

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

This CropLife International (CLI) initiative began 18 months ago on a compensation mechanism to provide recourse in the event of real damage to biological diversity. The effort began largely because of the constant query: “If your products are so safe, why don’t you stand behind them?” While we have always stood behind our products and stated our confidence in our products and our risk assessments, we had not offered a proposal that demonstrated we had that confidence. In addition, from the perspective of corporate responsibility, it was the right thing to do.

Six major agricultural biotechnology providers (BASF, Bayer CropSciences, Dow Agrosciences, DuPont, Monsanto and Syngenta) decided to explore the possibility of an agreement *inter se* to pay for damage to biological diversity if their own product actually caused such damage: the concept of the COMPACT (a voluntary private sector compensation mechanism). All of the companies, under the auspices of CLI have now agreed to the concept, and to the core provisions of such a COMPACT. We continue to consider the terms and conditions of an instrument. While not yet final, we expect to reach agreement prior to the negotiations in Bonn.

At the fifth and final meeting of the Open-ended Ad Hoc Working Group on Liability & Redress under the Biosafety Protocol in March, 2008 in Cartagena, Colombia, the companies described the concept in plenary session to the Working Group. The Co-Chairs and many Parties were appreciative of the concept and supportive of industry’s engagement. Many Parties expressed the need to know more.

The concept and project has now been adopted by the Funders’ Group (senior executives of the six companies) of CLI. CLI will represent the COMPACT to the MOP and to the media, and will sponsor outreach to communicate the principles and core provisions of the COMPACT to Parties to the Protocol leading up to and in preparation for the Meeting of the Parties (MOP) in May, in Bonn, Germany.

The fundamental principles of the COMPACT are:

- a. rigorous stewardship, risk assessment and risk management to prevent damage to biological diversity;

- b. science-based determinations of causation, of damage to biological diversity, and of recourse consistent with the Rio Declaration, the Convention on Biological Diversity, and the Cartagena Protocol on Biosafety;
- c. legal due process for all parties engaged in an alleged incident of damage to biological diversity;
- d. all definitions, terms, conditions and processes for the submission and determination of a claim under the Compact for damage to biological diversity (as defined by the Compact) are established within the four corners of the Compact;
- e. biological diversity is a public good to be protected by states and hence recourse for damage to biological diversity should only be pursued by the state;
- f. consistent with the scope of the Convention and of the Protocol, damages covered by the Compact are limited to damage to biological diversity (as defined by the Compact), and traditional damages are specifically excluded, as they are covered by national civil liability systems and generally insurable;
- g. recourse shall only be provided by the responsible member of the Compact after damage to biological diversity is determined to have been caused by that member's release of an LMO;
- h. no joint, several or shared liability under the Compact
- i. no double or multiple recovery for the same unique event (the same set of facts and circumstances) of damage to biological diversity;
- j. financial capacity to provide recourse and to undertake risk management measures commensurate to the risk posed by the activities in which a member is engaged;
- k. provision of prompt recourse upon proof of causation of damage to biological diversity;
- l. encouragement of remediation or repair in the first instance and by preference (over compensation) as the most appropriate recourse for damage to biological diversity;
- m. no prepayment, fund or other collective compensation measures for damage to biological diversity;
- n. broad and open membership of this Compact; and
- o. facilitation of the availability of commercial insurance for recourse for damage to biological diversity granted under the terms and conditions of this Compact.

The positions of the industry in these negotiations on Liability & Redress under the Cartagena Protocol on Biosafety remain:

1. An administrative process for the determination of damage to biological diversity, the cause of that damage, and the plans for remediation of that damage would best satisfy the intent and purpose of the Protocol.
2. That process should be administered by a competent authority of the Party with sufficient capacity to make science-based decisions, and should provide for adequate legal due process for all parties.
3. The scope of any liability regime should be derived from the scope of the Protocol: damage to the conservation and sustainable use of biological diversity; and the relevant definitions should be taken from the Convention on Biological Diversity.
4. The standard of liability should be fault based.
5. There should be no prepayment, fund or other financial security or collective compensation measures for damage to the conservation and sustainable use of biological diversity.
6. Any regime must be flexible enough to accommodate national legal systems for recovery of damage to biological diversity which are consistent with the Protocol, and recognize the sovereignty of existing national legal systems for the recovery of traditional damages.

APPENDIX 1: COMPACT Intervention – Cartagena, Colombia – 17 March 2008

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Thank you, Co-Chairs and distinguished delegates for this opportunity to discuss with you what we believe is an important concept for your consideration.

My name is Tom Carrato, and I am here in Cartagena representing the Global Industry Coalition. However, I speak to you now *not* for the GIC, but as a representative of six major agricultural biotechnology companies: BASF, Bayer CropScience, Dow AgroSciences, DuPont/Pioneer, Monsanto and Syngenta.

All of the companies which provide agricultural biotechnology traits and products are absolutely confident in the safety of our products and in the rigor of our risk assessment processes. That confidence is affirmed by the hundreds of independent national risk assessments and approvals of those products for release into the environment for production and for import as LMO-FFP's in many of your countries.

In addition, the products of agricultural biotechnology have now been grown and consumed for almost 15 years on over 1 billion acres in countries with over ½ of the world's population. Contrary to assertions made earlier, there has been no harm to human health and no damage to the environment or to biological diversity.

We have been asked in past plenary sessions of this Working Group: “If your products are so safe, then why don't you stand behind them?” We do stand behind our products, and the six major technology providers that I speak for today are committed that if our products were to cause actual damage to biodiversity, we would remediate that damage. We have been considering compensation mechanism approaches which would demonstrate that commitment, and which would answer the question posed, since it was first asked.

While we continue to consider options and discuss possible arrangements, the concept we are most seriously considering is a binding contractual obligation among our companies and others who choose to sign, to remediate actual “Damage to Biological Diversity” caused by our products, and setting forth the conditions for a Party to submit a claim and for approval of a claim for such damages. We refer to this option as a “Compact”.

The Compact would provide that only the responsible company would remediate or pay *after* actual “Damage to Biological Diversity” is proven pursuant to the claim procedures detailed in the Compact. As such, the Compact would not be a fund as has been considered in discussions of this Working Group, but rather like a form of self insurance the companies which join the Compact would undertake. The Compact would be a binding contract among the members, and a Party whose claim was allowed would be a third party beneficiary.

For the directors of any company to justify making such a financial commitment, they would need to understand the value of such an agreement in the context of these negotiations of the Liability & Redress Working Group.

We are considering this concept in order to contribute to negotiations that provide for a reasonable compensation mechanism and approach to liability for damage to biological diversity that is acceptable to all Parties and interested parties.

Thank you.

BASF, Bayer Crop Sciences, Dow AgroSciences, DuPont/Pioneer, Monsanto & Syngenta