

ICDC Rejoinder

to Nestlé's Investigation of Reported Non-Compliance with the International Code of Marketing of Breastmilk Substitutes

More than a year after its publication, Nestlé finally posted a response¹ on its website to “*Breaking the Rules, Stretching the Rules 2007*”, a tri-annual ICDC publication that reports evidence of International Code violations. In its 143-page document, Nestlé contends that only 9 of the 169 reported Code violations are valid. This is hardly surprising. For many years, IBFAN and Nestlé have disagreed on what is considered a Code violation, largely due to differences in interpreting the Code and subsequent WHA resolutions.



Nestlé readily acknowledges that there are “gaps in some countries’ implementation”² of the International Code and have issued a set of rules of its own - *Nestlé’s Instructions for Implementation of the WHO International Code for Marketing of Breastmilk Substitutes*. Unfortunately, these instructions are a vague and partial interpretation of the Code (see “*Nestlé and the International Code: Where do they differ?*”³ for more detail on how Nestlé misinterprets the Code). Nestlé sets out in detail its procedures for ensuring that its staff abide by management principles and instructions. It is thus clear that the violations encountered by IBFAN and others should not be considered the actions of rogue employees, but instead of the institution. Indeed, the fact that violations are so widespread and that Nestlé dismisses complaints about the majority of them indicates that it is Nestlé’s intention to not only excuse the practices, but to endorse and encourage them.

In its report, Nestlé discusses ways in which they self-monitor Code compliance. They refer to an ombudsman system. IBFAN has written to the ombudsman, care of Nestlé, regarding violations but never received a response. Nestlé also refers to ‘external’ audits conducted by Bureau Véritas. These audits are paid for by Nestlé and conducted according to its own terms of reference, which are not the same as the Code and WHA resolutions. While finding a small number of violations, Bureau Véritas have missed the large numbers encountered by IBFAN monitoring. They have also inadvertently exposed how Nestlé encourages governments to introduce voluntary regulatory systems instead of independently monitored and enforced legislation.

Rather than abiding by the Code and WHA resolutions as required by Article 11.3, Nestlé chooses to follow weakened regulatory measures and its own Instructions.

Bureau Véritas has also been criticised for other work conducted for Nestlé and Nestlé’s misrepresentation of for PR purposes is documented. For example, in 2005 Nestlé claimed it had confirmed that its water bottling operations in Sao Lourenco, Brazil, complied with all applicable legislation. However, Bureau Véritas was apparently

unaware that the Public Prosecutor had taken Nestlé to court over several breaches. Nestlé eventually settled out of court, agreeing to stop pumping and to compensate the spa town of Sao Lourenco for damage caused to its water park. Despite this, Nestlé continued to claim: “*a third party audit by Bureau Véritas confirms that we have acted in accordance with Brazilian legislation.*”

Nestlé has clearly demonstrated that its statements cannot be taken at face value. The company attempts to portray itself as a socially responsible company, willing to meet international standards, however, its actions and denial of Code violations suggest otherwise. ICDC and Nestlé’s conflicting opinions will remain so long as Nestlé pays lip service to Code compliance and insists on reducing the spirit and aim of the Code to its lowest common denominators.

This Rejoinder is a summary of the main areas of disagreement between ICDC and Nestlé; it also responds to Nestlé’s requests for future monitoring.

1. Universal application of the International Code.

The Code was adopted by the World Health Assembly (WHA) in 1981 to protect and promote breastfeeding in all countries by regulating the promotion of breastmilk substitutes, feeding bottles and teats. Implementation of the Code must be “*in its entirety*”. Adherence to the International Code is a “*minimum requirement*” for all Member States of WHO⁴. Nestlé has unilaterally decided that the International Code does not apply in industrialised countries.

Nestlé: “More than half of the IBFAN allegations (85) were cases in the developed world - Europe, the US, Canada, and Australia. All but two of these allegations were in accordance with national and EU decisions regarding application of the WHO Code in their countries, and cannot be considered violations neither by the governments nor by Nestlé. IBFAN applies criteria in these countries which are contrary to governmental decisions concerning how the Code should be applied in those countries.”

ICDC: Nestlé is required to ensure that its conduct at every level conforms to the principles and aim of the Code independently of any other measures taken for implementation of the Code (Article 11.3).⁵ Interestingly, Nestlé makes no reference to Article 11.3 when it sets out responsibilities for Code compliance, but refers only to Article 11.1 relating to governments and Article 11.4 relating to NGOs.

Neither the US nor Canada have implemented the Code, while Australia and many European countries have adopted national measures that fall below the minimum standard envisaged by the WHA. Code implementation at the national level enables sanctions to be meted out in the event of non-compliance. Nestlé claims it abides by national legislation. Naturally, all companies must follow applicable laws: no need to shout about abiding by the law. But this goes beyond; insufficient implementation does not absolve Nestlé from ignoring minimum standards set by the International Code and related resolutions if it takes its corporate social responsibilities as seriously as it

professes to do. Why Nestlé applies different standards for developed and developing countries is beyond comprehension as babies everywhere benefit from breastfeeding and are similarly exposed to risks when they are artificially fed.

It should also be stressed here that government inaction or shortfall does not imply disagreement with the Code. For example, government agencies in Canada “strongly urge the infant formula industry to support and implement the principles of the Code” despite the lack of legislation in Canada. The notion of “*respecting government decisions concerning how the Code should be applied*” is Nestlé’s sorry excuse to divert from the marketing issues at hand, and the fact that they are blatantly violating the Code in developed countries.

Nestlé cannot claim that they support breastfeeding or the International Code while they continue to undermine breastfeeding through inappropriate marketing of their products.

2. Scope of the Code.

Complementary foods, such as cereals and other baby foods, are considered breastmilk substitutes if they are marketed or represented as suitable for an age when breastmilk best fulfils the infant’s diet.

- Nestlé :*
- “*Many IBFAN allegations in the developing countries were related to cereals and baby foods marketed for use above 6 months of age, which are not formulated or marketed as breast-milk substitutes. They are therefore not within the scope of the WHO Code of Marketing of Breastmilk Substitutes and were therefore not valid cases of non-compliance with the WHO Code.*”
 - “*It should be noted that Nestlé does not market infant cereals, baby foods and growing-up milks as breast-milk substitutes*”

ICDC: Nestlé still markets many of its complementary foods to infants less than 6 months old as illustrated in the cases of cereal labels instructing for use as of 4 months, not stating an age at all, using inappropriate stages of development as an indicator to use the product, or by using photos of very young babies. Such practices violate resolution WHA 49.15 [1996] which recommends that complementary foods should not be marketed for or used in ways that undermine exclusive and sustained breastfeeding.

Through the inappropriate marketing of complementary foods, Nestlé also violates resolution WHA 54.2 [2001] which recommends that infants should be exclusively breastfed for the first six months of life to achieve optimal growth, development and health. Although Nestlé changed the labels of complementary foods to follow the six-month recommendation in developing countries, it has not done so in developed countries. This dichotomy in interpretation is defensible only from the business angle, certainly not from plain reading of the International Code and subsequent WHA resolutions.

3. Advertising in medical journals.

Nestlé uses medical journals to advertise its infant formulas, follow-up milks, and complementary foods even though the ban against advertising is an important tenet of the International Code.

Nestlé: This is completely permitted by the WHO Code as these ads are destined to a discerning health professional audience. Ads containing health claims also often go through a government or professional vetting committee.

ICDC: While product information restricted to scientific and factual matters are allowed under Code Article 7.2, this does not translate to allowing ads for health professionals. Ads in professional journals are unjustifiably allowed by some governments in countries where there is strong industry influence (and YES, unlike Nestlé, ICDC feels that governments too can be Code violators). Even if such ads are not violations per se under some national laws, the way these ads abound with health and nutrition claims render them so. Information to health professionals must be scientific and factual. Language such as “*nutrition and comfort for baby, peace of mind for mother*” an ad for Guigoz 1 and 2 in Middle East Paediatrics journal, or “*Immunity – You can’t see it. But babies need it*” an ad for Nan 2 in Paediatrics journal, and pictures of mothers and babies, are not scientific or factual, but promotional in nature.

4. Health and nutrition claims

Claims such as “*added DHA/AA makes the formula closer to breast milk and promotes the development of baby’s brain.*”, “*activating immune defenses in the crucial first months of life*” or “*contains all the vitamins and minerals known to be essential for the development of the infant*” are commonly found on Nestlé product packaging and promotional pamphlets.

- Nestlé*
- “*These claims are scientifically substantiated and are based on serious scientific research.*”
 - “*DHA is a known component of brain tissue. This is known as a nutrient function claim, it is a proven scientific claim and certainly not an over-claim.*”
 - “*These leaflets, labeled for professional information only and written in a technical or scientific language that is beyond the general public’s comprehension, are given to health workers to inform them about new products.*”

ICDC: Resolution WHA 58.32[2005] prohibits nutrition and health claims for breastmilk substitutes unless allowed by national legislation. Slogans such as “*creating intestinal flora similar to that of breastfed infants*” and “*to strengthen immune defences in the crucial first month of life*” are used to promote infant formula, idealise artificial feeding and are misleading. Nestlé has continued to use health claims comparing formula to breastmilk, despite government warnings in countries such as Canada.⁶ In relation to claims regarding fatty acids DHA and AA, a Cochrane review⁷ of the literature did not substantiate these claims, yet Nestlé continues to use these ingredients as a promotional tool. Lastly, information is permitted to health professionals (not the wider class of health workers), but it must be scientific and factual. The language used in claims, such as “*just*

the right quantity and quality of proteins” is not factual, but promotional in nature. The thin line between information and promotion is often blurred and companies like Nestlé take advantage of this to use information materials as marketing devices.

5. Donation of equipment and materials

Although Code Article 6.8 allows names and logos to appear on donated equipment or materials, Nestlé translates this to mean offering gifts for use by health workers to generate goodwill and to be used as conduits to mothers. Article 6.2 and 6.3 can be invoked to prevent health care facilities from being used for promotional ends. Article 7.3 prohibits financial and material inducements which can take many forms, even small items.

a) Gifts bearing the Nestlé logo.

Posters, calendars, bags, pens, prescription pads, towels, and wrist bands bearing the Nestlé corporate logo or the Nestlé Nutrition (fat birds) logo used on infant milks are commonly found in health care settings:



Nestlé: “The WHO Code prohibits material or financial inducements to promote products within the scope of the Code. This article of the Code was included to prevent tying of rewards for health workers to writing of prescriptions or sales of breast-milk substitutes. It was also included to prevent expectation of receiving gifts of meaningful value... Small items such as pencils or pens or hand towels with the Company logo do not constitute financial incentives or inducements as giving commissions to doctors for each formula prescription, or significant gifts would do. The WHO Code specifically allows giving useful materials and equipment to health care facilities, and permits them being marked with the corporate logo but no breast-milk substitute brand.”

ICDC: It is important that all the sub-articles of Code Article 6 relating to promotion in health care facilities be read together in order to uphold the principles and aim of the Code. Article 6.8 which allows donation of equipment and materials bearing a company’s name and logo must be read with Articles 6.2 and 6.3 when dealing with this issue:

Article 6.2 – “No facility of a health care system should be used for the purpose of promoting infant formula or other products within the scope of the Code.

Article 6.3 – “Facilities of health care systems should not be used for the display of products within the scope of this Code, for placards or posters concerning such products, *or for the distribution of material provided by a manufacturer or distributor other than that specified in Article 4.3.*

When gifts are offered to health workers, Article 7.3 comes into play.

Article 7.3 - “No financial or material inducements to promote products within the scope of this Code should be offered by manufacturers or distributors to health workers...”

The original purpose of Article 6.8 was to allow health care systems of poor countries to receive donations of expensive medical equipment, such as incubators, refrigerators and air conditioners, which they would otherwise not be able to afford. This has not been the case; monitoring has revealed that donations of expensive equipment are not going to countries that need them most, but unnecessary, inexpensive small items promoting the Nestlé name and logo are being circulated instead. There is a common assumption which Nestlé actively fosters, that small gifts do not significantly influence professional behaviour but social science research⁸ has demonstrated that gifts regardless of value promote good will and influence behaviour. Manufacturers know this very well.

Public display of the so-called “small items” confers medical endorsement on companies and their products. Thus, Nestlé is using health care systems for the purpose of promotion and violating Articles 6.2, 6.3, 7.2 and, generally, the spirit of the Code. ICDC further contends that the use of the ‘fat birds’ logo, which has been found on Nestlé ‘donations’, bears specific reference to their infant formula brands and violates even the permissive Article 6.8. Zeta Wilson of Nestlé Nutrition tried to persuade students from Sheffield University to end their support for the Nestlé Boycott and confirmed the intended purpose of such gifts, as she stated the purpose of gifts “is to keep the company name and products in people’s minds”⁹.

b) Gifts bearing the Blue Bear logo.

Memorabilia bearing images of the Blue Bear logo, a mascot for Nestlé cereal products, constitute company materials prohibited under Code Article 6.3. In countries where the products are still labelled as suitable for babies younger than 6 months, they fall under the scope of the Code. As such, memorabilia bearing the Blue Bear logo constitute gifts and incentives aimed at promoting products and are prohibited by Code Articles 5.4 and 7.3.



Nestlé: “As cereals and baby foods are not, and are not marketed as, breast-milk substitutes, marketing of them is not prohibited by the Code. The Blue Bear is never used with breast-milk substitute products, but only with cereals and other complementary foods. These items are not part of any scheme to promote infant food products.”

ICDC: Breaking the Rules, Stretching the Rules 2007 contained many examples where Nestlé advertised complementary foods to babies less than 6 months of age (i.e. cereal labels instructing for use as of 4 months, or not stating an age at all, using inappropriate stages of development as an indicator to use the product, and photos of young babies).

The Blue Bear logo used to be on infant formula (BEBA in Switzerland) and is still used to undermine breastfeeding. For example, at a hospital in Argentina, a calendar for “Stage 1” complementary foods shows Blue Bear at a stage when it is still learning to sit and shows a proportionally large head, characteristic of young babies, implying that the product is suitable for infants below 6 months of age, a time when they should be exclusively breastfed.

Additionally, the term “stage 1” can be a source of confusion as formulas are usually labelled as “1” or “2”, describing infant formula, for use under 6 months of age, and follow-up milk respectively. Both the Blue Bear and the label “stage 1” are misleading to

parents and create confusion about the recommended age for the use of the product. With such marketing strategies, Nestlé's complementary foods do fall under the scope of the Code and should be prohibited in health care facilities.

6. Sponsorship.

Nestlé commonly sponsors medical conferences, workshops, and continuing education courses, pays travel expenses for individuals to attend these events, etc relying on the provisions of Code Article 7.5. It ignores subsequent relevant WHA resolutions.

Nestlé: "Nestlé Nutrition Institute (NNI) activities are scientific non-branded activities. The main objective of Nestlé Nutrition Institute (NNI) activities is to encourage the exchange of sound scientific knowledge about infant and paediatric nutrition. NNI is committed to encourage breastfeeding practices and to comply with WHO Code regarding the use of breast-milk substitute only when needed. Continuous nutrition education through NNI workshops, NNI publication and sponsoring of international/national conferences targeting only Health Care Professionals are implemented in compliance with WHO Code Article 4 "Information and Education".

ICDC: Although Code Article 7.5 allows for sponsorship subject to disclosure, WHA resolutions 49.15 [1996] and 58.32 [2005], which Nestlé has chosen to ignore, have clarified this provision by urging Member States to ensure that financial support and other incentives for programmes and health professionals working in infant and young child health, do not create conflicts of interest. Sponsoring medical conferences, paying for travel expenses, taking health professionals out for dinner, etc. create conflicts of interest. Even if Nestlé's Instructions claim that financial or other support does not "imply endorsement", it goes a long way towards providing goodwill and wielding influence over the beneficiaries of their largesse. Why else would the company spend considerable sums on sponsorship if it is not with the intention of obtaining a proportionate return for the money invested?

7. Nestlé's recommendations to ICDC for future monitoring

In its Report, Nestlé made recommendations on how NGOs can make their monitoring more effective. This projects the impression that it is a company willing to listen and to change its ways. It also presumes that IBFAN monitors be employed to do what the company itself should be doing on a permanent basis: monitor and correct its marketing practices at every level (Article 11.3).

Below, in brief, is ICDC's response to these recommendations:

a) Too little, too late.

Nestlé: "Send violations to the company immediately so that investigation can take place and corrections made if necessary, rather than assembling them over a one to three years period for publication. Companies could be more effective and a stronger dialogue established in this way."

ICDC: *Breaking the Rules* is NOT primarily a mechanism to report violations to companies; it is first and foremost an overview that shows HOW companies (not just Nestlé) infringe the Code and resolutions. Dialogue between ICDC and Nestlé cannot be meaningful as long as there is no agreement on the universality of the Code, its scope and infant health – issues over which ICDC is not willing to compromise. Nestlé should not use IBFAN’s triennial report as an excuse not to monitor and correct its own conduct all the time. Many IBFAN groups do report violations directly to Nestlé and to governments. From time to time, ICDC also reports violations directly to the company as a way of testing its willingness to correct current practices. As an NGO, however, IBFAN has time and budget constraints. Nestlé is not similarly constrained. The problem is not what Nestlé knows and does not know, but what it knowingly allows.

b) Reporting to Government.

Nestlé: “Send allegations to Government”, Article 11.2.

ICDC: Monitors are encouraged to do so where there is a viable complaint mechanism and in some countries that works very well. Monitoring reports, both national, regional and global, such as *Breaking the Rules*, are always made available to governments, the media and international organizations concerned with Code compliance.

c) Irreconcilable differences

Nestlé: “Teach correspondents the difference between complementary foods marketed for use after 6 months of age, and breastmilk substitutes. A very large part of the allegations have to do with cereals and other baby foods which, unless specifically marketed as a breast-milk substitute, do not fall within the scope of the WHO Code.”

ICDC: No, all entries have been legally scrutinized and infringe on the Code. Instead, Nestlé must teach its staff not to impinge on breastfeeding through inappropriate marketing of its cereal products, especially in health facilities. See paragraphs above (esp. under 2.) to understand how Nestlé’s interpretation differs from the Code and WHA resolutions.

d) Look what they’re doing!

Nestlé: “Be vigilant on TV advertising of baby milks in developing countries. We find a significant number of non-Nestlé breast-milk substitutes advertised on TV and other mass media. TV advertising of infant formula itself is also occurring in developing countries such as China.”

ICDC: Nestlé should follow its own advice - send the violations to governments. Also, Nestlé is not exonerated from complying with the Code even if smaller companies do not do so. Monitoring is not the preserve of NGOs. With its battalion of marketing personnel, Nestlé have a ready-made police force – to defeat the competition. In addition, ICDC is willing to accept all verifiable reports of Code violations by all companies.

e) Stopping supplies

Nestlé: “Donations to hospitals in developing countries is still a common practice among some companies, and we are interested in collaborating with organizations whose aim is to stop this practice.”

ICDC: People who live in glass houses should not throw stones, but ICDC welcomes at all times any evidence from all parties, including Nestlé, which can offer information about this practice by any companies and promises to do what it can to hold these companies to account.

f) Passing the buck

*Nestlé: “Raise Code violations at distribution and retail levels directly with the trade”.
(i.e. distributors)”*

ICDC: ICDC sees every trader selling Nestlé products as its agent or distributor unless proven otherwise.

g) Honour and Obey

Nestlé: “Accept the EU Member States’ implementation of the WHO Code, as well as decisions taken by countries such as Canada and USA regarding WHO Code implementation.”

ICDC: As a public interest NGO, IBFAN believes in optimum action for better public health. The Code and resolutions are adopted policy documents striving for the highest obtainable standards and IBFAN will continue to push for their fullest implementation in all countries. It does not accept double standards. While the network respects laws, it will not accept inaction and will always highlight situations where children’s basic rights to health are violated, whether by duty holders such as companies or governments.

ICDC, January 2010

References:

¹ <http://www.babymilk.Nestlé.com/Developping+World/WHO+Code/Nestl%C3%A9+Investigation+of+Reported+Non-Compliance+with+the+International+Code+of+Marketing+of+Breast-m.htm>

² Nestlé's Instructions for Implementation of the WHO International Code for Marketing of Breastmilk Substitutes, July 2004 at page 4.

³ http://www.ibfan.org/code_watch-focus.html

⁴ Resolution WHA 34.22 [1981]

⁵ International Code Article 11.3

⁶ Letter to Industry: Requirements Related to Nutrition Information and Nutrition and Health Claims for Infant Formula accessed in March 31, 2009 from <http://www.inspection.gc.ca/english/fssa/labeti/inform/20070112e.shtml>

⁷ Simmer K., "Longchain polyunsaturated fatty acid supplementation in infants born at term"; the Cochrane Database of Systematic Reviews 2001, Issue 4, Art. No.: CD000376. See also Vallaey's C., "Replacing Mother—Imitating Human Breast Milk in the Laboratory" Cornucopia Institute, January 2008.

⁸ Brennan T.A., et al, "Health industry practices that create conflicts of interest", JAMA, 295:429-433, 2006.

⁹ Nestlé's UN Global Compact cover up, June 2009, www.nestlecritics.org