



Republic of Namibia
Annotated Statutes

Access to Biological and Genetic Resources and Associated Traditional Knowledge Act 2 of 2017

(GG 6343)

This Act has been passed by Parliament, but it has not yet been brought into force.
It will come into force on a date set by the Minister in the *Government Gazette*.

ACT

To regulate access to biological or genetic resources and associated traditional knowledge, and innovation, practices and technologies associated with biological and genetic resources and traditional knowledge; to protect the rights of the local communities over biological and genetic resources and associated traditional knowledge; to provide for a fair and equitable mechanism for benefit sharing; to establish the necessary administrative structures and processes for the implementation and enforcement of such principles; and to provide for incidental matters.

(Signed by the President on 9 June 2017)

ARRANGEMENT OF SECTIONS

PART 1 PRELIMINARY PROVISIONS

1. Definitions
2. Objects of Act
3. Application of Act
4. Exemptions from application of Act

PART 2 RIGHTS IN RELATION TO BIOLOGICAL AND GENETIC RESOURCES AND ASSOCIATED TRADITIONAL KNOWLEDGE

5. Rights in relation to biological and genetic resources and associated traditional knowledge

Access to Biological and Genetic Resources and Associated Traditional Knowledge Act 2 of 2017

PART 3
INSTITUTIONAL ARRANGEMENTS

6. Office of Biological and Genetic Resources and Associated Traditional Knowledge
7. Management of special funds

PART 4
ACCESS TO BIOLOGICAL AND GENETIC RESOURCES AND ASSOCIATED
TRADITIONAL KNOWLEDGE

8. Access permit
9. Prior informed consent
10. Benefit sharing
11. Material transfer agreement

PART 5
RECOGNITION AND PROTECTION OF COMMUNITY RIGHTS

12. Recognition of general rights of local communities
13. Protection of community intellectual property rights

PART 6
OFFENCES, PENALTIES AND FORFEITURE

14. Offences and penalties
15. Forfeiture

PART 7
GENERAL PROVISIONS

16. Acts binds State
17. Exclusions
18. Appeals to Minister
19. Appeals to High Court against decision of Minister
20. Limitation of personal liabilities
21. Offences by body corporate and jurisdiction
22. Delegation and assignment of powers and functions
23. Regulations
24. Transitional provisions
25. Short title and commencement

BE IT ENACTED as passed by the Parliament, and assented to by the President, of the Republic of Namibia as follows:

PART 1
PRELIMINARY PROVISIONS

Definitions

1. In this Act, unless the context otherwise indicates -

“access” means obtaining, collecting, possessing, acquiring, using, selling, either directly or indirectly, biological or genetic resources found in both *in situ* or *ex situ* conditions under the control of the State, or parts thereof, derivatives, products including synthetic products, and

Access to Biological and Genetic Resources and Associated Traditional Knowledge Act 2 of 2017

where applicable, intangible components or associated traditional knowledge, for purposes regulated under this Act;

“access and benefit sharing agreement” means an agreement mutually concluded between the right holders and the user, which provides for the terms of accessing biological and genetic resources and associated traditional knowledge and the sharing by the user, of any future benefits, that may derive from the activities involving the biological and genetic resources and associated traditional knowledge with the right holders;

“access permit” means a permit authorising access to biological and genetic resources and associated traditional knowledge issued under section 8;

“associated traditional knowledge” means the accumulated individual or collective knowledge, practices, innovations or technologies associated with biological and genetic resources which is created or developed over generations by local communities, vital for conservation, sustainable utilisation of biological and genetic resources and of socioeconomic value;

[The verb “is” should be “are” to be grammatically correct (“technologies... are”).]

“benefits” means any monetary or non-monetary gain or profit or interest or advantage arising from or accruing to or out of commercialisation, industrial application or economic use of the biological and genetic resources and associated traditional knowledge, to derive, develop or modify a product or process.

[The full stop at the end of this definition should be a semicolon.]

“benefit sharing” means sharing in a fair and equitable manner by user, of the monetary and non-monetary benefits, as contemplated under section 10, that accrue to or from the utilisation of biological and genetic resources and associated traditional knowledge, with the right holders;

“biological diversity” or “biodiversity” means variability among living organisms from all sources including, among others, terrestrial, marine and aquatic ecosystems and the ecological complexes of which they are a part, and including diversity within species, between species and ecosystems;

“biological resources”, includes organisms or parts thereof, populations, or any other biotic component of ecosystems with actual or potential use or value for humanity;

“bioprospecting” means exploratory activities including surveying, collection, characterisation, inventorisation, taxonomic identification, bio-assay and genetic sequencing that aims to identify genetic resources and information on associated traditional knowledge for the purpose of discovering its commercial value;

“commercialisation” means the following activities in relation to biological and genetic resources -

- (a) the filing of any complete intellectual property right application, whether in Namibia or elsewhere;
- (b) obtaining or transferring any intellectual property rights or other rights;
- (c) commencing clinical trials and product development, including the conducting of market research and seeking pre-market approval for the sale of resulting products;

Access to Biological and Genetic Resources and Associated Traditional Knowledge Act 2 of 2017

- (d) the multiplication of genetic resources through cultivation, propagation, cloning or other means to develop and produce products, such as drugs, industrial enzymes, food flavours, fragrance, cosmetics, emulsifiers, oleoresins, colours and extracts;
- (e) any other legal, commercial or scientific process aimed at acquiring, protecting or realising any real or potential commercial value of any biological and genetic resources or any component or any associated traditional knowledge; or
- (f) transfer of results of any research based on the accessed biological and genetic resources and associated traditional knowledge;

“commercialisation phase” means any research on, development or application of, biological or genetic resources and associated traditional knowledge where the nature and extent of any actual or potential commercial or industrial exploitation in relation to the project is sufficiently established to begin the process of commercialisation and associated traditional knowledge;

“community intellectual property rights” means rights held by local communities over their associated traditional knowledge associated with biological and genetic resources whether formally registered or not;

“community protocols” means a broad range of practices and procedures, both written and unwritten, developed by local communities in relation to their genetic resources and associated traditional knowledge which cover a range of matters, including how local communities expect external actors to engage with them;

“derivative” means any naturally occurring biochemical compounds resulting from the genetic expression or metabolism of biological or genetic resources, even if it does not contain functional units of heredity;

“discovery phase” means any research or development or application of, biological and genetic resources and associated traditional knowledge where the nature and extent of any actual, potential or commercial or industrial exploitation in relation to the bioprospecting is not sufficiently clear or known to begin the process of commercialisation;

“environment” means the complex of natural and anthropogenic factors and elements that are mutually interrelated and affect the ecological equilibrium and the quality of life, including -

- (a) the natural environment, being land, water and air, all organic and inorganic material and all living organisms; and
- (b) the human environment, being the landscape and natural, cultural, historical, aesthetic, economic and social heritage and values;

“Environmental Investment Fund of Namibia” means the Fund created in terms of section 2 of the Environmental Investment Fund of Namibia Act, 2001 (Act No. 13 of 2001);

“export permit” is a permit for exporting any biological or genetic resources or associated traditional knowledge issued under section 8;

“*ex situ*” means a condition wherein biological and genetic resources are housed, planted, stored, kept or found outside their natural ecosystem or habitats such as herbariums, research institutions, universities, botanical gardens, private collections and any other similar conservation centres;

Access to Biological and Genetic Resources and Associated Traditional Knowledge Act 2 of 2017

“genetic resources” means any material of plant, animal, microbial or other origin containing or derived from functional units of heredity and which has actual or potential value which may be found in *in situ* or *ex situ* conditions under the control of the State;

[The words “origin” and “potential” are reproduced as they appear in the Government Gazette; they were probably intended to be “origin” and “potential”.]

“innovation” means any generation of a new or an improvement of existing traditional knowledge or technologies through alteration or modification, or the use of the properties, values or processes of any biological and genetic material, whether existing in written or oral form;

“*in situ*” means a condition in which biological and genetic resources are found in their natural habitat or ecosystem;

“intangible components” means all know-how, innovation or individual or collective practice, with a real or potential value, that is associated with the biological and genetic resource, its by-products or the biological and genetic resource that contains them, whether or not protected by intellectual property regimes;

“local community” means a group -

- (a) living or having rights or interests in a distinct geographical area within Namibia with a leadership structure and it may include natural resource management organisations such as conservancies and community forest committees; or
- (b) with rights in relation to or stewardship over its natural resources, genetic resources and associated traditional knowledge and technologies, governed partially or completely by its own customs, traditions or laws;

“material transfer agreement” means a written agreement that governs the transfer of biological or genetic resources or associated traditional knowledge contemplated in section 11;

“Minister” means the Minister responsible for environment;

“Ministry” means the Ministry of Environment and Tourism;

“Office” means the Office referred to in section 6;

“permit office” means the office established in the Ministry;

“prescribe” means prescribed by regulation;

“prior informed consent” means the consent given by the concerned right holders to the user based on complete and accurate information regarding the utilisation intended for a particular biological or genetic resources and associated traditional knowledge.

[The phrase “a particular biological or genetic resources” should be either “particular biological or genetic resources” or “a particular biological or genetic resource”. The full stop at the end of the definition should be a semicolon.]

“regulation” means a regulation made under section 23;

“right holders” with regard to biological and genetic resources and associated traditional knowledge means -

Access to Biological and Genetic Resources and Associated Traditional Knowledge Act 2 of 2017

- (a) a person or community who holds associated traditional knowledge and who has rights with respect to such biological and genetic resources and associated traditional knowledge in terms of this Act; or
- (b) the State;

“sustainable use” means the use of components of the environment in a way and at a rate that does not lead to the long-term decline of the resources and the environment, thereby maintaining its potential to meet the needs and aspirations of present and future generations;

“this Act”, includes the regulations made under section 22;

[The comma after “this Act” is superfluous.]

“traditional knowledge” means knowledge, know-how, skills and practices that are developed, sustained and passed on from generation to generation within a community, often forming part of its cultural or spiritual identity;

“transfer of technology” means an action that aims to ensure access to and the development and transfer of technology for the conservation and utilisation of biological diversity or technology developed from genetic resources or associated traditional knowledge;

“user” means a holder of access permit; and

[The article “an” should appear before the phrase “access permit”.]

“utilisation of biological and genetic resources” means to conduct research and development on the biological, genetic or biochemical composition of biological and genetic resources, including through the application of biotechnology to such biological and genetic resources or their derivatives.

Objects of Act

2. The objects of this Act are to provide for the conservation, evaluation and sustainable use of biological and genetic resources and associated traditional knowledge to -

- (a) maintain and improve their diversity as a means of sustaining life support systems;
- (b) recognise, protect and support the inalienable rights of local communities over their genetic resources and associated traditional knowledge;
- (c) provide arrangements and procedures including measures for accessing biological or genetic resources of Namibia and associated traditional knowledge, their products and derivatives for purposes regulated under this Act subject to the prior informed consent of the rights holders and mutually agreed terms;
- (d) develop and promote appropriate mechanisms for a fair and equitable sharing of benefits arising from the use of genetic resources and associated traditional knowledge;
- (e) ensure the effective participation of concerned local communities, with a particular focus on women, in making decisions as regards the distribution of benefits which may derive from the use of their biological and genetic resources and associated traditional knowledge;

Access to Biological and Genetic Resources and Associated Traditional Knowledge Act 2 of 2017

- (f) promote and encourage the building of national and grassroots scientific and technological capacity relevant to the conservation and sustainable use of biological or genetic resources and associated traditional knowledge;
- (g) provide appropriate institutional mechanisms for the effective implementation of access to biological or genetic resources and associated traditional knowledge and enforcement of the rights of local communities;
- (h) promote biological and genetic resources including those of agricultural, horticultural, silvicultural, aquacultural and medicinal value with a particular focus on the major role women play; and
- (i) ensure that biological and genetic resources are utilised in an effective and equitable manner in order to strengthen sustainable development, food security and poverty alleviation.

Application of Act

3. This Act applies to -

- (a) biological and genetic resources in both *in situ* and *ex situ* conditions;
- (b) the derivatives of biological or genetic resources;
- (c) associated traditional knowledge;
- (d) benefits arising from the use of biological and genetic resources, their derivatives and associated traditional knowledge; and
- (e) the discovery or commercialisation phase of bioprospecting.

Exemptions from application of Act

4. (1) Despite anything to the contrary in section 3, the following activities are exempted from the application of this Act -

- (a) access to, use or exchange of biological and genetic resources and associated traditional knowledge by and between local communities based on own consumption, customary practices and traditional systems of exchange;
- (b) biological and genetic resources in transit through Namibia certified to be purely for food or other consumptive purposes as prescribed in the relevant laws;
- (c) commodity trade of biological and genetic resources for purposes other than utilisation of the biological and genetic resources which requires a valid permit under this Act but this must be established on a case by case basis; and
- (d) any prescribed activities.

(2) The exemptions in terms of subsection (1) do not apply to the commercialisation of biological and genetic resources and associated traditional knowledge.

Rights in relation to biological and genetic resources and associated traditional knowledge

5. (1) Subject to any right conferred by or under this Act, any right in relation to the access to or prospecting for, and the collection and sale or disposal of, and the exercise of control over any biological or genetic resource vests in the State despite -

- (a) any right of ownership of any local communities, person or group in relation to any land in, on or under which any such biological or genetic resource is found; and
- (b) any associated traditional knowledge which any local communities, person or group may have with regard to the biological or genetic resource in question.

(2) The rights in relation to traditional knowledge and technologies associated with any biological and genetic resource vest in the particular local community which holds and applies such knowledge for the sustainable conservation of the genetic resource.

(3) The rights in relation to traditional knowledge associated with any genetic resources and the right to grant access to such traditional knowledge may be enjoyed subject to the obligations of the State to ensure and regulate the fair and equitable sharing of the benefits arising from their utilisation and associated traditional knowledge and in accordance with the international obligations and the Namibian Constitution.

(4) The State has the ultimate responsibility of ensuring fair and equitable sharing of the benefits arising from the utilisation of genetic resources and associated traditional knowledge and the State must execute this responsibility in accordance with the provisions of this Act, the Namibian Constitution and international law.

PART 3
INSTITUTIONAL ARRANGEMENTS

Biological and Genetic Resources and Associated Traditional Knowledge Office

6. (1) The Minister must designate an office in the Ministry to be known as the Biological and Genetic Resources and Associated Traditional Knowledge Office to exercise the powers and functions conferred by or under this Act.

(2) The Office is managed by a person with relevant qualifications in dealing with conservation, sustainable use of biological and genetic resources and associated traditional knowledge, local communities and other such relevant expertise and experience appointed in terms of Office in terms of the Public Service Act, 1995 (Act No. 13 of 1995) and who is the head of the Office.

- (3) The powers and functions of the Office are -
 - (a) to regulate access to biological and genetic resources and associated traditional knowledge in terms of procedures that are fair and non- arbitrary and as provided for in this Act and regulations made under this Act;
 - (b) to provide for the creation of rules, procedures and guidance in obtaining prior informed consent of and establishing mutually agreed terms with the local communities for access to biological and genetic resources and associated traditional knowledge;

Access to Biological and Genetic Resources and Associated Traditional Knowledge Act 2 of 2017

- (c) to facilitate applications for access to biological and genetic resources and associated traditional knowledge, including the issuing of permits authorising access;
- (d) to recommend to the Ministry for the issuance of a permit authorising export of biological and genetic resources;
- (e) to monitor and ensure compliance and promote transparency in the utilisation of biological and genetic resources and associated traditional knowledge;
- (f) to provide for the issuance of an access permit for access as defined in this Act;
- (g) to collect, analyse and disseminate information on access to biological and genetic resources and associated traditional knowledge, and to educate users and local communities concerning their respective rights and obligations in terms of this Act;
- (h) to prepare model access and benefit sharing agreements and to assist local communities and other right holders to negotiate the terms of such agreements with the users of the biological and genetic resources and the associated traditional knowledge;
- (i) to establish a help desk, provide information and support, raise awareness, provide capacity development regarding the provisions of this Act and regulations made under this Act and deal with complaints relating to the violation of the provisions of this Act;
- (j) Promote building and developing technological capacity of national and grassroots level on scientific capabilities in the fields of conservation and sustainable use of biological and genetic resources and associated traditional knowledge;

[The term “Promote” at the beginning of paragraph (j) should be “to promote”.]

- (k) to supervise the consultative process between the applicant and the rights holders to ensure that prior informed consent is obtained in respect of access to biological and genetic resources and associated traditional knowledge;
- (l) where appropriate, establish committees and such ad hoc expert committees or contract such experts as may be considered necessary to carry out its functions;

[The word “to” should appear before the word “establish” and the word “contract”.]

- (m) to ensure compliance with the provisions of access and benefit sharing agreements and material transfer agreements;
- (n) to develop procedures for and to ensure protection of the intellectual property rights of local communities and other rights holders, with due regard for gender equality, wherever access to biological and genetic resources and associated traditional knowledge in local communities is granted;
- (o) to monitor and evaluate, at regular intervals the impacts of access and benefit sharing activities on taxa threatened by deterioration or extinction and of places threatened by a serious loss of biological diversity or threats to sustainable development, and to develop procedures to identify and disseminate information regarding impacts on biological and genetic resources;

Access to Biological and Genetic Resources and Associated Traditional Knowledge Act 2 of 2017

[There should be a comma after the phrase “at regular intervals” to set it off properly.]

- (p) to maintain an up-to-date system of information about research and development activities on biological and genetic resources and associated traditional knowledge;
- (q) to determine, with reference to scientific parameters and other external indicators, whether any utilisation of biological and genetic resources and associated traditional knowledge is in the discovery phase of bioprospecting or in the commercialisation phase, or has changed from one phase to the other, and to impose conditions accordingly;
- (r) to cooperate and liaise with other governmental bodies and private institutions and other relevant stakeholders in pursuance of the objectives of this Act and of any other national laws, policies, objectives and programmes;
- (s) in consultation with relevant authorities, to designate one or more organs of State as checkpoints to execute the monitoring obligations of the State in terms of the Nagoya Protocol;
- (t) to promote and encourage information sharing, awareness-raising, and training activities to help stakeholders and interested parties to understand their rights and obligations arising from the implementation of this Act, and of the relevant provisions of the international instruments on biodiversity;
- (u) to establish a research and development facility on indigenous biological natural resources to support and promote access and benefit sharing, biotrade and bioprospecting in Namibia as means to address poverty alleviation, support sustainable livelihoods and furthering sustainable development;
- (v) ensure compliance with this Act when biological and genetic resources and associated knowledge are accessed and transferred; and
- (w) to exercise such other functions as the Minister may prescribe.

(4) The Ministry is the competent national authority of Namibia for the purposes of the Nagoya Protocol.

Management of special funds

7. (1) For the purposes of this Act, any monies received by way of donations or grants or contributions received from national and international persons and organisations interested in strengthening conservation of biological and genetic resources and associated traditional knowledge and technologies by local communities is paid into the Environmental Investment Fund.

[The verb “is” should be “are” to be grammatically correct (“monies....are”).]

- (2) The monies received in terms of subsection (1) may be utilised -
 - (a) to finance projects developed by local communities, ensuring equity, including the development, conservation and sustainable use of genetic resources and channel benefits to the rights holders as the case may be for providing the biological and genetic resources and associated traditional knowledge;

Access to Biological and Genetic Resources and Associated Traditional Knowledge Act 2 of 2017

- (b) to conserve biological diversity, including the recovery, creation and maintenance of depositary banks, to foster scientific research, develop technologies associated with biological and genetic resources, development of areas from where such resources or associated knowledge has been accessed from, socio-economic development of such areas with the concurrence of the relevant persons or local communities and to build capacity associated with the use and conservation of biological and genetic resources and associated traditional knowledge;
- (c) to create awareness about and provide training and education in the field of biological and genetic resources and associated traditional knowledge; and
- (d) to pay for any other expenses related to the functions of the Office with the aim of fulfilling the objects of this Act.

PART 4**ACCESS TO BIOLOGICAL AND GENETIC RESOURCES AND ASSOCIATED TRADITIONAL KNOWLEDGE****Access permit**

8. (1) A person who intends to access biological and genetic resources in Namibia, found in both *in situ* or *ex situ* conditions or parts of such biological and genetic resources, their derivatives, products, including synthetic products, and wherever applicable, intangible components, including genetic information or gene sequences, and associated traditional knowledge, must apply for an access permit in the prescribed form and manner prior to carrying out any -

- (a) research leading to commercialisation;
- (b) scientific research with a commercial purpose;
- (c) commercialization, including industrial application and bioprospecting;
- (d) export; or
- (e) any other use as may be prescribed.

(2) A person may not export biological or genetic resources or associated traditional knowledge unless the person is in possession of an export permit issued by the Ministry as prescribed.

Prior informed consent

9. (1) Access to biological or genetic resources and associated traditional knowledge is subject to written prior informed consent of the concerned right holders of such biological or genetic resources and associated traditional knowledge.

(2) Any person intending to approach right holders for obtaining prior informed consent must first notify the Office and take the necessary guidance from the Office.

(3) In order to obtain prior informed consent, the user is required to provide a full explanation as prescribed of how the biological and genetic resources and associated traditional knowledge is to be acquired and used.

Access to Biological and Genetic Resources and Associated Traditional Knowledge Act 2 of 2017

(4) The concerned rights holders may refuse access to their biological or genetic resources or associated traditional knowledge.

(5) The Minister, when required in terms of the provisions of the Nagoya Protocol, may with reasons and in compliance with Article 18 of the Namibian Constitution reverse the decision made under subsection (4)

(6) The right holders must ensure the full and equal participation of women in the decision making processes in matters relating to the giving of prior informed consent and benefit sharing under this Act.

Benefit sharing

10. (1) A fair and equitable share of benefits from access and utilisation of biological and genetic resources and associated traditional knowledge must accrue to the concerned right holders.

(2) The types of benefits referred to in subsection (1) may include both monetary and non-monetary benefits and includes -

[The verb “includes” should be “include” to be grammatically correct (“typesinclude”).]

- (a) monetary benefits such as -
- (i) access fee or fees per sample collected or acquired;
 - (ii) up-front payments;
 - (iii) milestone payments;
 - (iv) payment of royalties;
 - (v) license fees in case biological or genetic resources are to be utilised for commercialisation;
 - (vi) fees to be paid to trust funds supporting conservation and sustainable use of biodiversity;
 - (vii) salaries on preferential terms where mutually agreed upon;
 - (viii) research funding;
 - (ix) joint ventures; and
 - (x) joint ownership of relevant intellectual property rights.
- (b) non-monetary benefits such as -
- (i) sharing of research and development results;
 - (ii) collaboration, co-operation and contribution in scientific research and development programmes, particularly biotechnological research activities;
 - (iii) participation in product development;

Access to Biological and Genetic Resources and Associated Traditional Knowledge Act 2 of 2017

- (iv) admittance to *ex situ* facilities of biological and genetic resources and to databases by participating institutions;
- (v) sharing of knowledge under fair and most favourable terms, including concessional and preferential terms where agreed, in particular, knowledge and technology that make use of biological or genetic resources, or that are relevant to the conservation and sustainable utilisation of biological diversity;
- (vi) developing capacities for technology transfer to Namibia;
- (vii) institutional capacity building;
- (viii) Developing human and material resources to strengthen the capacities for the administration and enforcement of access regulations;
- (ix) access to scientific information relevant to conservation and sustainable use of biological diversity, including biological inventories and taxonomic studies;
- (x) institutional and professional relationships that can arise from access and benefit sharing agreements and subsequent collaborative activities;
- (xi) employment opportunities;
- (xii) contracts to supply the raw material in respect of the biological or genetic resources required to produce commercial products therefrom;
- (xiii) access to technologies developed from biological or genetic resources or associated traditional knowledge;
- (xiv) training, both at institutional or local community level, to enhance local skills in biological and genetic resources conservation, evaluation, development, propagation and use; and
- (xv) provision of equipment, infrastructure and technology support.

(3) The access and benefit sharing agreement must contain mutually agreed terms and other prescribed conditions and minimum standards.

Material transfer agreement

11. (1) A person may not transfer any biological or genetic resources or associated traditional knowledge without obtaining an access and export permit and without entering into a material transfer agreement.

(2) The Minister must prescribe the terms and conditions and minimum standards of a material transfer agreement.

(3) A material transfer agreement may be combined with an access and benefit sharing agreement.

Access to Biological and Genetic Resources and Associated Traditional Knowledge Act 2 of 2017

Recognition of general rights of local communities

12. Subject to section 5, right holders have the following rights over biological and genetic resources and associated traditional knowledge -

- (a) the right to collectively share the benefits arising from the utilisation of biological and genetic resources and associated traditional knowledge;
- (b) the right to protect their biological and genetic resources and associated traditional knowledge as traditional custodians and users, and in terms of customary law and practices;
- (c) the inalienable right to use their biological and genetic resources and associated traditional knowledge in the course of sustaining their livelihood systems, conservation and sustainable use of biological diversity.

Protection of community intellectual property rights

13. (1) The State must recognise and protect the community intellectual property rights as they are enshrined and protected under the norms, practices and customary law found in, and recognised by, the concerned local communities, whether such law is written or not.

(2) An item of traditional knowledge must be identified, interpreted and ascertained in accordance with customary practices and law, whether such law is written or not.

(3) Non-registration of any traditional knowledge does not render it unprotected as community intellectual property rights.

(4) The publication of any written or oral description of a genetic resource and associated traditional knowledge, or the presence of genetic resources in a gene bank or any other collection, or its local use, may not preclude the local community from exercising its community intellectual property rights in relation to those resources.

PART 6
OFFENCES, PENALTIES AND FORFEITURE

Offences and penalties

- 14.** (1) A person who -
- (a) accesses biological or genetic resources and associated traditional knowledge without a permit issued in terms of this Act;
 - (b) fails to comply with a condition imposed by a permit issued under this Act;
 - (c) fails to provide, or willfully withholds, or provides false, information required under section 9(3);
 - (d) obtains access and benefit sharing agreement by any dishonest means;
 - (e) possesses, any biological or genetic resources or any associated traditional knowledge -
 - (i) in Namibia for commercial purposes; and

Access to Biological and Genetic Resources and Associated Traditional Knowledge Act 2 of 2017

- (ii) obtained in any other country in contravention of the domestic law of such country; or
- (f) exports biological or genetic resources or associated traditional knowledge in contravention of this Act,

commits an offence and is liable to a fine not exceeding N\$150 000 or to imprisonment for a period not exceeding 10 years, or to both such fine and such imprisonment.

(2) In the event of a conviction in terms of this Act the court may order that any damage to the environment resulting from the offence be repaired by the person so convicted, to the satisfaction of the Minister.

(3) If within a period of 30 days after a conviction or such longer period as the court may determine at the time of the conviction, an order in terms of subsection (2) is not being complied with, the Minister may take the necessary steps to repair the damage and recover the cost from the person so convicted.

(4) Whenever a person is convicted of an offence under this Act or and it appears that such person has by that offence caused loss or damage to any State institution or other person, the court may in the same proceedings at the written request of the Minister or other person and in the presence of the convicted person, inquire summarily and without pleadings into the amount of the loss or damage so caused.

(5) Upon proof of the amount referred to in subsection (4), the court may give judgment in favour of the Minister or other person against the convicted person and such judgment is -

- (a) of the same force and effect; and
- (b) executable in the same manner as if it had been given in a civil action duly instituted before a competent court.
- (6) A person who -
 - (a) forges or utters, knowing it to be forged or makes any unauthorised alteration to any agreement, permit or other document issued or provided for under this Act;
 - (b) makes any false entry or declaration in any register or document kept by the Office; or
 - (c) obstructs, hinders, or interferes with any person conducting an investigation into an alleged contravention of this Act,

commits an offence and is liable to a fine not exceeding N\$20 000 or to imprisonment for a period not exceeding two years, or to both such fine and such imprisonment.

Forfeiture

15. (1) Despite anything to the contrary in any law, a court convicting a person of an offence under this Act may declare any vehicle, piece of equipment, genetic resource, document or other thing by means of which the offence concerned was committed or which was used in the commission of such offence, or the rights of the convicted person to such vehicle, piece of equipment, genetic resource, document or other thing to be forfeited to the State.

Access to Biological and Genetic Resources and Associated Traditional Knowledge Act 2 of 2017

(2) A declaration of forfeiture under subsection (1) may not affect the rights which any person other than the convicted person may have to the vehicle or other thing concerned, if it is proved that he or she did not know that the vehicle or other thing was used or would be used for the purpose of or in connection with the commission of the offence concerned or that he or she could not prevent such use.

(3) Whenever a person is convicted of an offence under this Act, the court convicting such person may summarily enquire into and assess the monetary value of any advantage gained or likely to be gained by such person in consequence of that offence and, in addition to any other punishment imposed in respect of that offence made under subsection (1), impose on such person a fine equal to the amount so assessed or, in default of payment, imprisonment for a period not exceeding 10 years.

(4) Section 35(3) and (4) of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), applies with the necessary changes to any declaration of forfeiture under this section.

(5) Despite other laws to the contrary, all moneys received as payment of a fine or a penalty following a conviction, or from the proceeds of a sale in execution of vehicles or other things which have been declared forfeited to the State, accrue to the State.

PART 7 GENERAL PROVISIONS

Act binds State

16. This Act binds the State.

Exclusions

17. Despite anything to the contrary in this Act, the Minister may, by notice in the *Gazette*, declare with reasons that this Act or any part thereof, does not apply to any biological or genetic resources or associated traditional knowledge on the grounds of national interests or in compliance with, the international obligations of the State.

[There should be a comma before the phrase "or any part thereof" to set it off properly.
The comma after the phrase "in compliance with" is superfluous.]

Appeals to Minister

18. (1) Any person who feels aggrieved by a decision of the head of Office under this Act may appeal against such decision to the Minister.

(2) An appeal made under subsection (1), is dealt with in the prescribed form and manner.

(3) The Minister may consider and determine the appeal or may appoint an appeal panel consisting of persons who have knowledge and experience in matters of access and benefit sharing of genetic resources and associated traditional knowledge to advise the Minister on the appeal.

(4) The Minister must consider the appeal made under subsection (1) and may confirm, set aside or vary the order or the decision and make any other appropriate order, including an order that the prescribed fee paid by the appellant or any part, be refunded.

Access to Biological and Genetic Resources and Associated Traditional Knowledge Act 2 of 2017

(5) Any expenditure resulting from the performance of functions by the appeal panel in terms of subsection (3) are paid by the Ministry.

[The verb “are” should be “is” to be grammatically correct (“expenditure...is”).
Alternatively, the provision might have been intended to be “expenditures... are”.]

(6) An appeal made under subsection (1) does not suspend the operation or execution of the decision pending the decision of the Minister, unless the Minister, on the application of a party, directs otherwise.

Appeal to High Court against decision of Minister

19. (1) Any person aggrieved by a decision of the Minister made in terms of this Act may appeal against that decision to the High Court within the prescribed period.

(2) The appeal must be proceeded with as if it were an appeal from a magistrate’s court to the High Court.

Limitation of personal liabilities

20. The Minister, head of Office, staff member or any person employed by the Office is not personally liable for any loss or damages caused as a result of an act or omission committed in good faith under this Act, unless the loss or damages is attributed to the gross negligence or unlawful conduct of the Minister, head of Office, staff member or such person.

Offences by body corporate and jurisdiction

21. (1) If an offence under this Act which has been committed by a juristic person is proven to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of -

- (a) any director, member, trustee, manager or other similar officer of the juristic person; or
- (b) any person who was purporting to act in the capacity of a director, member, trustee, manager or similar officer,

such person as well as the juristic person commits an offence and is liable to a fine not exceeding N\$200 000 or to imprisonment for a period not exceeding 10 years, or to both such fine and such imprisonment.

(2) Despite any other law to the contrary, a magistrate’s court has jurisdiction to impose any penalty provided for in terms of this Act.

Delegation and assignment of powers and functions

22. (1) The Minister may delegate a power or assign a function conferred or imposed on him or her by or under this Act to -

- (a) the head of Office or staff member of the Office; or
- (b) a staff member of the Ministry.

(2) The head of Office may delegate a power or assign a function conferred or imposed on him or her by or under this Act to -

Access to Biological and Genetic Resources and Associated Traditional Knowledge Act 2 of 2017

- (a) staff member of the Office; or
- (b) a staff member of the Ministry.
- (3) A delegation or function referred to in subsection (1) or (2) -
 - (a) must be in writing;
 - (b) may be made subject to conditions;
 - (c) does not prevent the exercise of the power or performance of the function by the Minister or head of Office himself or herself; and
 - (d) may, without any prejudice of a right, be withdrawn by the Minister or head of Office.

Regulations

- 23.** The Minister may make regulations relating to -
- (a) the form and content of applications for access to biological and genetic resources and associated traditional knowledge;
 - (b) the requirements to be met by an applicant for an access permit and the application procedures, including the contents and format of application forms.
 - (c) the procedures to be followed by the head of Office to review applications, including the need, if any, to obtain public comment to any application or class of applications;
 - (d) the obligations of the Office to consult with the local community with regard to an application;
 - (e) the procedures to be followed and forms to be used by the head of Office for issuing any permit;
 - (f) the grounds for the denial of any permit issued under this Act;
 - (g) the reasons for which the Minister may revoke or cancel any permit issued under this Act, and the procedures to be followed by the Minister;
 - (h) the procedures for an aggrieved party to follow to appeal against the decision of the head of Office;
 - (i) the form, terms and conditions and minimum standards of access and benefit sharing agreements;
 - (j) the minimum requirements of the access and benefit sharing agreements;
 - (k) the keeping of access registers by the Office;
 - (l) the extent of rights of access to information and protection of proprietary information;

Access to Biological and Genetic Resources and Associated Traditional Knowledge Act 2 of 2017

- (m) fees or charges payable in respect of any matter arising under or required or permitted by this Act;
- (n) the establishment of branch offices of the Office in any part of the country for the purposes of enforcing compliance with this Act, as well as reporting to the Office, the obtaining, collecting, possessing, acquiring, using, selling, either directly or indirectly biological and genetic resources in Namibia or biological and genetic resources and associated traditional knowledge, which was obtained in another country in contravention of the domestic laws of that country;
- (o) community protocols detailing a clear process for access to biological and genetic resources, acquiring free and prior informed consent and establishing mutually agreed terms and benefit sharing agreements with respect to any utilisation of their biological and genetic resources and associated traditional knowledge; and
- (p) any matter that is required or permitted to be prescribed in terms of this Act or that is necessary to be prescribed for the proper implementation or administration of this Act or in order to achieve the objectives of this Act.

Transitional provisions

24. A person who has access arrangement relating to biological or genetic resources or associated traditional knowledge at the commencement of this Act must apply for a relevant permit within 12 months after the commencement of this Act, or such longer period as the Minister may determine by notice in the *Gazette*.

[The phrase “access arrangement” should be “an access arrangement” or “access arrangements”.]

Short title and commencement

25. This Act is called the Access to Biological and Genetic Resources and Associated Traditional Knowledge Act, 2017, and comes into operation on a date determined by the Minister by notice in the *Gazette*.