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Views of Japan Bioindustry Association (JBA) on the need for and modalities of a global multilateral benefit-sharing mechanism in Article 10 of the Nagoya Protocol

Dear Braulio Ferreira de Souza Dias
Executive Secretary of Convention of Biological Diversity

Concerning the notification 2015-049 of 5 May 2015, Japan Bioindustry Association (JBA) greatly appreciates the opportunity for submission of our views on the need for and modalities of a global multilateral benefit-sharing mechanism (hereafter GMBSM), as a stakeholder in relation to the Nagoya Protocol (hereafter the Protocol).

We would be most grateful if the Expert Meeting on Article 10 of the Nagoya Protocol would take into consideration our views given below, in the process of drafting its report for the second meeting of the Conference of the Parties serving as the meeting of the Parties to the Nagoya Protocol (COP-MOP2).

The views of Japan Bioindustry Association (JBA):

(i) Situations which may support the need for a global multilateral benefit-sharing mechanism that are not covered under the bilateral approach.

JBA's view:

On the basis of the reasons given below, Japan Bioindustry Association (JBA) has so far been unable to identify concrete situations where a GMBSM is necessary:

1. Premises for the consideration of Article 10

(1) The Parties' obligation under Article 10 is procedural.

Article 10 indicates that Parties shall consider the need for a GMBSM, and if such a need is identified, then they shall consider its modalities, meaning that Article 10 provides only the procedural obligation to the Parties.

(2) The Protocol and the Convention on Biological Diversity (CBD) are not retroactive.

The consideration of Article 10 must be conducted in a manner consistent with the legal framework of the Protocol and with the provisions of all the relevant Articles of the Protocol.

According to Article 28 of the Vienna Convention on the Law of Treaties, "unless a different intention appears from the treaty itself, its provisions do not bind a party in relation to any act that took place before the date of the entry into force of the treaty".

There had been discussions in the course of pre-Protocol negotiation concerning whether the Protocol should be retroactive or not. However, the assertions about "retroactivity" and "non-retroactivity" were both deleted from the draft text of the Protocol, and there is no mentioning of retroactivity in the Protocol. Therefore, based on Article 28 of the Vienna Convention on the Law

of Treaties, the Protocol is not retroactive.

(3) The Protocol does not apply to the genetic resources that are beyond "the Limits of National Jurisdiction"

Article 3 of the Protocol stipulates that "the Protocol shall apply to the genetic resources within the scope of Article 15 of the CBD". This means that the Protocol does not apply to the genetic resources that are beyond the limits of national jurisdiction.

Furthermore, according to Article 4 (Relationship with International Agreements and Instruments), the Protocol is compatible with other international agreements and instruments, and there is no hierarchy between them. With regard to the genetic resources that are beyond the limits of national jurisdiction, other international agreements and instruments (for example, the UN Convention on the Law of the Sea, and Antarctic Treaty) have been dealing with them within the framework of their respective systems.

2. Consideration of the need for a GMBSM

2.1 Genetic resources and traditional knowledge associated with genetic resources that occur in transboundary situations

(1) Situations where the same genetic resources or traditional knowledge associated with genetic resources occur *in-situ* within the territory of more than one Party

In situations where genetic resources or traditional knowledge associated with genetic resources are found *in-situ* within the territory of a Party, these resources shall be subject to the sovereign rights of that Party (Article 6 and Article 7). If any problem arises among more than one Party involved in instances where the same genetic resources or traditional knowledge associated with genetic resources occur *in-situ* in transboundary situations, it is up to the individual Parties involved to decide whether to cooperate, even though Article 11 provides a useful basis for an alternative approach.

(2) Situations where the same genetic resources or traditional knowledge associated with genetic resources are found *ex-situ* in different counties

Such instances can be conceived where genetic resources or traditional knowledge associated with genetic resources of a Party are taken out of the country after the entry into force of the Protocol, and placed in *ex-situ* conditions in different Parties.

Domestic measures of the providing Party for access to genetic resources or traditional knowledge associated with genetic resources are stipulated by Article 6 (Access to Genetic Resources) and Article 7 (Access to Traditional Knowledge Associated with Genetic Resources). Furthermore, the user Parties have obligation to take measures for compliance with domestic legislation or regulatory requirements of providing Parties on the basis of Article 15 and Article 16. Article 17 and Article 18 stipulate measures to support such compliance. Because all these provisions cover the above-mentioned *ex-situ* instances, there is no need to create a new GMBSM for them.

2.2 Situations where it is not possible to grant or obtain prior informed consent

What are the cases in which "it is not possible to grant or obtain prior informed consent"?

The following instances do not fall in the cases in which "it is not possible to grant or obtain prior informed consent":

(1) The cases where genetic resources or traditional knowledge associated with genetic

resources were obtained before the entry into force of the Protocol.
The reason: the Protocol is not retroactive (see 1(2)).

(2) The cases where genetic resources or traditional knowledge associated with genetic resources are beyond the limits of national jurisdiction.
The reason: these cases are outside the scope of the Protocol (see 1(3)).

(3) The cases where providing Parties have not put in place legislative or administrative measures in compliance with the provisions of the Protocol.
The reason: these cases should be considered as a case where capacity building is necessary, as provided by Article 22 (Capacity).

(4) The cases where genetic resources or traditional knowledge associated with genetic resources are obtained from a Party that does not require prior informed consent.
The reason: it is the sovereign right of the Party to choose that option (Article 6 and Article 7).

(ii) Possible modalities for a global multilateral benefit-sharing mechanism as well as information regarding the implications of different scenarios on these modalities.

JBA's view:
On the basis of our views for (i) given above, Japan Bioindustry Association (JBA) does not think that the consideration on possible modalities for GMBSM is necessary.

(iii) The areas requiring further consideration, as identified in paragraph 23 of the report of the Expert Meeting on Article 10 of the Nagoya Protocol. The areas are as follows (see document UNEP/CBD/ICNP/3/5):

(a) Whether or not there is a need for a GMBSM;

JBA's view:
Please refer to **our views** for (i).

(b) Whether there is sufficient experience with implementation of the Protocol to determine whether such a need exists;

JBA's view:
Please refer to **our views** for (i) that have been derived from logical consideration based on the legal framework of the Protocol with the provisions of all the relevant Articles of the Protocol kept in mind. It is difficult to anticipate a need for a GMBSM in the foreseeable future.

(c) Whether the utilization of genetic resources without PIC would entail benefit-sharing obligations that could be met through a GMBSM;

JBA's view:
Please refer to **our views** for (i).

(d) Whether a Party's decision not to require PIC (e.g. under Art. 6(1)) or to waive PIC (e.g. under Art. 8) can constitute situations for which it is not possible to grant or

obtain PIC in the context of Article 10;

JBA's view:
Please refer to **our views** for (i).

(e) Whether benefit-sharing requirements are waived when a Party has decided not to require PIC or has waived PIC;

JBA's view:
Please refer to **our views** for (i). The proposed case is a matter to be examined domestically by the Party concerned.

(f) Whether there is no requirement for benefit-sharing when mutually agreed terms are not required or have not been established;

JBA's view:
The proposed case is a matter to be examined domestically by the Party or entity concerned. The Bonn Guidelines may provide useful guidance for them.

(g) Whether the absence of ABS legislation or regulatory requirements in a Party due to lack of capacity or lack of governance means that PIC for access to genetic resources is not required and there is no obligation to share benefits. In the context of Article 10, whether such instances would constitute situations for which it is not possible to grant or obtain PIC;

JBA's view:
Please refer to **our view** under (i).2.2(3) on page 3. This situation should be considered as a case where capacity building is necessary, as provided for by Article 22 (Capacity).

(h) Whether the absence of measures in a Party to implement Article 7 means that PIC for access to traditional knowledge associated with genetic resources is not required and there is no obligation to share benefits. In the context of Article 10, whether such instances would constitute situations for which it is not possible to grant or obtain PIC;

JBA's view:
Please refer to **our view** under (i).2.2(3) on page 3. This situation should be considered as a case where capacity building is necessary, as provided for by Article 22 (Capacity).

(i) Whether a genetic resource that is found in more than one Party constitutes a transboundary situation in the language of Article 10 (even if it is possible to identify the source of the genetic resource) or whether the bilateral approach should be applied if a genetic resource is found in more than one Party and it is possible to identify the source of the genetic resource. In the latter case, whether the bilateral approach or a GMBSM could be fair and equitable;

JBA's view:
Please refer to **our view** under (i).2.1(1) on page 2.

(j) Whether traditional knowledge associated with a genetic resource that is found in more than one Party constitutes a transboundary situation in the language of Article 10 (even if it is possible to identify the source of the genetic resource) or whether the bilateral approach should be applied if traditional knowledge associated with a genetic resource is found in more than one Party and it is possible to identify the source of the genetic resource. In the latter case, whether the bilateral approach or a GMBSM could be fair and equitable;

JBA's view:
Please refer to **our view** under (i).2.1(1) on page 2.

(k) Whether Article 11 is sufficient to respond to transboundary situations;

JBA's view:
Article 11 is sufficient to provide a useful basis to respond to transboundary situations. If any problem arises among more than one Party involved in instances where the same genetic resources or traditional knowledge associated with genetic resources occur *in-situ* in transboundary situations, it should be up to the endeavor and wisdom of the Parties concerned to resolve the problem on the basis of Article 11.

(l) Whether a GMBSM should address the sharing of benefits arising from the utilization of:
(i) Genetic resources in *ex situ* collections in relation to transboundary situations or for which it is not possible to grant or obtain PIC;
(ii) Genetic resources in ex situ collections used for purposes for which PIC was not granted and for which it is not possible to grant or obtain PIC;
(iii) Genetic resources in areas beyond national jurisdiction or whether this issue falls within the competence of the United Nations General Assembly;
(iv) Genetic resources in the Antarctic Treaty area;
(v) Traditional knowledge associated with genetic resources that is publicly available and where the holders of such traditional knowledge cannot be identified or for which it is not possible to grant or obtain PIC.

JBA's view:
Please refer to **our views** under (i) on pages 1- 3.

Regarding question (l) (i) for the case of genetic resources in *ex situ* collections, refer to **our views** under (i) 2.1(2) on page 2.

Regarding question (l) (ii) for the case of genetic resources in *ex situ* collections, refer to all of **our views** under (i) on pages 1 - 3.

Regarding question (l) (iii) for the case of genetic resources in areas beyond national jurisdiction,

refer to **our views** under (i) 1(3) on page 2.

Regarding question (l) (iv) for the case of genetic resources in the Antarctic Treaty area, refer to **our views** under (i) 1(3) on page 2.

Regarding question (l) (v) for the case of traditional knowledge associated with genetic resources that is publicly available and where the holders of such traditional knowledge cannot be identified, Japan Bioindustry Association (JBA) is of the view that such traditional knowledge is out of the scope of the Protocol.

Sincerely yours,

Yoshiaki TSUKAMOTO
Executive Director
Japan Bioindustry Association