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INTERNATIONAL ARBITRATION

by

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This document was prepared at the request of the Secretariat of the Commission on Genetic Resources for Food and Agriculture acting as Interim Committee for the International Treaty on Plant Genetic Resources for Food and Agriculture, in order to provide background information on international arbitration to the Contact Group for the Drafting of the Standard Material Transfer Agreement that was established by the Interim Committee at its Second Meeting.

The content of this document is entirely the responsibility of the author, and does not necessarily represent the views of the FAO, or its Members.

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TABLE OF CONTENTS

INTERNATIONAL ARBITRATION

EXECUTIVE SUMMARY

1. The paper examines the advantages and disadvantages of arbitration as a mode of dispute settlement. Arbitration is a recognized and popular method of settling disputes in normal commercial practice, and offers considerable flexibility to the parties in choosing their own procedures and arbitrators. On the other hand may be more expensive than recourse to national courts as a means of dispute settlement. It may also present more difficulties in the enforcement of arbitral awards.

2. In the context of the Standard Material Transfer Agreement (SMTA) it may have the additional advantages of avoiding dispersive decisions, promoting a coherent body of law and practice over which the Governing Body may have a measure of influence, and avoiding some problems of substantive and procedural law that may otherwise be worrisome. Arbitration is normally binding and without appeal and thus can lead to quicker, and perhaps more cost efficient dispute settlement. An international framework for the enforceability of arbitral awards is provided by the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

3. There are many arbitration services offered to the commercial world. A basic distinction is between stand alone arbitration rules, such as the UNCITRAL Rules, and administered arbitration services, such as those provided by the International Chamber of Commerce (ICC) or the London Court of International Arbitration (LCIA). Administered arbitration service provide for a measure of institutional supervision of arbitral proceedings, including such services as the appointment and operation of panels or expert arbitrators and the dissemination on arbitral awards, and may thus be more appropriate for the purposes of the SMTA.

4. International arbitrations sometimes provide for the application of general principles of law as opposed to national systems of law. A system of international arbitration may also offer more flexibility from the point of view of recognizing the rights of the Multilateral System as a third party beneficiary under the SMTA or as a principal for whom the provider of the PGRFA is acting as agent. Agency may provide a useful concept in the context of the SMTA. In any case, the SMTA will need to be carefully drafted to reflect the legal relationships and rights created, including the rights to initiate legal action to protect those rights.

5. The paper also examines issues related to the initiation of dispute proceedings and the choice of applicable law, primarily from the point of view of their impact on the choice of arbitration as a means of dispute settlement.

INTERNATIONAL ARBITRATION

CHAPTER 1: INTRODUCTION

6. The Expert Group on the Terms of the Standard Material Transfer Agreement, which met in Brussels in September 2004, considered the possible option of international arbitration as a form of dispute resolution for the standard Material Transfer Agreement (SMTA)[2]. While not discarding the option of recourse to national legal forums, the Expert Group highlighted the possibility that recourse to national courts or mechanisms might result in dispersive decisions. In view of their inter-connections, the Expert Group discussed the issues of dispute settlement and applicable law together.

7. Various options were put forward with regard to **international arbitration**. One option was that "*amicable dispute settlement, if unsuccessful, could be followed by binding arbitration by a Panel of Experts established by the Governing Body. Aggrieved parties should not be limited to providers and recipients alone. All interested natural or legal persons should be able to lodge a complaint."* A second, though not necessarily different, option put forward by the Expert Group was for "*binding international arbitration, with an opportunity for recourse to mutually agreed experts*", while a third was for "*international arbitration by an existing international arbitration mechanism, such as the International Chamber of Commerce. If the existing international arbitration mechanism lacks the necessary expertise, a panel of experts could be appointed jointly by the existing international arbitration mechanism and the Governing Body of the Treaty.*"

8. In respect of **applicable law**, the only options put forward by the Expert Group were for "*the Treaty and the decisions of the Governing Body, as well as possible future protocols to the Treaty*", and for "*General Principles of Law, the Treaty, and the relevant decisions of the Governing Body"*. However, the additional option of national law (law of the provider, law of the recipient or law of the contract forum) is implicit in the notion of recourse to national legal forums.

9. This paper will analyze the advantages and disadvantages of international arbitration as opposed to recourse to national courts, and compare different legal frameworks for international arbitration with their respective costs. It will also discuss possible options with respect to the initiation of dispute settlement proceedings and review the options for the choice of the applicable law, primarily from the point of view of their impact on the choice of arbitration as a means of dispute settlement.

[2] See Report on the Outcome of the Expert Group on the Terms of the Standard Material Transfer Agreement, FAO Doc. CGRFA/IC/MTA – 1/04/Rep.

CHAPTER 2: STUDY APPROACH

2.1 Advantages and disadvantages of arbitration

2.1.1 General

10. Arbitration is a popular method of settling disputes in the normal international commercial world. Some of the reasons commonly advanced for its popularity are:

- the flexibility afforded to parties, from the point of view of procedures tailored to the needs of the parties, including flexibility in the choice of law, venue and language, and in the choice of arbitrators;
- the neutrality of the proceedings, which avoid a situation where one party may be forced to plead his case before the courts of the other party;
- Cost effectiveness and speed;
- Privacy and confidentiality.

11. Still at the general level, arbitration as a method of dispute settlement in commercial practice also has its detractors. Some of the disadvantages commonly advanced in this connection are:

- The costs of arbitral proceedings;
- Difficulties in the enforcement of arbitral decisions.

12. Issues of particular relevance to choosing a form of dispute settlement under the SMTA may be discussed under the headings of the possibility of dispersive decisions, compatibility with the Treaty, substantive and procedural issues, costs, length of procedures, sovereignty, neutrality, and enforceability.

2.1.2 The possibility of dispersive decisions

13. One of the strongest arguments in favour of a system of international arbitration is the possibility of divergent interpretations of the SMTA and indeed of the International Treaty through national courts. As noted above, the Expert Group itself highlighted this risk. The risk is significant in the case of the SMTA in that, while the Governing Body may reach consensus on the main lines of the SMTA, there are likely to be a number of detailed issues that may need to be further defined and clarified by the Governing Body over the course of time. There are at present over 60 Parties to the International Treaty. If the provisions of the SMTA are to be subject to divergent interpretations by over 60 different national jurisdictions in accordance with over 60 different systems of national law, then the possibility of the Governing Body developing a coherent practice with respect to the implementation of the SMTA over time is likely to be considerably diminished.

14. It should be noted that a system of administered international arbitration may help to minimize the extent of dispersive decisions regarding the implementation of the SMTA. Arbitration under national law, or even an unadministered system of international arbitration may not have such an effect[3].

2.1.3 Compatibility of recourse to arbitration with the Treaty

15. Article 12.5 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, recognizing that obligations arising under such MTAs rest exclusively with the parties to those MTAs.*"

[3] On the difference between administered and unadministered systems of arbitration see below, sections 2.2 and 2.3.

16. It appears that Article 12.5 was drafted with the idea of recourse to national courts in mind. However, the wording would not appear to preclude recourse to either national or international arbitration. Indeed, arbitration is an established mode of dispute settlement in commercial contracts. In any case, provision for arbitration does not exclude the purview of national courts both in reviewing the binding nature of the SMTA and the referral to arbitration, and in enforcing arbitral judgments.

17. The question of the compatibility of referral to international arbitration with the provisions of Article 12.5 was raised at the time of the Expert Group. At that time the Legal Adviser to the Meeting gave the following legal opinion. "*On request, the Legal Advisor noted that it was up to the Contracting Parties to decide the opportunities for recourse to be made available, including both resort to national courts and arbitration. For the Contracting Parties, in the exercise of their sovereign rights, to provide for binding international arbitration, would not, in his opinion, be contrary to the provisions of Article 12.5. In any case, it would still be open to parties to the MTA to have recourse to national courts to enforce international arbitral decisions, should this prove necessary".*

2.1.4 Substantive and Procedural issues

18. When dealing with substantive and procedural issues, it is appropriate to consider the question of international arbitration together with the question of the choice of applicable law. Indeed the Expert Group took this approach in its discussions. In this context, the Expert Group suggested "*the Treaty and the decisions of the Governing Body, as well as possible future protocols to the Treaty*", and "*general principles of law, the Treaty and the relevant decisions of the Governing Body*" as possible applicable law. Such a choice of law would itself suggest a predisposition towards arbitration, given that national courts will tend to apply primarily national law.

19. Referral to international arbitration, together with such a choice of applicable law, would appear to grant more flexibility on questions of both procedural and substantive law.

20. From the point of view of procedural law, reference has already been made to the flexibility accorded to the parties to the dispute in exercising control over the proceedings. This extends to such things as the choice of arbitrators, the venue and language of the arbitral proceedings, the language of the proceedings, and the timetable for the arbitration.

21. Arbitration also offers flexibility to the parties in being able to choose the applicable substantive law. In this connection, one important issue, which lies somewhat between procedural and substantive law may be the enforceability of so-called shrink-wrap agreements. In this context, international arbitration proceedings may be more likely to accept the enforceability of shrink-wrap agreements, especially if such an approach to expressing consent to be bound is endorsed by decisions of the Governing Body, which may themselves be a source of law governing the SMTA[4].

22. A further important issue would be the protection of the rights of third party beneficiaries, and the recognition of the rights of third party beneficiaries to initiate legal proceedings. Such rights are recognized in many legal systems. It is not known whether they are recognized in all legal systems. In this, as well as other areas, reference to international arbitration, and the choice of general principles of law, the Treaty and decisions of the Governing Body may have the effect of ironing out potential

[4] To a certain extent, however, this flexibility with respect to the enforceability of shrink-wrap agreements may be more apparent than real, since the question of enforceability could well be raised in a national court prior to arbitration. In other words, a party to the SMTA could well argue that, under national law, shrink-wrap arrangements may be insufficient to evidence consent to be bound, thus invalidating the entire agreement, including the referral to arbitration. Such pre-arbitration questions regarding the validity of the arbitration agreement also fall within the jurisdiction of the arbitral tribunal itself. The extent to which national courts would stand aside in favour of the arbitral tribunal is unclear. Certainly participation of the state concerned in the *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, as well as its arbitration laws, would be relevant factors.

differences in national legal systems that may pose difficulties, or create uncertainties, in the establishment of a common international practice for the implementation and enforcement of the standard MTA.

23. General issues relating to third party beneficiaries and choice of law are dealt with in section 3 and 4 below.

2.1.5 Costs

24. Some elements, such as the costs of lawyers, are likely to be common to all forms of legal proceedings whether they be in normal national courts or arbitration forums. Other costs, such as the costs of arbitrators, are specific to arbitration: national courts do not normally make charges for the time of judges. The costs awarded to a successful party in legal proceedings are the costs associated with the legal representation of his case, not the costs incurred by the court itself.

25. Given this fact, it can be said that recourse to national courts *per se* is likely to be less expensive than arbitration.

26. Against this factor, however, should be set the implications of the possible duration of a case. Arbitral awards are final and non-appealable: the judgements of national courts can normally be appealed, through one or possibly two further instances. Although there may be no costs in respect of the courts themselves, the fees for legal representation in successive levels of court hearings will need to be taken into account in calculating overall costs of dispute settlement procedures.

2.1.6 Duration of proceedings

27. It is not possible to give precise figures concerning the likely duration of legal proceedings in national courts. The situation will vary from country to country, and indeed from case to case. On the whole, however, it is likely that arbitration proceedings will be significantly more expeditious than recourse to national courts. Indeed it is often for this particular reason that commercial partners choose arbitration as a means of dispute settlement.

28. In this connection, it is to be noted that arbitral judgments are final and binding. There is thus no recourse to appeals procedures, which therefore limits substantially the duration of the total arbitration proceedings.

2.1.7 Sovereignty

29. Some Contracting Parties may consider it more appropriate to afford the primarily role in enforcing MTAs, like any other contracts, to their own national legal systems, as a manifestation of their own sovereignty. In the case of the SMT, however, it should be noted that the agreement will normally entail parties in more than one jurisdiction, and thus a choice between national legal systems.

2.1.8 Neutrality

30. Given that disputes arising under the SMTA will normally involve parties in different national jurisdictions, the concern of ensuring neutrality in adjudicating disputes may well be a relevant factor. One party to a SMTA may be reluctant to see disputes adjudicated in the national courts of the other party. International arbitration offers the possibility of appointing arbitrators that do not share the nationality of either the Provider or the Recipient.

2.1.9 Enforceability

31. The enforceability of dispute resolution decisions is likely to be an important factor in choosing between recourse to national courts on the one hand and arbitration on the other hand.

32. As a general rule, enforceability is unlikely to be concern where recourse is made to national courts. Judgments of national courts are automatically enforceable through the normal national legal system, provided that those judgments are final.

33. As noted above, arbitration awards are final and not subject to appeal. However, they are not automatically enforceable in the same way as a final judgment of a national court system. Thus if a party fails to comply with an arbitral award, it will be necessary to have recourse to national courts to obtain satisfaction. Where arbitration takes place in the same state where enforcement is sought, the enforcement proceedings will be governed by the local law on arbitration and the enforcement of arbitral judgments.

34. Many states have undertaken to enforce foreign arbitral awards and not to reopen substantive issues already decided through arbitral proceedings. The *New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards* requires the courts of Contracting States to recognize and enforce foreign arbitral awards, as well as to recognize arbitration agreements made in writing and to refuse to allow a dispute to be litigated before them when it is subject to an arbitration agreement. Some 135 States are Parties to the Convention[5]. The Convention covers most regions of the world, with the one exception of the South Pacific Island States.

2.2 Possible frameworks for arbitration

35. Arbitration is available under the national laws of most if not all countries. For international arbitration for general commercial cases[6], however, the main choices are between unadministered systems of arbitration, typified by the Arbitration Rules of the United Nations Commission on International trade Law (UNCITRAL), and administered systems of arbitration, such as those provided by the International Chamber of Commerce (ICC). The main difference between the two systems is that unadministered systems merely provide a series of rules governing the procedure of arbitration, while administered systems, such as that provided by the ICC, provide an institutional infrastructure to oversee arbitrations. Other administered systems of arbitration are provided by, amongst others, the London Court of International Arbitration (LCIA), the American Arbitration Association (AAA), the Netherlands Arbitration Institute, the China International Economic and Trade Arbitration (CIETAC), the Hong Kong International Arbitration Centre (HKIAC), the Singapore International Arbitration Centre (SIAC), the Inter-American Commercial Arbitration Commission (IACAC), and the World Intellectual Property Organization Arbitration and Mediation Centre (WIPOAMC). In this section, further information will be given on the UNCITRAL Rules, the ICC and the LCIA.

2.2.1 UNCITRAL

36. The UNCITRAL Arbitration Rules were adopted by UNCITRAL in 1976, and provide a comprehensive set of procedural rules upon which parties may agree for the conduct of arbitral proceedings arising out of their commercial relationship. The Rules are widely used in *ad hoc* arbitrations as well as administered arbitrations[7]. Basically the UNCITRAL Rules provide for a model

[5] The list of Parties to the New York Convention is set out in Annex 1 to this paper.

[6] The International Centre for Settlement of International Trade Disputes (ICSID) also provides an international arbitration service, but this is restricted to investment disputes between Contracting Parties and nationals, including national companies, or other States. The arbitration services provided by the Permanent Court of Arbitration are similarly restricted to disputes between States, or between States and private parties and those involving intergovernmental organizations.

[7] The Hong Kong International Arbitration Centre, for example, does not have its own rules of international arbitration and recommends procedures of arbitration that incorporate the UNCITRAL Rules. The London Court of International Arbitration has its own rules (LCIA Rules) but also offers arbitration services under the UNCITRAL Rules. The Singapore International Arbitration Centre Rules are based largely on a combination of the UNCITRAL and LCIA Rules.

arbitration clause[8], a set of rules for the appointment of arbitrators, procedural rules for the conduct of arbitral proceedings and the delivery of arbitral awards, rules governing the setting of costs and time limits for the various phases of the arbitration. The number of arbitrators is set at either one or three, according to the wishes of the parties. Where there are to be three arbitrators, each party to the dispute appoints one and the two arbitrators once appointed choose a third who shall act as the presiding arbitrator. If either party fails to appoint an arbitrator or if the arbitrators appointed fail to agree on their choice of a President, within the designated deadlines, then either party may apply to the Secretary-General of the Permanent Court of Arbitration to make the appointment. The parties may also choose to designate a different appointing authority in the arbitration clause in their own contract.

37. Arbitral proceedings under the UNCITRAL Rules are to be held at the place chosen by the parties themselves, or failing such a choice, at the place determined by the arbitral tribunal itself[9]. Similarly, the arbitral tribunal is to apply the law designated by the parties: failing any such designation, the tribunal is to apply the law determined by the conflict of laws rules which it considers applicable.

38. The tribunal is empowered to rule on its own jurisdiction, including the power to determine the existence or validity of the contract concerned. This would include issues such as the validity of the "shrink wrap" form of acceptance, although, as noted above, the validity of the contract in such circumstances might also be challenged in national courts as invalidating any agreement to refer the dispute to arbitration. In deciding upon any such challenge, the tribunal would apply the law chosen by the parties, or in the event of any overriding restrictions, the law of the arbitral forum.

39. The arbitral tribunal is empowered to appoint experts to report to it on specific issues determined by it.

40. Before proceeding to its final award, the tribunal is also empowered to order interim measures, for the protection of the subject-matter of the dispute. The final award is to be made by a majority of the arbitrators, is to be made in writing, and is final and binding on the parties to the dispute. It is to be made public only with the consent of both parties. Either party may apply to the tribunal for an interpretation of the award within a period of 30 days, but no appeals against the award are allowed.

41. The costs of the arbitration are to be fixed by the arbitral tribunal itself. The fees of each arbitrator are to be expressed separately. In general these must be reasonable in amount taking into account the amount in dispute and the complexity of the subject-matter, the time spent by the arbitrators and any other relevant circumstances of the case. The costs also include travel and other expenses incurred by the arbitrators, the costs of expert advice, travel and other expenses of witnesses and the costs of legal representation of the successful party, as well as the fees and expenses of any appointing authority. The deposit of advances for costs may be requested by the arbitral tribunal. An accounting is to be made after the award is announced.

42. Other than the tasks of appointing arbitrators to be undertaken by the Secretary-General of the Permanent Court of Arbitration, referred to above, no supervision of the arbitration proceedings is foreseen in the UNITRAL Rules. The parties themselves may however provide for supervisory services to be provided by a standing arbitration service while still applying the UNCITRAL Rules.

2.2.2 ICC

43. The rules of arbitration of the ICC are not fundamentally dissimilar to those of UNCITRAL, although the ICC Rules are perhaps more comprehensive. Like UNCITRAL, the ICC rules place the

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[8] *Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules as at present in force*.

[9] As discussed further below, the choice of the place or legal seat of the arbitration is important, as it will determine the procedural framework of law governing arbitration.

main emphasis on the will of the parties to the dispute. The main differences may be summarized as follows:

- The arbitral proceedings under the ICC rules are administered by the ICC International Court of Arbitration and its secretariat. This administration extends not only to the appointment of arbitrators failing action or agreement by the parties to the dispute, but also more substantive involvement with the arbitral proceedings and awards themselves. One essential element of this supervision is the scrutiny of draft awards by the ICC International Court of Arbitration. Draft awards are scrutinized both from the point of view of form and substance. As to the latter, while the ultimate responsibility for the award lies with the arbitrators, the Court may draw their attention to flaws in reasoning or other potential problems with the award. The ICC will also follow up in cases of failure to comply with the arbitral award, although its powers in this respect are limited, since the power to enforce arbitral awards lies essentially with national courts. The ICC also publishes reports[10] on its awards, which can have the effect of promoting coherence in those awards. Finally, the ICC can, and has on occasion, maintained panels of expert arbitrators who can be called upon to act in specific types of commercial dispute.

- The ICC Rules provide standard costs for both administrative expenses and arbitrators' fees. These are set out in an appendix to the ICC Rules of Arbitration. There are no up front fees required for use of the standard model arbitration clause. Administrative expenses for arbitrations are calculated on a sliding scale related to the sum in dispute. They start at US$2,500 for sums in dispute up to US$50,000, and then range from 3.5% for sums between 50,000 and 100,000, to 0.06% for sums between US$ 50,000,000 to US$80,000,000, with a maximum fee of US$88,800 for sums over US$80,000,000. A minimum and maximum range is set for arbitrators' fees, starting at US$2,000 to 17% for sums in dispute of up to US$ 50,000; 2% to 11% for sums between US$50,000 and US$100,000; and 0.01% to 0.056% for sums in dispute of over US$100,000,000.

44. The ICC is headquartered in Paris. The parties to a dispute are however free to chose a different place of arbitration. Failing such a choice, the place of arbitration will be fixed by the ICC International Court of Arbitration[11]. The choice of a place of arbitration, or forum, is important, for it determines the procedural law that will govern the arbitration. The ICC normally chooses Paris as the place of arbitration since French law is viewed as being particularly favourable to arbitration proceedings and allows considerable flexibility to the parties in determining their own procedural rules within the framework allowed for by French law. However, choosing the place of arbitration does not mean that oral hearings must be held in that place. Under the ICC Rules, the parties are free to choose any other location in which hearings and meetings are to be held.

45. Similarly, the Parties to a dispute are free to choose the applicable substantive law to be applied in the arbitration. This may be a national law. However, a reference to general principles of law to the exclusion of any national system of law is fairly standard, often with a further reference to the UNIDROIT Principles of International Commercial Contracts[12].

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[10] The reports are "sanitized", in the sense that the names of the parties and other sensitive information are removed.

[11] The ICC International Court of Arbitration is currently composed of 114 members from 78 countries

[12] For example, the ICC Model Form of International Agency Contract provides in its Article 24 on applicable law for the following option:

"Any questions relating to this contract which are not expressly or implicitly settled by the provisions contained in this contract shall be governed, in the following order: (a) by the principles of law generally recognized in international trade as applicable to international agency contracts, (b) by the relevant trade usages, and (c) by the UNIDROIT Principles of International Commercial Contracts, with the exclusion – subject to Article 24.2 hereunder – of national laws."

Similar provisions are included in the ICC Model Form of Sole Distributor Contract.

46. The parties to the dispute are also free to nominate their own arbitrators subject to formal confirmation by the Court[13]. Normally a sole arbitrator must be of a nationality other than those of the parties to the dispute. Failing any such appointment, or failure to agree upon a presiding arbitrator, the ICC Court will make the appointment. Normally the ICC does not maintain formal panels of arbitrators, preferring to leave the choice primarily to the parties themselves. However the ICC has on occasion drawn up such panels, as in the case of the banking industry.

47. While the ICC has its own Rules of Arbitration, it does also administer, and act as appointing authority, for arbitrations under the UNCITRAL Rules of Arbitration.

2.2.3 The London Court of International Arbitration (LCIA)

48. The LCIA was founded in 1892 and is thus one of the oldest international arbitration courts. The present Court of Arbitration was established in 1985. Although the Court is headquartered in London, it is open to the Parties to a dispute to choose a different place of arbitration. The Court has its own secretariat. The Court is made up of 35 members drawn from the various trading regions of the world, including Hungary, Australia, Nigeria, USA, Tunisia and China. UK membership is restricted to 25%. It is the Court that appoints the arbitrators to individual Arbitral Tribunals, although the Court is required to give due regard for any particular method or criteria of selection agreed in writing by the parties to the dispute. The LCIA provides a comprehensive international dispute resolution service, both under its own Rules and under the UNCITRAL Rules.

49. The LCIA Rules themselves are again broadly similar to the UNCITRAL and ICC Rules, given that the Rules provide for administered arbitrations. Arbitration may be by a sole arbitrator or a panel of three arbitrators. The legal seat of arbitration (and hence governing procedural law) may be agreed upon by the parties to the dispute, failing which it shall be London unless the LCIA Court determines otherwise. The Tribunal may hold hearings and meetings at other geographical locations at its discretion. The Tribunal has the power to rule on its own jurisdiction. It may also call experts, and may order interim measures. One difference lies in the schedule of fees and costs. The initial registration fee is set at £1,500, but the fees for arbitrators are based, not on the sum in dispute, but on the amount of time spent by the members of the arbitral tribunal, with fee rates normally within the range of £150 to £350 per hour depending on the complexity of the case and the special qualifications of the arbitrators.

50. As noted above, the LCIA also administers arbitrations under the UNCITRAL Rules.

2.3 Comparative advantages and disadvantages of "administered" and "unadministered" systems of international arbitration

51. It is not easy to compare different systems of administered arbitrations, such as the ICC, the LCIA, or other systems referred to in the previous section. It may, however, be useful to compare the system of administered arbitrations, such as ICC or LCIA, with stand-alone, non-administered systems[14].

52. In essence, the main **advantage** of a system of administered arbitration lies in the support and supervision that is provided. This support and supervision may include the following:

[13] In 2003, 988 arbitrators were appointed or confirmed. Of these, 201 served as sole arbitrators and 787 as members of a tribunal composed of three arbitrators. A total of 299 arbitrators were appointed by the ICC Court and 576 nominated by the parties. The 988 arbitrators came from a total of 69 countries, including a number of developing countries.

[14] A note by the London Court of International Arbitration putting the case for administered arbitrations is set out in Annex 2 to this paper.

- The support of the administering institution in overseeing the procedures of arbitration, providing for the appointment of arbitrators where necessary, and providing advice to the parties on arbitral procedures;
- The provision of institutional support to the process of arbitration, including the establishment and supervision of a panel of expert arbitrators if required;
- The supervision of the arbitral awards themselves, including ensuring consistency of arbitral procedures and judgments, and disseminating the substance of awards made.

53. The main **disadvantage** of a system of administered arbitration must be the added cost.

54. It is mainly out of a desire to reduce costs that many of the UN agencies have changed over to the stand alone UNCITRAL Rules in recent years, preferring a non-administered system of arbitration to systems like the ICC. Individual arbitrations are now conducted on an ad hoc basis.

2.4 Panel of arbitrators

55. The Expert Group also made specific reference to the possible establishment of a panel of experts who could be called upon as arbitrators. Reference has already been made to the specific experience of the ICC with panels of experts in the practices of the banking industry. In this connection, however, it should be noted that this experience, according to the ICC itself has been mixed. Lists of experts tend to become outdated, and the ICC feels that no restraints should be placed on the power of the parties to a dispute to choose their own arbitrators. Such a panel or list of expert arbitrators may however be useful in assisting the parties to a dispute in locating suitable arbitrators, including in particular a sole arbitrator or a presiding arbitrator for panels of three. It may also assist an appointing authority when called upon to appoint arbitrators.

CHAPTER 3: INITIATION OF DISPUTE SETTLEMENT – THIRD PARTY BENEFICIARIES

56. On option put forward by the Expert Group was that third parties should be able to initiate dispute settlement. In this context, the Legal Advisor "*noted that, because there are third party beneficiaries under the MTA, through the Multilateral System, it may be advantageous to allow for them to be represented in dispute settlement, which would be easier in international arbitration."*

57. In analyzing the possible options with respect to the initiation of dispute settlement proceedings by third parties, it is necessary to define more clearly the attributes of third parties that should be entitled to initiate such proceedings.

58. One possibility would be to define the term broadly to include, for example, interested inter-governmental or non-governmental organizations having competence in plant genetic resources. This is similar to the approach favoured, for example, by the Århus Convention. In that Convention, States Parties are required to ensure that NGOs having a substantial interest in the matter concerned, or which are maintaining the impairment of a right, have access to a review procedure before a court of law to challenge the substantive or procedural illegality of a decision subject to the article of the Convention dealing with public participation in environmental decision making, or where provided for by national law, that contravenes other provisions of the Convention. The Convention also requires Parties to grant access to their courts to challenge decisions taken by public or private persons that contravene national environmental law. Such an approach, however, might be difficult to implement when dealing with the rights of individuals under contractual law. At first sight it would also seem to run counter to the provisions of Article 12.5, which are discussed further below.

59. Another approach would be to follow the approach of national law in defining third parties entitled to initiate legal action as those having legally enforceable rights vested in them by the contract.

60. One of the basic general principles of contract law is the so-called privity of contract: only those that are privy to a contract, i.e. the parties themselves, can enforce the contract. Despite this principle, national laws of contract do recognize that third party beneficiaries may have rights to initiate legal action in defence of their rights, where the contract is clear in creating such rights and in making them enforceable[15]. Similarly an international arbitral tribunal will recognize the rights of third party beneficiaries to initiate legal action where the agreement which is the subject of the arbitration is clear in bestowing such rights on those third party beneficiaries.

61. In the case of the Standard Material Transfer Agreement, it is clear that many of the rights created by the SMTA are in fact third party beneficiary rights. One clear example is the payment required to be made by recipients of plant genetic resources under the SMTA who commercialize a product incorporating PGRFA accessed from the Multilateral System, where restrictions are placed on the future availability of the material for further research or breeding. In such cases, the payment is to be made, not to the provider of the germplasm, but to a mechanism to be set up by the Governing Body of the Treaty for the benefit of all farmers. In effect, the Multilateral System can be said to be a legal third party beneficiary of the SMTA, holding the proceeds in trust for the farmers. This is consonant with the concept set out in the Treaty that the Multilateral System is itself the source of the material being accessed. In this sense, the Multilateral System is not only a third party beneficiary with potentially enforceable rights under the SMTA, but can itself be seen to be almost a party to the contract acting through the agency of the provider of the germplasm.

62. Should the Governing Body of the Treaty deem it appropriate to accord the right to initiate dispute settlement proceedings to a third party beneficiary such as the "Multilateral System", it would be necessary for the SMTA to contain wording clearly according that right. It would also be necessary to define clearly who would be authorized to exercise those rights on behalf of the "Multilateral System",

[15] See for example, A.L. Corbin, Corbin on Contracts, West Publishing Co., 1952, Chapter 41.

given that the Multilateral System itself does not have any legal personality. Possible options would be to confer such rights on an international organization such as FAO acting under the instructions of the Governing Body, or on other persons duly appointed by the Governing Body to act on behalf of the Multilateral System in such cases. It would also be necessary to define, although not necessarily in the SMTA itself, the circumstances in which, and the procedures by which, such organization or persons would be empowered to initiate legal action.

63. In the event that the Governing Body should wish to accord rights to initiate dispute settlement proceedings to the "Multilateral System" as a third party beneficiary under the SMTA, it would be necessary to examine the consistency of such an approach with the wording of Article 12.5 of the Treaty. As noted above, Article 12.5 contains the clause "*recognizing that obligations arising under such MTAs rest exclusively with the parties to those MTAs"*. Would this clause in effect preclude the Governing Body from providing for the initiation of dispute settlement proceedings by duly authorized persons on behalf of the Multilateral System as a third party beneficiary under the SMTA? On the face of it, the literal wording would seem to run counter to such an approach. On the other hand, it could be argued that a third party beneficiary is in a sense a real party to the SMTA, particular in the present case where the Multilateral System is the source of the plant genetic resources being accessed under the SMTA and is the beneficiary of the main legal obligations of the recipient of that PGRFA. Another approach might be to formally recognize the "Multilateral System" as a party to the SMTA, or to define the provider of the PGRFA as an agent[16] for the Multilateral System. Either of these approaches would require changes to the article of the SMTA defining the Parties to the Agreement.

[16] The concept that the provider of the PGRFA is acting as an agent of the Multilateral System may indeed be a useful concept to pursue. In many senses it does appear that the provider is acting on behalf of the Multilateral System, in that the PGRFA come from the Multilateral System and the benefits themselves flow to the Multilateral System. The concept of agency would avoid any problems related to the possible non-recognition of the rights of third party beneficiaries. Agency has been defined in the context of English law as being "*the relationship that exists between two persons when one, called the agent, is considered in law to represent the other, called the principal, in such a way as to affect the principal's legal position in respect of strangers to the relationship by the making of contracts or the deposition of property*". G.H.7L. Fridman, The Law of Agency, Second edition, Butterworths, London, 1966, p.8. In such a case, of course, the Multilateral System, since it does not have its own legal personality, would need to be represented through FAO.

CHAPTER 4: CHOICE OF LAW

64. The Expert Group on the Terms of the Standard Material Transfer Agreement suggested General Principles of Law, the Treaty, and the relevant decisions of the Governing Body as one option for the applicable law for the Standard MTA. A second option of national law is implicit in the proposal of national courts as a possible alternative option for dispute settlement.

65. Should national law be chosen as the applicable law in the SMTA, it will be necessary to choose which national law should be applicable. In general, the choice would be between the national law of the Provider of the PGRFA, the national law of the Recipient, and perhaps, the national law of the place in which the contract was made. In the event of failure to choose an applicable law, the question of the applicable law would be decided under the private international law rules of the forum in which legal action is brought.

66. Should general principles of law be chosen as the applicable law, this would normally be linked with the choice of arbitration as a means of dispute settlement. As noted above, such a choice of law would not run counter to the practice of existing arbitration procedures. Indeed it is standard practice for all UN agencies to choose "general principles of law" as the applicable law in arbitration clauses in commercial contracts, normally specifying that this choice should be to the exclusion of any national system of law. The reason for such a practice is primarily because the United Nations does not normally think it appropriate to submit to the national law of any one country or indeed to the jurisdiction of any national courts. The ICC also includes reference to "generally recognized principles of law, to the exclusion of any national law" in at least several of its model contracts[17]. It may also be appropriate to follow the lead of the ICC in making reference also to the UNIDROIT Principles of International Commercial Contracts as one manifestation of such general principles of law.

67. The experience of existing arbitration services has highlighted the importance of selecting the seat or place of arbitration[18]. The place of arbitration determines the procedural laws that will provide a framework for the arbitration process. In this connection it is important to select a place of arbitration that will allow flexibility to the parties in determining their own procedures, and that will promote the enforceability of arbitral awards.

[17] See footnote 7 above.

[18] According to the ICC, France is a country that allows considerable flexibility to arbitration procedures, and is thus the default place of arbitration for ICC arbitrations.

CHAPTER 5: CONCLUSIONS

68. This background note on international practices with respect to arbitration, initiation of dispute proceedings and applicable law is submitted for the information of the Contact Group.

ANNEX 1: CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS, NEW YORK, 10 JUNE 1958

List of Contracting States

State	Ratification	Reservation
Afghanistan	30 Nov 2004	1 - 2
Albania	27 June 2001	-
Algeria	7 Feb 1989	1 - 2
Antigua and Barbuda	2 Feb 1989	1 - 2
Argentina	14 Mar 1989	1 - 2
Armenia	29 Dec 1997	1 - 2
Australia	26 Mar 1975	-
Austria	2 May 1961	-
Azerbaijan	29 Feb 2000	-
Bahrain	6 Apr 1988	1 - 2
Bangladesh	6 May 1992	-
Barbados	16 Mar 1993	1 - 2
Belarus	15 Nov 1960	-
Belgium	18 Aug 1975	1
Benin	16 May 1974	-
Bolivia	28 Apr 1995	-
Bosnia and Herzegovina	1 Sep 1993	1 - 2
Botswana	20 Dec 1971	1 - 2
Brazil	7 June 2002	-
Brunei Darussalam	25 July 1996	1
Bulgaria	10 Oct 1961	1
Burkina Faso	23 Mar 1987	-
Cambodia	5 Jan 1960	-
Cameroon	19 Feb 1988	-
Canada	12 May 1986	-
Central African Republic	15 Oct 1962	1 - 2
Chile	4 Sep 1975	-
China	22 Jan 1987	1 - 2
Colombia	25 Sep 1979	-
Costa Rica	26 Oct 1987	-
Cote d'Ivoire	1 Feb 1991	-
Croatia	26 July 1993	1 - 2
Cuba	30 Dec 1974	1 - 2
Cyprus	29 Dec 1980	1 - 2
Czech Republic	30 Sep 1993	-
Denmark	22 Dec 1972	1 - 2
Djibouti	14 June 1983	-
Dominica	28 Oct 1988	-
Dominican Republic	11 Apr 2002	-
Ecuador	3 Jan 1962	1 - 2
Egypt	9 Mar 1959	-
El Salvador	26 Feb 1998	-
Estonia	30 Aug 1993	-
Finland	19 Jan 1962	-
France	26 June 1959	1
Georgia	2 June 1994	-
Germany	30 June 1961	1
Ghana	9 Apr 1968	-

State	Ratification	Reservation
Greece	16 July 1962	1 - 2
Guatemala	21 Mar 1984	1 - 2
Guinea	23 Jan 1991	-
Haiti	5 Dec 1983	-
Holy See	14 May 1975	1 - 2
Honduras	3 Oct 2000	-
Hungary	5 Mar 1962	1 - 2
Iceland	24 Jan 2002	-
India	13 July 1960	1 - 2
Indonesia	7 Oct 1981	1 – 2
Iran, Islamic Republic of	15 Oct 2001	1 - 2
Ireland	12 May 1981	1
Israel	5 Jan 1959	-
Italy	31 Jan 1969	-
Jamaica	10 July 2002	1 - 2
Japan	20 June 1961	1
Jordan	15 Nov 1979	-
Kazakhstan	20 Nov 1995	-
Kenya	10 Feb 1989	1
Korea, Republic of	8 Feb 1973	1 - 2
Kuwait	28 Apr 1978	1
Kyrgyzstan	18 Dec 1996	-
Lao People's Democratic Republic	17 June 1998	-
Latvia	14 Apr 1992	-
Lebanon	11 Aug 1998	1
Lesotho	13 June 1989	-
Lithuania	14 Mar 1995	-
Luxembourg	9 Sep 1983	1
Madagascar	16 July 1962	1 - 2
Malaysia	5 Nov 1985	1 - 2
Mali	8 Sep 1994	-
Malta	22 June 2000	1
Mauritania	30 Jan 1997	-
Mauritius	19 June 1996	1
Mexico	14 Apr 1971	-
Moldova, Republic of	18 Sep 1998	1
Monaco	2 June 1982	1 - 2
Mongolia	24 Oct 1994	1 - 2
Morocco	12 Feb 1959	1
Mozambique	11 June 1998	1
Nepal	4 Mar 1998	1 - 2
Netherlands	24 Apr 1964	1
New Zealand	6 Jan 1983	1
Nicaragua	24 Sep 2003	-
Niger	14 Oct 1964	-
Nigeria	17 Mar 1970	1 - 2
Norway	14 Mar 1961	1
Oman	25 Feb 1999	-
Panama	10 Oct 1984	-
Paraguay	8 Oct 1997	-
Peru	7 July 1988	-
Philippines	6 July 1967	1 - 2
Poland	3 Oct 1961	1 - 2

State	Ratification	Reservation
Portugal	18 Oct 1994	1
Qatar	30 Dec 2002	-
Romania	13 Sep 1961	1 - 2
Russian Federation	24 Aug 1960	-
Saint Vincent and the Grenadines	12 Sep 2000	1 - 2
San Marino	17 May 1979	-
Saudi Arabia	19 Apr 1994	1
Senegal	17 Oct 1994	-
Singapore	21 Aug 1986	1
Slovakia	28 May 1993	-
Slovenia	6 July 1992	1 - 2
South Africa	3 May 1976	-
Spain	12 May 1977	-
Sri Lanka	9 Apr 1962	-
Sweden	28 Jan 1972	-
Switzerland	1 June 1965	-
Syrian Arab Republic	9 Mar 1959	-
Tanzania, United Republic of	13 Oct 1964	1
Thailand	21 Dec 1959	-
The Former Yugoslav Republic of Macedonia	10 Mar 1994	1 - 2
Trinidad and Tobago	14 Feb 1966	1 - 2
Tunisia	17 July 1967	1 - 2
Turkey	2 July 1992	1 - 2
Uganda	12 Feb 1992	1
Ukraine	10 Oct 1960	-
United Kingdom of Great Britain & N. Ireland	24 Sep 1975	1
United States of America	30 Sep 1970	1 - 2
Uruguay	30 Mar 1983	-
Uzbekistan	7 Feb 1996	-
Venezuela	8 Feb 1995	1 - 2
Vietnam	12 Sep 1995	1 - 2
Yugoslavia	12 Mar 2001	1 - 2
Zambia	14 Mar 2002	-
Zimbabwe	29 Sep 1994	-

Reservation:

1. Awards will be recognised and enforced only if made in the territory of another Contracting State.

2. The Convention applies only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the state making such declaration.

ANNEX 2: THE ADVANTAGES OF AN ADMINISTERED SYSTEM OF ARBITRATION, AS LISTED BY THE LONDON COURT OF INTERNATIONAL ARBITRATION

The advantages of an administered system of arbitration have been listed by the London Court of International Arbitration in the following terms:

"The case for administered arbitration
It is sometimes asked why parties should bother with institutional arbitration rules at all when there are effective arbitration laws in place in the jurisdictions of most of the important trading regions of the world, when there are good stand-alone procedures like the UNCITRAL rules, and when there is a body of highly experienced arbitrators, whose identities and qualifications may already be known to parties in dispute and/or their lawyers.

Here are some of the answers.

Certainty in Drafting
Ad hoc clauses are frequently either inadequate or overly complex. By incorporating institutional rules into their contract, the parties have the comfort of a comprehensive and proven set of terms and conditions upon which they can rely, regardless of the seat of the arbitration; minimising the scope for uncertainty and the opportunity for delaying or wrecking the process.

Taking care of the fundamentals without recourse to the Courts
The incorporation of a set of established rules will automatically and unequivocally take care of the fundamentals of effective arbitral procedures, including

- *the mechanism and timeframe for the appointment of the tribunal;*
- *determining challenges to arbitrators;*
- *default provisions for the seat and language of the arbitration;*
- *interim and conservatory measures; and*
- *control of the costs of the arbitration.*

The procedural law applicable at the seat of the arbitration may also provide for these matters. However, it can be time-consuming and costly to invoke the jurisdiction of national Courts at every procedural impasse. Court intervention may also jeopardise the confidentiality of the process.

Professional and cost-effective administration
Institutional rules, as opposed to general provisions, like the UNCITRAL Rules, bring with them the additional advantage of a professional administrative service, which an ad hoc tribunal, with or without the co-operation of the parties, frequently cannot adequately provide.

Ad hoc arbitrations do not run themselves. If the task is allocated to a member of the arbitrator's own staff; to members of the parties' legal teams; or to the parties themselves, there will be considerable direct and indirect cost incurred, and rarely will the job be as well done as by the specialists.

Controlled costs
An arbitral institution will also have in place a framework of charges, both for its own administrative services and for its arbitrators.

The major institutions will also act as secure and independent fundholders of sums deposited by the parties, disbursing these funds as required and, at all times, accounting to the parties for sums held and disbursed.

Knowledge of Arbitrators
An institution will also have detailed knowledge of, and ready access to, the most eminent and most

appropriately qualified arbitrators and will have tried and tested procedures for dealing with the increasingly contentious issue of conflicts.

Keeping the Process Moving
Whilst it is not the role of an institution to interfere with the conduct of the proceedings (as agreed between the parties, directed by the tribunal or prescribed by the rules) institutions do have an important role in monitoring the process, in lending support to parties, counsel and arbitrators, and in giving the occasional judicious nudge if things get stuck.

Even the most experienced of arbitrators frequently turn to the institutions for guidance and support. Equally, parties may be hesitant to prompt their tribunals if they feel that matters are not proceeding quickly or smoothly enough. The institution will do so on their behalf.

A good Secretariat will also provide a valuable sounding board on procedural matters.

Balance of Relationships
There are at least two sides to every dispute. In many cases, however, there is not a balance of knowledge, experience, expertise and sophistication in the arbitral process, either on the part of the parties or of their attorneys.

Established rules can act effectively to safeguard due process and, thereby, the reputation of the arbitral process and, indeed, the quality and enforceability of awards.

The Imprimatur of the Institution
It is often said that arbitrations conducted under the auspices of the major institutions are regarded by parties, and by the Courts, with greater respect and confidence than ad hoc arbitrations.

Permanent Information and Support Service
Last, but not least, subscribing to the services of an arbitral institution, whether or not those services are ever employed in anger, brings to parties and their legal advisers, to academics, and to the next generation of practitioners, an invaluable and permanent source of information and assistance, be it for theoretical or for practical purposes.[19]*"*

[19] From the Introductory Brochure about the LCIA downloaded from the LCIA website: http://www.lcia-arbitration.com/lcia/.