

15 January 2018

**Views and information of Japan Bioindustry Association (JBA)
further to decision NP-2/10 on Article 10 of the Nagoya Protocol**

Dear Ms. Cristiana Paşca Palmer, PhD
Executive Secretary of Convention of Biological Diversity

Concerning the notification 2017-094 of 20 September 2017 and the notification 2017-136 of 8 December 2017, Japan Bioindustry Association (JBA) greatly appreciates the opportunity for submission of our views and information further to decision NP-2/10 Article 10 of the Nagoya Protocol (hereafter the Protocol) as one of stakeholders.

We would be most grateful if the second meeting of the Subsidiary Body on Implementation would take into consideration our views and information given below, in the process of drafting its report for the third meeting of the Conference of the Parties serving as the meeting of the Parties to the Nagoya Protocol (COP-MOP3).

The information on situation in which it is not possible to grant or obtain prior informed consent in relation to in situ or ex situ genetic resources and associated traditional knowledge (paragraph 4):

(b) Parties, other Governments, indigenous peoples and local communities and stakeholders, including ex situ collections, are invited to submit information, including practical experiences, if any, on situations in which it is not possible to grant or obtain prior informed consent in relation to in situ or ex situ genetic resources and associated traditional knowledge (paragraph 4).

JBA's view:

On the basis of the reasons given below, Japan Bioindustry Association (JBA) has so far been unable to identify concrete situations in which it is not possible to grant or obtain prior informed consent in relation to in situ or ex situ genetic resources and associated traditional knowledge:

1. Premises for the consideration of Article 10

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.

(1) The Protocol is not retroactive.

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.

(2) 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 situation in which it is not possible to grant or obtain prior informed consent in relation to in situ or ex situ genetic resources and associated traditional knowledge

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 associated traditional knowledge were obtained before the entry into force of the Protocol.

The reason: the Protocol is not retroactive (see 1(1)).

(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(2)).

(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 associated traditional knowledge 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).

The views of JBA on the way forward in relation to Article 10

<p>(c) Parties, other Governments, indigenous peoples and local communities and stakeholders are invited to submit views on the way forward in relation to Article 10 (paragraph 5).</p>
--

In our understanding, the Conference of the Parties serving as the meeting of the Parties to the Nagoya Protocol (COP-MOP) has not so far identified the need for a Global Multilateral Benefit-Sharing Mechanism (GMBSM) for the utilization of genetic resources and associated traditional knowledge that occur in transboundary situations.

Furthermore, we have not been able to identify the need for a GMBSM for situations in which it is not possible to grant or obtain prior informed consent, in our consideration so far.

Therefore, we think it will be necessary to have sufficient discussions on the issues concerning situations in which it is not possible to grant or obtain prior informed consent in relation to in situ or ex situ genetic resources and associated traditional knowledge at the COP-MOP3, to ascertain whether or not there is the need for a GMBSM under Article 10 of the Nagoya Protocol.

Sincerely yours,

A handwritten signature in black ink, appearing to read 'Yoshiaki Tsukamoto', written in a cursive style.

Yoshiaki TSUKAMOTO
Executive Director
Japan Bioindustry Association