**Annex. 6. Sample of a Scoping Agreement**

**AGREEMENT FOR GRANTING ACCESS TO GENETIC RESOURCES FROM BHUTAN FOR THE SCOPING PHASE OF SUCH RESOURCES**

This Agreement is entered on the ... day of ... 2013 at Thimphu, Bhutan.

**Between**

**Ministry of Agriculture and Forests, Royal Government of Bhutan** acting through and represented by the **Program Director, National Biodiversity Centre** being the authorised officer of the Authorized Agency (AA) having its office at Serbithang, Thimphu, Bhutan (hereinafter referred to as “the AA”)

**And**

**...Name of the Company...**, established and existing under the laws of **...Name of the country...** with a capital of **...USD...** having its registered **...address of the company...** (hereinafter referred to as ...)

**Whereas:**

The **AA** has been established by the Royal Government of Bhutan under the powers granted to it by Section 5 of the Biodiversity Act of Bhutan 2003 (hereafter referred to as the Act) and the Access and Benefit Sharing Policy of Bhutan 2015. Under which, the **AA** is the authority to permit access to any genetic resources and /or associated traditional knowledge found within the territory of Bhutan.

**Name of the Company**... seeks to engage in the scoping phase of the utilization of Bhutan’s genetic resources and has made an application to the **AA** to seek its approval under Section 6 of the Act.

**This Agreement** is for granting approval for the scoping phase of access to Bhutan’s genetic resources described under Section 5 of this Agreement.

**The Parties hereto agree as follows:**

**1. Definitions**

In this Agreement, unless the context otherwise requires:

**Genetic Resources** means all material of plant, animal, microbial or other origin containing functional units of heredity and include the biochemical composition of genetic resources, genetic information and derivatives.

**Traditional Knowledge associated with genetic resources** means the knowledge, innovations and practices of Bhutanese communities that is related to the utilization of biodiversity and is not limited to knowledge relating to genetic structure of biological resources.

**Access to Genetic Resources** means the utilization of genetic resources from Bhutan irrespective of whether they are accessed in situ or ex situ for the purpose of conducting any research and/or development on the genetic and/or biochemical composition of genetic resources including through the application of biotechnology. Access to genetic resources also includes the conducting of any research and development on derivatives of biological or genetic resources from Bhutan.

**Access to Traditional Knowledge associated with genetic resources** means the utilization of traditional knowledge associated with genetic resources for the purpose of conducting any research and development.

**Bhutan Access and Benefit Sharing Fund (BABS Fund)** means a fund established to receive monetary benefits derived from the research and commercial utilization of Bhutan’s genetic resources and/or associated traditional knowledge including processing fee and the cash deposit payable at the Scoping phase for strengthening the sustainable conservation initiatives of biological resources.

**Act** means the Biodiversity Act of Bhutan 2003.

**Policy** means the Access and Benefit Sharing Policy of Bhutan 2015.

**The scoping phase of utilization of genetic resources and/or associated traditional knowledge** means the initial exploratory phase of research and development with the aim of establishing market or research potential.

**The actualization phase of utilization of genetic resources and/or associated traditional knowledge** means the phase when specific steps are undertaken to commercialize or engage in focused research on such resources and/or knowledge. The actualization phase includes, but is not limited to applications for intellectual property rights, product development and testing and marketing.

**2. Preamble**

2.1. Access to Bhutan’s genetic resources shall be divided in two phases: a Scoping Phase and an Actualization Phase with differing conditions for each phase.

2.2 The Scoping Phase to conduct exploratory research will require Scoping Permit which shall be in a form of a Scoping Agreement and contain a set of conditions for utilization of such resources.

2.3. Based on the outcome of the Scoping Phase if **...Name of the Company...** intends to undertake any step to commercialize or engage in focused research on such resources and/or research results which may include but is not limited to applications for intellectual property rights, product development and testing and marketing; **...Name of the Company...** shall enter into an ABS Agreement and secure Actualization Permit prior to engaging in such steps or the Actualization Phase of utilization of such resources.

2.4. Benefit sharing under the ABS Agreement during Actualization Phase shall be based on each party’s contribution, fairness and mutual consensus.

**3. Grant of Approval**

3.1. The AA hereby grants approval for access to genetic resources for the scoping phase subject to the terms and conditions set forth in this Agreement.

3.2. Any activity/usage involving the genetic resources that is not expressly authorized by the provisions of this Agreement and any additional annexure (s) hereto is deemed as prohibited.

3.3. **...Name of the Company...** 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 legal or natural person and a statutory authority competent to approve access to genetic resources under the Act.

**4. Assignment**

4.1. Without the prior written approval of the AA in each instance, neither this Agreement nor the approval granted hereunder shall be transferred or assigned in whole or in part by **...Name of the Company...** to any natural or legal person whether voluntarily or involuntarily, by operation of act or omission on the part of **...Name of the Company...** or otherwise.

4.2. In the event of any substantial changes in the management or shareholding of **...Name of the Company...**, that alters the control structure of **...Name of the Company...** and includes changes brought by a transfer of business units, merger, demerger or any other kind of corporate restructuring, **...Name of the Company...** shall ensure that the obligations under this agreement perpetuate and provide written notice to the AA not less than **thirty (30)** days prior to initiating such changes.

**5. Conditions for Access to Genetic Resources**

5.1. **...Name of the Company...** shall have access only to the biological resources approved by the AA and listed under Annex-1 of this agreement. The approved resources shall be made available to **...Name of the Company...** by National Biodiversity Centre (NBC).

5.2. The initial processing of the biological resources listed under Annex-1 of this agreement shall be done at Bioprospecting Laboratory, NBC, Serbithang, Thimphu as per the protocols of **...Name of the Company...** and shall be transferred to **...Name of the Company...** for advanced research.

5.3. **...Name of the Company...** undertakes to abide with the provisions of the Act and other related legislations in force in Bhutan and as amended in the future.

5.5. **...Name of the Company...** undertakes to facilitate measures for the conservation and sustainable use of genetic resources and to minimize any negative environmental or social impact of the collecting and research activities.

5.6. **...Name of the Company...** shall not distribute, transfer or part with the accessed genetic resources and associated information to any third party without prior written approval of AA nor engage in the ‘actualization phase’ of the accessed resources under this Agreement and signing of appropriate Agreement and issuance of Actualization Permit.

5.7. **...Name of the Company...** undertakes to submit status report in English on yearly basis on the progress of the scoping phase to the AA by 15th of December.

5.8. The AA reserves its right to supervise the access process to the genetic resources and the research as it may deem fit.

5.9. Any violation of above conditions will be deemed to be material breach of this Agreement making the Agreement voidable at the option of the AA.

**6. Other conditions**

6.1. **...Name of the Company...** shall submit in English a hard and soft copy of its scoping findings in the form of reports, publications, thesis or any other documents to the AA as soon as the scoping is completed or published or expiry of the term of the Agreement whichever is earlier. The AA will have full ownership of the results of the scoping phase if ...Name of the Company... decides not to enter into an ‘actualization phase’ of the utilization of Bhutan’s genetic resources.

6.2. **...Name of the Company...** shall pay such sum of Nu. 35,000.00 (thirty-five thousand only) as a processing fee for the Scoping Permit/Agreement. This fee will be deposited in Bhutan ABS Fund for strengthening the sustainable conservation initiatives of biological resources.

6.3. **...Name of the Company...** shall pay such sum of Nu. 350,000.00 (Three lakhs fifty thousand only) to the AA as a guarantee deposit.

**7. Liabilities and Indemnification**

7.1. **...Name of the Company...** shall be solely responsible for any claims by third parties arising from the **...Name of the Company...** acts or omissions in the course of performing this Agreement and under no circumstances shall the AA be held responsible or liable for any claims by such third parties.

7.2. **...Name of the Company...** shall indemnify and protect the AA 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 **...Name of the Company...**, its employees or agents, (whether by reason of negligence or otherwise) in the performance by or on behalf of **...Name of the Company...** of the provisions of this Agreement or any activity undertaken or purported to be undertaken under **...Name of the Company...** authority or pursuant to the terms of this Agreement.

7.3. **...Name of the Company...** undertakes to pay such a sum as determined by AA and mutually agreed for any breach of this agreement and loss incurred in Bhutan.

**8. Term of the Agreement and Termination**

8.1. This Agreement, unless terminated as provided herein, shall remain in effect for a period of **five (5)** years from the date of signing of this Agreement by the Parties. However the obligations of **...Name of the Company...** with respect to the utilization of Bhutan’s genetic resources and/or associated information under this Agreement will remain in perpetuity.

8.2. The AA may terminate the rights under this Agreement and revoke the Scoping Permit by a written notice if **...Name of the Company...** 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 AA.

8.3. **...Name of the Company...** agrees to forfeit its deposit in situations where the AA terminates this Agreement and revokes the Scoping Permit under the conditions listed in 8.2.

8.4. **...Name of the Company...** may terminate this Agreement by giving sixty (60) days advance written notice stating valid reasons for the same. However, such termination shall come into effect only on acceptance of the same by the AA given in writing not later than thirty (30) days after the notice period and payment of all outstanding dues and submission of mandatory reports on scoping conducted until then by **...Name of the Company...**

8.5. **...Name of the Company...** agrees to transfer to the AA all the data/results/conclusions of the scoping phase in the instance of the termination of this Agreement.

8.6. **...Name of the Company...** agrees to return the genetic resources remaining and/or associated information to the AA no later than thirty (30) days after the termination of this Agreement. The costs incurred in transferring these resources back to the AA will be borne by **...Name of the Company...**

8.7. The AA shall not be liable for any loss or damage whatsoever caused to **...Name of the Company...** due to revocation of approval for access and/ or termination of this Agreement on any ground whatsoever.

8.8. **...Name of the Company...**, on termination of the Agreement, agrees not use any of the data/results/conclusions from the research on the accessed material for any purpose whatsoever without the prior approval of the AA.

**9. Notice**

9.1. Wherever in this Agreement, it is required or permitted that any 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 English and in writing and will be validly given or sufficiently communicated if forwarded by registered post with acknowledgement due, e-mail, telegram, telex or facsimile as follows:

The addresses of the Parties for communication:

|  |  |
| --- | --- |
| **The AA** | **Name of the Company** |
| Program Director  National Biodiversity Centre  Ministry of Agriculture and Forests  P.O. Box 875, Serbithang  Thimphu, Bhutan |  |

9.2 Notice will be deemed to have been delivered:

a. If delivered by hand/courier, 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 post, 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.

9.3 The Parties may change their respective addresses for delivery by delivering notice of change no later than thirty (30) days after such change has been undertaken.

**10. Confidentiality**

10.1 Upon request from **...Name of the Company...**, the AA agrees to keep the research being carried out and the progress achieved as confidential. However, 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.

10.2 This confidentiality clause does not apply in cases where the AA terminates this Agreement and revokes the Scoping Permit under Section 8.2.

**11. Interpretation**

Any interpretation of words or phrases of this Agreement shall be in accordance with the purpose, spirit and letter of the Act and as defined in this Agreement.

**12. Arbitration**

12.1 If any difference in interpretation or dispute (hereinafter referred to as a ‘Dispute’) between the Parties arises under this Agreement, any Party may give the other Party a written notice clearly 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 thirty (30) days of the receipt of such notice.

12.2 If the Dispute is not resolved by such negotiations within the period mentioned, the Parties agree to settle the Dispute through arbitration conducted by the sole arbitrator appointed by the AA. The place of arbitration shall be in Thimphu, Bhutan. The language to be used in the arbitration proceedings shall be normally in English.

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

**13. Governing Law and Jurisdiction**

This Agreement is governed by and is to be construed in accordance with the laws of Bhutan without regard to the principles of conflict of laws. The Parties irrevocably and unconditionally submit to the exclusive jurisdiction of the courts in Bhutan.

**14. Severability**

If any part of this Agreement is declared or held invalid by a court of law 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**

No amendment or modification to this Agreement shall be valid or binding upon the Parties, unless agreed upon by the Parties, made in writing, and signed on behalf of each Party by their duly and legally authorized signatories and made as annexure to this Agreement.

**16. Entirety of Agreement**

This Agreement constitutes the culmination of all prior negotiations, understandings, representations and commitments and sets down the complete terms and conditions of Agreement between the parties as to the subject matter.

**17. Representations**

17.1. The Parties represent to each other that they have the legal right and power to enter into this Agreement and to perform its obligations under the terms of this Agreement and its execution, delivery and performance by and has been duly and validly authorized by all necessary corporate action or Government action on its part.

17.2. The signatories to this Agreement shall be duly authorized by the Parties and certified copies of such authorization are appended as Annexure (s). This Agreement has been executed in duplicate, each of which shall be deemed to be original; one shall be retained by the AA and other by **...Name of the Company...** and both shall constitute one and the same instrument.

**IN CONFORMITY OF THE ABOVE TERMS AND CONDITIONS**, this Agreement has beenexecuted by duly authorized representatives of the Parties on the day and the year first mentioned.

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