

Facilitating Benefit Sharing through Disclosure

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Indigenous groups are disadvantaged in many ways. They are concentrated in low- and middle-income countries, and within those countries, they are almost invariably poorer than other groups. Most have been displaced from their traditional settlements to less hospitable locations. They suffer from unusually high rates of disease. Partly as a result, their members' average healthy life expectancy is lower than average. Finally, they are more exposed than other groups to the hazards associated with climate change.¹

This state of affairs is unjust for three distinct reasons. First, the impoverishment of Indigenous groups is attributable in substantial part to unjust actions taken in the past by others. The histories of Indigenous groups vary, of course, but many have been subjected to genocide, enslavement, or forced migration.²

Second, the severity of their deprivation cannot be reconciled with any plausible conception of distributive justice. Whether tested against the

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1. See, e.g., PEOPLE AND CLIMATE CHANGE: VULNERABILITY, ADAPTATION, AND SOCIAL JUSTICE 3–19, 108–21, 149–64, 184–207, 211–18 (Lisa Reyes Mason & Jonathan Rigg eds., Oxford University Press 2019); see generally, e.g., INDIGENOUS PEOPLES, POVERTY AND DEVELOPMENT (Gillette Hall & Harry Patrinos eds., 2012) (documenting poverty in Indigenous peoples in Asia, Africa, and Latin America); HARV. PROJECT ON AM. INDIAN ECON. DEV., THE STATE OF THE NATIVE NATIONS: CONDITIONS UNDER U.S. POLICIES OF SELF-DETERMINATION (Oxford University Press 2008) (exploring contemporary the conditions of and trends concerning U.S. Indigenous peoples); JANE BURNS ET AL., OVERVIEW OF ABORIGINAL AND TORRES STRAIT ISLANDER HEALTH STATUS 2018 (Australian Indigenous HealthInfoNet 2019) (providing comprehensive summary of health and health status indicators for Aboriginal and Torres Strait Islander people).

2. See, e.g., Pedzisai Maedza, 'People Died There Like Flies that Had Been Poisoned': Remembering the First German Genocide in Namibia, in REMEMBERING MASS ATROCITIES: PERSPECTIVES ON MEMORY STRUGGLES AND CULTURAL REPRESENTATIONS IN AFRICA 135, 136, 142–43, 146 (Mphahisi Ndlovu et al. eds., Springer International Publishing 2024) (documenting genocide, enslavement, and forced migration in Namibia); Nancy E. van Deusen, *Why Indigenous Slavery Continued in Spanish America after the New Laws of 1542*, 80 AMERICAS 395, 395–405, 407–09, 425–32 (2023); see generally, e.g., JEFFREY OSTLER, SURVIVING GENOCIDE: NATIVE NATIONS AND THE UNITED STATES FROM THE AMERICAN REVOLUTION TO BLEEDING KANSAS (Yale University Press 2019) (documenting Native America dispossession and government-sanctioned force against Indigenous peoples).

guidelines supplied by utilitarianism,³ deontological theories,⁴ prioritarianism,⁵ or Aristotelian conceptions of human flourishing,⁶ their impoverishment—both absolute and relative to the positions of other groups within their countries of residence and globally—cannot plausibly be justified.

Third, private firms continue to reap substantial material benefits from the actions or creations of Indigenous groups without fairly sharing the proceeds thereof. For example, pharmaceutical firms often rely on guidance from Indigenous groups when developing new plant-based drugs (such as the promising malaria treatment developed with assistance from members of the Paliku and Galibi groups in French Guiana).⁷ Similarly, manufacturers often incorporate Indigenous designs in consumer goods (such as rugs embodying Tibetan designs and techniques, clothing and handbags embodying Mayan motifs, and T-shirts featuring Australian Aboriginal designs, like the one described by Carol Rose in her contribution to this Special Edition).⁸ Rarely are the groups in question compensated for their contributions.

Of the various parties that could help redress these injustices, the governments of upper-income countries are in many ways the best positioned. Unfortunately, their willingness to do so seems to be diminishing, not increasing. The cause is not increased hostility toward Indigenous groups *per se*. Rather, it derives from more general trends: the intensification of nationalism, growing resistance to all forms of “equity and inclusiveness,” and diminution in the desire to right wrongs committed in the past.⁹ The recent shift in the posture

3. See, e.g., JEREMY BENTHAM, *THE THEORY OF LEGISLATION* 102–09 (C.K. Ogden ed., 1987) (1789).

4. See, e.g., JOHN RAWLS, *THEORY OF JUSTICE* § 11, at 54–56, § 46, at 266; JOHN RAWLS, *JUSTICE AS FAIRNESS* § 13, at 42–43, 49, § 17, at 58–59; RONALD DWORKIN, *SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY* 1 (Harv. Univ. Press 2000).

5. See Derek Parfit, *Lindley Lecture at the University of Kansas: Equality or Priority?* (Nov. 21, 1991) (transcript available at <https://hdl.handle.net/1808/12405> [<https://perma.cc/P2ZT-AHSLJ>]).

6. See AMARTYA SEN, *INEQUALITY REEXAMINED* (1992); MARTHA NUSSBAUM, *WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH* (2000).

7. See William Fisher, *The Puzzle of Traditional Knowledge*, 67 *DUKE L.J.* 1511, 1514–20 (2018).

8. See *id.* at 1528–36; Carol M. Rose, *Traditional Knowledge and the Limits of Property*, 66 *HARV. INT'L. L.J.* 81, 93 (2025) (Special Edition).

9. For examples of the impact of these trends in various countries, see generally Vincent Ekow Arkorful et al., *Equitable Access and Inclusiveness in Basic Education: Roadblocks to Sustainable Development Goals*, 43 *INT'L J. PUB. ADMIN.* 189 (2019); A. Burcu Bayram et al., *Manipulating the Masses? Right-Wing Populist Messages, Political Ideology, and Public Support for Multilateral Development Aid in Germany, the United States, and the United Kingdom*, 36 *J. INT'L DEV.* 2705 (2024); Dennis Hammerschmidt, Cosima Meyer & Anne Pintsch, *Foreign Aid in Times of Populism: The Influence of Populist Radical Right Parties on the Official Development Assistance of OECD Countries*, 35 *CAMBRIDGE REV. INT'L AFFS.* 478 (2021); Tobias Heinrich, Yoshiharu Kobayashi & Edward Lawson, Jr., *Populism and Foreign Aid*, 27 *EUR. J. INT'L RELS.* 1042 (2021).

of the government of the United States has been especially dramatic, but the governments of many other upper-income countries are veering similarly.

The abrupt changes in the stances of national governments do not reflect, however, equally large changes in the sentiments of the citizens of those countries. In the United States and elsewhere, minor adjustments in the relative popularity of major political parties can cause huge shifts in public policy, disproportionate to the change in the attitude of median voters. The net result: many citizens of upper-income countries remain committed to the overall project of promoting distributive justice, both nationally and globally, but have few effective ways of implementing their commitments.¹⁰ Among the many people who will suffer from this impediment are the members of Indigenous groups.

There is no way to offset completely the withdrawal of national governments from the project of global distributive justice. But the consequences of that retreat for Indigenous groups in particular could be mitigated by expanding other channels through which persons who remain committed to their welfare could act.

The most promising of those channels is the pressure that persons (who remain persuaded of the injustice of the current situation) might bring to bear on the private firms who exploit Indigenous groups. As mentioned, these include pharmaceutical firms that rely in part on the knowledge of Indigenous groups when developing profitable drugs and the manufacturers of consumer products based on Indigenous knowledge.¹¹

Firms in these positions could help in three ways the Indigenous groups from which they (and the consumers of their products) are benefitting. The most obvious is by paying them more. Second, the firms could create trust funds that provide health care, education, and other long-term benefits to the members of Indigenous groups. An example would be the trust that South Africa's Council for Scientific and Industrial Research created to compensate the San people for permission to commercialize their knowledge concerning the appetite-suppressing power of Hoodia.¹² Last but not least, the firms could provide the members of Indigenous groups employment—for example, in manufacturing

10. See, e.g., Audrey Kearney et al., *KFF Health Tracking Poll February 2025: The Public's Views on Global Health and USAID*, KFF (Mar. 4, 2025), <https://www.kff.org/global-health-policy/poll-finding/kff-health-tracking-poll-february-2025-the-publics-views-on-global-health-and-usaid/> [https://perma.cc/574T-E4WU]; Lydia Saad, *Americans' Foreign Policy Priorities, NATO Support Unchanged*, GALLUP (Mar. 4, 2025), <https://news.gallup.com/poll/657581/americans-foreign-policy-priorities-nato-support-unchanged.aspx> [https://perma.cc/9VEH-BR4X].

11. See Fisher, *supra* note 7, at 1514–20.

12. See Roger Chennells, *Strengthening Partnership Between States and Indigenous Peoples: Treaties, Agreements and Other Constructive Arrangements*, 3–5, U.N. Doc. HR/GENEVA/ /SEM/ EXPERT/2012/BP.8 (July 16–17, 2012), <http://www.ohchr.org/Documents/Issues/IPeoples/Seminars/Treaties/RogerChennells.pdf> [https://perma.cc/L9GZUJ93].

the products derived from their heritages. Which of these contributions would be most beneficial? As Graham Dutfield suggests in this Special Edition, that question is probably most sensibly answered by the members of the groups in question.¹³

How, then, could members of society who remain committed to improving the welfare of Indigenous groups—especially those residing in countries where the incumbent government is unfavorable towards Indigenous group protections—bring pressure to bear on the firms? With respect to cultural products—rugs, clothing, handbags, and the like—the most straightforward path would be to buy goods only from firms that treat Indigenous groups fairly. With respect to pharmaceutical products, that strategy is less promising; few consumers, faced with alternative vaccines or therapeutics, can be expected to make choices based on the social responsibility of the competing manufacturers. But in the pharmaceutical field another form of leverage is available: investing only in firms that treat Indigenous groups fairly. The firms themselves can—and increasingly often do—make such strategic investments convenient by offering so-called “sustainably-linked bonds” bearing lower interest obligations.¹⁴

Strategies of these sorts can only work, however, if all parties know (a) when and how firms are making use of traditional knowledge and (b) the steps, if any, that those firms have taken to share benefits with those groups. Disclosure, in other words, is essential to consumer and investor activism.

The recent conclusion of the World Intellectual Property Organization’s (“WIPO”) Treaty on Intellectual Property, Genetic Resources, and Associated Traditional Knowledge made a major advance in compelling such disclosure.¹⁵ The relevant provisions of the treaty provide:

13. Graham Dutfield, *Landscape and Law: Territoriality and Rights in Knowledge*, 66 HARV. INT’L. L.J. 155, 181 (2025) (Special Edition).

14. For discussion of sustainability-linked bonds in general (and the associated hazard of “greenwashing”), see generally Daniel Murphy, *What are sustainability linked bonds and how can they support the net-zero transition?*, WORLD ECONOMIC FORUM (Nov. 11, 2022), <https://www.weforum.org/stories/2022/11/cop27-sustainability-linked-bonds-net-zero-transition/> [https://perma.cc/58RF-FZU9]; Frederic de Mariz et al., *Reforming Sustainability-Linked Bonds by Strengthening Investor Trust*, 17 J. RISK & FIN. MGMT. 1 (2024); Anne-Marie Anderson & Richard Kish, *Rewarding Performance Through Sustainability-Linked Bonds*, 44 ECON. AFFAIRS 294 (2024); Diana Sellevold & Philip Larsen, *Sustainability-Linked Bonds An Examination of Yield Differences Between Sustainability-Linked and Conventional Bonds* (2023) (M.Sc. thesis, Oslo Metropolitan University), <https://hdl.handle.net/11250/3106880> [https://perma.cc/A8L5-KAKD]. For discussion of their actual or potential use by pharmaceutical firms, see Charles Gore et al., *Negotiating Public-Health Intellectual Property Licensing Agreements to Increase Access to Health Technologies: An Insider’s Story*, BMJ GLOBAL HEALTH, Sept. 2023, at 1, 4; MEDICINES PATENT POOL, VOLUNTARY LICENSING: RIGHT FOR HEALTH, SMART FOR BUSINESS 30–31 (2024).

15. WIPO Treaty on Intellectual Property, Genetic Resources and Associated Traditional Knowledge, May 24, 2024, WIPO GRATK/DC/7, https://www.wipo.int/edocs/mdocs/tk/en/gratk_dc/gratk_dc_7.pdf [https://perma.cc/V2NB-SFLX].

3.1 Where the claimed invention in a patent application is based on genetic resources, each Contracting Party shall require applicants to disclose:

- (a) the country of origin of the genetic resources, or,
- (b) in cases where the information in Article 3.1(a) is not known to the applicant, or where Article 3.1(a) does not apply, the source of the genetic resources.

3.2 Where the claimed invention in a patent application is based on traditional knowledge associated with genetic resources, each Contracting Party shall require applicants to disclose:

- (a) the Indigenous Peoples or local community, as applicable, who provided the traditional knowledge associated with genetic resources, or,
- (b) in cases where the information in Article 3.2(a) is not known to the applicant, or where Article 3.2(a) does not apply, the source of the traditional knowledge associated with genetic resources.¹⁶

These obligations are broad and unqualified. As Faith Majekolagbe points out in her contribution to this Special Edition, they are not subject to the kinds of exceptions and limitations found in most WIPO treaties.¹⁷ As such, they are well designed to bring to the surface all instances in which pharmaceutical firms rely upon knowledge, developed by Indigenous groups, of the potential medicinal powers of plants (and conceivably of animals).¹⁸ To be sure, the United States may not ratify the treaty. However, if other upper-income countries do so, its power to flush out instances of reliance upon traditional knowledge will be unimpaired.

A more comprehensive disclosure obligation would do even more to facilitate consumer and investor activism. In a previous article, I suggested that, ideally, such an obligation would not be tied to intellectual property protection:

Instead of requiring applicants for patents, trademarks, industrial-design protection, and the like to reveal the degree to which they relied on traditional knowledge in creating the things for which they are seeking protection, the law could require all sellers of products and services to make such disclosures, regardless of whether they seek intellectual property protection. This adjustment would be less radical than it might appear. In a variety of commercial contexts unrelated to applications for intellectual property rights, sellers are already obliged to disclose aspects of their products and services. For example, in the United States, institutions offering residential mortgages must present borrowers with detailed information concerning the nature of the financial obligations they are

16. *Id.* §§ 3.1–3.2 (footnotes omitted).

17. Faith O. Majekolagbe, *Indigenizing Limitations and Exceptions under the International Intellectual Property Framework for Genetic Resources, Traditional Knowledge, and Cultural Expressions*, 66 HARV. INT'L. L.J. 209, 213 (2025) (Special Edition).

18. *Id.*

incurring; sellers of prescription drugs must include in their packaging and advertisements warnings concerning the risks associated with their products; sellers of packaged food must reveal the contents thereof; and sellers of clothes must include labels that indicate, among other things, the materials of which they are made and where they were manufactured.¹⁹

Particularly if buttressed with a private right of action, such a duty of disclosure would go far to reveal instances in which consumers goods incorporated traditional knowledge.

In the current political climate, adoption of legislation imposing such a duty on manufacturers is unlikely. However, a comprehensive disclosure regime of the sort sketched above could be approximated through nongovernmental action. A nonprofit organization, suitably global in its ambit, might aggregate and publicize information concerning instances in which products of all sorts were derived from traditional knowledge and the extent to which the manufacturers thereof shared benefits with the groups in question. The groups themselves typically are aware of such situations. If they were willing to report their knowledge to the NGO, it could function as an informational clearinghouse.

Organizations that might assume this responsibility already exist. Candidates include the Clearing-House Mechanism of the Convention on Biological Diversity²⁰ and the databases on Traditional Knowledge and Folklore that have been indexed by WIPO.²¹ However, their development and usage have been limited—in part because activists have long held out hope that more robust disclosure obligations and associated registries might be secured through legislation. Recognition that aid from that quarter is unlikely in the near future might prompt activists to devote more attention to the construction of a non-governmental registry.

To summarize, increased disclosure of circumstances in which private firms derive benefits from knowledge or cultural practices developed by Indigenous groups could enable consumers and investors, who regret the recent withdrawal of national governments from projects designed to promote global distributive justice, to pressure the firms to share their profits with the groups in question.

19. See Fisher, *supra* note 7, at 1570–71 (citations omitted).

20. *Clearing-House Mechanism*, CONVENTION ON BIOLOGICAL DIVERSITY, <https://www.cbd.int/chm> [<https://perma.cc/4LSK-WWE4>] (last visited Mar. 12, 2025).

21. Secretariat, World Intellectual Property Organization Intergovernmental Comm. on Intell. Prop. and Genetic Res., Traditional Knowledge and Folklore, Third Session, *Inventory of Existing Online Databases Containing Traditional Knowledge Documentation Data ¶¶* 11–48, 61–79, WIPO Doc. WIPO/GRTKE/IC/3/6 (May 10, 2002), https://www.wipo.int/meetings/en/doc_details.jsp?doc_id=2166 [<https://perma.cc/M8HY-NXGH>].

I must acknowledge, however, that highlighting this option risks obscuring more fundamental dimensions of the plight of Indigenous groups throughout the world. Of the three forms of injustice identified at the start of this essay, the third—uncompensated exploitation of traditional knowledge by private firms—is the least important. By proposing a way of inducing the firms to share their benefits more often, I risk deflecting attention from the deeper issues of corrective justice and distributive justice.²² It is thus crucial that, if and when political winds change, national governments, particularly those of upper-income countries, re-assume their responsibilities to alleviate the plight of Indigenous groups—a plight, for which they, or their predecessors in interest,²³ are at least partially responsible.

22. Cf. Alan David Freeman, *Legitimizing Racial Discrimination through Antidiscrimination law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1051–52, 1071–79, 1105–07 (1978).

23. See, e.g., *Johnson v. M'Intosh*, 21 U.S. 543, 584–85, 589–91 (1823).

