THE (INDIGENOUS) CASE FOR SHAREHOLDER PRIMACY AND ITS ROLE IN CLIMATE JUSTICE

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In 1970, Milton Friedman published his now-infamous essay, arguing that the purpose of a corporation is to produce value for its investors.[1] Articulating what is now known as the Friedman doctrine, or shareholder primacy, his essay argued that companies do not have social responsibilities to the public; instead, the responsibility of a company is to maximize financial returns to its shareholders.[2] In 2019, Business Roundtable, a nonprofit association of the CEOs of almost 200 major U.S. companies, announced the release of a new *Statement on the Purpose of a Corporation*.[3] Intended to be a direct rebuke of shareholder primacy, the Statement for the first time placed the interests of communities on the same level of importance as those of shareholders — stakeholder primacy, rather than shareholder primacy.[4] But characterizing these notions as diametrically opposed misses the point entirely.

It is absolutely true that we are no longer living in the world of Friedman and must recognize that corporations cannot be motivated solely by profit. And yet, it is difficult not to be cynical about Business Roundtable's announcement. Despite this supposedly monumental shift in the alignment of priorities, Business Roundtable has continued to assert, for example, that companies should not be held to a higher standard of disclosure than currently required by law, and that basic Dodd-Frank reporting requirements like CEO pay, resource extraction, and use of conflict minerals should not be considered material to stockholders.[5] Many of these companies also continue to accelerate the rate of climate change and infringe the rights and territories of Indigenous Peoples.

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1 Milton Friedman, *A Friedman Doctrine — The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES, (Sept. 13, 1970), https://www.nytimes.com/1970/09/13/archives/a-friedman-doctrine-the-social-responsibility-of-business-is-to.html [https://perma.cc/VQ9Y-VZYM].

2 *See id.*

3 BUS. ROUNDTABLE, STATEMENT ON THE PURPOSE OF A CORPORATION (2019), https://s3.amazonaws.com/brt.org/BRT-StatementonthePurposeofaCorporationOctober2020.pdf [https://perma.cc/7KSV-QJQG].

4 *See id.*; *Business Roundtable Redefines the Purpose of a Corporation to Promote "An Economy that Serves All Americans*,*"* BUS. ROUNDTABLE (Aug. 19, 2019), https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans [https://perma.cc/J9ZK-VDQZ].

5 BUS. ROUNDTABLE, THE MATERIALITY STANDARD FOR PUBLIC COMPANY DISCLOSURE: MAINTAIN WHAT WORKS 10–13 (2015), https://s3.amazonaws.com/brt.org/archive/reports/BRT.The%20Materiality%20Standard%20for%20Public%20Company%20Disclosure.2015.10.29.pdf [https://perma.cc/73YD-RG4F].

These policies are plainly incongruous with twenty-first-century corporate obligations, including considerations of community, climate justice, and racial equality.

The issue therefore is not necessarily with shareholder primacy or stakeholder primacy. The purported conflict between these two sets of interests underscores the lack of recognition of the important role shareholders can play in encouraging companies to be good stewards, as well as the lack of understanding that there is a business case for protecting human rights and achieving climate justice. Good governance requires companies to align corporate action with public statements, to be responsive to shareholder demands, and to fully consider environmental, social, and governance issues (ESG) in business decisions in order to create sustainable profit for shareholders. A corporation can only promote asset value if it does so truthfully while protecting its shareholders and the planet we all share.

In May 2020, the second-largest mining company in the world, Rio Tinto, destroyed a series of ancient cave structures in the Juukan Gorge in Western Australia; these caves were rich with artifacts that were not only sacred to two Australian Indigenous groups but also priceless archaeological treasures.[6] Rio Tinto has a long and occasionally controversial history of resource extraction, but it has continuously touted its human rights and environmental commitments and accomplishments.[7] Rio Tinto has committed itself to acting in concert with the UN Guiding Principles on Business and Human Rights[8] and the UN Declaration on the Rights of Indigenous Peoples,[9] including seeking the free, prior and informed consent (FPIC) of Indigenous Peoples before engaging in development that affects the land and rights of Indigenous Peoples.[10] Although FPIC is sometimes understood to require only some form of meaningful consultation, Rio Tinto has in the past gone further and stated that no development should occur without "express approval."[11]

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[6] Livia Albeck-Ripka, *Executives to Step Down After Rio Tinto Destroys Sacred Australian Sites*, N.Y. TIMES (Sept. 11, 2020), https://www.nytimes.com/2020/09/11/business/rio-tinto-indigenous-sites.html [https://perma.cc/Y7K3-9GDK].

[7] *E.g.*, *Sustainability*, RIO TINTO, https://www.riotinto.com/en/sustainability [https://perma.cc/3YFU-ZYUJ].

[8] OFF. OF UNITED NATIONS HIGH COMM'R OF HUM. RTS., GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS (2011), https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf [https://perma.cc/5YDE-QXPE].

[9] G.A. Res. 61/295, United Nations Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007).

[10] RIO TINTO, RIO TINTO SUSTAINABLE DEVELOPMENT 2012, at Human Rights 1, Communities 1 (2012), https://www.riotinto.com/en/invest/reports [https://perma.cc/8LYB-DB8V] (navigate to "Past Reports"; then select "2012"; then select "Sustainability Report 2012" from the available documents).

[11] For a collection of Rio Tinto statements on human rights, consent, and sustainable development, see MARIANNE VOSS & EMILY GREENSPAN, OXFAM AM., COMMUNITY CONSENT

It is also a member of the International Council on Mining and Metals (ICMM), which requires all members to implement policies consistent with ICMM Mining Principles.[12] This includes not only the ICMM Position Statement on Indigenous People and Mining, but also principles related to human rights, environmental performance, and social performance.[13]

And yet, despite challenges from Indigenous groups and activists, a clear lack of FPIC, and the apparent contravention of the company's own policies regarding development, Rio Tinto destroyed the Juukan caves.[14] Clearly, Rio Tinto was not meeting its own governance benchmarks with respect to Indigenous rights or environmental justice. The company quickly announced that the bonuses of the CEO and two other executives would be docked, but in September 2020, after significant shareholder pressure, the three were terminated.[15] The shareholders made clear that the corporation's management was taking unnecessary financial risks by not meeting its environmental and social commitments, and therefore could not protect the value of the company.[16]

For companies to have good internal governance they need to be held accountable to their environmental and social commitments. At the same time, companies have a business responsibility to uphold the financial value of their shares. In the twenty-first century, these two responsibilities have become much more obviously aligned, as choosing to ignore environmental and Indigenous concerns has become a material financial risk. Rio Tinto's error was not just destroying sacred land and creating lasting environmental damage, but doing so in a way that was harmful to the company's reputation and value. As Rio Tinto continues to seek mining opportunities on Indigenous lands and in environmentally sensitive locations,[17] our task is to make sure shareholders are

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INDEX: OIL, GAS AND MINING COMPANY PUBLIC POSITIONS ON FREE, PRIOR, AND INFORMED CONSENT (FPIC) 88–91 (2012), https://s3.amazonaws.com/oxfam-us/www/static/media/files/community-consent-index_final-1.pdf [https://perma.cc/4KLR-XDDH].

[12] *See* RIO TINTO, *supra* note 10, at Performance Overview 1; INT'L COUNCIL ON MINING & METALS, INDIGENOUS PEOPLES AND MINING 2 (2013), https://www.icmm.com/website/publications/pdfs/mining-principles/position-statements_indigenous-peoples.pdf [https://perma.cc/TUT9-RJSY].

[13] INT'L COUNCIL ON MINING & METALS, *supra* note 12, at 2.

[14] *See* Albeck-Ripka, *supra* note 6.

[15] *See id.*

[16] *See* Lorena Allam et al., *Rio Tinto: Why the Sacking of Three Executives Isn't Enough for Mining Investors*, THE GUARDIAN (Sept. 11, 2020, 4:00 PM), https://www.theguardian.com/business/2020/sep/12/indigenous-leaders-say-rio-tinto-dumping-executives-must-be-beginning-of-genuine-transformation [https://perma.cc/5MFX-SJVL].

[17] For example, Rio Tinto is one of two companies currently pushing to expedite government approval to extract copper from Oak Flat, sacred Apache land in Arizona. *See* Darby Ingram, *Rio Tinto Copper Mine Threatens Apache Sacred Land*, NAT'L INDIGENOUS TIMES (Dec. 30, 2020), https://nit.com.au/rio-tinto-copper-mine-threatens-apache-sacred-land [https://perma.cc/S3JW-VCW5]; Barbara Lewis, *Rio Tinto's Resolution Copper Project in Arizona Moves Step Closer*,

aware and activated to prevent unnecessary environmental damage and the racist destruction of sacred land.

Activated shareholders plainly have a role to play in the interconnected issues of racial justice and climate justice, especially in holding companies accountable for their public statements and commitments. Within the past decade, companies have begun to engage with ongoing social, racial, and environmental justice issues to a much greater degree, typically by condemning certain practices and making public commitments. In response to these pronouncements by companies, shareholders can and must consider whether these promises represent a hollow public relations statement or are in fact material in considering their investment in the company.

In May and June of 2020, sponsors and other companies associated with the Washington R*dsk*ns[18] all made significant pronouncements on racial justice in the aftermath of the killing of George Floyd and the subsequent uprising of the Black Lives Matter movement[19] — a movement which became inclusive of Indigenous and other people of color, even in the brutality of that moment for Black Americans.[20] However, these statements were plainly incongruous with supporting the name of the team, a deeply racist and offensive slur that Native groups have been protesting for decades.[21] In order to hold these companies to their word, First Peoples Worldwide, an Indigenous-led advocacy group, partnered with over one hundred investor groups and foundations (representing over $620 billion in assets) in appealing directly to Nike, PepsiCo, and FedEx and urging them to stop doing business with the team if it did not retire the name.[22] A traditional and social media firestorm followed. In early July, FedEx announced it supported changing

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REUTERS (Aug. 9, 2019, 1:47 PM), https://www.reuters.com/article/us-riotinto-resolution/rio-tintos-resolution-copper-project-in-arizona-moves-step-closer-idUSKCN1UZ23S [https://perma.cc/3JWN-QPCN].

[18] Out of an acknowledgment of the harm that the Washington Football Team's prior name has caused, and that its continued use perpetuates, for Indigenous Peoples, I have chosen not to include it in full in this Commentary.

[19] *E.g.*, *How We Stand Up for Equality*, NIKE, https://purpose.nike.com/how-we-stand-up-for-equality [https://perma.cc/8ZFV-3ASN]; Ramon Laguarta, *PepsiCo's Racial Equality Journey: Black Initiative*, PEPSICO, https://www.pepsico.com/racial-equality-journey [https://perma.cc/NF3U-48CR].

[20] *See, e.g.*, Andrew J. Campa, *Indigenous Groups, Black Lives Matter Join Forces to Decry Historical "Sins" on July 4*, L.A. TIMES (July 4, 2020, 6:16 PM), https://www.latimes.com/california/story/2020-07-04/indigenous-groups-black-lives-matters-join-forces-to-mark-historical-sins-on-july-4th [https://perma.cc/3CMZ-Q733].

[21] Tisha Thompson, *Behind the Scenes of the Investor Push to Change Washington's Football Team Name*, ESPN (Sept. 2, 2020), https://www.espn.com/nfl/story/_/id/29788894/behind-scenes-investor-push-change-washington-football-team-name [https://perma.cc/AV2L-RA9S].

[22] *First Peoples Worldwide Leads Investors' Call for NFL Washington Team Name Change*, FIRST PEOPLES WORLDWIDE (June 30, 2020), https://www.colorado.edu/program/

the team name, and Nike, Amazon, and other retailers quickly followed and began to remove existing team merchandise from commerce.[23] Ten days later, the team announced that it was finally retiring the name — a direct outcome of companies aligning governance with public commitments on racial equity.[24]

The rapidity of this change demonstrates that company behavior is driven by a need to respond to both public sentiment and shareholder activism.[25] Accountability is accelerating because of the digital age and social media, and companies simply cannot get away with what they used to get away with. In addition, companies are starting to recognize how they might be exposed for committing to do better on social issues and not delivering on those promises. Lack of accountability, of course, is reckless — and recklessness can give rise to litigation and reputational harm. For shareholders, these company statements, misstatements, and omissions are key tools for vindicating their rights to protect their investments for future generations. These statements are also material because they implicate the value of the company in the eyes of the investing public, and companies are therefore creating governance concerns or potential liability if the statements are determined to be misrepresentations.[26]

Embedded in these examples is the growing recognition that more sustainable practices are better for the long-term value of the company

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fpw/2020/06/30/first-peoples-worldwide-leads-investors-call-nfl-washington-team-name-change [https://perma.cc/L3MP-T7VW] (containing links to letters sent to Nike, PepsiCo, and FedEx).

23 *Amazon to Pull R*dsk*ns Merchandise While Team Mulls Nickname Change*, ESPN (July 8, 2020), https://www.espn.com/nfl/story/_/id/29430296/amazon-pull-redskins-merchandise-team-reviews-nickname [https://perma.cc/9KAA-7C7E]; Scott McDonald, *Nike Pulls R*dsk*ns Online Merchandise, Hours After FedEx Demands a Name Change*, NEWSWEEK (July 2, 2020, 10:35 PM), https://www.newsweek.com/nike-pulls-redskins-merchandise-online-store-after-fedex-demands-name-change-1515210 [https://perma.cc/DCD4-PPYV].

24 Tommy Beer, *Washington R*dsk*ns Officially Announce They Will Change Team Name*, FORBES (July 15, 2020, 9:42 AM), https://www.forbes.com/sites/tommybeer/2020/07/13/washington-redskins-officially-announce-they-will-change-team-name [https://perma.cc/LMK5-XYET].

25 *See generally* Procedural Requirements and Resubmission Thresholds Under Exchange Act Rule 14a-8, 85 Fed. Reg. 70,240 (Nov. 4, 2020) (to be codified at 17 C.F.R. § 240) (announcing new rules restricting shareholder proposals to limit shareholder engagement). For more information on how this decision will hurt shareholder democracy, see Press Release, Interfaith Ctr. on Corp. Resp., SEC Rule Changes Will Block Most Shareholder's Ability to File Proxy Proposals (Sept. 23, 2020), https://www.iccr.org/press-release-sec-rule-changes-will-block-most-shareholders-ability-file-proxy-proposals [https://perma.cc/Z4YU-KGU4].

26 Material misstatements and omissions are of course covered by section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j. SEC Rule 10b-5's materiality requirement, 17 C.F.R. § 240.10b-5 (2020), may also be an important avenue to holding companies accountable by ensuring that they meet international human rights standards and the commitments they have made toward those standards and other ESG goals. *See generally* Rachel Cherington, Comment, *Securities Laws and Corporate Social Responsibility: Toward an Expanded Use of Rule 10b-5*, 25 U. PA. J. INT'L ECON. L. 1439 (2004).

and that slash-and-burn behavior just does not fly anymore.[27] Investors have, of course, realized they can invest according to their values, but recklessness associated with bad governance is the value issue at play. All investors have the same goal, whether they are social investors or investors who are looking simply to grow their assets — everyone wants to grow the assets of the company and increase their capital. However, the ecosystem of incentives in place for asset growth can be a driver of both positive and negative outcomes.

In the case of Energy Transfer (formerly Energy Transfer Partners) and the Dakota Access Pipeline, senior executives were highly incentivized to complete construction of the pipeline, despite vociferous opposition by Indigenous Peoples, environmentalists, and the investing public — including investors with significant assets under management.[28] The construction of the pipeline quickly became a national and international lightning rod for human rights and environmental concerns and another example of the United States prioritizing business interests and fossil fuel development over the rights of Indigenous Peoples and the integrity of the environment.[29] Because of public opposition and legal opposition to the pipeline, Energy Transfer's stock price experienced wild volatility during the course of construction, resulting in significant material losses to the company and its shareholders.[30] And the continued legal uncertainty around the now-completed pipeline should

[27] *See, e.g.*, INST. FOR SUSTAINABLE INVESTING, MORGAN STANLEY, SUSTAINABLE REALITY: ANALYZING RISK AND RETURNS OF SUSTAINABLE FUNDS (2019), https://www.morganstanley.com/pub/content/dam/msdotcom/ideas/sustainable-investing-offers-financial-performance-lowered-risk/Sustainable_Reality_Analyzing_Risk_and_Returns_of_Sustainable_Funds.pdf [https://perma.cc/34J3-D2S5] (finding that there is "no financial trade-off in the returns of sustainable funds compared to traditional funds, and [that] they demonstrate lower downside risk," as well as "strong statistical evidence that sustainable funds are more stable," *id.* at 1); BARCLAYS, SUSTAINABLE INVESTING AND BOND RETURNS (2016), https://www.investmentbank.barclays.com/content/dam/barclaysmicrosites/ibpublic/documents/our-insights/esg/barclays-sustainable-investing-and-bond-returns-3.6mb.pdf [https://perma.cc/9PKU-UVZX] (finding that bond portfolios that had "positive" ESG factors had a "small but steady performance advantage," *id.* at 4).

[28] Jonathan Thompson, *The Twisted Economics of the Dakota Access Pipeline*, HIGH COUNTRY NEWS (Dec. 12, 2016), https://www.hcn.org/issues/48.21/the-twisted-economics-of-the-dakota-access-pipeline [https://perma.cc/S462-MWZE].

[29] For example, UN Special Rapporteur on the rights of Indigenous peoples, Victoria Tauli-Corpuz, called for construction of the pipeline to be halted because of a lack of meaningful engagement with the Standing Rock Sioux and other tribes. *North Dakota: "Indigenous Peoples Must Be Consulted Prior to Oil Pipeline Construction" — UN Expert*, U.N. HUM. RTS. OFF. OF HIGH COMM'R (Sept. 22, 2016), https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=20570 [https://perma.cc/5X3X-3PPC].

[30] CARLA F. FREDERICKS ET AL., FIRST PEOPLES WORLDWIDE, SOCIAL COST AND MATERIAL LOSS: THE DAKOTA ACCESS PIPELINE 52–53 (2018), https://www.colorado.edu/program/fpw/sites/default/files/attached-files/social_cost_and_material_loss_0.pdf [https://perma.cc/LG7G-5PX9].

continue to give investors pause.[31] Banks financing construction of the pipeline also experienced financial losses and reputational harm as customers moved billions in funds to other banking institutions; in some cases, the banks themselves backed out of the project at a likely loss to their own shareholders as well.[32]

The recklessness of Energy Transfer and Rio Tinto shows that companies need adequate incentives to align their behavior in order to reduce the risk of capital losses. A "check the box" approach is the wrong governance incentive, because domestic laws do not necessarily provide an adequate framework to protect against operational and human rights risks. Companies, therefore are increasingly looking to outside risk management frameworks such as the Equator Principles, which provides benchmarks for projects to act within international economic standards such as the UN Sustainable Development Goals and the UN Guiding Principles on Business and Human Rights.[33] While imperfect, these frameworks provide guidance in assessing and managing risks, particularly social and environmental, in investment and development projects. Sustainable development practices based on these frameworks not only encourage healthier long-term growth, but also help companies avoid the pitfalls of corporate action that is at odds with public statements — and protect shareholder value.

The implementation of these frameworks by a number of major companies is highly encouraging;[34] however, as the example of Rio Tinto demonstrates, implementation alone is not enough. Companies must also provide access and information to the public regarding these decisions so shareholders and potential investors can remain informed and activated.

Back in 1970, Friedman construed the concerns of environmental, social, and governance investors as socially and politically driven; but today, these concerns are inseverable from those of the complex market. The statements of Mr. Friedman and of Business Roundtable strike a

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[31] In July 2020, Judge Boasberg of the U.S. District Court for the District of Columbia ruled that the pipeline must be shut down pending a full environmental review. Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs, 471 F. Supp. 3d 71, 75 (D.D.C. 2020). In January 2021, the D.C. Circuit, while reversing the mandatory pipeline shutdown, affirmed that a full environmental review was required. Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs, 2021 U.S. App. LEXIS 2049, at *6 (D.C. Cir. Jan. 26, 2021). The Biden Administration continues to face pressure to shut down the pipeline completely. *See* David Blackmon, *First Keystone XL, Now Dakota Access: Pipeline Politics Swirl Around Biden*, FORBES (Feb. 10, 2021, 10:46 AM), https://www.forbes.com/sites/davidblackmon/2021/02/10/first-keystonexl-now-dakota-access-pipeline-politics-swirl-around-biden/?sh=3ed48f1510c1 [https://perma.cc/8L9F-KGUM].

[32] FREDERICKS ET AL., *supra* note 30, at 39–40.

[33] EQUATOR PRINCIPLES ASS'N, THE EQUATOR PRINCIPLES 3 (2020), https://equator-principles.com/wp-content/uploads/2020/05/The-Equator-Principles-July-2020-v2.pdf [https://perma.cc/LB4V-QAVM].

[34] *E.g.*, *Shareholder Engagement Moves Enbridge to Address Indigenous Rights in Operations and Investments*, SHARE (July 10, 2018), https://share.ca/enbridge-indigneous-rights [https://perma.cc/2NKJ-3KPD].

discordant note in the context of today's pressing problems, because a corporation can only promote value if it does so while seeking to protect its shareholders and the planet we share. The generations of today and tomorrow require corporate charters that reflect twenty-first-century shareholder primacy: a shareholder primacy that's about innovation instead of exploitation; a shareholder primacy that's about nonpartisan behavior; a shareholder primacy that ignores short-termism and recognizes that many holders of securities are in it for the long-term; a shareholder primacy that does not seek to entrench toxic investments; a shareholder primacy that thinks deeply about shareholder value and the free market. That shareholder primacy would, moreover, understand that a free market with an eye toward the hidden costs of social discord and climate change would not subsidize pollution and the costs associated with fossil fuels and climate change. A free market would be suspicious of the instability that climate change and social unrest would bring. And a free market would create a situation in which lack of innovation and subsidy for bad investments would, in fact, cause that free market to implode.

Corporate evolution is a must to preserve asset value and promote shareholder primacy in light of the challenges that corporations and society at large face in the year 2021 and beyond. This is a moment where shareholder governance, societal concerns, and the health of the planet hang in the balance for future generations of investors and affected communities alike. Value, based on truth in its many forms, is perhaps the only path to ensuring accountability and a sustainable future for all.