



International Baby Food Action Network - IBFAN
Red internacional de grupos pro alimentación infantil
Réseau international des groupes d'action pour
l'alimentation infantile

Geneva Infant Feeding Association - GIFA

1998 Recipient of the Right Livelihood Award



International Baby Food Action Network

Submission for consultation on operationalizing the framework for business and human rights presented by the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises

5-6 October 2009

The International Baby Food Action Network (IBFAN) is a 30-year old coalition of more than 200 not-for-profit non-governmental organisations in more than 100 developing and industrialised nations working for better child health and nutrition through the protection, support and promotion of breastfeeding and the elimination of irresponsible marketing of breastmilk substitutes. IBFAN is committed to the Global Strategy on Infant and Young Child Feeding (2002)¹ – and thus to assisting governments to implement the International Code of Marketing of Breastmilk Substitutes (International Code) and relevant Resolutions of the World Health Assembly (WHA)² to the fullest extent and to ensuring that corporations are held accountable for Code violations. In 1998 IBFAN received the Right Livelihood Award *"for its committed and effective campaigning for the rights of mothers to choose to breastfeed their babies, in the full knowledge of the health benefits of breastmilk, and free from commercial pressure and misinformation with which companies promote breastmilk substitutes"*

With this submission, IBFAN aims to contribute to the debate at the consultation as well as to provide its input towards the fulfillment of the mandate of the Special Representative of the Secretary-General (SRSG), John Ruggie, as stipulated in the HRC Resolution 8/7 – specifically paragraph 4(d) requesting the SRSG to "give special attention to persons belonging to vulnerable groups, in particular children."

We commend the efforts to date of John Ruggie as the SRSG. We echo his recent pronouncement that in the wake of the global economic crisis: "The terms transparency and accountability resonate more widely than before. And calls for fairness are more insistent."³

These terms also resonate with us as they raise crucial issues intrinsic to business and human rights that have yet to be adequately addressed.

Our comments herein are centered on the imperativeness for developing coherent and enforceable public-policy measures to address the adverse effects of unrestricted industry lobbying and the trend toward public private partnerships (PPPs). The work of the SRSG to date has yet to discuss these areas in appropriate degree or context; however, they are particularly germane to the field of business and human rights.

We are particularly concerned about the following:

- *The unfettered corporate influence over public policy-making and implementation, which is increasingly leading to policies favouring industry and public initiatives promoting commercial interests - all at the expense of public health and human rights.⁴ We aspire that the good offices of the SRSG are not exploited in this manner.*
- *The various forms of PPPs. A key component of the industry strategy to improve the corporate image, to counteract objective criticism by civil society organisations and to evade stringent and enforceable corporate accountability policies is to increase its engagement with UN and government bodies. Regardless of the nature of the UN-business engagement, the recent trend is to portray it in a positive light by using*

value-laden terms such as 'dialogue' or 'partnership' without proper definitions and classification. We believe that this trend raises discrepancies and blurs lines with respect to the 'role' of 'the corporation' in policy-making and implementation.

- *The lack of effective and enforceable legal measures for holding corporations accountable for misconduct.* In an October 2007 letter to the SRSG, we joined with more than 200 other NGOs and individuals to emphasise that voluntary corporate initiatives: “Are limited scope in terms of the rights they include and the sectors they cover, typically fail to ensure that the principles which they advocate are upheld in practice, allow companies to ‘opt in’ to standards which are convenient and to ‘opt out’ of standards which are not convenient; contradict the concept of human rights as minimum guarantees for the treatment of all people.” We maintain this position.

Exploring the appropriate relationship between government bodies and the private sector should be a key component of the SRSG’s work. However, by treating and analyzing 'the state' and 'the corporation' entirely separately, the SRSG’s 'protect, respect and remedy' framework creates a flawed model of reality, as these two actors are ever more intertwined.⁵ The private sector influences policy-making through direct lobbying and increasingly participates in policy-making and implementation through PPPs.

We are encouraged that the agenda of this consultation elicits an inquiry of the appropriate role for business in human rights policy-making and implementation.⁶ It is our position that the 'role' of corporations in “assisting Governments in achieving policy coherence in this field” is inappropriate and should be viewed with a high degree of caution and skepticism. With respect to “holding Governments to account for incoherent policies that may contribute to human rights abuses”⁷ we find also this 'role' highly problematic. In our view, in a democratic society it is the electorate that has this 'role', and not the powerful commercial sector.

To elaborate on the above, the following provides an overview of corporate strategies and approaches as they relate to our area of expertise. We conclude by respectfully making specific requests to the SRSG for actions that we consider to be part of fulfilling his mandate.

Infant and Child Feeding in the Realm of Human Rights

The International Code of Marketing of Breastmilk Substitutes (International Code) was adopted by the World Health Assembly (WHA) in 1981 and represents the first attempt to regulate an entire industry sector at a global level.⁸ The International Code aims “to contribute to the provision of safe and adequate nutrition for infants, by the protection and promotion of breastfeeding and by ensuring the proper use of breastmilk substitutes, when these are necessary, on the basis of adequate information and through appropriate marketing and distribution.” Subsequent WHA Resolutions and initiatives, such as the 2002 Global Strategy for Infant and Child Feeding, have clarified and amplified the International Code and carry equal status. Currently, the World Health Organisation (WHO) recommends “exclusive breastfeeding for the first six months of life, and with nutritionally adequate and safe complementary feeding through introduction of safe and adequate amounts of indigenous foodstuffs and local foods while breastfeeding continues up to the age of two years and beyond.”⁹

Furthermore, Article 24 of the Convention on the Rights of the Child (CRC) explicitly states the importance of breastfeeding as part of the child's right to the highest attainable standard of health. The CRC Committee recognises that “implementation of the [International Code] by State Parties is a concrete measure towards the realisation of parents' right to objective information on the advantages of breastfeeding.”¹⁰ Bringing the International Code into the human rights arena makes it clear that violators of the International Code must be held accountable for human rights violations, as expressed by Stephen Lewis, former UNICEF Deputy Executive Director: *“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.”*¹¹

Within this legal framework, IBFAN has worked alongside a range of public interest groups, governments and UN bodies to protect infants and young children from corporate misconduct - including engaging in abusive marketing practices; prejudicing public health officials through education, sponsorship and gifts; funding biased medical research and unduly influencing policy-making and implementation. It is our position that any of the foregoing corporate conduct that is in violation of the International Code is a human rights violation, and we continue to monitor the baby food industry and report misconduct in this regard.¹² IBFAN's global campaign is considered a case study in attempting to control abuses of corporate power.¹³

Analysis of corporate responses to efforts to strengthen and implement the International Code at the global, regional and national levels highlights the potential and limits of current legal mechanisms to keep in check corporate activities that conflict with human rights and other social concerns. It also raises crucial questions about the legal mechanisms needed to effectively hold corporations accountable internationally at a time when dialogues and public-private partnerships are regarded by many as the best way to interact with corporations and their business associations.

The Baby Food Industry's Undue Influence Through Lobbying

The baby food industry consistently claims to support the International Code. Despite such assurances, companies continue to violate it in a systematic manner and attempt to undermine its implementation. The global baby food market is currently worth approximately US \$ 29 billion and is expected to be worth US \$ 37.6 by 2014.¹⁴ If every baby in the world were to be artificially fed for just 6 months the market would grow exponentially. It is naive at best to expect companies would voluntarily forego such profits. This evidences the direct conflict of interest that this multi-billion dollar industry has in implementing the International Code, and explains why "[t]he industry uses its immense financial resources to impede countries' efforts"¹⁵ to adopt national legislation based on the International Code. This too clarifies why there is a need for stringent and enforceable policies to control industry lobbying practices, including measures to ensure transparency and fairness in public policy-making processes and forums.

The baby food industry maintains a powerful influence in the many forums where decisions affecting infant and young child feeding are made: the annual WHA; the FAO/WHO Codex Alimentarius Commission; the Economic and Social Council of the United Nations (ECOSOC); the UN Conference on Trade and Development (UNCTAD); the World Trade Organisation (WTO); the International Labour Organisation (ILO); the European Commission, the European Parliament and the EU Advisory Committees; national governments; regional and local authorities; professional associations and health authorities.

In recent years, the UN, and two agencies in particular, WHO and the UNICEF, have come under pressure from the baby food industry to drop the protection and promotion of breastfeeding from their agendas.¹⁶ As one commentator has described it, WHO "whose task is to improve world health" and UNICEF "which is concerned with the welfare of children" have fallen "into the role of mediators between the pressure groups and the baby food industry, rather than defenders of infant and young child health."¹⁷ The International Code directly targets corporate misconduct; and yet, the baby food industry consistently outnumbers public interest NGOs in great mass at the WHAs and other policy-making forums. The industry has persuaded WHO and UNICEF to include them in policy-oriented discussions in the interest of so-called 'fairness'. At the same time, the industry has squashed any efforts by UN bodies to adequately distinguish industry front groups – or business interest NGOs (BINGOs) – from public-interest NGOs (PINGOs), and has thereby secured an uneven and non-transparent playing field in the interest of so called 'non-discrimination'.¹⁸ Indeed, "the line between the two is a grey one, inhabited by trades unions, industry associations and other groups."¹⁹

At the national level, the industry has lobbied governments to adopt narrow implementation of the International Code, preferably as a voluntary measure rather than binding legislation. Industry's lobbying tactics have ranged from providing draft laws that are much weaker than the International Code, enlisting health professionals, sponsoring the research on which policy is based, threatening trade retaliation, advocating for 'freedom of commercial speech' and challenging legislation in the courts. These abusive lobbying practices have recently received extensive press coverage.²⁰

Where industry's tactics have failed, it is in large part due to the monitoring done by IBFAN and other public interest NGOs, including exposing company marketing activities and raising awareness of the need for strong enforceable measures to implement the International Code. Sometimes the health advocates won, bringing in strong regulations, even criminal law with powers of imprisonment. For example, in India and Brazil, legislation has been progressively strengthened to give the broad protection seen today. Sometimes the industry was victorious and the regulatory route was set aside in favour of 'voluntary codes' or weaker laws. In Mexico and Kenya, governments have followed the industry line. Within the EU, the industry managed to impede full implementation of the International Code in the EC Directives.

According to UNICEF: "*Marketing practices that undermine breastfeeding are potentially hazardous wherever they are pursued: in the developing world, WHO estimates that some 1.5 million children die each year because they are not adequately breastfed. These facts are not in dispute.*"²¹ In sum, where the baby food industry's unfettered lobbying activities have prevailed, the implementation of the International Code has been compromised and impeded; where the industry is permitted to aggressively promote breastmilk substitutes, breastfeeding rates decline; and where breastfeeding rates decline, infant mortality and morbidity rates increase.²²

UN and Private Sector Lobbying

The UN is well aware of the threats lobbying by for-profit interests poses to its underlying principles and values and has made some efforts to control lobbying. Recently, at the 2009 Business Summit on Climate Change, the UN Secretary General scorned corporations for their conspicuous lobbying activities against policies addressing global climate change: "*For those who are directly or implicitly lobbying against climate action I have a clear message: your ideas are out of date and you are running out of time,*" UN Secretary-General Ban Ki-moon told the meeting of more than 500 business leaders.²³

The rise of Corporate Social Responsibility (CSR) initiatives, with a prominent position taken by the UN Global Compact, has however accentuated the antagonistic lobbying practices of corporations. No longer are corporations just lobbying for policies counter to UN values and against the public interest. They are now lobbying for policies contradictory to their own commitments and aspirations. In this vein, former Secretary General Kofi Annan warned: "*Business must restrain itself from taking away, by its lobbying activities, what it offers through corporate responsibility and philanthropy.*"²⁴

Aware of this lack of coherence between so-called corporate responsibility and corporate lobbying, the Global Compact Office released a report in 2005 entitled 'Towards Responsible Lobbying'. The report stressed: "Businesses cannot continue to make high profile commitments, and then contradict these commitments through their less-visible lobbying."²⁵ The report highlighted the fact that "there is little in the way of guidelines for companies. Nor is there a system of regulation at the international level where lobbying increasingly takes place. Essentially, there has been no analysis of the inter-relationship between mandatory and voluntary forms of regulations, or of their effectiveness."²⁶

IBFAN finds the orientation of this report of interest, but there has since been emptiness in policy development and enforcement. It is not clear whether the Global Compact Office is planning to take on the outstanding issues enumerated in its report.

We believe that the SRSG is in a better position of impartiality than the Global Compact Office in this regard²⁷, and accordingly we respectfully urge the SRSG to take on this task. In

addition, the OECD has been working to develop principles and governance arrangements for improving transparency and accountability in lobbying.²⁸ The work of the SRSG could build upon and accentuate the OECD's efforts.

Rise of Public Private Partnerships and Conflicts of Interest

Since the late 1990's, the trend of Public Private Partnerships (PPPs) has permeated the UN, as it has been promoted by UN leaders as the innovative policy paradigm of the New Millennium. IBFAN argues that this policy paradigm has created a new political culture that carries a high risk of UN agencies ignoring public interests or embarking on unacceptable trade off of public interests in favour of business interests.²⁹ There has also been increasing pressure on WHO Member States and public interest non-governmental organisations (PINGOs) to engage with the private sector in what are presented as innovative PPPs, alliances or multi-stakeholder initiatives. IBFAN has been deeply troubled by this trend of extending the role of policy-making and implementation to for-profit entities that have a direct commercial interest in the outcome. We have published several critical publications which analysed this trend and evidence our concern that infant food companies are using PPPs to gain new marketing advantages and to unduly influence decision-making of public institutions and policy-makers.

The International Code and subsequent WHA Resolutions highlight the need for conflicts of interest safeguards and transparency in all public and private sector alliances or partnerships. For example, in the 2002 Global Strategy for Infant and Young Child Feeding (adopted by the WHA resolution 55.25) terms such as 'alliances' and 'partnerships' are firmly associated with the term 'conflict of interest'.³⁰ However, neither WHO nor UNICEF could provide a definition or specific guidance and we have since been concerned about the lack of understanding of the concepts 'conflict of interest' and 'accepted principles for avoiding conflict of interest' as well as the underplaying of their importance. We thus attempted to address this gap and published in 2005 a paper 'Conflicts of Interest and Policy Implementation: reflections from the field of health and infant feeding'. It was distributed throughout the IBFAN network, to WHO and UNICEF and shared with other NGOs. However, despite having overt 'corporate strategies', neither WHO nor UNICEF has since adopted adequate policies or safeguards to address these issues.

There is not yet an UN-wide accepted definition for public-private partnerships.³¹ Nor is there any classification which would appropriately distinguish among the types of interactions and relationships which are subsumed under this phrase. Member States have requested the UN Secretary-General to explain the difference between traditional UN relationships with the private sector and PPPs. The UN has yet to develop a coherent explanation.³² It appears, however, that a key feature distinguishing PPPs from other interactions and collaborations with the private for-profit sector is the shared process of decision making. One UN-sponsored book explains: "In the most strategic partnerships, the partners will work together at all levels and stages, from the design and governance of the initiative, to implementation and evaluation."³³ Reviewing UN-business partnerships for the United Nations Research Institute for Social Development (UNRISD) and the South Centre, researcher Ann Zammit concluded: "The term [partnership] covers a multitude of activities and relationships, perhaps best conceptualized as a special case of 'close' rather than 'arms-length' relationships between government and business."³⁴

This move toward 'close' relationships has proven to have negative impact on the implementation of the International Code. The blurring of the 'roles' of the public and private sectors has undermined the advances in raising awareness of the need for maintaining arms-length relationships between these actors as well as the need for implementing effective conflict of interest safeguards – which has been fostered through decades of debate and action to implement the International Code.

Global Health Alliances

One form in which PPPs have arisen is global health alliances. These partnership models are problematic in that they include private actors in their governing bodies, and thereby give private companies or super-wealthy individuals a power of co-decision over the priorities of international policy. For example, the Global Alliance for Improved Nutrition (GAIN) was launched in 2002 at a Special Session of the UN General Assembly on Children. Primarily funded by the Bill & Melinda Gates Foundation, GAIN was presented as “an alliance of international public, private and civic organisations committed to improving health, cognitive development and productivity in developing countries through the elimination of vitamin and mineral deficiencies, folic acid, and iron.” The inceptive aim of this PPP was to “leverage cost-effective food fortification initiatives” to achieve this goal.³⁵ GAIN’s website proclaims that its working method is to: “Use markets to deliver improved nutrition, based on public health objectives.”³⁶

Danone, the world’s second largest baby food company and a violator of the International Code, is one of GAIN’s partners; amongst WHO, UNICEF and a number of other public institutions.³⁷ Danone’s CEO was on GAIN’s board until his name suddenly disappeared in May 2009. This may have been in response to IBFAN’s pressure on WHO, UNICEF and GAIN for his removal based on conflicts of interest. However, Danone is still listed as an active partner among other industry members, and thus we consider this a hollow triumph. Still no safeguards are in place to ensure transparency and to address the inherent conflicts of interest.

IBFAN’s concerns are escalated by the fact that in January 2008, GAIN announced a US\$38 million grant from the Bill & Melinda Gates Foundation to help fund GAIN’s incipient Infant and Young Child Nutrition (IYCN) programme. On its website, GAIN explains that the goal of this programme is to support “public and private partners to reach infants in low-income families with high-quality and affordable nutritious foods that complement breast milk from six months of age.”³⁸ The cite mentions nothing about the promotion of breastfeeding. This is directly counter to both the spirit and letter of WHA Resolution 49.15, which calls for measures “to ensure that complementary foods are not marketed for or used in ways that undermine exclusive and sustained breastfeeding.”³⁹ This WHA Resolution serves to address the well-substantiated concern that complementary foods are often marketed in ways that undermine breastfeeding, and recognises the unassailable fact that even when introduced after six months, many foods do not complement breastfeeding but rather replace it when breastfeeding should be sustained as the principal food source. In spite of this WHA Resolution, GAIN’s explicit modus operandi for its IYCN programme is: “to provide financial and technical support to local companies and public private partnerships commercializing nutritious food products. Products include fortified complementary foods (e.g. porridge), micronutrient powders (e.g. sachets of vitamins and minerals) and lipid-based nutrient supplements (e.g. nutritious spreads).”⁴⁰ Again, GAIN’s IYCN programme website mentions nothing about the promotion of breastfeeding.

In April 2008, GAIN introduced its IYCN programme in India, an effort that was met with strong protest from 19 national public interest organisations working in the areas of health, development, right to food, gender, education and nutrition. The demonstrators protested against the increasing interference from baby food manufacturers - including Danone and other local Indian companies - to influence policies on infant and young child feeding and nutrition. This and numerous analogous challenges to the purpose and wisdom of forming PPPs such as GAIN have yet to be adequately analysed, answered or addressed.

Corporate Social Responsibility Initiatives

The voluntary Corporate Social Responsibility (CSR) initiatives, including the UN Global Compact – otherwise known as a high-level policy ‘partnership’ between business community, the UN and other ‘stakeholders’ can be seen as a form of PPPs.

Corporations have certainly benefited from their participation in the Global Compact. It has helped to enhance their reputation and political influence and has given them access to official assistance, such as export credit or investment insurance – even if they have not significantly changed their practices. Indeed, the Global Compact provides substantial opportunities for corporations to improve their image and reputation.⁴¹ Within industry circles ‘corporate social responsibility’ is closely linked to ‘public relations’ and an entire marketing sector has grown around this concept.

Perhaps some corporate partners have changed their practices as a result of the Global Compact pledge, but research shows that many have not.⁴²

Regulations vs. Voluntary Measures

The ongoing violations of the International Code by the baby food industry make clear that as a global society we ought to not naively place the totality of our hope in the UN Global Compact or other voluntary CSR initiatives.

There are two concerns we wish to highlight:

- On the one hand, for every corporation that joins the Global Compact, there are scores more that do not. What mechanisms are in place for these private sector actors? Non-Global Compact members of the baby food industry continue to blatantly violate the International Code. For example, just weeks ago, an Associated Press investigation revealed rampant violations of the International Code in Southeast Asia by United States based baby food industry giants Mead Johnson and Abbott.⁴³ Indeed, the International Code specifies that manufacturers and distributors of breastmilk substitutes should, “independently of any other measures taken”, ensure that their conduct conforms to the principles and aim of the International Code “at every level.”⁴⁴ But there is currently a dire lack of adequate mechanisms and/or forums for holding these corporations accountable for their International Code and, thus, human rights violations.
- On the other hand, Nestlé, the world’s largest baby food company, is listed as a partner of the Global Compact and yet continues to consistently and overtly violate the International Code; and most recently, is purportedly in breach of the Global Compact’s 10th principle on bribery and corruption for its actions and admissions in sourcing Mugabe milk in Zimbabwe.⁴⁵ We alerted the Global Compact Office of Nestlé’s International Code violations prior to its enlistment in October 2002, but to no avail. Seven years later, Nestlé has done a lot to change its image, but has done very little to change its actions. Every three years IBFAN releases a report called ‘Breaking the Rules Stretching the Rules’ which evidences and documents corporate violations of the International Code. The latest report, released in 2007, documented 169 allegations against Nestlé.⁴⁶ In February of this year, Nestlé released a 143 page in-house response, in which it admitted to a mere 9 cases of non-compliance.⁴⁷ For the other 160 allegations, Nestlé pleads innocence based on its own analysis and interpretation of the International Code. However, Nestlé’s interpretation and application of the Code has been consistently at odds with independent investigations and rulings⁴⁸ and Nestlé’s scheming interpretations of the International Code have not changed.⁴⁹ The case of Nestlé provides a striking example of how a company’s Global Compact pledges or aspirations are simply not enough. Nestlé has benefited from its alliance with the UN, and has incurred very little risk or cost. In Nestlé’s own public relations material, Nestlé admits: “Collaboration with public health bodies, government and other organisations further boosts our reputation as the world’s leading Nutrition, Health and Wellness company.”⁵⁰ In this same PR material, Nestlé describes examples of “progress” in meeting UN Millennium Development Goals. However, it cunningly refers to all but two of the MDGs: Reduce child mortality (MDG4) and improve maternal health (MDG5).⁵¹ This is a prime example of how voluntary codes allow companies to ‘opt in’ to standards which are convenient and to

'opt out' of standards which are not convenient; and thereby contradict the concept of human rights as minimum guarantees for the treatment of all people.

In sum, based on our experience, it is our position that PPPs – including global health alliances such as GAIN and CSR initiatives such as the Global Compact – have undermined the ability of the UN and its Member States to hold corporations accountable, work in the public interest and protect public health and human rights. They have empowered transnational corporations by giving them greater opportunities to exert undue influence in public health policy-making and human rights matters. They have created corporatist decision-making structures in which corporations or wealthy individuals are privileged partners at the expense of public sector and public-interest civil society actors and they have enabled many corporations to 'bluewash' their tarnished public images through association with prestigious UN-sanctioned initiatives. It is our position that voluntary measures are an inadequate response to corporate abuses. Rather, effective legal mechanisms for accountability and transparency must provide the foundation governing corporate conduct to ensure that human rights are respected, protected and fulfilled.

Conclusion

As set forth above, we are concerned that corporations are achieving undue influence through unfettered lobbying practices and various forms of PPPs. This has led to a weakening of International Code implementation, disregard for its violations and an intensified distrust in public institutions, corporations, professional bodies and public health workers. We are neither calling for a blanket prohibition against lobbying nor a blanket prohibition against all interactions between the public and commercial sector. Blanket avoidance or prohibition can lead to the paradox result of inaction in setting up policies and mechanisms to deal properly with the underlying issues. Rather than blanket prohibitions, a coherent system of checks and balances needs to be developed and implemented. Accordingly, we respectfully request the SRSG to take on the following as part of fulfilling his mandate:

- Clarify the legal and ethical framework underlying intergovernmental agencies' interactions with the private sector – and to clearly delineate and adequately control the appropriate 'role' of the private sector in policy-making and implementation. This includes ensuring transparency at all levels, and making a clear distinction between public interest NGOs (PINGOs) and business interest NGOs (BINGOs) which will help develop and strengthen the capacity of civil society and public institutions to regulate and control the activities of the private sector. While the private sector may be consulted at certain times, it should not be directly involved in the policy-making process. Policies and processes need to be in place to help recognise inherent power differentials and safeguards need to be implemented to ensure that the private sector does not unduly influence the policy-making agenda.
- Explore the critical issues that the trend of PPPs has brought forth, which is ever more relevant to the arena of business and human rights. We urge the SRSG to advocate for and assist in the development of a system for defining, classifying and evaluating various forms of PPPs, including replacing the term 'partnership' with a more neutral term such as 'interactions.' Policies and procedures need to be developed to assess the benefits and risks of various forms of public-private interactions, and to determine those forms that must be avoided. In addition, we request the SRSG to advocate for and assist in the development and implementation of effective and enforceable policies to manage conflicts of interest.
- Advance the understanding that effective and enforceable legal mechanisms for accountability and transparency must provide the foundation governing corporate conduct to ensure that human rights are respected, protected and fulfilled. We believe that enforceable policies are necessary to safeguard the sovereign right of

nations to develop and implement necessary controls to protect human rights, including the right to food and the protection of infant and young child health. Voluntary private sector initiatives should be understood as further efforts by industry to aspire towards fulfilling their responsibility to respect human rights.

Coordination of efforts with the Organisation for Economic Cooperation and Development (OECD) may be of help. The OECD has adopted Guidelines on Managing Conflict of Interest in the Public Service, which contains very pertinent advice, including: (1) Ensure that effective procedures are deployed for identification, disclosure, management, and promotion of the appropriate resolution of conflict of interest situations, (2) support transparency and scrutiny and (3) create an organisational culture in which dealing with conflict-of-interest matters can be freely discussed and raised.⁵² The OECD Guidelines have also identified a number of interactions and relationships which pose major challenges to the integrity of public institutions and their reputation. Among them, they identify both lobbying and PPPs as grey or emerging areas.⁵³

We urge the SRSG to assist in developing and implementing the above policies and procedures at the UN level - to ensure transparency, accountability and fairness - and to encourage all Member States to do the same. Together these measures will help ensure corporate accountability in the interest of safeguarding human rights principles, including protecting the vulnerable groups of infants and young children, as well as helping to maintain trust in health professionals, civil servants and public institutions

It is our hope that this submission will encourage the SRSG to take on these concerns as part of fulfilling his mandate.

¹ World Health Assembly and the UNICEF Executive Board adopted this key policy "to improve – through optimal feeding – the nutritional status, growth and development, health, and thus the survival of infants and young children." WHA Resolution 55.25, § 6.

² All references to the International Code herein include subsequent related WHA Resolutions which have equal status to the International Code.

³ A/HRC/11/13, 22 April 2009, para. 10

⁴ See, e.g., Feudenberg, N. and Galea, S. The Impact of Corporate Practices on Health: Implications for Health Policy *Journal of Public Health Policy* 2008: 29, 86–104 (provides scientific evidence to support argument that "corporate practices are an important determinant of health, and those policies that alter damaging corporate practices are likely to improve population health"). Also: Bodin, C. et al. Invited commentary - How to stop public health conferences becoming trade fairs *Public Health Nutrition* 2008:12:1581-1583.

⁵ The SRSG explains that the three pillars are "complementary in that each supports the others." A/HRC/11/13, para. 2. However, the SRSG fails to elaborate on this "complementary" relationship in any of the reports.

⁶ OHCHR Consultation on business and human rights Draft Agenda: State duty to Protect I: "What is the role of NHRI's, civil society and business in assisting Governments in achieving policy coherence in this field, and in holding Governments to account for incoherent policies that may contribute to human rights abuses."

⁷ Ibid.

⁸ WHO, International Code of Marketing of Breastmilk Substitutes, WHO Geneva, 1981.

⁹ Global Strategy for Infant and Young Child Feeding, adopted under WHA Resolution 55.25, 2002.

¹⁰ Hodgkin, R. and Newell, P. UNICEF Implementation Handbook for the Convention on the Rights of the Child, UNICEF 2007, p. 356.

¹¹ From a speech given by Stephen Lewis titled —Malnutrition as a human rights violation: implications for United Nations-supported programmes, 1999.

¹² In implementing the substantive content of corporate due diligence, we urge the SRSG to include in his list of instruments that companies at a minimum should look to the Convention on the Rights of the Child - which is one of the most universally agreed upon instruments by the international community, yet is not mentioned in the list provided by the SRSG. A/HRC/11/13, 22 April 2009, 53.

¹³ See, e.g., Richter, J. *Holding Corporations Accountable*. London: Zed Books 2001.

¹⁴ Marketsandmarkets.com – Global Baby Food Markets (2009-2014), released August 2009.

¹⁵ Coutsoudis, A. et al. The breastmilk brand: promotion of child survival in the face of formula-milk marketing. *The Lancet* 2009; 374: 423–25 ("Companies have spent an average of US\$30 every year per baby on product promotion, compared with \$0.21 per baby spent by the US Health Department on breastfeeding promotion"). Also: Merrick, J. Breast vs. bottle: food giant Nestlé, makers of powdered baby milk, is forging links with the Government *The Independent* 11 May 2008 ("Advertisers spend £10 promoting formula for every £1 the NHS spends encouraging breastfeeding").

¹⁶ See, e.g. Yamey, G. Baby food industry lobbies WHO on breast feeding advice. *British Medical Journal* 2000;321:591 (reporting that Manufacturers of infant food are lobbying the World Health Organisation (WHO) to delay any change to its recommendations on the optimal length of exclusive breast feeding). Also: Revill, J. and Harris, P. As magnates lobby the White House, the US refuses to back the WHO in the fight to reduce obesity *The Guardian* 18 January 2004 (reporting on the industry lobbying of WHO and the U.S. government to derail the WHO Global Strategy on Diet, Nutrition and Physical Activity).

¹⁷ Palmer, G. *The Politics of Breastfeeding - when breasts are bad for business* Pinter & Martin 2009. 257

¹⁸ Ever since the UN first created the category of NGO in 1946 for not-for-profit, non-state actors, industry associations have been able to apply for and obtain NGO status, despite the UN's explicit NGO status requirement that the organisation share the UN's values: NGOs "shall undertake to support the work of the UN and to promote knowledge of its principles and activities, in accordance with its own aims and purposes and the nature and scope of its competence and activities." Economic and Social Council (ECOSOC), Resolution 1296, 23 May 1968. For decades IBFAN has been urging UN bodies to make a clear distinction between public interest NGOs (PINGOs) and business interest NGOs (BINGOs). The WHO addressed this issue in its 2001 Civil Society Initiative (CSI), for which its 2002 CSI Review report noted the appeal that "business-linked organisations be classified as the private (for-profit sector) and not fall within the NGO/CSO classification" and that WHO build on the WHO Guidelines for Interactions with Commercial Enterprises (WHO Guidelines) to appropriately deal with conflicts of interest. WHO/CSI 2002: 9; 14. Industry adamantly opposed any efforts to make such distinctions on grounds of "non-discrimination." Efforts to incorporate IBFAN's recommendations in revisions of the WHO Principles Governing Relations with Nongovernmental Organisations and to the WHO Guidelines were thwarted through controversial debates during the 2003 and 2004 World Health Assemblies. To date, WHO does not make any such distinctions. IBFAN had also hoped that the UN Secretary-General's Panel of Eminent Persons on United Nations-Civil Society Relations might clarify some of the issues. In a 2003 working paper entitled 'Diverse Actors within the UN System', the Panel tried to make a better distinction between different actors but stressed that its results were not an official UN classification. The Panel defined 'private business sector' as including "for-profit firms, their federations and philanthropic initiatives emanating from firms." This distinction was lost, however, in the summary of a Multi-stakeholder Workshop on Partnership and UN-Civil Society Relationships held by the High-Level Panel. Under the heading 'Civil society' and 'other actors', it stated that "[i]t is important to be inclusive in our conception of civil society." Referring to diverse actors including professional associations and the private sector, the report stressed: "the UN has a practical need to engage with all these diverse actors to achieve global goals." Industries' perceived right to be represented in both private sector consultations and NGO consultations has resulted in increased avenues for industry influence in the international health and human rights arenas.

¹⁹ See, e.g., Global Compact Office/AccountAbility. *Towards Responsible Lobbying*. UN Global Compact Office Geneva 2003, p. 18.

²⁰ For example, in February 2008, *The Independent* reported that Nestlé took UK government officials on an all-expenses-paid trip to South Africa. The ruling Labour Party on the trip, Tom Levitt MP, since launched a campaign claiming that Nestlé voluntarily complies with the WHA marketing requirements for baby foods and has defended advertising and labelling practices in South Africa, despite these being criticised by the South African Department of Health and being illegal in the UK. Merrick, J. Breast vs bottle: food giant Nestlé, makers of powdered baby milk, is forging links with the Government *The Independent* 11 May 2008. In August 2007, *The Washington Post* uncovered a "high-level lobbying campaign by [infant] formula makers." It was described as "a full-court press to reach top political appointees at [US Health and Human Services], using influential former government officials, now working for the industry, to act as go-betweens" which ultimately "reversed an HHS decision to finance a \$630,000 community outreach effort to promote breast-feeding." Kaufman, M. HHS Toned Down Breast-Feeding Ads, Formula Industry Urged Softer Campaigns *The Washington Post* 31 August 2007. In 2007, *The New York Times* reported that Pharmaceutical and Healthcare Association of the Philippines (PHAP) – which includes large multinational baby food companies Wyeth, Abbot and Mead Johnson – brought the

Philippine Government to the Supreme Court in order to block the introduction of new infant formula marketing regulations implementing the International Code. The lawsuit contested the new rules and regulations in relation to the Philippine "Milk Code" on grounds of "freedom of speech." Conde, C. Breast-feeding: A Philippine battleground *The New York Times* 17 July 2007. In December 2003, *The Star* reported that baby food companies in South Africa formed the Infant Feeding Association (IFA) to challenge the government's proposed regulations to implement the Code, claiming the regulations: "would infringe on the manufacturers' right to freedom of speech and mothers' rights to information." Smetherham, J. Govt tries to limit info on baby feeding *The Star* 9 Dec. 2003.

²¹ UNICEF press release, 14th January 1997 (issued in response to the monitoring report *Cracking the Code*). Also: UNICEF website, Breastfeeding Challenge: "It has been estimated that improved breastfeeding practices could save some 1.5 million children a year. Yet few of the 129 million babies born each year receive optimal breastfeeding and some are not breastfed at all." www.unicef.org/programme/breastfeeding/challenge.htm accessed 28 September 2009.

²² See, e.g. Stocking, B. Multinationals break Vietnam law in formula sales *Associated Press* 1 Sept. 2009. Reports that "The number of Vietnamese mothers who exclusively breast-feed in the first six months — the most crucial period — stands at just 17 percent, less than half what it was a decade ago, according to UNICEF. Meanwhile, formula sales in Vietnam jumped 39 percent in 2008, according to a study by Nielsen, a market research firm. Another survey found that the industry spent more than \$10 million on advertising last year, placing it among Vietnam's top five advertisers."

²³ UN's Ban tells business to stop climate lobbying *EurActiv/Reuters* 25 May 2009.

²⁴ UN Press Release 2004 SG/SM/9387 ECO/71.

²⁵ Global Compact Office/AccountAbility. *Towards Responsible Lobbying*. UN Global Compact Office Geneva 2003, p. 6.

²⁶ *Ibid.*, p. 31.

²⁷ We are concerned, for example, that the Global Compact's report was sponsored by corporations including Co-Operative Financial Services, Gap, Inc., Novo Nordisk and Telefonica – which in and of itself raises conflicts of interest issues.

²⁸ The OECD held a Special Session on Lobbying in June 2007 which resulted in a Draft Framework. OECD. *Building a Framework for Enhancing Transparency and Accountability in lobbying*. 2007 GOV/PGC, p. 17. Other recent efforts to address lobbying in the international context include a conference held in May 2009 at the Centre D'études et de recherches internationales (CERI) entitled "Regulating Ethics and Lobbying: What can Europe And North American Learn from Each Other? Presentations and papers are available at <https://europe.umontreal.ca/pages/viewpage.action?pageId=2949195> accessed 29 Sept. 2009.

²⁹ Richter, J. 'We the peoples' or 'We the corporations': Critical reflections on UN-business partnerships, IBFAN-GIFA, 2003.

³⁰ Section 3 of the Global Strategy encourages partners to form: "fully transparent innovative alliances and partnerships consistent with accepted principles for avoiding conflict of interest."

³¹ A good example of the legal ambiguity of the term is represented by the definition of "partnership" provided by the 2003 Secretary General's Report on Enhanced Cooperation between the UN and all the Relevant Partners, in particular the private sector: "Partnerships are commonly defined as voluntary and collaborative relationships between various parties, both State and non-State, in which all participants agree to work together to achieve a common purpose or undertake a specific task and to share risks, responsibilities, resources, competencies and benefits." UN Doc. A/58/227, para. 9 (hereinafter 'SG's 2003 Report on Partnerships').

³² The SG's 2003 Report on Partnerships describes any and all interactions with the UN as "partnerships" - including lobbying and corporate responsibility initiatives: Partnerships between the United Nations and non-State actors work on many levels, address many different issues and serve different purposes. They range from participation in the intergovernmental process, as in the tripartite structure of the International Labour Organisation, to the consultative status of business associations with the Economic and Social Council, to more recent arrangements such as the Global Environment Facility, the Information and Communication Technology Task Force, global initiatives on specific health issues and the Global Compact." *Ibid.*, para. 12.

³³ Nelson, J. *Public-private partnerships: cooperation between the United Nations system and the private sector*. Report commissioned by the United Nations Global Compact. 2002, New York: United Nations Department of Public Information, p. 47.

³⁴ Zammit, A. *Development at risk: rethinking UN-business partnership*, Geneva: United Research Institute for Social Development (UNRISD) in collaboration with the South Centre 2003, p. xxv.

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- ³⁵ Press release, Bill & Melinda Gates Foundation, 9 May 2002 <http://www.gatesfoundation.org/press-releases/Pages/cost-effective-food-fortification-initiatives-020509.aspx> accessed 28 September 2009.
- ³⁶ <http://www.gainhealth.org/about/overview> accessed 28 September 2009.
- ³⁷ IBFAN has called on Danone to make fundamental changes in the marketing tactics of the dozen baby food companies it now owns but without success. Breaking the rules, stretching the Rules, IBFAN-ICDC, 2007.
- ³⁸ <http://www.gainhealth.org/programs/gain-infant-and-young-child-nutrition-program> accessed 28 September 2009.
- ³⁹ WHA Resolution 49.15 (1996).
- ⁴⁰ <http://www.gainhealth.org/programs/gain-infant-and-young-child-nutrition-program> accessed 28 September 2009.
- ⁴¹ See, e.g. Bruno, K. and Karliner, J. Tangled up in blue: Corporate partnerships in the United Nations. San Francisco, Transnational Resource & Action Center (TRAC) 2002, 2.
- ⁴² In October 2001, Global Compact partners submitted to a Global Compact Learning Forum meeting held in the UK case studies intended to demonstrate the action they had taken according to the Global Compact principles. An independent team of academic analysts which reviewed the submissions found that none conformed to the Global Compact case study guidelines while a significant number made no reference to any of the nine Global Compact principles. See Richter, J. Corner House Briefing 26, Codes in Context TNC Regulation in an Era of Dialogues and Partnerships Corner House 2002. n. 2
- ⁴³ Stocking, B. Multinationals break Vietnam law in formula sales. *Associated Press* (1 Sept. 2009). The violations included: commissions paid by Friesland Foods of the Netherlands to doctors to sell their formula; representatives of U.S. based Mead Johnson and Abbot directly approaching women shortly after birth to promote their products; gifts by Mead Johnson and Abbot to nursery schools, including benches, playground equipment adorned with their labels and company advertisements suggesting that children will be smarter and stronger if they drink formula, claims widely rejected by independent health professionals.
- ⁴⁴ International Code, section 11.3
- ⁴⁵ Thornycraft, P and Berger, S. Grace Mugabe, her 'stolen' farm and how she supplies Zimbabwean milk to Nestlé food giant *The Sunday Telegraph (UK)* 27 Sept. 2009. Mr. Mugabe, the president of Zimbabwe, and his wife are the subject of EU and US sanctions as a result of their controversial 29-year rule over the country. *The Sunday Telegraph* revealed that Nestlé sources up to 15% of its milk supply in Zimbabwe from Gushungo Dairy Estate, a property owned by Grace Mugabe. Swiss law provides that it "is forbidden to make funds available to persons mentioned, or put them, directly or indirectly at their disposition." Nestlé denies that it has violated Swiss law and has announced that it will continue to source its milk from the Mugabe farm. See Just-food.com. Update: Nestlé to continue sourcing Mugabe milk *Just-food.com* 28 September 2009.
- ⁴⁶ Breaking the Rules Stretching the Rules IBFAN-ICDC 2007.
- ⁴⁷ Nestlé Investigation of Reported Non-Compliance with the International Code of Marketing of Breast-milk Substitutes, 2009 (hereinafter 'Nestlé Investigation').
- ⁴⁸ Nestlé similarly dismissed an earlier report by IBFAN, which prompted the formation of the Interagency Group on Breastfeeding Monitoring made up of twenty seven academic, development and church organisations to investigate marketing practices. The Group published 'Cracking the Code' in 1997 and reported 'systematic' violations by Nestlé and other companies. Commenting at the time, UNICEF stated that IBFAN's monitoring was 'vindicated'. While this investigation was 12 years ago, the types of violations analysed in 'Cracking the Code' are similar to those reported in the 2007 Breaking the Rules report.
- ⁴⁹ For example, Nestlé consistently says that its cereals are not covered by the Code, asserting that "the WHO Code itself explicitly indicates that complementary foods are not covered under the Code, unless specifically marketed as breast-milk substitutes – which cereals are not." Nestlé Investigation, p. 15. Nowhere in the International Code are complementary foods "explicitly" left out. Article 2, Scope of the Code, rather explicitly includes complementary foods as: "other ... food and beverages, including bottle-fed complementary foods, when marketed or otherwise represented to be suitable, with or without modification, for use as a partial or total replacement of breast-milk." Moreover, WHA 49.14 (1996) requires "that complementary foods are not marketed for or used in ways that undermine exclusive and sustained breastfeeding." Indeed, even after six months, many foods do not complement breastfeeding but rather replace it when breastfeeding should be sustained as the principal food source. In addition, Article 11.3 of the International Code provides: "Independently of any other measures taken for [Code] implementation [baby] food manufacturers and distributors ...should regard themselves as responsible for monitoring their marketing practices according to the principles and aim of this

Code, and taking steps to ensure that their conduct at every level conforms to them." Nestlé's Operational Instructions claim that "Internal monitoring of the correct implementation of these Instructions and/or of the national code if it exists, is an on-going responsibility of Nestlé Marketing Management." Nestlé Investigation, p. 141. However, Nestlé admits that it does not comply with the Code in countries with policies that are not fully aligned with the International Code. For example, in EU countries, Nestlé admits to following the "European Infant Formula Directive", which is undisputedly a weaker version of the Code; and Nestlé explains that "[i]n countries such as the US and Canada, where governments have decided that it is not appropriate to implement the Code through national measures, Nestlé follows national decisions." Nestlé Investigation, p. 9.

⁵⁰ Nestlé, *Creating Shared Value 2008 Synopsis*.

⁵¹ *Ibid.*, p. 3.

⁵² OECD. *Managing conflict of interest in the public service: OECD Guidelines and country experiences*. Organisation for Economic Cooperation and Development 2003, p. 23; 26-27 (OECD 2003). While the OECD Guidelines provide many useful advices, they have still some significant shortcomings. Very problematic, for example, is their recommendation to "create new partnerships with the business... sector" whose aims include, among others, to involve business sectors "in the elaboration and implementation of the conflict-of-interest policy for public officials." p. 36. See Richter, J. *Conflicts of Interest and Policy Implementation Reflections from the field of health and infant feeding*. IBFAN-GIFA 2005, p. 17.

⁵³ OECD 2003, pp. 17, 20, 22, 29. Also: *infra* note 28.