

# MAYDAY – MAYDAY!

## WHO redefines conflicts of interest and opens floodgates to undue influences

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### FENSA

In May 2016, WHO's Member States took a decision that will have far reaching consequences for world health: As a central piece of WHO 'reform', they adopted the **WHO Framework of Engagement with Non-State Actors (FENSA)** despite predictions that this policy would increase undue corporate and venture philanthropy influences.

WHO's leadership ignored repeated requests of WHO Member States to provide guidance on conflict of interest issues. Ignored were warnings that the WHO-NSA relations policy contains a misleading conceptualisation of conflicts of interest. (1)

Nor was there an appropriate public debate about the fact that FENSA includes a new Official Relations policy which – by a shift of terminology combined with the introduction of an allegedly "overarching principle" of "inclusiveness"- has legitimized the long-standing ambitions of corporate lobby associations and mega-sponsoring foundations to be quasi automatically accredited as "non-State actors" (NSAs) in 'official relations' with WHO.

The Bill and Melinda Gates Foundation was one of the first organisations to profit from WHO's new terms of engagement. It gained the Official Relation status in January 2017, less than three years after a high level advisor to the Rockefeller Foundation had formulated the expectations of mega-foundations as follows: "We don't want to be just another 'non-state actor' ... the UN and governments must open [their] arms and create a more enabling environment for philanthropy, domestically and across borders."

Business associations had to wait longer to gain access as business non-State actor (BINSAs) to WHO's governing bodies:

In 1982, a PR executive had advised transnational corporations (TNCs) to deal "effectively" with the UN's "regulatory mood" by "organizing effective NGOs, gaining representation for them at every possible UN agency." By NGOs, he meant business associations such as the IFPMA which was at the time heavily lobbying against WHO working on a legally-binding International Code on Pharmaceuticals.

In 1987, when Nestlé CEO Helmut Maucher took the presidency of the International Chamber of commerce, he said in a Financial Times opinion piece entitled *Ruling by Consent*. "Governments have to understand that business is not just another pressure group but a resource that will help them set the right rules." (2)

### WHO's definitions of conflicts of interest

FENSA contains definitions of both, individual and institutional conflicts of interest. At first sight, they seem modelled along the definitions which are currently guiding most medical associations, the definitions promulgated by the US Institute of Medicine's Report (IoM) *Conflict of Interest in Medical Research, Education and Practice*, based on Denis F. Thompson.

*"A conflict of interest arises in circumstances where there is potential for a secondary interest (a vested interest in the outcome of WHO's work in a given area) to unduly influence, or where it may be reasonably perceived to unduly influence, either the independence or objectivity of professional judgement or actions regarding a primary interest (WHO's work)" (FENSA, para 22)*

*"All institutions have multiple interests, which means that in engaging with non-State actors WHO is often faced with a combination of converging and conflicting interests. An institutional conflict of interest is a situation where WHO's primary interest as reflected in its Constitution may be unduly influenced by the conflicting interest of a non-State actor in a way that affects, or may reasonably be perceived to affect, the independence and objectivity of WHO's work...." (FENSA, para 24)*

These definitions blur important distinctions which have been pointed out since the 2014 World Health Assembly, when the Member States refused to adopt the first draft FENSA.

For example, experts present at a 2015 *WHO Technical Meeting on Addressing and managing conflicts of interest in the planning and delivery of nutrition programmes at country level* voiced concerns about its confusing background paper, which contained a mix between FENSA's and Thompson's 1993 Col concepts.

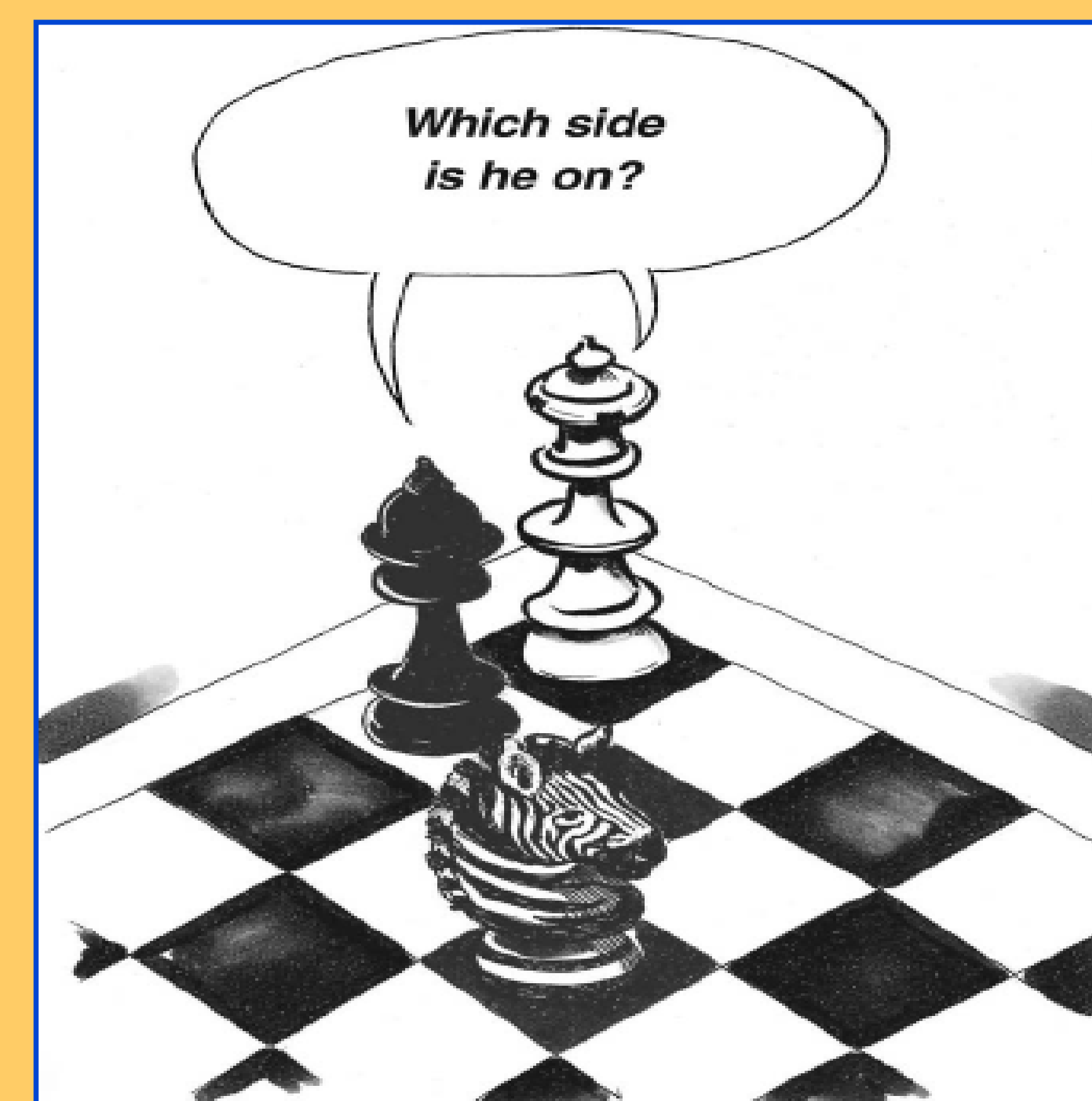
The discussion revealed that:

- its general Col definitions were "not sufficiently precise"; experts therefore advised to "draw on other existing definitions;"
- its specific Col definitions did "not conform to standard legal practice;"
- the term "vested interest" should not be employed in analyses of conflicts of interest; it should be replaced by terms such as "financial" or "personal conflicts of interest";
- there was a need to specify that "conflicts of interest refer to conflicts 'within' a person and institution" – a distinction proposed by Law Professor Ann Peters in her 2012 review of conflicts of interest in global governance.

### Why does WHO cling to problematic definitions?

This is indeed a question. Had WHO's leadership referred even to the relatively simple institutional conflicts of interest definition of the IOM, it could have argued that WHO cannot solve its prime institutional conflicts of interest – caused by its dependency on "voluntary" funding – while Member States refuse lifting the long-standing freeze on their assessed (obligatory) contributions.

Instead of referring to "multiple interests" of "all institutions" and combinations of "converging" and "conflicting interests," WHO's leadership could have followed helpful suggestions made throughout work on FENSA. They would have found, for example, that Professor Ann Peters had advised that conflict of interest concepts – to be legally meaningful - should include reference to loyalty conflicts caused by conflicting roles or by actors "serving two masters" with conflicting or diverging mandates. They would have seen, that already in 1993, Law Professor Marc Rodwin had proposed such a concept in his book *Medicine, Money and Morals* and has kept refining it ever since. The key question about loyalty conflicts is:



OECD *Managing Conflicts of Interest in the Public Service*, - Toolkit 2005

### Is there hope that the new WHO's Director General will correct problematic concepts in FENSA?

Coming from Africa, does he worry that the population from his continent may not profit from a development paradigm that extols 'voluntary funds' and investments while giving corporations and venture philanthropies influence in return, either on boards of global "multi-stakeholder partnerships" or straight at policy-making tables?

### What can be done ?

The Resolution, with which the FENSA policy was adopted, also re-introduced the "partnership" discourse, heavily questioned already during the early phase of WHO's 'reform'. In 2011, WHO Member States had listened to civil society concerns that the 'stakeholder' and 'partnership' terminology blurred key distinctions between actors. At that time Member States had refused the establishment of a multi-stakeholder *World Health Forum* which the then WHO Director-General, Dr. Margaret Chan had already committed to. They had asked to set up safeguards which would clearly distinguish between private sector and other actors.

FENSA is the outcome. It risks to pave way to an increase of **undue entanglements**, rather than appropriate relations, **between WHO, BINSAs and PHINSAs**. A review of FENSA is foreseen. However, it will come far too late for preventing the undermining of Col concepts and regulation worldwide.

#### MAYDAY!

The global public health ship is more than ever steered by those who can now refer to their right of "inclusion" as particularly valuable "stakeholders."

#### Say "No"

to 'stakeholderization' of our public fora and discourses.



### Bibliography

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