



COMPACT UPDATE
ADOPTION OF THE SECOND AMENDED TEXT OF THE COMPACT

In September 2012, the Members of the Compact adopted the Second Amended Text of the Compact. Many revisions came at the suggestion of the Compact’s Advisory Committee, which held its inaugural meeting 22-24 February 2012. The Advisory Committee is comprised of representatives, serving in their individual capacity, from a diverse group of states, regional or international governmental organizations, small and medium size enterprises, entities engaged in public and private research, non-governmental organizations and other stakeholders.

The Compact’s Members also received helpful input informally from various stakeholders, as well as the Permanent Court of Arbitration, which is the independent international arbitral body that facilitates fact-finding, conciliation, and arbitrations for resolving claims – including claims made under the Compact. After careful consideration, the Compact’s Members adopted the following changes to the Compact:

1. Revision to Make the Compact Consistent with the Supplementary Protocol

Many of the revisions in the Second Amended Text were made in an effort to improve consistency between the Compact and the Nagoya Kuala-Lumpur Supplementary Protocol on Liability and Redress (Supplementary Protocol). When the Members signed the Compact in June 2010, the terms and concepts of the Supplementary Protocol had not been finalized. As a result, the two documents in some instances used different words to refer to the same concept. At the Advisory Committee’s suggestion, the Members looked for opportunities to adopt terminology and concepts from the Supplementary Protocol when applicable to the Compact.

- As a preliminary matter, the Preamble has been updated to reflect the adoption and content of the Supplementary Protocol so that it recognizes the historical context in which it operates.
- The Compact also adopted several terms from the Supplementary Protocol. For example, the Compact now uses the title, “Use of Terms,” for its definition section, “Response Measures” in addition to “Response,” and “causal link” in its definition of causation.
- In addition, the Compact incorporated the same word used in the Supplementary Protocol – “restoration” – throughout its text for the concept of remediating a species or ecosystem determined to be damaged under the terms of the Compact. To this end, the phrase “Remediation End Point” has been changed to “Restoration Objective.” Also, the definition of Restoration Objective now incorporates language from the Supplementary Protocol regarding restoration of a damaged species or ecosystem to “the condition that existed before Damage occurred.” The Compact defines when this condition is reached in concert with the concepts, terms and conditions in the Compact.



- In three other provisions, changes were made to mimic comparable provisions in the Supplementary Protocol. (1) The Compact's requirement to mitigate potential damage to biological diversity had already closely resembled the Supplementary Protocol's description of a "Response Measure" as "reasonable actions to: prevent, minimize, contain, mitigate, or otherwise avoid damage, as appropriate." The two provisions now mirror each other. (2) The Compact adopted the Supplementary Protocol's definition for the territory for which a State may bring a claim, *i.e.*, when damage "occurred within the limits of its national jurisdiction." (3) The determination of whether an LMO caused the alleged change can now consider, as is permitted in the Supplementary Protocol, whether "any other human induced variation" or "any other natural variation" caused the change.
- Finally, in the unlikely event damage does occur, but the damaged species or ecosystem cannot itself be restored, the Compact now includes the option from the Supplementary Protocol that a State could seek restoration by "replacing the loss of biological diversity with other components of biological diversity for the same, or for another type of use either at the same, or as appropriate, at an alternative location." This concept of alternative restoration, which had not been in the Compact, is subject to the same terms and conditions governing restoration of the damaged species or ecosystem. This is a significant additional benefit for electing to utilize the Compact's dispute resolution mechanisms to adjudicate claims.

2. Other Important Changes and Clarifications

- The concept of "stewardship" is important to the Compact and its Members. The Advisory Committee, however, explained that the word "stewardship" does not translate into some languages. To help clarify what is meant by "stewardship," a sentence was added to the preamble explaining that stewardship is an "ethic that includes one's commitment to and implementation of responsible product life cycle management of an LMO."

It has long been an important requirement of membership in the Compact to comply at all times with objective industry stewardship obligations that apply to that Member. The current Members follow the Excellence Through Stewardship Program, which can be found at <http://www.excellencethroughstewardship.org>.

- The Compact previously included a requirement that any claim for damage to biological diversity related to an LMO must be filed within twenty years from the time the LMO has been authorized or released. The Members decided to lengthen the time for filing a claim in the event an LMO has been the subject of a successful claim under the Compact. For that LMO, the twenty-year time frame will restart upon the resolution of the successful claim.
- Several other changes were made to clarify terms or enhance the administration of claims. At the request of an Advisory Committee member, an act of "terrorism" was added to "Act of War or civil unrest" as an affirmative defense to a claim. Clarifications were made to assure that States can be reimbursed for interim measures taken before a claim is arbitrated.

1 October 2012



Other minor changes were made to tribunal administration, membership criteria, constitution of the Advisory Committee, and Member obligations upon withdrawal from the Compact.

- Finally, the criteria for selecting independent science experts was added to Appendix E in coordination with both the Technical and Advisory Committees.

The Members have been extremely pleased with the positive and helpful feedback from country representatives and other stakeholders. They welcome such feedback and will continue to consider changes to the Compact that enhance the effective and just administration of claims. Amendment summaries, such as this one, will be released when changes are made.

For more information about the Compact, including a copy of the Second Amended Text, please visit www.biodiversitycompact.org.