Agreement on Access to Marine Microorganisms and Benefit-Sharing

THIS AGREEMENT is made
BETWEEN:

_____

[Insert the name of the ProviderState institution[1]and its representative and the full contact details]

("the Provider")

AND:

_____

[Insert the name of the Recipient institution[3]and its representative and the full contact details]

("the Recipient")

hereinafter referred to as "the Parties".

PREAMBLE

Considering that the European Union funded research project Micro B3 (hereinafter the "Micro B3 Project") was a scientific research program with the following objectives:

- to cooperatively sample marine microbial biodiversity at various sites, including through global coordinated actions called "Ocean Sampling Days"
- to generate large-scale knowledge on marine microbial genomes in an environmental context and on actual or potential biotechnological applications
- to develop innovative bioinformatics approaches for the large scale integration of genomic data of marine microbes with environmental and ecosystems data
- to make the resulting knowledge accessible for the research and development community for policy makers and the public at large,

Considering that the European Union funded research project ASSEMBLE Plus is a scientific research project that will provide scientists from academia, industry

[1] The Provider must be empowered to represent the Provider State concerning the granting of a permit and the conclusion of an agreement on access to marine genetic resources, the utilization of genetic resources, the transfer of genetic resources and knowledge and the sharing of benefits drawn from its use.

[3] The Recipient shall not be the individual researcher but the institution which employs the researcher. This ensures that the agreement survives changes of personnel and that its implementation is surveyed.

and policy with a quality-assured programme of Transnational Access (TA) and Virtual Access (VA) to marine biological stations offering a wide variety of marine ecosystems, unique marine biological resources, state-of-the-art experimental and analytical facilities with integrated workflows, historical observation data, and advanced training opportunities.

Considering that the European Marine Biological Resource Centre (EMBRC), being a self-sustained European Infrastructure, can secure the long-term operation of OSD and its step-by-step expansion to additional ecosystem components and in coordination with the global Genomics Observatories consortium.

Considering that EMBRC-ERIC e-infrastructure will offer long-term support to the continuation of OSD through the ASSEMBLE PLUS project.

Recalling that access to and utilization of genetic resources taken from the marine internal waters, territorial sea, exclusive economic zone or continental shelf of coastal states should be consistent with the provisions of the Convention on Biological Diversity (CBD) taking into account their specifications by the Bonn Guidelines on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits arising from their Utilization, and, where appropriate, the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits arising from their Utilization (NP, not yet in force), as well as with the United Nations Convention on the Law of the Sea (UNCLOS) and the customary law expressed by UNCLOS, Marine Microbial Biodiversity, Bioinformatics and Biotechnology Ocean Sampling Day Handbook, version of June 2015

Recalling that according to these provisions access to and utilization of genetic resources taken from the above described maritime zones is subject to prior informed consent of the coastal state and mutually agreed terms if the coastal state so requires,

Recalling that according to these provisions coastal states have the right to regulate, authorize and conduct marine scientific research in their marine internal waters, territorial sea, exclusive economic zone and on their continental shelf; and that in the case of research undertaken by other states or international organizations the coastal state has the right, if it so desires and if practicable, to participate or be represented in the marine scientific research project and to access data and samples and receive preliminary reports, and final results,

Recalling that according to these provisions non-monetary and/or monetary benefits from the utilization of the genetic resources shall be shared with the Provider State if the same so requires and as it is set out in mutually agreed terms,

Recalling that according to these provisions the transfer of genetic resources to third parties shall be set out in a material transfer agreement,

Recalling that according to these provisions measures on access for non-commercial research purposes shall be simplified with a view to contribute to the conservation

and sustainable use of biodiversity, and

Acknowledging that research and development on genetic resources can be for the public domain or for proprietary purposes,

The Parties to this agreement hereby agree as follows:

Article 1. AGREEMENT

1.1 The agreement sets out the terms for the access to genetic resources found in/on the Provider State's marine internal waters, territorial sea, exclusive economic zone or continental shelf, for the utilization and transfer to third parties of the accessed genetic resources, for the management and transfer to third parties of associated knowledge and for the sharing of benefits drawn from the same.

1.2 The agreement is part of the Ocean Sampling Day Consortium. Its rights and obligations extend to all OSD partners.

1.3 The Parties agree to release a copy of the agreement to the registered users of the web portal built by the OSD.

Article 2. DEFINITIONS OF TERMS

As used in this agreement, the following terms shall have the meaning provided below:

a) **Access** means collecting genetic resources from the location where they are found.

b) **Accessed genetic resources** means the genetic resources collected on the basis of this agreement.

c) **Associated genetic knowledge** means any experimental or observational data, information and other findings on the composition, life conditions and functions of the accessed genetic resources.

d) **Derivative** means a naturally occurring biochemical compound resulting from the genetic expression or metabolism of biological or genetic resources, even if it does not contain functional units of heredity.

e) **Genetic resources** means any material of plant, animal, microbial or other origin containing functional units of heredity which is of actual or potential value.

f) **Ocean Sampling Days** are simultaneous sampling campaigns in the world's oceans aiming at providing insights about the microbial diversity and the identification of novel ocean-derived biotechnologies.

g) **OSD Consortium** means everyone who has constructively contributed to OSD sampling events.

h) OSD partner means an institution or university or any research facility that is a member in the OSD Consortium.

i) **Provider State** means the coastal state from whose marine internal waters, territorial sea, exclusive economic zone or continental shelf genetic resources are collected *in situ*.

j) **Third party** means any institution or university or any research facility other than OSD partners.

k) **Utilization for proprietary purposes** means research and development that aims at protecting the associated knowledge, including products and processes developed, by patent rights, keeping the associated knowledge secret, making the associated knowledge accessible at more than incremental costs for dissemination and/or bringing the products and processes developed from the accessed genetic resources on the market.

l)**Utilization for the public domain** means research and development that aims at making the associated knowledge, including products and processes developed, publicly available at no more than incremental costs for dissemination, and without being protected by patent rights or further restricted by other intellectual property rights.

m) **Utilization of genetic resources** means research and development on the genetic and/or biochemical composition of the accessed genetic resources, including through the application of biotechnology which is any technological application that uses biological systems, living organisms, or derivatives thereof, to make or modify products or processes for specific use.

Article 3. ACCESS TO GENETIC RESOURCES

3.1 The Recipient shall be entitled to collect samples as follows:

a) Kinds of samples[5], including the kind of genetic resources[6], if known:

_____

b) Number and quantity of samples:

_____

c) Geographical location of collection[7]:

_____

[5]E.g. seawater, sediment.
[6]The kind of genetic resources to be extracted from the sample, i.e. virus, bacteria, funghi, microorganism.
[7]E.g. GPS coordinates.

d) Time period for collection:

_____

3.2 The Recipient shall within … [time period to be specified by the Parties] after collection of the samples notify to the Provider the kinds of genetic resources the Recipient intends to utilize. The Provider may, within … weeks [to be specified], raise objections in which case the Parties will seek agreement on the kinds of genetic resources allowed to be utilized.
(This clause is to be crossed out if not applicable)[8]

3.3 The Recipient shall be entitled to move the accessed genetic resources to its premises and, subject to Article 1.2 of this agreement, to the premises of other OSD Partners, as well as to an institution or individual which is contractually bound with the Recipient to provide specified assistance concerning the utilization of the accessed genetic resources[9].

3.4 The Recipient shall deliver a portion of the accessed genetic resources to the Provider or an institution designated by the same:

_____

The samples shall be delivered in the following form:

_____

(This clause is to be crossed out if not applicable)

3.5 The Recipient shall bear all the costs incurred in accessing and delivering the genetic resources.

Article 4. UTILIZATION OF THE GENETIC RESOURCES

4.1. The Recipient shall be entitled to the utilization of the accessed genetic resources.
Specifications, if deemed necessary:

_____

4.2 The utilization of the accessed genetic resources shall be for the public domain.
Specifications, if deemed necessary:

_____

(This clause is to be crossed out if not applicable)

4.3 The Recipient shall be entitled to utilize part/all (please cross out) of the accessed genetic resources for proprietary purposes:
Specifications, if deemed necessary:

_____

(This clause is to be crossed out if not applicable)

[8] Not applicable if kind of genetic resources included is known *ex ante* under 3.1.a)
[9] All other transfers are considered transfers to third parties and bound by the conditions under Article 5.

4.4 Should the Recipient, after the conclusion of this agreement, intend to utilize the accessed genetic resources and/or use the associated genetic knowledge for proprietary purposes the Recipient shall seek the consent of the Provider.
Specifications of the consent procedure, if deemed necessary:

_____

4.5 Should the Provider, after the conclusion of this agreement, intend to utilize the accessed genetic resources and/or use the associated genetic knowledge for proprietary purposes the Provider shall enter into amicable negotiations with the Recipient on the modification or termination of this agreement.
(This clause is to be crossed out if not applicable)

Article 5. TRANSFER OF GENETIC RESOURCES TO THIRD PARTIES

5.1 The Recipient may transfer to a third party the accessed genetic resources, or parts of them, provided that the third party agrees with the Recipient, to apply to the transferred genetic resources Articles 4 to 16 of this agreement.

5.2 If the Recipient intends to transfer to a third party the associated genetic knowledge which is not yet submitted to the public domain according to Article 6, the third party shall agree with the Recipient, to apply to the transferred knowledge Articles 4 to 16 of this agreement.

5.3 In case of transfer to a third party, the Recipient needs the prior informed consent of the Provider, under one of the following modalities[10].
- a notification of the transfer to the Provider or an institution designated by the same, along with the sending of a copy of the transfer agreement, will be considered as proof of prior informed consent. The institution shall be the following [if applicable]:

_____

- other [specification of the modality]:

_____

[This clause is to be crossed out upon agreement that the consent is not required]

Article 6. DISSEMINATION OF KNOWLEDGE

6.1 The Recipient shall make the associated genetic knowledge publicly available at no more than incremental costs of dissemination. The dissemination can be through online media, print media or delivery upon request. The recommended forums for

[10] NOTE OF CAUTION: The Parties should be aware that too heavy PIC requirements could significantly complicate the research and development process during the non-commercial stage considered in this contract (defined as public domain). A facilitated PIC procedure for non-commercial use (public domain uses) as proposed here would also be to the advantage of the Provider country because this allows the Recipient to transfer GR or knowledge during the non–commercial stages more easily and this might lead to increased commercial product development in later stages, in which a new negotiation with the Provider country is initiated according to the renegotiation clause in Art. 4.4.

online dissemination are EMBRC-ERIC e-infrastructure (www.embrc.eu) and existing data bases and information networks such as the Global Biodiversity Information Facility (GBIF), SeaDataNet, Pangaea and the International Nucleotide Sequence Database Collaboration (INSDC).

6.2 Such knowledge shall be made available as soon as possible after its generation unless otherwise specified. No embargo period is allowed for the raw sequence data and the oceanographic data associated to the samples collected upon the Ocean Sample Days.
Specifications if deemed necessary:
_____

6.3 The Recipient shall make reasonable efforts to ensure that the release of associated genetic knowledge through online media, print media or delivery upon request will be organized such that users are bound not to use the associated genetic knowledge taken from the portals for proprietary purposes unless they have obtained prior informed consent of the Provider.

6.4 Paragraphs 1-3 of this Article do not apply to associated genetic knowledge used for proprietary purposes specified under Articles 4.3 and 4.4.

6.5 The Recipient shall make reasonable efforts to ensure that the users of knowledge accessed from EMBRC-ERIC e-infrastructure provide to the System the knowledge from their own research in such form and format as the System will reasonably require, in order to promote the objectives of the utilization for the public domain.

Article 7. ACKNOWLEDGING THE CONTRIBUTION OF THE PROVIDER STATE

7.1 When making associated genetic knowledge publicly available under Article 6 the Recipient shall indicate the country of origin of the utilized genetic resource.

7.2 When making associated genetic knowledge publicly available under Article 6 the Recipient shall acknowledge the role of scientists from the Provider State, and, where any work, significant advice or recommendations have been provided by such scientists, their (co-)authorship.

Article 8. RECORDING AND REPORTING

8.1 The Recipient shall maintain records concerning the storage and transfer of the accessed genetic resources and allow access to such records to the Provider or the authority designated by the same.

_____
_____
_____(insert name and address of authority if applicable)

8.2 The Recipient shall report in writing to the Provider or the authority designated by

the same every _____ [insert duration] months, beginning _____ and ending _____, providing details of the progress of utilization.

_____

_____

_____(insert name and address of authority if applicable)

8.3 With relation to associated genetic knowledge used for proprietary purposes specified under Articles 4.3 and 4.4, the Recipient shall, when reporting according to paragraph 2 of this Article, also report on any steps taken towards obtaining or implementing intellectual property protection and the selling of products or processes based on this knowledge[11].

Article 9. SHARING OF KNOWLEDGE

9.1 The Recipient shall provide the Provider, or the authority designated by the same, with the associated genetic knowledge and provide assistance in their assessment or interpretation as reasonably requested.

_____

_____

_____(insert name and address of authority if applicable)

9.2 Such knowledge shall, at the latest, be provided once it has been made publicly available.
Specifications if deemed necessary[12]:

_____

_____

9.3 The obligation under paragraph 1 of this Article extends to associated genetic knowledge used for proprietary purposes specified under Articles 4.3 and 4.4. When using the knowledge the Provider shall not prejudice any use for proprietary purposes by the Recipient [13].
Specifications, if deemed necessary:

_____

_____(This clause is to be crossed out if not applicable)

9.4 The Recipient shall furnish the Provider or the authority designated by the same with _____ (insert number) copies of any publication based on the utilization of the accessed genetic resources.

[11] Subject to negotiation of the Parties it could be agreed that the consent of the Provider is required for certain steps of commercialization such as the bringing on the market of the product.

[12] It may be concluded between the Parties that the Provider shall be informed before publication. This may allow the Provider to check if the requirements under Article 7 are fulfilled and/or if there is reason for pursuing proprietary purposes according to Article 4.5. In this case the provider shall keep the knowledge confidential during the agreed period.

[13] This clause will be negotiated along with the benefit-sharing arrangement: a provider country will prefer to have access to the information (even if the country keeps it confidential as specified under 9.2), but a company might prefer to give a higher upfront benefit-sharing under Article 11 as a *quid pro quo* for crossing this Article.

_____
_____
_____(insert name and address of authority if applicable)

Article 10. SCIENTIFIC COLLABORATION WITH THE PROVIDER STATE AND CAPACITY-BUILDING

As part of the Ocean Sampling Day Consortium the Recipient agrees to collaborate with scientists from the Provider in the utilization activities based on this agreement. Such involvement shall take the following forms:

_____
_____
_____[14] (to be specified by negotiations)

Article 11. BENEFIT-SHARING IN CASE OF UTILIZATION FOR PROPRIETARY PURPOSES

11.1 The Recipient agrees to pay an up-front compensation of … (amount to be specified) to the Provider, if the Recipient utilizes the accessed genetic resources for proprietary purposes. The payment is due to the Provider within … months (term to be specified) after consent on the kinds of genetic resources to be utilized has been reached under Article 3.2. The payment shall be transferred to the following account of the Provider:

_____
_____
_____(This clause is to be crossed out if not applicable)

11.2 If the Recipient utilizes the accessed genetic resources or uses the associated knowledge for proprietary purposes according to Articles 4.3 and 4.4, it must fairly and equitably share with the Provider any monetary benefit obtained.

11.3 The share shall be determined by further negotiations between the Parties to this agreement.

11.4. (Alternatively to 11.3) The share shall be _____percent of the revenue from sales of the product or process based on the accessed genetic resources. It shall be paid on the basis of a financial report to be sent to the Provider or an authority designated by the same at the end of any year of any revenue generation to the account designated by the same.

_____
_____
_____(Insert authority and account details)

[14] It should be noted that in the normal case of scientific collaboration the partners conclude a research collaboration contract in which the details of the collaboration are laid out. The ABS agreement should not be overloaded with such details. It will be advisable that the Parties to the ABS agreement make a reference to the research collaboration agreement.

11.5 If the Recipient utilizes the accessed genetic resources or utilizes the associated genetic knowledge for proprietary purposes without being entitled according to Articles 4.3 or 4.4, and therefore in breach of the conditions of this agreement, it must share with the Provider any monetary benefit obtained from such utilization or use. The share shall be _____ percent of the revenue from sales of the product or process based on the accessed genetic resources. It shall be paid on the basis of a financial report to be sent to the Provider or an authority designated by the same in due time upon request by the same.

_____

_____

_____(Insert authority and account details if applicable)

(This Article or single paragraphs of it are to be crossed out if not applicable)

Article 12. OTHER LAWS TO BE RESPECTED

The Recipient shall ensure that the collection, storage, transfer, utilization and exportation of the genetic resources complies with all applicable laws of the Provider State on the protection of human health and the environment, on taxes, on customs and any other concern.

Article 13. DURATION OF THE AGREEMENT

The agreement is of unlimited duration, except for the obligations under Articles 8.2 and 10, which shall end on [date to be inserted; e.g. 2 years after the termination of the OSD event]:

_____

Article 14. APPLICABLE LAW

14.1 The applicable law on any matters relating to the interpretation and the application of the present agreement shall be:

_____

14.2 The competent court for dispute settlement shall be:

_____

Article 15. DISPUTE SETTLEMENT

15.1 No Party shall, in the event of a dispute arising from this agreement, commence court proceedings (except proceedings for urgent interlocutory relief) before searching for an amicable solution according to paragraphs 2 and 3 of this Article.

15.2 A Party to this agreement claiming that a dispute has arisen under or in relation to this agreement must serve the other Party with a written notice specifying the nature of the dispute on receipt of which the dispute resolution shall forthwith begin.

15.3 Any dispute arising from this agreement shall be resolved expeditiously foremost by negotiation in good faith failure to which the Parties shall engage informal dispute resolution techniques, such as mediation and arbitration or similar techniques agreed to by them.

Article 16. TERMINATION OF THE AGREEMENT

16.1 The agreement may be terminated at any time by mutual agreement in writing.

16.2 The agreement may be terminated by default if the Recipient fails to satisfy any of the following obligations under this agreement: Articles 4.2, 4.3, 4.4, 5.1, 5.2, 5.3, 6.1, 6.3, 7, 8, 9.1 and 9.3, 11.2 and 11.5.

16.3 In the case of default the Provider may immediately terminate this agreement by giving written notice to the Recipient of the termination, provided that:

a) the Provider has given prior notice to the Recipient of the alleged default; and

b) the Recipient fails to respond to the Provider within the period specified by the notice (being not less than 20 business days and not more than 60 business days) to rectify or explain to the satisfaction of the Provider the reasons for the default.

16.4 If this agreement is terminated under paragraph 2 of this Article the Recipient will not thereafter utilize or transfer the accessed genetic resources or use or transfer associated genetic knowledge; and it will transfer back to the Provider or destroy, at the Provider's discretion, all genetic resources or associated genetic knowledge. The operation of this clause survives the termination of this agreement.

(Location, Date)

(Provider) (Recipient)