

Understanding conflicts of interest to safeguard democratic & evidence-based health and nutrition governance

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**Annotated presentation for IBFAN-members
and others who care about infant and young child feeding**

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Aim of this annotated presentation

To enable concerned citizens to ***better identify and more effectively argue for effective conflict of interest safeguards***

- in particular with respect to ***protecting regulatory processes*** from undue corporate influence;
- in other words, to help ensure ***democratic, genuinely evidence-based, health and nutrition governance***

Why bother with understanding conflicts of interest?

We, who work on corporate accountability issues, have a good 'gut feeling' about what constitutes a conflict of interest

We also know that in the infant feeding arena much was done to identify and address them e.g. via:

The ***International Code of Marketing of Breastmilksubstitutes (1981)***
& subsequent **World Health Assembly (WHA) Resolutions on Cols**

And the ***WHO/UNICEFF Global Strategy on Young Child and Infant Feeding (2002)***



Many may have thought that problems of undue corporate influence were solved



when the *WHO/UNICEFF Global Strategy on Young Child and Infant Feeding (GSYIF 2002)*

stressed the need to respect

«accepted principles for avoiding conflicts of interest»

& moreover

delineated the role of manufacturers...

of industrially manufactured foods for infants and young children
by restricting it to

- a) meeting specific quality, safety and labelling standards (Codex);
- b) and to conforming to the International Code & WHA Resolutions

However, the trend towards ‘partnership’ and ‘stakeholder’ relationships with industry has led to new challenges & confusing discussions

- We may be confused: Conflict of interest (Actual? Perceived/Apparent?)
- Even more confusing: ‘Conflicts of interest’ versus ‘conflicting’ and ‘diverging’ interests?
- What are ‘*interests*’ altogether?



Confused? –Naturally! 😊

Conflict of Interest

“An Elusive Concept”

Professor Anne Peters

Conflict of Interest in Global, Public and Corporate Governance

(2012)

No one universally accepted definition

Col = relatively new legal concept

But spirit of Col known to everybody

‘Spirit’ of Cols = idea behind Col concept & some ideas how to adequately address them **enshrined in popular sayings**, religious parables and stories, fairy tales, as well as slogans found in the press:

- *The hand that gives is always higher than the hand that takes (Congo)*
- *He who pays the piper calls the tune; what are the ‘strings attached’?*
- *You do not bite the hand that feeds you*
- *Are you not worried to be seen as being ‘in bed with industry’?*
- *You cannot serve two masters; wearing two (possibly conflicting) hats*
- *You do not invite the fox to build the chicken coop (in French: you do not invite the wolf to guard the sheep enclosure)*

I. CoI IN A NUTSHELL: Explains the *spirit behind CoI regulation* & introduces some CoI definitions

II. CoI IN GLOBAL NUTRITION GOVERNANCE: Raises attention to the *lack of adequate CoI regulation* in the international nutrition arena & problem that *concept being muddied and redefined* (example: SUN)

III. WHAT CAN BE DONE? Sketching out some ideas what could be done to advocate for CoI policies in order to *protect the capacity of public interest actors to hold transnational corporations accountable*

I. Conflicts of interest in a nutshell

Its spirit = conceptualisation by lawyers

- Col relate e.g. to professionals who are, or can be conceptualised, in a ***fiduciary (trust) relationship:***
judges; public officials & civil servants;
more recently: physicians etc.
- Fides (latin) means trust, faith, confidence...

Fiduciary (trust) relationship

Fiduciaries (the trust-takers) decide and/or act
on our (the trust-givers) behalf

- their decisions are **important** for us
- but we cannot check well on their decisions
- **The ‘trust givers’ must be able to trust in their decisions**

What is a conflict of interest?

Some definitions

Professor Peters proposes as *a first general definition*:

«A situation in which some interest of a person has a tendency to interfere with the proper exercise of his [or her] judgement in another's behalf»

Michael Davis, 1998



For a **legally meaningful definition** of Col Peters stresses the need to avoid confusing «conflicts of interest» with what others often call «conflicting interest»

«The conflict we are dealing with is an ***intrapersonal conflict*** arising **within a human or an institution** which is entrusted with such [fiduciary] decision making. It is **not** a clash **between** different actors.»

Remember: Difference of conflict WITHIN and BETWEEN

What is a conflict of interest?

Some other definitions

1. Most widespread practical “hands-on-definitions” in **medicine**: *Institute of Medicine (IoM)* 2009 definitions of **‘individual’** and **‘institutional’ conflicts of interest** in medical research, education and practice, & development of clinical practice guidelines
2. **More complex definition** by law professor Marc Rodwin
Focus: fiduciary relationship & duty of loyalty; also focussing on structural causes & systemic effects
3. Most accepted hands-on-definition for **civil servants**: see *OECD Guidelines for Managing Conflict of Interest in the Public Service* (2003)

Institute of Medicine IoM Definitions (2009)

An **individual conflict of interest**

«is a *set of circumstances* that creates a **risk** that professional **judgements** or **actions** regarding a *primary interest* will be **unduly influenced** by a *secondary interest*»

Individual Col

key notions of IoM/Thompon's concept

- A conflict of interest is a **«set of circumstances»** that creates **a risk**;
- Personal **primary «interests»** are e.g. key ethical & legal obligations of professionals (for physicians e.g. with respect to patient care, research, medical education, and advisory functions on public guidelines and policies);
- **Secondary interests** are often subdivided in **«financial»** and other **«personal» interests** (= *Col categorisation by causes No 1 & 2*)

«**Secondary interests** are not [necessarily] illegitimate in themselves»

...but the aim of conflict of interest regulation is «to *prevent these secondary factors from dominating or appearing to dominate...* in the making of professional decisions» (Dennis F. Thompson 1993)

In the case of conflict between
the primary and a secondary interest
the primary interest must always prevail!

NB: Individual Col category No 3: **Divided loyalty Col**

Duty to act with undivided loyalty

highlighted by law professor Marc Rodwin

In public functions, the “idea was that the public official or civil servant, [or expert in an advisory roles], needs to **act exclusively** in the **public interest.**”

They were meant to be **“loyal”** to those they are meant to serve,
“to be scrupulously honest with them and to act solely for their benefit”
(1993)

Conflicts of interest caused by divided loyalties «occur when [e.g] physicians **perform roles** that **interfere with** their **acting in** their patients’ **interest** or when their **loyalty is split between patients and a third party**» (2011)



Divided loyalty Col - examples



- when physicians perform, at the same time, the role of a healer and researcher;
 - when they provide a service for a pharmaceutical or food company (third party which has a for-profit interest); or when academics sit on the boards of health related companies.
-
- when civil servants are asked, at the same time, to work on corporate regulation (or for CSR) and to engage into a 'partnership'/multi-'stakeholder' relationship with the companies to be regulated;
 - or when public officials sit on boards of corporations or envision to join a TNC after the end of their public function (also known as post-employment Col/'revolving door' issue)

Col definition taking divided loyalty Cols specifically into account

Persons in a position of trust
(fiduciaries) have a Col
«when their **interests** or
commitments
compromise their **independent**
judgement or their **loyalty**»
to the trust-givers (fiducies).

Based on Marc Rodwin, 1993



Conflict of interest policies are meant to be, above all, **preventive policies**



Because

it is difficult for outsiders to know
whether or not financial interests
actually do bias the judgement of
e.g. a health professional or civil servant

Even if all **individual conflicts of interest** were
adequately regulated,
this might not be enough

This is why the IoM Report
also included a chapter on **institutional conflicts of interest**

Institute of Medicine IoM Definition (2009)

Institutional Conflicts of Interest

"Institutional conflicts of interest arise when an **institution's own** [secondary] financial interest or those of its **senior officials** pose risks to the integrity of the **institution's primary interests and missions.**"

IoM advised to take **institutional Col *very seriously***

"If they are not properly identified and managed, institutional conflicts **can undermine the work and reputation of an entire institution, including employees or members who are themselves strictly avoiding individual conflicts of interest."**

Core concerns *of conflict of interest regulation*

The protection of

1. the integrity of **decision-making processes** (on **other persons' behalf**)
2. the financial **independence**
3. the **trustworthiness** of, and **public trust**, in persons and institutions that are meant to act in the public interest

Core concern of Col policies & regulation

No 1

Protection of

integrity of decision-making processes

e.g. of policy-making; decisions on health norms & regulation of harmful corporate practices; public procurement etc.

as well as the

integrity of institutions

Core concern of Col policies & regulation

No 2

Protection of **independence**

Discussions about:

- **‘Appropriate’ levels** of funding/sponsorship contributions
- **Appropriateness** of accepting funding **from certain sources**
- **Systemic effects** of overreliance/dependency on sponsorship/‘charitable’ contributions e.g. on the global health and nutrition architecture; democracy; academic freedom

Core concern of Col policies & regulation.

No 3

Ensuring **trustworthiness & public trust (credibility)**

- not just «reputation»

(which can be manufactured by skilled public-relations professionals)

Trust taken very seriously

= **basis of legitimacy** = *reason of being*

of a profession or a public institution!

= «social contract» for public officials

'Perceived' conflicts of interest

Taken very seriously in Col policies

–e.g. in the «reasonable person test»

«The aim [of Col regulation] is to *minimize conditions that would cause reasonable persons (patients, colleagues and citizens) to believe that professional judgement has been improperly influenced, whether or not it has been»*

Dennis F. Thompson, 2005

- Persons and institutions in a position of trust must do all they can_
- to explain whether, or not, what outsiders (or concerned insiders) see as a conflict of interest is a an **actual Col**;
 - or whether it is **any other issue that might need some explaining (& change in the problematic practice or relationship) to dispell concerns**

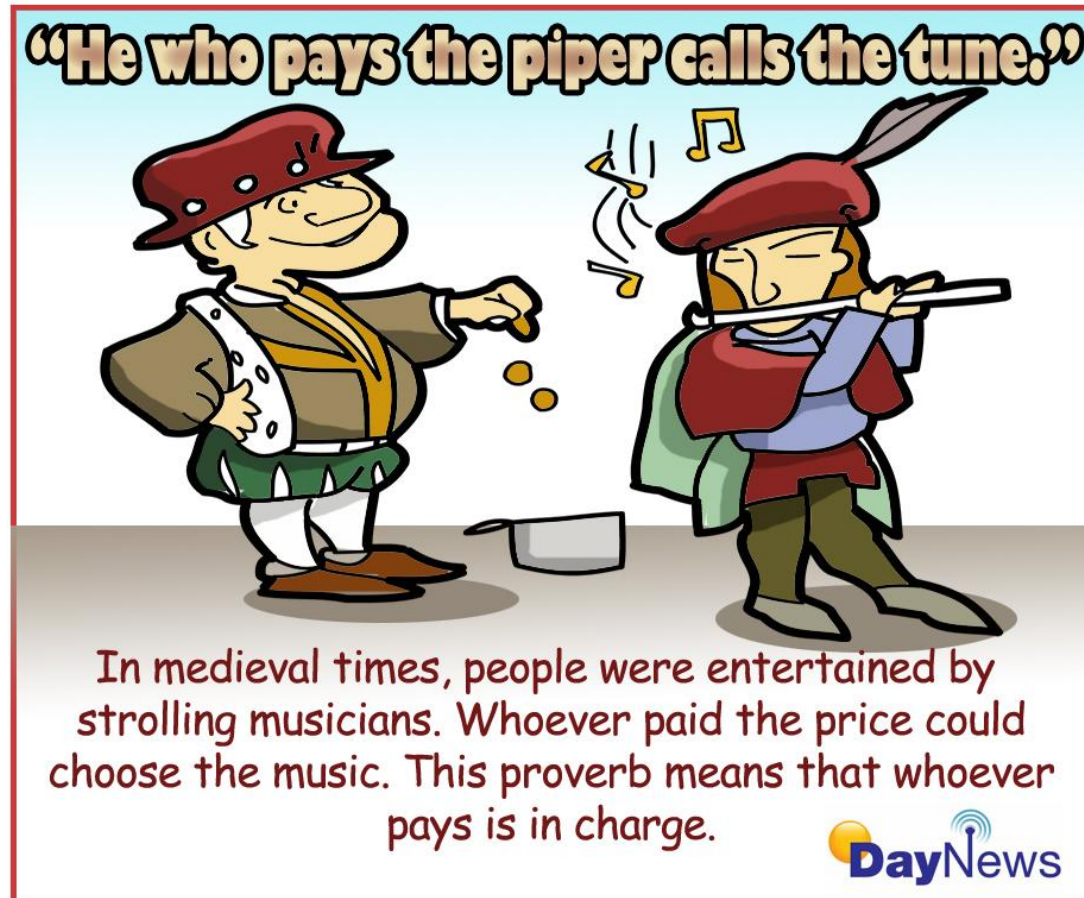


Assessing the seriousness of ColS - and what what to do about them...



- Opinions often diverge (partially because some of the actors in the discussion may already be affected by unresolved ColS)
- No details in this presentation - just some reflections on **«sponsorship relationships» with health related industries** who have an interest in expanding their markets and influencing policies (a.o. regulation of harmful practices)

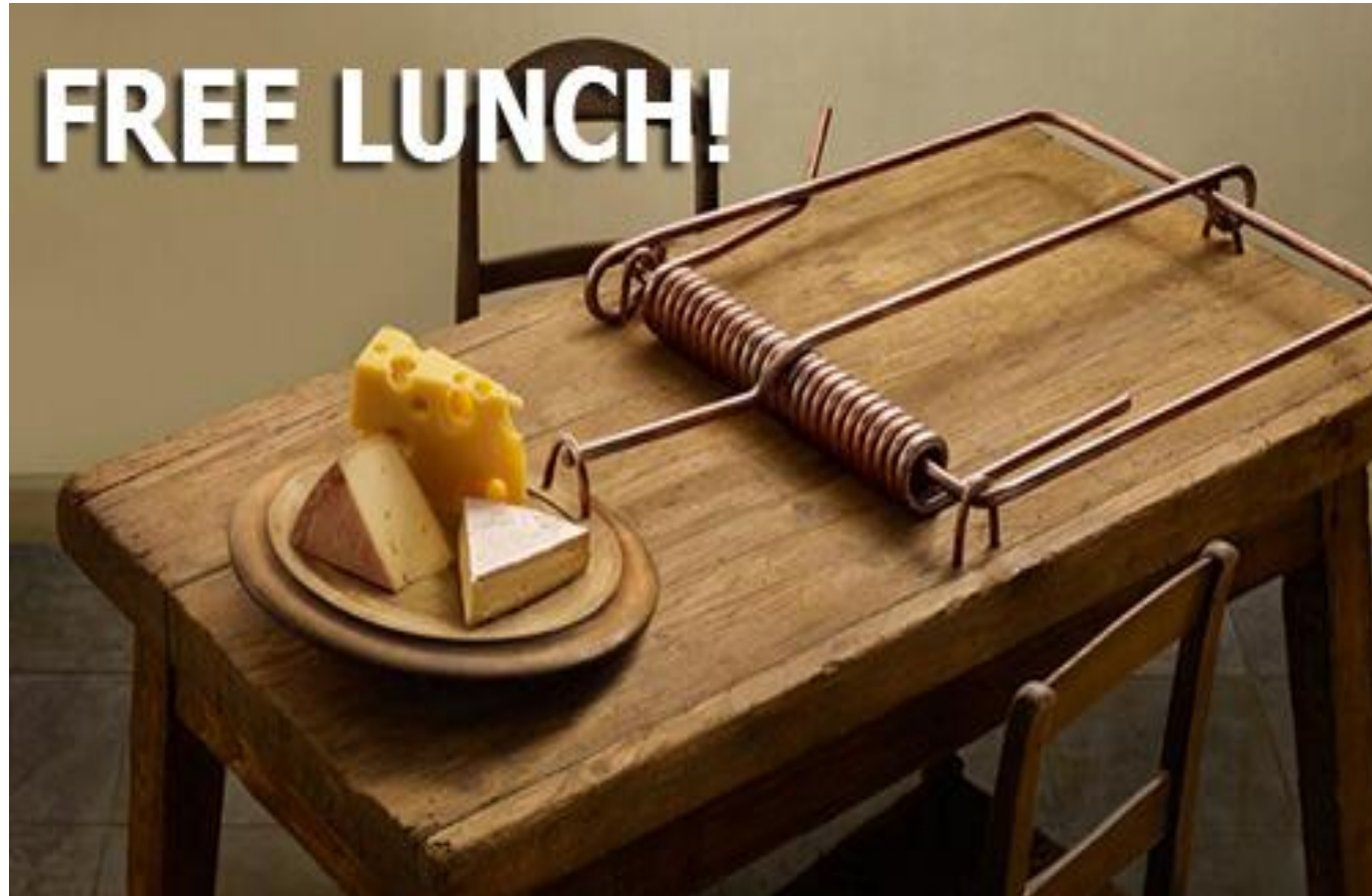
Peoples' perceptions concerning financial Col





“there’s
no such thing
as a free
lunch.”

«Only in a mousetrap can you find cheese for free»



To take or not to take? 😊...that is the question



Is corporate funding for medical education acceptable?

There continues to be much debate about benefits versus risks of **corporate sponsorship** for e.g. medical continued education and conferences from health related industries:

- Many medical associations say they can ensure that this will not bias their judgement (and thus argue e.g. for limiting the amount of funding received - so-called «capping» - of the contributions; possibly combined with funding guidelines)

Is corporate funding for education acceptable? (ctd)

- Research has shown a) that **persons with conflicts of interest tend to underestimate the extent to which CoIs bias their judgement in favour of the sponsor**; and b) that **even small gifts create reciprocity-relationships**. The receiver will feel obligated to give something in return;
- therefore others estimate that **limiting amounts will not solve the problems these sponsorship relationships create**, e.g. physicians who have signed the «No Free Lunch» pledge; or the International Society for Social Pediatrics and Child Health (ISSOP) which asserts:

“Sponsorship from the industry of paediatric education and conferences inevitably compromises the duty of paediatricians and other child health professionals to promote breast feeding.”

Is corporate funding for education acceptable? (ctd.)

Others still point out that the **funding for health professional «education» comes from *marketing* budgets**

Debates about CoIs and risk management with respect to corporate sponsorship may divert attention from the fact that **corporate sponsorship is meant to buy influence!**

«Drug companies are not providers of education, and they cannot be. No laws, regulations or guidelines should be based on the idea that they are»

Example 2:

How to assess sponsorships from companies whose practices should be regulated?

Major question by those who want to address **commerciogenic roots** of worldwide obesity 'epidemic'

Why not look at the **Tobacco Convention Article 5.3.**
& associated guidelines?

“[In] **setting and implementing their public health policies** with respect to tobacco control, **Parties shall act to protect these policies** from commercial and other vested interests of the tobacco industry in accordance with national law”

How to assess sponsorships from companies whose practices should be regulated? ctd.

Frequent argument: «**But food is not like tobacco!**»

???

BIG Food and BIG Soda are like infant food and pharmaceutical TNCs when it comes to combatting legally-binding regulation of marketing harmful practices

The issue is not just whether a product is harmful

A Col exists when a corporation has a «financial interest in the outcome» of a public-private interaction

Marc Rodwin, 2015

II. Conflicts of interest in global food & nutrition *governance*

Cols no problem?

What about **'stakeholder governance'**
in the up-coming **Nutrition Decade** following
the **Second International Conference on Nutrition (ICN2)**
held in Rome in 2014?



ICN2 Framework of Action (FFA)



which is meant to implement the post-INC2 actions

Recommendation No 3 of how to

«create an **enabling environment for effective action**»:

«[s]trengthen and establish, as **appropriate...**

multi-stakeholder mechanisms for food security and nutrition
to *oversee implementation* of policies, strategies, programmes
and other investments in nutrition»

Para continues:

«Such [multi-stakeholder] **platforms** may be needed at various levels, **with robust safeguards against** abuse and **conflicts of interest**»

Impression of readers:

Robust Col safeguards must exist

WRONG!

There is
no coherent, effective, CoI regulation
with respect to UN-business relationships
& independent public-private 'partnerships' (PPPs) &
multi-'stakeholder' initiatives (MSIs)

Findings of review on Cols in global public governance

Public-private partnerships

[& multi-stakeholder initiatives/alliances]

“increase the likelihood of new forms of conflicts of interest”

They **“erode the public-private distinction”**

Yet, in 2012, Col regulation for the UN system were
still in their **“infancy”**

& “attempts to harmonise it... only beginning”

Preventing and Managing Conflicts of Interest ***SUN Reference Note (2014)***

providing for «robust» Col regulation in MSIs?
or legitimizing multi-stakeholder approaches and sidelining critics?

Analysis of SUN Col Reference Note's
A basic discourse analysis:
What is said, how & what is left out?
(significant omissions)

Preventing and Managing Conflicts of Interest

- SUN Reference Note (2014)

How are CoIs defined?

- «An **institutional conflict of interest** arises when the pursuit of the private or secondary interest of an organisation's interest has the effect of compromising, interfering with, or taking precedence over the **joint endeavour**» (para 15)
- «The **secondary interest...** should not supersede the **primary purpose of establishing synergy** between organisations...» (para 10)



Remember the IOM definition?

Wrong primary mandate

The overarching 'primary interest' of a public-interest organisations or alliances is/should be the

public mandate of an organisation or initiative

Reading SUN's CoIReference Note's

the overarching purpose of CoI regulation appears to be the protection of

synergy creation

around the alleged «**common goal of promoting improved nutrition**»

in **joint endeavours** between public-interest and private-sector actors

Where is the public mandate?

- the 'primary interest'

to protect, respect and fulfill

peoples' human rights

to adequate food and nutrition,

and freedom from hunger



SUN's Reference Note on conflict of interest **does not:**

examine whether the inclusion of corporations in SUN's Lead group might constitute a severe, **unacceptable Col**

nor does it question
the **notion of turning everybody into a «stakeholder»**
in the food and nutrition arena

SUN CoIs guidance dismisses critical questions

«Some stakeholders argue that the potential for conflicts among certain groups of stakeholders is so great that those stakeholders should be automatically be excluded from engaging in the the SUN movement»

This is how the CoI Reference Note portrays IBFAN's & other public interest actors' concerns over the inclusion of TNCs into SUN's as 'partners' and 'stakeholders' in the Lead Group and in national nutrition policies and and programmes.



The CoI Reference Note states categorically:

«good governance is inclusive»



SUN's CoI Reference Note continues:

- And «with this assumption and an emphasis on **building trust** to permit such **inclusiveness** [this Note] describes ways for governments to manage potential and actual conflicts of interest of stakeholders who may be participating in the Movement.»
- «Prohibiting any individual entity – or **group of stakeholders** – from engaging in the SUN Movement at the country or global level should be a **last resort**» (para 9)

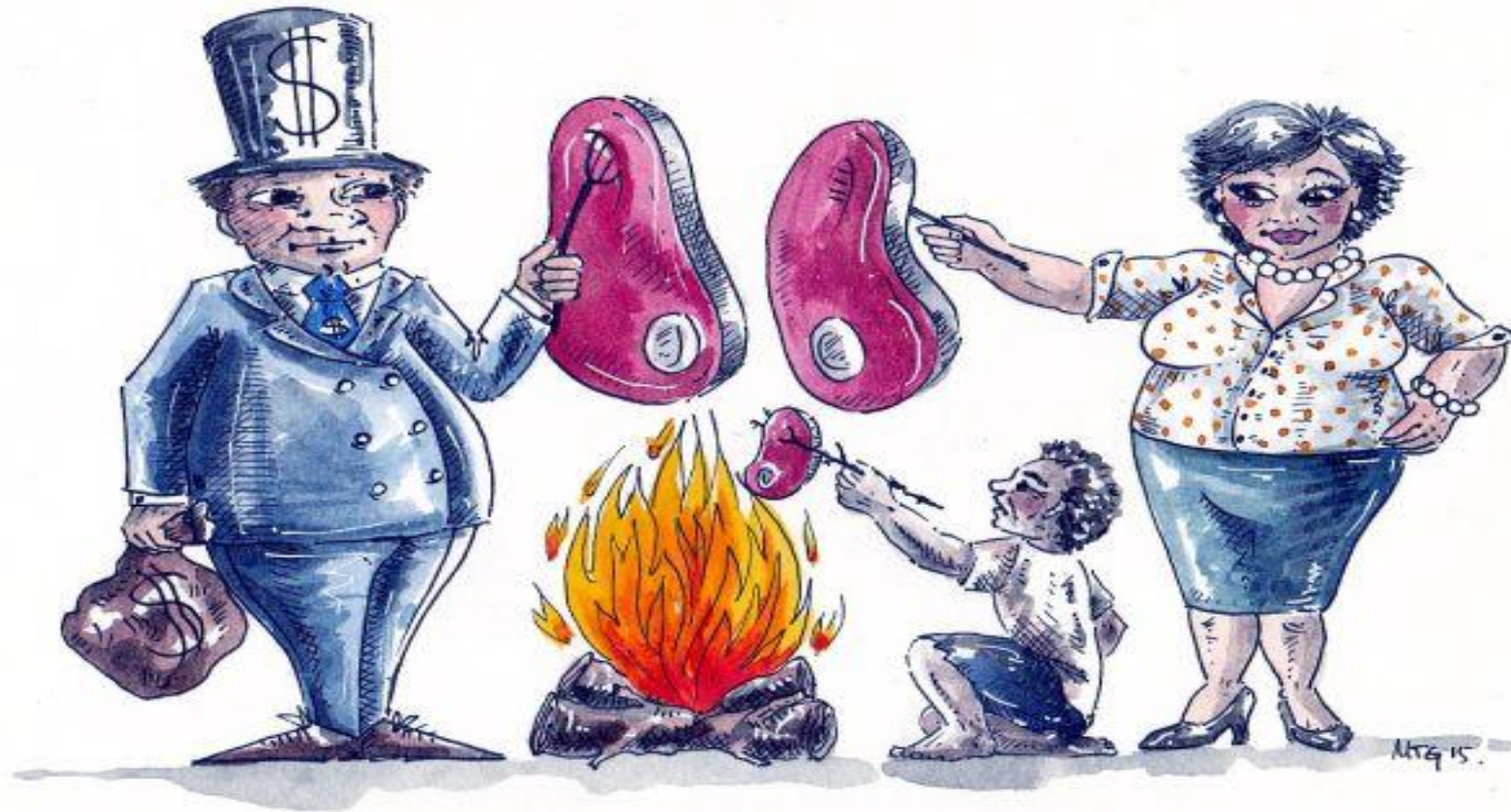
Is good governance automatically “inclusive” of TNCs?

Concern of IBFAN:

Soon there may be no more rule-setting (governance)
spaces in public health & nutrition outside

‘stake-holderised’ arenas

i.e. which include TNCs as the indispensable,
in fact privileged, ‘stakeholders’ in public health matters



Sub-suming public-interest with business interest actors under the name 'stake-holder' **blurs important distinctions**
*Distinction No 1. Some have bigger **STEAKS** 😊 to fry.....*

Distinction No 2.

Fundamental divergences between actors' 'primary interests'

“The commercial **interests** of multinational food companies inevitably **diverge** in fundamental ways from those of public sector agencies responsible for public health. We can recognize these divergent interests without demonizing industry, and we should do so. When public health officials **downplay the divergence, they imperil their public health mission, and the integrity of their institution.**”

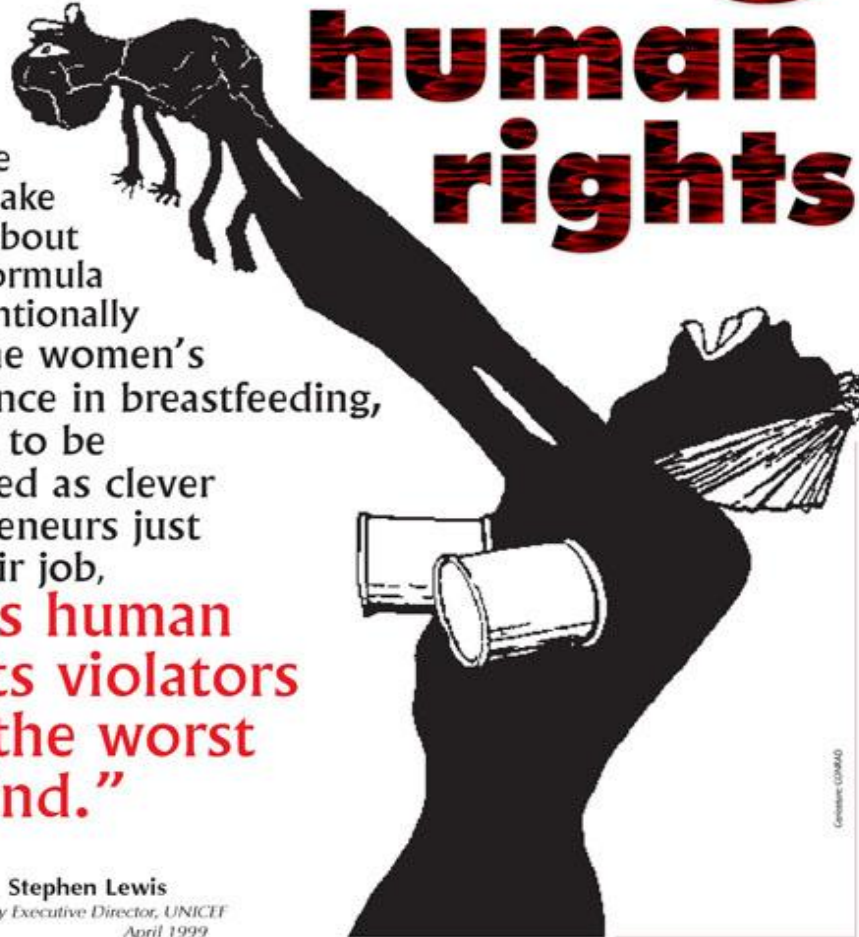
Jonathan Marks, 2014

TNCs that do not follow the Code are

Violating human rights

“Those who make claims about infant formula that intentionally undermine women’s confidence in breastfeeding, are not to be regarded as clever entrepreneurs just doing their job, **but as human rights violators of the worst kind.**”

Stephen Lewis
Deputy Executive Director, UNICEF
April 1999



Stephen Lewis
Former Deputy Executive-
Director of UNICEF
April 1999

In fact: What is «governance»?

Big word – why not use simple analogies?

- Governance comes from Greek **Kybernan = steer a ship** (French: “governail”)
- International relations theorist James A. Rosenau: “the process “whereby an organisation or society steers itself”
- Commission on Global Governance 1995:

“governance is the sum of the many ways in which individuals and institutions, public and private, manage their common affairs...”

In short: **Rule setting, formal and informal**

*Commission on **Global Governance 1995:***

Global governance mechanisms must be

“**more inclusive** and **more participatory**

– that is, **more democratic** than in the past.”

They must subject powerful “economic...” actors

to the “**rule of law** within global society.”

Key questions on «good» governance

Who steers the boat, who sets the rules?

And into which direction?

***Are we going towards corporate- &
venture-philanthropy led governance?***

What will be the result?



e.g. “Nestlé sails supermarket on the Amazon” June 2010







III. What can be done to protect public interest actors' capacity to hold TNCs accountable?

1. Call for policy measures to
«*identify, assess, and adequately address CoI
in the global food and nutrition arena*»*

By e.g. reminding public agencies & UN Member States of the

*OECD Guidelines for on Managing Conflict of
Interest in the Public Service (2003)*

Public interest advocates can argue that
Conflict of interest policies and regulation
- are **neglected task** in the building of the
international rule of law

Col policies are acknowledged part of
public and administrative law (OECD countries)

They are part of the system
of **'checks and balances'** in democracies

Core principles

which public officials should observe
when dealing with Col matters

- «**Serving the public interest**
- Promoting individual responsibility and personal example;
- Engendering an **organisational culture which is intolerant of conflicts of interest**
- Supporting **transparency and public scrutiny» !!!**

Duty of the leadership of a public organisation

- ensure that «decision-making procedures at all stages can be audited for integrity...»;
- **that conflict of interest policies are being set up, monitored, and enforced;** and
- «create an organisational culture where dealing with conflict-of-interest matters can be freely raised and discussed»

2. How to raise attention to conflicts of interest issues?

Civil society actors
need not be experts on Col

Use the «reasonable person» position
& argument

Any citizen can

1. Use **popular sayings & slogans** to raise attention to what most ‘reasonable persons’ may perceive as a conflict of interest;
2. Insist that **public institutions have the duty to give enough information & explanations** for the public to decide whether what they see as a Col is a real conflict of interest or just a perceived one;
3. If there is an attempt to sideline your concerns, **point out that perceived conflicts of interest need to be taken as seriously as real Col.** A perception of a Col may indicate that there is another serious ethical, legal or political problem that may need to be followed up and addressed.

How to persuade public-interest actors to *join hands* to work for effective Col policies?

for all public actors in the health and nutrition arena
- *including their own organisation* -
where needed

Sponsorship relationships,
public-private 'partnerships' & multi-'stakeholder' initiatives,
and long-term corporate divide-and-rule strategies
have driven a wedge between them



Maybe by pointing out that....



Lack of Col regulation in the infant nutrition arena is co-responsible for ill-health and death from *'commerciogenic malnutrition'*

- Those who work in the infant food area know that about 800,000 children's lives could be saved every year if all children between 0 to 2 years were optimally breastfed
- At the same time, children all over the world are now at risk from obesity-related diseases ...





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