

29 APRIL 2008

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**A COMPACT
(CONTRACTUAL COMPENSATION AGREEMENT)
CONCERNING RECOURSE IN THE EVENT OF DAMAGE TO BIOLOGICAL
DIVERSITY CAUSED BY LIVING MODIFIED ORGANISMS**

Questions & Answers

1. What is the “Compact”?

The Compact is a contract, a legally binding voluntary commitment among Members active in plant biotechnology who choose to sign the instrument, and who qualify for Membership. These entities agree that if their biotechnology-derived products cause actual damage to biological diversity, the responsible Member will provide recourse for that damage, under the terms and conditions of the contract.

2. What are the fundamental principles of the “Compact”?

See the accompanying background document.

3. Who are the Members of the “Compact”?

This CropLife International initiative began with six leading plant biotech companies, BASF, Bayer CropScience, Dow Agrosciences, DuPont, Monsanto, and Syngenta.

One of the Compact principles is to encourage open and broad Membership. A Compact Member can be any entity (private sector, public research, governmental entity) that could release an Living Modified Organism (LMO) such as a genetically modified plant into the environment, and that can meet the conditions of Membership (financial capacity, stewardship and rigorous risk assessment). Another principle of the Compact is facilitating the availability of insurance for recourse provided under the terms and conditions of the Compact for damage to biological diversity.

4. Why did the Members create the “Compact”?

This CropLife International initiative began to respond in a measurable way to the question: “If your products are so safe, then why don’t you stand behind them?” It is a further demonstration of corporate responsibility. Biodiversity is a valuable public good which needs to be protected. With the Compact initiative the plant biotech industry demonstrates

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its commitment to develop safe and sustainable products, while responsibly addressing the unlikely event that these product cause damage to biological diversity.

5. How do new Members join the “Compact”?

The basic conditions of Compact Membership such as financial capacity, stewardship and rigorous risk assessment are established in the Compact instrument. The details of those conditions, as well as the processes for application and admission will be set forth in the Bylaws. The Membership portions of the Bylaws will be developed based on the guidance from an Advisory Committee that will include representatives of the Parties, small and medium business enterprises, public and private research organizations and the Compact.

6. How does the “Compact” define “Damage” caused by LMOs?

Damage to biological diversity requires significant, measurable and adverse change from the baseline measure of biological diversity. The Compact describes a detailed and thorough definition of such damage. Any claim of damage requires science-based proof and determinations of damage, causation and appropriate recourse.

7. What about “traditional” or other types of damages?

The Compact specifically excludes traditional or other types of damages, as they are recoverable under national civil liability systems and are generally insurable, while damage to biological diversity is not currently insurable.

8. Does the “Compact” have a fault-based standard or strict liability standard?

The basic premise of the Compact is that if a Member’s LMO product causes damage to biological diversity and that Member is directly responsible for that damage, that Member will remediate the damage. That is strict liability for the Member that is the authorization holder who has released LMO that was the cause of the damage to biological diversity. However, there are a number of defenses, including misuse. Misuse is fault based, and misuse by a third party can both be a defense for the Member who is the authorization holder, but can also make a Member who misused the LMO product liable for the damage to biological diversity.

9. Does the “Compact” provide for defenses?

Yes, the Compact includes a number of defenses, including acts of God, misuse and damage resulting from a risk which was assessed by the Member and provided to the Party which then authorized the LMO based on that risk assessment. However, there is no “State of the Art” defense.

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10. Who has the right to make a claim under the “Compact”?

Recourse for damage to biological diversity should only be pursued by a Party, because biological diversity is a public good to be protected by states. Under the Compact, in order to prevent double or multiple recoveries for damage to biological diversity arising from the same set of facts and circumstances, only a Party can make a claim and receive recourse (compensation or remediation).

11. How does a country make a claim against the “Compact”?

A Party to the Protocol would Consent to adjudication of its claim under the Compact and submit the fully documented claim setting forth all of the scientific evidence which proves the elements necessary to establish damage to biological diversity, both general and specific causation by a specific LMO, and the appropriate recourse for that damage. The claim would be reviewed by the Technical Committee, and then subject to settlement by the Member and the Party, mediation, possible fact-finding under the auspices of the Permanent Court of Arbitration, or would proceed to arbitration at the Permanent Court of Arbitration.

12. How does a country enforce a claim against the “Compact”?

Each Member is contractually bound to provide prompt recourse when a claim is allowed against that Member after settlement, mediation or binding arbitration at the Permanent Court of Arbitration. The Party to the Protocol whose claim is allowed would be a third party beneficiary of the Compact as the result of signing the Consent, and can specifically enforce the obligation to provide recourse. In addition, the other Members are required to enforce the obligation to pay of a recalcitrant Member.

13. How does the “Compact” fit into the Article 27 negotiations under the Cartagena Protocol on Biosafety?

The Compact has been developed as a CropLife International initiative by leading plant biotech companies including BASF, Bayer CropScience, Dow Agrosiences, DuPont, Monsanto, and Syngenta over an 18 month period, in response to the question from Members of the Working Group on Liability & Redress: “If your products are so safe, then why don’t you stand behind them?” This Compact is the companies’ response to that question. The Compact is a demonstration of corporate responsibility. More precisely, the Compact is the industry’s effort to formalize the long standing commitment to stand behind the safety of its products. While the formal Compact is new, the responsibility these Members are documenting is not. The Compact’s members have always stood behind their products.

The Compact is a compensation mechanism intended to provide an alternative to mandatory compensation funds and onerous financial security requirements that would stifle research

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and development, deny access to the benefits of the technology and disrupt trade. This mechanism considered components of a longstanding and successful international compensation approach for accidental oil spills, and provides what we consider to be the best approach, fairly taking into consideration balancing the dual needs of affected Parties and of an industry that has much to offer an ever demanding global population. The Compact sets an example of the type of system that industry believes can effectively provide redress for actual damage to biological diversity, both substantively and procedurally.

14. How does the “Compact” adjudicate claims for “Damage”?

The claim will be reviewed by the Technical Committee for completeness and compliance with the terms and conditions of the Compact. The Claim would then be subject to settlement, mediation, possible fact-finding under the auspices of the Permanent Court of Arbitration, or would proceed to binding arbitration at the Permanent Court of Arbitration.

15. Does the “Compact” place a cap on financial liability for “Damage”?

Yes, the Compact caps financial liability for a single incident of damage to biological diversity caused by an LMO, and for the aggregate of all incidents caused by one LMO. In order to encourage remediation or repair in the first instance and by preference (over compensation) as the most appropriate recourse for such damage, the cap for remediation or repair is significantly higher than the amount of the cap for compensation.

16. What does the “Compact” require of countries that are Parties to the Protocol?

The primary prerequisite for a country that is a Party to the Protocol to submit a claim for damage to biological diversity to the Compact is that the Party executes Consent to the determination of the claim pursuant to the terms and conditions of the Compact. This consent includes agreeing to adjudication or binding arbitration of the claim under the provisions of the Compact, to protection of the integrity and confidentiality of the process, and to not subject the Member to double or multiple recoveries for damages that arise from the same incident. The Consent provides reciprocal obligations on the part of Members.

17. Is this CropLife International initiative simply establishing a fund where Members share liability for damage to biological diversity caused by their or by any other company’s LMO?

No, there is no fund of any sort, and there is no sharing of liability amongst the Members of the Compact or support for liability of any entity that is not a Member of the Compact. The Members who join the Compact each agree that if their product causes damage to biological diversity, they will provide recourse for that damage if the claim of the Party is allowed by the Compact. The Party must submit a claim and prove damage under the definitions of the Compact, making the claim subject to settlement, mediation, fact-finding or binding

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arbitration under the auspices of the Permanent Court of Arbitration. Only after the claim is proven and allowed under the Compact does the responsible Member and only that Member provide recourse. Again, there is no fund of any sort, there is no money set aside or prepayment of any funds prior to an incident of actual damage to biodiversity, and there is no sharing of liability among Members who did not cause the damage.

18. If another company, for example a small trade company or a seed company, imports seed containing an LMO from one of the Member companies, and there is damage to biological diversity, who will pay? If it is a third person importing, will the Member Company pay for the damage?

It depends on the specific facts. If Member X is the authorization holder for the trait and placed the trait on the market by licensing it to the small company, and the small company has followed all of the laws, any conditions of the approval, and any stewardship requirements imposed by the State authorizing the release and by Member X, then Member X will pay. If the small company has violated the law, or violated the conditions of approval, or the stewardship requirements imposed by Member X and the fault by the small company causes the damage to biodiversity, then Member X will not pay. But if the small company is also a Member of the Compact, then the small company will pay.

Any company that can meet the requirements can join the Compact. We have provisions in the Compact to try to develop broad Membership, to find ways to enable small companies to join and to make damage claims allowed under the Compact insurable.

19. Are there financial limitations on liability established under the Compact for damage to biological diversity? How did you arrive at those limitations?

Yes.

The financial limitations on liability were established in part by taking into account remediation costs for other types of environmental damage, and relating those to the nature of potential damage to biological diversity raised as concerns by those who fear such damage. In addition, the limitations consider the balance of the benefits offered by an LMO, as well as the process of deciding to authorize the production of that LMO. The limitations also recognize the importance of quantification of potential liability to the availability of insurance for that liability.

Furthermore, all involved recognize that the potential for such damage and the magnitude of such damage is presently a matter of conjecture and pure speculation; and we have a 15 year history with numerous LMO products on over 1 billion acres with no indication of actual damage to biological diversity.

Finally, the financial limitations are a product of arms length negotiation among the companies engaged in this CropLife International initiative.

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20. Are there time limitations for making a claim for damage to biological diversity? How did you establish those limitations?

Those time limits were established based on consideration of the balancing of the realistic needs of the Parties to be able to ascertain whether an LMO released in their territory has caused damage to biological diversity, with the needs of the industry for repose and limitation of exposure after a reasonable period of time.

21. What are the advantages of the “Compact” approach compared to other approaches discussed?

The Compact provides assurance that a Member has the capacity to pay and will pay if that Member’s LMO product actually causes damage to biological diversity. The Party that submits a successful claim has jurisdiction over the Member for the purposes of that claim and the right to enforce that obligation to pay.

As a matter of principle, there should be recourse for damage to biological diversity after damage and the appropriate remedy have been determined. Prior to such a determination, there can only be pure speculation as to whether damage will occur and what the cost to repair that damage would be. Any system which requires payment on the basis of such conjecture and speculation would stifle research and development, deny access to the benefits of the technology and prevent or disrupt trade. The Compact is a compensation mechanism that provides reasonable and appropriate alternative to such mandatory compensation funds or onerous financial security requirements.

22. Why was this initiative by the industry only now?

Actually, the companies began this CropLife International initiative over 18 months ago as a concept and an opportunity to demonstrate the industry’s confidence in the safety of its products and the rigor of its risk assessments. CropLife International is responding to the concerns raised about our confidence in our products, and seeking to contribute in a meaningful way to the protection of biological diversity and to these negotiations. To that end, we are coming forward with this private sector initiative on compensation mechanisms. The Compact is a demonstration of corporate responsibility and is the industry’s effort to formalize the long standing commitment to stand behind the safety of its products. While the formal Compact is new, the responsibility these Members are documenting is not. The Compact’s members have always stood behind their products.

23. What is the organizational structure of the Compact? (Members, Executive Committee, Technical Committee, etc.)

The Compact will be governed by an Executive Committee, which will initially consist of representatives of all Members and will operate according to rules established in the Compact and its bylaws. The Executive Committee will engage an Executive Director who

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will be responsible for the day-to-day operations of the Compact. The Compact will have a Technical Committee which will consist of experts in fields related to biological diversity issues appointed by Members. The Technical Committee will play a fundamental role in the review, evaluation and adjudication of claims.

Initially, the Compact will also have an Advisory Committee which will consist of representatives of Parties, public and private sector research, small business enterprise and Members. The Advisory Committee will guide the Compact on means and approaches to make the Compact accessible to research and small business entities, and on facilitating the availability of commercial insurance for recourse obligations determined under the compact.

24. Who composes the Executive / Technical Committee, how is it ensured that the Committee is actually “independent”?

The Executive and Technical Committees will consist of representatives of Members of the Compact. However, the Technical Committee is mandated to follow the terms and conditions of the Compact, and to make science-based technical determinations. Any Member whose LMO product is the subject of a claim is recused from any involvement in either Committee when considering that claim.

In addition, there is always access to the Permanent Court of Arbitration in case of a dispute. There is provision in the Compact for a panel of independent experts (academics, research scientists, experts in relevant fields), which will be to sole advisor to the PCA on science and technical issues. Parties and Members can nominate experts to that panel who meet qualification criteria to be established by the Bylaws.

25. What happens to the Compact if MOP 4 does not support this proposal as an alternative to mandatory compensation funds or financial security?

For the directors of any company to justify making the financial commitments represented by the Compact, they would need to understand the value of such an agreement in the context of these negotiations of the Liability & Redress Working Group. If there is no value or effect in the context of these negotiations from entering into the Compact, each company will weigh that as a factor in deciding whether to proceed.