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: :
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CHEMTURA CORPORATION :
(formerly Crompton Corporation), :
:
Claimant/Investor, :
:
and :
:
THE GOVERNMENT OF CANADA, :
:
Respondent/Party. :
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- - - - - - - - - - - - - - - - - - - -x Volume 7

HEARING ON THE MERITS

Thursday, December 17, 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 3:38 p.m. before:

PROF. GABRIELLE KAUFMANN-KOHLER, Presiding Arbitrator

THE HON. CHARLES N. BROWER, Arbitrator

PROF. JAMES R. CRAWFORD, Arbitrator

Secretary to the Tribunal:

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C O N T E N T S

P R O C E E D I N G S

PRESIDENT KAUFMANN-KOHLER: Is everyone ready? It looks like it.

Then I can open this hearing, and I'm always very pleased to open a hearing, but this one especially, and I thank all of you for your flexibility and your patience, and I especially thank the Government of Canada for having made all the arrangements that allow us to proceed with the hearing today as scheduled, as provided but a little later than the schedule, but we will be able to do what we have to do today.

You want to apologize? You're entitled to.

ARBITRATOR CRAWFORD: I do want to apologize on my own behalf and on behalf of the M-25.

PRESIDENT KAUFMANN-KOHLER: Thank you.

I don't need to introduce the Tribunal. We have the Secretary of the Tribunal, Mr. Vinuales, on my far right. You have Professor Crawford on my right and Judge Brower on my left.

For the transcript, I would ask the Claimants just to identify who is with you.

Mr. Somers, please.

MR. SOMERS: Thank you, Madam Chair.

For the Claimant's part in the room today are Mr. Benjamin Bedard to my left; to my right, Alison Fitzgerald; to her right, Renée Thériault; and at the back of room, General

15:39 Counsel for the Claimant, Billy Flaherty; and Vice President of Crop Protection for the Claimant, Mr. Paul Thomson.

Thank you.

PRESIDENT KAUFMANN-KOHLER: Thank you.

Could I then turn to Mr. Douaire de Bondy, please, for the Respondent.

MR. BONDY: Thank you, Madam Chair.

Today, we have, in addition to myself, Mr. Christophe Douaire de Bondy, Steve Kurelek. We have Christina Beharry; Carolyn Elliott-Magwood; Yasmin Shaker; Mark Luz; and, sitting in the back, Professor Celine Levesque. And at back of the room we have Mr. John Worgan of the PMRA, Ms. Lynn Ovinden, Ms. Cheryl Chaffey, and Basil Stapleton as well as Stephanie Beria Hogue (ph.) of Foreign Affairs. And I don't think I missed--and Jennifer George, sorry, at the end of table, whom I couldn't see.

Thank you.

PRESIDENT KAUFMANN-KOHLER: Thank you.

Is there anyone in the room who has not been identified?

MR. SOMERS: Yes, Madam Chair. An indulgence. I omitted to mention another valuable member of our team, Heather Cameron, to Renée Thériault's right.

Thank you.

PRESIDENT KAUFMANN-KOHLER: Thank you.

15:40 Is there someone else in the back, I think?

Yes, please.

MS. KATE: I'm Alicia Cate for the U.S. State Department.

PRESIDENT KAUFMANN-KOHLER: Thank you.

Have you heard us? Good.

Fine, then we will proceed with the agenda. The Claimant will have two hours for its main argument, and then I had suggested that we shorten the break that was initially scheduled to half an hour rather than one hour. But since we can stay on longer tonight, we will see when we are done with the argument of Claimant how much time we need for the break, and then we will proceed with the Respondent's arguments, and then we will have rebuttals and questions of the Tribunal, if there are any questions left after having heard you.

Is there any question or comment that the Parties would like to make before we proceed in such fashion?

Mr. Somers?

MR. SOMERS: None here, thank you.

PRESIDENT KAUFMANN-KOHLER: Fine.

Mr. Douaire de Bondy?

MR. BONDY: None here.

PRESIDENT KAUFMANN-KOHLER: Thanks.

Yes, please.

ARBITRATOR BROWER: I cannot see Mr. Somers through

15:41 the screen.

PRESIDENT KAUFMANN-KOHLER: You cannot see Mr. Somers. Do we need the screen for your presentation?

MR. SOMERS: No. Our presentation will be strictly verbal.

PRESIDENT KAUFMANN-KOHLER: So, we will put the screen on the floor, and we will see later what we could can do, if and when we need it.

(Pause.)

PRESIDENT KAUFMANN-KOHLER: Good. Thank you.

So, then we are all set.

Mr. Somers. You have the floor.

MR. SOMERS: Thank you, Madam Chair.

CLOSING ARGUMENT BY COUNSEL FOR RESPONDENT

MR. SOMERS: Just for the Tribunal and parties' information, I do expect our argument to be noticeably less than the time allotted, so we may well be afforded enough time to have dinner.

In preparing our argument, I was mindful of the Tribunal's directions regarding Articles 1103 and 1110 at the close of the evidentiary portion of the hearing, and so I will not be making any significant comment on those today. We do, however, of course, rely on the submissions on those two Articles that are contained in our Memorial and our Reply.

Accordingly, the argument that we will make today

15:43 focuses significantly on Article 1105 of the NAFTA; and, just to position our coming comments, I will read into the record the terms--the pertinent terms of Article 1105 that are set out at Paragraph 19 of our Post-Hearing Brief.

Article 1105, Minimum Standard of Treatment: Each party shall accord to investments of investors of another Party, treatment in accordance with international law, including fair and equitable treatment and full protection and security.

Now, it's trite law that the Vienna Convention on the Law of Treaties requires a contextual interpretation of this, like any other Treaty provision, and we would call the Tribunal's attention particularly to the NAFTA's privileging of principles of transparency throughout that Treaty and particularly in its opening provisions which underscore this aspect of fairness, equity, protection, and security that are due investments under Article 1105.

In trying to prepare argument and reviewing all the material filed by both sides, it was apparent to me that the Parties, the Claimant and Canada, have been in large measure talking past each other, and it was difficult in formulating the argument to try to find where an issue was solidly joined in order to be able to flesh out the terms of the dispute. And so, in preparing our argument, rather than go back to our materials and reiterate for what would be probably the fourth

15:45 time, not counting testimony, our position, I relied more on Canada's Post-Hearing Brief, and in particular the digest of its portion which it calls "key points" that it sets out at the beginning of its Post-Hearing Brief. And so, if you do have that, you will be able to follow along as I go through those bullet points, starting at Paragraph 2 of Canada's Post-Hearing Brief.

At Paragraph 2, Canada introduces these points with the statement, "The following key points were confirmed at the September 2009 hearing in support of these conclusions," the conclusions that are summarized above.

The first key point of Canada: "PMRA scientists undertook a Special Review of Lindane pursuant to Canada's commitments under the Aarhus Protocol on Persistent Organic Pollutants, prompted by international and domestic concerns of the risks lindane presented to human health and the environment."

Well, in fact, as we heard at the hearing, PMRA witnesses confirmed that the PMRA was being substantially pressured to ban lindane, not merely to review it. In the words of Dr. Franklin, who was, of course, leading the PMRA at the material time, everyone was pressuring Canada, pressuring Canada to ban lindane. This was not merely a special review that was undertaken in order to meet its commitment, but, as we will be arguing, in order to do away with lindane.

15:47 Canada's second key point: Regardless of what triggered the Special Review, it begins--well, the Claimant resists that statement. It is not "regardless" because what, in fact, triggered the Special Review informs how it was conducted and why it reached the result it did.

Canada continues: "It was an independent, scientific assessment of lindane. Its outcome was not dictated in advance..."

In fact, again, the Claimant resists that point. The documents show in our submission that it was dictated in advance. In the PMRA's own hand, from its Executive Director's office, in October of 1998, we have a commitment to phase out all uses of lindane before the Special Review, which accomplished this objective, was even announced much less concluded.

The key point continues: "...and was the result of a scientific process."

As Canada has noted, the role of a Chapter 11 Tribunal is not to second-guess the correctness of the science-based decision-making of highly specialized national regulatory agencies. We agree with this proposition. It's Canada that, in our submission, does not agree with it; if it did, it would not have presented a scientist as a witness to give its imprimatur on the correctness of the Special Review or to reinterpret the views of the highly specialized Board of

15:48 Review.

In contrast, it's the Claimant who has not waded into the correctness of the science, and we do not invite the Tribunal to do so. Canada's own domestic procedures had a purpose for this purpose: The Board of Review. It was invoked by the Claimant, and though it was delayed by the PMRA, years later the Board of Review vindicated the Claimant's views of the Special Review and its science. On the basis of Canada's rationale about the role of Chapter 11 tribunals, we submit that Dr. Costa's evidence about the science of the Board of Review ought to be given no weight in these proceedings.

Canada's next key point: "The Claimant was given appropriate opportunities to participate in the Special Review process."

It's hard to tell where this key fact was established in the record. The Board, which had pesticide regulation expertise, the Lindane Board of Review, thought otherwise. It used clear terms to impugn the Special Review, both scientifically and procedurally, and it found that adequate opportunity to participate in that process was not afforded in several instances.

Here, Canada is inviting you just to disregard the Board's conclusions and simply prefer its contradicted assertions about how the Special Review was conducted. By making such argument, we say that Canada seeks for this

15:50 Tribunal to revise away the Board's criticisms and recommendations, and in addition by presenting a toxicologist witness seeks to have you sit in appeal on the Board of Review and essentially review the review. The Claimant asks you to do no such thing.

I turn back to Canada's key points where I interrupted it at the top of Page 2, fourth line: "In any event, the Board of Review process corrected any irregularities in the Special Review process..."

Claimant says that the Board of Review did not correct anything. Its Report indicated what needed correcting. That was the extent of the remedy that the Board afforded and that Canadian law provided. It was for the PMRA to do the correcting, and then we say it did not do so.

The key point continues: "...and gave the Claimant full due process, including an opportunity to air its complaints about the Special Review and to submit new data."

Now, the due process afforded to the Claimant within the Board proceeding is not the due process that the Claimant is due by Canada. Permission to air one's complaints and to submit new data is not in itself due process. Here, Canada conflates the Board's due process procedures with the due process the Claimant was entitled to from Canada in respect of its investment. Permission to air complaints and to submit due data if those complaints and that data are not seriously

15:52 considered or taken into account is not due process.

The second key point of Canada on that page: "The Board of Review differed with PMRA scientists on certain points within the four corners of scientific debate and made various recommendations while finding Canada's result scientifically acceptable."

Well, the record shows that the Board did far more than that. In fact, it made specific findings about specific PMRA judgments that were scientifically excessive and unjustified, and that it found had a material impact on the result reached, and that pre-determined the outcome of the Special Review. The Board used words like "surprised" and "particularly perplexed" in evaluating the conduct of the Special Review. This was not, as Canada argues, a disagreement among scientists. The Board of Review, by law, supervises, oversees, and recommends. That is all it could do.

Canada repeatedly characterizes the process as a scientific debate. It is not a scientific debate. And to call it so empties it of any due process it did afford the Claimant, which is exactly what the PMRA did with the Board's recommendations.

Moreover, the Board didn't merely differ with the PMRA scientists, as that key point notes. It faulted the Special Review's notification and consultative processes as well, which are fundamental, constitutive elements of fairness, not of

15:54 science.

Next key point: "The PMRA nonetheless conducted a de novo review, the lindane Re-evaluation Note (REN) with a new scientific team." Now, the Tribunal has seen the reasons documented by Canada for nonetheless conducting a de novo review. Completing the Assessment of Lindane, we saw from the documents, would clarify/substantiate the position taken by the PMRA in 2001 and support the Government's position in Court. That was a note from the PMRA Science Management Committee, and it admits of absolutely no doubt about the outcome of this so-called "de novo" review over three years before the Re-evaluation Note was concluded.

The key point that Canada extracts from this is--moving on to the continuation of that key point--the REN took account of the Board's recommendations, offered the Claimant further procedural opportunities to air its complaints and to submit new data and reached an independent scientific result.

It seems to the Claimant that Canada would have to account for how it knew three years before this independent scientific result that the REN would substantiate its position taken in the Special Review five years before. In our submission, Canada hasn't done so.

The next key point: "As Canada took steps to review lindane, this pesticide has been deemed ineligible for

registration and use in nearly every country in the world based on the unacceptable risks it poses to human health and the environment."

As far as the Claimant is aware, the excuse that "but everybody is doing it" is not a defense to the duty to afford fairness and equity to investors. In a footnote to this point, Canada says, at the bottom of Page 2 of its Post-Hearing Brief: "The most telling proof of this is the inclusion of lindane among chemicals designated for elimination: Schedule A of the Stockholm Convention on POPs 9 May 2009."

The Convention operates by unanimous consensus, meaning Canada necessarily in Stockholm committed to lindane's elimination in May of this year, months before its independent scientific result--I put that in quotes--in the REN. The telling proof, if any, is that the REN's result, like the Special Reviews, of course, was a foregone conclusion.

In regard to the lindane-canola Withdrawal Agreement, Canada has set out the following key facts at the top of Page 3 of its Post-Hearing Brief: "The VWA was an industry-prompted and industry-led initiative responding to a significant crisis that was largely of Chemtura's own making."

The reasons advanced for this turnabout by Canada's witnesses were two-fold: First, that lindane's reputation would tarnish canola's healthy image--you recall that one--but documents in the record contradict this. In fact, the

15:58 grassroots invoked by Canada's witnesses--Canadian growers and seed treaters--as late as 2002, were still actively petitioning the EPA to register lindane on canola in the U.S. The Canadian Canola Council itself wrote to the Claimant before the termination of registrations of lindane by the PMRA to find out, in the event of a positive Special Review, whether the manufacturers would be able to continue or resume manufacture of lindane-based pesticides, and how quickly members of the Canola Council could obtain lindane seed treatments for the coming growing season.

This flatly contradicts the asserted healthy image concerns that the industry purportedly had as a basis--undermines it as a basis for industry support of the Voluntary Withdrawal Agreement on healthy image concerns.

The other reason given by representatives for Canada for industry-driven withdrawal was the alleged loss of the U.S. market due to the presence of an unregistered pesticide on canola seeds and residues in products made from it. On that point, Canada's witness for the Canadian Canola Council conceded that some the replacement products to be used in substitution for the lindane-based products were themselves not registered pesticides in the U.S. and would equally have fallen afoul of the same EPA and the same FDA rules. This didn't concern them, nor did it concern the PMRA, which was busy considering for registration these alternative pesticides

16:00 equally not registered in the U.S. for those uses. And it needn't have concerned the PMRA. The EPA itself characterized the likelihood of a residue issue arising as very slim.

The next Canada key fact: "The PMRA played at best a facilitating role under the VWA."

Now, the Claimant would expect that, in advancing this position, Canada has an explanation for such statements by the PMRA as in Reply Exhibit 33, in correspondence relating to conversations with the EPA by PMRA. "PMRA"--and I quote from Exhibit 33--"is not in a position to recommend cancellation of the use of lindane on canola, unless there was agreement for concerted action on all Lindane Products with the U.S. EPA."

Now, "concerted action" was spelled out later in that document as the phase-out of all uses of lindane. Claimant's submission is essentially that the VWA was simply a stocking horse for this prior agenda of the PMRA.

Further Canada key fact: "The Claimant initially agreed to the terms of the VWA as proposed by the CCC"--the Canadian Canola Council--"and stated its agreement publicly. It then spent the better part of a year attempting to force the PMRA to grant it preferential registration terms."

Now, this is, in Claimant's view, a curious reversal. The Claimant was, of course, in no position to force anything. The correspondence shows the request by Claimant rebuffed by PMRA in the course of 1999, leading up to the October

16:02 agreement. If, as Canada contends, this was an industry-led, industry-driven withdrawal, it's hard to see how PMRA could have been pressured or threatened by any action of the Claimant in relation to an agreement between private parties. The situation was, of course, exactly the reverse. It was the PMRA which held the power to regulate the Claimant, a pesticide producer, to register or to terminate, to expedite or to delay its ability to do business in Canada.

Next Canada key fact": "The Claimant's alleged conditions for participating in the VWA are not supported on the face of the October 27, 1999 letter which it regards as a deal between itself and PMRA. That letter, instead, reiterates the key terms of the original VWA. The only substantial point added in that letter concerned the possibility of reinstatement of Chemtura's Lindane Products for canola if certain conditions were obtained."

Now, in fact, the letter is of October 27 and the Agreement by PMRA of October 28 plainly had other conditions as well, notably the conclusion of the Special Review by the end of 2000. PMRA agreed to all these conditions, and the Claimant had a legitimate expectation that PMRA would live up to this agreement. It's a matter of record that the PMRA did not live up to it, notwithstanding Canada's next key point that PMRA substantially fulfilled its commitments."

Canada continues: "The PMRA's scientific review of

16:04 lindane was undertaken well in advance of the October 27, 1999, letter"--that's true--"and would have proceeded in any event. To the extent the PMRA's review was delayed, it was due to issues beyond its control, notably the collaboration with U.S. EPA upon which the Claimant equally insisted."

That statement totally eludes the terms of PMRA's Agreement with the Claimant on this issue. From Exhibit B-20, which is that letter, it is stated: PMRA shall coordinate and collaborate on the timely review and re-evaluation of any new lindane data already submitted and/or to be submitted in accordance with any Data Call-In or regulatory request and provide a scientific assessment of lindane by the end of 2000.

The Tribunal may recall the evidence that there was no Data Call-In or regulatory request. The collaboration with EPA that the record shows was PMRA comparing--PMRA's own words, "the vastly different results of assessment between the two agencies due to Canada's choice of a safety factor." This was not the collaboration agreed to by the PMRA with the Claimant, and it ought not now be allowed to be set up as an excuse for the delay in the Special Review.

Next Canada key point: "Despite having made no specific commitments concerning the timing of it its review of lindane replacement products in connection with the VWA."

Now, there, the Claimant recalls that PMRA committed to expedited reviews of replacement products, short time lines

16:06 for registering formulation changes, facilitating access to replacement products. Statements like these just by way of example would be found in Reply Exhibit 33, Reply Exhibit 55, or Canada's Exhibit WS-125.

Naturally, no specific timing in the sense of a specific date or specific number of weeks was given. It would depend on the content of the formulation changes submitted and what time, what date they were submitted. But the commitment of facilitating and expediting could only mean affording replacements consideration on a priority basis and faster than usual.

This key point of Canada continues on: "The PMRA accelerated the review of the two lindane replacement products, Gaucho 75ST and Gaucho 480, that Chemtura submitted in connection with the VWA."

Now, these two products were approved for registration by the PMRA on July 27, 1999. We recall Canada's key point that Claimant spent the better part of a year, 1999, attempting to force the PMRA to grant it preferential registration terms. Now, as it is plain on the face of the October agreement between Claimant and PMRA, the Agreement was not about registration terms. Lindane Products had not been de-registered or withdrawn at that point, and the single insecticide Gauchos, which are mentioned here, had been approved for registration by July, the previous July. The

16:08 dates of approvals for registration and the registration themselves that were requested by the Tribunal at the close of the evidentiary portion of the hearing are set out in Chart form at Appendix B of the Claimant's Post-Hearing Brief as well as to an appendix of Canada's Post-Hearing Brief. The reason for the differences in some of the material contained in those is that in Canada's timeline chart, Canada's total day count given to register, in Canada's words, "do not include delays for which the Applicant was responsible." Claimant's submission on that is that Canada's day counts are, therefore, useless for the purpose for which they were requested since Canada has arrogated to itself the determination of responsibility for those delays, which is a finding of fact.

Appendix A of the Claimant's Post-Hearing Brief--let's see--sorry, Appendix B of Claimant's Post-Hearing Brief instead contains an analysis based on the record as to the cause and duration of those delays, and Appendix A as well of our Post-Hearing Brief contains a detailed account, as presented by the witnesses for Canada, on the comparison between the process that was involved in both Gaucho CS FL and Helix registration procedures.

I go now to the next key point given by Canada at the bottom of Page 4, and those are in relation to the damages Claim of the Claimant.

First, the Canadian Canola industry, it says, as of

16:10 1998 no longer wished to use lindane without it being registered in both the U.S. and Canada.

Now, in fact, it's a matter of record that the Canadian Canola Council continued using lindane well after 1998, until the last possible date and then sought extensions after that date as well, and allowed it to continue to be used, the products, until 2002, the last possible date by which PMRA permitted it to be used.

The evidence also shows that the Canadian Canola Council itself was preparing to immediately revert to lindane use, had the agencies allowed it to be registered. And as conceded by Dr. Goldman, Canadian growers and seed treaters were themselves urging the EPA to grant a registration of lindane for canola use in 2002.

Canada's second key damages fact: "The U.S. EPA never granted a registration or tolerance for lindane use on canola, despite substantial efforts on Chemtura's part."

The Claimant testified here that when Canada de-registered its Lindane Products in early 2002 and refused to re-register Lindane Products for use on canola after its Special Review, Claimant had to devote its finite resources to redressing those issues in Canada. The Claimant knew the Special Review was a flawed one. It knew it was a result-driven exercise. That's why it demanded the Board of Review. It spent many years and dollars and company personnel

16:12 time on the Board of Review because of the crucial importance of its Canadian canola business. That is where its substantial efforts from 2002 through 2005 were actually directed.

Third Canada key fact on damages: "In consequence, the Canadian market for lindane was effectively ended as of 2001, the end of the VWA phase-out period, irrespective of the results of the PMRA Special Review."

In fact, of course, the Canadian market for lindane was effectively ended because of the Special Review, not irrespective of it. Had the Special Review gone the other way, PMRA itself had agreed in October of '99 to re-register the Lindane Products for canola as well. The growers, the seed treaters were showing themselves willing to return to it.

According to the PMRA's October agreement with the Claimant, the positive Special Review outcome would have led to re-registration in Canada and no other termination uses on other products. There would have been no Board of Review, no delays, no REN, no Federal court or NAFTA claims. The 2002 Re-registration Eligibility Decision of the EPA declared existing products in the U.S. eligible for re-registration contingent only on routine studies.

Canada's termination of lindane registrations in 2002 removed any incentive of U.S. growers to continue pressuring the EPA to issue a tolerance or registration and removed whatever motivation the EPA might have had to do so.

16:14 In its brief, Canada glosses over the period 2001 to 2005 in the U.S. and points to events in 2006 to the time when the lindane market had been effectively destroyed by its long hiatus in Canada, the necessary rise as a result of alternative products to fill the gap, and the delayed condemning of the Special Review by the Board, which was responsible for the termination of the registrations in the first place.

Now, Canada's final key fact: "As for the minor non-canola uses of lindane, the Claimant was offered but refused a phase-out period for sale of its remaining product."

The Claimant did not, of course, refuse the phase-out period. The Claimant refused to withdraw its registrations. It provided data to the PRMA, inventories and so on as requested in order for the PMRA to be able to calculate and enforce the phase-out period and schedule. The PMRA permitted phase-out by other producers, notwithstanding its testimony here of concern over risks.

Canada has made much of the word "voluntary" in the withdrawal of canola uses and that the Claimant had the choice whether to withdraw or not. You've heard the Claimant's testimony on the other hand that it testified it felt compelled to withdraw but that a good-faith scientific review would vindicate its position, hence the condition it put into its October agreement, to re-register in the event of a positive Special Review.

16:16 Once the Special Review issued, however, the PMRA's actual agenda was clear. One can readily appreciate what Canada would be saying in these proceedings about voluntary withdrawal of remaining uses had the Claimant done so. It would say, as it has, that the Claimant had a choice, took the benefit, and cannot now complain. But by 2002, objectivity and good faith were no longer an issue, and the Claimant stood on its legal rights, ultimately vindicated to the extent it was possible by the Lindane Board of Review. The denial of a phase-out was vindictiveness, not urgency, not concern for health or the environment. It was, in fact, completion of the PMRA's 1998 agenda to phase out all uses of lindane.

That, in fact, ends the substantive portion of the Claimant's arguments. The arguments that we have made on Article 1105 are, of course, as I said, contained in our Memorial and in our Reply, and they are summarized in our Post-Hearing Brief at Paragraphs 19 and onwards. We obviously do rely on those, and rather than my dilating on them here, I would welcome questions from the Tribunal in connection with those.

I would only wish to conclude by pointing out what is already summarized in Paragraph 21, that breach of a minimum standard of treatment pursuant to Article 1105 is demonstrated based on the authorities--the NAFTA in particular--the NAFTA authorities from which the summary is drawn by--in the middle

16:18 of the paragraph, I'm taking from that--a lack of sufficient evidence to support the decision at issue and are basing the decision on irrelevant considerations resulting in a decision that is clearly improper and discreditable. Lack of due process, including denial of the right to be heard leading to an outcome which offends a sense of judicial propriety, arbitrary, grossly unfair, unjust or idiosyncratic conduct, breach of an Investor's legitimate expectations, lack of transparency and candor in the administrative process, acting beyond the scope of lawful authority, failure to act in good faith, and failure to ensure a stable and predictable environment for investments.

We submit on most, if not all, of these heads, the conduct of the PMRA and, by implication, Canada, as shown in the record in these proceedings, has been made out. Absent questions, those are Claimant's submissions in direct argument.

PRESIDENT KAUFMANN-KOHLER: Thank you.

MR. SOMERS: Thank you.

PRESIDENT KAUFMANN-KOHLER: Do my co-Arbitrators have questions at this stage? Yes?

Judge Brower, would you like to start?

QUESTIONS FROM THE TRIBUNAL

ARBITRATOR BROWER: Do I recall correctly that the Board of Review in this case was the first Board that had ever been convened under the legislation that provided for it?

16:20 MR. SOMERS: You do.

ARBITRATOR BROWER: Okay. Have there been any since?

MR. SOMERS: Not to our knowledge.

ARBITRATOR BROWER: Okay.

Now, here is the question that I have in my mind: You fault the Special Review, the first proceeding by the PMRA. You don't fault the review, but the Board of Review. In fact, you rely on the Board of Review for having pointed up faults in it.

The question for us is whether under 1105 there is anything we can do or should do with respect to the initial Special Review by PMRA, considering that the Board of Review, has reviewed it within its powers, and while I take it it was not in a position to, with legal effect, reverse any action taken by the PMRA, it made recommendations following which PMRA went back and did another procedure or, let's say, a second procedure. You would say it was not another procedure, but it certainly was a following procedure, a second procedure.

Now, to the extent that REN, as it's called, implemented the recommendations of the Board of Review, do you have still a complaint with respect to any of those points? And to the extent it did not implement the recommendations of the Board of Review, such as what I call "the 10 factor," "10X factor," can one have really a complaint of unfair and/or inequitable treatment considering the fact there was this Board

16:22 of Review, there was a new proceeding? That seems to me your case depends on the REN essentially not having varied from the Special Review in any material way, but I think it is an issue with which we are faced. You're really relying on the REN--are you not?--rather than the Special Review itself except insofar as the Special Review, in your view, shows that the situation was essentially pre-ordained, and so the first Special Review and REN together prove that.

To the extent you're relying on the Board of Review as being good, then to the extent that REN implemented any of those recommendations, you don't have possibly a complaint with respect to those points and with respect to the points that were not followed or adopted or respected by REN. If that's the case, there is still a question: Where is the threshold beyond which we can find there was unfair and/or inequitable treatment?

That question has been somewhat repetitive, I do concede, but you get the point.

MR. SOMERS: Our position is definitely that the REN was a foregone conclusion, as the Special Review had been, both expository inventory of a pre-existing agenda to phase out lindane. You're absolutely correct. The Board of Review was a constrained mechanism to shine a light and second-guess the Special Review process, both science and procedure, because these were pesticide regulators reviewing it. It made

16:25 recommendations to the extent that it was empowered by Canadian law to do. So, there is a mechanism in Canadian law to at least have some oversight, limited oversight, but no executive power on the substantive result--and it did so.

As I just argued in brief, we have the documents which show, run along, do the REN, and it will substantiate what happened in the Special Review. So, to us, to the Claimant, the Special Review and the REN are just simply two perspectives on exactly the same conduct: foregone conclusions, designed, results-driven.

The apparent or the tantalizing scintilla of due process which the Board of Review afforded was negated by the fact that the REN was designed behind the scenes from the outset to reach the same conclusion which the Board of Review had found was not justified in the first proceeding. When we asked witnesses for Canada were there additional considerations taken into account, for example, in relation to the flawed thousand-fold uncertainty safety factor, we were told not, that it was the judgment of--without more, the judgment of the persons at PMRA that that was the appropriate factor.

Canada's position, as I read it in their submissions and in their key facts is that due process comes in when a Party is afforded the opportunity to air complaints and to submit data. When those complaints and that data aren't taken into account, not only is it a restoration of the lack of due

process that had occurred in 2002, it also goes to the transparency and good faith of the decision-maker and, if anything, affirms their determination to accomplish their agenda, irrespective of facts, irrespective of process.

And so we get no consolation at all about in relation to the REN. It was, pardon me for saying so, but it tarted-up Special Review with additional language, but no additional scientific basis for reaching its conclusions, and an admission in the documents themselves that before it's scarcely begun in 2006, the REN instituted at the beginning of 2006, and the document I quoted from counsel recommending that they continue to do it so that it bolsters their position in Court and in the NAFTA, and substantiates what happened before in August of 2006 with that document.

So I suppose our grievance, which grows out of the Special Review, means that the Board of Review impugned that, but Claimant never got satisfaction. If the Board of Review had reviewed the REN, we would be in exactly the same position, and I assert that we would have obtained the same result. There was no factual underlying difference between the REN and the Special Review in terms of what the scientists looked at or the integrity of the results.

ARBITRATOR BROWER: If--and this is if and an if that you obviously reject--but hypothetically, if effectively the science was right, if objectively the Special Review and the

16:29 REN had the correct answer or an answer which was within, let us say, a scientifically acceptable range of dispute, one could go--it was scientifically acceptable although not scientifically certain to be the absolutely right result, does motive make any difference? I mean, I know Immanuel Kant took the position that to do the right thing for the wrong reason is itself immoral, but in this situation, if they got the right answer, does it make any difference if everybody was gunning for lindane?

MR. SOMERS: First of all, as sort of an overarching difference, yes, it makes a difference. Minimum standard of treatment relates to fairness, equity, and due process. In fact, though, the correctness of the science is, if I can put it this way, is below the waterline of our case. It's almost--I don't want to say it's irrelevant because if the science had been correct we wouldn't be here. The Lindane Board of Review would have said go away you guys. The Special Review, you know, may have had some quirks. It may have fallen down here or there, but in substance it was correct. And the Lindane Board of Review was pronouncing on the integrity, the correctness, if you will, of the result.

So, we would never have gotten to the stage of having to deal with a correct assessment in terms of MST Claim as we are here. The lack of integrity of the scientific result in the Special Review and since the REN is on the same basis in

16:31 the REN itself, goes to the existence of the MST Claim in terms of the arbitrariness of the conduct, the lack of transparency, and so forth, these sorts of issues which are above the waterline of our case, if I could put it that way.

The incorrectness of the science goes to Canada's conduct, whether intentional, in bad faith, or driven by irrelevant and opaque considerations, all of which we say are afoul of their MST obligation. Had Canada been concerned about strictly scientific results and determining those objectively, it would have been able to do so. It wouldn't have mattered what other countries are doing. Science is science, regardless of which side of the border that you're on.

In fact, though, of course, as we have come to learn, toxicology assessments and risk mitigation are matters not just of science but of judgment and discretion and choices. But when those choices are made in bad faith or without regard to relevant considerations and so forth, the laundry list that I read through on MST before, they called to be scrutinized under the MST principle.

ARBITRATOR BROWER: I think one other question. Your Appendix--is it B?--the 30 pages--

MR. SOMERS: A.

ARBITRATOR BROWER: Oh, A, I'm sorry.

--with respect to how PMRA treated the application for Gaucho CS FL. Looking at Page 82 of your Post-Hearing Brief,

16:33 I'm curious about the following: You list under "Measure," from which I deduce that you believe (d) is a measure within the contemplation of NAFTA, PMRA failed to expedite the registration of Crompton's lindane-substitute products as it had committed to do, but you do not claim damages as such from that, but indirectly you do in the sense that you seem to say the failure to register more quickly deprived you of the opportunity to mitigate. But is that Claim really dependent strictly on our finding fault with the banning effectively of lindane? It seems to me that looks like a potentially independent problem because, on the one hand, you have the "banning," if we may call it that, of lindane; on the other hand, you were prevented from getting into the market for a substitute, but I don't see you claiming damages for that, and it probably would be helpful to understand your view of why that treatment amounts to a measure within the meaning of NAFTA.

MR. SOMERS: You're quite correct. Obviously we haven't accounted for independent damages arising from the delay itself. Claimant's eggs are in the basket of the treatment of lindane itself for damages purposes as well. That is correct.

ARBITRATOR BROWER: Does that mean that if hypothetically the Tribunal found for Canada on its treatment of lindane, but that it had been horribly unfair and

16:36 inequitable in taking the time it did, including 360 days just to pick up the papers at one stage, there is no Claim for damages?

MR. SOMERS: It is true, it is the Claimant's case that Claimant was separately injured by the actions of Canada in delaying the Gaucho Claim, on your hypothetical, in our submission. Because of the lindane actions, it's unquantifiable. Obviously, we don't resolve from one or the other, and we haven't pleaded in the alternative. And in doing the damage calculations, the damage, like the use to which they were put to show Canada's treatment of the Investor, were collectively calculated. They're unquantified damages in relation to the delay, the Gaucho delay, but they're not nonexistent.

In a hypothetical case that the Tribunal would find that Lindane product de-registrations and the preponderance of our materials, the case that goes to lindane issues, was without merit, but that the delay was accessible. I suppose that all that the Claimant could ask for is for the Tribunal to try to assess those damages. As I said, while it's obviously a positive number because it kept the material off of the market for a calculable period of time, we do not have in the record a number that we can present as ascribable exclusively to the Gaucho delay.

ARBITRATOR CRAWFORD: If I could supplement that. I

16:38 mean we can't make one up. Assuming that we take the view that, for whatever reason, there is no Claim in relation to the suspension of the sale of lindane but that there were delays in handling the replacement product which procedurally violated 1105, what do we do in terms of damages? I mean, the Gaucho ended up with a relatively small share of the market, and it will be pure speculation, surely, to say that, had it been registered a year earlier, it would have been substantially more successful; it was against the same competition.

MR. SOMERS: I guess I can only fall back on our position that the case, the Claimant's case, is one of a consistent pattern of conduct driven to a particular agenda in relation to this particular Investor. I agree, you can't pull one out of the air any more than the Claimant could say well, had we come a year earlier, we speculate that this, that and this might have happened to our sales. It's a global Claim, that this element cannot be quantified and is, while it's a severable issue in terms of we submitted on X date, 1400 days later we finally get a result which we should have got in half the time offends on its face, it isn't the Claimant's Claim per se. The Claimant's Claim is a global one. And this is, in our submission, continuing evidence of the prejudice and the treatment that was afforded the Investor.

PRESIDENT KAUFMANN-KOHLER: Any further questions at this stage? Yes, please, Professor Crawford.

16:41 ARBITRATOR CRAWFORD: How do we factor in the finding which would seemed to follow from Mr. Zatylny's evidence that the Voluntary Withdrawal Agreement took lindane out of the market, in any event? There may have been some problems with the PMRA's handling of the dossier, but isn't that academic in terms of what actually happened to lindane? I mean, if you couldn't use lindane in Canada because of the U.S. market and if the U.S. market was effectively closed for the reasons we know, surely the fact that the PMRA took too long or had it in for you in some way is irrelevant.

MR. SOMERS: A couple of points. First of all, the U.S. market was never closed. After 1998, we heard the testimony that not a single treated seed was sent into the U.S. by the Canadians in any event.

We say--backing up--when in late '97 and 1998 the EPA stated its rule that pesticides in Canada that are not registered in the U.S. cannot come into the U.S., whether those are lindane or any other, if the initial statements by EPA were that pesticides, without reference to lindane, we heard Mr. Zatylny for the council at the time express absolutely no concern that other unregistered pesticides were going into the United States as well. Our case is actually that the alarm and the particular steps taken by the PMRA to level the playing field by doing away with lindane instead of leveling the playing by what the U.S. producers were requesting--either do

16:43 away with lindane in Canada or allow it in the U.S.--was engineered by and exploited by the PMRA. The fact that the Canadian Canola Council, whether designed it or went along with it, doesn't matter. They were not in a position to prevent or de-register anything. The fact was it was the PMRA which had and could injure the Claimant and de-register or prevent lindane from being used.

The lindane was being used not on canola but in various other uses in the U.S. throughout this period and, as I said, in 2002 was declared eligible for re-registration contingent on various studies, and so it was continuing to be used. There was never any market shutdown for lindane on the U.S. side. Throughout the period in question as well, canola products grown from seed treated with lindane in the year '99, 2000, 2001, 2002, continued to enter the U.S.

ARBITRATOR CRAWFORD: Yes, but they entered the U.S. under the phase-out arrangement which was negotiated between the Canola Council and the PMRA. But--

MR. SOMERS: The PMRA--

ARBITRATOR CRAWFORD: --doesn't the evidence show the Canola Council took a view on behalf of growers that the product, their product, couldn't stand the criticism of the involvement with the Persistent Organic Pollutant and that it should be voluntarily phased out in the greater interests of the canola market in the U.S.?

16:45 I mean, if that's the position, then where is the causation in terms of what actually happened? Wasn't it the case that irrespective of the outcome of the Special Review lindane was on the way out? I mean, your executive officer said it was on the way out in 1998, and he was right.

MR. SOMERS: As far as that last statement goes, I absolutely agree. We reject, though, the contention that it was on the way out in terms from the industry's perspective. We have, for example, the growers writing to the EPA in 2002, as Dr. Goldman conceded, that they wanted it back. They were prepared to use it. We have as well the e-mail from the then Mr. Zatylny's successor, Joanne Buth, who wrote to Chemtura and said if the Special Review comes out favorable, when can we got our hands on some lindane? Can you ramp up production right away? It was Exhibit--I don't want to guess. I believe it was Exhibit 55. You may recall it. The industry was by no means distancing itself from lindane save for the de-registration, and as far as on the EPA side of thing, had the growers continued to be able to use it, EPA would have had an incentive to grant the tolerance, as we heard Mr. Aidala said. And while Dr. Goldman disagreed with the likelihood of it occurring, did not contradict the fact that it could occur, time limited or an import-only tolerance.

So, Claimant rejects the contention that lindane's day has come through some either property of--or opinion of the

16:47 growers, of the council, or some inherent property of lindane as a POPs. Recall that lindane was being mostly used in Canada until 2002, and was being used in the U.S. as well. There were several registrations until 2006, just not on canola. There was nothing inherent about lindane that was positioned to be banned as of 2002, anyway, in the U.S.

ARBITRATOR CRAWFORD: You mentioned the 2006 in relation to the United States. Obviously there was a phase-out, as I understand it, in the United States, which started to be effective then. And it's not suggested that that was anything to do with the PMRA. It was an independent event.

Doesn't that put a cap on your damages in any view?

MR. SOMERS: Well, actually, our case is that it is referable, and while in a span of years not away from the actions in Canada, being four or five years after the material events in Canada, is directly related to those.

The 2006 phase-out was a result of the producers, including the Claimant, in the U.S. withdrawing their registrations. The EPA did not make a determination in the face of existing registrations that it was not eligible for registration. They had been withdrawn, and then the EPA made its decision.

It's true that at the time that the EPA made that decision, things weren't looking good for lindane; however that--and again, as I've tried to argue already, that was as a

result of the Claimant, through the Board of Review process, trying to get its Canadian market back, and obviously not having the resources spread too thin to fight the war on both fronts, as it were, at both the PMRA, the Board of Review, and the EPA. But we do tie those events together. Had the Special Review--to pick a decision--had the Special Review not de-registered the products, we look at the 2002 Re-registration Eligibility Decision. It says "existing products eligible." To get canola in there, we need three more studies--you know, go to it. And rather, though, than bear down on those studies that the EPA needed and that would have then produced a re-registration eligibility for canola, events in Canada pulled the Claimant into that particular vortex and, quite frankly, caused it to concentrate its resources there.

But that is part of our but-for scenario, that had the Special Review not done what it did, it would have been a simple matter of continuing the EPA process as it had taken it up to 2002 and getting the registration down there as well.

ARBITRATOR CRAWFORD: With respect to a simple matter, and there was substantial international concern about these products and this particular isomer and--

MR. SOMERS: That's true.

ARBITRATOR CRAWFORD: --there's certainly evidence that it was very unlikely to be registered in the United States. I can see from your perspective that there was little

16:50 point in pursuing the position in the United States when the situation was as it was in Canada, but the evidence doesn't really support the idea that the United States's decisions were caused by the Canada decisions. They seem to be independent variables.

MR. SOMERS: The United States's decisions, like decisions of other agencies, are subject to demands by the users of the product. Where there are no such demands, there is no incentive for the Agency, the EPA in this case, to respond. There is no constituency for the product. There is no particular urgency to either grant a registration or to hurry it up or a tolerance or anything else. As lindane use was eliminated on the canola export, for example, North Dakota growers would lose their incentive to pressure the EPA, making--where it has no advocate, there wouldn't be any need for the Agency to take any particular measures in connection with the product but for a housekeeping matter of doing away or confirming the withdrawal of the registrations by the producers.

It's true that there was increasing concerns, as you say, about lindane. Those are undeniable and a matter of record. Our case is that they were not unmitigable, that if those concerns were such as to require the banning of the product or the de-registration of the product, the science would have supported that. In fact, the only way the PMRA

could find its way to do it was to use the data it did that it was scientifically attacked by the Board of Review.

We can't account for why various countries, if they ever did use lindane in the first place, prohibited its use. We have no information or documentation on that. We know that, even while Canada was supporting lindane use in 1997 and 1998, it was, if not a lone holdout, one of very few countries that were, and defended it, defended it scientifically, not merely politically. The documents show that as well. And so we don't take the increasing restrictions or banning of lindane internationally as pertinent for the questions here: additional risk mitigation procedures, additional products, whether they presented lower or no chances of volatilization and all the other toxicology concerns were available.

I'm not sure how much further to take this, except that when Canada in May of this year voted to annex it as a product for elimination before it had completed its re-evaluation--we have a bit of a contradiction there--it sealed the fate of lindane in effect, in contrast to what it had done in 1997 or '98 as far as adding that product to the Protocol.

ARBITRATOR BROWER: Do I understand correctly that both the Special Review and the REN relied solely on exposure of people preparing the lindane or putting it into the seeds? It was not a question of exposure of farmers or exposure of

16:54 consumers or residual effects of the canola?

MR. SOMERS: Certainly in the Special Review the PMRA stopped at exposure of seed treaters on-farm seed treatment as well but the occupational exposure of use and handling of the seed, the treated seeds themselves, as opposed to the product or the ground or anything like that.

In the Re-evaluation Note, again the same concern was identified based on the safety factor and the exposures as a result of that safety factor that would have resulted. Various other concerns were also identified, but as we read the REN notice which came out practically the week before the hearing, I believe, they were not quantified and so I believe the occupational exposure was key in both of those decisions, yes, as I recall.

PRESIDENT KAUFMANN-KOHLER: No further questions? No.

I am not entirely sure that I understand your position with respect to this Tribunal's mandate to review scientific conclusions. You say that this is not our mandate, and I think both Parties agree on that. But then you say, and that confirms the correctness of the science is not my case; the integrity of the science, however, is my case. And that, to me, raises a question in the sense that I cannot assess the integrity of the science without knowing whether it is basically acceptable or not. If it is grossly inaccurate because there are other motivations behind the conclusions,

16:57 then this is to some extent a conclusion of the correctness of the science.

So, can you just help me there? Do we simply look at procedure in completely disregard whether the factor should be 10 or the risk factor should be something else, or do we look at it nevertheless, and to what extent?

MR. SOMERS: If I understand your question, and I'm sorry, my apologies if I'm misconstruing it, but Claimant is not asking Canada--the Tribunal, I mean, to look at the risk factor, it should have been a hundred as opposed to a thousand. We have neither provided you the material nor the tools to make the determination anyway if we had wanted to.

PRESIDENT KAUFMANN-KOHLER: Yes, but assume the risk factor would be something completely outrageous. Would that not possibly be an argument? I'm not saying this is the situation. I'm just trying to understand your position with respect to the scope of our review.

MR. SOMERS: Our case turns on the independent evaluation by the Board of Review of the science. That was an objective body, while appointed by the Minister of Health were persons independent of the Canadian Government and, given our case, an inherently reliable or at least objective assessment of the science, we asked the Tribunal to give that the weight that its circumstances would suggest it has.

I can't give the Tribunal a bright line as to when

16:59 questionable science becomes sorcery, for example, or arbitrariness. And so if we were told, for example, a PMRA witness, that they arrived at the safety factor by flipping a coin or something, the Tribunal could take that into account and say, well, science is an English word, and words are part of our mandate, and that ain't science, and therefore it could reach a conclusion appropriate to that. The Tribunal in this case doesn't need to do that because the Board of Review has gone in and said a thousand is not justified, go back and look at another number. Choosing a thousand by PMRA, the Board said, predetermined the outcome. It was fatal. Our case is that that the PMRA's agenda. We say the Board of Review effective agreed that, while it didn't have to pronounce on a secret agenda of the PMRA, what the PMRA did was guaranteed to result in what we say was the PMRA's goal in the first place.

Respectfully--yes, go ahead.

PRESIDENT KAUFMANN-KOHLER: Yes, so are you saying that we should take the decision of the recommendation of the Board of Review on its face without questioning its scientific conclusions? That is what you're saying. This is the reason also why you say we should not look at Dr. Costa's evidence? Is that a fair summary?

MR. SOMERS: No, it's not. No Party in this room questions the Board's conclusions. No one impugned the Board, its objectivity or its accuracy, anything like that, Dr. Costa

17:01 included. All he said was this is just all scientists talking about scientific things within the four corners of the debate. We disagree with that position. We didn't see it as a debate. It was a critical by-the-board evaluation of what the Special Review was. It was a very one-way debate where the Board would weigh something.

What Dr. Costa's evidence was directed to was having you in effect do away or disregard the criticisms of the Board and try to constrain it into just an argument among scientists, don't bother your little heads about it, scientists do this sort of thing all the time, and it doesn't mean they disagree. It is that sort of parsing of the Board's to us very clear language that we reject and why we reject Dr. Costa's evidence, why we say the Tribunal ought not to give it any weight. It speaks for itself. It's editorializing after the fact by a person, frankly, who did not have the expertise in terms of pesticide regulation that members of the Board themselves had.

This isn't--it is--it is evidence as to the scientific process, which Dr. Costa gave us, and which we say has no place in this proceeding.

PRESIDENT KAUFMANN-KOHLER: Thank you.

There is another question that came to my mind when I read your Post-Hearing Brief. You have divided the actions of Canada in different measures, which is certainly helpful to the Tribunal, and you have a third measure that is the cancellation

17:03 of Chemtura's lindane for canola registrations, and that you have detailed on Page 53 and following of your Post-Hearing Brief.

And there your argument is that Chemtura was not granted the right to a phase-out period.

Now, the voluntary--let's say the Withdrawal Agreement so I don't characterize it, has a phase-out period. I understand there is issues of interpretation of this phase-out period, but there is one, and it's unclear to me how I bring this together with your argument that you should have been given a phase-out period.

MR. SOMERS: Apologies for not making that clear before.

There are two separate groups of Lindane Products based on end use: The canola and the non-canola.

PRESIDENT KAUFMANN-KOHLER: Yes, we are speaking of canola now.

MR. SOMERS: The phase-out denial was not on canola. It was on non-canola only, and that's where we have introduced a confusion, and I apologize.

PRESIDENT KAUFMANN-KOHLER: Yes, but then how do I read Paragraph 115 or 118 of your Post-Hearing Brief? Maybe I simply missed something, and you could tell me.

MR. SOMERS: What you missed was in the heading for the Paragraph 115 and--right.

17:05 PRESIDENT KAUFMANN-KOHLER: It is true that 117, for instance, says phase-out for non-canola Lindane Products, and that is clear to me because there we don't have the date of the Withdrawal Agreement, but my question relates to the lindane canola product.

MR. SOMERS: On the heading above 115, if I insert there third measure cancellation of Chemtura's lindane for non-canola registrations, would that help?

PRESIDENT KAUFMANN-KOHLER: It would help, yes, but my question is whether that's right or not. It would certainly help for the analysis.

MR. SOMERS: That's what it was meant to be there, sorry.

ARBITRATOR CRAWFORD: It should be non-canola.

PRESIDENT KAUFMANN-KOHLER: But then we have a fourth measure where the title is above 119, and as it says, remaining lindane registrations, so I thought that referred to non-canola.

MR. SOMERS: The non-canola registrations were terminated in two batches, on February 11th and February 21st. I could get the exact crop uses for which--I don't have them at my fingertips--for which each of those happened, both the February 11th and 21st were the non-canola uses.

PRESIDENT KAUFMANN-KOHLER: Fine. Thank you. That explains this.

17:06 Any other questions?

There was one question on which that was asked from the Claimant by Judge Brower, and I thought we should give the floor to Canada. The question was: Has there been another Board of Review process since the one we are interested in here? And Mr. Somers said no, not that he knew of, and I was asking myself whether you, Mr. Douaire de Bondy, could confirm this or not.

MR. BONDY: I will verify with our client on the break, but my recollection is that there had been at least a couple of Board of Review proceedings, but I think before, and there may have been a kind of predecessor of a Board of Review type proceeding before in the 1970s, but I will verify that on the break.

PRESIDENT KAUFMANN-KOHLER: You can tell us later, absolutely.

Fine. So, this leads us to the break. It's a little early for dinner, frankly. Can we start--have a shorter break, start and then maybe break sometime later? How would you see this?

MR. BONDY: Right. I could suggest that we start with my remarks, which were supposed to last about an hour, and then either decide to break at that time or proceed on with my colleagues who are going to speak to the other aspects of our case 1103, 1110, and damages. So, that would bring us with my

17:08 remarks to about just after 6:00, and then we can see at that time perhaps whether you would like to proceed.

PRESIDENT KAUFMANN-KOHLER: I think if that's acceptable to everyone, that is a good idea. But could maybe we take just five minutes to stretch and then we start with your remarks.

MR. BONDY: Sure.

(Brief recess.)

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

Then I would give the floor to Mr. Douaire de Bondy for your presentation. And when you are done with your presentation, we'll see whether we carry on or whether that will be a time for a break.

CLOSING ARGUMENT BY COUNSEL FOR RESPONDENT

MR. DOUAIRE de BONDY: Thank you, Madam Chair.

Now that all of the evidence is in in this case, we can step back and consider the Claimant's allegations in overview and confirm they must fail.

Our comments today will go to points basically following our Post-Hearing Brief. First, I'll do a summary overview. I'll then review the serious failings of the Claimant's case on the facts. I'll speak to Article 1105, and my colleague, Sylvie Tabet will speak to Article 1103. Steve Kurelek will speak to Article 1110, and Yasmin Shaker will

17:25 speak to damages. And whether or not that is before or after the break, we will see.

With regard to just in a very summary general overview, in Canada's case, Chemtura's case is fundamentally flawed both on the facts and on the law. The facts show no violation of Chapter 11. The core facts of this case are a Canadian national regulator highly specialized with the PMRA had a mandate to ensure that pesticides were used consistent with human health and the environment. It re-evaluated an old pesticide, lindane, applying scientific procedures and policies. It took the decisions that flowed from the exercise of its mandate and its expertise.

The case also concerns the main end-users of lindane, who were the Canadian canola farmers. They decided that lindane was a significant threat to their business. They organized a transition away from lindane to new and safer products.

Finally, the case concerns Chemtura, a company faced with an historical shift away from lindane, a shift the company itself accelerated. Chemtura refused to accept PMRA's scientific conclusions, sought to blame the Canadian Government for its client's decisions, and refused to take responsibility for its own failure to effectively manage predictable industry change. There is no basis here for any violation of Chapter 11.

17:26 The Claimant, in any event, relies on misstatements and misapplications of the legal tests, the legal rights protected under Chapter 11, Articles 1105, 1103, and 1110 specifically. Its main focus, which we have seen today, has been Article 1105.

The Claimant has adopted a scatter shot approach to Article 1105, seemingly making the calculation that if its complaints are sufficiently broad, surely some breach must possibly be found, but all of its claims fail because it applies the wrong standard.

As we have heard and the Parties are agreed, Article 1105 supports the customary international minimum standard of treatment or MST. There is a high threshold for breach of this standard. Chemtura instead suggests the Tribunal should apply what is effectively a domestic review standard or something even more intrusive than that standard, without proving, by the way, any evolution of customary international law to this effect. This is wrong at law.

The Claimant also imports into customary MST a series of novel elements or bases for breach. For example, the doctrine of legitimate expectations which it does not prove has become part of customary international law. It applies this doctrine moreover not to objective state inducements to its investment prior to those investments, but instead to its subjective impressions of exchanges with PMRA decades after it

17:28 invested in Canada. This reflects no known legal standard.

The Claimant also misapplies Article 1103 because its interpretation of MFN is unprecedented in the context of NAFTA and wrong at law. There is no difference between the NAFTA Article 1105 standard and the standard in Canada's BIT's post-NAFTA.

The Article 1110 Claim also fails in the first place because the Claimant has not been substantially deprived of its investment. The investment in this case is Chemtura Canada. That investment Chemtura Canada has not been rendered useless. If has not been brought to a standstill. It has not been neutralized. Chemtura is still full able to use, enjoy, and dispose of its investment.

In any event, there was no expropriation in this case. We're talking here about a voluntary industry phase-out of which Chemtura took the benefit. There was also no expropriation because there was a finding of unacceptable risk to human health and eventually also to the environment, by the way. Because this was a legitimate and core exercise of Canada's police powers, there can be no expropriation.

In terms of damages, Chemtura's case fails on the basis of pure causation, as we discussed a bit already. Here, the harm is not based upon what Canada did, but upon what another national regulator might have done had Canada's decision been different, which is obviously completely remote.

17:30 Moreover, the Claimant asks the Tribunal to assume away not just Canada's measure, but everything negative about lindane since 1998, including the worldwide ban, as if you just heard that apparently is not relevant to the Claimant's lindane sales.

Having gone through this very brief overview of why we think their Claims fail in summary, I would just like to review some of the facts of this case, as Mr. Somers did, on behalf of the Claimant. Here, first off, I have four points:

One, the Claimant's case is based on innuendo and bare allegations and the misreading of a handful of contemporary documents.

Second, this means that the Claimant has failed to meet the burden it must meet under the UNCITRAL Rule 24(1), and, therefore, its claims fail on this basis alone. The Claimant has failed to prove its case.

Now, Canada could have sat back on that legal standard and simply said the Claimants failed to prove its case, but instead put forward a very extensive factual record so that the Tribunal would have a full understanding of this matter.

But fourth, Chemtura has simply ignored where it best distorted that extensive record.

In short, there is no factual basis to agree with Chemtura's claims and ample factual reason to dismiss them. The omissions and distortions of the Claimant's case are too

17:31 numerous to review and to mention, and are set out, in any event, in our written submissions, so instead I'm just going to review some key facts regarding the scientific review and the VWA.

Regarding that scientific review, in the first place Chemtura ignores the background of Canada's actions concerning lindane. Chemtura suggests that there were no scientific grounds for launching a review of lindane in the late 1990s, calling PMRA's motivations into doubt. But as we have demonstrated, uses of lindane have been progressively withdrawn in Canada since as of the 1970s. Lindane's toxicity and environmental persistence were increasingly confirmed.

By the late 1990s, there were only a few registered uses left in Canada, and there were concerns even about these. Chemtura's own internal documents show that they knew that the use of lindane as a seed treatment was problematic in 1998, as any reasonable observer would have been anticipating PMRA's review of lindane rather than expressing feigned surprise.

The Claimant's denial of lindane status, in fact, carries through to the present. If you look in their Post-Hearing Brief, it starts out with the point that lindane is not banned, citing one minor pharmaceutical use. It ignores the fact that was recalled again today that lindane, in May of 2009, was announced by over 150 nations to be included on Schedule A of the Stockholm Convention, by which time I would

17:33 add, by the way, the REN had already been issued for over a year in draft and had gone through a year of comments from the Claimant. The Claimant's denial of the status of lindane just shows its willful blindness to reality.

Chemtura also misstates PMRA's motivations for launching the Special Review. It wrongly suggests that PMRA's review is prompted by nonscientific concerns, but those have been demonstrated to be fulfilling commitments of the Aarhus Protocol on Persistent Organic Pollutants. The Aarhus Protocol was signed by Canada in June 1998. Planning for the Special Review officially began in June of 1998. Canada adopted the legally correct position at Aarhus that it could not commit to ban a pesticide that was currently registered in Canada, which by the way, is not the situation in May of 2009. That's not the same thing as promoting lindane, as the Claimant suggests. That there was scientific uncertainty about these remaining lindane uses at the time was clear, but it's also clear that there were scientific Reports suggesting there was a problem, in particular a Canadian Arctic Contaminants Assessment Report which suggested that lindane was among the most prevalent organochlorine pollutants in the Canadian North. At Aarhus, Canada took note of emerging domestic and international data, and it agreed that remaining registered uses of lindane would be maintained only subject to a scientific re-evaluation.

This should have been fundamental to the Claimant's

17:35 expectations about the future of its lindane product, but Chemtura doesn't even mention this commitment in its submissions.

Chemtura also ignores Canada's substantial scientific effort in a special review. It argues that Canada removed lindane because of pressure and suggested there couldn't possibly be a scientific basis for withdrawing--for withdrawing lindane. But Canada's witnesses repeatedly confirmed at the hearing that PMRA's decision to withdraw support for remaining lindane registrations was based upon the objective application of PMRA's scientific practices and standards to scientific evidence. The scientists of the PMRA confirmed they were given no particular instructions as to outcome. Their decisions included the choice of an uncertainty factor. That decision was--their decision was not changed or affected by management.

You will recall the integrity of such witnesses as Cheryl Chaffey, one of the main scientists of the Special Review. She flatly rejected counsel's insinuation that the Special Review process was a foregone conclusion. She calmly detailed how PMRA reached its conclusions. John Worgan for his part confirmed that the policies applied in the Special Review were not specific to lindane, but were general policies adopted and applied by the PMRA in the context of re-evaluating over 400 old pesticides, of which lindane was only one.

Chemtura also seriously downplays and misstates the

17:36 opportunities it had to participate in the Special Review to exaggerate its process concerns.

It fails to mention, for example, a two-day meeting with the PMRA at the outset of the Special Review 10 to 11 May 1999 to discuss PMRA's Special Review practices and procedures at which it could have asked any question it wanted about that process.

It fails to mention the meeting between PMRA's Executive Director and Chemtura's Chief Executive over a year before the Special Review results were released, to again discuss any concerns the Claimant might have about that Special Review.

It fails to mentions PMRA's request that Chemtura provide occupational exposure data for the Special Review that Mr. Ingulli failed to tell you he provided that information to Claire Franklin at that meeting himself a year before and tried to distance himself from that data.

It fails to mention the opportunity Chemtura was given at the end of the Special Review to propose corrections to PMRA's conclusions in October 2001, and to propose further mitigation measures as opposed to saying that their Dupree Study was wrong and that mitigation measures should be applied, Chemtura just took the same data, the same study, and tried to apply a lower safety standard to that same data, not saying that it shouldn't be used at all.

17:38 The Claimant also fails to mention the Board of Review's specific criticisms of Chemtura, notably Chemtura's failure to adequately follow and seek to participate in the Special Review. These facts are key to considering the Claimant's Article 1105 allegations. Chemtura simply ignores them.

Chemtura also can't deny that U.S. EPA and PMRA engaged in extensive scientific exchanges in relation to lindane, so its tactic here has been to try to demonize these exchanges by alleging there's signs of collusion or improper influence.

The decision to collaborate on lindane reviews reflected NAFTA policy to promote harmonized decision making on pesticides as you've heard at the hearing. This policy includes exchanging scientific points of view regarding risk factors and seeking to reconcile the approach of the two countries, where possible.

Despite such efforts, each country maintained and maintains its domestic policy. Persistent differences of approach remain leading to persistent differences in pesticide registrations between the two countries. These exchanges between the U.S. EPA and PMRA simply confirmed the intensity of PMRA's scientific work on lindane and the integrity of its review process.

Now, as you have heard again today, Chemtura has

17:39 sought to discredit Canada's Special review process and scientific conclusions with reference to Board comments on process and on the science, but its reliance on the Board is completely misplaced. It suggests that decisions before this Tribunal and before the Board are essentially the same. This is false. The main point is the Board was not applying customary MST.

In any event, the Board proceedings, from a process review, are simply evidence of due process and are therefore fatal to its process complaints.

With regard to the science, there is evidence within the Board's decision itself confirming the Board's recognition of PMRA's scientific process. Cheryl Chaffey in her Affidavit also provided detailed comments on the good-faith scientific differences of view between PMRA and the Board. Scientific differences of view do not give rise to liability under international customary law. With regard to Ms. Chaffey's evidence, the Claimant has no response.

But Canada has gone further. We called an eminent toxicologist, Dr. Costa. He confirmed that PMRA's scientific process and scientific conclusions were, as I have said, scientific. He also confirmed that the differences of view between PMRA and the Board took place within the four corners of scientific debate.

The Claimant, instead of providing competing evidence,

17:41 has simply alleged that Dr. Costa's evidence was improper, saying the Board's decision speaks for itself. But, in effect, what the Claimant is trying to do is ask you--ask the Tribunal to accept without support its own--Claimant's own competing characterization of the Board's decision as opposed to Dr. Costa--and ignore Dr. Costa's evidence.

The Claimant also largely fails to address Canada's extensive evidence of PMRA's de novo scientific review process, the REN. Now, contrary to what the Claimant suggested this morning, as has been established through Dr. Costa's review and through the evidence of Mr. Worgan, Peter Chan, in the REN itself, which is an extensive scientific document which I invite you to review, that REN took account of the Board's recommendations and, as we have established, carried out a full second reevaluation of lindane, a de novo reevaluation, with a new scientific team that did not include members of the original scientific team.

The Claimant also fails to mention Canada's evidence that PMRA undertook a full public consultation about the safety factors it applies in its reevaluation process. Instead, at the hearing conducted a clumsy attack on the PMRA's integrity trying to show that PMRA wrongly influenced the REN's outcome. This is not a cogent response to Canada's evidence. As Canada established, Mr. Worgan had no substantive role in the REN. REN scientists were provided no particular instructions as to

17:43 outcome. Those scientists independently selected the safety factors to apply in the REN, and PRMA management in no way disturbed their conclusions.

Now, you have heard this morning Mr. Somers mention some advice that was given to PMRA allegedly calling in question the integrity of the REN process. I actually invite you to look at a memorandum which is included as Exhibit 1, the book of exhibits to the Reply of the Claimant, and look at the list of conclusions which states, "In response to the Board's comments and recommendations, the PMRA is preparing to act in the following areas:

"One, reconsider the Occupational Risk Assessment of lindane by taking account the new exposure study generated by Crompton since the Special Review, the Board's opinion, and other information presented at the hearing.

"Two, reconsider the original data and any supporting data relevant to the aggregate, dermal, and inhalation Risk Assessment.

"And, three, initiate communications with Crompton, other formal Registrants, and other interested parties to seek input to risk assessments and to discuss viable mitigation measures that may address health-related concerns for workers. Further, PMRA is currently reviewing its policy regarding the

17:44 use of uncertainty and safety factors and risk assessments."

Now, that is what the PMRA proceeded to do in the REN. The Board of Review did not instruct PMRA to change its decision. The Board of Review, as stated in the conclusions of the Board of Review's decision of August 2005, invited the PMRA to take additional data, potential new mitigation measures, and the Board's comments on some of the PMRA's conclusions into account and reconsider its decision, which is exactly what the PMRA proceeded to do.

PRESIDENT KAUFMANN-KOHLER: Excuse me, can you just tell us again what the exhibit number was. I'm not sure it's right in the transcript.

MR. DOUAIRE de BONDY: It's Exhibit 1 of the book of exhibits to the Reply of the Claimant.

PRESIDENT KAUFMANN-KOHLER: Thank you.

MR. DOUAIRE de BONDY: Just to conclude on the science, my colleague, Yasmin Shaker will speak to the EPA issues in more detail. I'd simply note here is that the Claimant exaggerates the differences of view between PMRA and EPA in its submissions, again in order to make PMRA's scientific decisions seem unreasonable. What is unreasonable is the Claimant's suggestion that there could be only one right answer regarding lindane, and also unreasonable a suggestion that countries could not legitimately have different national

17:45 policies and safety standards leading to different results.

The Claimant, in any event, ignores the negative trend of EPA decisions regarding lindane and more specifically the failure of its repeated attempts to obtain a lindane tolerance for canola, which is fatal to its damages Claim. You heard this morning Mr. Somers suggest that because Chemtura was distracted by the Board of Review proceedings or distracted by, I guess, by the NAFTA proceedings themselves, it didn't actually actively pursue a lindane tolerance or registration in the U.S. This is false. Dr. Goldman reviewed the contemporary record of the Claimant's repeated attempts to obtain a lindane tolerance and registration in the United States and determined that, despite substantial efforts, the Claimant got nowhere with those requests, and that was confirmed by Mr. Johnson, if you recall his testimony, when he repeatedly asked them for a time-limited tolerance, what did they say? They didn't say anything. They didn't reply or they said not now.

With regard to the VWA, I just have a few comments. I'd say that the pattern of ignoring documented fact, including the evidence of its own internal documents repeats itself here. Chemtura tries to ignore its own role in making lindane a focus of industry action. Mr. Somers this morning suggested why lindane as opposed to all these other pesticides? I suggest it look back to its own document of September 17, 1997, which specifically raised the issue of lindane vis-a-vis the U.S.

17:47 EPA. The U.S. EPA doesn't go out investigating. It relies on complaints. And also forgets that lindane was highly questioned as a particularly potentially dangerous pesticide at the time, perhaps not the situation with other chemicals at the time.

But more importantly, the Claimant's in denial about the key and leading role the Canadian Canola Council played in devising, promoting, and obtaining the Voluntary Withdrawal Agreement. It glosses over the repeated admission in its own internal contemporary documents that the VWA was not regulatory action, but rather the express wish of growers.

It also ignores its own repeated admission in contemporary documents that the PMRA would support the VWA only if it was voluntary.

With regard to when Chemtura agreed to the Voluntary Withdrawal Agreement, this concerns, on the one hand, the voluntary nature of that agreement and the content of that agreement. You will recall at the hearing Ms. Sexsmith and Mr. Zatylny confirmed that an agreement was reached in November of 1998. Now, the Claimant's representatives at that meeting were Mr. Dupree and Mr. Hallet. The Claimant decided not to call those witnesses. Instead, they asked the evidence of Mr. Ingulli, who was not present at that meeting. Well, we didn't even need the testimony of Ms. Sexsmith and Mr. Zatylny. Chemtura's own contemporary internal documents confirmed that

there was an agreement at the time. They also confirmed that they would take the position in public that they supported the Agreement while trying to extract preferential regulatory conditions of the PMRA behind the backs of their competitors.

The PMRA's response was consistent with its role as an impartial public body. It could not grant such preferential conditions, and it simply recalled the terms of Chemtura's agreement with industry.

PMRA did fast-track the registration of Chemtura's submitted lindane replacement product Gaucho 75ST and 480 FL. Chemtura again confirmed its agreement in the summer of 1999.

By October 1999, when that deal was about to be implemented, Chemtura returned with this request for preferential conditions. The only condition that actually arose or the only addition to the Voluntary Withdrawal Agreement that can actually be confirmed is the potential for fast-tracked reinstatement of lindane registrations if certain conditions apply; for example, registration in the United States, registration in Canada. Those conditions were never obtained. That clarification communicated to Chemtura was also clarified for all four Registrants in the meeting of October 22nd, 1999. This simply underlined that the VWA was not regulatory action, but rather a voluntary industry arrangement in light of a significant business threat.

Now, Mr. Ingulli, at the hearing, talked of Chemtura's

17:50 agreement to the VWA as a choice between two evils. One either imposed terms on PMRA for the withdrawal of lindane or two, faced cancellation on PMRA's terms. This is a false analysis. The October 1999 issue was not PMRA action. PMRA's review had already been launched and was going to go ahead in any event and reach the conclusion it would reach. Rather, what was at issue in October 1999 was the urgent demand of Chemtura's own customers that it adhere to a voluntary industry plan to stave off an industry crisis.

The decision Chemtura had to take in October '99 was whether it would fail to support its own customers, put in jeopardy hundreds of millions of dollars of their product sales, and essentially force an immediate industry withdrawal from lindane, which is Mr. Zatylny's testimony, or instead support the VWA as it was agreed and take the benefit of an additional three years of lindane as a result of the VWA, as Professor Crawford mentioned earlier. All of this had nothing to do with the PMRA.

With regard to the alleged conditions of the Voluntary Agreement, Chemtura's alleged expectations are not even made out on the face of its famous October 27th, '99 letter, which it's repeatedly characterized as the deal between itself and PMRA. That letter says nothing at all about replacement products, and it plainly states on its face that the last date for use of Chemtura's Lindane Products is July 1st, 2001.

17:52 I'd end my quick review of the facts with a comment adapted from Waste Management II: "There are sufficient reasons to explain the withdrawal of lindane in Canada, and there is no need to support--to resort to conspiracy theories unsupported by any evidence."

Having provided this general overview of the facts, I'll now speak to Article 1105 first on the standard to be applied and with regard to the Claimant's general and specific allegations of breach.

With regard to the standard, I have three main points. Article 1105 in the first place upholds, as the parties are agreed, the customary international minimum standard of treatment. Two, the Claimant claims that the customary international standard has evolved, but provides no proof of State practice or opinio juris.

And three, the Claimant then applies the wrong standard in place of customary MST.

With regard to the first point, as I say, the Parties are agreed, Article 1105 upholds customary MST, so I will pass on to my second point which the issue is instead the content of customary MST.

Now, NAFTA tribunals have recognized customary MST standard in a variety of formulations, but the principle running through these cases is that customary MST presents a high threshold for breach. Breach of the customary minimum

17:54 standard of treatment has been described as treatment in such an unjust or arbitrary manner that it rises to the level that is unacceptable from an international perspective. The intention of customary MST is to provide an objective minimum floor below which the treatment of investors must not fall.

Now, the Claimant asserts that customary MST has evolved, yet evolution of customary MST in international law must be established on two foundations: Consistent State practice and opinio juris. And the Claimant fails to provide proof of either.

Both parties are agreed that customary law is not frozen in time. That's not the point. That doesn't displace the Claimant's burden of proving either a lower threshold or novel content for customary MST. The Claimant adopts three methods to try to prove a change in the customary rule. All three fail.

In the first place, it seeks to import content into customary MST through Tribunal decisions interpreting freestanding fair and equitable treatment clauses or FET. For example, Tecmed, the Tribunal expressly noted that it was not bound by customary international law. Decisions under freestanding FET clauses have in some cases considerably expanded on recognized obligations under customary MST. The error of law here is easy to identify. These decisions depend upon principles of treaty interpretations. They do not purport

17:55 to reflect customary MST and, therefore, cannot be cited as examples of the content of customary MST.

The Claimant also cites to the conclusion of international treaties in recent years, investment treaties. This also fails. The Claimant assumes that in signing a treaty a signatory state means to enshrine the Treaty standard as custom. This is far from a necessary or clear conclusion. The majority of FET clauses in BITs contain no reference to international law, and UNCTAD studies on FET clauses say the reference to FET in investment instruments does not automatically incorporate the international minimum standard.

Moreover, evidence of consistent State Treaty practice is absent. Investment treaties are striking in their diversity. UNCTAD again notes at least four different approaches to FET itself at various BITs, and no consistent Association of FET and MST.

And, indeed, there is state Treaty practice mitigating or militating against the evolution that's alleged. The first example might be--is failures of attempt at a unified international investment treaty. The most recent UNCTAD studies suggest States around the world are moving away from freestanding FET clauses towards more precise standards, expressly or implicitly rejecting expansive interpretations given to such clauses.

In short, mere reference to BITs does not discharge

17:57 the burden of demonstrating a fundamental shift in customary international law. The argument has now been considered and rejected by several NAFTA Chapter 11 tribunals.

The last attempt the Claimant makes to prove an evolution of customary international law is the suggestion that some international tribunals have erased the distinction between freestanding FET clauses and customary MST. Now, obviously Article 38(1) of the statutes of the International Court of Justice confirms that decisions of international tribunals are not a source of customary international law. The views of particular tribunals are not a substitute for State practice and opinio juris. The writings of jurists and tribunals at most provide evidence of the practice of States, and then only insofar as they rest on factual and accurate descriptions of past State practice, not on projections or future trends or the advocacy of a better rule.

The decisions upon which the Claimant relies--in the decisions upon which the Claimant relies in any event, the determination of the content of customary international law was not a core or, indeed, a necessary aspect of the Tribunal's decision making. None contained the kind of detailed exposition of State practice and opinio juris one would need to make a secure finding on the content of an expanded customary standard.

In fact, what these tribunals appear to be saying is

17:59 that in a particular context of the case before them, it wouldn't matter whether one applied either the current Treaty standard, current treaty interpretations of FET or customary MST. This does not prove that MST--customary MST standard has changed.

Having failed to prove any evolution of customary MST, the Claimant bases its Claim on the wrong standard. As I mentioned, it substantially lowers the threshold for breach of customary MST. Mr. Somers recalled part of that this morning or earlier today by suggesting there was a violation of customary international law if there was a lack of sufficient evidence to support PMRA's decision, that the PMRA based its decision on irrelevant considerations, if there was a denial of the right to be heard or an act outside the scope of statutory authority. This, in effect, transforms the customary MST standard into a kind of domestic administrative review standard. This kind of serious modification to the customary standard would have to be based on clear evidence of State practice and opinio juris, which the Claimant has failed to provide.

Moreover, this alleged lowered threshold does not reflect the decisions of NAFTA Tribunals applying the customary MST standard. Such tribunals have found, for example, that not every procedural breach violates MST, even in the judicial context. Instead, there must be a "manifest failure of natural

18:00 justice." Not any action outside of the scope of statutory authority will be sanctioned; even if an action is ultra vires a State's internal law, that does not necessarily render the measures grossly unfair or inequitable.

As one Tribunal put it, something more than simple illegality or lack of authority is necessary to render an Act inconsistent with customary international law.

And, indeed, evidence of a State's attempts to comply with its regulations invalidate any claims of breach.

NAFTA tribunals have also held that administrative proceedings should be tested against the standards of due process and procedural fairness applicable in the administrative context. The administrative due process requirement is lower than that of the judicial process context. As for conduct, the standard of administrative conduct is not perfection; rather, examination of the impugned administrative Act must not lead the Tribunal to the conclusion that the decision was clearly improper and discreditable.

Even failure of a regulator to fulfill the goals of the regulatory regime would not be sufficient. The GAMI Tribunal held that a Claim of maladministration would likely violate Article 1105 if it amounted to an outright and unjustified repudiation of the relevant Regulations.

What do we have here? We have a regulator applying a regulatory regime in place at the time the Claimant began its

18:02 investment, reaching its determination, providing the Claimant basic due process, allowing the Claimant to review that decision through a sophisticated review procedure, conducting a good faith de novo review that took into account the recommendations of that Review Board, all signs of an effectively functioning domestic process and indeed addressing issues of process that are axiomatically domestic. There is no breach of MST here.

The Claimant may well be disappointed with the outcome of PMRA's decision, but mere disappointment does not confirm a breach of customary MST. The Claimant otherwise imports into customary MST various novel content under at least four headings, none of which have been established. It tries to rely on the notion of good faith, but as we have noted in our submission, good faith is not at international law an independent source of obligations. Rather, it reflects the manner in which existing obligations should be respected.

It also cites to transparency. Again, not established as an element of customary MST as found by Mr. Justice Tysoe in the Metalclad revision. All three NAFTA states have expressly rejected the allegation that transparency forms part of customary international law. Indeed, even tribunals applying the different--the freestanding FET standard speak of transparency as making public laws and Regulations, Regulations governing foreign investment, for example, in Tecmed. There is

18:04 no such allegation here. The Claimant isn't talking about the transparency in terms of publication of laws and Regulations. It refers to transparency in terms of when in a precise point of a domestic administrative review proceedings it was given what level of disclosure about certain facts which have been found to be factually counter--factually untrue in any event.

The Claimant, as I mentioned at the start, also heavily relies on its legitimate expectations, again a standard which it has not established in customary MST through State practice and opinio juris.

I will recall that even a breach of contract does not rise to the level of a Chapter 11 Claim without something beyond mere breach. A fortiori, the mere reversal of an expectation does not constitute an internationally sanctionable Act.

In any event, even legitimate expectations, to the extent they have been respected--reflected under decisions under freestanding FET clauses were in connection with objective representations made by a State to a prospective investor at the time the investor was contemplating the investment, and which induced the prospective investor to invest. Here we have the Claimant's subjective feelings about exchanges with PMRA that took place 30 years after its investment was made. There is no inducement here, and its claims reflect no known legal standard.

18:05 Finally, the Claimant has made allegations of obligations to ensure stable and predictable--a stable and predictable environment for the Claimant's investment. This asserted content for customary MST is not only unproved, it also contradicts the doctrine that an investor undertakes an investment in a foreign country at its own risk. MST is not an insurance policy against the evolution of legislation of policy over the regulatory environment. Governments regularly modify regulatory regimes including by strengthening safety standards. This is part of the democratic process. The expectation of état du droit is that the law may change.

The expectation is also that given new information, views on the safety of a product may change. There is no standstill clause in place at the time--at the date the Investor takes its investment. And in any event, there is no regulatory change here. Rather, what you see here is the application of a regulatory regime that was in place at the time the Claimant Chemtura invested.

I just have one final point about this standard. The Claimant in its Memorials complained about a broad spectrum of alleged measures and argued that these taken together constituted a breach of MST. Yet, at the end of the hearing the Tribunal invited the Claimant to articulate specific measures which it alleged were breached--breached MST themselves, and the Claimant took up this invitation in its

18:07 Post-Hearing Brief.

None of these particularized measures taken alone amount to a breach of customary MST, but in any event, my point is simply that any specific measure needs to be considered in light and counted as treatment of the investment taken as a whole. For example, any perceived breach in the Special Review of procedure must be considered in light of the Board of Review procedure and lindane REN, as was discussed earlier. Any one measure must be judged against the whole of Canada's conduct before a breach of customary MST can be found.

I will now turn to the facts as applied to MST. Again, Claimant's approach to Article 1105 has been to complain about everything it can possibly think of under every possible heading, reflecting an apparent calculation that if it complains loudly enough about enough things, surely the Tribunal will award it something.

Claimant's approach certainly increased Canada's burden as a Respondent in this case, but it does nothing to improve the Claim's merits. Nothing in Canada's conduct came even close to a breach of customary MST, either on the correct standard or the Claimant's incorrect reading of that standard.

First, with regard to the alleged pattern of conduct, the Claimant would have this Tribunal believe that PMRA took a political decision to eliminate lindane, that it manipulated industry fears about the chemical to ram through a hurried

18:09 phase-out, that it bullied Chemtura into withdrawing its registrations. It said PMRA's scientific review was nothing but a coverup; and, indeed, the opportunities Chemtura was given to challenge the scientific decision were just part of the scam.

The Claimant's allegations are offensive, unfounded in evidence, and contrary to common sense. PMRA didn't need a trade reason to conduct the reevaluation of a World War II era chemical. To do so was its core mandate. I described the evidence of Canada's substantial scientific process that eventually led to lindane's suspension on health and ultimately environmental grounds. As Dr. Goldman put it in her evidence, "National pesticide regulators aren't allowed to shoot first and ask questions later. A stakeholder's disappointment in the outcome of a regulatory decision does not prove that that decision was fixed. Nor does the parallel decision of the Canadian Canola industry to voluntarily phase out lindane prove any pattern of conduct on Canada's part."

In all of the circumstances of the late 1990s, recognition by this industry that lindane was a liability was perfectly reasonable, and they were wholly within their rights to organize an industry withdrawal. To the limited extent the PMRA made commitments regarding the Voluntary Withdrawal Agreement, it substantially fulfilled those commitments. If there is any pattern of conduct here, it's that of a

18:10 specialized regulatory Agency doing a scientific job, seeking to balance competing interests on limited--using limited resources and trying to treat all involved fairly.

With regard to individual or specific measures, I will just walk through them relatively quickly. Again, most of the Claimant's emphasis is on the Special Review and its allegations here are typically broad ranging. It alleges procedural failings, substantive failings in the review. It argues that if the Special Review was procedurally deficient, it must have been nontransparent or arbitrary. It alleges PMRA's conclusions were based on external pressure rather than on science, and therefore the decision must have been discreditable.

Since my general factual overview focused on the Special Review, I won't repeat that here. I would simply recall that Chemtura has failed to discharge its burden of proof regarding these accusations, and failed to address Canada's substantial evidence to the contrary.

I will, instead, focus on the flaws of these Special Review allegations in light of customary MST.

With regard to procedure, Canada provided substantial evidence of procedural opportunities granted to the Claimant in the Special Review. These were provided not because Canada asks this Tribunal to second-guess the decision of the Board, but because the decision this Tribunal must take is different

18:12 from that before the Board. The Board applied a domestic standard of administrative review. The question before this Tribunal is whether Canada's scientific review constituted a breach of customary MST.

The procedural opportunities granted to the Claimant in the Special Review itself confirmed that there was no due process breach of customary MST, especially in the administrative context. But the Tribunal must also consider the Claimant's alleged due process concerns--can't consider those alleged due process concerns in isolation. The Board of Review proceedings themselves and, indeed, the subsequent lindane REN form part of the procedural record that is before this Tribunal. And that Board of Review and REN, as Canada has demonstrated in unchallenged evidence, provided the Claimant substantial opportunities to make further data submissions and to challenge the PMRA's scientific decision. I invite the Tribunal to review again the history of exchange of correspondence between and meetings between Chemtura and the PMRA with regard even to the lindane REN results issued in April of 2008, let alone the proceedings between Chemtura and PMRA in the REN, let alone the enormous procedural opportunities in the Lindane Board of Review. The Claimant has had more due process with regard to the review of lindane than most people get in 50 lifetimes. There is no breach of Article 1105 here on any reading of the MST standard.

18:13 Because there was no breach of procedure, there is also no breach of transparency, even if that were part of the standard. Nor was the decision arbitrary. In any event, the transparency of which the Claimant complains does not even reflect the standard proposed under stand-alone or freestanding FET clauses. PMRA's legal and regulatory regimes were public. Its specific reevaluation policies were public, and I have mentioned that meetings that PMRA held with Chemtura to discuss its process and to discuss any Chemtura concerns.

With regard to alleged arbitrariness, Canada has provided extensive evidence of the reasoned basis of PMRA's decision making. The Claimant again may disagree with PMRA's conclusions, but we are a long, long way from a situation where a decision was taken in the absence of any scientific evidence.

Now, by emphasizing the Board of Review's decision, the Claimant makes the suggestion that because PMRA and the Board differed on some scientific issues, PMRA's decision must necessarily have been improper and in breach of international law. To state this simply confirms the argument lacks any merit. The point of Dr. Costa's evidence was not to rewrite or white wash the Board's decision, but rather to confirm that PMRA's process and conclusions were scientific and to confirm that the Board and PMRA differed in view within the four corners if a scientific debate.

His evidence also confirmed that PMRA's subsequent

18:15 reevaluation took account of the Board's recommendations through a scientific process and reached a scientific conclusion. Dr. Costa's evidence is unopposed. From the perspective of Article 1105, the Tribunal's inquiry can stop there. As I have said, scientific disagreements do not establish a breach of international law, and a tribunal constituted under Chapter 11 of the NAFTA is not charged with determining the correct scientific decision. To do so would not only be wrong at law. It would ignore the fact that scientists may, indeed, disagree in good faith. Even at the domestic level, decisions taken by specialized scientific regulators are not necessarily judged on the standard of correctness, and their decisions are not necessarily overturned because some scientists may take a different view. Nor is it the role of a NAFTA Chapter 11 Tribunal to determine Canadian national safety policy on pesticides or to punish Canada for having imposed a more conservative standard.

Determining the adequacy of the data for taking scientific decisions is also a mixed decision of science and policy which a NAFTA Chapter 11 Tribunal should not disturb. As has been stated, a high measure of deference to the facts and factual conclusions seems the only way to prevent investment tribunals from becoming science courts and from frustrating democratically adopted preferences of risk in matters of fundamental importance such as protection of public

18:16 health and the environment.

The Claimant's attempt--other attempts to impugn the PMRA's scientific process are otherwise founded on empty allegations. In light of the substantial evidence that PMRA took its decision through a scientific process and reached a scientific conclusion, the Claimant's allegations on this measure all fail.

Now, such an alleged measure, denial of the deadline of July 1st, 2001, also fails both on the law and the facts. The allegation in the first place relies on a doctrine of legitimate expectations, which has not been proved to form part of the customary standard, and the facts in any event have nothing to do with an inducement to invest.

From a factual point of view, the Claimant's alleged expectations regarding the July 1st date are, in any event, unreasonable. If you look back to the letter of October 27, 1999, you will see that lindane seed treatments were not to be used after July 1st, 2001. This is a revision to Chemtura's letter of the day before, which had alleged that Lindane Products could be used with no time limit. Contemporary internal documents from Chemtura confirm it understood that lindane could not be put into the ground on seed as a pesticide after July 1st, 2001. The Claimant's strained reading of its own documents to the contrary is subjective as well as unreasonable and, indeed, not proved as a contemporary

18:18 expectation. Moreover, Mr. Ingulli admitted at the hearing that Canada issued no threats in relation to July 1st, 2001, and therefore there was no measure by Canada that might be considered a breach.

The third and fourth alleged measures are closely linked to the first. They amount to saying that Canada was unjustified in suspending remaining lindane registrations based on its Special Review results. The Claimant itself recognizes the Minister had the right to cancel and suspend registrations based on safety considerations, and that's exactly what happened in the case of lindane. The PMRA determined that continued use of lindane posed unacceptable safety risks to the workers exposed to the chemical in seed treatment, and they took the required regulatory steps.

The offer of a phase-out further to that determination does not mean that PMRA's concerns were not real. Phase-outs are a typical policy of pesticide regulators. Phase-outs do not mean that there are no safety risks. They simply mean that the incremental risk of a phase-out is outweighed by the greater risk and disruption of immediate mass disposal. The Claimant's allegation that it did not enjoy a phase-out also fails. Chemtura was invited along with other Registrants to participate in a voluntary withdrawal of these non-canola uses based on the Special Review results. Chemtura simply rejected the offer and sued the Minister. Notwithstanding this, the

18:19 PMRA did not, in fact, cancel Chemtura's registrations of non-canola products. The PMRA suspended these registrations, and this allowed Chemtura products in the market to be sold and used until exhaustion. This is the functioning of domestic regulatory process. It has nothing to do with a breach of customary MST.

Now, the fourth measures rolled up into the third, so Ill move to the fifth, and I only have the fifth and the sixth, so we're coming to the end. The fifth alleged measure relates to the review of replacement products. These allegations suffer from the same legal and factual flaws discussed above, in the first place based upon a theory of legitimate expectations that is not established, and in any event do not relate to pre-investment state undertakings.

Moreover, the alleged expectation of the Claimant is not established. The October 27th, '99 letter upon which the Claimant's expectations were allegedly founded says nothing about the registration of replacement products. And other contemporary documents confirm to the contrary. The PMRA made no open-ended commitment to fast track any and all of the Claimant's potential replacement products. The PMRA, in fact, fast tracked its review of the two Gaucho products Chemtura submitted for review in connection with the VWA. It did so by October of '99, granting, therefore, Chemtura first to the market registration. And in contemporary documents, the

18:21 Claimant itself recognized that these registrations fulfilled any limited undertakings made by PMRA. Otherwise, the alleged discrimination against the Claimant's Gaucho CS FL is not established.

The Claimant's attempt to compare this review process to that of Helix is inapposite. As was established at the hearing, Helix was reviewed through a distinct NAFTA process through which Gaucho was not eligible on the objective application of those rules. In citing this as evidence of a breach, Chemtura is in effect asking this Tribunal to condemn Canada and the PMRA for having complied with a NAFTA program and NAFTA obligations? This makes no sense at all, and it certainly doesn't constitute a breach of customary MST.

The Claimant otherwise complains that the registration process for Gaucho CS FL took longer than it would have liked. This was despite that the Claimant itself was substantially late in submitting Gaucho for the PMRA's consideration, and despite that the Claimant failed to provide data required for this review was delayed in responses and changed its formulation in the course of the review. Canada cannot be condemned for a breach of international law because the Claimant thinks a domestic review process should have gone faster. This was a complex administrative and scientific process. It concerned health and environmental issues. The PMRA was juggling literally hundreds of competing demands, and

18:23 it was applying limited resources. Absent any evidence that the PMRA deliberately slowed this process which is, indeed, absent, there is simply nothing to say here from the perspective of international MST.

Now, Canada could get into the incredibly minute details set out often for the first time in the Claimant's Appendix, if the Tribunal so desires, but Ms. Chalifour in her evidence certainly gave evidence that in applying and reviewing Gaucho CS FL the PMRA was applying the policies that it has in place in order to ensure the effect of registration, the balancing of different Registrants' demands on the PMRA's process with limited resources.

One thing Judge Brower mentioned this morning about take 200 or 300 days to conduct a review, in fact, as Ms. Chalifour said in the course of her evidence, the fact that a registration record shows no evidence of activity during that period is not actually--does not actually mean there was no activity. There was a new computer system in place that was not actually always updated, and her evidence is that during that period there would have been work going on on the review, so it's not like PMRA put the review aside.

Now, I think if you look on the charts, you will see actually that the review procedure for Gaucho CS FL, not counting any delays that the Claimant itself caused, was within PMRA's management of submission policy standards, there was

18:24 some slight delay. I'd also recall that that management of submission policy is a policy PMRA imposes upon itself voluntarily in order to provide itself with the performance standard. Being late in relation to that standard in the context of multiple demands on its time does not constitute a breach of customary international law.

I will finish off with the sixth measure, the conduct of a de novo lindane reevaluation. I've read from you earlier the section of the description of PMRA's REN process, which is quite to the contrary of the characterization that the Claimant's counsel gave that document earlier today.

In the lindane REN, the PMRA deployed substantial resources to conduct a de novo review of lindane, employing a new scientific team, conducting a separate review of risk factors applied through public consultations. Dr. Costa reviewed the REN process and conclusions, and his unopposed evidence is that both were scientific. His unopposed evidence is PMRA took account of the Board's recommendations in reaching its decision. The Claimant's attempt to attack the REN based on the alleged influence of John Worgan is, as I have stated, unfounded. The Claimant argues the REN process was biased because PMRA's new scientific team reached a negative conclusion on lindane, but this complaint mischaracterizes the Board's role, the nature of the REN, and the customary MST standard. The Board did not order PMRA to change its Special

18:26 Review Decision. The Board recommended that PMRA reconsider certain aspects of its decision, particularly in light of mitigation measures Chemtura said were important. The PMRA did so in the REN. Indeed, it pursued all aspects of the review to a conclusion. I was interested to see that Mr. Somers was not even aware, despite all his critiques of the REN, that the REN actually found not only was--is lindane--does lindane pose unacceptable risks to human health through occupational exposure, but also its use as a seed treatment also leads to environmental contamination. The REN also determined, among other things, that lindane is potentially carcinogenic.

Mr. Somers also mentioned this morning that there is nothing in the record to show why any states might have banned lindane. I would invite you again to look back at that record and see that the U.K. itself in 1998 decided that lindane was unsafe due to occupational exposure concerns. The European Union, for that matter, one of historically the greatest users of lindane found by 2000 that lindane was unsafe based on occupational exposure risk. There were good reasons, good scientific reasons for countries, not just Canada, but also the United States and around the world to determine that lindane is unsafe.

Now, taking all of the Board considerations and the Claimant's additional data, including additional mitigation measures into account, PMRA's REN team determined that lindane

18:28 presented unacceptable risks to human health and the environment. This Tribunal does not sit as a further appellate Board from the scientific decision making of a specialized national agency, nor is it here to compensate Chemtura for its disappointment in the outcome of a regulatory decision. Chemtura's complaint in this regard is elsewhere. Confirms its deep misunderstanding of the Article 1105 standard and the role of a Chapter 11 Tribunal vis-à-vis the scientific decision making of a State.

Those are my submissions on 1105.

PRESIDENT KAUFMANN-KOHLER: Thank you.

Would this be a good time to have a break and have dinner Or would you prefer to carry on?

MS. TABET: We are in your hands. I will probably need about 10 minutes on 1103, and I believe my colleague, Mr. Kurelek, will need about 10 minutes on 1110.

PRESIDENT KAUFMANN-KOHLER: How much more time do you estimate the entire argument would last?

MS. TABET: Fifty minutes.

PRESIDENT KAUFMANN-KOHLER: Fine, so let's keep going, and then we will have the break afterwards, before the rebuttals.

MS. TABET: Good evening.

The Investor has argued that by virtue of the MFN provision in Article 1103 of NAFTA, it can import a stand-alone

18:30 FET provision which it claims is included in Canada's post-NAFTA BITs.

Now the Tribunal should reject this argument for three reasons:

First, Canada has not consented to this NAFTA Article 1103 Claim as brought by the Investor.

Second, the standard in Canada's post-NAFTA BIT is not different from the standard contained in the NAFTA.

And, third, the Investor has not demonstrated that it was accorded any less-favorable treatment than any other investor.

I will briefly address each of these points.

First, as a preliminary point, in Canada's view, this Article 1103 Claim is not properly before the Tribunal because it was made for the first time in the Investor's Counter-Memorial.

It is an entirely new Claim from the Article 1103 Claim that was raised in the various Notices of Intent; I think there were two or three Notices of Intent and two notices of arbitration. In those documents, the 1103 Claim was based on actual alleged differences in treatment accorded to other Registrants, and therefore a completely different claim than the one now being brought forward by the Investor. As a result, because the proper procedures were not followed, Canada has not consented to arbitrate this Claim.

18:31 We have addressed these points at Pages 90 and following of our Post-Hearing Memorial, so I do not propose to repeat those arguments in detail today, unless the Tribunal has any further questions on this.

Now, clearly the Investor has abandoned its efforts to make an Article 1103 Claim based on actual differences in treatment because it realized that it could not establish that PMRA has treated any of the other lindane Registrants differently from Chemtura.

So, instead, the Investor argues, as if it were uncontroverted, that MFN can serve to alter the substantive standards in the NAFTA by invoking differently worded provisions in other treaties signed by Canada.

More specifically, as I said, the Investor tries to import what it claims is a different stand-alone FET obligation in Canada's post-NAFTA BITs, and they do so to get around having to establish a breach of customary minimum standard of treatment. In essence, they are simply trying to get around whether three NAFTA Parties agreed and the FTC Note of Interpretation was the applicable standard.

And the MFN provision cannot be used by the Investor to do so, and this brings me to my second point, which is that the MFN provision is of no assistance here because the standard that Canada has agreed in all of its post-NAFTA BITs is the same as the standards set out in NAFTA Article 1105. Indeed, I

18:33 will just briefly take you to the language and show you that the language in the NAFTA, and in all of Canada's post-NAFTA BITs, refers to the international law standard.

So, the text of the NAFTA, as you can see before you, refers to treatment in accordance with international law, including fair and equitable treatment. If you take, for instance, the Canada-Costa Rica agreement, which is illustrative of the language in the 15 other of Canada's post-NAFTA BITs, you will see that it refers to fair and equitable treatment in accordance with principles of international law. So, as you can see the language is very similar, and the reference to international law establishes that these are not free-standing or stand-alone FET provisions.

The reference to international law must be, as in the NAFTA, understood to refer to the customary minimum standard of treatment. Canada's understanding of the language and the reference to international law in the NAFTA is explicitly explained in its NAFTA Statement of Implementation that was issued at the same time as the entry into force of the NAFTA, and in that document it explains and confirms that international law in Article 1105 refers to customary international law.

Now, while there is no similar Statement of Implementation for Canada's post-NAFTA BITs, given that the language used by Canada is almost identical to the language

18:35 used in the NAFTA, one can assume that Canada intended to refer to the same concept.

Now, the U.S. and Mexico's 1128 submissions that were filed in these proceedings support Canada's position in this respect. Before I take you to the U.S. and Mexico submissions, I want to briefly address the relevance of the FTC Note of Interpretation to this issue. And it is useful to recall that the 16 of Canada's post-NAFTA BITs that are referred to by the Investor pre-date the FTC Note of Interpretation. So why, then, one can ask why would the NAFTA Parties have issued a Note of Interpretation as to the applicable standard under Article 1105, if an investor could simply get around it by invoking Article 1103? And such an interpretation, would, as you can imagine, render the FTC Note useless. So the conclusion must be that the NAFTA Parties did not believe that language in other existing BITs at the time could be used to replace the customary international law standard in Article 1105.

This point is confirmed specifically by the submission of the three NAFTA Parties in the Pope & Talbot Case, which were filed in response to the Tribunal's questions in that case as to the relevance of Article 1103 to the interpretation of Article 1105 and in light of the FTC Note of Interpretation.

In its submission in Pope & Talbot in response to the Tribunal's question, Canada had expressed the view that the MFN

provision of the NAFTA did not alter the substantive content of the fair and equitable treatment obligation under Article 1105 and the applicable standard. And the U.S., again in that case, agreed with Canada's position and concurred specifically in an 1128 submission, and as did the Government of Mexico.

So, therefore, the three NAFTA Parties unanimously confirmed at the time that, and I quote, "Article 1103 cannot be relevant to or constitute an issue with respect to the interpretation of Article 1105."

Now, the two submissions of the United States and the Government of Mexico in this case have confirmed yet again this point, and therefore this should be given proper weight and consideration by the Tribunal.

So, let me turn to my third point, which is that the Investor has not demonstrated that any foreign investor was accorded more favorable treatment. It is important to recall that the purpose of NAFTA's MFN provision is to prevent discrimination as between foreign investors. Put in another way, it is to prevent competition between investors from being distorted by discrimination based on nationality considerations. This is reinforced by the text of Article 1103, which should be the starting point to properly interpret this particular MFN provision. And as you can see, the wording of the provision of the text of Article 1103 is very similar to the wording of Article 1102, which deals with

18:39 national treatment. Both provisions are intended to deal with discrimination on the basis of nationality, and they both call for a comparison of treatment: In one case, a comparison of the treatment accorded to foreign investors in like circumstances, and in the other case a comparison of treatment according to domestic investors in like circumstances.

The question that the Tribunal must therefore ask itself is whether if the Investor was of any different nationality it would have received more favorable treatment in the circumstances, and the evidence here establishes that it was not the case.

There were at least two other foreign non-U.S. lindane producers affected by the lindane de-registration, Rhône-Poulenc, a French company which became Aventis, and a Swiss-U.S. company Novartis, or that eventually became Novartis. These companies did not receive more favorable treatment than Chemtura, and in fact all lindane producers were treated equally by PMRA.

Again, it's not surprising, therefore, that the Investor has abandoned its NAFTA Article 1103 Claim that it initially formulated and instead brought forward a Claim that is not based on actual differences of treatment. Instead, the Investor's Claim is based on theoretical differences in treatment that may or may not result from the fair and equitable provision in Canada's treaty, but it has certainly

18:41 not established that if it were of any other nationality it would have received more favorable treatment. It has not established that competition between investors was distorted based on nationality considerations. And it has not established that it was put at a disadvantage vis-à-vis any foreign investor in this case.

So, ultimately, even if the language was different in Canada's post-NAFTA BITs, it would not necessarily translate here into more favorable treatment. And, in fact, the fact that Canada believes that all of its investment protection agreements referred to the standard of protection under customary international law means that it is unlikely that Canada would have treated investors any differently.

I don't propose to discuss in detail the various cases on MFN, given the hour, but suffice to say that there are a number of contradictory decisions on the issue of MFN, and that decisions of various other tribunals should be considered with appropriate caution, given the specific wording of the NAFTA Article 1103 provision and the submissions of the three NAFTA Parties as to the relevance of Article 1103 in interpreting Article 1105.

I would simply point in concluding that there are two cases apart from Pope & Talbot that are of more direct relevance and where similar arguments were made and those are the ADF and UPS cases, where the Claimants raised Article 1103

18:42 arguments to get around the FTC Note of Interpretation. In those two cases, the tribunals rejected the arguments on the basis that the investors had not established that there was more favorable treatment resulting from other BITs that were being invoked.

That concludes my remarks on Article 1103.

PRESIDENT KAUFMANN-KOHLER: Thank you.

Who is next? Mr. Kurelek, yes, please.

You're somewhat hidden by the screen. So would you mind sitting closer to us, or moving the screen, whatever is easier?

MR. KURELEK: In the next 15 minutes or so, I will help to provide the Tribunal with three reasons why Chemtura's Claim for expropriation must fail.

The first two reasons deal with primarily the Special Review, and the third deals with the Voluntary Withdrawal Agreement, or the VWA, as we have come to know it.

First, the evidence clearly shows that Chemtura was not substantially deprived of its investment as a result of the PMRA's decision to de-register lindane.

Secondly, even if you as a tribunal make a finding that Chemtura was substantially deprived of its investment, Chemtura still did not suffer an expropriation because the PMRA's decision to de-register lindane was a valid exercise of Canada's police power both to protect the environment and the

health of its citizens. It was valid because the PMRA's measures were, one, not arbitrary; two, not discriminatory; three, not excessive; and, four, were adopted in good faith.

Canada's third argument is that one of the critical elements of a successful expropriation Claim, coercion by the State, was missing here, at least with respect to Chemtura's decision to join the VWA regarding lindane use on canola.

Now, before I turn to these three arguments in detail, I would like to pause here to note that the substantial deprivation analysis is a dispositive inquiry in this case. It is Canada's submission that if Chemtura has not suffered--if you find that Chemtura has not suffered a substantial deprivation, then there is no need for you to go on and discuss or rule on Canada's other two arguments regarding police powers and a lack of coercion.

So, turning to argument number one, substantial deprivation. There is a threshold preliminary question that we need to ask here, and that is what qualifies as an expropriable investment under NAFTA? Canada's position on this question is clear. When Chemtura identifies Crompton Canada in both its Memorial and its Reply as its investment, that investment fully qualifies as an investment under Article 1139(a) of the NAFTA. I point you here to Paragraph 304 of Chemtura's Memorial and 537 of its Reply.

Aside from those two paragraphs, however, Chemtura

18:47 sends a rather confusing message as to what exactly its investment is in its Memorials. In both its Memorial and its Reply, Chemtura jumped several times back and forth between referring to its investment as, one, the whole corporation, the one I just identified as Crompton Canada; to two, its lindane seed treatment business; and sometimes even a third one; it's a combination of both of these. For a comprehensive listing of how Chemtura refers to its investment in both its Memorial and its Reply, I refer you to Canada's Rejoinder, just two paragraphs, 253 to 254. We have listed them up there.

Now, in its Counter-Memorial, Canada went to considerable detail to explain what does and does not, in its view, qualify as an investment under Article 39 of NAFTA, and why in this case the whole corporation must be examined in a substantial deprivation analysis.

A similar issue arose in both the Pope & Talbot and Feldman Cases. There, the Tribunal looked at the entire investment, not just a portion of them, to determine whether or not there had been an expropriation. That fact is significant because, in both cases, the Tribunal had an opportunity to examine only a small portion of the businesses but declined to do so. In Feldman, for instance, the Tribunal looked at more than simply the Claimant's single product line of cigarettes to see if there had been an expropriation. In Pope & Talbot, the Tribunal examined the whole investment, not merely the

18:48 Claimant's access to the U.S. market.

Chemtura also talks in its Memorial about the role that customers, goodwill, and market share have played in its investment. However, Canada made it clear in its Counter-Memorial that while those three elements--sorry, those three are elements of an investment to be taken into consideration when it comes to damages evaluation, they do not in and of themselves constitute an investment under 1139.

So, to conclude, again, it's Canada's submission that only Crompton Canada constitutes an investment capable of being expropriated under the NAFTA.

So, turning to the substantial deprivation analysis itself. Substantial deprivation is a well-trodden area of NAFTA case law. As Ms. Tabet said, it is getting late, and in deference to we understand your command of the case law, I won't go into the case law on substantial deprivation. I think we all know what Pope & Talbot and its reference to the Harvard Draft and the U.S. Third Restatement, but what I will say is that there are several indicia. When you look at these cases, there are several indicia of what constitutes a substantial deprivation in a case such as this, which is an indirect substantial deprivation Claim. And those indicia have emerged, but it doesn't matter which indicia you apply in this case. There has been no substantial deprivation.

For instance, if you look at the cases of Pope &

18:50 Talbot, PSEG, and Waste Management, they all stand for the proposition that in order to assess the degree of deprivation, the ownership and the effective control of an investment are important indicia. However, none of the Claimant's witnesses brought forth evidence that Canada had either assumed ownership of any part of its investment or had exerted control or the management of the same; nor, to use the language of other cases on this type, did the PMRA's actions result in Chemtura's investment being neutralized, rendered useless, brought to a standstill; and nor did the PMRA's actions amount to a virtual taking or sterilization of the enterprise.

Turning to the evidence briefly, you will see a pie chart at this point on the screen. LECG, Chemtura's own accounting experts in this case, conceded that Chemtura's lindane seed treatment business represented less than 10 percent of Chemtura's total sales during the relevant period. Moreover, when asked on cross-examination what percentage of Chemtura's total sales were taken up with lindane sales, Mr. Thomson admitted that "it wouldn't be more than 5 percent."

Now, I will pause here to give you some time to look at that pie chart, and I will tell you that, of the almost a billion dollars that you'll see there in the relevant period that represent the total Crompton Canada net sales, less than 10 percent of those were Crompton Canada's sales of lindane for

18:51 canola.

Now, I take those figures from two places. One is Canada's rejoinder at Paragraph 266 which refers to Navigant's Second Report at Paragraph 128, and that paragraph from Navigant's, Canada's Expert Report, relies in turn on LECG's documents number 15 and 16. So, these figures are from Chemtura themselves.

Finally, as both Feldman and Waste Management cases point out, NAFTA does not amount to an investor's insurance policy against economic loss of any kind. Indeed, in Feldman, the Tribunal noted that not all Government regulatory activity that makes it difficult or impossible for an investor to carry out a particular business change in the law or change in the application of existing laws that make it is uneconomical to continue a particular business is an expropriation under Article 1110.

So, now I turn to Canada's second argument regarding police powers. On the other hand, if this Tribunal holds that Chemtura has, in fact, suffered a substantial deprivation, then Chemtura's expropriation Claim still fails because the PMRA's decision to de-register lindane constituted a valid exercise of Canada's police powers to protect the environment and its citizens.

Now, a sovereign State's police power's are long established in international law, and in our Counter-Memorial

18:53 we start with I think John Hertz in 1941 who notes that there were always certain cases in which state interference with private property was not considered expropriation entailing an obligation to pay compensation, but a necessary act--sorry--to safeguard public welfare, for example, measures taken for reasons of police; that is for the protection of public health or security against internal and external danger. Canada submits that the registration of a pesticide by a national regulator clearly fits within the rubric of what Hertz called "protection of public health."

Legal scholars acknowledge that the police-powers doctrine is not absolute and can be used potentially by Governments to hide expropriatory behavior. As a result, certain analytical factors have been drawn up to assist tribunals in determining whether or not Governments are hiding behind the police-powers doctrine to enact expropriatory measures, and these are the four that I mentioned before, that we have come up here, that we've listed here, whether the measures were arbitrary, discriminatory, excessive or enacted in bad faith.

Now, Canada went on at quite some length in its Counter-Memorial and its Rejoinder explaining how the police-powers doctrine could apply in a case such as this one, where regulatory conduct is the subject of an expropriation Claim. Canada also pointed to extensive documentary and

18:54 Affidavit evidence in those two Memorials which indicated that the PMRA's actions were not arbitrary, discriminatory, excessive, or in bad faith, as well in its Post-Hearing Brief. With just one single paragraph, 219, Canada pointed to the specific hearing evidence, the oral evidence, that confirmed the same documentary and Affidavit evidence.

And so, as a result, I won't go into that evidence in any detail. It's fully set out in the Counter-Memorial, Paragraphs 597 to 650; the Rejoinder, Paragraph 278 and then 294 to 296; as well as the Post-Hearing Brief paragraph that I mentioned, 219.

But I will say this: There was nothing arbitrary in the way that Chemtura was treated by the PMRA in its science-based decision to de-register lindane. All the evidence demonstrates that Chemtura received significant due process throughout the relevant period, and I think Mr. Bondy did a very good job of pointing to that in his argument.

Number two, Chemtura was not discriminated against at all, let alone on the basis of nationality here. In fact, the available evidence shows that the PMRA treated all of the lindane producers equally, and that's something Ms. Tabet raised.

There was nothing, thirdly, in the PMRA Special Review, the REN, or its treatment generally of Chemtura that was so out of bounds or excessive as to compel an inference

18:56 that Canada was trying to use Regulation to hide an expropriation.

And, finally, Chemtura provided no evidence that with respect to the Special Review, the REN or the VWA, the PMRA acted in bad faith towards Chemtura. In fact, to the contrary, there is plenty of evidence showing that the PMRA acted in good faith, pursuant to its mandate to protect the health and safety of Canadians.

So, in conclusion, the documentary, Affidavit, and hearing evidence all demonstrate that PMRA's actions to ban lindane were a valid application of the police-powers doctrine.

Argument number three. Now I'm moving to the VWA, away from the Special Review. Chemtura's expropriation Claim also fails with respect to its canola sales because one of the critical elements of a successful expropriation Claim, coercion by the State, is missing here, and it was missing when Chemtura consented to the VWA. In its Counter-Memorial, Canada relied on the Tradex case as well as McLaughlin's International Investment Arbitration text for the proposition that, "whether a State has by action or inactions committed what might be considered an expropriatory measure, if the Investor has effectively consented to such action or inactions, a finding of indirect expropriation will generally not be made."

That was precisely the situation here. The impartial evidence presented at the hearing by Tony Zatylny, the

18:57 uncontradicted evidence of Wendy Sexsmith, clearly point to Chemtura not only freely entering into the VWA, but that it also took the benefit of that agreement. Moreover, the contemporaneous documents pertaining to the creation of the VWA also clearly indicate that the VWA was, in fact, voluntary.

We reference in our written material a number of documents, in particular Wendy Sexsmith from her First Affidavit, Exhibit Number 15, which is a document dated October 28th, '98. Gustafson was writing to its industry partners stating that, as a response to the threats for trade restrictions and negative controversy surrounding lindane use, that "both the CCC and CCGA have requested that all Registrants of canola seed protectants participate in a plan to voluntarily remove lindane as an insecticide for control of flea beetle in canola."

I will leave it at that in terms of documentary evidence, other than to refer you to three other exhibits from Wendy Sexsmith's First Affidavit, number 13, 84, 86; as well as Tony Zatylny Exhibit 25; and then four annexes, R-331, 335, 338, and 363--all of which tell the same story.

So, contrary to what Chemtura claims in its Reply, there is no evidence that PMRA compelled Chemtura to sign on to the VWA. In fact, Chemtura's later refusal in January of 2002 to join the rest of the lindane producers in an orderly withdrawal of lindane for non-canola uses is testament to the

18:59 fact that Chemtura's decision whether or not it was going to join the VWA was purely its own.

So, in conclusion, Chemtura's 1110 expropriation Claim must fail because there was no substantial deprivation; even if this Tribunal finds there was, PMRA's decision to de-register lindane was a valid exercise of Canada's police powers.

And finally, number three, one of the key elements of a successful expropriation Claim, coercion by the state, was missing here because Chemtura consented freely to the VWA with respect to canola.

Those are my submissions, subject to your questions.

PRESIDENT KAUFMANN-KOHLER: Thank you.

A question, yes, please.

QUESTIONS FROM THE TRIBUNAL

ARBITRATOR CRAWFORD: This test of substantial deprivation, let's assume I'm an investor in the United States investing in Canada, and I have ten buildings, and the State takes one of them, just seizes it. Why isn't that an expropriation covered by 1110?

MR. KURELEK: It's a valid question.

ARBITRATOR CRAWFORD: Thank you.

MR. KURELEK: Not one that I wasn't anticipating, either.

Let's see if I can answer it for you. I'm going to try and do it in two parts.

19:01 First, there is a concern that if an investor is able to artificially reduce the scope of its investment to whatever size it wants or whatever name it wants--so in this case let's say it's the lindane seed treatment business; it's that second of those three descriptions that I described earlier--the concern there is that if that is permitted to happen, a tribunal in your position won't have any analysis, substantial deprivation analysis, to do it all because the answer will always be yes, there has been a substantial deprivation, and that is contrary to the Tribunal practice which I've already discussed in terms of Feldman and Pope & Talbot.

But turning, secondly, to the facts of this case, in this case, the investment, as Chemtura has stated, is Crompton Canada. Crompton Canada is a company that had only 10 percent of its business dealings with a particular line of pesticide. What happened when lindane--there was a threat that it would be de-registered, and then eventually when it was de-registered is Crompton Canada was fully able to continue doing what it had been doing before, which is to sell pesticides. It created alternatives, three Gauchos, for instance, and so none of its buildings were taken. None of its distribution networks were taken. None of its offices were taken. There was no control that was taken over the company. No ownership was taken over the company. The company still was able to sell pesticides. It just wasn't able to sell lindane.

19:02 So, in that sense, your analogy isn't quite apposite to the facts of this case.

ARBITRATOR CRAWFORD: That's confession and avoidance. You haven't answered my question. As a matter of abstract law, surely it's the case that at least where you have a direct taking, if what is taken is property, then it's covered by 1110. I mean, whether it applies in this case is a different matter because you're looking at what is in effect an indirect expropriation.

MR. KURELEK: Sure. So, if we are talking in the hypothetical and that what PMRA did was it went in and it took one of Chemtura's buildings and it said we are taking this building for whatever reason, of policy or because we have enacted a statute that says we can do that, then conceivably, hypothetically, yes, it seems that there could be an expropriation Claim there. That's not at all what happened here.

ARBITRATOR CRAWFORD: Thank you.

PRESIDENT KAUFMANN-KOHLER: If there are no other questions at this stage.

ARBITRATOR BROWER: I have one for Mr. Douaire de Bondy.

PRESIDENT KAUFMANN-KOHLER: Excuse me. You have one for Mr. Bondy?

ARBITRATOR BROWER: Yes.

19:04 PRESIDENT KAUFMANN-KOHLER: You may ask it now, if you wish, yes.

We are not done, I think there is--there is the damages part.

Let's do the damages first and then ask any additional questions to anyone at the end.

Who is arguing the damages?

Yes, please.

MS. SHAKER: Good evening.

Over the next few minutes, I'm going to explain why Chemtura's damages claim fails for two key reasons.

First is that their Claim fails because it lacks causation, and the second is because their damages experts have ignored key pieces of information, and by doing so have produced a completely unreliable Report.

Before I go into the details of my arguments, I would like to remind the Tribunal that at the Memorial and Reply stage of this arbitration, LECG provided a damages calculation that encompassed all the alleged breaches together in one valuation number. It did so based on the instruction letter of May 28, 2008, by Claimant's counsel which asked LECG to make several cumulative assumptions that have been proved to be completely counterfactual.

Then, at the hearing in September, the Tribunal requested that the Claimant identify the alleged individual

19:05 breaches and their specific losses. The Claimant has responded by producing Table 1 in its Post-Hearing Brief, which is at Page 82, which you can see on the screen.

This table sets up five separate breaches and the alleged losses attributed to each.

I'm going to look at each of these breaches, proving that none of them resulted in any damages. I will start with the alleged breach of the Special Review as it makes up the bulk of the damages Claim. I will then work my way through the other alleged breaches and damages claims in the rest of Table 1.

So, starting with Measure B, which is the allegation that the Special Review is flawed and biased and as a result terminated Chemtura's lindane business for canola. The amount of damages linked to this alleged measure is $74.6 million, which is the vast majority of alleged damages in this arbitration. The damages for this measure are said to have begun in 2003, when LECG was instructed by Claimant's counsel to assume the U.S. EPA would have granted a tolerance and end in 2022, when LECG was told to stop its calculation.

The damages linked to this alleged breach completely fail because there lacks a sufficient causal link between the alleged measure and the damages claimed. Canada, in other words, is not the cause of these alleged damages, and this is for the following reasons:

19:07 First, the pivotal factor in this Damages Assessment is the decision of the Canadian canola growers to not use lindane on canola unless there is a tolerance for it in the U.S. In this way, it did not actually matter what the PMRA decided in a special review if there remained no tolerance for lindane on canola in the U.S. This is a fact that is not in dispute in this case and has been recognized in written and oral testimony by both Navigant, Canada's Expert valuators, and LECG.

For example, Paragraph 46 of LECG's First Report reads, and it's on the screen there: Even if Canada had fully complied with the conditions of the October 1999 Agreement, we assume that Claimant would have not been able to sell Lindane Products for canola in Canada until the U.S. EPA had either registered Crompton's Lindane Products for canola or set tolerance limits for these products so as to dissipate trade concerns on the part of Canadian canola growers.

And this point was confirmed by Mr. Zatylny of the Canadian Canola Council at the hearing who, when asked whether the Canadian Canola growers would continue to use lindane if this meant that they could not export their product to the U.S., responded no, they would not be interested in using the product. In fact, the U.S. market was just too important to their business.

The CCC actually also has a policy to only support

19:08 pesticides that had registrations in both countries.

Point number two. The only way the Claimant could get around this fatal break in the chain of causation was try to argue that Canada was the proximate cause of the EPA not granting a tolerance or registration for lindane. However, this argument totally fails as well. This Tribunal is essentially being asked to hold Canada liable for decisions made by another sovereign government. The EPA is an independent regulatory body with its own policies and processes in place, and this fact would not have changed if Canada had acted any differently. There is nothing pro forma about the tolerance or registration process, and the U.S. EPA would not have automatically issued a tolerance if Canada had made a positive decision in the Special Review. The Claimant's damages argument, therefore, fails because it attributes liability to Canada for not really what Canada did, but for what another national regulator has done.

Point Number three. In any event, Canada was not the cause behind EPA's decision not to issue a tolerance or registration. In fact, the evidence proves that the EPA was not going to issue a tolerance for lindane use on canola in 2003, 2004, 2005, or 2006, regardless of Canada's actions. Let's look at the evidence a bit more closely.

The documentary evidence attached to Dr. Goldman's Second Report proves the following three points--four points.

19:09 First, the steps EPA required the Claimant to take as a result of the 2002 RED in order to obtain attain a tolerance; two, the Claimant's substantial but unsuccessful efforts to meet those requirements between 2002 and 2006. And if you look--and I really suggest that the Tribunal look quite closely at the documentary evidence that's attached to Goldman's Second Report, especially the second volume, because it lays this out beautifully. In particular, between 2002 and 2006, it was clear that Chemtura realized that the Plant Metabolism Study would take a year and that they ran into technical problems with the Anaerobic Aquatic Metabolism Study. So it's not that they were not, as Mr. Somers said earlier, bearing down to try to get a tolerance. It's that they were running into snags, technical and otherwise, during the process.

Point three, the fact that all three required studies were only finally submitted to the EPA in 2005.

And, finally, the EPA was still continuing to assess lindane in 2006 and introduced new significant data requirements.

I would also just add that if you look at the documentary evidence that I mentioned earlier, there is actually no evidence of the opposite. There is no suggestion that they were backing off at all in their attempts. All the evidence is to the contrary, that they were trying extremely hard to get a tolerance.

19:11 Mr. Johnson confirmed in testimony that these efforts to meet the 2002 RED requirements were made and that the requirements alone made a tolerance between 2002 and 2006 impossible. The question was put to Mr. Johnson during his cross-examination: So, in other words, given that's three studies, the Plant Metabolism Study, the Anaerobic Aquatic Metabolism Study, the Seed Leaching Study, and this FQPA tolerance--or issue rather, no tolerances were actually possible between 2002 and 2006; is that right?

And Mr. Johnson replied, yes, it is for full tolerances.

Further, documentary evidence proves that the EPA was not going to make a decision on the tolerance until it had determined whether pharmaceutical issues should be taken into account in the Risk Assessment, and a decision wasn't made on this until February of 2006, and again Mr. Johnson confirmed this in testimony.

Point number five. Any damages claimed from 2006 onwards becomes extremely speculative as the chances of getting a tolerance at that point in the U.S. were beyond remote. A few months before the addendum was issued, the HCH Study was published revealing yet more concerns the EPA had about lindane--this time in breast milk. Mr. Johnson testified that in response to these additional concerns, Chemtura continued to put in efforts to convince the EPA that lindane was safe for

19:12 use. However, despite assembling a group of "renown scientists," and making voluminous submission, Mr. Johnson testified that the EPA "didn't buy their submissions and didn't find the submissions very compelling to them, deciding in July of that year to essentially ban lindane."

In fact, Chemtura knew that the EPA was not likely going to make a favorable decision on lindane in its 2006 addendum. An internal e-mail to Paul Thomson dated June 14, 2006, reads: EPA will make a decision on lindane before the end of August because of the FQPA deadline. It will not likely be a favorable decision. Therefore, if you intend to offer a phase-out, you need to show your hand before EPA shows their hand. The process needs to get moving." In fact, there is evidence back in 2005 that the Claimant was aware that this was going to happen as well. Mr. Johnson and Mr. Thomson agreed in testimony that this was Chemtura's concern at the time.

As expected, the EPA decided in 2006 that it was not only going to not grant new tolerances but it was going to withdraw support for lindane altogether in the U.S.

It's not surprising in light of these facts that both Mr. Johnson and Mr. Aidala conceded at the hearing that it was impossible to say with an certainty if the EPA would have ever granted a tolerance for lindane use on canola in the U.S., and both of their pieces of testimony are on the screen and in your PowerPoint as well.

19:14 All these points completely undermine Claimant's position that the EPA would have granted its tolerance had it acted any differently. The Claimant is assuming that a tolerance would have been possible in 2003 and has attributed $5.6 million to that year, this obviously fails, but so do any subsequent damages it has attributed for the years 2004, 2005, 2006 or, indeed, going forward.

Point Number six. In the face of this overwhelming evidence disproving their point, the Claimant has decided at the Post-Hearing Brief stage of this arbitration to put all its eggs in another basket, making the null argument that their has been what Mr. Johnson called at the hearing a "action-forcing event." The EPA could have issued a time-limited tolerance--sorry, called an "action-forcing event." The EPA could have issued a time-limited import tolerance. In other words, had there been a trade irritant, this could have forced the EPA to act by issuing such a tolerance. This attempt to rehabilitate Chemtura's case fails as well because it is also an entirely speculative argument.

First, however, it's worth pointing out that, contrary to Mr. Johnson's written testimony, his oral testimony proves that they did lobby for a time-limited import tolerance, but the EPA refused to issue one, and in that sense, I believe he said he was clarifying his written testimony. As he explained at the hearing, the Claimant had been lobbying the EPA for

19:15 years for a time-limited import tolerance: "We were constantly calling on the EPA, trying to get them to move. We called them regularly, sent memos over to the managers at the EPA, but the EPA did not respond favorably." Instead, according to Mr. Johnson, they "didn't say anything or they said not now."

Mr. Aidala also confirmed in oral testimony that despite Chemtura's request for a time-limited import tolerance, none was ever granted. At any rate, this argument lacks any real foundation because it is entirely speculative to assume that had there been an action-forcing event, the time-limited import tolerance would have been granted. This is for a number of reasons:

(a) The EPA is an independent regulatory body, and nothing about the mere existence of a trade irritant would mean that the EPA would have automatically guaranteed a time-limited import tolerance.

(b) Dr. Goldman testified that import tolerances are very rare. They are granted in extraordinary circumstances and EPA as a general rule does not like to issue them as they require a rapid--a very rapid review of the required data. Only one in five years had been issued during her tenure at the EPA. Further, the EPA doesn't generally grant such a tolerance when there is a registered alternative to the pesticide, which there was in this case. In the case of a time-limited import tolerance, EPA would have been even more strict.

19:17 (c) Mr. Johnson conceded in testimony that PMRA action would be only one possible cause behind any EPA decision and that other factors such as the pressure on the U.S. Government by the North Dakota farmers would play into any decision the U.S. EPA made. Similarly, Mr. Aidala conceded that the EPA would have also weighed the public's concerns, policy choices, data submission, data deficiencies, and numerous other factors in any decision.

(d) Finally, both Claimant's counsel and witness recognize that this argument is pure speculation. At the hearing, counsel asked Mr. Johnson to do "a little bit of speculation as to what maybe would have happened had there been an action-forcing event. In response, Mr. Johnson conceded, I don't know that they would have, but they well could have issued a tolerance. Based on the evidence the Claimant not only had tried and failed to get this unusual type of tolerance, but it is entirely speculative to assume it would have happened if Canada had acted any differently.

To conclude the discussion of this alleged breach, Canada cannot be held responsible for the actions of an independent foreign regulator. This point alone means that there is a break in the chain of causation in Claimant's arguments.

Further, all the evidence proves that Canada was not the cause of any EPA decision to not grant the Claimant a

19:18 tolerance.

Finally, it is entirely speculative to argue that things would have gone any differently for the Claimant had the Special Review been positive.

For these reasons this entire Claim for damages must be rejected.

Before I move on to the other breaches on Table 1, I just want to make a couple of comments about the Tribunal's questions at the hearing with respect to Dr. Goldman versus Mr. Aidala. It's worth pointing out that Dr. Goldman testified as to actually what happens and referred to the extensive documentary evidence in this case as support for her opinion. Mr. Aidala, on the other hand, speculated that the U.S. EPA might have granted a tolerance for lindane on canola in 2003 had the right data been supplied by Chemtura, and in doing so has completely ignored the evidence on record. In other words, she gave her Expert reviews on the historical record while he opined on the counterfactual hypotheticals.

Further, if you look at Mr. Aidala's First Statement at Paragraphs 26 to 27, you will see that he bases his opinion of the likely outcome of getting a tolerance on Mr. Johnson's Witness Statement and the 2002 RED. He comes to the conclusion that, assuming prompt submission of this data and allowing some time for evaluation by the EPA, a decision about the registration and tolerance or at least an import tolerance

should have been made early in 2003.

What is of note here is that first he admits this assumes prompt submission of the data, which it did not happen; and, second, he admits that the basis--he bases his opinion on Mr. Johnson's written evidence, which was completely discredited during Mr. Johnson's cross-examination.

I will now address the remaining alleged breaches in Table 1 of the Claimant's Post-Hearing Brief. Measure A: The Claimant has clarified that alleged measure A, the PMRA failed to complete a scientific review by late 2000, did not result in any damages. This has been argued by Canada in its Counter-Memorial and Rejoinder and is now conceded by the Claimant.

Measure D is the alleged measure which says PMRA failed to expedite the registration of Chemtura's lindane substitute products or the famous Gaucho CS FL, also has no damages--has no damages attached to it in the Table 1 chart, and we have spent some time already discussing this.

This is because LECG failed to do such a calculation, a point highlighted by Navigant in its supplemental report, and Mr. Kaczmarek's testimony, and conceded by LECG at the hearing. Based on this alone, this aspect of the damages Claim must be rejected as the Claimant has failed to meet the criteria of Article 1116 of NAFTA, which requires the Claimant to establish it has incurred loss or damage from a breach.

19:21 However, even if there had been a breach, there would be no damages. Both Mr. Kaczmarek and LECG agreed in testimony that Gaucho CS FL was a substandard product, as when it was released on the market it performed badly compared to its competitors, even though it was the cheaper product. Further evidence for this is found in the fact that its sales were quickly cannibalized by another substitute product launched by Gustafson in 2003 called Prosper, and we spent some time discussing this at the hearing. Prosper gained 22 percent of the market by 2006, while Gaucho CS FL only held 3.8 percent of the market by that time, and they're both products from Gustafson.

In fact, Gaucho CS FL is recognized by the industry as a substandard product compared to other substitute products, and both LECG and Navigant have cited independent reports confirming this fact.

All this evidence make it, as Navigant said at the hearing, doubtful whether an earlier introduction would have allowed it to perform any better than it actually did perform. Or, as LECG said, Gaucho CS FL actually did not do very well in the marketplace, so those are the facts. We realize the actual performance of Gaucho CS FL was not too good as compared to other substitutes. This makes any possible assessment of damages for this alleged breach impossible.

I just want to emphasize the point that the Claimant

19:23 did fail to identify any damages for this particular breach, and in that case, as I mentioned earlier, it fails to meet its burden of proof, and the Tribunal can come up with its own figure in the absence of it already being produced by the Claimant.

Moving on to alleged Measure C, which is the PMRA misinformed canola growers on the true meaning of the July 1st deadline. The Claimant argues that this alleged breach caused .7 million dollars in damages. This is the amount LECG has calculated that Chemtura could have sold the leftover lindane product but for the alleged misinformation about the deadline. First, as my colleague, Christophe Bondy has stated, the evidence proves that there was no misinformation about this deadline at all. However, even if there had been, there are no damages for this alleged breach for the following reasons:

One, Ms. Buth of the Canadian Canola Council testified that the growers were not altering their purchasing behavior based on any threats of fines.

Two, Mr. Ingulli also testified that Chemtura was aware that there was no threat of fines unless there was an intention to actually stockpile or cause harm.

Three, evidence suggests that Chemtura sold out of lindane back in 1999 by forward selling its product until 2001.

Four, a drop in sales in 2001 can be attributed to the drought, drop in acreage, and a worldwide drop in canola prices

19:24 that year.

Measure E. Alleged Measure E covers the alleged damages claimed for non-canola. This is the only Claim for non-canola they are alleging. These damages in the amount of 3.3 million are linked to PMRA's de-registration of Chemtura's lindane produce registration in February 2002 after the Special Review. According to the Claimant, they run until 2022. This Claim for damages also fails.

First, it assumes Chemtura should be compensated for its own refusal to accept a phase-out. Chemtura itself is responsible for these damages, if there are any.

Two, even if the Special Review had come to a positive decision in February 2002, it is entirely speculative to assume that losses for non-canola would incur in a scenario where growers stopped using lindane on canola. As Mr. Kaczmarek explained at the hearing in his Reports, the small amount of non-canola sales puts into doubt the viability of the non-canola lindane line on its own. In his opinion, the volume of sales for these products was so small relative to canola that he questioned whether the business would ever have been feasible.

Third, the Claimant has failed to discharge its burden of proof for this part of the Claim. LECG failed to do any sort of assessment of what the non-canola business would look like if the growers had refused to use lindane on canola,

making it impossible for Mr. Kaczmarek to substantiate whether the business would be viable. Further, Canada notes the complete dearth of documentary and testimonial evidence supporting the position that the non-canola line would continue without canola.

Finally, it's highly speculative to assume that the registration of non-canola products would continue in the U.S. past 2006. The requirements of the 2002 RED applied not just to the existing registrations, and as Canada has already demonstrated, the evidence proves that despite Chemtura's efforts, EPA did not issue a positive addendum decision in 2006. Any damages for non-canola in the U.S. past 2006, therefore, are entirely speculative.

I would like to briefly discuss LECG's Reports as the last part of my presentation.

PRESIDENT KAUFMANN-KOHLER: You have a little bit more than five minutes.

MS. SHAKER: That should be enough.

Canada has already proven that there are no damages for Measure B in Table 1 because there is no causal link between the alleged breach, the Special Review is flawed and biased, and the damages claimed. However, Canada also argues that the damages Claim fails because LECG has produced two unreliable Reports. More specifically, as Mr. Kaczmarek has demonstrated over the course of this arbitration, LECG employs

19:27 an inappropriate methodology to assess damages. I refer you both to Mr. Kaczmarek's Reports, both of his Reports, for his position on this matter, Sections 7 and 8 of his First Report, Sections 5 and 6 of his supplemental Report.

Mr. Kaczmarek also points out a number of other errors in the Report, such as the absurdity of suggesting that Chemtura would instantaneously regain their 82.7-percent market share after having been out of the market for two years.

Further, what is clear is that LECG has completely ignored or completely underplayed several key facts in this assessment that not only make any future cash flows for this business reasonably uncertain but completely implausible. Quickly, these include (a) the growing availability of replacement products in the marketplace; the growers rejecting the product as of October '98 and their desire to move on to replacement products; (c) the increasing health and environmental concerns about the product in Canada and around the world; (d) the growing number of international agreements that restricted or stopped the use of lindane altogether, and we spent some time talking about the Stockholm Convention; in particular; (e) uncertainty export markets in the countries LECG relies on in its analysis; (f) industry instability and consolidation; (g) the inferior marketing strategies of the Claimant compared to its competitors; and most importantly the lack of a tolerance in the U.S. without which there would be no

19:28 lindane for canola sales.

As Mr. Kaczmarek said in his testimony and in his Reports, looking at these facts as of the alleged date of breach, no reasonable businessman would buy this business. Its value was not only questionable but without a tolerance for it in the U.S., it was worthless. Indeed, this lack of a U.S. tolerance from Day 1 alone suggests that there was never a legally protected interest sufficient certainty to be compensable. As Mr. Kaczmarek said at Paragraph 77 in his Supplemental Report, in this particular case, the risks not only relate to whether or not the Claimant would have achieved the market share, sales, and profits calculated by LECG for Claimant's lindane-based pesticides. But whether or not a market for Claimant's lindane-based pesticides would have ever developed at all in a properly structured but-for scenario as of July 1st, 2001, there was merely a possible, but unquantifiable market at some unknown future date for lindane-based canola pesticides.

To conclude, LECG's damages analysis fails for essentially three reasons. As I've said before, there lacks a sufficient causal link between Canada's alleged actions and the EPA decision not to grant a tolerance for lindane in the U.S.; two, all other alleged measures also lack a causal link to any damages; and, three, LECG's Reports are built on a series of false assumptions and fail to take into account facts that

19:30 1 together make any valuation of future cash flows not only
2 reasonably uncertain but completely implausible.
3 Those are my submissions. Thank you.
4 PRESIDENT KAUFMANN-KOHLER: Thank you.
5 Any questions from my co-Arbitrators now? To anyone
6 on behalf of Canada.
7 QUESTIONS FROM THE TRIBUNAL
8 ARBITRATOR BROWER: Mr. Bondy, you say that in the REN
9 process, all of the recommendations of the Board of Review were
10 implemented, were heeded?
11 MR. DOUAIRE de BONDY: In the sense that the Board of
12 Review recommended, if you go back to the Board of Review's
13 decision, that the PMRA, for example, take into account
14 additional mitigation factors that Chemtura might propose, that
15 the PMRA reconsider the safety factors that were applied, that
16 the PMRA take into account any additional data that might be
17 supplied, and consider the Board's critiques on some aspects of
18 the PMRA's Special Review science decision-making, the PMRA
19 implemented all of those recommendations.
20 And again, our point was that the Board of Review was
21 not suggesting that the PMRA in the REN necessarily had to
22 reach a different decision, but rather that it should take
23 these additional considerations into account, which it did.
24 And as I said, the REN process was not the REN alone,
25 but also a stand-alone separate process which includes public

19:32 consultations of the safety factors that the PMRA determined applies--the risk factors that it applies in its re-evaluation process, and reissued an entirely new policy, which I believe was issued in draft in 2007 and finalized in 2008.

ARBITRATOR BROWER: Right, okay. I understand that.

I've read through Appendix A, I think it is, to the Post-Hearing Brief of the Claimant which details day by day the different stages through which the application for approval of Gaucho CS FL--have I got it right?--went, and I must say it's rather impressive, especially when you see that it took 360 days, according to the Appendix, for someone even to start, pick up the papers at a certain stage, which once they were picked up, went through in something like 25 days.

Now, I'm exposed to the jurisprudence in another case that a failure of a Court to act in a matter before it for a substantial period of time--what's substantial, of course, is in dispute--can constitute a denial of justice. Surely, you're not taking the position that papers can just lie around in an Administrative Agency more or less forever without consequences because there happened to be other applications pending, as there always are. It's quite striking vis-à-vis what the treatment for Helix was, and the Appendix explains that the reasons why, they argue, it should have taken the Helix longer because it wasn't presenting previously approved components.

Now, I know they say they haven't pleaded any damages

19:34 and you have various arguments in the situation, but on the face of it, that looks to me rather extraordinary. What are we to make of that?

MR. DOUAIRE de BONDY: Well, in the first place, I would invite you to compare the Claimant's allegations in that Appendix, many of which, I must add, are introduced for the first time in this Appendix, and therefore we were not given an adequate opportunity to reply to them.

In any event, compare this evidence to the evidence of Suzanne Chalifour, in particular, I believe, in her Second Affidavit and certainly in her hearing testimony, who explained that the PMRA has policies in place; that where there are deficiencies with a particular application, and there were, indeed, serious deficiencies with this application, the PMRA has loops which take additional amount of time.

With regard to the specific allegation about it sitting on a table for 300 days or something like that, that's actually untrue. As Suzanne Chalifour explained at the hearing, this Registry suggesting there was no work that went on in that period is actually not actually reliable in the sense that it was a new system and things would get registered towards the end. If you think that this took a long time, I would invite you to go to the Claimant's table and note that the equivalent product in the United States took not two but three years to achieve registration. So, if Claimant is

19:36 effectively alleging that Canada should be liable in international law for a domestic administrative review process that took a year's less time than its own home Government, the fact is these review processes, as Suzanne Chalifour's evidence substantially points out, are complex and that the PMRA is juggling multiple review--multiple submissions at the same time. It has limited resources.

So, in this case, the fact that it took two years as opposed to the three months the Claimant has alleged, as we have shown, there was no basis for that expectation, and the review went forward in accordance with PMRA's specific procedure.

My friend had pointed out that the fact that one part of the submission was in the queue means that one part of that submission during that 300-day period might not have been started but other parts of the review were ongoing.

Again, as I said before, we can go through chapter and verse each of these specific delays, and we will have responses on each of them, but our general position is that this was the implementation of a complex review process by a specialized administrative agency charged with a very serious mandate, juggling literally hundreds of other submissions, where the Claimant's own submission had very serious deficiencies. For example, its original submission in March 2000 lacked acute toxicology, data which the PMRA never waives, and that the

19:38 Claimant had no right to assume would simply be waived.

ARBITRATOR BROWER: Yes, but they point out that was cured pretty quickly, and the point is the comparison of what happened to Helix. I mean, the same number of applications were pending during the same period of time, more or less, when Helix was being looked at and against the background of all that's been going on with canola and lindane at this time, you would have thought that someone might have been paying attention to dealing with this since there was no all-in-one replacement product on the market. The number 40 and the number 45 and 70, 470, anyway, the two other products we have talked about had to be mixed and so forth. It is sort of striking. And when you add that as an element in their theory, their argument that somebody just had it in for lindane or maybe Chemtura, it just seems odd that it took so long. And actually Helix was initially rejected, or one of the applications was initially rejected, and then they were whizzed through by comparison, it seems, from what's recorded in that Appendix, notwithstanding that it's alleged that it was subject to a, how should I say, more of a review because it was not comprised of previously approved components, as contrary to CS FL, which was previously approved components with one exception perhaps.

MR. DOUAIRE de BONDY: If I could respond to your questions, in the first place, in terms of the fair treatment

19:40 of the Claimant's proposed replacement products as opposed to Helix, I'll remind the Tribunal that the PMRA, in fact, fast-tracked the two proposed replacement products, products that were put forward by the Claimant in November of 1998 as its replacement products, and the Claimant in its own internal documents acknowledged that fast-track registration of those products fulfilled any of its alleged expectations or understandings about what the PMRA would do. Mr. Ingulli admitted as much in a document of July in 1999, and certainly in their exchange of October 1999, you see the issue of replacement products quickly falls off the table.

The fact that that product might not have been as easy as the Claimant would have liked to market is not the PMRA's fault. The PMRA doesn't have anything to say about the marketing of products.

And I will point out the fact that the Claimant had actually registered for export only an insecticide-only version of Gaucho, and it submitted it in 1996, and it was registered in the summer of 1998 for export only. If the Claimant thought that that product was so grossly deficient in terms of marketing, it should have started developing an all-in-one. The evidence is that the Claimant itself did not have a properly formulated all-in-one until March of 2000. So, that's not the PMRA's fault.

And as far as the issue of Helix versus CS FL, I'll

19:42 remind you as well that the process for considering Helix for a Joint Review had begun well before the VWA was ever approved. It's set out in that letter of November 18, 1998, from Claire Franklin, which as the Tribunal, itself, noted during noted the hearing, suggested there was a long process that led up to that decision that Helix be considered for a Joint Review, and that was a NAFTA process. And according to the objective application of the NAFTA standards for that Joint Review process, Gaucho wasn't eligible, and in fact there's no evidence the Claimant even ever asked for that kind of a Joint Review.

ARBITRATOR BROWER: Accepting all of that, is a Joint Review faster than a usual Canadian review?

MR. DOUAIRE de BONDY: I think that in theory it is supposed to be faster. I think in practice--I mean we are talking about how the PMRA did in terms of its voluntary performance standard. The PMRA was late, probably proportionately later in the Joint Review process, according to its own standard, than it was in the management of submission policy standard that applied in the review of Gaucho CS FL.

ARBITRATOR BROWER: No, I understand all the points you're making. I won't pursue it further. It's simply, just taken on its own terms, why it did take so long, and the fact that it took so long tends or potentially feeds the suspicions that they're voicing or confirms them.

19:43 MR. DOUAIRE de BONDY: Sure. I mean in terms of suspicions, could we go back to that? I'm not quite clear what the linkage between--I mean, the issue, and PMRA's witnesses stated this repeatedly, they have no personal interest in the outcome of a regulatory review.

ARBITRATOR BROWER: I understand.

MR. DOUAIRE de BONDY: They applied their science and they reached a scientific decision.

ARBITRATOR BROWER: I understand all that, and I'm not stating anything to the contrary. I'm just saying that that's a large part of their case, that institutionally the PMRA had it in for lindane and it was going to sink it any way they could. It doesn't help you in defending against that that it took forever to get a replacement or they would seem forever to get a replacement product on the market.

MR. DOUAIRE de BONDY: And again I would say that it's not the PMRA's responsibility to develop replacement products for Registrants. PMRA applied its policies and, in fact, fast-tracked the two versions that were actually submitted to the PMRA.

ARBITRATOR BROWER: Okay. I understand all that. Thank you.

PRESIDENT KAUFMANN-KOHLER: Good. I see tired faces, so I think it would be a good time to break. I may have a few other questions, but I think we have been going rather long

19:45 now, and it is a good time to break.

After the break, Mr. Somers, you would like to present a rebuttal?

MR. SOMERS: Briefly, yes.

PRESIDENT KAUFMANN-KOHLER: A brief rebuttal, and you will then see whether you wish to answer or not.

How much time would you like for a break? I assume we can have dinner. It's been served for quite some time now. Should we start again at 8:30? Or is this too late? I have no preference. It's simply that we certainly need a break now.

(Pause.)

PRESIDENT KAUFMANN-KOHLER: 8:15 is preferable?

MR. SOMERS: Considering the condition of the food, maybe that's a good idea.

PRESIDENT KAUFMANN-KOHLER: I'm thinking about the condition of the people. But if you think 8:15 is acceptable to everyone, is that agreed?

MR. SOMERS: That's fine.

PRESIDENT KAUFMANN-KOHLER: Then let's start again at 8:15. Thank you.

(Recess.)

PRESIDENT KAUFMANN-KOHLER: May I ask someone to close the door. Thank you.

Fine. So we are ready to resume. We apologize for the small delay, and we will turn to Mr. Somers for your

rebuttal, and then we will hear Canada's rebuttal, and we will see whether at the end there are still questions from the Tribunal.

You have the floor.

MR. SOMERS: Thank you.

REBUTTAL ARGUMENT BY COUNSEL FOR CLAIMANT

MR. SOMERS: Just briefly--I'm reducing as I go--we heard substantial submissions on MST, minimum standard of treatment, and fair and equitable treatment--

ARBITRATOR BROWER: Would you get closer to the microphone.

MR. SOMERS: Yes.

We heard submissions on minimum standard of treatment and fair and equitable treatment. Canada's position was set out in its materials, and I didn't hear anything new today, so I'm not going to add anything another. I will only refer the Tribunal to our Post-Hearing Brief where our core submission is that minimum standard of treatment as expressed in Article 1105 has evolved since the standards articulated by my friend does include on the basis of NAFTA cases that were argued and decided since the FTC Note of Interpretation in the opinion of those tribunals, admittedly not stare decisis, but on the basis of the review of customary international law, do include that list of features to which the Government ought to be held accountable under 1105 that go beyond "shocking" or

20:28 "manifestly," "unjust" or "unfair behavior."

I'd refer the Tribunal in addition on this point to our Memorial at Paragraphs 340 and 41, which cite the ADF and UPS Cases also relied on by my friends in their argument tonight. So, at least as far as those cases go, we actually appear to be in agreement on the content of minimum standard of treatment.

On the question of expropriation, Canada denied that the deprivation by the Claimant was substantial on the basis that the sales of Lindane Products in Canada were in the neighborhood of 10 percent of its total Canadian pesticide sales, the sales of the Lindane Products. That is, in our submission, not the denominator to choose total sales. In fact, the reason the Claimant is here, or a good part of the reason it is here, is that lindane sales were--and I invite the Tribunal to confirm this in the materials filed by LECG--sales were representative, lindane sales representative, of 50 percent of the profits of the company, which, in Professor Crawford's terms, means that Canada took five of our houses; and that, we would say, is a substantial deprivation.

I don't want to dwell on this too long, but by way of an example I'm referring to Page 32 of the presentation by Canada of their Closing Argument. The issue at the top of that page is that Mr. Johnson confirmed--I'm reading from it--that an EPA tolerance was impossible between 2002 and 2006. And, in

20:30 fact, of course, that's not what Mr. Johnson says. And if he's quoted correctly, he confirmed that it was not possible for full tolerances. But the casual summary of his statement at the top of the page, in our submission, occurs at some other instances in Canada's materials. I just ask the Tribunal to be vigilant for the actual testimony that happened and not the summaries that appeared. The whole point of that cross-examination or that examination was to obtain on the record the fact that a tolerance was possible, just not a full one. A time-limited one was a different issue, and the testimony of Mr. Aidala went to that, as well.

I recall another statement on the question of damages as well, that the question of a time-limited tolerance was brought up, in Canada's view, for the first time in our Post-Hearing Brief. If I heard that correctly, and the transcript will confirm it or not, this, of course, it's not so. It did come up in substance during the hearing itself, and that's why it appears in our Post-Hearing Brief, which digests the testimony on that issue at the hearing.

On the question again of the U.S. tolerance--and again the transcript will confirm this one way or the other--as I recall the testimony, Dr. Goldman was not at the EPA for all of that material time; and, therefore, both Mr. Aidala, on Claimant's behalf, and Dr. Goldman on Canada's behalf were speculating, and to the extent that they are experts on EPA

20:32 procedure but were not involved in decisions at that time as to whether an import tolerance could or could not issue.

Canada also reiterated that their damage experts' contention that it was absurd to expect, as LECG did in its damage analysis in its but-for scenario, that Lindane Products and Chemtura's Lindane Products would have regained their market share after being out of the market for two years. But, in fact, we have on the record attempts, for example, by Canadian growers and seed treaters to have lindane reintroduced even as late as 2002, which obviously showed not only their readiness but their willingness to put their money where their mouth is as far as Lindane Products and resorting to the use of them.

So, to the extent that the damage expert for Canada questions not the calculation methodology or the actual numbers used by the Claimant's damage expert, but goes to criticizing the factual assumptions, obviously we reject the criticisms on the basis that the factual area, the factual plausibility of the Claimant's case has nothing to do with our damage calculation but to do with, obviously, the merits that are not in the province of the damage experts to opine on.

In answer to a question from Mr. Brower as to whether all recommendations in the Board of Review Report had been observed in the REN, our friends confirmed their view that it did, that the PMRA had followed all of those recommendations.

20:34 We obviously take exception or issue with that conclusion. And the Claimant's position, the Board of Review found that the uncertainty factor chosen was not justified and, therefore, recommended, as it was limited to doing, recommended that the PMRA go back and consider other factors--another factor, a smaller one, in fact, since that was the maximum factor.

In the course of the REN, whether or not other factors were considered--and I don't recall from the record whether they were; it hasn't been confirmed either way--the same uncertainty factor was chosen. No additional reasons were given to justify it; and, therefore, we say it remained an unjustified uncertainty factor and, therefore, did not implement the recommendations of the Lindane Board of Review.

Given that selection of the safety factor, in fact, in the PMRA's own submissions during the testimony of its representatives here, no amount of mitigation would have brought the level of concern or the margin of exposure in the terms of the toxicologists to an acceptable level, and so these were not independent recommendations in the sense that to implement one was all that was needed and the PMRA could decide whether or not to implement the other.

By the choice of that unjustified uncertainty factor, the PMRA precluded any other consideration of risk mitigation as recommended by the Board from having any effect whatsoever. So, the PMRA's refusal to follow that recommendation had a

20:36 domino effect on the subsequent recommendation as far as the emptying of it of meaning.

In terms of the contrast in answer to another question from Judge Brower, the contrast in time required between Gaucho and Helix, our friends pointed out that the Gaucho application in the United States took three years as a means to excuse, I suppose, Canada's delay in taking over, too, with the application up here. There is nothing on the record about why the Gaucho application in the U.S. took as long as it did. Without having information on the record--and I use this for illustrative purposes only--the Tribunal would not be aware whether at the time, the earlier time, that Gaucho CS FL was submitted in the U.S., whether the fungicides in that one had been approved in the U.S. before the way they had in Canada. Just suppose they had not been approved before--and I don't want to give evidence here, but as a hypothetical, suppose tat those fungicides had not been approved. The longer period it took in the United States would have been justified.

My point is only there is no information as to why it took as long as it did in the United States, and to try to use that as a means of pointing to Canada's good faith or expedition or efficiency in handling the Gaucho application up here is one we reject.

Thank you, Madam Chair. Those are our submissions.

PRESIDENT KAUFMANN-KOHLER: Thank you.

20:38 Can I turn to Mr. Douaire de Bondy, please.

REBUTTAL ARGUMENT BY COUNSEL FOR RESPONDENT

MR. DOUAIRE de BONDY: Thank you, Madam Chair.

We have just a few points. The first one concerns the Claimant's reference in its submissions to the memorandum of October 2nd, 1998, which is at Reply Exhibit 32. I simply wanted to recall Canada's evidence that that document confirms on its face that Canada did not agree to simply banning lindane or reaching a decision. In fact, in that document, it proposes that lindane be considered for a NARAP which, Canada has submitted, led to a 10-year process of consideration of lindane, a public process, to determine in the first place whether that product was eligible for a North American Regional Action Plan and to determine the steps to be taken subject to that plan. That's the first point.

Our second reply point simply relates to the desire of canola growers to return to lindane. Mr. Somers has referred repeatedly to reference in the EPA document of 2002 about a request by Canadian canola growers for registration of lindane for canola. I would simply recall that the EPA began its RED process in 1998, and that appendix simply made it a vague summary allegation to a request without indicating when the request was made. And as we have seen in the facts, the situation changed quite significantly between 1998 and '99, where canola growers first considered whether a registration

might be obtained in the United States and determined that that would not be possible and quickly instead devised the VWA.

With regard to Ms. Buth's e-mail of 2000, early 2001, suggesting that the CCC should prepare for potential re-registration of lindane, it's interesting that the Claimant in the hearing never took the opportunity to put that document to Ms. Buth to ask her what that meant. And, in fact, Ms. Buth specifically denied that she was promoting or expecting the return of lindane. As Ms. Sexsmith noted, she was simply preparing for the eventuality that that might happen.

The Claimant's submissions on this issue are in any event circular. If a national regulator eventually says that a particular pesticide does not present health and safety risk, then growers may consider returning to that product, but the point is that, in this particular context, the U.S. EPA and, indeed, regulators around the world were pointing to the contrary, and Canadian canola growers were taking note of that.

I will point your attention as well to Exhibit NCI-11, which describes a meeting with the Canadian Canola Council of June 3rd, 1999, between the Canadian Canola Council and Chemtura, and "Ed gave a good presentation"--this is someone from Chemtura--"discussed the topics of great interest to CCC in an unbiased and factual manner. The response from attendees was polite, but it is clear that position on lindane is unfavorable. Several comments from Eugene Dextrase of the CCC

such as why are we continuing to beat a dead horse, and the page had turned on lindane, and no matter what the kinds of alternative, this page will not be turned back speak volumes about his mindset on this topic. In general, I would say that future support from the CCC for continued use of lindane is nonexistent." That was the Claimant's internal document of June 3rd, 1999.

As for Lynn Goldman's evidence, her evidence is, in fact, that there was no evidence on the record of the canola growers making representations to the EPA seeking a lindane registration. She was speaking of U.S. growers. As we saw apart from one vague reference which might date back to 1999.

With regard to the Claimant's point, which is kind of self-contradictory, that it didn't refuse--this is with regard to the registration on lindane use on non-canola product, with regard to its comment that Chemtura didn't refuse a phase-out, it refused to withdraw its registrations. I mean, the comment itself is self-contradictory. If you look at their letter of the 28th of January 2002, which is Exhibit WS-62, the letter states on its face that they're rejecting withdrawal. And if you look at Canada's letters at R-307 and R-308 in reply, Canada's response is not vindictive, but the application of the regulatory system which was applicable at that time. And as I noted before, Canada did not, in fact, cancel the Claimant's remaining non-canola lindane registrations but rather suspended

20:44 them which allowed a phase-out, notwithstanding Claimant's refusal to participate in the voluntary withdrawal.

Just on a quick point about the Board of Review, whether it was the first one, there was one in 1984. It was one relating to a product called Alicor involving Monsanto. There was another in the early 2000s which the Claimant failed--the requester in that situation failed to pursue.

With regard to our favorite topic of replacement products and Judge Brower's comment again about the 360 days in queue, I just wanted to recall to the Tribunal's attention Suzanne Chalifour's comment on the specific point--

(Sound difficulties.)

MR. DOUAIRE de BONDY: All right. I was referring the Tribunal to Volume 4 of the hearing transcript, Pages 1112 and 1113, Professor Crawford asked about this issue of an apparent outstanding--the idea that it was outstanding in the queue for Level D from May 1st, 2001, to April 25th, 2002. Is that accurate?"

The witness replied, "First of all, the overall submission status was D in the queue. That doesn't, however, mean that one of the evaluators, one or more of the evaluators, on the review team had not started the review. That means that at least one had not until that point."

"Okay. Well, let me rephrase that question. The situation is that for the purposes of Level D-1, it entered the

20:47 queue on the 1st of May and it passed Level D only slightly more than a year later in May 2002."

"Yes."

And Arbitrator Crawford asked, "Is that unusual?"

She responded, "Well, the timelines for review of a Category B submission for a new formulation would be 12 months for the review period, and this review was completed in slightly more than that time, only slightly more. It was 300 some days rather than 365 days. So, PMRA did merely meet our timelines for this kind of review."

On the issue of replacement products, I would also note that with regard to the Claimant's claim that the appendix that the deficiencies were trivial, that is in the eye of the Claimant. The problem was that in March of 2000, rather than submit all the data required for that review, the Claimant submitted its product without a proper formulation, even, and simply asserted that it could waive certain key data.

In fact, Chemtura spent a lot more time arguing it shouldn't supply various data than it did actually producing that data. I refer the Tribunal's attention to Exhibit SC-33, which refers to the changed product specification, a re-review of resubmitted data. It is not true, as the Claimant suggests in its appendix, that Suzanne Chalifour was not able to identify incompleteness in the Gaucho CS FL application. The appendix to her Second Affidavit sets these out, things such as

20:48 efficacy data, things such as letters of authorization for the use of data which are important to providing protection to the owners of proprietary data. On Exhibit SC-30 of September 7th, 2000, reviewed some of these deficiencies. And if you look at a letter of the 26th of October 2000, you see the Claimant submitting acute toxicology data, GLP product chemistry, additional efficacy data. And, as Ms. Chalifour noted, each time that there were delays in the delivery of data, this incurred further loops within PMRA.

Regardless of whether the Claimant feels the requirements were trivial, no progress could be made until these requirements had been fulfilled. And the submission could not be deemed complete based on an assumed or asserted waiver, especially when they are related to things such as basic toxicology.

Finally, just a point on the safety factor in the REN, the Board did not in its Report of August 2005 suggest that the choice of an uncertainty factor necessarily led to a conclusion that the product could not pass review. In fact, Canada put in evidence that the factor 1000 has been applied regularly in many other cases, including in the case of Helix, which is a product the Claimant says was favored, and it passed using the application of a factor of 1000 uncertainty fact. So, the application of a factor 1000 does not necessarily lead to a conclusion that the product won't pass.

20:50 Mr. Somers also suggested that the use of this factor 1000 in the context of the Lindane REN was not justified. I will invite the Tribunal to examine Exhibit CC-33. I'm looking at Page 23 of that, and it states at the top of the page, "The concerns outlined in the PCPA hazard consideration section above would be equally applicable to this exposure scenario. In light of the uncertainty with respect to sensitivity, the toxicology concerns, and the overall evidence that suggests increased toxicity following repeated exposure, a target MOE of 1000 was therefore selected." And the review goes on to explain the reasons why a target MOE was selected in terms of short-term and immediate-term inhalation toxicology endpoint.

You hear me stumbling as I referred to some of this evidence because it is highly technical, and the fact is that PMRA took its decisions in the context of the REN based upon the application of highly technical scientific decision making and not picking the number 1000 out of the air or with a view to necessarily condemning lindane. As I say, the application of that factor does not necessarily lead to a result of nonregistration.

I believe my friend, Mr. Kurelek, has a submission to make with regard to expropriation.

MR. KURELEK: Very briefly, I would just like to respond to what Mr. Somers said about the use of net sales in Canada's substantial deprivation expropriation analysis, and I

20:52 believe he said that Canada was something like misplaced the focus, and the really the focus should be on loss of profits and loss of profits closer to 50 percent, and he referred vaguely to LECG documents. I invite Mr. Somers to point us to those documents because what our analysis or review of the Memorial shows that the only financials that we were given were on unedited--sorry, unaudited financials and LECG's Tab Number 15 from its First Report, quite sparse.

And, in fact, I think the numbers bear themselves out in Canada's Rejoinder in Paragraphs 264 to 269, and there is three sets of numbers there. If you would look at Paragraph 265, we quote from LECG who says, "Prior to the PMRA's measures, Chemtura's Lindane Products represented a small share of the overall business. Prior to the measures, lindane-based products represent around 6.3 of Chemtura's overall Canadian business measured by output or pounds"--so, that's weight; that's one set of numbers--"and approximately 17.6 percent measured by net sales," so now we have got pounds and net sales.

And if you jump over to our Paragraph 267, we call a red herring what Chemtura is talking about in its Reply about ow the fact that it had approximately 70 percent of the market for lindane. So, we have got pounds, net sales, percentage of market. None of those talks about profits.

The other point on this same issue is that Navigant at

20:54 the end of its Second Report notes that LECG did not do a before-and-after analysis in terms of substantial deprivation. It's not just the numbers there.

And, finally, let's assume that Mr. Somers is right and that there was a 50 percent loss in profits, which we don't see here; but, if it's in the record, I would like to see it. If that's true, it still is wrong in law because the test to be applied in substantial deprivation analysis for expropriation is substantial deprivation of the investment, not lost profits.

MR. DOUAIRE de BONDY: If I could make quickly one correction, I referred to Draft REN 14th April 2000 as Exhibit CC-33. In fact, it's Exhibit CC-37.

PRESIDENT KAUFMANN-KOHLER: Thank you.

MR. KURELEK: I just misspoke there. One minor point. The Tab 15 of LECG's Report is the only unaudited Financial Statement that breaks the figures down in terms to the level of lindane. That's the only lindane one we have, and that's again what Mr. Somers is referring to, lindane sales--sorry, we are talking about sales, he's talking about lindane profits, but that's the only document we have that breaks it down in terms of lindane.

PRESIDENT KAUFMANN-KOHLER: Thank you. That completes your rebuttal; is that right?

MR. DOUAIRE de BONDY: Yes.

PRESIDENT KAUFMANN-KOHLER: Thank you.

20:56 Do my co-Arbitrators have any follow-up questions?

ARBITRATOR BROWER: I have asked mine.

PRESIDENT KAUFMANN-KOHLER: Professor Crawford?

ARBITRATOR CRAWFORD: No.

PRESIDENT KAUFMANN-KOHLER: We have heard today again and read in the Post-Hearing Brief that Canada had not given its consent to arbitrate the Claim under 1103 and that was in response to the Tribunal's question because initially an objection had not been restated in the Rejoinder and is now being confirmed in the Post-Hearing Brief on Page 90 and following and in the oral argument, and I was asking myself whether the Claimant wishes to add anything on this topic. You probably have not addressed it in your Post-Hearing Brief--at least I don't remember it--because you had not received the answer yet.

MR. SOMERS: That's correct.

PRESIDENT KAUFMANN-KOHLER: And I don't remember what was in your earlier briefs, to tell you the truth, but I just thought I should give you an opportunity.

MR. SOMERS: Thank you for that.

Claimant's position is that, whittling it down, Article 1103 was invoked in our original materials without precisely stating the ground that it involved fair and equitable treatment as applied to subsequent BITs being imported on the MFN basis into the 1105 analysis. In the

20:58 Claimant's original Notice of Arbitration, it had been--the argument advanced did invoke 1103, Article 1103, but in the sense that other comparators to the Claimant had received more preferential treatment as information was obtained and documents produced and so forth. The Claimant did modify them.

Out submission, though, at bottom, is the Claim, however imperfectly expressed in the originating documents, ought not to preclude this Tribunal from considering it, and Canada can show no prejudice, given the fact that the 1103 Article was invoked in the early days of this case, including the Notices of Arbitration.

And I have--excuse me just a moment.

(Pause.)

MR. SOMERS: Canada's Reply submissions contain authority for the very propositions I'm advancing to you now, and I will get the paragraph reference for you.

PRESIDENT KAUFMANN-KOHLER: Good. Thank you.

MR. SOMERS: Paragraphs 441 to 453 of the Claimant's Reply.

PRESIDENT KAUFMANN-KOHLER: Fine. So, we will check it there. As long as it is set out, that's fine.

MR. SOMERS: Indeed.

PRESIDENT KAUFMANN-KOHLER: Thank you.

There is another question that is actually addressed to both. The Claimant, without using the words, I believe,

21:00 have an allegation of bad faith in the conduct of the Respondents in its treatment of lindane and Chemtura. I don't think you used the word, but you say "disingenuous" and other words.

Is there any difference in terms of standard of proof when one seeks to establish a bad faith as opposed to other facts? I don't think this was addressed, and I thought it might be helpful for the Tribunal to know what your views are, and it's really addressed to both Parties.

Mr. Somers?

Or you could also refer us--maybe I missed the place--where it was addressed.

MR. SOMERS: In Claimant's submission, there is no difference in the burden of proof that that requires. It's on balance. In order to apply a higher burden of proof to that would, in effect, be double-counting it because that allegation in and of itself is more difficult in effect to make out. So, to hold it to a higher standard as well as having established on balance bad faith in the first place would, in our view, be double-counting or double-burdening, if you will, the standard of proof that would be required.

You're right, we have been genteel about avoiding that particular formulation. In our view, and you have heard our case, so I will say one last time, a commitment before any of the science is undertaken, before any of the consultations are

21:02 undertaken, before anything else to phase out a product, and then to go through a charade of purporting to review it objectively, knowing all the time you are going to do what you're going to do, amounts to, in our view, bad faith.

PRESIDENT KAUFMANN-KOHLER: Mr. Douaire de Bondy, would you like to reply?

MR. DOUAIRE de BONDY: Thank you, Madam Chairman.

Canada did touch on this point at Paragraphs 21 and 22 of its Rejoinder Memorial.

And I think our point there is simply one of the seriousness of these sorts of allegations. This isn't a question of delay. They're very grave allegations to make against a State and a sophisticated public regulator. Mr. Somers suggests that the Claimant has tread lightly in this regard. I would say quite the opposite. The Claimant's Claims are full of allegations of conspiracy, bias, ad hominem attacks against particular PMRA officials based on their alleged career interests related to lindane, which aren't proved.

And I think the point we simply make is these aren't the sort of claims that should be made lightly, as the Claimant has done, or in the absence of any cogent evidence, as the Claimant has done. Whether a higher standard of threshold of proof is required legally is one question, but in terms of an attack on someone's integrity, I would suggest that one should at the very least have a very compelling case which the

21:03 Claimant has utterly failed to put forward.

PRESIDENT KAUFMANN-KOHLER: Thank you.

I think my other questions have been answered, so if there is nothing that the Parties would like to add, no? Mr. Douaire de Bondy?

MR. DOUAIRE de BONDY: Thank you.

We simply had a question about what the Tribunal would like to do as to costs, and Canada would like to make submissions.

PRESIDENT KAUFMANN-KOHLER: Yes, I will come to this now.

Now, just to sketch for you what the further procedure is, the Tribunal will, of course, deliberate. It will then come to a conclusion either that it has all that it needs to proceed to a decision, which I assume is likely, but one never knows, or that it needs some more input, but that would be on very specific matters that we would put to the Parties for their further written submissions. If we come to the conclusion that we need nothing further to make a decision, we would close the proceedings formally and ask for your cost statements. I assume you will want some time for the cost statements. Is 20 days or a time limit like this from the time we write that we need nothing further? A month?

MR. DOUAIRE de BONDY: I'm just wondering when the time will come when we will know we need nothing further.

21:06 PRESIDENT KAUFMANN-KOHLER: The meaning of Christmas.
No. It will hopefully come soon.
MR. DOUAIRE de BONDY: I would just suggest that in any event, if the Tribunal comes to that decision quickly, that perhaps a timeline of late January might be appropriate for making such submissions.
PRESIDENT KAUFMANN-KOHLER: We could even agree now--
MR. DOURAIRE de BONDY: We need at least 30 days.
PRESIDENT KAUFMANN-KOHLER: Yes, we could agree something like the end of January, if the Tribunal does not give any other directions because we need something more from the Parties. Would that be acceptable?
Mr. Somers?
MR. SOMERS: With apologies, I know that I will be out of the country for the last two to three weeks of January, so if that could slop into the beginning of February, that would be very helpful.
PRESIDENT KAUFMANN-KOHLER: Mid-February? Would that be acceptable?
MR. DOUAIRE de BONDY: Yes.
PRESIDENT KAUFMANN-KOHLER: On the Respondent's side as well?
MR. SOMERS: I'm grateful, thank you.
PRESIDENT KAUFMANN-KOHLER: Sure.
Then it is difficult for us to give you a specific

time when we hope to be able to issue an award, assuming that we need nothing further in terms of information from the Parties. It's obviously a complex case, where there are a lot of facts, and we have to do justice to the way you have pleaded them and review the evidence carefully as well as the legal arguments, but you can rest assured that we will do our best to proceed as speedily as possible, but it's a little bit difficult for us to tell you now something more precise because we need first to have deliberation and see where we are.

Are there any questions or comments that you would like to make before we close?

On the Claimant's side?

MR. SOMERS: None here, thank you.

PRESIDENT KAUFMANN-KOHLER: Thank you.

And the Respondent's side?

MR. DOUAIRE de BONDY: None other than to thank the Tribunal for their attention during the hearing of this often very complex evidence and to thank them for their contingency plans today.

And we thank also the Secretary and the Court Reporter. Have I forgotten anyone? Thank you.

PRESIDENT KAUFMANN-KOHLER: Thank you.

Do my co-Arbitrators have anything to add? No? Thank you.

Then it remains for me to thank you for a very

21:09 professional conduct of this arbitration, for the quality of your written submissions, and also for your oral presentations today and also to thank you very much for having carried out this hearing under somewhat unusual conditions, but it's 10 past 9:00, and we have been able to complete what we had on our schedule, so thank you very much to everyone for your patience.

And now I wish you a good evening or what remains of it, and a good trip to those of you who have to travel back tomorrow, and I can close this hearing.

I should not close without thanking the court reporter.

Thank you.

(Whereupon, at 9:10 p.m., the hearing was adjourned.)

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