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/UNICEFF 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
CoI = relatively new legal concept
But spirit of CoI known to everybody

‘Spirit’ of CoIs
= idea behind CoI 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

• CoI 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 CoI, 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*»

Based on def. by Prof Dennis F. Thompson 1993
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!
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 commitments 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»

Marc Rodwin, 1993
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**.
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."

Institute of Medicine IoM Definition (2009)
IoM advised to take institutional CoI 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
CoI 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
CoI 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 CoI policies – e.g. in the «reasonable person test»*

«The aim [of CoI 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 CoI;

2. Even if the issue turns out to be ‘only’ a perceived CoI, 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)
People’s perceptions concerning financial Col

“He who pays the piper calls the tune.”

In medieval times, people were entertained by strolling musicians. Whoever paid the price could choose the music. This proverb means that whoever pays is in charge.

DayNews
“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
Example 1:

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 extend 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 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»

Marcia Angell
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 (2016-2015)

was proclaimed by UN General Assembly in April 2016 after «almost 2 years of intense negotiations» following 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 CoI safeguards must exist
**WRONG!** Findings of a review on CoIs 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, CoI 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, CoI regulation** with respect to UN-business relationships & global public-private ‘partnerships’ (PPPs) & multi-’stakeholder’ initiatives (MSIs)

The CoI 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» CoI regulation in MSIs? or legitimizing multi-’stakeholder’’ approaches and sidelining critics?

Analysis of SUN CoI Reference Note

A basic discourse analysis: What is said, and how? & what is left out? (significant omissions)
How are Cols 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 CoI Reference Note, the overarching purpose of CoI 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 CoI

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

«This Reference Note, in contrast, assumes that good governance is inclusive»

(para 11, January 2015)
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 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
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

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 CoI 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 CoI

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 CoI 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 CoI**. A perception of a CoI 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 CoI 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 CoI 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 CoI regulatory systems
Whose duty is it?

• Concerns of corporate accountability- and other civil society actors should be taken seriously
• The building of public CoI 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 CoI regulation and other public interest safeguards is an urgent task if the DECADE OF ACTION ON NUTRITION is to succeed!
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