

SHOOK
HARDY & BACON

**NAGOYA – KUALA LUMPUR SUPPLEMENTARY
PROTOCOL (N-KL SP)
ON
LIABILITY AND REDRESS
AND
“THE COMPACT”**

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Liability & Redress

- Cartagena Protocol on Biosafety (BSP)
- Article 27: Directed Parties to Adopt a Process for Liability and Redress
- 10 Year Process
 - Initial Gridlock
 - Period of Engagement
 - Introduction of “The Compact”
 - Parallel Track to Completion in 2010

Supplementary Protocol

- Basic Framework for Liability & Redress
- Transboundary Movements of LMOs
- Administrative Process
- Clear Definitions of Key Terms

Supplementary Protocol

- Clear scope and definitions – those in N-KL SP should be incorporated:
 - Damage;
 - “Significant” adverse effect; and
 - Response measures.
- “Operator” : holds persons in operational control responsible.
- The requirements of both factual and legal causation.
- Appropriate defenses to protect against unfair imposition of responsibility.
- Response measures which are consistent with the N-KL SP definition and focused on remediation.
- Reasonable financial and time limitations for claims.

Supplementary Protocol

- Enter Into Force After Deposit of the 40th Instrument of Ratification, Acceptance, Approval or Accession.
- Complex Process for Ratifying Party
- 18 Separate References to Domestic Law
- Assessment & Development of Domestic Law

The “Compact”

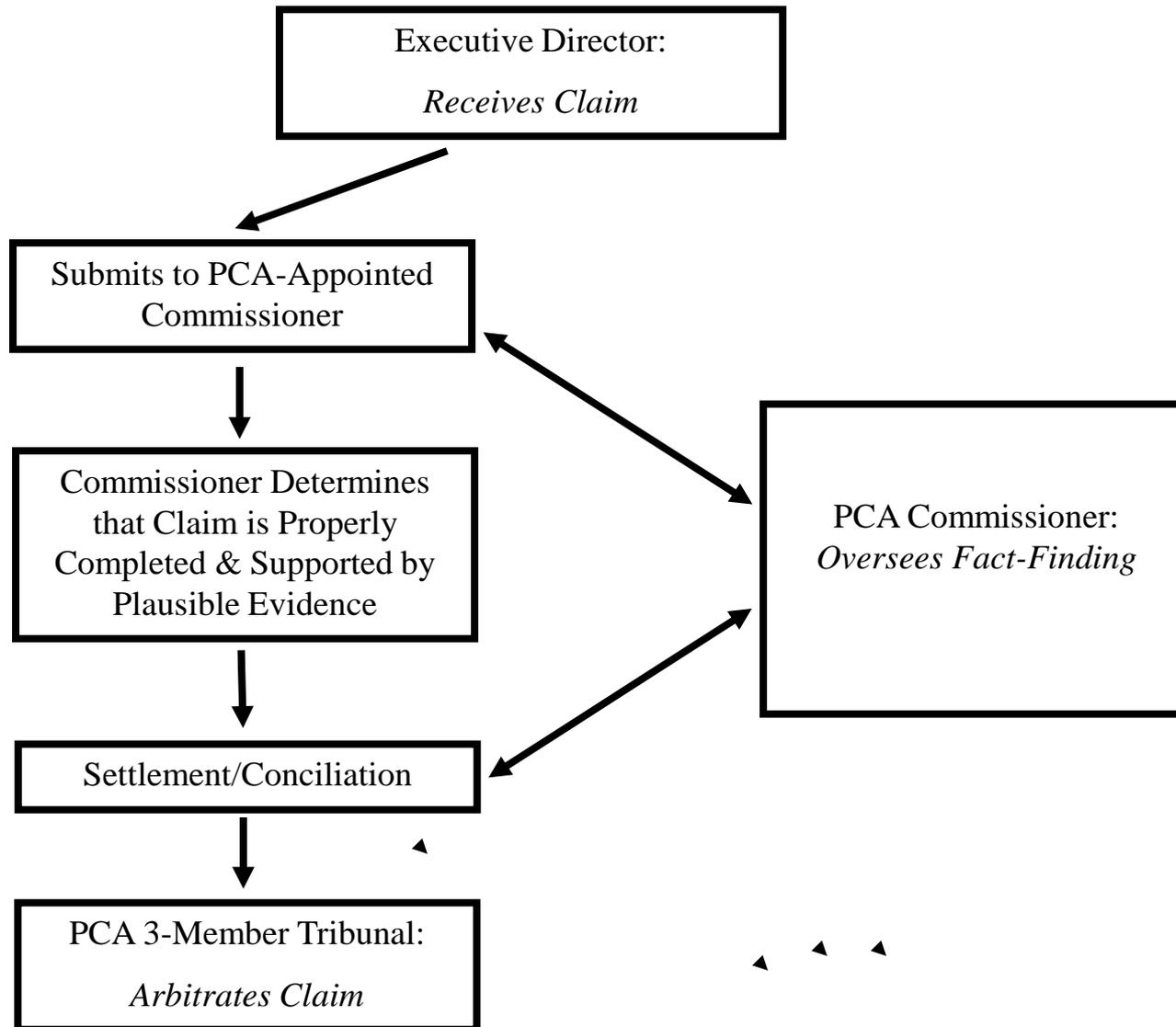
A Contractual Mechanism for Response in the Event of Damage to Biological Diversity Caused by the Release of a Living Modified Organism

- **Private Sector Initiative = Voluntary Binding Contract:** Each Member of the Compact agrees that it will timely respond to damage to biological diversity caused by the release of an LMO by that Member.
- **Designed to be a fair, accessible, and efficient system:**
 - Fully developed, clearly defined and self-contained process;
 - Any W.T.O. or U.N. Member can initiate a claim supported by science-based evidence;
 - Timely resolution of a claim administered by the Permanent Court of Arbitration; and
 - Qualified neutrals make all decisions and have access to independent experts.

The “Compact”

- **Technology Provider Is Responsible for Its Own LMO:** Compact Members can be responsible for responding under the Compact even when responsibility might fall to others in the supply & use chain under otherwise applicable law. There are clearly defined defenses, such as misuse.
- **Complements N-KL Supplementary Protocol with a Form of Financial Security:** The Compact assures both access to those who release LMOs and their ability to pay.
- **An Option for States:** States choose whether to seek redress under the Compact. The Compact provides States with a meaningful opportunity to seek Response under the Compact in lieu of other redress mechanisms that may be available to the State.

Claims & Assessment Process Flow Chart



The Compact's Relation to the N-KL SP

- The Compact provides an example of a mechanism that affords financial security, consistent with principles underlying insurability and of domestic business and corporation laws
- The Compact also provides examples of reasonable and practical provisions that address the issues left by the N-KL SP to *domestic law* or not covered by the N-KL SP at all, including:
 - *Considerations and Elements in Determining Damage*
 - *Causation*
 - *Channeling of Responsibility*
 - *Defences*
 - *Misuse*
 - *Time & Financial Limitations*

Core Principles for Fair Liability

- Protection of biological diversity as a “public good” by the State.
- Science-based evidence and decisions.
- Responsibility channeled to “operator” who caused the damage.
- Legal due process for those against whom claims are made.
- Independent unbiased decision-makers.
- Respect for precedent in the country’s legal system. There is no need to change basic approaches to liability and redress.
- Practical and fair application.
- Encourages Social Responsibility: enabling the use of technology that is essential to food and agricultural security while appropriately protecting biological diversity.

Now What?

- Ratification and Implementation
- CropLife International Implementation Guide
- Compact Remains Available Option for States

Coexistence Lessons Learned

- Engagement & Communication
 - Leads to Proper Results
 - Perception of Legal Risk vs. Actual Risk
- Fair Liability System
 - Increased Acceptance
 - Encourages Beneficial Behaviors
 - Reduces Trade Barriers