

## **THE “COMPACT” OVERVIEW**

### **ASSURING TIMELY RESPONSE IN THE EVENT OF DAMAGE TO BIOLOGICAL DIVERSITY**

The leading agricultural biotechnology provider companies - BASF, Bayer CropScience, Dow AgroSciences, DuPont, Monsanto and Syngenta - are voluntarily offering States a legally binding “Compact” for seeking redress from a Compact Member if the release of a Living Modified Organism (“LMO”) by that Member causes damage to biological diversity. This groundbreaking agreement is a demonstration of both the companies’ confidence in the safety of their LMOs and their commitment to protect biological diversity.

The system the Compact sets up is accessible, fair, and efficient. Any State can submit a claim against a Member of the Compact if the release of an LMO by that Member caused damage to biological diversity in that State. If settlement cannot be reached, the matter would be expeditiously resolved under the auspices and modified rules of the Permanent Court of Arbitration (“PCA”), a long-established independent international arbitration body, and the Compact. CropLife International (“CropLife”) has coordinated the development of the Compact, and the Members aspire to broad Compact membership by others who work with LMOs.

The Compact fills an important void. Members have tremendous confidence in the safety of the LMOs they develop. They are committed to rigorous stewardship, risk assessment, and risk management to prevent damage to biological diversity. Nevertheless, they recognize that others have expressed concern that such damage could occur and, currently, many domestic and international legal systems do not have clear laws and procedures for addressing biological diversity-related damage. After considerable evaluation, it was decided that a binding contract for international arbitration, voluntarily committed to by industry leaders, would be the most immediate, efficient, and effective means to assure States that a company would provide redress should the release of an LMO by that Member cause damage to biological diversity.

In this light, the Compact’s goals are to assure the international community that its Members (1) engage in rigorous risk assessments before bringing an LMO to market, (2) have the financial capacity (through insurance or other means) for responding in the unlikely event that the release of an LMO by that Member causes damage to biological diversity, and (3) will promptly remediate damage, or otherwise compensate a State, when necessary. The Members have engaged in dialogue with States and stakeholders, and the Compact has been revised to reflect significant and helpful feedback received from the international community since its introduction in May 2008. The Compact is scheduled to be signed in 2010.

#### **The Compact’s Guiding Principles**

The Compact fully recognizes and respects that States can receive a response for damage to biological diversity under the Compact or pursue a remedy under otherwise applicable law. The Compact properly reflects that States cannot do both. If a response is provided under the Compact, it would be unfair for there to be double or multiple recoveries for the same damage. Members believe States will find the Compact to be a preferable alternative because it provides the certainty of a fair, clear and definite process and of the financial ability of Members to respond. The Compact also offers an opportunity for the timely resolution of a claim by qualified neutrals to efficiently and effectively handle claims for damage to biological diversity which are likely to be very complex.

The Compact reflects principles set forth in the Rio Declaration on Environment and Development that a responsible party should remedy damage to biological diversity caused by that party. If the release of an LMO by a Member caused damage to biological diversity, that Member will remediate the damage to the extent that is it causally responsible. For this Compact only, Members have agreed that they will not be able to assert certain traditional defenses, such as a “state of the art” defence, and that they may be responsible for responding even when they took reasonable care to prevent the damage. In these ways, the Compact creates stringent standards of responsibility for Members.

*This document corresponds with the “Compact” as of 17 May 2010. For media inquiries, please contact Deb Carstoiu with CropLife International at (202) 833 4485; For technical inquiries, please contact Tom Carrato, Executive Director of the Compact at (202) 436-4163.*

The responsibility of the State is to establish through science-based evidence where there has been measurable, significant, and adverse change to biological diversity to a species or ecosystem. The Compact has clear definitions of these terms, as well as a fair and reasonable process for determining if a Member should be required to respond to such damage. The heart of that process is (1) establishing a baseline of biological diversity of the affected species and measuring change from that baseline; (2) determining whether the change from that baseline is significant and adverse; (3) assessing whether and how the release of an LMO by a Member caused that damage; and (4) deciding what response should be awarded to remedy the damage. The preferred response is remediation, with compensation available in limited circumstances.

Materials, decisions and processes of a claim under the Compact are only for determining whether a Member must provide redress under the Compact. A State cannot use such Compact-related materials for any purpose outside of the Compact, with regard to any Member or non-Member.

The Compact has no impact on non-Members.

### **The Compact's Claims Adjudication Process**

The Compact establishes a fair and efficient mechanism for processing claims where all substantive decisions are made by independent parties. To govern the internal processes of the Compact, three Committees will be established. An Executive Committee will oversee the Compact and include representatives of all Members. A Technical Committee will advise the Executive Committee and work with an Advisory Committee on developing rosters of neutrals and independent experts for resolving claims. The Advisory Committee, including representatives of States, research organizations, nongovernmental organizations, other stakeholders (e.g., grain traders) and Members, will provide advice and feedback to assure that the Compact is achieving its goals.

To initiate a claim, a State will submit to the Executive Director a completed arbitration agreement and claim form (both are included in the Compact's appendices), along with the evidence it believes proves the elements necessary to establish damage and responsibility.

- A PCA-Appointed Commissioner will review the claim to assure it was completed properly and is supported by plausible evidence. The Commissioner may request fact-finding to achieve this end.
- The State and named Members will be encouraged to resolve all completed claims amicably, taking advantage of the conciliation rules of the PCA.
- If no resolution is reached, the matter will be brought before a tribunal formed under the PCA. The tribunal will hear evidence and have independent experts (e.g., academics and research scientists) assist as needed on science and technical issues. There will be a collaborative process for the Advisory Committee and Members to establish objective criteria for choosing such experts.
- If responsibility is established, the tribunal will assign a percentage of causation to each responsible Member, who will respond up to the amount of that percentage of the final award, subject to the financial limits in the Compact.

A Member is obligated to respond promptly. Should enforcement be necessary, the Compact requires the other Members to file a specific performance action against the recalcitrant Member.

### **Conclusion**

Members are committed to the safe production and use of LMOs and to standing behind their LMOs' safety and performance in advancing the world's sustainable production of food, feed, fibre and fuel. By signing this Compact, they pledge prompt, appropriate, and necessary remedial measures if found responsible for damage to biological diversity. Members hope the success of the Compact will encourage others to join it and believe States will find the Compact to be a timely, valuable, and effective claims-adjudication system.

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