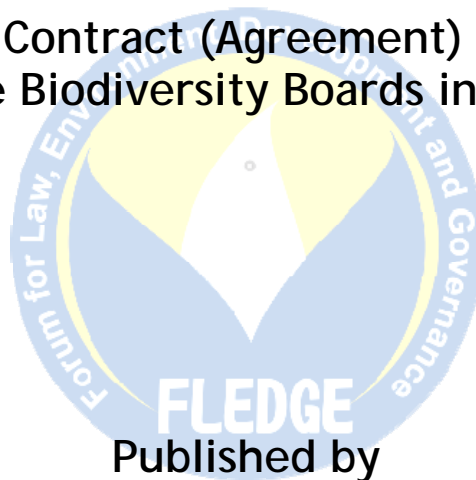


Making Access and Benefit Sharing (ABS) Frameworks Work at State Level in India

“Model” ABS Contract (Agreement) for use by the
State Biodiversity Boards in India



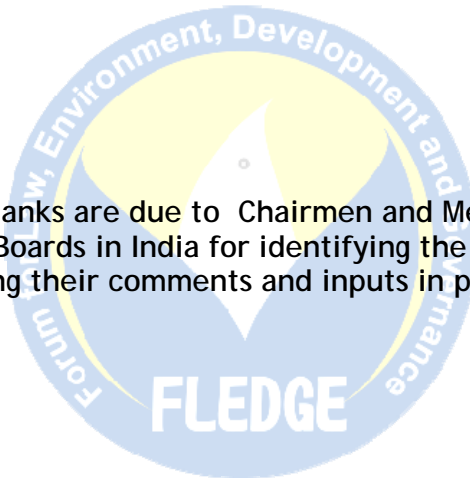
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Forum for Law, Environment, Development and Governance



Making Access and Benefit Sharing (ABS) Frameworks Work at State Level in India

Introduction

India prides itself as one of the few countries that established implementation options for Article 15 of the Convention on Biological Diversity (CBD) on issues of Access and Benefit Sharing (ABS) even before the Nagoya Protocol on ABS was adopted. The Biological Diversity Act (2002) of India provides options for ABS through contracts (Agreements) for commercial utilization of biological resources and traditional knowledge both by Indians (Section 7) and non-Indians (Section 3).

While the National Biodiversity Authority (NBA) is mandated to implement Section 3 of the Act, the State Biodiversity Boards (SBBs) are mandated to implement Section 7 of the Act that deals with Indians intending to commercialize biological resources¹.

In response to this, the SBBs while developing state specific Biological Diversity Rules incorporated provisions for seeking 'prior permission' for commercial utilization by Indians from the SBBs using Form I by paying a requisite application fee. However, invoking the provisions of such applications has been weak until recently.

With the interpretation of the Act to include several commercial uses of biological resources such as export of marine resources, medicinal plant use by the traditional medical practices, extraction of oils and others, making of products containing extracts of biological resources, the SBBs have recently become active to bring a wide variety of sectors and stakeholders under the ABS provisions of the Act and the State level Rules.

With the notification of ABS Guidelines by Government of India in 2014², several SBBs have started to use Form I under the State Rules to enter into ABS contracts with Indians. However, the negotiations being held to deal with ABS and the kinds of contracts being signed are different in different SBBs, sometimes dealing with same sector and similar uses. This is primarily due to lack of communication between the SBBs and between NBA and SBBs to come up with ABS contracts that have common approaches and clauses. Such situations could potentially cause legal wrangles for the SBBs when different SBBs use different benefit sharing options as well as different contractual obligations for similar uses and sometimes with same stakeholder groups operating in different States in India.

Considering the keen interest of SBBs to enter into ABS contracts as soon as possible to use the ABS Guidelines notified, there is now an urgent need to provide some guidance as well as similarities in approaches to deal with ABS contracts (Agreements). In order to limiting possible conflicts in ABS contracts and legal challenges to differential interpretation of the

¹ Section 7 of the Biological Diversity Act (2002) reads as 'No person, who is a citizen of India or a body corporate, association or organization which is registered in India, shall obtain any biological resource for commercial utilization, or bio-survey and bio-utilization for commercial utilization except after giving prior intimation to the State Biodiversity Board concerned'

² Guidelines on Access to Biological Resources and Associated Knowledge and Benefits Sharing Regulations, 2014. Government of India. Gazette Notification 21 November 2014.

provisions of the Act by different SBBs implementing the Biological Diversity Act, this 'Model' ABS Contract has been developed that considers the following:

1. The ABS Guidelines issued in 2014,
2. The provisions of Section 7 of the Biological Diversity Act,
3. The provisions on ABS elaborated by various SBBs through the SBB Rules, and
4. The need for common approaches with differential option for negotiated benefit sharing between SBBs.

This 'Model' is merely provides suggestive elements having basic minimum requirements for a legally sound ABS contract (Agreement) that minimizes legal problems both for the SBBs and the users of biological resources as well as provide a coherent option for implementing the Act across States in India.



The “MODEL ABS AGREEMENT”

(FOR USE BY THE STATE BIODIVERSITY BOARDS IN INDIA)

AGREEMENT ON ACCESS TO BIOLOGICAL RESOURCE FOR COMMERCIAL UTILIZATION AND SHARING OF BENEFITS

Pursuant to the issuance of Access to Biological Resources and Associated Knowledge and Benefits Sharing Regulation, 2014 by the Ministry of Environment, Forests and Climate Change;

Referring, in particular, to Paragraph 2 of the above Regulation, this Agreement on Access to Biological Resources for Commercial Utilization or for Bio-survey and Bio-utilization for Commercial Utilization is being agreed to.

The purpose of this agreement is for access to biological resource occurring in India for commercial utilization and subsequent sharing of benefits.

This agreement is entered into on theday of year XXXX in accordance with Section 7 read with Section 24 (1) of the **Biological Diversity Act, 2002** (Hereinafter referred to as “The Act”) and Rule XX of the **State Biological Diversity Rules, XXXX** (Hereinafter referred to as “The Rules”).

Between

XXX State Biodiversity Board, acting through and represented by the Member Secretary being the authorised officer of the Authority (Hereinafter referred to as “SBB”) having its office _____

And

_____ son/daughter ofresiding ator M/S.a company which is registered in India and existing under the laws of India having its office at _____, India. (Hereinafter referred to as the applicant represented by _____ authorised representative of the applicant.

Hereinafter, the SBB and the applicant shall collectively be referred to as “the Parties” and individually as “Party”.

WHEREAS:

SBB was established by the Government of XXXXXX under the powers granted to it by section 22(1) of the Biological Diversity Act, 2002 (Act XX of YYYY). Under the said Act, the SBB is the authority to permit for any commercial utilization of any biological resource found within the territory of the State.

The applicant has made an application in Form-I (attached with this agreement as Schedule C), under Rule XX of the XXX Biological Diversity Rules, MONTH, YEAR seeking approval from the SBB to access the biological resource for the purpose of commercial utilization (detail of the use). **The Parties hereto agree as follows:**

1. Definitions

In this agreement, unless the context otherwise requires:

Act means the Biological Diversity Act, 2002 (No.18 of 2003) and includes the Rules/Regulations/guidelines/notifications/regulations made under it.

Biological resources: mean the biological resource as defined in Section 2(c) of the Act, which the applicant desires to access for the purposes of commercial utilisation and which is as described in Schedule A to this agreement.

Commercial utilisation means actual use as described in Schedule B (details of commercial utilization furnished by the applicant) to this agreement.

Purpose

In order to obtain approval from State Biodiversity Board, the applicant i.e. NAME applied in Form-I and paid application fee of Rs XXXX/- (Rupees XXXXX only) as per State Biological Diversity Rules, YYYY, XX (1,2,3). The State Biodiversity Board by order approves the access to biological resource for commercial utilization in the form of an agreement duly signed by an authorized officer of the authority and the applicant.

The applicant is an individual/entity/ company (Specify) falling within section 7 of the Act, has made an application in Form-I (attached to this agreement as **Schedule C**) under Rule 16(1) of the State Biological Diversity Rules, 2009 to seek approval of SBB for access of biological resource.

This agreement is entered into between the Parties to facilitate the access and benefit sharing mechanism wherein it has been decided by SBB that a benefit sharing amount will be paid by the applicant as per the terms and conditions set forth in this agreement.

2. Grant of Approval

- 2.1 Based on the application made by the applicant under Form I of the SBB Rules and after due perusal of the application and in consultation with the Biodiversity Management Committee (BMC) as appropriate and needed, the SBB hereby grants the approval for access to biological resource as specified in Schedule A for the purposes of commercial utilisation subject to the terms and conditions set forth in this agreement.
- 2.2 Any activity/use involving the biological resource and/or associated knowledge that is not expressly authorized by the provisions of this agreement and any annexure hereto shall be deemed to be expressly prohibited.

- 2.3 The applicant 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 parties hereto or make them in any way liable as partners of or as agents for one another. No Party has the authority to act for or to assume any obligation or responsibility on behalf of the other Party and the relationship between the Parties is that of a person and a statutory authority competent to approve access to biological under the Act.

3. Assignment

- 3.1 Without the prior written consent of the SBB in each instance, neither this agreement nor the approval granted hereunder shall be transferred or assigned in whole or in part by the applicant to any person whether voluntarily or involuntarily, by operation of the Act or omission on the part of the applicant or otherwise. Failure to obtain the prior written consent of the SBB to any such transfer or assignment shall be deemed to be a material breach of this agreement and results in the immediate termination of this agreement, without notice in addition to any other actions that may be taken against the applicant for the violation of the Act, along with application of provisions of Section 56 of the Act on penalty for contravention of directions.
- 3.2 This agreement is strictly entered into will be treated as terminated in the event of any substantial changes in the management or shareholding of the applicant's entity, that alters the control structure of the entity and includes changes brought by transfer of business units, merger, demerger or any other kind of corporate restructuring.
- 3.3 In the event that there is an assignment by operation of law or otherwise, the applicant would have to obtain the consent of the SBB and procure that the transferee/successor assumes the applicant's obligations under the Agreement.

4. Conditions for access to biological resources

- 4.1 The applicant shall have access to the biological resource and/or associated traditional knowledge specified in **Schedule A** of this agreement and undertakes to access the same in accordance with the directions given by the SBB established in accordance with Sec. 22 of the Act or the Biodiversity Management Committee (BMC) constituted in accordance with Sec.41 of the Act or any other governmental agencies.
- 4.2 The applicant undertakes that it shall not allow any persons other than its authorized employees under its direct control and supervision to have access to the biological resource and shall take measures to protect the biological resource from any claims by third parties including creditors and trustees appointed by the court or other authorities in certain legal proceedings like bankruptcy, winding up etc.
- 4.3 The applicant 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.

- 4.4 The approval given under this agreement is without prejudice to any other approvals/permissions that may be required for the purpose of access to the biological resource and/or associated knowledge to be taken by the applicant from any other authorities under any other 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 termination of this agreement. However, before such termination, upon an application by the applicant, a reasonable time as deemed appropriate by the applicant may be given to rectify the default and obtain required approval, permit, or licenses etc., within such time period so granted by the SBB.
- 4.5 The applicant shall not obtain, transfer, distribute any form of intellectual property rights or part with the biological resource and/or the associated knowledge accessed under this agreement in any manner without obtaining the prior written consent of the NBA under Section 6 of the Act.
- 4.6 The applicant shall deposit the voucher specimen/Type specimen in the designated repositories of India in accordance with the guidelines and directions given by NBA and intimate the SBB of its compliance to this provision in writing within 15 days of such deposit.
- 4.7 Applicant that it will undertake measures for the conservation and sustainable use of biological resources and minimize the environmental impact of its research and collection activities.
- 4.8 The applicant shall not transfer the results of research relating to any biological resource that is the subject of this Agreement to any person specified in Section 3(2) of the BDA without obtaining the approval of the NBA pursuant to Section 4 of the Act.

5. Liabilities and Indemnification

- 5.1 The applicant shall be solely responsible for any claims by third parties arising from the acts or omissions in the course of performing this agreement and under no circumstances shall the SBB be held responsible or liable for any such claims by third parties.
- 5.2 The applicant shall indemnify and save the SBB 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 applicant, its employees or agents, (whether by reason of negligence or otherwise) in the performance by or on behalf of the applicant 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 applicant undertakes to pay a sum of up to ten lakh for any material breach of this agreement and further undertakes to pay such sum in addition to the amount as determined by the State Biodiversity Board.

6. Terms and Termination

- 6.1 This agreement, unless terminated as provided herein, shall remain in effect for a period of XXX years from the date on which the applicant make its first access to the biological resource under this agreement. In case the applicant continues the commercial utilization of the biological resource mentioned in the agreement beyond the period initially agreed upon, the party shall apply for renewal to the State Biodiversity Board for subsequent required period at which time a new agreement has to be effected with relevant provisions as decided mutually.
- 6.2 Either party may terminate this agreement by a written notice on the happening of any of the following:
- a) If the applicant does not make a payment due hereunder and fails to clear such non-payment within Thirty (30) days after the date of notice in writing of such non-payment by the applicant.
 - b) If the applicant becomes insolvent or shall have a petition in bankruptcy, winding up filed for or against it, such termination shall be effective immediately upon the SBB giving written notice to the applicant.
 - c) The SBB shall revoke access or approval granted to the applicant, if any of the circumstances mentioned in Rule XXX of STATE. Biological Diversity Rules, YYYY arise and on any one or more of the grounds stated therein, namely:
 - i) On the basis of reasonable belief that the person accessing the said bio-resource has violated any of the provisions of the Act or the condition on which application was allowed;
 - ii) When the person has failed to comply with the terms of the agreement.
 - iii) On failure to comply with any of the conditions of access;
 - iv) 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.

- 6.3 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. The SBB may terminate this agreement by giving sixty (60) days advance written notice of termination. Upon termination, the applicant shall submit a final payment report to the SBB and any outstanding payments shall become immediately payable.

- 6.4 Upon termination of this agreement, the applicant shall cease all use of the biological resource and shall, upon request, return or destroy (at the option of the SBB all biological resources under its control or in its possession. The costs in this regard shall be borne by the applicant.
- 6.5 The SBB shall not be liable for any loss or damage whatsoever caused to the applicant due to revocation of approval for access and/ or termination of this agreement on any ground whatsoever.

7. Royalty and other Benefit Sharing:

- 7.1 The applicant shall pay XXX % of annual gross ex-factory sales of the product up to Rs. XX . The benefit sharing component shall be worked out based on the annual ex-factory gross sales minus (deduct) Government taxes, excluding income tax, towards benefit sharing respectively to the State Biodiversity Board and State Biodiversity Board Fund. The amount payable by the applicant to the State Biodiversity Board shall be sent in the form of demand draft issued in favour of Member Secretary, State Biodiversity Board payable in XXXXX on any scheduled bank.

8. Reports and Audit

- 8.1 The applicant shall submit to the SBB yearly reports on the following:
- a) The quantity of biological resource accessed.
 - b) The total quantity of the products produced by the use of the accessed biological resources.
 - c) The total billings of such products (ex factory)
 - d) Any other related information sought by the SBB by a written notice.
- 8.2 The applicant shall keep accurate records (together with supporting documentation) appropriate to determine all amounts due to the SBB. Such records shall be retained for at least three (3) years following the end of the reporting period to which they relate.
- 8.3 The records mentioned in clause 8.2 should be made available during normal business hours for audit by any person authorized by the SBB for the sole purpose of verifying reports and payments there under. In conducting audits in pursuant to this clause, such person shall have access to all records which he reasonably believes to be relevant to the calculation of royalties.
- 8.4 The audit by such authorized person shall be at the expense of the SBB, except that if such audit shows an underreporting or underpayment in excess of five percent (5%) for any twelve (12) month period, then the applicant shall pay the cost of such examination as well as any additional sum that would have been payable to

the SBB had the applicant reported correctly, plus interest on said sum at the rate of three per cent (3%) more than the then prevailing rate of Interest in a nationalized bank per month from the date of the incorrect reporting.

9. Confidentiality

9.1 The SBB agrees to treat as confidential any and all confidential information marked as "CONFIDENTIAL" by the applicant at the time of entering into this agreement (subject to due diligence of the request by the State Biodiversity Board as per the prevalent rules and procedures) and to that end further agrees that information disclosed in pursuant to this agreement relating to the formulations, including efforts to commercialize the formulations, shall be deemed confidential information. The SBB will maintain the confidentiality of the information pertaining to the applicant at the written request of the applicant and with due review of need for such request for confidentiality.

9.2 Notwithstanding clause 9.1, 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.

10. Notice

10.1 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 post with acknowledgement due, e-mail, or facsimile as follows:

The addresses for delivery are:

To

The Member Secretary, State Biodiversity Board, ADDRESS

Email: Fax:

10.2 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.

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

11. Arbitration

- 11.1 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.
- 11.2 If the dispute is not resolved by such good faith, negotiation within the period mentioned, the Parties agree to settle the dispute through arbitration conducted by the sole arbitrator appointed by the Chairman, SBB. The arbitration shall be governed by the Arbitration and Conciliation Act, 1996. The place of arbitration shall be XXXXX, India. The language to be used in the arbitration proceedings shall be English or as mutually agreed between the Parties.
- 11.3 The Parties hereto agree that the award and determination of the arbitrator shall be final and binding on both Parties hereto.

12. Governing Law and Jurisdiction

- 12.1 This agreement is governed by and is to be construed in accordance with the laws of India without regard of the principles for the conflicts of laws subject to the provisions of clause 11 (arbitration). In the event of a dispute not settled through arbitration as specified in clause 11, the parties are free to exercise their right of appeal as provided under Section 52 of the Act. However, the Parties irrevocably and unconditionally submit to the exclusive jurisdiction of the High Court in, STATE, India.
- 12.2 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.

13. Waiver

- 13.1 The waiver by SBB, of any breach of any terms of this agreement made by the applicant shall not prevent the subsequent enforcement of that term and shall not be deemed a waiver of any subsequent breach.

14. Severability

- 14.1 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.

15. Modification

15.1 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 duly and legally authorized signatories.

16. Entire Agreement

16.1 The parties acknowledge that there are no representations either oral or written, as regards the subject matter of this agreement, between the SBB and the applicant 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.

17. Representations

17.1 Either party represents 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.

17.2 The documents attached hereto as Schedules form 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 Resource and access (attached by the applicant)

Schedule B: Details of the Commercial Utilization (attached by the applicant)

Schedule C: Application made in Form-I

Schedule D : Details of Benefit Sharing mutually agreed and delivery mechanism and

Schedule E any other appendix may be added subsequently under the provisions of this agreement.

This agreement has been executed in duplicate. The original is to lie with the SBB and the duplicate with the applicant, 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 Authorized Officer of the

Signed by duly authorized

applicant

representative of applicant

authorized vide resolution No

dated of the Board of Directors

State Biodiversity Board ,

Member Secretary

Witness

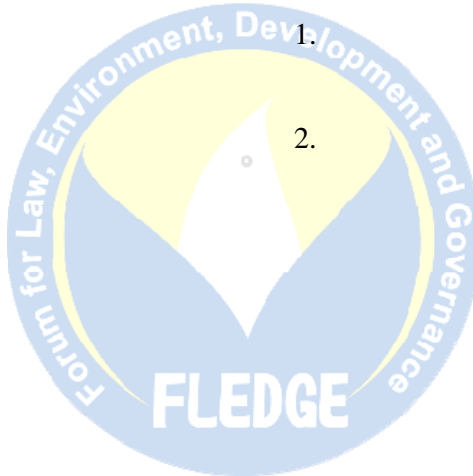
Witness

1.

1.

2.

2.



Annexes

Schedule A: Details of the biological resource

- Name(s) of the resource(s) to be accessed
- Purpose of access
- Total quantity to be accessed per year
- Number of times the resource will be accessed
- Details of wherefrom the resource is accessed

Schedule B: Details of the commercial utilization

Schedule C : Details of Benefit Sharing

- Monetary
- Non-Monetary

Schedule D: Application made in Form I

About FLEDGE

FLEDGE (Forum for Law, Environment, Development and Governance) is a non-profit trust established in November 2014 to work on a array of issues pertaining to law, environment, development and governance. The core focus of FLEDGE would be fostering sustainable environment and development laws and policies within a larger framework of good governance.

In particular, FLEDGE focuses on human resource development, capacity building and awareness raising using research and analysis as the basic tools combined with field analyses, as needed.

It also works towards creating networks and communities of practice to tap uncommon opportunities and to train the next generation of environment and development practitioners, using knowledge platforms.



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