

ACCESS TO BIOLOGICAL RESOURCES AND BENEFIT SHARING BILL 2017

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A BILL

i n t i t u l e d

An Act to implement the Convention on Biological Diversity and any protocol to the Convention dealing with access to biological resources and traditional knowledge associated with biological resources and the sharing of benefits arising from their utilisation and for matters connected therewith.

[]

WHEREAS the Convention on Biological Diversity was opened for signature at Rio De Janeiro, Brazil on 5 June 1992 and entered into force on 29 December 1993;

AND WHEREAS Malaysia deposited her instrument of ratification on 24 June 1994 and therefore in accordance with Article 36 of the Convention, the said Convention entered into force as far as Malaysia is concerned on 22 September 1994;

AND WHEREAS the Convention on Biological Diversity enjoins Parties to take legislative, administrative or policy measures, as appropriate, to implement the provisions relating to access to genetic resources and the fair and equitable sharing of benefits arising from their commercial and other utilisation;

NOW THEREFORE, IT IS ENACTED by the Parliament of Malaysia as follows:

PART I

PRELIMINARY

Short title and commencement

1. (1) This Act may be cited as the Access to Biological Resources and Benefit Sharing Act 2017.

(2) Subject to subsection (3), this Act comes into operation on a date to be appointed by the Minister by notification in the *Gazette* and the Minister may appoint different dates for the coming into operation of different provisions of this Act.

(3) This Act comes into operation in the States of Sabah and Sarawak on such date as the Minister may, after consultation with the State Authorities, appoint by notification in the *Gazette*.

Non-application of the Act

2. This Act shall not apply to the specific biological or genetic resource covered by and for the purpose of any specialized instrument on access to biological resources and benefit sharing to which Malaysia is a party.

Act to be read with other laws

3. (1) This Act shall be read together with any other written laws relating to access to biological resources and benefit sharing arising from the utilization of the biological resource.

(2) The provisions of this Act shall be in addition to, and not in derogation of, the provisions in any other law for the time being in force, relating to forests, wildlife, animals, fishery and international trade in endangered species, except for matters that fall within the provisions of this Act.

(3) Nothing in this Act shall be interpreted as restricting the right of a State to take action relating to access to biological resources and benefit sharing arising from their utilization, provided that such action is consistent with the objective and provisions of this Act.

Interpretation

4. In this Act, unless the context otherwise requires—

“advisory body” means a body comprising indigenous and local communities established by the Competent Authority under subsection 9(2);

“Advisory Committee” means a committee established by the National Competent Authority under section 11;

“animal” includes—

- (a) any mammal (other than man), bird, reptile, amphibian, arthropod, or other vertebrate or invertebrate, whether alive or dead, and the egg, young or immature form derived from them;
- (b) any readily recognizable part or derivative of an animal;
- (c) wildlife as defined under the Wildlife Conservation Act 2010 [*Act 716*]; and
- (d) fish as defined in the Fisheries Act 1985 [*Act 317*];

“authorized intermediary” means any person named by the applicant for a permit under sections 12 or 15 to take the biological resource or traditional knowledge associated with biological resource on its behalf;

“biological resource” includes—

- (a) the genetic resources, organisms, microorganisms, derivatives and parts of the genetic resources, organisms, microorganisms or derivatives;
- (b) the populations and any other biotic component of an ecosystem with actual or potential use or value for humanity; and
- (c) any information relating to paragraphs (a) and (b);

“clearing house mechanism” means a web-based information portal established by the National Competent Authority under section 32;

“Competent Authority” means the Competent Authority as specified in the First Schedule;

“Convention” means the Convention on Biological Diversity;

“derivative” includes a naturally occurring biochemical compound derived, developed or synthesized, from a biological resource or resulting from the genetic expression or metabolism of the biological or genetic resource, or part, tissue or extract, whether it contains functional units of heredity or otherwise, and information in relation to derivatives;

“genetic resource” means any material of plant, animal, microorganism, fungi or other origin that contains functional units of heredity and that has actual or potential value for humanity;

“indigenous community” means a group of persons comprising—

(a) in the case of Peninsular Malaysia, aborigines as defined in the Aboriginal Peoples Act 1954 [*Act 134*]; or

(b) in the case of Sabah and Sarawak, natives as defined in Clause (6) of Article 161A of the Federal Constitution,

and who speak an aboriginal or a native language and habitually follow and embody an aboriginal’s or a native’s traditional way of life, customs and beliefs;

“local community” means a group of individuals who have settled together and continuously inherit production processes and culture or a group of individuals settled together in a village or area and under an eco-cultural system;

“microorganism” means any organism of microscopic size and parts of organism of microscopic size, including sterile organisms, viruses and viroids;

“Minister” means the Minister charged with the responsibility for natural resources and environment;

“non-commercial” means for academic purposes or non-profit oriented;

“permit” means a permit issued by a Competent Authority under section 13 or 16, as the case may be;

“permit holder” means a person holding a permit issued by a Competent Authority under section 13 or 16;

“plant” includes—

- (a) any species of plant or any part of such species whether alive or dead and includes the stem, branch, tuber, bulb, corm, stock, budwood, cutting, layer, slip, sucker, root, leaf, flower, fruit, seed or any other part or product whatsoever of a plant whether severed or attached; and
- (b) any readily recognizable part or derivative of a plant;

“premises” includes any hut, shed, structure, platform, house, building, conveyance and land whether or not enclosed or built upon;

“prescribed” means prescribed by regulations made under this Act;

“propagating material” means any biological resource material including material of plant or animal origin or any part of the biological resource material, used for multiplication or reproduction;

“research and development” includes the study or systematic investigation or technological application by analyzing, sampling, bioassaying and inventoring or other methods for any purpose including taxonomic research, and potential commercial product development;

“resource provider” includes—

- (a) Federal Government, or State Authority possessing biological resources in *in-situ* conditions;
- (b) Federal Government, or State Authority, in respect of *ex-situ* biological resource, where the resource originates;

- (c) a government department, agency or public higher education institution holding a biological resource in *ex-situ* conditions, whether in a collection or otherwise, where the origin of the biological resource cannot be ascertained with due diligence;
- (d) Federal Government or, State Authority from where the resource is accessed in situations where—
 - (i) the biological resource is held in *ex-situ* conditions by a private body; or
 - (ii) the biological resource is taken from private land; and
 - (iii) the origin of the biological resource cannot be ascertained with due diligence.
- (e) the indigenous and local communities, where the resource is on land to which they have a right as established by law;
- (f) the indigenous and local communities, where they are the holders of the traditional knowledge including members of the community who are traditional healers; or
- (g) an individual, where the biological resource is taken from the body of that individual;

“State Authority” means the state authority of the relevant state in Malaysia and in the case of Federal Territories, the Minister for the Federal Government charged with the responsibility for Federal Territories;

“take” includes—

- (a) in relation to an animal, to harvest, catch, capture, trap and kill or obtain in any other way;
- (b) in relation to a plant specimen, to collect, harvest, pick, gather and cut or obtain in any other way;

(c) in relation to other biological resources including microorganisms, to collect, pick or obtain in any other way; or

(d) to obtain a biological resource in any other way;

“threatened taxa” means critically endangered, endangered or vulnerable species as listed respectively in Appendices I, II and III of the Third Schedule of the International Trade in Endangered Species Act 2008 [Act 686].

Access to a biological resource

5. (1) A person is said to have access to a biological resource if—

(a) the taking of a biological resource from its natural habitat or place where it is kept, grown or found including in the market for the purpose of research and development; or

(b) there is a reasonable prospect as determined by the Competent Authority that a biological resource taken by the person will be subject to research and development.

(2) Access to a biological resource shall not include the following activities:

(a) fishing for commerce, recreation or game;

(b) taking animals or plants for food;

(c) taking biological resource that has been cultivated or tended for any purpose other than the purpose of research and development;

(d) taking natural produce including oils and honey for any purpose other than the purpose of research and development;

(e) collecting plant reproductive material for propagation;

(f) carrying out commercial forestry;

- (g) in relation to indigenous and local communities, for the use and exchange of the biological resource among themselves in the exercise of their traditional and customary practices;
- (h) taking of a biological resource by any person that is—
 - (i) a living modified organism as defined in the Biosafety Act 2007 [Act 678] for which intellectual property rights have been granted and subsist; or
 - (ii) a plant variety for which a breeder’s right has been granted and subsists under the Protection of New Plant Varieties Act 2004 [Act 634]; and
- (i) access to a biological resource exempted under section 60.

Small farmers’ rights

6. (1) Nothing in this Act shall be interpreted to limit the right of a small farmer—

- (a) to save, use, exchange and sell farm-saved seed or propagating material; and
- (b) to undertake conventional breeding or traditional practices in use in agriculture, horticulture, poultry farming, dairy farming, animal husbandry or bee keeping.

(2) For the purposes of this section, “small farmer” has the meaning assigned to it in the Protection of New Plant Varieties Act 2004.

PART II

AUTHORITIES

National Competent Authority

7. (1) An authority to be known as the “National Competent Authority” is established.

(2) The National Competent Authority shall consist of the following members:

- (a) the Secretary General of the Ministry responsible for natural resources and environment who shall be the Chairman; and
- (b) such number of persons to be appointed by the Minister.

Functions of the National Competent Authority

8. The National Competent Authority shall have the following functions:

- (a) to coordinate the implementation and enforcement of the provisions of this Act by the Competent Authorities;
- (b) to determine the fees payable upon consultation with the Competent Authorities;
- (c) to communicate with other countries and the secretariat established under any treaty, agreement, convention or protocol relating to access and benefit sharing in relation to a biological resource, as appropriate, on matters under this Act;
- (d) to implement and to fulfill the requirements under any treaty, agreement, convention or protocol relating to access and benefit sharing in relation to a biological resource to which Malaysia is a party where such treaty, agreement, convention or protocol relates to the purposes of this Act;
- (e) to create awareness and to provide training, education and information relating to access and benefit sharing in relation to a biological resource;
- (f) to keep and maintain a register of permits issued by the Competent Authorities and information relating to the permit;

- (g) to establish measures under subsection 30(1) with the aim of monitoring and tracking of a biological resource or traditional knowledge associated with a biological resource accessed;
- (h) to support customary laws and practices of indigenous and local communities, and the development of community protocols and procedures by the indigenous and local communities, as the case may be;
- (i) to establish and maintain a clearing house mechanism under section 32;
- (j) to act as Competent Authority for all *ex-situ* collections where the origin of the biological resource cannot be ascertained with due diligence and which do not come within the jurisdiction of any other Competent Authority; and
- (k) to do such other things as it deems fit to enable it to perform its functions effectively or which are incidental to the performance of its functions.

Competent Authorities

9. (1) The Competent Authorities as specified in the First Schedule shall have jurisdiction over all matters relating to access to a biological resource in the region as specified in the First Schedule.

(2) The Competent Authorities shall establish an advisory body to deal with matters relating to indigenous and local communities and traditional knowledge associated with the biological resource comprising representatives of indigenous and local communities whose advice shall be sought and taken into account.

(3) The Competent Authorities may, if it thinks necessary, establish such committee to facilitate the carrying out of its functions under this Act.

(4) Any member of advisory body appointed under subsection (2), other person invited to any meeting of the advisory body and member of committee established under subsection (3) may be paid such allowances and other expenses as the Competent Authorities may determine.

(5) The Competent Authorities shall consult and seek the advice of the National Competent Authority in the exercise of its powers and performance of its functions under this Act.

Functions and powers of the Competent Authorities

10. (1) The Competent Authorities shall have the following functions:

- (a) to deal with all the applications for access to a biological resource or traditional knowledge associated with a biological resource within its jurisdiction and the sharing of benefits arising from the utilisation of the biological resource or traditional knowledge associated with a biological resource;
- (b) to maintain a record of all access applications and decisions relating to such applications, including the permits issued;
- (c) to prepare an annual report concerning such access applications and decisions relating to such applications including permits issued and to submit the report and copies of the permits to the National Competent Authority on or before such date as the National Competent Authority may determine; and
- (d) to do such other things as it deems fit to enable it to perform its functions effectively or which are incidental to the performance of its functions.

(2) The Competent Authorities shall have the powers to do all things necessary or expedient for or in connection with the performance of its functions under this Act.

Advisory Committee

11. (1) The National Competent Authority shall establish an Advisory Committee and appoint such number of persons with experience, knowledge and expertise on matters relating to the scientific, legal, technical, ethical and other relevant disciplines to be the members of the Advisory Committee.

(2) The members of Advisory Committee appointed under subsection (1) and any other person invited to any meeting of the Advisory Committee may be paid such allowances and other expenses as the National Competent Authority may determine.

(3) A member of the Advisory Committee appointed under subsection (1) shall, unless he sooner resigns or vacates his office or his appointment is sooner revoked, hold office for a term not exceeding two years and shall be eligible for reappointment.

(4) The Advisory Committee shall, upon request, provide advice on scientific, legal, technical, ethical and other relevant disciplines to the National Competent Authority and the Competent Authority.

PART III

REQUIREMENTS FOR PERMIT TO ACCESS BIOLOGICAL RESOURCES

Application for permit for commercial or potential commercial purpose

12. (1) Any person who intends to access a biological resource or traditional knowledge associated with a biological resource including through an authorized intermediary for commercial or potential commercial purposes shall apply for a permit to the relevant Competent Authority in the form and manner as may be prescribed and which shall be accompanied by payment of the prescribed fee.

(2) The Competent Authority may, after receiving the application under subsection (1), approve the application, if the following matters have been satisfied:

- (a) a benefit sharing agreement has been established in accordance with section 22;
- (b) in the case of access to a biological resource or traditional knowledge associated with a biological resource, as the case may be, the applicant has obtained the prior informed consent in accordance with section 23;
- (c) the application is not for any threatened taxa;

- (d) the application is not for any endemic species, rare species or any species protected under any federal or state law;
- (e) the access is not likely to result in adverse effects on the livelihood or cultural practices including religious, ceremonial or other traditional or customary practices of indigenous and local communities;
- (f) in the case of access to human genetic resource, its use is not for the purposes contrary to ethical values or the public interest;
- (g) the access may not result in adverse environmental impact which may be difficult to control and mitigate;
- (h) the access may not cause genetic erosion or affect any function of the ecosystem;
- (i) the access may not adversely affect food security;
- (j) the use of the biological resource is not for the purposes contrary to the national or State interest;
- (k) the use of the biological resource is not for the development of biological or chemical weapons, or for military or terrorist purposes;
- (l) the use of the biological resource is not for the purposes associated with genetic use restriction technology;
- (m) the applicant has not committed an offence under this Act;
- (n) the applicant has not been adjudicated a bankrupt or, in the case of a company, has not been wound up;
- (o) the application complies with the requirements of this Act or any other written law; and
- (p) the use of the biological resources is not contrary to the related international agreements or instruments to which Malaysia is a party.

(3) The Competent Authority shall refuse the application if—

- (a) any of the grounds specified in subsection (2) is not fulfilled; or
- (b) after consultation with the National Competent Authority, the applicant is from, or otherwise based or operating in, jurisdictions which do not provide for adequate and effective measures that requires biological resources utilized within its jurisdiction to be accessed in accordance with prior informed consent and that mutually agreed terms to be established as provided under this Act.

(4) Notwithstanding subsection (3), the Competent Authority may issue a permit relating to paragraphs (2)(c) and (d) if the Competent Authority is satisfied that the application for permit does not undermine the conservation and sustainable use of biodiversity.

(5) After giving due consideration to the application under subsections (1) and (2), the Competent Authority may—

- (a) approve the application, with or without condition, and issue a permit to the applicant; or
- (b) refuse the application, stating the grounds for refusal.

(6) Any person who accesses a biological resource or traditional knowledge associated with a biological resource without a permit under subsection (1) or contravenes any condition imposed on the permit under subsection (5) commits an offence and shall, on conviction, be liable—

- (a) where such person is an individual, to a fine not exceeding five hundred thousand ringgit or to imprisonment for a term not exceeding ten years or to both; or
- (b) where such person is a body corporate, to a fine not exceeding five million ringgit.

Issue of permit for commercial or potential commercial purpose

13. (1) The Competent Authority shall issue a permit for commercial or potential commercial purpose which contains particulars as may be determined by the National Competent Authority in consultation with the Competent Authority.

(2) Upon issuance of the permit under subsection (1), there shall be no change of use in relation to the biological resource as specified in the permit except upon a fresh application being made and a permit issued under this section.

(3) The Competent Authority may at any time after issuing a permit under subsection (1)—

(a) impose any additional condition on the permit as it thinks necessary or expedient; or

(b) amend or revoke any condition imposed on the permit.

(4) Where the Competent Authority invokes subsection (3), the Competent Authority shall give the permit holder a written notice of its intention to do so and opportunity to make written representations within the period specified in the notice.

(5) After the expiry of the period specified in the notice, and after considering any representation made by the permit holder, the Competent Authority shall decide whether to impose, vary or revoke any condition under subsection (3).

(6) The Competent Authority shall give the permit holder a written notice of its decision under subsection (5) as soon as practicable and the decision shall take effect on a date specified in the written notice.

(7) Any person who contravenes subsection (2) or any condition imposed on the permit under subsection (3) commits an offence and shall, on conviction, be liable—

(a) where such person is an individual, to a fine not exceeding two hundred thousand ringgit or to imprisonment for a term not exceeding ten years or to both; or

(b) where such person is a body corporate, to a fine not exceeding five hundred thousand ringgit.

Permit for commercial or potential commercial purpose not transferable

14. (1) A holder of a permit shall not transfer the permit or assign any right, duty, liability or obligation under the permit to any other person.

(2) Any person who contravenes subsection (1) commits an offence and shall, on conviction, be liable—

(a) where such person is an individual, to a fine not exceeding two hundred thousand ringgit or to imprisonment for a term not exceeding ten years or to both; or

(b) where such person is a body corporate, to a fine not exceeding five hundred thousand ringgit.

Application for permit for non-commercial purpose

15. (1) Any person who intends to access a biological resource or traditional knowledge associated with a biological resource, including through an authorized intermediary for non-commercial purpose shall apply for a permit to the relevant Competent Authority in the form and manner as may be prescribed and shall be accompanied with a copy of a statutory declaration duly completed as specified in the Second Schedule and payment of the prescribed fee.

(2) Any activity undertaken under subsection (1) shall be in collaboration with a public higher education institution, public research institution or Government agency, unless the relevant Competent Authority is satisfied that—

(a) the applicant is a non-profit organization based or registered in Malaysia;

(b) local researchers are involved in the activity; and

(c) a program for capacity building is included in the activity.

(3) The Competent Authority may, after receiving the application under subsection (1), approve the application, if the following matters have been satisfied:

- (a) the application is not for commercial or potential commercial purpose;
- (b) in the case of access to a biological resource or traditional knowledge associated with a biological resource, as the case may be, the applicant has obtained the prior informed consent in accordance with section 23;
- (c) the application is not for any threatened taxa;
- (d) the application is not for any endemic species, rare species or any species protected under any Federal or State law;
- (e) the access is not likely to result in adverse effects on the livelihood or cultural practices including religious, ceremonial or other traditional or customary practices of indigenous and local communities;
- (f) in the case of access to human genetic resource, its use is not for the purposes contrary to ethical values or the public interest;
- (g) the access may not result in adverse environmental impact which may be difficult to control and mitigate;
- (h) the access may not cause genetic erosion or affect any function of the ecosystem;
- (i) the access may not adversely affect food security;
- (j) the use of the biological resource is not for the purposes contrary to the national or State interest;
- (k) the use of the biological resource is not for the development of biological or chemical weapons, or for military or terrorist purposes;
- (l) the use of the biological resource is not for the purposes associated with genetic use restriction technology;

- (m) the applicant has not committed an offence under this Act;
- (n) the applicant has not been adjudicated a bankrupt or, in the case of a company, has not been wound up;
- (o) the application complies with the requirements of this Act or any other written law; and
- (p) the use of the biological resources is not contrary to related international agreements or instruments to which Malaysia is a party.

(4) The Competent Authority shall refuse the application if—

- (a) any of the grounds specified in subsection (3) is not fulfilled; or
- (b) after consultation with the National Competent Authority, the applicant is from, or otherwise based or operating in, jurisdictions which do not provide for adequate and effective measures that requires biological resources utilized within its jurisdiction to be accessed in accordance with prior informed consent and that mutually agreed terms to be established as provided under this Act.

(5) Notwithstanding subsection (4), the Competent Authority may issue a permit relating to paragraphs (3)(c) and (d) if the Competent Authority is satisfied that the application for permit does not undermine the conservation and sustainable use of biodiversity.

(6) After giving due consideration to the application under subsections (1) and (3), the Competent Authority may—

- (a) approve the application, with or without condition, and issue a permit to the applicant; or
- (b) refuse the application, stating the grounds for refusal.

(7) Any person who accesses a biological resource or traditional knowledge associated with a biological resource without a permit under subsection (1) or contravenes any condition imposed on the permit under subsection (6) commits an offence and shall, on conviction, be liable—

- (a) where such person is an individual, to a fine not exceeding one hundred thousand ringgit or to imprisonment for a term not exceeding seven years or to both; or
- (b) where such person is a body corporate, to a fine not exceeding one million ringgit.

Issue of permit for non-commercial purpose

16. (1) The Competent Authority shall issue a permit for non-commercial purpose which contains particulars as may be determined by the National Competent Authority in consultation with the Competent Authority.

(2) Upon issuance of the permit under subsection (1), there shall be no change of use in relation to the biological resource as specified in the permit except upon a fresh application being made and a permit issued under this section.

(3) The Competent Authority may at any time after issuing a permit under subsection (1)—

- (a) impose any condition on the permit as it thinks necessary or expedient; or
- (b) amend or revoke any condition imposed on the permit.

(4) Where the Competent Authority invokes subsection (3), the Competent Authority shall give the permit holder a written notice of its intention to do so and opportunity to make written representations within the period specified in the notice.

(5) After the expiry of the period specified in the notice, and after considering any representation made by the permit holder, the Competent Authority shall decide whether to impose, vary or revoke any condition under subsection (3).

(6) The Competent Authority shall give the permit holder a written notice of its decision under subsection (5) as soon as practicable and the decision shall take effect on a date specified in the written notice.

(7) Any person who contravenes subsection (2) or any condition imposed on the permit under subsection (3) commits an offence and shall, on conviction, be liable—

- (a) where such person is an individual, to a fine not exceeding one hundred thousand ringgit or to imprisonment for a term not exceeding seven years or to both; or
- (b) where such person is a body corporate, to a fine not exceeding five hundred thousand ringgit.

Decision to be informed

17. The Competent Authority shall inform its decision in writing to the applicant and notify the National Competent Authority as soon as practicable of the outcome of any application relating to permits made under this Act.

Circumstances where permit is not required

18. No permit is required—

- (a) by any person employed or studying and carrying out research for non-commercial purpose in or under the authority of, a public higher education institution, public research institution or Government agency within Malaysia, subject to such conditions as may be prescribed and subject to prior informed consent of the relevant indigenous and local community has been obtained for any access to a biological resource and traditional knowledge associated with a biological resource referred to in subsection 23(1);
- (b) for the exchange of biological resources between persons within a public higher education institution, public research institution or Government agency within Malaysia or between such institutions or agencies within Malaysia for non-commercial purpose, unless otherwise required by a Competent Authority and subject to such conditions as may be prescribed; or
- (c) by any person or institution in or outside Malaysia who accesses a biological resource from a permit holder under subsection 15(1) or the person or institution under paragraph (a), at the request of such permit holder or the person or institution, for the purpose of carrying out or continuing any research for non-commercial purpose.

Transfer of biological resource or results of research in relation to biological resource

19. (1) No person or institution referred to in paragraphs 18(a) and (b) shall transfer any biological resource or traditional knowledge or results of research in relation to a biological resource or traditional knowledge to a person or institution other than that referred to in paragraphs 18(a) and (b) without the prior approval of the Competent Authority.

(2) Where the approval is given by the Competent Authority for the transfer, such transfer shall be subject to such conditions as may be prescribed and the transferee shall be required to apply for a permit under this Act, unless otherwise decided by the relevant Competent Authority.

(3) A permit holder or the person or institution referred to in paragraphs 18(a) and (b) shall notify the Competent Authority of the access and such access may be subject to such terms and conditions as may be imposed by the Competent Authority.

Permit for non-commercial purpose not to be used for commercial purpose

20. No person issued with a permit for non-commercial purpose, and no person or institution referred to in paragraphs 18(a) and (b) and the transferee referred to in subsection 19(2) shall carry out, or allow others to carry out, research and development for commercial purposes on any biological resource or traditional knowledge associated with the biological resource, unless the person obtains a permit for commercial or potential commercial purpose under section 13 and a benefit sharing agreement has been entered into in accordance with section 22.

Possession, etc., of biological resource and traditional knowledge associated with biological resource

21. (1) Any person who is not an authorized intermediary and who has in his possession or under his control a biological resource or traditional knowledge associated with a biological resource and—

(a) supplies, sells, offers or advertises for sale; or

(b) offers for profit, gain or benefit,

such biological resource or traditional knowledge associated with a biological resource to a person who requires a permit under this Act commits an offence.

(2) Any person who commits an offence under subsection (1) shall, on conviction, be liable—

(a) where such person is an individual, to a fine not exceeding five hundred thousand ringgit, or to imprisonment for a term not exceeding ten years or to both; or

(b) where such person is a body corporate, to a fine not exceeding five million ringgit.

Benefit sharing agreement

22. (1) An applicant for a permit for access to a biological resource or traditional knowledge associated with a biological resource, for commercial or potential commercial purposes shall enter into a benefit-sharing agreement with the resource provider.

(2) A benefit-sharing agreement shall be based upon mutually agreed terms and provide for fair and equitable benefit sharing.

(3) Where the Federal Government or State Authority is not the resource provider under subsection (1), it may require the applicant to pay a percentage of any monetary benefits derived under the benefit sharing agreement as it may determine.

(4) Any such monetary benefits shall be deposited into a fund as may be established by the Federal Government or State Government.

(5) The Competent Authority shall use any payment or any part of the payment received under this Part towards the conservation of biodiversity and the sustainable use of its components and for such other incidental expenses.

Requirement for prior informed consent and mutually agreed terms, etc.

23. (1) The prior informed consent of the relevant indigenous and local community shall be obtained for any access to—

(a) a biological resource on land to which such indigenous and local community have a right as established by law; and

(b) traditional knowledge associated with a biological resource that is held by such indigenous and local community.

(2) The prior informed consent of indigenous and local communities shall be obtained in accordance with customary laws and practices, protocols and procedures of indigenous and local communities, as the case may be.

(3) Any person who intends to access the biological resource or traditional knowledge in subsection (1) for commercial or potential commercial purposes under subsection 12(1) shall enter into a benefit sharing agreement with the relevant indigenous and local community.

(4) Any prior informed consent shall be obtained from and benefit sharing agreement entered into with—

(a) the representative, organisation or body identified in accordance with the customary laws and practices, protocols and procedures of the said indigenous and local communities; or

(b) where no such representative or organisation of the traditional knowledge associated with a biological resource can be identified—

(i) with the holders of the traditional knowledge associated with a biological resource within the indigenous and local communities; or

(ii) with the Federal Government or State Authority, as the case may be, if the holders of the traditional knowledge associated with a biological resource cannot be identified.

(5) Any monetary benefit obtained from the benefit sharing agreement entered under subparagraph (4)(b)(ii) shall be deposited into a fund as may be established by the Federal or the State Government and any benefit, including where applicable non-monetary benefit, shall be applied for the interest of indigenous and local communities taking into account the advice of the advisory body established under subsection 9(2).

(6) Where the same traditional knowledge associated with a biological resource is shared by more than one indigenous or local community—

- (a) the applicant shall obtain the prior informed consent of and enter into benefit sharing agreement with the duly identified representative or organization of all the holders of the traditional knowledge associated with the biological resource; or
- (b) where it is not practicable in all the circumstances of the case to ascertain all such holders, and this is proven to the satisfaction of the Competent Authority, the applicant shall obtain the prior informed consent of, and enter into the benefit sharing agreement with the duly identified representatives or organisation of such of the holders as the applicant may ascertain.

(7) In the event that there is a claim by any indigenous and local community that it is the rightful holder of the traditional knowledge associated with a biological resource after the application is approved, the Competent Authority shall—

- (a) determine the said claim in consultation with the indigenous and local community whose prior informed consent has been obtained and benefit sharing agreement entered into;
- (b) if the claim is proven to the satisfaction of the Competent Authority, declare that the said indigenous and local community is entitled to share the benefits due to the indigenous and local community under the benefit sharing agreement; and
- (c) determine the quantum or nature of benefits to which the indigenous and local community is entitled under paragraph (b), in consultation with all the indigenous and local communities concerned.

PART IV

PERMIT, REGISTER, RECORDS AND DISPOSAL

Permit as evidence of compliance

24. (1) The Competent Authority shall, upon issuance of the permit under section 13 or 16, forward to the National Competent Authority a copy of such permit.

(2) The permit referred to in subsection (1) shall be evidence of the following information:

- (a) the prior informed consent of the Competent Authority for access to the biological resource;
- (b) the prior informed consent of the indigenous and local community under section 23 for access to a biological resource or traditional knowledge associated with a biological resource, as the case may be;
- (c) the origin of the biological resource accessed;
- (d) the establishment of a benefit sharing agreement with the resource provider where applicable;
- (e) the person to whom the permit is issued; and
- (f) the use for which the permit is issued.

Register of permits

25. The National Competent Authority shall keep and maintain a register of permits issued by the Competent Authorities.

Records

26. (1) Any person who is issued with a permit for access to a biological resource or traditional knowledge associated with a biological resource shall keep the following record:

- (a) the description of the biological resource or traditional knowledge associated with the biological resource, including available unique identifiers;

- (b) the date or dates of access;
- (c) the place of access;
- (d) the quantity or size of the biological resource (such as weight or physical dimension);
- (e) the common and scientific name of, or given to, the biological resource;
- (f) the location where the biological resource is kept; and
- (g) the particulars about any subsequent physical disposition of the biological resource, including the names and addresses of others having possession of the biological resource or a part of the biological resource.

(2) A copy of the records referred to in subsection (1) shall be furnished to the National Competent Authority and Competent Authority within thirty days after the biological resource is taken or any other period as determined by the National Competent Authority and Competent Authority, respectively.

(3) A record referred to in subsection (1) shall be kept by the permit holder while the biological resource or traditional knowledge associated with a biological resource is in the holder's possession and for twenty years after the end of the period of use.

Disposal of biological resource

27. (1) If a permit holder does not intend to keep the biological resource for which the holder has a record in accordance with subsection 26(1), the permit holder shall offer the biological resource to the Competent Authority.

(2) If the Competent Authority does not agree to take the biological resource in the circumstances mentioned in subsection (1), the permit holder shall dispose of the biological resource in a manner as may be determined by the Competent Authority and the permit holder shall forthwith furnish a report of the disposal of the biological resource to the Competent Authority.

PART V

REVOCATION OF PERMITS AND APPEALS

Revocation of permit

28. (1) The Competent Authority may at any time revoke any permit issued under this Act on all or any of the following grounds:

- (a) the permit holder has contravened any provisions of this Act;
- (b) the permit holder has contravened any of the conditions of the permit;
- (c) the permit was issued as a result of false, misleading or inaccurate information;
- (d) the permit was obtained improperly or illegally; or
- (e) the permit holder has been convicted of an offence under this Act.

(2) Before revoking the permit, the Competent Authority shall give the permit holder an opportunity to be heard.

(3) Where the Competent Authority revokes the permit under subsection (1), the Competent Authority shall immediately notify the permit holder and the National Competent Authority of the decision and grounds for the revocation.

(4) Upon such notification, the permit holder shall immediately surrender the permit, any research results and related documents, and the accessed biological resource to the Competent Authority that issued the permit.

(5) Any permit holder who contravenes subsection (4) commits an offence and shall, on conviction, be liable—

- (a) where such person is an individual, to a fine not exceeding two hundred thousand ringgit or to imprisonment for a term not exceeding ten years or to both, and in the case of a continuing offence, to a further fine not exceeding five thousand ringgit for each day during which the offence continues after conviction; or

- (b) where such person is a body corporate, to a fine not exceeding five hundred thousand ringgit, and in the case of a continuing offence, to a further fine not exceeding ten thousand ringgit for each day during which the offence continues after conviction.

Appeal against revocation of permit

29. (1) A person who is aggrieved by the revocation of the permit may, within thirty days after being informed in writing of the revocation, appeal against such decision to the Court.

(2) The Court may, after considering an appeal made under subsection (1), confirm or set aside the decision appealed against.

(3) For the purposes of this section, “Court” means the High Court of Malaya and the High Court in Sabah and Sarawak or either of the High Court in Malaya and the High Court in Sabah and Sarawak, as the case may require.

PART VI

MONITORING AND TRACKING

Measures for monitoring and tracking

30. (1) The National Competent Authority, in consultation with the Competent Authority and other relevant agencies shall establish measures for the purpose of monitoring and tracking the biological resource or traditional knowledge associated with a biological resource.

(2) Such measures shall include—

(a) the designation of checkpoints; and

(b) the requirement for the production of the permit at the checkpoints established.

(3) The checkpoints designated under paragraph (2)(a) shall include offices or authorities dealing with applications for patent, product registration or approval and public research funding grants.

(4) The authorities responsible for the checkpoints shall inform the National Competent Authority and the relevant Competent Authority in writing of the production of the permit under paragraph (2)(b).

Notification for application of patent

31. (1) Any person applying for a patent, whether in or outside Malaysia, in relation to a biological resource or traditional knowledge associated with a biological resource accessed shall notify to the National Competent Authority in writing within thirty days from the date of the application.

(2) Any person who contravenes subsection (1) commits an offence and shall, on conviction, be liable—

(a) where such person is an individual, to a fine not exceeding one hundred thousand ringgit or to imprisonment for a term not exceeding seven years or to both; and

(b) where such person is a body corporate, to a fine of not exceeding five hundred thousand ringgit.

PART VII

CLEARING HOUSE MECHANISM

Establishment of clearing house mechanism

32. The National Competent Authority shall establish and maintain a clearing house mechanism as a means for sharing of information relating to access and benefit sharing and information provided by a Competent Authority to the National Competent Authority as required by this Act.

Posting and confidential information

33. (1) A copy of the permit including the information in the permit sent to the National Competent Authority under this Act shall, at the same time, be posted on the website of the clearing house mechanism by any authorized person.

(2) The information under subsection (1) shall not be posted if it is classified as confidential as determined by the relevant Competent Authority.

(3) For the purposes of subsection (2), information is classified to be confidential if—

(a) it is culturally sensitive; or

(b) disclosed, it may—

(i) damage a person's commercial interests;

(ii) result in a risk to the biodiversity; or

(i) be detrimental to the national interest.

(4) Any determination as to confidentiality under subparagraph (3)(b)(i) shall be made upon the application of the applicant.

PART VIII

USER MEASURES

Measures to support laws of other countries

34. (1) Any person shall provide permit or its equivalent as evidence of compliance with the law or other regulatory requirements of a Party to the Nagoya Protocol to the relevant authority, before using or commercialising biological resource or traditional knowledge associated with a biological resource accessed from the jurisdiction of such Party, if that Party requires such permit or its equivalent.

(2) For the purposes of subsection (1), the National Competent Authority shall establish measures aimed at preventing the use or commercialisation within Malaysia of a biological resource or traditional knowledge associated with a biological resource, which is not accompanied by a permit or its equivalent.

(3) A notification by a Competent Authority of the other Party to the Protocol to the National Competent Authority that it has not issued a permit or its equivalent for access to its biological resource or traditional knowledge associated with a biological resource, or mutually agreed terms have been established, shall be *prima facie* evidence of the notification.

PART IX

POWERS RELATING TO ENFORCEMENT, SEIZURE, ARREST, ETC.

Enforcement officers

35. The enforcement officers are any officer appointed by the Minister upon recommendation of the Competent Authority.

Power of investigation

36. (1) An enforcement officer shall have all the powers necessary to carry out an investigation under this Act.

(2) In any case relating to the commission of an offence under this Act, any enforcement officer carrying out an investigation may exercise all or any of the special powers in relation to police investigation in seizable cases given by the Criminal Procedure Code [Act 593].

(3) This section shall not be construed as limiting or affecting any similar powers conferred on any person under any other written law.

Authority card

37. (1) There shall be issued to each enforcement officer under section 35 an authority card to be signed by an officer duly designated by the relevant Competent Authority.

(2) Whenever such enforcement officer exercises any of the powers under this Act, he shall, on demand, produce to the person against whom the power is being exercised the authority card issued to him under subsection (1).

Power to enter premises

38. An enforcement officer may at any time enter any premises for the purpose of—

- (a) inspecting any biological resource, conveyance, machinery, contrivance, equipment, book, record, document or other article as he considers necessary;
- (b) verifying the accuracy of records or statements or any information given to an enforcement officer; or
- (c) collecting any biological resource.

Access to computerized data

39. Any enforcement officer conducting a search under this Act shall be given access to computerized data whether stored in a computer or otherwise, and for such purpose, shall be provided with the necessary password, encryption code, decryption code, software or hardware and any other means required to enable comprehension of computerized data.

Seizure of thing, etc.

40. Any biological resource, conveyance, machinery, contrivance, equipment, book, record, document or other article that an enforcement officer reasonably suspects has been used or will be used in the commission of any offence under this Act may be seized and detained by the enforcement officer.

Power to stop, search and seize conveyances

41. (1) If an enforcement officer has reasonable cause to suspect that any conveyance is carrying any biological resource, machinery, contrivance, equipment, book, record, document or other article in respect of which an offence under this Act is being or has been committed, he may stop and examine the conveyance and may, if on examination he has reasonable cause to believe that such conveyance is or has been used for the commission of such offence, seize such conveyance and any biological resource,

machinery, contrivance, equipment, book, record, document or other article found in the conveyance that is reasonably believed to furnish evidence of the commission of such offence.

(2) The person in control or in charge of the conveyance shall, if required to do so by the enforcement officer—

(a) stop the conveyance and allow the enforcement officer to examine it; and

(b) open all parts of the conveyance for examination and take all measures necessary to enable or facilitate the carrying out of such examination as the enforcement officer considers necessary.

(3) A person who contravenes subsection (2) commits an offence and shall, on conviction, be liable to a fine not exceeding one hundred thousand ringgit or imprisonment for a term not exceeding seven years or to both.

Notice of seizure

42. (1) Where any seizure is made under this Act, the enforcement officer making the seizure shall give a notice in writing of the seizure and the grounds of the seizure to the owner of the biological resource, conveyance, machinery, contrivance, equipment, book, record, document or other article seized by delivering a copy of such notice to the owner, if the owner or his whereabouts are known.

(2) A notice under subsection (1) need not be given if the seizure is made in the presence of—

(a) the owner or his agent;

(b) the occupier of the premises; or

(c) the person in control or in charge of the conveyance where the seizure is made under section 40.

(3) Where any biological resource, conveyance, machinery, contrivance, equipment, book, record, document or other article are stored, kept or found, the enforcement officer seizing the

items shall prepare a list of the items seized and immediately deliver a copy signed by him to the owner or person in charge of the place, premises or conveyance which has been searched, or to such owner's or person's agent or servant, at that place, premises or conveyance.

Temporary return of conveyance, etc.

43. (1) Where any conveyance, machinery, contrivance or equipment is seized under this Act, the court may temporarily return the conveyance, machinery, contrivance or equipment to the owner of the conveyance, machinery, contrivance or equipment or the person from whose possession, custody or control it was seized, subject to such terms and conditions as the court may impose, and subject in any case to sufficient security being furnished to the satisfaction of the court that the conveyance, machinery, contrivance or equipment shall be surrendered to the court on demand and that such terms and conditions, if any, shall be complied with.

(2) Where any seized conveyance, machinery, contrivance or equipment is temporarily returned under subsection (1), a person who—

- (a) fails, on demand, to surrender the conveyance, machinery, contrivance or equipment to the court; or
- (b) contravenes any of the terms or conditions imposed under subsection (1),

commits an offence and shall, on conviction, be liable to a fine not exceeding one hundred thousand ringgit or to imprisonment for a term not exceeding seven years or to both.

Forfeiture of seized biological resource, etc.

44. (1) Any biological resource, conveyance, machinery, contrivance, equipment, book, record, document or other article seized in exercise of any power conferred under this Act shall be liable to forfeiture.

(2) An order for the forfeiture of any biological resource, conveyance, machinery, contrivance, equipment, book, record, document or other article shall be made if it is proved to the satisfaction of the court that an offence under this Act has been committed and that the biological resource, conveyance, machinery, contrivance, equipment, book, record, document or other article was the subject matter of or was used in the commission of the offence, even though no person has been convicted of such offence.

(3) If there is no prosecution with regard to any biological resource, conveyance, machinery, contrivance, equipment, book, record, document or other article seized under this Act, such biological resource, conveyance, machinery, contrivance, equipment, book, record, document or other article shall be taken and deemed to be forfeited at the expiration of a period of one calendar month from the date of service of a notice to the last known address of the person from whom the biological resource, conveyance, machinery, contrivance, equipment, book, record, document or other article was seized indicating that there is no prosecution in respect of such biological resource, conveyance, machinery, contrivance, equipment, book, record, document or other article unless before the expiration of that period a claim thereto is made in the manner set out in subsections (4), (5), (6) and (7).

(4) Any person asserting that he is the owner of the biological resource, conveyance, machinery, contrivance, equipment, book, record, document or other article referred to in subsection (3) and that it is not liable to forfeiture may personally or by his agent authorized in writing, give written notice to the enforcement officer in whose possession such biological resource, conveyance, machinery, contrivance, equipment, book, record, document or other article is held that he claims the biological resource, conveyance, machinery, contrivance, equipment, book, record, document or other article.

(5) On receipt of the notice referred to in subsection (4), the enforcement officer shall refer the claim to a Magistrate for his decision.

(6) The Magistrate to whom a matter is referred under subsection (5) shall issue a summons requiring the person asserting that he is the owner of the biological resource, conveyance, machinery, contrivance, equipment, book, record, document or other article and the person from whom it was seized to appear before him, and when they appear or they fail to appear, due service of the summons having been proved, the Magistrate shall proceed to the examination of the matter.

(7) If it is proved that an offence under this Act or any of its subsidiary legislation has been committed and that the biological resource, conveyance, machinery, contrivance, equipment, book, record, document or other article referred to in subsection (6) was the subject matter of or was used in the commission of such offence, the Magistrate shall order the biological resource, conveyance, machinery, contrivance, equipment, book, record, document or other article to be forfeited, and shall, in the absence of such proof, order its release.

(8) Any biological resource, conveyance, machinery, contrivance, equipment, book, record, document or other article forfeited or deemed to be forfeited shall be delivered to the Competent Authority and shall be disposed of in such manner as the Competent Authority thinks fit, including repatriation under subsection (9) if the Competent Authority so decides.

(9) When a decision of repatriation is made under this Act in respect of any biological resource which has been imported into Malaysia in contravention of this Act, and the biological resource was brought into Malaysia in a conveyance, the owner or importer of the biological resource or his agent shall, if required in writing by the Competent Authority, provide or be responsible for—

- (a) the free passage for the return of the biological resource to the place at which the biological resource was shipped to Malaysia, or to any other port or place designated by the Competent Authority; and
- (b) where required, proper maintenance and storage of the biological resource during the voyage, flight or journey.

(10) No person shall be liable under subsection (9) unless the decision of repatriation has been made by the Competent Authority within—

- (a) where there are no proceedings instituted, twelve months from the date on which the biological resource were imported into Malaysia; or
- (b) six months from the date the proceedings for the offence in connection with such importation into Malaysia are concluded.

(11) Any person who contravenes subsection (9) commits an offence and shall, on conviction, be liable—

- (a) where such person is an individual, to a fine not exceeding one hundred thousand ringgit or to imprisonment for a term not exceeding seven years or to both; or
- (b) where such person is a body corporate, to a fine not exceeding one hundred and fifty thousand ringgit.

Property in forfeited biological resource, etc.

45. Any biological resource, conveyance, machinery, contrivance, equipment, book, record, document or other article forfeited or deemed to be forfeited under this Act shall be the property of the Competent Authority.

Release of seized biological resource, etc.

46. Notwithstanding section 44, the Competent Authority may, where it thinks fit, at any time direct that any biological resource, conveyance, machinery, contrivance, equipment, book, record, document or other article seized under this Act be released to the person from whose possession, custody or control it was seized.

Cost of holding seized biological resource, etc.

47. Where any biological resource, conveyance, machinery, contrivance, equipment, book, record, document or other article seized or surrendered under this Act is held in the custody of the Competent Authority pending completion of any proceedings in respect of an offence under this Act, the cost of holding it in custody shall, in the event of any person being convicted of such offence, be a debt due to the Competent Authority or Government, as the case may be, by such person and shall be recoverable accordingly.

No costs or damages arising from seizure to be recoverable

48. No person shall in any proceedings before any court in respect of the seizure of any biological resource, conveyance, machinery, contrivance, equipment, book, record, document or other article seized or surrendered in the exercise or the purported exercise of any power conferred under this Act, be entitled to the costs of such proceedings or to any damages or other relief unless such seizure was made without reasonable cause.

Additional powers

49. (1) An enforcement officer shall, for the purposes of the execution of this Act or any of its subsidiary legislation, have power to do all or any of the following acts:

- (a) to require the production of records, accounts and documents and to inspect, examine and copy any of the records, accounts and documents;
- (b) to require the production of any identification document from any person in relation to any case or offence under this Act or any of its subsidiary legislation;
- (c) to make such enquiry as may be necessary to ascertain whether the provisions of this Act or any of its subsidiary legislation have been complied with.

(2) A person who fails to comply with a request made under subsection (1) commits an offence and shall, on conviction, be liable to a fine not exceeding one hundred thousand ringgit or to imprisonment for a term not exceeding seven years or to both.

PART X

GENERAL

Payment into fund

50. Except for the money received by a Competent Authority under section 22 and subsection 23(5), all moneys received under this Act by a Competent Authority shall be paid into and form part of—

- (a) where the Competent Authority is under the jurisdiction of the Federal Government, the Consolidated Fund; or
- (b) where the Competent Authority is under the jurisdiction of the State Government, the State Consolidated Fund.

Compounding of offences

51. (1) The Minister may, with the approval of the Public Prosecutor, make regulations prescribing—

- (a) any offence under this Act and any regulations made under the Act that may be compounded;
- (b) the criteria for compounding such offence; and
- (c) the method and procedure for compounding such offence.

(2) The Competent Authority may, with the consent in writing of the Public Prosecutor, compound any offence committed by any person under this Act and prescribed to be a compoundable offence by making a written offer to the person suspected to have committed the offence to compound the offence upon payment to the Competent Authority of an amount of money not exceeding fifty per centum of the amount of maximum fine for that offence within such time as may be specified in his written offer.

(3) An offer under subsection (2) may be made at any time after the offence has been committed but before any prosecution for it has been instituted.

(4) If the amount specified in the offer is not paid within the time specified in the offer or such extended time as the Competent Authority may grant, prosecution for the offence may be instituted at any time after that against the person to whom the offer was made.

(5) Where an offence has been compounded under subsection (2), no prosecution shall be instituted in respect of the offence against the person to whom the offer to compound was made, and any biological resource, conveyance, machinery, contrivance, equipment, book, record, document or other article seized in connection with the offence may be forfeited or released by the Competent Authority in accordance with sections 44 and 46, subject to such terms and conditions as the Competent Authority thinks fit.

Institution of prosecution

52. No prosecution for or in relation to any offence under this Act shall be instituted except by or with the written consent of the Public Prosecutor.

False declaration

53. (1) Any person who makes, orally or in writing, signs or furnishes any declaration, return, certificate or other document or information required under this Act which is untrue, inaccurate or misleading in any particular commits an offence and shall, on conviction, be liable—

(a) where such person is an individual, to a fine not exceeding fifty thousand ringgit or to imprisonment for a term not exceeding three years or to both; or

(b) where such person is a body corporate, to a fine not exceeding five hundred thousand ringgit.

(2) Any person who—

(a) without lawful authority alters, forges, mutilates or defaces any permit, certificate or registration; or

- (b) knowingly makes use of any permit, certificate or registration which has been so altered, forged, mutilated or defaced,

commits an offence and shall, on conviction, be liable—

- (aa) where such person is an individual, to a fine not exceeding one hundred thousand ringgit or to imprisonment for a term not exceeding seven years or to both; or
- (ab) where such person is a body corporate, to a fine not exceeding five hundred thousand ringgit.

Offence committed by body corporate

54. Where a body corporate commits an offence under this Act or any of its subsidiary legislation, any person who at the time of the commission of the offence was a director, manager, secretary or other similar officer of the body corporate or was purporting to act in any such capacity or was in any manner or to any extent responsible for the management of any of the affairs of the body corporate or was assisting in such management—

- (a) may be charged severally or jointly in the same proceedings with the body corporate; and
- (b) where the body corporate is found to have committed the offence, shall be deemed to commit that offence and shall, on conviction, be liable to the penalty applicable to an individual unless, having regard to the nature of his functions in that capacity and to all circumstances, he proves—
 - (i) that the offence was committed without his knowledge, consent or connivance; and
 - (ii) that he took all reasonable precautions and had exercised due diligence to prevent the commission of the offence.

Offence by partner, servant or authorised intermediary

55. Any person who would have been liable to any penalty under this Act for any act, omission, neglect or default if the act, omission, neglect or default is committed by him personally shall be liable to the same penalty if the act, omission, neglect or default is committed by his partner, servant or authorised intermediary unless he proves—

- (a) that the act, omission, neglect or default was committed without his knowledge, consent or connivance; and
- (b) that he took all reasonable precautions and had exercised due diligence to prevent the act, omission, neglect or default.

Public servant

56. Every member, officer, servant or agent of the National Competent Authority or Competent Authority while discharging his duties as such member, officer, servant or agent shall be deemed to be a public servant within the meaning of the Penal Code [*Act 574*].

Protection against suit and legal proceedings

57. No action shall lie or prosecution shall be brought, instituted or maintained in any court against—

- (a) any member, officer or enforcement officer of the National Competent Authority and Competent Authority; and
- (b) any other person for or on account of or in respect of any act done or purported to be done by him under the order, direction or instruction of the National Competent Authority or Competent Authority, enforcement officer or any other officer duly appointed by the National Competent Authority or Competent Authority,

if the act was done in good faith and in a reasonable belief that it was necessary for the purpose intended to be served by it and for the carrying into effect the provisions of this Act.

Protection of informers

58. (1) Except as provided in subsections (2) and (3), no witness in any civil or criminal proceeding shall be obliged or permitted to disclose the name or address of an informer or the substance of the information received from him or to state any matter which might lead to his discovery.

(2) If any book, record, account, document or computerized data which is in evidence or liable to inspection in any civil or criminal proceeding contains any entry in which any informer is named or described or which might lead to his discovery, the court shall cause all such passages to be concealed from view or to be obliterated so far only as may be necessary to protect the informer from discovery.

(3) If on the trial for any offence under this Act or any of its subsidiary legislation, the court after full enquiry into the case believes that the informer willfully made in his complaint a material statement which he knew or believed to be false or did not believe to be true, or if in any other proceeding the court is of the opinion that justice cannot be fully done between the parties in that proceeding without the discovery of the informer, the court may require the production of the original complaint, if in writing, and permit enquiry and require full disclosure, concerning the informer.

Rewards

59. The National Competent Authority or Competent Authority may order such rewards as it thinks fit to be paid to any person for services rendered in connection with the detection of any offence under this Act or any of its subsidiary legislation, or in connection with any seizures made under this Act.

Power to exempt

60. (1) The Minister may, by order published in the *Gazette*, exempt the following from all or any of the provisions of this Act:

- (a) a specific biological resource or a specific collection of biological resources, including future additions to the collection and for such purpose as the Minister may specify, if—
 - (i) the resource is held as a specimen away from its natural environment, whether in a collection or otherwise, by a government department or agency and the access to the biological resource is administered by the said department or agency in a manner consistent with the objective of this Act;
 - (ii) there is a request in writing by the government department or agency holding the biological resource in accordance with subparagraph (1)(a)(i); or
 - (iii) there are existing exchange and use practices that provides for access and benefit sharing of biological resource consistent with the objective of this Act;
- (b) any person or class of persons or any biological resource, including any use of a biological resource, upon recommendation of the relevant Competent Authority and in consultation with the National Competent Authority and the relevant advisory body established under subsection 9(2) where the interest of indigenous and local communities may be affected, subject to such terms and conditions as the Minister thinks fit to impose.

(2) The Minister may prescribe different procedures in respect of a specified biological resource or a specified collection of biological resource to promote the conservation of biodiversity.

(3) The Minister shall obtain the consent of the relevant State Authority before making any exemption under paragraph (1)(a) where the biological resource is within the jurisdiction of that particular State Authority.

(4) The Minister may, upon recommendation of the relevant Competent Authority and in consultation with the National Competent Authority and the relevant advisory body established under subsection 9(2) where the interest of indigenous and local communities may be affected, revoke any order made under subsection (1) if he satisfied that such exemption should no longer be granted.

Power to amend Schedules

61. (1) Subject to subsection (2), the Minister may, by order published in the *Gazette*, amend the Schedules.

(2) The First Schedule may only be amended with the consent of the relevant State Authority.

Power to make regulations

62. (1) The Minister may, after consultation with the National Competent Authority and Competent Authority, and where necessary and applicable, the advisory body established under subsection 9(2), make such regulations as may be expedient or necessary for the better carrying out of the provisions of this Act.

(2) Without prejudice to the generality of subsection (1), the regulations may be made for the following:

- (a) to prescribe the manner of applying for access to a biological resource and traditional knowledge associated with a biological resource under this Act, the particulars to be supplied by an applicant, the duration, terms, conditions and restrictions to be impose upon issuance of a permit;
- (b) to prescribe the terms and conditions for access to a biological resource and traditional knowledge associated with a biological resource under paragraphs 18(a) and (b);

- (c) to provide for special procedures for a specified biological resource or a specified collection of biological resource to advance conservation of biodiversity;
- (d) to provide for standard procedures or codes for access and benefit sharing for biological resources generally or specified biological resource or collections of biological resource and traditional knowledge associated with a biological resource;
- (e) to prescribe the manner for access to a biological resource and traditional knowledge associated with a biological resource by an authorised intermediary;
- (f) to provide for the cancellation of the permit;
- (g) to provide for matters relating to fees and charges;
- (h) to provide the procedure for appeals;
- (i) to provide for the composition, allowances, procedures and incidental matters relating to the establishment and conduct of the advisory body, committee and Advisory Committee;
- (j) to provide for the minimum terms for a benefit sharing agreement;
- (k) to provide the measures aimed at preventing the use within Malaysia, of a biological resource or traditional knowledge associated with a biological resource, which is not accompanied by a permit or its equivalent and evidence that mutually agreed terms have been established;
- (l) to provide the measures for the purpose of monitoring and tracking the biological resource accessed;
- (m) to provide the essential elements for obtaining the prior informed consent of the indigenous and local communities; and
- (n) to provide for such other matters as are contemplated by, or necessary for giving full effect to, the provisions of this Act and for their due administration.

(3) The regulations made under subsection (1) may prescribe any act in contravention of the regulations to be an offence and may prescribe penalties—

- (a) where such person is an individual, to a fine not exceeding two hundred thousand ringgit or to imprisonment for a term not exceeding ten years or to both; or
- (b) where such person is a body corporate, to a fine not exceeding five hundred thousand ringgit.

Transitional provisions

63. (1) Any person who, on the date of the coming into operation of this Act, is accessing a biological resource or traditional knowledge associated with a biological resource to which this Act applies with the consent of the resource provider shall, within twelve months from the date of the coming into operation of this Act, make an application for a permit under section 12 or 15, as the case may be.

(2) Pending the determination of such application, such person may continue accessing the biological resource or traditional knowledge associated with a biological resource.

(3) After the date of the coming into operation of this Act, any person who is in possession of a biological resource or traditional knowledge associated with the biological resource in respect of which this Act would apply and there is no benefit sharing agreement entered, shall enter into such agreement with the resource provider if—

- (a) there is a new use of the biological resource or traditional knowledge associated with the biological resource; or
- (b) there is development of a new product arising from the biological resource or traditional knowledge associated with the biological resource.

(4) Upon the conclusion of the benefit sharing agreement under subsection (3), the Competent Authority shall issue a permit under section 12 for access of the biological resource or traditional knowledge associated with the biological resource.

FIRST SCHEDULE

[Subsection 9(1)]

COMPETENT AUTHORITIES

Competent Authority	Biological Resource	Region
Ministry of Federal Territories	All covered under this Act	Federal Territory of Kuala Lumpur, Labuan and Putrajaya
Johor State Economic Planning Unit	All covered under this Act	Johore
Kedah State Economic Planning Unit	All covered under this Act	Kedah
Kelantan State Economic Planning Unit	All covered under this Act	Kelantan
Melaka State Economic Planning Unit	All covered under this Act	Malacca
Negeri Sembilan State Forestry Department	All covered under this Act	Negeri Sembilan
Pahang State Economic Planning Division	All covered under this Act	Pahang
Penang State Economic Planning Unit	All covered under this Act	Penang
Perak State Economic Planning Unit	All covered under this Act	Perak
Perlis State Economic Planning Unit	All covered under this Act	Perlis
Selangor State Economic Planning Unit	All covered under this Act	Selangor
Terengganu State Economic Planning Unit	All covered under this Act	Terengganu
Sabah Biodiversity Council	All covered under this Act	Sabah
Ministry of Urban Development and Natural Resources	All covered under this Act	Sarawak

SECOND SCHEDULE

[Subsection 15(1)]

Form 1

STATUTORY DECLARATION

APPLICATION FOR A PERMIT FOR NON-COMMERCIAL PURPOSE

I [name of applicant] (NRIC No./Passport No.) of [address] solemnly and sincerely declare the following:

1. That in relation to [insert the biological resource, traditional knowledge associated with the biological resource, purpose for access and use], I—

- (a) do not intend to use the biological resource or traditional knowledge associated with the biological resource, to which the proposed action relates, for commercial or potential commercial purposes;
(b) undertake to give a written report on the results of any research on a biological resource or traditional knowledge associated with the biological resource to the Competent Authority;
(c) undertake to offer a taxonomic duplicate of the biological resource collected to the Competent Authority;
(d) undertake not to give the biological resource to any person other than the Competent Authority without its prior written permission; and
(e) undertake not to carry out, or allow others to carry out, research or development for commercial or potential commercial purposes on any biological resource, or derivative, or in relation to traditional knowledge associated with the biological resource, unless he obtains a permit for commercial or potential commercial purposes in accordance with section 12 and a benefit sharing agreement has been entered into in accordance with subsection 22(1) of this Act.

2. I am aware that a person who intentionally makes a false statement in a statutory declaration is guilty of an offence under section 53 of this Act.

And I make this solemn declaration conscientiously believing the same to be true and by virtue of the provisions of the Statutory Declarations Act 1960.

Subscribed and solemnly declared by the abovenamed
.....
at.....
in the State of
this....., 20.....

Before me,
.....
(Signature of Sessions Court Judge,
Magistrate or Commissioner for Oaths)

EXPLANATORY STATEMENT

The Access to Biological Resources and Benefit Sharing Act 2017 (“the proposed Act”) seeks to implement the Convention on Biological Diversity and the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits arising from their Utilization to the Convention on Biological Diversity and to provide for other related matters.

1. Part I of the proposed Act deals with preliminary matters.

Clause 1 contains the short title of the proposed Act and empowers the Minister to appoint the date of coming into operation of the proposed Act.

Clause 2 seeks to provide for non-application of the proposed Act to specific biological or genetic resource covered by and for the purpose of specialized instrument on access to biological resources and benefit sharing.

Clause 3 seeks to provide that the proposed Act is to be read with other written laws and be regarded as an addition to, and not in derogation of, other laws.

Clause 4 contains the interpretations of certain words and expressions used in the proposed Act.

Clause 5 seeks to provide for the meaning of access to biological resource and the activities for any purpose other than the purpose of research and development that do not constitute such access.

Clause 6 seeks to provide that the small farmers’ rights shall not be limited by the proposed Act.

2. Part II of the proposed Act contains provisions relating to the establishment of National Competent Authority, Competent Authority and Advisory Committee.

Clause 7 seeks to provide for the establishment of the National Competent Authority and its members.

Clause 8 contains the functions of the National Competent Authority.

Clause 9 seeks to provide for the establishment of the Competent Authorities.

Clause 10 contains the functions and powers of the Competent Authorities.

Clause 11 seeks to provide for the establishment of the Advisory Committee by the National Competent Authority and its functions.

3. Part III of the proposed Act contains provisions relating to permit to access a biological resource or traditional knowledge associated with a biological resource.

Clause 12 deals with the application for permit for access to a biological resource or traditional knowledge associated with a biological resource for commercial or potential commercial purpose. The proposed section seeks to provide for matters to be considered by the Competent Authority before approving an application for permit.

Clause 13 contains provisions on issuance of permit for commercial or potential commercial purpose with or without condition.

Clause 14 seeks to provide that permit for commercial or potential commercial purpose is not transferable.

Clause 15 deals with application for permit for access to a biological resource or traditional knowledge associated with a biological resource for non-commercial purpose. The proposed section seeks to provide for matters to be considered by the Competent Authority before approving on application for permit.

Clause 16 contains provisions on issuance of permit for non-commercial purpose with or without condition.

Clause 17 seeks to provide that the decision of the outcome of any application of permit must be informed in writing to the applicant.

Clause 18 contains provisions on circumstances where permit is not required under the proposed Act.

Clause 19 contains provisions on the transfer of biological resource or traditional knowledge associated with a biological resource or results of research in relation to a biological resource or traditional knowledge associated with a biological resource to a person or institution.

Clause 20 seeks to provide that the permit for non-commercial purpose shall not be used for commercial purpose.

Clause 21 contains prohibition on dealing with biological resource or traditional knowledge associated with a biological resource by person who is not an authorized intermediary and who has in his possession or under his control biological resource or traditional knowledge associated with a biological resource.

Clause 22 seeks to provide that the applicant for a permit for access to a biological resource or traditional knowledge associated with a biological resource for commercial or potential commercial purpose must enter into benefit sharing agreement with the resource provider.

Clause 23 contains provisions on the requirement to obtain prior informed consent of the relevant indigenous and local communities and the sharing of benefits through mutually agreed terms.

4. Part IV of the proposed Act contains provisions on permit, register and records of permit, and disposal of biological resource.

Clause 24 seeks to provide that permit shall constitute evidence of compliance.

Clause 25 deals with the keeping and maintenance of register of permits.

Clause 26 seeks to provide for the record to be kept by the permit holder.

Clause 27 deals with the disposal of a biological resource by the permit holder.

5. Part V of the proposed Act contains provisions on revocation of permit and appeals.

Clause 28 seeks to provide for the grounds of revocation of permit.

Clause 29 seeks to provide for appeal by a person aggrieved by the revocation of permit shall be made to the High Court.

6. Part VI of the proposed Act contains provisions on monitoring and tracking of biological resource or traditional knowledge associated with a biological resource.

Clause 30 deals with the measures for monitoring and tracking the biological resource or traditional knowledge associated with a biological resource through the establishment of checkpoints.

Clause 31 seeks to provide that a person applying for a patent in relation to a biological resource or traditional knowledge associated with a biological resource shall notify the National Competent Authority within thirty days from the date of the application.

7. Part VII contains provisions relating to clearing house mechanism.

Clause 32 seeks to provide for the establishment of a clearing house mechanism for the sharing of information relating to access and benefit sharing.

Clause 33 seeks to provide for the requirement to post a copy of the permit including the information in the Clearing House Mechanism website except if it is classified as confidential by the relevant Competent Authority. The criteria when information in the permit is deemed to be confidential are also provided in this *Clause*.

8. Part VIII contains provisions relating to user measures.

Clause 34 seeks to provide for the establishment of measures to support the access and benefit sharing laws of a Party to the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits arising from their Utilization and to prevent the use within Malaysia of any biological resource or traditional knowledge associated with a biological resource that has not been accessed in accordance with the laws or regulatory requirements of that Party.

9. Part IX contains provisions relating to enforcement, seizure, arrest, etc.

Clause 35 seeks to empower the Minister to appoint enforcement officers upon recommendation of the Competent Authority.

Clause 36 seeks to provide for the power of the enforcement officer to investigate any offence under the proposed Act.

Clause 37 seeks to provide for each enforcement officer authorized shall be issued an authority card and shall on demand produce his card when necessary under the proposed Act.

Clause 38 seeks to provide for power of the enforcement officer to enter any premises for the purposes of inspection, verification or collection of biological resources.

Clause 39 seeks to provide for the provision relating to access to computerized data.

Clause 40 seeks to provide for provision relating to seizure of things, etc.

Clause 41 seeks to empower the enforcement officer to stop, search and seize conveyances.

Clause 42 seeks to impose a duty on an enforcement officer to give a notice of seizure of the things seized.

Clause 43 seeks to provide provision for the temporary return of seized conveyances, machinery, contrivance or equipment by the court to the owner subject to such terms and conditions as the court may impose.

Clause 44 seeks to provide provision for the forfeiture of seized biological resources.

Clause 45 seeks to provide that any biological resources and others forfeited or deemed to be forfeited under the proposed Act shall be the property of the Competent Authority.

Clause 46 seeks to provide for the release of anything seized under the proposed Act.

Clause 47 seeks to provide that the cost of holding anything seized or surrendered under the proposed Act shall be a debt due to the Competent Authority or Government and may be recoverable accordingly if that person is found guilty of an offence.

Clause 48 seeks to provide that no costs or damages arising from the seizure or surrender of anything in the exercise or the purported exercise of any powers under the proposed Act shall be recoverable in any proceedings before any court unless the seizure was done without reasonable cause.

Clause 49 seeks to provide for the additional powers of the enforcement officers for the purposes of the execution of the proposed Act.

10. Part X contains provisions relating to general matters.

Clause 50 seeks to provide that all payments of money received except under section 22 and subsection 23(5) shall be paid into the Consolidated Fund in the case where the Competent Authority is under the jurisdiction of the Federal Government and State Consolidated Fund in the case where the Competent Authority is under the jurisdiction of the State Government.

Clause 51 seeks to empower the Competent Authority to compound offences in writing with the consent of the Public Prosecutor.

Clause 52 seeks to provide for the institution of prosecution.

Clause 53 seeks to make it an offence for a person to provide any false declaration, etc.

Clause 54 seeks to provide for the offence committed by body corporate.

Clause 55 seeks to provide for the offence committed by partner, servant or authorized intermediary.

Clause 56 seeks to provide that every member, officer, servant or agent of the National Competent Authority or Competent Authority shall be deemed to be a public servant within the meaning of the Penal Code [*Act 574*] while discharging his duties as such.

Clauses 57 and 58 seek to provide for the provisions relating to the protection of officers and informers respectively against legal proceedings.

Clause 59 seeks to provide for the provision relating to rewards.

Clause 60 seeks to empower the Minister to exempt a specific biological resource or a specific collection of biological resource or any person from the provisions of the proposed Act.

Clause 61 seeks to empower the Minister to amend the First Schedule (with the consent of the relevant State Authority) and Second Schedule by an order published in the *Gazette*.

Clause 62 seeks to empower the Minister to prescribe regulations under the proposed Act.

Clause 63 deals with transitional provisions.

FINANCIAL IMPLICATION

This Bill will involve the Government in extra financial expenditure the amount of which cannot at present be ascertained.

[PN(U2)3017]