

**THE COMPACT  
A CONTRACTUAL MECHANISM FOR RESPONSE  
IN THE EVENT OF DAMAGE TO BIOLOGICAL DIVERSITY  
CAUSED BY THE RELEASE OF A LIVING MODIFIED ORGANISM**

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**PREAMBLE**

***A. Title and Effective Date***

This instrument shall be referred to as “the Compact.” All references to “the Compact” or the “provisions” or the “terms and conditions of the Compact” include the Compact and its Appendices, including the Bylaws.

The Effective Date is [\_\_\_\_\_].

***B. Membership***

The Compact is made and entered into by the following signatories (hereinafter referred to individually as a “Member” and collectively as “Members”):

- i. BASF Plant Science Company GmbH, a corporation established under the laws of Germany, whose registered office is at Carl-Bosch-Strasse 38, 67056 Ludwigshafen/Rhein, Germany.
- ii. Bayer CropScience Aktiengesellschaft, incorporated under the laws of Germany, whose corporate office is at Alfred Nobel Strasse 50, 40789 Monheim am Rhein, Germany.
- iii. DowAgroSciences, LLC, a limited liability company formed under the laws of Delaware in the United States of America, whose principal place of business is at 9330 Zionsville Road, Indianapolis, Indiana 46032, United States of America.
- iv. E.I. du Pont de Nemours and Company, a company incorporated under the laws of Delaware in the United States of America, whose principal place of business is at 1007 Market Street, Wilmington, Delaware, 19898, United States of America.

- v. Monsanto Company, a corporation incorporated under the laws of Delaware in the United States of America, whose principal place of business is at 800 North Lindbergh Blvd, St. Louis, Missouri, 63167, Unites States of America.
- vi. Syngenta Crop Protection AG, established under the laws of Switzerland, whose registered office is at Schwarzwaldallee 215, 4058 Basel, Switzerland.

The Compact will be administered in accordance with its terms and conditions, and under the auspices of CropLife International. Membership criteria for joining the Compact will be broad and open.

### **C. Purpose**

In signing the Compact, each Member is agreeing to a voluntary system for binding arbitration so that a State can seek Response in the event that a Release of a Living Modified Organism (“LMO”) by a Member is alleged to have Caused Damage to Biological Diversity. Each Member is completely bound by the terms and conditions of the Compact. A State’s decision to engage in binding arbitration under the terms and conditions of the Compact is always completely voluntary.

The Compact creates an accessible, efficient, effective and fair dispute resolution system that States can rely upon and find valuable. It is consistent with principles set forth in the Rio Declaration on Environment and Development (“Rio Declaration”) that a responsible party should pay for Damage to Biological Diversity Caused by that party.<sup>1</sup> Response can be required even where a Release is unintentional, negligent or occurs even though reasonable care had been taken to prevent the Release. Thus, a Member will provide timely Response, subject to the terms and conditions of the Compact, in the event that a Release of an LMO by that Member Causes Damage to Biological Diversity.

To facilitate a State’s ability to seek Response, the Compact assures a State that it will have an internationally recognized arbitral forum within which disputes over Damage to Biological Diversity can be timely addressed. The terms of the Compact are also intended to encourage the development of commercial insurance for the cost of Response for Damage to Biological

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<sup>1</sup> Rio Declaration on Environment and Development, Rio de Janeiro 3-14 June 1992, Principle 16.

Diversity should it be required under the terms and conditions of the Compact. The availability of commercial insurance will enhance a Member's ability to demonstrate the requisite financial capacity to Respond. Its availability should also create the opportunity and incentive for any entity who works with LMOs to join the Compact, thereby providing States greater assurance of access to Response. The availability of commercial insurance will facilitate broad and open membership, one of the core goals of the Compact.

The Members recognize the limited scope of the Compact and fully respect State sovereignty. The Compact's arbitration system is complementary to and cannot replace international rules and procedures adopted under Article 27 of the Cartagena Protocol on Biosafety ("the Protocol"). The Compact cannot and does not impact the ability of a State to pursue a claim for damage to biological diversity under applicable domestic or international law. However, if a State chooses to file a Claim under the Compact and a Member Responds, the State must in return assure that the Member is not subject to double or multiple recoveries for the same Incident of Damage to Biological Diversity.

#### ***D. Historical Context***

The Convention on Biological Diversity ("the Convention") was adopted on 5 June 1992 and entered into force on 29 December 1993.

- Agenda 21, adopted by the United Nations Conference on Environment and Development in Rio de Janeiro in June 1992, states (in Chapter 16) that biotechnology "promises to make a significant contribution in enabling the development of, for example, better health care, enhanced food security through sustainable agricultural practices, improved supplies of potable water, more efficient industrial development processes for transforming raw materials, support for sustainable methods of afforestation and reforestation, and detoxification of hazardous wastes. Biotechnology also offers new opportunities for global partnerships, especially between the countries rich in biological resources (which include genetic resources) but lacking the expertise and investments needed to apply such resources through biotechnology and the countries that have developed the technological expertise to transform biological resources so that they serve the needs of sustainable development."

- The Convention recognizes (in Article 16) that both access to and transfer of technology, including biotechnologies, among the parties to the Convention are essential elements for the attainment of its objectives.
- Parties to the Convention are obligated (in Article 19) to “take legislative, administrative or policy measures, as appropriate, to provide for the effective participation in biotechnological research activities by those...Parties, especially developing countries, which provide the genetic resources for such research...” and to “take all practical measures to promote and advance priority access on a fair and equitable basis...to the results and benefits arising from biotechnologies based on genetic resources provided.”

The Protocol was adopted on 29 January 2000 and entered into force on 11 September 2003.

- The Protocol recognizes (in its Preamble) “that modern biotechnology has great potential for human well-being if developed and used with adequate safety measures for the environment and human health.”
- The Protocol states (in Article 1) that it was created, “in accordance with the precautionary approach contained in Principle 15 of the Rio Declaration and Development” for the purpose of contributing “to ensuring an adequate level of protection in the field of the safe transfer, handling and use of living modified organisms” resulting from modern biotechnology “that may have adverse effects on the conservation and sustainable use of biological diversity, taking also into account risks to human health, and specifically focusing on transboundary movements.”
- The Protocol states (in Article 27) that signatories to the Protocol shall adopt a process “with respect to the appropriate elaboration of international rules and procedures in the field of liability and redress for damage resulting from transboundary movements of living modified organisms, analysing and taking due account of the ongoing processes in international law on these matters, and shall endeavour to complete this process within four years.” To carry out the process, the Conference of the Parties serving as the Meeting of the Parties to the Protocol (MOP 1) issued its decision BS-I/8 in Kuala Lumpur, Malaysia in February 2004 establishing an Open-ended Ad Hoc Working Group of Legal and Technical Experts, with terms of reference set forth in an annex to that decision. Following up on the work done by that Ad



Hoc Working Group, MOP 4 issued its decision BS-IV/12 in Bonn, Germany in May 2008, establishing a Group of the Friends of the Co-Chairs to continue the process of negotiating “international rules and procedures in the field of liability and redress for damage resulting from transboundary movements of living modified organisms” and to report to MOP 5 on 11-15 October, 2010 in Nagoya, Japan.

Members of the Compact have participated as observers in the Meetings of the Parties, the Ad Hoc Working Group and the Group of the Friends of the Co-Chairs under the Protocol to engage in the development of a framework concerning liability and redress. In establishing the Compact, the Members seek to support the efforts of the Group of the Friends of the Co-Chairs and the Parties to the Protocol in facilitating appropriate, reasonable, workable, timely, and efficient mechanisms including voluntary compensation mechanisms to enable all States to obtain redress in the event that damage to biological diversity results from the transboundary movement of LMOs.

### ***E. Guiding Principles***

The Members have tremendous confidence in the safety and their stewardship of the LMOs they develop and Place on the Market. In 25 years of experience with modern biotechnology there has not been a scientifically verified Incident of Damage to Biological Diversity caused by any one of their LMOs. The Members are committed to continued rigorous stewardship, risk assessment and risk management of their LMOs to prevent Damage to Biological Diversity.

The Members recognize that some have publicly expressed concerns that damage to biological diversity could occur in the future from transboundary movement of an LMO. The Compact directly addresses such concerns. Under the Compact, should the Release of an LMO by a Member Cause Damage to Biological Diversity, that Member will undertake timely, appropriate and necessary Response.

With regard to the adjudication of Claims, the following guiding principles apply:

- (a) The Members believe that Biological Diversity is a public good which States have a special responsibility to protect and hence Response to Damage to Biological Diversity under the Compact can only be pursued by States;

- (b) Legal Due Process governs the administration and adjudication of a Claim for an alleged Incident of Damage to Biological Diversity;
- (c) The administering authority for Claims must be independent of all Members and States and must act in a neutral capacity to advance the goal of Legal Due Process under the Compact and for this reason, the Permanent Court of Arbitration<sup>2</sup> (“PCA”) has been selected to serve as the administering authority for Claims;
- (d) As a contract designed to establish a voluntary, self-contained substantive and procedural framework for resolution of Claims involving the Members’ LMOs, all definitions, terms, conditions and processes for the submission and determination of a Claim for Damage to Biological Diversity under the Compact are established in the Compact;
- (e) Science-Based evidence must support decisions on each of the elements of a Claim, including *inter alia* Causation, Damage to Biological Diversity and Response, just as is the case under the Rio Declaration, the Convention, and the Protocol;
- (f) The preferred Response to Damage to Biological Diversity is remediation, with compensation only being available in the event that remediation is not practicable;
- (g) The responsible Member will Respond to the extent of that Member’s Proportional Responsibility for Damage to Biological Diversity; there is no joint and several responsibility. There also is no pre-payment fund, or other collective compensation measures for Damage to Biological Diversity;
- (h) In agreeing to Respond under the Compact, a Member cannot be held financially responsible for and is completely protected from double or multiple recovery for the same Incident of Damage to Biological Diversity;
- (i) Members are to provide timely Response upon award of a Tribunal or as a result of settlement of a Claim, and are to have the financial capacity to Respond; and

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<sup>2</sup> <http://www.pca-cpa.org>.

- (j) Nothing in the Compact is intended to have any impact on the rights and obligations of a Member outside the auspices of the Compact or on the rights and obligations of any Non-Member whatsoever.

**NOW, THEREFORE, in consideration of the mutual agreements and undertakings contained herein, the Members do hereby agree as follows:**

## **CHAPTER I. SCOPE, PURPOSE AND TERMINOLOGY**

### ***Article 1: Scope and Purpose***

- 1.1 The Compact is voluntarily formed, and shall be maintained and operated for an indefinite period.
- 1.2 The Compact's purpose is to provide States with an efficient and effective means for obtaining Response, under the specific terms and conditions of the Compact, in the event that Damage to Biological Diversity is Caused by the Release of an LMO by a Member.
- 1.3 The Compact is not and does not create a legal entity, but rather defines the respective contractual rights and obligations of Members with regard to its specific subject matter and processes. Nothing in the Compact shall be deemed to create a partnership or joint venture and/or principal and agent relationship between or among Members. The Compact does not constitute a commitment or agreement, either expressed or implied, by any or all of the Members to undertake any specific or future action in concert with one another not approved in strict accordance with the terms and conditions of the Compact.
- 1.4 The Compact respects State sovereignty; complements domestic and international laws on redress for damage to biological diversity; and does not and cannot derogate from the ability of a State to pursue any claim for such damage under applicable domestic or international laws.
- 1.5 Nothing in the Compact limits any citizen of a State from making representations to the State regarding alleged Damage to Biological Diversity or the right or any obligation of the State to submit a Claim in accordance with the Compact. Nothing in the Compact

limits any citizen of a State from bringing any action allowed by the domestic law of the State to compel the State to submit a Claim under the Compact.

- 1.6 Nothing in the Compact affects the rights of any citizen of a State to bring any action permitted under applicable law. Recovery in such an action of Traditional Damages resulting from an Incident of Damage to Biological Diversity does not constitute double or multiple recovery under the Compact.
- 1.7 The Compact does not affect the rights and obligations of Members outside of the specific subject matter and processes of the Compact. Whether expressly or by implication, (a) no provision of the Compact, (b) no action taken, proceeding, or finding or decision made as a result of the implementation of, or under the processes of, the Compact and (c) no Compact-Related Material, shall be used, including offering it for admission as evidence, by a Member in any other context, including proceedings under the regulatory or administrative process, or civil or criminal liability systems, of any State or jurisdiction, provided that, subject to the law and evidentiary rules of the forum, a Member may use or offer as evidence Compact-Related Material (including an award by a Tribunal in favour of the Member) in the event that a State has lost a Claim before a Tribunal under the Compact and then seeks redress against the Member in another forum for the same Incident of Damage or with respect to issues resolved in an award by the Tribunal.
- 1.8 Whether expressly or by implication, no provision of the Compact, no action taken, proceeding, or finding or decision made as a result of the implementation of, or under the processes of, the Compact and no Compact-Related Material shall affect the rights or obligations of a Non-Member except to the extent that such Non-Member, by its written consent consistent with the terms and conditions of the Compact, elects to participate in the Claims or Assessment and Arbitration Process.
- 1.9 The Compact does not affect the rights or duties of a Member to (a) communicate with any governmental entity or regulatory authority concerning any issue relating to the Member, or (b) satisfy any legal or regulatory obligation.

- 1.10 The Compact sets forth in Appendix H the antitrust policy adopted by the Members. This policy shall be complied with, at all times, by all bodies established under the Compact, its Members, and any outside consultants and/or experts that may be retained from time to time within the context of Compact activities.

***Article 2: Terminology***

- 2.1 This Article contains definitions and determinations for terms used in the Compact. Terms defined in the Convention and the Protocol that are used in the Compact but are not defined herein shall be defined as they are in the Convention and the Protocol as of the Effective Date of the Compact. All other terms shall have their plain, ordinary meaning, including any terms defined under the Convention or the Protocol after the Effective Date of the Compact.
- 2.2 To facilitate the reading of the text of the Compact, some definitions in the Convention or Protocol are repeated in identical terms in the Compact. Where the definition used herein is not identical to a definition in the Convention or Protocol, the definition in the Compact is controlling.
- 2.3 A word importing the singular shall be read as also importing the plural and a word importing the plural shall be read as also importing the singular, if applicable in the context. The use of a verb in the present tense shall include the future, if applicable in the context.
- 2.4 The following are definitions and determinations for terms used in the Compact:
- i. Act of God: A natural phenomenon of exceptional, inevitable and irresistible character (e.g., an earthquake, flood, or tornado). Transformation creating an LMO, subsequent changes which result directly from that transformation, and pollen flow are not Acts of God.
  - ii. Advisory Committee: The committee established in Article 5 of the Compact.
  - iii. Adventitious Presence: The incidental presence of foreign material (including an LMO) in an agricultural product at levels that could reasonably be expected to be

present when using generally accepted or legally required agricultural, manufacturing, handling, distribution and use practices. For the purposes of the Compact, Adventitious Presence includes the presence of an Authorised or of an Unauthorised LMO. Any validly detected LMO which is present as the result of Misuse is not Adventitious Presence. For purposes of the Compact only, a Member is responsible for the Adventitious Presence of an LMO released by that Member.

- iv. Affiliate: A legal person or entity (including an association, joint venture, joint stock company, trust, unincorporated organization or any government or regulatory, administrative or political subdivision or agency, department or instrumentality thereof), excluding a natural person, that directly or indirectly through one or more intermediates, owns, controls, or is controlled by, or is under common control with, a Member. For purposes hereof, the term “control” (including “controlled by” and “under common control with”) means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise.
- v. Assessment and Arbitration Process: The process for the determination of a Claim set forth in Chapter VI.
- vi. Authorisation Holder: The Member(s) or Non-Member(s) who hold(s) an authorisation or approval for an LMO. The terms “Authorisation” and “Authorised” are used to express the rules on Authorisation Holder in the Compact.
- vii. Baseline: The state of Biological Diversity of a Species or Ecosystem alleged to be Damaged determined to exist prior to the change in Biological Diversity alleged to have been Caused by the Release of the LMO subject to the Claim. Evidence to establish the Baseline must be Science-Based and, at a minimum, must be consistent with Science-Based evidence necessary to establish baseline

<sup>3</sup> Evidence or data used to establish the Baseline may be gathered during the investigation of alleged Damage to Biological Diversity and must be from the twenty-five years immediately preceding the date when the alleged Significant and Adverse Change occurred.

- viii. Biological Diversity: The variability among living organisms from all sources including, *inter alia*, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part; this includes diversity within Species, between Species and of Ecosystems.
- ix. Bylaws: Those rules set forth in Appendix A to the Compact.
- x. Causation: Causation is a determination that the Release of an LMO is the Cause-in-fact and proximate Cause of Damage to Biological Diversity. A determination of Causation requires that (a) general causation exists, i.e., the change can generally be caused by the specifically identified LMO, (b) specific causation exists, i.e., the Damage to Biological Diversity is Caused by (would not have occurred *but for*) the Release of the specifically identified LMO, and results directly from the phenotypic or genotypic modification to that LMO; and (c) there is no superseding event or logically unrelated or remote event that alters the chain of events that otherwise might have connected the Release of that LMO to the Damage to Biological Diversity. The terms “Caused,” “Cause”, “Causally” or “Causing” are used to express the rules on Causation in the Compact.
- xi. Claim: A statement by a State asserting a right to Response under the terms and conditions of the Compact.
- xii. Claim Form: The form set forth in Appendix C to the Compact.
- xiii. Claims Process: The processes set forth in Article 14 of the Compact.

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<sup>3</sup> See, for example, <http://www.cbd.int/tourism/guidelines.shtml?page=1>: “Baseline information is necessary to enable informed decisions to be taken on any issue. A minimum of baseline information is needed to enable impact assessment and decision-making and it is recommended that its compilation follow the ecosystem approach.”

- xiv. **Commissioner:** A person appointed as a Commissioner under the PCA's Optional Rules for Fact-Finding Commissions of Inquiry ("PCA Fact-Finding Rules") as modified by the Bylaws.
- xv. **Compact-Related Material:** Any information, document, evidence, testimony, or other material created, obtained, or disclosed solely for the preparation or pursuit of a Claim under the Compact or solely in the course of Compact-related activities. Compact-Related Material does not include (a) evidence adduced by a State in investigating an Incident of Damage to Biological Diversity or in preparing a Claim for submission, or (b) documents created in the ordinary course of business even if they are used in connection with a Claim.
- xvi. **Conciliator:** The person appointed as a Conciliator under the PCA's "Optional Rules for Conciliation of Disputes Relating to Natural Resources and/or the Environment" (PCA Environmental Conciliation Rules), as modified by the Bylaws.
- xvii. **Consensus:** No Member (or in the case of a State or organisation on the Advisory Committee, no representative) objects to a proposed outcome or result.
- xviii. **Damage to Biological Diversity:** Damage to Biological Diversity is a determination made under Chapter III of the Compact. The term "Damage" is used to express the rules on Damage to Biological Diversity in the Compact.
- xix. **Ecosystem:** A dynamic complex of plant, animal and micro-organism communities and their non-living environment interacting as a functional unit limited, for purposes of the Compact, to the extent of the natural habitat or natural range of a Species alleged to be Damaged.
- xx. **Executive Committee:** The committee made up of representatives of each Member of the Compact to discharge the activities set forth for it in the Compact and its Bylaws. The names of the persons on the Executive Committee appear in



Appendix F to the Compact which will be updated periodically as provided for in the Bylaws.

- xxi. Executive Director: The person appointed as the Executive Director under the Compact responsible for day-to-day operations of the Compact under the direction of the Executive Committee as set forth in the Compact and its Bylaws.
- xxii. Good Standing: A Member who satisfies the criteria for membership set forth in the Compact and its Bylaws including (a) meeting all of its financial obligations under the Compact and Bylaws, (b) not being in default as that term is used in the Bylaws (c) not having given notice of Withdrawal under the Bylaws, and (d) fulfilling the stewardship and risk management requirements in Article 3 of the Compact.
- xxiii. Incident: All Damage to Biological Diversity resulting from an event of Damage arising out of the same facts and circumstances. All Damage in each of the following examples constitutes a single Incident:
  - a. Damage in an Ecosystem that is of the same type;
  - b. Damage that is from the Release of an LMO in an Ecosystem;
  - c. Damage that affects more than one, but contiguous States;
  - d. Damage that involves one Species which migrates or moves among States;
  - e. Damage that affects more than one Species in an Ecosystem; or
  - f. Damage that is Caused by two or more LMOs (e.g., transformation events or event/crop combinations).

Claims for Response by two or more States from a single Incident shall be consolidated as provided in Chapter VI of the Compact.

- xxiv. Least Developed Country: A State recognised by the United Nations' Office of the High Representative for the Least Developed Countries, Landlocked Developing Countries and Small Island Developing States as such (<http://www.unohrls.org/en/ldc/related/62/>).
- xxv. Legal Due Process: This term defines the procedural and substantive requirements necessary to safeguard against unjust or arbitrary deprivation of legal rights or property. Minimum requirements for adequate Legal Due Process include: (1) an unbiased tribunal; (2) notice of a claim and the grounds asserted for it; (3) an opportunity to present evidence and arguments to support one's position; (4) provision of adequate time for preparation of a claim or defence; (5) the right to call witnesses; (6) the right to know the evidence against one; (7) the right to have a decision based only on the evidence presented; (8) the right to counsel of the Member's or State's choosing and to confidentiality of counsel-client communications; (9) the making of a record; (10) the right to a hearing; (11) a statement of reasons for a decision; (12) the availability of judicial review to the extent provided by law applicable under the Compact; and (13) the right to assistance of an interpreter if the Member or State cannot understand or speak the language used before a tribunal.
- xxvi. Living Modified Organism ("LMO"): Any living organism that possesses a novel combination of genetic material obtained through the use of modern biotechnology, provided that an LMO incorporates and expresses one or more specific transformation event(s) in a plant or animal including sterile organisms, viruses and viroids, and the progeny thereof which express the event(s).
- xxvii. Measurable Change: The quantum of change from the Baseline as determined in Article 7 of the Compact.
- xxviii. Megadiverse Country: One of the following seventeen countries which formed in 2002 a group entitled, "Like-Minded Megadiverse Countries" (see [http://www.lmmc.nic.in/prologueLmmc\\_new.php?Section=two](http://www.lmmc.nic.in/prologueLmmc_new.php?Section=two)): Bolivia, Brazil, China, Colombia, Costa Rica, Democratic Republic of Congo, Ecuador, India, Indonesia, Kenya, Madagascar, Malaysia, Mexico, Peru, Philippines, South

Africa and Venezuela. This group collectively holds more than 70% of the world's biodiversity and 45% of the world's population.

- xxix. Member: A signatory to the Compact. The named Member shall represent Affiliates for all purposes of the Compact and only the named Member can speak for all of its Affiliates. All Affiliates, through their related Member, are bound by the obligations, and are entitled to the rights, of the Compact.
- xxx. Misuse: Misuse is a determination established under Article 10 of the Compact.
- xxxi. Mutual Agreement For Binding Arbitration ("Arbitration Agreement"): The mutual written agreement between a State and a Member to resolve the Claim filed by the State in accordance with the terms and conditions of the Compact.
- xxxii. Non-Member: A natural or legal person who is not a Member.
- xxxiii. Operating Costs: Those costs defined in the Bylaws.
- xxxiv. Permanent Court of Arbitration ("PCA"): The intergovernmental organization first established by the 1899 Convention for the Pacific Settlement of International Disputes which provides services for the resolution of disputes involving various combinations of States, State entities, intergovernmental organizations, and private parties. The PCA is the body which shall administer all Claims under the Compact.
- xxxv. Place on the Market: The action of intentionally making available an LMO for any use in a State. Making available can be *inter alia* for commercial gain or free of charge, or a charitable contribution, and can be based on any type of legal instrument, including through licensing. Notwithstanding whether a Member Placed an LMO on the Market, a Member does not Place on the Market a generic or bioequivalent version of that LMO which another person or entity Places on the Market in that State. Placing an LMO on the Market in a State shall be considered to be Placing on the Market in every State to which that LMO would lawfully move in the ordinary course of export, transit, import, handling,

processing, sale, distribution or use, unless that movement is or results from Misuse. For purposes of the Compact, absent Misuse, a Member whose Unauthorised or Adventitiously Present LMO is Released shall be deemed to have Placed that LMO on the Market. The terms “Places on the Market” or “Places the LMO on the Market”, “Placed on the Market” or “Placed the LMO on the Market” and “Placing on the Market” have the same substantive meaning.

- xxxvi. Plan: The means for remediating Damage to Biological Diversity pursuant to Article 9 of the Compact.
- xxxvii. Plausible Evidence: Facts that support the reasonable inference that a Claim may result in a finding that a Member is responsible to Respond. Plausibility requires more than mere assertions and conclusions, a formulaic recitation of the elements of a Claim, or the mere possibility that a Member might be responsible to Respond.
- xxxviii. Proportional Responsibility: The percentage (zero to one hundred) of Damage to Biological Diversity attributed to a Cause of that Damage or to a defence.
- xxxix. Protected Area: An area of land or sea, under the Convention and domestic law consistent with or implementing the Convention, specially dedicated to the protection and maintenance of biological diversity in compliance with The World Conservation Union's ("IUCN") definitions for protected areas: Strict Nature Reserve, Wilderness Area, National Park, Natural Monument, Habitat/Species Management Area, Protected Landscape/Seascape, and Managed Resource Protected Area. The United Nations Environment Programme World Conservation Monitoring Centre maintains a world database ("Database") of protected areas at <http://www.wdpa.org/wdpamap.aspx>. Any area recognized on that Database as protected shall qualify as a Protected Area under the Compact if it meets the requirements of this provision. Where the area in question is not in the Database, the Tribunal will make the determination as to whether the area complies with the IUCN definitions for protected areas and the requirements of this definition such that it may be considered a Protected Area under the Compact.

- xl. Public Health: The physical health and well-being of a whole community as managed by the responsible governmental bodies or agencies in a State. Under the Compact, an impact on Public Health requires an imminent and substantial endangerment to the physical health and well-being of the whole community.
- xli. Release: Any instance in which an LMO enters the environment.

Placing on the Market that results in an LMO entering the environment is a Release in that State.

Release of an LMO may also occur *inter alia*, (1) during research and development (including field trials) or production; (2) during export, transit, import, handling, processing, sale, distribution, planting, or use; or (3) from unintentional transboundary movement. For the purposes of the Compact, a Release occurs during export, transit, import, handling, processing, sale, distribution, planting or use only if there is Misuse in the course of that activity. Becoming an Authorisation Holder is not a Release *per se*.

- xlii. Remediation End Point: The state of Biological Diversity that is the goal of the Plan for remediation of the Species or Ecosystem alleged to be Damaged, where:
  - (a) population dynamics data for the Species alleged to be Damaged demonstrate that the Species can maintain itself on a long-term basis as a viable component of the Ecosystem;
  - (b) the natural range of the Species has been increased to a sustainable level;
  - (c) a sufficient habitat exists to maintain the Species on a long-term basis;
  - or (d) one or more other Species in the affected Ecosystem related to or dependent upon the Species alleged to be Damaged can maintain itself on a long-term basis as a viable component of the Ecosystem.
- xliii. Response: Remediation, compensation, or a combination thereof, as determined in accordance with Article 9 of the Compact. Response excludes Traditional Damages, which are not recoverable under the Compact from a Member under any circumstances. A Member's obligation to Respond under the Compact is calculated by, and may not exceed, the Member's Proportional Responsibility

times the total cost of Response. The terms “Responds” or “Responding” are used to express the rules on Response in the Compact.

- xliv. Science-Based: The peer-reviewed, published and generally accepted scientific methodology used in the relevant scientific community of endeavour (such as genetics, ecology, microbiology, species population dynamics, and social sciences). The methodology must consist of a testable hypothesis, existence and maintenance of standards controlling the technique’s operation, and an acceptable known or potential rate of error, and the results must be repeatable. Science-Based evidence must be used in the determination of each element of a Claim for Response and presented by an expert witness qualified to present the evidence.
- xlv. Significant and Adverse Change: The determination of a Significant and Adverse Change is set forth in Article 8 of the Compact.
- xlvi. Small Island Developing State: A State recognised by the United Nations’ Office of the High Representative for the Least Developed Countries, Landlocked Developing Countries and Small Island Developing States as such (<http://www.un.org/special-rep/ohrls/sid/list.htm>).
- xlvii. Special Drawing Right (“SDR”): The unit of account of the International Monetary Fund (“IMF’s”), the value of which is posted daily on the IMF’s website ([www.imf.org/external/np/fin/data/rms\\_sdrv.aspx](http://www.imf.org/external/np/fin/data/rms_sdrv.aspx)).
- xlviii. Species: Any member of an Ecosystem and any major subdivision of a genus or subgenus, regarded as the basic category of biological classification, composed of related individuals that resemble one another, and are able to breed among themselves.
- xlix. Standard of Proof: The Standard of Proof is clear and convincing evidence for each element of a Claim and for defences. Clear and convincing evidence is that measure or degree of proof that will produce in the mind of the decision maker a firm belief or conviction as to the truth of the allegations sought to be

established. The level of proof required to satisfy that standard is more than that required under a preponderance of the evidence, but less than that required for proof beyond a reasonable doubt.<sup>4</sup> The Standard of Proof for other fact issues, including determination of Proportional Responsibility, shall be the preponderance of the evidence standard.

The burden of demonstrating that the Standard of Proof has been met will be borne by: (a) a State with respect to a Claim, (b) a Member with respect to a defence, or (c) a Member with respect to establishing Proportional Responsibility.

1. State: Any country which is a member of the World Trade Organization (as may be listed at [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm)) or which is a Member State of the United Nations (as may be listed at <http://www.un.org/members/list.shtml#p>).
- li. Technical Consultant: An independent technical expert (individual or company), such as an ecologist, biologist, environmental economist, accountant or lawyer, engaged by the Executive Committee, Executive Director or Technical Committee to provide technical, financial or legal analysis and assistance in carrying out the purposes of the Compact. The costs of any such Technical Consultant, if appointed, are Operating Costs of the Compact. Any Technical Consultant appointed will be required to sign a separate non-disclosure agreement as provided for in Appendix G to the Compact.
- lii. Technical Committee: A subcommittee to the Executive Committee established under the Compact to discharge the activities set forth for it in the Compact and the Bylaws. The names of the persons on the Technical Committee appear in

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<sup>4</sup> This is the same standard of proof adopted in the *Trail Smelter* decision in which the Tribunal held that “under the principles of international law, as well as the law of the United States, no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.” Compendium of Decisions on the Environment, International Decisions (December 1998, [http://www.unep.org/padeli/publications/Jud.dec.%20pre\(Int%20.pdf](http://www.unep.org/padeli/publications/Jud.dec.%20pre(Int%20.pdf))).

Appendix F to the Compact which will be updated periodically as provided for in the Bylaws.

- liii. Traditional Damages: Personal injury damages, property damages, economic loss, lost profits, loss of income, and special, consequential, incidental, derivative, compensatory, non-economic, exemplary or punitive damages. These measures of damages are Traditional Damages under the Compact whether or not recognised under a State's civil liability system.
  - liv. Tribunal: In the case of a Claim, an arbitral tribunal appointed pursuant to the Optional Rules for Arbitration of Disputes Relating to the Environment and/or Natural Resources" (PCA Environmental Arbitration Rules) as modified by the Bylaws. In the case of resolution of a dispute among Members under Article 24.8 of the Compact, an arbitral tribunal formed under the International Dispute Resolution Procedures of the American Arbitration Association administered by the International Centre for Dispute Resolution.
  - lv. Withdrawal: The procedure set forth in Article 23 of the Compact and in the Bylaws by which any Member withdraws from the Compact.
- 2.5 These definitions and determinations will be reviewed as may be necessary but, at a minimum, every five years following the Effective Date, and amended as appropriate based on advancements in scientific information and knowledge and on experience with the Compact.

## **CHAPTER II. MEMBERSHIP AND ADVISORY COMMITTEE**

### ***Article 3: Criteria for Membership and Stewardship of LMOs***

- 3.1 The Members shall seek to achieve broad Compact membership. Membership in the Compact shall be open to all entities with legal personality and capacity (natural and legal persons) who may Release LMOs and who satisfy the criteria set forth in this Article and in the Bylaws. Non-compliance with the requirements of this Article only affects the membership status of a Member, and does not affect that Member's responsibility to Respond under the Compact.



- 3.2 The Bylaws elaborate the process for applications by and acceptance and inclusion of new Members after the Effective Date. Applications for membership after the Effective Date will be considered by the Executive Committee in accordance with the procedures set forth in the Bylaws. The Bylaws will also set forth rules and processes for the full integration of new Members, with provision for transitional measures where necessary in order to assure efficient and uninterrupted operation of all bodies established under the Compact.
- 3.3 The Bylaws will also provide for processes to facilitate the membership of small and medium sized enterprises (“SMEs”) and entities engaged in public and private research, consistent with one of the fundamental Compact objectives of achieving broad and open membership. Should facilitating such membership require an amendment of the Compact or its Bylaws, the Executive Committee will actively consider and adopt necessary amendments, taking into account recommendations of the Advisory Committee.
- 3.4 Where the Executive Committee denies a membership application, it will provide a written statement of reasons for so doing, including the reasons the application did not satisfy the criteria set forth in this Article. An unsuccessful applicant may resubmit an application when it can satisfy the criteria in this Article.
- 3.5 All Members must demonstrate their capacity to meet their potential financial obligations for Response. Such financial capacity may be demonstrated in any reasonable manner, including proof of self-insurance. The Members shall also seek to encourage the development of commercial insurance for Response obligations. The Executive Committee will establish, through the Bylaws, criteria for determining whether applications for membership demonstrate such financial capacity and in so doing shall take the advice of an appropriate Technical Consultant. When considering an application for membership particular care will be taken to assure, consistent with Appendix H to the Compact, that no discussion or exchange of commercially sensitive information occurs.
- 3.6 Members must comply at all times with objective industry stewardship obligations either (a) applicable to that Member under the “Excellence Through Stewardship”<sup>sm</sup> Program (“ETS”), or (b) applicable to that Member under such other industry stewardship

programs, best practices, or standards that are recognized by the Executive Committee. The Compact recognizes the application of ETS to Members who are technology providers. Compliance with objective industry stewardship obligations (e.g., the ETS) means that the Member meets the criteria or standards of those industry stewardship obligations based upon an independent third party audit or upon the use of any other appropriate neutral process that verifies compliance.

- 3.7 Members who are Authorisation Holders must:
- (a) perform rigorous assessments of all potential risks to the environment, ecologies and Biological Diversity consistent with (i) Annex III of the Protocol, (ii) best industry practices and (iii) regulatory requirements for the States where the Member seeks Authorisation to Release the LMO; and
  - (b) publish a summary of the risk assessment, and seek to have the State where the LMO is Authorised place that summary on the Biosafety Clearing House. The publishing of that summary shall not constitute the waiver of any privilege that may attach to information or documents used or referred to in the creation of that summary.
- 3.8 When a Member becomes aware of an allegation of Damage to Biological Diversity Caused by a Release of an LMO by that Member, that Member shall, as appropriate, investigate and take the following risk management measures:
- (a) reassess the environmental, ecological and biological diversity risks of that LMO and complete such reassessment as promptly as possible using good faith reasonable efforts, taking into account the Damage to Biological Diversity allegedly Caused by that LMO;
  - (b) notify and consult with the competent authority, including the agency that granted the authorization for that LMO, of any State where the Damage to Biological Diversity allegedly Caused by that LMO is alleged to have occurred; and
  - (c) to the extent practicable, take all necessary and appropriate measures to (i) prevent, (ii) minimize, limit and mitigate, or (iii) avoid recurrence of, any Damage to

Biological Diversity. Such measures may include removing that LMO (e.g., where its continued presence presents substantial risks of Causing the same or similar alleged Damage to Biological Diversity). Reasonable, necessary and fully-documented costs incurred by a Member under this Article 3.8 to minimize, limit and mitigate Damage to Biological Diversity that becomes the subject of a Claim under the Compact shall be counted in determining the financial limits applicable under the Compact.

**Article 4: General Rights and Obligations of Membership**

- 4.1 Members accept all of the terms and conditions of the Compact, and agree to the submission of any Claim against the Member to binding arbitration administered by the PCA as provided for in the Compact.
- 4.2 Members will carry out their obligations under the Compact in good faith. A Member against whom Response is sought in a Claim shall execute the Arbitration Agreement executed by the State to initiate the Claims and Assessment and Arbitration Processes under the Compact. The Member's execution of the Arbitration Agreement shall occur within the time period set forth in Article 14.4. By executing the Compact, each Member hereby appoints the Executive Director of the Compact as its agent to execute the Arbitration Agreement on behalf of the Member if the Member fails to timely sign the Arbitration Agreement.
- 4.3 A Member identified in a Claim shall recuse its representatives from any participation in any activity under the Compact regarding or which could directly affect the outcome of that Claim.
- 4.4 Nothing in the Compact prohibits Authorisation Holders, Members or Non-Members from entering into agreements which provide for indemnification or allocation of respective responsibilities for the costs of fulfilling the duty to Respond. Such agreements may allow for the indemnifying or cost-bearing party to defend a Claim against a Member. Such agreements shall have no bearing on a State's right to assert a Claim against a Member.

4.5 Nothing in the Compact shall affect the right of any Member to recover contribution or indemnification for Response from any other Member or Non-Member.

4.6 A Member who ceases to be a Member for any reason, including dissolution, is responsible for completing any outstanding Response obligations. If a Member ceases to be a Member after submission of a Claim against it and before that Claim is concluded, that Member shall remain obligated to provide any Response required pursuant to the provisions of the Compact. A Member cannot withdraw from, or trigger its own default under, the Compact in order to avoid a Claim.

**Article 5: Formation and Participation of Advisory Committee**

5.1 The Executive Committee will form an Advisory Committee. The Advisory Committee shall be a standing committee as set forth in the Compact and its Bylaws, which set forth the composition and the rules and procedures for the Advisory Committee.

5.2 The Advisory Committee shall consist of representatives of States, SMEs, entities engaged in public and private research, non-governmental organisations, Members and other stakeholders (e.g., grain traders, processors, and growers).

5.3 The Advisory Committee will provide advice and counsel to the Executive Committee on appropriate criteria to facilitate membership in the Compact of SMEs and entities engaged in public and private research. In particular, it will identify concepts, approaches, means, or processes to:

(a) assess the extent of the potential risk posed by the activities in which an SME or a public and private research entity is engaged, in the event that the SME or such entity applies for membership,

(b) assess the SME or such entity's potential exposure for Responding and determine appropriate financial obligations under the Compact relative to such potential exposure; and

(c) enable an SME or such an entity to satisfy these financial obligations.

- 5.4 The Members believe that as long as commercial insurance or financial support for potential obligations of SMEs, and public or private research entities to Respond is not available or affordable, the Compact's membership goals will be difficult or impossible to achieve. For this reason, the Advisory Committee will provide advice to the Executive Committee on encouraging the development of commercial insurance for the Compact's contractual obligations, particularly obligations to Respond.
- 5.5 The Advisory Committee will provide advice to the Executive and Technical Committees on the criteria for the selection and identification of neutrals for the roster in Appendix D and of independent science experts for the roster in Appendix E.
- 5.6 The Advisory Committee will provide advice on membership, obligations of Members and States, and on any other matter set forth in the Compact or assigned to it by the Executive Committee.

### **CHAPTER III. DAMAGE TO BIOLOGICAL DIVERSITY**

#### ***Article 6: Obligation for Damage to Biological Diversity***

- 6.1. Each Member undertakes and agrees to Respond to Damage to Biological Diversity Caused by the Release of an LMO by that Member in accordance with the terms and conditions of the Compact.
- 6.2 Damage to Biological Diversity gives rise to Response only where it is a Measurable, Significant and Adverse Change in a Species or a Measurable, Significant and Adverse Change in a Species or Ecosystem that results in a loss of a natural resource service essential to sustain any Species.

#### ***Article 7: Baseline and Measurable Change to Biological Diversity***

- 7.1. Damage to Biological Diversity is determined by comparing the nature and quantum of change in the Species or Ecosystem from the Baseline. To determine if there is a Measurable Change in Biological Diversity, the Baseline must first be established. Then the conditions alleged to represent change or Damage must be compared to that Baseline to verify that there has been a Measurable Change from the Baseline. If Measurable

Change has occurred, it must then be determined whether the Measurable Change is Significant and Adverse as provided in Article 8.

- 7.2. The determination of the Baseline and the comparison of the Baseline to the conditions alleged to represent change or Damage shall be based on Science-Based evidence, including an assessment of *inter alia* the following:
- (a) the nature and characteristics of the Species;
  - (b) the natural range/distribution of Species and the naturally occurring fluctuation in numbers and distribution of the Species over time;
  - (c) the interaction of the Species within the Ecosystem and the Species' capacity for natural regeneration;
  - (d) the Species' capacity for propagation;
  - (e) the Species' capacity for recovery within a reasonable period of time under natural restorative forces; and
  - (f) the functionality or natural resource service provided by the Species.

**Article 8: Significant and Adverse Change**

- 8.1 Measurable Change under Article 7 is a Significant and Adverse Change only when, as a result of that change:
- (a) population dynamics data for the Species alleged to be Damaged demonstrate that the Species cannot maintain itself on a long-term basis as a viable component of its natural habitat;
  - (b) the natural range of the Species has been reduced to an unsustainable level;
  - (c) a sufficient habitat no longer exists to maintain the Species on a long-term basis; or

(d) one or more other Species in the affected Ecosystem related to or dependent upon the Species alleged to be Damaged cannot maintain itself on a long-term basis as a viable component of the Ecosystem.

8.2 In assessing whether there has been Significant and Adverse Change, the Tribunal shall take into consideration the life histories of the Species, which may demonstrate naturally occurring changes over time (increases and decreases) in population census, geographical distribution, gene frequency, and other biological parameters. Such naturally occurring changes in these or other parameters are not Significant and Adverse Change *per se*, as they may be necessary for the adaptation of the Species or the natural evolution of the Ecosystem. Also, such changes may be a factor in the determination of whether Significant and Adverse Change has occurred but are not sufficient in and of themselves to establish such Significant and Adverse Change.

8.3 The following are examples of changes to a Species that are not Significant and Adverse Changes *per se*:

(a) a change in Biological Diversity which is within the historical or expected range of fluctuations regarded as “normal” for the Species;

(b) a change in Biological Diversity due to natural causes or resulting from intervention relating to the normal management of the Ecosystem;

(c) a change in Biological Diversity for which it is determined that any resulting reduction in numbers or distribution of Species will be reversed or will recover due to natural restorative forces to the Remediation End Point or to a condition which leads, solely by virtue of the dynamics of the Species or its Ecosystem, to a condition at least equivalent to the Remediation End Point;

(d) a change in Biological Diversity which is consistent with the risk assessment, and results from the intended use, of the LMO authorised by the State (e.g. the reduction or loss of the target pest Species);

- (e) a change in the genetic content of a Species that does not significantly impact its functionality, interactions within its Ecosystem or its conservation status;
- (f) the mere presence of an LMO or unique genetic elements from an LMO in the Species or within the Ecosystem; or
- (g) a change in Biological Diversity resulting from actions, activities or events which would have occurred even if the LMO's unmodified counterpart was used (e.g. the conventional crop of the same Species as the LMO crop).

**Article 9: Proof of Response**

- 9.1 Response shall only be in the form of remediation, compensation, or a combination thereof pursuant to this Article 9.
- 9.2 Remediation is the preferred form of Response. Where the State seeks remediation, the State shall propose a Plan and the Member may offer an alternative Plan, containing, at a minimum the elements set forth in this Article 9.2. Absent agreement on the Plan by the State and Member, the Plan will be determined by the Tribunal in accordance with the following:
- (a) The Plan shall be designed to achieve the Remediation End Point and be based on Science-Based evidence. The Plan shall not exceed that which is necessary to achieve the Remediation End Point.
  - (b) The Plan shall take into account the characteristics of the Ecosystem in which Damage is alleged to have occurred, such as whether it is (i) a Protected Area, (ii) a centre of origin,<sup>5</sup> or (iii) a developed, industrialized or degraded Ecosystem.
  - (c) The Plan shall take into account negative impacts, if any, on Public Health or on an Ecosystem proven to have been Caused by the Damage to Biological Diversity.

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<sup>5</sup> The phrase "centre of origin" comes from the work of a Russian botanist, Nikolai Vavilov, who attempted to determine the location where various cultivated plants originated. Proof of a centre of origin under the Compact must be established by Science-Based evidence.



- (d) The Science-Based determination of the scope, methods and processes of a Plan may consider as appropriate the precautionary approach as it is described in Principle 15 of the Rio Declaration. For the Plan to include a different scope, method or process for a related or dependent Species (Ecosystem approach) than the scope, method or process for the Damaged Species, Science-Based evidence must demonstrate that impacts to related or dependent Species require such a different scope, method or process.
- (e) The Plan shall take into account benefits from the Release of the LMO in accordance with Article 9.5 of the Compact.
- (f) The Plan shall include detailed costs of implementing the Plan, which shall be reduced to present value. The discount rate used in making a present value calculation shall be determined as set forth in the Bylaws. The costs shall be calculated in the currency of the State receiving an award and the total costs shall be converted to SDR for the purposes of the financial limits in Article 13 of the Compact.
- (g) The Plan shall incorporate a mechanism for the Tribunal to address any future requests for amendments to the Plan that are agreed to by the parties or are the subject of contention between the State and Member.
- 9.3 Compensation is only available when (a) remediation is not possible; (b) it is not technically or financially feasible to achieve the Remediation End Point; (c) the cost of implementing the Plan exceeds the economic value of the Damage to Biological Diversity; or (d) the Tribunal determines that compensation is appropriate under this Article 9 of the Compact.
- 9.4 Where the State seeks compensation, the amount of compensation shall be determined through a valuation method<sup>6</sup> based on objective processes and objective criteria. The valuation:

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<sup>6</sup> The Secretariat of the Convention on Biological Diversity has published a manuscript entitled, *An Exploration of Tools and Methodologies For Valuation of Biodiversity and Biodiversity Resources and Functions*,” as

- (a) shall be supported by Science-Based Evidence;
- (b) shall take into account an assessment of the loss of functionality, value, use or natural resource services from the Species resulting directly from and attributable only to the change from the Baseline and any projected future loss of function, value, use and natural resource services; the effect of such loss on established domestic customs and the characteristics of the Ecosystem where Damage to a Species has occurred, such as whether it is (i) a Protected Area, (ii) a centre of origin<sup>7</sup>, or (iii) a developed, industrialized or degraded Ecosystem;
- (c) shall take into account the provisions of Article 7 of the Compact;
- (d) shall take into account negative impacts, if any, on Public Health or on an Ecosystem proven to have been Caused by the Damage to Biological Diversity;
- (e) shall take into account benefits from release of the LMO;
- (f) shall take into account the cost of remediation; and
- (g) shall be calculated in the currency of the State receiving compensation and shall be converted to SDR for the purposes of the financial limits in Article 13 of the Compact.

9.5 In determining Response, the Tribunal shall take into account:

- (a) all benefits resulting from the Release of the LMO, including any increase in the function, value, or natural resource services of or to the Species, any other Species or the Ecosystem compared to any loss of function, value, or natural resource service of the Damaged Species;

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CBD Technical Series No. 28, containing case studies of the application of valuation methodologies described in the manuscript and which may be applicable in the Assessment and Arbitration Process if consistent with the terms and conditions of the Compact.

<sup>7</sup> See note 5.

- (b) whether natural restorative processes would in a reasonable period of time reverse any such loss; and
- (c) whether remediation would eliminate or substantially reduce the benefits from the Release of the LMO.

Any Response Plan shall be tailored to preserve such benefits resulting from the Release of the LMO. If the Plan cannot be so tailored, the Tribunal shall determine Response *ex aequo et bono*, including appropriate remediation, a combination of remediation and compensation, compensation instead of remediation or no compensation or remediation.

- 9.6 Response, including an *ex aequo et bono* Response, under this Article 9 is subject to the financial limits on Response set forth in Article 13 of the Compact.

#### **CHAPTER IV. DEFENCES AND TIME LIMITATIONS**

##### ***Article 10: Defences***

- 10.1 Defences shall be used by the Tribunal solely to adjust the Proportional Responsibility of the Member(s) and of any Non-Member(s) who has elected to participate in the adjudication of a Claim. No defence can establish legal responsibility of a Non-Member, unless that Non-Member has elected to participate in the adjudication of a Claim.
- 10.2 The Member alleging a defence shall have the burden of proving that defence in accordance with the Standard of Proof. The Tribunal shall determine the percentage of Damage to Biological Diversity attributable in the aggregate to defences raised.
- 10.3 The only defences that can be raised by a Member in a Claim for Damage to Biological Diversity are:
- (a) an Act of God;
  - (b) an act of war or civil unrest;

- (c) Misuse of an LMO (as determined in accordance with Article 10.4 below and subject to Articles 12.2 and 12.3 of the Compact);
  - (d) compliance with compulsory measures imposed by the State (other than necessary and appropriate preventive or remedial measures related to the LMO);
  - (e) realization of a risk
    - (i) specifically assessed by the Authorisation Holder in compliance with Annex III of the Protocol (including those risks for which management measures were proposed in the risk assessment), where
      - (1) the risk assessment was accepted by the State (recognizing that the State does not assume responsibility for such risk) with or without management measures imposed by the State, and
      - (2) the State granted an Authorisation for that LMO to the Member under the applicable domestic law or regulations of the State, or pursuant to the Protocol, and
    - (ii) where the Damage to Biological Diversity is consistent with the type, magnitude and probability of harm presented in the risk assessment referred to in subparagraph (e)(i)(1); or
  - (f) realization of a risk posed by an activity specifically authorised or specifically permitted by applicable law or regulations of the State.
- 10.4 Misuse only occurs when the conditions of subparagraphs (a), (b), (c), (d), or (e) below are satisfied; as a result, an LMO was Released and that LMO Caused Damage to Biological Diversity; and compliance with the applicable law or regulation, condition, safety measure, or standard would have prevented the Release of the LMO and the resulting Damage:

- (a) a violation of law or regulation that either (i) specifically addresses *inter alia* preventing the Release of the LMO, or (ii) specifically regulates the activity resulting in the alleged Misuse of the LMO; or
- (b) a violation of the conditions of use, conditions of the Authorisation or other applicable safety measures required by the State and applicable to the LMO; or
- (c) a failure to follow reasonable conditions of use or other safety measures applicable to the LMO required by an Authorisation Holder for that LMO or by a Member who Placed the LMO on the Market, provided that such conditions of use or other safety measures have been conspicuously communicated in a writing by that Authorisation Holder or Member (e.g., through labeling, guidance for use or contractual terms, as applicable) (i) to the person alleged to have engaged in Misuse, or (ii) such that the person alleged to have engaged in Misuse, in the ordinary course of business, knew or should have known of the conditions of use or other safety measures; or
- (d) a failure to comply with required or generally accepted best practices or objective industry stewardship obligations applicable to the activity resulting in the alleged Misuse and that were established by a recognized standard setting organization generally relied upon in that industry, the industry, or a trade association of the industry engaged in the activity resulting in the alleged Misuse of the LMO; or
- (e) an unauthorised alteration of an LMO or labeling or packaging of an LMO.

Export, transport, import, handling, processing, sale, distribution, planting and use of seed or grain, containing

- (a) the Adventitious Presence of an LMO, or
- (b) an LMO Unauthorised in the State where the Damage is alleged to have occurred,

is not Misuse provided that in the case of (b), the person engaged in that activity had no knowledge that the seed or grain contained an Unauthorised LMO. In the event that there is any validly detected LMO in the seed or grain as the result of Misuse, the amount of

that LMO in the seed or grain may be low enough to pose no risk of Damage to Biological Diversity. Consequently, such Misuse is only a defence if the amount of such LMO is sufficient to Cause Damage to Biological Diversity, there is a Release, and the LMO Causes Damage to Biological Diversity.

A Member identified in a Claim as having allegedly Caused Damage to Biological Diversity cannot rely upon its own Misuse as a defence under the Compact.

As a rule of construction in determining Misuse, the Tribunal is to consider the primary purpose of the Compact: if an LMO Causes Damage to Biological Diversity, the Member who is the Authorisation Holder or who Places the LMO on the Market under the Authorisation has the obligation to Respond to the Damage to the extent that Member is Proportionally Responsible. By contrast, Misuse only affects that obligation where another person is responsible. The Misuse defence shall be narrowly construed.

***Article 11: Time Limitations***

11.1 A Claim cannot be submitted by the State if, in the determination of the Tribunal, the Claim is submitted later than the earliest date of:

- (a) three (3) years from the date on which a competent authority of the State submitting the Claim knew or should have known based on Plausible Evidence of the Damage to Biological Diversity. For purposes of this subparagraph, (i) Plausible Evidence of Damage to Biological Diversity is determined by an objective, rather than a subjective, standard and includes Science-Based evidence which could have been discovered in the exercise of reasonable due diligence or was provided by a credible source; and (ii) continuing Releases of the same LMO alleged to be the Cause of the Damage to Biological Diversity or continuing Damage to Biological Diversity does not give rise to additional Claims but could give rise to an amendment of the Claim subject to the PCA Environmental Arbitration Rules as modified by the Bylaws. If Damage to Biological Diversity is Caused by the Release of an LMO for which a Member might otherwise be responsible, and the State knew or, should have known from Plausible Evidence of the Damage to Biological Diversity, the State must submit the Claim within three years of the date the State knew or should have known

of that Damage or the Claim is barred irrespective of continuing Releases or continuing Damage to Biological Diversity;

(b) three (3) years from the date of effective notice by a citizen to a competent authority of the State of the Damage to Biological Diversity, taking into account that all evidence of Damage must be Science-Based; or

(c) twenty (20) years after the first Authorisation or Release (whichever is earliest) of the LMO alleged to be the Cause of Damage to Biological Diversity in the State submitting a Claim.

11.2 Filing of a Claim under Article 14 of the Compact suspends the limitations period of the Compact. There is no suspension of the limitations period under the Compact for the time period that (a) a Claim was pending if the Claim is dismissed by a Commissioner under Article 14, or (b) any judicial or administrative action is pending against a Member for the same Incident of Damage in or by the State which filed the Claim.

## **CHAPTER V. RESPONSE AND FINANCIAL LIMITS**

### ***Article 12: Response Obligation***

12.1 Response shall be provided only by a responsible Member to the extent of that Member's Proportional Responsibility for the Damage to Biological Diversity. Members who have no Proportional Responsibility for the Damage (e.g., the Member did not Release an LMO or that Member's actions are not otherwise the Cause of Damage to Biological Diversity) will have no Response obligation for that Damage to Biological Diversity. Where any Damage to Biological Diversity is determined by a Tribunal to be sufficiently reversible or repairable to a Remediation End Point by natural restorative processes within a reasonable time, there shall be no obligation by any Member to Respond.

12.2 Where there is a Member who is the Authorisation Holder for an LMO the Release of which Caused Damage to Biological Diversity in a State submitting a Claim:

- (a) in the absence of Misuse of that LMO by another Member or a Non-Member, the Member who is the Authorisation Holder and who Released the LMO has the obligation to Respond subject to the terms, conditions and defences in the Compact;
  - (b) if there is Misuse of that LMO by a Member who is not the Authorisation Holder, that Member and that Authorisation Holder have the obligation to Respond to the extent of their Proportional Responsibility under the terms, conditions and defences in the Compact; and
  - (c) if there is Misuse of that LMO by a Non-Member, that Authorisation Holder has the obligation to Respond only to the extent of its Proportional Responsibility under the terms, conditions and defences of the Compact.
- 12.3 Where there is no Member who is the Authorisation Holder for an LMO the Release of which Caused Damage to Biological Diversity in the State submitting a Claim (either because a Non-Member is the Authorisation Holder or there is no applicable authorisation procedure in that State for that LMO), but a Member Released that LMO in the State:
- (a) in the absence of Misuse of that LMO by another Member or a Non-Member, the Member who Released the LMO in that State has the obligation to Respond subject to the terms, conditions and defences in the Compact;
  - (b) if there is Misuse of that LMO by another Member, that other Member and the Member who Released the LMO have the obligation to Respond to the extent of their Proportional Responsibility under the terms, conditions and defences in the Compact; and
  - (c) if there is Misuse of that LMO by a Non-Member, the Member who Released the LMO has the obligation to Respond only to the extent of its Proportional Responsibility under the terms, conditions and defences of the Compact.
- 12.4 There shall be no joint and several liability among Members. In the event that more than one Member is determined to be Causally responsible for the Damage to Biological



- Diversity (e.g., where there is more than one Authorisation Holder Member for an LMO, or where more than one Member Released or Misused the LMO), subject to the financial limits in Article 13 of the Compact, Response obligations shall be apportioned among them according to each Member's Proportional Responsibility (e.g., a Member causing 25% of the Damage will be responsible to meet 25% of the Response obligation).
- 12.5 There are and shall be no funds or other collective compensation measures under the Compact. In accordance with Article 12.1, under no circumstances shall any Member be obligated to Respond for Damage to Biological Diversity Caused by another Member or a Non-Member. If Damage to Biological Diversity is Caused by a Member and by one or more Non-Members, the Member shall be responsible to Respond only to the extent of that Member's Proportional Responsibility.
- 12.6 Where multiple Claims can be submitted for the same Incident of Damage to Biological Diversity, the total cost of Response for the Incident shall be subject to the financial limits in Article 13 of the Compact applicable to the Incident. Response shall be apportioned by the Tribunal among the States submitting a Claim according to the relative percentage of Damage from the Incident occurring in each State.

If an Incident occurs in more than one State, but not all affected States have made a Claim under the Compact, the Member, States that have made a Claim, and the Commissioner reviewing a Claim under Article 14 of the Compact are encouraged to approach States which have not filed a Claim to request that they consider filing a Claim so that all Claims involving a single Incident can be resolved in the same proceeding before the same Tribunal.

If not all of the States make Claims under the Compact, the Member can offer evidence to establish the percentage of Damage from the Incident occurring in the State(s) not making a Claim. The financial limits in Article 13 of the Compact applicable to the State(s) making a Claim shall be reduced by that percentage.<sup>8</sup>

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<sup>8</sup> To illustrate this requirement, if the Tribunal determines that 10% of the Damage occurred in the State not making a Claim, the financial limit in Article 13 applicable to the State making a Claim is reduced by that same 10% and the new financial limit would be 90% of the original financial limit.

- 12.7 Subject to the financial limits in Article 13 of the Compact, Response awarded to a State shall include reasonable, necessary and fully-documented costs incurred by the State to minimize, limit or mitigate the Damage to Biological Diversity prior to settlement of a Claim or an award by a Tribunal.
- 12.8 Upon determination of a Member's total Response cost, either by settlement or by award of a Tribunal, the responsible Member will demonstrate financial security as provided in the Bylaws to satisfy the total Response cost (up to the financial limits in Article 13 of the Compact) through:
- (a) proof of financial capacity to Respond (e.g., through self-insurance or otherwise);
  - (b) proof of commercial insurance coverage;
  - (c) the provision of a banker's draft; or
  - (d) other form of financial security.
- 12.9 The Compact prohibits double or multiple recovery against a Member for the same Incident and protects a Member from such double or multiple recovery. Any award of Response by a Tribunal or any agreement for Response by the Parties shall expressly provide that if there is in another forum a final, non-appealable judgment against the Member in favour of State or any person or entity for the same Incident for which Response has been awarded under the Compact, such Response is automatically terminated and prior expenditures for such Response shall be immediately reimbursed. If the judgment, rather than being against the Member, is being paid by the Member pursuant to an indemnity agreement, any amount paid under such indemnity shall be included in determining whether the financial limits under Article 13 of the Compact for that Incident of Damage have been reached.
- 12.10 If there is a dispute under Article 12.9 above whether a judgment in another forum is for the same Incident:

- (a) a Tribunal consisting of a single arbitrator acting under the PCA Environmental Arbitration Rules as modified by the Bylaws shall resolve the dispute;
- (b) the presiding arbitrator of the Tribunal adjudicating the Claim shall serve as the arbitrator;
- (c) if the presiding arbitrator is not available, the Secretary-General of the PCA shall designate one of the other two arbitrators on the Tribunal adjudicating the Claim to serve as the arbitrator; and
- (d) if a Tribunal has not yet been formed, the PCA Secretary-General shall appoint the arbitrator under the PCA Environmental Arbitration Rules as modified by the Bylaws.

**Article 13: Financial Limits on Response**

13.1 To encourage remediation alone as the most appropriate form of Response, in the event that Response is awarded on a Claim, the following financial limits will apply for any single Incident of Damage to Biological Diversity:

- (a) for remediation alone, a maximum sum of 30 million SDR; or
- (b) for compensation alone, a maximum sum of 15 million SDR.

13.2 Awards that include a Response in the form of both remediation and compensation will be infrequent under the Compact because the Compact's stated preference is for remediation, not compensation, and compensation can only be awarded under very limited circumstances as set forth in Article 9 of the Compact. Should the circumstances warrant an award of both remediation and compensation in Response to a Claim, these principles apply to the awards:

- (a) In no event shall an award total more than 30 million SDR for any single Incident of Damage to Biological Diversity;
- (b) An award for an Incident shall first be applied to remediation;

- (c) Only if the financial limit in 13.1(a) is reached by applying the award to remediation alone, no award of compensation shall be made for that Incident, provided that a State may make application to the Tribunal to adjust an award for any single Incident to provide for compensation and if the Tribunal determines that the State has shown good cause that compensation is required to meet specific State goals for the conservation and sustainable use of its biological diversity taking into account risks to human health, the Tribunal may include compensation in its award up to the amount that would be the lesser of (i) the limit on compensation in 13.1(b) or (ii) the proportion of compensation to the total Response cost (the costs of remediation plus compensation) multiplied by the maximum sum for compensation (15 million SDR),<sup>9</sup> even though the amount available for remediation will be reduced by the amount of the award of compensation; and
- (d) The total of remediation and compensation remains subject to the financial limits for compensation in 13.1(b) and award total in 13.2(a) and if the total of the present value of the cost of remediation and the amount of compensation for an award for a single Incident meets the applicable limits, compensation shall be payable at the time of that award.

13.3 The following financial limits will apply for all Incidents of Damage to Biological Diversity Caused by one LMO:

- (a) for remediation, a maximum sum of 150 million SDR; or
- (b) for compensation, a maximum sum 75 million SDR.

Should awards for Incidents of Damage Caused by an LMO include remediation, compensation, or both remediation and compensation, the maximum sum of all such

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<sup>9</sup> To illustrate, assume that the cost of remediation is 30 million SDR and despite the Compact's preference for remediation, the Tribunal determines that there is a basis to award compensation. Assume further that compensation would be 10 million SDR. The lesser of (a) 15 million SDR or (b)  $(10/(30 + 10)) \times 15$  million SDR, would be the maximum allowed for compensation if the required showing was made. In this example (b), equaling 3.75 million SDR, would be the "lesser" amount and represents the maximum compensation that could be awarded. If awarded, the maximum sum allowed for remediation is reduced to 26.25 million SDR (30 million SDR minus 3.75 million SDR).

awards for all Incidents of Damage Caused by that LMO is 150 million SDR, of which no more than 75 million SDR total can be for compensation.

If there are pending Claims for multiple Incidents of Damage Caused by one LMO and the Response sought in the aggregate exceeds these financial limits, these financial limits shall be apportioned among the respective Claims by the Tribunal or Tribunals hearing those Claims according to the relative total cost of Response awarded on each Claim. To the extent that any circumstance makes apportionment unfeasible or impracticable, Response shall be conducted or paid on each award until these limits are reached. The Executive Director shall take necessary actions to inform Tribunals of the status of financial limits.

- 13.4 Once a financial limit has been reached, no further Claims may be brought or pursued under the Compact in relation to that Incident or LMO, respectively. If such a Claim is filed, the Executive Director shall return it with the explanation that the financial limits have been reached. If such a Claim is pending, the Executive Director shall give notice to the Commissioner or the Tribunal and the State and Member(s) involved, and the Claims Process or Assessment and Arbitration Process shall be immediately terminated.
- 13.5 Every fifth year following the Effective Date, the Executive Committee will review these financial limits on Response taking into account any Incidents of Damage that have occurred, and may increase them if the Executive Committee determines an adjustment to be appropriate. Any increase in the financial limits shall apply only to Claims submitted after the adjustment is approved by the Executive Committee.

## **CHAPTER VI. ADJUDICATION OF A CLAIM**

### ***Article 14: Claims Process***

- 14.1 Only a State may submit a Claim. A State may only submit a Claim with respect to Damage to Biological Diversity that has occurred within its boundaries.
- 14.2 A State may not submit or pursue a Claim against a Member arising out of an Incident that is the subject of a judicial or administrative action against that Member in the State, or was the subject of a judicial or administrative action against that Member in the State

where (a) the State prevailed against the Member in the judicial or administrative action, (b) the State and the Member entered into a settlement of the action; (c) the Member prevailed against the State in the action, (d) the action was dismissed with prejudice or otherwise disposed of in a manner that the State is prohibited from refileing the action.

14.3 A Claim must include:

- (a) an Arbitration Agreement in the form set forth in Appendix B to the Compact and executed by the State;
- (b) a completed Claim Form (as provided in Appendix C to the Compact); and
- (c) Plausible Evidence relied on by the State to establish each element of the Claim.

14.4 A State will submit the Claim to the Executive Director. The Executive Director shall record the date and time of receipt of a Claim, notify the named Member(s) by facsimile or electronically, and send a copy of the Claim by express delivery. The Member(s) shall execute the Arbitration Agreement and return it to the Executive Director within ten calendar days after it is received by the Member. A Member asserting that Article 13.3 or 14.2 of the Compact apply to the State's Claim shall, at the time that it transmits the signed Arbitration Agreement, also transmit to the Executive Director the factual basis for that assertion. Pursuant to Article 4.2 of the Compact, if that Member fails to execute the Arbitration Agreement, the Executive Director acting as agent for the Member, including a Member who has given notice of withdrawal or is in default, shall execute the Arbitration Agreement on behalf of the Member.

14.5 Within twenty (20) calendar days after receipt of a Claim by the Executive Director, the Executive Director, with notice to the State and the Member(s), shall provide the PCA with the Claim, the executed Arbitration Agreement, and all other information submitted by the State or Member under Articles 14.2 and 14.3 above, and ask the PCA to appoint a Commissioner. If the Executive Director does not act within this time period, the Claim and the Compact and its Appendices, including the Bylaws, may be submitted directly to the PCA by the State to initiate the process to have a Commissioner appointed. The Commissioner must be appointed from the roster in Appendix D to the Compact, or, if no

- roster has been assembled, based on the minimum qualifications for a Commissioner set forth in Appendix D.
- 14.6 The Commissioner must review the Claim to verify that (a) the Arbitration Agreement has been properly executed and binds the State and that the State has authority to submit the Claim to binding arbitration as set forth in the Arbitration Agreement and the Compact, (b) the Claim Form has been satisfactorily completed, (c) the State has submitted Plausible Evidence to establish each element of the Claim. If the Commissioner determines that the Claim does not meet the requirements in any of these respects, the Claim shall be deemed filed and the Commissioner shall return the Claim to the submitter, with sufficient explanation of the Claim's deficiencies to facilitate amendment and submission for reconsideration to the Commissioner.
- 14.7 The Commissioner must also review the Claim to verify that the Claim meets the requirements of Articles 13.3 and 14.2 of the Compact if invoked by a Member. If the Commissioner determines that the Claim does not meet the requirements of Article 13.3 or 14.2 of the Compact, the Commissioner shall dismiss the Claim.
- 14.8 If a Claim is returned to the State for amendment and that Claim is not submitted for reconsideration to the Commissioner within six months after the date the Commissioner returns the Claim to the submitter, or such additional time as the Commissioner may allow up to a maximum of an additional six months, the Claim shall be dismissed by the Commissioner. A dismissed Claim that is re-filed is a new Claim; it shall be filed with the Executive Director under Article 14.4 above to start the process anew and will be adjudged by the time limitations of Article 11 of the Compact based on the date the new Claim is filed.
- 14.9 Any Member against whom a Claim has been filed may request that the Commissioner review other Claims filed previously to determine whether those other Claims were submitted for the same Incident of Damage to Biological Diversity, and, if so, all such Claims that are pending shall be consolidated for adjudication. If such Claims are being reviewed by different Commissioners, the Commissioner appointed to review the earliest-filed of the Claims shall make this determination and consolidate all Claims arising out of the same Incident for adjudication.

- 14.10 If a party challenges a determination of the Commissioner under Article 14.6, Article 14.7, Article 14.8, or Article 14.9 above, a Tribunal consisting of one arbitrator appointed under the Assessment and Arbitration Process shall resolve that challenge.
- 14.11 The Commissioner shall complete its initial review obligations under Article 14.6 above within one hundred and twenty (120) days after receipt of the Claim(s) by the PCA, or, if a Claim has been submitted for reconsideration to the Commissioner, within sixty (60) days after the date of its submission. If the Commissioner fails to meet either deadline, the Executive Director, the State, or the Member is entitled to inform the Secretary-General of the PCA of the failure and to request that the PCA investigate the reason for the failure, and, if necessary, appoint a new Commissioner. If a party makes a challenge under Article 14.10 of the Compact, the Commissioner shall complete its initial review obligations under Article 14.6 above within sixty (60) days after the challenge is resolved by a Tribunal.
- 14.12 If the Commissioner determines that the Claim meets the requirements of Article 14.6 above, to facilitate conciliation, the Commissioner shall request from the named Member an answer to the Claim. The answer may include defences the Member is then asserting and evidence relied on by the Member in answer to each element of the Claim. The Member shall have sixty (60) days to respond to the Commissioner's request, or upon a request by the Member for additional time to respond, such additional time as the Commissioner may allow. If a Member fails to respond to the Commissioner's request, the State may proceed directly to the Assessment and Arbitration Process.
- 14.13 At any time in the Claims Process, the Commissioner may propose fact finding under the PCA Fact-Finding Rules as modified by the Bylaws to facilitate the review or resolution of a Claim. During the Claims Process, a party involved in the Claim may also propose such fact finding. If the parties involved in the Claim consent to fact finding on an issue, fact finding may then be undertaken as agreed to by the parties. The Commissioner who proposes fact-finding may also serve as the Commissioner who conducts the fact finding.
- 14.14 The Claims process will end when the Commissioner issues a written report stating that the Commissioner has completed its responsibilities under this Article 14, including, if



fact finding is conducted under Article 14.13 above, the report of the Commissioner issued under the PCA Fact-Finding Rules as modified by the Bylaws.

**Article 15: Settlement and Conciliation**

- 15.1 Voluntary settlement discussions between a Member and a State may occur at any time.
- 15.2 On the date that the written report of the Commission is issued under Article 14.14 of the Compact, a conciliation time period shall be deemed to have been triggered. The PCA's "Optional Rules for Conciliation of Disputes Relating to Natural Resources and/or the Environment" (PCA Environmental Conciliation Rules) as modified by the Bylaws, shall be applicable to the conciliation. The Conciliator shall be appointed as provided in these Rules and may be identified prior to the triggering of the conciliation time period, as provided in the Bylaws, in order to facilitate the conciliation process.
- 15.3 At any time in the Settlement and Conciliation Process, the Conciliator may propose fact finding under the PCA Fact-Finding Rules as modified by the Bylaws to facilitate the resolution of a Claim. During this process, a party involved in the Claim may also propose such fact finding. If the parties involved in the Claim consent to fact finding on an issue, fact finding may then be undertaken as agreed to by the parties. The Commissioner who reviewed the Claim under the Claims Process shall serve as the Commissioner who conducts the fact finding.
- 15.4 The Conciliator shall be permitted to draw on the expert roster in Appendix E to the Compact for assistance in preparation for or conduct of the conciliation.
- 15.5 If the State and the Member cannot resolve the Claim through settlement or conciliation within ninety days (90) days after conciliation has been triggered under this Article 15, or such longer time as may be mutually agreed by the State and the Member, the Claim shall proceed to the Assessment and Arbitration Process.

**Article 16: Assessment and Arbitration**

- 16.1 The Assessment and Arbitration Process shall consist of the review and determination, by a Tribunal under the PCA Environmental Arbitration Rules, as modified by the Bylaws of:

- (a) the Claim;
  - (b) a Commissioner's determination whether a Claim meets the requirements of Article 13.3 or 14.2 of the Compact; or
  - (c) a Commissioner's determination under Article 14.9 of the Compact.
- 16.2 All Parties in the Assessment and Arbitration Process are entitled to Legal Due Process at all times during the adjudication of a Claim.
- 16.3 The Tribunal will be selected from the roster of neutrals in Appendix D or as otherwise set forth in the Bylaws. The Secretary General of the PCA shall serve as appointing authority for, and secretariat to, the Tribunal. Notwithstanding the roster or the criteria in Appendix D, the parties participating in the Assessment and Arbitration Process have the right to select one or more members of the Tribunal if they mutually agree on the selection of the member(s) and in writing jointly so advise the Secretary-General of the PCA of their mutual agreement.
- 16.4 The roster of independent science experts in Appendix E, which shall include experts in those disciplines relevant to the Science-Based determination of Causation, Damage to Biological Diversity, Response and the Plan, shall be the sole and exclusive resource for scientific expertise for any arbitration by a Tribunal under the Compact except as otherwise set forth herein.
- If the parties participating in the Assessment and Arbitration Process agree to use an independent science expert not on the roster, the Tribunal may use that expert. If the Tribunal makes a finding that a person not on the roster of independent science experts but who otherwise meets the criteria for being on the roster is the best qualified expert on an issue in dispute, the Tribunal may recommend that person to the Executive Director for inclusion on the roster, including for the Claim under consideration.
- 16.5 With respect to the adjudication of a Claim under Article 16.1(a) above, in accordance with the terms and conditions of the Compact, the Tribunal shall make the determinations

required under Chapters III, IV, and V of the Compact and any other determinations under the Compact required to complete this adjudication.

- (a) Each element of a Claims and defence must be adjudicated by the Tribunal on the basis of Science-Based evidence that meets the Standard of Proof.
  - (b) Evidence of facts shall be provided by witnesses competent to provide such evidence.
  - (c) Where the Tribunal determines that there is more than one Cause of the Damage to Biological Diversity (*e.g.* the Release of an LMO by a Member and an Act of God, or the Release of an LMO by an Authorisation Holder Member and Misuse of the LMO by a Non-Member or another Member), or that the Member has successfully asserted a defence, the Tribunal shall determine the Proportional Responsibility attributed to each Cause and, in the aggregate, to all defences.
  - (d) The Tribunal shall determine the Proportional Responsibility of each Member.
  - (e) The Tribunal shall issue a final award including (i) a summary and rationale for each determination it made pursuant to this Article 16.5, (ii) the Response, if any, required of a Member, (iii) the cost of that Member's Response obligation, (iv) the language prohibiting double or multiple recovery under Article 12.9, (v) any reimbursement to be made to a State under Article 17.4 of the Compact, (vi) confidentiality requirements made under Articles 20.1(b) or 20.3 of the Compact, and (vi) all other elements of an award required under the Compact.
- 16.6 The Tribunal shall serve any order and the final award on the Parties, and shall provide a copy to the Executive Director. There shall be no appeal from any order or award of a Tribunal. The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards shall govern challenges to an award.

**Article 17: Costs**

- 17.1 The cost of a Commission and the fees of the Commissioner appointed under the PCA Fact-Finding Rules are an operating cost of the Compact.

- 17.2 Unless otherwise provided under the Compact, each party to a conciliation shall pay an equal share of the cost of conciliation and the fees of the Conciliator. Each party to a conciliation shall bear its own costs of the conciliation, including each party's own attorneys' fees.
- 17.3 Unless otherwise provided under the Compact, each party to an arbitration shall pay an equal share of the cost of arbitration and the fees of the Tribunal. Each party to an arbitration shall bear its own costs of the arbitration, including each party's own attorneys' fees.
- 17.4 If Response is granted following a Claim by a State which is a Least Developed Country, Small Island Developing State or Megadiverse Country, the Member(s) responsible for that Response shall pay the percentage equal to the Member's Proportional Responsibility of that State's reasonable and fully-documented costs for arbitration and submitting and pursuing the Claim under the Compact. A Member's cost pursuant to this provision is not subject to the financial limits in Article 13 of the Compact.
- 17.5 The fees charged by a Commissioner, Conciliator, or arbitrator on a Tribunal shall not exceed the rate established by the Executive Committee as set forth in Appendix D.

## **CHAPTER VII. PERFORMANCE AND ENFORCEMENT**

### ***Article 18: Performance of the Response Obligation***

- 18.1 If the Tribunal determines that Response should be awarded, the responsible Member(s) will comply with the award in accordance with the terms and conditions of the Compact and the Arbitration Agreement.
- 18.2 If the Tribunal awards Response consisting of remediation pursuant to a Plan, the Member has the right to undertake to manage and to provide or contract for all resources necessary to implement the remediation pursuant to the Plan, but the Member shall consult with the State prior to its implementation to define the working relationship between the Member and State during implementation of Response. Any differences between the Member and State on the scope of the working relationship will be referred to the Tribunal for resolution.

- 18.3 In its award, the Tribunal will retain jurisdiction to permit a party to seek modification of the award for good cause shown based on post-award events or to resolve disputes that may arise during the implementation of the award, including any dispute over whether the Remediation End Point has been achieved.

**Article 19: Enforcement**

- 19.1 This Article applies to enforcement of a Tribunal award, including Response obligations, and to payments to a Member to avoid double or multiple recovery.
- 19.2 The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards concerning the recognition and enforcement of arbitral awards shall be applicable to an award rendered in an arbitration pursuant to the Compact. An award rendered by a Tribunal addresses differences arising out of legal relationships which are commercial.
- 19.3 The Member's Response obligation is fully enforceable under (a) the laws of the State that prevails on its Claim, (b) the laws of the State that is the domicile of the Member; and (c) the governing law of the Compact.
- 19.4 The following process shall be used for establishing that a Member is in breach of that Member's Response obligations based on an award of the Tribunal or a settlement.
- (a) A State shall submit written notice to the Executive Director of that State's intent to seek a determination that the Member has breached the Tribunal's award, including its Response obligations, and the reasons supporting such a determination.
  - (b) The Executive Director shall send that notice to the Member alleged to be in breach by facsimile or electronically, with a copy by express delivery.
  - (c) Upon receipt of such written notice, the Member has ten (10) days to admit the breach in writing and agree to cure the breach or otherwise provide a written response to the notice of breach.

(d) Absent a resolution between the State and Member of the asserted breach, State may seek in one of two ways a determination that the Member has breached its Response obligations:

(i) if a Tribunal had been formed during the adjudication of the Claim, the State may seek a determination from the presiding arbitrator of the Tribunal (or if the presiding arbitrator is not available either of the other arbitrators on the Tribunal as designated by the Secretary-General of the PCA) that the Member has breached its Response obligations.

(ii) if the Member's Response obligation was the subject of a settlement with the State before the formation of a Tribunal, the matter shall be referred by the Executive Director to the Secretary-General of the PCA to appoint a sole arbitrator as set forth in the Bylaws to determine whether the Member has breached its agreement for Response.

(e) The arbitrator appointed under (d) shall determine if the Member has breached its Response obligations under the PCA Environmental Arbitration Rules as modified by the Bylaws. The arbitrator shall provide its award to the parties and the Executive Director.

19.5 The State can enforce a Tribunal's award under Article 19.4 above, under applicable law for the enforcement of a commercial arbitration award.

19.6 To assist the State in enforcement, the other Members agree to bring an action for specific performance against a Member determined to be in breach. Upon receipt of a determination that a Member is in breach of its Response obligation, the Executive Director will advise the other Members and promptly initiate the specific performance action. This action may be brought in the name of the Executive Director on behalf of the Members individually or as an unincorporated association under the Compact. The Member deemed in breach:

(a) shall cooperate with the Executive Director and other Members in facilitating their access to any form of financial security obtained or offered by that Member,

including, if appropriate, by assigning all rights to applicable insurance, banker's drafts, or funds under any other form of financial security;

- (b) consents to jurisdiction and venue in a location selected by the other Members in bringing an action for specific performance;
- (c) shall be responsible for all costs, including attorneys' fees, incurred by the remaining Members in bringing the action;
- (d) shall be responsible for all reasonable and fully documented costs, including attorneys' fees, incurred by the State as well as the costs of proceedings to obtain a determination that the Member has breached its obligation for Response; and
- (e) shall be responsible for the incremental costs of Response, if any, resulting from the failure of that Member to undertake the Response obligation. Such incremental costs shall not be included in determining whether the financial limits on Response in Article 13 of the Compact have been reached.

Any dispute in calculating costs under Article 19.6(c)-(e) above shall be resolved under the PCA Environmental Arbitration Rules as modified by the Bylaws by the arbitrator who made determinations under Article 19.4.

- 19.7 The State due Response is a third party beneficiary of the Article 19.6 enforcement rights. In the event that the Executive Director or other Members fail to initiate an action for specific performance within ninety (90) days after the Executive Director receives a notice that a Member is in breach of its Response obligations, the State may bring the action for specific performance action under Article 19.6.

That Member shall have the same obligations to the State as it does to the other Members under Article 19.6. With respect to that Member's corresponding obligation to consent to jurisdiction and venue in the location selected by the State, such consent only applies to actions under this Article 19.7.

- 19.8 If a Member believes it is entitled to reimbursement to prevent a double or multiple recovery, and there is a dispute with the State over such entitlement, the dispute shall be resolved by arbitration using the PCA Environmental Arbitration Rules as modified by the Bylaws. There shall be one arbitrator. The presiding arbitrator of the Tribunal on the Claim shall serve as the arbitrator. If the presiding arbitrator is not available, the Secretary-General of the PCA shall designate one of the other two arbitrators on the Tribunal to serve as the arbitrator. If a Tribunal has not yet been formed, the Secretary-General of the PCA shall appoint the arbitrator under the PCA Environmental Arbitration Rules as modified by the Bylaws.
- 19.9 Other than as set forth in this Article 19, (a) nothing in the Compact is intended to create, or creates jurisdiction in any State or any other venue in which jurisdiction would not exist in the absence of the Compact, and (b) execution or operation of the Compact does not create jurisdiction over a Member in a State.

## CHAPTER VIII. CONFIDENTIALITY

### *Article 20: Confidentiality*

- 20.1 Article 8 of Annex II to the Convention provides that in arbitrations under the Convention, “the parties and the arbitrators are under an obligation to protect the confidentiality of any information they receive in confidence during the proceedings of the arbitral tribunal.” The confidentiality protocols set forth in (a) the Arbitration Agreement, and (b) the applicable provisions of the PCA Fact-Finding Rules, PCA Environmental Arbitration Rules, and the PCA Conciliation Rules all of which as may be modified by the Bylaws, shall apply to all Compact-Related Material and all copies, excerpts, or abstracts thereof.
- 20.2 In maintaining consistency with Article 20.1 above and to preserve the independence, impartiality and integrity of the process, all Compact-Related Material is confidential except as:
- (a) Required by domestic law of the State submitting a Claim, where the law was effective before the Claim arose and was disclosed in the Claim submission, (i) notwithstanding the provisions of the Compact or a decision of the Tribunal requiring



confidentiality, and (ii) provided that the State shall not disclose proprietary information, trade secrets or confidential business information of a Member under this subparagraph;

- (b) Agreed to by the State and named Member as included in any modification of the Arbitration Agreement in accordance with Article 22 of that Agreement;
- (c) Agreed to by the State and named Member in an express written agreement other than the Arbitration Agreement to waive confidentiality as to Compact-Related Material created solely by the State or by the Member, provided that the Member may execute such a waiver only after approval in writing by Consensus of the Executive Committee permitting such waiver;
- (d) Made publicly available under the terms of the Compact;
- (e) Legally in the possession of a party, or is publicly available, prior to the disclosure of such Compact-Related Material to that party in the Claims or Assessment and Arbitration Process;
- (f) Becomes publicly available to a party to a Claim without any violation of the Compact or the Arbitration Agreement subsequent to its disclosure in the Claims or Assessment and Arbitration Process;
- (g) Is independently acquired or developed by a party to a Claim; or
- (h) Becomes lawfully available to a party to a Claim on a non-confidential basis from any third party, where the disclosure to the party does not, to the knowledge of the party after due inquiry, violate any contractual or legal obligation such third party has with respect to the Compact-Related Material.

20.3 Where Claims are consolidated for adjudication pursuant to Article 14.9 of the Compact, and the States are cooperating with each other, Compact-Related Material may be exchanged between or among such States to the extent necessary to allow such

cooperation but the confidentiality requirements of the Compact otherwise apply to such material.

- 20.4 In addition to the confidentiality obligations under the Compact and the Arbitration Agreement, any party to a Claim may ask the Tribunal to enter a confidentiality order as to proprietary business information or trade secrets or confidential business information.
- 20.5 The Claims and Assessment and Arbitration Processes are confidential. The proceedings of the Tribunal, including all hearings, are to be held *in camera* and are confidential.
- 20.6 The terms of this Article 20 shall apply to legal counsel (a) for the State(s) submitting a Claim and (b) the Member(s) subject to such Claim.
- 20.7 Any natural or legal person engaged by the Executive Committee or Technical Committee (e.g., employed by, consultant to, or agent of) will be engaged only, *inter alia*, after having signed a legally binding contractual agreement (in the confidentiality agreement form provided in Appendix G to the Compact) requiring them to respect the confidentiality obligations in this Article.

## **CHAPTER IX. BYLAWS, AMENDMENTS, WITHDRAWAL, DISSOLUTION**

### ***Article 21: Bylaws***

- 21.1 The Bylaws for administration and operation of the Compact are set forth in Appendix A to the Compact. It is the intent of the Members that the Bylaws will facilitate the efficient and effective accomplishment of the purposes of the Compact. Upon execution of the Compact, the Bylaws shall become effective and binding on the Members.
- 21.2 For five years from the Effective Date, the Bylaws may be amended by a two-thirds vote of the Members of the Executive Committee who are in Good Standing. Thereafter, the Bylaws shall be amended in accordance with the procedures set forth in the Bylaws.
- 21.3 The Bylaws shall establish the membership, governance, rules and procedures for all bodies of the Compact, for all committee actions and for the adjudication of all Claims, subject to the terms and conditions of the Compact.

21.4 If there is a conflict between the terms of the Bylaws and the terms of the Compact, the terms of the Compact are controlling.

**Article 22: Amendment**

22.1 The Compact may only be amended as set forth in this Article 22. Only a Member is permitted to propose amendment to the Compact. An amendment to the Compact shall not be effective unless it is in writing and approved by Consensus of the Executive Committee.

22.2 The Executive Director shall attach to the meeting agenda of the Executive Committee the text of any proposed amendment that the Executive Committee is to deliberate at that meeting.

22.3 Amendments to the Appendices to the Compact shall be made as follows:

(a) Appendix A may be amended as set forth in Article 21.2 of the Compact.

(b) Appendices 3 and 7 may be amended by a two-thirds vote of the Members of the Executive Committee in Good Standing unless the Bylaws provide for a different process to amend Appendices 3 and 7 in which case the method established in the Bylaws will be followed to amend Appendices 3 and 7.

(c) Appendices 4 and 5 may be amended as set forth in the Bylaws.

(d) Appendices 2 and 8 may be amended in accordance with Article 22.1 of the Compact.

22.4 Any amendment to the Compact shall be made public through a website or other suitable publication mechanism and to the Convention Secretariat for posting to the Convention on Biological Diversity website (<http://www.cbd.int/>)<sup>10</sup> as soon as practicable after it is approved.

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<sup>10</sup> The Secretariat to the CBD is responsible for transmitting information to the Committee of the Parties to the Convention. <http://www.cbd.int/secretariat/role.shtml>.

**Article 23: Withdrawal and Dissolution**

- 23.1 Withdrawal from the Compact shall be effected as provided for in the Bylaws. Any Member who effects a Withdrawal from the Compact shall be bound by obligations concerning confidentiality and Operating Costs for twenty (20) years from the date of Withdrawal.
- 23.2 The Compact shall be dissolved by Consensus of the Executive Committee; provided, however, that obligations concerning confidentiality and Operating Costs shall survive such dissolution and shall continue in effect for twenty (20) years from the date of dissolution.
- 23.3 The Compact shall automatically dissolve in the event that there are less than 2 (two) Members.
- 23.4 Upon dissolution of the Compact, and after payment of all indebtedness and satisfying obligations of any kind of the Compact, the Executive Committee shall decide on the method of liquidation and the distribution of any Compact funds.
- 23.5 If any Claims are pending on the effective date of dissolution, the affairs of the Compact shall not be closed and the accounts of the Compact shall not be settled until (a) all Claims are resolved by settlement, conciliation, or a Tribunal, and (b) any Response obligations, and should enforcement become necessary, any enforcement obligations of the Members, are discharged. States are allowed a grace period after dissolution and new Claims will be accepted under the Compact through the sixtieth calendar day after the effective date of dissolution. Following the expiration of the grace period, no new Claims will be accepted under the Compact.
- 23.6 The Executive Committee shall establish the effective date of dissolution of the Compact under this Article 23. Notice of dissolution and the effective date of dissolution shall be made public through a website or other suitable publication mechanism and to the Convention Secretariat for posting to the Convention on Biological Diversity website (<http://www.cbd.int/>) as soon as practicable after dissolution is approved.

## CHAPTER X. GENERAL PROVISIONS

### *Article 24: General Provisions*

- 24.1 The Compact will not be construed, nor will it be implied, to constitute any licence from any Member of any other Members' intellectual property, including but not limited to patents, trademarks, copyrights or proprietary data.
- 24.2 All correspondence, reports, invoices, minutes and manuscripts concerning any matter under the Compact will be in English, are the property of the Members, and are subject to all of the provisions of the Compact.
- 24.3 There are no promises, terms, conditions or obligations other than those contained in the Compact. The Compact and its Appendices represent the entire agreement between the Members for the above purposes. The Compact supersedes all oral and written agreements or understandings of, or statements or representations by, the Members heretofore made relating to the subject matter of the Compact and contains the entire understanding of the Members with respect to its subject matter. The Compact has been the subject of numerous public discussions and dialogues, and there have been several publicly available versions of draft execution texts. The Compact supersedes all prior versions and all public discussions all of which have been merged into the Compact. No prior text, public discussion, comment or other written materials can be used to interpret the provisions of the Compact and may not be relied upon for any purpose in connection with the operation of the Compact.
- 24.4 The Compact is binding on successors. Except in the case of the sale to a third party of its business associated with the Compact, no Member shall assign the Compact or any of its rights, obligations or beneficial interests hereunder in whole or in part to any other party without the written permission of the other Members, which permission will not be unreasonably withheld. Should the business of a Member be sold to a third party, subject to any procedures that may be set forth in the Bylaws, the new owner shall agree in writing to take on the responsibilities of the original Member. In the event that the third party fails to take on those responsibilities, the Member whose interests have been purchased shall be deemed to have effected its Withdrawal from the Compact.

- 24.5 Irrespective of Article 24.4, the Members recognize that a Member might be reorganised into an independent legal entity under or within a holding company. The other Members consent in advance to the assignment of the Compact, and the rights and obligations of the Compact, to whichever Member legal entity agrees in writing to undertake the principal contractual performance under the Compact as long as the financial capacity obligations of Article 3 of the Compact are satisfied by such legal entity.
- 24.6 The operation of the Compact is determined exclusively by its Articles and Bylaws. Damage to Biological Diversity is to be solely determined according to the provisions of the Compact. Where there is a need under the Compact to consider other governing legal principles, the Code of Obligations of Switzerland (and not any of Switzerland's conflicts of law provisions) shall be applied subject to the terms of the Compact and, specifically, Article 18 of the Bylaws.
- 24.7 The Executive Committee will publish an annual report summarizing the operation of the Compact in the previous calendar year within 120 days of the beginning of each calendar year. A summary will be provided of all Claims which have been concluded (i.e., where there has been a settlement, or the Assessment and Arbitration Process for a Claim has been completed, or where a Claim has been dismissed). The number of Claims submitted for that period but not yet concluded will be provided but no Compact-Related Material will be reported by the Executive Committee except as mutually assented to by the State(s) submitting a Claim and the Member(s) subject to such Claim. A final award from a Tribunal shall be made publicly available subject to redaction of information (a) confidential under Article 20 of the Compact or (b) as provided for in the Bylaws.
- 24.8 Except with respect to an action under Article 19.6, any unresolved dispute among Members related to the interpretation, administration or operation of the Compact or to require participation in a Claim by a Member who is alleged to have withdrawn from the Compact or triggered its own default to avoid the Claim, shall be referred to and finally resolved by (a) conciliation, if the Members agree to first conciliate, or (b) arbitration, in either case under the International Dispute Resolution Procedures of the American Arbitration Association administered by the International Centre for Dispute Resolution, as modified by the Bylaws. The number of arbitrators shall be one. The decision of the arbitrator shall be final and binding on all Members and there shall be no appeals from an

order or award of the arbitrator. The place of arbitration shall be London, England but hearings may be held in any location agreed to by the arbitrator and the parties to the arbitration. The language to be used in the arbitral proceedings shall be English. The application of Section 69 of England's Arbitration Act of 1996 (in existence as of the date of the Compact or as it might be amended in the future) is hereby excluded.

- 24.9 Any employee of a Member who is seconded to perform work in any Compact-related capacity shall remain an employee of that Member, and shall not be considered to be engaged by the Compact.

***Article 25: Start-Up of the Compact***

- 25.1 The Members acknowledge execution of the Compact as only the first step in implementing their commitments under the Compact. Upon execution of the Compact, the signatories are the initial Members of the Compact and will appoint their representatives to the Executive Committee. Once the Executive Committee is formed, the Members' expectations are that the Executive Committee will expeditiously appoint an Executive Director (on an interim basis, if appropriate), create the Technical Committee, and initiate the process to form the Advisory Committee. It is the Members' further expectation that the Executive Director and the Executive and Technical Committees will complete all of the tasks necessary for operation of the Compact, including the development of qualifications for neutrals and criteria to nominate experts, the creation of the roster of neutrals and independent science experts, completion of the process to permit receipt of any Claims, and all other steps required under the Compact to make the Compact operational. The Members will seek to have the Compact fully operational no later than the end of the Conference of the Parties serving as the Fifth Meeting of the Parties in Nagoya, Japan on 15 October 2010, but the Members commit to have the Compact operational as soon as practicable. Should a State have a Claim before the Compact is operational, the time between the date that the Compact is executed and the date that the Compact is ready to receive Claims shall not be counted under Article 11 of the Compact, and this passage of time shall not otherwise prejudice the rights of States or Members under the terms of the Compact.

**IN WITNESS WHEREOF, the Members have caused the Compact to be executed by their duly authorised representative on the date set forth next to each signature,**

**BASF Plant Science Company GmbH**

By: \_\_\_\_\_  
Name: Peter Eckes  
Title: President & Chief Executive Officer

By: \_\_\_\_\_  
Name: Mark Ehrhardt  
Title: Group Vice President

**Bayer CropScience AG**

By: \_\_\_\_\_  
Name: Prof. Dr. Friedrich Berschauer  
Title: Chief Executive Officer

By: \_\_\_\_\_  
Name: Dr. Gerhart Marchand  
Title: General Counsel

**DowAgroSciences, LLC**

By: \_\_\_\_\_  
Name: Antonio Galindez  
Title: President and Chief Executive Officer

By: \_\_\_\_\_  
Name: William W. Wales  
Title: General Counsel



**E.I. du Pont de Nemours and Company**

By: \_\_\_\_\_

Name: James C. Borel  
Title: Executive Vice President

By: \_\_\_\_\_

Name: Thomas L. Sager  
Title: Senior Vice President and General Counsel

**Monsanto Company**

By: \_\_\_\_\_

Name: Hugh Grant  
Title: Chairman, President and Chief Executive Officer

By: \_\_\_\_\_

Name: David F. Snively  
Title: Senior Vice President, General Counsel and Secretary

**Syngenta Crop Protection AG**

By: \_\_\_\_\_

Name: Mike Mack  
Title: Chief Executive Officer

By: \_\_\_\_\_

Name: Christoph Maeder  
Title: General Counsel

## APPENDIX A

### BYLAWS

#### CHAPTER I. PURPOSE, DEFINITIONS AND LANGUAGE

##### **Article 1: Purpose**

- 1.1 These Bylaws are adopted pursuant to Article 21 of the Compact (A CONTRACTUAL MECHANISM FOR RESPONSE IN THE EVENT OF DAMAGE TO BIOLOGICAL DIVERSITY CAUSED BY THE RELEASE OF A LIVING MODIFIED ORGANISM) upon execution of the Compact.
- 1.2 These Bylaws are established for administration and operation of the Compact and shall be interpreted in a manner consistent with the provisions of the Compact, in order to:
- (a) facilitate the efficient and effective accomplishment of the purposes of the Compact; and
  - (b) provide or supplement rules and procedures relating *inter alia* to membership, governance, and the resolution of Claims.

##### **Article 2: Terminology**

- 2.1 All references to an “Article” in these Bylaws are references to the provisions of these Bylaws unless otherwise expressly stated.
- 2.2 The definitions and determinations in the Compact apply to these Bylaws. In addition, the following definitions shall apply:
- (a) Majority Vote: The majority of all Members on a Committee who are entitled to vote when a vote is called (i.e. those in Good Standing who have not had to recuse themselves pursuant to Article 4.3 of the Compact ).
  - (b) Operating Costs: All past or future (i) contract charges, (ii) legal, accounting and other professional fees, (iii) other expenses, and (iv) capital expenditures approved by the Executive Committee.

(c) Super Majority: A Super Majority shall be required in the circumstances explicitly stated in these Bylaws. A Super Majority shall be two-thirds (2/3) of all Members on a Committee who are entitled to vote when a vote is called (i.e. those in Good Standing who have not had to recuse themselves pursuant to Article 4.3 of the Compact).

(d) Written Notice: All means of written communication including certified mail, e-mail and facsimile.

### ***Article 3: Language***

3.1 All correspondence, reports, invoices, minutes and manuscripts concerning any matter under these Bylaws will be in English. Where the original of any document is in a language other than English a certified translation will be provided.

## **CHAPTER II. MEMBERSHIP**

### ***Article 4: Compact Membership***

4.1 As a condition of membership of the Compact each applicant for membership will submit to the Executive Committee information demonstrating its fulfilment of the financial, stewardship and risk management requirements in Article 3 of the Compact. The Executive Committee shall consult with a Technical Consultant to determine whether the information provided by each applicant demonstrates fulfilment of these requirements. If the Executive Committee requires supplementary information from an applicant it shall request the information in writing. When considering an application for membership, particular care will be taken to ensure that the application is evaluated on a fair and non-discriminatory basis and that, consistent with Appendix H to the Compact, no discussion or exchange of commercially sensitive information occurs. The Executive Committee shall issue its decision on an application in writing within 180 days after receipt of a complete application. When the Executive Committee denies a membership application, it will provide a written statement of the reasons for the rejection. An unsuccessful applicant may resubmit an application when it can satisfy the criteria for membership.

4.2 Proof of the fulfilment of the membership criteria set forth in the Compact shall require at a minimum, submission of specific documents for each of the following criteria:

- (a) for the purpose of Article 3.1 of the Compact, legal personality and capacity shall be demonstrated by provision of articles of establishment or association, and an explanation of the material aspects of the legal regime pursuant to which the applicant for membership is constituted in law;
  - (b) for the purpose of Article 3.1 of the Compact, engagement or likely engagement in Release of LMOs shall be demonstrated by statements submitted to such effect to financial or environmental regulatory authorities;
  - (c) for the purpose of Article 3.5 of the Compact, capacity to meet potential financial obligations in relation to Response shall be demonstrated by means of a third party certificate of insurance, or documentation of provision for self-insurance, or documentation of financial security or other means that satisfy criteria established by the Executive Committee;
  - (d) verification of compliance with Articles 3.6, 3.7, and 3.8 of the Compact.
- 4.3 On execution of the Compact each signatory to the Compact is a Member, and shall appoint a representative to form the Executive Committee. As soon thereafter as is practicable but no later than within ninety (90) days after the Executive Committee is prepared to receive applications for membership to the Compact, each signatory shall provide the information establishing its qualifications for membership under Articles 4.1 and 4.2 of these Bylaws for review by the Executive Committee in accordance with Article 4.1 above. The Executive Committee shall, within 180 days thereafter, (a) consider the information submitted by each signatory to the Compact and (b) verify that the signatory satisfies the criteria for membership. A signatory's representative on the Executive Committee shall recuse itself from confirming its own application for membership. If a signatory is unable to meet the criteria for membership, the signatory shall withdraw from the Compact without prejudice to make a subsequent application to become a Member.
- 4.4 An application for membership from an entity that is not a signatory to the Compact on the Effective Date may be made at any time after the Executive Committee gives notice

that it is prepared to receive applications for membership to the Compact. The application shall include the information specified in Articles 4.1 and 4.2.

- 4.5 If the Executive Committee approves the membership of an applicant which is not a signatory to the Compact such applicant shall acquire from the date on which the Executive Committee issues its decision the full rights of a Member, and shall thereafter be integrated into the operation of the Compact.
- 4.6 The Executive Committee shall have the right at periodic time intervals as may be determined by the Executive Committee to verify that all Members continue to meet the requirements for Member status, including requiring each Member to certify that there are no changes that would affect its qualifications for membership.

### **CHAPTER III. COMMITTEES**

#### ***Article 5: Executive Committee***

- 5.1 The Executive Committee shall oversee the operations and administration of the Compact. By Majority Vote, the Executive Committee will elect one Member representative as a Chair and another as Vice-Chair, both to sit for two (2) years. The Chair and Vice-Chair shall be elected on the basis of their qualifications and their ability to act impartially and independently. The Chair and Vice-Chair shall not be representatives of the same Member.
- 5.2 If the representative acting as Chair or Vice-Chair ceases for any reason to perform their respective obligations prior to the end of the two (2) year period, a replacement will be elected by Majority Vote of the Executive Committee.
- 5.3 At the end of the two (2) year period, the Executive Committee will elect by Majority Vote new representatives for the position of Chair or Vice-Chair neither of whom shall be a representative of the same Member whose representative served as Chair in the prior term.
- 5.4 The Chair's and Vice-Chair's responsibilities shall be to ensure that the Executive Committee carries out its responsibilities as set forth in Article 5.10 of these Bylaws.

- 5.5 Each Member of the Compact in Good Standing shall have one primary representative on the Executive Committee and one alternate representative, but shall only have one vote. It is the intention of the Members that the primary representative will attend all meetings. The Chair and Vice-Chair shall have no separate vote from the Member he/she represents.
- 5.6 Each representative on the Executive Committee shall act for and bind the Member he/she represents with respect to all matters covered by the Compact. Any Member may, at any time, change its representative by filing a Written Notice to that effect with the Chair of the Executive Committee. The names of representatives on the Executive Committee shall be maintained in Appendix F of the Compact.
- 5.7 The Executive Committee shall meet or confer for the purposes of overall direction and administration of the Compact on a regular basis and whenever necessary (in person or by telephone or by electronic means) following reasonable Written Notice (i.e., normally at least ten (10) calendar days unless decided differently at the previous meeting) and distribution of an agenda by the Chair. If agreed by unanimous written consent of all representatives (either before or at the beginning of a meeting), the Executive Committee may meet without Written Notice.
- 5.8 The Executive Committee shall aim to act by Consensus of all Members in Good Standing present or represented at the meeting by proxy, telephone or electronic means. If Consensus cannot be reached the Executive Committee will act by Super Majority vote unless otherwise specified in the Compact or these Bylaws.
- 5.9 If a representative and alternate representative of a Member cease to participate in the functions of the Executive Committee, that Member shall appoint replacement representatives as soon as practicable and, in any event, before the next meeting of the Executive Committee, or shall forfeit its voice and vote until the replacements are appointed. A determination of a failure to participate shall be made by the Chair of the Executive Committee.
- 5.10 The activities and responsibilities of the Executive Committee shall include, but shall not be limited to:

- (a) amending the terms of the Compact consistent with Article 22 of the Compact;
- (b) amending the terms of the Bylaws consistent with Article 14 of these Bylaws;
- (c) considering applications for membership;
- (d) retaining, as necessary, Technical Consultants;
- (e) establishing and maintaining a roster of neutrals and independent science experts, listed at Appendices 4 and 5 to the Compact and/or establishing qualifications or criteria for neutrals or experts to be listed on the rosters;
- (f) making contracts with the Executive Director and other contracts as necessary under the Compact;
- (g) dealing with Members in default;
- (h) publishing an annual report;
- (i) dissolving the Compact consistent with Article 23 of the Compact;
- (j) establishing subcommittees to carry out tasks under the Compact; and
- (k) otherwise carrying out the terms of the Compact and these Bylaws.

5.11 The Executive Committee may assign tasks to a subcommittee and, if it does so, shall define the scope of each task in writing to the subcommittee.

#### **Article 6: Technical Committee**

6.1 The Executive Committee shall establish a Technical Committee which will act as a subcommittee to the Executive Committee. The Technical Committee will at its initial meeting by Majority Vote elect one of the Member representatives as a Chair and another as Vice-Chair, both of whom will serve for an initial term of three (3) years. Thereafter

- the terms shall be two (2) years. Subject to confirmation by the Executive Committee, the Chair and Vice-Chair shall be elected on the basis of each person's technical qualifications and ability to act impartially and independently. The Chair and Vice-Chair shall not be representatives of the same Member. No person shall simultaneously serve on the Technical and Executive Committees.
- 6.2 If the representative acting as Chair or Vice-Chair ceases for any reason to perform their respective obligations prior to the end of a term, a replacement will, as soon as practicable, be elected by Majority Vote of the Technical Committee. At the end of the initial three (3) year term and each successive two (2) year term, the Technical Committee will elect by Majority Vote new representatives for the position of Chair or Vice-Chair neither of whom shall be a representative of the same Member whose representative served as Chair in the prior term.
- 6.3 The Technical Committee shall meet or confer (in person, by telephone or by electronic means) on a regular basis and whenever necessary for the purposes of the Compact, following Written Notice by the Chair (normally at least three (3) working days unless decided differently at the previous meeting), including an agenda. If agreed by unanimous written consent of all representatives (either before or at the beginning of a meeting), the Technical Committee may meet without Written Notice.
- 6.4 Each Member of the Compact in Good Standing shall have one primary representative and one alternative representative on the Technical Committee, but shall only have one vote. It is the intention of the Members that the primary representative will attend all meetings. The Chair and Vice-Chair shall have no separate vote other than the vote of the Member that he/she represents.
- 6.5 Unless specified otherwise in the Compact, (a) the Technical Committee shall aim to act by Consensus of all Members in Good Standing present or represented at the meeting by proxy vote, telephone or electronic means and (b) if Consensus cannot be reached the Technical Committee will act by Super Majority vote unless otherwise specified in the Compact or these Bylaws.



- 6.6 Each representative in the Technical Committee shall act for and bind the Member he/she represents with respect to all matters covered by the Compact. Any Member may, at any time, change its representative by Written Notice to that effect to the Chair of the Technical Committee. The names of Member's representatives on the Technical Committee shall be maintained in Appendix F of the Compact.
- 6.7 If a representative or alternate representative of a Member fails to participate in the functions of the Technical Committee, that Member shall appoint replacement representatives as soon as practicable and, in any event, before the next meeting of the Technical Committee, or shall forfeit its voice and vote on the Technical Committee until the replacements are appointed. A determination of a failure to participate shall be made by the Chair of the Technical Committee.
- 6.8 The Chair's and Vice-Chair's responsibilities shall be to ensure that the Technical Committee carries out its responsibilities as set forth in Article 6.9 of these Bylaws and the Compact.
- 6.9 In fulfilling its responsibilities under the Compact, the activities and responsibilities of the Technical Committee shall include, but shall not be limited to:
- (a) advising the Executive Committee and Advisory Committee on technical issues;
  - (b) advising the Executive Committee on the establishment and maintenance of a roster of neutrals and independent science experts, listed at Appendices D and E to the Compact and/or identifying qualifications or criteria for neutrals or experts to be listed on the rosters;
  - (c) engaging Technical Consultants; and
  - (d) conducting ancillary tasks related to the above responsibilities.

### **Article 7: Advisory Committee**

- 7.1 The Advisory Committee will be chaired by the Executive Director, who will solicit participation from States and organisations as set forth in Article 7.2 of these Bylaws

with the intent to assure representation of a plurality of views. The Executive Director will chair the Advisory Committee but will have no vote.

7.2 The Executive Committee shall invite the participation of representatives to the Advisory Committee from each of the following categories:

- (a) States (a maximum of eighteen (18) with two (2) each from the seven regions of the Food and Agriculture Organization of the United Nations (Africa, Asia, Europe, Near East, Latin America and the Caribbean, North America, Southwest Pacific),<sup>1</sup> plus China, Japan, New Zealand, and Switzerland);
- (b) International Governmental Organizations (a maximum of three including the European Commission);
- (c) Small and Medium Sized Enterprises (“SMEs”) (a maximum of two (2));
- (d) Entities engaged in public and private research (a maximum of two (2));
- (e) Non-Governmental Organisations (“NGOs”) (a maximum of two (2));
- (f) Stakeholders (e.g., grain traders, processors, and growers) (a maximum of four (4));  
and
- (g) Members of this Compact (a maximum of two (2)).

Where there are more applicants seeking to accept invitations to join the Advisory Committee than there are places in any of the above categories, within a thirty-day time period set by the Executive Director, the applicants shall determine among themselves which applicants will fill those positions and notify the Executive Director. If within this time period, the applicants do not agree among themselves on which applicants shall serve on the Advisory Committee, the Executive Committee shall select the representatives in a fair and non-discriminatory manner and with the intent to assure

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<sup>1</sup> [http://www.fao.org/unfao/govbodies/memberships\\_reg\\_en.asp](http://www.fao.org/unfao/govbodies/memberships_reg_en.asp).

representation of a plurality of views and shall notify the Executive Director. In the event that any of the categories above are unrepresented or underrepresented, the Executive Committee will evaluate and act upon steps it might take to obtain the representation contemplated above. When a member of the Advisory Committee is no longer able or available to serve, the Executive Committee may invite a substitute from the same category above from which that member is associated.

- 7.3 The Advisory Committee will provide advice and counsel to the Executive and Technical Committees on:
- (a) appropriate criteria to facilitate the membership of SMEs and entities engaged in public and private research;
  - (b) encouraging the availability of commercial insurance for Damage to Biological Diversity and of the obligations for Response under the Compact;
  - (c) the criteria for the selection and identification of a roster of neutrals in Appendix D and for the selection of and the identification of the roster of independent science experts in Appendix E;
  - (d) the operation of the Compact; and
  - (e) any other matter set forth in the Compact or these Bylaws or assigned to it by the Executive Committee.
- 7.4 The Advisory Committee shall meet or confer (in person, by telephone or by electronic means) at least quarterly, if practicable, and whenever else necessary for the purposes of the Compact, following reasonable Written Notice (normally forty-five (45) calendar days or thirty (30) calendar days if to be held by telephone unless decided differently at the previous meeting). If the majority of the representatives are in attendance and reach a Consensus (either before or at the beginning of a meeting), the Advisory Committee may meet without Written Notice.

- 7.5 The Advisory Committee shall act by Consensus. At the request of the Executive Director or any representative, the Advisory Committee may take an advisory vote on any issue.
- 7.6 In carrying out its work, the Advisory Committee may engage and consult with qualified experts subject to the confidentiality provisions of the Compact. The Advisory Committee shall issue its advice in writing to the Executive Committee. Deliberations by the Advisory Committee shall not be subject to the provisions on confidentiality in Article 20 of the Compact. The Advisory Committee may, acting by Consensus, seek confidential business information from a Member, but the Member has the sole right to make a determination whether it will provide the information and, if so, under what conditions, including one which limits access to the confidential business information only to persons who execute a binding confidentiality agreement with sufficient assurances that the confidentiality of the information will be honoured.
- 7.7 Initial advice on the issues in Article 7.3(a) of these Bylaws shall be issued within two (2) years from the formation of the Advisory Committee.
- 7.8 The Advisory Committee shall have a term of five (5) years, which shall be extended for an additional five (5) years with the concurrence of the Executive Committee. Thereafter, upon a request from the Advisory Committee, the Executive Committee may extend the Advisory Committee's term of office.
- 7.9 Upon submission of satisfactory documentation of the expenses incurred, the Executive Committee will pay the reasonable expenses of an Advisory Committee member for participation on the Advisory Committee.

## **CHAPTER IV. OPERATIONS OF THE COMPACT**

### ***Article 8: Executive Director***

- 8.1 The Executive Committee will engage an Executive Director. The Executive Director (a) shall not be affiliated with any Member while serving in the role of Executive Director unless otherwise agreed to by all of the Members, (b) shall have established credentials, expertise and experience in the issues addressed and the types of procedures employed in

- the Compact, and (c) shall execute an employment agreement that includes confidentiality provisions consistent with the terms of the Compact and these Bylaws.
- 8.2 If the position of Executive Director becomes vacant, duties of the Executive Director may be temporarily assigned by the Executive Committee to a Member's representative on the Executive or Technical Committee. In such an event and taking into account the time spent performing duties of the Executive Director by the Member's representative, the Executive Committee may approve a credit, in an appropriate amount, in favour of the Member against its share of Operating Costs. If duties of the Executive Director are distributed to representatives of Members under this Article 8.2, the representatives shall not receive any confidential information relating to another Member.
- 8.3 The Executive Director shall also serve as Secretary to the Compact with the responsibility to maintain the records and the financial books and accounts of the Compact, and to make them available for inspection by any Member upon reasonable notice to the Executive Director.
- 8.4 The Executive Director shall organize, attend and facilitate all Executive, Technical, and Advisory Committee meetings and shall record and maintain the minutes of each meeting. The Executive Director (a) shall at all times maintain the confidentiality of all information vis-à-vis each Member, (b) shall not share confidential information relating to one Member with another Member and (c) shall take reasonable administrative steps to ensure that this obligation is not breached.
- 8.5 The Executive Director is responsible for the day-to-day operations and administration of the Compact, including oversight of any Technical Consultant.
- 8.6 The Executive Director shall have the obligations set forth in Articles 14 and 19 of the Compact. The Executive Director shall maintain all records relating to a Claim, including any written reports issued by a Commissioner and any award rendered by a Tribunal.

## **Article 9: Operating Costs**

- 9.1 Each Member will on an equal basis pay all Operating Costs. Membership in the Compact requires that each Member pay its share of Operating Costs from the date on which the Executive Committee issues its membership approval decision and as invoiced thereafter. As appropriate to accommodate the expansion of the membership of the Compact, the Executive Committee shall retain the discretion to modify the payment requirements for applicants for membership based upon the relative ability of Members to pay the full amount that would otherwise be due upon approval of an application for membership.
- 9.2 Where the Executive Committee approves a membership application, the new Member shall be assessed its share of prior capital expenditures and previously committed expenses for continuing Operating Costs (e.g., employment contracts, leases, and unexpended budget costs) for the year in which the new Member joins, and each existing Member will receive a corresponding credit against future assessments for its share of the payment made by the new Member.
- 9.3 The Executive Committee may elect to provide a credit, in an appropriate amount, against a Member's share of Operating Costs to any Member which has regularly provided a higher level of personnel or resources to carry out Compact activities.

## **Article 10: Financial Procedures**

- 10.1 At least ninety (90) days prior to the beginning of each calendar year, the Executive Director shall present to the Executive Committee an annual budget to meet the Operating Costs for Compact activities. Following the incorporation of any changes to the budget it deems necessary, the Executive Committee shall approve the budget prior to sixty (60) days before the beginning of each calendar year.
- 10.2 At least forty-five (45) days prior to the beginning of each calendar year, the Executive Director shall invoice each Member for the next year's costs based on the approved budget, and in an amount sufficient to cover each Member's respective share of the total Operating Costs of the Compact to be incurred during the following calendar year. All invoices shall be paid within thirty (30) days of receipt.

- 10.3 Within thirty (30) days after the end of each calendar quarter, the Executive Director will issue a quarterly report regarding the actual expenses and receipts of the Compact for that calendar quarter, comparing such actual expenses and receipts against the approved budget.

**Article 11: Books of Account**

- 11.1 The Executive Director shall maintain separate books of account covering the Operating Costs and funds disbursed and received. Such books, and all records pertaining thereto, shall be open for inspection by the Members at all reasonable times. On an annual basis, the Executive Director shall provide an accounting of all funds received and Operating Costs incurred under the Compact. The Executive Committee may, as necessary, retain a certified public accounting firm to prepare an annual audited financial statement and tax information.
- 11.2 The books of account, all records pertaining thereto, and all invoices under these Bylaws shall be in U.S. Dollars.

**CHAPTER V. DEFAULT, WITHDRAWAL, AND AMENDMENT**

**Article 12: Default**

- 12.1 A Member is deemed in default if it fails to:
- (a) pay an invoice when due; or
  - (b) meet any of the obligations or conditions of membership of the Compact.
- 12.2 The Executive Committee shall provide Written Notice to any Member that it deems to be in default. The notice shall require the Member (a) to cure the default, or, (b) if the default is one under Article 12.1(b) request a meeting with the Executive Committee within thirty (30) days after transmission of the Written Notice.
- 12.3 If the Member requests a meeting, the Executive Committee shall set a date and time for the meeting which the Member shall attend.

- 12.4 The Member shall have the right to be heard by the Executive Committee at the meeting and shall explain why the Member has not cured the default or why the Member believes it is not in default.
- 12.5 After considering the Member's explanation, and within 30 (days) after the meeting, the Executive Committee shall notify the Member:
- (a) that the Executive Committee no longer deems the Member in default; or
  - (b) that the Executive Committee finds the Member in default and that the default must be remedied in a manner specified within thirty (30) days. The notification shall inform the defaulting Member that it has the right to notify the Executive Committee, by Written Notice within the thirty (30) day period, that it refuses to take the steps specified by the Executive Committee to cure the default.
- 12.6 Should the Member fail to attend the meeting, or should the Member not respond (by curing the default or otherwise) within the time limit set forth in the notification received from the Executive Committee under the above paragraphs, the Member shall be in default under the Compact.
- 12.7 A Member deemed in default, or in default, remains responsible for, and shall continue to execute, its obligations under the Compact including any obligation to provide Response.
- 12.8 A Member in default forfeits its voting rights under the Compact and these Bylaws.
- 12.9 A Member in default under Article 12.1(a) of these Bylaws shall cure the default by advancing the funds due, plus interest from the date of default which shall be equal to 10% per annum simple interest. After a defaulting Member makes payment, any sums (including interest) so paid by the defaulting Member shall be credited to any Member or Members who advanced the defaulting Member's share of any additional assessments paid while the Member was in default.
- 12.10 A Member which fails to pay an invoice within ninety (90) days after such payment was due shall remain liable for the payment, but, subject to Article 13 of these Bylaws, shall



cease to be a Member without the need for Executive Committee action and irrespective of whether the Member was issued or received a notice of default with respect to the failure to make the payment. Such Member may seek reinstatement as a Member by making the payment with interest and reapplying for membership to the Executive Committee unless the Executive Committee waives the application requirement. The interest rate shall be set by the Executive Committee consistent with interest rates generally prevailing at the time payment is due.

- 12.11 If a Member invokes Article 24.8 of the Compact before Article 12.10 above is operative with respect to a default that relates to a failure to make payment, the Member shall make the undisputed portion of the payment and escrow any disputed portion of the payment in a separate account established by the Executive Director until dispute resolution under Article 24.8 of the Compact is concluded. Article 24.8 of the Compact, if otherwise applicable, shall be available to resolve other disputes involving a default. If Article 24.8 is not invoked to resolve a dispute over a default within ninety (90) days following the end of the thirty (30) day time period to cure a default established by Article 12.5(b) of these Bylaws, the Member shall, subject to Article 13 of these Bylaws, cease to be a Member without the need for Executive Committee action. Such Member may seek reinstatement as a Member by curing the default and reapplying for membership to the Executive Committee unless the Executive Committee waives the application requirement.

### **Article 13: Withdrawal**

- 13.1 A Member not in default may withdraw from participation in the Compact by submitting to the Chair of the Executive Committee a Written Notice of withdrawal signed by a duly authorised representative of the Member. The withdrawal shall become effective twelve (12) months after receipt of the Written Notice by the Chair. A withdrawing Member shall not be entitled to any refunds of sums previously paid by the Member under these Bylaws.
- 13.2 The withdrawing Member or one who ceases to be a Member pursuant to Article 12 of these Bylaws, remains responsible to complete any outstanding Response obligations. If a Member withdraws or ceases to be a Member pursuant to Article 12 after submission of a Claim against it and before that Claim is concluded, that Member shall remain under an

obligation to provide any Response required pursuant to the provisions of the Compact and all obligations relating to confidentiality shall survive the termination of membership. A Member cannot withdraw from, or trigger its own default under, the Compact in order to avoid a Claim.

- 13.3 One year after a Member has withdrawn, or within sixty (60) days after a Member ceases to be a Member pursuant to Article 12, the remaining Members shall by proportional share take over the withdrawing Member's share of any assessments for Operating Costs, or other financial obligations accrued under the Compact. Subsequent payment by, or recovery from, the defaulting Member, shall be credited to the other Members who advanced the defaulting Member's share of an assessment.

***Article 14: Amendment***

- 14.1 For a period of five (5) years from the Effective Date these Bylaws may be amended by a Super Majority vote of the Executive Committee. Thereafter, these Bylaws shall be amended by Consensus of the Members of the Executive Committee in Good Standing.

**CHAPTER VI. ROSTER OF NEUTRALS AND EXPERTS**

***Article 15: Roster of Neutrals and Independent Science Experts***

- 15.1 The process to establish the roster of neutrals and a roster of independent science experts shall be open, collaborative, and transparent. Any State and the Advisory Committee may nominate neutrals or experts for inclusion on these rosters. The Executive and Technical Committees shall consider and recommend, respectively, such nominees that meet the minimum qualifications or criteria that are set forth in Appendix D or Appendix E to this Compact. Qualifications or criteria shall be objective and the Advisory Committee shall advise the Executive Committee and Technical Committee on the appropriate qualifications or criteria to use. The Executive and Technical Committees will endeavour to develop a roster of neutrals and independent science experts that has equitable geographic representation.

- 15.2 If for any reason the Executive Committee does not establish a roster of neutrals or a roster of independent science experts, candidates for service as a neutral must meet the minimum qualifications set forth in Appendix D and candidates for service as an independent science expert must meet the criteria set forth in Appendix E.

## **CHAPTER VII. MODIFICATIONS TO PCA FACT-FINDING, CONCILIATION AND ENVIRONMENTAL ARBITRATION RULES**

The PCA's procedural rules are patterned after the 1976 UNCITRAL Arbitration Rules and explain that parties can modify them by agreement in writing. ("The framers of existing and future agreements may need to determine the relationship between the [PCA] Rules and those agreements, and may modify them as necessary.") These Bylaws contain the following modifications to the PCA rules to bring them up to date with arbitration and dispute resolution practice since 1976 to assist a Commissioner, Conciliator, or Tribunal to address a State's Claim under the Compact.

### ***Article 16: Modifications to PCA Fact-Finding Rules***

#### **16.1 The PCA Fact-Finding Rules**

The Permanent Court of Arbitration (PCA) has promulgated the "Optional Rules for Fact-Finding Commissions of Inquiry" ("PCA Fact-Finding Rules"). The PCA Fact-Finding Rules are available at: [http://www.pca-cpa.org/showpage.asp?pag\\_id=1188](http://www.pca-cpa.org/showpage.asp?pag_id=1188).

#### **16.2 Use of the PCA Fact-Finding Rules To Support the Claims Process**

Article 14 of the Compact provides that the PCA Fact-Finding Rules as modified by the Bylaws can be utilized as part of the Claims Process.

#### **16.3 Modifications of the PCA Fact-Finding Rules**

The following are the modifications to the PCA Fact-Finding Rules as permitted by Article 1.2 of these Rules. The PCA Fact-Finding Rules as modified herein will be followed in the Claims Process and by the Commission of Inquiry formed under the PCA Fact-Finding Rules. Execution of the Mutual Agreement For Binding Arbitration represents acceptance by a State, or all States, and a Member, or all Members, involved in the Claims Process, of these modifications to the PCA Fact-Finding Rules and express agreement to abide by them.

#### **16.4 Number and Appointment of Commissioners**

(a) There shall be one Commissioner.

- (b) The Commissioner shall be selected by the Secretary-General of the PCA from the roster in Appendix D to the Compact, or, if no roster has been assembled, based on the minimum qualifications for a Commissioner set forth in Appendix D. The Executive Director shall be responsible for providing notice to the Secretary-General of the need to make the appointment. The provisions of Article 5 of the PCA Fact-Finding Rules are applicable to a Commissioner.
- (c) If for any reason the Commissioner fails, or is unable, to perform the duties of the Commissioner, dies, or resigns, the Commissioner shall be replaced following the same procedures utilized to appoint the Commissioner initially.

#### **16.5 Place of Meeting of the Commission**

- (a) The Commission shall meet in The Hague or in any other location where the PCA has adequate facilities to host the activities of the Commission or any other location deemed appropriate by the Commissioner after consultation with the parties. The Commissioner may hold telephonic conferences with the parties (i) on procedural issues or (ii) to conduct the Claims' review process or, in the event of multiple Claims, the Claims consolidation process, set forth in Article 14 of the Compact.
- (b) With respect to Article 6.3 of the PCA Fact-Finding Rules, if the Commissioner decides to conduct fact-finding in the State or States involved in the Claims Process, the State or States and the Member or Members involved in the Claims Process shall cooperate with the Commissioner in facilitating fact-finding proceedings in whatever locale is determined by the Commissioner.

#### **16.6 Language**

With respect to Article 8 of the PCA Fact-Finding Rules, the language to be used in Commission proceedings shall be English.

#### **16.7 Cooperation of Parties with the Commission**

With respect to Article 9 of the PCA Fact-Finding Rules, if a party in the Claims Process is unable to ensure the appearance of a witness or expert before the Commission, the method for collecting, in the place where the witness or expert is located, the evidence

from the witness or expert, whether in the form of oral testimony or otherwise, shall be determined by the Commissioner.

**16.8 Submission of Statements to the Commission**

With respect to Article 10 of the PCA Fact-Finding Rules on confidentiality of all matters relating to the fact-finding proceedings, if a party believes that disclosure is required by law applicable to the party, it will give the other parties prompt notice of the belief and an opportunity to challenge the applicability of the law in an appropriate forum before the disclosure of any information referred to in Article 10 of the PCA Fact-Finding Rules.

**16.9 Transmission and Archiving of Documents**

With respect to Articles 6.1 and 9.1 of the PCA Fact-Finding Rules, following Written Notice from the Executive Director, all paper or electronic documents (hereafter in Articles 17, 18 and 19 of these Bylaws, “document” or “documents” refers to both paper and electronic documents) in the personal possession of the Commissioner shall be transferred to the International Bureau of the PCA in paper or electronic format for archiving, and in the case of electronic documents then deleted so that the Commissioner is no longer in possession of any such documents.

**16.10 Conduct of the Fact-Finding Proceedings**

(a) With respect to Article 12 of the PCA Fact-Finding Rules, the Commissioner may permit oral testimony of a witness or expert to be submitted by a party in the form of a witness statement but shall allow all other parties the right to orally examine the witness before the Commissioner.

(b) All fact finding proceedings before the Commissioner shall be in person and transcribed by a person qualified to make such transcriptions. Any proceeding by telephone or video conference shall, at the discretion of the Commissioner, be (i) transcribed or (ii) summarized by the Commissioner in the form of a written summary of the results of the proceeding and circulated to the parties.

**16.11 Termination of Fact-Finding Proceedings**

(a) With respect to Article 14.2 of the PCA Fact-Finding rules, the fact finding report of the Commission shall not be binding on the parties with the proviso that in the

arbitration conducted under the Assessment and Arbitration Process, (i) the Commission's report may be made part of the arbitration record and (ii) the Tribunal shall infer that the facts found by the Commission are true unless the party contesting the facts can demonstrate that under the Standard of Proof such an inference is inappropriate.

- (b) With respect to Article 14.1 of the PCA Fact-Finding Rules, following issuance of a written report, the responsibilities of the Commissioner shall not terminate until the Assessment and Arbitration Process has been initiated.

#### 16.12 **Costs**

- (a) With respect to Article 16.1 and 16.2 of the PCA Fact-Finding Rules, the costs of the Commission shall be borne by the Members as an Operating Cost of the Compact. The remainder of Article 16.2 of the PCA Fact-Finding Rules shall apply to each party's expenses and costs (including attorneys' fees) except that (i) if a Least Developed Country, Small Island Developing State, or Megadiverse Country, is bringing the Claim, the expenses of that State identified in the second sentence of Article 16.2 of the PCA Fact-Finding Rules shall be borne by the Members as an Operating Cost, and (ii) costs shall not, under any circumstances, include any attorneys' fees where the amount or payment of the fee for services is contingent in whole or in part on the outcome of a Claim.
- (b) With respect to Article 16 of the PCA Fact-Finding Rules, the costs defined in Article 16.1 of the PCA Fact-Finding Rules shall be an Operating Cost of the Compact except where the Commissioner dismisses a Claim. Where a Commissioner dismisses a Claim, the State that brought the Claim shall be solely responsible for the costs defined in Article 16 of the PCA Fact-Finding Rules.

#### 16.13 **Suspension of Review of a Claim by a Commissioner**

If the State or any person or entity brings an action invoking provisions of applicable law to recover damages and other relief that are or may be duplicative in any manner of any form of Response that is available on a Claim made by the State under the Compact which is being reviewed by a Commissioner, then to avoid parallel proceedings and the potential for double or multiple recovery, the review of the Claim by the Commissioner shall be immediately suspended. It is Member's obligation to bring to the attention of the

Commissioner the presence of the parallel action and to establish that the parallel action creates the potential for a double or multiple recovery. A Claim that is suspended under this Article 16.13 for more than one year shall be dismissed by the Commissioner.

### **Article 17: Modifications to the PCA's Environmental Conciliation Rules**

#### **17.1 The PCA Environmental Conciliation Rules**

The Permanent Court of Arbitration (PCA) has promulgated the "Optional Rules for Conciliation of Disputes Relating to Natural Resources and/or the Environment" ("PCA Environmental Conciliation Rules"). The PCA Environmental Conciliation Rules are available at: [http://www.pca-cpa.org/showpage.asp?pag\\_id=1188](http://www.pca-cpa.org/showpage.asp?pag_id=1188).

#### **17.2 Use of the PCA Environmental Conciliation Rules To Facilitate the Resolution of Claims Under The Compact**

Article 15 of the Compact provides that the parties in the Claims process will, in a conciliation, use the PCA Environmental Conciliation Rules, as modified by the Bylaws.

#### **17.3 Modifications of the PCA Environmental Conciliation Rules**

In addition to the provisions of Article 15 of the Compact, the following are the modifications to the PCA Environmental Conciliation Rules as permitted by Article 1.2 of these Rules. The PCA Environmental Conciliation Rules as modified herein will be followed in a mediation (used interchangeably with "conciliation" herein) as part of the Claims process. Execution of the Mutual Agreement For Binding Arbitration represents acceptance by a State, or all States, and a Member, or all Members, involved in the Claims process, of these modifications to the PCA Environmental Conciliation Rules and express agreement to abide by them.

- (a) With respect to Article 2 of the PCA Environmental Conciliation Rules, rather than having one of the parties initiate conciliation, the Executive Director will send the parties the written invitation to conciliate and will copy the International Bureau of the PCA and will provide to the International Bureau the information set forth in Article 2.1(a) of the PCA Environmental Conciliation Rules. In determining when to issue the invitation, the Executive Director will give consideration to the time it will take to select the Conciliator and the time allowed under Article 15 of the Compact

for conciliation in the absence of an agreement by the parties to the Claims process to extend that time.

- (b) There shall be one Conciliator.
- (c) Within ten days after the Commissioner determines that a Claim is complete, the Conciliator shall be selected by Consensus of the State(s) and Member(s) that are parties to the dispute from the roster in Appendix D to the Compact or, if no roster has been assembled, based on the minimum qualifications for a Conciliator set forth in Appendix D. If the Executive Director is not informed by the parties within this time period that a Consensus has been reached, within thirty (30) days after expiration of this ten-day time period, the Secretary-General of the PCA shall appoint the Conciliator from the roster in Appendix D to the Compact, or, if no roster has been assembled, based on the minimum qualifications for a Conciliator set forth in Appendix D. The Executive Director shall be responsible for providing notice to the Secretary-General of the need to make the appointment.
- (d) It is the goal of these modifications to the PCA Environmental Conciliation Rules to have the Conciliator selected before the parties conclude their settlement discussions as contemplated by Article 15 of the Compact so that if the parties are unable to resolve their differences without the assistance of a Conciliator, the conciliation can immediately begin as contemplated by Article 15 of the Compact.
- (e) With respect to Article 5 of the PCA Environmental Conciliation Rules, the Commissioner shall provide the Conciliator with the Claims Form and supporting information and information submitted by the Member or Members. The Conciliator shall have the discretion to ask for a further written statement of the position of each party. The Conciliator shall have the flexibility to request information from the parties that will assist the Conciliator in the resolution of the Claim consistent with the time period for conciliation established in the Compact unless the parties to the Claim agree to extend those time periods as allowed by Article 15 of the Compact.

## ***Article 18: Modifications to the PCA Environmental Arbitration Rules***

### **18.1 The PCA Environmental Arbitration Rules**



The Permanent Court of Arbitration (PCA) has promulgated the “Optional Rules for Arbitration of Disputes Relating to the Environment and/or Natural Resources” (“PCA Environmental Arbitration Rules”). The PCA Environmental Arbitration Rules are available at: [http://www.pca-cpa.org/showpage.asp?pag\\_id=1188](http://www.pca-cpa.org/showpage.asp?pag_id=1188).

**18.2 Use of the PCA Environmental Arbitration Rules in the Assessment and Arbitration Process**

Article 16 of the Compact provides that the PCA Environmental Arbitration Rules shall govern the Assessment and Arbitration Process, except as modified by the Bylaws.

**18.3 Modifications to the PCA Environmental Arbitration Rules**

The following are the modifications to the PCA Environmental Arbitration Rules as permitted by Article 1.1 of these Rules. The PCA Environmental Arbitration Rules as modified herein will be followed in the Assessment and Arbitration Process and by the Tribunal formed under the PCA Environmental Arbitration Rules. Execution of the Mutual Agreement For Binding Arbitration represents acceptance by a State, or all States, and a Member, or all Members, involved in the Assessment and Arbitration Process of these modifications to the PCA Environmental Arbitration Rules and express agreement to abide by them.

**18.4 Introductory Rules**

With respect to Articles 2 and 3 of the PCA Environmental Arbitration Rules, because the Claims Process under Article 14 of the Compact requires the submission of a Claim to a Commissioner, arbitral proceedings shall be deemed to commence consistent with Article 14 of the Compact. Formal notice of arbitration shall be given by the Executive Director to the State or States which brought the Claim and Member or Members alleged to be the Cause of Damage to Biological Diversity. The notice shall include the Claim and all other submissions made by the State or States to the Commissioner under the Claims Process along with a copy of the Compact. Notice shall be made by courier to the State or States and Member or Members and the courier shall be required to collect a receipt documenting the date of delivery of the notice.

**18.5 Composition of the Arbitral Tribunal**

- (a) There shall be three arbitrators except that there shall be one arbitrator in the case of a review of a Commissioner's determination whether a Claim has satisfied the requirements of Article 14 of the Compact or whether multiple Claims represent a single Incident, or in the case of a review of an assertion by a State that a Member has breached its Response obligation.
- (b) For a Tribunal with three arbitrators, within thirty (30) days after receipt of notice of arbitration, the State or States involved in the Assessment and Arbitration Process shall appoint one arbitrator from the roster in Appendix D to the Compact, or, if no roster has been assembled, based on the minimum qualifications for an arbitrator set forth in Appendix D. If the State fails to select the arbitrator within this time frame, the Claim shall not be further considered until the State selects the arbitrator. Within thirty (30) days after the selection made by the State, the Member or Members involved in the Assessment and Arbitration Process shall appoint a second arbitrator also from the roster in Appendix D to the Compact, or, if no roster has been assembled, based on the minimum qualifications for an arbitrator set forth in Appendix D. If the Member fails to select the second arbitrator within this time period, the Secretary-General of the PCA shall, using the roster in Appendix D to the Compact, or, if no roster has been assembled, based on the minimum qualifications for an arbitrator set forth in Appendix D, appoint the second arbitrator. Within thirty (30) days after the second arbitrator is selected, the two arbitrators shall select the third arbitrator also from the roster in Appendix D to the Compact or, if no roster has been assembled, based on the minimum qualifications for an arbitrator set forth in Appendix D, and this third arbitrator shall serve as the presiding arbitrator of the Tribunal. If the two arbitrators fail to select the third arbitrator within this time period, the Secretary-General of the PCA shall appoint the third arbitrator from the roster in Appendix D to the Compact or, if no roster has been assembled, based on the minimum qualifications for an arbitrator set forth in Appendix D. Each party is entitled to consult with arbitrator appointed by that party on the selection of the presiding arbitrator. In the case of an assertion by a State that a Member has breached its Response obligation, the sole arbitrator shall be the presiding arbitrator of the Tribunal or if the presiding arbitrator is not available, the sole arbitrator shall be one of the other members of the Tribunal as designated by the Secretary General of the PCA. For any other circumstance where a Tribunal consists of with one

arbitrator, the arbitrator shall be appointed by the Secretary-General of the PCA using the roster in Appendix D to the Compact, or, if no roster has been assembled, based on the minimum qualifications for an arbitrator set forth in Appendix D. Notwithstanding the roster or the criteria in Appendix D, the parties participating in the arbitration have the right to select one or more members of the Tribunal if they mutually agree on the selection of the member(s) and in writing jointly so advise the Secretary-General of the PCA of their mutual agreement.

(c) Within the time frames set forth in this Article 18.5, (i) where there is more than one State making a Claim against a Member in the same PCA-administered arbitration and the States are unable to agree on the appointment of an arbitrator, the Secretary-General shall make the appointment; or (ii) where there is more than one Member named as a respondent to a Claim made in the same PCA-administered arbitration and the Members are unable to agree on the appointment of an arbitrator, the Secretary-General shall make the appointment. In either case, the States or Members will advise the Secretary General of the names of the persons on the roster in Appendix D to the Compact who were acceptable to them to serve as a party-appointed arbitrator, and the Secretary-General shall select the States' party-appointed arbitrator from among the names provided by the States and the Members' party-appointed arbitrator from among the names provided by the Members. If no roster has been assembled, the Secretary-General shall select the States' party-appointed arbitrator or the Members' party-appointed arbitrator based on the minimum qualifications for a neutral set forth in Appendix D.

(d) The minimum qualifications required for a person proposed to be appointed to the Tribunal are set forth in Appendix D to the Compact. The provisions of Article 9 of the PCA Environmental Arbitration Rules are applicable to a prospective arbitrator in the Assessment and Arbitration Process.

(e) If an arbitrator is challenged under Articles 9-12 of the PCA Environmental Arbitration Rules, under Article 12 of these Rules, the decision on the challenge shall be made by the Secretary-General of the PCA. If the challenge is sustained, a substitute arbitrator shall be appointed pursuant to the procedures set forth in these Bylaws with all time periods starting on the date the challenge was sustained.

- (f) If an arbitrator dies or resigns, a substitute arbitrator shall be appointed pursuant to the procedures set forth in these Bylaws with all time periods starting on the date of death or resignation.

**18.6 Designation of Confidential Business Information**

With respect to Articles 15.4, 15.5, and 15.6 of the PCA Environmental Arbitration Rules, a party in the Assessment and Arbitration Process shall have the right to designate proprietary business information or trade secrets as confidential business information. If such a designation is made, the Tribunal (i) shall require any person to whom the confidential business information is to be disclosed, including disclosure to persons in attendance at any hearings or disclosure to any experts, to sign an appropriate confidentiality undertaking, and (ii) shall not reference the text of such information in any award that is rendered.

**18.7 Place and Language of Arbitration**

(a) The legal seat of the arbitration is Geneva, Switzerland. For convenience, after consultation with the parties, the Tribunal may hold hearings by telephone or video conference, or may hold evidentiary hearings at any other location, but the award shall be deemed to be made at Geneva, Switzerland.

(b) The language to be used in proceedings, and with respect to all submissions, is English.

**18.8 Statement of Claim and Defence**

(a) With respect to Articles 18 and 19 of the PCA Environmental Arbitration Rules, the Tribunal shall consult early with the parties in the Assessment and Arbitration Process to determine whether it is necessary to have a Statement of Claim or Statement of Defence submitted in light of the submissions already made by the parties as part of the Claims Process.

(b) With respect to Article 20 of the PCA Environmental Arbitration Rules, if a party seeks to amend a Claim or a defence, the arbitration shall be suspended and the matter returned to the Commissioner who first reviewed the Claim or defence for

consideration under Article 14 of the Compact, including the provisions of Article 15 of the Compact relating to settlement and conciliation, unless the parties consent to the amendment in which case the matter shall remain before the Tribunal for continuing proceedings. If reconsideration under Articles 14 and 15 of the Compact does not result in a resolution of the amendment or the Claim within ninety (90) days after suspension of the arbitration, Article 20 of the PCA Environmental Arbitration Rules shall then be followed by the Tribunal.

#### 18.9 Joinder

The Tribunal shall have the power (i) on the application of any party, but only after all parties have had a reasonable opportunity to state their views, to allow one or more third persons to be joined in the arbitration as a party provided that any such third person and the applicant party have consented thereto in writing, and (ii) thereafter to make a single final award, or separate awards, in respect of all parties in the arbitration. The Tribunal shall not permit *amicus* parties or *amicus* submissions.

#### 18.10 Evidence and Hearings

- (a) With respect to Article 24.1 of the PCA Environmental Arbitration Rules, the Standard of Proof set forth in the Compact shall be followed by the Tribunal.
- (b) With respect to Article 24.3 of the PCA Environmental Arbitration Rules, the documents, exhibits, and other evidence that a party in the Assessment and Arbitration Process is relying upon shall be exchanged with all other parties at least ninety (90) days before any oral hearing at which evidence will be received by the Tribunal. The Tribunal has the discretion to allow a party to supplement its evidence within the ninety-day period having due regard for delay, prejudice, or the adequacy of time to prepare for the oral hearing that may be caused by granting the request.
- (c) With respect to Article 24 of the PCA Environmental Arbitration Rules, no party in the arbitral proceedings shall be required to produce documents requested by another party. If a party seeks a site inspection, the provisions of Article 7 of the 2010 IBA Rules for the Taking of Evidence in International Arbitration (IBA Rules), including the reference to objections under Article 9.2 of the IBA Rules, shall apply except that

as to confidentiality, the confidentiality provisions of the Compact and these Bylaws shall be followed.

- (d) With respect to Article 25.2 of the PCA Environmental Arbitration Rules, if a party intends to call witnesses for any oral hearing, the witness's evidence shall be submitted in writing to the Tribunal and all other parties in the arbitration at least sixty (60) days before the hearing at which the witness's evidence will be presented. If the proponent of the witness elects to do so, the proponent shall be permitted to offer limited oral examination to assist the Tribunal in understanding the evidence of the witness. Thereafter, all other parties shall be permitted by the Tribunal to conduct an oral examination of witnesses. The party who initially presented the witness shall subsequently have the opportunity to ask additional questions on the matters raised in the other parties' questions. Oral examinations are subject to the Tribunal's authority to control the manner in which witnesses are examined. The Tribunal may ask questions of a witness at any time. The Tribunal may arrange the order of testimony by issue or in such a manner that witnesses presented by different parties can be questioned at the same time and in confrontation with each other. Subject to these Bylaws, Article 4 of the IBA Rules shall be applied by the Tribunal to witnesses of fact.
- (e) With respect to party-appointed expert witnesses, Article 5 of the IBA Rules shall be applied by the Tribunal. Expert witnesses must produce reports containing Science-Based opinions or evidence or their reports and testimony shall be disregarded by the Tribunal to the extent that the reports do not contain Science-Based opinions or evidence. For purposes of oral examination, expert witnesses shall be treated in the same manner as fact witnesses as set forth in all but the last sentence of Article 18.9(d) of these Bylaws.
- (f) All proceedings in person before the Tribunal shall be transcribed by a person qualified to make such transcriptions. Any proceeding by telephone or video conference shall, at the discretion of the Tribunal, be (i) transcribed or (ii) summarized by the Tribunal in the form of a written summary of the results of the proceeding and circulated to the parties.

#### 18.11 **Interim Measures**

With respect to Article 26 of the PCA Environmental Arbitration Rules, interim measures shall be permitted only upon a showing of a substantial likelihood that the person seeking interim measures will succeed in meeting the Standard of Proof on all elements necessary to establish Damage to Biological Diversity Caused by a Member or Members irrespective of defences raised by the Member or Members; that the interim measure is required to prevent irreparable harm; and the harm sought to be prevented outweighs the harm to the Member or Members if the interim measures are required. Interim measures, if awarded, shall be no greater than required to contain or minimize damage or otherwise to preserve the status quo until a hearing can be held on the merits of the Claim. Security shall be required by the Tribunal from the proponent of the interim measures if interim measures are awarded. If interim measures are awarded, the cost of such measures shall be included for purposes of calculating financial limits on Response under Article 13 of the Compact. If interim measures are awarded and the State does not prevail on its Claim on the merits, the Tribunal shall order disbursement of the security to the Member. Should the security required by the Tribunal be insufficient to reimburse a Member for the costs paid by the Member for interim measures, the Tribunal shall require the State to pay the Member for the costs so expended not reimbursed by the security.

#### 18.12 **Experts for the Tribunal**

With respect to Article 27 of the PCA Environmental Arbitration Rules, the Tribunal may appoint one or more experts from the roster that appears at Appendix E to the Compact or, if no roster has been assembled, based on the criteria for an independent science expert set forth in Appendix E. If the parties agree to use an independent science expert not on the roster, the Tribunal may also use that expert. Article 6 of the IBA Rules entitled "Tribunal-Appointed Experts" shall be applied by the Tribunal to supplement Article 27 of the PCA Environmental Arbitration Rules, subject to (i) the confidentiality rules of the Compact, (ii) these Bylaws, and (iii) Article 15 of the PCA Environmental Arbitration Rules as it has been modified by these Bylaws.

#### 18.13 **Notices and Submissions to the Executive Director**

With respect to Article 28 of the PCA Environmental Arbitration Rules, if a Member fails to appear or make submissions, before any proceeding to determine whether sufficient cause exists for the failure, the Tribunal will provide notice to the Executive Director of

the Compact of the failure. The Tribunal shall also provide copies of orders or awards to the Executive Director.

**18.14 Form and Effect of the Award**

- (a) With respect to Article 32.1 of the PCA Environmental Arbitration Rules, the final award, and any interim, interlocutory, or partial awards shall be consistent with the terms of the Compact, the Bylaws, and the Arbitration Agreement. Except as otherwise permitted by these Bylaws, prejudgment interest is not permitted to be awarded by the Tribunal under any circumstances. If an award of compensation is made, the award may be expressed in any currency. The Tribunal may order that simple or compound interest shall be paid on such award of compensation beginning on a specified future date, if the compensation is not paid by that future date.
- (b) With respect to Article 32.3 of the PCA Environmental Arbitration Rules, the Tribunal shall explain the basis for any award rendered in sufficient detail with supporting record references, but honouring the confidentiality of confidential record references, to allow the parties to follow each step of the reasoning underpinning the conclusions upon which the award is based.
- (c) If Response by a Member or Members is required by the award of the Tribunal, financial assurance shall be demonstrated by the Member or Members consistent with Article 3.5 of the Compact, and the award must be consistent with the obligation in Article 12.8 of the Compact and the financial limits in Article 13 of the Compact. A challenge to the adequacy of financial assurance shall be made to, and resolved by, the Tribunal. For purposes of estimating the present value of the cost of Response, the Tribunal shall utilize a discount rate no less than 3% and no more than 7% with the determination of the precise rate by the Tribunal after hearing argument of the parties, if the parties do not otherwise agree on the discount rate within this range.
- (d) If an award of Response is made, and payment of monies is required by a Member or Members to implement the Plan of remediation, the award shall provide that, unless the parties agree on another approach, (i) the State or States may use funds only for Response and not for administrative or other costs associated with submission or pursuit of the Claim; (ii) the Member or Members shall make payments into an



escrow account of a reputable financial institution or investment bank; (iii) funds shall be released from escrow only against invoices documenting that an expenditure was made for Response; (iv) the Member or Members shall have audit rights to verify that expenditures are being used only for Response; (v) the State or States shall annually produce certified public accounting statements of expenditures and receipts from escrow documenting the purposes for which funds were expended.

(e) If an award is made against a Member or Members and a Plan is included in the award, the Member or Members, as opposed to the State or States, shall first be given the opportunity to implement the Plan.

(f) The Tribunal shall retain jurisdiction to address any disputes that arise in the course of implementation of Response under the Plan.

**18.15 Suspension of Review of a Claim by a Commissioner**

If the State or any person or entity brings an action invoking provisions of applicable law to recover damages and other relief that are or may be duplicative in any manner of any form of Response that is available on a Claim made by the State under the Compact which is being heard by the Tribunal, then to avoid parallel proceedings and the potential for double or multiple recovery, the proceedings before the Tribunal shall be immediately suspended. It is Member's obligation to bring to the attention of the Tribunal the presence of the parallel action and to establish that the parallel action creates the potential for a double or multiple recovery. A Claim that is suspended under this Article 18.3(x) for more than one year shall be dismissed by the Tribunal. Any Response awarded by a Tribunal shall expressly provide that if there is an award or judgment in any other forum of Response in favour of the State or any person or entity for damages and other relief which duplicates in any manner Response awarded under the Compact, such Response under the Compact shall be terminated and that the State shall immediately reimburse the Member for all sums paid for such Response prior to such termination.

**18.16 Compact Principles for Determination of Claims, Rules of Construction and Applicable Law**

With respect to Article 33 of the PCA Environmental Arbitration Rules, the Tribunal shall apply the requirements of the Compact to determinations of Causation, Damage to

Biological Diversity, Response, and the Plan under the Compact's Standard of Proof. If the Tribunal determines that there is an ambiguity requiring resort to rules of construction of contracts, the following rules shall be applied by the Tribunal (i) there shall be no construction of language against a person because the person drafted the language in question, (ii) the language of the Compact shall control over any conflicting language in any appendix or other document; and (iii) the words of the Compact shall be given their plain or common meaning. Parol evidence may not be considered in the interpretation of the Compact unless there is an ambiguity identified by the Tribunal, but under no circumstances shall prior drafts of the Compact, negotiation materials related to the Compact, or public communications about or extrinsic materials relating to the Compact, be considered at all in interpreting the Compact. If additional rules of construction must be utilized, then the Code of Obligations of Switzerland (and not any of Switzerland's conflicts of law provisions) shall be the source of rules of construction to resolve the ambiguity but the rules of construction set forth in these Bylaws shall supersede any conflicting rules of construction under the Code of Obligations of Switzerland.

#### 18.17 **Costs and Deposits of Costs**

- (a) With respect to Article 40 of the PCA Environmental Arbitration Rules, the costs of the arbitration shall be apportioned according to Article 17 of the Compact, or if applicable, Article 19.6 of the Compact. Each party in the arbitration shall bear its own costs, including attorneys' fees, except as provided for in Article 17 of the Compact, or, if applicable, Article 19.6. If for any reason an arbitration is abandoned, suspended, or terminated, by agreement or otherwise, the parties shall remain liable to pay the costs of the arbitration. Costs of arbitration shall not include any attorneys' fees where the amount or payment of the fee for services is contingent in whole or in part on the outcome of a Claim. The Tribunal shall have the discretion to award costs and attorneys' fees in an amount determined by the Tribunal to be appropriate against any party that conducts itself in bad faith during the proceedings.
- (b) If a party refuses to make a deposit as required under Article 41 of the PCA Environmental Arbitration Rules, the remaining parties may be directed to pay the deposit. In such circumstances, the party making the substitute payment shall be entitled to recover that amount as a debt immediately due from the defaulting party. Pre-judgment interest shall be allowable on this sum.

(c) Failure by a State or States to provide promptly and in full the required deposit may be treated by the Tribunal as a withdrawal of the Claim.

**18.18 Rules of Professional Conduct**

The following rules of professional conduct shall be applicable to counsel in addition to any other rules of professional conduct that may be applicable: (i) There is a duty of candor to the Tribunal; (ii) No party may communicate with an employee of another party without the consent of the other party's counsel; and (iii) if a document is withheld from the Tribunal because of a claim of privilege, the Tribunal will be advised of the existence of the document and the basis of the claim of privilege; and (iv) if a party comes into possession of confidential or privileged documents of another party by means other than intentional transmittal by the other party, the Tribunal and all parties will be promptly notified and the documents will be destroyed or returned to the other party.

**18.19 Limits on Use and Retention of Confidential Information and Documents**

Confidential information from the arbitral proceedings may not be used in any proceeding to enforce or challenge an award except as required by law and, if required, shall be filed under seal. After Written Notice from the Executive Committee to the Tribunal and the Secretary-General of the PCA, the Tribunal shall destroy or, in the case of electronically stored information, delete, all documents, records or other information generated by the parties or the Tribunal that are in the personal possession of the members of the Tribunal, except for the award of the Tribunal, unless the documents, records or other information must be maintained with respect to a challenge to, or enforcement of, an award, or under applicable law.

**CHAPTER VIII. RESOLUTION OF DISPUTES AMONG MEMBERS**

***Article 19: Modifications to the ICDR's International Arbitration Rules***

**19.1 The ICDR International Arbitration Rules**

This Article 19 supplements the requirements of Article 24.8 of the Compact and represent additional modifications to the ICDR International Arbitration Rules beyond those set forth in Article 24.8 of the Compact, as permitted by Article 1.1 of the ICDR's International Arbitration Rules (<http://www.adr.org/sp.asp?id=33994>).

## 19.2 **Modifications to the ICDR International Arbitration Rules**

Execution of the Compact represents acceptance by all Members of the following modifications to the ICDR International Arbitration Rules and express agreement to abide by them to resolve disputes under Article 24.8 of the Compact. Except as otherwise set forth below, the ICDR International Arbitration Rules are applicable.

## 19.3 **The Tribunal**

- (a) Within sixty (60) days following the date notice of the arbitration is received by the administrator under Article 1 of the ICDR International Arbitration Rules, the arbitrator shall be selected by Consensus of the Members from the roster of arbitrators in Appendix D to the Compact or, if no roster has been assembled, based on the minimum qualifications for an arbitrator set forth in Appendix D. If a Consensus cannot be reached within this time frame, the claimant shall provide Written Notice to the administrator and the administrator shall, within ten (10) days, select the arbitrator from the roster in Appendix D or, if no roster has been assembled, based on the minimum qualifications for an arbitrator set forth in Appendix D.
- (b) If the arbitrator must be replaced for any reason, the same procedure set forth in Article 19.1(a) of these Bylaws shall be followed. The sixty (60) day time period shall start on the date that the position of arbitrator ceases to be filled.

## 19.4 **Place of Arbitration**

- (a) With respect to Article 13.2 of the ICDR International Arbitration Rules, if the tribunal decides to hold conferences or hear witnesses or inspect property or documents elsewhere than London, England, the tribunal must first consult with the parties, and in the case of hearing witnesses or inspecting property or documents, the tribunal must determine that the witnesses, property, and documents are, only available at the place selected by the tribunal.
- (b) For convenience, the tribunal may hold hearings by telephone or video conference, but the award shall be made at the place of arbitration.

**19.5 Conduct of the Arbitration and Evidence**

With respect to Articles 16 and 19 of the ICDR International Arbitration Rules,

(a) the documents, exhibits, and other evidence the parties are relying upon shall be exchanged with each other at least ninety (90) days before any oral hearing at which evidence will be received by the tribunal.

(b) no party shall be required to produce documents requested by another party.

**19.6 Further Written Statements, Hearings, and Party-Appointed Experts**

(a) With respect to Articles 17 and 20 of the ICDR Environmental Arbitration Rules, if a party intends to call witnesses for any oral hearing, the witness's evidence shall be submitted in writing to the tribunal and all other parties in the arbitration at least sixty (60) days before the hearing at which the witness's evidence will be presented. If the proponent of the witness elects to do so, the proponent shall be permitted to offer limited oral examination to assist the tribunal in understanding the evidence of the witness. Thereafter, all other parties shall be permitted by the tribunal to conduct an oral examination of witnesses. The party who initially presented the witness shall subsequently have the opportunity to ask additional questions on the matters raised in the other parties' questions. Oral examinations are subject to the tribunal's authority to control the manner in which witnesses are examined. The tribunal may ask questions of a witness at any time. The tribunal may arrange the order of testimony by issue or in such a manner that witnesses presented by different parties can be questioned at the same time and in confrontation with each other. Subject to these Bylaws, Article 4 of the IBA Rules shall be applied by the tribunal to witnesses of fact.

(b) With respect to party-appointed expert witnesses, Article 5 of the IBA Rules shall be applied by the tribunal. For purposes of oral examination, expert witnesses shall be treated in the same manner as fact witnesses as set forth in all but the last sentence of Article 19.6(a) of these Bylaws.

(c) All proceedings in person before the tribunal shall be transcribed by a person qualified to make such transcriptions. Any proceeding by telephone or video conference shall,

at the discretion of the tribunal, be (i) transcribed or (ii) summarized by the tribunal in the form of a written summary of the results of the proceeding and circulated to the parties.

**19.7 Designation of Confidential Business Information**

A party shall have the right to designate proprietary business information or trade secrets as confidential business information. If such a designation is made, the tribunal (i) shall require any person to whom the confidential business information is to be disclosed, including disclosure to persons in attendance at any hearings or disclosure to any experts, to sign an appropriate confidentiality undertaking, and (ii) shall not reference the text of such information in any award that is rendered.

**19.8 Interim Measures**

With respect to Article 21 of the ICDR International Arbitration Rules, interim measures shall be permitted only upon a showing of a substantial likelihood that the party seeking interim measures will succeed in meeting its burden of proof; that the interim measure is required to prevent irreparable harm; and the harm sought to be prevented by the party seeking interim measures outweighs the harm to all other parties if the interim measures are required. Security shall be required by the tribunal from the proponent of the interim measures if interim measures are awarded.

**19.9 Experts for the Tribunal**

Article 6 of the IBA Rules entitled “Tribunal-appointed experts” shall be applied by the tribunal to supplement Article 22 of the ICDR International Arbitration Rules, subject to (i) the confidentiality rules of the Compact, and (ii) these Bylaws.

**19.10 Form and Effect of the Award**

With respect to Articles 27 of the ICDR International Arbitration Rules,

(a) the final award, and any interim, interlocutory, or partial awards shall be consistent with the terms of the Compact and these Bylaws;

(b) the tribunal shall explain the basis for any award rendered in sufficient detail with supporting record references, but honouring the confidentiality of confidential record

references, to allow the parties to follow each step of the reasoning underpinning the conclusions upon which the award is based.

#### 19.11 **Applicable Law and Remedies**

With respect to Article 28 of the ICDR International Arbitration Rules, if the tribunal determines that there is an ambiguity requiring resort to rules of construction of contracts, the following rules shall be applied by the tribunal (i) there shall be no construction of language against a person because the person drafted the language in question, (ii) the language of the Compact shall control over any conflicting language in any appendix or other document; and (iii) the words of the Compact shall be given their plain or common meaning. Parol evidence may not be considered in the interpretation of the Compact unless there is an ambiguity identified by the tribunal, but under no circumstances shall prior drafts of the Compact, negotiation materials related to the Compact, or public communications about or extrinsic materials relating to the Compact, be considered at all in interpreting the Compact. If additional rules of construction must be utilized, then the Code of Obligations of Switzerland (and not any of Switzerland's conflicts of law provisions) shall be the source of rules of construction to resolve the ambiguity but the rules of construction set forth in these Bylaws shall supersede any conflicting rules of construction under the Code of Obligations of Switzerland.

#### 19.12 **Costs and Deposit of Costs**

- (a) With respect to Articles 31 and 33 of the ICDR International Arbitration Rules, the claimant and the respondent (if there is more than one claimant, then, collectively, they are considered here as a single claimant) and the respondent (if there is more than one claimant or respondent, then, collectively, they are considered here as a single claimant or a single respondent) shall make equal deposits with the administrator to cover the costs of the arbitration referred to in Article 31, paragraphs (a), (b) and (c) of the ICDR International Arbitration Rules. If for any reason the arbitration is abandoned, suspended, or terminated, by agreement or otherwise, the parties shall remain liable to pay the costs of the arbitration.
- (b) With respect to Article 31 (a)-(c) of the ICDR International Arbitration Rules relating to the costs of the arbitration the tribunal shall divide the costs equally. To illustrate, if one Member is the claimant, and all other Members are respondents, each side will

pay one-half; or if two or more Members are claimants, and the remaining Members are respondents, each side will pay one-half. If for some reason the arbitration has three sets of parties, each set of parties will pay one-third. If the Members on any side of a claim are unable to allocate among themselves their share of these costs, the tribunal shall apportion them for that set of parties. With respect to Article 31 (d)-(e) of the ICDR International Arbitration Rules relating to each party's costs of representation and costs associated with any application for interim or emergency relief, each party shall bear its own costs, including attorneys' fees.

- (c) If a party refuses to make a deposit as required under Article 33 of the ICDR International Arbitration Rules, the remaining parties may be directed to pay the deposit. In such circumstances, the party making the substitute payment shall be entitled to recover that amount as a debt immediately due from the defaulting party. Pre-judgment interest shall be allowable on this sum.
- (d) Failure by a claimant to provide promptly and in full the required deposit may be treated by the tribunal as withdrawal of the claim.

#### 19.13 **Confidentiality**

- (a) With respect to Article 27.8 and 34 of the ICDR International Arbitration Rules,
  - (i) the administrator is not permitted to make public an award;
  - (ii) If a party believes that disclosure of confidential information is required by applicable law, it will give the other parties prompt notice of the belief and an opportunity to challenge the applicability of the law in an appropriate forum before the disclosure of any information. After Written Notice from the Executive Committee, the tribunal and the administrator shall destroy or, in the case of electronically stored information, delete, all documents, records or other information generated by the parties or the tribunal except for the award of the tribunal, unless the documents, records or other information must be maintained with respect to a challenge to, or enforcement of, an award, or under applicable law.



(b) Confidential information from the arbitral proceedings may not be used in any proceeding to enforce or challenge an award except as required by law and, if required, shall be filed under seal.

**19.14 Rules of Professional Conduct**

The following rules of professional conduct shall be applicable to counsel in addition to any other rules of professional conduct that may be applicable: (i) There is a duty of candor to the tribunal; (ii) No party may communicate with an employee of another party without the consent of the other party's counsel; and (iii) if a document is withheld from the tribunal because of a claim of privilege, the tribunal will be advised of the existence of the document and the basis of the claim of privilege; and (iv) if a party comes into possession of confidential or privileged documents of another party by means other than intentional transmittal by the other party, the tribunal and all parties will be promptly notified and the documents will be destroyed or returned to the other party.

**19.15 Joinder**

The tribunal shall have the power (i) on the application of any party, but only after all parties have had a reasonable opportunity to state their views, to allow one or more third persons to be joined in the arbitration as a party provided that any such third person and the applicant party have consented thereto in writing, and (ii) thereafter to make a single final award, or separate awards, in respect of all parties in the arbitration.

## APPENDIX B

### *Mutual Agreement For Binding Arbitration (“Arbitration Agreement”)*

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FIRST AMENDED TEXT

## Mutual Agreement For Binding Arbitration (“Arbitration Agreement”)

This Arbitration Agreement is entered into between \_\_\_\_\_ (“State”), and \_\_\_\_\_ (“Member”) to arbitrate the Claim against Member being submitted by State to the Executive Director of THE COMPACT, A CONTRACTUAL MECHANISM FOR RESPONSE IN THE EVENT OF DAMAGE TO BIOLOGICAL DIVERSITY CAUSED BY THE RELEASE OF A LIVING MODIFIED ORGANISM (“Compact”) on \_\_\_\_\_ concerning Member’s Living Modified Organism (“LMO”) described as follows:

All references to State’s “Claim” in this Arbitration Agreement are to this specific Claim. Where referred to jointly in this Arbitration Agreement, State and Member are called “Parties.”

### Recitals

- A. Whereas the Parties have a mutual commitment to the conservation and sustainable use of Biological Diversity;
- B. Recalling that the Compact establishes a voluntary system for binding arbitration to permit States to seek Response in the event that Release of a Member’s LMO is alleged to Cause Damage to Biological Diversity;
- C. Recognizing that under the Compact, a Claim filed by a State is administered by the Permanent Court of Arbitration (PCA); the PCA’s Optional Rules for Fact-Finding Commissions of Inquiry (“PCA Fact-Finding Rules”) and Optional Rules for Conciliation of Disputes Relating to Natural Resources and/or the Environment (“PCA Environmental Conciliation Rules”), both as expressly modified by the Bylaws to the Compact, are applicable during the Claims Process to resolve a Claim before arbitration; and the PCA’s Optional Rules for Arbitration of Disputes Relating to the Environment and/or Natural Resources (“PCA Environmental Arbitration Rules”), as expressly modified by the Bylaws to the Compact, are applicable to address the Claim in the Assessment and Arbitration Process;
- D. Whereas by executing this Arbitration Agreement, State is asserting a Claim under the Compact alleging Damage to Biological Diversity Caused by the Release of Member’s LMO, thereby triggering the Claims Process and potentially the Assessment and Arbitration Process, and the Parties are demonstrating their commitment to resolve their dispute before neutral arbitrators as rapidly as is practicable while ensuring Legal Due Process on the merits of State’s Claim and Member’s defences;

Wherefore, the Parties, in consideration of the mutual undertakings and promises set forth below, agree as follows:

### Article 1: Terminology

Terms used in this Arbitration Agreement which are defined in the Compact or the Compact’s Bylaws (“Bylaws”) have the same meaning set forth in the Compact or the Bylaws.

## **Article 2: Acceptance of the Terms and Conditions of the Compact and Bylaws**

The Parties accept the terms and conditions of the Compact and its Bylaws, whether or not expressly set forth in this Arbitration Agreement and irrespective of references in this Arbitration Agreement to specific articles of the Compact.

## **Article 3: Acceptance of the PCA and the PCA's Rules**

The PCA shall be the administering authority for State's Claim. The terms and conditions of the Compact together with the PCA Fact-Finding Rules, Environmental Conciliation Rules and Environmental Arbitration Rules, all as expressly modified by the Bylaws govern the resolution of the Claim.

## **Article 4: Representations and Undertakings of Member**

Member represents and warrants the following:

- (a) The person signing this Arbitration Agreement represents a Member of the Compact and is duly authorised to execute this Arbitration Agreement and to bind Member to the terms and conditions of this Arbitration Agreement; and
- (b) Member has the capacity to carry out the terms and conditions of the Compact.

## **Article 5: Representations and Undertakings of State**

State represents and warrants the following:

- (a) The person signing this Arbitration Agreement is duly authorised to execute this Arbitration Agreement and to bind State to the terms and conditions of this Arbitration Agreement;
- (b) State has the capacity to carry out the terms and conditions of this Arbitration Agreement; and
- (c) State has the authority (i) to reimburse a Member for the costs of Response paid by Member in the form of remediation or compensation in the event of double or multiple recoveries for the same Incident of Damage to Biological Diversity for which a Claim and Response are allowed under the Compact, including where there is in another forum a final non-appealable judgment against Member in favour of the State or any person or entity for the same Incident for which such Response was awarded the State under the Compact; and (ii) if interim measures are awarded, to satisfy security requirements imposed by the Tribunal and, if State does not prevail on its Claim, to pay Member any deficiency in the amount of security.

## **Article 6: Claims Process**

6.1 State shall submit its Claim to the Executive Director of the Compact and serve a copy on Member(s) by facsimile or electronically and overnight delivery (one or two days) at the address for notice purposes provided in Appendix F to the Compact. The submission will include a completed Claim Form and Plausible Evidence relied on by the State to establish each element of the Claim.

6.2 The Parties will cooperate with the Commissioner in the performance of the Commissioner's obligations under Article 14 of the Compact, including the Commissioner's obligation under

Article 14 of the Compact to verify State's authority to bind State by executing this Arbitration Agreement.

6.3 If the Commissioner determines that a Claim is deficient and requires submission for reconsideration, State will comply with the time limits established by the Commissioner and the Compact for submission of the Claim for reconsideration. If State does not comply with such time limits, State's Claim shall be dismissed and the Claims Process will end as set forth in Article 14 of the Compact. If Member fails to comply with a request by a Commissioner to submit a response to State's Claim, State may proceed directly to the Assessment and Arbitration Process.

6.4 If Member is subject to more than one Claim, Member may request that the Commissioner determine that the Claims arise out of the same Incident of Damage to Biological Diversity. If the Commissioner so determines, State's Claim shall be consolidated for adjudication with other Claims against Member that arise out of the same Incident.

6.5 If State or Member disputes a determination of the Commissioner made under Articles 14.6, 14.7, 14.8 or 14.9 of the Compact, a Tribunal consisting of one arbitrator shall resolve the dispute under the PCA Environmental Arbitration Rules as modified by Article 17 of the Bylaws.

6.6 During the Claims Process, State or Member may propose to each other that fact finding be undertaken under the PCA's Fact-Finding Rules. If either Party proposes fact finding to the other, or if a Commissioner proposes fact finding, the Party or the Parties, as the case may be, will respond within ten calendar days to the proposal. If the Parties consent to fact finding on an issue, fact finding shall be undertaken under the PCA's Fact-Finding Rules as modified by Article 15 of the Bylaws. The fact-finding Commissioner shall be appointed as set forth in the Bylaws. The Commissioner serving under Article 14 of the Compact may serve as the Commissioner who conducts fact finding.

## **Article 7: Settlement and Conciliation**

7.1 The Parties may attempt to resolve the Claim through voluntary settlement discussions that either Party may initiate at any time.

7.2 Except as otherwise set forth in the Compact, State and Member will engage in conciliation under the PCA Environmental Conciliation Rules as modified by Article 16 of the Bylaws. Conciliation will occur in the 90-day period as set forth in Article 15.5 of the Compact. The Parties may extend this 90-day time period by mutual agreement.

7.3 The Conciliator shall be appointed as set forth in the Bylaws to the Compact. During conciliation, the Parties will have present persons with decision-making authority. The Conciliator shall be permitted to draw on the expert roster in Appendix E to the Compact for assistance in preparation for the conciliation or, if no roster has been assembled, an independent science expert agreed to by the Parties. If no roster has been assembled and the Parties do not agree on an expert to assist the Conciliator, the Conciliator shall choose an expert who, in the Conciliator's sole judgment, meets the criteria for an independent science expert set forth in Appendix E or meets the Conciliator's specific needs for expert assistance in the conciliation.

## **Article 8: Consolidated Claims**

8.1 If the Claim of State and Claims of other States are consolidated under the terms of the Compact, and no challenge is successfully made to the consolidation, to avoid wasteful or

unnecessary duplication and to the extent that State is directed to do so by the Tribunal, (i) State shall cooperate with every other State in pursuing such Claims; (ii) Compact-Related Material may be exchanged between or among State and such other States to the extent necessary to allow such cooperation but the confidentiality requirements of the Compact and this Arbitration Agreement otherwise apply to such material; and (iii) if a Tribunal awards Response, the Tribunal shall apportion such Response among State and such other States in accordance with Article 12 of the Compact.

8.2 Where multiple States have the right to bring a Claim for a single Incident, but not all affected States have made a Claim under the Compact, Member and State will approach States which have not filed a Claim to invite them to file Claims so that all Claims involving the Incident can be resolved in the same proceeding before the same Tribunal.

8.3 If State's Claim involves an LMO that is the subject of Claims for other Incidents involving the same LMO, State and Member shall make every reasonable effort to effect a consolidation of all Claims related to that LMO before the same Tribunal.

## **Article 9: Assessment and Arbitration Process**

9.1 If conciliation fails, the Parties will resolve State's Claim by binding arbitration before a Tribunal under the PCA Environmental Arbitration Rules as modified by Article 17 of the Bylaws. There shall be three arbitrators.

9.2 The Tribunal's review shall consist of an adjudication of each element necessary to establish a Claim, including Damage to Biological Diversity, Causation, Response, a Plan, and any defence, under the terms and conditions of the Compact and its Bylaws.

9.3 Science-Based evidence will be offered by State or Member in support of each element of the Claim, including Damage to Biological Diversity, Causation, Response, and a Plan or in support of any defences asserted.

9.4 Proof of each element of a Claim and any defence must meet the Standard of Proof.

9.5 Member is only responsible for its Proportional Responsibility. If Member is determined to be Causally responsible for Damage to Biological Diversity, its Response obligation shall be apportioned by the Tribunal according to the Proportional Responsibility of that Member.

9.6 If an Incident for which State is making a Claim occurs in more than one State and not all of the States make Claims under the Compact, Member can, on State's Claim, offer evidence before the Tribunal to establish the percentage of Damage from the Incident occurring in the State(s) not making a Claim. The financial limits in Article 13 of the Compact applicable to State's Claim shall be reduced by that percentage.<sup>1</sup>

9.7 If during the pendency of State's Claim, the Executive Director of the Compact gives notice to State, Member, and the Commissioner or Tribunal that a financial limit under the Compact governing State's Claim has been reached, the Claims Process or Assessment and Arbitration

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<sup>1</sup> To illustrate this requirement, if the Tribunal determines that 10% of the Damage occurred in a State not making a Claim, the financial limit in Article 13 of the Compact applicable to State's Claim is reduced by that same 10% and the new financial limit would be 90% of the original financial limit.

Process shall be immediately terminated without prejudice to any rights of the State to proceed against a Member outside of the Compact.

### **Article 10: Interim Measures**

If interim measures are sought by State under the PCA Environmental Arbitration Rules as modified by Article 17 of the Bylaws and awarded to State by the Tribunal, security shall be provided by State as determined by the Tribunal. If State does not prevail on its Claim on the merits, the security shall be paid to Member and should the security required by the Tribunal be insufficient to reimburse Member for the costs paid by Member for interim measures, State shall reimburse Member for all costs so expended in excess of the amount of the security.

### **Article 11: Response**

11.1 If the Tribunal awards to State Response consisting of remediation pursuant to a Plan, Member has the right to undertake to manage and to provide or contract for all resources necessary to implement the remediation pursuant to the Plan, but Member shall consult with State prior to its implementation to define the working relationship between Member and State during implementation of Response. Any differences between Member and State on the scope of the working relationship will be referred to the Tribunal for resolution.

11.2 If Member does not implement the Plan itself, Member shall fund the cost of the Plan in an amount and according to a payment schedule agreed upon by the Parties, or, failing agreement, in an amount and on a schedule determined by the Tribunal, and State will be solely responsible to implement the Plan. Member shall have the right to monitor, inspect and verify work performed, and to review and authorise, subject to the Tribunal's oversight, invoices for work performed, and any award from a Tribunal shall provide for such rights.

11.3 If State conducts remediation using funds paid by Member as a result of an award rendered by a Tribunal pursuant to this Arbitration Agreement, State agrees to spend those funds to implement Response approved by the Tribunal and agrees not to use any of such funds to pay costs (including attorneys' fees) incurred by State in preparing a Claim or prosecuting a Claim in the Claims Process or Assessment and Arbitration Process. The award of the Tribunal shall reflect the agreements of the State contained in this Article 11.3.

11.4 If State is awarded Response in the form of compensation, State agrees to use such award to address the Damage to Biological Diversity or to advance Biological Diversity, and not to use any part of such award to pay costs (including attorneys' fees) incurred by State in preparing a Claim or prosecuting a Claim in the Claims Process or Assessment and Arbitration Process. The agreement of State contained in this Article 11.4 shall be contained in the Response award of the Tribunal.

11.5 In determining Response, the Tribunal shall take into account the benefits set forth in Article 9.5 of the Compact. Any Plan for Response shall be tailored to preserve such benefits resulting from the Release of the LMO. If the Plan cannot be so tailored, the Tribunal shall determine Response *ex aequo et bono*, including appropriate remediation, a combination of remediation and compensation, compensation instead of remediation or no compensation or remediation.

11.6 If a Tribunal awards Response, the Response, including an *ex aequo et bono* Response, shall not exceed the financial limits of Article 13 of the Compact.



11.7 In its award, the Tribunal will retain jurisdiction to permit a Party to seek modification of the award for good cause shown based on post-award events or to resolve disputes that may arise during the implementation of the award, including any dispute over whether the Remediation End Point has been achieved.

## **Article 12: No Double or Multiple Recovery or Parallel Proceedings**

12.1 Member shall provide Response only once to State for an Incident of Damage to Biological Diversity for which a Claim and Response are allowed under the Compact. With respect to the same Incident of Damage, Member will not be subject to double or multiple recovery or concurrent or multiple proceedings, and State agrees that, should it prevail in a Claim under the Compact, it will not bring any other action against Member for that Incident. This Arbitration Agreement shall have no application to claims for Traditional Damages.

12.2 Any award of Response by a Tribunal or any agreement for Response by the Parties shall expressly provide that if there is in another forum a final, non-appealable judgment in favour of State or any person or entity for damages and other relief which duplicates in any manner Response awarded under the Compact, such Response is automatically terminated. State shall immediately reimburse Member for all sums paid for such Response prior to such termination.

12.3 If there is a dispute over satisfaction of the terms of Article 12.2 of this Arbitration Agreement, the dispute shall be resolved by arbitration under the Compact using the PCA Environmental Arbitration Rules as modified by the Bylaws. There shall be one arbitrator. The presiding arbitrator of the Tribunal on the Claim shall serve as the arbitrator. If the presiding arbitrator is not available, the Secretary-General of the PCA shall designate one of the other two arbitrators on the Tribunal to serve as the arbitrator. If a Tribunal has not yet been formed, the Secretary-General of the PCA shall appoint the arbitrator under the PCA Environmental Arbitration Rules as modified by the Bylaws.

12.4 If State or any person or entity in that State brings an action invoking provisions of domestic or international law to recover remediation or compensation for Damage to Biological Diversity, and the alleged Incident of Damage to Biological Diversity is also the subject of State's Claim, then to avoid parallel proceedings and the potential for double or multiple recovery: (1) where allowed under domestic law, State agrees to intervene in, and seek suspension of, that action pending resolution of the Claim under the Compact; or (2) where such intervention is not allowed under domestic law; is allowed but the State does not intervene within ninety (90) days after receiving notice of the action; or intervention in, or suspension of, the action is denied, the Claims or Assessment and Arbitration Process shall be immediately suspended. It is Member's obligation to bring to the attention of State and the Tribunal the existence of the parallel action. Where Member seeks suspension of the Claim, Member must establish that the parallel action is for the same Incident. If the Claim is suspended for more than one year, the Claim shall be dismissed by the Tribunal, provided that the time from the date of filing for intervention by the State to the date of either denial of the intervention or the suspension of the parallel action shall not be counted in calculating the length of time for which the Claim under the Compact has been suspended.

## **Article 13: Enforcement**

13.1 The Tribunal shall have jurisdiction to enter any order necessary to enforce the provisions of this Arbitration Agreement or any award of the Tribunal. The Tribunal shall retain such jurisdiction until (a) the later of the resolution of a Claim with no award of Response, (b) the satisfaction in full of any award of Response for a Claim, (c) the expiration of the statute of

limitations for any domestic or international law under which remediation or compensation could be awarded for the Incident of Damage to Biological Diversity which is the subject of this Claim or (d) expiration of the provisions of this Arbitration Agreement.

13.2 The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, and any other applicable multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards, or law or treaty of a country where an award is sought to be relied upon, shall be applicable to enforcement of any award rendered by the Tribunal, irrespective of whether State is a party to the New York Convention. The Parties expressly agree that the differences between them are commercial and State acknowledges that the Parties' differences arise out of legal relationships which are considered as commercial under domestic law of State.

13.3 If Member agrees with State on Response or if a Tribunal allows Response against Member, and State believes that Member is in breach of its obligation for Response, in addition to any other enforcement rights of State, State may elect to enforce Member's Response obligation as set forth in Article 19 of the Compact. Where the Executive Director is to refer the matter to the PCA and the Executive Director fails to do so, State may refer the dispute to the PCA to start the dispute resolution process.

- (a) In the event that within ninety (90) days after the Executive Director is provided notice by State of a determination of breach by Member of Member's Response obligation, the other Members of the Compact fail to exercise their obligation under Article 19 of the Compact to enforce Member's Response obligation, State shall have the same right to bring an action for specific performance, and Member against which Response is allowed shall cooperate with State in the same manner that it cooperates with the other Members under Article 19 of the Compact. For purposes only of actions by State under Article 19 of the Compact, if Member breaches its Response obligation, Member consents to jurisdiction and venue selected by State.
- (b) If Member is determined to be in breach of its Response obligation, (i) Member shall be responsible for all reasonable and fully documented costs, including attorneys' fees, incurred by State as well as the costs of proceedings to obtain such determination and (ii) Member shall be responsible for the incremental costs of Response, if any, resulting from the failure of that Member to undertake Response as agreed to or allowed, and such incremental costs shall not be subject to the financial limits on Response in Article 13 of the Compact. If there is any dispute in calculating State's costs, including attorneys' fees, or any such incremental costs, the dispute shall be resolved by the arbitrator who made the determination of breach.

13.4 Both Member's Response obligation and this Arbitration Agreement shall be fully enforceable under the laws of State that prevails on its Claim, the laws of the State that is the domicile of Member; and the governing law of the Compact.

13.5 If State and Member settle the Claim, upon execution of the agreement of settlement, notice will be provided by Member to the Executive Director of the Compact, and if a Tribunal has been formed, to the Chair of the Tribunal and the Secretary-General of the PCA.

#### **Article 14: Jurisdiction and Venue**

14.1 Other than as set forth in Articles 19.4 and 19.6 of the Compact and Articles 12 and 13 of this Arbitration Agreement,

- (a) Nothing in the Compact is intended to create, or creates jurisdiction in State or any other venue in which jurisdiction would not exist in the absence of the Compact, and
- (b) Neither execution of this Arbitration Agreement nor adjudication of a Claim pursuant to this Arbitration Agreement creates jurisdiction over Member in State.

14.2 Member expressly agrees to jurisdiction for purpose of enforcement by State in domestic courts of State of an award by the Tribunal that favours State over Member. State expressly agrees to waive immunity from the jurisdiction of domestic courts of State in relation to both the recognition and enforcement of any award of the Tribunal that favours Member over State.

### **Article 15: Costs of the Claims and Assessment and Arbitration Processes**

15.1 Except as set forth herein, State shall not be responsible for the cost of a Commission and the fees of the Commissioner appointed under the PCA Fact-Finding Rules which costs are an operating cost of the Compact. State shall be responsible for the cost of a Commission and the fees of the Commissioner if the Commissioner dismisses a Claim.

15.2 Each Party shall pay an equal share of the cost of conciliation and the fees of the Conciliator. Each party to a conciliation shall bear its own costs of the conciliation, including each party's own attorneys' fees.

15.3. Except as provided in Article 17 of the Compact or otherwise set forth in this Arbitration Agreement, each Party shall pay an equal share of the cost of arbitration and the fees of the Tribunal and bear its own costs of the arbitration, including each party's own attorneys' fees.

15.4 Where one of the Parties is entitled to recover costs, including attorneys' fees from the other, the amount must be reasonable. No attorneys' fees shall be recoverable by either Party for the services of counsel whose retention is premised on payment of fees contingent in whole or in part on the outcome of the Claim. If State becomes entitled to an award of costs under Article 15.3 of this Arbitration Agreement, such costs shall not include any attorneys' fees where the amount or payment of the fee for services is contingent in whole or in part on the outcome of a Claim.

15.5 If State is a Least Developed Country, Small Island Developing State, or Megadiverse Country, and if Member is responsible for Damage to Biological Diversity on State's Claim, Member shall pay the percentage equal to Member's Proportional Responsibility of State's (a) reasonable and fully documented arbitration costs and (b) other costs of submitting and pursuing a Claim. Such costs are not subject to Member's financial limits under Article 13 of the Compact.

### **Article 16: Seat of Arbitration and Governing Law**

The legal seat of any arbitration held under the Compact and this Arbitration Agreement is Geneva, Switzerland. A Tribunal may have hearings by telephone or video conference or may hold evidentiary hearings at any other location acceptable to the Tribunal. Governing law shall be as set forth in the Compact and Bylaws.

### **Article 17: No Appeals**

An award or order of a Tribunal formed under the Compact and this Arbitration Agreement is final and binding on Member and State without any right of appeal.

## Article 18: Confidentiality

The Parties will protect confidentiality and the integrity of the Claims and Assessment and Arbitration Processes. The Parties:

- (a) will abide by the confidentiality obligations of: (i) Article 20 of the Compact, (ii) the applicable PCA Rules as modified by the Bylaws, and (iii) this Arbitration Agreement.
- (b) may waive their confidentiality obligations by express written mutual agreement signed by authorised representatives of each of them, but, in the case of Member, only after Member has first complied with the requirements of Article 20.2(c) of the Compact.
- (c) specifically acknowledge Article 24.7 of the Compact addressing publication of certain information on Claims and will cooperate with each other to effect the goals of Article 24.7.
- (d) will implement the following protocols in relation to all Compact-Related Material:
  - (i) all officials, officers, employees, internal lawyers and any other person receiving Compact-Related Material for State and Member will be made aware of the confidential nature of the information and will be required to abide by the confidentiality obligations of this Arbitration Agreement;
  - (ii) disclosure to other persons (e.g., agents, consultants, experts, and external lawyers) will be limited exclusively to those who have a clear need to see and use Compact-Related Material for the purposes of the Compact and only after those persons have signed a legally binding confidentiality agreement (in the form provided in Appendix G to the Compact) requiring them to abide by the confidentiality obligations in Article 20 of the Compact;
  - (iii) upon final resolution of the Claim and completion of any required Response, State (unless expressly prohibited by domestic law adopted before submission of a Claim) and Member shall dispose of all Compact-Related Material by shredding and of all Compact-Related Material stored electronically by permanent deletion; and
  - (iv) on request by State or by Member, all Compact-Related Material, including all copies, excerpts or abstracts thereof, in the possession of another person (e.g., agents, consultants, experts, and external lawyers) must be promptly returned by that person, except as follows,
    - a. Compact-Related Material stored electronically in backup storage media that are accessed for disaster recovery purposes only and that are subject to domestic laws, regulations or rules if the storage media are recycled for reuse on a periodic basis rather than stored permanently, and
    - b. A single copy of Compact-Related Material if domestic laws, regulations or rules require such material to be retained (but only for as long as the requirement is applicable) or to establish a record of the information returned as required by this Arbitration Agreement.

## **Article 19: Prohibitions on Use of Compact-Related Material**

19.1 Member and State agree that the Compact, Compact-Related Material, any Response or Plan, actions taken as Parties, proceedings, findings or decisions resulting under the processes of the Compact, any transcripts of hearings before the Tribunal or witness statements presented to the Tribunal, and any award of a Tribunal shall not be offered as evidence, or provided to any other person to use as evidence, in any related or unrelated civil, criminal, regulatory or administrative proceedings (including proceedings involving claims for Traditional Damages), and shall not be used to advance, impact or otherwise influence any such proceedings or any claims for Traditional Damages, except as follows:

(a) State is required by domestic law or order of a court to provide any of this information for use as evidence but before producing the information State must give sufficient notice to affected Member(s) and the Executive Director to give them a meaningful opportunity to challenge the production and under no circumstances will State produce proprietary information, trade secrets or confidential business information of a Member;

(b) Member may use or offer as evidence Compact-Related Material (including an award by a Tribunal in favour of Member) in the event that a State has lost a Claim before a Tribunal under the Compact and then seeks redress against Member in another forum for the same Incident or with respect to issues resolved in an award by the Tribunal; and

(c) Member or State may use any of this information to defend a Response or Plan.

19.2 The prohibition in Article 19.1 does not apply to enforcement by State or Member of an award by a Tribunal or of the obligations of either State or Member to each other under this Arbitration Agreement or the Compact.

19.3 In the event State subsequently pursues an action with respect to issues specifically resolved against State in an award by a Tribunal for a Claim under the Compact, State agrees not to object to admissibility of the award in such an action should Member choose to offer the award as evidence in support of its defence to State's subsequent action.

## **Article 20: Good Faith**

The Parties will carry out their respective obligations under this Arbitration Agreement in good faith.

## **Article 21: No Impact on Non-Members or Non-Participating Members**

No provision of this Arbitration Agreement, the Compact, no finding or decision made under the processes of the Compact and no Compact-Related Material shall affect the rights or obligations of any person who is not a Member of the Compact unless such person, by written consent, elects to participate in this Claims or Assessment and Arbitration Process. This Arbitration Agreement and the Compact do not affect the rights and obligations of Members outside of the specific subject matter and processes of this Compact.

## **Article 22: Modification or Amendment**

This Arbitration Agreement may be modified or amended only in a writing executed by State and Member, provided that a Member shall execute such modification or amendment only after first obtaining written Consensus of the Executive Committee expressly permitting that modification or amendment.

**Article 23: Entire Understanding**

This Arbitration Agreement supersedes any oral and written agreements or understandings of, or statements or representations by, State or Member heretofore made relating to the subject matter of the Compact or this Arbitration Agreement and contains the entire understanding of State and Member with respect to its subject matter. There are no promises, terms, conditions or obligations affecting the parties other than those contained in this Arbitration Agreement.

**Article 24: Resolution of Disputes Under this Arbitration Agreement**

Any dispute arising under this Arbitration Agreement shall be resolved under the Assessment and Arbitration Process of the Compact using the PCA Environmental Arbitration Rules as modified by Article 17 of the Bylaws to the Compact.

**Article 25: Advice of Counsel**

The Parties acknowledge that they have had advice of counsel with respect to their decision to enter into this Arbitration Agreement.

**Article 26: Effective Date**

This Arbitration Agreement is effective as of the latest date of execution by the Parties.

By the signatures of their duly authorised representatives below, State and Member bind themselves to the terms of this Arbitration Agreement.

For the Government of \_\_\_\_\_

By \_\_\_\_\_ Date: \_\_\_\_\_

Signature

\_\_\_\_\_

Printed Name

\_\_\_\_\_

Title or Official Position

Seal:

Member

By \_\_\_\_\_ Date: \_\_\_\_\_

Signature

\_\_\_\_\_

Printed Name

\_\_\_\_\_

Title

## ADDENUM 1 TO APPENDIX B

### *Addendum to Mutual Agreement for Binding Arbitration*

(NAME OF ENTITY JOINING ARBITRATION) (“Joining Party”) hereby seeks and consents to participate in the adjudication under the Compact of a Claim made by (NAME OF STATE OR STATES MAKING CLAIM) (“Claimant(s)”) pursuant to the Mutual Agreement for Binding Arbitration (“Arbitration Agreement”) executed by Claimant(s) and Member(s) (NAME OF MEMBER or MEMBERS DEFENDING CLAIM) of the Compact (“Claim No. XX”).

The Joining Party, Claimants, and Members hereby agree that, upon determination by the Commissioner or the Tribunal appointed pursuant to the Compact that Joining Party satisfies the conditions of membership in the Compact, the Joining Party is a signatory to the Arbitration Agreement and has all of the rights and obligations of a Member of the Compact for the purposes of that Arbitration.

Joining Party unconditionally consents (1) to all of the terms and conditions of the Compact that bind Members who are involved in the adjudication of a Claim No. XX under the Compact and (2) to be bound to the terms of the Arbitration Agreement. The Joining Party shall be treated as a Member of the Compact and a signatory to the Arbitration Agreement in all respects in the adjudication of Claim No. XX.

With respect to Claim No. XX, if this Addendum is executed following the appointment of a Commissioner, Conciliator, or Tribunal under the Bylaws to the Compact, Joining Party accepts the appointments as if it participated in the appointment process under the Bylaws to the Compact. If this Addendum is executed following issuance of any report by a Commissioner or any orders or awards by a Tribunal, Joining Party shall have the same rights and obligations with respect to any such report, orders, or awards as a Member(s) or Claimant(s) has (have) at the time of joinder by the Joining Party.

This Addendum is irrevocable and by their signatures below, Member(s) and State(s) accept and approve this Addendum and their approval is irrevocable.

Joining Party acknowledges that it has had the advice of counsel and understands that by virtue of execution of this Addendum to the Arbitration Agreement, Joining Party has agreed to submit to fact-finding, conciliation, and arbitration with Member(s) and Claimants with respect to Claim No. XX under applicable rules of the Permanent Court

of Arbitration as those rules have been modified by the Bylaws to the Compact, and shall have the rights and obligations of a Member of the Compact in those proceedings.

Agreed:

**Joining Party**

By \_\_\_\_\_ Date: \_\_\_\_\_

Signature

\_\_\_\_\_

Printed Name

\_\_\_\_\_

Title

Approved:

**Member**

By \_\_\_\_\_ Date: \_\_\_\_\_

Signature

\_\_\_\_\_

Printed Name

\_\_\_\_\_

Title

**For the Government of** \_\_\_\_\_

By \_\_\_\_\_ Date: \_\_\_\_\_

Signature

\_\_\_\_\_

Printed Name

\_\_\_\_\_

Title or Official Position

Seal:



## APPENDIX C

### Claim Form

**Note:** *If more than one Member is the subject of a Claim, a Claim Form should be submitted as to the Claims against each Member.*

#### **Administration of Claim:**

1. Name of the State.
2. Name of the Agency or Department responsible for the Claim.
3. Name of the representative of the State for receipt of all notices, a mailing address, a delivery address (if different from a mailing address) a telephone number, a facsimile number, and an email address. *(The State must inform the Executive Committee in writing if this information changes.)*
4. Identify the Member(s) alleged to have Caused Damage to Biological Diversity.
5. Submit the laws, orders, or other documents which:
  - a. Establish that the person signing the Arbitration Agreement is duly authorised to execute the Arbitration Agreement and to bind the State to the terms and conditions of that Arbitration Agreement. *If a provision of law applying in that State is inconsistent with or contravenes a term or condition of the Arbitration Agreement thereby preventing the State from executing the Arbitration Agreement, the State will give notice to the Executive Committee and the affected Member(s) and the parties will confer to determine if there is a solution that permits the State to pursue the Claim under the Compact (e.g., amendment of the Arbitration Agreement);*
  - b. Impose any legal limitations on the State's compliance with the confidentiality or document destruction requirements of the Compact, the Bylaws or the Arbitration Agreement.
6. Provide the information establishing when, how and from whom the State became aware of the Damage.

#### **Claim for Damage:**

7. Provide the evidence establishing when, where and how the LMO was released.
8. Provide the evidence establishing who released the LMO.
9. Identify the Species, the Ecosystem and the natural resource services affected.
10. Identify any effects on Public Health.
11. Provide the evidence and the method of establishing the Baseline.
12. Identify all of the alleged changes from the Baseline, and provide the evidence of those changes.
13. Identify whether each of the changes is beneficial, neutral, or adverse, and provide the evidence supporting each determination.
14. Describe which of the changes are alleged to constitute Damage under the Compact.
15. Provide the evidence establishing that each change is Measurable.
16. If a change is alleged to be adverse, provide the evidences establishing that each change is Significant and Adverse.
17. If the State has done so in the regulatory , approval or Assessment and Arbitration Process or otherwise, describe the balancing of beneficial and adverse changes.

18. Provide the evidence establishing general Causation and specific Causation (which includes Cause-in-fact and proximate Cause), describing all effects which result directly from the Damage, and which would not have happened but for the Damage.
19. Provide the evidence establishing which LMO Caused the Damage and how.
20. Identify any other Causes of the Damage of which you are aware, and provide the evidence establishing that Causation, and of the relative Causal responsibility of the LMO and the other Causes.

**Response - Remediation or Compensation:**

21. Provide a description of what action, if any, has been taken to remedy or mitigate the Damage.
22. Provide a Plan with actions required to minimize, mitigate or remediate the Damage.
23. Provide the evidence establishing and supporting the State's proposed Plan for remediation.
24. Provide the evidence establishing the cost of that Plan for remediation.
25. If compensation is being sought, provide the evidence establishing the valuation of compensation and all bases for that valuation..

## APPENDIX D

### *Roster of Potential Neutrals*

#### ***Minimum Qualifications For A Neutral Under the Compact***

1. A person of the same nationality as the Claimant or the Respondent may not serve on a Tribunal under the Compact. Where the Respondent is a corporation, the “nationality” of the Respondent is the place of its incorporation or its principal place of business and does not include the nationality of any subsidiaries or other locations where the Respondent may have business operations.

#### ***Neutral Fees***

1. The fees charged by a neutral under the Compact may not exceed \_\_\_\_\_.

## **APPENDIX E**

### ***Roster of Independent Science Experts***

Pursuant to the terms of the Compact, the roster of independent science experts shall be established following execution of the Compact and formation of the Executive Committee and Technical Committee. The criteria for nominating experts for this roster shall be determined by the Technical Committee and approved by the Executive Committee with the advice of the Advisory Committee after their respective formation. Once established, the roster and the criteria shall be set forth on attached sheets to be labelled “Roster of Experts” or “Criteria for Nomination of Experts for the Roster of Experts” which shall then become a part of this Appendix E. Each sheet shall be marked with a date and shall be signed by the Chair of the Technical Committee. The roster shall be maintained by the Executive Committee and Technical Committee. Updates to the roster or the nominating criteria shall similarly be dated and signed by the Chair of the Technical Committee.

***Criteria for Selection of Independent Science Experts***

**APPENDIX F**

***Executive and Technical Committee Membership and Addressees for  
Notice Purposes***

**Executive Committee**

**For BASF Plant Science Company GmbH**

Primary Representative

Christina L. Good  
Title: Senior Counsel

Alternate Representative

**For Bayer CropScience AG**

Primary Representative

Dominic Muyldermans  
Title: Senior Counsel

Alternate Representative

**For DowAgroSciences, LLC**

Primary Representative

Brad Shurdut  
Title: Leader, Global  
Regulatory, Government & U.S.  
Federal Affairs  
Eileen B. Salathé Gernhard

Alternate Representative

**For E. I. du Pont de Nemours and Company**

Primary Representative

Karl Sherman  
Title: Corporate Counsel

Alternate Representative

**For Monsanto Company**

Primary Representative

J. Thomas Carrato  
Associate General Counsel,  
Global Regulatory Law &  
Stewardship

Alternate Representative

**For Syngenta Crop Protection AG**

Primary Representative

Michael Szabo  
Title: Legal Counsel

Alternate Representative

**Technical Committee**

**For BASF Plant Science Company GmbH**

Primary Representative

Andrew Reed  
Director, Global Regulatory

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Alternate Representative

**For Bayer CropScience AG**

Primary Representative

Rob MacDonald  
Global Regulatory Manager, Oil  
Seeds

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Alternate Representative

**For DowAgroSciences, LLC**

Primary Representative

Nicholas P. Storer  
Global Science Policy Leader,  
Biotechnology

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Alternate Representative

**For E. I. du Pont de Nemours and Company**

Primary Representative

Ray Layton  
Research Fellow

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Alternate Representative

**For Monsanto Company**

Primary Representative

Tom Nickson  
Regulatory Environmental  
Policy, Lead

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Alternate Representative

**For Syngenta Crop Protection AG**

Primary Representative

Alan Raybould  
Syngenta Fellow

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Alternate Representative

**Addressees for Notice Purposes:**

<i>Member</i>	<i>Contact Information</i>
Peter Eckes President & Chief Executive Officer	<b>BASF Plant Science Company GmbH</b> BPS – LI444 67117 Limburgerhof, GERMANY Fax: +49.621.60.662.7011 E-mail: <a href="mailto:peter.eckes@basf.com">peter.eckes@basf.com</a>
Joachim Scholz Senior Vice President – Legal	<b>Central Legal Department, BASF SE</b> ZRR – D100 67056 Ludwigshafen, GERMANY Fax: +49.621.60.664.9255 E-mail: <a href="mailto:Joachim.scholz@basf.com">Joachim.scholz@basf.com</a>
Dr. Gerhart Marchand General Counsel	<b>Bayer Cropscience AG</b> Alfred-Nobel-Strasse 50 40789 Monheim, GERMANY Ph: ++49.2173/38.58.08 Fax: ++49.2173/38.51.43
Dominic Muyldermans Senior Counsel Executive Committee Member	<b>Bayer Bioscience NV</b> Technologiepark 38 9052 Gent, BELGIUM Ph: ++32.9.243.05.01 Fax: ++32.9.233.19.23
General Counsel	<b>Dow AgroSciences, LLC</b> 9330 Zionsville Road Indianapolis, Indiana, 46032 USA Facsimile Number: 317.337.4847
Karl Sherman, Esq. Corporate Counsel	<b>E.I. du Pont de Nemours and Company</b> Barley Mill Plaza 25/1366 4417 Lancaster Pike Wilmington, Delaware 19805, USA Fax: 302.892.7949 <a href="mailto:Karl.Sherman@usa.dupont.com">Karl.Sherman@usa.dupont.com</a>
David F. Snively Senior Vice President, General Counsel & Secretary	<b>Monsanto Company</b> Mail Zone A3NA 800 N. Lindbergh Blvd St. Louis, Missouri, 63167 USA Fax: 314.694.6399 <a href="mailto:david.f.snively@monsanto.com">david.f.snively@monsanto.com</a>
J. Thomas Carrato Associate General Counsel Executive Committee Member	<b>Monsanto Company</b> Mail Zone E1NH 800 N. Lindbergh Blvd St. Louis, Missouri, 63167 USA Fax: 314.694.1622 <a href="mailto:j.thomas.carrato@monsanto.com">j.thomas.carrato@monsanto.com</a>
General Counsel	<b>Syngenta Crop Protection AG</b> Schwarzwaldallee 215 4058 Basel, Switzerland Fax: +4161.323.25.90

FIRST AMENDED TEXT



## APPENDIX G

### ***Non-Disclosure Agreement For Technical Consultant or Others Employed by Executive or Technical Committees***

In consideration for retention by the Executive Committee to the Compact (A CONTRACTUAL MECHANISM FOR RESPONSE IN THE EVENT OF DAMAGE TO BIOLOGICAL DIVERSITY CAUSED BY THE RELEASE OF A LIVING MODIFIED ORGANISM) to provide consulting services;

or

In consideration for employment by the Executive Committee or Technical Committee to perform services;

and except as to Compact-Related Material,

- (a) that participants in a Claim consent to be made public,
- (b) is made publicly available under the terms of the Compact,
- (c) is legally in the undersigned's possession or publicly available prior to the disclosure of Compact-Related Material to the undersigned,
- (d) that, subsequent to its disclosure for purposes of the Compact, becomes publicly available to the undersigned without any violation of the Compact or this Agreement;
- (e) that is independently acquired or developed by the undersigned; or
- (f) that becomes legally available to the undersigned on a non-confidential basis from any third party, the disclosure of which to the undersigned does not, to the knowledge of the undersigned, violate any contractual or legal obligation such third party has with respect to Compact-Related Material,

the undersigned agrees as follows:

1. All terms used here that are defined in the Compact shall have the same meaning as set forth in the Compact.
2. I acknowledge that I have received a copy of the Compact and that I have read it.

3. I agree that I will treat Compact-Related Material in accordance with the provisions of this agreement and the confidentiality provisions of the Compact.
4. I agree that Compact-Related Material will be used solely for the purpose of providing services to the Executive Committee or Technical Committee. I will not use Compact-Related Material for any commercial purpose.
5. I may disclose Compact-Related Material to persons employed by me to assist me in performing services for which I am engaged by the Executive Committee or Technical Committee (hereafter "Representative"), but only after I secure the written agreement of the Representatives to the terms of this Non-Disclosure Agreement and an acknowledgement by them that they have read the Compact and agreed to be bound by the confidentiality provisions of the Compact. I will be responsible for any breach of this agreement by a Representative and I further agree, at my sole expense, to take all reasonable measures (including but not limited to court proceedings) to restrain a Representative from prohibited or unauthorised disclosure or use of the Compact-Related Material.
6. I agree that the Compact-Related Material that is in written form shall not be copied or reproduced at any time without the prior written consent of the Chair or Vice-Chair of the Executive Committee or Technical Committee, except for distribution to my Representatives in accordance with and subject to the provisions of this agreement.
7. In addition, without the prior written consent of the Chair or Vice-Chair of the Executive Committee or Technical Committee, I will not, and I will direct my Representatives not to, disclose to any person the existence of this agreement (i) that Compact-Related Material has been made available to me or my Representatives, or (ii) or any terms, conditions or other facts with respect to any such my retention to perform services under the Compact.
8. In the event that I am requested or required (by oral questions, interrogatories, requests for information or documents, subpoena, civil investigative demand or other process of State law) to disclose any Compact-Related Material, I will provide the Chair of the Executive Committee with prompt notice of any such request or requirement (written if practical) so that the Executive Committee may seek an appropriate protective order or waive my compliance with the provisions of this agreement. If, failing the entry of a protective order or the receipt of a waiver hereunder, I am, after consultation with the Chair of the Executive Committee and after providing the Executive Committee with written opinion of legal counsel to that effect, legally compelled to disclose Compact-Related Material, I

may disclose only that portion of Compact-Related Material which I am legally compelled to disclose and will exercise reasonable efforts to obtain assurance that confidential treatment will be accorded to that portion of Compact-Related Material which is being disclosed. In any event, I will not oppose action by the Executive Committee to obtain an appropriate protective order or other reliable assurance that confidential treatment will be accorded the Compact-Related Material

9. I agree that all Compact-Related Material shall be and shall remain the property of the Members of the Compact. Upon the termination of my services, within a reasonable time or within five days after being so requested by the Chair of the Executive Committee or Technical Committee, I shall return or destroy all Compact-Related Material furnished to me. Except to the extent that I advise the Chair of the Executive Committee or Technical Committee in writing by counsel that such destruction is prohibited by law, I will also return to the Technical Committee or destroy all written material, memoranda, notes, copies, excerpts and other writings or recordings whatsoever prepared by me or my Representatives based upon, containing or otherwise reflecting any Compact-Related Material. Any destruction of materials shall be verified by me in writing or by one of my duly authorized officers. Any Compact-Related Material that is not returned or destroyed, including without limitation, any oral Compact-Related Material, shall remain subject to the confidentiality obligations set forth in this agreement.
10. I agree that the obligations of Paragraphs 8 and 9 apply to electronically stored Compact-Related Material.
11. It is understood and agreed that money damages would not be a sufficient remedy for any breach of this agreement and that the Executive Committee shall, on behalf of the Members, be entitled to specific performance and injunctive or other equitable relief as a remedy for any such breach and I further agree to waive any requirement for the security or posting of any bond in connection with such remedy. Such remedy shall not be deemed to be the exclusive remedy for breach of this agreement but shall be in addition to all other remedies available at law or equity to the Members.
12. Should Compact-Related Material be disclosed by me or my Representatives in a manner that specific performance or injunctive or other relief is not available to prevent or cure the disclosure, I agree that I will return all compensation paid to me for services rendered under the Compact.
13. In the event of litigation relating to this agreement, if a court of competent jurisdiction determines in a final, non-appealable order that I or my Representatives have breached

this agreement, then I shall reimburse the Members for their reasonable legal fees and expenses incurred in connection with such litigation, including any appeals there from.

14. It is understood that this agreement shall be governed and construed in accordance with the laws of \_\_\_\_\_, regardless of the laws that might otherwise govern under applicable principles of conflicts of law thereof.
15. I agree, on behalf of myself and my Representatives, to submit to the jurisdiction of any court of competent jurisdiction selected by the Executive Committee to resolve any dispute relating to this agreement and waive any right to move to dismiss or transfer any such action brought in any such court on the basis of any objection to personal jurisdiction, venue or the convenience of the forum.
16. I agree that my obligations under this agreement shall survive the termination of my services in connection with the Compact.

To demonstrate that I agree to the terms set forth above, I have executed this agreement below and represent that I am authorised to enter into this agreement on my behalf individually and on behalf of any entity named below.

Accepted and agreed as of this \_\_\_ day of \_\_\_\_\_, 20\_\_:

(Name of Technical Consultant individually or by firm) or

(Name of Person or Entity employed by Executive or Technical Committees)

By: \_\_\_\_\_

(PERSON SIGNING)

(TITLE)

## **Compact Non-Disclosure Agreement**

*(To be signed by any person given access to Compact-Related Material, such as counsel to a State or Member)*

In consideration for gaining access to Compact-Related Material, and except as to Compact-Related Material,

- (a) that participants in a Claim consent to be made public,
- (b) is made publicly available under the terms of the Compact,
- (c) is legally in the undersigned's possession or publicly available prior to the disclosure of Compact-Related Material to the undersigned,
- (d) that, subsequent to its disclosure for purposes of the Compact, becomes publicly available to the undersigned without any violation of the Compact or this Agreement;
- (e) that is independently acquired or developed by the undersigned; or
- (f) that becomes legally available to the undersigned on a non-confidential basis from any third party, the disclosure of which to the undersigned does not, to the knowledge of the undersigned, violate any contractual or legal obligation such third party has with respect to Compact-Related Material

the undersigned agrees as follows:

1. All terms used here that are defined in the Compact shall have the same meaning as set forth in the Compact.
2. I acknowledge that I have received a copy of the Compact and that I have read it.
3. I agree that I will treat Compact-Related Material in accordance with the provisions of this agreement and the confidentiality provisions of the Compact.
4. I agree that Compact-Related Material will be used solely for purposes of the Compact. I will not use Compact-Related Material for any commercial purpose.
5. I may disclose Compact-Related Material to persons employed by me to assist me in performing services for purposes of the Compact (hereafter "Representatives"), but only after I secure the written agreement of the Representatives to the terms of this Non-Disclosure Agreement and an acknowledgement by them that they have read the Compact and agreed to be bound by the confidentiality provisions of the Compact. I will

be responsible for any breach of this agreement by a Representative and I further agree, at my sole expense, to take all reasonable measures (including but not limited to court proceedings) to restrain a Representative from prohibited or unauthorised disclosure or use of the Compact-Related Material.

6. I agree that the Compact-Related Material that is in written form shall not be copied or reproduced at any time except for purposes of the Compact or for distribution to my Representatives in accordance with and subject to the provisions of this agreement.
7. In addition, I will not, and I will direct my Representatives not to, disclose to any person the existence of this agreement (i) that Compact-Related Material has been made available to me or my Representatives, or (ii) or any terms, conditions or other facts with respect to any such my retention to perform services for purposes of the Compact.
8. In the event that I am requested or required (by oral questions, interrogatories, requests for information or documents, subpoena, civil investigative demand or other process of State law) to disclose any Compact-Related Material, I will provide (a) the State or Member who employs me and (b) the Chair of the Executive Committee, with prompt notice of any such request or requirement (written if practical) so that the State or Member or Executive Committee may seek an appropriate protective order or waive my compliance with the provisions of this agreement. If, failing the entry of a protective order or the receipt of a waiver hereunder, I am, after consultation with the State or Member who employs me, or the Chair of the Executive Committee, and after providing the State or Member who employs me and the Executive Committee with written opinion of legal counsel to that effect, legally compelled to disclose Compact-Related Material, I may disclose only that portion of Compact-Related Material which I am legally compelled to disclose and will exercise reasonable efforts to obtain assurance that confidential treatment will be accorded to that portion of Compact-Related Material which is being disclosed. In any event, I will not oppose action by the State or Member who employs me and the Executive Committee to obtain an appropriate protective order or other reliable assurance that confidential treatment will be accorded the Compact-Related Material
9. I agree that all Compact-Related Material shall be and shall remain the property of the Members of the Compact or the State who employs me. Upon the termination of my services, within a reasonable time or within five days after being so requested by the State or Member who employs me or the Chair of the Executive Committee or Technical Committee, I shall return or destroy all Compact-Related Material furnished to me.

- Except to the extent that I advise the State or Member who employs me and the Chair of the Executive Committee or Technical Committee in writing by counsel that such destruction is prohibited by law, I will also (a) return to the State or Member who employs me or the Technical Committee, or (b) destroy, all written material, memoranda, notes, copies, excerpts and other writings or recordings whatsoever prepared by me or my Representatives based upon, containing or otherwise reflecting any Compact-Related Material. Any destruction of materials shall be verified by me in writing or by one of my duly authorised officers. Any Compact-Related Material that is not returned or destroyed, including without limitation, any oral Compact-Related Material, shall remain subject to the confidentiality obligations set forth in this agreement.
10. I agree that the obligations of Paragraphs 8 and 9 apply to electronically stored Compact-Related Material.
  11. It is understood and agreed that money damages would not be a sufficient remedy for any breach of this agreement and that the State or Member who employs me, or the Executive Committee, shall be entitled to specific performance and injunctive or other equitable relief as a remedy for any such breach and I further agree to waive any requirement for the security or posting of any bond in connection with such remedy. Such remedy shall not be deemed to be the exclusive remedy for breach of this agreement but shall be in addition to all other remedies available at law or equity to the Members.
  12. Should Compact-Related Material be disclosed by me or my Representatives in a manner that specific performance or injunctive or other relief is not available to prevent or cure the disclosure, I agree that I will return all compensation paid to me for services rendered for purposes of the Compact.
  13. In the event of litigation relating to this agreement, if a court of competent jurisdiction determines in a final, non-appealable order that I or my Representatives have breached this agreement, then I shall reimburse the State or Member who employs me, or the Executive Committee, for their reasonable legal fees and expenses incurred in connection with such litigation, including any appeals there from.
  14. It is understood that this agreement shall be governed and construed in accordance with the laws of \_\_\_\_\_, regardless of the laws that might otherwise govern under applicable principles of conflicts of law thereof.
  15. I agree, on behalf of myself and my Representatives, to submit to the jurisdiction of any court of competent jurisdiction selected by the State or Member who employs me, or the Executive Committee, to resolve any dispute relating to this agreement and waive any

right to move to dismiss or transfer any such action brought in any such court on the basis of any objection to personal jurisdiction, venue, or the convenience of the forum.

16. I agree that my obligations under this agreement shall survive the termination of my services in connection with the Compact.

To demonstrate that I agree to the terms set forth above, I have executed this agreement below and represent that I am authorised to enter into this agreement on my behalf individually and on behalf of any entity named below.

Accepted and agreed as of this \_\_ day of \_\_\_\_\_, 20\_\_:

(Name of Person who receives Compact-Related Material)

By: \_\_\_\_\_

(PERSON SIGNING)

(TITLE)



## **APPENDIX H**

### ***Antitrust Policy***

In order to avoid any violation of any antitrust laws which apply to the Members or to this Compact, the Executive Committee and Technical Committee representatives, the Executive Director and the Technical Consultants, if appointed, agree that the following activities shall be avoided (and who will sign a binding undertaking to respect this antitrust policy):

Discussion or exchange of commercially sensitive information, including:

- Members' or other undertakings' pricing policies and customer credit terms;
- production costs, capacity, sales volumes;
- plans for production, distribution and marketing;
- changes in industry production;
- transportation rates, zone prices, freight equalisation;
- company bids on new and existing contracts, company procedures for responding to bid invitations;
- marketing plans and commercial strategies; and
- information about raw material suppliers.

Members further agree to:

- acknowledge this antitrust policy before each committee meeting;
- inform other appropriate personnel involved in the work of this Compact about the rules of antitrust policy;
- limit all discussions during meetings to the topics on the agreed agenda;
- protest immediately should the discussion or any meeting activity appears to fall within the scope of the above mentioned activities to be avoided;
- maintain minutes of all meetings (which should include note of the understanding of and acknowledgment of this antitrust policy).