



**Convention on
Biological Diversity**

Distr.
GENERAL

UNEP/CBD/ICNP/3/INF/3
19 November 2013

ORIGINAL: ENGLISH

OPEN-ENDED AD HOC INTERGOVERNMENTAL
COMMITTEE FOR THE NAGOYA PROTOCOL ON
ACCESS TO GENETIC RESOURCES AND THE
FAIR AND EQUITABLE SHARING OF BENEFITS
ARISING FROM THEIR UTILIZATION

Third meeting

Pyeongchang, Republic of Korea, 24-28 February 2014

Item 4.2 of the provisional agenda*

**REPORT OF THE INFORMAL MEETING FOR THE IMPLEMENTATION OF
ARTICLES 19 AND 20 OF THE NAGOYA PROTOCOL**

Note by the Executive Secretary

1. At the request of the Government of Japan, the Executive Secretary is circulating herewith, for the information of participants in the third meeting of the Open-ended Ad Hoc Intergovernmental Committee for the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising From their Utilization, the report of the Informal Meeting for the Implementation of Articles 19 and 20 of the Nagoya Protocol, which was organized by the Government of Japan and held in the Keio Plaza Hotel in Tokyo, from 25 to 26 March 2013.

2. The document is being circulated in the form and language in which it was made available to the Secretariat.

* UNEP/CBD/ICNP/3/1.

REPORT OF THE INFORMAL MEETING FOR THE IMPLEMENTATION OF ARTICLES 19 AND 20 OF THE NAGOYA PROTOCOL

A. INTRODUCTION

1. In accordance with decision XI/1 of the Conference of the Parties, the third meeting of the Open-ended Ad Hoc Intergovernmental Committee for the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization (ICNP-3) will exchange views on the development, updating and use of sectoral and cross-sectoral model contractual clauses, voluntary codes of conduct, guidelines, and best practices and/or standards, pursuant to Articles 19 and 20 of the Protocol*.

2. In order to support this exchange of views, the Ministry of Foreign Affairs of the Government of Japan, in collaboration with the Secretariat of the Convention on Biological Diversity (SCBD) and the United Nations University – Institute of Advanced Studies (UNU-IAS) convened an informal meeting to enable experts from developed and developing countries, as well as stakeholders representing different groups of users of genetic resources, to discuss their views of and experiences with such tools in advance of ICNP-3, with the intention of conveying outcomes of the informal meeting to the ICNP-3.

3. The meeting was supported by a study developed by Ms. Catherine Monagle of UNU-IAS to inform and support discussions. Specifically, the study provided an overview of:

- (i) Model contractual clauses developed by governments or by particular user groups to support the negotiation and development of access and benefit-sharing (ABS) agreements.
- (ii) Codes of conduct, guidelines, best practices and standards developed to assist with the implementation of the ABS provisions of the Convention and/or the Nagoya Protocol.

4. In each case the study reflected on common features and differences among these tools, considering parameters such as the relevant sector, authoring organization, whether the tool was developed prior to or after the adoption of the Nagoya Protocol, scope, purpose and any distinctive features in light of the particular needs of the sector for which it was developed. The discussion was supported by examination of a selection of Article 19 and 20 tools, chosen to represent a cross section of the different types of tools available. The study was to offer some preliminary reflections on the nature of any further research that would be needed to provide a more comprehensive and detailed analysis of the best ways of supporting the implementation of the Protocol through Articles 19 and 20, including any further information that could be provided by Parties and others to this end.

5. The intention was for the draft study to be further revised following the informal meeting, to take into account further reflections emerging during the discussions among participants at the informal meeting, particularly those relating to user experience of Article 19 and 20 tools, and the implications of the Nagoya Protocol for the design and updating of such tools.

6. The informal meeting was attended by invited experts and observers. A list of invited experts is attached as Annex I to this meeting report.

* UNEP/CBD/COP/11/35 Report of the eleventh meeting of the Conference of the Parties to the Convention On Biological Diversity, Hyderabad, India, 8-19 October 2012, Decision XI/1.

B. OPENING OF THE MEETING

7. Welcoming remarks were offered by Ambassador Masahiko Horie, Ambassador for Global Environmental Affairs of the Ministry of Foreign Affairs, Japan. Amb. Horie welcomed participants, noting the many prominent experts who were in attendance. Amb. Horie further offered his sincere thanks to the United Nations University and the SCBD for the organization of the meeting. Noting that Japan had hosted the Tenth meeting of the Conference of the Parties at which the Nagoya Protocol was adopted, Amb. Horie observed that the phase for developing a conceptual and institutional framework had ended, and the phase of implementation begun. Amb. Horie affirmed the commitment of the Government of Japan to implementation, recognizing that the conservation of biological diversity and the sustainable use of its components continues to be very important for the world. While Japan has made its financial contributions to implementation through the Japan Biodiversity Fund and the Nagoya Protocol Implementation Fund, Amb. Horie also expressed Japan's willingness to supporting further development of the intellectual content that will contribute to implementation. Reflecting on the importance of Articles 19 and 20, Amb. Horie noted the difficulties that can arise when Parties take very different approaches. He observed that Article 19 and 20 tools help to deepen common understandings of the requirements of the Protocol, so supporting effective implementation.

8. Professor Govindan Parayil, Director of the UNU-IAS, and Vice Rector of the United Nations University welcomed participants to Tokyo, the headquarters of the United Nations University. Professor Parayil emphasized the important role of Articles 19 and 20 of the Protocol, noting that tools falling within their scope are primary vehicles through which the aims of the Protocol will be realized. He further noted the expertise and diversity of participants, with many participants bringing practical experience of developing, and using the tools that Articles 19 and 20 of the Protocol describe. Professor Parayil identified the value to parties of learning more about user experience of Article 19 and 20 tools, as well as how the Protocol has influenced revision of tools that were developed before the Protocol's adoption. He noted that Parties want to learn from the experience and reflections of participants to assist them deliver on their role in shaping the next phase of the Protocol's implementation.

9. Welcoming remarks were offered by Ms. Kathryn Garforth, Programme Officer on Access and Benefit-Sharing, Secretariat of the Convention on Biological Diversity (CBD), on behalf of the Executive Secretary of the CBD. Ms. Garforth thanked the Government of Japan and the UNU-IAS, and welcomed participants and the wide range of expertise they would bring to the discussions. The meeting, Ms. Garforth noted, would be an important opportunity to discuss challenges and opportunities in the development and use of model contractual clauses, codes of conduct, guidelines and best practices or standards and for participants to share views and experiences on their implementation. She also highlighted progress towards entry into force of the Nagoya Protocol and urged countries to make every effort to ratify the Protocol so that they could participate in the first meeting of the Parties on equal footing with the other Parties to the Nagoya Protocol.

C. ORGANIZATIONAL MATTERS

10. The meeting was chaired by Dr. Atsushi Suginaka, Director of the Global Environment Division of the International Cooperation Bureau of the Ministry of Foreign Affairs of Japan.

11. Dr. Suginaka explained the aim, expected outcomes and proceedings of the meeting. He noted that the aim of the meeting would be to facilitate a discussion among experts on ways to best implement Articles 19 and 20 and to provide a summary and conclusions of the discussion, alongside the UNU-IAS study, as inputs of the Government of Japan to the ICNP-3, in cooperation with the United Nations University.

12. Dr. Suginaka further outlined the mechanisms of the Nagoya Protocol, and its challenges, including lack of capacity in provider countries and potentially variable requirements between provider

/...

countries, noting implications for costs and enforcing compliance. Aims of the meeting for the discussion of Article 19 included identifying and deepening understanding of terms to be included in model contracts, identifying any particular sectoral characteristics and any common elements, and considering the role of the Conference of the Parties serving as the meeting of the Parties to the Protocol (COP-MOP) in the implementation of Article 19.

13. Dr. Suginaka further noted the importance of voluntary norms under Article 20, being codes of conduct, guidelines, best practice and/or standards, noting that as ABS is based on private contracts, and that the scope and kinds of ABS are diverse, it is an area that is difficult and inappropriate to control only through legal measures. Aims of the meeting for the discussion of Article 20 included identifying and deepening understanding of items to be included in codes of conduct, best practices, guidelines and/or standards, the specific role of the COP-MOP in periodically taking stock of the use of voluntary norms and in considering adoption of specific voluntary norms.

D. REPORT FROM UNU-IAS ON THE COMMISSIONED STUDY ON ARTICLES 19 AND 20 OF THE NAGOYA PROTOCOL ON ACCESS AND BENEFIT SHARING – SURVEY OF MODEL CONTRACTUAL CLAUSES, CODES OF CONDUCT, GUIDELINES, BEST PRACTICES AND STANDARDS

14. Ms. Catherine Monagle introduced the main observations, conclusions and recommendations of the draft study surveying model contractual clauses, codes of conduct, guidelines, best practices and standards.

15. Model contractual clauses, it was observed, streamline implementation of the Protocol, reducing the need for users and providers to continually reinvent the wheel when they execute agreements. They provide them with illustrative options of legal clauses that enable them to capture the goals of the Convention and Protocol in the many and diverse circumstances in which real access and benefit sharing agreements are made. In this way, they have the potential to help keep transaction costs down.

16. In summarizing the study, Ms. Monagle noted the various authors of model contractual clauses and the range of contexts in which they tend to be developed. She noted that those model agreements currently available include examples from each of the following groups:

a. Authored by a public or private sector institution not expected to be a party to the agreement, such as an industry association, or professional association, and sometimes developed alongside and/or as part of a code of conduct, guidelines, best practice and/or standard;

b. Authored by governments and linked to the fulfillment of legislative or other regulatory requirements;

c. Authored by a potential party to the agreement, such as a research or collection institution;

d. Actual agreements, made model contracts retrospectively, or examples from other contexts, such as the Standard Material Transfer Agreement (SMTA) of the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA), that have some illustrative value for those negotiating access and benefit sharing arrangements based on mutually agreed terms.

17. The range of legal issues covered by model contractual clauses was described, noting that they include:

a. Identification of parties;

- b. Duration of agreement;
- c. Definition of terms;
- d. Scope of agreement;
- e. Scope and intent of research permitted (i.e. commercial or non-commercial intent), and process for identifying and notifying a subsequent change of intent;
- f. Description of material to which the agreement applies, and the intended process of analysis;
- g. Status of unused material;
- h. Requirements upon transfer of material or research to third parties;
- i. Evidence of the prior informed consent (PIC) of the providing party;
- j. PIC, benefit sharing and other requirements where associated traditional knowledge held by indigenous and local communities is accessed or used within the research process;
- k. Statement of principle that benefits are to be shared;
- l. Space for the description of any fixed benefits to be shared, alongside suggestions as to range of benefits that might fall within this category;
- m. Space for the description of variable benefits to be shared, alongside suggestions as to range of benefits that might fall within this category;
- n. Intellectual property rights options;
- o. Statement as to any legislative instruments that must be complied with or any other requirements that must be met, for example, particular permits that must be acquired;
- p. Nomination of applicable law and jurisdiction;
- q. Dispute resolution process to be applied;
- r. Description of any processes to monitor compliance;
- s. Process to be followed in the event of breach of contract, and process for termination.

18. Observations of the study concerning model contractual clauses included that:

- a. ABS arrangements consistent with the Convention and Protocol might be created through a single agreement/contract, or through an interconnecting series of agreements and other instruments that together form an ABS arrangement;
- b. In reality most model clauses are provided within the context of a complete agreement that has been designed to work as an integrated whole. It is important then to consider not only model contractual clauses separately, but to analyze model agreements and arrangements in their entirety;
- c. The range of issues considered tended to be similar across those model agreements examined, though the way of dealing with a given issue may be tailored to context;

d. While some model agreements offer various optional clauses that represent different ways of approaching a given legal issue, many offer only a single, fixed template;

e. Even where there is only a single option provided for a given legal issue, model agreements are based in most cases on the premise that there is still some room for parties to negotiate, so long as the agreement meets the minimum requirements of national legislation or regulations;

f. Overall, model agreements tend to have several broad substantive and structural similarities, reflecting the objectives and provisions of the Convention and Protocol;

g. In most cases the development of model contractual clauses predated the Protocol. Given the implications of the Protocol for the development and scope of model contractual clauses, tools developed prior to the Protocol are likely to require updating. Of those model agreements examined, not all have yet been revised since the Protocol's adoption. Nevertheless, elements consistent with the additional requirements of the Protocol are found in certain models even though their development predated the Protocol;

h. As model agreements often implement national legislative requirements, revision of such models in line with the Protocol may in some cases need to follow on from and reflect national implementation processes. At the same time, Articles 19 and 20, particularly those that have been revised, may support the understanding of Parties and others as to options for the practical implementation of the Protocol, including in the context of legislative and policy development.

19. Codes of conduct, guidelines, best practices and standards were described as communicating to those who seek access to genetic resources, and to those who provide them, what they must do to act in line with the Convention and Protocol. They also provide a practical opportunity to draw out the links between the three objectives of the Convention, by assisting users and providers to frame ABS arrangements in a way that grasps the opportunities for these objectives to be delivered in a mutually supportive way. As such, they were suggested as being an important intermediary between the broad goals of Parties as articulated by the Convention and Protocol, and real implementation of those goals in real circumstances.

20. Codes of conduct, guidelines, best practices and standards, it was noted, apply across a range of sectors, encompassing both industry sectors and basic non-commercial research fields. Authors include government departments, public sector collections, funding institutions, and botanic gardens, industry organizations, scientific or professional member organizations, and research and academic institutions, among others. Such tools may be useful in supporting compliance with national ABS legislative, policy and administrative measures. They may also be designed to support ABS agreements consistent with the Convention and Protocol where no national measures have been developed but where parties to an ABS agreement want to respect established international principles.

21. The tools available take various forms and structures, although there are significant substantive similarities across the different tools available. Elements that are commonly found include:

- Summaries of the goals and principles of the Convention and the Nagoya Protocol, and, in some cases, other relevant instruments;
- Background on the history and development of ABS agreements, and research practice involving ABS across sectors;
- Guidance on appropriate conduct, including behavioral and ethical guidelines, such as in seeking prior informed consent (PIC) from local and indigenous communities and in liaising with national focal points;

- Guidance on the principles and practicalities involved in establishing PIC;
- Guidance on considerations involved when seeking to access and/or use traditional knowledge within a research process;
- Guidance on options for supporting the technology transfer provisions of the Convention and the Protocol;
- Explanation of requirements to enter into formal contractual benefit sharing agreements on mutually agreed terms, and noting benefit sharing options, including both monetary and non-monetary benefits;
- Explanation of requirements to comply with national ABS measures, including any requirements for obtaining PIC or permits to remove materials found in site;
- Guidance on intellectual property rights issues and options.

22. Within the study, the relevance to and overlap of Article 20 tools with those supporting implementation of access and benefit sharing consistent with Article 8(j) of the CBD and Article 12 of the Protocol was raised as being an issue that may be worthy of further consideration. While most often not focused solely on access and benefit sharing ABS, these tools provide guidance to users and providers of genetic resources on specific issues relating to access and benefit sharing when it concerns the traditional knowledge, innovations and practices of indigenous and local communities. Such tools may assist those seeking access to the traditional knowledge, innovations and practices of indigenous and local communities to understand what constitutes ethical behaviors in the process of seeking consent, conducting research and negotiating benefit sharing agreements with indigenous and local communities. Community protocols developed by indigenous and local communities, for example, may play a role in assisting communities to understand and assert their rights and interests during ABS negotiations, and to communicate their expectations and processes to those seeking access.

23. Several Article 20 tools have been already revised to take into account the Nagoya Protocol. Where tools have been updated, they tend to incorporate direct references to the background, history and objectives of the Protocol, and incorporate the language and concepts introduced in the Protocol.

24. The preliminary conclusions of the study included that there would be value in further sharing of lessons learned during the development and use of both Article 19 and 20 tools, and participants were encouraged to share such experiences during the informal meeting.

25. Despite their clear value, it was noted that it is important also to acknowledge the limits of model contractual clauses, codes of conduct, guidelines, best practices and standards. In particular, it was noted, the availability of model tools does not generally negate the need for ABS agreements to be tailored to the specific scenario at hand, and for both parties to have independent advice prior to the conclusion of an ABS agreement between them. These needs were described as having implications for capacity and resources required by both users and providers, including, where relevant, indigenous and local communities.

26. Other questions that would benefit from further consideration were suggested, including the need for further detailed consideration of the implications of the Protocol for the updating of Article 19 and 20 tools. Participants were also encouraged to reflect upon how much commonality of elements there is across tools used by different sectors, as a factor informing discussion of the value in maintaining diversity of tools or encouraging further standardization.

E. ARTICLE 19 – MODEL CONTRACTUAL CLAUSES***Article 19. Model Contractual Clauses***

1. *Each Party shall encourage, as appropriate, the development, update and use of sectoral and cross-sectoral model contractual clauses for mutually agreed terms.*
2. *The Conference of the Parties serving as the meeting of the Parties to this Protocol shall periodically take stock of the use of sectoral and cross-sectoral model contractual clauses.*

Presentations on views and experiences in relation to model contractual clauses (Article 19) by invited experts

27. Mr. Geoff Burton, UNU-IAS, facilitated the sessions on Article 19. The presentations on Article 19 as well as those on Article 20 were made available through the website of the Traditional Knowledge Initiative of UNU-IAS (www.unutki.org).

28. Ms. Heidi Banse of the Directorate-General for the Environment of the European Commission discussed the state of play of implementation of Articles 19 and 20 of the Nagoya Protocol in the European Union (EU), including to outline the 2012 Proposal for a Regulation of the European Parliament and of the Council on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization in the Union. Ms. Banse also described the nature of EU trusted collections and their role in encouraging user compliance, and raised a number of points concerning model contractual clauses for further consideration by the meeting. These are among those captured in the summary of discussion (see section H ‘Summary of Discussions’).

29. Dr. Susette Biber-Klemm of the University of Basel outlined the process of developing the Swiss Academy of Sciences Agreement on Access and Benefit Sharing for non-commercial research, a sector-specific approach containing model clauses. Analysis of user experience to date was limited. In the non-commercial research sector, Dr. Klemm noted the need of academic users for simple access procedures, alongside the need of providers for transparency and control in respect of the nature of utilization of genetic resources, noting that the distinction between commercial and non-commercial use is often not absolute but graduated. Dr. Klemm suggested that the experience of the Swiss Academy of Sciences indicated that a uniform model agreement covering all types of research and all types of research situations is no option. In this regard, she noted that the Swiss Academy of Sciences agreement contains a ‘backbone’ standard agreement, with a range of options to reflect the needs of various research situations and sectors. Dr. Klemm further discussed the relationship between model contractual clauses, best practices and standards, codes of conduct and guidelines, noting that model contractual clauses can be integrated within or attached alongside as a complement to such Article 20 tools.

30. Dr. Jorge Cabrera of the Instituto Nacional de Biodiversidad (InBio), Costa Rica, outlined InBio’s experience with model clauses in the context of the negotiation of actual agreements, noting that different stages of negotiation require different types of instruments, including draft contracts and templates, and that these may be based on Article 19 model contractual clauses. He suggested that there are differences between the needs and approaches of different sectors. He further suggested that certain types of provisions may be more useful as model clauses than others. For example, those issues on which model contractual clauses may be particularly useful may include confidentiality, publications, approach to dispute resolution, and the defining of terms. Others, such as intellectual property rights, field of use, exclusivity, transfer of material and benefit sharing, may be more variable, with model clauses on these issues not as useful. Dr. Cabrera also described the ABS Management Tool, outlining the considerations

that informed its development. (The ABS Management Tool is considered further in the context of Article 20, below.)

31. Dr. Philippe Desmeth of the Belgian Coordinated Collections of Micro-organisms (BCCM) and President of the World Federation of Culture Collections outlined the role of Material Accession Agreements (MAAs) and Material Transfer Agreements (MTAs) in the context of culture collections. He particularly highlighted lessons learned from the evolution of the BCCM MTA and described plans to update the Micro-Organisms Sustainable use and Access regulation International Code of Conduct (MOSAICC) in light of the Protocol. Dr. Desmeth noted the dynamic nature of scientific progress and research processes, suggesting that ABS arrangements need to be reactive and flexible such that they are able to take into account technological advances. Dr. Desmeth further outlined research processes in microbial research, describing the relationship of these processes to the needs of users and providers in the context of access and benefit sharing in the field of microbial research. In particular, Dr. Desmeth outlined the use of microbial strain numbers associated with the transfer of materials, noted the importance of clarity around choice of laws in MTAs, and suggested that there may be a place in model MTAs for both broad conceptual definitions identified globally and defined pursuant to national laws, as well as more specific operational definitions focused on the needs of particular sectors.

32. Dr. Alejandro Lago Candeira, Director UNESCO Chair for the Environment of the Universidad Rey Juan Carlos, Spain, introduced UNESCO Chair projects associated with Articles 19 and 20, including: auditing services for ABS contracts; development of ABS policies for private companies involved in marine bioprospecting; support for development of the institute for Marine Biotechnology in Mozambique; an ABS capacity building project for biotechnology research institutes; and collaboration with IUCN in development of the regional project on strengthening the implementation of ABS frameworks in Latin America and the Caribbean funded by the Global Environment Facility. Drawing from this experience, Dr. Lago Candeira described feedback from these activities, including broad recognition of the importance of Article 19 tools, alongside the benefits of sharing user experience. Dr. Lago Candeira expressed the expectation that implementation of the Protocol would lead to more examples to be developed and shared over time. He noted there appeared to be limited experience in dealing with associated traditional knowledge in a way that took into account the related provisions of the Protocol and that further sharing of experiences in relation to this element of the Protocol would be particularly useful.

33. Prof. Joaquim Machado of the Department of Science and Technology Policy of the University of Campinas, Brazil, offered views on the potential for genomics science, in particular the use of selection signatures to support ABS, noting their potential role in tracking the history of the evolution and movement of genetic material. Prof. Machado further described and compared national legislative approaches to ABS involving associated traditional knowledge.

34. Ms. Anke van den Hurk of Plantum NL described the plant breeding process, noting the generally complex ancestry of plant varieties and the complexity of the gene flow around the world over time. Ms. van den Hurk noted the relevance of the model provided by the SMTA of the ITPGRFA for the plant breeding sector. Advantages of such an approach in the specific context of plant breeding included a focus on the genetic level for defining benefit sharing, the value of a single, simple contract for levelling the playing field in the negotiation of contracts, and recognition of a breeders' exemption as a benefit. Perceived disadvantages included difficulties in tracking and tracing, no valuation of the actual contribution of the genetic resource, no exhaustion of rights and lack of flexibility. Ms. van den Hurk further outlined current activities for the development of model clauses and best practices in the plant breeding sector, noting the particular sector-based considerations that are relevant to the development of such clauses and best practices in this context. Ms. van den Hurk concluded with the observation that analysis of Article 19 and 20 tools should be firmly focused on user needs and experience, and that

model contractual clauses and best practices can help to make the Protocol work so long as they are adapted to the needs of the particular sector in question.

Discussion on Article 19

35. Participants discussed the themes emerging from the presentations on Article 19. These were summarized at the conclusion of the meeting (see section H ‘Summary of Discussions’).

F. ARTICLE 20 – CODES OF CONDUCT, GUIDELINES AND BEST PRACTICES AND/OR STANDARDS

Article 20. Codes of Conduct, Guidelines and Best Practices and/or Standards

1. *Each Party shall encourage, as appropriate, the development, update and use of voluntary codes of conduct, guidelines and best practices and/or standards in relation to access and benefit-sharing.*
2. *The Conference of the Parties serving as the meeting of the Parties to this Protocol shall periodically take stock of the use of voluntary codes of conduct, guidelines and best practices and/or standards and consider the adoption of specific codes of conduct, guidelines and best practices and/or standards.*

Presentations on views and experiences in relation to codes of conduct, guidelines, best practices and standards (Article 20) by invited experts

36. Ms. Kathryn Garforth facilitated the sessions on Article 20.

37. Dr. Marco D'Alessandro of the Federal Office for the Environment, Switzerland, offered reflections on voluntary guidelines and best practice tools, highlighting the experience with and/or support of the government of Switzerland for: the ABS Good Practice Tool for academic research on genetic resources developed by the Swiss Academy of Sciences; the ABS Management Tool developed by Stratos in cooperation with Geoff Burton and Jorge Cabrera; the International Plant Exchange Network (IPEN) and other ABS standards in *ex situ* collections; and, private initiatives by organizations such as the International Federation of Pharmaceutical Manufacturers and Associations (IFPMA) and the Union for Ethical Biobanking (UEBT). Dr. D'Alessandro emphasized the role of government in encouraging the development and use of such tools, in particular through financial, technical and advisory support. Lessons learned included that:

- Voluntary guidelines and best practices are very useful for Governments as they provide practical guidance to users of genetic resources and associated traditional knowledge;
- Tools are generally welcomed among users and providers of genetic resources, however a limited number of applications of the tools in real ABS-projects exist. This may be because: they are voluntary and there may be no obligation, time or willingness to use them; ABS-projects are often non-linear and various partners are involved; tools might not fit perfectly to a specific sector; and, there may be a lack of clear procedures and competent authorities on the provider side;
- Simple tools that are consistent with national and international ABS-regulations are needed.

On Article 20 Dr. D'Alessandro suggested:

- The Article 20 statement 'each Party shall encourage, as appropriate, the development, update and use of voluntary codes of conduct, guidelines and best practices and/or standards in relation to access and benefit-sharing' is addressed to Parties and it is for each Party to determine how best to implement it.
- There can be value in Article 20 tools both in a top down sense, in the sense of explanatory guidelines describing and encouraging compliance with national regulations,

/...

as well as in a bottom up sense, through supporting tools developed by specific sectors and stakeholders, noting that governments could provide financial, technical, or advisory support to ensure consistency with national and international regulations.

- It is important that there is not duplication of similar tools, and there is updating in light of the Protocol where required.
- Where tools have a broader scope than the Protocol they should indicate which parts go beyond the Protocol.
- Article 20 tools can incorporate Article 19 model contractual clauses.
- The requirement to periodically take stock of the use of Article 20 tools could be an ongoing agenda item for future COP-MOPs of the Protocol, and could be included among monitoring and reporting obligations as required under Article 29 of the Protocol. In addition, tools consistent with the Protocol could be made available through the ABS Clearing-House.
- The COP-MOP might consider adopting or endorsing specific tools judged as being consistent with the Protocol, though noting that such tools would remain voluntary.

Dr. D'Alessandro also described processes toward ratification of the Protocol in Switzerland, and Switzerland's outlook on the implementation of the Protocol.

38. Ms. Lila Feisee of the Biotechnology Industry Organization (BIO) outlined the interests of BIO members in the CBD and Protocol, and described the specific experience of the Biotechnology Industry Organization and its members in developing and using the BIO Model Material Transfer Agreement and Guidelines (MTA). In this Ms. Feisee noted that though the BIO MTA was designed to be used consistently with any national regulations in place, it was also intended to be helpful to members by providing a workable starting point in those situations where they found there were no regulations to guide their conduct. Ms. Feisee described several examples of ABS in the biotechnology sector, noting both those that had both facilitated access and the flow of benefits to providers, as well as those that had characteristics that precluded research from proceeding. She also described the incentives needed for technology transfer in the biotechnology sector. On the implications of the experience of the biotechnology sector for the development of model clauses, particularly those about change of intent and benefit sharing, Ms. Feisee emphasized the length of time and complexity of the chain between access to a genetic resource and commercialization. In particular she noted that it is often universities or public research institutions that are the original user of genetic resources. In many cases, at that point the research may not yet be commercial or even be expected to become commercial. When the potential for commercialization becomes apparent spin off companies may be formed or there may be collaboration with small- and medium-sized enterprises to pursue commercial applications. There is also likely to be further research and development prior to market launch. These dynamics have particular implications for how issues such as change of intent and duration of agreement are dealt with in model approaches, and more broadly indicate that the specific working practices of the various sectors seeking access to genetic resources need to be taken into account.

39. Ms. Maria Julia Oliva of the Union for Ethical BioTrade discussed standards as a tool for putting ABS into practice. In particular, Ms. Oliva outlined the process of developing, implementing and reviewing the UEBT's Ethical BioTrade Standard. She noted that UEBT is a non-profit association with members from the private and public sectors, as well as civil society. As a member of ISEAL, UEBT follows rigorous procedures in developing and managing the Ethical BioTrade Standard. For example, standard-setting organizations must ensure that participation in standards consultation is open to all

interested parties and that participation and decision-making reflects a balance of interests among interested parties in the subject matter. The Ethical BioTrade Standard is based on seven principles: biodiversity conservation; sustainable use; fair and equitable benefit sharing; socio-economic sustainability; legal compliance; respect for the right of actors; and clarity about land tenure. Members of the standard abide by mandatory requirements and are subject to independent verification. The Ethical BioTrade Standard was revised in 2012 including to update it in the light of the Nagoya Protocol. The review involved consultations and took into account user experience. Ms. Oliva also described the role of standards in the broader context of evolving governance frameworks, noting the scope for voluntary approaches to build consensus, experience and guidance in topics with insufficient regulations. She suggested that standards can represent a bottom up approach that informs the development of public policy and in so doing can help to close the governance gap between international and national rules.

40. Mr. Oluwatobiloba Moody of the Traditional Knowledge Division of the World Intellectual Property Organization (WIPO) highlighted the work of WIPO relevant to intellectual property and genetic resources, noting the tools developed by WIPO that alongside other goals, support the development of ABS arrangements. In particular, Mr. Moody noted WIPO's Draft Intellectual Property Guidelines for Access to Genetic Resources and Equitable Sharing of the Benefits arising from their Utilization, and WIPO's database of biodiversity related ABS clauses. Mr. Moody also described the mandate of WIPO's Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, noting the text-based negotiations underway and the potential implications of these discussions for the range and treatment of subject matter that might be considered in the development of model contractual clauses.

41. Dr. Lily Rodriguez of the University of Bonn, and Secretary of the Working Group on ABS of the German Research Foundation's (DFG) Senate Commission on Biodiversity Research outlined the DFG Guidelines and experience for basic non-commercial research. In this context, she noted the significance of Article 8 of the Protocol which requires that each Party, in the development and implementation of its access and benefit-sharing legislation or regulatory requirements to create conditions to promote and encourage research which contributes to the conservation and sustainable use of biological diversity, particularly in developing countries, including through simplified measures on access for non-commercial research purposes, taking into account the need to address a change of intent for such research. Dr. Rodriguez described DFG noting that it is a private organization under public law, and has a duty to fund only basic research. It covers all branches of the sciences and humanities and facilitates international collaboration. The DFG has developed specific supplementary instructions for funding proposals concerning research projects within the scope of the CBD. These were designed to provide information about the CBD and ABS, to facilitate compliance during the proposal and implementation of DFG funded projects, and to promote transparency and trust. Following the guidelines is a condition to apply for research grants.

Dr. Rodriguez noted that a study conducted between May to September 2008 found that the guidelines applied to 14 projects, 7 of those involving collaborative research with developed countries, with 23 countries involved overall. Of these 5 had national ABS rules, 11 had focal points, 7 had a national ABS authority and 13 had a CBD focal point. These findings illustrated the difficulties that researchers can face in the absence of national regulations or contact points. In terms of current experience, Dr. Rodriguez noted: that there may be no contact information or procedures available for ABS; and that countries often demand researchers have a local counterpart. Particular challenges encountered by researchers included that:

- Information about country procedures and contacts frequently remains unclear;
- In many cases there are still no ABS regulations in operation;

- In many cases countries have already established other types of permits, which already cover at least part of ABS requirements and may become in the future certificate of compliance;
- Counterparts (researchers) may not be aware of any regulations that do exist.

To work through such challenges it was suggested that:

- It is important that researchers establish contacts and identify rules before developing a proposal for DFG;
- Monitoring is a key issue for possible future changes of intent;
- Checkpoints along the research chain are important for compliance and building trust;
- There is a need to develop clear information about country procedures and contacts;
- If there are no ABS regulations, those that exist in other places could be adapted and revised to regulate basic research;
- Researchers must cope with uncertainty, and must know that if there are no ABS obligations, other requirements may apply;
- Instead of applying contracts designed for commercial use, it may be possible to convert existing standards into ABS simplified rules;
- There would be value in raising awareness of the value to provider countries of engaging in basic research.

As a next step Dr. Rodriguez suggested it would be important to update the DFG Guidelines to reflect the Protocol, and in light of expected EU regulations, and to continue to monitor the use of the Guidelines. She further suggested that there were some practices that could be considered standard in the context of basic research, such as collaboration with local partners, and nomination of a local counterpart, the sharing of results with local partners and providers, and accessibility to databases. In addition, she suggested that to pursue facilitated access, it would be useful to work on defining benefits, to consider the role, content and structure of a certificate of compliance, to establish checkpoints for verifying the use of genetic resources such as publications, and to work on collaborative monitoring in user countries to detect change of intent in the use of samples.

42. Ms. China Williams of the Royal Botanic Gardens, Kew, described the pilot project for Botanic Gardens, outputs of which were the Principles on Access to Genetic Resources and Benefit-Sharing, alongside common policy guidelines and explanatory Text including model agreements and definitions. Ms. Williams noted that 22 Gardens had signed up to the Principles to date. The Principles provide a framework for individual gardens to work within, noting that it is left to institutions to develop their own policy on ABS. The principles provide guidance to inform the design of these specific tools and to guide their implementation. The Principles also demonstrate CBD commitment to partners and legislators. Ms. Williams described lessons learned through the pilot project, as well as by Kew Gardens in developing its own institutional toolkit. Ms. Williams observed that for institutions, the process of developing a policy in the context of agreed guidelines gives confidence both internally and externally, however it requires adequate time and investment. The experience of Kew and other gardens suggests that guidelines need to integrate a system for how and when they would be reviewed and/or updated, and should include assessment and monitoring criteria. Ms. Williams noted that model agreements and

/...

clauses can save time and simplify research. It is important to remember also though that models must remain negotiable as terms must be mutually agreed. She suggested that there is a danger of using model agreements too automatically, leading to a failure to check or record terms. There may also be complications in the event of inconsistency between two different models, with implications for the extent to which a proliferation of models is advisable.

Discussion on Article 20

43. Participants discussed the themes emerging from the presentations on Article 20. These were summarized at the conclusion of the meeting (see section H ‘Summary of Discussions’).

G. PANEL DISCUSSION

44. A panel was convened and tasked to identify and consider issues and themes emerging during the meeting.

45. Dr. Seizo Sumida of the Japan Bioindustry Association (JBA) described the Ministry of Economy, Trade and Industry of Japan (METI) and JBA Guidelines on Access to Genetic Resources for users in Japan, as well as the JBA’s other ABS tools, including information exchanges, specialised ABS website (<http://mabs.jp/>) and its ABS help desk. These tools were developed on the basis of lessons learned by Japan from early awareness raising activities. These activities demonstrated that explaining ABS principles to users was not enough. They needed practical tools specific to the needs of their sector. The Guidelines represent a bottom up approach, however as they are published by government, Dr. Sumida noted that Japanese companies take them very seriously. Dr. Sumida noted that the Guidelines instruct users to abide by the laws of the provider country and establish a contract with the provider. In the case no relevant law is in place in that country, they suggest to establish a contract, bearing in mind other existing laws and the principles of the CBD and Bonn Guidelines. In 2012, the Guidelines were updated in light of the Nagoya Protocol. The implicit understanding of users in Japan is that as the Guidelines are authored by government, if they encounter obstacles in accessing materials from other countries during the use of these tools, the Japanese government (METI) will assist and provide advice.

Dr. Sumida made three further observations based on themes emerging during discussion, as follows:

- Voluntary guidelines in combination with best practices tools are very useful and should be promoted by the CBD. The goal, as mentioned by other presenters, must be to narrow the gap between theory and practice. While model tools are important, however, they are not all that is required and there must continue to be resources to support other needs. Among these other needs is situation-specific advice needed by users and providers on an agreement-by-agreement basis.
- The role of collections institutions and biological resource centres is very important.
- There is a need to support the plant-breeding sector to develop a best practice as they are in a difficult situation with the simultaneous relevance of different regimes, with the CBD being based on bilateral principles, and ITPGRFA and the International Union for the Protection of New Varieties of Plants (UPOV) each with a different approach. A best practice in the plant-breeding sector, Dr. Sumida suggested, could be developed independent of a north/south context, given the importance of plant breeding to countries such as India and Brazil.

46. Dr. Kabir Bavikatte of Natural Justice, based on the themes emerging from discussion, reflected on the ‘why’, ‘what’, ‘who’, ‘when’ and ‘how’ of model clauses. He noted that the ‘why’ of model clauses is that they support certainty, enforceability, efficiency and standardization. The ‘who’ of model

/...

clauses includes States, researchers, individuals, communities, companies, sectors and importers. The ‘what’ of model clauses evokes a balancing act between flexibility and standardization, including across sectors. The ‘when’ of model clauses incorporates various stages including discovery, the stage of capturing value, commercialization, derivatives and products. The ‘when’ of Article 20 focuses on a pre-legal framework, and legal framework, with tools and guidelines to assist implementation relevant in the pre-legal framework stage, including to inform the development of a legal framework, and to give effect to it once developed. The ‘how’ includes voluntary standards, incentivized standards and enforceable standards. Finally, Mr. Bavikatte noted issues of competing standards, suggesting there may both be Nagoya plus, Nagoya minus and filling the gap standards.

47. Ms. Larissa Lima Costa of the Ministry of External Relations, Brazil, reflected on lessons learned from the information presented over the course of the meeting; as well as from the use of model contractual clauses, codes of conduct, guidelines, best practices and standards. Ms. Lima Costa offered observations relating to the themes emerging, as captured in the summary of discussions (see section H). Ms. Lima Costa further presented ideas for this area in the future and outlined possible next steps on Articles 19 and 20 of the Nagoya Protocol. Suggested next steps included further consideration by experts and Parties of:

- The meaning of Article 19 including whether it is relevant to any contractual clause or only sectoral and cross-sectoral clauses;
- The role of COP-MOP in taking stock of model contractual clauses submitted by Parties;
- The need for further clarity around what is expected from Parties in terms of implementation of Article 19, particularly in cases where sectors are not active in developing model tools;
- The value of further analysis of Article 19 in the context of other Articles of the Protocol, including Articles 5, 6(g), 8, 9, 12, 14 and 20;
- Consideration as to whether the information submitted by Parties to the SCBD on the models/tools developed by sectors and indigenous and local communities within their jurisdiction implies its validation by the competent authorities.

48. Mr. Mark Taylor of the Australian Government Department of Sustainability, Environment, Water, Population and Communities, described Australia’s experience, noting its permit system and the limited use agreement for non-commercial use. The limited use agreement represents a simplified process for non-commercial research as encouraged by Article 8(a) of the Protocol. A more comprehensive agreement allowing unrestricted use and offering a broader range of benefits is only negotiated where warranted by commercial interest. Mr. Taylor noted some lessons learned during revision of the Australian model agreements including that it had been decided to rework a termination clause that provided for intellectual property sanctions against the user, given that this compromised certainty and became unworkable. The agreement was reworked to represent more of a partnership based than punitive approach. Mr. Taylor also noted that in respect of royalty rates and revenue, while guidance on expectations could be very helpful, flexibility to allow for future developments and innovation tends to be more important. When associated traditional knowledge is relevant to the research process, Mr Taylor noted: that current requirements are set in legislation; that governments are not party to traditional knowledge agreements; that disclosure of intended use is required; and, that use of traditional knowledge must be negotiated according to a code of conduct. Implementing the associated traditional knowledge provisions of the Protocol will involve consultation on implementation, ensuring that in the Australian model traditional knowledge is accessed with PIC and on the basis of mutually agreed terms. He suggested that codes of conduct and model clauses will play an important role in this context.

Reflecting on themes and lessons emerging from the meeting, Mr. Taylor suggested that model contracts support clarity and simplicity, that there is a tension between the value of diversity versus standardization, and that although a single multilateral model is likely to be very difficult, a simple model can be achieved. Key elements are simplicity, flexibility and workable practicality. Guidelines and codes of conduct are complementary to implementing regulation and can be particularly relevant to implementation of requirements around associated traditional knowledge. Such guidelines and codes of conduct should be consistent and supportive and not confusing and could be a bridge between policy and practice. Their capacity building role was valuable, and they could support sectoral engagement, networks and peer support. They also may have a role in signalling the development of international norms of ethical research and ABS.

49. Ms. Anke van den Hurk emphasised several themes emerging, including the need to remember the value of innovation as a benefit to society a whole, and to keep the flow of genetic resources occurring. In the specific context of the plant-breeding sector, it was important to note that a number of regimes and processes are in place – the ITPGRFA, the FAO Commission on Genetic Resources for Food and Agriculture, the Nagoya Protocol and the UPOV agreement. In the context of ABS under the CBD and Protocol, Ms. van den Hurk noted it has been hard to get agreements in place. She suggested that model contractual clauses and Article 20 tools both support each other and provide information to users and providers and it is important that the models developed by users and providers are in sync. Users require clear rules and processes, and models and procedures need to be cognizant of the realities of the needs and working practices of different sectors, noting that needs across sectors differ. It is also important in the design of ABS processes and models that the needs of small and medium enterprises, including start-ups in developing countries, are considered, as they have fewer resources than larger companies. The ABS system, she suggested, is one that should work for all players. She further noted that the distinction between commercial and basic research is often complex, and to the extent possible, users need to understand the implications of commercialization at the stage of access. The importance of managing the expectations of providers in terms of the realistic level of benefits in various sectoral contexts was also emphasized.

50. Participants asked questions of the panellists and further discussed the themes emerging. These were summarized at the conclusion of the meeting (see section H).

H. SUMMARY OF DISCUSSIONS

51. Ms. Catherine Monagle summarised the discussion that had taken place during the meeting and invited feedback on this summary. Following further discussion among participants, reflections emerging from the meeting included the following observations, conclusions and recommendations. Note that these reflections are not intended to represent a consensus view but rather a compilation of themes emerging.

The Role of Articles 19 and 20 in Implementation of the Nagoya Protocol

- a. Model contractual clauses, codes of conduct, guidelines, best practice and standards within the scope of Articles 19 and 20 are useful and should be promoted, given that they narrow the gap between regulation and practice. They promote consistency, legal certainty, transparency, traceability and may reduce transaction costs.
- b. Article 19 and 20 tools, while very important, are not alone sufficient. Broader capacity and systems are required for effective implementation of the Nagoya Protocol.

Parties' Obligations in Implementing Articles 19 and 20

- c. Parties have questions around what the terminology of Articles 19 and 20 actually requires of them. In particular, clarification is sought around what it means 'to encourage, develop,

/...

update and use' Article 19 and 20 tools. For Article 19, clarification is sought around what it means in the context of both 'sectoral and cross-sectoral model contractual clauses'. Clarification is also sought as to what 'periodically take stock of the use of' tools requires, and how the discussion around adoption of specific tools under Article 20 will proceed. Clarification is also sought on whether submission to the SBCD by Parties implies the validation of tools by competent authorities.

- d. Model contractual clauses do not substitute for other strategies to build capacity of users and providers to negotiate ABS agreements.

Articles 19 and 20 in the Context of the CBD and Protocol

- e. It is important that the potential role of Article 19 and 20 tools in practically supporting the CBD objectives on conservation and sustainable use be fully realized, including through implementation of Article 9 of the Protocol requiring that Parties shall encourage users and providers to direct benefits arising from the utilization of genetic resources towards the conservation of biological diversity and the sustainable use of its components.
- f. There would be value in exploring further how model tools can encourage parties to agreements to integrate options in contracts that support national priorities of provider countries for conservation and sustainable use. That might include, for example, exploring collaborative research agreements with providing country research institutions that support national priorities for conservation and sustainable use.
- g. Participants noted that facilitated access for non-commercial research as provided for by Article 8 of the Protocol is still a concern and that detailed consideration of ways to support such facilitated access might be included in future discussions, noting that there are several tools concerning this sector.
- h. At the same time as Parties are implementing Articles 19 and 20, they are also focusing on several other requirements of the Protocol. It is important that model tools are designed to ensure that they support implementation of the Protocol as a whole.
- i. Given that the effectiveness of a contract-based approach is reliant on enforceability, it would be important to focus on enforceability and compliance within model approaches.
- j. Further attention could be given by Parties as to how best to encourage model clauses to be developed by indigenous and local communities in the context of benefit sharing arising from the utilization of traditional knowledge associated with genetic resources, as provided for under Article 12 of the Protocol.

Collecting, Analyzing, and Communicating Information on Articles 19 and 20

- k. There would be value in further collection and sharing of information on the experience of users and providers with Article 19 and 20 tools.
- l. The active, ongoing and systematic collection and analysis of Article 19 model contractual clauses and Article 20 tools is encouraged, including to identify common elements and differences, in addition to the submission of tools by Parties to the ABS Clearing-House.
- m. There are sources of information on model tools and actual agreements that are not currently collected in a systematic manner nor included in any international database. The perspective of certain sectors may be missing.

- n. With more active and ongoing collection and analysis, model tools used across sectors could be compared more systematically over time, including to identify and monitor use of common elements. This would assist in furthering understanding of how much commonality there is across both model tools and actual contracts. It will also assist Parties with the periodic stocktaking and updating requirements of the Protocol.
- o. Methods for the systematic analysis of template and other contracts used, for example, in the legal profession might be useful in informing the approach to ongoing analysis of model and actual agreements. For example, the use of web based tools for the annotation of contracts and record keeping on the use of particular contractual clauses may be helpful in the context of access and benefit sharing.
- p. There is support for ensuring the databases of WIPO and the CBD, including the ABS Clearing-House are mutually supportive. There would be value in both institutions considering how further synergies between the two tools could be practically achieved.
- q. In the context of technology transfer much can be learned from standard operating procedures and industry best practices, particularly in areas such as licencing of intellectual property, both in and outside the ABS context.
- r. There would be value in further reflecting upon how Article 19 and 20 tools can enhance reporting and record keeping for the implementation of Articles 19 and 20. For example, it would be useful for sectors to keep records of all executed contracts based on the sector's model tools including records of any legal disputes concerning certain provisions.
- s. Methods and triggers for monitoring and updating model tools might be built into model tools and this should be encouraged.

Trends in use and user experience

- t. Experience is that for some Parties the number of access permissions being sought, particularly for non-commercial research, is high, and it is noticeable that in many of these applications users have been unsure of the trigger for the transition from non-commercial to commercial intent. Guidance on these issues in model tools would be helpful, noting that certain existing models tools have offered ways of suggesting where this line is reached. Information sharing across countries and sectors on how different types of model tools can articulate and provide guidance to users and providers on this issue would be useful.
- u. The development and dissemination of detailed case studies examining research practices and user needs within different sectors would be valuable.
- v. The distinction between user and provider countries is not always fixed or helpful – a country can be both a user and provider and this tendency may become even more apparent over time. For example, the research sector within countries that are often viewed as provider countries may itself be a user of genetic resources. Model tools need to be able to reflect this dynamic.
- w. Users and providers are not the only actors for whom model tools under Article 20 can be useful. For example, patent examiners and other groups with a role in monitoring and enforcing ABS arrangements can also often benefit from the capacity building assistance model tools provide.
- x. The role of *ex situ* collections as access providers is very important in many sectors. The

range of model tools developed reflect this dynamic and further tools might be developed with this in mind.

Diversity and standardisation

- y. There are a range of views on the advantages and disadvantages of standard and consistent model Article 19 and 20 tools versus diverse tools within and across sectors and countries. While there is one view that a more consistent approach may support certainty, lower transaction costs and even out discrepancies in bargaining power between parties, there is equally concern that different sectors have different requirements and operate in different contexts and that model tools must reflect the diversity of national approaches and legislative regimes. To respond to these different contexts, there is a view that continued space for the development and use of a diversity of Article 19 and 20 tools is important. The potential for context or sector specific standardization could be considered. Greater standardization may be helpful in some sectors and not in others, and detailed analysis of this issue may be valuable.
- z. There are a range of issues dealt with in model contractual clauses that tend to be dealt with in a similar way across sectors. Certain types of clauses may be more amenable to standardization than others and systematic analysis of this issue may be helpful. Greater sharing of information across sectors may be valuable to this end. Analysis could be directed toward considering the common elements of both Article 19 and 20 tools to establish how much diversity there is in practice. It may not be possible that a one size fits all system is appropriate, however a one size system with adaptable straps tailored to different needs might be more appropriate.
- aa. Under Article 20 of the Protocol, Parties are to consider the adoption of specific codes of conduct, guidelines and best practices and/or standards. This provision of the Protocol could be operationalized in a number of different ways, including that such specific tools adopted could remain voluntary, but represent verification that a given tool is in compliance with the Protocol. While the adoption of such tools could support standardisation, this would not be inevitable as a range of specific tools could be adopted representing a range of sectoral contexts.
- bb. The proliferation of models creates some practical challenges, for example where two institutions, each having their own model, attempt to form an agreement between them. The existence of different, competing models may be challenging to negotiation processes.

Lessons and Questions from User Experience

- cc. The discussion reflected on the appropriate locus of ABS compliance given the way research works in some sectors, and the long chain of partners between access, commercialization and utilization. Equally, the dangers of too much responsibility on providing country institutions at the expense of user obligations and due diligence was identified. These issues might have particular implications for the way model tools define processes for changes of intent from non-commercial to commercial intent, among other issues, noting that Article 5(1) of the Protocol specifically requires that benefits arising from the utilization of genetic resources as well as subsequent applications and commercialization shall be shared in a fair and equitable way. Change of intent is not always straightforward usually takes place over a long timeline and involving many different and new actors. Parties to agreements often need support in understanding when a change of intent is triggered, and when and how to deal with that change.

- dd. Simplicity and practicality are key, and existing examples show how effectiveness, simplicity, practicality and consistency with the Convention and Protocol can be achieved.
- ee. Standards may have a slightly different role in the implementation of ABS implementation as compared to guidelines, codes of conduct and best practices, and the significance of these differences for the international governance of ABS arrangements might be further explored. There may be value in particular of further reflection on the role of standards in a post-Nagoya world.
- ff. Model tools should not just be used automatically, but as tools that help parties develop a shared and comprehensive understanding of the terms of an agreement and that build trust.
- gg. There would be value in further exploring how model contractual clauses can best support the correct description and identification of materials, best support compliance, and take into account the needs of industry in protecting confidentiality and commercially sensitive information.
- hh. The implications of limited duration agreements for compliance, and how to define obligations after termination might be further considered.
- ii. It is important that model contracts support legal certainty and transparency. It is also important that the transaction cost and level of administrative effort is appropriate in the particular circumstance.
- jj. Non-monetary benefits are very important as they are often immediate, direct and certain, as opposed to the potentially high value but very uncertain monetary benefits. Model tools should encourage users and providers to think about the range of non-monetary benefits that might be considered.
- kk. Further discussion of options for technology transfer, including in the context of non-commercial research, and how these options might be reflected in model tools would be valuable.
- ll. Noting that legal certainty plays a critical role in encouraging investment in natural products based research and development, further reflection on how tools falling within the scope of Articles 19 and 20, and the implementation of Articles 19 and 20 can best support such certainty would be useful.
- mm. Guidelines and other tools can play an important awareness raising role in sectors whose activities are relevant to ABS but who currently have very little awareness of their obligations.
- nn. Recognizing the diversity of legal systems, questions remain as to how to address any possible inconsistency of model contractual clauses with national legislation.

I. CLOSURE OF THE MEETING

52. The Co-Chairs of the ICNP, Ms. Janet Lowe of New Zealand and Mr. Fernando Casas of Colombia, thanked the Government of Japan and the United Nations University for facilitating an extremely productive and frank discussion, and noted that the report of the meeting would be a valuable input to ICNP-3. The Co-Chairs welcomed the range of sectors participating, the focus on both developed and developing country perspectives, and the strong scientific contribution to the meeting. By way of concluding observations the Co-Chairs stressed that Articles 19 and 20 of the Protocol, as much as they

/...

focus on contracts between the users and providers of genetic resources, must be viewed through the prism of the objectives of the Protocol, and, more broadly, the three objectives of the CBD. The Co-Chairs welcomed that the discussion had situated Articles 19 and 20 within this context. The Co-Chairs further noted that the Nagoya Protocol operates in a changed environment, with many scientific developments and new business models emerging since the adoption of the CBD. When negotiated, it was implicit, insofar as Article 19 talks about sectoral and cross-sectoral model contractual clauses, that there would be some areas of commonality across different sectors and that there would be value, in terms of having a workable, simple, easily understandable and legally sound and reliable regime, for these sectors to come together in discussion. The Co-Chairs identified particular issues for which the support of model clauses could be particularly useful. These issues included change of intent in the use of genetic resources or associated traditional knowledge, how issues of third party and subsequent users could be dealt with, and how, in light of the aforementioned issues, the duration of contracts should be defined. They also noted the role of model contractual clauses in supporting compliance under Article 18 by encouraging parties to a contract to be explicit about choice of law or jurisdiction.

53. Closing remarks were offered by the chair, Dr. Atsushi Suginaka. Dr. Suginaka thanked all participants for their contribution, thanked the UNU-IAS and conveyed his great appreciation to the SBCD. Dr. Suginaka welcomed how the meeting had encouraged further understanding of the role of Articles 19 and 20 in filling the gap between the governmental regulation and private sector practices, and further noted how the promotion of model contracts and private norms itself contributes to awareness raising and capacity building. Dr. Suginaka noted that it seems there is no one size fits all and that there are different needs among sectors, among regions and stakeholders. By increasing common understandings of model contracts and voluntary norms however, and by encouraging a deeper knowledge of differences among sectors, he noted we can implement the Nagoya Protocol more effectively. For this we need to continue discussion within the ICNP and COP-MOP. Dr. Suginaka undertook to circulate the meeting report and invite all participants to comment. The Government of Japan in cooperation with the UNU would submit the results to the ICNP-3.
