

REPUBLIC OF VANUATU

BILL FOR THE PROTECTION OF TRADITIONAL KNOWLEDGE AND EXPRESSIONS OF CULTURE ACT NO. OF 2018

Explanatory Note

The Purpose of this Bill is to protect Vanuatu's traditional knowledge and expressions of culture as an intangible and tangible intellectual property associated with the use of genetic resources. This is part of our commitment to preserve traditional knowledge and to make provision for fair sharing of benefits which arises out of the use of traditional knowledge as expressly stated in the Convention on Biological Diversity and Nagoya Protocol. Parliament has ratified the Convention on Biological Diversity on 1992 and the Nagoya Protocol was ratified in 2014.

Pursuant to the National Sustainable Development Plan 2016 to 2030, the Vanuatu 2030 People's Pan which is the National Strategic Plan of the Vanuatu government under Policy objectives SOC 1.2, it emphasis the preservation and enhancement of cultural and traditional knowledge, including appropriate medicines, natural remedies and healing practices.

The enactment of this Bill is part of the sectorial strategy in fulfilling national policy objectives under SOC 1.2 in ensuring that, there is a legislative framework in place to establish an Institution that will take charge in administering and regulating the identification, and proper use of traditional knowledge through prior informed consent of custom owners, as well as monitor the terms and conditions of an agreement to ensure that custom owners gain a fair share of the use of their traditional knowledge associated with genetic resources.

The enactment of such legislation will ensure the proper monitoring and regulation of Vanuatu's traditional knowledge and expressions of culture, for commercial use and to ensure that the traditional owners have given their prior informed consent for such use and derive benefits from the use. An example being the bungy jump which gets a resemblance of Nagol jump of South Pentecost. Having such legislation in place provides an avenue where the custom owners of such traditional knowledge can register their custom knowledge and gain legal rights to protect their custom knowledge. A person who uses that traditional knowledge without the prior informed consent of the traditional owners commits an offence under this Act

The Bill contains provisions on prior informed consent and user agreements. It is a must to obtain the prior informed consent of the owners of traditional knowledge before one can use the

traditional knowledge or expression of culture. The user agreements must contain provisions setting out the benefit sharing arrangements for such use which both parties must agree to. There are provisions providing for an identification process for owners of traditional knowledge and expressions of culture as well as an alternative dispute resolution process if there is a dispute between the traditional owners on ownership of the traditional knowledge.

Consultations have been conducted throughout the country with local communities in 2012 as well as in 2016 by the Office of the Registrar of Intellectual Property on this Bill.

Deputy Prime Minister and Minister of Trade, Commerce, Industry and Tourism



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REPUBLIC OF VANUATU

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An Act to provide for the protection, regulation and management of traditional knowledge and expressions of culture in Vanuatu and for related matters.

Be it enacted by the President and Parliament as follows-

PART 1 PRELIMINARY MATTERS

1 Interpretation

In this Act, unless a contrary intention appears:

Authority means the Traditional Knowledge and Expressions of Culture Authority established under subsection 13(1);

biological materials means natural biocompatible materials that comprise a whole or a part of a living structure or biomedical device that performs , augments or replaces a natural function;

customary use means the use of traditional knowledge or expressions of culture in accordance with the customary laws and practices of the traditional owners;

derivative works means any intellectual property creation or innovation based upon or derived from traditional knowledge or expressions of culture;

fixation means the embodiment of:

- (a) sounds or visual images; or
- (b) the representations of sounds or visual images,

in such a manner that they can at a later time be perceived, reproduced or communicated with or without the aid of a device (for example, a recording of a live musical performance);

genetic materials means any material of plant, animal, microbial or other origin containing functional units of heredity;

Minister means the Minister responsible for culture;

user agreement means a contract that provides for specific terms on benefit sharing arrangements that must be mutually agreed upon between the provider of traditional knowledge or expressions of culture and the user;

other materials mean any material apart from biological or genetic materials, the use of which is intrinsically linked to specific traditional knowledge or expressions of culture;

register means the register for user agreements, board of arbitration decisions and applications made under this Act;

Regulation means a Regulation made under this Act;

traditional cultural rights means the traditional rights of individuals, tribes, clans or communities to control the manner in which the knowledge or information they provide is used and accessed;

traditional knowledge includes any knowledge that generally:

- (a) is or has been created, acquired or inspired for traditional economic, spiritual, ritual, narrative, decorative or recreational purposes; and
- (b) is or has been transmitted from generation to generation; and
- (c) is regarded as pertaining to a particular traditional group, clan or community of people; and
- (d) is collectively or individually originated and held;

traditional owners means:

- (a) a group, clan or community of people; or
- (b) an individual who is recognized by a group, clan or community of people as the individual,

in whom the custody and ownership of the traditional knowledge or expressions of culture are entrusted in accordance with the customary law and practices of that group, clan or community.

2 Application of the Act

- (1) This Act applies to traditional knowledge and expressions of culture that:
 - (a) existed before the commencement of this Act; or
 - (b) are created on or after the commencement of this Act.
- (2) This Act does not affect or apply to rights that exist immediately before the commencement of this Act, including intellectual property rights.
- (3) This Act does not affect or apply to contracts, licences or other agreements entered into by traditional owners before the commencement of this Act in relation to the use of traditional knowledge or expressions of culture.

PART 2 TRADITIONAL CULTURAL RIGHTS AND MORAL RIGHTS

3 Holders of traditional cultural rights

- (1) The traditional owners of traditional knowledge and expressions of culture are the holders of the traditional cultural rights in the traditional knowledge or expressions of culture.
- (2) The traditional cultural rights in traditional knowledge or expressions of culture are in addition to, and do not affect, any rights under any law relating to copyright, trademarks, patents, designs or other intellectual property.

4 Scope of protection for traditional cultural rights

- (1) Traditional owners have exclusive rights:
 - (a) in respect of all traditional knowledge, to:
 - (i) control, exploit and utilize their traditional knowledge; or
 - (ii) grant prior informed consent to the access and use of their traditional knowledge; or
 - (iii) the access and use of traditional knowledge based on fair and mutually agreed terms; or
 - (iv) prevent misappropriation and misuse through acquisitions, use or exploitation of traditional knowledge without prior informed consent and user agreement; or
 - (v) prevent the granting of unauthorized intellectual property rights involving the use of their traditional knowledge and derivative works without acknowledging them as traditional knowledge holders and respecting their cultural norms and practices; or
 - (b) in respect of sacred expressions of culture, to prohibit any unauthorized fixation, disclosure, use or other exploitation; or
 - (c) in respect of all expressions of culture other than secret or sacred traditional expressions of culture, to prohibit:
 - (i) in relation to expressions of culture other than words:

- (A) signs; or
- (B) names; or
- (C) symbols; or
- (D) their fixation; or
- (E) reproduction; or
- (F) public performance; or
- (G) translation or adaptation; or
- (H) communicating to the public; or
- (I) distribution and offering for sale; or
- (J) sale of articles,

that are falsely represented as expressions of culture made by traditional owners, or any use that disparages, offends or falsely suggests a connection with traditional owners or brings them into contempt or disrepute; or

(ii) in relation to expressions of culture which are words:

- (A) signs; or
- (B) names and symbols including derivatives; or
- (C) any use for commercial purposes other than their traditional use; or
- (D) acquisition or exercise of intellectual property rights; or
- (E) the offering for sale or sale of articles,

that are falsely represented as expressions of culture made by traditional owners, or any use that disparages, offends or falsely suggests a connection with traditional owners or brings them into contempt or disrepute.

(2) For the purpose of this section:

exploitation means any of the following acts:

- (a) where the traditional knowledge is a product - the manufacturing, importing, offering for sale, selling, stockpiling or using the product beyond the traditional context; or
- (b) where the traditional knowledge is a process - the use of the process beyond the traditional context and the carrying out of the acts under paragraph (a) with respect to a product that is a direct result of the use of the process; or
- (c) research and developments on traditional knowledge or expressions of culture which lead to profit making or commercial purposes.

misappropriation means:

- (a) acquisition or use of traditional knowledge or expressions of culture in violation of the provisions of this Act; or
- (b) deriving benefits from acquisition or use of traditional knowledge or expressions of culture if:
 - (i) the person who acquires or uses traditional knowledge is aware; or
 - (ii) could not have been unaware; or
 - (iii) is negligent to become aware,

of the fact that the traditional knowledge or expressions of culture was acquired, appropriated or used by any unfair means; or
- (c) any commercial activity that is contrary to honest practices that results in unfair or inequitable benefits from traditional knowledge or expressions of culture.

5 Protection

(1) This section applies to traditional knowledge and expressions of culture that:

- (a) are unique and distinctively associated with and integral to the cultural identity of traditional holders being recognized as holding the traditional knowledge or expressions of culture; or
 - (b) are collectively generated, preserved and transmitted in a traditional and intergenerational context; or
 - (c) have not been widely known with prior informed consent; or
 - (d) in relation to secret or sacred traditional knowledge or expressions of culture - is kept secret by the traditional holder or holders and has not been shared with any other person or community; or
 - (e) originates from intellectual activity which takes place in a wide range of traditional, social, cultural, environmental and technological contexts; or
 - (f) can be identified by the traditional community as being traditional knowledge and expressions of culture; or
 - (g) is not an application of principles, rules, skills, know-how practices and normal learning and is generally well known; or
 - (h) satisfies any other requirement for protection by the Authority.
- (2) The matters for the protection of expressions of culture, from which traditional culture is embodied as part of the cultural life of an indigenous citizen of Vanuatu includes:
- (a) phonetic or verbal expressions such as stories, epics, legends, poetry, riddles, words, signs, names and symbols, chants, histories and songs in oral narratives; and
 - (b) tangible expressions, such as material expressions of art, handicrafts, carvings, sculptures, pottery, terracotta, mosaic, woodwork, metal-ware, jewellery, basketry, weaving, needlework, shell work, rugs, costumes and textiles, glassware, carpets, costumes, musical instruments, architectural drawings, designs, paintings (including body-painting and tattooing), traditional craftsmanship and associated skills and historic tangible expressions; and

- (c) musical or sound expressions, such as songs, rhythms and instrumental music, the sounds of which are the expression of rituals;
 - (d) visual and performing arts or expressions by actions such as sand drawings, dances, plays, ceremonies, rituals in sacred places and peregrinations, sports and traditional games, puppet performances, and other performances, whether fixed or unfixed, social practices, rituals (spiritual) ceremonies and festive events, traditional health rituals.
- (2) Subject to subsection (1), the subject matter of the protection of traditional knowledge is also knowledge originating from the intellectual activity and insight in a traditional context, which includes:
- (a) skills, innovations, practices and learning, where the knowledge is embodied in the traditional lifestyle of a community, or contained in the codified knowledge systems passed on from one generation to another; and
 - (b) agricultural, environmental, aroma and cosmetic, medical and medicinal knowledge, knowledge associated with biological or genetic materials; and
 - (c) scientific inventions, scientific discoveries, undisclosed information; and
 - (d) other tradition-based innovations resulting from intellectual activity in the industrial, research and scientific fields,
- developed and transmitted through traditional intergenerational means.

6 Derivative works

- (1) Any copyright, trademark, patent, design or other intellectual property right that is based on traditional knowledge or expressions of culture is to be regarded as traditional knowledge and expressions of culture, derivative works.
- (2) The intellectual property rights in relation to such work, vests with the creator as provided under the following Acts:
 - (a) Copyrights and Related Rights Act No. 42 of 2000; or
 - (b) Trademarks Act No. 1 of 2003; or

- (c) Patents Act No. 2 of 2003; or
 - (d) Designs Act No. 3 of 2003.
- (3) Subject to subsection (4), in determining the level to which a copyright, trademark, patent, design or other intellectual property is derived from traditional knowledge or expression of culture, the Authority or the Court may, in addition to other considerations, have due regard to:
- (a) the absolute or comparative level of the contribution of traditional knowledge, regardless of its quality, in identifying the active ingredient in a product or in the process of developing a product; and
 - (b) the level of contribution of expressions of culture, regardless of its quality, in the creation of a work or service; and
 - (c) the percentage of traditional knowledge used in an invention; and
 - (d) the percentage of expression of culture used in a creation; and
 - (e) the level of labour of tradition-based skill and judgment associated with the quality of contribution to a creation, invention or service; and
 - (f) the level of importance that is more probable or is likely to be attributed to the contribution.
- (4) The absolute rights to copyright, trademark, patent, design or other intellectual property are limited to certain special cases that do not:
- (a) conflict with the normal utilization of the traditional knowledge and expressions of culture by the traditional holders; and
 - (b) unreasonably prejudice the legitimate interests of traditional holders while taking into account the legitimate interests of third parties.
- (5) If a derivative work, traditional knowledge or expressions of culture is to be used for a commercial purpose, the user agreement must:
- (a) contain a benefit sharing arrangement providing for equitable monetary or non-monetary compensation to the traditional owners; and

- (b) provide for identification of the traditional knowledge or expression of culture on which the derivative work is based in an appropriate manner, in connection with the exploitation of the derivative work, by mentioning the traditional owners and the geographical place from which it originated; and
- (c) provide that the traditional knowledge or expressions of culture in the derived work, will not be subject to derogatory treatment.

7 Beneficiaries of Protection

Beneficiaries of protection include, but are not limited to traditional holders within indigenous Vanuatu communities.

8 Exceptions and limitations to exercise traditional cultural rights

- (1) The exceptions and limitations on the exercise of traditional cultural rights include:
 - (a) traditional exchange systems within and between indigenous Vanuatu communities; and
 - (b) production of traditional medicines for household or emergency use; and
 - (c) customary use; and
 - (d) face to face teaching; and
 - (e) judicial proceedings; and
 - (f) making of recordings and other reproductions for inclusion in an archive or inventory for non-commercial cultural heritage and safeguarding purposes by the Authority; and
 - (g) reporting news or current events; and
 - (h) such other use as the Authority may declare by Order, after consultation with the traditional owners.

9 Prohibited use

- (1) The exercise of traditional cultural rights under this Part is to be prohibited where the use is:
 - (a) harmful to the environment and to human health; or

- (b) for the development of biological and chemical weapons; or
 - (c) for any other use that the Authority deems as a prohibited use.
- (2) If there is evidence to suggest that a risk of serious or irreversible damage is made to the:
- (a) indigenous community; or
 - (b) human health; or
 - (c) society; or
 - (d) environment or biological diversity,

as a result of activities or the use of traditional knowledge, expressions of culture and associated biological or genetic or other materials under this Act, the Authority is to stop the damage by suspending, terminating or make reparation activity.

10 Moral Rights

- (1) The traditional owners of traditional knowledge or expressions of culture are the holders of the moral rights in the traditional knowledge or expressions of culture.
- (2) The moral rights of traditional owners of traditional knowledge and expressions of culture are:
- (a) the right of authorship, ownership or integrity to their traditional knowledge and expressions of culture; and
 - (b) the right not to have ownership of traditional knowledge or expressions of culture or its derivatives, falsely attributed to them; and
 - (c) the right not to have their traditional knowledge or expressions of culture be subjected to insulting, derogatory, culturally or spiritually offensive uses; and
 - (d) the right to decide when, where and in what form their work will be disclosed to any other person; and

- (e) the right to withdraw a work from publication because of change of opinion.
- (3) The moral rights of traditional owners in their traditional knowledge and expressions of culture exist independently from their traditional rights.
- (4) Moral rights continue in force in perpetuity and are inalienable, and cannot be waived or transferred.
- (5) A person who, without the traditional owner's prior informed consent, does an act which is inconsistent with the moral rights, commits an offence punishable upon conviction:
 - (a) in the case of a natural person – to a fine not exceeding VT 2,000,000 or imprisonment for a term not exceeding 12 months; or to both; or
 - (b) in the case of a body corporate – to a fine not exceeding VT 2,000,000.

11 Material Form not required

Traditional cultural rights exist in traditional knowledge and expressions of culture, whether or not traditional knowledge and expressions of culture exist in material form.

12 Duration of traditional cultural rights

Traditional cultural rights continue in perpetuity.

PART 3 ESTABLISHMENT OF THE TRADITIONAL KNOWLEDGE AND EXPRESSIONS OF CULTURE AUTHORITY

13 Establishment and membership of the Authority

- (1) The Traditional Knowledge and Expressions of Culture Authority is established.
- (2) The Minister is to appoint the following persons to be members of the Authority:
 - (a) the Chief Executive Officer of the Malvatumauri Council of Chiefs who is the Chairman; and
 - (b) the Director of the Vanuatu Cultural Centre; and
 - (c) the Director of the Department of Environment; and
 - (d) a representative of the Vanuatu Intellectual Property Office nominated by the Registrar; and
 - (e) a representative of the Vanuatu Handicraft Association, who must be a member of that Association.

14 Functions of the Authority

- (1) The Authority has the following functions:
 - (a) to consult with relevant authorities on the grant of any bio-prospecting licences under the Environmental Protection and Conservation Act [CAP 283], relating to traditional knowledge; and
 - (b) to consider and determine applications that have elements of traditional knowledge and expressions of culture, for registration of:
 - (i) trademarks; and
 - (ii) patents; and
 - (iii) designs; and

- (iv) research based on:
 - (A) traditional knowledge; or
 - (B) expressions of culture; or
 - (C) associated biological or genetic materials; and
- (c) to oversee the administration of the Trust Account on behalf of the beneficiaries; and
- (d) to approve and monitor annual strategic work plan, budgets and performance objectives of the Authority; and
- (f) to effectively and efficiently, manage the Fund ; and
- (g) to perform such other functions as may be conferred on the Authority under this Act or any other Act.

15 Powers of the Authority

- (1) The Authority may do all things necessary and convenient for the better carrying out of its functions under this Act.
- (2) Without limiting the generality of subsection (1), the Authority may:
 - (a) acquire, hold and dispose of property directly related to the function of the Authority; or
 - (b) acquire copyright; or
 - (c) charge fees for services rendered by it; or
 - (d) order inspections and audit or examine accounts of the Authority; or
 - (e) to borrow any sum required by the Authority to carry out its functions or to exercise any of its powers under this Act or any other Act; or
 - (f) impose sanctions such as warnings, temporary suspension or dismissal against a member of the Authority, who:

- (i) infringes the provisions of this Act or its Regulations; or
- (ii) has been implicated in conduct which adversely affects the interest of the traditional owners and the communities.

16 Meetings of the Authority

- (1) The Authority is to meet at least 4 times a year and may hold such other meetings as are necessary for the proper performance of its functions.
- (2) In the absence of the Chairperson at a meeting, the members are to elect from amongst themselves another member to preside at the meeting.
- (3) At a meeting of the Authority, a quorum is 3 members present at the meeting.
- (4) Any matters arising at the meeting is to be decided by a majority of the members present and, in the case where there is a tie vote, the Chairperson, or if another member has been elected under subsection (2) to preside at the meeting, has a casting vote.
- (5) The Authority may request independent advice on any matter concerning the Authority or the administration of the Fund.
- (6) The Authority is to regulate its own procedures.

17 Disclosure of Interest

A member of the Authority who has an interest in a matter to be discussed or determined at a meeting of the Authority, must declare his or her interest and must not take part in any discussions or decisions relating to that matter.

18 Authority may establish committees

- (1) The Authority may establish committees as it considers necessary to deal with specific matters relating to the functions of the authority.
- (2) In addition to subsection (1), the Authority must form a Committee whose function would be to advise and make recommendations on any technical matter relating to the functions and powers of the Authority.

19 Secretary of the Authority

- (1) The Public Service Commission is to appoint a Secretary of the Authority.
- (2) The Secretary has the following functions:

- (a) to receive and process applications under this Act; and
- (b) to monitor compliance with user agreements and to advise traditional owners of any breaches of such agreement; and
- (c) to provide training and educational programs for traditional owners and users of traditional knowledge and expressions of culture; and
- (d) to develop a code of ethics in relation to the use of traditional knowledge and expression of culture; and
- (e) to issue advisory guidelines for the purpose of this Act; and
- (f) to liaise with regional bodies in relation to matters of the Authority; and
- (g) to maintain a record of traditional knowledge and expressions of culture which are subject to any research and study; and
- (h) to administer user applications; and
- (i) to perform such other functions as may be conferred on him or her by this Act or any other Act.

20 Sitting allowances

A member, including the Chairperson of the Authority, is entitled to a sitting allowance at a rate to be prescribed by the Minister.

PART 4 IDENTIFICATION OF TRADITIONAL OWNER

Division 1 Applications for use and identification of traditional owners

21 Application for the use of traditional knowledge and expressions of culture

- (1) A person that intends to use any traditional knowledge or expression of culture for a non-customary use (whether or not of a commercial nature) must apply to the Authority to obtain the prior informed consent of the traditional owners.
- (2) The application must:
 - (a) be in the prescribed form; and
 - (b) be accompanied by the prescribed fee.
- (3) The Authority must refer the application to the Malvatumauri Council of Chiefs to conduct the identification process of owners.

22 Determination of applications by the traditional owners

- (1) A traditional owner must decide whether:
 - (a) to reject the application; or
 - (b) to accept the application and to enter into negotiations for a written authorised user agreement in relation to the application.
- (2) The Authority must ensure that the relevant process has been followed to acquire a prior informed consent.
- (3) The Authority in collaboration with the Department of Environment is to issue written guidelines for the purposes of this section.
- (4) The Authority is to advise the applicant in writing of the traditional owners' decision.

Division 2 Identification of traditional owners

23 Guidelines for identification of traditional owners

The Authority in collaboration with the Malvatumauri Council of Chiefs is to develop written guidelines for the purposes of this section.

24 Identification of traditional owners

- (1) If the Malvatumauri Council of Chiefs is not satisfied that it has identified all the traditional owners or is satisfied that there is a dispute about ownership, the Council must make a recommendation to the Minister to appoint a board of arbitration to deal with the dispute.
- (2) The Malvatumauri Council of Chiefs must advise the Authority if all of the traditional owners have been identified in accordance with customary law and the guidelines referred to in section 23.

25 Traditional Owners Trust Account

- (1) The Traditional Owners Trust Account is established.
- (2) There is to be paid into the Account, any sum of which is due to traditional owners as fees or royalties payable under this Act, which is not able to be paid to the traditional owners for reason of a dispute that exists in relation to ownership of the traditional knowledge.
- (3) The Traditional Owners Trust Account is to be operated and maintained by the Director General of the Ministry of Finance and Economic Management.
- (4) Funds may be withdrawn from the Account and paid to the traditional owners that have been determined by the Malvatumauri Council of Chiefs.

PART 5 ESTABLISHMENT OF THE TRADITIONAL KNOWLEDGE AND EXPRESSIONS OF CULTURE FUND

26 Establishment of the Fund

- (1) The Traditional Knowledge and Expressions of Culture Fund is established.
- (2) The Fund consists of:
 - (a) any amount appropriated by Parliament; and
 - (b) any grant or donation to the Fund; and
 - (c) any other income derived from under this Act.

27 Purposes of the Fund

- (1) The purposes of the Fund are:
 - (a) to provide funding for the promotion and development of traditional knowledge and expressions of culture innovation and creativity, market research studies and for the implementation of the protection regime and public awareness raising activities; and
 - (b) to provide funding for the development of research, management, leadership and entrepreneurial skills for traditional owners with respect to the commercialization of their traditional knowledge and expressions of culture; and
 - (c) to promote research for safeguarding indigenous Vanuatu heritage including the languages, art, expressions of culture and traditional knowledge and associated biological or genetic materials or other materials; and
 - (d) for any other purposes approved by the Authority.

PART 6 USER AGREEMENT

28 User Agreement

- (1) The Authority is to develop in collaboration with the Vanuatu Cultural Center, the Malvatumari Council of Chiefs and the Department of Environmental Protection and Conservation, a standard template for user agreements relating to all non-customary uses of traditional knowledge and expressions of culture which is to be entered into between the traditional owners and users.
- (2) The Authority is to facilitate the execution of all user agreements under this Act.
- (3) A user agreement that has been executed in contravention of subsection (2), is null and void.

29 Terms and Conditions of User Agreement

In addition to section 28, the Authority in collaboration with the Vanuatu Cultural Centre and the Department of Environmental Protection and Conservation are to prescribe the terms and conditions of a User Agreement.

30 Existing user agreement and prior informed consent

- (1) If an owner of traditional knowledge and expressions of culture, entered into a form of user agreement before the commencement of this Act, the traditional owner is deemed to have given their prior informed consent to the use to which the agreement relates.
- (2) The parties must disclose to the Authority any agreed compensation terms in force before the commencement of this Act.
- (3) The Authority may request the parties to consider amendments to any of the terms and conditions of any existing agreement.
- (4) This section applies despite any other provisions in this Act.

31 Register of User Agreement

The Authority is to maintain a register of all user agreements executed under this Act.

32 Valuation of traditional knowledge and expressions of culture and associated biological materials

- (1) Traditional knowledge and expressions of culture and associated biological or genetic materials are subject to valuation by an expert who is experienced in the field of determining a fair and equitable compensation.
- (2) The expert will be engaged by the Authority on such terms and conditions as determined by the Authority.
- (3) A benefit sharing arrangement for a user agreement must not be concluded without complying with subsection (1).

PART 7 ALTERNATIVE DISPUTE RESOLUTION

33 Board of arbitration

- (1) The Minister may on the recommendation of the Authority, appoint a board of board of arbitration, if there is a dispute between traditional owners.
- (2) The board of arbitration may consist of:
 - (a) a sole arbitrator; or
 - (b) 4 members who must represent equally the Island Council of Chiefs in the relevant area where the dispute has arisen.
- (3) The board must make its award without delay and, in any case, not later than 21 days from the date of receiving notification of the dispute.
- (4) An award or other decision of the board, must be made unanimously by all the members of the board.
- (5) The board must notify the parties to the dispute of the award or any other decision that the board has made within 5 days of making the award or the decision.
- (6) Anything communicated to a board or a person presiding over any arbitration proceedings must not be admissible in evidence in any proceedings before a Court, except with the consent of the party who communicated it to such board or person.
- (7) In an arbitration proceeding, a board of arbitration or a person presiding over such proceeding may:
 - (a) permit or refuse a legal practitioner to represent a party; or
 - (b) permit or to exclude members of the public or representatives of the press from attending such proceedings.

34 Evidence

- (1) A board of arbitration may require such information as may be necessary for the purpose of arbitrating a dispute under this Act, without being bound

by the rules of evidence applicable in civil or criminal proceedings, and may require any person:

- (a) to provide, in writing such particulars in relation to any matter as may be required; or
 - (b) to attend and give evidence on oath.
- (2) If a person objects to providing in accordance with subsection (1), any such information or to answering any question or to producing any document on:
- (a) the ground that it will tend to incriminate him or her; or
 - (b) on any other lawful ground, he or she is not required to furnish such particulars or to answer such question or to produce such document,

is not to be liable to any penalty for refusing to do so.

- (3) A person who:
- (a) without lawful excuse fails to comply with any requirement imposed on him or her under subsection (1); or
 - (b) knowingly gives information or produces a document which is false in any material particular,

is guilty of an offence punishable on conviction by:

- (A) in the case of an individual – a fine not exceeding VT 1,000,000 or imprisonment for a term not exceeding 2 years, or both;
- (B) in the case of a body corporate –a fine not exceeding VT 3,000,000.

35 Expenses of arbitration

If a settlement of a dispute is brought about by way of arbitration proceedings, the board may order all or any of the parties to the dispute to contribute towards the expenses of the proceedings, in full or in part, as the board thinks fit.

36 Remuneration of conciliators and board members

The chairperson and members of a board of arbitration are to be paid by the Authority, such travelling and other allowances, including compensation for loss of remunerative time, as may be determined by the Minister by the Regulation.

37 Register of awards by board of arbitration

(1) The Authority is to keep and maintain a register of the awards made by a board of arbitration under this section.

(2) The register may be made available for inspection by the public.

38 Award by board

An award made by a board under this Part on any traditional cultural right to traditional knowledge or expressions of culture, with or without associated biological or genetic material or other material, is final.

PART 8 OFFENCES, CIVIL LIABILITY AND REMEDIES

39 Prohibition to have access, acquire or use traditional cultural rights

(1) A person must not have access to, acquire or use traditional cultural rights of traditional holders including:

- (a) where a third party has claimed legitimate access or use to associated biological or genetic materials with traditional knowledge and expressions of culture; or
- (b) traditional knowledge and expressions of culture associated with other materials, covered by a safeguard clause,

without the consent of traditional owners.

(2) A person who acts in contravention of subsection (1), commits an offence punishable on conviction by:

- (a) in the case of an individual - a fine not exceeding VT5,000,000 or imprisonment for a term not exceeding 2 years, or both; or
- (b) in the case of a body corporate - a fine not exceeding VT10,000,000.

40 Unauthorised activity or dealing

A person that carries out any unauthorised activity or dealing with traditional knowledge and expressions of culture affecting the protection, preservation or promotion of the traditional knowledge and expressions of culture commits an offence punishable on conviction by:

- (a) in the case of an individual - a fine not exceeding VT5,000,000 or imprisonment not exceeding 2 years or both; or
- (b) in the case of a body corporate - a fine not exceeding VT10,000,000.

41 Civil Liability

(1) A person that carries out any activity or dealing with traditional knowledge and expressions of culture affecting the protection, preservation or promotion of the traditional knowledge and expressions of culture, is liable for any damage, injury or loss caused directly or indirectly to the traditional owners.

- (2) The damage, injury or loss referred to under subsection (1), may include all or any of the following:
- (a) personal injury;
 - (b) Psychological abuse;
 - (c) damage to reputation;
 - (d) financial loss;
 - (e) breach of moral rights;
 - (f) breach of traditional cultural rights to associated biological or genetic materials;
 - (g) breach of traditional cultural rights to traditional knowledge and expressions of culture;
 - (h) breach of traditional cultural rights to traditional knowledge and cultural expression associated with other materials;
 - (i) breach of rights to grant consent for access, use and to have a user agreement.
- (3) If liability under this section is incurred by a user or any director, manager, secretary or similar officer of the body corporate or the financiers and beneficiaries of a non- profitable organisation or institution, these persons are to be similarly liable unless they can show that they did everything in their power to prevent the damage, injury or loss in question.
- (4) If there is more than one user under subsection (1), that is responsible for the damage or injury or loss, then the liability is to be joint and several.
- (5) In the case of causing harm to the moral right and integrity of the communal knowledge or expressions of culture, redress includes the costs of restoration or rehabilitation or transfer to owners, actually incurred or to be incurred and where applicable, the costs of preventive measures and any damage or injury or loss caused by the taking of the preventive measures.
- (6) In addition to subsection (5), the person responsible may be required to carry out the restoration or rehabilitation or transfer at his or her own cost to the satisfaction of the Authority.

42 Remedies

- (1) The Court may grant all or any of the following remedies in relation to civil proceedings instituted under this Part:
- (a) an injunction;
 - (b) damages for injury or loss resulting from the unauthorised use;
 - (c) a declaration that the traditional cultural rights of the traditional owners have been contravened;
 - (d) an order that the defendant make a public apology for the contravention;
 - (e) an order that any false attribution of ownership, or derogatory treatment of the knowledge cease or be reversed;
 - (f) an order for an account for profits;
 - (g) an order for the seizure of any object or material made, imported or exported contrary to this Act;
 - (h) such other orders as the Court considers appropriate.
- (2) An Order under this section is additional to any other Court Order made under this Act.

43 Matters for consideration

The Court in deciding what relief is to be granted may take into account all or any of the following matters:

- (a) whether the defendant was aware or ought to have been reasonably aware of the traditional cultural rights and moral rights of the traditional owners;
- (b) the effect on the reputation of the traditional owners resulting from the unauthorised use;
- (c) anything done by the defendant to mitigate the effects of the unauthorised use;
- (d) any cost or difficulty that may have been associated with identifying the traditional owners;

- (e) any cost or difficulty in ceasing or reversing any false attribution of ownership, or derogatory treatment of the knowledge;
- (f) whether the parties have undertaken any other action to resolve the dispute.

44 Defence and other matters

- (1) It is a defence to an offence under this Act, if the traditional owners have given their prior informed consent to the use in question.
- (2) Nothing in this Part prevents the traditional owner or user concerned from attempting to resolve a dispute through:
 - (a) mediation; or
 - (b) negotiation; or
 - (c) reconciliation under customary law and practices.

45 Other rights of actions and remedies

This Part does not affect any rights of action or other remedies, whether civil or criminal, provided for under any other law.

PART 9 BORDER CONTROL AND EXPORT LICENCE

46 Border control

- (1) Subject to section 47, all customs, quarantine and immigration officers must not allow the transportation or dispatch out of the country of any biological or genetic material, or any other material derived from any research and to be subjected to any further research or experimentation for the purpose of commercialisation, except in accordance with this Act.
- (2) A person who fails to comply with subsection (1), commits an offence and is liable on conviction by:
 - (a) in the case of an individual - a fine not exceeding VT 1,000,000 or to imprisonment for a term not exceeding 12 months; or
 - (b) in the case of a body corporate –a fine not exceeding VT 3,000,00.
- (3) The Authority may liaise with relevant authorities for the inspection of materials required under this Act.

47 Export licence

- (1) A person who intends to export or send any traditional knowledge and expression of culture with or without associated biological and genetic materials or other materials for further research and experimentation or for the purpose of commercialisation must make an application to the Authority for an export licence.
- (2) An application under subsection (1) must be in the prescribed form and be accompanied by the prescribed fee.
- (3) The Authority may grant a licence to a person with or without conditions as the Authority may determine.
- (4) If a person has been granted a licence under subsection (1), the person must produce to the customs, quarantine or immigration officer, the user agreement and the exportation license issued by the Authority whenever the person carries out any of the activities referred to in subsection (1).
- (5) A person who fails to comply with this provision commits an offence and is liable on conviction by:
 - (a) in the case of an individual - to a fine not exceeding VT 1,000,000 or to imprisonment for a term not exceeding 12 months; or

- (b) in the case of a body corporate-to a fine not exceeding VT3,000,000.

PART 10 MISCELLANEOUS PROVISIONS

48 Accounts and Audit

- (1) The Authority must keep accounts and records of transactions of the Fund and its operations and must prepare financial statements and accounts for each financial year.
- (2) The accounts of the Authority must be audited annually by a qualified auditor.

49 Annual Report

- (1) The Authority is to prepare an annual report on its activities including its financial report for submission to the Minister at the end of every financial year.
- (2) The Minister must cause a copy of the report to be laid at the next meeting of Parliament after receiving the report.

50 Protection from personal liability

A member of the Authority or of a committee is not personally liable for any act or omission done or omitted to be done in good faith under this Act.

51 Regulation

The Minister may make Regulations to give effect to and for the better carrying out of the provisions of this Act.

52 Transitional Provisions

- (1) Despite any other provision in this Act, this Act applies to a non-customary use of traditional knowledge or expressions of culture that existed immediately before the commencement of this Act, without the prior and informed consent of the traditional owners and a user agreement.
- (2) A person to whom subsection (1) applies, must not later than 6 months after the commencement of this Act, comply with the provisions of this Act in relation to a non-customary use of traditional knowledge or expressions of culture.

53 Commencement

This Act commences on the day on which it is published in the Gazette.