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The Case for Public Regulation of Professional Ethics for Counsel in International Arbitration

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Who Should Regulate the International Bar?

The regulation of professional ethics of the international bar is among the most hotly debated issues in international arbitration (inter-state, investor-state, and commercial). It reflects the regulatory gap that has developed as proceedings before international courts and tribunals have proliferated and counsel diversified. Addressing this issue is crucial, as diverging national regulation as well as a lack of clarity about acceptable standards of conduct may jeopardize the integrity and effectiveness of proceedings and cast the legitimacy of the administration of international justice into doubt.

So far, the debate on professional ethics in international arbitration has focused on both developing the basic conceptual and normative framework and producing codes of conduct that are workable and acceptable in practice. It has brought about thorough academic studies, such as those of [Catherine Rogers](#) and [Arman Sarvarian](#), and detailed codes of conduct, including the [2010 Hague Principles](#), the [2013 IBA Guidelines](#), and the Guidelines for Party Representatives annexed to the [2014 LCIA Arbitration Rules](#).

Less addressed are questions of who should regulate professional ethics in international proceedings and who has the legitimacy to do so. Much of the present debate is based on the widespread assumption, if not agreement, that private bodies and professional self-regulation are the institutions and instruments best suited to address the regulatory gap. Public actors—international courts and tribunals, as well as international organizations such as the [Permanent Court of Arbitration \(PCA\)](#) or the [International Centre for Settlement of Investment Disputes \(ICSID\)](#)—are rarely considered as potential regulators of counsel conduct and enforcers of sanctions for misconduct. This is all the more surprising as these actors are uniquely positioned to play a key role in the regulation of the international bar.

Public Regulation versus Self-Regulation or National Approaches

Ensuring the integrity and efficiency of international proceedings by upholding basic procedural principles is an objective that seems best pursued by regulation through international courts, tribunals, or administering institutions, as opposed to private (professional) organizations or national bar associations. The particular advantage of international courts, tribunals, and administering institutions, especially those that have broad membership, such as the PCA or ICSID, is that they are

public actors serving a public purpose in the peaceful settlement of international disputes,.

Public institutions are particularly well placed to address those aspects of professional ethics that concern the relationship between counsel and court (or tribunal) and therefore form part of the law of procedure. Examples of this category include the nature and scope of counsel duties with respect to the presentation of truthful evidence, questions concerning the preparation of witnesses, and the permissibility of ex parte communications between counsel and court or tribunal. International courts, tribunals, and administering institutions are less suited to regulate other aspects of professional ethics, such as the regulation of the legal services market to ensure equal and fair competition among counsel and to protect clients' interests against professional malpractice.

In contrast, arbitral tribunals face limitations in developing rules on professional ethics, due to their one-off nature and the resulting risk of fragmentation. Likewise, administering institutions that are in essence organs of the international business community face limitations in terms of the legitimacy they can confer on the regulation of the international bar. Regulation by such bodies may be seen in the eyes of the general public as self-serving instruments that have the 'private' interest of international lawyers in mind, rather than the 'public' interest of the international community in the administration of justice. Public regulation of counsel conduct in international proceedings would alleviate that concern. Furthermore, in the absence of some other international body in charge, only an international court, tribunal, or administering institution would be able to ensure that all actors appearing in international proceedings are subject to the same rules of professional conduct.

While largely public, national regulation of professional ethics also has important limitations. Allocating responsibility to regulate counsel conduct and sanction breaches to national bar associations or state courts cannot provide a level playing field in international proceedings. National institutions may establish different rules, administer identical rules differently, and differ in their enforcement and sanctioning practices. Additionally, such regulation would not reach non-lawyers appearing as counsel before an international court or tribunal. At least in theory, giving national institutions power to regulate counsel conduct and sanction breaches could also undermine the integrity of international proceedings. Conceivably, national institutions could be captured by one of the (state) parties to an international proceeding and used to sabotage the proceeding by taking action against the opposing party's counsel. Such a result would be avoided if international courts, tribunals, or administering institutions were in charge of developing and administering rules for counsel conduct in international proceedings.

Regulatory Power of International Courts and Tribunals

International courts and tribunals are not only well placed to ensure uniform and legitimate regulation of counsel conduct in international proceedings, they also possess the legal authority and competence to develop and enforce such rules. Rules governing counsel conduct in relation to an impending or ongoing international proceeding can be enacted as part of the competence to 'lay down rules of procedure' that many international courts and tribunals are expressly given. Examples include Article 30(1) of the Statute of the International Court of Justice (ICJ) or Article 16 of the Statute of the International Tribunal for the Law of the Sea.

Such competence encompasses not only questions concerning the organization of hearings, the presentation of evidence, and the decision-making process of the court or tribunal, but also the procedural rights and obligations of the parties and the standards of conduct for their counsel in relation to the proceedings. Thus, on the basis of Article 30(1) of its Statute, the ICJ has laid down in its Practice Directions some, albeit limited, standards of conduct for counsel. Similarly, under the competence conferred to ICSID's Administrative Council under Article 6(1)(c) of the ICSID Convention to 'adopt the rules of procedure for ... arbitration proceedings,' rules on counsel conduct could be

adopted.

International courts and tribunals lacking such express authorization to develop rules of procedure can rely on their inherent powers to take all necessary measures for the preservation of the integrity of the proceedings before them and to ensure the effectiveness of their judicial function. In fact, the HEP v. Slovenia tribunal, an arbitral tribunal established under the ICSID Convention, and the International Criminal Tribunal for the Former Yugoslavia have successfully done so.

These inherent powers could also serve as a basis for international courts and tribunals to develop rules on how counsel should conduct themselves in international proceedings and to implement sanctions in case they are breached. For example, the International Criminal Court and the International Residual Mechanism for Criminal Tribunals have adopted codes of conduct that include wide-ranging sanctions, including admonition, public reprimands, the imposition of fines, and even suspension or permanent ban on practicing before the respective court or tribunal. Likewise, courts and tribunals in interstate or hybrid proceedings have used various means to sanction counsel misconduct, including reprimanding counsel in the award or judgment, imposing costs on the party whose counsel engaged in professional misconduct, taking into account misconduct in weighing evidence, and even excluding counsel from further proceedings (for a survey I co-authored with Charles Brower, see [here](#)). These sanctions, if properly employed, are likely no less effective in ensuring compliance of counsel with standards of conduct than the sanctions that can be imposed by state courts or national bar associations.

Conclusion

One concern regarding public regulation relates to the multitude of existing international courts, tribunals, and administering institutions for arbitral proceedings. If all of such institutions developed rules on professional ethics in isolation, little would be gained in ensuring clarity and uniformity in regulating the international bar. Mechanisms are needed for international courts and tribunals to coordinate their work so as not to impose starkly diverging obligations concerning counsel conduct. Inter-court and tribunal working groups and consultation with administering institutions is one option. Addressing questions of professional ethics in existing inter-governmental platforms and organizations, such as UNCITRAL or the PCA, is another.

At the same time, pushing for more public regulation of the international bar does not mean that the development of rules on professional ethics by private, professional organizations or arbitration institutions has been in vain. On the contrary, such initiatives are highly useful in laying the ground for public regulation of professional ethics in international proceedings. In developing such regulation, public actors can build on, or even endorse, the rules developed by private professional organizations. Such endorsement would not only validate the efforts made by such organizations in the development of rules of professional ethics. It would also give those rules the public imprimatur that is needed to enhance the legitimacy of international arbitration in the eyes of the general public. This would ensure that international dispute settlement is practiced in the interest of the entire international community and in the name of international law, rather than only in the interest and name of international lawyers.