

Annex. 7. Sample of an Access and Benefit Sharing Agreement

ABS Agreement

ACCESS AND BENEFIT SHARING AGREEMENT (this “Agreement”) entered into on, among:

1. [insert details of Provider] hereinafter referred to as the “User”
[hereinafter referred to as the “User”]; and
2. [insert details of Provider] [hereinafter referred to as the
“Provider”]; and
3.[insert details of National Focal Point] [hereinafter referred to
as the “National Focal Point”];

Hereinafter, the User and the Provider shall collectively be referred to as “Relevant Parties” and individually as “Relevant Party”.

WHEREAS:

- (A) the Convention on Biological Diversity (CBD) and the Nagoya Protocol (NP) to which Bhutan is a party gives the responsibility to manage biological diversity to ensure fair and equitable sharing of the benefits arising from the use of genetic resources;
- (B) realizing the benefits that the country may accrue from regulating access to its genetic resources and ensuring fair and equitable sharing of benefits, the Biodiversity Act of Bhutan, 2003 was enacted to provide for detailed provisions relating to access to genetic resources and benefit sharing;
- (C) the National Focal Point is the entity vested with the responsibility to regulate the access to genetic resources and benefit sharing in the country;
- (D) the User intends to access genetic resources specified in this Agreement from the Kingdom of Bhutan;
- (E) the Provider through this agreement furnishes the Prior Informed Consent (PIC) granting the access to genetic resources/traditional knowledge associated with genetic resources;
- (F) in consideration of the grant of access to genetic resources, the User is entitled to access and use the biological resource and in accordance with this Agreement and will provide the National Biodiversity Centre and the Provider with the benefits specified herein.

NOW THEREFORE, the parties hereto hereby agree as follows:

1. Definitions

1.1. In this Agreement, unless the context otherwise requires, the following terms shall have the following meanings:

“Access Area”: means the area from which the User will have access to biological resources;

“Access to genetic resources”: means the collection, transfer, or utilization of genetic resources from Bhutan irrespective of whether they are found in situ or ex situ for the purpose of conducting research or development on genetic or biochemical composition of genetic resources including through the application of biotechnology;

“Access to traditional knowledge”: means utilization of traditional knowledge associated with genetic resources for the purpose of conducting any research and commercial utilization;

“Act”: means the Biodiversity Act of Bhutan, 2003 and includes any subsequent amendment or re-enactment of the Act;

“Bhutan Access and Benefit Sharing Fund”: means a fund established to receive monetary benefits derived from the research and commercial utilization of Bhutan’s genetic resources or associated traditional knowledge or both;

“Biological resources”: means plant, animal and micro-organism or parts thereof, their genetic material and by products with actual or potential use or value but excluding value added products;

“Commercial utilization”: includes applying for, obtaining or transferring intellectual property rights by sale or license or in any other manner, or commencement of product development, conducting market research or the sale of any resulting product;

“Genetic resources”: means all material of plant, animal, microbial or other origin containing functional units of heredity and includes the biochemical composition of genetic resources, genetic information regardless of the manner in which the genetic information is stored or knowledge of how the hereditary material works in an organism and derivatives;

“Product”: means material produced, obtained, extracted or derived through research and development activity;

“Prior Informed Consent”: means a process through which the National Focal Point seeks the consent of the providers of genetic resources or holders of associated traditional knowledge;

“Provider”: means a person (individual or organization) named as Provider and includes their authorized representative, where the context permits;

“Third Party”: means any person or institution other than the Provider, the User or any collaborator under their control or supervision;

“User”: means a person (individual or organization) named as the User and includes their authorized representative, where the context permits;

2. Interpretation

- 2.1. Clause heading are inserted for convenient reference only and have no effect in limiting or extending the language of provisions to which they refer.
- 2.2. Words importing a person include a partnership and a body whether corporate or otherwise.
- 2.3. A reference to any legislation includes any statutory modification substitution or re-enactment of such legislation.
- 2.4. The schedules form an integral part of this Agreement.

3. Prior Informed Consent

- 3.1. This Agreement is made pursuant to the Prior Informed Consent (PIC) given by the Provider granting the access to genetic resources.

4. Access

- 4.1. The User shall have access to the Genetic Resources as specified in Schedule A of this Agreement.
- 4.2. The User shall pay a sum of Nu. 35,000.00 as processing fee to the National Focal Point at the time of execution of this agreement.

5. Access Use Conditions

- 5.1. The User shall have access only to the genetic resource/associated traditional knowledge specified in Schedule A of this Agreement and undertakes to access the same in accordance with the conditions specified in this Agreement.
- 5.2. The User shall attach details of the commercial utilization of the genetic resources/associated traditional knowledge accessed in accordance with Schedule B of this Agreement.
- 5.3. Any use involving the genetic resource/associated traditional knowledge that is not expressly authorized by the provisions of this agreement shall be deemed to be expressly prohibited.
- 5.4. The User undertakes that it shall not allow any persons other than its authorized employees under its direct control and supervision to have access to the genetic resource.
- 5.5. The User shall not obtain, transfer, and distribute any form of intellectual property rights associated with the genetic resource/associated traditional knowledge accessed under this agreement in any manner without obtaining the prior written consent of the National Focal Point.
- 5.6. The User shall not transfer the results of research relating to any genetic resource/associated traditional knowledge that is the subject of this Agreement to a third party without obtaining the approval of the National Focal Point.

5.7. The User undertakes to comply with the existing national laws, regulatory mechanisms and international agreements or treaties for the access to genetic resources.
 Provided that in case of conflict between the national laws and international agreement, the national laws shall prevail.

6. Access Permits and Approval

- 6.1. The approval given under this agreement is without prejudice to any other permits or approval that may be required for the purpose of access to the genetic resource/associated traditional knowledge from any other authorities under any other laws in force in the territory of Bhutan.
- 6.2. The failure to acquire such permit or approval under clause 6.1 shall be deemed as a material breach of this agreement and shall result in the termination of this agreement. However, upon an application by the User, the User may be given the opportunity to rectify the default and obtain the required permit or approval within such time as maybe granted by the National Focal Point.

7. Third Party Transfer

- 7.1. Without the prior written consent of the National Focal Point, neither this agreement nor the approval granted hereunder shall be transferred or assigned in whole or in part by the User to a third party.
- 7.2. In the event of any substantial changes in the management or shareholding of the User that alters the organizational or control structure of the User and includes changes brought by acquisition, merger, demerger or any other kind of corporate restructuring, the User shall ensure that the obligations under this agreement perpetuate and provide written notice to the National Focal Point not less than thirty (30) days prior to initiating such changes.

8. Liabilities and Indemnification

- 8.1. A Relevant Party shall be solely responsible for any claims by third parties arising from its acts or omissions in the course of performing this agreement and under no circumstances shall the other Relevant Party be held responsible or liable for any such claims by third parties.
- 8.2. A Relevant Party shall indemnify the other Relevant Party and its employees from and against all claims, losses, damages, costs (including attorney fees), actions, suits or other proceedings, in any manner based upon, arising out of, related to, occasioned by or attributable to, any acts or conduct of the Relevant Party, its employees or agents, (whether by reason of negligence or otherwise) in the performance by or on behalf of the Relevant Party of the provisions of this agreement or any activity undertaken or purported to be undertaken pursuant to the terms of this agreement.

9. Benefit Sharing

- 9.1. The User shall pay to the Provider of annual gross ex-factory sales of the product on such date as may be agreed between the relevant parties.
- 9.2. % of the total monetary benefits specified in clause 9.1 shall be paid to the Bhutan Access and Benefit Sharing Fund.

10. Obligation of the Provider

10.1. The Provider has the obligation to facilitate access to the genetic resources/associated traditional knowledge which includes the facilitation in acquisition of permits required in accordance with the relevant national laws.

11. Termination

11.1. This agreement, unless terminated as provided herein, shall remain in effect for a period of 5 years from the date of signing this agreement. In case the User continues the commercial utilization of the genetic resource/associated traditional knowledge mentioned in the agreement beyond the period initially agreed upon, the User shall apply for renewal to the National Focal Point for subsequent required period at which time a new agreement has to be effected with relevant provisions agreed mutually.

11.2. The Relevant Parties may terminate this Agreement at any time by mutual agreement in writing by giving sixty (60) days advance written notice of termination. or either Relevant Party may terminate this agreement by a written notice on the happening of any of the following:

- a) if the User does not make a payment due and fails to clear such non-payment within thirty (30) days after the date of notice in writing of such non-payment; or
- b) if the User becomes insolvent or has a petition in bankruptcy, winding up filed for or against it, such termination shall be effective immediately upon the National Focal Point giving written notice to the User.

11.3. The National Focal Point may revoke access or approval granted to the applicant, if any of the following circumstances arise:

- a) on the basis of reasonable belief that the person accessing the said genetic resource has violated any of the provisions of the Act or the condition on which approval was granted;
- b) when the person has failed to comply with the terms of the agreement;
- c) on failure to comply with any of the use conditions; or
- d) on account of overriding public interest with reference to protection of environment and conservation of biological diversity and protection of the rights, livelihoods and knowledge of communities.

In the event of revocation of access or approval as mentioned above, this agreement shall automatically stand terminated.

11.4. Upon termination of this agreement, the User shall cease all use of the genetic resource/associated traditional knowledge and shall, upon request, return or destroy (at the option of the National Focal Point) all genetic resources under its control or in its possession. The costs in this regard shall be borne by the User.

11.5. The National Focal Point shall not be liable for any loss or damage whatsoever caused to the User due to revocation of approval for access and/ or termination of this agreement as provided in clause 11.3.

11.6. The User upon termination of the Agreement, agrees not use any of the data, results, or conclusions from the research on the accessed material for any purpose whatsoever without

the prior approval of the National Focal Point.

12. Reports and Audit

- 12.1. The User shall submit to the National Focal Point yearly reports on the following:
 - a) the quantity of Genetic resource accessed;
 - b) the total quantity of the products produced by the use of the accessed genetic resources/ associated traditional knowledge;
 - c) audited financial statements; and
 - d) any other related information sought by the National Focal Point by a written notice.
- 12.2. The User shall keep accurate records (together with supporting documentation) appropriate to determine all amounts due to the Provider. Such records shall be retained for at least three years following the end of the reporting period to which they relate.
- 12.3. In conducting audits in pursuant to clause 12, such person shall have access to all records which he reasonably believes to be relevant to the calculation of monetary benefit.

13. Confidentiality

- 13.1. The Provider and the National Focal Point agrees to treat as confidential all confidential information marked as “CONFIDENTIAL” by the User and agrees that information disclosed in pursuance of this agreement relating to the formulations, including efforts to commercialize the formulations, shall be deemed confidential information.
- 13.2. The Provider and the National Focal Point shall, upon due review of the need for confidentiality, maintain the confidentiality of information pertaining to the User at the written request of the User.
- 13.3. Notwithstanding clause 13.1 and 13.2, confidential information may be disclosed to the extent required by any law or regulation or order of any governmental, administrative, or judicial authority having jurisdiction over any of the Parties.

14. Notice

- 14.1. Wherever in this agreement, it is required or permitted that a communication, notice or demand be given or served on any party, such communication, notice or demand will be given in writing and in English and will be validly given or sufficiently communicated if forwarded by Registered post or e-mail:

For the National Focal Point:

.....
Post Box No.
Email address:.....
Email address:.....

For the Provider:

.....
Post Box No.
Email address:.....
Email address:.....

For the User:

.....
Post Box No.
Email address:.....
Email address:.....

- 14.2. Notice will be deemed to have been delivered:
- a) if delivered by hand, upon receipt;
 - b) if sent by electronic transmission, 48 hours after the time of transmission, excluding from the calculation of weekends and public holidays; or
 - c) if sent by post, seven (7) days after the mailing thereof.
- 14.3. The Parties may change their respective addresses for delivery by delivering notice of change as provided in this paragraph.

15.Governing Law and Jurisdiction

15.1.This agreement is governed by and is to be construed in accordance with the laws of Bhutan

16. Arbitration

- 16.1.Subject to clause 15.1 any dispute arising out of or in connection with this Agreement, including any question regarding its existence, validity or termination shall try to settle the dispute amicably between them by negotiating in good faith.
- 16.2.If the dispute is not resolved under clause 16.1, the Parties agree to settle the dispute through arbitration. The arbitration shall be governed by the Alternate Dispute Resolution Act of Bhutan, 2013. The place of arbitration shall be in Thimphu, Bhutan. The language to be used in the arbitration proceedings shall be in English

17. Severability

- 17.1.If at any time, any provision of this Agreement is or becomes illegal, invalid or unenforceable, either the legality, validity or enforceability of the remaining provisions will in any way be affected or impaired.

18. Modification

- 18.1.No amendment or modification of this agreement shall be valid or binding upon the parties, unless agreed upon by both parties, made in writing, and signed on behalf of each of the Parties by their authorized representatives.

19. Benefit of Agreement

- 19.1.This Agreement shall bind and inure to the benefit of the successors and assignees of the

parties. However, none of the Relevant Parties may assign or delegate any of its rights or obligations herein without the prior written consent of other relevant party and the National Focal Point.

20. Representations

20.1.Either Relevant Party represents to each other Relevant Party that it has the legal right and power to enter into this agreement or to perform its obligations under the terms of this agreement and the execution, delivery and performance of this agreement by it has been duly and validly authorized by all necessary action on its part.

21. Miscellaneous

- 21.1.The User hereby agrees that this agreement shall not in any way constitute or be presumed to constitute a partnership, joint venture or joint enterprise in any way or for any purpose between the Relevant Parties hereto or make them in any way liable as partners of or as agents for one another.
- 21.2.The documents attached hereto as Schedules form an integral part of this agreement, and consists of:
Schedule A: Access to Genetic Resources/associated traditional knowledge
Schedule B: Details of Commercial Utilization of genetic resources/associated traditional knowledge
Schedule C: Details of Benefit Sharing mutually agreed and delivery mechanism
- 21.3.Payments to be made under this Agreement shall be channeled through banking instruments excepting payment in cash.

IN WITNESS WHEREOF the parties hereto, acting through their duly authorized representatives, have caused this Agreement to be signed in their respective names as of the day and year first above written.

[NAME OF PROVIDER]
.....

Witnessed by.....

Name:
[NAME OF USER]
.....

Witnessed by.....

Name:
Details;
NATIONAL FOCAL POINT
.....

Witnessed by.....

Name:
Details;

Schedule A: Access to Genetic Resources

Sample of biological resources to be collected and associated Traditional Knowledge: [include name of species or lowest level of taxon, to which the resources belong; mention form of biological resource to be collected (leaves, stem, flower, roots etc.)]

- Access Area:** [state the area from which the sample will be taken]
- Time and Frequency of entry to access area:** [state the anticipated dates and times of entry to access area]
- Purpose of Access:** [provide a brief description of the purpose(s) of collecting samples including end products.]
- Labelling of Samples:** [include a statement setting out the means of labelling the samples]
- Schedule B :** Details of Commercial Utilization of Genetic Resources
- Schedule C :** Details of Benefit Sharing Mutually Agreed and Delivery Mechanism
