



UNION FOR
ETHICAL
BIOTRADE

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WITH RESPECT

ABS IN SOUTH AFRICA

OVERVIEW OF LEGAL REQUIREMENTS, PROCEDURES AND RELEVANT AUTHORITIES

South Africa is one of the most biodiverse country in the world, in terms of species diversity and endemism. For example, the smallest yet richest of the floral kingdoms, the Cape Floral Kingdom, falls entirely within the country.

The wealth of biodiversity is recognised as an opportunity to support national sustainable development goals. Legal, policy and other measures approach the sustainable use of biodiversity and fair and equitable benefit sharing as ways to support local livelihoods, as well as providing business and job creation opportunities.

Disclaimer *This document is for information purposes only. The information provided is not legal advice. UEBT aims to ensure its accuracy, but it provides no guarantees in this regard. Official information on laws and regulations on ABS is available through national focal points, competent authorities or the ABS Clearing House at absch.cbd.int/countries*

International agreements

- **Convention on Biological Diversity (CBD)**
Party since 31 January 1996
- **Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Resulting Benefits (Nagoya Protocol)** Party since 12 October 2014
- **International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA)** South Africa is not yet a Party to this treaty

National ABS legal framework

- The National Environmental Management: Biodiversity Act (NEMBA) of 2004 and the Bioprospecting, Access and Benefit Sharing (BABS) Regulations of 2008, amended in 2015, establish the national legal framework for access to indigenous genetic and biological resources and benefit-sharing in South Africa.
- Additional documentation, including permit application forms available in annex to the BABS Regulations and other resources, have also been developed to guide users in obtaining ABS-related permits and is available at www.environment.gov.za/projectsprogrammes/bioprospectingaccess_benefitsharing_babs_clearinghouse.

SCOPE OF ABS REQUIREMENTS

ABS requirements in South Africa apply to indigenous biological resources when used for bioprospecting and/or biotrade. They do not apply to indigenous biological resources accessed with the intent to carry out scientific research without any potential commercial application (e.g., taxonomy).

What resources are covered?

Indigenous biological resources cover plants, animals, fungi or microorganisms occurring naturally within South Africa. The term 'biological resources' encompasses not only these organisms, their parts and their genetic material, but also their biochemical compounds and other derivatives and their genetic information. The term 'indigenous' covers native species, whether wild or cultivated. Exotic plants, animals or other organisms introduced in South Africa through human activity are not included.

What activities are covered?

Bioprospecting

Bioprospecting refers to any research on, development or application of, indigenous biological resources for commercial or industrial exploitation. This is a broad concept that covers the range of activities to bring new ingredients and products to the market and may involve two phases, which are subject to distinct requirements:

- **The discovery phase** of bioprospecting covers any research, development or application of, indigenous biological resources where the nature and extent of any actual or potential commercial or industrial exploitation in relation to the project is not sufficiently clear or known to begin the process of commercialisation. For example, a project to collect samples of different types of algae off the coast of Cape Town to search for any bioactive compounds with potential to be used in pharmaceuticals would be considered as the discovery phase of bioprospecting.
- **The commercialisation phase** of bioprospecting covers research, development or application in which the actual or potential commercial or industrial exploitation is known and the objective is to begin the process of commercialisation. For example, a project involving research on the application of the known anti-allergic properties of rooibos in a nasal spray, product formulation and launch in the market would be considered to fall within this phase.

Biotrade

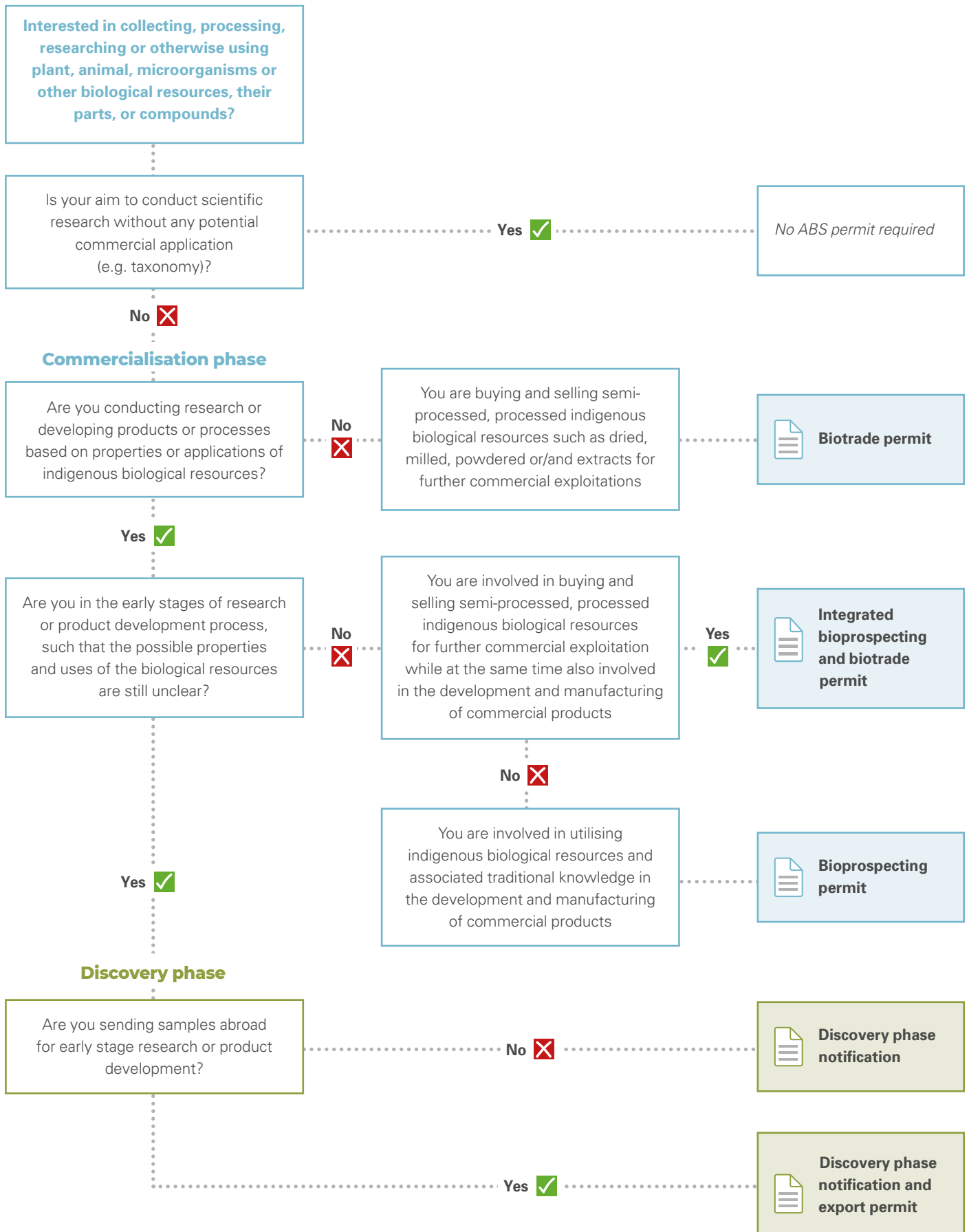
Biotrade refers to the buying and selling of indigenous biological resources, whether powders, oils, extracts, etc, for further commercial exploitation. Examples of activities considered to fall within this concept include:

- Harvesting seaweed to dry and sell as an ingredient for healthy food products
- Wild collection of *Helichrysum petiolare* to be distilled into oil and sold in bulk to fragrance manufacturers



ACCESS REQUIREMENTS AND PROCEDURES

South Africa has in place different access requirements and procedures, depending on the specific activities to be undertaken, as illustrated below:



Discovery phase of bioprospecting

Notification

Activities conducted during the discovery phase do not require a permit, as long as these activities take place within South Africa. Nevertheless, the universities, companies or other entities planning to undertake discovery phase activities must notify the Department of Forestry, Fisheries and the Environment (DFFE), as the competent national authority.

Notification is a simple procedure, as it does not require any agreements or stakeholder engagement. The notification form, which is available in Annexure 1 of BABS regulations, requires:

- Details of the applicant
- Bioprospecting project information, including the project proposal, resources involved, and whether any traditional knowledge is associated with the resource.
- A commitment signed by the applicant to comply with permit requirements for the commercialisation phase should the project enter this phase.

An official acknowledgement letter serves as proof of notification and includes conditions to be met by the applicant, such as periodic reports and restriction on the transfer of samples to third parties.

Export permit

If discovery phase activities are to be carried out in another country, an export permit is required in addition to the notification. It is important to note that – for all ABS-related permits in South Africa – at least one of the permit applicants must be a company or other entity registered in South Africa or a South African natural person. Co-applicants may be foreign nationals or legal entities established abroad.

The discovery phase export permit form, which is available in Annexure 2 of BABS regulations, requires similar information as above, but also must be accompanied by supporting agreements with providers of both the indigenous biological resources and, if relevant, the associated traditional knowledge. A fee must also be paid prior to submitting an application for an export permit.

Boxes 2 and 3 describe who are the providers in the South African ABS framework and how such providers are identified in practice.



Information on the different types of agreements and documents required from providers, including material transfer agreements, benefit sharing agreements and community resolutions is provided below.

Commercialisation phase of bioprospecting, biotrade, or integrated activities

Who should apply for an ABS permit in South Africa?

In South Africa, all entities along the supply chain involved in bioprospecting or biotrade activities must be covered by a relevant permit. For example, in a supply chain involving a company buying dried, powdered leaves from an indigenous plant to make a cosmetic ingredient, a manufacturer using the ingredient in a personal care product and a brand selling the final product, all would require permits.

Different types of permits – a bioprospecting permit, a biotrade permit or an integrated biotrade and bioprospecting permit – authorise activities linked to the commercialisation phase of bioprospecting, biotrade or a combination of both bioprospecting and biotrade.

These different permits require similar information and a single application form, which is available in Annexure 5 of the BABS Regulations.

Information to be provided include

- Details of the applicant and collaborators
- The type and amounts of the resource to be accessed
- Traditional knowledge associated with the resource
- Stakeholders, including the access provider and traditional knowledge holder
- A business plan or project summary

A fee must be paid when submitting the application. Fees vary depending on the turnover of the company and whether it is based in South Africa or not. Additionally, the application form must be accompanied by a material transfer agreement, benefit sharing agreement and, if relevant, a community resolution.

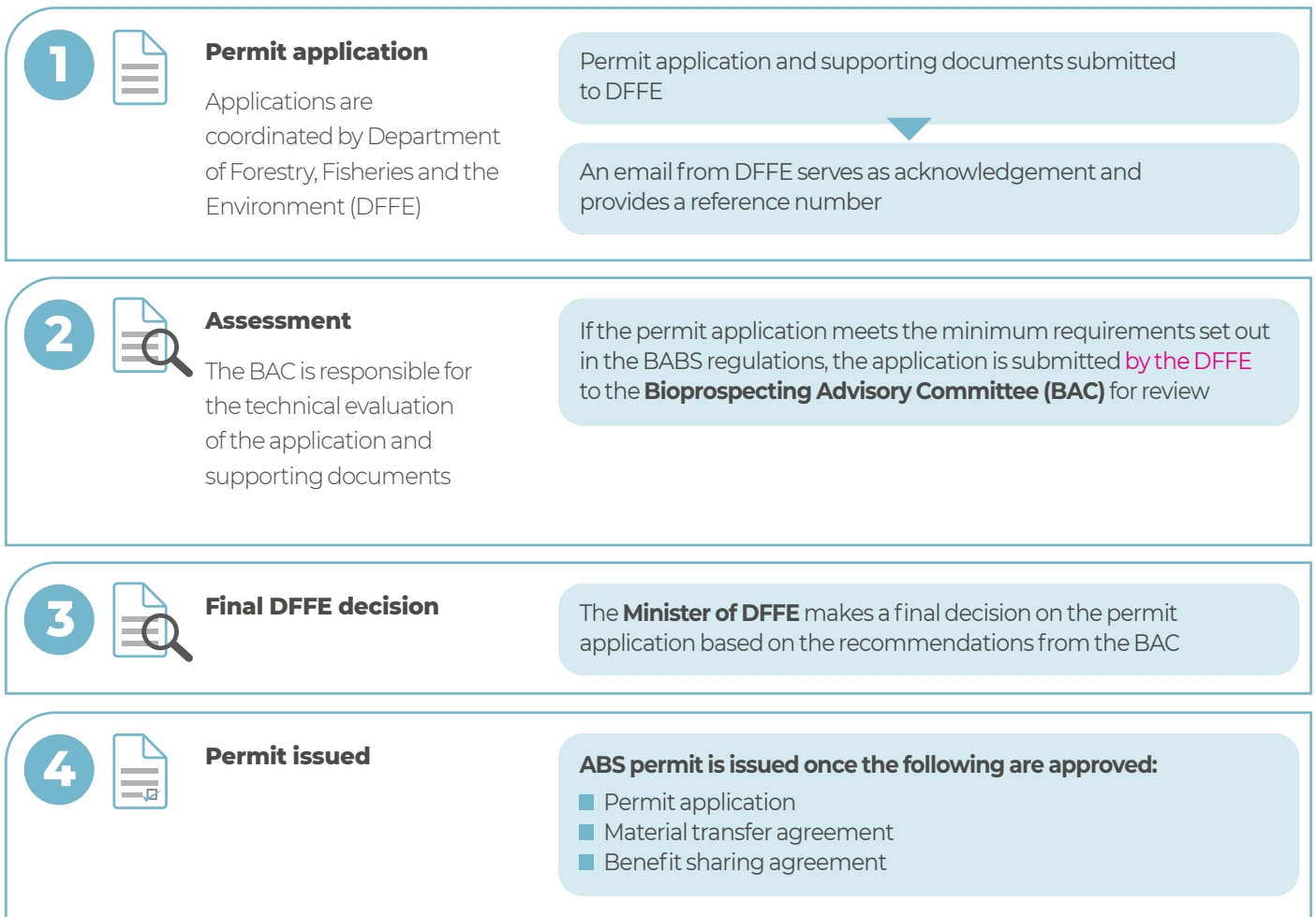
Box 1

The Bioprospecting Advisory Committee and its role

The Bioprospecting Advisory Committee (BAC) supports DFFE decisions on the issuance of permits by providing advice and expertise on proposed projects and benefit sharing agreements.

It is composed of representatives from a number of organisations, including the South African National Biodiversity Institute (SANBI), the South African National Parks (SANParks), provincial nature conservation agencies, and various national government departments including the DFFE, the Department of Science and Innovation, the Department of Trade, Industry and Competition, the Department of Agriculture, Land Reform and Rural Development, the Department of Health and the Department of Cooperative Governance and Traditional Affairs.

PROCEDURE FOR ABS-RELATED PERMITS IN SOUTH AFRICA



ACCESS AND BENEFIT SHARING AGREEMENTS

A **material transfer agreement (MTA)** and a **benefit-sharing agreement (BSA)** with the provider of the resource and, if relevant, the holder of traditional knowledge are requirements for obtaining a discovery phase export permit, a biotrade permit, a bioprospecting permit or an integrated biotrade-bioprospecting permit.

Material transfer agreement

A MTA is an agreement concluded between the permit applicant and the provider of the indigenous biological resources. It includes the terms of access and use of the resource and enables the DFFE to know the origin of the resources and the purpose for which it is accessed. A template is available in Annexure 11 of the BABS Regulations.

Benefit-sharing agreement(s)

Benefit sharing agreements are negotiated between the applicant and the providers of the indigenous biological resources and, if relevant, the associated traditional knowledge.

Box 2

Provider of indigenous biological resources

The provider of the biological resources is the natural person, government agency, legal entity or indigenous community that provides access to the indigenous biological resource and is the owner of the land where these resources are cultivated or collected.

A template is available in Annexure 12 of the BABS regulations. Although the template contains a list of potential monetary and non-monetary benefits, benefits are established on case by case basis depending on the nature of the project. All benefits must be paid into the Bioprospecting Trust Fund managed by DFFE, which then transfers funds for projects or other benefits to the providers.

Box 3

Traditional knowledge holders

In South Africa, ABS requirements cover traditional knowledge associated with indigenous biological resources. Companies are required to acknowledge all existing knowledge even if they are not using such knowledge in their activities. Part of the application process involves validating whether or not such knowledge is relevant to the proposed activities. Such validation and identifying the holders may be a challenge.

For some plants, such as Hoodia, Rooibos, Honeybush, and many others, the existence of traditional knowledge and holders of this knowledge have been identified. DFFE, as the competent authority, can assist in identifying the holders of traditional knowledge and provide guidance in situations where multiple communities have been identified as holders of knowledge. When a community is identified as the traditional knowledge holder, the process for a community resolution and informed consent followed by ABS negotiations must be implemented.

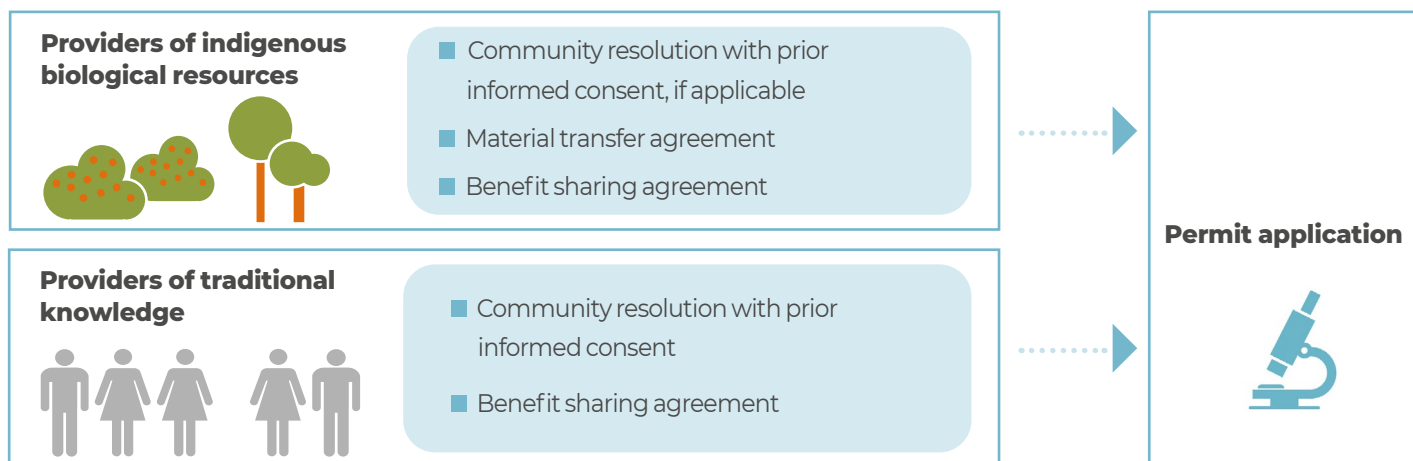
Community resolution

In situations where an indigenous community is the collective holder of traditional knowledge or owns the land where the indigenous biological resource will be accessed, ABS permit applications must be accompanied by a community resolution. This resolution indicates that the prior informed consent of the community has been obtained and that it has full knowledge of the intended use of the resource and/or knowledge.

The community resolution is to be completed using Annexure 13 of the BABS regulations.



Agreements with providers required for ABS-related permits



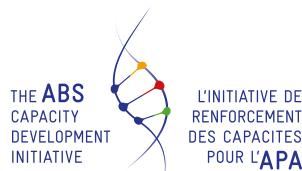
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REFERENCES

Photo credits: close up of a Hoodia plant in flower (By Christin Winter, © Shutterstock), Wild flowers in a rooibos tea field near Clanwilliam in the Western Cape Province (By Grobler du Preez, © Shutterstock), Close-up of pale blue inflorescence and pinnate leaves of a licorice shrub (By Carmen Hauser, © Shutterstock), Person Holding Container With Seaweed (By Chokniti Khongchum, © Pexels)

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