

CONFLICT OF INTEREST IN
GLOBAL, PUBLIC AND
CORPORATE GOVERNANCE

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Managing conflict of interest: lessons from multiple disciplines and settings

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1. Introduction

This concluding chapter draws together the findings of the preceding chapters. It deals with ten issues which have emerged as salient ones in different settings. Section 2 summarises regulatory proposals made for three spheres of governance (in international institutions, in public administration and in corporate governance). Section 3 deals with the recurring theme of motives (intentions) versus effects, and of processes versus results. Regulation of risk and appearances includes the criminal law concept of bribery as an offence of endangerment. Moreover, conflict of interest can have a (potentially obnoxious) effect on the actual decision only when leeway is granted to decision-makers. Private and public law conceptualise this issue by different techniques. Section 4 values independence and impartiality as guarantees of non-conflictedness of judges (especially international judges), of arbitrators (especially in investor-state arbitration), and of members of international expert bodies. Public administrators are not independent, but they must be impartial. Section 5 analyses conflict of interest in politics, while distinguishing the various types of office-holders: elected politicians, members of parliament, and heads of state. Section 6 specifically investigates financial interests, with regard to bankers' compensation and management and board payments. Section 7 deals with the trade-off between unconflictedness and disinterestedness versus expertise and connectedness, which appears to be inevitable. The preceding chapters have demonstrated that it might be well worth tolerating conflict of interest in order to benefit from the conflicted

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agents' expertise. Besides securing expertise, the exploitation of conflict of interest may engender further benefits (Section 8). For example, it might under specific conditions even contribute to institution-building. Section 9 deals with conflict of interest in multi-level governance. Here the conflict between national and international interests is a systemic problem. Section 10 explores the limits of the law. The proliferation of conflict of interest regulation in all spheres of governance triggers the question whether conflict of interest is and should be a legal concern, or whether it should rather be treated as a matter of integrity and professionalism. The legalist approach might be futile or even counterproductive. However, any integrity culture needs a proper institutional frame, which can in turn be developed through the law itself. Section 11 concludes that there is convergence regarding both the *problématique* of conflict of interest and the regulatory reactions, across all spheres of governance. The privatisation of previously public tasks has proved to be a major conflict of interest-generating factor, also in the international sphere. Similar regulatory responses to conflict of interest have been pursued on different levels of governance, and this is worth acknowledging and promoting. First, a common rationale for combating conflict of interest is the protection of trust. Secondly, command-and-control regulation and market-based regulation must be mixed. Transparency requirements make sense but also have their limits, in all spheres of governance. Finally, pluralisation, instead of neutralisation, is a common and recommendable strategy to manage conflict of interest. The costs arising from strictly banning conflict of interest are similar in all spheres of governance. Despite these similarities, regulatory responses must of course remain diverse and tailored to the situation. In the end, in pluralist settings, notably with their extensions to the global level, conflict of interest regulation can be conceived as one procedural strategy to pursue the *bonum commune*.

2. How to regulate conflict of interest? Concrete proposals in three spheres of governance

Various chapters of the main parts of this book make suggestions for improving regulation of conflict of interest. Three chapters exemplify the three spheres of governance: global, public and corporate. Their findings are summarised in this section.

2.1 'Conflict of interest of international civil servants' (Chapter 4)

Auguste Nganga Malonga, in Chapter 4, asks the relatively novel question whether not only officers of national public service, but also officials of international organisations need guidelines on conflict of interest. Nganga Malonga's starting point is that the difference between national public services and international public service is eroding. This in particular includes the closer relations with the private sector on both levels of governance which bears an emerging potential for new forms of conflict of interest. The conceptual background is global administrative law. Through that lens, international organisations are considered as genuine global public administrations. Therefore they are expected to make similar efforts to acquire (or restore) public confidence and to retain and gain legitimacy.

Nganga Malonga gives a useful overview of staff regulations and rules of the most important international organisations, and mentions new important documents which address conflict of interest in international organisations, namely the report of the international civil service commission of 2002 and the draft for a UN-system-wide Code of Ethics. However, uniform codes are problematic, because each of the organisations has its own mission, has a staff composed of various nationalities, and duty stations in many countries.

Nganga Malonga enumerates and illustrates the typical conflict of interest constellations which require regulation. One issue is contracts and recruitment, where the promotion of relatives and favouritism occurs. A second issue is financial disclosure requirements. The open regulatory question is to whom this should apply – only to higher staff or to all? A third issue are external activities and relations with private sector and non-profit organisations (including teaching, publications, participation to advisory functions in scientific or governing boards). Fourthly, attempts from lobbyists to influence the work of international organisations are growing. For example, the World Health Organization is influenced by the pharmaceutical industry.¹ This constellation also calls for regulation. Further issues rising also for international organisations are post-employment and the protection of confidential information acquired during office against later use.

Besides the identification of the subject matter issues, the level of regulation needs to be determined. It is an open question whether overall

¹ See in detail pp. 409–411.

soft standards on conflict of interest in international organisations have already emerged. Because conflicts are not per se improper, the organisations' disciplinary procedures seem not to be an appropriate response. Nganga Malonga suggests placing the emphasis on prevention. To his mind, standards of ethics or codes of conduct should contain the elements of ongoing risk analysis and awareness raising through training programmes with use of case studies.

In conclusion, the emergence of the issue of conflict of interest in the international bureaucracies parallels and is indeed a natural consequence of the evolution of the role of international organisations on the world stage. Vigilance is required especially because of the relations to the private and the non-profit sector. And increased scrutiny is appropriate because of the use of public funds. Success of global governance requires public trust, and managing conflict of interest is one building block of generating and maintaining such trust.

2.2 *'Conflict of interest and the administration of public affairs' (Chapter 9)*

Benjamin Schindler uses examples from Swiss administrative law to make the conclusive argument that specific statements on the exact definition and methods of combating conflict of interest are possible only within the framework of a national legal system. As Jean-Bernard Auby,² Schindler unmasks the image of an impartial administration devoting itself to the public good in complete independence of individual interests and partisan disputes as a regulative ideal which can however never be attained in practice, because there is no a priori existing and clearly identifiable public good or interest. And it is no more possible to provide an ultimate definition of undesirable conflict of interest than it is to define the public interest. The modern administration's task of assessing and weighing interests entails a political responsibility of the administration, which cannot be assumed by isolating itself from outside influences.

Governmental offices, agencies, commissions, services and organisations are beset by a broad and changing spectrum of conflict of interest all over the world. But whether these conflicts should be regarded as undesirable or not tends to depend on historical experience and on the

political environment. Moreover, the ways and methods to prevent these conflicts can vary from nation to nation when considering legal tradition and administrative culture.

For example, the historically entrenched Swiss (cantonal) style of administration is prone to conflict of interest, because it has traditionally eschewed a fully professionalised administration, and has instead relied on part-time administrators from the citizenry, as a means of democratic self government. Also, the very small scale of the administration in the cantons much increases the risk that personal or professional ties or animosities impact on administrative decisions. Thirdly, the Swiss administration has been very open towards the private sector and runs many public-private ventures. But where the state regulates exactly the area in which it acts as an entrepreneur itself, a conflict of interest is inbuilt.

Schindler discusses three legal instruments for managing conflict of interest in the administration: public sector employment law, administrative organisational law and administrative procedural law. Regarding administrative procedure, he suggests a strong functional separation in the very early administrative stages, and an emphasis on contradictory elements, following the model of the US Administrative Procedure Act, in order to further the truly comprehensive assessment and balancing of interests.

Despite finding that any approach to conflict of interest in the administration must inevitably be a local one, Schindler identifies a global 'minimal heart of good governance', namely that public officials must not exploit their office for personal ends. In addition, a tendency to global harmonisation of legal concepts relating to conflict of interest can be observed in two specific areas of administrative law. In public procurement, an area particularly prone to corruption, favouritism, and nepotism, strict transparency and communication requirements have emerged worldwide, last but not least in the course of national implementation of the WTO General Procurement Agreement.

In environmental law, a different strategy has been pursued. The aim here is not to suppress certain interests, but to strengthen the representation of the environmental interests which are in structural terms under-represented, for example through special rights of appeal for environmental NGOs.

Schindler points out that criminal law is suited to tackle only the most extreme forms of conflict of interest in form of outright corruption. In order to address the most common and less severe forms, regulation should combine employment legislation, the law of administrative organisation

² Auby, 'Conflict of interest and administrative law', Chapter 8 in this volume.

and administrative procedural law. Schindler concludes that a one-size-fits-all solution for the whole area of public administration should be treated with considerable caution. Administrative structures, cultures and legal systems are far too divergent for such an approach.

2.3 'Taking conflict of interest in corporate law seriously – direct and indirect rules addressing the agency problem' (Chapter 17)

Rashid Bahar and Antoine Morand address conflict of interest in corporate law which is a particular, egregious type of agency conflict. Corporate law is beset by agency conflicts because its distinctive features (the pooling of assets of shareholders, who jointly control a business through transferable shares, and the delegation of management to specialised directors and managers, while shareholders enjoy the benefits of limited liability) require a principal to rely on a specialised but self-interested agent.

Obviously, the *managers* may be conflicted because they may not only have the interest of investors at heart. The controlling *shareholders* present the risk for *minority shareholders* that they will divert corporate profits for their own benefit. Thirdly, shareholders, directly or through the management they appoint, may use corporate assets to their own benefit without considering the interests of other persons (*creditors and other stakeholders*) who invested financial or human capital in the endeavour.

From an agency perspective, the core purpose of corporate law is to minimise and hold in balance these three agency problems. Bahar and Morand use the example of Swiss corporate law, with comparative references to other jurisdictions, to test this proposition. They first survey those few rules which explicitly aim to contain conflict of interest, notably the directors' and officers' duty of loyalty and equal treatment of shareholders (which might be considered as the 'positive component' of conflict of interest). The authors then identify other legal provisions, notably in the Swiss Code of Obligations, which relate to issues such as structures of a stock company, shareholder rights and liability, and which might implicitly or indirectly also result in limiting conflicts of interest. Bahar's and Morand's main conclusion is that, while Swiss corporate law hardly explicitly addresses conflict of interest, the bulk of the statute law indirectly addresses the issue. Still the current legal regime seems to dissatisfy the 'users' of corporate law, as the low ranking Swiss corporate governance in the 'Doing business' studies of the World Bank shows. The existing rules are not well calibrated, they are in some

respects over-inclusive, in others under-inclusive for addressing conflict of interest. Bahar and Morand therefore suggest that the law reformer should address systematically the various types of conflict of interest and subject them to the same set of rules. They suggest to avoid outright banning of simultaneous jobs and not to prescribe incompatibilities by law, in order to preserve the benefit of specialisation and expertise which results from the reliance on agents. Instead, the law should introduce procedural mechanisms such as disclosure, voting rights, and trustees to monitor compliance. These mechanisms should allow shareholders and creditors to react through voice and rights. Procedural mechanisms, as opposed to substantive standards, constitute a legislative framework in which the corporation can operate freely without being stifled by the legislator which is not equipped to decide in an abstract fashion what is good for companies. Procedural rules have the further advantage that courts are well equipped to apply them without having to enter into substantive business decisions when scrutinising a conflicted situation.

3. Regulatory approaches to motives, appreciation and process

An important theme which recurred throughout the chapters of this volume is that of motives (intentions) versus effects, of processes versus results. Crucially, the concept of conflict of interest relates to intra-personal conflicts. The 'conflictedness' is a state of the mind of a person who is empowered to take decisions on behalf of others. That state of mind can only be inferred from external indicators. It can hardly be verified from the outside whether a decision-maker has in fact been conflicted, whether that conflict had a decisive impact on the decision-making process, and whether it was a causal factor for the resulting decision. Therefore, regulators all over the world seeking to manage conflict of interest must pay attention to decision-making motives and processes rather than to the outcomes.

In that context, a kind of cross-over evolution has been diagnosed. While the approach to 'conflict' has become more objective (focusing on appearances, and not on what actually happened, but what might happen), and thus implied a move towards prophylactic laws, the approach to 'interest' has become more subjective, covering no longer merely pecuniary, but all kinds of interests.³ Appearances and

³ Stark, *Conflict of Interest in American Public Life*, passim, esp. pp. 4–5.

presumptions play a part both in the public sphere and to the professional sphere, as two chapters in this book illustrate.⁴

3.1 'Conflict of interest and administrative law' (Chapter 8)

Jean-Bernard Auby, in Chapter 8, asks whether the logics of administrative law are well in accordance with those which are the rationale for avoiding conflicts of interest in public apparatuses. The analysis is based on a broad concept of conflict of interest which includes conflicts between different public interests.

Auby points out that administrative law, more than other areas of law, needs to address conflict of interest, but at the same time has more difficulties in dealing with the issue. The need stems from the *inevitability of administrative discretion*. The more discretion, the more important becomes regulation (or at least taking cognisance and establishing principles) on conflict of interest. But the difficulties arise from the convergence of private and public interests, and from the impossibility of 'neutrality' in balancing conflicting public interests.

Auby concludes that once it is admitted that administrators are prone to conflict of interest and that this is a problem which must be tackled, the consequence is that not only administrative rules but our entire understanding of administrative law requires modification. Notably, there is a need to reconsider what 'the' public interest and public interests are in legal terms. It might be added that this question poses itself also on the level of global governance.⁵ For example, is there really an 'interest of the European Union', as Article 17 of the Treaty on the European Union (TEU) presupposes, and who defines it and how?⁶

3.2 Regulation of risk and appearances

The concept of conflict of interest does not refer to actual wrongdoing, but only to the potential to engage in wrongdoing. It describes a situation, not an action. An office-holder or professional does not

⁴ Besides Auby's chapter also Davis, 'Empirical research on conflict of interest: a critical look', Chapter 3 in this volume.

⁵ See Peter, *Public Interest and Common Good*.

⁶ Art. 17(1): '1. The Commission shall promote the general interest of the Union and take appropriate initiatives to that end.' Treaty on European Union (TEU) of 13 December 2007 (OJ 2008 C 115/13).

'commit' a conflict of interest, he may find himself in a situation.⁷ The presence of a conflict of interest needs 'no wrong result, not even an intention to do wrong – only the violation of our sense of "the rules of [fair] play"'.⁸ 'The issue is one of fair play and, as such, is more a matter of conscience . . . than of consequences.'⁹

The question is whether the rules of fair play should be enforced by law. In any regime under the rule of law, regulation which curtails the liberty of those subjected to it must not be disproportionate.¹⁰ This means that regulation on conflict of interest should be as unobtrusive as possible, and should intervene only where this is necessary. Regulation on conflict of interest could easily be justified if it were clear that a conflicted state of the mind always led to wrong decisions. However, there is agreement that focusing on wrong decisions would not suffice to combat the harm. Regulators seek to ban conflict of interest already on the ground that it bears the particular risk of wrong decisions, even if that risk does not materialise. The argument is that conflict of interest is a (moral) harm in itself, because 'it renders one's judgement less reliable than normal. Conflict of interest creates an unusual risk of error.'¹¹ From a legal perspective, 'the best argument for laws disallowing conflicts of interest probably lies within the threat of a general disorder that would arise only "if everybody did it"'.¹²

But why would focusing only on actually wrong outcomes not be sufficient? First of all this would require an examination of causality and alternative causalities, which is unfeasible. If an effective influence of the interest on the decision (i.e. a causality of the interest for the outcome) were required, this would, for example, not be the case if the decision was taken by a body by unanimity, and when the conflicted member did not play a crucial part in the decision-making process, especially if he was not a rapporteur or chairman.¹³ In those cases, conflict of interest would have to go unsanctioned. More importantly, the mere risk of a wrong outcome in

⁷ Speck, 'Conflict of Interest', p. 67. See also Davis, 'Conflict of Interest', p. 592: 'Having conflict of interest is not like stealing money or taking a bribe. One can have a conflict of interest without doing anything wrong.'

⁸ Margolis, 'Conflict of Interest and Conflicting Interests', p. 364. ⁹ *Ibid.*, p. 365.

¹⁰ See on proportionality concerns Hine, 'Conclusion', pp. 214–215.

¹¹ Davis, 'Conflict of Interest', p. 589.

¹² Margolis, 'Conflicting Interests and Conflicting Interests', p. 364.

¹³ See in this sense Commission de réflexion pour la prévention des conflits d'intérêts dans la vie publique, *Pour une nouvelle déontologie de la vie publique* (26 January 2011), p. 47 with reference to French administrative law.

itself undermines *trust*. Trust is a good deemed worthy of protection in all three spheres of governance, as will be shown in detail below at pp. 411–413.

Besides banning conflicts which in themselves constitute only a risk of a wrong decision, regulators go even further and tackle not only the conflict but already the *appearance* of conflict. The reason why appearances count again lies in the fact that the 'conflict' is a state of the mind. This means that real conflictedness or non-conflictedness can hardly be measured. Therefore, both public law and corporate law treat appearances of a conflict on the same footing as actual conflicts.¹⁴

To conclude, in all spheres of governance, regulators address conflictedness as such (independent of its impact on decisions). The justification is that independently of whether the decisions taken by a (potentially) conflicted fiduciary is in fact not in the principals' best interest, it is apt to undermine the confidence of the principals (clients or the general public). And because of the preoccupation with trust and confidence, additionally even the mere appearance of a conflict of interest is tackled by regulators on all levels of governance, and with all types of regulatory instruments, including professional self-regulation. If the risk has materialised, and the decision taken by a conflicted decision-maker was indeed wrong (assuming that this can be precisely determined, which is not always the case), this constitutes an additional harm.

3.3 Corporate and administrative law: business judgement rule and discretion

In the modern constitutional state, public bodies may not act without a legal basis. And given the overall state of regulation, professionals do not act free of legal constraints either. Do, as a general matter, these legal constraints effectively neutralise any potentially obnoxious effect of possible conflict of interest? Indeed, only if a decision-maker has a leeway, a conflict of interest can have an effect on the actual decision. If the decision-maker does not have any manoeuvring space, his conflictedness would and could not make a difference to the result.

It might be argued that, due to the inherent indeterminacy of legal norms, no legal rule can strictly predetermine the outcomes of its

¹⁴ See for public governance Organisation for Economic Co-operation and Development (OECD), *Managing Conflict of Interest*, p. 13; for corporate governance Thévenoz and Bahar, *Conflict of Interest*, p. 21 on the legal presumption that the duty of loyalty is not complied with in specific situations.

application. There is never only one 'right decision', neither for the judge nor for the administrator, nor for the law-abiding professional.¹⁵ Law-interpreters and appliers always have some leeway. This means that even in a strictly regulated context, the decision-maker's conflict of interest has the potential to influence his or her way of applying the legal rules to the facts at hand.

Moreover, in all spheres of governance, the law has acknowledged an additional manoeuvring space through specific legal techniques. For example, the interplay between national regulation and European judicial scrutiny is governed by the European Court of Human Rights concept of a '*margin of appreciation*', conceptualising the leeway domestic authorities enjoy when applying the standards of the European Convention of Human Rights.

In the corporate sphere, the '*business judgement rule*' is acknowledged. Given the fact that economic decision-makers typically face a variety of economically sound options, entrepreneurial decisions taken, for example by members of the board of directors of a company, are not scrutinised strictly by courts. For example, in a limited liability company (*société à responsabilité limitée*), the directors will not incur liability for any business decisions lying within that margin of appreciation. However, the business judgement rule (i.e. the rule of non-liability) does *not* apply to decisions influenced by special or extraneous interests.¹⁶

In the sphere of public governance, a functional equivalent is the concept of '*official discretion*' as espoused by the administrative law of many national legal orders.¹⁷ Idealtypically, the exercise of discretion can be distinguished from applying the law. Exercising discretion is a volitional act, a choice among a number of possible options for action. In contrast, the application of the law is (idealtypically) a cognitive act.

Seen through the lens of the concept of discretion, conflict of interest is closely related to abuse of discretion, best known in its French inception of '*détournement de pouvoir*'.¹⁸ The French term is frequently used in some

¹⁵ Cf. in favour of the 'one right answer' Dworkin, 'Can Rights Be Controversial?'. See also Dworkin, 'Is there Really No Right Answer in Hard Cases?'. Against Dworkin see Woosley, 'No Right Answer'.

¹⁶ See for German corporate law Schneider, 'Commentary on § 52', para. 482, pp. 3154–3155.

¹⁷ Galligan, *Discretionary Powers*; Schindler, *Verwaltungsermessen*.

¹⁸ See, e.g. Waline, *Droit administratif*, pp. 606–608. This textbook defines the standard case of *détournement de pouvoir* as 'la poursuite par l'auteur d'un acte d'un but étranger à l'intérêt general' (p. 606).

systems of national administrative law to describe irregularity of motive or purpose in connection with the exercise of discretion. *Détournement de pouvoir* occurs when discretionary powers are exercised for purposes other than those for which such powers have been granted, or are not exercised for the objectives underlying the conferral of these powers. Although some common law systems such as the US do not have an equivalent of this concept, British administrative law recognises 'improper purpose', and 'taking irrelevant considerations into account' as common law grounds for the control of administrative discretion.¹⁹ Abuse of discretion is therefore a principle common to various jurisdictions and constitutes a general principle of law in the sense of Article 38(1)(c) of the ICJ Statute.²⁰ This means that international bodies often enjoy discretion in an administrative law sense, and they might also abuse it.²¹

Abuse of discretion matters because it constitutes a ground for judicial review. Courts are empowered to scrutinise whether discretion was abused, and may possibly vacate an administrative decision flawed by abuse. The interesting point is that within this framework of administrative law, the illegality stems not from the wrong results, but relates to the *process* of decision-making.²² Judicial control is – in this context – a control of reasons, not a control of the (formally correct) result.

And this is the link to conflict of interest. Conflict of interest means that an 'alien' interest was present – *independently of whether this really changed the decision*. In the field of administrative discretion, this is apt to constitute abuse of discretion. Of course the administrator's inner motive can never be scrutinised by a court, but can only be inferred from the official reasons given for a decision by the individual or collective decision-maker. The reasoning should reveal whether undue interests have impacted on the decision or not.

3.4 *The criminal law concept: offences of endangerment*

Addressing a risky situation with the tool of criminal law has led to the conceptualisation of offences of endangerment. The criminal offence of bribery has been conceptualised as being *independent of the actual*

¹⁹ See, e.g. Barnett, *Constitutional & Administrative Law*, pp. 734–738.

²⁰ Amerasinghe, *The Law of the International Civil Service*, p. 278.

²¹ Cahin, 'La notion de pouvoir discrétionnaire appliquée aux organisations internationales'.

²² See Alexy, 'Ermessensfehler', pp. 707–708.

outcome of a tainted decision-making process. Within the UNCAC framework, the intention of the briber of public officials is exactly to elicit official action *within the* mandate or competence of the official: 'in order that the official act or refrain from acting *in the exercise of his or her official duties*' (Article 15 UNCAC (emphasis added)). The OECD Convention of 1997 relates to acts of officials 'in relation to the performance of official duties'. The Convention leaves it to the state parties to criminalise as bribery all forms of corrupting influence upon (foreign) public officials, whether the 'consideration' for the bribe is the *breach* of duties or their *correct* performance.²³ OECD state parties must ensure that discretionary decisions are, as such, covered by their domestic law definition of bribery. Conduct within official discretion, but influenced by improper motives, must be covered as well. Such action must be *per se* considered as being contrary to the official's duty to act impartially, even if the resulting decision seems formally correct.²⁴ This means that bribery can occur also with regard to the exercise of an official's discretion, even when its result, the decision, ultimately stays within the realm of discretion. The authors of the OECD Convention were convinced that an advantage offered to a public official is bound to influence how he uses his discretion. The person offering the advantage is speculating on the abuse of discretion for a corrupt purpose, and should be punished. This is the case even though, objectively speaking, the official's decision may seem to be perfectly justifiable and reasonable. The reason for the criminalisation of active bribery even in this constellation is that courts cannot revisit the issue in order to determine whether the official might have decided differently had the advantage not been offered.²⁵

The concept of discretion has, in the context of bribery, even been transferred to the private realm. With regard to bribery among private persons, Article 4a of the Swiss Unfair Competition Law, for example, states that the resulting action of the bribed employee, associate, mandated person or auxiliary of a private sector entity must be either contrary to his duties or 'depending on his power of appreciation [*soit contraire à ses devoirs ou dépende de son pouvoir d'appréciation*]'.²⁶

²³ Zerbes, 'Commentary on Article 1', pp. 137–138.

²⁴ Official Commentary No. 3 to the OECD Convention on bribery, reprinted in Mark Pieth, Lucinda A. Low and Peter J Cullen (eds.), *The OECD Convention on Bribery*, p. xxx. See for this principle in Swiss law (§ 332ter Swiss criminal code) Pieth, 'Korruption', paras. 41–42.

²⁵ Zerbes, 'Commentary on Article 1', pp. 138–139.

The criminal offence can be committed wherever there is 'discretion' in this private law sense, independent of an illegal result, and even independent of any abuse of discretion. To conclude, both the administrative law approaches to conflict of interest, and the criminal law approach to bribery²⁶ focus on risks and processes, as opposed to outcomes.

3.5 Irrelevance of bad intentions and distinction of 'bias' and 'partiality'

Conflictedness in the person of a decision-maker is in part conscious, and in part not. One cannot have an interest without knowing it. But one can easily misjudge how much it might affect one's judgement. Indeed, psychological research clearly demonstrates that people with a conflict of interest often esteem too highly their own reliability.²⁷ Persons 'are prone to having optimistic biases regarding themselves, including judgments about whether their own behavior is objective.'²⁸ This bias in assessing oneself, including the erroneous assumption of one's own capacity to decide in an impartial manner, is often unconscious and unintentional, and largely under-appreciated. So rather than committing any intentional violation of ethical or legal rules, decision-makers affected by conflict of interest are, as psychological research shows, in 'strategic ignorance of harm'.²⁹

In this context, conflictedness must be distinguished from *bias*. Conflictedness is not bias but a tendency toward bias. Bias has been defined as an 'aggregate drift of judgment in one direction'.³⁰ To be biased means to be unconsciously one-sided (as opposed to neutral). Bias does not necessarily involve interests. For instance, a hardcore natural scientist can be biased in his research against finding supernatural phenomena. Bias is always unconscious. Taking this into account, Michael Davis' methodological Chapter 3 in this volume, 'Empirical research on conflict of interest: a critical look', focuses on (psychological) research on conflict of interest. Davis suggests the following (psychological) research programme. First, bias should be abandoned as the stand-in for conflict of

²⁶ See on the relationship between conflict of interest and bribery Peters, 'Conflict of interest as a cross-cutting problem of governance', Chapter 1 in this volume, pp. 30–33.

²⁷ Davis, 'Conflict of Interest', p. 591; Moore et al., 'Introduction', p. 3.

²⁸ Dana, 'How Psychological Research Can Inform Policies for Dealing with Conflicts of Interest in Medicine', p. 371 (emphasis added).

²⁹ Dana, 'Conflicts of Interest and Strategic Ignorance of Harm', p. 206.

³⁰ Davis, 'Empirical research', Chapter 3 in this volume, relying on Dana, 'How Psychological Research Can Inform Policies for Dealing with Conflicts of Interest in Medicine'.

interest. The study of perception may be a more fruitful way. Secondly, it should be investigated whether conflict of interest can be unconscious. Thirdly, researchers should try to measure reliability of judgement, not just bias.

The element of unconsciousness of the actors beset by a conflict of interest is important, because this should guide the strategies to combat conflict of interest. The conclusion to draw for the functionality and effectiveness of transparency and disclosure requirements is that these are *insufficient* to reach the objective of unconflicted decision-making. Disclosures will not eliminate the extent to which the decision-maker let him or herself be influenced by the undue interest, an extent that he or she normally underestimates. The suitable measure would therefore be 'creating disincentives for ignorance of harm'.³¹

4. Independence and impartiality as guarantees of non-conflictedness

Reducing the occurrence for the likelihood of conflict of interest is central to the fair administration of justice. The classical twin requirements of independence and impartiality of judges and arbitrators serve this goal. Independence is a traditional mechanism to prevent conflict of interest arising from dependency on others and the resulting tendency to favour their interests. In this book, two chapters examine the independence and impartiality of ICSID arbitrators (Chapter 6), and of expert members of international human rights bodies (Chapter 7). The groundwork for this, the principles of independence and impartiality of national and international judges and arbitrators in general, both in national and in global governance, will briefly be recapitulated here (pp. 371–380). Outside of the adjudicative (dispute-resolving) function, the principle of the impartiality of the administration contains a similar guarantee of non-conflictedness (pp. 382–383).

4.1 The impartiality and independence of the judiciary

No other chapter of this book deals with conflict of interest in the judicial branch; this will therefore be addressed in this section. With regard to the judiciary, the issue is normally phrased in different terms,

³¹ Dana, 'Conflicts of Interest and Strategic Ignorance of Harm', p. 218.

namely in terms of independence and impartiality. Especially 'impartiality' is to some extent equivalent to the absence of a conflict of interest (although, inversely, partiality does not always result in a conflict of interest).³²

Independence and impartiality are not only legal requirements for judges in probably all modern legal systems,³³ but are qualities which characterise the judicial office and define a court in the modern sense. Often, the principles of impartiality and independence are enshrined in constitutional texts. They are likewise prescribed by international law (Article 14 ICCPR and Article 6 ECHR).

The concepts of independence and impartiality overlap, and are usually not clearly distinguished. The notion of independence refers primarily to the lack of any connection between the tribunal and other government institutions, especially the executive branch. Impartiality must exist in relation to the parties to the suit and the case at issue.

As far as judicial *impartiality* is concerned, the ECHR has seminally distinguished between a subjective and an objective approach to ascertaining judicial impartiality. In the words of the ECHR:

Whilst impartiality normally denotes the absence of prejudice or bias, its existence or otherwise can . . . be tested in various ways. A distinction can in this context be drawn between a subjective approach, that is endeavouring to ascertain the personal conviction of a given judge in a given case, and an objective approach, that is determining whether he offered guarantees to exclude any legitimate doubt in this respect.³⁴

³² Conscious partiality is part of the job in many settings, and does not as such pose any conflict of interest problem. For example, Amnesty International (AI) could be said to be 'partial' towards human rights, and rather hostile towards the countervailing *raison d'état*. However, this is not any hidden agenda of AI, but exactly the institutional role of this NGO. So neither any 'undue' interest nor a role conflict is present. See on the links between impartiality and conflict of interests, and on the impossibility of a complete disinterestedness of the judiciary Emmanuelle Jouannet, 'Remarques conclusives', pp. 295–298.

³³ See as random examples for German Courts: §§ 41–49 of the law on civil procedure (ZPO); § 54 of the law on the administrative tribunal procedure (*Verwaltungsgerichtsordnung*); §§ 22 and 24 of the law on criminal procedure (StPO); for the German Constitutional Court § 19 *Bundesverfassungsgerichtsgesetz*; for the US 28 USC § 455: Disqualification of justice, judge, or magistrate judge: '(a) Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.'

³⁴ ECHR, *Piersack v. Belgien*, appl. no. 8692/79, 1 October 1982, Ser. A 53 (1982), para. 30. See more recently ECHR (Grand Chamber), *Kyprianou v. Greece*, appl. no. 73797/01, 15 December 2005, para. 118.

This two-pronged test has been widely adopted in judicial and arbitral practice, both with regard to judges sitting in domestic courts and for international courts and tribunals.³⁵

Under the subjective approach, the judge's impartiality will be presumed unless there is evidence to the contrary.³⁶ There are few – if any – cases where impartiality has been established under the 'subjective' test, since in practice such evidence can be very hard to come by.

The objective test refers to structural issues. The question here is whether the way in which the court is composed and organised, or a certain succession of functions or one or more of its members, may give rise to doubts as to the impartiality of the court or judge. Under the objective test, it is crucial that not only actual partiality must be avoided, but already any appearance of partiality. The court here follows the English dictum that 'justice should not only be done, but should manifestly and undoubtedly be seen to be done'.³⁷ In the worldwide case law regarding judicial impartiality, similar criteria have been applied to establish the (apparent) lack of impartiality. Courts use concepts such as 'legitimate fear' of bias, 'objectively justified fear', or a 'real danger of bias', looked at through the eyes of a reasonable man, or ask whether the circumstances 'lead a reasonable observer, properly informed, to reasonably apprehend bias'.³⁸ The rather rare incidence of a successful challenge of a higher judge occurred in the *Pinochet* affair before the British House of Lords. The former Chilean head of state Augusto Pinochet was accused of crimes against humanity. During the extradition procedure he challenged Law Lord Hoffmann who was involved in an organisation affiliated to Amnesty International (AI), with AI appearing as a party to the case. The House of Lords characterised this constellation as one where Lord Hoffmann was a judge in his own (ideational) cause. The fact that the interest involved was non-pecuniary did not hinder the application of the automatic disqualification rule.³⁹

³⁵ See for the ICTY, *Prosecutor v. Furundzija* (IT-95-17/1-A), Appeals judgment of 21 July 2000, para. 181.

³⁶ See only ECHR, *Kyprianou* (note 34), para. 119; ICTY, *Furundzija* (note 35), para. 196.

³⁷ Lord Hewart CJ, *The King v. Sussex Justices, ex parte McCarthy*, judgment of 9 November 1923, 1 King's Bench Division, 256–260, at 259.

³⁸ The latter phrase is used by ICTY, *Furundzija* (note 35), para. 208.

³⁹ House of Lords, *R v. Bow Street Metropolitan Stipendiary Magistrates, ex parte Pinochet* (No. 2) [1999] UKHL 1; [2000] 1 AC 119, 15 January 1999. See on this case Davala, 'Conflict of interest in universal human rights bodies', Chapter 7 in this volume.

The safeguarding of judicial independence and impartiality in national courts has long been an issue of international policy. On the global level, the United Nations have adopted 'Basic Principles on the Independence of the Judiciary', which, however, mention impartiality only under the heading of the freedom of expression and association of judges.⁴⁰ In Europe, the Council of Europe has adopted a recommendation 'The independence, efficiency and role of judges',⁴¹ and a 'European Charter on the Statute for Judges'.⁴² It has also established a Consultative Council of European Judges (CCJE) as an advisory body.⁴³ This body produces, to the attention of the Committee of Ministers, opinions related to independence, impartiality (including conflict of interest) and competence of judges.⁴⁴

Judges worldwide have also engaged in self-regulation of judicial conduct. A group of justices from Asia and Africa elaborated the 'Bangalore Principles on Judicial Conduct', on the basis of a review of a large number of ethical codes for judiciaries.⁴⁵ The principles were adopted in 2002 and set up six fundamental 'values'. The first ones are independence and impartiality. The Principles state that '[j]udicial independence is a pre-requisite to the rule of law and a fundamental guarantee of a fair trial', and that '[i]mpartiality is essential to the proper discharge of the judicial office'.

With respect to judicial ethics, including the avoidance of conflict of interest, a shift can be observed from relying on more informal checks towards a more active approach.⁴⁶ This approach includes, for example, the adoption of codes of conducts for judges, and the establishment of 'councils for the judiciary', as recently happened in various European countries, whose task is to safeguard and further judicial ethics. Jonathan Soeharno names four reasons for the growing attention to judicial

⁴⁰ Para. 8, Principles endorsed by the General Assembly Resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

⁴¹ Committee of Ministers, Recommendation R(94) 12 of 13 October 1994.

⁴² (DAJ/DOC 898) 23) of 8–10 July 1998.

⁴³ See www.coe.int/t/dghl/cooperation/ccje/default_en.asp (last accessed 15 December 2011).

⁴⁴ See, e.g. Opinion No. 3 of the Consultative Council of European Judges (CCJE) to the attention of the Committee of Ministers of the Council of Europe on the principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and impartiality, of 19 November 2002. This opinion extensively deals with impartiality and with conflict of interest (paras. 20–40).

⁴⁵ 'Bangalore Principles of Judicial Conduct', elaborated by a judicial group on strengthening judicial integrity, and adopted by a Round Table Meeting of Chief Justices held at the Peace Palace in The Hague, of 25–26 November 2002. The codes and instruments on which the Bangalore Principles draw are listed in the annex.

⁴⁶ Soeharno, *The Integrity of the Judge*, p. 13.

integrity, which includes attention to conflict of interest arising for judges. These are the growing power of the judiciary, with respect to the complexification of societies with the ensuing growth of occasions for conflicts, more media attention, the upsurge of individualism and the decrease of moral homogeneity.⁴⁷

In the end, judges should *not be isolated from the society* in which they live, and should concomitantly not be completely *disinterested* (which is anyway illusionary). A reasonable balance therefore needs to be struck between the degree to which judges may be involved in society and the need for them to be and to be seen as independent and impartial.⁴⁸

4.2 *The impartiality and independence of the international judge*

The standards of independence and impartiality apply to international judges as well.⁴⁹ They are codified for the International Court of Justice,⁵⁰ for the Human Rights Courts,⁵¹ for the International Criminal Court,⁵² for the ad hoc criminal tribunals,⁵³ and for basically every other international court.

⁴⁷ *Ibid.*, pp. 16–19. ⁴⁸ CCJE, Opinion No. 3 (note 44), para. 28.

⁴⁹ See on this issue in scholarship Ruiz Fabri and Sorel (eds.), *Indépendance et impartialité des juges internationaux*; International Law Institute (institut de droit international), session de Rhode, 6th commission, 'La situation du juge international' (*travaux préparatoires and projet de résolution*), rapporteur: Gilbert Guillaume, *Yearbook of the Institute of International Law* 74 (2011) (Paris: Pedone).

⁵⁰ Arts. 2 and 20 ICJ Statute.

⁵¹ See, e.g. Art. 21(3) ECHR; Art. 19 of the Statute of the Inter-American Court of Human Rights of 1 October 1979 (Resolution No. 448): '1. Judges may not take part in matters in which, in the opinion of the Court, they or members of their family *have a direct interest* or in which they have previously taken part as agents, counsel or advocates, or as members of a national or international court or an investigatory committee, or in any other capacity' (emphasis added). See in scholarship Flauss, 'Libres propos sur l'indépendance des juges à la Cour européenne des droits de l'homme'.

⁵² Art. 36(3)(a), Art. 40, Art. 41(2)(a) ICC Statute (Rome Statute of the International Criminal Court of 17 July 1998, ILM 37 (1998), 1002). See with regard to the prosecutor whose role is that of an impartial representative of the global public interest Art. 42(7) ICC Statute; and finally the ICC Staff Regulations, adopted by the Assembly of States Parties, New York, 8–12 September 2003 (Doc. ICC-ASP/2/10): Conflict of interest, (m): 'Staff members shall not be actively associated with the management of, or hold a financial interest in, any profit-making business or other concern, if it is possible for the staff member or the profit-making business or other concern to benefit from such association or financial interest by reason of his or her position with the Court.'

⁵³ Art. 13 of the Updated Statute of the International Criminal Tribunal for the former Yugoslavia (Security Council Res. 1877 of 7 July 2009), mentioning only 'impartiality' as a personal quality of the judges. See also Rules of Procedure and Evidence, IT/32/Rev. 45,

As on the domestic plane, the institutional independence of an international judge depends on his or her country's adherence to the rule of law. There is no reason to believe that judges appointed by dictatorships to international courts and tribunals enjoy more independence than those appointed to the domestic courts by those governments.⁵⁴ This means that the members of an international court, which is composed by the nationals of diverse countries, may enjoy very different degrees of independence from their governments. Admittedly, 'personal' independence may be a different matter. It has been asserted that the opinions of international judges from the former socialist block have not coincided more frequently with their governments' officially proclaimed positions than those of judges from Western states,⁵⁵ but this assertion has not been statistically corroborated. It is clear that the institution of judicial independence must be embedded – on the multiple levels of governance – in a political system and legal culture in which this independence is not only formally guaranteed but also respected in fact.

In international courts, there is an *additional specific threat* to the impartiality of judges, namely the danger that the judge on an international court who decides on legal disputes involving his or her country of nationality, is beset by a conflict of interest between the interest of the international community, which mandates that he or she decide the dispute in full independence and impartiality, and the national interest of his or her home country.⁵⁶

8 December 2010, Rule 15: Disqualification of Judges (adopted 11 February 1994, last amended 17 November 1999): '(A) A Judge may not sit on a trial or appeal in any case in which the Judge has a personal interest or concerning which the Judge has or has had any association which might affect his or her impartiality. The Judge shall in any such circumstance withdraw, and the President shall assign another Judge to the case.' See as two examples of challenges of judges in international criminal proceedings: ICTY, *Furundzija* (note 35), fourth ground of appeal, paras. 164–215 relying on the ECHR case law on the standards for an 'impartial' tribunal, and on legal comparison. Special Court for Sierra Leone, Appeals Chamber, Decision on Defence Motion Seeking the Disqualification of Justice Robertson from the Appeals Chamber (13 March 2004), *Prosecutor v. Sesay* (case no. SCSL-2004-AR15–15).

⁵⁴ Szurek, 'La composition des juridictions internationales permanentes', p. 54. Historically, in the era before 1989, the independence of those judges who were nationals of authoritarian or totalitarian countries, notably of communist countries, has often been called into question.

⁵⁵ Lachs, 'A Few Thoughts on the Independence of Judges of the International Court of Justice', pp. 596–597. Manfred Lachs was a member of the ICJ and a national of Poland in the communist period.

⁵⁶ International courts and tribunals are always put together under due consideration of regional groups. The ECJ and the ECHR are composed of a number of judges equal to the

The institutional design of international courts does *not* naively assume that, because it is the essence of the judicial office to be independent, the nationality of the judges would play no role whatsoever. Although the aspiration is to 'super-nationalise' the judges on international courts⁵⁷ – i.e. to strip them off all national interests – it is understood that this is no more than a regulative idea. On the other hand, the institutional design of international courts does not imply 'that the judges would act as a kind of defence lawyers for their country for the protection of a presumed national interest'.⁵⁸ Rather, designers reckon with some national bias or appearance of bias of the judges, and pursue a pragmatic strategy for managing this perennial conflict of interest. That pragmatic strategy is to 'neutralise' the assumed national bias in the person of the individual judges through the assumed national biases of his or her colleagues. Then, an important exception to the usual general norms on judicial impartiality is that the national judge *need not recuse him or herself* in a case involving his or her own country.⁵⁹ He is allowed to participate in the deliberations and to vote. This is a deviation from the principle that no one should be a judge in his own cause (assuming that the judge's country's cause is, because of the bond of nationality, inevitably also his or her cause). The reason for this allowance is that recusal would hamper the geographic representation of various legal cultures.⁶⁰ The (expected) bias of the bench will be neutralised by 'the other party's' judge.

number of member states to the respective organisation, so that a member state of the regime will have its 'own' judge (See Art. 19(2) TEU: 'The Court of Justice shall consist of one judge from each Member State. It shall be assisted by Advocates-General. The General Court shall include at least one judge per Member State.' Art. 20 ECHR: 'The Court shall consist of a number of judges equal to that of the High Contracting Parties.'). See on the independence of the international judge and possible conflicts of interest due to his nationality Manouvel, *Les opinions séparées à la Cour internationale*, pp. 197–203; Szurek, 'La composition des juridictions internationales permanentes', pp. 65–70.

⁵⁷ de Lapradelle, Statement, in Permanent Court of International Justice, Advisory Committee of Jurists, *Procès-Verbaux of the Proceedings of the Committee* (16 June–24 July 1920) (Clark, New Jersey: The Lawbook Exchange Ltd., 2006), p. 534.

⁵⁸ Christian Tomuschat rightly points out that '[j]udges who would be seen by their colleagues as blind followers of the policies of their governments would soon be discredited and could therefore hardly serve as a forceful champion of the legitimate aspirations of their home countries'. Tomuschat, 'National Representation of Judges and Legitimacy of International Jurisdictions', p. 183.

⁵⁹ See, e.g. Art. 31(1) ICJ Statute.

⁶⁰ See, e.g. Art. 9 ICJ Statute prescribing 'that in the body [of the ICJ] as a whole the representation of the main forms of civilisations and of the principal legal systems of the world should be assured'.

If in a court case, there happens to sit, e.g. due to the predetermined composition of a chamber, no judge on the bench who is a national of a state party to the dispute, or when (only) a judge of the nationality of the opposing party to the dispute sits, then the 'non-represented' party will be allowed to elect a judge ad hoc (which will in practice most often be a national of that state).⁶¹ There is a sort of presumption of bias of the ad hoc judge in favour of his appointing state.⁶² As the British judge Sir Gerald Fitzmaurice remarked in a debate on a study by the International Law Institute: 'le vote d'un juge *ad hoc* est un vote plus ou moins acquis d'avance pour son pays ... Tandis que la première loyauté des juges réguliers est envers la Cour, celle d'un juge *ad hoc* est envers son pays.'⁶³ In fact, ad hoc judges almost always vote in favour of their designating state, even if they have to write a dissenting opinion for this, and even if they are completely isolated.⁶⁴

Nevertheless, the deviation from the general principles of impartiality lying in both the non-recusal of an international judge in a case against his country and in the institution of the ad hoc judge, and the resulting *endorsement* of the conflict of interest can be justified. The first reason is respect for cultural and legal diversity. The second reason is to secure acceptance of the international courts and tribunals by the states parties and their population. It must be reckoned with the 'instinctive mistrust felt by nations for a Court composed of foreign judges', as the former Secretary of State of the US phrased it in the session of the Advisory Committee of Jurists debating the creation of a permanent international court of justice.⁶⁵ This antipathy against '*fremde Vögte*' ('foreign reeves') forms, by the way, an important part of Swiss national mythology.⁶⁶

⁶¹ See, e.g. Art. 31(2) ICJ Statute.

⁶² In a confidential interview, an ad hoc judge complained that 'members of the regular bench assume that he is biased in favour of the state that appointed him and consequently do not take his views seriously'. Swigart, 'The National Judge', at 229.

⁶³ Etudes des amendements à apporner au statut de la Cour internationale de Justice, Observations de M. Gerald-Gray Fitzmaurice, *Yearbook of the Institute of International Law*, 1 (1954), 441–446, at 445.

⁶⁴ See for a detailed nuanced analysis Manouvel, *Opinions séparées à la Cour internationale*, pp. 201–203.

⁶⁵ Elihu Root, Statement, in Permanent Court of International Justice, Advisory Committee of Jurists, *Procès-Verbaux of the Proceedings of the Committee* (16 June–24 July 1920) (Clark, New Jersey: The Lawbook Exchange Ltd., 2006), p. 538.

⁶⁶ The core objective of the early confederacy of the fourteenth century was to expel imperial judges. One of the central items of the Swiss Federal Charter of 1291 is that the *Eidgenossen* 'will accept or receive no judge in the aforesaid valleys, who shall have obtained his office for any price, or for money in any way whatever, or one who shall not

The creators of international courts therefore sought to assure the peoples: '[I]t must be possible to tell the masses that there will be at least one person upon the Court who is able to understand them.'⁶⁷ In a limited sense, peoples have to feel 'represented' by 'their' judge (even if this judge is independent and will not accept instructions). Thirdly, the national judge will secure that the voice of a state party be heard inside the councils of the judges. This hearing will assure that its arguments are taken seriously and that, where relevant, its national legal system will be understood.⁶⁸ Fourthly, the institution of the national judge, especially in the situation where a national of the opposing party to the conflict is on the bench, is said to assure the equality of arms.⁶⁹ For these reasons, the existence of national judges and of ad hoc judges (who are clearly in a conflict of interest) is one of the conditions *sine qua non* of the functioning of the international judiciary.⁷⁰

4.3 The independence of arbitrators

The proper fulfilment of the function of arbitration is mostly couched in terms of independence and impartiality, similarly with regard to judges.⁷¹ But sometimes it is phrased in conflict of interest language. An example for an explicit conflict of interest regulation is the WTO Dispute Settlement Understanding which governs the quasi-arbitral dispute settlement procedure for inter-state disputes arising from the treaties gathered under the WTO umbrella, such as the General Agreement on Tariffs and Trade (GATT). The Dispute Settlement Understanding stipulates: 'All persons serving on the Appellate Body ... shall not participate in the consideration of any disputes that would create a direct or indirect conflict of interest.'⁷² The accompanying Rules of conduct state that '[e]ach person covered by these Rules ... shall be independent

be a native or a resident with us' (emphasis added). English in *The Origin of the Swiss Confederation* Section 1, Document vol. 1 (Aarau, 1933). Available at www.admin.ch/org/polit/00056/index.html?lang=en (last accessed 15 December 2011).

⁶⁷ Root, *Procès-Verbaux* (note 65), p. 538.

⁶⁸ Vagts, 'The International Legal Profession', p. 257; Manouvel, *Opinions séparées*, 2005, p. 197.

⁶⁹ Manouvel, *Opinions séparées à la Cour internationale*, p. 199. ⁷⁰ *Ibid.*, p. 203.

⁷¹ See Hoffmann, 'Duty of Disclosure and Challenge of Arbitrators'; Trakman, 'The Impartiality and Independence of Arbitrators Reconsidered'; Singhal, 'Independence and Impartiality of Arbitrators'; Larson, 'Conflicts of Interest and Disclosures'.

⁷² Art. 17(3) Understanding on Rules and Procedures Governing the Settlement of Disputes of 15 April 1994, ILM 33 (1994), 114.

and impartial, shall avoid direct or indirect conflicts of interest . . . so that through the observance of such standards of conduct the integrity and impartiality of that mechanism are preserved'.⁷³

The issue of arbitrator independence and impartiality is tightly regulated. It is even held to be overregulated.⁷⁴ The numerous existing standards differ amongst themselves. Hence the success of challenges to arbitrators' independence and impartiality has become somewhat unpredictable, and this legal insecurity might be dysfunctional for arbitration.

Arbitrators occupy both a private and a public role. In the commercial sphere, economic actors resort to arbitration because they want to avoid state courts. But arbitral awards have important repercussions beyond the parties, last but not least because they make law, the global *lex mercatoria*. ICSID arbitration has even more 'public governance' features, because respondents are states. It is therefore unsurprising that approaches to arbitrator's conflict of interest are becoming increasingly strict.⁷⁵

4.4 'Conflict of interest in international investment arbitration' (Chapter 6)

Challenges to arbitrators have increased considerably over the last few years, and could become even more problematic in arbitral practice. This may be a direct consequence of the increased transparency of investment arbitration. The chapter by August Reinisch and Christina Knahr first outlines the applicable legal standards determining potential conflict of interest in investment arbitration, focusing on the ICSID Convention and the ICSID Arbitration Rules, and also taking into consideration the UNCITRAL Arbitration Rules. It then discusses possible scenarios in which conflicts of interest can arise, describes some exemplary investment disputes where arbitrators were challenged and analyses how alleged conflict of interest of arbitrators was addressed. Finally, Reinisch and Knahr examine whether the existing mechanisms are appropriate to deal with the problem of conflict of interest in investment arbitration and ask whether there is anything that could

⁷³ Art. II(1) of the Rules of conduct for the understanding on rules and procedures governing the settlement of disputes, of 11 December 1996 (WT/DSB/RC/1 (96-5267)).

⁷⁴ Larson, 'Conflicts of Interest and Disclosures', pp. 880, 905, 919-920.

⁷⁵ See on the traditional *lower* standards of arbitrator independence with a view to finding qualified arbitrators p. 398.

be done to prevent the undesirable situation of challenges and potential disqualification of arbitrators from occurring in the first place.

The first limb of the classic requirement, *independence*, is compromised when arbitrators have contact with a party or counsel of a party. However, a party-appointing system such as arbitration inherently presumes some acquaintance between the party and the arbitrator. Therefore, criteria to assess the appropriate degree of independence must be found, such as proximity, intensity, dependence, and materiality. The ICSID case law has adopted a 'robust approach', as Reinisch and Knahr call it. The link between a tribunal or committee member 'must be of an intensity that truly casts doubt on the ability to exercise independent judgement'.⁷⁶

Secondly, and more recently, questions relating to the second limb, *impartiality* or perceived lack of impartiality of ICSID arbitrators have surfaced. Impartiality has been called into question due to arbitrators' previously expressed opinion, also in their capacity as scholars. But of course an intense scholarly debate is an asset for investment arbitration. Only the display of such strong convictions on specific issues that would prevent the arbitrator from having an open mind for the facts in dispute can imply impartiality.

Mechanisms to manage conflict of interest in arbitration are disclosure requirements and challenge procedures. For example, Article 57 ICSID Convention allows an arbitrator's challenge in the case of a 'manifest lack' of the qualities required by Article 14(1) ICSID Convention, which is a high threshold. The threshold for sustaining a challenge appears to be lower under the International Bar Association (IBA) guidelines than under the ICSID Convention. But although the applicable written standards differ, there seems to be a marked convergence in practice, in particular with regard to the substantive grounds for determining that a conflict may undermine an arbitrator's independence or impartiality. In practice, the 'manifest lack' standard seems to be influenced by the 'justifiable doubts' standard and is related to the 'reasonable third person' perspective.

It is an empirical fact that arbitrator challenges pursuant to the ICSID Convention rarely succeed. But maybe there is an institutional problem of a possible collegiate arbitrator bias in deciding on a conflict of interest of a colleague. Reinisch and Knahr conclude that the recent inflationary use of challenging mechanisms in ICSID proceedings may border on harassment tactics, but has also contributed to the development of an

⁷⁶ Reinisch and Knahr, 'Conflict of interest in international investment arbitration', Chapter 6 in this volume, p. 114.

increased awareness of improprieties that must be avoided in order to secure the integrity of the arbitration process.

4.5 'Conflict of interest in universal human rights bodies' (Chapter 7)

Michal Davala's chapter describes the rules (hard law, rules of procedure, codes of conduct) on independence, impartiality and conflict of interest for the members and office-holders of various types of human rights monitoring bodies (treaty-based and charter-based bodies), and for different procedures (state reports, individual complaints and special procedures).

Conflict of interest can and should be addressed in two types of rules: in the selection requirements and in the procedural rules of the respective body dealing with individual communications. Davala finds that the existing rules on both levels are insufficient to secure independent judgement. He proposes new mechanisms to reinforce the independence and impartiality of individuals acting as experts and quasi-judges in the universal human rights machinery, such as cooling-off periods for government officials before taking up their post in an international monitoring body, abolishment of the requirement of re-nomination by the government for re-election, longer terms of membership, and increased remuneration, or even the creation of a World Court on Human Rights which would be staffed with judges enjoying full guarantees of judicial independence.

Both treaty- and charter-based bodies need the highest degree of credibility. Only then their decisions, resolutions or other actions will be seen as objective outcomes and will be accepted. The reinforcement of the features of independence and expertise rather than the political character would enhance all the human rights mechanisms.

4.6 *The impartiality of the administration*

The harm done by conflict of interest in the public administration is, according to the OECD, that such conflict weakens adherence by public officials to the ideal of impartiality.⁷⁷ Concomitantly, the active prevention and management of conflict of interest in the administration is one way to safeguard the traditional core principle of the impartiality of public administration.⁷⁸ That principle is not only a more traditional

⁷⁷ OECD (note 14), p. 98.

⁷⁸ See for France Mitard, 'L'impartialité administrative'; Commission de réflexion (note 13), pp. 45–55 with references to the case law of the *Conseil d'Etat*. See for Switzerland Art. 29 of the Swiss Federal Constitution and Art. 10 of the Swiss Law on the federal

label for the absence of conflict of interest or administrators, but moreover comprises, with regard to the administrators' activity, the requirements of a distance to the object of the decision, unbiasedness, neutrality, not allowing own interests to impact the administrative decision, non-identification with particular interests and the equal treatment of citizens.⁷⁹ Impartiality is also a value of the EU administration. The EU Charter of Fundamental Rights enshrines a right to good administration which means that, '[e]very person has the right to have his or her affairs handled *impartially*, fairly and within a reasonable time by the institutions and bodies of the Union' (Article 41(1) of the Fundamental Rights Charter (emphasis added)).⁸⁰

To conclude, the principle of impartiality is to some extent a traditional expression of a very strict requirement of non-conflictedness. It has been specifically developed for institutions whose function is to settle disputes between two parties, but is also relevant for the public administration which normally does not settle disputes. It has been shown that this principle is relevant both on the national and on the international level, and both in the public and the private sphere. In particular, modern commercial arbitration blurs both boundaries: it is becoming more and more transnational and is neither a fully private nor fully public institution.

5. Conflict of interest in politics

5.1 *The special case of elected holders of public office*

Holders of higher public office, who are often elected, not just appointed, such as members of government, members of parliament, judges of superior courts, members of court of audit and central or

administrative procedure, in scholarship Schindler, *Die Befangenheit der Verwaltung*. In Germany, the 'obligation of neutrality' is a traditional core principle of the German civil service (*Berufsbeamtentum*). See also §§ 22 and 23 of the German federal law on administrative procedure, which has also been adopted by the German Länder; in scholarship Fehling, *Verwaltung zwischen Unparteilichkeit und Gestaltungsaufgabe*. In Turkey, civil servants are not even allowed to become a member of a political party (Art. 68 of the Turkish Constitution of 18 October 1982 (as amended on 23 July 1995): 4121/6 Article).

⁷⁹ Fehling, *Verwaltung zwischen Unparteilichkeit und Gestaltungsaufgabe*, p. 505.

⁸⁰ See also the 'European Code of Good Administrative Behavior' of 28 July 1999, in force since 1 January 2000. 'Good administration' has been qualified by the courts as a general principle of EU law (CFI, Case T-54/99, *max.mobil v. Commission*, [2002] ECR II-00313, para. 48), and the right to good administration is a fundamental component of European citizenship.

national banks, should be distinguished from ordinary public employees or civil servants.⁸¹ Elected officials have a political mandate, i.e. they are accountable to the entire electorate, but only for the limited term of office. In contrast, civil servants are not elected, and they normally hold a position in the bureaucracy over a long period (as opposed to an electoral term of office). Working typically in one specific sector (housing, migration environmental issues, etc.), civil servants are more involved with details, so that there is a potential for a deep entanglement with societal and economic interests. (But note that not all areas of administration are equally prone to conflict of interest. Typical at-risk areas are public procurement⁸² and the health sector.⁸³) Finally, civil servants are legally accountable to their superiors in the hierarchy of the state bureaucracy, not directly politically accountable to the people.

Due to these different features, conflict of interest regimes for civil servants should not be directly used for holders of political office. In fact, sanctions in relation to political office-holders are currently, in the EU member states, relatively soft compared to sanctions for civil servants' misbehaviour.⁸⁴ It should be seriously considered whether this relative softness is appropriate to the distinct functions of political office-holders, or whether tightening were adequate. An example of a recent code of conduct for government members is the Ministerial Code of the United Kingdom. It states that 'Ministers must ensure that no conflict arises, or appears to arise, between their public duties and their private interests.'⁸⁵

With regard to one particular conflict of interest arising from dual roles, the position of members of government is different in political systems of parliamentary democracy and in presidential democracies. A characteristic of parliamentary democracies (such as the UK or Germany) is that members of parliament may become members of the government without giving up their membership in parliament. This means that a conflict of interest between two roles (governing role and

⁸¹ See for comparative studies specifically on conflict of interest of elected officials, notably legislators: Speck, 'Conflict of Interest' (on Argentina, Brazil and Chile); Kaye, 'Reluctant Innovators' (on the US and the UK).

⁸² Schindler, 'Conflict of interest and the administration of public affairs – a Swiss perspective', Chapter 9 in this volume.

⁸³ See pp. 409–410 on the World Health Organization (WHO).

⁸⁴ Demmke et al., *Regulating Conflicts of Interest*, p. 8.

⁸⁵ Cabinet Office, May 2010, para. 1.2.f. See also s. 6 'Ministers' constituency and party interests'; s. 7: 'Ministers' private interests'.

legislative role) is inbuilt in the system. In contrast, systems of presidential democracy (such as the US and to a limited extent France) are characterised by an incompatibility between membership in parliament and in the government.⁸⁶

It has been speculated that the empirical relation between conflict of interest legislation and the different forms of democratic government has something to do with the different institutional traditions: in presidential systems, conflict of interest has traditionally been addressed by legislation and hard law solutions exist. In contrast, in parliamentary systems, conflict of interest is rather a recent issue.⁸⁷ However, the fact that the accumulation of two different political functions is considered normal in parliamentary democracies does not explain this differing approach. Parliamentary systems also provide for the incompatibility of government membership with other offices, professions and trade,⁸⁸ and do not display a general insensitivity towards the accumulation of offices. It may be noted that the members of the EU 'government', the EU Commissioners, are subject to a far-reaching incompatibility rule (Article 245 TFEU).⁸⁹

⁸⁶ See e.g. Art. 23 French Constitution of 28 September 1958: '(1) *Membership of the Government* is incompatible with the exercise of any *Parliamentary mandate*, with the holding of any representational office at national level in a trade organisation, and with any public employment or professional activity' (emphasis added). The explanation for the tradition of incompatibility in presidential democracies is that the president (and his administration) has an independent basis of authority (not based on the elections to parliament).

⁸⁷ Hine, 'Conclusion', pp. 218–225, 220.

⁸⁸ See, e.g. Art. 66 of the German Basic Law: 'Neither the Federal Chancellor nor a Federal Minister may hold any other salaried office, or engage in any trade or profession, or belong to the management or, without the consent of the Bundestag, to the supervisory board of an enterprise conducted for profit.'

⁸⁹ Art. 245 TFEU: 'The Members of the Commission shall refrain from *any action incompatible* with their duties. Member States shall respect their independence and shall not seek to influence them in the performance of their tasks. The Members of the Commission may not, during their term of office, engage in any other occupation, whether gainful or not. When entering upon their duties they shall give a solemn undertaking that, both during and after their term of office, they will respect the obligations arising therefrom and in particular their duty to behave with integrity and discretion as regards the acceptance, after they have ceased to hold office, of certain appointments or benefits. In the event of any breach of these obligations, the Court of Justice may, on application by the Council acting by a simple majority or the Commission, rule that the Member concerned be, according to the circumstances, either compulsorily retired in accordance with Article 247 or deprived of his right to a pension or other benefits in its stead' (emphasis added). This provision is complemented and detailed by the Code of Conduct for Commissioners (C (2011) 2904).

5.2 *'Politicians as judges? Conflict of interest in Swiss Parliament during decisions on the validity of popular initiatives' (Chapter 11)*

One group of elected politicians are parliamentarians. For them, specific conflict of interest situations arise, because they pass a number of laws in their own interest, such as laws on their own remuneration, on parliamentary immunity, on political parties or on election financing. Generally speaking, conflict of interest of members of parliaments is, according to a comparative study on EU member states, under-regulated.⁹⁰

Anna Christmann's chapter deals with a specific conflict of interest arising for members of the Swiss federal parliament in a political system which places a high value on direct democracy. The study exemplifies how a conflict of interest arising for political actors may indeed undermine the constitutional principle of the separation of powers.

Under the Swiss Constitution, Swiss citizens may launch a legislative proposal (called 'popular initiative') which must then be put to vote before the entire citizenry. Any such proposal must be in conformity with peremptory international norms. The Swiss Constitution allocates the task of scrutiny to the federal parliament, and not to a court. The reason for this allocation is respect for popular sovereignty. The idea is that parliament is closer to the people, and therefore better suited than a court to take a decision which might result in preventing the people to take a democratic vote. By performing the legal scrutiny of the proposal before it is put to vote, members of parliament (MPs) act in a secondary role as quasi-judges.

Christmann raises the question whether members of parliament really decide on the admissibility of popular initiatives on legal rather than on political grounds. In a first step, she analysed the statistics on voting behaviour of the different parliamentary factions, and also interviewed Swiss MPs. She found that the centre party's members vote highly strategically, whereas left-wing parties members' are in a conflict between liberal and republican values: liberal values demand respect of higher law which would suggest qualifying legally dubious popular initiatives as inadmissible. In contrast, republican values suggest upholding the admissibility of such initiatives. The right-wing (populist) party's members face no conflict at all because they do not – according to Christmann – take legal aspects into account.

Christmann concludes that the majority of Swiss parliamentarians decide on political rather than on legal grounds when scrutinising the legality of a popular referendum. One reason for this is that

⁹⁰ Demmke et al., *Regulating Conflicts of Interest*, p. 37.

parliamentarians are not equipped for such a review, because they lack legal expertise. Another, even more important reason might be the conflict of interest in which they find themselves: their capability of judging the legality of the initiative in front of them is tainted by their personal interest in being re-elected, which requires them not to disappoint their voters. Acting as 'judges' means performing a function that is incumbent on a different branch of government.

These findings are not only relevant for the Swiss review process of popular initiatives, but also for the general question of separation of powers. When MPs are confronted with different institutional roles, they do not necessarily opt for the appropriate role but for the more convenient one with respect to future electoral success or other personal objectives. Their decision is biased by their personal interests, just like decisions taken by board members or managers, who do not always decide in the best interest of their company but in their own interests. If one seeks for decisions based on legal considerations, parliament might not be the adequate institution.

While Braendle and Stutzer's chapter⁹¹ demonstrates empirically that the presumed conflict of interest in which parliamentarian administrators find themselves is less pernicious than constitutional designers expect, Christmann's findings point to the opposite direction: a conflict between the parliamentarians' job of properly applying legal rules and their personal strategical interest pleasing the voters has the pernicious effect of leading to a too lenient scrutiny of proposals.

5.3 *'Conflict of interest of heads of state: the example of Madagascar' (Chapter 13)*

Jan Christoph Richter's chapter uses the example of the former President of Madagascar, Marc Ravalomanana (2002–2009), to illustrate the dimensions of conflict of interest caused by the business activities of a head of state in a developing country where accountability mechanisms are particularly weak. When he came to power, Ravalomanana owned one of Madagascar's largest companies, a dairy business. Over the course of his administration, his companies underwent considerable expansion. In the end, significant sectors of his business empire were destroyed during countrywide lootings until the President was ousted from power. Richter draws generalisable conclusions on some features of legislative

⁹¹ Braendle and Stutzer, 'A dilemma in the separation of powers: public servants as legislators', Chapter 10 in this volume.

frameworks addressing conflict of interest of elected officials, he suggests in which processes these should be developed, and derives recommendations for donor institutions.

First, conflict of interest regulation should serve a dual objective: to dissuade elected officials from misconduct and to guide and protect them from false accusations. Secondly, regulation should take into account the particularities of the respective official position. For example, heads of state may be in office for one term only. Far-reaching restrictions of private sector interests and activities may therefore cause dependency on the public office and limit the pool of talents.

Thirdly, the real chance of enforcing regulation on conflict of interest should be carefully considered. Enforcement may be unrealistic in developing countries where the notion of conflict of interest is relatively new and formal oversight institutions are weak. Especially one core element of conflict of interest regulation, namely the exclusion from decision-making processes, may be particularly difficult to apply to some offices. For example, heads of state with widespread business interests will find it difficult to govern if they exclude themselves from all decisions that affect their business interests.

Fourthly, transparency and proactive communication appear to be of paramount importance for effectively managing such conflict of interest. In developing countries with weak formal oversight institutions, the civil society and the media may play an essential role both in raising general awareness with regard to conflict of interest and as watchdogs that hold top-level elected officials accountable.

Clearly, mere replication of regulatory schemes on conflict of interest regulation from developed countries in countries where accountability mechanisms and rule of law are weak is unlikely to be successful. Concepts and the measures to address such conflict of interest need to take into consideration the weaknesses of the local governance systems, and local values and traditions.

These insights are important for donors. They should avoid the application of 'one size fits all' solutions that may not be applicable in the country context and therefore might be unrealistic to implement. Instead, they should support the development of contextualised concepts and solutions, based both on research and on public consultations. Donors should also continuously assess the efforts to address such conflict of interests. Lack of credible efforts should have a substantial impact on donor risk assessments and the allocation of their support. A focus on measures directed at strengthening formal and informal

oversight institutions rather than reforms driven by the executive seems paramount. If trained properly, investigative journalists and local NGOs with a focus on conflict of interest could assume a monitoring role.

6. Financial interests

A comparative study of conflict of interest regulation in EU member states found that most policies divide conflict of interest into two types, those involving pecuniary interests, and those involving non-pecuniary interests.⁹² In this volume, three chapters deal in particular with financial interests of managers and other actors in the financial and corporate world.

6.1 'Conflict of interest: compliance and its contribution to corporate governance in the financial services sector' (Chapter 14)

Monika Roth's chapter analyses conflict of interest as part of good corporate governance. Roth asks whether and when compliance as a concept can contribute to a better understanding and awareness for identifying and dealing with conflict of interest in the financial sector and what this means, for example, for strategic decisions.

Roth argues that in private banking, the novel culture of financial innovation has done more harm than good. Since banks began to create and to sell financial products, their new role has clouded their judgement about the difference between being someone's agent and being the seller of products. With the creation of the new products, banks became institutionally opposed to dealing with conflict of interest in an appropriate way, because that conflict of interest has become an inherent element of their business case.

Advisers have come under explicit or unspoken pressure to load up their clients' portfolios with products which earn the highest fee for their bank. Whatever the adviser then does, he damages either the legally and contractually defined interests of the client, or he misses the declared or immanent objectives set by the bank (his employer). The fees and incentive schemes which are linked to the new products exacerbates the problem. Bank advisers are often paid according to the fees they earn for their employer by selling products. So their own financial interest prevails (as a secondary interest).

⁹² Demmke et al., *Regulating Conflicts of Interest*, p. 28.

In this situation, it can hardly be ensured that each specific transaction in an asset management relationship is well founded and in the interest of the client, regardless of the coexisting bank's own or other clients' interests. Therefore, Roth concludes, the proper management of a conflict of interest may even require management to reject a business idea because this business would create an intrinsic conflict of interest. Business ideas built on the existence of conflict of interest undermine or destroy the mechanisms and safeguards established by the legislator, such as transparency and accountability requirements.

The debate about conflict of interest, compliance and its contribution to corporate governance (and performance) must, according to Monika Roth, focus on the role of the board, the CEO, and on the rules for governing a company. Notably the board, which appoints the CEO and which is responsible for the strategy, must endorse a clear compliance culture and compliance principles.

Decisions about products and services, including the renouncement on a service, form a key building block in the successful management of compliance starting from the top. What matters, says Roth, is not the organisation, but creating a new spirit about how to deal with conflict of interests. Ultimately, Monika Roth pleads for integrity: management must behave so that it can be trusted, and compensations schemes must reward performance with integrity.

6.2 *'Conflict of interest and the furore over banker compensation' (Chapter 15)*

Andrew Stark's chapter uncovers a specific conflict of interest arising for top managers in the financial sector, more specifically for senior executives in publicly held investment banks. Publicly held banks are banks owned by shareholders in the legal form of a listed stock company.

In the past, senior executives have often (expressly or implicitly) threatened to leave their bank for a private equity firm if they do not earn enough money, in form of a salary and annual bonuses. This threat has led to very high salaries and bonuses.

In this context, two types of conflicts of interest arise. First, there is an internal conflict: the prospect of a financial gain (or bonus) incites the executives to violate the fiduciary duty they bear towards investors and shareholders. The likeliness of a violation of that fiduciary duty stems from the fact that the bonuses and compensations are typically not clawed back. This fact incites the executives to incur unreasonable risks

for the firm, and hence for the shareholders, because they themselves do not risk anything with regard to their personal income. They will not suffer any loss of remuneration or bonus even if the firm suffers a loss.

Secondly, a conflict of interest arises when private employers promise higher remunerations. (Stark calls this conflict an 'external' one, because the promise comes from the outside of the current role of the manager.) This situation constitutes a threat of a conflict of interest because distinct features are present in this constellation, features which distinguish the situation from ordinary bargaining on the labour market, for example by doctors or lawyers.

The executives switch roles and migrate across the dividing line from a professional to a principal. This results in a situation in which the banker or executive who makes the threat of leaving his publicly held firm is abandoning the principals to whom he owes a duty while at the same time putting himself in their place. According to Stark, this constitutes a kind of 'fiduciary betrayal'.

As a remedy, Stark suggests a cooling-off period for senior public bank managers who threaten to move, just as it is now prescribed in many jurisdictions for senior public officials such as ministers, secretaries of state or governors. A senior banker should, for example, be barred for a year after leaving his public bank job from taking a position with a private equity or hedge fund.

Stark's chapter comprises a suggestion for transferring a mechanism originally designed for the sphere of 'public' governance (in this case the cooling-off period) to the sphere of 'private' governance. Such legal transfers could be envisaged with regard to other instruments for managing conflict of interest too.

6.3 *'Conflict of interest related to management and board payments - profit-based remuneration systems make things worse' (Chapter 16)*

Lukas Handschin's chapter explores a particular type of conflict of interest in corporations concerning the remuneration of the top management and of the board members of a stock company (exemplified by the stock company under Swiss law, with comparative references to other legal systems). Typically, the board of directors of a stock company decides on its own salary. This situation is beset by a conflict of interest, because the board members are torn between realising the best interest

of the company by deciding on a reasonable level of remuneration, and their own, personal pecuniary interest in a high salary.

Recusal rules are too weak to prevent self-interested decisions, because the board members mutually serve each other by tacit understanding. The owners of the stock company, the shareholders, cannot exercise effective control over this phenomenon, because they are not organised and do not speak with one voice. Disclosure of remuneration does not help either, because the shaming factor does not deter shameless personalities, and hardly functions in cultures where making (a lot of) money is accepted by the general public. Transferral of the decision on board remunerations to the principals, acting in the General Assembly, is not feasible either.

Profit-based remuneration (e.g. in form of bonuses) seems to be a way out of the conflict of interest, because it seems to *align* the board members' personal interest with that of the company. However, the chapter demonstrates that far from eliminating the conflict of interest, profit-based remuneration exacerbates it. One reason is that there is hardly any objective yardstick to measure the specific success to which the bonus is linked. Even defining the figures is a matter of evaluation. Accounting rules are not mathematical formulas, but (legal) rules. By definition, they leave room for discretion and even for falsification by the board of directors. In the end, the board does not merely state, but actually *defines* the profit of the company. Faced with the prospect of success-based remuneration, board members are tempted to show a profit which is not realistic. The consequence of showing such fictitious profits leads to a cash-out to the shareholders which puts the company at risk. So the conflict of interest leads to further harms.

However, small companies need these schemes to attract good managers. This means that the conflict of interest resulting from success-based remuneration cannot be resolved by simply banning such remuneration schemes. Other solutions must therefore be found.

According to Handschin, the only way is to ensure that the persons who make these decisions on behalf of the company or who participate in the decision-making process act only and exclusively in the interest of the company. The incentive structures must assure that these persons are not conflicted when making decisions affecting the valuation of assets and risks. In other words, they must not have a personal interest in the result of these decisions. If their remuneration is linked to the company's profit, they are unable to act independently and are in fact in a conflict of interest.

The problem could be solved by introducing a novel organisational structure, for example audit committees, staffed with non-executive and independent members, to control the exercise of discretion related to the definition of the profit. A different solution could be the adoption of a remuneration scheme which relates to 'objective' (for example cash-flow-related) figures or to so-called prudent figures (namely prudence-based valuation rules) which bear much less the risk that the shown profits are fictitious. Furthermore, the determination of the remuneration could be tied to specific benchmarks, such as the achievement of a specific business plan.

7. Unconflictedness and disinterestedness versus expertise and connectedness

Three chapters of this book illustrate that avoiding and banning conflict of interest comes with a cost. The disinterestedness of the 'clean' decision-makers has its price, notably the loss of expertise, of social capital or just of familiarity with the field. The trade-off between purity and performance must be made in all spheres of governance, be it in *global* politics, law and administration (as Chapter 5 explains), in the *domestic public* sphere (Chapter 10), or in the sphere of medicine which is normally regulated on the domestic or even local level and where *professional self-regulation* abounds (Chapter 18).

7.1 'How to start thinking about conflict of interest in global governance' (Chapter 5)

René Urueña, in Chapter 5, suggests starting thinking on conflict of interest in global governance on the basis of four theses: first, that the role of conflict of interest regulation in global governance is essentially different from its domestic namesake; secondly, that difference is due to the all-important role that expertise plays in global governance; thirdly, that the role of expertise in global governance triggers a paradox, which can be put as follows: regulation (and control) of expert power in global governance is dependent in its legitimacy on the very expertise it tries to regulate and control; and fourthly, that in order to escape a conceptual dead-end that may emerge from such a paradox, it seems promising to turn to the language of virtue ethics, in order to rethink conflict of interest at a truly global level.

Urueña begins by discussing the role of international law in global governance focusing on legal instrumentalism, and then turns to the two

principal reconstructive projects it has triggered: global constitutionalism and global administrative law. He explores the important role played by expertise in each of these projects. The next section describes the paradoxical relation of expertise and conflict of interest regulation. Finally, Urvueña proposes reading conflict of interest as an ethical problem, and draws on virtue ethics in order to rethink the role of conflict of interest regulation in global governance.

7.2 'A dilemma in the separation of powers: public servants as legislators' (Chapter 10)

Chapter 10 is authored by two economists, Thomas Braendle and Alois Stutzer. It analyses the conflict of interest in which members of parliament who are at the same time civil servants find themselves in. This type of conflict affects the liberal constitutional principle of a separation of powers. In order to preserve such a separation of powers, some countries prescribe that public servants have to withdraw from office even before they accept a candidacy for parliament. Other states require parliamentarians to give up or to stay their employment as a civil servant during their term as a parliamentarian.⁹³ No rule of ineligibility or incompatibility exists with regard to the civil servants (*Beamte*) of the German *Länder*, which is why the authors were able to collect data from these jurisdictions.

Braendle and Stutzer then examine the consequences of a strong representation of public servants in parliament. Parliamentarians playing the dual role as agents in the public service and as principals who supervise the public service in parliament are *prima facie* beset by a conflict of interest which potentially undermines the constitutional principle of the separation of powers.

On the other hand, parliamentarians who are at the same time civil servants might be able to perform their role as parliamentarians better than anybody else. They have insider information, they are particularly loyal to the state, they have more time to dedicate themselves to parliamentary activity, and they are independent from lobbyism and the pressure of industry. Exactly *because* of their secondary affiliation to the executive branch, they might be even more motivated than other

⁹³ See, e.g. Art. 144 of the Swiss Federal Constitution. Art. L231 of the French Code électoral, version consolidée au 19 May 2011.

parliamentarians to exercise the oversight function over that branch properly. For these reasons, a strong representation of public servants might *improve* parliamentary performance.

This theoretical reasoning is empirically tested by the authors with the help of a data set for the German *Länder*. The oversight activity by those *Länder* parliaments is measured by counting parliamentary interpellations. The data show that more interpellations are submitted in those parliaments in which the fraction of civil servants is higher. Civil servants are obviously more active in parliamentary oversight than their fellow members of parliament. This means that the presence of dual-function holders actually improves parliamentary oversight instead of inhibiting it.

The conclusion is that the conflict of interests in which those dual function holders find themselves is not pernicious, because the parliamentarians-civil servants (as the data show) do not restrain themselves out of any loyalty to the administration. On the contrary, they do exercise control seriously, and thereby work 'against' their second affiliation. This suggests that strict ineligibility rules are not necessary to preserve the operability of the principle of separation of powers.

7.3 'Conflict of interest at the bedside: surrogate decision-making at the end of life' (Chapter 18)

In this chapter, Susan Shapiro explores the inbuilt tension besetting fiduciary or trust relationships, namely that the most able and desirable trustees – those who offer familiarity, commitment, knowledge, inside information, expertise, experience and political, financial and social capital – are, precisely because of their insiderness, also least likely to be disinterested.

She studies this tension with regard to a particularly asymmetric and vulnerable fiduciary relationship in the medical setting, namely the relationship between a surrogate decision-maker and an incompetent patient. Shapiro relies on data from a multi-year ethnographic study of more than 2,000 patients who passed through either the neurological or the medical intensive care unit of a large urban US teaching hospital.

Shapiro first identifies possible sources of conflict of interest arising for the surrogate decision-maker, namely his or her financial interests, the caretaking responsibilities demanded of family members, emotional needs such as fear of loss and finally religious beliefs – all of which might interfere with his or her judgement when taking medical decisions on behalf of the patient.

Most surrogate decision-makers do not talk about any conflict of interest, especially when they are close to the patient (as a family member or friend). If at all, the issue is voiced in discussions with parents of younger patients. This, of course, does not mean that conflicts do not exist, but rather that they are either unconscious or deliberately denied. Surrogates tend to delude themselves that their interests replicated those of the patients or simply ignore the patients' preferences.⁹⁴

In reality, however, all surrogate decisions, except those by a state-appointed guardian, are made by conflicted fiduciaries, and some are tainted by these conflicts. Against this background, and knowing that the mentioned sources of conflict of interest are much more relevant for family members than for strangers to the patients, some bioethicists have suggested that family members should be barred from acting as a surrogate. But this proposal, argues Shapiro, takes us full circle to the tension between conflicted intimates who know us well and disinterested strangers who do not. Patients might still prefer the former, even *with* the baggage, i.e. the likelihood of conflictedness, they bring to the role. Moreover, in many cases the patients might indeed subordinate their interests to the interests of their children or other family members. In that case, the surrogate decision-maker could legitimately bring in his or her personal interest.

Ultimately, the question is whether or not 'conflict of interest' is an *appropriate concept* to frame situations where interests of the trust giver and of the trustees are often interdependent and in which objective information or self-awareness about where the interests really diverge is largely missing. Shapiro gives an affirmative answer. She considers the concept of conflict of interest appropriate, with the caveat that for both the intimates themselves and for outsiders, 'disinterestedness will be more of a work in progress'. She concludes that the best strategy to manage conflict of interest in this particular medical context is to identify and clarify any divergence of interest when the patients are still competent.

7.4 The trade-off

The three book chapters summarised in the preceding section have exemplified that it might be well worth tolerating conflict of interest in order to benefit from the conflicted agents' expertise. This section places those three constellations in context.

⁹⁴ See on this psychological phenomenon p. 370.

The dilemma between unconflictedness (impartiality, independence, disinterestedness) and expertise is classical. The reason is that real life expertise is normally controversial, 'political', and *interest bound*. In most societal spheres, decision-makers' expertise is co-constituted by their knowledge of the key players in the field and their integration into the networks of the community. These capacities bring with them the risk of a conflict of interest. Benefiting from this type of expertise necessarily means to renounce on disinterestedness.

The dilemma has been acknowledged in all three spheres of governance. For *public governance*, Cardinal Richelieu, Prime Minister of France from 1624 to 1642, wrote: '[L]a probité du conseiller d'Etat . . . n'empêche pas qu'un homme ne puisse pas faire ses affaires en faisant celles de l'Etat, mais elle lui défend seulement d'y penser au prejudice des intérêts publics, qui lui doivent être plus chers que sa propre vie.'⁹⁵ Richelieu preferred a corrupt minister to an incompetent one, because the incompetent one would always make the wrong decisions, whereas the corrupt one could still, in some instances, not let himself be guided by his proper interests, and then could make a good decision.⁹⁶ Richelieu's insight has been seized upon by modern observers of public governance. It has been argued that the state is often served better by an official who deviates from principles than by the one who scrupulously respects them but whose competence is limited to this. There is – from that perspective – also 'productive corruption'.⁹⁷ Indeed, Jan Christoph Richter's chapter in this volume illustrated that, in Madagascar, a businessman has been elected as a head of state exactly *because* of his economic expertise, and despite his conflictedness.⁹⁸

With regard to the *financial sphere*, Richelieu's wisdom is applicable as well. It has been pointed out that '[t]he principals may have to settle for a lower standard of quality in exchange for higher integrity, and the trade-off is not easy to quantify'.⁹⁹ The argument is here that 'a qualified but conflicted agent is often preferable to an honest but incompetent one'.¹⁰⁰

⁹⁵ Richelieu, *Œuvres du cardinal de Richelieu*, p. 33. ⁹⁶ *Ibid.*, pp. 33–34.

⁹⁷ Jacques Dufresne, *Conflits d'intérêts: Pour une éthique réaliste*, 1 October 2001, available at http://agora.qc.ca/Documents/Conflit_dinterets-Pour_une_ethique_realiste_par_Jacques_Dufresne (last accessed 15 December 2011).

⁹⁸ Richter, 'Conflict of interest of heads of state: the example of Madagascar', Chapter 13 in this volume.

⁹⁹ Thévenoz and Bahar, *Conflict of Interest*, p. 7. ¹⁰⁰ *Ibid.*, p. 14.

In the commercial sphere, the tension between unconflictedness and expertise has been most clearly articulated with regard to *arbitrators*, and is even considered a characteristic feature of arbitration.¹⁰¹ Hence, it is controversial whether the same standard of impartiality and independence should apply to judges and to arbitrators.¹⁰² A prominent view is that these standards should be less strict for arbitrators, because arbitrators are 'men of affairs, not apart from, but of the marketplace', as two US Supreme Court justices put it in a leading case on the disqualification of arbitrators.¹⁰³ That case concerned a commercial suit between a subcontractor and a prime contractor. The subcontractor challenged an arbitrator who was an engineering consultant whose services were used sporadically by the prime contractor. The Justice's concurring opinion highlighted the dilemma of having to choose between expertise and disinterestedness, by arguing that there is 'no reason automatically to disqualify the *best informed and most capable* potential arbitrators'. From that perspective, arbitrators should not be 'automatically disqualified by a business relationship with the parties before them'. There should not be disqualification especially when both parties have been informed of the relationship in advance, or if the relationship is 'trivial'.¹⁰⁴

The traditional reason given for the lenient approach to arbitrator independence and impartiality is that economic actors choose arbitration as a mode of dispute resolution mainly because of the arbitrator's expertise for the subject at stake, and that this requires a trade-off between expertise and impartiality. But this reasoning seems to be outdated. Economic actors nowadays do not primarily seek, through arbitration, a fair compromise, but a neutral adjudicative process in which an independent legal analysis takes place.¹⁰⁵ It therefore seems more appropriate to hold arbitrators to the same standards of impartiality as judges.¹⁰⁶ Once again, this issue exemplifies a convergence of the 'public' sphere (adjudication) and the 'private' one (arbitration).

¹⁰¹ Larson, 'Conflicts of Interest and Disclosures', pp. 890–891.

¹⁰² See on this controversy Singhal, 'Independence and Impartiality of Arbitrators', pp. 125–126.

¹⁰³ US Supreme Court, *Commonwealth Coatings Corp. v. Continental Casualty*, concurring opinion by justices White and Marshall (393 US 145 (1968), at 150).

¹⁰⁴ *Ibid.* (emphasis added).

¹⁰⁵ Singhal, 'Independence and Impartiality of Arbitrators', pp. 125–126.

¹⁰⁶ Cf. in that direction the International Bar Association (IBA) which do not allow for a distinction between sole arbitrators, party-appointed arbitrators and tribunal chairs (IBA Guidelines on Conflicts of Interest in International Arbitration, approved on

With regard to *global* governance, René Uruña has pointed out that expertise is a primary source of the (social) legitimacy of global governance (due to the weakness or even lack of other sources of legitimacy or beliefs in legitimacy, such as tradition or patriotism). Therefore the control of expert power and of the 'politics of expertise'¹⁰⁷ through conflict of interest regulation is more problematic on the global level and must not unduly cancel out or neutralise the expertise of the global decision-makers.¹⁰⁸

The dilemma between expertise and disinterestedness, described for all spheres of governance, basically means that stricter rules with requirements for distance to the subject matter will inevitably carry with them a loss of decision-making capacity. And it also means that, inversely, benefiting from expertise means having to renounce on strict conflict of interest regulation. The sociological insight (Chapter 18) then is that this tension between disinterestedness and expertise (including familiarity with the issue or with the principals), although conflict of interest is perceived and acknowledged as a problem, is accepted and even embraced by some principals.

This observation should inform regulatory choices. Banning conflict of interest inevitably means renouncing on the benefits the trustees offer. Any regulatory strategy must therefore be aware of trading off the benefits of insidership against the benefits of disinterestedness. The regulator should take into account that in many contexts, the addressees of the law apparently cherish the benefits of insidership highly, and are prepared to tolerate its flip-side, namely conflictedness. This leads to suggesting a less rigorous approach to conflict of interest which should not seek to eradicate all instances of real or apparent conflict.

8. The benefits of conflict of interest

Combating conflict of interest is, as the preceding section showed, costly. Endorsing conflict of interest does not only avoid these costs, but possibly conveys additional, specific benefits. Two chapters in this volume highlight these.

22 May 2004 by the Council of the International Bar Association, General Standard 5 (p. 14), available at www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx (last accessed 15 December 2011).

¹⁰⁷ Kennedy, 'The Politics of the Invisible College'.

¹⁰⁸ Uruña, 'How to start thinking about conflict of interest in global governance?', Chapter 5 in this volume.

8.1 *'Private vices, public benefits? Small town bureaucratisation in Namibia' (Chapter 12)*

Gregor Dobler analyses a typical conflict of interest on the governance level of local administration in a developing country. Making use of empirical material from a border boom town in Northern Namibia, this chapter recounts how the town administrator in a small Namibian town uses the rhetoric of his office (namely by threatening to enforce the law) in order to seek an 'arrangement'. The arrangement consists in him granting a favour to someone by not enforcing the legal prohibition. The administrator can only apply the threat within the limits of, and by referral to the official legal framework. But thereby he appropriates his office's power for his private aims. This generally turns the institutional role into an empty shell.

Under certain conditions, however, private interests can lend power and relevance to the state's institutions. Dobler identifies conditions under which this process might happen. First, state institutionalisation must have surpassed a minimum threshold. The state must have the practical implementation capacity to matter on a local level, and it has to be able to eclipse other actors' powers. Secondly, administrators and administered must share a common understanding of what should, in theory, constitute the appropriate role behaviour. Finally, administrators have to fear consequences if they do not comply with the rules. If these three conditions are met, Dobler argues, the coupling of private and institutional interests in the end strengthens the institutional logic and confines private interests to ever narrower areas.

To sum up, the chapter shows that even acts which go against the principal's short-term interests can, in the long run, lead to an increasingly clear definition of institutional roles. It thus describes how individual self-interest of local administrators can contribute to a process of institution building. Ultimately this means that conflict of interest is not per se bad, but under these conditions, beneficial.

8.2 *'Conflict of interest from the perspective of the sociology of organised action' (Chapter 2)*

Erhard Friedberg calls into question the view that conflict of interest is bad. Conflict of interest is just another formulation of the classic principal-agent dilemma. It is, in structural terms, ubiquitous. No collective action, no society can be imagined without it. More even, conflict of interest will be experienced as a resource.

The question is, according to Friedberg (Chapter 2), not about eliminating the structural fact, but to control the discretionary and potentially opportunistic behavioural problem. This means that considering conflict of interest as a problem is mainly (or even purely) a matter of perception. Friedberg identifies the following reasons for the recent change of perception: the increase in complexity and interdependence of our societies, the spread of democracy and the concomitant general distrust in hierarchical institutional set-ups, and a decrease of institutional trust. Moreover, formerly fuzzy professional boundaries have hardened and tightened. This factious formerly unified fields of social and professional action into specialised spheres. Knowledge acquired in another sphere, instead of being a resource, becomes a reason for disqualification because it putatively generates a conflict of interest. For these reasons, conflict of interest is a structural problem in collective action. A feature of our modern societies is the emergence of network aristocracies. These thrive on the accumulation of roles in certain positions which in turn offer opportunities for discretionary action that benefits them, but might be potentially detrimental to the collective good. All considered, conflict of interest is not only inevitable, it is also ambiguous. It can be profitable for the organisation, when well managed.

9. Conflict of interest in multi-level governance: international versus national interests

In this book, two chapters draw contrasting pictures of conflict of interest management in global governance. While Auguste Nganga Malonga (Chapter 4) highlights the *commonalities* between national and international bureaucracies, and calls for conflict of interest rules following the domestic model, René Urueña (Chapter 5) on the contrary insists on the *difference* between domestic and global administrations which, in his view, lies in the basis of legitimacy of international law and the role that expertise plays as an ersatz legitimacy in the sphere of global governance.

In this section, another specific feature of conflict of interest in global, or rather in multi-level governance, shall be explored. This is the inbuilt tension between the international civil servants' formal responsibility exclusively towards the international organisation they serve and their at least latent loyalty towards their state of nationality.¹⁰⁹

¹⁰⁹ See on this tension with regard to international judges pp. 375–379.

It is generally said that the 'de-nationalisation' of the international organisations' staff ('international civil servants'), effectuated by the principles of *independence* together with *impartiality and loyalty to the organisation*, are a basic condition for the functioning of all international (or supranational) organisations.¹¹⁰ Basically all international organisations' founding documents contain these principles.¹¹¹ For example, the provision on the European Commission in Article 17(3) TEU runs:

The Commission's term of office shall be five years. The members of the Commission shall be chosen on the ground of their general competence and European commitment from persons whose *independence* is beyond doubt. In carrying out its responsibilities, the Commission shall be *completely independent* ... [T]he members of the Commission shall *neither seek nor take instructions* from any Government or other institution, body, office or entity. They shall refrain from any action incompatible with their duties or the performance of their tasks.¹¹²

So while the underlying ideal demands that international secretariats be unencumbered by the influence of member states, there is in reality 'always a potential conflict of loyalties'.¹¹³ This perennial conflict is normally not considered through the lens of the modern concept of conflict of interest.¹¹⁴ Still, the entire set-up of the organisations reveals that the designers realistically acknowledge that the international secretariats are not exclusively devoted to the organisation and clinically

¹¹⁰ Schermers and Blokker, *International Institutional Law*, para. 524. Additionally, privileges and immunities of staff members of international organisations are a specific tool to safeguard the staff's independence from the member states. See in detail Barnes, 'Tenure and Independence in the United Nations International Civil Service'; Jonah, 'Independence and Integrity of the International Civil Service'; Weiss, 'International Bureaucracy'; Tarassenko and Zacklin, 'Independence of International Civil Servants'.

¹¹¹ See, besides Art. 100 UN Charter (quoted in Peters, 'Conflict of interest as a cross-cutting problem of governance', Chapter 1 in this volume, p. 16) as further random examples: Art. 9 of the Constitution of the International Labour Organisation of 1 November 1945; Art. VI(5) of the Constitution of the United Nations Educational, Scientific and Cultural Organization (UNESCO) of 16 November 1945; Art. 37 of the Constitution of the World Health Organization of 22 July 1946.

¹¹² Emphases added. ¹¹³ Schreuer and Ebner, 'Art. 100', MN 4.

¹¹⁴ For example, within the United Nations system, the concept of conflict of interest has rather been applied to circumstances in which international civil servants appear to benefit personally, especially in financial terms, from any business or transaction with the organisation they serve. See International Civil Service Commission (ICSC), *Standards of Conduct for the International Civil Service* (January 2002), paras. 21–22, available at <http://icsc.un.org/resources/pdfs/general/standardse.pdf> (last accessed 15 December 2011), endorsed by GA Res. 56/244 (2002).

isolated from their home country, but are in reality 'a grouping of conflicting loyalties'.¹¹⁵ It is common-sensical that the nationality of an organisation's civil servant *does* play an informal role for his official decision-making. This unavowed expectation explains the requirements of a wide geographical basis, national quotas, and rotation schemes for the staff which exist in all international organisations.¹¹⁶

So in the staff of international organisations there is always a tension between the necessity of safeguarding its independence on the one hand, but on the other hand the member states' desire to have national *de facto* 'representatives' in that staff. Although *formally* the member states cannot instruct or influence their national once he has been recruited, they are keen to have in place, in the organisation's staff, a person who has at least some sensitivity for the interests of the member state, and who can function as its interlocutor. In short, member states look for a vehicle to have national interests taken into account, even within those organs of international organisations which are in theory supposed to defend exclusively the interests of the organisation – as opposed to those organs which are composed of member states' delegates and whose function it is to represent the member states' interests (such as the General Assembly in the UN, the General Council of the WTO, etc.). This is the reason why, for example within the EU, the scheme of the Treaty of Lisbon to reduce the size of the EU Commission (which had grown larger with each territorial enlargement of the EU) in order to restore its efficiency,¹¹⁷ had met such stiff opposition that it was given up.¹¹⁸

¹¹⁵ Weiss, 'International Bureaucracy', at 303.

¹¹⁶ See, e.g. Art. 101(3) UN Charter: 'The paramount consideration in the employment of the staff and in the determination of the conditions of service shall be the necessity of having the highest standard of efficiency, competence, and integrity. Due regard shall be paid to the importance of recruiting staff on as *wide a geographical basis* as possible' (emphasis added). The objective of these schemes is to prevent international organisations from becoming the monopoly of nationals from large, developed countries, and to secure the truly 'international' character of the staff. But if the staff were really independent and loyal only to the organisation, the nationality of the servants would not matter.

¹¹⁷ Art. 17(3) TEU: 'The members of the Commission shall be chosen from among the nationals of the Member States on the basis of a system of strictly equal rotation between the Member States, reflecting the demographic and geographical range of all the Member States.' The Commission is appointed by the Council in the formation of the heads of governments.

¹¹⁸ Conclusions of the Presidency of the European Council of 12 December 2008 (Doc. No. 17271/08): '2. On the composition of the Commission, the European Council recalls that the Treaties currently in force require that the number of Commissioners be reduced in 2009. The European Council agrees that provided the Treaty of Lisbon

To conclude, geographically bound formal and informal election and appointment schemes for the staff of international organisations are a specific tool to manage the pervasive and specific conflict of interest in global governance, namely the conflict between national and international interests. 'The geographical quota tends to *ensure that national interests continue to be an acceptable rationale for policies*, both inside and outside the organisations.'¹¹⁹ Thereby, *the organisation's interest and the member states' interests are supposed to be balanced*,¹²⁰ a subtle 'dialectic' between the nationality requirement and independence is effectuated by the geographic schemes.¹²¹

This balancing functions more or less well, and has been severely criticised. Thomas Weiss has written that:

[t]he overriding basis for action by an international civil service should be loyalty to the world community and to supranational perspectives. Ironically, the geographical quota system reinforces the acceptance and validity of national loyalties in the heart of international organisations, promoting precisely what international administration was theoretically erected to overcome.¹²²

But the root of the problem that national interests – which are actually in the context of global governance 'alien' – take over 'is to be found not so much in corrupt individuals, but rather in the legal and political constraints under which the nationals of some member States operate in the Secretariat'.¹²³ This is a systemic problem of multi-level governance.

10. The limits of the law

In all three spheres of governance, the ever-denser conflict of interest regulation, which is seen as increasingly technical and arid, provokes the question of the limits of the law. Is conflict of interest really a legal question, or rather one of virtue? In public and global and corporate governance, this argument is typically formulated in terms of

enters into force, a decision will be taken, in accordance with the necessary legal procedures, to the effect that the Commission *shall continue to include one national of each Member State* (emphasis added).

¹¹⁹ Weiss, 'International Bureaucracy', p. 293 (emphasis added).

¹²⁰ Haltern, *Europarecht*, p. 83 (with regard to the EU Commission).

¹²¹ Lagrange, *La représentation institutionnelle dans l'ordre international*, p. 234.

¹²² Weiss, 'International Bureaucracy', p. 303.

¹²³ Schreuer and Ebner, 'Art. 100', MN 74 (on the UN Secretary-General).

'integrity',¹²⁴ and in the professional sphere both in terms of 'integrity' and of 'professionalism'. Along this line, it has been asserted that 'professionalism is the first, and primary, bulwark' against detrimental effects of conflict of interest.¹²⁵

For example, legal provisions based on the concepts of good faith and loyalty cannot resolve problems of conflict of interest, when their premise, namely that managers are well-meaning persons who act with integrity, is wrong. In this regard, Lukas Handschin's findings¹²⁶ dovetail with Monika Roth's main argument¹²⁷ that personal integrity (and the appropriate personnel choices, personnel training, and role models in top management) matter most for successfully dealing with conflict of interest. But this is ultimately true for law in general. The operability of legal rules depends to a large extent on shared societal (including ethical) attitudes. If this basis is lacking, the legal rules will remain a dead letter.

So should conflict of interest be better managed within the framework of an (unenforceable) 'integrity-based ethics regime' (relying on aspiration), rather than through an enforceable 'compliance-based regime' (relying on discipline and sanctions) – to use in the famous distinction established in the 1990s by the OECD?¹²⁸ Probably, a combination is best. Along this line, the already mentioned study on conflict of interest of political office-holders recommends that emphasis be put on an integrity infrastructure which consists of a proactive approach towards conflict of interest (and ethics in general), including a combination of awareness raising instruments (including leadership), transparency policies, rules and standards as well as deterrent measures.¹²⁹

¹²⁴ See in this sense for global governance Urueña, 'Conflict of interest in global governance', Chapter 5 in this volume; for corporate and financial governance Roth, 'Conflict of interest: compliance and its contribution to corporate governance in the financial services sector', Chapter 14 in this volume. See also OECD (note 14), p. 96: The proper objective of an effective conflict of interest policy is not the simple prohibition of all private capacity interests on the part of public officials, the immediate objective should be to maintain the integrity of official policy. In scholarship Warren, *Administrative Law in the Political System*, p. 183: '[A] person's inner attitudes toward governance, not conflict-of-interest or other similar statutes, provide the best guidance for proper conduct.'

¹²⁵ Loewenstein, 'Commentary', p. 203.

¹²⁶ Handschin, 'Conflict of interest related to management and board payments – profit-based remuneration systems make things worse', Chapter 16 in this volume.

¹²⁷ Roth, 'Conflict of interest', Chapter 14 in this volume.

¹²⁸ OECD, Public Management Service (PUMA), *Managing government ethics*, February 1997, available at www.oecd.org/dataoecd/59/60/1899269.pdf (last accessed 15 December 2011).

¹²⁹ Demmke et al., *Regulating Conflicts of Interest*, p. 138. See for the same conclusion on integrity in the private, especially the financial sector Roth, 'Conflict of interest',

The suggestion to place more emphasis on 'integrity' and 'professionalism' seems all the more justified as existing hard conflict of interest rules are, anyway, notoriously difficult to enforce. It has even been stated that 'conflict-of-interest laws are virtually impossible to enforce' unless they are flagrantly violated.¹³⁰ Therefore, '[p]robably more important than having detailed conflict of interest regimes is to have a credible monitoring and control mechanism in place, the crucial issue being transparency and accessibility of information, monitoring and enforcement'.¹³¹

Moreover, sanctions can be divided into those targeting the acts resulting from tainted processes (by invalidation, vacation, etc.), and those targeting persons (removal from office, fines, etc.). The French *Commission de réflexion*'s main finding is that targeting persons in a 'deontological' fashion is more important than just targeting the acts.¹³²

The suggestion to combine the legalist and the ethics approach is furthermore supported by the seemingly paradoxical fact that, typically, countries in which a high level of corruption exists (or is perceived to exist) have denser and stricter conflict of interest rules than in countries with an entrenched integrity tradition. Is it not revealing that Article 43(1) of the relatively new Constitution of Madagascar states that public service shall neither be the source of illicit enrichment nor a means to serve private interests?¹³³ Such a straightforward and rather blunt constitutional prohibition of corruption would not be conceivable in a country like, say, Switzerland, because here the underlying norm is so deeply entrenched in culture that it goes without saying (even if it is of course not always observed). In fact, countries that are viewed as abiding the law very strictly, and in which a strong ethos of the public official exists (such as Germany with its tradition of

Chapter 14 in this volume. See for the necessity of a contextually adequate regulation, esp. taking into account the differences between industrial states and developing states Richter, 'Conflict of interest of heads of state', Chapter 13 in this volume.

¹³⁰ Warren, *Administrative Law in the Political System*, p. 183.

¹³¹ Demmke et al., *Regulating Conflicts of Interest*, p. 141.

¹³² Commission de réflexion (note 13), p. 45.

¹³³ Art. 43 of the Constitution of Madagascar of 19 August 1992: '(1) No one called to carry out an office under this Constitution may accept presents or remuneration, except for his official salary, from any person or corporation domestic or foreign, under penalty of dismissal. (2) The application of these provisions shall be determined by law.' See also Richter, 'Conflict of interest of heads of state', Chapter 13 in this volume.

the *Beamtentum*), have – for example – practically no rules on restricting professional commitments after leaving public office.¹³⁴

In parallel, in order to make up for the absence of a grown and time-honoured culture of a non-national public service in the interest of international or supranational regimes (and because of the greater risk of succumbing to national interests), it might be expected that conflict of interest regulation in international organisations is denser and more explicit than on the domestic plane. This is the case for the EU, where conflict of interest is regulated *more densely* with regard to the EU institutions than in the EU member states themselves.¹³⁵ In contrast, conflict of interest regulation on the global plane (for international organisations with a global scope) is still in its infancy, and attempts to harmonise it are only beginning.¹³⁶ It is submitted that tighter regulation of conflict of interest in global governance is in principle welcome, although, as René Uruña points out, this might crowd out the expertise of the international civil servants which is in turn crucial for maintaining legitimacy.¹³⁷

The empirical observation of dense regulation in spheres of 'low culture' confirms that regulation is normally a reaction to perceived deficiencies, and maybe even be inversely proportionate to the integrity and trust reigning vis-à-vis the public institutions. Where less trust exists, such as towards the relatively novel and far away European and global governance institutions, or in legal cultures which are less hostile vis-à-vis corruption, more regulation is called for (often in the aftermath of scandals, accompanied by high media attention).

But the question is whether this regulation in fact reaches the objective of reducing the damaging effects of conflict of interest. There is little scientific knowledge about the effectiveness of the different regimes and instruments.¹³⁸ Their effectiveness seems to owe as much to the governance context (features such as transparency, accountability, proper

¹³⁴ Demmke et al., *Regulating Conflicts of Interest*, p. 59, mentioning Germany, Denmark, Finland, the Netherlands and Sweden.

¹³⁵ *Ibid.*, pp. 11 and 60. See for the EU regime in detail Peters, 'Cross-cutting problem of governance', Chapter 1 in this volume, pp. 12–13.

¹³⁶ See Nganga Malonga, 'Conflict of interest of international civil servants', Chapter 4 in this volume; Peters, 'Cross-cutting problem of governance', Chapter 1 in this volume, pp. 10–12.

¹³⁷ Uruña, 'Conflict of interest in global governance', Chapter 5 in this volume.

¹³⁸ Demmke et al., *Regulating Conflicts of Interest*, pp. 7–8 and 23. The authors urge that more concentration should be given to implementation issues. According to that study, the real challenges are to analyse how registers of interest are monitored, how post-employment rules are enforced, and how ethics committees work in practice.

contracting, auditing and scrutiny and fairness) as to the sophistication of the conflict of interest law itself.¹³⁹ At this point, we seemingly come full circle: conflict of interest legislation is enacted in order to counteract the lack of an integrity culture, but seems to work only in the context of such a culture. However, such a culture needs a proper institutional frame, and can be developed, *inter alia*, through the law itself.

It has been pointed out that existing rules appear to have little deterrent effect because, due to the nature of the 'offence', conflicted agents typically underestimate the risk of being held liable. They assess that future risk as being very small, but the probability of benefit (the rewards of self-enrichment) as very high and near certain.¹⁴⁰ This observation again points to the fact that it is not in the first place a cost-benefit calculus of gain versus sanctions which can lead to compliance in this field, but rather integrity (independent of sanctions).

Finally, more regulation might in some instances be counterproductive, because the more rules there are, the more violations will occur. Media-driven scandalisation over such violations is no proof that conflict of interest is increasing as such. But it might foster the public perception that holders of public office are less ethical than they were before, and thus decrease, instead of increase public trust.¹⁴¹

11. Conflict of interest in governance: convergence or context-specificity?

This book is designed to test the hypothesis that conflict of interest is a cross-cutting governance problem which concerns both the public and the private sphere, and the local, national, and global level of governance. But does the phenomenon of conflict of interest and the regulatory approaches to it really pose, if not identical then similar, problems which call for parallel responses? If yes, then the entire risk field of conflict of interest would manifest a relativity of the public-private divide, and a trend of transnationalisation of governance (in the sense of eroding the boundaries between the domestic and the international).

¹³⁹ Hine, 'Conclusion', p. 214.

¹⁴⁰ Issacharoff, 'Legal Responses to Conflict of Interest', p. 194.

¹⁴¹ Demmke et al., *Regulating Conflicts of Interest*, p. 121.

11.1 A main challenge: blurriness of public and private

It has been stated that privatisation and private-public partnerships increase the likelihood of new forms of conflict of interest.¹⁴² This is common knowledge in the context of nation states, and it has been well researched how privatisations have transformed the administrations and the (formally) public service of states. What is less known and worth illustrating is the similar phenomenon *on the level of global governance*. After the global political seismic shift of 1989, the United Nations started to undertake great efforts to cooperate with the private sector. A 2005 report of the Secretary-General heralded 'partnerships' between the United Nations and business as a novel policy instrument.¹⁴³ Such global private-public partnerships are intended to contribute to the realisation of public functions. The report enumerates four functions of partnerships: to perform advocacy, to develop norms and standards, to share and coordinate resources and expertise, and finally to harness markets for development. It asks for a 'partnership mainstreaming' of the United Nations. Most importantly, the Secretary-General here presents the partnerships as a catalyst of institutional reform and innovation of the United Nations itself in the direction of a more outward-looking, more impact-oriented organisation, as a stimulus for the diffusion of improved management practices and for enhancing a performance-based thinking.¹⁴⁴ This approach copies the administrative reforms that have been pursued within Western nation states since the 1980s under the label of 'new public management'. The price of more flexibility and more effectiveness-orientation may well be an increased potential for conflict of interest.

This is exemplified by the ongoing quasi-privatisation of the World Health Organization.¹⁴⁵ Public health is, generally speaking, an at-risk sector with regard to conflict of interest, because of the very high stakes (in terms of saving human lives and making money), and powerful pharmaceutical industries involved. Around 40 per cent of the WHO budget is nourished through private funding, with the Bill Gates

¹⁴² Peters, 'Cross-cutting problem of governance', Chapter 1 in this volume, pp. 34–35.

¹⁴³ UN General Assembly 2005, *Enhanced Cooperation Between the United Nations and All Relevant Partners, in Particular the Private Sector. Report of the Secretary General (A/60/214)*. The report gives numerous examples for partnerships between business actors and UN sub-organisations or programmes. The UNDP has a 'Partnership Bureau' with a 'Private Sector Division'.

¹⁴⁴ *Ibid.*, paras. 32, 60, 62, 63.

¹⁴⁵ Mathari, 'Ungelöste Interessenkonflikte in der WHO', *Neue Zürcher Zeitung*, 25 May 2011, 9.

Foundation being the second biggest voluntary contributor. Against this background, making that Foundation finance the external evaluation of the WHO performance created a conflict of interest. Another case in point was the WHO decision to classify the swine flu of 2009 as the highest risk level, which was suspected as having been tainted by conflict of interest. However, an independent expert investigation did not corroborate that suspicion.¹⁴⁶ A third example for appearances of conflict of interest was the debate over the Swiss member of the WHO Executive Council Paul Herrling, who was a research director at the pharmaceutical firm Novartis. He launched a WHO initiative on orphan diseases while he himself directed research projects for Novartis in this field. Finally, the WHO was heading for a substantial privatisation through the creation of a 'multi-stakeholder World Health Forum', composed of states, non-governmental organisations, private foundations and business.¹⁴⁷ This reform has been criticised by the NGO *Médécins sans frontières* for 'institutionalising conflicts of interests as the norm within the WHO by extending the role of policy and decision shaping to for-profit actors that have an interest in the outcome'. According to that NGO, the projected World Health Forum risked compromising and distorting internationally and nationally agreed public health priorities. 'This is ever more worrying in the absence of a strong and clear WHO policy on conflicts of interests' wrote *Médécins sans frontières*.¹⁴⁸ The project was therefore abandoned.

Overall, privatisation in a broad sense – comprising public–private partnerships, the new combinations of traditional 'bureaucratic' hierarchy with 'horizontal' ('market-like') cooperation and collaboration, the use of private law to clothe institutions and processes, and outsourcing tasks and services – both on the domestic plane and in global governance, might alleviate mismanagement, ineffectiveness and lack of funding – but it bears risks.

¹⁴⁶ 'WHO use of advisory bodies in responding to the influenza pandemic', Pandemic (H1N1) 2009 briefing note of 3 December 2009.

¹⁴⁷ See the WHO Director-General's report: 'The future of financing for WHO: World Health Organization reforms for a healthy future', WHO Doc A64/4 of 5 May 2011, paras. 86–87.

¹⁴⁸ *Médécins sans frontières* and Declaration de Berne join the Call to stop the World Health Forum, 17 May 2011, available at www.evb.ch/en/p25019347.html (last accessed 15 December 2011). The projected reform has also been criticised by some governments as 'expropriating' the states which in the eyes of the critics should remain in the driving seat for reform.

These new structures erode the public–private distinction. Moreover, that distinction is called into question by the existence of a third, societal, sphere. Civil society is neither 'public' in the sense of governmental, nor 'private' in the sense of self-interestedness and profit-making. Here as well, conflict of interest can arise, i.e. with regard to decision-making by NGOs.¹⁴⁹ This is all the more relevant as NGOs are increasingly integrated in trilateral regulatory partnerships (public–private–societal).¹⁵⁰ Still it is controversial whether bribing employees or directors of *not-for-profit entities* as opposed to for-profit entities can constitute a criminal offence.¹⁵¹ This question has a high practical relevance, given the recurrent accusations of corruption of high level representatives of sport associations such as the Fédération Internationale de Football Association (FIFA). Again, this issue cuts across the domestic and the international level.

To conclude, when government becomes privatised, and when decision-making becomes more collaborative (across regions, sectors, and forms of government), it becomes more likely that decision-makers will wear private and public hats simultaneously, and that commercial interests and public interests are hard to hold apart. All this bears the potential of novel variants of conflict of interest, and this indeed cuts across all spheres of governance.

11.2 Similar regulatory responses

A common rationale for combating conflict of interest: protecting trust

Is there a similar rationale for combating conflict of interest in the various spheres? It is submitted that this common rationale is ensuring trust. That objective has been most clearly spelled out with regard to public officials. In the public sphere, public trust is the basis of the social contract and of democracy. Here, trust is also linked to the idea that holders of public and political office must be accountable to the citizens.¹⁵² A loss of trust may in turn have detrimental economic effects, such as damaging the

¹⁴⁹ See MacDonald, McDonald and Norman, 'Charitable Conflicts of Interest' on conflict of interest in NGOs, more concretely on charities that raise funds for medical research.

¹⁵⁰ Cf. Peters et al. (eds.), *Non-state Actors as Standard Setters*.

¹⁵¹ See in favour of such an extension for Swiss criminal law Pieth, 'Korruption', para. 91.

¹⁵² Cf. Art. 15 of the French Declaration of the Rights of Man and Citizen of 26 August 1789: 'Society has the right to require of every public agent an account of his administration.'

investment climate.¹⁵³ Concomitantly, the modern rationale for criminalising bribery (in the public sector) is, in many jurisdictions, to protect the public's trust in the objectivity and rationality of the office-holders' action.¹⁵⁴

Secondly, trust is paramount in global governance.¹⁵⁵ Just as much, and maybe even more than their domestic counterparts, the global institutions depend on public faith. This includes the international courts and tribunals, whose judges must 'inspire confidence in court decisions and in the judicial system more generally'.¹⁵⁶

But is the protection of trust also relevant in the corporate sphere? Here, the primordial regulatory objective of combating conflict of interest, including its criminal outgrowth, bribery, is ensuring fair competition among market participants. Firms should not obtain an unfair competitive advantage through bribing officials or the personnel of private entities.¹⁵⁷ But besides, markets for their functioning crucially need trust and confidence (of investors, of purchasers, of consumers, of clients). The paramount importance of trust in the corporate sector shines up in the term 'to entrust' to describe the handing over of resources to the management (the agent) by the shareholders (the principal). And confidence is a classic concern in the legal profession. For example, the Law Society of England and Wales imposes a blanket prohibition on solicitors from acting where there is or may be a significant risk of conflict of interest. The rationale is the Society's 'desire to maintain public confidence in the profession. Maintaining confidence in the solicitor-client relationship is regarded as of paramount importance. Clients should have confidence that the solicitor's partisanship is not compromised by his potentially conflicting responsibilities to others'.¹⁵⁸ Finally, the more 'stakeholderism' gains ground in the corporate sector,

¹⁵³ Richter, 'Conflict of interest of heads of state', Chapter 13 in this volume.

¹⁵⁴ In contrast, an older rationale for penalising passive bribery was the violation of the office-holder's duty of loyalty towards the state. That idea could not justify the criminalisation of active bribery and led to an asymmetry between both offences which has now been abandoned in many legal systems. Pieth, 'Korruption', para. 18.

¹⁵⁵ Nganga Malonga, 'International civil servants', Chapter 4 in this volume.

¹⁵⁶ Swigart, 'The National Judge', p. 223.

¹⁵⁷ For this reason, Switzerland, for example, has codified private bribery in the code against unfair competitive practices, Art. 4a *Loi fédérale du 19 décembre 1986 contre la concurrence déloyale (LCD)*, R.S. 241.

¹⁵⁸ Griffiths-Baker, *Serving Two Masters*, p. 164.

and the more corporate social responsibility is accepted,¹⁵⁹ the more the public 'trust' in corporate action is worth protecting as well.

Mixing command-and-control-regulation and market-based regulation

It has been asserted that the regulation of conflict of interest is and should be categorically different in areas of command-and-control-regulation from those where market-based regulation occurs. In the classical duty-based paradigm, the office-holders adopt standards and enforce them. Office-holders are prone to experiencing a conflict between the 'public' and the 'private' interest.

In contrast, in the paradigm of market-based regulation, the governing bodies do not impose standards, but create a framework in which market participants can meet. The standards then emerge from the meeting of offer and demand. To some extent, the market participants can be said to regulate themselves through that mechanism. The 'governance' tool here is competition and market discipline. Along this line, a comprehensive study on the financial services sector has found that in investment banking, auditing, credit assessment, consulting by rating agencies, '[t]he market is often able to provide incentives that constrain conflicted agents, discounting the value of services when it perceived a conflict of interest is present'.¹⁶⁰ For example, clients who are concerned about conflict of interest of an auditor reduce the value they attach to the audit opinion. 'In response, financial service providers frequently institute safeguards to reduce the incentives to exploit conflicts, thereby protecting their reputation'.¹⁶¹

Crucially, in the paradigm of 'regulation' through the market, it is expected and indeed essential for each participant *to act in his private interest* for market regulatory mechanisms to work. In the words of Adam Smith:

It is not from the benevolence of the butcher, the brewer, or the baker, that we expect our dinner, *but from their regard to their own interest*. We address ourselves, not to their humanity but to their self-love, and never talk to them of our own necessities but of their advantages.¹⁶²

¹⁵⁹ See on this aspect Peters, 'Cross-cutting problem of governance', Chapter 1 in this volume, pp. 16–17.

¹⁶⁰ Crockett et al., *Conflicts of Interest in the Financial Services Industry*, p. xix.

¹⁶¹ *Ibid.*

¹⁶² Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations*, book I, chapter ii, s. 2 (emphasis added).

[E]very individual ... generally, indeed, *neither intends to promote the public interest, nor knows how much he is promoting it* ... [H]e intends only his own gain, and he is in this ... led by an invisible hand to promote an end which was no part of his intention. Nor is it always the worse for the society that it was not part of his intention. By pursuing his own interest he frequently promotes that of the society more effectually than when he really intends to promote it.¹⁶³

In this classic formula, the 'public interest' is promoted unintentionally through the market participants' regard to their personal interest. Ideally, there is no conflict but on the contrary a *convergence* of interest.

However, several chapters in this book showed that this theoretical model often does not work and that the assumed convergence of interest is incomplete or absent, for instance due to perverse incentives such as rewarding too risky decisions.¹⁶⁴ This means that a *conflictual structure of interests* is ubiquitous, both in the person of office-holders or in the person of market participants who 'regulate' themselves. This also means that the regulatory response should not categorically differ. Moreover, it is far from clear in which issue areas duty-based ('command-and-control') regulation is appropriate, and where market-based regulation is best.

It is a truism that in various markets, competition may not suffice to generate overall welfare and fairness, especially where the interests of some participants are both diffuse and of low overall value, where high information costs make consumer choices difficult, and where high investment costs make the entry for rivals hard. Under such conditions it is unlikely that market mechanisms alone can protect certain participants and this applies also to the protection against obnoxious effects of conflict of interest.¹⁶⁵ An area where this insight plays is the financial services market, where many clients depend on the services of one agent, and where a lack of transparency hampers competition.¹⁶⁶

Finally, the regulatory choice (between command-and-control regulation and market-based regulation) does and cannot depend on whether there is a public interest or not. More and more issues in the public interest, such as a clean environment and education, are being

¹⁶³ Ibid., book IV, chapter ii, s. 9 (emphasis added).

¹⁶⁴ See especially Handschin, 'Conflict of interest related to management and board payments', Chapter 16 in this volume; Roth, 'Conflict of interest', Chapter 14 in this volume. See also Peters, 'Cross-cutting problem of governance, Chapter 1 in this volume, pp. 23–25 on financial interests.

¹⁶⁵ Cf. Issacharoff, 'Legal Responses', p. 190.

¹⁶⁶ Palazzo and Rethel, 'Conflicts of Interest in Financial Intermediation', p. 20.

addressed through market-based regulation, for example through voluntary environmental agreements, emission certificate trading or school vouchers for parents.

Transparency requirements

An obvious commonality in global¹⁶⁷ and public governance,¹⁶⁸ and in regulation on the financial services (a 'private' industry)¹⁶⁹ is that transparency is the most popular remedy. Disclosure requirements have become the most important instrument in the field. It is no coincidence that the most powerful NGO in the global effort against corruption calls itself 'Transparency International'.

But it also seems that the *shortcomings* of disclosure policies are visible in all three spheres of governance. First, the declaration as such does not in itself resolve the conflict but merely makes it visible. Disclosure would be sufficient if it led agents to marginalise the due interest. This is, however, not the case, especially because the decision-makers typically over-estimate their own reliability.¹⁷⁰ Secondly, disclosure obligations are often cumbersome and risk overflowing the clients or the public with irrelevant information.¹⁷¹ Thirdly, disclosure can sometimes make matters worse, because – as it has been found for the accounting business – professionals may be more willing to give biased advice when they know that the person receiving the advice is aware of their conflict

¹⁶⁷ Within the UN, all staff members at the ASG level and above are since 1999 obliged to file financial disclosure statements in respect of themselves and their dependants (UN Staff Regulations of 7 February 2003 (Doc ST/SGB/2003/5), Art. I, Duties, obligations and privileges, Regulation 1.2 (n)).

¹⁶⁸ See for all holders of high public office, including parliamentarians, Demmke et al., *Regulating Conflicts of Interest*, p. 11.

¹⁶⁹ Thévenoz and Bahar, *Conflict of Interest*, p. 18: In the financial services area, disclosure has emerged as the favourite instrument of policy-makers, instead of a prohibition of acting in conflictual situations. Crockett et al., *Conflicts of Interest in the Financial Services Industry*, find this response adequate: '[T]he combination of market discipline, supplemented by mandatory disclosure of conflicts, and supervisory oversight are generally sufficient to contain the exploitation of conflicts of interest and the consequent damage to the efficiency of the financial system ... Radical solutions to conflict of interest problems that socialise information or stringently separate financial service activities are likely to do far more harm than good' (at p. xx).

¹⁷⁰ See supra p. 370 and Davis, 'Conflict of interest', p. 591.

¹⁷¹ Office of Government Ethics, *Report to Congress, Evaluating the Financial Disclosure Process for Employees of the Executive Branch and Recommending Improvements to it* (Washington DC, March 2005) therefore recommends to reduce the number of valuation categories, shortening some of the reporting time periods, raising the money threshold, and eliminating unnecessary data.

of interest.¹⁷² Finally, the clients (or the public) can do little to react on the disclosed information, if they have no real alternative.¹⁷³ It is therefore on good grounds that the EU implementing Directive on Markets in Financial Instruments of 2006 succinctly states that ‘over-reliance on disclosure without adequate consideration as to how conflicts may appropriately be managed is not permitted’.¹⁷⁴

Pluralisation instead of neutralisation

Although the concept of conflict of interest to some extent presupposes that the process of decision-making (in political and economic entities) should be ‘clean’ and rational from the beginning, a clinically isolated devotion to the office or profession, stripped of all interests, is not expected. On the contrary, many collective decision-making bodies, in all three spheres of governance, are often specifically composed of members who are supposed to represent various (societal or economic) interests. It is submitted that this is a common and recommendable strategy to manage conflict of interest.

In the public sphere, pluralisation is sought and could even be strengthened in parliaments, consultative expert committees, state governments and courts. For example, regulations, but more often unwritten rules and mere practices on the composition of higher courts foresee selection of candidates exactly on the basis of those members’ affiliation to groups which are assumed to represent specific interests.¹⁷⁵ The Swiss Government, a collective body, is composed of seven people. When electing the government members, parliament is held to see that the diverse (linguistic and cultural) regions of Switzerland are represented (Article 175(4) of the Swiss Federal Constitution). In legislative bodies (parliaments), a guiding idea is that this body should be a more or less exact portrait, in miniature, of its constituency. This kind of descriptive representation is desired here on the assumption that the

¹⁷² Moore et al., ‘Conflict of Interest and the Case of Auditor Independence’, p. 24.

¹⁷³ This has been stated with regard to the commercial sphere (Moore et al., ‘Conflict of Interest and the Case of Auditor Independence’, at 24) and for voters (Hine, ‘Conclusion’, pp. 230–231).

¹⁷⁴ Directive 2006/73 of 10 August 2006 (OJ 2006 L 241/26), implementing MiFID, preamble para. 27.

¹⁷⁵ See for the value of diversity (of nationality, language, cultural background, professional experience) on courts and the tension to the principle of the impartiality of judges Swigart, ‘The National Judge’.

representative’s characteristics are a guide to the actions he or she will take. Put differently, descriptive representation is sought because it presumably enhances the representation of diverse *interests*. In some parliaments, seats are reserved for women or minorities, in order to enhance such diversity.¹⁷⁶ Finally, bodies governing the media are typically required to reflect cultural diversity, and their membership is designated accordingly.¹⁷⁷

In the global sphere the search for pluralism permeates the set-up of the governing bodies and staff of international organisations. The recruitment of international civil servants respects geographical quotas. The bodies should be composed of nationals of different member states, so that the overall composition of the staff is a mix and truly international.¹⁷⁸

In the private sphere, pluralism is sought in the board of directors and the executives of corporations in order to gather both expertise and interest representation. A well-balanced composition of the board is here considered to be an element of good corporate governance. For example, laws and codes of conduct in numerous jurisdictions require the board of directors of a shareholder company (or the supervisory board) to be composed so as to ensure that all business expertise which the company needs is included.¹⁷⁹ This means that

¹⁷⁶ See for example Part XVI ‘Special provisions relating to certain classes’ of the Constitution of India of 26 November 1949; in scholarship Peters and Suter, ‘Representation, Discrimination, and Democracy’.

¹⁷⁷ See on the BBC: the Royal Charter of October 2006, Art. 14 (Trust members for the nations). The ordinary BBC trust members should represent the four nations, and ‘[e]ach person to be designated under this article shall be suitably qualified by virtue of (a) his knowledge of the culture, characteristics and affairs of the people in the nation for which he is to be designated, and (b) his close touch with opinion in that nation.’ Available at www.bbc.co.uk/bbctrust/about/how_we_govern/charter_and_agreement (last accessed 15 December 2011). See, amongst the media laws of the various German Länder, the provisions on diverse membership of the boards, e.g. the *Bayerisches Rundfunkgesetz* (Art. 6(2)); the *Norddeutscher Rundfunk Staatsvertrag*, or the *Westdeutsches Rundfunkgesetz* (§ 15).

¹⁷⁸ See in detail pp. 401–404.

¹⁷⁹ Various codes on corporate governance contain recommendations on a well-balanced membership of the board of directors or supervisory board to that end. For example, the Swiss Code recommends that the board should be composed by members with ‘experience and knowledge from different fields’, and should also comprise ‘members having long-standing international experience or members from abroad’ (Art. II(b)(12) of the Swiss Code of Best Practice for Corporate Governance, adopted by *economiesuisse*, 21 February 2008, available at www.ecgi.org/codes/documents/swiss_code_feb2008_en.pdf (last accessed 15 December 2011). See for the UK: Art. B(1) of the UK Corporate

persons who are linked to suppliers, customers, competitors or even employees will also be appointed to such a board.

In all scenarios, and in all three spheres of governance, it is expected that the purposeful diversity will lead both to more informed decision-making, to a reconciliation and partly even mutual cancellation of interests during the deliberations, and thus eventually to a balanced decision. Both the representivity and an acknowledged expertise of the decision-makers are particularly important for decisions whose outcomes affect a culturally diverse public (for example in international settings).¹⁸⁰ Excessive suspicion harboured vis-à-vis potentially undue interests, and strict regulation of any perceived conflict of interest might hamper pluralism. The solution lies in, it is submitted, the further 'pluralisation' of decision-making bodies instead of their 'neutralisation'.

Costs

Besides the loss of expertise,¹⁸¹ the following similar costs of strictly banning all conflict of interest arise in all spheres of governance. First of all, disclosure requirements are in tension with the protection of privacy.

Secondly, as any other regulation, conflict of interest regulation to a certain extent hampers the functioning of the relevant markets or the institutions.¹⁸² If conflict of interest rules require recusal, the proper and regular composition of the decision-making body is disrupted, and this also

Governance Code, available at www.ecgi.org/codes/documents/uk_cgc_june_2010_en.pdf (last accessed 15 December 2011). See for Germany Art. 5.4.1. of the Corporate Governance Code, adopted by a government-appointed commission, current as of 26 May 2010. For an overview on the world's corporate governance codes see www.ecgi.org/codes/all_codes.php (last accessed 15 December 2011). In some civil law countries, the law acknowledges different categories of company shares. Then, in some jurisdictions, the group of holders of each category of shares has the power to appoint at least one board member. For Switzerland: Art. 709(1) Swiss Code of Obligations (*Code des Obligations*). In Germany, such a power of appointment can be foreseen in the articles of the company (§ 101(2) German Stock Companies Act (*Aktiengesetz*)). Moreover, German employees have a legal right to appoint a board member (*Aufsichtsratsmitglied*) (*Mitbestimmungsgesetz* of 21 May 1951; *Betriebsverfassungsgesetz* of 11 October 1952; *Mitbestimmungsänderungsgesetz* of 7 August 1956). In France, such a power may be enshrined in the articles of the company under Arts. L 225–27 *et seq.* and L 225–79 of the French Code of Commerce (*Code de Commerce*). See for the Societas Europaea (SE) Art. 4 of the EU Directive 2001/86/EC of 8 October 2001 (OJ 2001 L 294/22).

¹⁸⁰ This is the core of Uruña's argument. See Uruña, 'Conflict of interest in global governance', Chapter 5 in this volume.

¹⁸¹ See pp. 393–399.

¹⁸² For public governance Hine, 'Conclusion', p. 235; for the area of financial intermediation Palazzo and Rethel, 'Conflicts of Interest in Financial Intermediation', p. 19.

creates legal insecurity. With regard to the financial markets, it has been additionally pointed out that too intense regulation might stifle innovation.¹⁸³

With regard to (too) strict impartiality requirements on judges, it has been pointed out that not only the confidence which the courts must inspire is at stake, but on the other hand also the public interest in having a rational and smoothly operating judicial system. For example, the practical advantages of having a close network of local courts in which in a pre-trial stage judges act as investigators who in a later stage *also* sit as judges on the higher court might well outweigh the dangers for judicial impartiality going with this.¹⁸⁴

Generally speaking, all mechanisms to identify and remove conflict of interest cost money. In the economic sphere, the compliance costs might disproportionately weigh on small firms. The heavy burden on them is all the more perverse as these firms are less exposed to conflict of interest.

Finally, given the fact that conflict of interest arises in fiduciary relationships, an additional consideration is that the more this relationship is burdened with direct (and costly) oversight and control, the less it makes sense for the principals to appoint an agent or trustee. From the perspective of the agent, too high compliance costs might deter persons from seeking such a position in the first place.¹⁸⁵

11.3 The trend to diversity

Empirically, if there is a common regulatory trend, it is the trend towards more differentiation. As countries develop a greater sensitivity toward conflict of interest in general, 'there is a greater awareness that catch-all legislation . . . is likely to be a rather blunt instrument. There is thus a form of convergence in the search for appropriate forms of conflict-of-interest regulation across advanced democracies.'¹⁸⁶ But this regulation targeted at different types of office-holders and different sets of institutional relationships will not quickly lead to common patterns.

With regard to public governance, the currently most comprehensive study on conflict of interest concludes:

¹⁸³ Issacharoff, 'Legal Responses', pp. 192–193.

¹⁸⁴ ECHR, *Fey v. Austria*, appl. no. 14396/88, judgment of 24 February 1993, Ser. A No. 255-A, concurring opinion Judge Martens, para. 4.

¹⁸⁵ This is relevant both for public office (OECD (note 14), p. 96) and for the commercial sphere (Issacharoff, 'Legal Responses', pp. 189–90).

¹⁸⁶ Hine, 'Conclusion', p. 225.

[T]here is no ideal type of conflict of interest system: the need for different conflict of interest systems as well as conditions for their success and failures depend to a large extent on the particular socio-cultural environment. Consequently, so-called 'high-trust' countries need different rules and standards than 'low-trust' countries with a high level of corruption.¹⁸⁷

So conflict of interest regimes must be shaped to the needs of the specific administration, taking the particularities of the administrative culture and the political context into account. New policies should be developed in a manner that respects and reflects the culture of the country and the different institutions. There is no patent recipe for a perfect or correct code on conflict of interest,¹⁸⁸ and no general theory of conflict of interest regulation can be drawn up.¹⁸⁹

11.4 New regulatory frameworks

Conflict of interest regulation is just one area in which the general debate on regulatory choice can and must be continued. As elsewhere, the basic argument in favour of state regulation is that this is the means to secure full democratic legitimacy. On the other hand, the classic argument in favour of self-regulation are the principles of subsidiarity and proportionality. Finally, the danger of overregulation is all the more real as conflict of interest is situated in the grey zone between ethics and law.

The question of regulatory design, whether sweeping general legal provisions on good faith and loyalty are sufficient or whether detailed rules on conflict of interest are preferable, is ultimately a question of assigning the job to the legislator or to the courts. Where merely general principles exist, problem-solving will be left to the judiciary. Again, this is not specific to conflict of interest regulation.

Also, the necessity to steer a middle course between too broad rules (which are unlikely to incite a specific conduct), and too specific rules (which do not cover a broad array of constellations), between too flexible rules (which do not have a prohibitory value), and too rigid ones (which are unmanageable), is not a specific problem of conflict of interest, but a general regulatory challenge which plays in any social setting. Additional antagonist values and principles which the conflict of interest regulator must take into account are transparency versus privacy, and trust versus control.

¹⁸⁷ Demmke et al., *Regulating Conflicts of Interest*, p. 138.

¹⁸⁸ *Ibid.*, p. 9.

¹⁸⁹ Hine, 'Conclusion', pp. 213–215.

So is conflict of interest a suitable field for regulatory innovation, where new tools of governance, and 'smart' regulation could be tried? Clearly, the path of *multi-level* (local–national–regional–global) regulation which is at the same time *co-regulation* (state and self-regulation) which has so far emerged, should be followed. International organisations could formulate broad objectives and allow for concrete and differentiated implementation in various states, complemented by self-regulation of different economic sectors or entire industries.

11.5 Conflict of interest and the common good

The rise of the concept of conflict of interest, and the increasing perception that conflict of interest presents a problem which requires regulation, manifests an *Americanisation* of the discourse and of regulatory approaches – given the fact that the term has been coined in the United States and that that country possesses the oldest and probably most sophisticated legislation on conflict of interest.

Both the idea of conflict of interest itself, the perception of certain situations as a conflict, and its evaluation as a bad thing might be Western-centric. Is not the current climate of combating conflict of interest a 'Western' one? Do not the roots of the concept (especially as applied to the public sphere) lie in the Western notions of individualism, citizenship and public interest (*bonum commune*)?¹⁹⁰ The whole idea of conflict of interest rests on the implicit assumptions that decision-makers should pursue the 'general' (or the corporation's, or the shareholders') interest. Can this idea be usefully applied to all types of governance, for instance to a neo-patrimonial state in Africa?¹⁹¹ I submit that it can, because – however defined and conceptualised – the search for the well-being of a given community and for justice, is a universal or at least universalisable aspiration. The gist is that such a common good (or equivalent idea) can, in pluralistic (national) societies, and all the more in the extremely pluralistic global sphere, anyway not be defined in a substantive manner. The *bonum commune* can therefore be attained only in an indirect way. In the end, thus, conflict of interest regulation *is a procedural strategy to realise the common good*.

¹⁹⁰ Hejka-Ekins, 'Conflict of Interest', p. 482.

¹⁹¹ See Dobler, 'Private Vices, public benefits? Small-town bureaucratisation in Namibia', Chapter 12 in this volume.