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# ICDC LEGAL UPDATE

June 2010



## From ICDC's desk in Penang...

Aside from much travel for Code training and advocacy, a good part of last year was taken up by the revamp of ICDC's flagship publication *Protecting Infant Health: A Health Workers Guide to the International Code*. This new 11th edition was completely revised and updated, both in content and in design. Copies were widely distributed by mail to IBFAN groups and at the World Health Assembly.

Preparatory work for *Breaking the Rules 2010* (BTR 2010) began late February. It is a huge task which requires much analysis and research. Some highlights from BTR 2010 were used → for advocacy at the World Health Assembly (WHA).

The BTR 2010, however, will not be finished until the end of the year.

### A new resolution!

2010 is a reporting year for Infant and Young Child Nutrition at WHA. As usual, IBFAN was there with a small team including ICDC's director. They advocated for strengthening a resolution forwarded by the Executive Board. Many of the amendments tabled by concerned governments were adopted after wrangles in a drafting committee. One of the most important recommendations was: *"to end inappropriate promotion of food for infants and young children and to ensure that nutrition and health claims shall not be permitted for foods for infants and young children, except where specifically provided for, in relevant Codex Alimentarius standards or national legislation"*. The subjective word *"inappropriate"* was inserted during drafting, weakening the intent of the original amendment which was to *"end all promotion ..."*

Another operative paragraph was the call ... *"upon infant food manufacturers and distributors to comply fully with their responsibilities under the International Code of Marketing of Breastmilk Substitutes and subsequent relevant World Health Assembly resolutions"*. The infant food industry which was present at WHA with more and more aggressive lobbyists than ever before, certainly did not like this part.

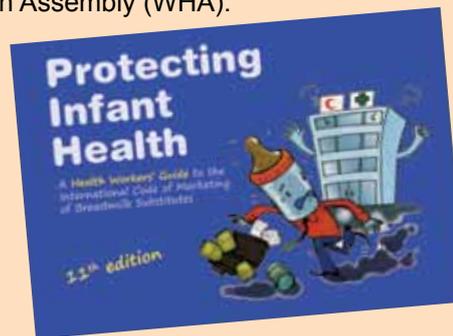
Countries expressed concern over the *ineffectiveness of voluntary measures* to ensure compliance with the Code. The Director General was asked to support *"efforts to develop and/or strengthen legislative, regulatory or other effective measures to control marketing of breastmilk substitutes."*

❖ Link to the resolution [http://apps.who.int/gb/ebwha/pdf\\_files/WHA63/A63\\_R23-en.pdf](http://apps.who.int/gb/ebwha/pdf_files/WHA63/A63_R23-en.pdf)

Have a pleasant read! Raja Abdul Razak, Publication Support

## HIGHLIGHTS

- Hero concedes to label changes in the Dominican Republic
- No more free supplies for Hong Kong
- Two thumbs up for Pakistan and Fiji!
- Breastfeeding Older Children
- Bisphenol A banned in three countries
- Troublemaker Mead Johnson
- Latest on DHA
- Another WHO Code: debated in Madrid, adopted in Geneva



## Hero baby concedes to label changes in the Dominican Republic

A 'new' company which has recently appeared quite frequently in our Code monitoring database is Hero, which started as jam makers in Switzerland some 100 years ago. Over the past few years, it began to acquire small baby food companies in Europe and the US, e.g. Galactina, Adapta, Céralino, Semper, Organix and Beechnut. Recent forays into Africa/Middle East and Turkey & Central Asia have turned the small Hero into a global enterprise. As if to test its new strength, it has taken to challenging the Code, as a recent incident in Dominican Republic shows.

### Challenge in the Dominican Republic

In the Dominican Republic, the Code has been implemented as a strong law since 1995.

In 2009, the *Comisión Nacional Lactancia Materna* (CNLM) which administers the law, objected to the registration of *Hero Baby* as a formula product brand name. CNLM felt that Hero's formula should be distinguishable from other Hero products such as complementary foods, which are also branded *Hero Baby*. Authorities confiscated the product at points of sale. Angered by this, Hero challenged the decision using trade and intellectual property arguments. Hero complained of "discriminatory and excessive treatment" and requested corrective action through the country's Ministry of Trade and Industry. With backing from ICDC, CNLM stood firm and was able to show that its action was legally justifiable. [Registered trademarks do not give the owner the right to use them indiscriminately; all a registered trademark does, is prevent others from using it.] Hero retreated and agreed to re-label its formula products.

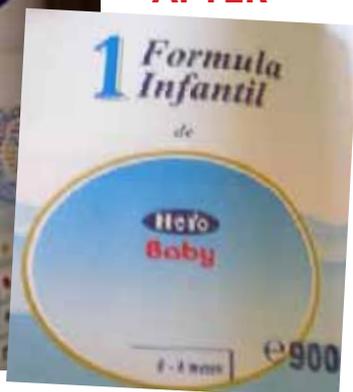
Pictures show the cosmetic changes Hero made to its infant formula and follow-on formula. The plain blue label only shows the product type and age indication. The company logo has been reduced in size and gone is the image of the feeding bottle from the infant formula label.

Minor but significant changes and a victory for the protection of breastfeeding against commercial promotion. ICDC congratulates CNLM for its vigilance!

### BEFORE



### AFTER



## No more free supplies

This is not an April Fool's joke. After years of lobbying by breastfeeding advocates, the Hospital Authority (HA) in Hong Kong decided to stop hospitals from accepting free formula supplies as of 1st April 2010. The Secretary for Food and Health announced that hospitals under the Hospital Authority will begin to purchase infant formula through a transparent tender system.

This brings Hong Kong, a Special Administrative Region within China, in line with international recommendations.

[A 1994 WHA resolution calls for an end to free and low cost supplies in hospitals; an earlier resolution from 1986 recommends that the small amounts of breastmilk substitutes needed for the minority of infants who require them should be bought.]

Under the new system, tender documents require companies to comply with the provisions of the International Code and subsequent World Health Assembly Resolutions within HA facilities and to follow quality standards set by the Codex Alimentarius Commission or some other national or international standard. Nutrition and health claims on formula products are specifically prohibited.

### Cutting the umbilical cord

This bold move by the Hospital Authority cuts the metaphorical umbilical cord that nurtures the dependency of hospitals and health workers on companies. Since the majority of mothers continue with the brand they were given in hospitals because of implied medical endorsement, free supplies are worthwhile investments that will be recovered through future sales.

The HA decision will bring down a primary barrier to the promotion of breastfeeding, giving the practice a better chance among Chinese mothers. Dr. Patricia Ip of BFHI HK Association, one of the prime movers behind this important change in hospital policy points out, "This HA decision removes a public institution from obviously violating the Code, a major barrier to becoming Baby-Friendly."

In addition to the move by HA, the Department of Health in Hong Kong also has the go ahead to look at how other provisions the Code can be implemented. ICDC is providing some of the resource materials. Watch this space for more developments from Hong Kong.



Boxes and boxes of teats used to accompany the distribution of free formula in Hong Kong. There is enough for every newborn.

## Two thumbs up for Pakistan and Fiji!

ICDC is pleased to announce that two countries have moved up on the IBFAN scale for Code implementation over the past few months.

First, there is **Pakistan**. The country gets upgraded from its current category 2 (many provisions law) in the *ICDC State of the Code by Country 2009* to category 1. Although the *Protection of Breastfeeding and Child Nutrition Ordinance* was promulgated in 2002, the law was silent on many important aspects of marketing and the administration and enforcement of the law. In October 2009, exercising powers delegated to it under the Ordinance, the Ministry of Health issued the *Protection of Breastfeeding Rules*.



The 2009 Rules are exemplary in the way they shore up existing weaknesses in the Ordinance. For example, under the Ordinance, at least one industry member may sit on the National Infant Feeding Board. For those concerned about conflicts of interest, this is one Board member too many (bearing in mind the high level of influence industry wields in the echelons of power.) The Rules neutralise potential harm from spreading by barring all other members of the Board from having any direct or indirect financial interest in baby foods and other products covered by the Ordinance.

The Rules also contain detailed provisions curtailing promotion in the areas of labelling, information and education and health facilities – aspects which are only cursorily dealt with under the Ordinance. *Legal Update* hails the movers and drafters of the 2009 Rules. It took 7 years but it's a job well done.



Then there is **Fiji**. After years of false starts, ICDC was commissioned in November 2009 to draft the law for Fiji. Following the country's Plan

of Action for Nutrition, the draft was fast-tracked into law in one of the quickest legislative processes ever seen. This was possible because of the political will and support from the Ministry of Health. The ground work was laid out by an ICDC alumnus and a team of supportive health professionals and government officials, including lawyers from the Solicitor-General's office.

*The Marketing Controls (Foods for Infants and Young Children) Regulations 2010* were approved by the Cabinet in February and gazetted three months later in May 2010.

The Regulations, adopted as subsidiary legislation under the country's Food Safety Act, are comprehensive and render promotion of commercial baby foods and related products illegal.

They will help place the Government of Fiji on track for the achievement of the Millennium Development Goals. Fiji is now in category 1 in the IBFAN scale – a giant leap forward, in a matter of months, from its former “draft” state. Where there is a will, there is a way. Congratulations, Fiji!

## Beyond two years

While the rest of world bemoans poor breastfeeding rates and practices, Ann Sinnott's book, *Breastfeeding Older Children*, looks at the inverse reality of sustained breastfeeding. Not just for two years but well beyond. She calls sustained breastfeeding a hidden phenomenon and says mothers do not draw attention to the fact that they are breastfeeding older children because it is an oft-vilified practice.

Ann writes from her own experience and that of the 2,040 families (48 countries, 4,038 children) who took part in her e-survey. She explores the lack of scientific evidence for common criticisms of the practice. Her 294-page book includes many people's voices challenging the myths and prejudices that surround sustained breastfeeding and reveals why so many mothers are willing to swim against the cultural tide and risk public censure to breastfeed their older children.



Topics examined are fathers' reactions, impact on couple relationships, health professionals' undermining attitudes, neuroscience findings, challenges in the work place and initiatives for change. It draws attention to glaring research gaps and makes a convincing case for sustained breastfeeding quite simply because there are irrefutable advantages and no basis to stop.

The book contends that sustained breastfeeding is a feminist issue and a woman's right. It concludes that it is time to open a new frontier for feminist action – including in the workplace.

In a detailed Appendix, *Breastfeeding Older Children* presents realities of artificial feeding and its risks, a discourse that is useful for making feeding decisions at any stage. It anchors the book to the International Code of Marketing of Breastmilk Substitutes which seeks not only to give women the freedom to make informed choices without commercial influence, but facilitates the fulfillment of the child's right to the best attainable standard of health.

## Bisphenol A banned in three countries

Bisphenol A (BPA) in polycarbonate feeding bottles has been banned in Canada, Denmark and France. Belgium and many American States are also considering a ban. BPA is believed to cause impaired brain function leading to learning disabilities, increased incidence of certain types of cancer and declining sperm counts. Babies can be affected even at very low doses.

Bisphenol A is also used for the lining inside formula tins.

## Troublemaker Mead Johnson

As Mead Johnson begins life as a company independent of its former owner, Bristol-Myers Squibb, three noteworthy episodes cement the company's dubious reputation as a troublemaker. Find out more about the product launch that never was, the promotion campaign which backfired and a rogue product in the Philippines.

### Mead Johnson's chocolate milk misstep

Mead Johnson thought it had a winner in its hands when it launched a chocolate flavoured milk this year, which the company called "toddler formula". Employing hard sell tactics, Mead Johnson trumpeted the following claim: "As your child grows from an infant to a toddler, he's probably becoming pickier about what he eats. Now more than ever, ensuring that he gets complete nutrition can be a challenge. That's why we created new *Enfagrow Premium Chocolate with Triple Health Guard*. With over 25 nutrients, Omega-3 DHA, prebiotics, and a great tasting chocolate flavor he'll love, you can help be sure he's getting the nutrition he still needs even after he outgrows infant formula." The elation was short lived, however.

In a Business News report dated June 10, Mead Johnson announced that it would discontinue production and gradually, over the coming weeks, phase out the new chocolate toddler formula. The vanilla flavoured variety will continue. Mead Johnson blamed *misunderstanding and mischaracterisation over the proper role [of] Enfagrow Premium chocolate formula* for the failure of the product. It is more likely that consumer outrage over a 'chocolate formula' and the effect such a high-sugar drink would have on children's health that resulted in its deserved end.

There is no need for follow-on milks. WHO recommends continued breastfeeding for 2 years and beyond, but babies who are not breastfed after 6 months can go on to have formula or other animal milk.

### Millions for misleading ads paid to competitors rather than the real victims

Mead Johnson was ordered to pay US\$13.5m in damages to a competitor, PBM, after a US court found it guilty of misleading advertising. *Enfamil LIPIL* was made to sound nutritionally superior to store formulas by PBM. It is the third time Mead Johnson has been sued for false advertising and in each case, it has admitted wrongdoing.

*Legal Update feels the real victims are the consumers who were and continue to be misled by all formula promoters. Who compensates them?*



Cultivating bad habits – Mead Johnson's **Enfagrow** in the US has the solution for toddlers who do not like the taste of milk – flavour it with chocolate! Never mind concerns about child obesity.

### Philippines: No approval but Mead Johnson sells it anyway

The sale of all infant milks in the Philippines is governed by the Bureau of Food and Drugs (BFAD). Companies require permits for each product before they can be placed on supermarket shelves.

On 28 March 2010, the permit for a Mead Johnson product expired, and BFAD refused to issue a fresh permit to Mead Johnson on the grounds that the product did not comply with Codex requirements for fat levels for children aged 1 year and above. Yet Mead Johnson continues to sell the product, and does so with claims which are illegal.



### Latest on DHA claims

In a recent letter to Baby Milk Action, Ricardo Uauy, chair of the WHO/FAO expert committee on fats says:

*"The evidence for effectiveness of DHA addition to formula for term babies in terms of improved long term mental development is weak at best. Data from a population based very large study (n=800) per group recently completed in Mexico does not support a benefit from DHA supplementation on measures of mental development at 18 to 24 months. The studies that demonstrate effects are smaller in numbers and few, if any, show effects beyond 4 years of age. This issue remains open from a research point of view, but until stronger data are available I would opt for a view that the effects of DHA on mental development are not sufficiently documented to establish public health policy. ... A claim that "DHA containing formula is closer to human milk composition", although factually true, is misleading in terms suggesting it parallels the benefits of human milk feeding."*

### WHO Code of Practice on the International Recruitment of Health Personnel

ICDC's director was asked to speak at the Health Worker Migration Global Policy Advisory Council Meeting held in Madrid a week before the WHA. The Council, chaired by the rightly famous Mary Robinson, was hoping to see its Code of Practice adopted at the Assembly in Geneva (it was) and wanted to learn more about WHO's 'first Code' on the Marketing of Breastmilk Substitutes. How was it passed, what are the politics at the Assembly and how did IBFAN keep the Code alive and effective? The ICDC director gave them a brief history ending with the warning: "don't think you have won the war once a Code gets adopted. That is only one battle; the next is to make it happen in all countries." For both Codes, the commitment and engagement of NGOs is essential.