5-2006 36 ELR 10345

ELR
NEWS & ANALYSIS

# ARTICLES

# The International Treaty on Plant Genetic Resources for Food and Agriculture: Potential Mechanisms for Ensuring Compliance and Resolving Disputes

by Daniele Manzella

*Editors' Summary: Plant genetic resources are essential to feeding the world's population. With the goal of guaranteeing food security through the conservation, exchange, and sustainable use of the world's plant genetic resources for food and agriculture, as well as the fair and equitable benefit sharing arising from its use, the Food and Agriculture Organization of the United Nations adopted the International Treaty on Plant Genetic Resources for Food and Agriculture in November 2001, after seven years of negotiation. In this Article, Daniele Manzella examines the enforceable obligations of the Contracting Parties to the treaty, as well as the contract obligations of parties to material transfer agreements that arise under it, and makes a number of recommendations to ensure the treaty's successful implementation.*

## I. Introduction

Maintenance of biological diversity in farming systems generates value for agriculture. Retaining a wide range of varieties also helps in facing changes in the environment as well as new diseases and pests. Additionally, breeders managing the evolutionary process of varieties have the opportunity of discovering traits and characteristics that are useful for agronomic interests. Traditionally, the large genetic pool of plants has been conserved by farmers as custodians of biodiversity within farming systems. The exchange of those plant genetic resources for food and agriculture (PGRFA) across national boundaries has been the basis for the breeding of all the major crops that are essential to food security. In the context of the sovereign rights of states over biological resources, conservation and sustainable use of PGRFA should be promoted in the interest of agriculture. Access to PGRFA by farmers and breeders also needs to be facilitated in terms of transaction costs while still ensuring the fair and equitable sharing of benefits generated by its utilization.

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### *A. Summary of the International Treaty on Plant Genetic Resources for Food and Agriculture*

The International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA), the first legally binding multilateral agreement focusing on the intersections between agriculture, commerce, and the environment, was approved by the United Nations (U.N.) Food and Agriculture Organization (FAO) Conference on November 3, 2001.[1] Its objectives, in harmony with the Convention on Biological Diversity (CBD),[2] are to ensure the conservation and sustainable management of PGRFA as well as the fair and equitable sharing of the benefits arising from their use.[3] The ITPGRFA promotes the facilitated exchange of the plant genetic resources that are most important to food security and upon which all countries are interdependent.

1. International Treaty on Plant Genetic Resources for Food and Agriculture (approved Nov. 3, 2001), *available at* http://www.fao.org/AG/cgrfa/itpgr.htm (last visited Mar. 31, 2006) [hereinafter ITPGRFA].

2. 31 I.L.M. 818 (1992) [hereinafter CBD].

3. ITPGRFA, *supra* note 1, art. 1.1. The close relationship between the CBD and the ITPGRFA has its origin in the mandate for the negotiation of the ITPGRFA, given by the FAO Conference in 1993, which stressed that the revision of the International Undertaking on Plant Genetic Resources should be in harmony with the CBD and should deal with the issues of access to PGRFA on mutually agreed terms, including ex situ collections not addressed by the International Undertaking, and the realization of farmers' fights. The ITPGRFA provides that its objectives are to be pursued by closely linking the ITPGRFA to the FAO and the CBD as well as by the cooperation of the Governing Body with the Conference of the Parties to the CBD *Id*. arts. 1.2, 19.3(f), (g), and (l).

The ITPGRFA succeeds the International Undertaking on Plant Genetic Resources (the Undertaking), which was a soft law instrument dealing with sustainable management of plant genetic resources at the global level. The premise of the Undertaking was that plant genetic resources were a heritage of mankind and, consequently, were to be made available without restriction for plant breeding and other scientific purposes. That principle was later superseded by the CBD-enshrined principle of sovereign rights of states over genetic resources. The Undertaking was framed into the FAO Global System, together with the Commission on Plant Genetic Resources, which is an inter-governmental forum, later renamed Commission on Genetic Resources for Food and Agriculture. Other elements of the FAO Global System are the cooperative networks for PGRFA conservation (the Ex-Situ Seed Bank Networks), an information system on the global status of PGRFA (the World Information and Early Warning System on PGRFA), a global reporting mechanism (the Report on the State of the World's Plant Genetic Resources for Food and Agriculture), and a global PGRFA management program (the Global Plan of Action on the Conservation and Sustainable Utilization for Plant Genetic Resources for Food and Agriculture (Global Plan of Action)).[4] The ITPGRFA comes as a response to the need to shift the Undertaking's conceptual grounds and, more generally, the FAO Global System on PGRFA, away from the concept of plant genetic resources as a "heritage of mankind" and toward the principle of state's sovereignty on genetic resources, as affirmed in the CBD.

The CBD recognizes "the special nature of agricultural biodiversity, its distinctive features and problems needing distinctive solutions."[5] This recognition serves as the intellectual basis for the realization that separate regulatory frameworks are required for agricultural genetic resources. The primary difference between the CBD's and the ITPGRFA's approach to access and benefit-sharing is that bilateral arrangements prevail under the CBD (individually negotiated contracts between provider and recipient) while the ITPGRFA foresees multilaterally negotiated, and thus uniform arrangements.

The ITPGRFA came into force on June 29, 2004. As of March 31, 2006, it had 97 Contracting Parties. The ITPGRFA is divided into seven parts. Part I spells out its objectives and definitions. The core of the ITPGRFA, meaning the main obligations of the Contracting Parties that directly relate to its objectives, are in Part II (General Provisions) and Part IV (The Multilateral System for Access and Benefit-Sharing). Part III deals with farmers' rights. Part V refers to supporting components, which are drawn from a group of existing international arrangements for PGRFA management. Part VI sets forth the financial provisions of the ITPGRFA. Part VII outlines the institutional provisions for the Governing Body and the Secretary of the Governing Body, as well as compliance and dispute settlement provisions.

### 1. General Provisions and Farmers' Rights

Many of the provisions of the ITPGRFA in Parts I, II, and III are policy-oriented provisions that, when put in the context of a legally binding multilateral agreement, leave large margins of discretion for Contracting Parties in the exercise of their sovereign rights over PGRFA. According to Article 4, Contracting Parties must generally ensure the conformity of their laws, regulations, and procedures with their obligations under the ITPGRFA.

The ITPGRFA's provisions for conservation and sustainable use in Articles 5 and 6 list a number of actions, such as surveys and inventories, support to farmers, local community-based management, and on-farm conservation, that are operational in nature and intrinsically linked to the national policy priorities of each Contracting Party. Indeed, all of these actions are to be taken "as appropriate" with respect to the needs and policies of each Contracting Party. Article 6 also refers to policy and legal measures for sustainable use of PGRFA, which "may include" measures such as "fair agricultural policies" for diverse farming systems and participatory plant breeding. The list is explicitly nonexhaustive. It is notable that even the provision that calls for the review of regulations concerning variety release and seed distribution is to be undertaken "as appropriate" thereby leaving a large margin of discretion for Contracting Parties.[6]

In substance, Articles 5 and 6 seem to draw upon the Global Plan of Action[7] by endorsing its policy framework in the context of the ITPGRFA and further develop themes already set out in the CBD. The policy nature of the obligations of Articles 5 and 6 seems to be confirmed by subsequent Article 7, which calls for the integration of the activities listed in Articles 5 and 6 into the national agriculture and rural development policies and programs "as appropriate." Article 7 also calls for international cooperation in meeting the goals of the ITPGRFA.

Article 9 deals with farmers' rights, a concept that recognizes the contribution of local and indigenous communities and farmers to food security. Article 9 places the responsibility for the realization of those rights on national governments, which should take action in accordance with their needs and priorities. Article 9 contains a nonexhaustive list of measures for the promotion of farmers' rights that each Contracting Party should take "as appropriate, and subject to its national legislation."

### 2. The Multilateral System for Access and Benefit-Sharing

The ITPGRFA reaffirms the CBD's principle of the sovereign right of states over PGRFA. At the same time, the ITPGRFA recognizes the interdependence of all countries with respect to those resources and, based on the special na-

4. The Global Plan of Action on the Conservation and Sustainable Use of Plant Genetic Resources for Food and Agriculture [hereinafter GPA] is a voluntary, i.e., legally not binding, instrument that was negotiated and formally adopted by 150 countries in 1996 at the Leipzig International Technical Conference on Plant Genetic Resources. The GPA lists 20 priority areas for in situ conservation and development, ex situ conservation, utilization of plant genetic resources, as well as institutions and capacity building. It aims to assist countries in establishing priorities for conservation and sustainable use. The GPA is a rolling plan that is monitored and reviewed by the FAO Commission on Genetic Resources for Food and Agriculture. *See* FAO, Report of the International Technical Conference on Plant Genetic Resources (1996), *available at* http://www.fao.org/ag/AGP/AGPS/Pgrfa/pdf/itcrepe.pdf (last visited Mar. 14, 2006).

5. CBD, *supra* note 2, Decision II/15 of the Conference of the Parties, *at* http://www.biodiv.org/decisions/default.aspx?m=COP-02&id=7088&lg=0 (last visited Mar. 14, 2006).

6. ITPGRFA, *supra* note 1, art. 6.2.

7. *See supra* note 4.

ture and distinctive features of PGRFA, seeks distinctive solutions for access and benefit-sharing. The most distinctive of these solutions is undoubtedly the Multilateral System, a mechanism to facilitate access to genetic resources of certain crops and enable the sharing of the benefits arising from the commercialization of certain products.[8]

The scope of the ITPGRFA covers all PGRFA and, accordingly, the general obligations in Part II apply to all PGRFA. However, the obligations arising under Part V of the ITPGRFA on the Multilateral System apply only to those crops listed in Annex I that are under the management and control of the Contracting Parties and are in the public domain.[9] The Multilateral System also includes PGRFA listed in Annex I and held by the International Agricultural Research Centres (IARCs) of the Consultative Group on International Agricultural Research (CGIAR).[10] The Contracting Parties are required to take appropriate measures to encourage natural and legal persons in their jurisdictions to include their holdings of PGRFA of crops that appear in Annex I in the Multilateral System.[11]

The Multilateral System established by the Contracting Parties under Part IV of the ITPGRFA is undoubtedly the core of the ITPGRFA. Articles 12 and 13, which set out provisions for access and benefit-sharing, respectively, are discussed in detail below. The challenge of setting out a system of access and benefit-sharing under multilaterally agreed terms and conditions is the most original feature of the ITPGRFA. It is not surprising then, that most of the obligations that might be subject to an enforcement mechanism derive from this aspect of the ITPGRFA.

3. Supporting Components and Financial Provisions

As the heading of Part V of the ITPGRFA suggests, the "supporting" components are outside the scope of the ITPGRFA itself, but are part of the machinery for the proper implementation of its objectives. These components include the existing Global Plan of Action[12] and the international plant genetic resources networks,[13] as well as the development and strengthening of a Global Information System on PGRFA.[14] In this context, the ITPGRFA deals with ex situ collections held by the IARCs of the CGIAR, which have their own juridical personality but cannot be Contracting Parties to an international treaty in their own right. The ITPGRFA calls upon the IARCs to sign agreements with the Governing Body to bring their collections into the Multilateral System.[15]

The key to the successful implementation of obligations in multilateral environmental agreements is the provision of adequate monetary resources by the Contracting Parties. The ITPGRFA addresses this issue in Article 18, which states that Contracting Parties are to implement a funding strategy that will assist in the implementation of the ITPGRFA. The funding strategy set forth in Part VI consists of three main elements. One part of the funds is expected to derive from the financial benefits of the commercialization of resources accessed and developed under the Multilateral System. Funds coming from other international mechanisms, funding institutions, and bodies are a second element of the funding strategy. To that effect, Contracting Parties shall take the "necessary and appropriate measures" within the governing bodies of those institutions to ensure due priority and attention to the effective allocation of resources for the plans and programs of the ITPGRFA. Financial resources provided directly by each Contracting Party for national activities is the third pillar of the funding strategy. In this regard, the Contracting Parties have agreed upon general objectives and priorities without any hard commitments for monetary disbursement.

*B. Scope of This Article*

After many years of negotiations, the FAO Conference has succeeded in creating a treaty on sustainable agriculture that recognizes the role and mandate of the agricultural sector in the context of conservation and sustainable use of biological resources.

The ITPGRFA attempts to facilitate access to PGRFA worldwide and promote an alternative mechanism for access to PGRFA and benefit-sharing that differs from access to PGRFA on a bilateral basis (which is problematic for farmers and breeders, particularly in developing countries where there are not enough resources and capacity to negotiate bilaterally).Thus, it is important not only for the implementation of the general policy framework contained in the ITPGRFA to be facilitated through adequate compliance mechanisms but also that the obligations related to the Multilateral System be sufficiently enforced. Recognizing the ITPGRFA's key role for food security and sustainable agriculture, this Article seeks to find innovative solutions to ensure its effectiveness by first examining the enforceable obligations of the Contracting Parties to the ITPGRFA, as well as the contract obligations of parties to material transfer agreements (MTAs) that arise under the ITPGRFA. This Article goes on to review the compliance and enforcement options currently available under the ITPGRFA and the main issues relating to compliance and enforcement. This Article takes a look at the spectrum of possible compliance mechanisms that will help not only to effectuate the commitments of the Contracting Parties, but also facilitate its implementation through nonadversarial processes. The Article also reviews the options for resolution of disputes under MTAs. The Article makes certain recommendations to the future Governing Body of the ITPGRFA and parties to MTAs to assist in implementation and enforcement of the ITPGRFA and ensure its effectiveness.

## II. Enforceable Obligations

As noted above, the main legally enforceable obligations of the ITPGRFA relate to the Multilateral System. An analysis of the provisions relating to the Multilateral System is given below in order to indicate what the enforceable obligations in the ITPGRFA are and what possible disputes may arise. Such an analysis is necessary in order to tailor appropriate compliance and dispute settlement mechanisms.

8. ITPGRFA, *supra* note 1, art. 10.2 (calling on Contracting Parties to establish such a Multilateral System).
9. *See id*. art. 11.2.
10. *Id.* art. 11.5.
11. *Id.* art. 11.3.
12. *Id.* art. 14.
13. *Id.* art. 16.
14. *Id.* art. 17.
15. *Id.* art. 15.

*A. Article 12: Facilitated Access and MTAs*

The functioning of the Multilateral System is stated in Article 12, whereby the Contracting Parties agree to take the necessary legal or other appropriate measures to provide facilitated access through the Multilateral System to other Contracting Parties and legal and natural persons under their jurisdiction. Article 12 establishes the terms and conditions of such access. Access will be granted solely for the purpose of utilization and conservation for research, breeding, and training for food and agriculture; chemical, pharmaceutical, and/or other non-food/feed industrial uses are expressly excluded from the Multilateral System.

Article 12 innovatively attempts to sustain access by prohibiting recipients from claiming intellectual property rights (IPRs) or other rights that have a limiting effect upon such access. Additionally, under the terms of the ITPGRFA, recipients shall assure continued access to PGRFA accessed under the Multilateral System. However, access is still limited in a number of contexts. First, there is an allowance of discretion to developers where plant genetic resources are currently under development. Furthermore, access to plant genetic resources protected by IPRs and other property rights is subject to the strictures of relevant international agreements and national laws.

Article 12.4 requires that facilitated access be provided through a standard MTA, which must contain certain provisions set forth in the ITPGRFA.[16] The MTA is a bilateral contract between a provider and a recipient of PGRFA setting out the terms and conditions of access. MTAs are self-contained contracts that specify conditions as to the use of the material and operate within the context of the ITPGRFA.[17] In substance—and this is one of the core obligations of the ITPGRFA—the Contracting Parties to the ITPGRFA must ensure that the standard MTA is applied in all transfers of PGRFA of Annex I crops by the natural and legal entities under their jurisdiction. The MTA is in effect the legal instrument that allows the legal obligations provided for in the ITPGRFA to be passed on to recipients, and from them to subsequent recipients, by means of a contract.

The Governing Body is tasked with the approval of the standard MTA that all Contracting Parties as well as individuals or legal entities under their jurisdiction will be required to use to regulate access to PGRFA of Annex I crops.[18] The ITPGRFA prescribes some of the terms and conditions that the standard MTA must contain: (1) the scope of the access to be provided—"utilization and conservation for research, breeding and training for food and agriculture"[19]; (2) a prohibition on recipients claiming any IPRs or other rights that limit facilitated access to the PGRFA or their genetic parts and components, in the form received[20]; (3) provisions for constant availability to the Multilateral System of material accessed by the recipients and conserved[21]; (4) the terms of benefit-sharing set forth in Article 13.2.d(ii) (described below); (5) any other relevant provisions of the ITPGRFA; and (6) the requirement that any recipients shall pass on the obligations of the MTA to the person or entity to which the material is subsequently transferred.[22]

The provision dealing with IPRs on material accessed from the Multilateral System undoubtedly contains some ambiguities left open to different interpretations. The phrase "intellectual property rights or other rights that limit the facilitated access" is ambiguous.[23] It may be interpreted as drawing a line between types of IPRs limiting facilitated access, i.e., access under the terms and conditions of the Multilateral System, and others not limiting such access. By virtue of the breeder's exemption in plant breeders' rights laws and the research exemption in some national patent laws, those two forms of IPRs can be taken not to limit further facilitated access to the PGRFA for the purposes of the Multilateral System, i.e., utilization and conservation for research, breeding, and training for food and agriculture. Others may claim that the meaning of the provision is to prohibit recipients from claiming any IPR, whether or not it limits access and only those other rights that limit access, over the material in the form received from the Multilateral System. What is sure is that this ambiguity has the potential for causing disputes between parties to individual MTAs when these ITPGRFA provisions become part of the contract.

Further ambiguities within the context of the IPR provision that may cause disputes can be found in the phrase "PGRFA or their genetic parts or components."[24] There is no definition in the ITPGRFA of "genetic parts or components" but only of "genetic material."[25] In addition, the phrase "in the form received" is also ambiguous, especially with regard to breeding that does not alter the essential features of the material, e.g., through backcrossing, and the patenting of genes isolated from the material received. The requirements for differentiating a product from the Multilateral System material in order to make it patentable is a controversial matter likely to be decided in the practice and jurisprudence of national intellectual property laws. For instance, a third party seeking access to material already transferred under a prior MTA may be refused such access based on IPR restrictions on some genes isolated from the accessed material. These disputes may arise under the contractual terms of the MTA and may be decided under its designated dispute resolution mechanism.

*B. Article 13: Benefit-Sharing*

Access is only one aspect of the Multilateral System, which also aims to guarantee the sharing of benefits arising from the development of accessed material in accordance with multilaterally agreed terms and conditions. Article 13 sets forth terms and conditions for benefit-sharing. Contracting Parties recognize that facilitated access to PGRFA itself constitutes a major benefit of the Multilateral System.[26] The Contracting Parties are to consider modalities of a strategy of voluntary benefit-sharing contributions from food-pro-

16. *Id.* art. 12.4.

17. H. David Cooper, *The International Treaty on Plant Genetic Resources for Food and Agriculture*, 11 Rev. Eur. Community & Int'l Envtl. L. 1 (Apr. 2002).

18. ITPGRFA, *supra* note 1, art. 12.4.

19. *Id.* art. 12.3(a).

20. *Id.* art. 12.3(d).

21. *Id.* art. 12.3(g).

22. *Id.* art. 12.4.

23. *Id.* art. 12.3(d).

24. *Id.*

25. *Id.* art. 2.

26. *Id.* art. 13.1.

cessing industries.[27] Other mechanisms for the sharing of benefits are the exchange of information,[28] access to and transfer of technology,[29] capacity-building,[30] and, most relevantly, the sharing of monetary and other benefits arising from commercialization.[31] The involvement of the private and public sectors in activities identified in Article 13 through partnerships and collaboration is one possible form of commercial benefit-sharing. Under Article 13.2.d(i), the Contracting Parties agree to take measures in order to achieve commercial benefit-sharing in research and technology development, including with the private sector in developing countries and countries with economies in transition.

Article 13.2(d)(ii) contains the most controversial provisions related to benefit-sharing. It provides that the standard MTA must require recipients commercializing products that are PGRFA and that incorporate material accessed from the Multilateral System to pay into a trust account under the administration of the Governing Body an equitable share of the benefits arising from the commercialization of that product. The payment is mandatory where restrictions are placed on the availability of the product for further research and breeding, e.g., limitations deriving from the grant of IPRs. Where such a product is available without restriction to others for further research and breeding, the recipient who commercializes is not required to share benefits but shall be encouraged to make such payment voluntarily. The Governing Body is called upon to determine the level, form, and manner of the payment in line with commercial practice. The Governing Body may decide to establish different levels of payment for various categories of recipients who commercialize such products and may also decide on the need to exempt from such payments small farmers in developing countries and in countries with economies in transition. The Governing Body may, from time to time, review the levels of payment with a view to achieving fair and equitable sharing of benefits, and may also assess, within a period of five years from the entry into force of the ITPGRFA, whether the voluntary payment shall be made mandatory.

The obligation to share the monetary benefits arising from the commercial use of genetic resources represents one of the most innovative mechanisms of the ITPGRFA. Again, the provisions combine the obligations of Contracting Parties to the ITPGRFA with the obligations of parties to the MTAs. While the provisions are innovative, there are still a number of issues in the interpretation of the provisions that will need to be resolved, presumably, by the enforcement body before which contractual disputes based on the MTA will be determined. Of course, the Governing Body may also provide interpretive guidance to resolve such issues by, for instance, refining the wording of some ITPGRFA provisions that will be part of the standard MTA.[32]

One issue that may cause controversy is the determination of when "a product is available without restriction to others for further research and breeding."[33] Criteria for making such a determination are not given in the ITPGRFA. The clause seems to address the situation where patents or other IPRs are granted on any genetic parts or components of the new product and have the effect of restricting the availability of the product. As discussed above, some jurisdictions' patent legislation contains a research exemption allowing the use of the patented subject matter for further research purposes, including breeding. Is this considered a case where a product is available without restriction for research and breeding in terms of the ITPGRFA, and, if so, does it apply in all cases or with some distinctions?

Another issue is the interpretation of the term "commercialization." Monetary benefit-sharing shall take place in the event of any commercialization, but what exactly does this term mean? At what point is a product considered commercialized? Is it commercialized when offered for sale, or when the offer is accepted, or when profits arise? The Governing Body may agree on a common interpretation of the term in the future or may adopt provisions of the standard MTA that shed light on the wording of the ITPGRFA, but should this not happen or should the decisions of the Governing Body still leave room for interpretation, disputes regarding when the obligation to pay a certain amount of money as benefit-sharing under the MTA arises may also be determined by a dispute settlement body on a case-by-case basis.

Another ambiguity that may cause arguments is what constitutes "incorporation" of material accessed from the Multilateral System. Both conventional breeding and biotechnological methods may result in the incorporation of accessed material, and technical questions may arise as to the extent of the incorporation of the material into a product triggering the requirement to share benefits. For example, would any incorporation of the material be sufficient to satisfy this requirement? Or would the incorporation of an essential part of the material be necessary? Again, the interpretation of this term may be the subject of a contractual dispute under an MTA.

### *C. Summary of Obligations*

A governing body of an international treaty will, in the normal course, address the implementation issues of particular parties relating to specific obligations whose compliance the parties collectively wish to ensure. In the ITPGRFA, those obligations are likely to be the general conditions for access in Article 12 and the mechanisms for benefit-sharing in Article 13, as outlined above. Some of these obligations will be part of the terms and conditions of standard MTAs. Therefore, it is also important that the MTAs themselves be appropriately enforced to ensure that the ITPGRFA is effectively implemented.

Parties to potential disputes arising out of MTAs will be providers of PGRFA material on one hand, and recipients of such material on the other. At least for the first transfer of the material, providers are likely to be public institutions. In fact, the Multilateral System covers all PGRFA of Annex I crops that are under the management and control of Contracting Parties and in the public domain (typically, gene banks and collections that are under the responsibility of a

27. *Id.* art. 13.6.

28. *Id.* art. 13.2(a).

29. *Id.* art. 13.2(b).

30. *Id.* art. 13.2(c).

31. *Id.* art. 13.2(d).

32. *See id.* art. 19.3(a).

33. *Id.* art. 13.2(d)(ii).

state are administered by public research organizations). The subsequent recipients, who could be another public institution, a private individual, or a nongovernmental legal entity, will be subject to the same terms and conditions as those that applied under the first MTA.

However, this may not be the scenario where original providers of PGRFA are natural and legal persons under the jurisdiction of Contracting Parties that have included their materials in the Multilateral System.[34] In those cases, the original provider who will be party to the MTA will be a holder of germplasm that is not under the direct management and control of a state (most likely, an individual or a nongovernmental legal entity). This poses one of the fundamental questions related to enforcement of Contracting Parties' obligations: how to ensure that the terms of the standard MTA are adhered to by natural and legal persons under the jurisdiction of the Contracting Parties. Presumably, a Contracting Party will have to adopt legal measures imposing the standard MTA on individuals and entities since it is obvious that the obligations of the ITPGRFA are not directly binding upon non-states and/or non-Contracting Parties. In the absence of measures imposing the standard MTA on individuals and entities under its jurisdiction, the Contracting Party will be in breach of an obligation under the ITPGRFA but the transfer may remain valid in terms of national laws. A pressing question is what recourse other Contracting Parties will have against such a Contracting Party in breach of this obligation.

The above discussion flagged some of the interpretative issues that may result in disputes between parties to an MTA if its provisions do not go beyond the ambiguous wording of the ITPGRFA, e.g., the claiming of IPRs on material accessed and its genetic parts and components, the conditions for the monetary payment of benefits arising from commercialization and its amount. These open questions highlight the intersection of obligations of Contracting Parties to the ITPGRFA and the obligations of individuals and legal entities executing transfers of material pursuant to the ITPGRFA provisions embodied in the MTA as a key-issue to be considered in the establishment of compliance and enforcement mechanisms.[35]

## III. Compliance and Enforcement Provisions

The ITPGRFA provides for various methods of enforcement. Article 21 requires the establishment of a compliance mechanism, while Article 22 establishes a hierarchy of dispute resolution options. These two articles concern the enforcement of the Contracting Parties' obligations under the ITPGRFA. However, as previously discussed, a pillar of the Multilateral System is the conclusion of individual MTAs. Therefore, the ITPGRFA also requires that the Contracting Parties provide some mechanism for recourse in case of contractual disputes arising under such MTAs.[36] In addition, it is advisable, if not imperative, that parties to MTAs, as with any other contract, designate an enforcement mechanism in the MTA for resolution of disputes. It is envisioned that once a standard MTA is adopted by the Governing Body, provision for the enforcement of obligations under such contracts will be included in the standard MTA.

### *A. Compliance Mechanism—Article 21*

Article 21 of the ITPGRFA reads as follows:

> The Governing Body shall, at its first meeting, consider and approve cooperative and effective procedures and operational mechanisms to promote compliance with the provisions of this Treaty and to address issues of noncompliance. These procedures and mechanisms shall include monitoring, and offering advice and assistance, including legal advice or legal assistance, when needed, in particular to developing countries and countries with economies in transition.[37]

As stated, mechanisms to promote compliance and address issues of noncompliance, such as monitoring and offering advice or assistance, shall be "cooperative and effective." The term "cooperative" may be interpreted as promoting a nonadversarial means to address compliance issues. The reference to "operational mechanisms" concerns the establishment of a specific body or committee to consider compliance issues.

Compliance procedures are included in most recent international environmental treaty arrangements. Experience with recent international treaties shows that such mechanisms are beneficial and often prevent disputes from arising. Compliance mechanisms are also much more cost-efficient than allowing a problem to get so bad that a dispute between Contracting Parties arises and dispute settlement is required. Effective compliance mechanisms create incentives and assistance for Contracting Parties to comply with their obligations.

Yet while Article 21 calls on the Governing Body to establish a compliance mechanism, no further guidance is given. The absence of a compliance mechanism may cause the ITPGRFA to falter before it even gets started. The rationale of the Multilateral System is to ensure uniform terms and conditions. Any "leak" in the system—nonstandard conditions applied for the transfer of Annex I material or the failure to comply with standard conditions—would create disparity and substantially hamper the ITPGRFA machinery.

### *B. Settlement of Disputes Between Contracting Parties—Article 22*

Article 22 of the ITPGRFA, which regulates the settlement of disputes between Contracting Parties,[38] reads as follows:

> 1. In the event of a dispute between Contracting Parties concerning the interpretation or application of this Treaty, the parties concerned shall seek solutions by negotiation.

34. Contracting Parties invite individuals or nongovernmental legal entities holding PGRFA collections of Annex I crops (other holders) to include their collections into the Multilateral System. *See id.* art. 11.2.

35. Gregory Rose, *International Law of Sustainable Agriculture in the 21st Century: The International Treaty on Plant Genetic Resources for Food and Agriculture*, 25 Geo. Int'l Envtl. L. Rev. 583 (2003).

36. ITPGRFA, *supra* note 1, art. 12.5.

37. *Id.* art. 21.

38. The dispute settlement provisions apply only to Contracting Parties to the ITPGRFA. Separate dispute settlement procedures may need to be set out in the agreements between the IARCs and the Governing Body for disputes arising out of the interpretation or application of those agreements.

> 2. If the parties concerned cannot reach agreement by negotiation, they may jointly seek the good offices of, or request mediation by, a third party.
>
> 3. When ratifying, accepting, approving or acceding to this Treaty, or at any time thereafter, a Contracting Party may declare in writing to the Depositary that for a dispute not resolved in accordance with Article 22.1 or Article 22.2 above, it accepts one or both of the following means of dispute settlement as compulsory:
>
> (a) Arbitration in accordance with the procedure laid down in Part 1 of Annex II to this Treaty;
>
> (b) Submission of the dispute to the International Court of Justice.
>
> 4. If the parties to the dispute have not, in accordance with Article 22.3 above, accepted the same or any procedure, the dispute shall be submitted to conciliation in accordance with Part 2 of Annex II to this Treaty unless the parties otherwise agree.[39]

Although Article 22 addresses dispute settlement, it does not define "dispute," nor is that term defined elsewhere in the ITPGRFA. This is in contrast to Article 27 of the CBD, which speaks of "a dispute between Contracting Parties concerning the interpretation or application of this Convention . . . ." Under the ITPGRFA, the determination of whether a dispute has arisen is made by the concerned Contracting Parties, which may consider a "dispute" any controversy on legal, policy, or technical matters as long as it amounts, allegedly, to a breach of the enforceable provisions of the ITPGRFA text. However, as noted above, there may also be disputes on the interpretation of certain provisions in the ITPGRFA that do not yet rise to an actual breach of an obligation under the ITPGRFA.

Article 22 of the ITPGRFA facilitates dispute resolution by subjecting disputes to gradually more intrusive and formal mechanisms. The ITPGRFA provides that Contracting Parties must first seek to resolve any disputes concerning the interpretation or application of the ITPGRFA by negotiation.[40] Negotiation gives the Contracting Parties a first opportunity to express their mutual concerns amongst themselves. In the case of unfruitful negotiation, Contracting Parties may resort to good offices or mediation by a third party. Such nonbinding mechanisms bring in an impartial perspective that may facilitate dialogue. If those preliminary attempts fail, the Contracting Parties may choose to submit the dispute to binding procedures such as arbitration or judicial settlement.

When negotiation, mediation, or good offices have failed, Article 22.3 sets forth that a Contracting Party may accept dispute resolution by arbitration,[41] by the International Court of Justice (ICJ),[42] or both. While the ITPGRFA provides that a Contracting Party may declare at any time that it accepts one of these compulsory procedures for resolving any disputes, it is highly unusual for multilateral treaty parties to so elect, and more likely that conflicts between parties will be addressed through political processes within the framework of the ITPGRFA's Governing Body.[43] As for submission of the dispute to the ICJ, it is notable that submission to the ICJ does not apply when one of the parties to the dispute is an organization, i.e., the European Community, and not a state. In addition, referral of cases to the ICJ is likely to be costly and time-consuming and, thus, not suited to expeditious resolution of disputes. With regard to arbitration as the choice for a binding dispute resolution option, the ITPGRFA sets forth the procedures in the Annex for instituting and administering an arbitral tribunal.[44] In the event that a Contracting Party has not made a declaration for compulsory dispute resolution or where Contracting Parties in dispute have not accepted the same procedure for the settlement of disputes, the ITPGRFA provides that the dispute *must* be submitted to conciliation unless the parties agree otherwise.[45] Conciliation is essentially institutionalized negotiation.[46] Procedures for the creation of a conciliation commission and the taking of decisions by the conciliation commission are set forth in the Annex.[47] The conciliation commission's report takes the form of a nonbinding set of proposals as opposed to a binding decision. If the conciliation commission's proposed terms are rejected, then conciliation has failed and the parties are under no further obligation to attempt to resolve the dispute.

Consequently, where the parties to a dispute do not agree with the conciliation commission's recommendation, there is no further resolution to the dispute and the parties are at an impasse. This lack of a compulsory binding decisionmaking process may also cause the ITPGRFA to falter. It is generally accepted that the mere existence of a compulsory binding enforcement procedure often prevents disputes from arising. Without one, disputes may never be resolved or disputes on interpretation may drag on indefinitely, therefore delaying the intended benefits of the ITPGRFA. The existence of a binding dispute resolution

39. ITPGRFA, *supra* note 1, arts. 22.1 to 22.4.

40. *Id.* 22.1.

41. *Id.* art. 22.1(a).

42. *Id.* art. 22.1(b).

43. *See* Rose, *supra* note 35.

44. The arbitration procedure set forth in Part 1 of Annex II to the ITPGRFA, covers: notification to the Secretary (Article 1); establishment of the arbitral tribunal (Articles 2 and 3); the scope of decisionmaking (Article 4); powers of the arbitral tribunal to establish rules of procedure (Article 5) and recommend interim measures of protection (Article 6); obligations of the Parties to provide information (Article 7); confidentiality (Article 8); costs (Article 9); intervention (Article 10); counterclaims (Article 11); decision process (Article 12); absence of a Party (Article 13); deadline for decision (Article 14); scope of decision (Article 15); finality of decision (Article 16); and controversy regarding the decision (Article 17).

45. ITPGRFA, *supra* note 1, art. 22.4.

46. Conciliation has been defined by the Institute of International Law as:

> [A] method for the settlement of international disputes of any nature according to which a Commission set up by the Parties, either on a permanent basis or an ad hoc basis to deal with a dispute, proceeds to the impartial examination of the dispute and attempts to define the terms of a settlement susceptible of being accepted by them, or of affording the Parties, with a view to its settlement, such aid as they may have requested.

INSTITUTE OF INTERNATIONAL LAW, REGULATION ON THE PROCEDURE OF INTERNATIONAL CONCILIATION, art. 1, at 385-91, Ann. IDI 49-II (1961), *available at* http://www.idi-iil.org/idiE/resolutionsE/1961_salz_02_en.pdf (last visited Apr. 2, 2006).

47. The conciliation commission procedure set forth in Part 2 of Annex II to the ITPGRFA, covers: creation and composition of a conciliation commission (Article 1); appointment of commission members (Articles 2 to 4); decision process (Article 5); and competence issues (Article 6).

procedure will give Contracting Parties the incentive to comply with their obligations under the ITPGRFA and expedite its effective implementation.

### *C. Resolving Disputes on Material Transfer Agreements—Article 12.5*

Under Article 12.5, the Contracting Parties are obligated to ensure that a national court or any dispute resolution body has jurisdiction to hear contractual disputes arising out of MTAs. The provision reads:

> Contracting Parties shall ensure that an opportunity to seek recourse is available, consistent with applicable jurisdictional requirements, under their legal systems, in case of contractual disputes arising under such MTAs, recognizing that obligations arising under such MTAs rest exclusively with the parties to those MTAs.[48]

This provision means that Contracting Parties must make sure that a national court or dispute resolution body has jurisdiction to hear contractual disputes arising out of MTAs. This dispute resolution system is only to be used to enforce the rights and obligations of the parties to the MTA. The obligations of the Contracting Parties are addressed by Articles 21 and 22, as discussed above.

Issues of enforcement relating to MTAs arise primarily by virtue of the fact that MTAs are private contracts and the ITPGRFA only applies to Contracting Parties. The enforcement of such contracts is obviously important if not integral to the functioning of the ITPGRFA. Therefore, the ITPGRFA, through the Governing Body and the Contracting Parties, should not only make sure that the terms of the standard MTA are clear and enforceable, but should also try to influence the procedures and decisions that relate to the resolution of disputes concerning the enforcement of MTAs. This is important in order to ensure their consistency with the goals and objectives of the ITPGRFA. Although the MTAs are outside of the jurisdiction of the ITPGRFA, their effective enforcement is integral to achieving its overall goals. Although parties to MTAs are not Contracting Parties to the ITPGRFA, they should still be held to its policies, goals, and procedures in order to ensure its success.

## IV. Proposals

Given the enforceable obligations and the existing enforcement provisions of the ITPGRFA, it is obvious that some work is left to be done to ensure the effective and efficient implementation and enforcement of the ITPGRFA. Given the status of the MTA as a private contract, which falls outside of the enforcement provisions of the ITPGRFA in strictly legal terms, and the lack of a compulsory binding dispute resolution procedure, innovative proposals for effective enforcement and implementation are needed. Indeed, the ITPGRFA itself recognizes this fact, through Article 21 for the development of compliance procedures and mechanisms and Article 12.5 on the adoption of a standard MTA.

### *A. Establishment of a Compliance Mechanism*

Article 21 calls on the Governing Body to approve procedures and mechanisms to promote compliance with the provisions of the ITPGRFA and to address issues of noncompliance. Obligations under the ITPGRFA that may benefit from a compliance mechanism include a variety of actions, such as the general obligation that states should encourage natural and legal persons in their jurisdictions to include their holdings of PGRFA in the Multilateral System, the requirement that Contracting Parties facilitate access to PGRFA, or the obligation that Contracting Parties share the benefits, whereby assistance can be given to parties to help meet these obligations and, therefore, the goals of the ITPGRFA. Extremely important for a compliance mechanism is the obligation to ensure the conformity of laws, regulations, and procedures with obligations under the ITPGRFA. The establishment of procedures for the enforcement of MTAs would also benefit the compliance procedure.

On a theoretical basis, compliance procedures differ from traditional dispute settlement procedures. In general, dispute settlement procedures are confined to addressing legal disputes. In the context of treaties, this involves the interpretation and application of treaty provisions. The dispute settlement procedure is limited by the scope of the actual dispute and by the parties to the dispute. A compliance procedure may also involve the interpretation and application of treaty provisions, but it is not restricted to such questions. Dispute settlement procedures are adversarial, while compliance mechanisms are nonadversarial. In addition, compliance procedures are future-oriented and proactive, formulating solutions to problems that may arise or seeking to return a party to compliance as soon as possible. Dispute resolution, on the other hand, is past-oriented and reactive and seeks to provide an injured party with redress.[49] Another distinction is that dispute settlement procedures provide an instrument primarily for the protection of individual interests whereas compliance procedures deal with more general issues of compliance or seek to protect a common treaty interest. In this context, it is important to recall the preamble of the ITPGRFA, which recognizes that PGRFA are "a common concern to all countries." To that effect, compliance will definitely protect an interest that is expressly recognized as common to all the Contracting Parties. Finally, the main distinction is that the findings of a compliance mechanism are addressed to the parties to any dispute and are not normally binding. Meanwhile, dispute settlement procedure rulings are addressed only to the disputing parties and are more often binding.

On a practical basis, however, the compliance mechanism may highlight some issues that, once interfering with individual interests, escalate to a dispute. Reversely, individual disputes may be based on concerns that go beyond the single case. If at all possible, it would be extremely beneficial to find an innovative solution that includes compliance with MTAs in the compliance mechanism. Perhaps governmental organizations, e.g., national genebanks, that are parties to MTAs could refer some disputes, e.g., disputes involving general interpretative issues of the MTA, initially to the ITPGRFA's compliance mechanism as an initial effort to comply with the terms of the MTA. The objectives of the ITPGRFA may be better served by a compliance mechanism regime that assists and encourages Contracting Parties to

48. ITPGRFA, *supra* note 1, art. 12.5.

49. Maas Groote & René Lefeber, Compliance Building Under the International Treaty on Plant Genetic Resources for Food and Agriculture (FAO Commission on Genetic Resources for Food and Agriculture, Background Study Paper No. 20, 2003).

comply rather than one that is accusatorial and confrontational in nature. However, while Article 21 provides that the Governing Body must develop a compliance mechanism, it only gives limited guidance. Therefore, it is necessary to set forth the main goals and elements of a compliance mechanism in order to begin to tailor one to the ITPGRFA.

Compliance procedures provide a vehicle to identify compliance difficulties, including possible or alleged situations of noncompliance. The procedures operate at an early stage in order to establish the root causes of such difficulties and noncompliance situations and to formulate the most appropriate responses, with a view to solving such difficulties or correcting the state of noncompliance without delay.[50] Thus, the objective of the compliance procedures should be to promote compliance with the ITPGRFA as opposed to punishing noncompliance. In so doing, a compliance mechanism should provide advice or assistance, where appropriate. Compliance procedures help to promote the understanding and implementation issues of the treaty in which it operates. A compliance mechanism can provide a means to clarify the content to promote the application of the provisions of the agreement and, thus, lead significantly to the prevention of disputes. In the ITPGRFA context, the lack of a binding dispute resolution mechanism makes the need for a compliance mechanism even stronger.

In order to promote, facilitate, and secure compliance, a compliance mechanism should not only be nonadversarial, conciliatory, and cooperative but should also include adequate procedural safeguards for those involved. Such safeguards include provisions for due process, transparency, fairness, expedition, and predictability. These procedural safeguards contribute significantly to the perceived legitimacy of the compliance procedure. Such safeguards are implemented through mechanisms such as timetables and deadlines, representation and entitlement to participate, requirements for submissions, confidentiality, decisionmaking, and reasoning of decisions. The compliance procedure should be simple, facilitative, and leave the taking of decisions to the compliance body. It should be calculated to encourage and assist those Contracting Parties that are in potential or actual breach of their obligations to achieve full compliance with the ITPGRFA.[51]

A possible framework for an effective compliance mechanism would require Contracting Parties to submit periodic reports on implementation of and compliance with obligations under the ITPGRFA, which a body within the ITPGRFA would collect and analyze. Such a body, perhaps the Secretary of the Governing Body, should then be required to communicate information it finds on noncompliance or difficulty complying with obligations to the Contracting Party or Parties concerned. Those Contracting Parties should then be required to respond and inform the body of relevant facts and issues and propose remedial action, including any necessary inquiries where desirable. Based on the noncomplying Party's response, the reviewing body should first try to assist the Party in coming into compliance. Where this assistance does not resolve the compliance issues, the information provided by the Contracting Parties or resulting from an inquiry could be reviewed by another body, perhaps the Governing Body, which may make whatever recommendations it deems appropriate or take additional action in order to assist the Party to come into compliance.

Examples of measures to assist with compliance include not only monitoring and reporting, investigating, and a centralized committee that assembles and analyzes information and makes recommendations or formulates enforcement responses, but also cooperative research, financial and legal assistance, technology transfer, and other capacity-building assistance. These measures can be adjusted to meet varying requirements of cases of noncompliance, and may include both facilitative and stronger measures as appropriate and consistent with applicable international law. An effective compliance mechanism requires, at the very least, reporting, monitoring, capacity-building, and recommendations. In fact, Article 21 recognizes some of these key elements and requires, at a minimum, monitoring and the offering of advice or assistance as part of the compliance mechanism envisioned by the ITPGRFA. Proposals for information-gathering, capacity-building, the establishment of a compliance body, and dispute submission procedures with regard to the ITPGRFA are identified and examined in more detail below.

### 1. Information System

In order for the monitoring aspect of a compliance mechanism to be effective, some reporting or information-gathering mechanism is needed. Reporting requirements are important for several reasons. First, a national report contains information on compliance by an individual party. Second, the total of national reports provides insight into the aggregate compliance by the Contracting Parties to a treaty. Third, noncompliance with reporting obligations often signals or precedes compliance difficulties with other obligations.[52]

A major shortcoming of the ITPGRFA is that it does not impose any requirements on the Contracting Parties to report on their implementation of commitments or on the state of PGRFA under their jurisdictions. One recommendation is for the Governing Body to decide to invite Contracting Parties to report on their implementation of the ITPGRFA and their compliance with it. This would fill what would otherwise be an important gap in the ITPGRFA.[53] Compliance information could be provided through audited national and corporate self-reporting or voluntary submissions. In addition, the effectiveness of a compliance procedure significantly increases when the compliance body has a broad mandate for information-gathering, as the input for monitoring is information and information can be obtained from various sources.

In addition, it is necessary to define the sources from which the compliance body may seek information, the type

50. *See id*.

51. *See* Commission on Genetic Resources for Food and Agriculture, Compilation and Analysis of Governments' Views on Compliance With the International Treaty on Plant Genetic Resources for Food and Agriculture (Doc. No. CGRFA/MIC-2/04/3) (2004), *available at* http://www.fao.org/ag/cgrfa/docsic2.htm (last visited Mar. 14, 2006). In November 2004, in Rome, Italy, at the second meeting of Commission on Genetic Resources for Food and Agriculture, which was acting as Interim Committee for the ITPGRFA, it was agreed that an Open-Ended Working Group was to be established and convened prior to the first meeting of the Governing Body.

52. *See* Groote & Lefeber, *supra* note 49.

53. *See* Cooper, *supra* note 17.

of information the body may receive, and which entities may provide such information. The type of information Contracting Parties would need to submit would be information on national implementation, including information on legislative, regulatory, and administrative measures taken to implement the ITPGRFA. Other information showing compliance with obligations under the ITPGRFA might include surveys and inventories and evidence of efforts undertaken to promote facilitated access and benefit-sharing. Providers of information can range from Contracting Parties and governments across the spectrum of recognized entities, including organizations, corporations, and private individuals. Such a requirement should clearly define who must submit information as well as who may submit information. Each Contracting Party should designate the agency responsible for reporting compliance information to the Governing Body. Reporting assistance may be given to developing countries where necessary.

Once this information is received, the monitoring function must define who will monitor and how the process of monitoring is to be carried out. The designation of a reviewing and monitoring body with a clear mandate is discussed below. The Secretary, established under Article 20.3(b), may be designated as a "clearinghouse" for information. Provision for confidential information may be necessary and it must be clearly defined what will be done with the information once received. Such a compliance information system that receives compliance information from Contracting Parties could also be used as a system of information exchange to assist other Contracting Parties in implementing their obligations. This information may be made available through the Secretary clearinghouse or may be disseminated automatically. Information exchange among Contracting Parties is, in fact, one of the recognized benefits of the Multilateral System.[54]

2. Capacity-Building

Through reporting and monitoring, determinations of noncompliance or problems with compliance are detected. Capacity-building addresses these issues and helps Contracting Parties comply with their obligations. This is one of the most important aspects of a compliance mechanism. The references to advice and assistance in Article 21 are facilitative measures to assist a Party with compliance difficulties. Capacity-building can also be available even without reporting and monitoring. Contracting Parties can request such assistance in advance of noncompliance, where they know that compliance issues are likely to arise. Provision of advice or assistance may be particularly important in strengthening the capacity of developing countries and countries with economies in transition.[55] Since the ITPGRFA contains so many policy-guiding provisions, capacity-building is particularly useful in implementing these "soft" obligations.

Capacity-building advice and assistance may be of a technical, financial, or legal nature. Technical assistance can take the form of education and training. Financial assistance may take the form of technology transfers, debt relief, or actual monetary transfers. Legal assistance may include drafting national laws to implement the ITPGRFA.

Capacity-building assistance varies depending on the level of involvement of the compliance body or other treaty bodies providing assistance. The level of assistance could either take the form of recommendations on needed assistance, advice on the procurement of assistance, the facilitation of assistance, or the actual provision of assistance. Beneficiaries of such assistance may range from heads of state or ministries to local communities and individuals. In addition, the provision of assistance should take into account the status and special needs of a party as a developing, least developed, or economy in transition country. Of course, those countries will have priority in receiving assistance, particularly since this is where the majority of PGRFA originates. This priority is also reflected in Article 8 of the ITPGRFA, which calls on Contracting Parties to promote the provision of technical assistance to Contracting Parties, especially those that are developing countries or countries with economies in transition. Such capacity-building assistance might be provided by a body established specifically for this purpose such as a Compliance Committee discussed below, by an existing ITPGRFA institution such as the Secretary or Governing Body, by other Contracting Parties to the ITPGRFA, bilaterally or multilaterally, or by international or other organizations or entities completely outside the treaty framework but with experience in such capacity-building assistance.

3. Standing Compliance Committee

In order for many of the compliance measures to succeed, there must be an effective mechanism for identifying compliance issues, including those that could lead to disputes. This may involve an ensemble of institutions carrying out information-gathering, monitoring, reporting, investigative, provision of assistance, recommendatory, conciliatory, and mediatory functions. Often the competent body of an international agreement regularly reviews the overall implementation of oblspecific difficulties of compliance, and considers measures aimed at improving compliance. Existing ITPGRFA bodies that could be designated to perform such functions are the Governing Body or the Secretary of the Governing Body. The designation of any one of these two bodies would be cost-effectiveigations under the agreement, examines .

In order to effectively manage a compliance mechanism, however, separate and independent compliance committees are often established. Such standing bodies are established to further the continuity of process and people as well as the prompt response to any compliance issues that may arise. The choice of whether compliance functions should be entrusted to an existing body or a new body is up to the Contracting Parties. However, issues to be taken into account in establishing a standing Compliance Committee include: the size of the body; the representation of interest groups in the body; the capacity in which members are acting; and the qualification of persons to be eligible to serve on the body.

A Compliance Committee should not only monitor, investigate, and analyze issues of a particular party's compliance problems, but should also analyze general issues of noncompliance with the aim of identifying and addressing

54. ITPGRFA, *supra* note 1, art. 13.2(a).

55. *See* Cooper, *supra* note 17.

aggregate and systemic compliance difficulties.[56] The Compliance Committee should consider the submissions, information, and observations before it with a view to facilitating compliance and securing an amicable solution to the matter.

The Compliance Committee could be charged with monitoring and reviewing incoming information on compliance; investigating matters referred to it by the Contracting Parties, the Governing Body, or some other referring body or party; reporting its findings on compliance; providing advice, recommendations, and information regarding the implementation of, and compliance with the ITPGRFA; or taking action. A nonexhaustive list of the functions of a Compliance Committee generally includes:

- receive, consider, analyze, and report on any submissions regarding noncompliance;
- receive, consider, and report on any information or observations forwarded to it by the Secretary or other internal institution;
- request, where it considers necessary, further information on matters under its consideration;
- undertake, upon the invitation of the party concerned, information-gathering in the territory of that Party;
- identify the facts and possible causes relating to individual cases of noncompliance;
- determine where assistance may be needed;
- make recommendations to the individual party;
- make recommendations to the competent body, such as the Governing Body, regarding the provision of legal, financial or technical assistance, technology transfer, training or other capacity-building measures; and
- provide advice or assistance, including assistance for the collection and reporting of data, technical assistance, technology transfer and financial assistance, information transfer, and training.

Additional measures that might be taken or recommended by a Compliance Committee with a view to promoting compliance and addressing cases of noncompliance and taking into account such factors as the cause, type, degree, and frequency of noncompliance include: the issuance of a caution; the issuance or publication of a declaration of noncompliance; the development and submission of a compulsory compliance action plan to achieve compliance within a time frame agreed upon between the Compliance Committee and the Party concerned; or requesting the Party concerned to submit progress reports on the efforts it is making to comply with its obligations under the ITPGRFA. Throughout the entire compliance process, the Compliance Committee should keep the Contracting Parties informed of such implementation problems and the actions taken to solve them as fully as possible, through notification. This information is part of the information exchange that may assist other Contracting Parties in their implementation of the ITPGRFA obligations.

Once it is determined by the Compliance Committee that a Contracting Party is encountering major problems with the implementation of the ITPGRFA and the Compliance Committee has exhausted its attempts to work with the Party to try to solve the problem, then the matter should be referred to a designated competent body, such as the Governing Body. In this case, the Committee would submit its report, including any recommendations it considers appropriate. On receipt of the report of the Compliance Committee, the Governing Body may decide upon and impose measures to secure full compliance, including by pursuing the matter in direct contact with the Contracting Party concerned.

### 4. Complaint Submission Procedures

A compliance mechanism could also provide for the receipt of complaints by Contracting Parties and voluntary submissions by non-parties and civil society organizations. This would be supplementary to the functions of the Compliance Committee, discussed above. This complaint submission procedure differs from the formal dispute resolution process for disputes between Contracting Parties, set forth in Article 22, as a complaint to a Compliance Committee regarding a Contracting Party's noncompliance does not involve harm to another Contracting Party and is not intended to resolve disputes between two Contracting Parties for violations of obligations under the ITPGRFA. Such a function should clearly delineate who may submit complaints and information in order to prevent abuse of the process. This is particularly so since this function is supplementary to the other functions of the Compliance Committee and since procedures for disputes between Contracting Parties are already in place, as discussed above, or may be further developed, as discussed below.

When establishing a complaint submission procedure, it is necessary to indicate who may initiate such procedures. Several options to trigger the compliance procedures have been used or proposed. The self-trigger may be used by a Party itself where it concludes that despite its best, bona fide efforts, it is unable to comply fully with its obligations under the ITPGRFA. In such cases, the Contracting Party may request technical, legal, or financial assistance. Another trigger may come from one or more Contracting Parties lodging a complaint with the designated body or submitting information to the Compliance Committee with respect to another Contracting Party's implementation of its obligations. A third trigger may be the Secretary, Compliance Committee, or other internal body initiating the process where it becomes aware of a possible case of noncompliance by a Contracting Party through an investigation, receipt of information, or other information-gathering system. The Contracting Parties to the ITPGRFA should decide whether the compliance body may receive information or complaints from non-party states, international organizations, nongovernmental organizations (NGOs), or natural persons.

Procedures to respond to such complaints may include a formal investigation process. The result of such an investigation process could lead to a compliance determination or referral to another body, such as the Governing Body. The referred to body may in turn, continue the formal investigation process or simply issue a final determination of noncompliance. As Article 19 of the ITPGRFA allows the Governing Body to make recommendations to promote implementation, such recommendations are within the Governing Body's purview. The Governing Body may choose to receive information already gathered by the Compliance Committee in its investigative function, if this has been utilized.

56. *See* Groote & Lefeber, *supra* note 49.

This complaint submission procedure would be different from the compliance committee procedures, as one process is initiated by outside "third-party" submissions and the other is based on reviews of submitted reports. The determinations or recommendations of the Governing Body and the Compliance Committee are similar; however, the Governing Body might manage the complaint in a more formal matter with possibly more serious consequences. As the Governing Body might hierarchically have more power than the Compliance Committee, such consequences might include suspension of specific rights and privileges under the ITPGRFA, in accordance with the applicable rules of international law concerning the suspension of the operation of a treaty. Other follow-up mechanisms resulting from this complaints procedure could include compulsory payments or suspension of Multilateral System access rights.[57]

5. Conclusions

The establishment of a compliance mechanism may seem complex and laborious and the procedures intricate. However, it is the most effective and efficient means of ensuring successful implementation of an international treaty. A compliance mechanism helps Contracting Parties solve problems before they become disputes. The existing bodies of the ITPGRFA can play an important role in the compliance mechanism. Many procedures will have to be set forth, mainly reporting and monitoring, review, recommendations, assistance, as well as final determinations.

Whatever form a compliance mechanism takes, its main function is to ensure the achievement of the ITPGRFA's objectives. The Governing Body's role in a compliance mechanism is particularly important as it will most likely be called upon to provide interpretations of the ITPGRFA provisions with the aim of facilitating Contracting Parties' compliance in a uniform manner. Through the compliance mechanism, the Governing Body could be called on, either by the Compliance Committee or the complaint submission process, to issue decisions on compliance through a complaints process, recommendations on the interpretation or implementation of the ITPGRFA, or guidance on how to maintain compliance. These decisions should also guide the achievement of the ITPGRFA's goals.[58]

57. *See* Rose, *supra* note 35.

58. In December 2005, the Open-Ended Working Group on the Rules of Procedure and the Financial Rules of the Governing Body, Compliance, and the Funding Strategy, of the Commission on Genetic Resources for Food and Agriculture acting as Interim Committee for the ITPGRFA [hereinafter Open-Ended Working Group] met in order, among other tasks, to review documents concerning governments' views on compliance with the ITPGRFA. During the meeting, countries and regions made comments and submissions. The Open-Ended Working Group then consolidated the submissions into a text in the form of a draft resolution for the consideration of the Governing Body. Attached to the resolution is an annex with procedures and mechanisms for compliance. The Working Group, however, did not go into detail of the annex to the Resolution because of the limitation of time. The Open-Ended Working Group agreed that this text should be submitted for consideration by the Governing Body, and noted that, in addition to the text, the comments and submissions provided by delegations in the present meeting, and the written submissions in the documents mentioned above, should be taken into account. The Open-Ended Working Group invited further submissions and comments by countries and regions. Countries were also urged to consider further consultations to address outstanding issues before the first session of the Governing Body. Due to the provisional nature and the uncertain destiny of the said resolution and annex, this Article has not expressly considered it in the elaboration of proposals. *See* COMMISSION ON GENETIC RESOURCES FOR FOOD AND AGRICULTURE, OPEN-ENDED WORKING GROUP ON THE RULES OF PROCEDURE AND THE FINANCIAL RULES OF THE GOVERNING BODY, COMPLIANCE, AND THE FUNDING STRATEGY (Doc. No. CGRFA/IC/OWG-1/05/Rep) (2005), *available at* http://www.fao.org/ag/cgrfa/ico1.htm (last visited Apr. 2, 2006).

*B. Dispute Resolution Options for Contracting Parties*

Where the proposed compliance mechanism does not bring a Contracting Party into compliance with its obligations under the ITPGRFA and such noncompliance leads to a dispute, Contracting Parties will normally attempt to resolve any disputes amongst themselves through political processes. If the normal diplomatic processes fail, as discussed above, Article 22 provides for various forms of dispute settlement. However, as already discussed, there is no compulsory binding decisionmaking procedure to resolve disputes. While Article 22 provides for binding procedures as an option, such as referral to the ICJ or arbitration, they are not compulsory. And, while Article 22 provides that conciliation is compulsory as a last resort if the dispute is not resolved through the other means, the result is nonbinding. Therefore, once conciliation is exhausted and the dispute is still unresolved, the parties to the dispute are under no further obligation to attempt to resolve the dispute.

As there is no compulsory and binding dispute resolution process in the ITPGRFA, where a dispute falls within the intersection of the ITPGRFA and the World Trade Organization (WTO), the likely forum for dispute resolution would be the WTO Dispute Settlement Body, which has compulsory jurisdiction in WTO matters. Ultimately, conflicts over attempts to patent seeds or genes received through the Multilateral System may end up in the dispute settlement system of the WTO, the ITPGRFA, or both.

Hopefully, only a few disputes will arise and/or the existing dispute settlement procedures will be sufficient to resolve such disputes.This is optimistic and wishful thinking, however, for even the most comprehensive multilateral treaties. Therefore, in order to ensure the most efficient and effective implementation of the ITPGRFA, as well as the most consistent determinations and interpretations of obligations arising under the ITPGRFA, the Governing Body should recommend a compulsory binding dispute resolution procedure. Where the Governing Body does not so recommend, Article 24 allows for the Contracting Parties to mutually agree on a different form of dispute settlement. For the same reasons that the Governing Body should recommend a binding compulsory dispute resolution mechanism, so the Contracting Parties should voluntarily submit to such a binding mechanism. However, this still does not resolve the problem of the absence of a compulsory mechanism.

Should the disputing Contracting Parties not agree to the binding dispute resolution procedures already provided for under the ITPGRFA, inter alia, arbitration pursuant to Part 1 of Annex II or referral to the ICJ, the Contracting Parties may otherwise agree on such common forms of dispute settlement outside of constituent treaties, including ad hoc arbitration or use of an existing arbitration institution. Therefore, the discussion below on the same such proposals for resolving disputes arising under the MTAs applies here as well. At the very least, the Governing Body should issue a recommendation or decision that referral to some form of binding dispute resolution mechanism is in the best interest

of implementation of and compliance with the ITPGRFA. The Governing Body could recommend to the Contracting Parties that they either opt for compulsory conciliation that is binding or binding arbitration that is compulsory, thereby strengthening the enforcement options that are currently available under Article 22.

*C. Dispute Resolution for MTAs*

As discussed above, MTAs are contracts between the parties to the MTA, namely, the recipient and the supplier. As for the recipient, Article 12.2 of the ITPGRFA establishes that the recipient may be a Contracting Party or another person or entity under the jurisdiction of any Contracting Party. Thus, the recipient may be a legal entity (private or public) as well as a natural person. As for the supplier, the ITPGRFA provisions allow for several categories to have such status. The ITPGRFA indicates that the obligation to provide facilitated access rests with the Contracting Parties with regard to all PGRFA listed in Annex I that are under their management and control and in the public domain.[59] The Multilateral System includes Annex I PGRFA, which are the in situ collections of IARCs and other international institutions and may include listed PGRFA held by "natural and legal persons" within the jurisdiction of the Contracting Parties.[60] By virtue of subsequent transfers, the recipients of material may become suppliers.[61]

From the provisions above it can be inferred that in the initial instance a Contracting Party may be a party to an MTA, but in all subsequent transactions both parties to an MTA will most likely be noncontracting and non-state parties. It is therefore predictable that many, if not all, of the issues relating to MTAs will arise in the sphere of private law as opposed to public law. Article 12.5 therefore provides that "Contracting Parties shall ensure that an opportunity to seek recourse is available, consistent with applicable jurisdictional requirements, under their legal systems, in case of contractual disputes arising under such MTAs." Contracting Parties, therefore, have great flexibility in setting up a dispute resolution mechanism that will fulfill the requirement of Article 12.5. The Contracting Parties can designate an existing mechanism or create a new mechanism, which will of course only apply to disputes between the parties to the MTA.

MTAs that are historically and widely used in transactions for the transfer of plant genetic resources are generally governed by the principle of contractual freedom. This means that parties to an MTA have wide discretion in setting the terms of their agreement and in tailoring it to the specific needs of individual genetic resource transfers, subject to general principles of contract law. However, MTAs under the ITPGRFA are subject to the conditions and limiting principles established by the ITPGRFA. As discussed above, a standard MTA to be approved by the Governing Body is being developed in order to translate the language of the ITPGRFA into contractual obligations for recipients of material under the Multilateral System.[62]

MTAs are subject to the law of contract, which may vary significantly from country to country. In the absence of any specific choice of law in the MTA, individual states will determine jurisdiction under the contract law of the individual state. Involvement of diverse actors from public and private sectors in MTAs will bring together diverse legal systems, and confluence of legal systems and approaches to contract performance could lead to disputes over contract interpretation. Although the MTAs under the ITPGRFA are to be interpreted in the context of the ITPGRFA, national courts may not be sensitive to the intricacies or goals of the ITPGRFA. In addition, it is not currently clear that the judicial system of most countries will be sufficiently familiar with the technicalities of MTAs and the ITPGRFA to provide cost-effective resolution of disputes. Even if national courts duly consider the ITPGRFA when resolving contract disputes under the MTAs, national courts in different countries will inevitably have different interpretations of the ITPGRFA, thereby resulting in divergent legal opinions concerning the interpretation or implementation of the obligations under MTAs from the various national courts. In terms of MTAs under the ITPGRFA, it would be inefficient and contrary to the consistent interpretation of the ITPGRFA to have different laws apply to the MTAs. In the interest of effective implementation of the ITPGRFA, it is more attractive to try to ensure consistency in the opinions of disputes regarding MTAs.

For all these reasons, the MTAs can and should be "internationalized," meaning that international law rather than national laws should be used to interpret and resolve contractual disputes and that such disputes should be referred to international arbitration as opposed to national courts. By way of comparison, the internationalization of trade and investment contracts is industry standard as parties to these types of contracts are generally not confident in the national courts of the other Contracting Party due to political or economic agendas. Therefore, these contracts are internationalized so that any disputes are resolved without consideration to national agendas. It is also important that these contracts are treated somewhat consistently, thereby calling for the applicability of the same law to all such contracts. The situation may be analogous in that the facilitated access to PGRFA under the Multilateral System will result in an increased volume of standard transaction on an international and uniform basis.

The Contact Group charged with preparing the standard MTA should include applicable law and dispute resolution clauses that internationalize the MTAs that arise under the ITPGRFA. The governing law and the forum for dispute resolution provisions are important in order to reduce legal

59. ITPGRFA, *supra* note 1, art. 11.2.

60. *Id.* arts. 11.5, 11.3.

61. *Id.* art. 12.3(g).

62. A Contact Group, i.e., a group of experts appointed on a regional basis, for the drafting of the standard MTA was established by the Second Meeting of the Commission on Genetic Resources for Food and Agriculture acting as the Interim Committee for the ITPGRFA. At its first meeting, the Contact Group for the drafting of the standard MTA adopted the First Draft Standard Material Transfer Agreement on July 25, 2005. The draft contains two clauses on interpretation/applicable law and dispute resolution. The draft contains bracketed text with several options. A second meeting of the Contact Group will take place in April 2006. Due to the provisional nature and the uncertain destiny of the draft standard MTA, this Article does not analyze it and makes suggestions independently from it. *See* Commission on Genetic Resources for Food and Agriculture, Report of the Contact Group for the Drafting of the Standard Material Transfer Agreement (Doc. No. CGRFA/IC/ CG-SMTA-1/05 Rep.) (2005), *available at* ftp://ext-ftp.fao.org/ag/cgrfa/cgmta1/smta1repe.pdf. (last visited Mar. 14, 2006).

uncertainty and promote consistency in the interpretation and enforcement of the ITPGRFA. If such provisions are not included in the standard MTA, then the Governing Body should at least make a recommendation that disputes over MTAs should be referred to binding international arbitration in order to assist in the efficient and consistent application of the goals and objectives of the ITPGRFA. Where such provisions are not included in the standard MTA, parties to each MTA will need to set their own rules. The parties the MTAs will be able to choose the applicable law and international arbitration through freedom of contract and should take the recommendations of this Article as a guideline in the drafting or negotiating of MTAs. At the very least, applicable law and dispute resolution provisions should be established.

1. Applicable Law

With the exception of the substantive provisions of the MTA, the applicable law clause is one of the most important clauses, as it establishes the law to which the contract is to be governed. The issue of applicable law in contractual practice is normally left to the freedom of the Contracting Parties to choose the laws of one of the Contracting Parties, a neutral state, or any other designation of law they choose. However, the jurisdictional rules that determine the applicable law in relation to contracts are particularly complex. Contracts may be interpreted and enforced under the law of the jurisdiction where the action is brought (*lex fori*), where the contract was concluded (*lex loci contractus*), or where the contract is to be carried out (*lex loci solutionis*). MTAs in particular may be interpreted and enforced under the law of the jurisdiction of the recipient state or the provider state. Other considerations of applicable law include the intention of the parties to the contract and the nature of any government interest. In addition, the forum that hears a dispute will also govern the applicable law.

With regard to applicable law, as stated above, the ITPGRFA does not specify the law that governs the MTA other than stating that facilitated access to PGRFA and subsequent transfers shall be in accordance with the provisions of the ITPGRFA. Therefore, the obligations of MTAs should be interpreted according to the provisions of the ITPGRFA. Article 12.5 does not refer to any applicable law, only stating that such disputes will be contractual disputes, which is clear as MTAs are contracts.

As stated, the parties to a contract are free to choose the applicable law; if it is not chosen, conflict of law rules may be applied and the dispute will be determined under the laws of the recipient state, the provider state, or the state where the contract was negotiated. The jurisdiction determined by conflict of laws rules in each MTA dispute will undoubtedly be different every time. In order to avoid the complexities that come with determining the law applicable to such contracts and the divergent opinions on the interpretation of the ITPGRFA that would inevitably accompany domestic law applicability, the Governing Body approving the final text of the standard MTA (or the parties to the MTA if such choice is left to their discretion) should designate the applicable law in the MTA.

As discussed above, and for a variety of reasons, generally neither party will find the law of the state of the other party totally acceptable. Therefore, the parties normally attempt to choose a law other than the national law of either of the parties to the contract. A typical solution in international contracts is to stipulate that disputes be settled on the basis of *general principles of law*, or *international law*, thereby avoiding contentious issues about the applicable law. This formula is standard usage in the case of agreements entered into by organizations of the U.N. system. However, general principles of law and/or international law do not cover all matters that may arise in contract disputes. Therefore, conflict of law and jurisdictional principles would end up applying the national law of one of the parties or some other law to fill in the gaps. It is therefore necessary that the chosen applicable law covers all issues that might arise.

Factors that enhance perceived legitimacy include the extent to which decisions are based on precedent, on laws that already bind participants, and on the lessons of past successes and failures. Because MTAs are to be interpreted and enforced in accordance with the ITPGRFA, it is necessary that at the very least the ITPGRFA be one of the laws applicable to the MTA. In addition to the treaty itself, subsequent protocols and even decisions or recommendations of the Governing Body may be applicable in interpreting the obligations and compliance with MTAs in order to ensure consistent interpretation and implementation. Stipulating that the ITPGRFA, its protocols, and the Governing Body's recommendations and decisions apply to disputes arising under MTAs may reduce the tendency for divergences in the interpretation of the obligations under the standard MTA and allow for greater influence of the Governing Body in the development of interpretations. In this vein, the policy guidance that may be issued by the Governing Body may also be helpful. Finally, other cases related to the interpretation of MTAs will certainly be valuable in interpreting subsequent disputes.

Referral to these sources as applicable law will most certainly cover the majority of disputes that arise under MTAs. However, there may still be gaps of applicable law, for example, complex provisions of intellectual property law or trade law. Where these gaps exist, conflict of laws rules will inevitably apply. Therefore, in drafting the applicable law clause for the standard MTAs, the Contact Group, the Governing Body, and the Contracting Parties should consider applying "general principles of law or international law, the ITPGRFA and its protocols, decisions, recommendations and policy guidance of the Governing Body, and relevant case precedent arising under other MTA disputes."

Alternatively, in order to "avoid" national laws and ensure uniformity in interpretation, the MTA may also contain a clause choosing as applicable law the principles of international commercial contracts established by the International Institute for the Unification of Private Law (UNIDROIT).[63] This is subject to the qualification of MTAs as "commercial contracts." The UNIDROIT Principles represent a system of contract rules that are common to existing national legal systems or best adapted to the special requirements of international commercial transactions, like those involving a provider of germplasm and foreign recipients of genetic material. The principles provide a body of rules to be applied when the parties have agreed that their contract be governed by general principles of law, the so called *lex mercatoria* or the like. According to Article 1.4, those principles do not re-

63. *See* UNIDROIT, *UNIDROIT Principles of International Commercial Contracts 2004*, *at* http://www.unidroit.org/english/principles/contracts/main.htm (last visited Mar. 14, 2006).

strict the application of mandatory rules, whether of national, international, or supranational origin, that are applicable in accordance with the relevant rules of private international law.

2. Dispute Resolution

The ITPGRFA does not specify that the courts should intervene in disputes over MTAs. Article 12.5 merely states that Contracting Parties should ensure that an opportunity to seek recourse is available under their legal systems that does not appear to preclude recourse to either national or international arbitration. Again, this clause gives great flexibility to the Contracting Parties. As discussed above, the Contact Group should include in the standard MTA the dispute resolution mechanism to be used for disputes concerning compliance with MTAs. Inclusion of a dispute settlement clause will speed up the process, as the method for resolution will be predetermined and not be open to further negotiation or act as an additional point of contention among the parties in dispute.

Options for resolution of disputes arising under MTAs include traditional mechanisms for dispute settlement, as well as mechanisms specific to the ITPGRFA:

- Conciliation
- Mediation
- Litigation in the national courts of one of the parties to the MTA, the recipient or provider state
- Litigation in the national courts of a neutral state or in the state where the MTA was negotiated
- Arbitration, following the framework of Part 1 of Annex II of the ITPGRFA
- Ad hoc arbitration
- Institutional arbitration
- Referral to a panel of experts established by the Governing Body
- Direct referral to the Governing Body

Whichever dispute resolution mechanism is chosen for the MTAs would be separate and distinct from Article 22 of the ITPGRFA, which concerns relations between Contracting Parties. However, the mechanisms referred to in Article 22 and set forth in the Annex to the ITPGRFA, arbitration and conciliation, could also be followed in the MTAs. Amendments to the procedures set forth in the Annex would have to be made for private parties as opposed to state parties, but these amendments are minor. Any references to provisions of the ITPGRFA in the MTAs will maximize consistency in implementation, interpretation, and application of the ITPGRFA and the MTAs associated with it. However, use of the mechanisms set forth in the Annex for MTA disputes would most likely overburden the body designated to handle these disputes. Therefore, the designation of a different mechanism is preferable. This does not mean that in choosing the appropriate mechanism that the Contracting Parties should not consider the provisions set forth in the Annex. Since these provisions have already been negotiated, reviewed, and approved by the Contracting Parties on some level, they have some validity.

The dispute resolution procedure chosen does not necessarily have to be only one of these alternatives to the exclusion of others. As is typical in dispute resolution clauses in international treaties, and as set forth in Article 22 of the ITPGRFA, a hierarchy of alternatives can be utilized. Generally, amicable good faith negotiations follow attempts at informal diplomatic resolution, followed by increasingly more formal and binding mediation and arbitration. Parties are often given a choice of options for dispute settlement or are required to follow the hierarchy from informal nonbinding mechanisms to formal binding mechanisms until the dispute is resolved. While this process can be quite time-consuming where the issues are contentious, it can also be quite expeditious for minor matters. Where the issues are contentious or complex, it is usually best to go directly to the more formal binding mechanisms of arbitration in order to effectively resolve the dispute. If it is foreseen that a range of disputes over MTAs will arise, from straightforward issues to hotly contentious issues, it may be wise to give parties a choice of mechanisms.

However, when choosing a dispute resolution mechanism, the Governing Body or parties to the MTA should keep in mind that the most important criteria is that the decisions of the dispute settlement body be consistent and binding. Consistency in the law helps increase the legitimacy of the dispute resolution process, which is why the applicable law clause is so integral to the dispute resolution mechanism. Consistent interpretation and application of the goals of the ITPGRFA for MTA disputes would also add much to the legitimacy of the ITPGRFA. Most important, however, is the promotion of reasonably predictable outcomes and a coherent body of law and practice that provides parties some assurance that similar disputes will result in similar outcomes. The overarching goal of the dispute resolution mechanism should be to establish a common international practice for the implementation and enforcement of the MTAs.

In order to ensure such consistency, all such disputes would have to be decided by the same forum, or decided by a forum that gives precedential value to prior MTA disputes decided in other forums. This second option would require all decisions regarding MTAs, regardless of the mechanism used, to be published and referred to as the precedential applicable law. This would ensure that no matter which forum were chosen, from conciliation to arbitration, the decision-makers would have to take prior decisions into account, thereby ensuring consistency and coherency. However, it is often difficult to require one forum to give such precedential value to the decisions of other forums. Thus, it is preferable and certainly more effective if all disputes were resolved by the same forum and not by national courts in different jurisdictions.

For the same reasons discussed above in relation to applicable law, referral of MTA disputes to national courts of the recipient state, the provider state, or some neutral state is generally not preferred. The initial determination of which national court has jurisdiction is another issue that would cause further contention between the parties. Disputing parties are not generally comfortable with recourse to the courts of their opponent. In addition, national courts may not have the experience or the capacity to deal with these types of disputes. Moreover, where a party to an MTA is a state, national courts generally do not have jurisdiction over sovereign states. But, most importantly, if the provisions of the MTA are subject to divergent interpretations by different national jurisdictions in accordance with varied systems of national

law, then the possibility of the Governing Body developing a coherent practice with respect to the implementation of the MTA over time is likely to be considerably diminished.

For similar reasons as those weighing against national court jurisdiction, other methods of dispute resolution, mediation, conciliation, and arbitration are also undesirable. Each of these other mechanisms calls for individuals or panels to resolve a dispute on an ad hoc basis. Therefore, the persons and procedures would change for each case, and the decisions and interpretations would be as divergent as those in the various national courts. Moreover, decisions reached in mediation and conciliation are generally not binding. Mediation and conciliation, however, do have their advantages. They are generally affordable and provide parties with extreme flexibility as to their composition and venue. They are also more informal and amenable to amicable resolution. They should therefore not be discounted as viable means for resolution of certain disputes. But where consistency and predictability of outcomes of disputes related to MTAs is desired, these mechanisms are not the best suited to the task. This need for consistency is therefore the primary motivation for referring MTA disputes to arbitration, particularly institutional arbitration.

The referral of disputes to the Governing Body or a panel of experts designated by the Governing Body may resolve the fear of receiving divergent opinions from divergent arbitrators or judges. But these options pose administration difficulties and concerns about lack of resources and experience. There are procedural and administrative duties incumbent on dispute resolution bodies that are better handled by professional services such as coordinating the parties and the judges and their submissions, finding venues for hearings, distributing material and keeping records, maintaining rosters of arbitrators and experts, distributing the judgment, and accounting. The maintenance of a "judicial" determination body is not an easy task. Referral to institutional arbitration would relieve the Governing Body of the burden of creating and maintaining such a mechanism.

Institutionalized arbitration, therefore, is the mechanism that ensures the greatest ease and consistency for the resolution of disputes that arise under MTAs. Arbitration is the most formal of the options, other than litigation and adjudication. In turning to arbitration, a line is crossed between diplomatic methods of settling disputes and adjudication. The contrast is sharpened by the fact that an arbitral award is a binding decision. The mere existence of an arbitration clause in agreements can often serve to prevent disputes before they arise. Where parties are aware that any violation of their obligations under a contract will subject them to the jurisdiction of a dispute settlement body with the power to issue a binding judgment, they are generally more attentive to abiding by their commitments. On the other hand, where disputes do arise and arbitration is initiated, it may be more expensive than recourse to national courts.

One of the most advantageous features of arbitration is that it offers the parties considerable flexibility in choosing their own procedures. Arbitration allows the parties to constitute and operate their own court. The power to select arbitrators and establish procedural rules can respond to states' desire that the process be sensitive to their "social or legal culture" or their "historical experience." Arbitration, therefore, mitigates risk and acts as a bridge between legal systems and cultures. Arbitration also provides a neutral forum as opposed to the courts of the opposing party. The parties are able to appoint arbitrators that do not share the nationality of any of the parties, the provider or the recipient, the claimant or the respondent. An arbitral tribunal composed of party-appointed neutrals offers both parties assurance of impartiality.

Arbitration is also helpful where there is a need to balance the interests of the parties involved. For example, arbitrators may be able to balance the interests and powers of the parties where a dispute is between an individual and a state. In addition, where a party to an MTA is a state, arbitration may have appeal where sensitive disputes require the application of equitable principles as well as the rule of law. Arbitrators have more flexibility in the law and principles they apply to their decisionmaking process than do most national courts. Arbitrators also have the flexibility to consider other areas of law that are relevant to a particular dispute. For example, international arbitration would help address MTA issues that overlap with other areas of law, i.e. trade and intellectual property, because such internationalization of the MTAs would mean that the arbitrators would take these other areas of international law into account when reviewing the cases and arriving at decisions. This, therefore, is another important reason to choose international arbitration as the dispute settlement mechanism for MTAs: referral to international arbitration would help to keep all disputes arising under MTAs in one forum instead of potential resolution in the WTO or a national or international intellectual property tribunal.[64] Finally, as already discussed, international arbitration provides for more predictability than litigation in a domestic setting where the law relating to MTAs and the ITPGRFA may not yet be fully developed and the dispute is clearly international in scope.

Arbitration is particularly useful for resolving MTA disputes where domestic courts lack jurisdiction over foreign sovereign entities. Traditionally, states have found arbitration useful in that it permits privacy and confidentiality and allows them to select the factual and legal issues to be adjudicated. However, the degree of confidentiality and nontransparency will have to be decided upon by the parties to the MTA or the Governing Body depending on the goals of the dispute settlement mechanism. Where the goal of the mechanism is consistency in interpretation of the obligations arising under the MTAs, as well as effective implementation of the ITPGRFA, a more transparent mechanism is generally desirable. This will allow Contracting Parties and parties to MTAs to better understand how to meet their obligations consistent with the arbitral decisions. In addi-

64. The adoption of the UNIDROIT Principles of International Commercial Contracts as the applicable law fits perfectly into the choice of an arbitration agreement. The reason for this is that the freedom of choice of the parties in designating the law governing their contract is traditionally limited to national laws. Therefore, a reference by the parties to the Principles will normally be considered to be a mere agreement to incorporate them in the contract, while the law governing the contract will still have to be determined on the basis of the private international law rules of the forum. As a result, the Principles will bind the parties only to the extent that they do not affect the rules of the applicable law from which the parties may not derogate. The situation may be different if the parties agree to submit disputes arising from their contract to arbitration. Differently from national courts, arbitrators are not necessarily bound by a particular domestic law. As a result, the UNIDROIT Principles would apply to the exclusion of any particular national law. Only those rules of domestic law that are mandatory irrespective of which law governs the contract, as set out in Article 1.4 of the Principles, will apply.

tion, publication of decisions is generally necessary in order to allow future disputes to take prior disputes into account.

Institutional arbitration offers particular advantages that ad hoc arbitration does not. These advantages include:

- *Availability of pre-established rules.* Institutional arbitration generally comes with its own procedural rules that arbitrations by their institutions must follow. Therefore, reference to a particular institution in the dispute resolution clause will include reference to that institution's procedural rules. However, rules of an existing institution may be used without submitting to administration by that institution and a chosen institution may administer arbitration according to its own rules or the rules of another institution.
- *Physical facilities for arbitrations and support services*.
- *Administrative assistance if the institution has a secretariat or court of arbitration.* The secretariat provides institutional supervision of arbitral proceedings. Institutional arbitration can help control costs, as the institution often does some of the work of the arbitrator and usually bills at a much lower rate.
- *Review of final award to assure it meets basic requirements for enforcement*. Some arbitration institutions will also maintain jurisdiction over the enforcement of an award. However, the enforcement of an arbitral award is usually left to the national courts in accordance with the U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards.[65] The availability of effective remedies and enforcement are important features that help to build the confidence of participants in a dispute settlement procedure.
- *Supervision of arbitral awards.* Ensuring consistency of arbitral procedures and judgments and disseminating the substance of awards made.

Where the Contact Group or the parties to an MTA, upon advice from the Governing Body, decide to refer all disputes arising out of MTAs to institutional arbitration, the specific institution that will administer the arbitration, from time of demand for arbitration, to the award, must be specified in the MTA. There are several options for international institutional arbitration: the International Chamber of Commerce, the London Court of International Arbitration, and the Permanent Court of Arbitration, among others.[66] Given the specific issues related to MTAs and the ITPGRFA, the Permanent Court of Arbitration (PCA) may be a viable option for institutional arbitration of disputes arising under the MTAs.

The PCA provides a comprehensive set of procedural rules upon which parties may agree for the conduct of arbitral proceedings. The PCA Administrative Council, with the approval of the Member States,[67] adopted by consensus the *Optional Rules for Arbitration of Disputes Relating to the Environment and/or Natural Resources*.[68] These rules result from the efforts of the PCA together with a working group and drafting committee of experts in environmental law and arbitration. The PCA Rules seek to address the principal lacunae in environmental dispute resolution identified by the working group. Prior to the adoption of the PCA Rules, there was no unified forum to which states, intergovernmental organizations, NGOs, multinational corporations, and private parties could have recourse when they agreed to seek resolution of controversies concerning environmental protection and conservation of natural resources in arbitration.

The PCA Rules may be particularly suited to resolving the disputes arising out of MTAs because they uniquely provide for:

- *Use by any combination of parties.* States, intergovernmental organizations, NGOs, multinational corporations, and other private entities may use the rules. As disputes concerning MTAs may involve multiple parties of mixed origin, the PCA Rules allow for greater flexibility in the nature and number of the parties. Therefore, both state-private party disputes and inter-private entity disputes are foreseeable. Should a decision be made to include third-party beneficiaries as possible interveners in MTA disputes, as discussed more fully below, these rules are perfectly suited to recognize the Multilateral System as a separate entity.
- *Availability of a panel of experts.* A panel of experts is nominated by PCAs Member States and the Secretary-General so that at the option of the parties they can have immediate access to expert advice to assist either the parties or the tribunal.
- *Availability of a panel of arbitrators.* This feature is of particular relevance to MTA disputes as issues in dispute and interpretation of policies of the ITPGRFA may require arbitrators versed in the particular areas of law under scrutiny. In addition, the PCA also has a long history of hearing commercial disputes, therefore, should commercial or intellectual property experts be needed, the PCA would surely be able to find such arbitrators.
- *Confidentiality procedures.* Designed to protect information impacting national security and for commercial parties, intellectual property, trade secrets, and other proprietary information. Again, the degree of confidentiality desired in the dispute resolution mechanism depends on the desired goals of the mechanism.

65. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958.

66. Other examples of existing institutions include: the American Arbitration Association (AAA), the Inter-American Commercial Arbitration Commission (IACAC), the Swiss Arbitration Association, the Belgian Centre for Arbitration and Medication, the Stockholm Chamber of Commerce, and the World Intellectual Property Organization Arbitration and Mediation Center. For a description of certain international institutional arbitration mechanisms in relation to MTA dispute resolution, see GERALD MOORE, INTERNATIONAL ARBITRATION (Commission on Genetic Resources for Food and Agriculture, Background Study Paper No. 25, 2005), *available at* ftp://ext-ftp.fao.org/ag/cgrfa/BSP/bsp25e.pdf (presented at the First Meeting of the Contact Group on the Terms of the Standard Material Transfer Agreement, *available at* http://www.fao.org/ag/cgrfa/cgmta1.htm (last visited Mar. 25, 2006)).

67. The PCA currently has 103 Member States. PCA, *Contracting States and Accession Information*, *at* http://www.pca-cpa.org/ENGLISH/CSAI/ (last visited Apr. 2, 2006).

68. PCA, OPTIONAL RULES FOR ARBITRATION OF DISPUTES RELATING TO THE ENVIRONMENT AND/OR NATURAL RESOURCES (2001), *available at* http://www.pca-cpa.org/ENGLISH/EDR/ (last visited Mar. 25, 2006).

- *Provisional measures.* Provisional measures may be particularly useful in the context of MTA disputes, as they may prevent the further transfer of material accessed through an MTA that is in dispute and therefore secure the integrity of the Multilateral System before an adjudication on the transfer in dispute is made.
- *Fast track procedures.* At the parties' option, a speedier response to the issues presented to the tribunal may be had.
- *Model clauses.* These model clauses have been developed by arbitration experts for parties wishing to adopt the PCA Rules and refer disputes to the PCA for resolution and ensure jurisdiction to the PCA as the forum for resolving disputes. This feature will save the Contact Group time in drafting the dispute resolution clause to be inserted in MTAs.

The PCA Rules permit choices providing optimal party autonomy. The structural innovation of the two panels—one of environmental science experts, the other of natural resources law specialists—will afford parties the opportunity, but not the obligation, to quickly impanel a tribunal and to contact scientific authorities. The lists and contact information for both panels is maintained and updated by the PCA so that when immediate action is required, parties can resort to reputable, experienced panel members. The PCA institutional base will provide the parties with procedural guidance, cost-efficient registry services, and time-tested administrative assistance. It is therefore recommended that the Contact Group and the Governing Body strongly consider referring disputes arising out of MTAs to the PCA.

As discussed above, referral to institutional arbitration will generally come with established rules of procedure for the arbitration. However, in ad hoc arbitration parties need to specify in the agreement all aspects of arbitration or refer to established stand-alone rules, such as the PCA Rules. Likewise, should the Contact Group, the parties to the MTA, or the Governing Body decide not to take the recommendations of this Article to appoint the PCA or other institutional arbitration mechanism as the dispute resolution body for MTA disputes, they may decide to create and refer to their own arbitration procedures in the dispute resolution clause. It is useful to have the procedural rules that govern an arbitration mechanism set forth in the contract as this will further ensure consistency, fairness, and due process if all disputes are subject not only to the same applicable law but also to the same procedures.

Should the parties decide to draft their own procedural rules, it is important to note the key elements of any arbitration agreement:

- *Scope of arbitration.* The arbitration clause should be as broad as possible, but cannot cover matters incapable of being submitted to arbitration. The scope of the arbitration for MTAs would be any dispute related to the MTA.
- *Procedure to initiate arbitral proceedings*. Generally all parties must be notified in writing.
- *Means for dealing with non-appearing parties.* Where the parties have agreed in the MTA to submit to arbitration for the resolution of disputes, but then one party refuses to proceed after the other party has invoked arbitration, a procedure for dealing with such a situation must be set forth. Generally the non-submitting party is held in default and a ruling is made against them.
- *Choice of location.* Choice of place of arbitration is related to the selection of an arbitration institution. Absent an express choice by the parties, the place of arbitration determines the procedural law of the arbitration. However, with institutional arbitration the parties can choose the procedural law of the arbitration, thereby avoiding any issues. The choice of location determines the extent of potential interference by local courts during arbitral proceeding and may also affect enforcement of the award. Generally a venue accessible to all parties is chosen.
- *Choice of language.* The parties may designate one language as the official language and allow option of simultaneous interpretation of another language.
- *Choice of Arbitrator.* If institutional procedural rules are used that provide for selection of arbitrators, no further reference to selection is necessary, except in compelling circumstances. Without such rules, agreement must be clear on the selection process. A panel of three arbitrators is standard for international arbitrations; each party appoints one and the parties together or the selected arbitrators select a third, with an appointing authority designating any missing member. A sole neutral arbitrator is also a possible option. If the panel of arbitrators must have special skills, it should be specified in the arbitration agreement. The designation of arbitrators with special skills may be particularly useful in the resolution of MTA disputes, which can be quite technical.
- *Powers of arbitrator.* The rules must set forth whether the arbitrators can conduct investigations, site inspections, requests for information, documentation, or other evidence.
- *Availability of provisional relief*
- *Scope and limitation of discovery*
- *Hearing procedures*
- *Time allowed to arbitrators to make awards*
- *Notice and form of award.* Generally, a majority of arbitrators must agree on the award, which must be based on applicable law and be final and binding. If the award is to be recognized and enforced internationally, it should state the reasons for the award with the legal basis, including reference to the process by which that legal basis was selected.
- *Procedures for award enforcement.* Effectiveness of arbitration in providing final and binding resolution of international disputes depends upon a legal framework for court enforcement if a party defaults.
- *Costs.* Provision for allocation of costs either equally between the parties or by the non-prevailing party or the party to initiate the proceedings.

Particularly important is who may initiate dispute settlement. In this regard, one element is to be considered carefully. Most of the obligations of the MTA do not directly affect the interests of the two parties but are directed to an identified third beneficiary, e.g., the payment of a share of benefits deriving from commercialization of a derived product that is not available without restrictions for further research and breeding, or to a variety of third-party beneficiaries, e.g., parties having an interest in keeping material, in the form received from the Multilateral System, free from IPR claims. Accordingly, it must be considered whether the dispute could be initiated not only by the provider and the recipient who are parties to the MTA but also by any interested natural or legal person or by a person duly appointed to represent the interests of such third-party beneficiaries. Aggrieved parties should not be limited to providers and recipients alone. All interested natural or legal persons should be able to lodge a complaint. Therefore, third-party beneficiaries of the MTA through the Multilateral System should be able to initiate dispute settlement. As it is understood that the Multilateral System has no juridical personality and is simply a figurative expression to define the mechanism under which access and benefit-sharing are dealt with in the ITPGRFA, innovative, if not creative, solutions will have to be adopted by the Governing Body. In designing these solutions, the applicable law and the dispute resolution mechanism should allow for the *locus standi* of third-party beneficiaries.

Finally, since states are most likely to be parties to MTAs at least at the outset, the dispute resolution clause should include a commitment by states to resolve disputes through arbitration. States should also agree that the arbitration clause is an explicit waiver of immunity against enforcement and execution of the award or judgment and that the award or judgment, if unsatisfied, is enforceable against the state in courts of any nation in accordance with its laws. This clause prevents a state party from trying to block enforcement of an award by invoking sovereign immunity. For the same reasons that a compulsory binding decision is necessary for Contracting Parties under the ITPGRFA, it is necessary here.

## V. Conclusion

The effective, efficient, and successful enforcement of the new and innovative ITPGRFA presents many challenges and opportunities. The complex intersection between obligations of the Contracting Parties to the ITPGRFA under public law and the obligations of the parties to the individual MTAs under private law makes the future work of the Governing Body particularly problematic. In this respect, the opinion of the author is that the distinction between the enforcement mechanisms for the Contracting Parties and the enforcement mechanisms for the parties to the MTAs should not be overemphasized. While it is true that public international law does not impose obligations on individuals and legal entities that do not have personality under international law and that contractual obligations under private law shall not project their effects on international law, some degree of osmosis between the two mechanisms is advisable to guarantee that the ITPGRFA machinery effectively produces the expected results.

In substance, the fact that an international treaty contains provisions to be reproduced in a contract under private law is an innovative concept that challenges traditional compliance and enforcement mechanisms. Contracting Parties should monitor the enforcement of individual MTAs in such a way that focuses on overarching issues that may be collectively addressed under a compliance mechanism or that may eventually reach the level of a dispute between Contracting Parties. Conversely, it is advisable that the settlement mechanism for disputes arising from MTAs be flexible enough to take into account the developments occurring at the Governing Body level in such a way to guarantee a relatively uniform application of the multilaterally agreed upon terms and conditions of the MTA and respecting the logical underpinnings of the ITPGRFA. In this respect, if the compliance and enforcement solutions that the Governing Body adopts are supportive, governments as well as breeders, farmers, scientists, and other actors dealing with PGRFA will all become allies in the realization of the ITPGRFA's ambitious goals.