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**Conflict of Interest: Concepts, Rules and Practices Regarding
Legislators in Latin America**

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Conflict of Interest: Concepts, Rules and Practices Regarding Legislators in Latin America

Abstract

Rules and regulations concerning conflict of interest play an important role in discussion on institutional prerequisites for good governance. Our analysis focuses on the concept of conflict of interest and possible tools to provide for solutions. The text embraces a short presentation of the concept of conflict of interest and its discussion in recent literature. We then apply the concept to the case of elected officeholders to the legislative branch, discussing applicability of the main tools for solution of conflict of interest, namely avoidance, disclosure and procedure. Empirical substantiation is drawn mainly from Latin American countries: Argentina, Brazil and Chile. The issues are legislators' conflicts of interest when proper or family interests appear, when third-party commitments rooted in campaign finance or lobbying are involved, or when elected officeholders legislate on behalf of their own interests, including remuneration, political finance or non-monetary benefits. Possible steps to control or mitigate conflicts of interest on these three levels are discussed.

Introduction

Academic discussion about corruption has undergone drastic changes in the last years. Until two decades ago, the question of definition and the intercultural validity of the concept of corruption were important questions. Model building was not grounded theory, but rather speculative. Few existing case studies available were drawn from countries in the North. At the same time, an unspoken consensus saw corruption as a problem of societies with underdeveloped bureaucracies in the South and with centralized state capitalist regimes in the communist regimes.

Since then, the field of anticorruption policies changed radically. From an academic perspective, two important changes occurred. The first was a move towards empirical research with a strong focus on diagnosis. Measuring corruption has become a growing industry. After overcoming earlier concerns about insurmountable obstacles to approach the corruption phenomenon empirically, evaluating material from journalistic or criminal investigations produced case studies with valuable insights into corruption schemes. In addition, social science—both academic and applied—started using survey methodologies to circumscribe the corruption phenomenon. The focus varied from incidence to perception and values towards corruption.

However, the most important change of quantitative research was that it came up with numbers, drawing the attention of a larger audience to the phenomenon of corruption. With this breakthrough to measuring corruption and its success outside the academic world, resources applied in the same area have been intensified and a competition for indexes is still taking place. After the euphoria with datasets and statistical analysis of mutual influence of indicators on corruption subsided, economic and social development criteria—and academic concerns about the focus of measurement and validity and precision of methods—slowly gain space again.

The second change in academic approaches to corruption was its focus on institutional rather than on social or cultural factors. This was due to an external demand to develop analyses with capacity to give political advice to anticorruption initiatives. A certain fatigue with measurement, notwithstanding its spectacular impact on the public agenda setting, goes along with a demand of “more operational governance indicators.”¹ But social science itself has developed a new approach to issues concerning institutions and government. Applied new institutionalism and demands from reformists have merged into a focus of analysis on institutions and mechanisms of control. Following the approach of new institutionalism, the concept of institutions embraces sets of public rules that together with oversight and internalization produce regular social behavior. From this viewpoint, a system of party finance or of application of criminal sanctions is understandable as an institution, while the classical concept of looking at a Government Auditing Office does not necessarily fit into the concept. Organizational analysis is not in all aspects compatible with institutional analysis.

Institutional analysis has been established in anticorruption research under the paradigm of “National Integrity Systems.” It is a practitioner’s approach that mixes organizational and institutional approaches. The NIS is an analysis that focuses on the effectiveness of a set of organizations and mechanisms linked to issues of control and prevention. Control embraces a number of different mechanisms like oversight, investigation and sanction. Prevention is linked to questions of sound rules, information flow and acceptance of rules in practice.

A number of studies have been implemented with a focus on comparative description of institutional tools and practice of mechanisms of prevention and control. One approach is to focus on organizations like the court system, the legislative branch or government audit institutions. Others

¹ World Bank. Toward More Operationally Relevant Indicators of Governance, PREM Note No. 49, December 2000

focus on institutions (i.e., sets of rules in the above-mentioned sense, like resource administration, public procurement, civil service human resource management or political finance systems). This focus on specific organizations or institutions requires specialized knowledge in every single matter, to understand the principles of sound rules, feedback mechanisms and the relation between theory and practice. Experience shows expertise on governance issues in different areas of public life is not easily transferable between these areas. This makes the task of anticorruption specialists hard and there are voices arguing there is no such thing as an anticorruption specialist.

However, some mechanisms apparently have transversal validity. They are principles to be applied in several areas, building on the same logic set. These include broad concepts like guaranteeing transparency and disclosure, whose expected effects on due process and integer behavior are applicable to any area. Implementing individual accountability, (i.e., the role of holding individuals responsible and applying sanctions) is also a universal principle. Impunity is expected to have a negative impact on integrity in any area.

Transversal validity is also attributed to specific mechanisms like ethic codes and codes of conduct. Another specific mechanism is conflict of interest rules. The current understanding is that these mechanisms contain transverse validity in all areas. They are tools to be applied in organizations and institutions concerned with corruption and corruption control.

The Concept of Conflict of Interest

Conflict of interest is a concept spanning over several institutions. Conflict of interest builds on the sociological concept of roles that describe an individual's behavior in social groups being shaped by unspoken expectations concerning patterns of behavior. Social roles are acquired in a learning process; compliance and transgression receive positive and negative social feedback. Social actors incorporate a number of social roles, developing each one in a specific social context or group of reference. A wife may be a mother at home, a professional at workplace and a student when learning Spanish after work.

A public officeholder does equally play a specific social role. Its characteristics have been described by Weber as being governed by explicit rules and sanctions, including a process of learning and acquisition of

professional knowledge, and embedded in an environment of social recognition and esteem.

It is intrinsic to the role concept that these may frequently overlap each other. These situations are responsible for conflicts of behavior. A public servant may have to deal with people he knows privately. He may even have to decide on issues he or his family has a personal interest in. These and other situations describe overlapping roles that result in conflicting demands about the expected behavior. As a neighbor and a clerk, a public officeholder might be expected to speed up a specific demand, while the regulations defining his official role do not allow such procedure. The person in question has to decide to pay allegiance to one of these roles and postpone the obligations with the other.

The peril for the public interest is when officeholders overrule their public duty and pay allegiance to other social roles. This may involve family or friends, party loyalty or other commitments and own financial interest.

The concept of conflict of interest does not describe actual wrongdoing, but rather, the potential to do so. The public officeholder may behave correctly. If he does not, the situation can be described as non-compliance with due process in public office. This may include private gain, but also extends to situations where an officeholder pays loyalty to a different social group at the public's expense.

Conflict of interest rules develop solutions for scenarios of public officeholders being confronted with allegiances from different social roles. They are preventive in the sense of foreseeing those situations of conflicting allegiances and acting before they happen. The approach is threefold: either avoiding conflict of interest situations by rules of incompatibility for public office or disclosing interests in order to enable public oversight. A third solution is developing procedures for advice and investigation by special organizations.

Incompatibility rules can either have the meaning of a question of principle or they are applied in topical situations. In the first instance, public office is by nature incompatible with certain social roles. In order to assume public office, the person must renounce the social role demanding conflicting allegiance. In the second case, situations of conflicting interests appear temporary and can be solved by withdrawal from office duties or by rejecting private allegiances.

Disclosure rules put trust in the role of public oversight and peer review. Rules on procedure for advice and oversight set up special bodies for this

role. In this last case, special commissions may have limited functions of oversight and advice. In other cases, ethic commissions incorporate investigation and “responsibilization.”

Conflicts of Interest: The Scope of Solutions

A review of literature on conflict of interest immediately reveals that the issue is intimately linked to professional ethics. Typical occupational fields where questions of conflicts of interest arise and are discussed are law, medicine, academic, auditing and financial services. Here are examples drawn from an article on conflict of interest situations in the private sphere:²

- A doctor recommends medicines manufactured by pharmaceutical companies that pay for her holidays, trips or medical equipment.
- An academic evaluates articles submitted to professional journals submitted by professional enemies (or allies).
- A financial analyst gives a buy recommendation on securities that are part of her own portfolio or that of a relative.

The conflict of interest situations are abundant in the public sphere, too. Officeholders in different sectors of public administration may see themselves confronted with a situation where their allegiance to the public conflicts with their personal or family interest, or other conflicting expectations they are bound to by belonging to a specific social group. However, there are concepts different from avoidance, disclosure or advice that allow public officeholders to behave properly in these situations. Public officeholders are swayed by an explicit set of rules on principles and procedures and at best, are given no leeway or scope for decision-making. This setting allows living up to most situations of conflict of interest.

Thus, while a professor should probably not decide on a scholarship application by a student who is a member of his family, or a physician might not be able to impartially diagnose his or her own child—either for fear of serious diseases or the admittance of such possibilities—clerks in public service can easily have their relatives as clients asking for permission or an application. As long as there are rules dense enough to guide their decision, there would be no urge to resort to further preventive mechanisms.

² Antonio Argandoña: Conflicts of interest: The ethical viewpoint, Working Paper 552, Chair of Economics and Ethics, University of Navarra, March 2004

We could state conflict of interest rules are an alternative solution for situations where definition of public interest guided by rules on due process is not possible. Conflict of interest rules try to either avoid the situation or open ways for clarification on how to behave properly when dealing with the public or special bodies.

However, in some situations the concept of dealing with conflicts of interest by means of rules and procedures seems insufficient to take care of the situation of allegiances outside public service. Our first explanation would be outside commitments are either too strong to be banned by means of rules and guidance. When guidance by rules is not available, recourse to incompatibility, disclosure and advice are alternatives. Under this augury, conflict of interest rules play a role for public officeholders today.

Legislators' Mandate: a Blank Check?

If this interpretation was right, (i.e., conflict of interest being a tool for situations where principles of loyalty and trust rather than rules are important), then conflict of interest rules are not that important for public service at large, but rather for some very specific situations of officeholders who have an "open mandate." Legislators are certainly part of this group. Their role is widely defined as representing the public interest.

Representative democracies are based on the principle of a relative autonomy of elected officeholders to define their understanding of the public interest. Elections are based on trust and do not only include vague commitments concerning programs and values. The unforeseeable nature of future decisions and challenges does not allow for legally binding rules on future behavior. The sole regulation of behavior is left to mechanisms of political market.

A glance at the constitutions of three Latin American countries shows there are few principles guiding a representative on how to exercise his role. In Argentina, members of both houses are expected to exercise their mandate properly with the only qualification of this expectation being to abide by the constitution. The same formula is repeated in the bylaw on Congress that specifies the oath that office deputies and senators have to take. Neither does the Constitution define a set of values for orientation nor does it state prohibitions for orientation of officeholders.

The Brazilian case is slightly different. Even though the constitution requires the president to carry out his duties abiding by the constitution and

promoting public interests, there is no such orientation for the representatives. Instead, they decided to include the same formula in their bylaws. The Brazilian constitution further defines a list of situations incompatible with the dignity of the office. These include abuse of powers and undue benefits from office.

The Chilean constitution and bylaws go a step further. Aside from the common obligations that follow the constitution, bylaws require members of Congress to act with integrity and transparency. The constitution also explicitly states that public interest has precedence over private interests.

Moving towards the same objective of devising positive guidelines for representatives to carry out their mandate, political scientists suggested a catalogue of positive values for public ethics. Dennis Thompson, an expert on the issue of ethics of congressional representatives in the United States, suggests a set of values including independence, fairness and accountability.³ The first principle of independence teaches officeholders not to subordinate their conduct to influences other than the common good.

Notwithstanding these differences, this short review of constitutional and ordinary law confirms the analysis that guidance for representatives with respect to content is limited to the general principle of safeguarding the common good. In any case, the concept of common good is subject to interpretation. The definition of behavior banned from Congress has not prospered either. Not even the rule of not accepting benefits from office is incorporated into many constitutions.

As a result, there is a broad zone where orientation ends and before prohibition starts. This is why conflict of interest rules are an important tool for representatives. They can avoid some risks or spark the process to clarify roles.

³ Dennis F. Thompson: Ethics in Congress. From individual to institutional corruption, Washington D.C., The Brookings Institution, 1995

Table 1: Rules and guidelines for representatives

Rule on commitment of parliamentarians	Argentina	Brazil	Chile
Guiding values and rules	Abide by constitution [Constitution]	Promoting public interest [bylaw] Preserve dignity of office [Constitution]	Abide by constitution and laws [Constitution] Precedence of public over private interest Act in accordance with values of integrity and transparency
Prohibitions	none	Behavior violating dignity: Undue private benefit from office Abuse of privileges from office [Constitution]	none

Commitments Incompatible with Elected Legislative Office

Legislators' are placed in an area in the political system where conflicting interests are abundant. A comparative study conducted on ethics in legislatures states concluded that, "The nature of their position requires legislators to continually face ethical dilemmas."⁴ One of the central roles of elected representatives is to participate in the political process where different interests and values are aggregated. It involves the contribution to the processing of political decisions accepted not only by those groups whose interests have been accomplished, but also by those who had to give in is an important part of political negotiation. Thus, politics per se and legislators' task in special cases is intimately linked to the situation of conflicting interests and values. These conflicting interests do not represent a conflict they should or could avoid. It is the proper nature of their role in the political system to merge these conflicts into commonly accepted solutions. However, the notion of conflicting interests is not meant that way. Conflict of interests means a role conflict of an officeholder due to an outside commitment, preventing him from complying with his duty.

⁴ National Democratic Institute for International Affairs: Legislative Ethics. A Comparative Analysis, Legislative Research Series Paper 4, Washington, 1999.

Drawing from this introduction, we would expect the set of legal rules to define conflict of interest situations for lawmakers and institute mechanisms to avoid those conflicts of interest, others where they should disclose or finally open procedure for consultation and clarification. These are the basic tools available on the menu for solving conflict of interest situations.

The laws in the countries included in our analysis (Argentina, Brazil and Chile) define a number of situations as incompatible with the mandate of a representative. In Argentina, the constitution defines incompatibilities with the church and with the executive branch. Members of the clergy cannot represent the people, nor can governors represent their province in the National Assembly.

On the other hand, the Brazilian constitution focuses on the question of incompatibility rather from the perspective of fair elections than based on concerns about integrity of elected officeholders. Thus, the prohibition of reelection of chief of executives since 1998 softened by allotting for one reelection. If running for offices different from their incumbent office, candidates have to step back six months before election. Likewise, the spouses and relatives (in descending order) of chief of executives are barred from running for office in the territory. However, these incompatibilities are to protect elections from undue influence and do not apply to the role of officeholders. The constitution is explicit on this point.

Caring similarly for fair elections and separation of powers, the Chilean constitution includes a long list of incompatibilities. Hardly any high-ranking member of government can run for a seat in Congress. This ban extends to judges at the highest courts, the highest prosecutors and the chief auditor. All of them have even a quarantine of one year after leaving the office before they can run for election.

But Brazilian and Chilean lawmakers do also care about the integrity of elected officeholders. In both countries, members of Congress cannot maintain contracts with the state, neither in persona nor as owners, controllers or managers of companies. Chile is even more careful, since it does not allow former members of Congress to be hired by a public institution during the six months after finishing their term.

Incompatibility Rules: An Overview

Constitutions, laws and bylaws set complex rules concerning situations considered incompatible with the role of a representative. Most legal systems separate different time periods, applying a set of rules for electoral competition, but not necessarily the same rules for the moment after taking office. Some of these situations defined as incompatible with running for an elected office or serving as an officeholder extend to the period before or after the term.

Another important criterion of analysis includes the public values to be protected by rules of incompatibility. Analysis of cases in question suggests separating three different categories. These include rules concerned with the principle of separation of powers, especially the influence of government on electoral results. In many cases, these concerns extend to officeholders after taking office.

A second set of rules identifies outside commitments of regular, systematic character, responsible for a second allegiance of officeholders that might very probably mine an officeholder's commitment with the public interest. These commitments may pertain to another organization, private or public, requesting far-reaching allegiance (church, military). They also might refer to a leading role in a for-profit organization doing business with the state. They are different in nature, an issue that will be discussed in the following.

A third category of incompatibilities embraces rather specific situations than commitments, based on a regular relationship. Due to its nonsystematic character, these "situations" are difficult to identify in general terms. An elected officeholder abusing his office to facilitate access of constituents to public administration risks losing his mandate in Chile. However, in Brazil, this is a situation considered normal and even expected by constituents. An elected officeholder rejecting to act as a facilitator would risk losing elections.

Table 2: Incompatibility Rules

	Argentina	Brazil	Chile
Separation of powers, fair competition	Governors cannot represent province(s) in Congress	President, governors and mayors cannot run for a third term Relatives cannot run for the legislative branch in same territory Members of Congress cannot hold other elected offices	Ministers; governors and other heads of executive branch; judges of higher courts; auditor general; high echelon prosecutors Senators cannot hold office of deputy
Incompatible regular third-party commitments	Clergy of a church	Member of Military Forces Members of Congress cannot maintain contracts with public institutions (neither in persona nor as manager, owner or controller of company)	Members of Congress cannot maintain contracts with public institutions (neither in persona nor as manager, owner or controller of company) Director or similar management role in a bank or a corporation Veto extends to 1 year before and one year after office term
Other incompatible situations or specific behavior		Loss of political rights Criminal condemnation Electoral crime Lack of presence in 1/3 of sessions Undue economic benefits from office Abuse of privileges	Represent private interests against the state Provide or intermediate public employment for third party Represent parties in a labor conflict before administration or courts Take part in and manipulate student movements Instigate against political order by non-legal means

Typifying Commitments: Private, Third Party and Ex Officio

Another viewpoint on regular outside commitments that places at risk allegiance with the duties of representatives is separating the different nature of commitments. Literature is rich in citing examples of legislators' private commitments conflicting with their duty to make decisions, based on criteria of public interest. The following example is adapted from a paper of Gerard Carney:⁵

- How does a legislator decide whether to support proposed legislation which restricts the logging of timber when ... the legislator's family operates a transport business in connection with that industry?

In a straightforward approach, these private interests are naturally perceived as a handicap, but in any case, disturbing for representation. We may accept the situation since it is exceptional in nature. A legislator's scope of engagement only occasionally is expected to come across a situation where his private or family business is touched by lawmaking. At the same time, the situation is inevitable, since lawmakers are chosen from society, whose role is to represent the people. Their own interests as farmers, teachers, sales clerks or workers are an important asset and qualify them to run for office. The proper concept of representation suggests a strong element of enrootedness of the legislative branch in society.

A second set of commitments is intimately linked to the role of a representative. Therefore, I would call them outside commitments or third-party commitments. This typically refers to private interest groups trying to gain influence on the officeholder. These interest groups embrace private business, pressure groups or even sectors of the state. The above-mentioned dilemma between representation and legislation is repeated in this relation between elected officeholders and their constituencies. Supporting candidates in election campaigns is considered normal part of modern representative democracy, as is the lobbying of legislators once they are elected. But there is a line to draw between legitimately representing interests in the public debate and exclusively speaking for special interests when deciding on laws whose legitimacy is based on the public interest.

Commitments with third parties that focus on the officeholders' role of representing constituencies and interest groups are ruled upon occasionally.

⁵ Gerard Carney: Conflict of Interest: Legislators, Ministers and Public Officials, Working Paper, Transparency International, 1998

After the Report of the Noolan Commission, Westminster Parliament introduced a rule prohibiting MPs from receiving payment for any proceeding in Parliament.⁶ In the case of Latin American countries in question, concerns still focus more on independence from government, thus, the prohibitions of accepting government employment or other benefits. Running the risk of an overhasty conclusion, we could state that the regulation on third-party commitments is still based on a case-by-case approach and has not developed to systematic solutions. The cases of campaign finance and lobbying are prone to systematic solutions. In the next chapter, we will show why and how.

A third group of commitments capable of distorting decision making in the interest of the public are “ex officio” financial interests of representatives. Legislators decide in most countries on essential parts of their own remuneration. Salaries and benefits of representatives are defined by ordinary legislation, (i.e., by the interested themselves). Legislators equally work out the laws on party and election finance, not to forget the rules on lobbying. Representatives legislate also on behalf of their own interests when defining the rules of resource administration in Congress. Different from administration, there is no external power to introduce regulation when nepotism or improper administration of funds is an issue. In many countries, a tacit agreement between the audit office and the legislative branch allows for both of them to have their accounts not reviewed by an external body. Aside from these examples linked to financial interests, there is a range of issues that lawmakers are supposed to have a strong interest in. This includes rules on parliamentary immunity. In many countries, this constitutes a sensitive issue, since elected officeholders are virtually exempt from any civil or criminal prosecution.

Solutions concerning these possible conflicts of interests of elected representatives when deciding on their interest as officeholders are still rare. The cases in question in Latin America do not show any original solution. However, we will refer to other examples to come to a solution of this obvious problem.

Private Commitments: A Handicap or an Asset of Representation?

In the short introduction on private commitments above, we were left with a paradoxical situation where a lawmaker’s private commitments are conceived as a handicap, but at the same time, they are part of a set of

⁶ First Report of the Committee on Standards in Public Life. A Draft Code of Conduct for Members of Parliament.

assets that qualify him or her for the job. A first answer would be to accept these overlaying loyalties as inevitable. A fact-based argument could be that the professionalization of politics results in a political class relatively free from financial interests linked to typical economic activities. In many countries, politics has developed into a new professional branch, obviously not free from self-interest. We will return to this issue later. But we are still left with the question of whether this is desirable. Given the fact that it is not possible to recruit legislators free from personal interests, the solution would be to accept this situation and develop strategies to manage them when required. The set of conflict of interest tools—including absolute or case-based impediment, disclosure of interests allowing for external review and activation of procedures of advice, oversight and sanctions—are expected to offer appropriate solutions for emerging conflicts.

However, considerations about the role of parliamentarians in the political process can take us to a more radical conclusion about the role of self-interest. A different view on private interests of legislators would be to see them as part of the proper essence of the role of representation. It is undeniable that the proper model of representation is based on an idea of drawing on people enrooted in society, bringing a representative set of interests and conflicts into the political process. Speaking on behalf of a constituency does not necessarily require being part of it. A representative might defend interests of exporters without having private interests in the exporting industry. His party's program or his personal view of sound economic development might give export acceleration a central value. However, the situation of a businessperson closely linked to exporting sectors running for election, thus bringing his view and experience to the knowledge of politics, cannot be excluded and is even desirable. The idea of legislatures representing a miniature society inspires many studies on the social background of members of representative bodies. Most of these studies include an underlying critique on the lack of legitimacy, when certain groups like lawyers, public service or entrepreneurs are overrepresented.⁷

Again, from the viewpoint of legislators representing society, personal interests are rather a quality than a handicap to fulfill the job properly. An important conclusion to draw from this preliminary discussion is conflict of interest might be a cornerstone of the very mandate of parliamentarians. Having to represent specific constituencies and deciding in the name of the public is a conflict not avoidable, but the substance political representation is made of.

⁷ I am aware of Hanna Pitkin's due critique of this view of representation as a mirror of society.

This antithetic situation can develop into a real conflict when we look for guidance and possible solutions. From the first perspective, a Congress member would have to avoid situations where his own interests might be involved. As an exporter, he would avoid working in committees dealing with export interests. However, in compliance with his role of representing his constituency, he is asked to seek engagement specifically in areas closest to his own interests. If we include third-party interests into the scope of our observation, the dilemma becomes more accentuated. Should Congress members avoid or go after committees and issues they and their extended constituency has an interest in?

This dilemma also extends to the conflict of interest tools, since avoiding conflicts of interest seems no longer an option. Parliamentarians must participate when the interest of the groups they represent are at stake. This includes voters, campaign financiers and lobbyists and increases the probability of their own or family business being involved. The disclosure solution is not immediately affected by this dilemma, but the institutions carrying out oversight functions like CSOs or committees will have to make a normative judgment as to what extent the role of representation conflicts with independent lawmaking.

Dennis Thompson has suggested a tentative solution to this dilemma.⁸ Based on a separation of the role of representation, involving special interests from a role of lawmaking-based criteria of common interest, he suggests different procedure. Thompson splits different roles in parliament and designs a desirable profile for each of them. Thus, participation in plenary debates or in commissions allows more range for special interest representation. Heading those committees or serving as a reporter to a law requires more independence from the interests in question. A second important idea of Thompson is conflict of interest roles cannot be solved on the level of individual ethics, but should take into account institutional patterns. Thus, a commission's independence may not suffer when a limited number of declared defenders of special interests participate. However, when all members have this profile, the commission's independence is called into question.

Third-Party Commitments: Measurable by Grade?

Certain extensions of a legislator's role, representing constituencies or special interests, deserve special attention. One of the most important forms of building links between candidates and social or economic interests is

⁸ Dennis F. Thompson: *idem*.

campaign support. An additional situation is the lobbying of interest groups once representatives are in office. Campaign supporters and lobbyists approach legislators to influence their behavior.

Campaign and party finance rules touch on a number of aspects of political life. In part, they are designed to reinforce values of equality in participation and fairness of political competition. Other rules may forge the whole landscape of political competition by means of public support to parties and candidates. The menu of political finance regulations established in the last century covers a wide range of problems to face and values to stand for. Concerns about possible conflicts of interest are part of this range of problems. At the center of political finance regulations, concern about conflicts of interest is the nature of links between campaign supporters and candidates.

A number of bans to campaign or party donations from specific social or economic groups are based on the concept of troublesome double allegiances for political representatives. Most important bans exclude foreign entities, companies at large or state contractors specifically, interest groups or religious groups and public institutions from donating to campaigns. The ban of foreign entities to gain influence on representatives expresses the preoccupation of shielding the proper nucleus of political decisions from foreign influence. Excluding corporate money at large from financing politics can be a signal of concern about officeholders representing money instead of citizens. This expresses a clear concern with a possible conflict of interest that might arise. Beyond touching individual members of a legislative body, it touches the institution as a whole.

However, few countries have succeeded in reconciling this radical position with the need to supply sufficient funds to finance parties and campaigns. Banning corporations closely connected to the state by public contracts, concessions or other financial ties expresses concern about the independence of officeholders. Too often, the built-in expectation of donations is future retribution by means of public contracts. Bans stop this temptation before it starts.⁹ Not allowing public institutions to unilaterally contribute to campaigns is based rather on concern about fair elections than on independent representation. The abuse of administrative resources to influence the electoral outcome has been a historic pattern of campaign finance in many democracies. Allegiance on the part of representatives to the government though is a rather common pattern in modern democracies.

⁹ Obviously the relation can be inverted, since public contractors can be forced to contribute to government candidates. Thus, depending on politic and economic context bans can preserve rather fair elections.

Government seeks support of the majority of the legislative branch even in presidential systems, and the quid pro quo in the form of shared control over the government apparatus is considered business as usual in modern democracies.

The countries in question follow mainstream solutions concerning the bans imposed on donors. All three countries ban foreign entities from establishing links with representatives by means of campaign contributions. Equally, not all three allow state institutions to bias campaigns by one-sided finance. An atypical ban on political donations from employers' associations and labor unions in Brazil and in Argentina expresses a peculiar fear of labor relations influencing the political process. This ban on organized special interests is surprising, since in other countries, the party system is built around strong associations with organized interests of capital and labor. Argentina bans purveyors of the state from contributing to campaigns. The Brazilian solution is halfhearted, since private entities depending on state permissions (broadcasting and television) are excluded from campaign finance, while state contractors are free to contribute. In fact, they hold an important share in campaign finance.

The relation between donors and candidates is not uniform, but different in nature, expectations and intensity. However, campaign finance regimes cannot rule on motivations. But to a certain extent, they can have sway on the intensity of donor-candidate relationships. In our set of countries, Argentina is the sole one to establish rules on the intensity of relations established by political finance. Campaign finance laws establish the maximum share a party can receive from an individual donor: a person's share can reach up to 0.5% of total campaign funds; a company's maximum share is 1%. This reduces a candidate's relative influence from one individual donor, thereby increasing his independence when making decisions. The Brazilian case where no such rule exists illustrates the potential meaning of such a rule. Most candidates depend on a small number of donors.¹⁰

Measuring intensity of relations between donors and elected officeholders—by means of relative dependency from single donors or donor groups—and combining this approach with the criteria proposed by Thompson could result in an interesting tool for civil societies' oversight on the presence of special interests in committees within the legislative branches and independence of chairpersons of these committees.

¹⁰ For further reference and date: Bruno Wilhelm Speck: *Mitos, Norms and Data on Corruption of the Electoral Process Due to Campaign Finance*, article to be published in Peru.

Table 3: Bans and limits on donor dependency

	Argentina	Brazil	Chile
Veto	Foreigners, government, class interest, purveyor of state	Foreigners, government, class interests, companies subsidized or permission by state	Foreigners, government
Donor/recipient relationship	Limited relationship donor-party.	none	none
Disclosure	Previous and post-election	Post-election	Post-election, partial

Ex-Officio Self-Interest: An Unsolvable Problem?

Situations where legislators have to decide on their own behalf are numerous. This includes the polemic definition of their own remuneration, an issue that causes fierce criticism in most countries. A bad image of the political class and the privileges representatives enjoy in societies stamped by poverty add to the underlying conflict of interest. However, in none of the three cases observed, an alternative way of deciding on questions of own financial interests has been installed at the national level. Possible solutions could include involving representatives of several powers or the obligation of hearing an independent committee.

The same critique applies to the question of political finance. A number of countries have adopted commissions to give advisory opinion on issues of election and party finance. However, this is not the case in any of the countries in question. The political class is too reluctant to yield influence to groups and experts outside the legislative branch. During eight years of debate on reform of political finance, no representative of the electoral justice, responsible for analyzing and approving the accounts, has been heard in the committees in Brazilian Congress. Contrariwise, Panama established a procedure of regular revision of party and election finance by the electoral justice. Germany adopts a system of an independent commission to be heard before reforms are implemented.

The conflict of interest is equally evident when non-financial benefits are in question. The cases of Argentina and Brazil are enlightening. Brazilian members of Congress cannot be held responsible by the justice system, unless the house they belong to allows for prosecution. In Argentina, similar rules apply, but officeholders are doubly protected, since Congress

needs to approve prosecution by a qualified two-thirds majority. The historic reason for these protective measures is understandable when taking into account the record of authoritarian rule in these countries. However, it is important to remember that this extended immunity protecting officeholders against any accountability for civil or criminal offenses has created a perverse system of incentives. Consequently, criminals run for office seeking parliamentary immunity and members of the political class not being responsible for their deeds are seduced to behave irresponsibly.¹¹

The field of conflict of interest involving ex-officio self-interest of Congress members is still lacking models or best practices to follow. Notwithstanding this lack of ideas, it is one of the fields where conflicts of interest are most pressing and where bad images of politicians urge for solutions.

Table 4: Legislation on one’s own behalf

	Argentina	Brazil	Chile
Definition of immunity rules	Prosecution depending on 2/3 majority in Congress	Prosecution depending on majority in Congress	Prosecution depending on decision by Higher Court
Remuneration	Decision by Congress	Decision by Congress	Decision by Congress
Political finance	Decision by Congress	Decision by Congress	Decision by Congress

Disclosure, a Halfway Solution

Disclosure is an alternative to solutions based on incompatibility rules. While the latter have to make a decision on what relationship to allow and what to bar from influencing officeholders, the disclosure requirement postpones this decision to an actor not identified. The public at large, the press or peers may be granted access to information on interests of officeholders.

In the countries in question, legislation on political finance has undergone radical changes since re-democratization. A trait common to all reforms is the progress towards transparency. In 2002 Argentina introduced new campaign finance legislation to ban previous loopholes that allowed anonymous donations. The lawmakers even introduced a system of

¹¹ The list of Members of Brazilian Congress awaiting prosecution for civil or criminal offences is long. The Chairman of the Chamber of Deputies, elected in 2005, is known for a long record of uncovered checks to pay his expenses.

provisional rendering of accounts before Election Day to allow citizen access to the candidates' profile of political finance. However, compliance with this regulation is still minimal. Brazil radically changed its system of political finance since major scandals erupted in the early 1990s. The lawmakers have removed most bans and limits and introduced a dense system of disclosure on political finance. The Electoral Court followed up in the same direction with ordinances gradually modernizing the system of accountability to a stage that permits public access to the whole database of campaign accounts and donors. Chile recently (2004) reviewed its campaign finance laws, abolishing a system of accountability that did not even provide for regular accounts to be remitted to the electoral authority. The new law fostered transparency ... yet despite the introduction of a three-class system of transparency, the law still allowed anonymous donations.

Transparency on financial interests does apply equally to personal assets of officeholders. In Chile, declaration of assets of elected officeholders is fixed in the bylaws of Congress. However, since no credible sanctions are defined, the chairperson of both the Senate and Chamber of Deputies simply publishes a list of those officeholders who did not comply with this regulation. Specific legislation in Argentina (1999) and Brazil (1993) establishes the obligation for officeholders to declare their assets when taking office and at the end of their term.¹² Both laws extend to officeholders elected and non-elected and is meant to support accusations under the criminal offense of "undue enrichment." In many Latin American countries, officeholders are obligated to provide credible evidence that their assets are based on earnings in accordance with the law.

Despite the specific justification of declarations of assets, the information might serve for clarification of potential conflicts of interests, too. This requires systematization and public availability of information on private assets. In most countries, both requirements are unfulfilled. This includes our small sample, where de-facto access to declarations of assets is not granted. In the case of Argentina the CSO Poder Ciudadano tried to access the data according to the law. After having its request denied at first stance, the organization appealed to the court and finally gained access.¹³ In Brazil, a similar experience occurred when a newspaper-based initiative accessed declarations of assets of all Congress members and published the data on the Internet.

¹² For Argentina Law 25.188, 1999; for Brazil Law 8.730/1999.

¹³ Monitoring the Senate, Argentina, in: Transparency International: Corruption Fighters Toolkit. Civil Society Experiences and Emerging Strategies, Berlin, 2002.

The disclosure approach to conflict of interest situations is supposed to kick off a process of public clarification of due and undue process. The rules on disclosure of assets and debts, and of publicizing interests and private commitments, are supposed to pave the way for a discussion of proper and improper behavior. Despite the focus on achieving access and disseminating data, there should be no illusion about the difficult task of interpreting data. In this sense, disclosure forwards the ethical decision on the frontline between due representation of special interests versus the requirement to legislate independently to the observer's moral conscience. Thus, the model sets trust in the mechanisms of social oversight and the political market of electoral support.

Table 5: Disclosure of private assets and political finance

	Argentina	Brazil	Chile
Declaration of assets	Yes, when taking office and at end of term	Yes, when taking office and at end of term	Yes, when taking office without sanctions
Access to declarations	Yes, on request	Yes, on request Media initiative turned declarations public in 2002	Yes, on request

Clarification by Procedure is Hardly Applicable to Elected Officeholders

Avoidance based on incompatibilities, in part or at large, is the mainstream concept in dealing with conflict of interest situations. The second solution, public oversight, is based on disclosure of interests forwarding the authority and responsibility of control to the citizen. The third model of solution stemming from experience of conflict of interest solution in the private sector is based on consultation, oversight and sanction. This model was adopted by the Westminster Parliament after a major scandal involving undue perception of financial benefits of MPs. A post of a Parliamentary Commissioner for Standards was created, responsible for the registering of interests declared by officeholders, advice to MPs when requested, and investigation of undue behavior.

In the Latin American countries in question, no similar form of institutionalization and definition of due process for conflict of interest

situations exist. In Argentina, in the instance when a member of Congress signs a contract with a public institution or when another economic benefit is perceived, the constitution obligates him to ask for permission from his peers first. However, neither the constitution nor bylaws explicitly mention possible conflict of interest situations that could occur despite abiding by rules of impediment.

Chile defines conflict of interest situations precisely as private or family business conflicting with an elected officeholder's duty. The congressperson in question has to disclose his interest. He or she may participate in debate, but cannot vote on the subject in question. Chile applies a different procedural solution when the question comes to incompatibilities with previous outside commitments of elected officeholders are in question. The constitution decides these contractual commitments lose validity when the congressperson is sworn in. Another model of automated procedure is initiated when a congressperson decides to celebrate a contract with a state authority or is involved in other incompatible situations. Then, according to the constitution, his mandate expires. This automated reaction applies also to situations like a member of Congress intervening in favor of a party in an administrative or judicial labor conflict or when inciting against the public order. This context shows the perils of automated solutions involving the loss of political mandate.

The Brazilian Constitution, like the Chilean, foresees situations of incompatible behavior or outside commitments and provides for solutions based on procedure. Unlike the case of Chile, no automated process is triggered off, but due process similar to a judicial case is set in motion. However, no power outside Congress participates in this process, thus, making the whole process based on the principle of peer review.

Table 6: Procedure for incompatible commitments

	Argentina	Brazil	Chile
Conflict of interest situations (beyond incompatibility rules)	Not defined	Vaguely defined, members withdraw from decision-making; however, not mandatory	Defined as personal interests, members are required to withdraw from decision-making, participation in debate is possible
Procedures (on both violation of incompatibility or occasional conflicts of interest)	Previous permission from Congress for benefits from governmental institutions	Violation of dignity activates a process of cancellation of mandate involving due process [Constitution]	Incompatible outside commitments automatically cancelled when taking office Officeholder automatically loses seat when involved in incompatible situations

Concluding Remarks

Despite certain popularity among social scientists of concepts looking at politicians as profit-maximizing actors, the problem of conflicts of interest has not attracted much attention. Literature on conflict of interest situations and possible solutions focusing on professions is abundant, as mentioned above. The concepts drawn from this private sector background need adaptation to public officeholders, even more for special situation of elected representatives.

The resulting analysis suggests incompatibility rules are an important tool to keep elected representatives from risky situations. However, the scope of situations covered by a strategy of prevention simply dictated by avoidance is limited. Property, family or business interests are part of the natural assets of any representative, and strategies of abdication have limited reach. When establishing barriers of incompatibility for personal interests, like a ban on any kind of business with the state, these should equally extend to third-party commitments. Special interests' influence on elected officeholders is reflected in their financial support to election campaigns. Unlike natural private commitments, special interests do not randomly relate to representatives. They are in search of influence, in the name of their private business. This is why third-party commitments are the main stage of conflicts of interest of elected officeholders.

Despite the fact that elected officeholders must be able to balance the roles of representation and independent legislation, political finance regulations are to expect supporting candidates' independence. Regulation concerning donor-candidate relationships does mainly rely on solutions imposing bans. However, a couple of countries have explored regulations supporting relative independence of candidates from donors.

Besides strategies of avoidance, two complementary solutions for conflicts of interests are based on concepts of clarification by disclosure and establishing procedure for guidance and oversight. Disclosure of personal or third party interests is a value for the political process at large that fosters an environment for informed voting among the citizens in question. The ability of social oversight and the political market to produce results is yet to be proven in reality. Opening procedures for advice and clarification might not be a solution adequate for elected officeholders.

As for the problem of officeholders deciding on their own "ex-officio" interests, solutions based on procedure might be a viable since avoidance and disclosure are no feasible ways. Establishing due process that involves expert opinion and/or approval of other powers could be an avenue worthwhile of further exploration.