

AGREEMENT FOR THIRD PARTY TRANSFER OF BIORESOURCES AND/OR ASSOCIATED KNOWLEDGE

This Agreement is entered into as of the day of, 2009 in accordance with sub section 2 of Section 20 of the **Biological Diversity Act, 2002** (Hereinafter referred to as " The Act") and Rule 19 of the **Biological Diversity Rules, 2004** (Hereinafter referred to as "The Rules").

Between

National Biodiversity Authority acting through and represented by (Name of the incumbent), Chairman being the authorised officer of the Authority (Hereinafter referred to as "the **NBA**" or "the Authority") having its office at 5th Floor, TICEL Bio Park, Taramani, Chennai-600 113, Tamil Nadu, India. (www.nbaindia.org).

And

The Transferor(any person, who intends to transfer any biological resource and/or associated knowledge from India) (Hereinafter referred to as "the **Transferor**")

Hereinafter, the NBA and the Transferor shall collectively be referred to as "the Parties" and individually as "Party".

WHEREAS:

NBA has been established by the Government of India under the powers granted to it by section 8 of the Biological Diversity Act, 2002 (No. 18 of 2003). Under the said Act, NBA is the authority to permit access to any biological resources and/or associated knowledge found within the territory of India.

The Transferor is any person, who intends to transfer any biological resource and/or associated knowledge from India who can be a Company/ Trust established and existing under the laws of (name of the country and Act) individual/ etc.....and has accessed the Biological Resources and/or associated knowledge for the purposes of Commercial Utilisation/Research and now is interested in transferring the accessed Biological Resources to the Transferee.

The Transferor has made an application in Form IV (to be attached with this Agreement), under Rule 19 of the Biological Diversity Rules 2004 to seek approval from the NBA to transfer the accessed biological resources and/or associated knowledge to the Transferee for the purposes of Commercial Utilisation/Research.

The format of this Agreement on third party transfer of bioresources have been prepared strictly in accordance with the provisions of the Biological Diversity Act, 2002 and the Biological Diversity Rules 2004

The Parties hereto agree as follows:

1. Definitions

In this Agreement:

Act means the Biological Diversity Act, 2002 (Act 18 of 2003) and includes the Rules/Regulations/notifications made under it.

Biological Resources: means Biological Resources as defined in the Act, which the Transferor accessed for the purposes of Commercial Utilisation/Research as described in Schedule A to this Agreement.

Transferee: means the person/Company to which the Transferor intends to transfer the Biological Resources.

Purpose

The purpose of this agreement is for third party transfer of biological resources and/ or associated knowledge occurring in India for research/ biosurvey and bio-utilisation. In order to obtain approval from National Biodiversity Authority (established by the Government of India under the powers granted to it by Section 8 of the Biological Diversity Act 2002) any person, who intends to transfer any biological resource and/or knowledge associated thereto from India to a third party is required to apply in **Form IV** and pay application fee **Rs 10000/=** (Rupees Ten Thousand only) as per Biological Diversity Rule 19 (sub rule 1, 2). The National Biodiversity Authority by order approves the third-party transfer of biological resources and/or associated traditional knowledge in the form of an agreement duly signed by an authorised officer of the Authority and the applicant.

This regulation is mainly to contribute to the conservation and sustainable use of biological diversity and to secure equitable sharing of benefits arising out of the use of accessed biological resources if any.

2. GRANT OF APPROVAL

2.1 The Transferor requests for approval to transfer the Biological Resource and/or associated knowledge and the NBA hereby grants the approval subject to the terms and conditions set forth in this Agreement and compliance with all other laws in force in India.

2.2 The Transferor shall transfer the Biological Resources and/or associated knowledge only on the execution of a written agreement with the Transferee. The Agreement shall impose a mandatory obligation on the Transferee to comply with all the terms and conditions imposed on the Transferor by the approval agreement executed on Day of2005, which agreement shall be attached as an appendix to the written agreement between the Transferor and Transferee.

Provided that, in the absence of any agreement between the NBA and the Transferor, the Transferor shall attach the standard agreement (in accordance with the purpose of the transferee) as available with the NBA and all clauses therein shall be binding on the Transferee.

2.3 The Transferee shall have no rights to directly access the Biological resource and/or associated knowledge other than from the Transferor.

2.4 Transferor hereby undertakes to notify NBA immediately, if the Transferee or any third party makes any breach of this Agreement or the provisions of the Act comes to his knowledge.

2.5. If the transferor is a person falling under the Subsection 2 of Section 3 of the Act, then the Transferor undertakes to provide the Agreement entered by him with NBA approving his access to biological resources and/or associated knowledge for the purpose mentioned therein and a copy of the agreement shall be annexed to this agreement as Schedule C (to attached with this agreement as Schedule C). Failure to provide proof of approval will automatically nullify this agreement.

2.6. The Transferor undertakes to provide the details of the purpose of third party transfer of the biological resource and/or associated knowledge in Schedule B (purpose of third party transfer (to attached with this agreement as Schedule B). The use of biological resource and/or associated knowledge intended to be transferred shall be limited to the purpose for which it is accessed as specified in Schedule B of this agreement. In the event of any commercialization, Transferor and the transferee undertakes to seek fresh approval of NBA for the access and shall share benefits arising out of such commercialization as determined by NBA according to the Act and guidelines, regulations/notifications of the Central Government. Any breach of this condition shall result in the immediate termination of this agreement by NBA

2.7. In the event of seeking any form of intellectual property rights for any innovation on the accessed bioresources and/or associated knowledge in India or outside India, the transferee shall collaborate with any Research Institution/Universities established in India under the laws of India and recognized by the Government of India and seek prior approval from NBA as per the provisions of the Act and Rules and the guidelines/ regulations for seeking intellectual property rights on biological resources and/or associated knowledge issued/notified by Central Government.

2.8. The transferor undertakes to comply with the existing national laws, regulatory mechanisms and international agreements/treaties however subject to the Act and this Agreement. The applicant shall also be abiding by the notifications/guidelines as issued/notified by the Government of India for the access to biological resources and/or associated knowledge.

2.9. The approval given under this agreement is without prejudice to any other approvals/permissions that may be required to be taken by the transferor for the purpose of third party transfer of the biological resources and/or associated knowledge from any other authorities under any law in force in the territory of India. Failure to acquire such approvals/permissions shall be deemed as a material breach of this Agreement and shall result in the immediate termination of this Agreement.

2.10. The transferee shall not distribute, transfer or part with, or obtain any form of Intellectual Property Rights (IPRs) based on the Biological Resources and/or associated knowledge accessed

under this Agreement in any manner without obtaining the prior approval of the NBA under the provisions of the Act.

2.11 . The transferor shall deposit the voucher specimen/type specimen in the national designated repositories of India in culture collection in accordance with the guidelines/directions given by NBA

3. Royalty and other Benefit Sharing [will change on a case by case basis and will be regulated by the ABS guidelines]

3.1 In the even the transferee intending for the commercial utilization of the transferred biological resources and/or associated knowledge, then the transferee shall pay to the National Biodiversity Authority, annually, during the term of this Agreement a royalty of.....% as agreed of the total sales of the Product derived from the use of the Biological Resource accessed as determined by NBA according to Act, Rules and notifications/Regulations/guidelines issued/notified by the Central Government.

3.2. NBA shall direct the Transferor to share the benefits in all or any of the following manner as per sub section 2 and 3 of Section 21 of the Biological Diversity Act, 2002:

- (a) grant of joint ownership of Intellectual Property Rights to NBA, or where benefit claimers are identified, to such benefit claimers.
- (b) Transfer of technology
- (c) Location of production, research and development units in such areas which will facilitate better living standards to the benefit claimers;
- (d) Association of Indian scientists, benefit claimers and the local people with research and development in biological resources and bio-survey and bio-utilization;
- (e) Setting up of venture capital fund for aiding the cause of benefit claimers.
- (f) Payment of monetary compensation and non monetary benefits to the benefit claimers as the National Biodiversity Authority may deem fit.

4. Terms and Termination

4.1 This Agreement, unless terminated as provided herein, shall remain in effect for a period of one year from the date on which the approval is given by the NBA to the Transferor for the transfer of the Biological Resources and/or associated knowledge.

4.2. The Transferor shall intimate the NBA in writing not later than one month prior to the date of first transfer.

4.3 The Transferor may terminate this Agreement by a written notice on the happening of any of the following:

- (a) If The Transferor does not make a payment due hereunder and fails to cure such non-payment within Thirty (30) days after the date of notice in writing of such non-payment by NBA.

(b) If The Transferor defaults in the performance of any obligations under this Agreement and the default has not been remedied within sixty (60) days after the date of notice in writing of such default by NBA.

(c) The NBA shall revoke access or approval granted to Transferor if any of the circumstances mentioned in Biological Diversity Rule 15(1) arises and on any one or more of the grounds stated therein, namely:

1. The Transferor has violated any of the provisions of the Act or the conditions on which approval was granted,
2. The Transferor has failed to comply with the terms of agreement,
3. The Transferor has failed to comply with any of the conditions of access granted,
4. on account of over riding public interest or for protection of environment and conservation of biological diversity.

(d) The NBA shall revoke access or approval granted to the Transferor in case if it is found that the Transferor has accessed/attempted to access the biological resources for which access is restricted or prohibited under rule 16, namely: any endangered taxa ; any endemic and rare species; access may likely to result in adverse effect on the livelihoods of the local people; the access may result in adverse environmental impact which may be difficult to control and mitigate; access may cause genetic erosion or affecting the ecosystem function; and the use of resources for purposes contrary to national interest and other related international agreements entered into by India

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

4.4 As regards all other aspects and terms & conditions not provided for in this agreement, they shall be governed by the provisions of the Act, rules, regulations and the order of approval. Transferor may terminate this Agreement by giving sixty (60) days advance written notice of termination. Upon termination, the Transferor shall submit a final payment report to NBA and any outstanding payments shall become immediately payable.

4.5 Upon termination of this Agreement, the Transferor shall cease all use of the Biological Resources and/or associated knowledge and shall, upon request, return or destroy (at the option of NBA) all Biological Resources under its control or in its possession. The costs in this regard shall be borne by the Transferor.

4.6. NBA shall not be liable for any loss or damage whatsoever caused to the Transferor due to revocation of approval for access and/ or termination of this agreement on any ground whatsoever.

5. 5. Liabilities and Indemnification

5.1 The transferor shall be solely responsible for any claims by third parties arising from the transferor's acts or omissions in the course of performing this Agreement and under no circumstances shall the NBA be held responsible or liable for any such claims by third parties.

5.2 The transferor shall indemnify and save NBA harmless and its employees from and against all claims, demands, losses, damages, costs (including attorney fees), actions, suits or other proceedings, all in any manner based upon, arising out of, related to, occasioned by or attributable to, any acts or conduct of the transferor, its employees or agents, (whether by reason of negligence or otherwise) in the performance by or on behalf of the transferor of the provisions of this Agreement or any activity undertaken or purported to be undertaken under the authority or pursuant to the terms of this Agreement.

5.3 The Transferor undertakes to pay a sum of ten lakhs rupees for any material breach of this Agreement and further undertakes to pay such sum of ten lakhs rupees in addition to the amount as determined by NBA as the loss incurred by the Republic of India or the stake holders involved.

6. Notice

6.1 Wherever in this Agreement, it is required or permitted that a communication, notice or demand be given or served by either Party to or on the other Party, such communication, notice or demand will be in writing and will be validly given or sufficiently communicated if forwarded by Registered mail acknowledgement due, e-mail, telegram, telex or facsimile as follows:

The addresses for communication are:

To the NBA:

The Chairperson, National Biodiversity Authority, 5th Floor, TICEL Bio Park, Taramani, Chennai-600 113, Tamil Nadu, India.

e-mail: chairman@nbaindia.in Fax:044-2254 1073

To The Transferor:

.....

6.2 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 weekends and public holidays;
- (c) if sent by certified mail, four (4) days after the mailing thereof, provided that if there is a postal strike or other disruption such notice will be delivered by hand or electronic transmission.

6.3 The Parties may change their respective addresses for delivery by delivering notice of change as provided in this paragraph.

7. Confidentiality

7.1 The NBA agrees to treat as confidential any and all Confidential Information marked as “CONFIDENTIAL” and to that end further agrees that information disclosed pursuant to this Agreement relating to the Formulations, including efforts to commercialize the Formulations, shall be deemed Confidential Information.

7.2 Notwithstanding clause 7.1, Confidential Information may be disclosed to the extent required by any law or regulation or order of any governmental/administrative/judicial authority having jurisdiction over any of the Parties, with appropriate efforts made to maintain confidentiality.

7.3 NBA shall maintain Confidential Information in confidence, for as long as the confidential information does not fall within the Public Domain.

8. Arbitration

8.1. If any controversy, question, dispute or difference (hereinafter referred to as a ‘**Dispute**’) between the Parties hereto arises under this Agreement, any Party may give the other Party a written notice of Dispute adequately identifying and providing details of the Dispute. On receipt of such notice by the other Party, the Parties shall try to settle the Dispute amicably between them by negotiating in good faith within 30 days of the receipt of the notice of Dispute by the other Party.

8.2. If the Dispute is not resolved by such good faith negotiations within the period mentioned, the Parties agree to settle the Dispute through arbitration conducted by the sole arbitrator appointed by Chairman,NBA. The arbitration shall be governed by the Arbitration and Conciliation Act, 1996. The place of arbitration shall be Chennai, India. The language to be used in the arbitration proceedings shall be in English or as mutually agreed between the Parties.

8.3. The Parties hereto agree that the award and determination of the arbitrator shall be final and binding on both Parties hereto.

9. Governing Law and Jurisdiction

9.1. This Agreement is governed by and is to be construed in accordance with the laws of India. In the event of a dispute not settled through arbitration as specified in clause 9, the parties are free to exercise their right of appeal as provided under Section 52 of the Act. However, the Parties irrevocably and unconditionally submits to the exclusive jurisdiction of the High Court in Chennai, India

9.2. As regards all other aspects not provided for in this agreement, they shall be governed by the provisions of the Act, rules, regulations and the order of approval.

10. Waiver

The Waiver by NBA, of any breach of any terms of this Agreement made by Transferor shall not prevent the subsequent enforcement of that term and shall not be deemed a waiver of any subsequent breach.

11. Severability

If any part of this Agreement is declared or held invalid by a court for any reason, the invalidity of that part will not affect the validity of the remainder which will continue in full force and effect and be construed as if the Agreement had been executed without the invalid portion.

12. Modification

No amendment or modification to 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 duly and legally authorized signatories.

13. Entire Agreement

The Parties acknowledge that there are no representations either oral or written, as regards the subject matter of this Agreement, between the NBA and the transferor other than those expressly set out in this Agreement. All previous negotiations, understandings, representations, warranties, memoranda or commitments concerning the subject matter of this Agreement are merged in and superseded by this document and are of no effect. This Agreement constitutes the entire understanding between the parties as to the subject matter of this Agreement. This Agreement sets forth all representations forming part of or in any way affecting or relating to the subject matter of this Agreement.

14. Representations

Either Party represent to each other Party that it has the legal right and power to enter into this Agreement and 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 corporate action or Government action on its part.

The documents attached hereto as Schedules forms an integral part of this Agreement as fully as if it were set forth herein *in extenso*, and consists of:

Schedule A: Details of the biological resources and/or associated knowledge for the intended for the third party transfer **(To be attached by the Transferor)**

Schedule B: Details of the purpose of Third party Transfer **(To be attached by the Transferor)**

Schedule C: Copy of the Agreement between the transferor and the NBA if the transferor is a person falling under the Subsection 2 of Section 3 of the Act **(To be attached by the Transferor)**

Schedule D: Application in Form V (To be attached by the Transferor)

and any other Appendix that may be added subsequently under the provisions of this Agreement.

This Agreement has been executed in duplicate. The original is to lie with the NBA and the duplicate with Transferor. Each of which shall be deemed to be an original, but all of which together shall constitute one and the same instrument.

IN WITNESS WHEREOF this Agreement has been executed by duly authorized representatives of the Parties on the day and the year first mentioned

Signed by the Authorised Officer
of the Authority

Signed by duly authorized representative
of transferor, authorized vide resolution No.
dated of the Board of Directors

For National Biodiversity Authority

For Transferor

Witness

- 1.
- 2.

- 1.
- 2.

SCHEDULE A- Details of the Biological resources and/or associated knowledge for the third party transfer

SCHEDULE B - Purpose of third party transfer

SCHEDULE C – Copy of the Agreement between the transferor and the NBA if the transferor is a person falling under the Subsection 2 of Section 3 of the Act

SCHEDULE D: Application under Form V