

## **2. AGREEMENT ON ACCESS TO BIOLOGICAL RESOURCES FOR COMMERCIAL PURPOSES**

This Agreement is entered into as of the ..... day of ....., year..... in accordance with Section 3 of the Biological Diversity Act, 2002 and Rule 14 of the Biological Diversity Rules, 2004.

### **Signed Between**

**National Biodiversity Authority** (Hereinafter referred to as "the **NBA**") having its office at 475,9th South Cross Street, Kapaleeswar Nagar, Neelankarai, Chennai – 600041, India (www.nbaindia.org).

And

**XYZ** (which can be a Manufacturer/Company/Institute/ Individual,Trust etc) having its office at..... (Hereinafter referred to as **XYZ**)

Hereinafter, the NBA and XYZ 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 (Act 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.

XYZ is a (Manufacturer/Company/Institute/ Individual/Trust etc) .....and having business interests in the manufacturing of products which requires certain biological resources and/or associated knowledge as a raw materials.

XYZ has made an application in Form I, under Rule 14 of the Biological Diversity Rules, 2004 to seek approval from the NBA to access the biological resources and/or associated knowledge for the purposes of Commercial Utilisation of the same.

### **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:** means the biological resources as defined in section 2(c) of the Act and includes any associated knowledge, which XYZ desires to access for the purposes of Commercial Utilisation and which is as described in Schedule A to this Agreement.

**Commercial Utilisation** means any use as described in the Act and limited to the actual use as described in Schedule B to this Agreement.

## **2. Grant of Approval**

2.1 XYZ requests for approval and the NBA hereby grants the approval to access the Biological Resources and the associated knowledge specified in Schedule A for the purposes of Commercial Utilisation subject to the terms and conditions set forth in this Agreement.

2.2 Any activities/use involving the Biological Resources that are not expressly authorized by the provisions of this Agreement and any annexures hereto shall be deemed to be expressly prohibited.

2.3 XYZ 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 certain actions under the Act.

## **3. Assignment**

3.1 Without the prior written consent of the NBA in each instance, neither this Agreement nor the rights granted hereunder shall be transferred or assigned in whole or in part by XYZ to any person whether voluntarily or involuntarily, by operation of law or otherwise. Failure of XYZ to obtain the prior written consent of the NBA to any such transfer or assignment shall be deemed to be a material breach of this Agreement and result in the immediate termination of this Agreement, without notice in addition to any other actions that may be taken against XYZ 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 personal to XYZ and will be treated as terminated in the event of any substantial changes in the management or shareholding of XYZ, that alters the control structure of XYZ and includes changes brought by a transfer of business units, merger, demerger or any other kind of corporate restructuring.

## **4. Conditions for Access to Biological Resources**

4.1 XYZ shall have access only to ..... (quantity) of Biological Resources as specified in Schedule A of this Agreement and undertakes to access the same in accordance with the directions given by the NBA (as delegated to SBB or BMC or any other governmental agencies)

4.2 XYZ 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 Resources. XYZ undertakes to protect the Biological resources at least as well as it protects its own valuable tangible personal property and shall take measures to protect the Biological Resources 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 XYZ undertakes to comply with the existing national laws, regulatory mechanisms and international agreements/treaties.

4.4 The approval given under this agreement is without prejudice to any other approvals that may be required to be taken by XYZ from any other authorities under any other law in force in the territory of India. Failure to do so shall be a material breach of this Agreement resulting in the immediate termination of this Agreement.

4.5 XYZ shall not distribute, transfer or obtain IPR or part with the Biological Resources and/or the associated knowledge accessed under this Agreement in any manner without obtaining the prior written consent of the NBA under the provisions of the Act. Nothing contained in this Agreement shall be construed as an authorization from the NBA for the transfer of Biological Resources or any associated knowledge by XYZ.

4.6. XYZ shall deposit the voucher specimen/Type specimen in the designated repositories of India in accordance with the guidelines and directions given by NBA.

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

5.1 XYZ 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.

5.2. NBA shall direct XYZ 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

## **6. Reports and Audit**

6.1 XYZ shall submit to NBA half yearly reports on the following:

- (a) the quantity of Biological Resources and/or associated knowledge accessed.
- (b) the total quantity of the Products produced by the use of the Accessed Biological Resource and/or associated knowledge.
- (c) the total billings of such Products (ex factory)
- (e) any other related information sought by the NBA by a written notice.

6.2 XYZ shall keep accurate records (together with supporting documentation) appropriate to determine all amounts due to NBA. Such records shall be retained for at least three (3) years following the end of the reporting period to which they relate.

6.3 The records mentioned in clause 6.2 should be made available during normal business hours for audit by any person authorised by NBA, for the sole purpose of verifying reports and payments hereunder. In conducting audits pursuant to this clause, such person shall have access to all records which he reasonably believes to be relevant to the calculation of royalties.

6.4 The audit by such authorized person shall be at the expense of NBA, except that if such audit shows an underreporting or underpayment in excess of five percent (5%) for any twelve (12) month period, then XYZ shall pay the cost of such examination as well as any additional sum that would have been payable to NBA had XYZ 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.

## **7. Term and Termination**

7.1 This Agreement, unless terminated as provided herein, shall remain in effect for a period of ..... years (case to case basis) from the date on which XYZ made its first access to the Biological Resources under this Agreement.

7.2 NBA may terminate this Agreement by a written notice on the happening of any of the following:

(a) If XYZ 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 XYZ becomes insolvent or shall have a petition in bankruptcy, winding up filed for or against it. Such termination shall be effective immediately upon NBA giving written notice to XYZ.

(c) If an audit conducted pursuant to clause 6.3 shows an underreporting or underpayment by XYZ in excess of 20% for any twelve (12) month period.

(d) If XYZ 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.

(e) If any of the events mentioned in Rule 15 of the Biological Diversity Rules, 2004 occur.

7.3 XYZ may terminate this Agreement by giving sixty (60) days advance written notice of termination. Upon termination, XYZ shall submit a final payment report to NBA and any outstanding payments shall become immediately payable.

7.4 Upon termination of this Agreement, XYZ shall cease all use of the Biological Resources and shall, upon request, return or destroy (at the option of NBA) all Biological Resources under its control or in its possession.

## **8. Notice**

8.1 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 delivery are:

To the NBA:

The Chairperson, National Biodiversity Authority, 475, 9<sup>th</sup> South Cross Street, Kapaleeswarar Nagar, Neelangarai, Chennai – 600041

e-mail:..... fax:.....

To XYZ:

.....

8.2 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.

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

## **9. Arbitration**

9.1 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.

9.2 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 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.

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

## **10. Governing Law and Jurisdiction**

This Agreement is governed by and is to be construed in accordance with the laws of the Republic of India without regard for conflicts of laws principles. The Parties irrevocably and unconditionally submits to the exclusive jurisdiction of the courts in Chennai, India and any courts which have jurisdiction to hear appeals from any of those courts and waives any right to object to any proceedings being brought in those courts.

## **11. Waiver**

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

## **12. 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.

## **13. Modification**

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.

## **14. 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 XYZ 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.

## **15. 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

Schedule B: Details of the Commercial Utilisation

Schedule C: Application made by XYZ in Form I

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

This Agreement has been executed in Duplicate. 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

For National Biodiversity Authority:

For XYZ:

Witness

- 1.
- 2.

- 1.
- 2.

### **Schedule A: Details of the Biological Resources**

[To be filled in by XYZ]

### **Schedule B: Details of the Commercial Utilisation**

[To be filled