Comments from Japan

The discussion on the need for and modalities of a global multilateral benefit-sharing mechanism (GMBSM) should aim at a result acceptable for all stakeholders including the users of genetic resources and traditional knowledge associated with genetic resources. In addition, it could be desirable for all stakeholders that this discussion proceeds in a manner that induces more constructive commitments by the user side to the fair and equitable benefit-sharing system established by the Nagoya Protocol, paying profound attention to the influence of the discussion itself. It is also important that the scope of discussion in other fora should not be duplicated under the Protocol.

1. Situations which may support the need for a global multilateral benefit-sharing mechanism that are not covered under the bilateral approach;
* It is important to consider the need for GMBSM in accordance with the Convention and the Protocol, and that GMBSM would be managed as a form in which benefits shared through this mechanism should be used to support the conservation of biological diversity and the sustainable use of its components directly.
* The benefit-sharing arising from the use of these genetic resources in areas beyond national jurisdiction has been discussed in other fora, such as through the process to develop an international legally binding instrument under UNCLOS on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction (BBNJ) as decided in A/RES/69/292. For the purposes of utilizing limited resources as efficient as possible, the discussion under the Nagoya Protocol should not preempt the discussion under the BBNJ process.
* Article 11 of the Protocol is placed to promote transboundary cooperation in which Parties to amicably consult with a view to reaching mutually satisfactory solution to the issues in a transboundary situation. The GMBSM should not preclude Parties’ efforts on genetic resources in transboundary situations, and therefore empirical knowledge of application of transboundary cooperation should be respected as implementation of Article 11 of the Protocol.

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

* For productive discussion over possible modalities of a GMBSM, it could be reasonable approach to give high priority to identifying gaps which are not covered under existing mechanisms and with this in mind to construct the discussion based on an understanding clearly shared among stakeholders regarding the need for a GMBSM.
* The possible modalities of GMBSM should not impose burden only to users of genetic resources and traditional knowledge associated with genetic resources. The mechanism should bring “win-win” effects to both users and providers, and support the conservation of biological diversity and the sustainable use of its components in the most cost-effective manner.
* There is a concern that if GMBSM requires benefit-sharing from the genetic resources or traditional knowledge associated with genetic resources accessed before its establishment, those who have accessed some genetic resources before the establishment of a GMBSM would face a burden unpredictable at the moment of access. Obligations should not be applied retroactively.

(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.

1. Whether or not there is a need for a GMBSM;
* Bearing in mind that the Expert Meeting on Article 10 of the Nagoya Protocol reported “a GMBSM is not intended to replace the bilateral nature of the Nagoya Protocol but to supplement it” as a potential area of common understanding, the need for a GMBSM should be judged based on sufficient experience of bilateral approach of benefit-sharing through the implementation of the Protocol.

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

* It is difficult to say there is sufficient experience under such circumstances that there is no information on actual benefit-sharing case registered in the clearing-house after the entry into force of the Protocol.

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

* We should not prejudge that the utilization of genetic resources without PIC always fall under the scope of GMBSM. The situations which GMBSM would address should be limited within the situations where it is essentially required. Furthermore, Parties have not yet reached any conclusion whether GMBSM is either compulsory or voluntary mechanism.

(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;

* If a Party made a decision not to require PIC or to waive PIC, we can construe that Party did not exercise intentionally its sovereign right to grant PIC, therefore the case is not covered under Article 10.

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

* Without prejudice to the existence of PIC, benefits should be shared upon mutually agreed terms in accordance with Article 15 of the Convention and Article 5 of the Protocol. That principle should be reminded in the consideration of the need for and modalities of GMBSM.

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

* Without prejudice to the existence of PIC, benefits should be shared upon mutually agreed terms in accordance with Article 15 of the Convention and Article 5 of the Protocol. That principle should be reminded in the consideration of the need for and modalities of GMBSM.

 (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;

* With a view to realizing mutually beneficial cooperative relationship between users and providers, we share the importance of capacity-building for those countries. GMBSM is not a sole solution.

 (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;

* Without prejudice to the existence of PIC, benefits should be shared upon mutually agreed terms in accordance with Article 15 of the Convention and Article 5 of the Protocol. That principle should be reminded in the consideration of the need for and modalities of GMBSM.
1. 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;
* It is necessary to clarify how and by what taxonomy the identity of a certain genetic resource is decided, taking into account the feasibility of the actual operation.
* It could be brought up as an issue whether a Party which contribute to more for the conservation of biological diversity and the sustainable use of its components should receive more stake of benefit-sharing.

(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;

* If the benefit-sharing arising from traditional knowledge associated with genetic resources found in more than one Party is pursued through GMBSM, clear and internationally shared definition of traditional knowledge associated with genetic resources would be required.
* It is not reasonable that the fact the mere existence of the same traditional knowledge in more than one country results in more burden for benefit-sharing.

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

* Article 11 of the Protocol is placed to promote transboundary cooperation in which Parties amicably consult with a view to reaching mutually satisfactory solution to the issues in a transboundary situation. The GMBSM should not preclude Parties efforts on genetic resources in transboundary situations, and therefore we should respect empirical knowledge of application of transboundary cooperation as implementation of the 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;

* There is a concern that if GMBSM requires benefit-sharing from the genetic resources or traditional knowledge associated with genetic resources accessed before its establishment, those who have accessed some genetic resources before the establishment of a GMBSM would face a burden unpredictable at the moment of access. Obligations should not be applied retroactively.

(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;

* In general, it should be solved by the bilateral approach with the stipulation in the mutually agreed terms. If there is any possibility that the bilateral approach does not work, such situation should be identified through the experiences of implementation of the bilateral approach.

(iii) Genetic resources in areas beyond national jurisdiction or whether this issue falls within the competence of the United Nations General Assembly;

* For the purposes of utilizing limited resources as efficient as possible, the discussion under the Nagoya Protocol should not preempt the discussion under the BBNJ process.

(iv) Genetic resources in the Antarctic Treaty area;

* For the purposes of utilizing limited resources as efficient as possible, the discussion under the Nagoya Protocol should not preempt the discussion under Antarctic Treaty System. If necessary, reviewing the discussion there so far may give useful suggestions.

(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.

* If the benefit-sharing arising from traditional knowledge associated with genetic resources is pursued through GMBSM, clear and internationally shared definition of traditional knowledge associated with genetic resources would be required. Regarding the point of “publicly available”, there should be some threshold which distinguishes the traditional knowledge associated with genetic resources appropriate as the scope of GMBSM from just useful information anyone knows.