

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

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**Annotated presentation for IBFAN-members
and others citizens who care about infant and young children's health and wellbeing**



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Aim of this annotated presentation



To enable concerned citizens to *better identify conflicts of interest* and *more successfully argue for effective conflict of interest (CoI) 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?

People who work on corporate accountability issues,
people who work on health and nutrition issues
often have a good 'gut feeling'
about what constitutes a conflict of interest

They may 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 relevant **World Health Assembly (WHA) Resolutions**
on conflicts of interest

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/UNICEF Global Strategy for Infant and Young Child Feeding (GSIYCF 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 their role to:

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

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

- What are Conflict of interest? - *Actual? Perceived/Apparent?*
- Even more confusing: ‘*Conflicts of interest*’ versus ‘*conflicting*’ and ‘*diverging*’ interests?
- And 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 are **enshrined in popular sayings**, religious parables and stories, fairy tales and popular myths, 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 & the problem that the *CoI concept is being muddied and redefined* (example: SUN)
- III. WHAT CAN BE DONE?** Sketches some ideas how concerned citizens could advocate for CoI policies in order to *protect the capacity of public interest actors to hold TNCs 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 the ‘trust-takers’ decisions**

What is a conflict of interest?

Some definitions

Professor Ann 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 the **key difference: WITHIN versus BETWEEN**

‘Conflict-WITHIN’ a person or institution

Example of a widely used definition

«A **‘conflict of interest’** involves a **conflict between the public duty and private interest of a public official**, in which the public official has private-capacity interests which could improperly influence the performances of their official duties and responsibilities»

OECD Guidelines

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

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 (I) ‘**individual**’ and (II) ‘**institutional**’ conflicts of interest* in medical research, education and practice, & development of clinical practice guidelines

2. **A more complex definition** by law professor Marc Rodwin
Focus: fiduciary relationship & duty of loyalty; analysis also taking structural causes & systemic effects into account

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 ColS

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 into
(1) **«financial»** and other (2) **«personal» interests**
(= *Col categorisation by major 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 Corporate Social Responsibility CSR) and to engage into a sponsorship-, 'partnership'/multi-'stakeholder'- relationship with the companies to be regulated;
- or when public officials/civil servants 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)

A Col definition taking divided loyalty Cols specifically into account

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

Based on definition by Professor Marc Rodwin, 1993

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

Because

it is difficult for outsiders to ascertain
whether or not financial interests
have biased the judgement of e.g.
a health professional or civil servant

& because

«conflicts of interest have the capacity to cause harm»

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 purposes *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

Col policies & regulation

Key purpose No 1

Protection of

integrity of decision-making processes

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

as well as the

integrity of institutions



Col policies & regulation

Key purpose No 2

Protection of **independence**

Discussions need to take place about issues such as:

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

Col policies & regulation

Key purpose No 3

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

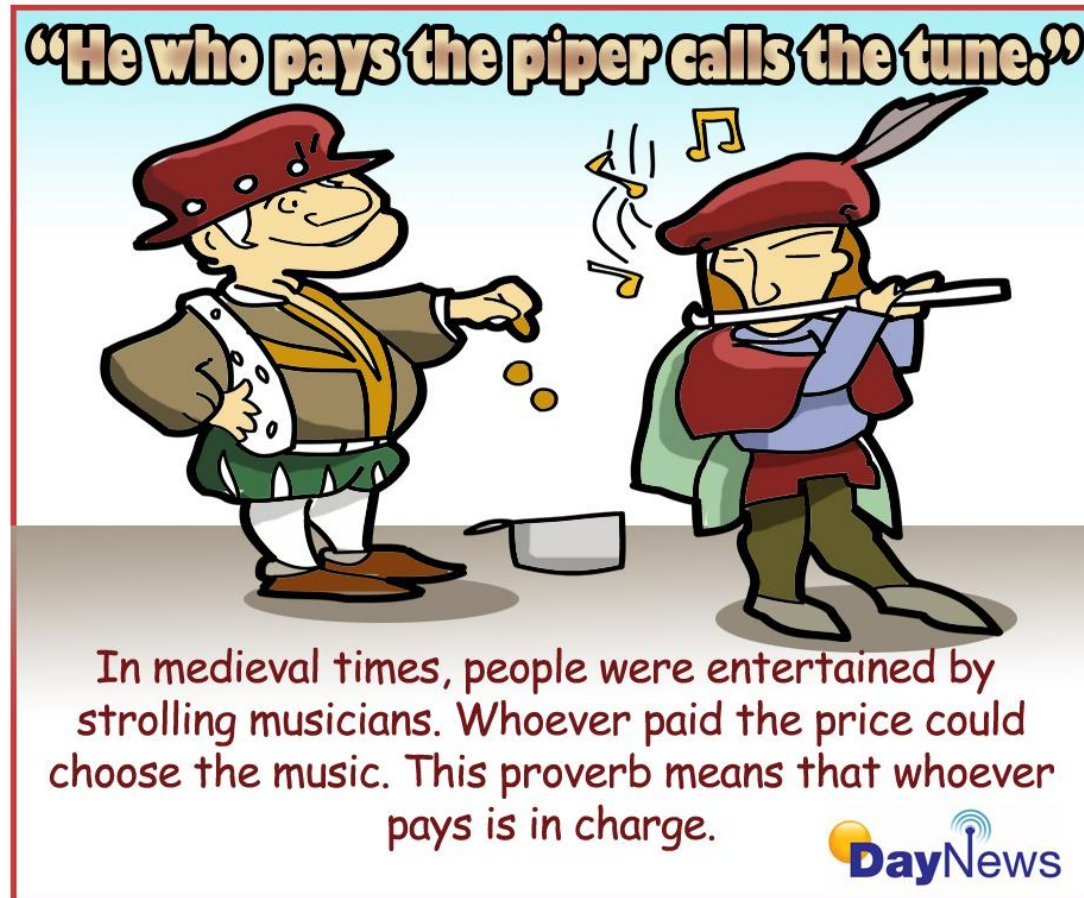
Dennis F. Thompson, 2005

1. 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**;
2. Even if the issue turns out to be 'only' a **perceived Col**, there is still a **need for public clarification to dispell concerns - and possibly to change, or terminate, a practice or relationship** that caused the concern

Assessing the seriousness of Cols - and 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 on assessing Col** in this presentation - **just some reflections on «sponsorship relationships» with health related industries** who have an interest in expanding their markets and influencing policies (which deal e.g. with the regulation of problematic corporate practices)

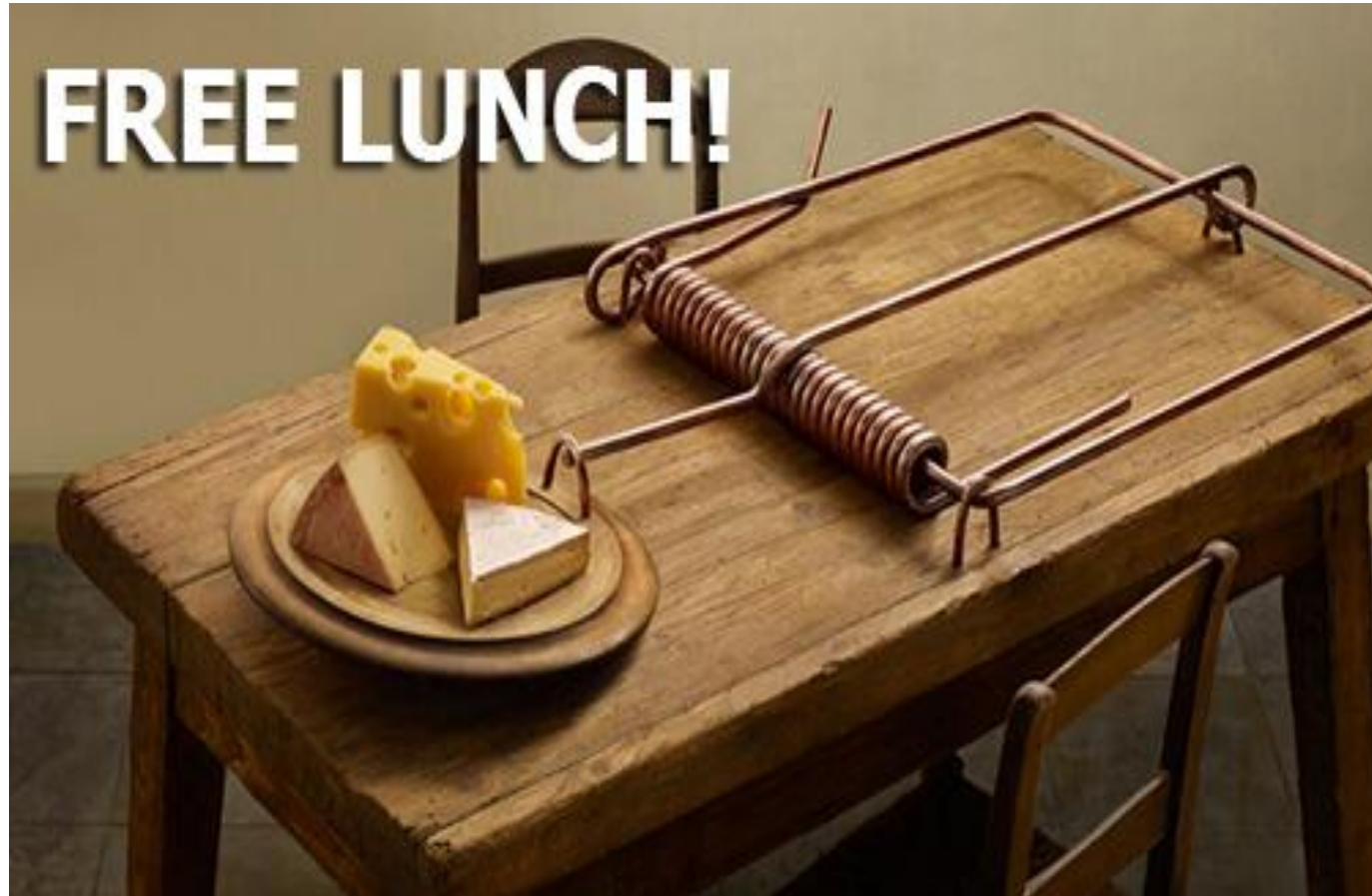
Peoples' perceptions concerning financial Col





“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** from health related industries for e.g. medical continued education and conferences :

- 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 often feels obligated to give something in return.
- Some health professionals take this research seriously when they argue that **limiting amounts will not solve the problems that certain sponsorship-relationships create**. E.g. physicians of the International Society for Social Pediatrics and Child Health (ISSOP) asserted:

“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 **WHO 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, pharmaceutical and tobacco TNCs when it comes to their 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 upcoming

United Nations Decade of Action on Nutrition

(2016-2025)

UN Decade of Action on Nutrition (2016-2025)

was proclaimed by UN General Assembly
in April 2016

after «almost 2 years of intense negotiations»

following the

the **Second International Conference on Nutrition (ICN2)**

held in Rome in 2014





UN Decade of Action on Nutrition



WHO and FAO see UN Resolution as a
“**leap forward in galvanising action on nutrition**”

«Today's resolution recognises the need **to eradicate hunger and prevent all forms of malnutrition worldwide**. The Decade of Action on Nutrition will provide an **umbrella for a wide group of actors to work together** to address these and other pressing nutrition issues.”



UN Decade of Action for Nutrition

Proposed global governance structure



“The UN resolution **calls upon FAO and WHO to lead the implementation** of the Decade of Action on Nutrition **in collaboration** with the World Food Programme (WFP), the International Fund for Agricultural Development (IFAD) and the United Nations Children's Fund (UNICEF), and involving coordination mechanisms such as the United Nations System Standing Committee on Nutrition (UNSCN) and **multi-stakeholder platforms** such as the Committee on World Food Security (CFS).....”



Governance structure ctd.



The UN General Assembly Resolution furthermore

“invites Governments and **other relevant stakeholders**, including international and regional organizations, civil society, **the private sector** and academia, to actively support the implementation of the United Nations Decade of Action on Nutrition, including through **voluntary contributions**, as appropriate” (para 4)

**Corporate ‘stakeholder’ support
and finances welcome -**

without mention of CoIs in the Resolution?



UN Decade of Action on Nutrition



will build on the

ICN2 Framework of Action (ICN2 FFA)

The FFA list under its actions of how create an
«**enabling environment for effective action**»

the recommendation to

«...strengthen and establish, **as appropriate...**

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

The ICN2 FFA Recommendation No 3 specifies:

«Such [multi-stakeholder] **platforms** may be needed at various levels, **with robust safeguards against** abuse and **conflicts of interest**» (para 44)

Impression of readers:

Robust Col safeguards must exist

WRONG! Findings of a 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 was
still in its “infancy”**

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

Professor Ann Peters 2012

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

The Col Reference Note developed by SUN
is not addressing this gap.

Preventing and Managing Conflicts of Interest ***SUN Reference Note (2014/15)***

**Is it providing «robust» Col regulation in MSIs?
or legitimizing multi-‘stakeholder’ approaches and sidelining critics?**

Analysis of SUN Col Reference Note

A basic discourse analysis:

What is said, and how?

& what is left out? (significant omissions)

Preventing and Managing Conflicts of Interest

- SUN Reference Note (2015)

How are CoIs defined?

- “An organizational or **institutional conflict of interest** arises when pursuit of an organization’s interests, whether ‘private’ or secondary, has the effect of compromising, interfering with, or taking precedence over the objectives of the **joint endeavour.**” (para 24)
- “[t]he private or **secondary interests** of any participating individual should not supersede the **primary purpose** of **establishing synergy** between organizations for the common goal of promoting improved nutrition “ (para 19 - all quoted paras refer to the 2015 version)



Remember the IOM definition?

SUN Reference Note: **Wrong** primary mandate

The overarching 'primary interest' of a public-interest organisation or alliance
is/should be the

public mandate of an organisation or alliance

Reading SUN's Col Reference Note,
the overarching purpose of Col regulation appears to be the protection of

synergy creation

around the allegedly «**common goal of promoting improved nutrition**»
in **joint endeavours** between public-interest and private-sector actors

Can TNCs be expected to fully support
the «common goal of improved nutrition»?

And where is clear reference to 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 conflicts of interest **does not:**

examine whether the inclusion of corporations
in SUN's Lead Group constitutes a severe,
unacceptable Col

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

SUN's CoIs guidance dismisses concerns of critics by portraying them as follows

*«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 Reference Note, in contrast, assumes that

good governance is inclusive»

(para 11, January 2015)



SUN's Col 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 11)

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



Subsuming 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.**”

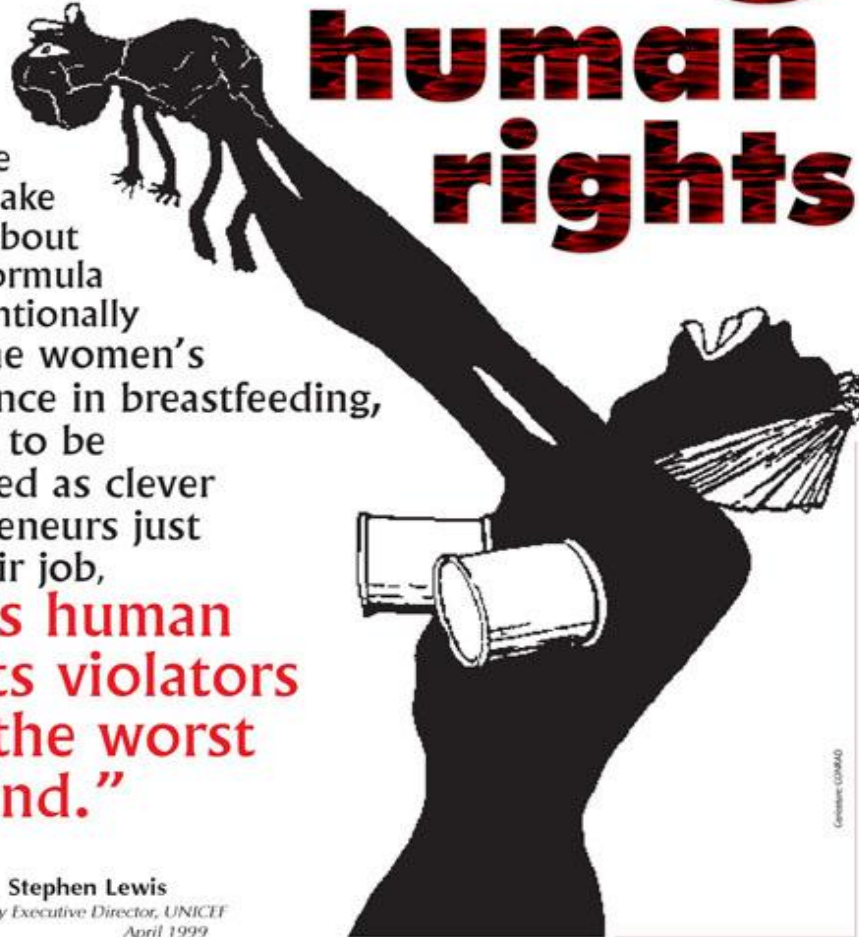
Jonathan Marks, 2014

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 1998:
“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-led &
venture philanthropy-led governance?***

What will be the result?



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



And what did customers find on this boat...?





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

- To ensure that «decision-making procedures at all stages can be audited for integrity...»;
- To ensure that **conflict of interest policies are being set up, monitored, and enforced**; and
- To «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

Citizens 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. point out, if there is an attempt to sideline their concerns, that **perceived conflicts of interest need to be taken as seriously as real Col**. A perception of a Col may indicate that there are other **serious ethical, legal or political problems** that may need to be addressed – such as the building of undemocratic, corporate-led, global governance structures

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 public interest actors.

Maybe by pointing out that the
**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

...



Building Col regulatory systems

Whose duty is it?

- Concerns of corporate accountability- and other civil society actors should be taken seriously
- The building of public Col regulatory systems, however, is not their task
- Such work needs the collaboration of many knowledgeable and committed public-interest actors, including academia
- Ultimately, it is the role of our governments and the UN to strengthen - not erode - the Rule of Law

The building of coherent and effective Col regulation and other public interest safeguards is an **urgent task** if the **DECADE OF ACTION ON NUTRITION** is to succeed!



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