to do their calculations on a counterfactual scenario.

19 Did you receive similar instructions?

20 A. No, I did not.

21 Q. In that case, in order to dispute or respond to the  
22 assumptions that were built into those instructions that LECG  
23 considered, you had to make assumptions or conclusions of your  
24 own that went to the facts that underlay the calculations; yes?

25 A. That's correct.

11:58 1 Q. Where did those assumptions that you made or the  
2 disputing that you did, if I can put it that way, of the  
3 assumptions contained in the LECG material come from?

4 A. Well, there are underlying differences we've relied  
5 on, some Witness Statements. They're all specified within our  
6 expert reports.

7 Q. All right. So, you reviewed the Witness Statements  
8 and assertions, I will say, of fact that are--or at least some  
9 of them, because it's a big record--but some of them that are  
10 in the record and that you reference in your Reports as the  
11 basis for your belief, just for example, that the canola  
12 growers, concerned with the healthy image of canola, would have  
13 phased out or stopped entirely their use of lindane-based  
14 pesticides, just as an example.

15 A. Yes, as an example, obviously we referred to the  
16 Witness Statement of Tony Zatylny, but we also went further and  
17 referenced the October 1998 letter from the CCGA to PMRA which  
18 specified that the growers no longer wished to use lindane.

19 Q. And so in reference to that particular fact or  
20 development in the situation, that's what you used.

21 And similarly with the other assumptions that you made  
22 or the other assumptions that LECG used and you disputed, you  
23 referred to various documents in the record.

24 A. That's correct.

25 Q. Okay. But were those enumerated for you in any way or

11:59 1 were you given the material as such and went through it  
2 yourself in order to develop the assumptions or the contra  
3 assumptions, if I can say that, to--that you relied on in your  
4 Report?

5 A. They were certainly not presented to me and offered,  
6 for example. No one said this is what this document says  
7 incorporated into your Report.

8 We received a lot of documents. We went through those  
9 documents. We made our own interpretations of what they said,  
10 and then where appropriate for further clarification, for  
11 example, regarding that 1998 letter, we asked for additional  
12 context regarding that letter. Obviously, it was a  
13 ten-year-old letter, and we wanted to understand someone who  
14 was familiar with the letter and understand better the context  
15 so that we were interpreting the letter correctly.

16 Q. Fair enough. And I don't know if this sounds like I'm  
17 going to sneak up on you and say aha, you know, you used this  
18 fact and you should never have or he talked to you is not what  
19 it's about. All--I'll just put a circle--you know, just sort  
20 of to put a rope around all this. Can I say--and correct me if  
21 I'm wrong--but your critique of the LECG Report in respect of  
22 the assumptions is dependent on the conclusions, let's say,  
23 that the--the factual conclusions that the Tribunal makes on  
24 these questions before it; is that fair?

25 A. I'm sorry, could you rephrase that.



12:00 1 Q. Yeah, maybe I'll--yeah.

2 In terms of the assumptions the LECG uses that you  
3 dispute and that you use to criticize their Report or the  
4 validity of its numbers, those are questions of fact, and your  
5 criticisms, the validity of your criticisms of them are also  
6 questions of fact that if the Tribunal doesn't accept that, for  
7 example, the canola growers are going to move away from  
8 lindane, if you don't accept that, then your criticism is  
9 equally removed or negated.

10 A. Yes, perhaps, but many of these assumptions of fact I  
11 believe are very closely related to the damages issues. And in  
12 conducting my work, if I'm given an assertion of a fact that is  
13 very closely tied to damages, I conduct my own independent  
14 assessment of that fact to make sure it's reasonable to  
15 incorporate into my analysis.

16 My criticism was that I thought there was lots of  
17 evidence that LECG did not consider that would highly question  
18 whether those facts should have been incorporated into their  
19 analysis as they did.

20 Q. So, for example, when Mr. Zatylny, who ostensibly  
21 represents 30,000 growers says the growers hate lindane, it  
22 damages the healthy image, we are moving away from it, is that  
23 the sort of thing you mean? You'll take that fact into account  
24 and say, "Well, LECG's calculation is flawed, because they  
25 didn't take this fact, closely related to damage, into

12:02 1 account." Is that right?

2 A. Not just Mr. Zatylny's statement, but the letter  
3 itself, which was a--

4 Q. Right.

5 A. Contemporaneous piece of evidence, yes.

6 Q. Fair enough.

7 And I wasn't trying to tie you down to make you prove  
8 the fact or anything like that. I just meant that, as an  
9 example, that's--okay.

10 Just a line on ex ante versus ex post. And I'm way  
11 over my head here, so be gentle.

12 So, as I understand the ex ante approach, one fixes on  
13 the breach date or evaluation date. I think the date that's  
14 been being used here is January 2003, January 1, 2003; is that  
15 right?

16 A. January 2003 is one possible date. We've talked about  
17 it, because that's when mechanically cash flows begin in LECG's  
18 model. I think we heard Mr. Abdala this morning talking more  
19 mid 2001 is really when the acts alleged to have occurred did  
20 occur, and so maybe mid 2001 is a better date to look at from  
21 an ex ante point of view.

22 Q. Okay. Could I ask you to turn to--you give this  
23 useful discussion about an ex ante/ex post in your first--it  
24 was useful for me--in your first Report at, I think,  
25 Footnote 81.

12:03 1           No, that's not right.

2           Maybe you can help me. It's the widget  
3 factory--widget factory example. No, it's in your second  
4 Report, I'm sorry.

5           Do you have it?

6           A. What's the page reference? I'm sorry.

7           Q. It's Page 22 of your second Expert Report.

8           A. Yes.

9           Q. So, expropriation of a 30-year bond, in your Expert  
10 Opinion, it would be--that would be an ex post appropriate--

11          A. Yes, as I explained, I think whether one implements an  
12 ex ante approach or ex post approach is something that is very  
13 closely tied to the facts and circumstances of each case. So,  
14 what I was explaining here in this Footnote 81 on Page 22 of  
15 the second Report is, I gave an example of a bond. A bond is a  
16 contractual instrument with defined payments at defined times,  
17 and so I think one could logically conclude that if we were  
18 standing here and knew that bond had been expropriated 30 years  
19 ago, we could understand exactly what payments would have been  
20 made over the past 30 years under that bond. With that type of  
21 information, to me, it would make no sense to do ex ante,  
22 because there's no risk associated with what those cash flows  
23 and what the timing of those cash flows are, so an ex post  
24 approach would be most appropriate.

25          Q. I guess it's suitable because you can take the facts,

12:05 1 the historical information which you now have access to,  
2 because you're evaluating in the future from the data being  
3 looked at. You could take them into account and not over- or  
4 under-compensate for things that actually happened?

5 A. I'm not sure if I follow the question, but with  
6 respect to the bond, there is defined coupon payments. We know  
7 precisely what they are. They are set forth in the bond  
8 contract, so we don't need to discount those payments if they  
9 were to have occurred in the past. We can put interest on them  
10 and treat them under an ex post approach.

11 Q. Because under the ex post approach you can see they  
12 were actually paid?

13 A. Yes, if they would have been paid to--

14 Q. That's all I meant, yes.

15 A. The bondholders, for example, yes.

16 Q. In the case of the Claimant, if you had to value the  
17 business as of July '98, you would have had to project future  
18 sales and discount them, and that those should correlate with  
19 the actual sales that happened between 1998 and current; isn't  
20 that right?

21 A. If what you're saying is, if I were trying to attempt  
22 to value the Lindane Product line as of July 1998, I wouldn't  
23 be taking, you know, into account anything happened after July  
24 '98, but only the reasonable expectations as of July 1998.

25 Q. And that's because it's speculative, because it's

12:07 1 based on the but-for scenario as to what happens after those  
2 sales stop?

3 A. I think it's a difference of methodology. If--again,  
4 you're asking me to value a product line at a point in time.  
5 Evaluation of an income-generating asset is always future  
6 looking. It is never--an ex post approach is really a damages  
7 sort of methodology that doesn't really comport with valuing an  
8 income-generating asset.

9 Q. But as far as the lindane business goes, its value is  
10 mainly in its sales, isn't it, so you're projecting sales to  
11 devalue that lindane business? Not an asset.

12 A. Certainly, that's the first line item that one would  
13 forecast, yes.

14 Q. And the significant one in this case, lindane  
15 business? It's--

16 A. Well, sales would be important to any product line,  
17 yes.

18 Q. Okay. And so, valuing in our case from 1998 to 2009  
19 would require projecting sales based on some historical amount  
20 and pushing those forward past the date when the sales stopped  
21 in order to construct and project the value; is that right?

22 A. That's true.

23 Q. So, your criticism of the ex post methodology used in  
24 this case is based on the uncertainty that PMRA and EPA would  
25 have approved and allowed sales to continue into the future,

12:08 1 and that--it's a fact your question mark or your dubiousness  
2 about the approach is again based on those factual assumptions  
3 that underlie the variability to calculate those sales?

4 A. Some of those factual assumptions, yes, but also other  
5 factors as well.

6 Q. If, in valuing the sales of canola--no, I'm sorry, of  
7 lindane, the pesticides for canola going forward, you would  
8 base expectations of future demand on acreage to be planted.

9 A. Correct.

10 Q. You would have factored in increases in acreage or  
11 projected increases in acreage in order to refine that  
12 estimate; is that fair?

13 A. If the acreage would be expected to increase, then  
14 yes; if it would be expected to decrease, then I would factor  
15 that in.

16 Q. Under an ex post approach, you could use the actual  
17 acreage increases to calculate that number. Under an ex ante,  
18 though, you would have to deem them based on some past  
19 performance. In that case, wouldn't an ex post approach be  
20 more precise, because it looked at in terms of--precise in this  
21 context is trying to get at the number that would have happened  
22 most closely to what it would be. It is speculative. But  
23 under the ex ante, you would say, "Well, in the past, acreage  
24 grew 2 percent a year, so we are going to push that number  
25 through forward to the date that we want to get to today."

12:10 1 Under the ex post approach, though, you could look  
2 at--you could actually go to 2006 and look at the actual  
3 acreage and use that.

4 A. That's correct.

5 Q. Yes.

6 A. But when you do that, as I explained in both my  
7 Reports, you have to take a look at the whole situation, which  
8 is, if you're going to insert actual information that you know  
9 into the calculation, simultaneously what you're doing to  
10 the--what we are calling the historical cash flows, cash flows  
11 between the date of harm and today, you're removing the  
12 discounting associated with those cash flows. Instead you're  
13 adding interest, so you're implying that what you're doing is  
14 adding a higher degree of confidence to the measurement of  
15 those cash flows and implementing an ex post approach.

16 Now, what I have said is, you have to have a  
17 sufficient amount of information, not just the acreage in which  
18 canola is planted, but other things such as market share,  
19 prices and so forth, costs, on how to implement those in order  
20 to justify removing the discounting associated with them and  
21 adding an interest component on top of it.

22 Q. I actually think I even partly followed that. But  
23 doesn't that mean, then, that you've got--there are deficits  
24 and there are advantages to the two methodologies? It depends  
25 on the constellation of the particular facts, as you said. It

12:12 1 might tweak the analysis one way or the other, depending on how  
2 they fall.

3 A. Yes, there is definitely positives and negatives to  
4 each. I have presented myself, in many cases, ex post  
5 calculations where I thought the facts, circumstances and data  
6 available to me allowed for reasonable calculation on that  
7 basis, and in other cases the information was not robust  
8 enough, if you will, to implement that approach, and I reverted  
9 to an ex ante approach.

10 Q. All right. As a matter of your professional judgment,  
11 that was the most appropriate one based on the--

12 A. Correct.

13 Q. Facts in that case. Okay.

14 PRESIDENT KAUFMANN-KOHLER: Can I just interrupt here,  
15 so I don't have to come back? That is really so the choice  
16 between one or the other approach is just a matter of  
17 information or evidence. It's not a matter of concept.

18 THE WITNESS: Correct.

19 I mean, both approaches are equally recognized as  
20 being acceptable approaches to compute damages. I think the  
21 appropriate approach will depend on facts and circumstances of  
22 each case, and the data, as you just suggested, that's  
23 available to be able to take advantage of.

24 PRESIDENT KAUFMANN-KOHLER: Yes, so, that's how I  
25 understand it. You said, actually, the primary flaw with



12:13 1 LECG's ex post cash flow approach is that they incorporate very  
2 little information data and so on. So, I understand, this is  
3 what you're criticizing. You're not criticizing the ex post  
4 approach as such, as a method.

5 THE WITNESS: Precisely, right.

6 PRESIDENT KAUFMANN-KOHLER: Thank you.

7 Sorry about the interruption.

8 BY MR. SOMERS:

9 Q. Let me--I will take a flier. In your exhibit, I'm  
10 looking at Exhibit--it's NCI-5. I have it in a big white  
11 binder, exhibits to the Expert Report. Brent Kaczmarek--in  
12 fact, it's Exhibit NCI-5 as well as being at Tab 5 of your  
13 exhibits binder.

14 And that's an Excel sheet entitled "Actual Revenues  
15 and Profit Based on LECG Base Case Scenario for Canola and  
16 Non-canola, '97 Through 2008 in U.S. Dollars." And, I think,  
17 the--well, I guess the bottom line of it, literally, is total  
18 profit as of November 24, '98. In order to calculate this, you  
19 would have used cash flows, the company's cash flows generated  
20 by its lindane business; is that right?

21 A. Yes, I did.

22 Q. You used actual cash flows as they actually, really,  
23 truly happened; right?

24 A. That's correct. As I'd stated in my first Report, I  
25 used these actual cash flows and said, if these cash flows were

12:15 1 deemed to be a reasonable proxy for expected cash flows, then  
2 one could assess that the value of Claimant's Lindane Product  
3 business would be worth roughly \$6 million once it was agreed  
4 that the Voluntary Withdrawal Agreement would be put in place.  
5 So, I was trying to give the Tribunal an order of magnitude as  
6 to what the value of those products would have been back in  
7 November 1998.

8 Q. And since you used actual cash flows, isn't that a  
9 species of ex post calculation, as I understand?

10 A. Well, rather than embark on attempting myself to come  
11 up with what the reasonable expectations were, I simply used,  
12 as a shorthand, to say if the actuals could be deemed to have  
13 been reasonable expectations as of November '98, then this is  
14 what a discounted cash flow valuation of Claimant's Lindane  
15 Products would look like, and the result would be as of  
16 November 1998.

17 So, I used actuals as a proxy for expectations.

18 Q. I think that's a yes with some semantics around it,  
19 but I'm not sure. I think I understand the theoretical  
20 distinction you're making. It's because you're not using the  
21 actuals as the closest--the appropriate methodology to arrive  
22 at the appropriate number, but because they were the handiest  
23 as a proxy, as you said. But--as a layman, I see that as a  
24 distinction without a difference. I don't know. The number  
25 would have been exactly the same had you used the ex post

12:17 1 analysis. You just would have called it--used it to serve  
2 maybe a different purpose.

3 A. Well, in doing this, I was not attempting to do any ex  
4 post type analysis. I was attempting to do a valuation of the  
5 product line. And again, everything would be forward-looking  
6 from the point in time at which I'm valuing it. I simply just  
7 used the actuals as a shortcut. The technically correct way  
8 would be to stand in 1998, November 1998, and say, given what  
9 lindane's product business has done up until that date, what  
10 would be my expectations for that business to do until the  
11 Voluntary Withdrawal Agreement is expired.

12 Q. All right. You performed an ex ante valuation forward  
13 from that date; is that right? The value of the--

14 A. Yes, this was my approximation of what a valuation  
15 would be ex ante on November 1998.

16 Q. In doing your--well, did you not do other ex ante  
17 valuations as well in going forward from this date?

18 A. No, what I discussed in my Report was how a reasonable  
19 businessperson would look at the value of the product line over  
20 time.

21 Q. Yes.

22 A. I said obviously a lot of risk in early '98 with  
23 respect to all of the Protocols coming out about lindane and  
24 the trends historically, that there would be a great amount of  
25 risk. I did not do a valuation. I just put that out for the

12:18 1 Tribunal to consider how someone would evaluate the business.

2           Then I said, as of October '98, when we see evidence  
3 that the growers no longer want a lindane-based product, my  
4 conclusion was, at that point, when there is no market demand  
5 for the product, the product has no value. So I said, as of  
6 that date, it was worthless, October '98. Then, with the  
7 implementation of the VWA, well, now there is some certainty to  
8 the business for a particular defined period of time. So now  
9 it has some amount of value. I put it at around roughly  
10 6 million.

11       Q. Did you assume in the valuation exercise that the PMRA  
12 would terminate lindane registrations and that the EPA would  
13 not, for example, grant a registration or tolerance?

14       A. In conducting this \$6 million valuation?

15       A. Yeah. My belief is that, as of November 1998, a  
16 reasonable person looking at that product line could not  
17 foresee or count on any sales of lindane-based products upon  
18 the expiry of the VWA, the primary evidence of that being the  
19 growers didn't want to buy it.

20       Q. But my question--fair enough, and I understand that's  
21 your position on the growers' opinions, but I'm talking about  
22 the EPA and the PMRA. That has nothing to do with what the  
23 growers want.

24           My question was just did you--you built into yours as  
25 well that the EPA would not have granted a registration and the

12:20 1 PMRA would have withdrawn the lindane registrations. Yes?

2 A. Well, as I said, even if the EPA would have granted  
3 it, that just simply allows for sales to be conducted. That  
4 doesn't mean actual sales would be in demand.

5 Q. So, did you not take a position on whether the PMRA  
6 would withdraw the registrations or the EPA would--

7 A. In conducting this, it didn't matter, because if there  
8 is no demand for the product, even though it could be sold, if  
9 people don't want it, there could be no sales for it  
10 afterwards.

11 Q. If PMRA--so, you didn't take--you didn't consider what  
12 the PMRA might or might not have done or what the EPA might or  
13 might not have done?

14 A. When you have evidence that the customer base doesn't  
15 want the product, it doesn't matter whether or not it  
16 would--you could sell it. The question is, do people want it  
17 if you can sell it.

18 Q. We are back to the facts then. It sounds like the  
19 dispositive fact that your valuation relies on is that the  
20 market turns its back on this stuff and never looks back?

21 A. That's correct.

22 Q. Oh, okay.

23 Just a couple of questions. I'm done with that  
24 exhibit, so we can get this bulky thing out of our way, and I'm  
25 going on to your second Report. I'm looking at Paragraph 108

12:21 1 of your second Expert Report. There, there is some critique of  
2 LECG's market share calculations.

3 A. Yes, I'm with you.

4 Q. I was trying to understand the critique at the second  
5 bullet, and it sounds like what's happened is the Canadian  
6 acreage was taken into account but the seeds that go to both  
7 Canadian and some U.S. acreage were counted, and so it  
8 increased the apparent market share by sort of concentrating  
9 ourselves into Canada when in fact they were distributed over a  
10 larger acreage that included North Dakota.

11 A. That's correct.

12 Q. So, to make sure I don't misstep, the purpose of the  
13 exercise of the market share is to get at a dollar figure,  
14 so--the projected sales number, so what we would do is we  
15 would--let's fix that error, take out the lower market--not  
16 take, but reset the market share to reflect the lower market  
17 share that actually happened by not concentrating North Dakota  
18 seeds into the Canadian acreage sort of thing. But then  
19 projected sales are a function of the number of seeds planted  
20 and the acreage. So, if we--while we'll dilute the Claimant's  
21 market share, we will spread it over a bigger acreage, and it's  
22 a factor of those, so the number at the end of the day, the  
23 projected sales is exactly the same.

24 Do you follow?

25 A. No, I think they're overstating the percentage.

12:23 1 Q. Yes, they are overstating it as a percentage. You're  
2 absolutely right. But if the only reason we want the  
3 percentage is to get a sales figure, then the sales figure is  
4 exactly the same at the end of the day because while they have  
5 a smaller market share, they have a smaller market share about  
6 a bigger acreage?

7 A. Yes, correct. I'm with you.

8 Q. That's my only point.

9 So, while I take your correction about the market  
10 share percentages as a gee whiz number, it's not quite that big  
11 as far as once we reduce it to the dollars that we are after in  
12 the first place, it comes--it comes to the same number. That  
13 was my only point.

14 Did you agree with that conclusion of mine?

15 A. Yes, yes.

16 Q. On the third bullet, which it does take one aback  
17 initially, you say, "LECG illogically calculated Chemtura  
18 Canada would have a market share greater than the entire  
19 market"--I'm sure they would love that--"more than a  
20 hundred percent for the entire year '96."

21 Well, at least to get you to consider the possibility  
22 that the reason that that might have happened might be that  
23 sales for a given year, if you calculate market share based on  
24 sales, sales in a given year might be referable to more than  
25 one year. In other words, in a given year, the producers

12:25 1 estimate how many, let's say, treated seeds they need, and the  
2 in turn the distributors or the seed treaters estimate how many  
3 seeds they will have to treat. And in turn they guess on how  
4 much lindane they will have to buy or whatever treatment they  
5 will have to buy to treat those seeds, but acreage is year to  
6 year, depending on commodity prices and moods and everything  
7 else fluctuate wildly, and so some years it's short, but some  
8 years it's excessive.

9           So, if they buy too much in a given year, it looks as  
10 though the sales cover more than the total market in terms of  
11 the actual acreage that actually happened, but, of course,  
12 that's carryover. That's hangover for the next year or the  
13 next two years. I think the shelf-life--well, never mind that.

14           Is that fair? Might that account for that 115 percent  
15 I think was the number elsewhere in your testimony about the  
16 overestimation?

17           A. Certainly it could account for some portion of it, but  
18 I think the explanation given was that seed treatment companies  
19 are buying two and three years in advance, which is not I think  
20 in accordance with what some of the testimony has been in the  
21 record, so our view is that obviously it looks like a  
22 significant outlier that ought to have been investigated.

23           I did show on Page 49 of my first Report just how wild  
24 the varying--the measurements of the market share were taken by  
25 LECG over time. And what they did was simply take an average



12:26 1 over, for example, the decade which, given these variations and  
2 also possible trends, they have simply erased those trends and  
3 variations by taking a smooth average, and so I was suggesting  
4 here that obviously with a market share figure of 115, which  
5 seems extraordinary, agreeing with your point that some of it  
6 may be due to excess purchases, but certainly not excess  
7 purchases for two and three years in advance, but that we  
8 should be looking more deeply at whether this market share  
9 calculation is right, given these figures.

10 Q. I will go back to your second Report, and I'm looking  
11 at Paragraph 40.

12 You dispute that--well, instead of that, I will just  
13 read from the last sentence of that paragraph 40 of yours. "In  
14 our view, the risk of Chemtura Canada regaining its market  
15 share must be factored into the analysis seeing as it was a  
16 primary consideration of the industry in seeking the VWA."

17 So, presumably the risk of it regaining its market  
18 share is factored into the analysis to diminish the likelihood.  
19 In other words, you're saying it's not that it might get more  
20 market share. It's that it will be--if anything, it will be  
21 less, and some risk factor should be put in to take account of  
22 that. Is that what you mean?

23 A. Well, not only that, but perhaps different than how  
24 LECG has assumed. The heading to the section is they could  
25 regain their former market share they say of around 82 percent.

12:29 1 The assumption built into the analysis is that, even though  
2 lindane is out of the market for two years, that suddenly the  
3 market share almost instantaneously reaches back to 82 percent,  
4 even though Helix had captured much of that market share. I  
5 did not think that that was a reasonable assumption as to how  
6 the product being reintroduced into the market, how those  
7 products would have behaved.

8           And I didn't think it likely that--so, not only  
9 unlikely that they could have regained the full market share  
10 that they had, but very unlikely that they could have regained  
11 it almost instantaneously.

12       Q.   And, indeed, in Paragraph 45 you say, "In our view,  
13 this evidence indicates that Helix would not only have competed  
14 successfully against a lindane-based product, it indicates  
15 lindane-based products would have likely found little, if any,  
16 market share since the growers had made it clear that they had  
17 no interest in using lindane-based products regardless of  
18 cost."

19           So, two things. First, that point of yours that the  
20 lindane growers--not lindane growers--canola growers that  
21 turned their back on Lindane Products is also fundamental to  
22 this point that you're making; is that right?

23       A.   Yes, and that was based upon another document that I  
24 had been given. I'm not sure if I have it in front of me.

25       Q.   I'm sorry, does this document refer to whether lindane

12:30 1 would be--whether canola growers would buy lindane?

2 A. Yes, absolutely. It basically is the position of the  
3 CCC that they are turning the page, as they said, and  
4 regardless of costs they're not going back to lindane.

5 Q. Unfortunately, for me, it's not up to me or you as to  
6 what they're going to do. I was just trying to understand what  
7 your Report is premised on. That's a determination of fact  
8 that other people will have to make.

9 I'm just trying to understand the bases for your  
10 Report. I'm not going to contest whether the canola growers  
11 are going to go back to lindane or not.

12 A. I very much understand the Tribunal can make that  
13 determination, but for me as a damage Expert, it's so closely  
14 related to the damage calculations that I must make an  
15 assumption myself in order to put the analysis together.

16 So--

17 Q. Fair enough.

18 A. --I made my own independent assessment, which the  
19 Tribunal is free to agree or disagree with.

20 Q. And I accept.that.

21 ARBITRATOR CRAWFORD: And your assumption is that  
22 canola growers would not have gone back to lindane, even if  
23 lindane had been a lawful product and irrespective of the price  
24 difference?

25 THE WITNESS: That's correct.

12:31 1 BY MR. SOMERS:

2 Q. Did you take into account the fact--in any of your  
3 damage calculations the fact that if or in your rebutting of  
4 the assumptions the fact that some or all of the producers of  
5 competing products like Helix had a lindane product, had  
6 discontinued the lindane product and could easily have  
7 reintroduced that lindane product if it was legal to do so.  
8 Did you take that into account?

9 A. No. Again, it's my view, based on the evidence I have  
10 reviewed, that demand would not return for a lindane-based  
11 product.

12 Q. Irrespective of price differential?

13 A. Correct.

14 Q. Okay. Now I'm really taking chances, but I'm going on  
15 wade in a little bit to the WACC versus CoE debate, weighted  
16 cost of capital versus cost of equity.

17 Your position is that the appropriate discount rate to  
18 be used here is the cost of equity?

19 A. That's correct.

20 Q. LECG says that Weighted Average Cost of Capital is the  
21 appropriate one, as I understand it.

22 For Gustafson as well, because they enter into the  
23 damage calculations as well, you use the cost of equity as the  
24 discount rate?

25 A. That's correct.

12:34 1 Q. Discounted cash flows to the company, for a given  
2 company, which don't include payment of interest or of  
3 dividends should be--how would you discount those?

4 A. You will have to be more specific I think with the  
5 question when you say discounted cash flows to the company. In  
6 what sense?

7 Q. Where a cash flow is not--doesn't involve the payment  
8 of interest or dividends, and you were trying to discount--as  
9 you have to do in our case, flows to the company, which--was  
10 there any particular methodology you would use?

11 A. Who is the company in your--you say discounted cash  
12 flows to the company. Who is the company?

13 Q. Just a given company. I'm just trying to understand  
14 when you would use the weighted cost of capital versus when you  
15 would use the cost of equity. Is there some basically  
16 underlying factual difference that directs your judgment?

17 A. Yes, there is. If we are talking in a commercial  
18 context where you have one company suing another, cash flows  
19 that might have been generated by the company might be  
20 discounted at the Weighted Average Cost of Capital. Here we  
21 are dealing with an investor-State arbitration issue, so we  
22 have an investor and we have an investment, and this is the way  
23 I construct all of my damage calculations in these types of  
24 proceedings.

25 And so I asked myself what is the form of investment

12:35 1 that the Investor has? It has ownership, equity ownership, in  
2 both Chemtura Canada and a 50 percent ownership in via Chemtura  
3 Canada and Gustafson. And that is the framework on which the  
4 damages ought to be computed, whether they're wholly owned or  
5 5 percent owned. They have an equity interest in the company,  
6 and we're to determine how their equity interest was affected  
7 by the measures.

8 Q. The way that LECG calculated the--using a discounted  
9 cash flow method used--compared an actual scenario to a but-for  
10 scenario. The difference in cash flow in those two--comparing  
11 those two would go to the equity, would go to the Claimant, the  
12 equity holder; yes?

13 A. That's correct.

14 Q. And is your criticism of what LECG did, so I'm trying  
15 to understand it here, they used--in using a discount rate that  
16 was the average for that industry and not its actual cost of  
17 capital? I'm sorry.

18 A. Well, there was not only a criticism that they're  
19 using the wrong discount rate, but then they were using  
20 elements of the parent company to infer what the costs of  
21 capital would be for the subsidiaries.

22 Q. So, then, assuming liability is found, the  
23 compensation due to the Claimant would be discounted at the  
24 actual cost of capital of the company that was affected by the  
25 measures?

12:37 1 A. It's discounted at the cost of equity of the  
2 investment, so those investments being Chemtura Canada and  
3 Gustafson.

4 Q. I guess the concern with that is that if the measures  
5 have affected--themselves have affected the company's cost of  
6 capital, it understates the damage because the measures sort of  
7 have this double whammy effect? Do you understand? Do you  
8 follow me?

9 A. Yes, I'm following you.

10 Q. Well, isn't that so?

11 A. The costs of capital measured by LECG has a double  
12 whammy effect on accounting?

13 Q. No. That if you use--if you use the--let me come at  
14 it another way.

15 If you look at an average return of companies in that  
16 industry generally to capture the business risk in that sector  
17 but not the impact of the specific measure on that company's  
18 cost of capital, wouldn't that be preferable so that you  
19 don't--so that you don't interfere let's say with the  
20 calculation or allow the measure to have interfered with the  
21 calculation to that specific company?

22 A. Sure, I think I understand what you're saying.  
23 Certainly a State's malfeasance, if you will, shouldn't be a  
24 reason to increase the discount rate, but I don't think that  
25 LECG is doing a calculation that takes into account Canada's

12:39 1 alleged malfeasance in this regard. I think it's looking at  
2 industry in general and saying this is average cost of capital,  
3 so I don't think there is a sort of double count in terms of  
4 the calculation.

5 Q. Fair.

6 Well, that's tested the limits of my knowledge of the  
7 area. Thank you very much. You have been very candid.

8 PRESIDENT KAUFMANN-KOHLER: Any redirect questions?

9 MS. SHAKER: I have a couple redirect questions. More  
10 than a couple, actually, but not many.

11 REDIRECT EXAMINATION

12 BY MS. SHAKER:

13 Q. Mr. Kaczmarek, what are the missing facts in this case  
14 that would make an ex ante approach inappropriate, in your  
15 opinion?

16 A. I'm sorry, could you repeat that?

17 Q. You were saying that in your testimony that the ex  
18 ante approach is inappropriate in this case. What would have  
19 made it--what was it missing? What facts are missing in order  
20 for it to become inappropriate, in your opinion?

21 A. Well, we don't really have any experience to judge in  
22 the sort of post-VWA environment where Lindane Products are  
23 competing against non-lindane-based products, so we can't  
24 observe the competition at all. We can't see how one product  
25 might differentiate itself from another, we can't see what the



12:41 1 pricing strategies are, we can't see what the costs maybe would  
2 be for lindane if there are lower volumes being purchased for  
3 particular market shares. There is just no competitive market  
4 experience to assess in my view, and with the absence of that,  
5 I think that the only reasonable thing one could do is make ex  
6 ante forecasts of maybe what would happen rather than suggest  
7 that we know precisely how the market would have evolved post  
8 the VWA.

9 Q. And my apology. I actually meant, you answered the  
10 question correctly, even though I said ex ante instead of ex  
11 post.

12 Can you explain a little bit more about this idea of  
13 taking actual facts into account in the ex post analysis versus  
14 sort of this idea of taking into account facts in the but-for  
15 world?

16 A. Well, you know, when you're doing a but-for  
17 assessment, it's always hypothetical, but the foundation of it  
18 is, of course, you assume the acts that are alleged to be in  
19 breach did not occur. What I think LECG has done with respect  
20 to calculating their but-for assessment is they're going beyond  
21 just but-for the acts, and they are attaching to those acts a  
22 series of other events that they're suggesting would not have  
23 happened, such as the Stockholm Convention or the NARAP and so  
24 forth in order to make it fit into the hypothetical.

25 And so I think that's where in my view the analysis

12:42 1 has gone astray. It really isn't a pure but-for what the  
2 Respondent has alleged to have done but for a series of acts  
3 that actually went against the Claimant, they're now turned  
4 into counterfactual issues in the analysis.

5 Q. Can you just turn to Paragraph 73 of your second  
6 Report.

7 So, here in Paragraph 73, my question is, and you can  
8 read the second sentence and the third sentence. My question  
9 is, if the Tribunal comes to the conclusion that the PMRA  
10 Special Review reached the wrong conclusion, and it should have  
11 concluded that lindane was safe, you say here that the trade  
12 irritants still remained. Would that introduce considerable  
13 market uncertainty as well?

14 A. Absolutely. I mean, as I've stated here, it's really  
15 returning to the status quo. Prior to the trade irritant  
16 issue, lindane was registered in Canada but not the United  
17 States. So, if the PMRA had said, hey, it's safe and allowed  
18 the registrations to continue, you're in the same situation you  
19 were all along, which is no harmonization, no possibility for  
20 sales.

21 Q. And so how would a reasonable businessmen at that  
22 moment in time see the business?

23 A. Well, obviously I think with great uncertainty. There  
24 is no market to sell the product. I think a reasonable  
25 businessman would be gravely concerned that the customer base

12:44 1 and the trade groups associated with the customer base are  
2 saying that it doesn't--it no longer wants the product due to  
3 the healthy image concerns it creates for canola. Standing  
4 there at that point in time back at the end of the VWA, as I've  
5 stated in my second Report, you have an uncertain future market  
6 at some uncertain future unknown date for an unknown amount of  
7 time. That's about as uncertain as one can get regarding a  
8 business.

9 Q. I think we have mostly been talking about canola. I'm  
10 just wondering--is that right, we have been talking about  
11 canola for most of this?

12 A. Yes, that's fair.

13 Q. The Claimants made a Claim for damages with respect to  
14 non-canola. I'm just wondering what your opinion is of that.

15 A. Yes, we address this in both the first Report and the  
16 Second Report. LECG did not do any sort of assessment of what  
17 non-canola business could be like if the growers had refused to  
18 use lindane on canola, but it would continue to be allowed to  
19 be used on non-canola products such as mustard and the cereals.

20 In our view, and the amount of volume of sales for  
21 those products was so small relative to canola that we highly  
22 questioned whether or not the business would even be feasible  
23 to continue marketing a lindane-based product for those crops,  
24 because obviously you'd have to convince the seed treatment  
25 companies to add that other product, where there were maybe

12:46 1 other products that they could have in-house for treatment.

2           So, in our view, we considered it speculative to know  
3 whether or not that business could survive economically for  
4 non-canola, and then they didn't provide any additional  
5 evidence which would allow us to substantiate whether the  
6 business would be viable.

7           Q. The Tribunal's shown some interest in this idea of a  
8 possible alleged delay in the registration of the Gaucho CS FL  
9 product. I'm wondering if you can just give me your opinion or  
10 give us your opinion as to whether or not there would be any  
11 damages if that was, in fact, the case.

12           MR. SOMERS: Madam Chair, before the witness answers.  
13 Just, as I recall, this is redirect, and I'm not sure if this  
14 is of interest to the Tribunal, fair, but this does not arise  
15 from any of my examination as I recall it.

16           PRESIDENT KAUFMANN-KOHLER: That's right, yes.

17           MS. SHAKER: I can withdraw the question, then, unless  
18 the Tribunal thinks it's of interest to them.

19           PRESIDENT KAUFMANN-KOHLER: Why don't you withdraw the  
20 question, and we see whether we want to ask it.

21           MS. SHAKER: Okay.

22           BY MS. SHAKER:

23           Q. Just one last question, then. In your opinion, in the  
24 Damages Assessment--actually I will just leave it at that, I  
25 think.

12:47 1 PRESIDENT KAUFMANN-KOHLER: Fine.

2 Any questions by my co-Arbitrators? Judge Brower?

3 ARBITRATOR BROWER: Yes.

4 PRESIDENT KAUFMANN-KOHLER: Yes.

5 QUESTIONS FROM THE TRIBUNAL

6 ARBITRATOR BROWER: Mr. Kaczmarek, you placed  
7 considerable emphasis on the fact that there was documentary  
8 evidence as of October 1998. I believe that the Canola Growers  
9 Council and its members essentially would prefer not to have  
10 anything more to do with canola, and therefore there was no  
11 future market for--I'm sorry, not canola, with lindane. Right.  
12 There was no future market for Lindane Products, if I've  
13 understood that correctly.

14 THE WITNESS: That's correct, sir.

15 ARBITRATOR BROWER: Okay. Now, however, had there  
16 been no products available that could do essentially what  
17 lindane had done, which I believe was not clear as of  
18 October 1998, could that not have changed the situation,  
19 would--growers wouldn't want to be with nothing, would they?

20 THE WITNESS: I think that's exactly right, and I  
21 think that was one of the primary drivers behind the VWA, was  
22 to ensure that the growers could continue to use lindane and  
23 was part of the Record of Understanding between Canada and the  
24 United States that they could continue for a period of time to  
25 use it while replacement products were put before the PMRA and

12:49 1 registered so that it could eventually be used.

2 ARBITRATOR BROWER: Right. So, your assumption that  
3 there was no market for the future really depended upon the or  
4 depends upon the availability of adequate substitutes by 2000.

5 THE WITNESS: Yes. That's exactly right. I mean,  
6 that's precisely how markets behave when the market says we  
7 don't want this, we prefer an alternative, companies innovate  
8 and provide that to satisfy the demand, and that's exactly what  
9 happened. Several products came out on the market to replace  
10 lindane.

11 ARBITRATOR BROWER: Okay. Thank you.

12 PRESIDENT KAUFMANN-KOHLER: Professor Crawford,  
13 please.

14 ARBITRATOR CRAWFORD: I'm not going to ask the  
15 question that was predicted, but I'm going to ask another  
16 question, a more general character.

17 Obviously, when you're dealing with markets and things  
18 like pesticides, you're dealing with an extremely highly  
19 regulated situation in which products can be removed by  
20 administrative act, not merely in the market where the product  
21 is grown, but also in the export markets.

22 What sort of--what does that scenario, the situation  
23 in which standards are obviously changing more scientific  
24 information is becoming available, what does that do to the  
25 process of valuation of individual company lines?

12:50 1           THE WITNESS:  If I could paraphrase your question,  
2  you're asking sort of the international trends that are  
3  occurring and possibly going against lindane and how does that  
4  affect valuation?

5           ARBITRATOR CRAWFORD:  I'm asking it more generally  
6  than lindane.  It seems to me that there is an inherent  
7  valuation problem.  The standard valuations assume that you  
8  have got relatively stable markets in goods which are goods per  
9  se, as it were, whereas the whole market in pesticides is  
10 really constructed within a very tight Regulatory Framework,  
11 which is going in the direction of becoming more tight and more  
12 integrated at an international level.

13           I'm just interested whether you have experiences  
14 perhaps with other commodities in which that's affected  
15 valuation.  It's more a philosophical question.

16           THE WITNESS:  Yes, actually, you touched on, and I was  
17 going to raise the analogy of minerals or oil, for example, and  
18 what happens in commodities such as those is we look at things  
19 such as proven and probable reserves, and limit cash-flow  
20 projections to a period of time to take into account  
21 possibilities of risk extending beyond that to the cash flows.

22           So, from a regulatory point of view, someone looking  
23 at a business that is facing lots of Regulation and potential  
24 future Regulation, the valuation professional is more likely to  
25 account for that by truncating the life expectancy of the

12:52 1 particular product over a period of time, so that it--you know,  
2 it adequately accounts for the risk associated with earning  
3 cash flows beyond that period.

4 PRESIDENT KAUFMANN-KOHLER: You would not take a  
5 regulatory risk factor into account into your discount rate,  
6 for instance?

7 THE WITNESS: There's two schools of thought on that.  
8 You can take risk into account in cash flows, or you can take  
9 risk into account in discount rates. The pure academics will  
10 tell you never to put the type of risk in the discount rate.  
11 They will say put it in the cash flows. I will say the  
12 business people are a bit more pragmatic, and that's where I  
13 fall. I tend to do a little bit of both, so I was giving the  
14 extent of the cash flow adjustment truncating the volumes and  
15 the sales to a particular year is a way to deal with it in cash  
16 flows as opposed to adding a premium to the discount.

17 ARBITRATOR CRAWFORD: Thank you very much.

18 PRESIDENT KAUFMANN-KOHLER: I think you have expressed  
19 yourself on the questions that I had asked from your opponent  
20 Experts, so I can leave these aside.

21 The obvious question that Professor Crawford did not  
22 ask, maybe I should ask it. What is the consequence of the  
23 delay in the registration of Gaucho CS FL on the Damage  
24 Assessment?

25 THE WITNESS: Sure. I think, if I can grab an LECG--I



12:54 1 think it's their second Report.

2           This table, I think, was put up on the screen earlier.  
3 It's Table 4 on Page 25, and I think this provides--this is  
4 some useful information regarding performance of Gaucho CS.

5           PRESIDENT KAUFMANN-KOHLER: First Report?

6           THE WITNESS: First Report, yes, Page 25.

7           And I think one of the errata sheets, if I'm not  
8 correct, was for the Gaucho Canola System line showing  
9 .7 percent market share. I think there are errata indicating  
10 that that should be zero, just to clarify.

11           But what you can see here obviously is how Gaucho CS  
12 actually performed, getting as much as 9.4 percent of the  
13 market in '03, but then falling down to 3.8 percent in 2006.

14           Now, a couple of points that I think are interesting  
15 with respect to this question of whether Gaucho CS would have  
16 done better if introduced earlier. What you can see on the  
17 bottom line is the performance of Prosper, which is also a  
18 Gustafson product. And what one can see obviously is that  
19 Prosper did very well in 2005 and 2006 after it was introduced.

20           So, really what this tells me is Gustafson had  
21 introduced a secondary product after seeing that Gustafson was  
22 not--sorry, as Gaucho CS was not performing very well.  
23 Footnote 23, LECG concedes that Gaucho was not performing very  
24 well according to this market study.

25           So, given that evidence, it seems doubtful whether an

12:56 1 earlier introduction would have allowed it to perform any  
2 better than it actually did perform because eventually  
3 Gustafson saw fit to cannibalize the Gaucho of sales, if you  
4 will, by the introduction of an alternative product.

5 ARBITRATOR CRAWFORD: Just from this material, you  
6 would say the loss in market sales that Helix suffered from a  
7 high of 75 percent down to just 50 percent was largely due to  
8 the introduction of Prosper?

9 THE WITNESS: It appears so, yes.

10 PRESIDENT KAUFMANN-KOHLER: In your examination, you  
11 have said that if the Special Review would have concluded that  
12 lindane was safe, that would not have changed the situation  
13 because you still would have had the trade irritant issue.

14 Now, one of the issues I'm struggling with is really  
15 the causation, which measure triggers what damage, and I asked  
16 a similar question before from LECG.

17 I read in your Report and the Second Report Pages 26  
18 and 27 you have listed a number of measures. I don't know  
19 whether these are all the measures complained of or not, but  
20 let's look at those. And you have specifically said that a  
21 number of these measures had no effect on damages, and you  
22 actually point out that LECG has accepted this because that's  
23 what appears from their calculation.

24 Can you explain this better, and then what having said  
25 this, which are the events that are really triggers for the

12:58 1 damage.

2 THE WITNESS: Yes, but I have maybe taken the latter  
3 part of your question first. In Paragraph 82, what I have  
4 tried to surmise with what LECG's analysis is is corresponding  
5 to numbers three and five in my listing here, that being that  
6 they wrongly restricted sales after July 2001, and wrongfully  
7 terminated Claimant's registrations for lindane on all crops.

8 As we just discussed, and as I think LECG also  
9 testified to with regard to number six, there wasn't any  
10 calculation put into the record as to possible losses for the  
11 late introduction of Gaucho CS.

12 Then that turns, of course, to the issues of one, two,  
13 and four.

14 And with regard to those issues, as you will see, I go  
15 on in Paragraph 82 to suggest that while, for example, taking  
16 number one, Canada required the VWA in reliance on relevant  
17 considerations. It was also, of course, the canola industry,  
18 the CCC and CCGA that was asking for this, and the trade  
19 irritant issue.

20 So, in effect, the VWA allowed for sales and did not  
21 actually take away for sales, so I didn't really see what  
22 damage flowed from that particular act.

23 Improperly suspending Claimant's lindane product  
24 registrations, again with respect to at least the canola  
25 products, with the trade irritant issue open, there still is no

13:00 1 damage with respect to that. The trade irritant issue is  
2 really controlling in terms of whether or not sales could  
3 proceed or not proceed.

4 And then number four, the delayed issue of a  
5 scientific study, as LECG is confirmed, again the trade  
6 irritant issue is controlling, so even if it came out in 2000  
7 as they expected, it wouldn't have allowed for sales to occur  
8 until the trade irritant issue was resolved, so it could have  
9 happened in '01 or '02, and it really has no effect on damages  
10 because they recognize until the trade irritant issue was taken  
11 off the table, sales could not resume of Lindane Products.

12 PRESIDENT KAUFMANN-KOHLER: Thank you.

13 The Tribunal would like to suggest to re-call  
14 Mr. Abdala and Mr. Chambouleyron specifically on this question  
15 because this is something that is developed in a second Report  
16 of Mr. Kaczmarek, and I must say I should have asked the  
17 question earlier, and I did not. And since Mr. Abdala and  
18 Mr. Chambouleyron who have now heard the explanations of  
19 Mr. Kaczmarek, I think it's fair that they can say whether they  
20 agree or whether they disagree and why. Is this agreeable to  
21 everyone, Mr. Somers?

22 MR. SOMERS: No objection here, Madam Chair.

23 PRESIDENT KAUFMANN-KOHLER: To Canada as well?

24 MS. SHAKER: That's fine.

25 PRESIDENT KAUFMANN-KOHLER: Thank you.

13:02 1           So, Mr. Kaczmarek, thank you for your explanation.  
2 This closes your examination, unless there is some additional  
3 issue that comes up later, but I don't think so.

4           (Witness steps down.)

5           PRESIDENT KAUFMANN-KOHLER: Could I ask Mr. Abdala and  
6 Mr. Chambouleyron to come back to the witness table.

7           (Pause.)

8 MANUEL ABDALA and ANDRES CHAMBOULEYRON, CLAIMANT'S WITNESSES,

9   RECALLED

10   QUESTIONS FROM THE TRIBUNAL

11           PRESIDENT KAUFMANN-KOHLER: You have heard  
12 Mr. Kaczmarek's explanations, and we would like to give you an  
13 opportunity to comment as the explanation given in Paragraph 82  
14 a correct understanding of your Damage Assessment, or is it  
15 not, and if not, then why not?

16           THE WITNESS: (Mr. Abdala) Well, I would say it's not  
17 for the following reason. If you read, for instance, the  
18 measure number two here, which Mr. Kaczmarek says that we kind  
19 of accept that there is no damages, number two says, Canada  
20 improperly suspended Claimant's lindane product registrations.  
21 The way it is stated here is as if that would not have any  
22 other consequence for the but-for scenario. But if you read  
23 our instructions is because it suspended the product  
24 registration, it also stopped pursuing registration on  
25 tolerance in the U.S.

13:06 1           So, for us, that's kind of indistinguishable in the  
2 sense that in our instructions we have considered both  
3 together. So, I'm not sure how to interpret here or the fact  
4 that number two is not linked to the consequences that Claimant  
5 is alleging that suspension of the lindane product registration  
6 would have had as to subsequent actions that they would  
7 undertake in the U.S.

8           So, I cannot agree that we have agreed to say damages  
9 are zero for number two because obviously number two seems to  
10 be kind of for us the core or one of the core aspects of the  
11 legal Claim in this case.

12           Then, as for number one, which requires the VWA in  
13 reliance on irrelevant considerations, again I would say, well,  
14 we have not attempt to assess that particular Claim  
15 individually, so you would have to understand it how that  
16 particular Claim relates to others that are also part in this  
17 case, so I cannot say well, I agree that damages are zero to  
18 that because it depends on how you interpret the compensation  
19 issues as to whether that Claim of number one is related to  
20 others.

21           So, again, for us, the general answer is that we have  
22 taken the bundle of all the claims in this case and computed  
23 damages for those and did not attempt to compute separate  
24 damages.

25           And I think I would comment on number four and number

13:08 1 six. On number four, the issue of timing, whether this  
2 scientific study of the PMRA would have been submitted earlier  
3 or not, I would agree with what Mr. Kaczmarek has just said,  
4 that in practice for our damage purpose analysis doesn't have  
5 much of an effect because we are resuming lindane sales only in  
6 early 2003, and only we would say to the extent that, for  
7 instance, if this scientific study would have been earlier and  
8 eventually allowed earlier reinstatement would have allowed  
9 Gustafson and Crompton Canada to eventually sell all the  
10 inventories that they could not sell after July 1st, 2001. So,  
11 again, damages would not be zero. If you look our damage  
12 computations, there is a very small component I think it's  
13 worth \$400,000 of damages related to these inventories that  
14 Chemtura could have solved, but was not able to sell because of  
15 lack of regulatory approval.

16           So, I cannot agree to number four being zero either  
17 because there's this issue of inventories.

18           As for number six, the issue of Gaucho versus Helix,  
19 we would not contest that the Gaucho CS FL actually did not do  
20 very well in the marketplace, so those are the facts. And our  
21 ex post analysis would have considered those facts as well, the  
22 fact that Gaucho did not perform very well.

23           Again, we have not attempted to assess how much more  
24 Gaucho CS would have sold in the absence of lindane replacement  
25 so as to be able to identify like a separate single category of

13:10 1 that Claim. We have not attempted to do. But obviously we  
2 realize the actual performance of Gaucho CS was not too good as  
3 compared to other substitutes.

4 PRESIDENT KAUFMANN-KOHLER: Thank you.

5 I think that answers the Tribunal's questions.

6 There are no follow-up questions on either side?

7 MR. SOMERS: Just one more for clarification.

8 FURTHER REDIRECT EXAMINATION

9 BY MR. SOMERS:

10 Q. I wondered if the witnesses could at least tell me how  
11 the value--how, if any way, the numbers two and five would be  
12 valued differently, numbers two and five on this six point  
13 list.

14 A. How would it be valued differently?

15 Q. Right. If you look at them, I don't see them as  
16 different in quality.

17 A. (Mr. Abdala) Well, that's what I explained here,  
18 number two for us, it has to be read with the consequences that  
19 the suspension would have had, which is not engages--not  
20 engaging anymore on pursuing tolerance, so it would be no  
21 differences as to the core aspect of the case.

22 PRESIDENT KAUFMANN-KOHLER: Any other questions,  
23 Mr. Somers?

24 MR. SOMERS: No, thank you, Madam Chair.

25 PRESIDENT KAUFMANN-KOHLER: Thank you.



13:11 1 On the Respondent's side, any questions?

2 MS. SHAKER: Just a clarification with point four.

3 FURTHER RECROSS-EXAMINATION

4 BY MS. SHAKER:

5 Q. Canada unjustly issued a delayed scientific study of  
6 lindane that also includes the assumption that it would be  
7 positive as well?

8 A. (Mr. Abdala) Yes. That's in our instructions as well.  
9 Yes.

10 Q. Okay. That's it.

11 PRESIDENT KAUFMANN-KOHLER: Fine. So, that concludes,  
12 then, these additional questions. Thank you for your  
13 explanations.

14 THE WITNESS: (Mr. Abdala) Thank you very much.

15 (Witnesses step down.)

16 PRESIDENT KAUFMANN-KOHLER: So, now we will take a  
17 lunch break until--we need a little--the Tribunal needs a  
18 little bit more time than the other days because there is a  
19 number of things we wish to discuss among Tribunal Members.  
20 Can we start again 2:45? Is this acceptable to everyone?

21 And then the only thing that remains to be done when  
22 we reconvene is really discuss the Post-Hearing Briefs and  
23 maybe give a few more details on the oral session for December.

24 MR. SOMERS: Thank you.

25 PRESIDENT KAUFMANN-KOHLER: Fine.

13:13 1 (Whereupon, at 1:13 p.m., the hearing was adjourned  
2 until 2:45 p.m., the same day.)

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1 AFTERNOON SESSION

2 PRESIDENT KAUFMANN-KOHLER: Good. So, we can resume  
3 with the Procedural Matters that we still need to be dealing  
4 with.

5 The first question is the hearing. We can confirm the  
6 date of the 17th of December, as we envisaged yesterday. We  
7 would suggest that we structure the day as follows: We would  
8 start at 10:00 in the morning, and the Claimant would have two  
9 hours to present its oral argument. Then we will take a break,  
10 and the Respondent would have two hours from 1:00 to 3:00.  
11 Then you could have short rebuttals. And when I say "short," I  
12 would say a maximum of 30 minutes, and Tribunal questions, and  
13 then we would probably end around 5:00-5:30 on the 17th.

14 Is that an acceptable schedule, Mr. Somers?

15 MR. SOMERS: Yes, thank you.

16 PRESIDENT KAUFMANN-KOHLER: Fine.

17 MR. DOUAIRE de BONDY: And yes for Canada.

18 PRESIDENT KAUFMANN-KOHLER: Thank you.

19 Then the next question is the Post-Hearing Briefs.

20 Have you conferred about the time limit?

21 MR. SOMERS: We have. And I can report that we've  
22 agreed on Friday, October 23rd.

23 PRESIDENT KAUFMANN-KOHLER: October 23rd. And that is  
24 agreed on Canada's side?

25 MR. DOUAIRE de BONDY: Yes.

14:47 1           PRESIDENT KAUFMANN-KOHLER: Good.

2           Then, on the content, I have a number of things to  
3 tell you, and my co-Arbitrators will thereafter add anything  
4 they think needs to be added.

5           First of all, as I mentioned yesterday, do not repeat  
6 what is in the previous briefs. The idea is really to now wrap  
7 up and comment on the evidence that was gathered during these  
8 hearing days. You can obviously address any issue that you  
9 deem pertinent, and please address in addition a number of  
10 issues that the Tribunal would now like to flag.

11           And before I mention these issues, as always, do not  
12 overinterpret the questions of the Tribunal. We are just  
13 trying to make sure that we have covered the ground, depending  
14 on how matters evolve later in the deliberations. We are not  
15 pre-judging. So that's in general.

16           Now then, going in more detail to the contents, we  
17 would suggest that you concentrate on the minimum standard of  
18 treatment under Article 1105 because we feel that the issue of  
19 the MFN and FET under 1103 as well as the issue of  
20 expropriation have been well covered in the previous briefs,  
21 and we don't feel that we need more on these aspects.  
22 Obviously, the facts that you will address flow into these  
23 claims as well; that goes without saying.

24           Then there are a number of obvious issues on which I  
25 will not dwell now. You know them. I mean, the interpretation

14:49 1 of the Voluntary Withdrawal Agreement when, why, what; the  
2 assessment of the Special Review and whether the trade issue  
3 drove the PMRA's action or whether it was health and  
4 environmental concerns, and so on. You will address those that  
5 you think you need to among those. So, I'm not insisting on  
6 that.

7           By contrast, it would help us if you could give  
8 particular attention to articulating each measure what is  
9 alleged to be a breach of the standard of treatment, and  
10 together with each measure, then the consequence of that  
11 measure with an emphasis on the question of causation and the  
12 damage that was caused, generated by the specific measures.  
13 That, of course, implies that you disassociate the different  
14 measures. Sometimes you will have to maybe combine two or  
15 three and say they form a whole and they together produce this  
16 consequence. But the idea is really that we would like to have  
17 each measure specifically addressed. The identification of the  
18 measures do not seem to coincide precisely when we look at the  
19 Memorials of the Claimant and then look at the expert reports.  
20 So, you have to help us with that, as well. That implies,  
21 obviously, for each measure that you specify the date of the  
22 breach.

23           It also implies that in your analysis you give us--it  
24 goes without saying, but maybe I say it--nevertheless, you give  
25 us for each allegation a reference to the evidence, be it

14:51 1 documents or witnesses.

2           So, that is the main aspect that we would like you to  
3 focus on. It could be helpful in addition that you try and  
4 distinguish the case and the measures that are alleged to be in  
5 breach of the standard of treatment according to products. It  
6 may not be exactly the same--it is not the same story,  
7 depending on what product you're considering, and basically  
8 there is lindane on canola, there is lindane on non-canola, and  
9 there is the question of the replacement product, mainly Gaucho  
10 CS FL.

11           So, that is somehow a different approach from the one  
12 I set out before, but we have asked ourselves questions about  
13 that approach as well, and it may be helpful if you can address  
14 that.

15           As we mentioned during the hearing, it would assist us  
16 if you could prepare a timeline, and that would be, of course,  
17 an agreed timeline for the registrations both in Canada, and it  
18 would help if you add the U.S., and that is for Gaucho  
19 products, in the plural, of course, for Helix. I think it  
20 would be useful if you add Helix Xtra because you were looking,  
21 and it might also be helpful if you add Prosper after what  
22 we've heard this morning from the damage Experts and the--has a  
23 link with the causation issues.

24           Then I have a more specific point of clarification.  
25 The Respondent, in the Counter-Memorial, specifically

14:53 1 Paragraph 853 following, has raised an objection that the  
2 MFN/FET Claim under 1103 as a new Claim that was not comprised  
3 in a Notice of Arbitration and they never consented to  
4 arbitrate this Claim. This objection is not repeated in the  
5 Rejoinder, and the question is: Is it maintained or not? And  
6 if so, is it a jurisdictional objection or something different?

7 And the last point is obviously no new documents with  
8 the Post-Hearing Briefs.

9 So, that is really what the Tribunal had to say about  
10 the Post-Hearing Briefs. Maybe my co-Arbitrators want to add  
11 anything.

12 Judge Brower?

13 ARBITRATOR BROWER: Thank you.

14 An important part of the Claimant's case is based on  
15 the exchange of letters of October 27 and 28, 1999, and I  
16 believe Mr. Ingulli emphasized that that was the Agreement that  
17 Chemtura made with the PMRA as opposed to the Agreement  
18 asserted by Canada as having occurred and involved everyone  
19 approximately one year before, and as I understand it, your  
20 failure, among other things, to have achieved an expedited  
21 treatment in Canada of an application for CS FL put you at such  
22 a disadvantage in the marketplace that Helix essentially pushed  
23 you out of the field or close to the edge. That exchange of  
24 letters, it seems to me you have not argued, constitutes a  
25 contract within the contemplation of the applicable law of

14:56 1 Canada or Ontario or wherever. In other words, it's not an  
2 enforceable contract, where if it is, we should know that. It  
3 doesn't appear to have been argued that it's an enforceable  
4 contract as between a buyer and seller.

5 Have I got that right so far?

6 MR. SOMERS: Yes.

7 ARBITRATOR BROWER: Right. Okay. If it's not an  
8 enforceable contract in the sense of civil or common law  
9 relating to contracts, then the question still remains what  
10 could one really have expected of such an exchange agreement  
11 has been referred to between an administrative agency and a  
12 Registrant.

13 In particular, the point that the Claimant has made  
14 about not achieving expeditious consideration of its CS FL  
15 application is not an obligation that appears to be recorded in  
16 the exchange of October 27 and 28, 1999. That's been confirmed  
17 in the testimony.

18 So, with respect to that issue, there is the  
19 additional point of exactly what you rely on. I mean, we have  
20 read the Memorials, but we need to know--mentioned yesterday,  
21 what we need is a road map, a very precise road map. What do  
22 you rely on for that?

23 Now, inasmuch as this is not a contract the way you  
24 understand the contract in the law, do you have to show--is it  
25 the position of Canada that they must show bad faith,



15:51 1 misrepresentation or malicious conduct in some way, or not?  
2 And what if the failure of performance of what was set out in  
3 what you refer to as that agreement was beyond the control of  
4 PMRA itself to any extent?

5 Now, inasmuch as this is not a contract to any extent,  
6 that's another aspect of asking how much can you expect from  
7 such undertakings by an administrative agency which is part of  
8 a governmental system which has many influences, distractions,  
9 priorities, perhaps intervening concerns. To any extent. That's  
10 another aspect of asking how much can you expect from such  
11 undertakings by an administrative action which is part of a  
12 governmental system, which has many influences, distractions,  
13 priorities, perhaps intervening concerns.

14 Is it your contention, the Claimant, that--I guess  
15 I've already telegraphed this--that the Helix was preferred  
16 over CS FL in the administrative application process due to  
17 any--that it was done willfully or intentionally or in bad  
18 faith, or you would be content with it just--that's the way it  
19 happened, but that violates the standard of fair and equitable  
20 treatment to be applied? Is there a possibility that Chemtura  
21 just did not, in its development of a substitute product, move  
22 early enough, given the whole situation, or successfully enough  
23 in the laboratory?

24 I have a question as to what you would prove if you  
25 satisfy us that EPA would have approved a lindane tolerance in

15:01 1 2003. Are we to deduce anything from that other than the--that  
2 in accordance with your agreement you asserted October 1998  
3 that would have triggered obligation on the part of PMRA to  
4 reinstate your lindane registrations?

5 A point in that respect is it's quite an unusual  
6 situation, each side has produced on that point as an expert a  
7 former Assistant Administrator of EPA of the relevant area, one  
8 of whom succeeded the other, and one says, "No way, lindane  
9 tolerance would have been granted in 2003," and the other says,  
10 "My opinion is that it would have." On what basis is the  
11 Tribunal to choose between these two Experts? And if we are  
12 unable to choose between the two, if we find them both credible  
13 and they've given these contrary opinions, what is the result?  
14 Does the Claim of Claimant on that point fail for lack of  
15 satisfying the burden of proof, or what are we to do with that?

16 I should be able to answer this without asking it, but  
17 it would be helpful to know--have noted for me at  
18 least--whether the Claimant asserts that the Special Review is  
19 flawed in ways other than those cited by the Board of Review,  
20 and what precisely--again, road map--did the PMRA do wrong in  
21 the REN process.

22 And REN it seems to me pretty important because if REN  
23 turns out to have been right, that presumably would  
24 eliminate--could eliminate a major portion of your Claim  
25 because I'm sure there would be, I suspect--it's pretty obvious

15:04 1 the position of Canada must be if we messed it up the first  
2 time, we learned from the Board of Review and we made sure to  
3 cross all our t's and dot all our i's in the REN. And if they  
4 did, how much have you been--how have you been damaged? What's  
5 the causal effect of the previous mistakes?

6 Another Expert Witness question here, Canada has  
7 produced an expert saying that, in REN, the PMRA got the  
8 science right, if I've understood that correctly--Dr. Costa.  
9 Claimant has produced no opposing Expert. What is the effect  
10 of that, if any, in our deliberations? Of course, we can  
11 disbelieve Dr. Costa, if that would be our choice, but assuming  
12 we gave his testimony considerable weight and there is no  
13 opposing Expert, what's the position?

14 Finally, it seems to be an implication in the  
15 Claimant's case that if PMRA had acted in accordance with the  
16 schedule in the Agreement of October 1998 and had acted  
17 positively with respect to lindane, that EPA would have  
18 followed on. That's almost a given, but that could be a pretty  
19 complicated proposition. So, I think we need to understand  
20 precisely why you feel that would be the case. So, that's all  
21 the food for thought I had to offer at this point.

22 PRESIDENT KAUFMANN-KOHLER: Thank you.

23 Professor Crawford.

24 ARBITRATOR CRAWFORD: There is obviously an issue in  
25 this case as to the extent of the authority of a NAFTA Tribunal

15:06 1 under Chapter 11 in relation to a specialist authority of a  
2 State which has particular statutory mandate in a particular  
3 field of expertise. I would be interested in the further  
4 elaboration by the Parties of the relationship between  
5 Article 1105 and that special mandate; and, in particular, in  
6 the question whether accepting that there is what is sometimes  
7 rather grossly referred to as a "margin of appreciation" at the  
8 domestic level, there is any distinction between the "margin of  
9 appreciation" and the "margin of regulatory appreciation," we  
10 might call it, in the context of the substance of decisions  
11 relating to the safety of pesticides as distinct from the  
12 procedure by which those decisions are made.

13           That's really the only thing I have to add to what my  
14 colleagues have said.

15           PRESIDENT KAUFMANN-KOHLER: Thank you.

16           There were many different points, and you have all  
17 taken notes very diligently, but you will, of course, read it  
18 over in the transcript, but it could be that there is a  
19 clarification question at this point, and then, of course, you  
20 could raise it.

21           Mr. Somers?

22           MR. SOMERS: Yes, Madam Chair, thank you.

23           First, at the outset you had said no new documents but  
24 also you had requested also a timeline. So, can I infer from  
25 that that we can put in demonstrative exhibits based on

15:08 1 existing document or testimony in the record to explicate these  
2 complicated issues in the same way that a demonstrative exhibit  
3 has been permitted?

4 PRESIDENT KAUFMANN-KOHLER: Absolutely. Certainly.

5 MR. SOMERS: Okay.

6 Second, you had asked for, in relation to the list of  
7 pesticide products that have been caught up in the issues in  
8 the hearing, I wondered if I could suggest adding to that list  
9 Premiere Z or Zed.

10 PRESIDENT KAUFMANN-KOHLER: That's the Zeneca product,  
11 yes.

12 MR. SOMERS: Right. Which also had interplay with--

13 PRESIDENT KAUFMANN-KOHLER: Yes.

14 MR. SOMERS: --various events.

15 I wanted to signal as well that when Mr. Brower asked  
16 whether we had argued contract in terms of those October 27,  
17 28, 1999, letters, and I signaled a no, I meant we had not  
18 argued contract, not that there was no contract. I just wanted  
19 to make sure that's what I was signaling.

20 Thank you, that's it.

21 PRESIDENT KAUFMANN-KOHLER: We had not misunderstood  
22 this.

23 Mr. Douaire de Bondy.

24 MR. DOUAIRE de BONDY: Thank you, Madam Chair.

25 Just a quick point of clarification. You mentioned no

15:10 1 new documents and we assume you also mean no new Expert  
2 evidence? No new further comments from Experts?

3 PRESIDENT KAUFMANN-KOHLER: You assumed right.

4 MR. DOUAIRE de BONDY: Thank you.

5 PRESIDENT KAUFMANN-KOHLER: No other questions?

6 MR. DOUAIRE de BONDY: No.

7 PRESIDENT KAUFMANN-KOHLER: No. Then we get to the  
8 close of this hearing.

9 Are there any other issues, questions, comments,  
10 complaints that you would like to raise now?

11 Mr. Somers?

12 MR. SOMERS: A treacherous question, but is there a  
13 page or word limit on the Post-Hearing Brief?

14 PRESIDENT KAUFMANN-KOHLER: We've discussed this, and  
15 I should have said--and thank you for raising it--that we would  
16 appreciate your being concise, but at the same time, we don't  
17 think that we would like to impose a page limit. You will know  
18 what is most effective.

19 MR. SOMERS: Thank you. That's all.

20 PRESIDENT KAUFMANN-KOHLER: Anything on the  
21 Respondent's side, to be raised at this point before we get to  
22 close?

23 MR. DOUAIRE de BONDY: Just as a practical matter,  
24 I've had confirmation that we can proceed on December 17th in  
25 the same location. And as Madam Chair noted last night, there

15:12 1 is a tunnel from the Chateaux Laurier to the Conference Centre,  
2 but we'd also would like to thank the Tribunal for their  
3 attention this week and for their questions.

4 PRESIDENT KAUFMANN-KOHLER: Thank you. And thanks for  
5 clarifying that we could meet here. I had assumed we could,  
6 but I should have asked, of course.

7 So, it remains for me to thank, on behalf of the  
8 Tribunal, Canada for their hospitality here and the perfect  
9 organization of the logistics. It was a very good place to  
10 meet and to work.

11 To thank the Court Reporter, who has done a great job,  
12 as always.

13 The Party representatives, the witnesses, the Experts  
14 who have helped a lot, or have very patiently listened for long  
15 days; and then, of course, counsel as well for very diligent  
16 and professional conduct of this hearing, and also for a very  
17 friendly and cooperative attitude that helped us focus on the  
18 real issues and not get distracted by all kinds of practical or  
19 procedural difficulties. So, we really thank you. It was for  
20 the hearing, but it's been all through the proceedings.

21 And then I can close this hearing--unless there is  
22 anything? No? My co-Arbitrators want to add? No?--and wish a  
23 good trip back to those who have to travel.

24 Thank you.

25 (Whereupon, at 3:13 p.m., the hearing was adjourned

15:13 1 until December 17, 2009.)

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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