

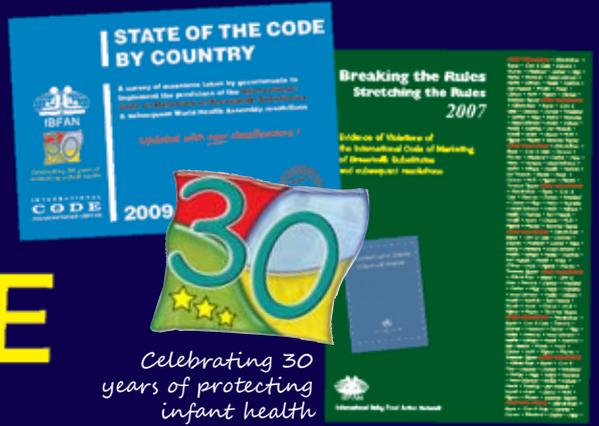


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ICDC LEGAL UPDATE

November 2009



From ICDC's desk in Penang...

30 years of IBFAN

IBFAN celebrated its 30th anniversary on 12 October 2009. For over three decades, the network galvanised public support to protect and promote breastfeeding. Back in 1979, no one would have believed it would take so long. And the job is not finished. The health of babies is still at risk. Yet, without IBFAN, many more would have died and the Code would have been a dead document.

Code implementation

ICDC is proud of its record within the IBFAN network. It has trained hundreds of policy makers on the International Code and subsequent resolutions. Today over 105 countries have introduced the Code into enforceable laws; where these measures are enforced, breastfeeding rates are recovering, slowly but surely.

Training in 2009

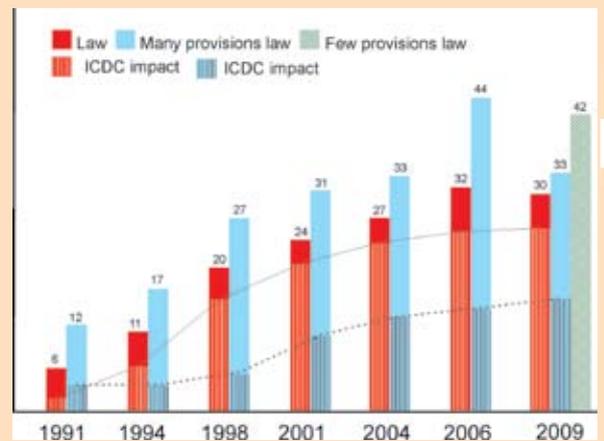
Training and outreach activities took ICDC around the world. It conducted Code training courses at the national and regional levels in Kyrgyzstan (Central Asia - March), Kenya (East and Southern Africa - July), Zambia (Sept) and Egypt (Oct). ICDC also participated in meetings in Geneva (May & Oct), Penang (Aug), Nairobi (Sept), Cairo (Oct) and Al Ain (Nov). As this issue of **Legal Update** goes into circulation, Annelies Allain and Yeong Joo Kean, ICDC's Director and Legal Advisor, will be in Fiji to help the Ministry of Health finalise its draft law and to advocate for its adoption.

On the home front, ICDC's time has been taken up with the publication of resource materials: **The Code and Infant Feeding in Emergencies** with support from GIFA and ENN and **State of the Code by Company 2009** which summarises the performance of 17 baby milk and 12 bottle & teat companies based on our global monitoring report, **Breaking the Rules, Stretching the Rules 2007**. To put countries which are in the process of revising their laws or drafting supporting rules and regulations on the right track, ICDC has prepared a **Basic Framework for Code Implementation**. With the help of our Consultant, Jean-Pierre Allain, the Spanish version is also available. In addition, ICDC hopes to finalise the 11th edition of our flagship publication **Protecting Infant Health – A Health Workers' Guide to the Code** before year end.

In this issue of **Legal Update** - we share the recommendations from a Legal Experts' meeting in Nairobi in **Unravelling the knots in Code implementation**. We show how one company is discredited through its advertising campaign in **Milupa in hot soup with 'Best' formula**. We question the propriety of industry working with hospitals to develop a programme on **Safe food preparation for infants**. We share some alarming figures of the **global baby food market** and highlight **formula pushing in Myanmar**.

The work continues ...

Yes, Code violations still occur – but imagine what the infant and young child feeding scene would have been like without IBFAN? Getting milk companies to comply in toto with the Code and subsequent WHA resolutions may seem like an uphill battle but as Albert Camus once said *the struggle itself is enough to fill one's heart*. Happy birthday IBFAN !



Based on a new survey conducted in 2009, there are 105 countries which implemented the Code as law. ICDC training has had positive impact on a number of these laws as indicated by the striped red and blue columns.

In 2009, a new category ('Few provisions law') was created for those countries whose laws do not take the WHA resolutions into account. Most of the EU countries were downgraded into this category.



Without protection, promoting breastfeeding is an uphill battle, an impossible task.

Raja Abdul Razak, Publication Support

Unravelling the knots in Code implementation

Companies use a variety of tactics to undermine the law making process either during the drafting and adoption phase or after the laws are in place. Threats that the laws may be contrary to international trade agreements or undermine human rights treaties, or interfere with a company's right to carry out its business are not uncommon. New marketing practices surface all the time and are designed to stretch Code provisions to the limit.

Realising the urgent need to address these challenges, ICDC joined a group of legal experts in Nairobi in July 2009 to unravel the difficult knots often encountered during Code implementation.

Legal Update now shares a brief summary of the consensus and recommendations from the meeting. For easy reading, they are framed as FAQs. Readers wishing to get a full account of the issues discussed can write to ICDC.

1. *Toddler or growing up milks drive the growth of the baby food market and indirectly promote formula milks within its brand range. Are they covered by the scope of the Code?*

A breastmilk substitute as defined under Code Article 2 and read together with resolution WHA 58.32 includes any milk product marketed as suitable for feeding a baby up to the age of 24 months or beyond. The words "or beyond" could be interpreted to mean children up to 3 years. As long as a product is indicated as suitable for use for children below 2 years of age, it would not matter if older children are used in the promotion of growing-up milks.

2. *Should complementary foods (CFs) be regulated to ensure that their promotion does not undermine exclusive and sustained breastfeeding?*

CFs should be regulated to ensure that they are not represented as suitable for use below the age of six months. Promotion of CFs targeted at younger babies and carried out in health care facilities where there is implicit product endorsement must be stopped relying on: a) Code Preambles which state that "every effort should be made to use locally available foods" and that "CFs should not be used as breastmilk substitutes"; b) resolution WHA39.28 [1986] and WHA 49.15[1996] which recommend that CFs should not be marketed or used in ways that undermine exclusive or sustained breastfeeding and c) Global Strategy on IYCF (endorsed in WHA 55.25[2002]) which emphasises the use of home and community based technologies to enhance nutrient density, bioavailability and micronutrient content of local foods and sound & culture specific nutrition counselling recommending widest use of indigenous foodstuffs.

3. *Do the restrictions under Code Article 4.2 (information and education) and Article 9.2 (labelling) infringe upon the rights of companies as trademark (TM) owners?*

A trademark is any word, name, symbol, design or device or slogan that is used to identify and distinguish one's goods and services from that of another. TM registration gives the registered owner the right to exclude other parties from using the registered TM but it does not confer on the

registered TM owner the right to use the mark. The use of a registered trademark of breastmilk substitutes is subject to national laws which implement the Code.

4. *Is there any basis to the argument that corporations have rights which inhibit Code implementation e.g. the right to free expression and the right to provide information to mothers?*

There can sometimes be conflicting rights and when this happens, recognition must be given to the special protection for particularly vulnerable populations, such as women and children. The Covenant on Civil and Political Rights (CPR) expressly states that freedom of expression may be subject to certain restrictions, among them respect for rights of others.

5. *Is the Code a barrier to trade?*

The Code and subsequent resolutions are likely to be considered an international standard according to the Agreement on Technical Barriers to Trade (TBT). Under TBT when a law is adopted in conformity with relevant international standards, it is not viewed as an unnecessary obstacle to trade and countries are granted legal cover or a "safe harbour" from challenges. TBT also recognises that no country should be prevented from taking measures necessary to ensure the quality of its exports, or for the protection of human, animal or plant life or health, or for the prevention of deceptive practices

Milupa in hot soup with 'Best Formula'

An ad which we received not too long ago startled us by a claim which read *After 50 years of research into breastmilk, our experts have developed IMMUNOFORTIS ... This unique formulation helps support your baby's natural immune system, making it the best follow-on milk.* The ad shows a smiling and tranquil looking mother with her arms wrapped around her baby. It is obvious that the image projected is one of protection. The 'IMMUNOFORTIS shield', visible in the ad, reinforces this image.

Acting on a complaint filed by Baby Milk Action, the UK IBFAN group, the Advertising Standards Authority (ASA) found the advertisement had, among other things, not provided substantiation to back its claim that, of all the follow-on milks available, Aptamil supported the immune system the best. The ad had breached the Advertising Practice Code clauses on Substantiation, Truthfulness and Comparisons. *Legal Update* looks forward to improved practices by Milupa following this ASA ruling.



The discredited Milupa ad in the UK



In the United Arab Emirates, a similar ad was used on a different Milupa product. ICDC is unaware of a similar channel for complaint. In the absence of a Code-based law, is there any other shaming device which the active breastfeeding group in the UAE can rely on to compel Milupa to behave?

Safe food preparation for infants – are the milk nurses back ? Pilot projects in Peru and Indonesia !

Powdered infant formula (PIF) is not sterile – harmful organisms like *Enterobacter sakazakii* and Salmonella may enter during production. To minimise health hazards, the WHO Guidelines on Safe preparation, storage and handling of PIF (developed pursuant to resolution WHA 58.32 [2005]) describe how it can be prepared more safely. So, for infants who have to be fed with PIF, who is to ensure that these Guidelines are adhered to ?

Articles 6.4 and 6.5 of the International Code prohibit the use of company-sponsored service representatives in health care facilities and require that formula feeding be demonstrated only by health workers if necessary. Information should only be given to mothers who need to formula feed and that information should include a clear explanation of the hazards of improper use.

Breastfeeding advocates fought hard to introduce these provisions into the Code to keep company-sponsored personnel out of hospital territory. Despite such clear wording, the International Hospital Federation (IHF) announced in May 2009 a partnership with the International Association of Infant Formula Manufacturers (IFM) to "undertake field missions in Peru and Indonesia to address patient safety ... with the aim to develop a patient safety-oriented programme for safe food preparation and feeding practices in hospital settings."

This announcement is cause for worry. If the IFM were allowed such missions, says ICDC Director Annelies Allain, "it will be like inviting the mothercraft nurses or milk nurses back into hospitals through the front door."

As IFM members are known Code violators, putting them in bed with health professionals is very likely to result in more Code violations in hospitals. WHA resolutions 49.15 (1996) and 55.25 [2005] warn against such conflicts of interest.



Hospitals now have WHO Guidelines to help them with safe preparation, storage and handling of formula. There is no need to work with companies. For the protection of infant health, hospital doors should be closed to industry at all times.

Cartoon: Dept. of Health Thailand & UNICEF Thailand.

Under the Global Strategy on Infant and Young Child Feeding, baby milk companies' roles are limited to ensuring product quality and compliance with the Code. Hospitals everywhere should be wary of joining forces with industry to iron out a problem that began at the factory floor. Roping in hospitals to ensure the safe use of products post-production is like closing the stable doors after the horses have bolted.

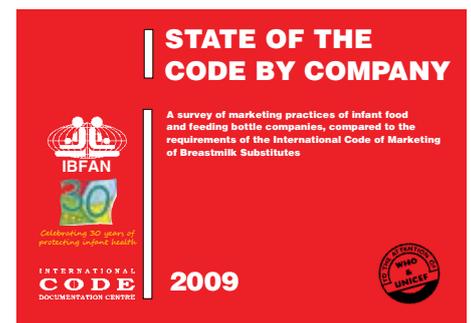
Growing baby food market feeds acquisitions and aggression

The slight increase in exclusive breastfeeding rates in many regions over the last decade is matched disproportionately by a growing baby food market. The business rose to US\$31 billion in retail sales value in 2008, an increase of 10.5% from the previous year.

Two reports from *Markets & Markets* (July 2009) and *Euromonitor* (Sept 2008) on the global baby food market, forecast upward trends in sales – they estimate that baby foods will be worth between US\$37.6 billion to US\$42.7 billion in sales by 2014. In the Asia-Pacific region which accounts for 31 percent of global sales, this upsurge is expected mainly in China and Vietnam where fast growing economies have resulted in hectic lifestyles, increased purchasing power and a growing infatuation with Western packaged and processed baby food. Revenue from sales in these 'market hotspots' are a big boost for the mostly American and European milk companies, whose sales on home turf have dwindled because of low birth rates and static market conditions.

The fastest way to increase profits is to buy an existing popular product line. Acquisitions are the trend for expansion. Unfortunately, aggressive promotion increases with size.

In 2007, Nestlé bought Gerber for \$5.5 billion to boost its presence in the US market. The baby food giant, with an estimated 40% of the world market ranks as worst Code violator.



This ICDC chart ranks companies according to estimated market share and grades their performance vis-à-vis the International Code.

This position, however, may soon be taken over by French company Danone, producers of Blédina. In 2007, Danone acquired all of Dutch NUMICO and thus in one fell swoop acquired a cluster of Code-violating companies around the world. Infant foods now constitute 18.4% of Danone's business and €2.8 billion of its consolidated sales.

The marketing reports reveal that companies play up the 'fear factor' by focusing on problems like scarcity of time to prepare homemade baby food, 'non-lactation problems' in mothers and fear of 'incomplete' nutrition.

Commercial baby foods are largely unnecessary, and market forecasts can still be proven wrong !

To buck the trend, governments need to regulate the baby food market through Code-based laws and to enforce them effectively. This way, mothers can be empowered to make infant feeding decisions free of commercial influence. Given objective information and the necessary support, mothers will be able to breastfeed optimally and to provide timely and adequate complementary foods using nutrient-rich local ingredients.

Pushing formula in Myanmar

ICDC recently uncovered information from Myanmar which shows how one company, United Pharma, is breaking all the rules. The company indulges in direct advertising to promote. United Pharma uses local celebrities and their babies to market their *Bright Mind System* range of infant formulas and toddler milks. Although the company is careful not to show an actual can of branded infant formula for 0-6 months, they used instead, a brandless 'stand-in' product designated as 'Stage 1'. The Code has yet to be implemented as law in Myanmar and there are no foreseeable plans to do so.



Our contacts in Myanmar requested us to highlight to the outside world what United Pharma is doing so that pressure can be brought to bear on the company. ICDC has written to United Pharma in both Myanmar and the Philippines and urges you to do the same.

Register your protest against this advertising which violates the International Code. Write to United Pharma. The address of their headquarters is Unilab Nutritionals Inc., 4/F, Bonaventure Plaza, Ortigas Avenue, Greenhills, San Juan, Metro Manila, Philippines.



Actual can of infant formula is not branded, but the inference is clear.



Actress Nandar Hlaing and husband Zay Thiha say they want the future life of their beloved daughter to sparkle and glitter with the Bright Mind System.



Myanmar pop star R. Zarni, his wife One and baby daughter appear in this Hi-Nulac ad. The ad starts off with a promise of a 'sparkling new generation' for the couple. Next, a list of (unproven) claims are rattled off: Presence of DHA boosts brain and vision development; Nucleotides for building immunity; Taurine, iron, iodine and choline for better intelligence and helps early learning.



This ad entitled *For the Shining Stars of the Future* features Myanmar actress Hlaing Phyu Phyu Tun and her daughters. Although the ad said Hlaing breastfed, she also fed her baby Hi-Nulac for "extra complementary nutrition on top of breastmilk for better optimal brain and body growth". Hlaing is quoted as saying "I want the best for my daughter".



This ad stops short of actually promoting Stage 1 infant formula but uses a baby instead to represent the product. The phrase *Born to Excel* appears in the first two columns above the babies – Excel is part of the brand name of Stage 1 and Stage 2 formulas (Hi-Nulac Excel). *Grow up with Bright*, seen in the third and fourth columns, refers to the name of United Pharma's growing-up milks – Bright.