



APPENDIX II: SAMPLE MUTUALLY AGREED TERMS FORMAT

MEMORANDUM OF UNDERSTANDING

This Memorandum of Understanding is entered **BETWEEN**

.....

(Insert the name of the provider) AND (Insert the name of user)

IN RELATION TO *(Insert appropriate title of the project)*

Whereas the sovereign rights over biodiversity are vested in the State;

Whereas the Kenyan Government has ratified CBD and signed to the Nagoya Protocol, and

Noting that Kenyan Government has put in place various legislative measures for sustainable utilization and conservation of biodiversity such as; the Constitution of Kenya (2010), Environmental Management Co-ordination Act (EMCA) 1999, the Wildlife (conservation and Management) Act, 2013, the Forest Act of 2005, Industrial Property Act, 2001, Seeds and Plant Varieties Act, 2012, Kenya Agricultural and Livestock Research Act, 2013, the Environmental Management and Coordination (Conservation of Biological Diversity and Resources, Access to Genetic Resources and Benefit Sharing) Regulations 2006;

NOW THEREFORE the parties agrees as follows:

1: PARTIES TO THE AGREEMENT

These Mutually Agreed Terms (MAT) hereinafter referred to as 'the agreement' is entered into at..... (Insert location) on this day..... of _____ [insert year]: **BETWEEN**

....., P. O Box, Physical Address....., Tel.

....., Fax:, E-mail:.....hereinafter referred to

as **Provider**, AND, P. O Box

....., Physical Address.....,

Tel....., Fax:,





E-mail:.....hereinafter referred to as **User /recipient**.

2: USE OF TERMS

In this **Agreement**, the expressions set out below are defined as indicated in the glossary of this toolkit.

3: SCOPE AND OBJECTIVES OF THE AGREEMENT

3.1. Scope

This Agreement shall apply to access and benefit sharing of genetic resources for both non-commercial and commercial uses within the scope of the Constitution of Kenya, 2010 and the laws of Kenya.

3.2 The objectives of this Agreement

To facilitate:

- a. Access to genetic resources including derivatives and associated TK,
- b. Sustainable utilization of the genetic resources including derivatives,
- c. Transfer of genetic resources including derivatives to third parties, and
- d. Sharing the benefits resulting from the utilization of genetic resources including derivatives.

4: STATEMENT OF WORK (PROJECT SUMMARY)

4.1 The user shall attach a (1-2 page) description of the project that includes elements in Annex 1 of this Agreement.

4.2 The Genetic Resource(s) shall be accessed from (*insert exact locality where the resource is to be accessed including the GPS coordinates, L.R. No., e.t.c*)

4.3 Title and Objectives of the Project shall be

5: OBLIGATIONS OF PARTIES

5.1. Obligations of the Provider





5.1.1 To allow the user to access the genetic resource and/or associated traditional knowledge – (*specify the nature of material or species and the part(s) of the species to be accessed*) relating to:

5.1.2 To conserve the genetic resources and preserve any associated traditional knowledge

5.1.3 To collaborate with a relevant lead agency/ies in providing the genetic resource

5.1.4 To facilitate the user(s), designated and competent authorities with information and data pertinent to the utilization of the genetic resources

5.1.5 To meet minor costs incidental to the access, including organizing for community meetings and reporting

5.1.6 To adhere to terms and conditions of this Agreement

5.1.7 To renegotiate for PIC, and MAT (where applicable) during variation of the access permit,

5.1.8 Shall disclose and share information on:

a) Any known use of the accessed material.

b) Any potential use.

5.2. Obligations of the User

5.2.1. Shall ensure that they obtain an access permit from the designated authority prior to accessing genetic resource(s)

5.2.2 Shall collaborate with a relevant lead agency/ies in accessing the genetic resource

5.2.3 Shall facilitate the provider(s), designated and competent authorities with information and data pertinent and resulting from the utilization of the genetic resources including derivatives

5.2.4 Shall meet all costs incidental to the access, including technology transfer and reporting

5.2.5 Shall use the GR and/or associated TK as specified in PIC and MAT.





5.2.6 Shall renegotiate the PIC, and MAT (where applicable) and apply for a variation of the access permit, if s/he intends to vary the use of the GR and or its derivatives in the initial PIC and MAT.

5.2.7 Shall disclose and share information on:

- a) Any known use of the accessed material.
- b) Any potential use.

6: CONFIDENTIALITY

6.1 All parties hereby undertake to treat as confidential any data and information generated by either party during and after access and declares in writing to be confidential and which is not otherwise known or available to the public (hereinafter referred to as 'Confidential Data')

6.3 TK, information and data disclosed and or generated during access to the GR shall not be disclosed to third parties without consent of the provider⁶.

6.4: The **Government** has a right to access the information and data as appropriate.

6.5. The **Designated National Authority** and/or **Competent Authority** shall give the user written notice of its intention to publish data and information provided by the user to a third party in public interest or safety.

7: REPORTING

Parties agree that;

7.1. The User shall submit a written quarterly report to **the Competent Authority** and the **Designated National Authority** with effect from the date of issuance of access permit.

7.2. The user shall submit a written annual report to the provider from the date of issuance of access permit. In case the provider is a local or indigenous community, a summary of the report shall be adapted to a non-scientific audience and translated into Kiswahili or local language using the existing communication mechanism at the cost of the user.

8: BENEFIT SHARING

⁶ NB: Parties may develop separate confidential agreement/s binding themselves to keep in confidence certain information that they consider secret.





The **Designated National Authority, Competent Authority, Provider, User and Local Community** shall agree to share fairly and equitably the benefits arising out of the genetic resource and/or associated traditional knowledge as spelt out in this **Agreement** and shall have a clear benefit sharing plan indicating both monetary and non-monetary benefits as outlined in Articles 5 and 9 and as detailed in the Annex of the Nagoya Protocol and according to the Constitution and Laws of Kenya

9: SOVEREIGNTY OF GENETIC RESOURCES AND ASSOCIATED KNOWLEDGE

9.1 The Government of Kenya shall retain sovereign rights to and title to the genetic resource and associated knowledge, accessed by the user on behalf of Kenyan citizens.

9.2 The Government will ensure that special arrangements are made to transmit equitable benefits to the provider including the local community.

9.3 Access and benefit sharing measures shall be undertaken as spelt out in SMTA and MTA linked under Annex 1 of this Agreement.

10: INTELLECTUAL PROPERTY RIGHTS

10.1. The user shall not file or obtain whether in the country of the user, Kenya or elsewhere any intellectual property rights whether by patents, copyright, trademark and related systems over any accessed genetic resource under this Agreement including any properties, derivatives or processes including those that may utilize the knowledge of local communities regarding any product or process, even if the process has been modified to a more sophisticated level of commercialization for extracting, isolating or synthesizing the chemical extracted from the genetic resource without prior agreement with the provider.

10.2. All publications must acknowledge the provider and source of GR 10.3. In the event that the intellectual property application must be filed urgently and may not have adequate time to notify the provider, the user shall notify the provider and Designated National Authority of such filing within fourteen days.

10.4 The user or applicants of IPRs must include mandatory disclosure of source of origin including evidence of PIC and MAT in all IP applications.





11: TRANSFER TO THIRD PARTIES

The user shall not transfer genetic resources or any component, derived component, including associated knowledge thereof to third parties without first having explicit written consent from provider and informing the Designated National Authority.

12: TERMINATION OF AGREEMENT

This agreement shall be terminated as follows:

- 12.1 If one of the parties fails to fulfill or violates its obligations under this agreement, PIC and/or MAT then the aggrieved party may terminate the agreement upon 30 days notice given in writing to the other party (ies).
- 12.2 If the user is in the process of bankruptcy, the lead agency and the provider can immediately terminate the agreement.
- 12.3 Termination of this agreement, except in the case of bankruptcy, will be done through mutual agreement by all parties.
- 12.4 The termination of this agreement shall not affect the rights and obligations that were due to accrue to any party (ies) prior to the effective date of termination, subject to MTA.
- 12.5 Upon termination of this Agreement, the user shall stop using the genetic resources and associated knowledge. However, the user will continue to use co-owned product upon payment of royalties agreed upon by all parties.
- 12.6 The Designated National Authority shall notify the clearing house mechanism on the revocation, citing reasons thereof.
- 12.7. Upon completion of the project or termination thereof, the genetic resource shall be **returned** to the provider at the expense of the user or destroyed as may be determined by the DNA and lead agency, subject to the requirements of MTA.

13: HANDLING OF THE GENETIC RESOURCE AFTER COMPLETION

14: FORCE MAJEURE

- 14.1 Neither party (ies) shall be liable to the other party (ies) for any delay or non-conformance of its obligations under this Agreement arising from any clause beyond its





reasonable control, including, but not limited to, any of the following: Act of God, decree, war, fire, drought, explosion, civil commotion or industrial disputes of a third party or impossibility of obtaining gas or electricity or materials.

14.2. The affected party (ies) must promptly notify the other party (ies) in writing, but in no circumstances no later than 14 days, of the cause and likely duration of the cause.

14.3. Such notice having been given, the performance of the affected party's obligations, to the extent affected by the cause, shall be suspended during the period the cause persists.

14.4. Without prejudice to the above, the affected party (ies) must take all reasonable measures to minimize the impact of any force majeure on the performance of its obligations under the Agreement and to ensure, as soon as practicable, the resumption of normal performance of the obligations affected by the force majeure.

15: Applicable Laws

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

16: DISPUTE RESOLUTION

16.1. Any dispute, difference or question arising out of or in connection with this agreement, including any question regarding its existence, validity or termination shall, to the extent possible, be resolved by negotiation, mediation and/or conciliation.

16.2. In the event that the dispute remains unresolved for more than three (3) months from the date when the dispute is first notified in writing by either party to the other party, the dispute shall be referred to and finally settled through arbitration in accordance with the Arbitration Act No. 4 of 1995 of laws of Kenya as amended from time to time or it shall be submitted to an arbitration body in accordance with the procedure laid down in part 1 of Annex II of the Convention on Biological Diversity.

16.3. If either of the parties fails to comply with the award of the arbitral tribunal, the aggrieved party(ies) may, in accordance with paragraph 16(d) (iv) of the Annex to Section A of Decision VI/24 of the 6th Conference of the Parties of the Convention on Biological Diversity, UNEP/CBD/COP/6/20, the Hague, 7-19 April 2002, ask the Government of





Republic of Kenya or the Government of Netherlands to enforce the award given by the arbitral tribunal.

17: NOTICE

17.1. Any notice or other document to be served under this Agreement must be delivered by hand or sent by registered mail or by international courier service to be served at the addresses below:

The..... the **Provider**, P. O. Box, Physical Address....., Tel., Fax:, E-mail:.....

or

The.....the **User**, P. O Box, Physical Address....., Tel....., Fax: E-mail:.....

Copied to:

- a) Competent Authority (*Insert the name of the Institution and the address*)
- and
- b) Designated National Authority (*Insert the name of the Institution and the address*)

17.2. All notices or documents shall be deemed to have been served at the date and time of delivery of the said notices or documents to the recipient party.

18: ENTIRE AGREEMENT

18.1 The provisions of this agreement and the contents of Prior Informed Consent constitute the entire agreement between the parties and the parties do not make any representations or warranties except those contained in this agreement and Prior Informed





Consent. The agreement shall only be extended or amended by consent in writing and signed by authorized representatives of the parties of this Agreement.

19: NO ASSIGNMENT

19.1 This agreement is specific to the parties and none of the rights or the obligations under this Agreement may be assigned or transferred without the prior informed consent of the other party (ies).

20: NO PARTNERSHIP IN LAW

20.1. Nothing contained in this Agreement shall constitute a partnership in law between the Competent Authority, Provider and User or constitute either of the Agent of the other.

21: MONITORING & EVALUATION

21.1. The parties to this agreement shall put in place and implement appropriate measures for monitoring and evaluation of terms of this Agreement.

21.2. The parties shall institute mechanisms of proper record keeping and avenues for prudent financial management for monitoring and evaluation purposes

21.3. Measures must be put in place to monitor repository of holotypes, data and information during the project.

21.4. The parties shall cooperate with checkpoints in monitoring implementation of this Agreement

22: DISTRIBUTION OF COPIES OF AGREEMENT

22.1 Each of the parties to this Agreement shall receive and keep a copy bearing original signatures. In addition, one counterpart of the Agreement shall be submitted to Designated National Authority at the time of applying for an access permit.

22.2. Designated National Authority shall send a scanned copy to the clearing house mechanism.

22.3 The language of this Agreement shall be English. There shall be translation of whole or in part into Kiswahili or local language, where necessary.

IN WITNESS WHEREOF the parties have appended their signatures (prints) and seals on the date and year mentioned above.





Executed as an Agreement

SIGNED on behalf of the

1. PROVIDER

(Insert the name of the provider)

By (insert name of signatory)

(Insert signatory position)

DATED

SIGNED on behalf of the

2. Witnessed by

(insert name of signatory)

(Insert signatory position)

3. USER

(Insert the name of the user).....

By (insert name of signatory)

(Insert signatory position)

DATE

4. Witnessed by

(insert name of signatory)

(Insert signatory position)

5. COMPETENT AUTHORITY

(Insert name of the institution)By..

(insert name of signatory)

(Insert signatory position)

DATED





6. SIGNED on behalf of the **Witnessed by**
(*insert name of signatory*)
(*Insert signatory position*)

Annexes

- 1.1** Statement of work (about 1 page)
- 1.2** PIC
- 1.3** Benefit sharing plan
- 1.4** MTA
- 1.5** Sample Permit Form from NEMA ABS Regulations, 2006

