

TRANSNATIONAL BUSINESS DEALS AND THE PROFESSIONAL OBLIGATIONS OF LAWYERS

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ABSTRACT

Professional codes of ethics regulate lawyers' conduct and prioritize loyalty to their clients' legitimate interests. Clearly, effective legal representation is an essential aspect of every attorney's responsibility. However, this essay goes further and asks if it is sufficient in one important class of cases—legal assistance in the negotiation and implementation of transnational business deals. This essay argues that, at least for such transactions, legal professionals have ethical obligations that extend beyond the interests of their principals and should include recognition of broader social, environmental, and human rights concerns. But if legal professionals accept that claim, how can such obligations be articulated and enforced without undermining attorneys' primary obligations to their clients? This essay makes a preliminary attempt to frame an answer.

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INTRODUCTION

Lawyers confront tradeoffs between the interests of their clients and their own financial and career goals.¹ Professional codes of ethics regulate lawyers' conduct and prioritize loyalty to their clients' legitimate interests. Effective legal representation is an essential aspect of every attorney's responsibility, but this essay asks if it is sufficient in one important class of cases—legal assistance in negotiating and implementing transnational business deals. It argues that legal professionals should recognize broader social, environmental, and human rights concerns, extending ethical obligations beyond those owed to their principals. Assuming legal professionals accept this responsibility, how can such obligations be articulated and enforced without undermining their primary obligations to their clients? Should such ethical obligations take the

1. Legal payment schemes provide one example. Many lawyers are paid by the hour, which may incentivize time sheet inflation. In contrast, lawyers paid a fixed amount based on task completion may have an incentive to trade quality for speed. For a general discussion of this literature, see Eric A. Posner, *Agency Models in Law and Economics* (John M. Olin Program in L. and Econ., Working Paper No. 92, 2000), https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1036&context=law_and_economics [<https://perma.cc/RMC5-JJ7E>] (looking at agency relationships and determining what the right incentives are to get desired outcomes).

form of individual moral imperatives, or should they also be included in the professional codes of conduct accepted by transactional lawyers?

Professional codes of ethics typically focus on fulfilling clients' demands, with little emphasis on obligations to the broader society and to the rule of law in general.² Although codes of legal ethics apply across the legal landscape, representation related to international trade and investment raises particularly sensitive issues for the practice of law. Current ethical codes for the legal profession provide insufficient guidance to lawyers who negotiate and enforce international business contracts on behalf of multinational corporations (MNCs) that are often wealthier and more politically powerful than the sovereign governments on the other side of transactions.³ Given this power imbalance, the contracts that lawyers negotiate on behalf of MNCs can help shape international rules and transnational commercial practices. As a result, I argue that transactional lawyers should consider the broader implications of their advice to clients.

Even when international investment brings economic benefits to the host country, the contracts that lawyers negotiate may skew the benefits toward the MNC and away from the host country's citizens. This is particularly likely if the counterparty is a country with weak institutions or corrupt leadership. Analogous issues arise if the counterparty is a dominant local firm that is either owned in whole or in part by the government or is closely tied to those with political power.⁴ Depending on the client's intention, the contract may end up facilitating grave social ills.⁵ Even if the MNC plays no active role in

2. See *infra* notes 14-38 and accompanying text.

3. SUSAN ROSE-ACKERMAN & BONNIE PALIFKA, CORRUPTION AND GOVERNMENT: CAUSES, CONSEQUENCES AND REFORM (Cambridge Univ. Press, 2d ed. 2016), Table 15.1, 501 (comparing the sales of the twenty largest corporations in 2015 with the 2013 GDP of selected countries).

4. There are two problems: (1) weak institutional capacity in the state and in domestic firms and (2) a corrupt authoritarian government whose leaders siphon off private benefits. They may go together, although committed kleptocrats may organize efficient corrupt regimes that operate for their own benefit. Present-day corruption is often connected to the effects of colonialism. See *generally* DARON ACEMOGLU & JAMES ROBINSON, WHY NATIONS FAIL: THE ORIGINS OF POWER, PROSPERITY AND POVERTY (Crown, 2012) (discussing the ways that oppressive, corrupt governments lead to poverty in their nations and theorizing about ways to ameliorate this result).

5. See ROSE-ACKERMAN & PALIFKA, *supra* note 3 at 275-293 (looking at the lack of bargaining power of government officials when compared with corrupt

facilitating corruption or poor governance, these ills are often the direct consequence of the contractual relationships that lawyers enable, promote, facilitate, or tolerate. Codes of legal ethics largely ignore this possibility.

Traditionally—barring rare circumstances—lawyers are not professionally accountable for their client’s conduct and objectives, even if the conduct has improper motives. This is partially because the original codes envisaged the lawyer as an agent working domestically for an individual client. Although bar associations recognize the changing role of lawyers in business transactions in a globalizing economy, the codes are only beginning to take these changes into account. In some important international transactions, the wealth and power of modern corporations could well turn them into de facto rule-makers and rule-enforcers.

MNCs have begun to consider the ethical implications of their operations, especially with respect to their operations in developing countries. For example, MNCs increasingly embrace Corporate Social Responsibility (CSR), a worldwide movement by corporations to regulate themselves on the environmental, social, and governance (ESG) consequences of their investments.⁶ This has led to broader recognition of these ethical implications by key stakeholders.⁷

private actors); see also Ben Judah & Nate Sibley, *The Enablers: How Western Professionals Import Corruption and Strengthen Authoritarianism*, HUDSON INST. 5, 11 (2018), <https://s3.amazonaws.com/media.hudson.org/files/publications/EnablersFINAL.pdf> [<https://perma.cc/4GRP-223F>] (arguing that Congress should consider whether law firms should be able to combine business, lobbying, legal, and other functions). The authors conclude that regulation is required before “an unscrupulous minority’s alliance with authoritarian kleptocrats further harm the legal industry’s ethical responsibility to fellow Americans.” *Id.*

6. Mauricio Andrés Latapí Agudelo, Lára Jóhannsdóttir, & Brynhildur Davíðsdóttir, *A Literature Review of Corporate Social Responsibility*, 4 INT’L J. OF CORP. SOC. RESP. 1 (2019).

7. For example, the three major firms that rate securities are now offering information to investors on commitments to ESG goals. See Jacob H. Hupart, *Rating Agencies Focus on ESG Concerns*, INSIGHTS-MINTZ (Sept. 20, 2021), <https://insights.mintz.com/post/102h6rf/rating-agencies-focus-on-esg-concerns> [<https://perma.cc/2S8F-BCVH>] (noting that Fitch will begin to offer information on ESG ratings); see also *Fitch Group Announces Creation of Sustainable Fitch and Launches ESG Ratings Products*, FITCH RATINGS (Sept. 15, 2021), <https://www.fitchratings.com/research/banks/fitch-group-announces-creation-of-sustainable-fitch-launches-esg-ratings-products-15-09-2021> [<https://perma.cc/52L6-82QE>] (announcing the new ESG ratings in a Fitch press release). Fitch stresses that its ratings are based on “outcome, impact and action

As currently understood, the “governance” part of ESG refers narrowly to the corporate governance of a given company.⁸ My argument goes further to support business practices consistent with the 2011 United Nations Guiding Principles on Business and Human Rights (UNGPs).⁹ These Principles insist that, in addition to respecting well-established principles of human rights, private enterprises should act in ways that support peace, stability, and safety in the societies where they operate.¹⁰ The UNGPs emphasize that the specialized nature of particular businesses does not exempt them from these responsibilities.¹¹ The international business community has been slow to apply the UNGPs beyond supporting statements of principle. For example, in the United States, the Business Roundtable issued a largely aspirational statement on CSR in 2019.¹² Although MNCs cannot be held responsible for a government’s failure to provide for its citizens, an MNC can seek to leverage its economic influence to

rather than purely on policies and broader commitments.” *Id.* However, given the contested nature of some ESG measures, such ratings risk imposing a particular view of socially responsible action on business without a full public debate. Furthermore, a recent op-ed claims that the indices should measure overall social costs, not just those borne by the companies themselves. Hans Taparia, *One of the Hottest Trends in the World of Investing Is a Sham*, N.Y. TIMES (Oct. 2, 2022), <https://www.nytimes.com/2022/09/29/opinion/esg-investing-responsibility.html> [<https://perma.cc/ZQ6Y-ZRQK>].

8. Kelly Tang, *Exploring the G in ESG in Greater Detail*, INDEXOLOGY (Mar. 14, 2018), <https://www.indexologyblog.com/2018/03/14/exploring-the-g-in-esg-governance-in-greater-detail-part-i/> [<https://perma.cc/95F7-C7WC>].

9. Human Rights Council Res. 17/4, HR/PUB/11/04, (June 16, 2011) [hereinafter UNGPs]; see also Susan Rose-Ackerman, *Corruption and the Global Corporation: Ethical Obligations and Workable Strategies*, in TRANSNATIONAL LEGAL PROCESSES 148 (Michael Likosky ed., 2002).

10. UNGPs, *supra* note 9, at 14; Rose-Ackerman, *supra* note 9, at 168.

11. See generally UNGPs, *supra* note 9 (noting that all corporations no matter their size or sector must adhere to and respect human rights); see also Rose-Ackerman, *supra* note 9, at 168 (stating that all corporations have a duty to avoid corruption in contracting to promote stability in the nations in which they operate).

12. *Business Roundtable Redefines the Purpose of a Corporation to Promote ‘An Economy for 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/ZSK4-E2CB>] (listing firms’ commitment to all their stakeholders, that is, to customers, employees, suppliers, local communities including environmental “sustainability”, and to shareholders’ long-run interests). The Business Roundtable is an association of the top executives of America’s leading companies and does not deal explicitly with the firms’ international role, <https://www.businessroundtable.org/>.

counteract a government's unwillingness to take actions related to ESG principles. Domestic codes of conduct for the legal profession could urge attorneys to be involved in efforts to include ESG principles in their clients' negotiating strategies as well as to expand the coverage of the "governance" prong to include an obligation to push back against counterparty demands for corrupt or illicit contractual arrangements.

In short, the UNGPs imply that transactional lawyers representing powerful MNCs play a role in upholding an MNC's stated commitments to CSR. This essay proposes reforms in both legal practice and professional codes of ethics that would incorporate the UNGPs into the international practice of law in ways that would encourage lawyers to push back against transactions that violate widely shared social values and principles. More specifically, they ought to avoid drafting contracts that threaten public security and safety, cause severe environmental damage, or violate basic human rights. I argue that transactional lawyers ought to take into account the complex ways in which their clients' investments may encourage public officials to misappropriate social gains for their private purposes through corruption that contributes to these harms. If any of these harms seem likely, professional codes and ethical norms should require lawyers to structure deals to minimize these socially harmful results.

I will be exploring the implications of such a shift in professional ethics in concrete terms, with a focus on multinational investment in countries with some combination of weak institutions, widespread poverty, and markedly unequal distributions of income and wealth. In such contexts, domestic regulation of professional ethics may well be inadequate, and I consider how the professional responsibilities of lawyers could be enforced internationally. The article is organized as follows. Part I begins with existing codes of ethics governing legal practice. Part II concentrates on lawyers' roles in global transactions, followed in Part III by a discussion of lawyers' obligation to avoid assisting or facilitating grave harms. Part IV considers how expanded ethical obligations might be applied to the international practice of law. Part V argues that the arguments made here should also apply to other professions, such as accountancy.

I. Legal Practice as a Profession

The power of the legal profession arises from the distinctive role it plays in structuring and stabilizing human relationships into rules and norms. Its special responsibility is recognized by the bar associations themselves in designing professional codes of ethics.

These codes are powerful tools because attorneys who violate them can face disciplinary action. For example, attorneys who are disbarred by an association are often forbidden by governments from practicing before their courts and prohibited from providing all forms of legal representation.¹³

In the United States, the American Bar Association's (ABA) Model Rules of Professional Conduct state that the principal obligation of a lawyer is "zealously to protect and pursue a client's legitimate interests," that are "within the bounds of law" as far as the lawyer knows.¹⁴ This "knowledge," in turn, is narrowly defined as "actual knowledge of the fact in question."¹⁵ It was only in April 2020, thirty-seven years after the ABA initially published the Model Rules, that the ABA officially clarified that lawyers must avoid willful blindness when circumstances suggest "a high probability that a client is seeking the lawyer's services in a transaction to further criminal or fraudulent activity."¹⁶ The Model Rules also state that "the profession has a

13. See, e.g., N.Y. COMP. CODES R. & REGS. tit. 22, § 1240.15 (outlining conduct of disbarred or suspended attorneys), [https://www.nycourts.gov/ad3/agc/Forms/Rule%201240.15\(f\)%20Affidavit%20of%20Compliance.pdf](https://www.nycourts.gov/ad3/agc/Forms/Rule%201240.15(f)%20Affidavit%20of%20Compliance.pdf) [<https://perma.cc/BT8V-XB3E>]. Other less severe forms of discipline include suspension for a fixed term and public censure. Disbarred attorneys in New York can reapply for bar admission a minimum of seven years after being debarred. See *Attorney Matters: Reinstatement to Practice After Suspension or Disbarment*, N.Y. STATE SUP. CT. APP. DIV., https://www.nycourts.gov/courts/ad2/attorney_matters_ReinstatementtoPractice.shtml [<https://perma.cc/VYY2-6ANS>] (detailing the reinstatement procedure for disbarred attorneys in New York). For a review of representative cases in New York from 2020 see ATTORNEY GRIEVANCE COMMITTEES 2020 ANNUAL REPORT (2020), <https://nysba.org/app/uploads/2021/11/2020-Attorney-Grievance-Committee-Report.pdf> [<https://perma.cc/8SJL-ZDBF>] (listing various disciplinary proceedings conducted by the New York Attorney Grievance Committee of the Supreme Court, Appellate Division First Judicial Department during 2020).

14. MODEL CODE OF PRO. RESP. Preamble § 9 (AM. BAR ASS'N 2020), https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents/ [<https://perma.cc/E9P9-9H48>] [hereinafter ABA MODEL RULES]. See *infra* text accompanying note 17 for further discussion of the Model Rules.

15. ABA MODEL RULES, *supra* note 14, at r. 1.0(f).

16. According to the ABA's Formal Opinion 491, a lawyer has the duty to inquire when the facts known to the lawyer indicate a strong likelihood of criminal or fraudulent intent of the client, and the failure to make such reasonable inquiry constitutes willful blindness that is punishable under the Model Rules. See ABA Comm. on Pro. Ethics & Grievances, Formal Op. 491 (2020) (discussing the prohibition of lawyers assisting or advising clients with conduct that the lawyer knows is criminal).

responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar.”¹⁷ In the context of a particular attorney-client relationship, “[a] lawyer’s representation of a client, including representation by appointment, does not constitute an endorsement of the client’s political, economic, social or moral views or activities.”¹⁸ Outsiders might worry that the code does not go far enough and is overly protective of the legal profession because it focuses on disciplining only especially bad actors who could tar the reputation of the entire profession.

The ABA Rules are not entirely silent on a lawyer’s behavior in situations of potential conflict between personal beliefs and client demands. For example, a lawyer must withdraw from representation if there is reasonable belief that the client is using the lawyer’s services to engage in fraud.¹⁹ In providing legal advice, a lawyer may rely on factors outside the law—including “moral, economic, social and political factors that may be relevant to the client’s situation.”²⁰ In a comment, the ABA elaborates that “moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.”²¹ However, this guidance remains suggestive and ambiguous, especially when compared to the duty to “zealously” represent the client’s interest.²²

In Europe—and countries influenced by European law—national legislation frequently governs aspects of legal practice that are left to state bar associations or state supreme courts in the

17. ABA MODEL RULES, *supra* note 14, at para. 12. Entry into the legal profession is a state-level responsibility, but the ABA’s Model Rules serve as the foundation for state codes of ethics. These codes apply to all lawyers admitted to practice before the highest courts in the jurisdiction. In some states, statutes delegate the regulation of entry to the state bar association, a private regulatory body composed of lawyers. These bodies have discretionary power to ration individuals’ access to the profession and to set educational requirements. In other states, such as New York, Illinois and Maryland, the state supreme court issues a code of ethics for the profession and administers the admission and discipline of lawyers. For state-by-state information, see *State Bar Associations*, LAW. LEGION, <https://www.lawyerlegion.com/associations/state-bar> [https://perma.cc/S6WR-BS3M] (providing a state-by-state analysis of the bar associations for every state).

18. ABA MODEL RULES, *supra* note 14, at r. 1.2(b).

19. *Id.* at r. 1.16.

20. *Id.* at r. 2.1.

21. *Id.* at r. 2.1 cmt.

22. *Id.* at ¶ 2.

United States.²³ Supplementing national statutory frameworks, the Council of Bars and Law Societies of Europe (CCBE) articulated a trans-European set of principles. The CCBE seeks to advance “the views of European lawyers” and to defend “the legal principles upon which democracy and the rule of law are based.”²⁴ The CCBE’s 2021 Model Code of Conduct for European Lawyers aims to determine professional norms in Europe and, especially, to set standards for the cross-border practice of law.²⁵ The Code’s Preamble states that lawyers “hold a key position in ensuring the trust of the public in actions of the courts—the mission of which is fundamental in a democratic system governed by the rule of law.”²⁶ To preserve the rule of law, a lawyer must be independent, not only “of the state and other powerful interests,” but also of “his or her own client,” and they “shall not compromise their professional standards to please the client, the court, third parties or public authorities.”²⁷ Lawyers “shall not assist their clients in committing illegal, criminal, or fraudulent actions,” and should withdraw if the client persists.²⁸

One might expect that governments that centralize professional regulation in the state would have ethical codes with a broader societal reach than in polities with decentralized professional regulation, such as the United States. However, this does not appear to be the case based on a cursory overview of the regulatory landscape. In Europe, where central governments regulate access to the legal profession, lawyers themselves are a powerful interest group that has shaped the rules under which attorneys operate.²⁹

23. European statutes regulating lawyers in European Member States are collected here: COUNCIL OF BARS AND L. SOC’YS OF EUR. (CCBE), *Documents/Professional Regulations*, <https://www.ccbe.eu/documents/professional-regulations/>. For the United States consult the website of the American Bar Association, https://www.americanbar.org/about_the_aba/, and information from each state’s bar association.

24. *History*, CCBE, <https://www.ccbe.eu/about/history/> [<https://perma.cc/RC8N-HHCP>].

25. COUNCIL OF BARS AND L. SOC’YS OF EUR. (CCBE), MODEL CODE OF CONDUCT FOR EUR. LAW. (2021) https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/DEONTOLOGY/DEON_CoC/EN_DEONTO_2021_Model_Code.pdf [<https://perma.cc/EL5E-X64N>] [hereinafter CCBE MODEL CODE OF CONDUCT].

26. *Id.* at 4.

27. *Id.* at 6–7.

28. *Id.* at 17.

29. For an examination of this phenomenon in the United States, see Robert W. Gordon, *Lawyers, the Legal Profession & Access to Justice in the United States—*

The normative responsibility of lawyers is not just a western construct. Globally, the International Bar Association (IBA), an international voluntary association for legal professionals, issued International Principles on Conduct for the Legal Profession.³⁰ In addition, in 1990, the United Nations Congress on the Prevention of Crime and the Treatment of Offenders adopted The Basic Principles on the Role of Lawyers that underscores all persons' right to independent legal counsel. In so doing, it declares that:

Lawyers, in protecting the rights of their clients and in promoting the cause of justice, shall seek to uphold human rights and fundamental freedoms recognized by national and international law and shall at all times act freely and diligently in accordance with the law and recognized standards and ethics of the legal profession.³¹

The IBA has also advanced ten principles that attempt to balance domestic standards of professional responsibility with cross-border differences in the norms of legal practice.³² The document states that the lawyers' duties to their clients are paramount.³³ Yet, the Fifth Principle also insists that this duty should not conflict with lawyers' duty in "the interests of justice, to observe the law, and to *maintain ethical standards*."³⁴ The Commentary attached to the Principles states that lawyers "must not engage in, or assist their client with, conduct that is intended to mislead or adversely affect the interest of justice, or willfully breach the law."³⁵ The IBA claims that the Principles take into consideration the Universal Declaration of Human Rights, but the Principles were issued in 2014 before UNHRC adopted the UNGPs. Although the IBA issued a Practical Guide on Business and Human Rights for Business Lawyers in 2016, the document nods to the UNGPs as a reference point, not as a professional

A Brief History, 148 DAEDALUS 177 (2019) (arguing in part that the organized bar has repeatedly prioritized its own interests at the expense of the public).

30. INT'L BAR ASS'N, INTERNATIONAL PRINCIPLES ON CONDUCT FOR THE LEGAL PROFESSION (2011) [hereinafter IBA PRINCIPLES].

31. U.N. HUM. RTS. OFF. OF THE HIGH COMM'R, BASIC PRINCIPLES ON THE ROLE OF LAWYERS (Sept. 7, 1990), <https://www.ohchr.org/en/instruments-mechanisms/instruments/basic-principles-role-lawyers> [https://perma.cc/PF28-N4U7].

32. IBA PRINCIPLES, *supra* note 30, at 5–7.

33. *Id.* at 6.

34. *Id.* (emphasis added).

35. *Id.* at 25.

mandate.³⁶ The IBA document does not explain how lawyers should deal with concrete situations where conflicts arise. It emphasizes that the Ten Principles have no legal force but instead seek “to promote and foster the ideals of the legal profession.”³⁷ Nevertheless, a serious attempt at clarifying these standards would greatly reinforce the efforts by corporate lawyers to expand their own understanding of their professional responsibilities in light of their firms’ explicit embrace of ESG activities and the UNGPs. One model for the IBA going forward is its own proactive effort to limit corruption in international business transactions. Although its statement of principles does not explicitly mention corruption, the IBA has created an Anti-Corruption Committee that has been active in issuing reports and organizing conferences.³⁸

In short, although domestic and international bodies attempt to codify lawyers’ ethical obligations, their codes of conduct rarely cover the ethical challenges that arise in the negotiation of transnational business investments involving MNCs and projects with a measurable impact on host countries’ economies and society and on the lives of ordinary citizens. I turn now to consider the distinctive issues that pervade legal practice in the negotiation of such deals.

36. INT’L BAR ASS’N, PRACTICAL GUIDE ON BUSINESS AND HUMAN RIGHTS FOR BUSINESS LAWYERS 27, 36 (2016), <https://www.ibanet.org/MediaHandler?id=d6306c84-e2f8-4c82-a86f-93940d6736c4> [https://perma.cc/GAA3-RHE4] [hereinafter IBA PRACTICAL GUIDE] (noting that “the UNGPs do not abridge [lawyers’] duty, which includes the duty to decide . . . how to act in their client’s best interests, independently of expectations and pressures that are external to the lawyer client relationship”). The guide later notes that “a law firm’s main ability to influence a client to avoid or mitigate human rights impacts . . . may depend largely on whether the client sees the lawyer as a wise professional counselor or trusted advisor, a status which is not automatically granted.” *Id.*

37. IBA PRINCIPLES, *supra* note 30, at 5.

38. See generally *Anti-Corruption Committee*, INT’L BAR ASS’N, <https://www.ibanet.org/unit/Criminal+Law+Section/committee/Anti-Corruption+Committee/3119> [https://perma.cc/73GL-5KZ4] (providing an overview of the IBA’s Anti-Corruption Committee’s progress); see also *18th Annual IBA Anti-Corruption Conference*, INT’L BAR ASS’N, https://www.ibanet.org/session-details/se_112152 [https://perma.cc/6W6Y-EFVV] (highlighting that the IBA resumed its annual conference, holding the eighteenth annual Anti-Corruption Conference in June 2022).

II. Lawyers' Roles in Transactional Commercial Negotiations

An emphasis on the ethical duty to vigorously defend one's client fits well with the archetypal model of the American trial, especially if the client is a natural person.³⁹ In such settings, established rules of procedure seek to protect the rights of both parties, and an independent third party makes the decision after considering the arguments on both sides. The clients are natural persons who, under law and custom, are assumed to be independent moral agents. Litigation often focuses on whether a citizen's rights were violated due to the misuse or abuse of power by public authorities or by other private entities. In this context, zealously representing client interests and insulating the lawyer from the client's personal moral qualities are necessary; lawyers' personal moral judgments should not undermine citizens' right to effective legal counsel.⁴⁰

Nevertheless, in the United States, the ABA's client-focused Model Rules have long been subject to controversy as ethical guidelines, even in the litigation context.⁴¹ The ABA's technical view of lawyers does not correspond with the realities of transactional law practice. Unlike litigation, the transactional negotiation of contracts does not take place before a neutral authority operating under

39. See Judith A. McMorrow & Luke M. Scheuer, *The Moral Responsibility of the Corporate Lawyer*, 60 CATHOLIC UNIV. L. REV. 275, 280–294 (2010) (summarizing the view that lawyers should only defend their clients' interests, and then criticizing it as inadequate for transactional lawyers).

40. Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, A Problem, and Some Possibilities*, 11 AM. BAR FOUND. RSCH. J. 613, 613 (1986). That is not to say that there is a consensus on the ethical responsibilities of lawyers in litigation. See also Steven L. Schwarcz, *The Role of Lawyers in the Global Financial Crisis*, 24 AUSTL. J. OF CORP. L. 214, 220–224 (arguing that a lawyer's responsibility to the public that extends only to refusing to support clients' efforts to break the law and to resign if the client persists is not sufficient in the transactional context emphasized here). Many scholars have explored the ethical dilemmas and problems that lawyers face, including, but not limited to, severe power imbalance between two parties, information barriers between the lawyer and the client, and unequal access to legal services. See, e.g., McMorrow & Scheuer, *supra* note 39, at 294–306, (critiquing the ethical duty to defend as inadequate); Alvin B. Rubin, *A Causerie on Lawyers' Ethics in Negotiation*, 35 LA. L. REV. 577 (1974–1975); Deborah L. Rhode, *Ethical Perspectives on Legal Practice*, 37 STAN. L. REV. 589 (1985).

41. One strand of this debate focuses on whether it is in the public interest to encourage lawyers to play an amoral role. The ABA Model Rules prioritize zealous representation over other ethical considerations—supporting the idea that lawyers do not bear professional responsibility for their clients' actions. For a critique of this position, see generally Rhode, *supra* note 40.

established procedures that ensure fairness. On the contrary, parties to the negotiation create both the content of and the procedure used for the negotiation.⁴² Lawyers negotiating on behalf of a corporation are not independent moral agents who can autonomously make decisions and be responsible for the ethical implications of their decisions. Rather, corporations are entities separating owners from managers, requiring the latter to maximize profits for the former.⁴³ Even firms that express a commitment to CSR and ESG goals may look to their lawyers for help in operationalizing their stated ethical goals.⁴⁴

Further, in a transactional negotiation, a lawyer is often more than an impartial technician whose only job is to find a pre-established, legally compliant way to pursue the client's objectives. On the contrary, the lawyer is more of a strategist or partner actively participating in business decisions.⁴⁵ Lawyers serve as key counselors to executive leadership and, increasingly, as points of contact for important external parties, including the public.⁴⁶ Transactional attorneys are retained to advance the business objectives of their

42. McMorrow & Scheuer, *supra* note 39, at 285–86.

43. McMorrow & Scheuer, *supra* note 39, at 278.

44. Business schools have begun to incorporate ESG concerns into their MBA curricula as companies proactively incorporate ESG into business plans. These plans reflect both genuine ethical commitments from management and boards of directors and strategic responses to criticism that seeks to influence public opinion and forestall government regulation. In the interplay between firm management and the rating agencies, lawyers need to avoid blind adherence to rating agencies' formulas for producing rankings. For an overview, see *8 Best ESG Rating Agencies—Who Gets to Grade*, IMPACT INV. (June 21, 2022), <https://theimpactinvestor.com/esg-rating-agencies/> [<https://perma.cc/M6ZE-L9NY>].

45. For example, in Latin America, domestic law firms play a central role in building a corporate strategy for an international enterprise to enter the domestic economy through mergers and acquisitions. They help investment projects obtain the required permits. They write the bylaws of the new company to prevent “obstacles” such as taxation or legal compliance issues that may delay the project launch. This advice aims to stay within the formal legal rules, and some law firms give awards to lawyers for top performance in these areas of law practice. Two bodies, Chambers & Partners and Latin Lawyers, give awards to lawyers for excellent performance in facilitating international investments. See *Methodology*, CHAMBERS & PARTNERS, <https://chambers.com/about-us/methodology> [<https://perma.cc/32HZ-5JPP>]; Latin Lawyer 250, 2030 24th Edition, LATIN L., <https://latinlawyer.com/rankings/latin-lawyer-250> [<https://perma.cc/5RZ6-E9BV>].

46. Deborah Scally, *The Changing Face of the General Counsel*, CORPORATE BD. MEMBER (2016), https://cdn2.hubspot.net/hubfs/380858/The_Changing_Face_of_the_GC_-_Corporate_Board_Member_Magazine_Q2_2016.pdf [<https://perma.cc/A7HF-KRWB>].

clients in settings with few—if any—external procedural controls. As Judith McMorro and Luke Scheuer argue: “The overly broad notion that lawyers are not accountable for the goals of their clients serves as a crutch that prevents corporate lawyers from considering and articulating the moral value of their service.”⁴⁷ In the worst case, client values affect the actions and advice that lawyers provide, influencing them to provide advice that arguably undermines the rule of law.

This discrepancy between claims for the limited ethical responsibility of the legal profession and representing corporations is magnified in international business negotiations. As discussed above, if the counterparty to an MNC is the government of a country with widespread poverty and weak institutions, the power dynamic is lopsided in favor of the foreign investor. The MNC can call upon both a well-resourced, in-house legal department and some of the world’s leading law firms. The host state may be unable to access legal talent knowledgeable about international investment law.⁴⁸ Alternatively, the counterparty may represent the corrupt interests of a kleptocrat or be controlled by a dictator or autocrat unconcerned about the basic human rights of the country’s citizens. In either case, the MNC may seek to negotiate a high profit rate and mitigate its financial risk through contract terms that shift risks to the counterparty. In such cases, lawyers retained by MNCs have an ethical obligation to consider the overall social value of the transactions, even if their applicable codes of ethics do not make that clear. Such calculations are particularly important if the citizens directly affected by the MNC’s investment in their communities are not part of the negotiation process and have little ability to avoid its negative consequences.⁴⁹

47. McMorro & Scheuer, *supra* note 39, at 280; *see also*, Richard W. Painter, *The Moral Interdependence of Corporate Lawyers and Their Clients*, 67 S. CAL. L. REV. 507, 507–08 (1994).

48. Robert Howse, *International Investment Law and Arbitration: A Conceptual Framework* 4 (Inst. of Int’l L. and Just. Working Paper No. 2017/1, 2017); *see also* Poulsen, *infra* note 76 (noting some countries’ inadequate appreciation of the risks of ratifying bilateral investments treaties).

49. The most clear-cut examples are large mining contracts that lack adequate consultation with the local populations living near the proposed project site. Even if the host state asserts that appropriate consultations have taken place, these may be cursory and inadequate. Indigenous groups have consultation rights under Convention (No. 169) Concerning Indigenous and Tribal People in Independent Countries, 27 June 1989, 1650 U.N.T.S. 383. https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:55:0::NO::P55_TYPE,P55_LANG,P55_DOCUMENT,P55_NODE:REV,en,C169,/Document

Transactional lawyers cannot themselves change the investment environment in host states, but they can raise red flags. The large size of some deals vis-à-vis a host country's economy can affect the country's development path for better or worse. Such investment projects can be distorted by grand corruption, create threats to public security, cause severe environmental harms, and/or undermine human rights.⁵⁰

The worst cases for MNCs and their lawyers arise when a contract signed with one regime is voided when a new regime takes over the government. In that case, problems do not arise from the inexperience or lack of legal resources on the part of the host country and its firms. Even with no imbalance of legal skills, a corrupt or repressive regime may conclude a deal with a foreign investor that victimizes generations of the host country's citizens. Eventually, if there is a regime change, new leaders may seek to void past contracts signed by corrupt or self-seeking leaders. As Emmanuel Gaillard reports: "In a number of arbitrations, states and state entities have sought to distance themselves from these practices by alleging that a dispute inherited from a previous government arises out of a contract or investment tainted by corruption."⁵¹ In other words, the MNC's lawyers need to be alert to the possibility of side deals that jeopardize the long-term interests of the host country's citizens. Corrupt

[<https://perma.cc/43EZ-JWPU>]. However, the treaty is not subject to effective enforcement. Furthermore, local communities without indigenous or tribal status depend upon the laws of the host country, and these are often inadequate or poorly enforced. For the case of Peru, see Milagros Mutsos Ramsay, *Between an Obligation and a Right: The Participation of Indigenous Peoples in the Peruvian Mining Sector*, Yale Law School Seminar, 2022 (on file with Professor Rose-Ackerman).

50. Some are proposing the creation of an International Anti-Corruption Court to hear cases against corrupt, kleptocratic rulers. The proposal, which has received considerable attention, is utterly impractical. No head of state or government could be subject to the jurisdiction of the court unless his or her national government had ratified the treaty, an option that seems extremely unlikely. For a critical but balanced view, see Mathew Stephenson & Sofie Arjon Schütte, *An International Anti-Corruption Court: A Synopsis of the Debate*, ANTI-CORRUPTION RSCH. CTR. (Dec. 15, 2019), <https://www.u4.no/publications/anti-international-anti-corruption-court-a-synopsis-of-the-debate> [<https://perma.cc/X42Z-PNF5>].

51. Emmanuel Gaillard, *The Emergence of Transnational Responses to Corruption in International Arbitration*, 35 ARB. INT'L 1, 2 (Apr. 16, 2019). See, e.g., *World Duty-Free Company Limited v. Republic of Kenya*, 15 ICSID Case No. ARB/00/7, Award (2006) (ruling in favor of Kenya, contract voided as result of corrupt payoffs to previous president); *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/11/12, Award (2014) (voiding contract due to corruption under previous government).

payments may seem a small price to pay for achieving a contract, but lawyers and their clients need to be alert to two possibilities. First, an initial bribe payment may only be the start of a subsequent pattern of extortion as the project progresses.⁵² Over time, bribe demands can lead to lost profits. Both the investor and the purported domestic beneficiaries of these deals receive less. More of the benefits flow to political cronies of those in power. Second, the deal itself may be structured to hide large bribes behind over-engineered, special purpose projects.⁵³ The basic point is that MNC lawyers need to approach negotiations with a clear-eyed view of the risks of corruption that may both erode the firm's profits and impose costs on ordinary citizens. Although the investor may want to focus on its own profits, the overall context of the investment ought to be part of its lawyer's perspective in advising on such deals.

Even in a well-functioning representative democracy, citizens may not take account of the interests of future generations.⁵⁴ Those living today wield absolute authority over future generations.⁵⁵ Lawyers that represent firms making long-term investments or those that will leave permanent scars on the landscape need to insist that their clients consider mitigating these future effects through explicit contract terms, even if not pushed to do so by their counterparties. However, if domestic governments fail to provide effective protection, the current international legal regime does not provide a remedy for international human rights harms perpetuated by MNCs.⁵⁶ The firm and the regime's elite collude to maximize their joint gains and then negotiate over the division of the benefits. In short, international contracts risk entrenching deals that violate human rights or permit

52. ROSE-ACKERMAN & PALIFKA, *supra* note 3, at 99–109.

53. *Id.*

54. For a discussion of inter-generational obligations, see Rose-Ackerman, *supra* note 9, at 134–38. For an overview of the issues, see Peter Howard & Jason A. Schwartz, *Valuing the Future: Legal and Economic Considerations for Updating Discount Rates*, 39 YALE J. ON REGULATION 595 (2022) (explaining how using discount rates from the financial sector will wipe out most inter-generational benefits). For a graphical illustration, see TODD N. TUCKER & RAJESH D. NAYAK, OIRA 2.0: HOW REGULATORY REVIEW CAN HELP RESPOND TO EXISTENTIAL THREATS 19–22 (2020), https://rooseveltinstitute.org/wp-content/uploads/2021/08/GDI_OIRA-2.0_202004.pdf [<https://perma.cc/N4B7-T3CA>].

55. T. Page, *On the Problem of Achieving Equity and Efficiency Intergenerationally*, 73 LAND ECON. 580 (1997).

56. Todd Weiler, *Balancing Human Rights and Investor Protection: A New Approach for a Different Legal Order*, 27 B.C. INT'L & COMP. L. REV. 429 (2004).

corrupt or fraudulent behavior by public officials.⁵⁷ Consider a few recent events that illustrate the grave moral and ethical implications of such international business deals. In March 2020, a staff report of the bipartisan Congressional-Executive Commission on China suggested that many American businesses are sourcing goods made with forced labor in Xinjiang.⁵⁸ Some prominent apparel producers and fashion retailers announced plans to stop production in Xinjiang.⁵⁹ In 2021, a coup in Myanmar, which resulted in the killing of hundreds of citizens in less than three months, served as another test case for the social responsibility of MNCs.⁶⁰ Soon after the coup, Japanese beer manufacturer Kirin and energy giants, TotalEnergies and Chevron, withdrew from joint ventures with companies controlled by the Myanmar military.⁶¹ In 2019, the Brazilian state-controlled oil company, Petrobras, paid \$700 million to the U.S. oil and gas firm, Vantage Drilling Company, after cancelling its contract with Vantage, arguing that the contract was awarded through corruption.⁶²

57. See, e.g., HUMAN RTS. WATCH, *THE ENRON CORPORATION: CORPORATE COMPLICITY IN HUMAN RIGHTS VIOLATIONS* (2002), <https://www.hrw.org/reports/1999/enron/> [<https://perma.cc/6WZU-SVYZ>] (reporting on human rights violations that Enron contracts helped cause); HUMAN RTS. WATCH, *THE PRICE OF OIL: CORPORATE RESPONSIBILITY AND HUMAN RIGHTS VIOLATIONS IN NIGERIA'S OIL PRODUCING COMMUNITIES* (1999) (reporting on corporate facilitation of human rights abuses in Nigeria).

58. CONGRESSIONAL-EXECUTIVE COMM'N ON CHINA, *GLOBAL SUPPLY CHAINS, FORCED LABOR, AND THE XINJIANG UYGHUR AUTONOMOUS REGION* (2020).

59. Eva Dou et al., *U.S. Ban on China's Xinjiang Cotton Fractures Fashion Industry Supply Chains*, WASH. POST (Feb. 22, 2021), https://www.washingtonpost.com/world/asia_pacific/china-cotton-sanctions-xinjiang-uyghurs/2021/02/21/a8a4b128-70ee-11eb-93be-c10813e358a2_story.html (on file with *Columbia Human Rights Law Review*).

60. Lindsay Maizland, *Background: Myanmar's Troubled History: Coups, Military Rule, and Ethnic Conflict*, COUNCIL ON FOREIGN RELATIONS (Jan. 21, 2022), <https://www.cfr.org/background/myanmar-history-coup-military-rule-ethnic-conflict-rohingya>.

61. Nina Shibata, *Kirin Makes Painful Decision to Exit Myanmar Over Human Rights*, NIKKEI ASIA (Feb. 14, 2022), <https://asia.nikkei.com/Spotlight/Myanmar-Crisis/Kirin-makes-painful-decision-to-exit-Myanmar-over-human-rights> [<https://perma.cc/KV72-LD69>]. Raphaël Cecchi, *Foreign Investors Continue to Divest amid Rising Reputational and Sanctions Risks*, CREDENDO (Jan. 28, 2022), <https://credendo.com/en/knowledge-hub/myanmar-foreign-investors-continue-disinvest-amid-rising-reputation-and-sanctions>.

62. *Brazil's Petrobras Pays \$700 Million to Vantage Drilling after Court Decision*, REUTERS (June 21, 2019), <https://www.reuters.com/article/us-petrobras-vantage-drilling/brazils-petrobras-pays-700-million-to-vantage-drilling-after-court-decision-idUSKCN1TM2R5> [<https://perma.cc/JAR2-M76V>]. In this case, the

This article does not intend to imply that the legal professionals who contributed to the conclusion of these deals knowingly or intentionally facilitated forced labor, state-sponsored violence against citizens, or corruption at the highest levels of government. Even so, to close a deal, lawyers can strategically turn a blind eye. For some highly corrupt deals, it is difficult to accept lawyers' claims of innocence. If lawyers were aware of such risks before deciding to work on these deals, how might that knowledge have influenced the nature of the legal services provided? Would the current ABA Model Rules and their counterparts serve as an adequate guide to lawyers' ethical responsibility? I argue that they do not, and that they need to be strengthened to guide transactional lawyers toward the ethical practice of law.

Arguing for enhanced ethical obligations for transactional lawyers does not imply that lawyers should advise clients on every existing ill in the countries where they operate. For example, one might argue that lawyers should urge clients and host states to promote sustainable development in host states. However, that broad goal is unlikely to be tightly tied to any particular contract, and, instead, implicates a country's overall development plan. Thus, it goes beyond the ethical obligations of MNC lawyers. Nevertheless, for very large deals in countries with low levels of human development, such a broad perspective might correspond to the nature of the investment project itself, and these concerns should be incorporated into the structure of the ultimate deal with the aid of the firm's lawyers.

III. Lawyers' Obligation to Avoid Assisting or Facilitating Grave Harms

Law firms and practitioners must deal with ethical pressures as they negotiate international business deals. First, these ethical difficulties are linked to MNCs' own commitments to CSR and to host states' governance. Second, Bilateral Investment Treaties (BITs) cover many international investment deals. Recent model BITs incorporate clauses dealing with the ethical commitments of the firms and the governments involved—providing a framework for future BITs. Third, transnational investments involve massive financial transfers that

arbitrators determined that it was unclear whether Vantage knew about the corruption, and Petrobras effectively waived the ability to cite corruption as a reason to terminate the contract when it re-approved a drilling agreement after the corruption scandal emerged. *Id.*

risk being classified as “money laundering.” Here, foreign direct investment becomes intertwined with the movement of funds across borders in ways that may hide the illicit nature of such transfers.⁶³ After outlining the dilemmas facing individual law firms and practitioners, Part IV argues that bar associations ought to support the ethical practice of law by articulating principles to guide the legal profession that reflect ongoing changes in the interactions between lawyers and their clients as their work affects society more broadly.

A. Legal Representation and Corporate Social Responsibility

How should a lawyer or law firm respond when faced with transactions, such as contracts for mineral extraction, that raise ethical issues that must be resolved in the text of the contract? In this context, there are three escalating levels that demand a response from the client’s lawyers.

If the MNC has a stated commitment to CSR, the first level involves working with the client to incorporate these commitments into contract negotiations. If the firm has no such policy, industry or national standards can provide guidance. Furthermore, if the host state’s government has a record of promoting corruption, violence, or environmental and human rights abuses, lawyers should ask their clients to consider how their actions may contribute to these risks, even beyond ESG goals.

If the MNC is hostile to advice, the lawyer may decide that further engagement will not be constructive, refusing continued representation. As the IBA Practical Guide states: “[w]ithdrawal is a last resort, and may not be legally permitted in any event.”⁶⁴ At least in the United States, tribunals are unlikely to forbid a lawyer from withdrawing based on the ethical lapses or illegal actions of the client.⁶⁵ The IBA has not articulated legal consequences that might

63. BITs are discussed in Section III.B, text accompanying *infra* notes 75–96. Money Laundering is discussed in Section III.C, text accompanying *infra* notes 108–124.

64. IBA PRACTICAL GUIDE, *supra* note 36, at 36. The IBA goes on to claim that: “Staying in the relationship and continuing to try to persuade the client to prevent and mitigate human rights impacts may serve the purposes of the UNGPs better than withdrawal.” *Id.* While in some cases this statement may prove true, it is just as likely that this is wishful thinking.

65. ABA MODEL RULES, *supra* note 14, Rule 1.16 (permitting a lawyer to terminate representation if the representation will “result in violation of the rules

follow from withdrawal motivated by ethical reasons. Nevertheless, refusing to negotiate a contract will achieve little unless the law firm itself is so influential that withdrawing its services sends a signal to the MNC's market participants and home government. A problematic deal could well continue with representation from less scrupulous lawyers. However, if a client's actions continue to violate a host country's laws or regulations, a lawyer could become a whistleblower. In a deeply corrupt country with little rule of law, however, withdrawal may be the only realistic option. Whistleblowing contradicts the conventional role of the attorney. Thus, it should be an extreme option, utilized rarely.

One way to overcome these difficulties is to elevate CSR to a real constraint on the firm's behavior. In signing on to work for a client, outside counsel should check the firm's CSR commitments and use them as a template for its own advice and representation. Firms without a CSR policy should be urged to develop one.

Ultimately, elevating loyalty to one's client above nearly everything else provides poor guidance to lawyers who face grave ethical dilemmas in the situations I have described. Transactional lawyers should attempt to convince their clients to modify the deal to reduce these social or environmental harms, even at the expense of corporate profits. Sometimes, host country laws encourage such ethical behavior.⁶⁶ Furthermore, lawyers can argue that accepting these obligations is in the long-term interest of the business if it wishes to avoid local labor and citizen unrest, and if it seeks a positive reputation as a good global citizen that will make it an attractive future business

of professional conduct or other law"). The ABA Rules note that a lawyer can withdraw from representing a client if "the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement." *Id.* The same rule also allows withdrawal if the client has engaged in criminal or fraudulent behavior related to the lawyer's services. *Id.* Regardless of these safeguards, courts can order the lawyer to "continue representation notwithstanding good cause for termination." *Id.*

66. Peruvian environmental regulation obliges companies to have an environmental impact assessment before the execution of a project. Law of the National Environmental Impact Assessment System, (Supreme Decree No. 019-2009-MINAM) (Peru). This assessment can include environmental and social commitments that go beyond what the law demands. Lawyers can advise their clients to incorporate specific commitments that might help avoid environmental and human rights abuses, even if regulation does not demand that action.

partner.⁶⁷ However, such a reputation may not be possible to establish unless the firm accepts some short- and medium-term costs. A firm's lawyers cannot make such fundamental choices of business strategy themselves, but they can be sure that the tradeoffs are on the table for discussion. One goal is to normalize such discussions in the transnational practice of law to create a virtuous cycle.

Problems of ethical business practice exist on a scale from minor to deeply harmful to citizens and to public institutional integrity. Some conflict with each other—a mine may scar the landscape and displace local villagers but provide minerals that can be used to develop climate-friendly technologies. For example, the key minerals for a clean energy transition are cobalt, copper, lithium, manganese, nickel, and zinc.⁶⁸ Peru is one of the main producers of copper worldwide, and conflicts have arisen between investors in mining projects and nearby residents.⁶⁹ The Ministry of Energy and Mines can declare that a project is of “national interest”, and this designation helps win support for the project's Environmental Impact Assessment (EIA). The EIA must include a participation mechanism for neighboring communities, but local communities do not have a veto over the final permit. In one contested case in 2010, Minera Chinalco Peru S.A. obtained government approval to develop a copper mine and to relocate the residents of the nearby town of Morococha to a new site

67. Several organizations rank companies in terms of their commitment to ESG principles. For instance, in 2021 Investors' Business Day (IBD) listed the 100 best ESG companies. *IBD Names the 100 Best ESG Companies of 2021*, BUSINESSWIRE (Oct. 25, 2021), <https://www.businesswire.com/news/home/20211025005275/en/IBD-Names-the-100-Best-ESG-Companies-of-2021> [https://perma.cc/SLK3-APZ3]. KLD issued a second index in 2022 that focused on the US market: *MSCI KLD 400 Social Index (USD)*, MSCI, <https://www.msci.com/documents/10199/904492e6-527e-4d64-9904-c710bf1533c6> [https://perma.cc/9MKE-GFJ7]. However, there are no standardized data sources for these rankings so they provide only limited guidance.

68. *Transition Minerals Tracker: Global Analysis of Human Rights Policies and Practices*, BUS. & HUM. RTS. RES. CTR. (Feb. 1, 2021), <https://www.business-humanrights.org/es/de-nosotros/informes/análisis-global-pol%C3%ADticas-y-prácticas-de-derechos-humanos-de-las-empresas-en-el-transition-minerals-tracker/> [https://perma.cc/NKF5-AL7G].

69. Millie Mutsios Ramsay, Yale Law School, LLM 2022 provided the information on mining projects in Peru and role of public participation. For Peru's status as a copper producer see *The Five Top Countries Producing Copper in the World*, WORLD ENERGY TRADE (May 24, 2021) <https://www.worldenergytrade.com/metales/cobre/los-cinco-principales-paises-mineros-de-cobre-del-mundo> [https://perma.cc/Z8KC-AS6Y].

called New Morococha.⁷⁰ Although, most of the original residents now live in New Morococha, there is still active social conflict from those who rejected the resettlement process.⁷¹ In an effort to resolve the situation, in 2022, the Ministry created a Temporary Working Group called “Dialogue Table for the Population Resettlement Process of Morococha.”⁷²

Clearly, lawyers should assure that their clients follow relevant domestic regulations and the stricture imposed by lenders, such as international financial institutions, that require Environmental and Social Impact Assessments (ESIA).⁷³ Where legal requirements and lending conditions are absent, however, a lawyer hired by a party should insist that due diligence include consideration of how the project will affect socio-economic and environmental conditions and the furtherance of human rights goals. Lawyers cannot

70. See Gervase Poulden, *Morococha: The Peruvian Town the Chinese Relocated*, CHINA DIALOGUE (Apr. 15, 2013), <https://chinadialogue.net/en/business/5898-morococha-the-peruvian-town-the-chinese-relocated/> [https://perma.cc/PS8Z-2MDL] (stressing the positive aspects of the relocation, but mentioning continued resistance).

71. DEFENSORÍA DEL PUEBLO. REPORTE MENSUAL DE CONFLICTOS SOCIALES NO. 222 60 (2022), <https://www.defensoria.gob.pe/wp-content/uploads/2022/09/Reporte-Mensual-de-Conflictos-Sociales-Nº-222-Agosto-2022.pdf> [https://perma.cc/BU4Z-9KBB].

72. Ministry Resolution 077-2022-PCM] art. 4 (Peru). Among the functions of this working group are:

(i) propose actions and measures aimed at solving the problem related to the population resettlement process of Morococha; informing publicly, through the Presidency of the Working Group, the advances and exhorting its members to the effective and opportune fulfillment of their commitments., (ii) articulate with public and private entities, and other local and national actors, to contribute to the culmination of the Morococha population resettlement process, and (iii) promote, after evaluation, the signing of a Framework Agreement between the civil society of the district of Morococha and the company Minera Chinalco Perú S.A.

Id.

73. The exact meaning of ESIA varies across lenders and advocates. See generally RIKI THERIVEL & GRAHAM WOOD, *METHODS OF ENVIRONMENTAL AND SOCIAL IMPACT ASSESSMENT* (Glasson ed., 4th ed. 2017) (describing how ESIAs generally work and should be carried out); WORLD BANK, *WORLD BANK ENVIRONMENTAL AND SOCIAL FRAMEWORK* (2017), <https://documents1.worldbank.org/curated/en/383011492423734099/pdf/The-World-Bank-Environmental-and-Social-Framework.pdf> [https://perma.cc/TU9H-EDYJ] (describing the World Bank’s environmental and social framework and standards).

resolve fundamental value conflicts on their own. Nevertheless, even if lawyers cannot directly affect the social value of a project, they can insist on transparency between the parties and to the public, both inside and outside the country.

B. CSR and International Investment Agreements

Recently, there has been a rise in references to CSR in model cross-national investment agreements.⁷⁴ Many investment contracts involving MNCs are covered by bilateral investment treaties (BITs) or International Investment Agreements (IIAs), with disputes resolved through arbitrations that the firm can initiate without obtaining the acquiescence of the MNC's home state.⁷⁵ The impact of these treaties and agreements on foreign direct investment (FDI) is uncertain, but FDI promotion is the stated purpose of developing states that sign BITs

74. Tomoko Ishikawa, *Materializing Corporate Social Responsibility in Investor-State Dispute Settlement*, 312 COLUM. FDI PERSP. 1, 1 (2021).

75. See *Bilateral Investment Treaties and Related Agreements*, U.S. DEP'T OF STATE, <https://www.state.gov/investment-affairs/bilateral-investment-treaties-and-related-agreements/> [<https://perma.cc/HXS3-6X5H>] (explaining the basic mechanics of the BIT program). See generally *International Investment Agreements (IIAs)*, UNCTAD, <https://unctad.org/topic/investment/international-investment-agreements> [<https://perma.cc/MX2S-NQPF>] (providing links to information about BITs and IIAs); 2012 U.S. Model Bilateral Investment Treaty, U.S. DEP'T OF STATE (2012), <https://2009-2017.state.gov/documents/organization/188371.pdf> [<https://perma.cc/G2VE-ERS4>] [hereinafter Model U.S. BIT] (laying out the terms of treaties between the U.S. and other countries "concerning the encouragement and reciprocal protection of investment").

The World Bank has also supported investor-state arbitration. See Tarald Laudal Berge & Taylor St John, *Asymmetric Diffusion: World Bank 'Best Practice' and the Spread of Arbitration in National Investment Laws*, 28 REV. INT'L POL. ECON. 584, 584 (2021) (finding that "governments who receive technical assistance from the World Bank's Foreign Investment Advisory Service are more likely to include arbitration in their laws").

In recent years, multilateral trade and investment agreements are replacing some bilateral arrangements with the aim of further increasing international investment and trade. A prominent example is the 2021 U.S.-Mexico-Canada Agreement. See *Agreement between the United States of America, the United Mexican States, and Canada 7/1/20 Text*, OFF. OF THE U.S. TRADE REPRESENTATIVE, <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between> [<https://perma.cc/4NWX-33QR>] [hereinafter USMCA]. It includes a bilateral provision covering the U.S. and Mexico for investor-state arbitration using the World Bank's International Center for the Settlement of Investment Disputes (ICSID). *Id.* at Annex 14-D.

with wealthy countries that are important sources of investment funds.⁷⁶ Such treaties aim to expand the dollar volume of investments in developing countries by imposing more of the risk on the host country and shifting more of the profits of each deal toward the investor. Thus, they aim to increase the total investment pie but with a lower percentage of the profits accruing to the host country.⁷⁷

Outright expropriation is the most straightforward basis of a suit for compensation. A right to compensation is usually written into contract terms or provided for in the treaty commitments of host countries.⁷⁸ Going further, a firm may seek compensation even though the government's regulatory action does not single out the company and can be justified on public welfare grounds.⁷⁹ However, modern investment treaties leave space for governments to regulate environmental harms, protect the rights of labor, and sanction anti-competitive activity. The United States Model BIT, a key template, includes such provisions, but they are explicitly exempt from being tested in arbitral tribunals.⁸⁰ The U.S. Model BIT only urges voluntary

76. LAUGE N. SKOVGAARD POULSEN, *BOUNDED RATIONALITY AND ECONOMIC DIPLOMACY: THE POLICY OF INVESTMENT TREATIES IN DEVELOPING COUNTRIES* 12 (Cambridge Univ. Press 2015). Poulsen, writes: "In short, investment treaties were adopted willingly by capital-importing states seeing the treaties as useful supplements to parallel reforms of domestic investment regimes." *Id.* However, on pp. 5–9, he argues that, as a matter of fact, BITs themselves were only of marginal value given the other techniques that MNCs had to protect their investments. *Id.*

77. See Susan Rose-Ackerman & Ryan Bubb, *BITs and Bargains: Strategic Aspects of Bilateral and Multilateral Regulation of Foreign Investment*, 27 INT'L REV. OF L. AND ECON. 291 (2007); Jennifer Tobin & Susan Rose-Ackerman, *When BITs Have Some Bite: The Political-Economic Environment for Bilateral Investment Treaties*, 6 REV. OF INT'L ORG. 1 (2011) (providing empirical data that BITs alone—without domestic reforms—will not create sustainable development). For an overview of the variable results concerning the impact of BITs on investment in host countries, see JONATHAN BONNITCHA, LAUGE N. SKOVGAARD POULSEN & MICHAEL WAIBEL, *THE POLITICAL ECONOMY OF THE INVESTMENT TREATY REGIME* 155–180 (Oxford Univ. Press 2017).

78. U.S. International Trade Administration, *TRADE GUIDE: BILATERAL INVESTMENT TREATIES*, <https://www.trade.gov/trade-guide-bilateral-investment-treaties> (stating that among the major benefits of such treaties are limits on expropriation and "prompt, adequate, and effective" compensation if expropriation occurs).

79. While outright expropriation is no longer a major risk, "indirect" expropriation remains an issue when connected with a host state's efforts to provide social benefits or mitigate environmental harms.

80. Model U.S. BIT, *supra* note 75 arts. 12–13 (referencing consultations covering environmental and labor protections). The model BIT provides for explicit

consultation.⁸¹ The 2019 Dutch Model BIT goes further in mentioning “social risks and impact”, but the provision is also non-binding.⁸²

Thus, the practical impact of these provisions may be limited. For example, the Central American-Dominican Republic Free Trade Agreement (CAFTA) includes environmental and labor provisions.⁸³ However, an arbitral tribunal held that the plaintiff, a group of United States labor unions, had not demonstrated an impact on trade linked to Guatemalan labor-law violations.⁸⁴ BITs typically make no mention of arbitrations initiated by those harmed by the investment project, and they generally explicitly prevent firms from initiating arbitration over these issues.⁸⁵

Over and above explicit treaty exemptions, governments with weak legal labor and environmental provisions—or that fail to enforce their own laws—will likely benefit the foreign investor who would be unlikely to challenge the policy. BITs do not give private individuals the right to initiate an arbitration. Only the state and MNC involved can bring a claim under the BIT, but, in practice, almost all claims are brought by MNC’s, not host countries.⁸⁶ The host country’s citizens

exemption of these sections. *Id.* at Section B, art. 24(1)(a)(i)(A). For similar provisions, see USMCA, *supra* note 75, art. 14.

81. Model U.S. BIT, *supra* note 75, arts. 12–13.

82. Netherlands Model Investment Agreement, § 2, art. 7(3), Mar. 22, 2019, <http://arbitrationblog.kluwerarbitration.com/wp-content/uploads/sites/48/2020/05/new-model-Netherlands-BIT.pdf> [<https://perma.cc/THS2-Y7EG>] (“The Contracting Parties reaffirm the importance of investors conducting a due diligence process to identify, prevent, mitigate and account for the environmental and social risks and impacts of its investment.”). For an in-depth report on the legal implications of corporate human-rights commitments, see Anna Kirkpatrick, *Human Rights and International Mining Disputes*, GLOB. ARBITRATION REV. (June 9, 2021), <https://www.lexology.com/library/detail.aspx?g=2cdfb60f-0fba-4e31-8a46-cdd7c59c16ed&l=9K8F1LF>.

83. *Dominican Republic-Central America Free Trade Agreement*, U.S. TRADE REP. (2012), <https://ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta/final-text> [<https://perma.cc/9KRZ-WCTF>].

84. For an analysis, see Phillip Paiement, *Leveraging Trade Agreements for Labor Law Enforcement: Drawing Lessons From the US-Guatemala CAFTA Dispute*, 49 GEO. J. INT’L L. 675 (2018) (detailing the dispute between the US and Guatemala, where the arbitration panel found that the US had failed to prove that the failure of labor law enforcement in Guatemala effected trade between the two nations).

85. See Kirkpatrick, *supra* note 82 (explaining that BITs generally explicitly prevent firms from initiating arbitration over these issues).

86. Aceris Law, *States as Claimants in Investment Arbitration*, ACERIS LAW (May 23, 2018), <https://www.acerislaw.com/states-as-claimants-in-investment->

must rely on their domestic law to seek legal redress, and BITs may override domestic policy initiatives and lawsuits by local citizens.⁸⁷ Hence, because of the advantages that BITs give to MNCs, it is important for the corporation's lawyers to structure MNC deals to avoid situations where aggressive profit-maximization imposes severe effects on ordinary people that deprive them of rights and security.

Even if treaty language does not require compensation for nondiscriminatory government regulations, the terms may be unclear and invite firms to seek compensation for government actions that reduce profits but that the host country believes will increase its citizens' welfare. A treaty's terms may look innocuous on their face and receive little pushback from host country lawyers eager for a deal and willing to overlook the "fine print." Thus, Lauge Poulsen finds that host country officials in low- and middle-income countries who reviewed the texts of BITs often did not consider the potential risks to host countries built into boilerplate BITs.⁸⁸ His case study of South Africa details that the country's officials reportedly distrusted a Canadian draft treaty that contained detailed, legalistic language providing some protections to disadvantaged groups in both countries. They preferred the simple language of the European BITs that contradicted aspects of the South African constitution.⁸⁹ If one accepts Poulsen's conclusions, the inadequacy of treaty negotiations places a responsibility on present-day MNC lawyers. They should not encourage their clients to take on risky projects that could end up imposing disproportionate harm on the host country's population. Corruption, risk to public security, environmental harms, and human rights abuses are areas of special concern, but ignorance by public officials in the cases discussed by Poulsen suggests that pure inadvertence can be just as harmful. MNCs' lawyers have an obligation to be sure that all parties understand the up- and downside risks of the investment projects that they help to negotiate.

arbitration/ (finding that even cases brought by host states have ended without an arbitral decision).

87. POULSEN, *supra* note 76.

88. *Id.*

89. Lauge N. Skovgaard Poulsen, *Bounded Rationality and the Diffusion of Modern Investment Treaties*, 58 INT'L STUD. Q. 1, 9 at n.33 (2014) (quoting a Canadian official who reported that "it is a big challenge to convince developing countries that they are not being tricked by the detail of [BIT] provisions, but that our [Canadian] model is actually more balanced in . . . preserving regulatory flexibility").

Additionally, the pool of potential arbitrators is limited, and arbitrators may not always be neutral in resolving the disputes they face. Instead, many are practicing international investment lawyers who have close ties to the interests of various corporate clients.⁹⁰ Hence, lawyers negotiating contracts for an MNC have an obligation to be clear with the counterparty if the contract signs away some of the state's freedom to regulate in the interest of concluding an individual deal. Tradeoffs, made during negotiations, should be part of the public record of the contracting process to help promote public accountability. To facilitate this, the UNGPs should be upgraded to include principles for the transactional legal profession involved in advising MNCs on contract negotiations with host countries or their own large firms.

Some model BITs and free trade agreements (FTAs) mention the obligations of the investor and of the host country to respect the human rights of citizens of the host country and to uphold environmental and labor standards. A notable example is Morocco's 2019 Model BIT, article 20, that includes references to investors' responsibility to uphold and contribute to the sustainable development of the host state, including compliance with "international obligations regarding human and labor rights, responsible business conduct, health and environmental protection, and consistent with climate change mitigation and adaptation objectives."⁹¹ The model BIT, article 28.3, states:

90. *Background Paper on Double-Hatting*, ICSID (Feb. 25, 2021), [https://icsid.worldbank.org/sites/default/files/Background_Papers_Double-Hatting_\(final\)_2021.02.25.pdf](https://icsid.worldbank.org/sites/default/files/Background_Papers_Double-Hatting_(final)_2021.02.25.pdf) [<https://perma.cc/2SCB-LPU6>] (listing several cases where litigants challenged the objectivity of arbitrators based on their work as arbitrators or counsel in other cases). For a discussion of bias exhibited by investment arbitrators, see Georgios Dimitropoulos, *Investor-State Dispute Settlement Reform and Theory of Institutional Design*, 9 J. INT'L DISP. SETTLEMENT 535 (2018) (giving suggestions for how settlement dispute can be reformed to limit these biases).

91. Morocco Model BIT art. 20 (2019), <https://edit.wti.org/document/show/b5908c50-ef94-4902-b71d-12024f285ef8> [<https://perma.cc/D7LZ-NL96>]. The treaty notes:

0.1 Investors and their investments will strive to contribute to the sustainable development of the Host Party and the local community through responsible practices.

20.2 Investors of a Party in the territory of the other Party shall endeavor to contribute to human capital formation, job creation and technology transfer.

20.3 Investors of a Party in the territory of the other Party shall endeavor to apply the International Labor

If an investor or its investment has breached any of its obligations under this Agreement, neither the investor nor the investment shall have the right to initiate any dispute resolution process established under this Agreement. The Host Party may raise this issue as an objection to jurisdiction in any dispute arising under this Section.

Kabir Duggal and Nicholas Diamond provide additional examples, but they point out that the firm's responsibility is often stated in vague language that may not be enforceable if a dispute arises.⁹² For example, they point to the generalities in the Southern African Community Model BIT that recognizes the "important contribution investment can make to . . . sustainable development . . . including the reduction of poverty . . . and the furtherance of human rights and human development."⁹³ According to Duggal and Diamond, the lack of precise language, even for direct and binding obligations, may make future disputes difficult to resolve. Despite the ambiguity, the use of such language in treaties requires a

Organization's Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy and the OECD Guidelines for Multinational Enterprises, as well as specific or sectoral standards of responsible conduct promoted by the Parties.

20.4 Investors will be expected to manage or operate their investments in compliance with international obligations regarding human and labor rights, responsible business conduct, health and environmental protection, and consistent with climate change mitigation and adaptation objectives.

20.5 A tribunal established under Section VI of this Agreement shall, in determining the amount of compensation, take into account the failure of the Investor to comply with its commitments referred to in paragraph 20.4 of this section.

Id.

92. Kabir A. N. Duggal & Nicholas J. Diamond, *Model Investment Agreements and Human Rights: What We Can Learn From Recent Efforts*, COLUM. J. TRANSNAT'L L.: THE BULLETIN (Aug. 19, 2021), <https://www.jtl.columbia.edu/bulletin-blog/model-investment-agreements-and-human-rights-what-can-we-learn-from-recent-efforts> [<https://perma.cc/ZT6C-UKXB>].

93. *Id.* See generally SOUTH AFRICAN DEVELOPMENT COMMUNITY, SADC MODEL BILATERAL INVESTMENT TREATY TEMPLATE WITH COMMENTARY (2012), <https://www.iisd.org/itn/wp-content/uploads/2012/10/sadc-model-bit-template-final.pdf> [<https://perma.cc/8VE8-53PK>] (providing a model BIT for South Africa Development).

response from a firm's lawyers who draft contracts between the firm and host countries. This will be especially true if other countries follow Ecuador's proposed 2018 Model BIT that defines "investment" to require a positive contribution to the host state that incorporates "full respect of human rights and the environment."⁹⁴ The Moroccan BIT has vaguer language overall but seeks the same result. In other words, a host state could refuse to give an investment protection under the BIT if social, environmental, and labor conditions are not fulfilled.

Of course, model BITs drafted by countries that are host states for foreign investment may have little relevance for FDI if investors' home countries are not party to such BITs and, instead, insist that the BITs that they sign be based on their own templates. Model BITs, such as those of Ecuador and Morocco, appear to be purely hortatory expressions of wishful thinking. In fact, Ecuador's proposed model BIT apparently never went beyond the proposal stage even within Ecuador. It was never reflected in a ratified BIT, and Ecuador, instead, has withdrawn from most of its existing BITs with only two presently in force.⁹⁵

However, model BITs with terms extending beyond the prohibition of direct expropriation began in the United States. Its revised Model BIT, issued in 2012, includes clauses that preclude parties from lowering standards or weakening the enforcement of

94. Javier Jaramillo, *New Model BIT Proposed by Ecuador: Is the Cure Worse Than the Disease?*, KLUWER ARB. BLOG (July 20, 2020), <http://arbitrationblog.kluwerarbitration.com/2018/07/20/new-model-bit-proposed-ecuador-cure-worse-disease/> [https://perma.cc/F6SH-Q9LN] (summarizing and critiquing Ecuador's 2018 Model BIT).

95. The website of BITs maintained by the United Nations Conference on Trade and Development shows that Ecuador has not entered into any BITs incorporating this model. All BITs made under a previous government were terminated except for those with the Netherlands and Spain, which have not been amended to reflect the 2018 Proposed Model BIT. See Investment Policy Hub, *International Investments Agreements Navigator*, UNCTAD (2022), <https://investmentpolicy.unctad.org/international-investment-agreements/countries/61/ecuador> [https://perma.cc/5R7C-PHGB]. In addition, Ecuador's own commitment to the principles expressed in the proposed model BIT is cast in doubt by a case referred to the Inter-American Court of Human Rights in 2020 by the Inter-American Commission of Human Rights. The case involves Ecuador's alleged violation of the rights to life, territory, and economic rights of the uncontacted Tagaeri and Taramepape peoples and references investment projects. Press Release, *IACHR refers case on Ecuador to the Inter-American Court*, OAS (Oct. 5, 2020), https://www.oas.org/en/iachr/media_center/PReleases/2020/245.asp [https://perma.cc/WWV2-C3U6].

domestic labor and environmental laws in order to encourage foreign investment. Although issues arising under these clauses are excluded from the investor-state dispute settlement process, the United States Model BIT allows parties to engage in bilateral consultation to resolve such issues.⁹⁶ The United States was partially motivated to draft a new model BIT because MNCs based in middle-income countries were beginning to invest in the United States. More BITs and FTAs can be expected to become truly bilateral as time goes on. The U.S.-Canada-Mexico agreement is a prominent example where some arbitrations have been launched against the U.S. as host to investments from Canada and Mexico.⁹⁷

Other contemporary multi-lateral trade and investment agreements include developed countries that are both host and home countries for investors. All signatories, then, will have an interest in provisions that protect their own citizens and regulate cross-border environmental harms, such as climate change. Broad ESG provisions are included in regional trade and investment agreements, which include chapters on sustainability, employment, human rights, and the environment. Consider two examples. The 2017 EU-Canada Comprehensive Economic and Trade Agreement (CETA) Chapter 22 deals with the interconnection between economic growth, social development, and environmental protection. Chapter 23 focuses on labor rights and standards.⁹⁸ Under the 2019 Economic Partnership Agreement between the UK and CARIFORUM (a group of Caribbean states), the parties agreed not to weaken the protection or the enforcement of domestic environmental, labor, social, public health, and occupational safety legislations in an effort to maintain a

96. Model U.S. BIT, *supra* note 75, arts. 12–13; *see also* Bertram Boue, *Labour Related Provisions in International Investment Agreements* (Int'l Lab. Org. Employment Sector Working Paper No. 126), https://www.ilo.org/wcmsp5/groups/public/-ed_emp/documents/publication/wcms_191245.pdf [<https://perma.cc/Q8F6-6SLZ>] (providing an overview of major labor related provisions in WTO LAW and bilateral and preferential trade investment agreements).

97. *See Table of Foreign Investor Cases and Claims under NAFTA and Other US "Trade" Deals*, PUB. CITIZEN, (Aug. 2018), <https://www.citizen.org/wp-content/uploads/migration/investor-state-chart-aug-2018.pdf> [<https://perma.cc/3L79-842J>] (listing cases where the U.S. was the respondent).

98. Comprehensive Econ. and Trade Agreement, Eur. Union-Can., chs. 22–23, Jan. 14, 2017, https://eur-lex.europa.eu/eli/agree_internation/2017/37/oj [<https://perma.cc/H93Q-XFSZ>].

competitive advantage.⁹⁹ Although both agreements are open to alternative interpretations, the treaty language articulates values benefiting both parties. The ABA has issued a set of model contract clauses dealing with human rights in supply chains.¹⁰⁰ These model clauses are not part of the ABA's formal code of professional responsibility. However, they are justified as stating principles similar to the UNGPs and the OECD's Guidelines for Responsible Business Conduct, as well as anticipating action by the European Union.¹⁰¹

These developments reflect an evolving consensus that the property rights of investors and the rights and well-being of citizens need a more even balance, putting private business activities in a social context. Obtaining the balance through subsequent MNC contractual negotiations reasonably requires the MNC's lawyers to uphold the firm's expressed commitment to human rights and compliance with any treaty under which the deal will fall. The lawyers must articulate this commitment in concrete ways in the text of the contract. Of course, it will be difficult to go from lofty rhetoric to concrete commitments, but lawyers will be able to draw on treaty language and management's statements to justify their concerns. In practice, they may face difficult situations where the host government's negotiators are less committed to human rights than the MNC's own aspirational statements. Such disjunctions can lead the host country's negotiators to charge the MNC with a neo-colonialist attitude, where the human rights agenda is an unwelcome import. Lawyers can counter such claims through the use of declarations by regional and international organizations that include the host country, such as the United Nations, the Organization

99. Econ. Partnership Agreement, CARIFORUM-UK, chs. 4–5, May 2019, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/803413/1._CARIFORUM_Command_Paper_Part_One.pdf [<https://perma.cc/R9MU-785H>].

100. *Contractual Clauses Project: Working With Stakeholders to Ensure Human Rights Due Diligence in Business Contracting*, A.B.A., https://www.americanbar.org/groups/human_rights/business-human-rights-initiative/contractual-clauses-project/ [<https://perma.cc/F5MP-Y5QW>].

101. *Id.*; UNGPs, *supra* note 9; ORG. FOR ECON. COOP. & DEV., OECD DUE DILIGENCE GUIDANCE FOR RESPONSIBLE BUS. CONDUCT. (2018), <http://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf> [<https://perma.cc/LPW2-KSTE>].

of American States, the UN Economic Commission for Africa (especially its High-Level Panel on Illicit Financial Flows).¹⁰²

Civil society and the media should work to document firms' violations of human rights and other ESG commitments. Such an alliance can even make compliance with ESG goals a profitable strategy for MNCs. Focusing on the mining sector and the assassination of local activists, one empirical study concluded that shining a human-rights spotlight on firm behavior negatively affects multinationals' asset prices.¹⁰³ Because formal laws—domestic and international—are inadequate to hold companies accountable, the article's preliminary findings suggest that the publicity strategies of human rights groups have an impact by revealing information to international markets.

Lawyers ought to play a role in normalizing ESG into MNC's transactions with developing countries. The first problem is the stated ESG commitments themselves, and lawyers may play a role in drafting their texts to limit their business impact while using language meant to assuage critics. Instead, legal advisors should insist that an MNC's ESG pledges are straightforward about their limitations as well as their affirmative promises. Second, and most challenging for lawyers, are cases where the MNC has not taken a public stand, but where corrupt payments or human rights violations seem likely under some contractual terms. Then, lawyers must decide whether to voice outright opposition in the face of MNC indifference. Sometimes, they may be able to appeal to the long-term economic interests of the firm, especially if the firm seeks to avoid future stigma for its behavior. The business and financial press has begun highlighting the role of lawyers and law firms in promoting ESG-oriented practices.¹⁰⁴ Law firms

102. AU/ECA CONFERENCE OF MINISTERS OF FIN., PLANNING & ECON. DEV., ILLICIT FINANCIAL FLOW: REPORT OF THE HIGH LEVEL PANEL ON ILLICIT FINANCIAL FLOWS FROM AFRICA (2015).

103. DAVID KREITMEIR ET AL., THE VALUE OF NAMES: CIVIL SOCIETY, INFORMATION, AND GOVERNING MULTINATIONALS ON THE GLOBAL PERIPHERY, (2022), <https://osf.io/preprints/socarxiv/aw7sq> [<https://perma.cc/LS5N-MH2P>].

104. See, e.g., Dan Roe, *Thanks to the SEC, Law Firms See Increasing Business in ESG*, AM. LAW. (Aug. 9, 2022), <https://www.law.com/americanlawyer/2022/08/09/thanks-to-the-sec-law-firms-see-increasing-business-in-esg/?slreturn=20220827133215> [<https://perma.cc/3GHV-R92R>]; Nicole DeNamur, *Environmental, Social, and Governance: What Lawyers and Firms Need to Know About Accountability*, NWSIDEBAR (May 31, 2022), <https://nwsidebar.wsba.org/2022/05/31/environmental-social-and-governance-what-lawyers-and-firms-need-to-know-about-accountability/>

advertise their work on ESG strategy development. For example, law firms such as Holland & Knight¹⁰⁵ and Clifford Chance¹⁰⁶ market themselves as able to help clients develop, organize, and execute such strategies.

Even if a lawyer represents a corporate client without a strong CSR position or is negotiating a contract on an issue not covered by the client's ESG policy, the spirit of the CSR movement nevertheless applies to lawyers. The internationally recognized rights and privileges granted to lawyers based on their role in society as the protectors of civil liberties and justice implies a basic professional responsibility to respect fundamental and universally recognized ethical and social principles in giving advice, even if not solicited by the client. Lawyers arguably have an ethical obligation to avoid facilitating actions or relationships that reasonably can be expected to result in grave social harm. Such strictures do not amount to imposing a new duty on lawyers. In the end, a lawyer makes a conscious choice to represent a client, and lawyers should be able to publicly justify and defend their choices in the most basic ethical terms.¹⁰⁷ Under a broad view of

[<https://perma.cc/CQX4-4PX9>]; Jeffrey B. Gracer, *Together, We Can Change the World. Lawyers as ESG Allies*, INT'L SOC'Y OF SUSTAINABILITY PROS. (Nov. 2020), <https://www.sustainabilityprofessionals.org/isspblog/lawyers-as-esg-allies> [<https://perma.cc/4D85-9J48>]; *Does Your Corporate Legal Department Lead the ESG Strategy?*, WOLTERS KLUWER (Aug. 9, 2022), <https://www.wolterskluwer.com/en-gb/expert-insights/leading-the-esg-strategy> [<https://perma.cc/EUZ9-E8RT>] (discussing how individuals and general counsel are at the forefront making decisions regarding ESG in companies); Philip Chang, *Why ESG Matters for Big Law Firms*, USC GOULD'S BUS. L. DIG. (Dec. 29, 2021), <https://lawforbusiness.usc.edu/why-esg-matters-for-big-law-firms/> [<https://perma.cc/58BB-K9NS>] (discussing how Big Law Firms are incorporating ESG into their business strategy); Carol Schiro, *Why Law Firms Need to Make ESG a Priority*, N.Y. STATE BAR ASS'N, <https://nysba.org/why-law-firms-need-to-make-esg-a-priority/> [<https://perma.cc/TCJ6-FCRB>] (discussing how Big Law Firms are making ESG a priority in their business).

105. *Environmental, Social and Governance (ESG)*, HOLLAND & KNIGHT, <https://www.hklaw.com/en/services/practices/corporate-transactions-and-finance/environmental-social-and-governance-esg> [<https://perma.cc/38B7-8KTQ>].

106. *Sustainability and ESG*, CLIFFORD CHANCE, <https://www.cliffordchance.com/expertise/services/esg.html> [<https://perma.cc/38B7-8KTQ>].

107. For discussions on lawyers' responsibility for the choice of clients, see Monroe H. Freedman, *The Lawyer's Moral Obligation of Justification*, 74 TEX. L. REV. 111 (1995) (arguing that lawyers have a moral obligation to justify their decisions to represent clients who have committed heinous crimes); Serena Stier, *Legal Ethics: The Integrity Thesis*, 52 OHIO STATE L. J. 551 (1991) (arguing that

governance, the third “G” pillar of ESG should affect the way a firm negotiates with a host country or its domestic firms. A proposed contract facilitated by corruption or that uses subcontractors or local partners with poor labor and environmental records should lead a firm’s lawyers to raise objections. They should push for a more ethically defensible outcome in spite of pushback from the counterparty, or, in the limit, advise against the deal.

C. Money Laundering and Lawyers as Facilitators

Some groups have attempted to reconcile the special roles and duties of lawyers with the growing need to clarify and strengthen their ethical responsibilities as a profession. For example, anti-money laundering (AML) efforts emphasize the role of lawyers and other specialized professionals in facilitating clients’ money-laundering and other fraudulent activities. Thus, the national and international AML framework affects the way lawyers interact with their MNC clients both with respect to the ratified treaty provisions and global principles governing the cross-border transfers of funds. This article is particularly focused on efforts to promote standards of MNC behavior that lacks formal legal status but can support the ethical operation of multinational businesses.

For example, the Financial Action Task Force (FATF) is an intergovernmental AML watchdog issuing recommendations to restrict cross-border financial flows related to drug trafficking, terrorist financing, and corruption.¹⁰⁸ Bringing lawyers into the AML effort is supported by the World Economic Forum, the Stolen Assets Recovery Initiative of the World Bank, and the UN Office of Drugs and Crime (UNODC). All of these bodies urge enhanced reporting requirements for professionals who serve as “gatekeepers” to the international financial system, including accountants, entity formation agents, and lawyers.¹⁰⁹

while lawyers may be morally responsible for their decision to represent certain clients, they are not morally responsible for their clients’ actions and objectives).

108. For background on the FATF, see *Who We Are*, FATF, <https://www.fatf-gafi.org/> [<https://perma.cc/NXW7-M4RK>]. On the relationship to the anti-corruption agenda, see Rose-Ackerman & Palifka, *supra* note 3, at 510–14.

109. *Gatekeepers: A Unifying Framework*, WORLD ECON. F. (June 2021), https://www3.weforum.org/docs/WEF_Gatekeepers_A_Unifying_Framework_2021.pdf [<https://perma.cc/5H27-K8MY>] (linking key documents).

Moving to black-letter law, the United Kingdom passed the Proceeds of Crime Act of 2002 and the Money Laundering Regulations of 2003.¹¹⁰ The legislation requires transactional attorneys to engage in due-diligence and report suspected money laundering by clients if linked to criminal activity.¹¹¹ There have been similar attempts in the United States to pass laws to comply with the AML principles of the FATF, but these efforts have not been successful.¹¹² The ABA did establish a Task Force on Gatekeeper Regulation and the Profession, but its report opposed subjecting lawyers to enhanced customer due diligence, record keeping, and reporting requirements, which had been a part of the FATF's formal recommendations.¹¹³ The ABA opposed a proposed statute and argued that the problem was not serious.¹¹⁴ It argued that no additional regulation was warranted because even under current law, lawyers are required to file voluminous Suspicious Activity Reports (SARs) that are not useful tools to control money laundering.¹¹⁵ However, it is unclear whether money laundering is uncommon or a pervasive problem that justifies general reporting requirements. The efficacy of the United Kingdom law in limiting money laundering and/or shifting it to other jurisdictions is not

110. The Proceeds of Crime Act, (2002), c. 29 (UK); The Money Laundering Regulations 2003, No. 3075 (UK).

111. Section 330 of the Proceeds of Crime Act, *supra* note 110; and Regulation 7 of the Money Laundering Regulations, *supra* note 110, exempt legal advisors from reporting when they receive information about money laundering in privileged circumstances. However, privileged circumstances do not include "information or other matter which is communicated or given with the intention of furthering a criminal purpose."

112. See The Incorporation Transparency and Law Enforcement Assistance Act, S. 2956, 110th Cong. (2008); Stop Tax Haven Abuse Act, S. 681, 110th Cong. (2007).

113. *Gatekeeper Regulations on Attorneys*, ABA, https://www.americanbar.org/advocacy/governmental_legislative_work/priorities_policy/independence_of_the_legal_profession/bank_secrecy_act/ [https://perma.cc/C9QD-R5YA].

114. Lawton P. Cummings & Paul T. Stepnowsky, *My Brother's Keeper: An Empirical Study of Attorney Facilitation of Money-Laundering through Commercial Transaction*, J. PRO. LAW. 1, 28–29 (2011).

115. *Gatekeeper Regulations on Attorneys*, ABA, https://www.americanbar.org/advocacy/governmental_legislative_work/priorities_policy/independence_of_the_legal_profession/bank_secrecy_act/ [https://perma.cc/C9QD-R5YA].

known.¹¹⁶ Furthermore, money laundering could be quite common but be so well hidden that it seems rare.

According both to Levi and to Cummings & Stepnowsky, one purpose of the ABA Task Force on the Gatekeeper Regulation and the Profession has been to avoid federal regulation by proposing industry self-regulation.¹¹⁷ It adopted a list of Voluntary Good Practices Guidance for Lawyers to Detect and Combat Money Laundering and Terrorist Financing. Although the United States has no due diligence requirements equivalent to those in the UK, the ABA Model Rules require attorneys to withdraw their representation if they believe their services are being used for criminal or fraudulent purposes. The Model Rules also allow release of information that would otherwise be protected by attorney-client privilege to prevent reasonably certain harm to others.¹¹⁸

Lawyers' associations argue against AML regulations for lawyers, in part, by claiming there are no data showing that lawyers are being used to facilitate money laundering. Cummings & Stepnowsky studied ten money laundering cases filed in the Second Circuit in 2009. In four cases, lawyers directly facilitated money laundering. In the remaining six, the lawyers' involvement was "unwitting,"¹¹⁹ a vague term that could imply willful blindness. It is, of course, difficult to know if this is a large or a small number because

116. Michael Levi, *Making Sense of Professional Enablers' Involvement in Laundering Organized Crime Proceeds and of Their Regulation*, 24 TRENDS IN ORG. CRIME 96, 104 (2021); Delphine Nougayrède, *Anti-Money Laundering and Lawyer Regulation: The Response of the Professions*, 43 FORDHAM INT'L L. J. 321, 323 (2019). In July 2021, HM Treasury issued a *Call for Evidence on the Effectiveness of the UK Anti-Money Laundering Regime* as part of a broad review of its anti-money laundering and counter-terrorist financing policies under the Economic Crime Plan for 2019–22. *Call for Evidence: Review of the UK's AML/CTF Regulatory and Supervisory Regime*, UK GOV'T (July 22, 2021), <https://www.gov.uk/government/consultations/call-for-evidence-review-of-the-uks-amlctf-regulatory-and-supervisory-regime> (on file with *Columbia Human Rights Law Review*).

117. Levi, *supra* note 116; Cummings & Stepnowsky, *supra* note 114; see also Nougayrède, *supra* note 116, at 338 (noting that the United States appears to have a stronger concept of the legal industry as an exceptional profession in which lawyers serve as "zealous advocates and protectors of clients against the state, but also as guardians of democracy and the rule of law"). Nougayrède highlights that lawyers in the United States are fairly unique in not facing any mandatory AML reporting requirements. *Id.*

118. ABA MODEL RULES, *supra* note 14, at r. 1.6.

119. Cummings & Stepnowsky, *supra* note 114, at 4.

many cases escape the notice of prosecutors. As Katie Benson concludes in a British study: “[T]he facilitation of money laundering by legal professionals is not a homogenous phenomenon; it is complex and multi-faceted, comprising a variety of actions, purposes, actors and relationships.”¹²⁰

However, even if few lawyers are directly involved in money laundering, many illegal financial transactions are predicate offenses. Of particular concern is the payment and the receipt of bribes, a predicate offense under the principles set out by the FATF.¹²¹ Most MNCs are headquartered in jurisdictions subject to the OECD Anti-Corruption Convention. This Convention requires ratifying countries to make it an offense against their domestic law for corporations to pay bribes to get business abroad.¹²² The US anti-corruption regime includes the Foreign Corrupt Practices Act (FCPA), the precursor of the OECD Convention. Its broad jurisdiction covers foreign companies issuing or trading shares in U.S. markets.¹²³ Thus,

120. KATIE BENSON, *LAWYERS AND THE PROCEEDS OF CRIME: THE FACILITATION OF MONEY LAUNDERING AND ITS CONTROL* 155 (2016).

121. *Designated Categories of Offense*, FIN. ACTION TASK FORCE, <https://www.fatf-gafi.org/glossary/d-i/> [<https://perma.cc/3RZG-XKN8>]; Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot) Act, Pub. L. No. 107-56, 115 Stat. 273, § 315. These provisions might not apply if corruption occurred in a side deal outside the primary contract.

122. Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (Anti-Bribery Convention), (Dec. 17, 1997), <https://www.oecd.org/corruption-integrity/explore/oecd-standards/anti-bribery-convention/> [<https://perma.cc/W6M8-SPGD>] [hereinafter OECD Convention].

123. The Foreign Corrupt Practices Act of 1977 (FCPA) covers criminal law violations and civil violations of its books and records requirements. The FCPA was the catalyst that eventually led to the negotiation and promulgation of the OECD Convention. The FCPA, Pub. L. 95-213, 91 Stat. 1494 (1977), 15 U.S.C. § 78dd-1, (a) reads:

It shall be unlawful for any issuer which has a class of securities registered pursuant to section 781 of this title or which is required to file reports under section 780(d) of this title, or for any officer, director, employee, or agent of such issuer or any stockholder thereof acting on behalf of such issuer, to make use of the mails or any means or instrumentally of interstate commerce corruptly in furtherance of an offer, payment, or promise to pay, or authorization of the payment of any money, or offer, gift, or authorization of the giving of anything of value to— (1) any foreign official . . . (2) any foreign political party or official thereof or any candidate for foreign political office . . . in

lawyers representing MNCs subject to the OECD Convention and, especially, to the FCPA need to be sure that the firms they represent have engaged in due diligence both internally and in host countries. Doing so will limit risks to the corporation and its management accrued from criminal activities that may be associated with otherwise legitimate business activities. Unfortunately, to avoid any liability for their clients' behavior, some legal professionals may resist onerous due-diligence rules.¹²⁴ They prefer not to know too much about those they represent.

D. Due Diligence and Professional Ethics

Due diligence obligations potentially contradict the positions of several bar associations. The IBA argues that "neither the UNGPs nor the [IBA] Practical Guide [on Business and Human Rights] are intended to override the professional standards of any jurisdiction or to prescribe any of the factors that lawyers may or may not consider as independent professionals."¹²⁵ In response to the publication of the report of UN-sponsored Financial Accountability and Transparency Initiative (FACTI), the IBA sharply criticized the report's recommendations concerning the obligations of "enablers," including lawyers.¹²⁶ Comment 5 to Rule 2.1 of the ABA Model Rules states that

order to assist such issuer in obtaining or retaining business for or with, or directing business to, any person

Id.

The Act in 78m also includes reporting requirements for listed companies, enforced by the Securities and Exchange Commission. *See generally Foreign Corrupt Practices Act*, U.S. SEC. & EXCHANGE COMM., <https://www.investor.gov/introduction-investing/investing-basics/glossary/foreign-corrupt-practices-act-fcpa> [<https://perma.cc/RB6S-W3LC>] (providing a glossary of key terms required to understand the FCPA).

124. *See* Levi, *supra* note 116 (discussing options for avoiding lawyer misconduct).

125. IBA PRACTICAL GUIDE, *supra* note 36.

126. *IBA President Says FACTI Report Recommendation Would Undermine Independence of the Legal Profession*, INT'L BAR ASS'N (Feb. 26, 2021), <https://www.ibanet.org/article/708b629d-caeb-4d78-9650-e6d250b834fd> [<https://perma.cc/DYM2-66YU>]; *see generally* FACTI PANEL, FINANCIAL INTEGRITY FOR SUSTAINABLE DEVELOPMENT (2021), <https://www.factipanel.org/reports> [<https://perma.cc/DYM2-66YU>] [hereinafter FACTI Report]. The author was a member of the FACTI panel.

“[i]n general, a lawyer is not expected to give advice until asked by the client.”¹²⁷ However, Rule 1.2(d) says that:

A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with the client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.¹²⁸

The Rules go on to say that “a lawyer ordinarily has no duty to initiate investigation of a client’s affairs or to give advice that the client has indicated is unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client’s interest.”¹²⁹ Official bar associations are very reluctant to move the needle on this issue.

However, if an MNC has made a public commitment to ESG principles and avoiding corrupt payoffs, its lawyers ought to take these statements at face value in providing advice. Arguably, such advice does not conflict with the lawyer’s responsibility toward his or her client. However, the MNC’s managers and board members may not be genuinely committed to costly ESG goals and anti-bribery pledges contained in its press releases and webinars. Attorneys should work to bring rhetoric and reality together.

IV. Mechanisms of Enforcement

Lawyers’ professional obligation to avoid or mitigate grave social ills in large-scale transnational transactions can be defended on two levels. Most basically, as outlined in Part III, it is an appeal to individual attorneys and law firms to adopt standards of ethical behavior for themselves and their firms, given existing investment treaties and anti-money laundering requirements. Secondly, as argued here, it is a plea for the legal profession and international bodies to go beyond encouraging individual integrity and to incorporate specific obligations in professional codes of conduct, including in broader efforts to improve contract drafting and enforce treaties that aim to promote foreign direct investment. The argument for this second approach

127. ABA MODEL RULES, *supra* note 14, r. 2.1 Advisor – Comment, [5] Counselor – Offering Advice.

128. *Id.*, Rule 1.2(d).

129. *Id.*

seems strong if the bar accepts my concerns as legitimate values for the legal profession to endorse.

I outline four overlapping options: (1) revised national bar association codes of conduct; (2) global efforts to harmonize professional norms; (3) professional support for the development of ethical contracting practices in ways that involve international financial institutions; and (4) advocacy by the legal profession for the rigorous enforcement of domestic and international and treaties, especially the OECD Anti-Corruption Convention.

First, national bar associations' model codes should incorporate clearer and stronger instructions to lawyers to avoid giving legal advice that could facilitate grave social harms. These instructions should outline the ethical obligations of lawyers who negotiate transnational business contracts with counterparties in countries with weak or authoritarian legal systems. Such provisions would incentivize counsel to consider the potential harm to the host country's citizens as a factor influencing acceptable contract terms. At a minimum, bar associations should require lawyers to inquire further when they advise on transactions that may facilitate violations of human rights—including corruption, threats to public safety, and/or major environmental harms.

One option is for bar associations to support national efforts to improve the integrity of its own MNCs. For example, in 2018, Canada created an ombudsperson for responsible enterprise who has the authority to review allegations of human rights abuses by Canadian corporations operating abroad in the oil and gas, mining, and garment sectors.¹³⁰

130. STANDING COMM. ON FOREIGN AFF. AND INT'L DEV., MANDATE OF THE CANADIAN OMBUDSPERSON FOR RESPONSIBLE ENTERPRISE (2021), <https://www.ourcommons.ca/Content/Committee/432/FAAE/Reports/RP11419917/faaerp08/faaerp08-e.pdf> [<https://perma.cc/MYJ5-V5ZR>]. The Canadian Ombudsperson's mandate is to:

[1] [p]romote the implementation of the *UN Guiding Principles on Business and Human Rights* and the *OECD Guidelines for Multinational Enterprises*; [2] [a]dvise Canadian companies on their practices and policies with respect to Responsible Business Conduct; [3] [r]eview allegations of human rights abuses arising from the operations of Canadian companies abroad in the mining, oil and gas and garment sectors; [4] offer informal mediation services, and [5] [p]rovide advice to the Minister on any matter relating to the CORE's mandate.

If national bars do revise their codes of professional ethics to take up these issues, the change may require additional measures—such as sanctions—for non-compliant lawyers.

Without sanctions, lawyers who voluntarily abide by ethical obligations could be disadvantaged in the market.¹³¹ To make sanctions meaningful, the bar would have to agree on a list of activities that represent serious violations. Professional standards would need a sliding scale based on degrees of harm. For example, this scale could begin with warnings, followed by stronger forms of disciplinary sanction. These negative consequences could be balanced with special mention by the bar association of those members whose practice is of especially high integrity. It remains to be seen, of course, if the profession has a clear set of value commitments capable of being translated into principles for disciplinary and honorific actions.

The recommendation for a revised code of conduct applies even to situations where the lawyer's client is obeying the law as interpreted and enforced in the counterparty's jurisdiction. Thus, it goes beyond existing debates over provisions that consider how attorneys should respond to a client's malfeasance that violates the law as applied to them. For example, in 1983, the ABA's Kutak Commission, which developed the Model Code of Conduct, proposed requiring lawyers to blow the whistle if they learn that their client is planning to commit a crime or a fraud, although it did not extend its proposals to client's ethical or moral lapses.¹³² The House of Delegates rejected the Commission's recommendations in adopting the revised code.¹³³

Id.; *Responsible Business Conduct Abroad – Questions and Answers*, GLOB. AFF. CAN. (July 8, 2020), <https://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/otherautre/faq.aspx?lang=eng> [https://perma.cc/2C7U-TEJM]. So far, the CORE has not made any decision. However, between March 15 and December 15, 2021, it received 46 inquiries and 5 complaints. *CORE Quarterly Report on Inquiries and Complaints*, GOV. OF CAN. (Jan. 17, 2022), https://core-ombuds.canada.ca/core_ombuds-ocre_ombuds/quarterly-report-rapport-trimestriel.aspx?lang=eng [https://perma.cc/6ZH5-J7FM].

131. This could happen if most MNCs have no independent interest in abiding by ethical ESG standards. This possibility highlights the importance of civil society and citizen advocates. The legal profession must operate with allies in other professions and in the broader society.

132. Stuart Taylor Jr., *Lawyer Confidentiality v. Disclosing Crimes-to-Be*, *News Analysis*, N.Y. TIMES, Feb. 14, 1983, at A9.

133. *Id.*

Whistleblowing to prevent a client's own criminal acts has led to criticism. Some argue that the practice poses a conflict of interest.¹³⁴ Dennis Ventry makes a counterargument, focusing on a case lost by a lawyer-whistleblower. He concludes that the legal profession needs to "appreciate, understand, and act on the growing number of circumstances under which a lawyer may reveal a client's crimes and frauds."¹³⁵ If the lawyer is acting to uphold a code of ethical professional behavior—not for financial gain—no conflict of interest would arise. Ventry goes on to argue, however, that reaping financial benefits from whistleblowing is ethical.¹³⁶ In support of that claim, he argues that it is disingenuous to state that a lawyer has no professional obligation to report wrongdoing simply because a statute seeks to expand the number of whistleblowers by offering a reward.¹³⁷ After all, law enforcement authorities must examine the truth of every allegation made by the whistleblower.¹³⁸ Whether or not the lawyer goes public or collects a bounty, the possibility of whistleblowing by the lawyer can deter those who might respond to an attorney's private objections by simply hiring another lawyer.

Second, ideally, the enhanced professional obligations of lawyers should be articulated uniformly at the global level. If attorneys from only a few countries are subject to higher standards of conduct, clients can easily find alternatives, resulting in no change in MNC behavior. The IBA does play an advisory role in seeking to promulgate and enforce enhanced ethical standards for the legal profession. Although it seeks to promote the convergence of national standards of conduct and encourages member bars to take certain steps, its role is

134. Jennifer M. Pacella, *Advocate or Adversary: When Attorneys Act as Whistleblowers*, 28 GEO. J. LEGAL ETHICS 1027, 1027 (2015) (arguing that the SEC's rules should be amended to make it so that attorneys cannot receive financial gain for whistleblowing).

135. Dennis J. Ventry Jr., *Stitches for Snitches: Lawyers as Whistleblowers*, 50 U.C. DAVIS L. REV. 1455, 1545 (2017).

136. *Id.*

137. *Id.*

138. The U.S. whistleblowing statutes only protect and reward those who provide information. The information provided may then be used in any subsequent enforcement action. The False Claims Act, 31 U.S. C. Sections §§ 3729-3731, and the Whistleblower Protection Act, Pub. L. No. 101-12, 5 U.S. C. § 2302(b)(8). The former rewards whistleblowers in the private sector with a share of any subsequent penalties and damages. The latter protects those inside government from retaliation.

largely confined to agenda-setting.¹³⁹ The conduct of individual lawyers is ultimately regulated by bar associations that have sanctioning authority.

Third, the legal profession could develop templates to help MNC lawyers structure deals in ways that provide leverage to those seeking ethical outcomes. If sustainable development issues arise, MNCs can bring in the World Bank or another international financial institution (IFI) to provide funding and oversight. For example, in 2000, the World Bank Group financed the Chadian and Cameroonian governments' equity stakes in a pipeline that connected Chadian oil fields to the Atlantic coast of Cameroon. After a report by the Bank's Inspection Panel critiquing the poor human rights and governance records in both countries, the Bank provided capacity-building grants for the host governments to mitigate environmental and social impacts.¹⁴⁰ It also imposed restrictions on the use of oil revenues.¹⁴¹ However, in 2008, the World Bank withdrew support from the project due to the failure of the Chadian government to abide by the terms of the arrangement.¹⁴² Despite the poor results of this effort, options for collaboration between investors, host countries, and IFIs deserve further study. Attorneys in global law firms with broad experience in the pitfalls that can arise in negotiating such contracts should advise IFIs on how to exert leverage on both parties and to design workable

139. See the summary of the IBA Principles in the text at *supra* note 30, and the IBA Practical Guide in the text at *supra* notes 32–38.

140. WORLD BANK, CHAD-CAMEROON PETROLEUM DEVELOPMENT AND PIPELINE PROJECT: OVERVIEW, REPORT NO. 36569 11–16 (2006).

141. *Id.*; see *Following Violent Crackdown in Chad, Environmental Defense & Chadian Association for the Promotion and Defense of Human Rights Call on World Bank to Rethink Funds for Chad Pipeline Project*, ENV. DEF. FUND (June 13, 2001), <https://www.edf.org/news/following-violent-crackdown-chad-environmental-defense-chadian-association-promotion-and-defens> [<https://perma.cc/AUV3-M7D7>] (describing opposition to the World Bank's funding of the pipeline project); see also INVESTIGATION REPORT: CHAD-CAMEROON PETROLEUM AND PIPELINE PROJECT (LOAN NO. 4558-CD); PETROLEUM SECTOR MANAGEMENT CAPACITY BUILDING PROJECT (CREDIT NO. 3373-CD); MANAGEMENT OF THE PETROLEUM ECONOMY (CREDIT NO. 3316-CD), WORLD BANK INSPECTION PANEL (July 17, 2002), <https://www.inspectionpanel.org/sites/www.inspectionpanel.org/files/ip/PanelCases/22-Investigation%20Report%20%28English%29.pdf> [<https://perma.cc/VM3P-6Z4H>] (conducting an investigation into the progress of the pipeline and the use of funding).

142. Xan Rice, *World Bank Cancels Pipeline Deal with Chad after Revenues Misspent*, THE GUARDIAN (Sept. 11, 2008), <https://www.theguardian.com/world/2008/sep/12/worldbank.oil> [<https://perma.cc/393N-F8HR>].

oversight mechanisms. They can draw on their own history of past contracts that either succeeded or turned out badly for the parties themselves or for non-parties subject to their effects. For example, in the case of the Chad-Cameroon pipeline, the pipeline itself was built quickly, leaving the World Bank and other investors with little leverage over a Chadian government that faced domestic pressures that were inconsistent with the social welfare aims of the arrangement.¹⁴³ One way to accomplish this goal could be for the World Bank to document both successes and failures in contract drafting, based on information supplied by transactional lawyers. Such information could help frame legal practice going forward.¹⁴⁴

Fourth, national or regional enforcement by even a subset of jurisdictions can be valuable, given that no enforceable global standards exist. As outlined below, examples include codes of conduct that apply only to the legal profession and multi-lateral treaties and domestic statutes designed to influence the behavior of MNCs seeking international business deals. If some national bar associations take a rigorous stand against the risk of their members assisting kleptocrats, criminals, and abusers of human rights, such a position could reinforce public trust and confidence in the profession, the apparent decline of which has worried some practitioners.¹⁴⁵ If the bar associations that take the lead represent a large portion of the most sought-after global transactional lawyers, they could help set the norms and expectations

143. See WORLD BANK, *supra* note 140, at ix (discussing alternative strategies that the World Bank could have used to fund the pipeline project) (“World Bank support could have been designed to reduce the disconnect between the quick pace of project construction activities of the private sector and the slower pace of capacity building by the government.”).

144. The World Bank tries to promote integrity and good governance in connection with its loans and grants. It provides services designed to ensure “that upstream projects are considered through a lens of environmental, social and governance (ESG) and with the intention to reduce carbon as much as possible . . .” *Infrastructure Finance*, WORLD BANK (Aug. 31, 2022), <https://www.worldbank.org/en/topic/financialsector/brief/infrastructure-finance> [<https://perma.cc/N6TC-2MTZ>].

145. Catherine Baksi, *Public Less Likely to Trust Lawyers*, L. SOC’Y GAZETTE (July 15, 2019), <https://www.lawgazette.co.uk/news/public-less-likely-to-trust-lawyers/71519.article> [<https://perma.cc/TR3M-NDNP>]; see also Mark A. Cohen, *Law On Trial—What the Legal Industry Can Do to Defend It*, FORBES (June 16, 2020), <https://www.forbes.com/sites/markcohen1/2020/06/16/law-on-trial-what-the-legal-industry-can-do-to-defend-it/?sh=2d09d5755de4> [<https://perma.cc/3CQ4-WP8Y>] (discussing ways for the legal industry to help restore public confidence in the legal system).

for attorneys in other countries and regions. Counterparties to any contractual negotiation could require that those sitting across that table comply with similar ethical standards. Of course, national bar associations could not easily police and enforce such commitments, but mutually recognized standards might help change expectations. At present, the closest analogy is conflict-of-interest rules for the selection of arbitrators under which one party can invoke these rules against the arbitrator selected by the other.¹⁴⁶

Reform initiatives by bar associations are not the only option. Higher ethical standards for lawyers can be buttressed if bar associations urge members to stress clients' and counterparties' obligations to abide by legal instruments, such as BITs, FTAs, and national legislation that governs international transactions, including provisions of treaties not subject to arbitration. Although most treaties that govern investment do not explicitly protect human rights, some BITs and FTAs include environmental and labor protections in their texts, and these have been incorporated into recent binding agreements, even though they are not subject to investor-state arbitration.¹⁴⁷ Tort law, led by Dutch courts, has played a more robust role for holding MNCs to account.¹⁴⁸ Victories for civil society groups,

146. Meg Kinnear, *Challenge of Arbitrators at ICSID - An Overview*, 108 AM. SOC'Y INT'L L. 412, 414–15 (2014).

147. See text accompanying *supra* notes 80,91–102.

148. *Milieudefensie et al. v. Royal Dutch Shell*, Hague District Court, (26-05-2021) C/09/571932/HA ZA 19-379. For a summary and critique of this case, see Benoît Mayer, *Milieudefensie v. Shell: Do Oil Corporations Hold a Duty to Mitigate Climate Change?* OXFORD BUS. L. BLOG (June 7, 2021), <https://www.law.ox.ac.uk/business-law-blog/blog/2021/06/milieudefensie-v-shell-do-oil-corporations-hold-duty-mitigate-climate> [https://perma.cc/8RYX-4U7E] (summarizing the District Court of the Hague's judgment that Royal Dutch Shell has an obligation to mitigate climate change by "reduc[ing] all carbon dioxide (CO2) resulting from its global operations—including those from the combustion of oil-and-gas products by its customers—by 45 percent by 2030"). The case was decided by a district court, and Shell plans to appeal. See *Shell Confirms Decision to Appeal Court Ruling in Netherlands Climate Case*, SHELL, <https://www.shell.com/media/news-and-media-releases/2021/shell-confirms-decision-to-appeal-court-ruling-in-netherlands-climate-case.html> [https://perma.cc/NKH9-PE59]. For one global law firm's reaction, see *Dutch Court Orders Shell to Reduce Emissions in First Climate Change Ruling Against Company*, CLEARY (June 30, 2021), <https://www.clearygottlieb.com/news-and-insights/publication-listing/dutch-court-orders-shell-to-reduce-emissions-in-first-climate-change-ruling-against-company> [https://perma.cc/KFW8-39XK] (noting that "this decision marks the first time any court in the world has imposed a duty on a company to do its share to prevent

although of limited immediate effect, are beginning to propel international law firms to advise clients concerning human rights due diligence and combating climate change.¹⁴⁹

Going further, a few jurisdictions require businesses to conduct due diligence to limit the risks of severe human rights violations within their supply chains or to disclose internal control measures to prevent such risks. For example, California's Transparency in Supply Chains Act and the UK's Modern Slavery Act require qualifying entities to disclose how they are preventing and mitigating risks of slavery and human trafficking in their supply chains.¹⁵⁰ In France, under the Corporate Duty of Vigilance Law, companies have a statutory obligation to monitor the risks of serious violations of human rights, health and safety, and the environment committed not only by their own operations but also their subsidiaries, suppliers, and subcontractors.¹⁵¹ Although these laws have limitations, they nonetheless illustrate ways in which business interests can be required to incorporate ethical considerations into their contractual negotiations. If business clients have an obligation to avoid or mitigate violations of human rights, lawyers have a professional obligation to help their clients carry out this obligation in ways consistent with the attorneys' own training and role.

A positive example of this is the OECD Anti-Bribery Convention. The Convention gives lawyers an incentive to negotiate honest cross-border contracts for their clients even if they risk losing contracts to firms from non-signatory jurisdictions.¹⁵² The United States remains the dominant force in the enforcement of the

dangerous climate change," and "[s]imilarly situated companies should expect to be bound by the same rules").

149. For a full discussion of human rights, see Kirkpatrick, *supra* note 82. She is a lawyer at Clifford Chance, a global law firm. Cleary Gottlieb is another global law firm advertising its commitment to and expertise in promoting "sustainability." See *Sustainability Thought Leadership*, CLEARY, <https://www.clearygottlieb.com/practice-landing/sustainability> [<https://perma.cc/N23K-PQ46>] (describing the firm's ESG-related experience and capabilities).

150. Kamala D. Harris, *The California Transparency in Supply Chains Act: A Resource Guide*, CAL. DEP'T JUST. (2015), <https://oag.ca.gov/sites/all/files/agweb/pdfs/sb657/resource-guide.pdf> [<https://perma.cc/5ZBA-NBN5>].

151. *French Corporate Duty of Vigilance Law (English Translation)*, RESPECT INT'L., <https://respect.international/french-corporate-duty-of-vigilance-law-english-translation/> [<https://perma.cc/H2DP-REY7>].

152. OECD CONVENTION, *supra* note 122.

Convention under the U.S. Foreign Corrupt Practices Act (FCPA), but several other countries have also been active.¹⁵³ In some recent cases, the United States Department of Justice has acted in concert with law enforcement bodies in other countries to reach settlements that may require firms to engage in monitored efforts to improve their internal compliance systems.¹⁵⁴ This is a promising development, but the firms involved may resist. For example, Goldman Sachs, a prominent financial institution, recently avoided such oversight through a large financial settlement with US authorities. It had been involved in deals involving a corrupt Malaysian financier that resulted in a guilty plea by its Malaysian subsidiary. Goldman itself only paid large fines to both Malaysian and U.S. authorities. It admitted “mistakes” but did not plead guilty to anything and avoided appointment of an outside monitor to review compliance procedures. Goldman blamed a rogue employee, not its own control systems or its corporate culture.¹⁵⁵ In contrast to the earlier cases involving Odebrecht and Siemens (two firms headquartered outside the US but subject to the jurisdiction of

153. OECD, 2020 ENFORCEMENT OF THE ANTI-BRIBERY CONVENTION 2 (2021), <https://www.oecd.org/daf/anti-bribery/OECD-Anti-Bribery-Convention-Enforcement-Data-2021.pdf> [<https://perma.cc/T6BT-TVN5>].

154. Important examples include settlements with Siemens, a firm headquartered in Germany, and Odebrecht, a Brazilian construction firm. For a summary of the Siemens case, see Siri Schubert & T. Christian Miller, *At Siemens, Bribery Was Just a Line Item*, N.Y. TIMES (Dec. 21, 2008), <https://www.nytimes.com/2008/12/21/business/worldbusiness/21siemens.html> [<https://perma.cc/J7MU-4AMP>]; Bertrand Venard, *Lessons From the Massive Siemens Corruption Scandal One Decade Later*, THE CONVERSATION (Dec. 13, 2018), <https://theconversation.com/lessons-from-the-massive-siemens-corruption-scandal-one-decade-later-108694> [<https://perma.cc/G57B-VBL5>]. For a review and analysis of the Odebrecht case, see Nicolás Campos et al., *The Ways of Corruption in Infrastructure: Lessons from the Odebrecht Case*, 35 J. ECON. PERSPECTIVES 171 (2021).

155. See Alexandra Stevenson & Matthew Goldstein, *Goldman Sachs and Malaysia Reach \$3.9 Billion Settlement in 1MDB Scandal*, N.Y. TIMES (July 24, 2020), <https://www.nytimes.com/2020/07/24/business/goldman-sachs-malaysia-1mdb.html> [<https://perma.cc/F8QQ-YF25>] (“Goldman Sachs, which received \$600 million in payments for its bond work, has consistently denied any wrongdoing. But top officials have repeatedly apologized for actions of Mr. Leissner, who they contended acted without the bank’s approval.”); Matthew Goldstein, *Goldman Sachs Is Said to Admit Mistakes in 1MDB Scandal*, N.Y. TIMES (Oct. 21, 2020), <https://www.nytimes.com/2020/10/20/business/goldman-sachs-1mdb-malaysia.html> [<https://perma.cc/2H4C-UEGJ>] (“Goldman has long blamed rogue employees, including Mr. Leissner, a former top partner in Asia that the bank has said acted without approval.”).

the FCPA), Goldman Sachs has political connections across US administrations and its employees' political contributions support candidates from both parties.¹⁵⁶ These examples suggests that anti-corruption law enforcement bodies might benefit from working collaboratively across national boundaries, not just to share intelligence, but also to craft enforcement strategies that treat firms evenhandedly and seek to limit the impact of political connections. Lawyers working for such firms need to help set up effective compliance systems that change internal firm behavior rather than simply cracking down on misbehaving employees. So-called "rogue employees" may just be people who took advantage of a system full of loopholes and vague standards.

V. Other Professional Enablers

The professional obligations of members of the bar extend by analogy to other professions that enable cross-border deals.¹⁵⁷ Many of them operate under national and international codes of ethics. Of particular importance are accountants, bankers and other financial market participants, architects and engineers, and other consultants.¹⁵⁸ Public accountants prepare independent audits and are

156. *Goldman Sachs, Summary* OPEN SECRETS (all cycles), <https://www.opensecrets.org/orgs/goldman-sachs/summary?toprecipcycle=2022&contribcycle=2022&lobcycle=2022&outspendcycle=2022&id=d000000085&topnumcycle=A>. Goldman Sachs defends itself in the memo: POLICY ENGAGEMENT AND POLITICAL PARTICIPATION, FEBRUARY 2022, <https://www.goldmansachs.com/investor-relations/corporate-governance/corporate-governance-documents/political-statement.pdf>.

157. OECD, ENDING THE SHELL GAME: CRACKING DOWN ON THE PROFESSIONALS WHO ENABLE TAX AND WHITE COLLAR CRIMES (2021), <https://www.oecd.org/tax/crime/ending-the-shell-game-cracking-down-on-the-professionals-who-enable-tax-and-white-collar-crimes.htm> [<https://perma.cc/RKM7-498R>]; FACTI Report, *supra* note 122 at 27–29, 47.

158. *See generally* AICPA, CODE OF PROFESSIONAL CONDUCT (2014) (providing guidance to accountants about their professional responsibilities); IESBA, HANDBOOK OF THE INTERNATIONAL CODE OF ETHICS FOR PROFESSIONAL ACCOUNTANTS (2022), https://www.ifac.org/system/files/publications/files/2022-IESBA-Handbook_ENG_Web_Secure.pdf [<https://perma.cc/FM39-57ZT>] (providing an international professional code for accountants); US BANK, CODE OF ETHICS AND BUSINESS CONDUCT (2022), <https://www.usbank.com/dam/documents/pdf/coe/coeHandbook.pdf> [<https://perma.cc/FW9Y-9QB7>] (providing a code of ethics for people who work at U.S. Bank); AIA, 2020 CODE OF ETHICS AND PROFESSIONAL CONDUCT (2020), <https://www.aia.org/pages/3296-code-of-ethics-and-professional-conduct> [<https://perma.cc/LJ4G-VR7K>] (providing a code of ethics for architects);

paid by the firms they audit. Banks and other financiers earn fees from the successful provision of financing that may depend upon a deal's profit margin. Architects and engineers draft the plans used in negotiations between MNCs and local governments and firms. Although the nature of their professional relationships to MNCs differs, all face choices about the extent to which broader ethical issues should inform their work.¹⁵⁹ Thus, efforts to raise awareness of the ethical professional obligations of lawyers should encourage others to consider related issues faced by other enablers of transnational commercial deals. Professional norm-setters need to understand how their expertise can coexist with the facilitation of unethical practices that have social, economic, and political consequences.¹⁶⁰

In many cases, willful blindness to malfeasance seems an easy way to avoid responsibility and maintain a profitable business relationship. Architects and engineering firms have earned lucrative fees from designing public buildings and other construction projects over many years. They have sometimes done this without questioning either over- or under-designed choices that pad contract terms and create health and safety hazards.¹⁶¹ Similarly, financial intermediaries may fail to ask hard questions of borrowers, especially if the contract shifts the costs of default to others, such as the state. Examples of the former include the decade-long corrupt system of public contracts in Laval, Quebec,¹⁶² and of the latter, the U.S. mortgage crisis in the early

NSPE, *NSP Code of Ethics for Engineers*, <https://www.nspe.org/resources/ethics/code-ethics> [<https://perma.cc/WKT7-WNSA>].

159. For example, see Stavros Gadinis & Colby Mangels, *Collaborative Gatekeepers*, 73 WASHINGTON AND LEE L. REV. 797 (2016); Eileen Z. Taylor & Jordan A. Thomas, *Enhanced Protections for Whistleblowers under the Dodd-Frank Act: The Responsibilities, Rights, and Risks of Reporting Fraud*, 2013 THE CPA J. 66, <https://info.labaton.com/hubfs/CPA-Journal-Enhanced-Protections-for-Whistleblowers-Under-the-Dodd-Frank-Act.pdf> [<https://perma.cc/FJ6H-DY6B>].

160. FACTI REPORT, *supra* note 126, at 27–29, 47.

161. Thus, professionals may enable the corruption of others without being actively corrupt themselves, *id.* Of course, professionals are sometimes active participants. For example, John Poulson, an architect, was convicted of corruption in connection with public construction projects in the UK. *Architect John Poulson and Maulding Corruption Case*, SCAMLEAKS (May 2015), <https://scamsleaks.blogspot.com/2014/05/architect-john-poulson-and-maulding.html>.

162. Christine Muschi, *Corruption Was Well-Implanted in Laval, Mayor's Government Inquire Hears*, THE GLOBE AND MAIL (May 16, 2013), <https://www.theglobeandmail.com/news/national/corruption-was-well-implanted->

21st century.¹⁶³ These enabling professions need to be analyzed and critiqued with a concern for the ethical obligations of those who make a living from their professional affiliations and training.

CONCLUSION

Much discussion of corporate social responsibility emphasizes firms' direct environmental and social impacts and their internal governance structures. These are worthy concerns, but I seek to broaden the frame to include the ethical issues that arise in the negotiation and implementation of contracts between MNCs and counterparts in countries with pervasive poverty or serious governance challenges. Here is where lawyers' professional responsibility comes in. If a deal presents risks of bribery, fraud, violence, or serious environmental and human rights abuses, both the ABA Model Rules and similar international bar codes should take account of the more expansive notions of corporate responsibility elaborated by the UNGPs. Lawyers should also work to uphold MNCs' own commitments to CSR in the negotiation of transnational deals. In other words, ethical issues arise not just in a firm's conduct of its internal affairs but also in the behavior of those associated with its contractual activities. Ethical issues that affect transnational business dealings will arise for the lawyers who represent these firms.

If the host country's government is kleptocratic or otherwise corrupt and dysfunctional, the terms of the MNC's investment contract can exacerbate or ameliorate such governance problems. A MNC's support of good governance should extend beyond its relationships with its own employees, suppliers, shareholders, financiers, and customers. Under such an expanded notion of governance, the firm will face difficult choices about how to respond to institutional challenges. Will an MNC's investment facilitate or undermine efforts to improve the governance of the host country itself? The possibility of affecting economic and social development, of course, will only arise when the deal is large with respect either to the size of the host country's economy or to that of a particular sub-region. A deal to exploit a mineral resource can give a substantial boost to the host country's

in-laval-mayors-government-inquiry-hears/article11979784/
[<https://perma.cc/Q99M-CM5E>].

163. MARTIN NEIL BAILY, ROBERT E. LITAN & MATTHEW S. JOHNSON, *THE ORIGINS OF THE FINANCIAL CRISIS* 17–18 (2008).

budget but also can deeply affect the environment and the living conditions of those in the affected region.

All of the difficult tradeoffs and ethical challenges for investments with systemic effects place an especially heavy burden on transactional lawyers who advise MNCs. They ought to help guide contract negotiations in the direction of mutually beneficial deals that further the economic, social, and political development of the host state, not just of the MNC. Lawyers should consult their own system of values, but also should be obligated by professional codes of conduct to avoid supporting deals that overlook or abet corruption, create threats to public security and safety, create severe environmental harms, and/or violate basic human rights. Lawyers ought to be part of the ongoing efforts to limit conflicts between corporate transactions and the rights and welfare of citizens. Even given the voluntary nature of corporate codes and recommendations, lawyers can help to incorporate the principles they express into the mainstream of acceptable global investment practices.

At the same time, the MNC's lawyers should not and cannot take responsibility for a host state's policy agenda. They cannot implement human rights, social, and environmental policies on their own in particular polities. Nevertheless, they can ask their clients to consider whether the particular investment in question will violate internationally recognized human rights or global agreements.

Innovations that have arisen from collaboration with International Financial Institutions and enforcement of the OECD Anti-Bribery Convention are important developments, but they are not sufficient. They depend too much on the prosecutorial energy and resources of a few countries and international bodies. Short of calling in outside help from an IFI, what can lawyers do to avoid helping draft and implement contracts linked to corruption, threats to public security and safety, environmental harms, or violations of human rights? Lawyers should be able to signal their compliance with ethical standards, and national bar associations should identify non-compliers and sanction them. However, this option would require the bar to clarify the nature of specific risks—for example, evidence that lawyers supported clients who finance terrorism, evade taxes, or commit bribery. Otherwise, it will be difficult to determine what behavior is off limits and incorporate existing obligations to the client. Enforcement is unlikely to be successful if it punishes lawyers for an undefined set of behaviors or, conversely, if the violators are seldom identified and punished. Further, national-level implementation

complicates the relationship between lawyers from different jurisdictions. Transnational business deals often require cooperation between lawyers from multiple countries who are subject to their own national codes of ethics. If only a subset of lawyers in a deal faces strong ethical obligations, they may be unable to affect the outcome of the negotiation.

Backed by international investment treaties, the legal professionals who help to draft and implement contracts for foreign direct investment face issues of attorney-client privilege if ethical issues arise in the drafting and implementation of contracts. When do lawyers have an obligation to report suspected illegal behavior by their clients? What if both the client and its negotiating partner seek to collaborate on contract terms and on subsequent behavior that is arguably corrupt or fraudulent or that evades taxes? Do lawyers have a professional obligation to refuse to assist in such transactions, even if the extent of legal violations is uncertain and the chance of catch is very low? Attorneys' codes of ethics already prohibit them from knowingly facilitating criminal or fraudulent acts, and the ABA recently issued an opinion saying that lawyers have an ethical responsibility to inquire further if circumstances suggest a high probability of criminal or fraudulent behaviors of clients.¹⁶⁴ These provisions, however, only prohibit the provision of legal services; they do not give lawyers an obligation to blow the whistle on such behavior. When should they have such an obligation with respect to clients or counter-parties? The answers to these questions are especially vexed in an international environment where ethical standards and principles of lawyer-client privilege may vary across jurisdictions.¹⁶⁵

The most straightforward cases are broadly recognized legal violations—corruption, facilitation of violence, and clear human right abuses. However, similar ethical issues arise for contracts that damage the environment and the socioeconomic conditions of local residents. Some recommend default rules to govern deals involving participants

164. AM. BAR ASS'N STANDING COMM. ON ETHICS AND PRO. RESP., FORMAL OPINION 491 (April 29, 2020), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba-formal-opinion-491.pdf [<https://perma.cc/3BWV-6UZ7>].

165. See generally Susan D. Franck, *International Arbitration and Attorney-Client Privilege—A Conflict of Laws Approach*, 51 ARIZ. STATE L. J. 935 (2019) (analyzing international jurisdictions' approach to privilege issues in arbitration).

based in different legal systems.¹⁶⁶ However, any default rule ought to acknowledge the possibility that strong attorney-client protections can permit the parties to entrench unethical behavior without expressions of concern from the parties' lawyers. There is much work here for bar associations and international watchdogs. Codes of professional legal ethics ought not to focus as much as they do on the specific relationship between lawyer and client. Important as that is, professional standards ought to be broadened to incorporate widely recognized social concerns and rely less strongly on lawyers' knowledge of the specific deal at hand in ways that ignore its predictable ramifications.

This broader focus is especially important for the governance prong of ESG policy. Lawyers helping to negotiate multinational deals that are large relative to the host country's economy and society need to provide firms with advice and draft contract terms that enlist the power of their clients and hold them to their own CSR commitments. Profits are necessary for any investment project, but blindness to a deal's long-run economic and social consequences can backfire, seriously damage the host country's citizens, and help to undermine the international economic order. Governance effects ought to go beyond the firm's own internal structures. Instead, MNCs should avoid propping up authoritarian regimes with outside economic inflows. Attorneys ought to seek to mitigate tendencies that entrench kleptocrats, and they can base their advice on the long-run value to the corporation of a reputation for supporting good governance, fighting corruption, and promoting human rights and environmental benefits.

166. Rachel Reiser argues that the international arbitration system ought to develop transnational rules that stress fairness to the parties and their reasonable expectations. She argues that rules of thumb that use the place of arbitration, the professional domicile of the lawyer, the place where the document is located, or the most/least favored nation approach are all arbitrary and unacceptable. She recommends creation of a default rule to apply across the board that protects the reliance issues of the parties. Rachel Reiser, *Applying Privilege in International Arbitration: The Case for a Uniform Rule*, 13 CARDOZO J. OF CONFLICT RESOL. 653 (2012).

In a different forum—initial public offerings in the Hong Kong—conflicts are arising between the London's investment-banking culture as imported into Hong Kong and the more free-wheeling practices of Chinese IPO deals. *See Hong Kong's regulators try to push back against Chinese market practices*, THE ECONOMIST (July 3, 2021), <https://www.economist.com/finance-and-economics/2021/07/03/hong-kongs-regulators-try-to-push-back-against-chinese-market-practices?giftId=e8aba94b-9407-4332-8764-6b2ac0a5b6d3> [https://perma.cc/6ML3-UJRE].