

SYMPOSIUM: A FOCUS ON ETHICS IN INTERNATIONAL COURTS AND TRIBUNALS

CONFLICTS OF INTERESTS: NAVIGATING IN THE FOG

*Hélène Ruiz Fabri**

The issue of conflicts of interests has for a long time only been mentioned in passing in relation to recusals of international judges or arbitrators. It now attracts increasing attention, which has two facets. The first one is of normalcy: the exponential growth of international adjudication over the last three decades has turned issues that were previously rather marginal—with few rules, mostly self-regulation, and little institutionalization—into systemic issues. The other dimension is pathological: the feeling that the issue is not properly addressed contributes to the climate of mistrust around international adjudication. More generally, the topic of conflicts of interests turns out to be constantly torn between opposite poles, such as integrity versus quality. These dialectic tensions, which challenge the concept of what makes a good judge or arbitrator, pervade the perception of conflicts of interests as well as their identification and management. Conflicts of interests are an inherently ambiguous issue and exist in a gray zone. The complexity of this phenomenon requires both fine-tuned and rigorous regulation through the use of an array of tools and reforms.

Gray Area: Many Shades

A complex society like ours favors a multipositionality of actors, i.e., their affiliation with multiple social and professional spheres, each having its own networks, interests, and governing principles and generating special ties or bonds of interest. This is especially true for international adjudication inasmuch as being an international judge or an arbitrator is not a permanent career. There is always a before, often an after, and sometimes other professional activities in parallel. Moreover, to be appointed, it is not enough to have the necessary competencies. One must also make it onto the radar of those holding the power of appointment, which is more likely for people affiliated with multiple networks. But once appointed, the same person falls under the categorical imperative of independence and impartiality, which requires her to be free from external influences and internal bias in order to focus exclusively on the interest of the parties in having their dispute settled based on law. Indeed, should another interest interfere, there would be a conflict of interests, which can be defined as a “situation in which a person in charge of an interest other than her own does not act or can be suspected of not acting in a loyal or impartial manner vis-à-vis this interest but with the aim of favoring another one, her own or a third one.”¹

A dispute is in itself a conflict of interests, as was clearly stated as early as 1924 by the Permanent Court of International Justice.² A judicial or arbitral decision consists of taking a side in such a conflict, allowing one interest

* *Professor of Law, Director at the Max Planck Institute Luxembourg for Procedural Law.*

¹ JOËL MORET-BAILLY ET AL., [LES CONFLITS D'INTÉRÊTS, NOUVELLES FRONTIÈRES DE LA DÉMOCRATIE](#) (2017).

² [Mavrommatis Palestine Concessions](#) (Greece v. Great Britain), 1924 P.C.I.J. (ser. A) No. 2, at 11 (“A dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons.”).

to prevail over another in a reasoned way. If parties submit their dispute to a judicial or arbitral body, they expect this third party not only to balance and assess their arguments in the face of the law, but to do so independently and impartially. Although this is one of the most basic rules of the game and the bedrock of trust, it is also one whose boundaries remain blurred or at least exist in a gray area. Indeed, it is not always so easy to determine whether a decision-maker is sufficiently independent and impartial. This gray area is the place where bonds of interest can transform into conflicts of interests.

It is possible to speak of a gray area for two main reasons. First, there are very few situations that are clear-cut enough to constitute a priori incompatibility, as where the arbitrator or judge is a family member of one of the parties. Even then, the required degree of family relation would need to be ascertained. In other words, even clear-cut solutions might have their share of arbitrariness. More generally, assessing whether there is or is not a conflict of interests—or appearance of such a conflict, because appearances also count—depends on a case-by-case analysis whose results can vary depending on who decides and the field of law concerned. Second, the perception of the issue of conflicts, and with it the tolerance threshold, has shifted over time; sensitivity to conflicts of interests and more generally to ethical questions has increased, in a context of desacralization of authority. Significantly, even for longstanding courts like the International Court of Justice, the formal use of challenge procedures is recent, showing that the traditional soft ways of solving potential issues—such as pressure from peers—might no longer suffice.³ Other adjudicatory fields are even more affected, especially criminal courts and investment arbitration, as they are also the most exposed to questions about their legitimacy. Investment arbitration in particular finds itself at the center of this debate because it looks like a small, incestuous world.

Complexity of the Phenomenon: Objectivity and Ambiguity

The concept of conflicts of interests does not cover the mere need by a decision-maker to arbitrate between conflicting interests. Rather, it encompasses situations where the conflict is internal to the decision-maker. It is not an action but an objective situation in which lies an abnormal risk of improper considerations influencing a decision. This situation is objective in the sense that it can be assessed by facts showing 1) the possession of an interest, 2) an interference of this interest with the main mission, and 3) that this interference is sufficiently intense to raise doubts about the ability to make an independent and impartial decision. This objectivity means that a conflicted person can be perfectly honest, yet not that all conflicted persons are perfectly honest (but then the conflict slides into offences like influence peddling or corruption). What is at stake once a conflict of interests exists is the risk of an improper decision. That this risk does not materialize is not the issue once doubts exist regarding the reliability of the decision. Appearances of conflict count as much as actual conflicts, echoing the mantra according to which “justice must not only be done, it should be seen to be done.”

Conflicts of interests are context-dependent. A conflict of interests may arise from the very structure in which the person operates. Indeed, several biases are embedded in the structure of international adjudication. The most obvious—and classic—is nationality, even though a judge is not supposed to “represent” his or her national state. The most extreme example is the European Court of Human Rights, where the national judge is entitled to sit in every case involving the national state, even in case of referral or relinquishment of a case to the Grand Chamber, which means that he or she would judge the same case two times. Another example is the ad hoc judge, an institution meant to compensate states that do not have a national on the bench, as often happens at the ICJ. This structural conflict of interests is legally endorsed and the risk it represents accepted. This choice is commonly explained as an effort to avert other risks, such as mistrust of being judged by foreign judges only, the lack of representativeness of the bench, or the security of having on the bench someone able to explain the domestic

³ [CHALLENGES AND RECUSALS OF JUDGES AND ARBITRATORS IN INTERNATIONAL COURTS AND TRIBUNALS](#) (Chiara Giorgetti, ed. 2015).

system. Thus, it is possible that several risks coexist between which a choice has to be made, leading one to wonder whether there exist more generally situations where conflicts of interests might be tolerated and trade-offs made. For example, beyond structural aspects, another common situation involves a judge or arbitrator who has special expertise or relevant knowledge. In this context, conflict of interest debates are sometimes framed as involving a dialectical tension or tradeoff between “lower quality” and “higher integrity” decision-makers (or vice versa), a framing that both presents a dilemma and assumes that there is some acceptable level of conflict of interest.

Addressing Conflicts of Interests: Standards and Procedures

Even if one does not buy this kind of bold opposition (quality versus integrity), which most of the time favors a lenient approach to conflicts and is protective—if not protectionist—of a small market of decision-makers, it confirms that conflicts of interests are a deeply ambiguous or, at least, ambivalent phenomenon, if only because they are not systematically detrimental or harmful. Whether they are detrimental depends on the particular circumstances of each case. It then becomes a matter of balancing several factors to assess if there is a risk that a secondary interest interferes with such an intensity that it casts doubt on an independent and impartial exercise of the adjudicative mission. Examples of possible conflicts include a state’s politics influencing a judge regarding verdicts in criminal courts;⁴ double-hatting leading an arbitrator to favor a position that he or she might adopt as counsel in another case;⁵ and suspicion of prejudgment due to previously expressed opinions (so-called “issue conflicts”). Assessing such situations raises several issues, including the identification of the appropriate standard, who decides, and who bears the burden of proof.

It is often stated that the benchmark is lower for arbitrators than for judges, echoing the idea that the public sphere is stricter than the private sector regarding conflicts of interests. But the public dimension of investment arbitration, if not of commercial arbitration, is more and more acknowledged, thus putting independence and impartiality at the forefront. If the benchmarks do seem to differ depending on the field, the way they are interpreted in practice seems to be converging towards a reasonableness standard (“reasonable expectation of an open mind”⁶ on behalf of the parties; circumstances leading “a reasonable observer, properly informed, to reasonably apprehend bias”⁷; “justifiable doubts” “from the point of view of a reasonable third person”⁸).

However, this optimistic note of convergence around a standard is tempered by other unresolved debates, such as who decides if someone is conflicted if the person does not self-recuse after being challenged. In most cases, decisions on challenges are made by the body itself (the court or tribunal). Although logically related to the body’s independence, this situation is uncomfortable, especially in arbitration, when the number of members is very low. This fact can encourage leniency, as has been criticized in the context of the International Centre for Settlement of Investment Disputes. This can explain why an increasing number of arbitral systems opt for an externalized decision, most of the time by the institution administering the arbitration. However, that may not solve the problem, as the next question is who will control the controller.

In any event, even a more institutionalized system cannot ignore that parties can use challenges as a tool in their litigation strategy. Justified or not, these challenges result in a significant number of arbitrators spontaneously

⁴ Marko Milanovic, *Danish Judge Blasts ICTY President*, EJIL: TALK! (June 13, 2013).

⁵ On role bifurcation creating concerns, see Malcolm Langford et al., *The Ethics and Empirics of Double Hatting*, 6:7 ESIL REFLECTIONS (2017).

⁶ *Devas v. India*, PCA Case No. 2013-09, Decision on the Respondent’s Challenge to Hon. Marc Laronde and Prof. Francisco Orrego Vicuña, para. 58 (Sep. 30, 2013).

⁷ Prosecutor v. Furundzija, Case No. IT-95-17/1-A 99, Judgment, para. 189 (Int’l Crim. Trib. for the Former Yugoslavia July 21, 2000).

⁸ Int’l Bar Ass’n, *IBA Guidelines on Conflicts of Interest in International Arbitration* (2)b (2014).

stepping down, probably due to the risk of reputational cost. Parties no longer hesitate to challenge their judges or arbitrators, and the rise of challenges based on issue conflicts shows how weak the presumption of impartiality has become. Indeed, it is difficult to evaluate whether an opinion is a bias and whether a bias necessarily creates a conflict.

Lack of a Culture of Conflicts of Interests: Optimism and Defiance

The problem is partly psychological. Who has not heard a bold statement such as “independence is first and foremost a state of mind”? It is hard to deny, and yet the issue is not that simple. Indeed, conflict is also a state of mind: “one cannot have an interest without knowing it. But one can easily misjudge how much it might affect one’s judgment.”⁹ Social psychology has demonstrated the widespread existence of “optimism bias,” which in this context involves both an overestimation of one’s ability to decide impartially and an underestimation of the harm that a decision taken while being conflicted can cause. Of course, this bias is unconscious and, as such, should not be confused with conflict itself. But it can foster a culture that ignores conflicts, especially when combined with other biases. For example, many international judges and arbitrators belong to epistemic communities, which may produce a capture effect that is both cognitive and sociological. Thus, a judge or an arbitrator might be influenced by the mentality of a milieu to which one of the parties or its counsels also belongs.

Judges and arbitrators are not the only actors to suffer from optimism bias. It seems that potential victims of a conflict of interests are less suspicious if the conflict is known, as if transparency can prevent or diminish an eventual harm even though it does not eliminate the judge’s or arbitrator’s own optimism bias. Transparency is not enough; a specific education to refine the sensitivity of all the players in the adjudicatory game to conflicts of interests is needed. While sensitivity has globally increased, it has tended to amalgamate all situations in a perception of soft corruption or generalized bias. This perception does not sufficiently acknowledge that conflicts of interests are a complex phenomenon which stretch along a long continuum.

Management of Conflicts of Interests: Fine-Tuning and Rigor

This increased sensitivity to conflicts of interests is correlated with a shift from practices of informal checks and internal pressures towards a more active response to an increased claim for visible and verifiable ethics. This approach involves not only a growing use of challenge or recusal procedures, but also a regulatory push to adopt codes of ethics. This push includes the Code of Judicial Ethics of the International Criminal Court¹⁰ and the Rules of conduct for the understanding on rules and procedures governing the settlement of disputes of the World Trade Organization dispute settlement system,¹¹ as well as various guidelines, such as the International Bar Association Guidelines on Conflicts of Interest in International Arbitration, which look beyond the classical rules of incompatibility already in place. Significantly, the latter uses a system of “traffic-light” lists (green, orange, red) to help assess concrete situations, an approach that echoes the idea of gray zones mentioned above. The content of these guidelines might be seen as too vague, but they at least confirm that prevention is the best approach. Indeed, it is difficult to conceive of formal ex post sanctions for judicial decisions undermined by

⁹ Anne Peters, *Managing Conflict of Interest: Lessons from Multiple Disciplines and Settings*, in *CONFLICT OF INTEREST IN GLOBAL, PUBLIC AND CORPORATE GOVERNANCE* 357, 370 (Anne Peters & Lukas Handschin eds., 2012).

¹⁰ Int’l Crim. Ct., *Code of Judicial Ethics*.

¹¹ World Trade Org., *Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes*, WT/DSB/RC/1 (Dec. 11, 1996).

conflicts of interests, except if there exists a double degree of jurisdiction and the reviewing organ does not shy away from annulling or modifying the decision. Even then, the problem remains for the latter organ.

Various approaches can and should be combined, some of them already existing in some systems. The complementarity of these approaches allows for fine-tuning. The most common approach is the disclosure of bonds of interest (transparency), although it is insufficient by itself given the optimism bias mentioned above. Nevertheless, the focus of disclosure requirements could be refined to avoid irrelevant information. The process could also be better controlled—what is the use of information whose honesty is not checked?—while preserving privacy (an argument often used against invasive disclosure). Lessons can be drawn from past challenges, provided they are more systematically made public and are adequately reasoned. But this is not yet common and, in any event, it is a rather negative way of learning.

However, disclosure would become more accurate if accompanied by an increased culture of conflicts of interests through education about ethics and the social cost of conflicts of interests. The more socially costly a conflict of interests is, notably in terms of undermining the public credibility of the institution, the less acceptable it should be. It is time, in this regard, to take into account that courts as well as arbitral tribunals have several audiences, not limited to the parties, even if confidentiality sometimes hides this reality. This is also why a proper education might promote a value like loyalty, i.e., to act with integrity in the service of the adjudicative mission. This value is more demanding than independence and impartiality in that it requires a more active attitude.

An increased awareness could also be cultivated, for example, through the use of ethics advisers that potentially conflicted persons could consult. Another disciplining option is to limit the possibility of holding some functions simultaneously or successively (with waiting periods),¹² an approach that could be extended to staff beyond judges.

All these strategies mainly aim at neutralizing conflicts of interests. But more important is to share a common concern for the protection or restoration of trust. No doubt broadening and pluralizing the reservoir of international judges and arbitrators should be considered, a need that the geographical distribution requirement in use in most courts does not sufficiently meet. The claim for more diversity is not new but is strengthening, and it represents an appropriate way of breaking the vicious circle of the argument that conflicts are unavoidable in a small market.

¹² This idea is stated in the Post-Employment Guidelines issued by the Appellate Body of the WTO, World Trade Org. Appellate Body, [Post-Employment Guidelines](#), WT/AB/22 (Apr. 16, 2014).