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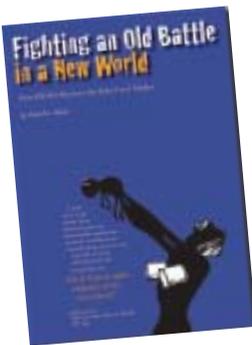
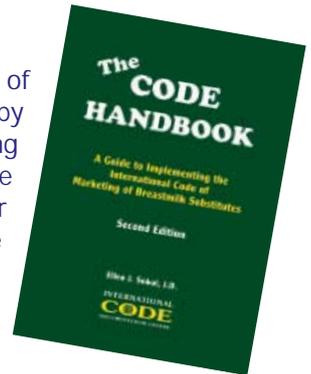
ICDC LEGAL UPDATE

September 2005



From ICDC's desk in Penang:

Since our March Legal Update, the ICDC office has been busy with the Second Edition of ICDC's main teaching tool: **"The Code Handbook"**. The bulk of the writing was done by Ellen Sokol, ICDC's former Legal Advisor, but much office time was needed in conceptualising and steering the project. The layout, design, research, editing and proof-reading were done by ICDC. Many IBFANers contributed by responding swiftly and resourcefully to our queries for information, updates or clarifications. We thank those involved. The Code Handbook, Second Edition is now at the printers and we can breathe again.



Another book finally 'born' after a 3-year incubation period was **"Fighting an Old Battle in a New World"** by Annelies. It was published in May 2005 by the Dag Hammarskjöld Foundation as part of their Development Dialogue series. Annelies was asked to write it as a sequel to **"IBFAN: On the Cutting Edge"**, her first contribution to this series. **"Fighting an Old Battle"** focuses on Code monitoring and examines the struggle by IBFAN to enforce corporate compliance with the Code as well as to move apathetic international bureaucracies to act in favour of child health. ICDC hopes it will become a source of guidance and inspiration for all – lest we forget.

Contact us for details on how to get your personal copy of these books.

This year's World Health Assembly generated plenty of activities for ICDC and other IBFAN offices. A new resolution was adopted and we were proud to hear a number of ICDC alumni attending the Assembly as national delegates speak out in favour of the Resolution. Find out at page 3 what the resolution entails.

In between the publications and the Assembly, we conducted one regional training course on Code implementation for the CIS and the Baltics in Armenia, jointly with IBFAN Europe and UNICEF; and a national monitoring course for the Philippines, hosted by UNICEF Manila.

In this issue, we also bring you news from Latvia where an exciting Court case involving the Code was fought. And we share a rare insight from a government official in Botswana who succeeded in getting the country to adopt the best ever regulations based on the Code in record time. For these and more, read on!

Yeong Joo Kean & Annelies Allain

HIGHLIGHTS

1. **A Case of Right vs. Might - Lawsuit in Latvia**
2. **Botswana Adopts Regulations - The Inside Story**
3. **Brand New Resolution on Infant and Young Child Nutrition at WHA**
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5. **From Australia - A\$37 Billion of Breastmilk!**
6. **Health Committee in New Zealand Recommends Action on Code**
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8. **Malaysian NGO Rebuffs Companies**
9. **NEWSFLASH – Laws in Mongolia & Malawi; Honduras in the pipeline**

1. A Case of Right Vs Might - Lawsuit in Latvia

Many IBFAN groups take on the responsibility to monitor pursuant to Article 11 of the International Code. One such group is the Latvian Breastfeeding Promotion and Protection Association (LKEVAB). Its action prompted a backlash and a chain of events which we relate in this issue of Legal Update because the group deserves praise for standing firm in the face of adversity.

LKEVAB discovered during a monitoring exercise that the Latvian Paediatric Association (LPA) had endorsed a Nestlé hypoallergenic follow-on formula – Nan HA 2 – by allowing the words – “IESAKA LATVIJAS PEDIATRU ASOCIĀCIJA” or “Recommended by the Latvian Paediatric Association (LPA)” to be printed on the label.

In September 2004, LKEVAB sent a letter to the President of the LPA, Ministry of Health, Nestlé and other medical associations in the country to complain about the product endorsement. The letter explained why such product endorsement was objectionable, how it constitutes illegal advertising and set out the relevant article of the Latvian Regulations which forbids the idealisation of products. LKEVAB also relied on the International Code and subsequent World Health Assembly Resolutions to stress the significant role of health professionals in the promotion, protection and support of breastfeeding. LKEVAB further alleged that LPA breached professional ethics by recommending a formula product and through its co-operation with Nestlé, aroused suspicion of corruption.

This strongly-worded letter provoked the ire of the President of the LPA and when LKEVAB refused to retract the letter, he filed a defamation suit in the District Court of Riga against LKEVAB for injuring LPA's honour and reputation.



The product endorsement shown here was removed just prior to the trial

The case was heard in January 2005 and in May after evaluating the evidence, the Court ruled that the LPA's case was unfounded and dismissed the suit. The Court relied, among other briefs, on a letter by UNICEF which made 3 salient points on the Code:

- 1) Product endorsement was incompatible with Article 5 because it has the effect of encouraging mothers or parents to choose a particular brand product.
- 2) A professional association of health workers is obliged under Article 7.1 to encourage and protect breastfeeding and product endorsement is incompatible with this obligation.
- 3) Payment or any other form of benefit given in exchange for product endorsement, if any, violates Article 7.3 of the Code which prohibits financial or material inducements to health workers.

LPA has filed an appeal. For this round at least, victory belongs to LKEVAB, represented at the trial by Ms Inga Kacevska, an attorney from the legal firm of Skudra & Udriņš.



Attorney Inga Kacevska explaining the Latvia case at the Sub-Regional Training Course in Yerevan in July. Ms Kacevska's firm has a record of taking on community and pro bono work and represented LKEVAB at a discounted rate.



2. Botswana Adopts a Law - The Inside Story

On 17 June 2005, the Government of Botswana published the Marketing of Foods for Infants and Young Children Regulations pursuant to the country's Food Control Act. The Regulations, adopted in record time are comprehensive and far-reaching. The following are excerpts from an exclusive interview with Mr HHT Tarimo, Head of Food Control, Department of Public Health, Ministry of Health and Secretary to the National Food Control Board, regarding the process of Code implementation in Botswana. It is hoped that the Botswana experience will spur on neighbouring countries which are at draft stage to adopt their own laws.

LU: Prior to the adoption of the present Regulations, Botswana had a voluntary Code and there were several earlier attempts to enact a law. Can you share with us how the current set of regulations got started?

HHT: Botswana's attendance at the June 2002 Code Monitoring training workshop in Mbabane, Swaziland, organised by IBFAN Africa and facilitated by IBFAN-ICDC, was the catalyst. It really inspired us to accelerate the adoption of the Code into national law.

LU: ICDC received a number of interesting Code violations from Botswana. How was monitoring carried out? Did it help the legislative process?

HHT: We started monitoring violations after the Mbabane Workshop. We also organised a national Code monitoring training workshop in 2002 for 20 participants followed by Code monitoring study tours in Zimbabwe and Tanzania. By 2003, hundreds of Code violations had been

collected nationwide but effective follow-up interventions were hindered. It became evident that there was no way to stop ongoing violations without a law. The draft National Plan of Action for Children and other national policy documents all call for effective Code compliance. There was also pressure from the National Food Control Board to have regulations in place. Our involvement in the debate on the WHA resolution on *E Sakazakii* sped up finalisation of the Regulations as we needed to adequately address emerging issues on infant feeding.

LU: Did you get support from outside your Ministry?

HHTT: We had to work with the Legislative Drafting Division in the Attorney General's (AG) Chambers. The Division has guidelines which reduce the time taken to draft legislation. Upon receipt of instructions from the Ministry in 2003, the Division started on an intense analysis of the International Code itself and subsequent WHA resolutions to 'domesticate' these instruments. The Division relied heavily on the "Understanding the Code" document as well as information on IBFAN, WHO and UNICEF websites. Apart from the AG's Chambers, we also sought advice from UNICEF and IBFAN-ICDC. There was very good teamwork between the Legislative Drafting Division and the Food Control Board. Meetings were attended as scheduled, discussions were productive and requests for further information were honoured promptly. The total com-

mitment and support of our Ministry of Health, UNICEF and ICDC were the major forces behind the success of our Plan.

LU: The Regulations have innovative provisions which are not Code-based but which are tailored to suit the country's social framework. What inspired those?

HHTT: Consultations with stakeholders and field visits played a crucial role in tailoring the Code to address pertinent issues not particularly catered for in the International Code. These include the prohibition of selling expired foods, the need to formalise monitoring tasks and prohibition of practices that create an association between manufacturers or distributors of baby foods and breastfeeding.

LU: You have contributed much to the Code cause since 2002. Do you have a vision you wish to share?

HHTT: Having the law published is just a milestone in our strategic plan. Dissemination and effective implementation of the new regulations is our current goal but harmonisation of Code implementation in the whole region should be the next thing to consider.

LU: Thank you and good luck with enforcement. Once again, our congratulations.

Copies of the Botswana Regulations can be obtained from ICDC.

3. Brand New Resolution on Infant and Young Child Nutrition at WHA

On 28 May 2005, the 58th World Health Assembly passed Resolution WHA 58.32 to tackle the issue of intrinsic contamination of powdered formula by the *Enterobacter sakazakii* bacterium. The Assembly debated at length about the right of parents and health workers to be informed of such health risks; it also discussed marketing tactics which use health and nutrition claims and the whole issue of sponsorship.

Past issues of *Legal Update* highlighted the many hurdles encountered. First, the Resolution was deferred because industrialised countries argued on points of procedure. Then, it was literally hijacked by WHO's Food Safety Unit in a move to push the contamination issue to the Codex Alimentarius Commission.

By the time the draft Resolution was resurrected for the May Assembly, tension was riding high. The situation was made murkier by attacks from antagonistic factions in the US. One article alleged that the resolution was an anti-woman move which could lead to a ban of infant formula and force women out of the workplace. Another article warned that the big losers would be the world's poor. It claimed that infant formula is a time-saving technology helping to boost African economies. There were calls for political powers

to reform the WHO for its "latest absurdity" and "for coming under the influence of radical health and environmental activists, who push a bitterly anti-enterprise ideology."

Strong support from African delegates won the day. 49 countries spoke with one voice. They understood that breastfeeding will reduce infant mortality and morbidity in their countries. Resistance by industrialised countries meant that several compromises had to be made but the final text of the resolution still was a victory for babies.

The Resolution requires Member States to take action:

- ✓ to alert the public about the danger of intrinsic contamination of powdered infant formula by *Enterobacter sakazakii* and other pathogens;
- ✓ to ensure that nutrition and health claims are not permitted for breastmilk substitutes unless allowed under national law;
- ✓ to ensure that financial support and other incentives for programmes and health professionals working on infant and young-child health do not create conflicts of interest;
- ✓ to ensure that research contains declarations of conflicts of interest and is subject to independent peer review.

The controversy surrounding the Resolution and the 17 months it took for it to be adopted reveal what was really at stake: the direct impact on the multi-billion dollar baby food industry.

As in other years, ICDC joined other IBFAN members in Geneva to campaign for the Resolution. The challenge now is to achieve implementation at the national level.

4. End of the Road in Sight? - Supplies in Hong Kong

After years of advocacy by the Baby Friendly Hospital Initiative Hong Kong Association (BFHIHKA), the Hospital Authority in Hong Kong intends to stop receiving free supplies of formula within two years, reported the Hong Kong Chinese newspaper, Ming Pao, on 31 July 2005. Dr. Cheng Man-yung, Deputy Director of the Hospital Authority, said in a press conference during World Breastfeeding Week, that the practice weakens hospitals' motivation to reduce formula feeding and misleads people to think formula is the normal and ideal method of feeding. Hong Kong's extremely low breastfeeding rates bear this out. Once supplies are stopped, the Hospital Authority will buy formula for those mothers who decide not to breastfeed. The cost is thought to be less than 1% of the total annual budget of the Hospital Authority.

5. From Australia - A\$37 billion of Breastmilk!

A NSW Health report, which will be the basis of a new breastfeeding policy, lists economic, health and environmental benefits of breastfeeding. It uses the analysis done by Dr. Julie Smith of the Australian National University. She calculated that mothers in Australia produce 34 million litres of breastmilk a year and estimated the "capital stock value" (the entire present and future worth) of breastfeeding to be 37 billion Australian dollars. Were mothers to breastfeed according to WHO recommendations, that value would increase to 100 billion dollars.

 **"Looking at the economics helps support the argument of why we need to encourage and support (breastfeeding); it's incredibly expensive to feed babies formula. Then there's the cost of healthcare services that breastfeeding prevents."**
Liz Develin, manager of nutrition and physical activity at NSW Health, quoted in Sydney Morning Herald.

6. Health Committee in New Zealand Recommends Action on Code

In June 2005, the Health Select Committee of New Zealand released a report on breastfeeding rights. Voicing the belief that every woman has the right to breastfeed the Committee states that this right may

be protected by the New Zealand Human Rights Act or through new legislation modelled on the Scottish Breastfeeding Act 2005 (see LU March 2005). It further recommends to strengthen the implementation of the International Code of Marketing of Breastmilk Substitutes since the current voluntary self-regulation is insufficient for Code compliance.

7. Infant Formula: Beats cell phone cards and beer!

The economics of breastfeeding are important in the Philippines which has a law implementing the Code since 1986. During a visit to Manila, ICDC obtained statistics which confirm that a law itself is not enough. There needs to be enforcement and good education programmes for health workers and mothers. There is little awareness of the law and companies violate it with impunity. A presidential advisor recently revealed that infant formula is the country's top commercial commodity, ahead of cell phone cards and beer!

25% of infants in the Philippines are formula-fed and most are very poor. The country spent 21.3 billion Pesos (US\$400 million) on the purchase of formula every year. In addition, parents who care for sick infants (bottle-fed infants are often ill) lose US\$180 million annually in wages, and the healthcare costs for treating sick infants amount to another US\$80 million per year.

In 2003 only 16.1% of babies were exclusively breastfed up to 4 months (0.5% in Manila). WHO estimates that 16,000 babies could be saved from death by exclusive breastfeeding for the first six months and appropriate complementary foods plus breastfeeding up to two years. The Department of Health has developed a National Plan on Infant and Young Child Feeding and is trying to strengthen the National Milk Code.

8. Malaysian NGO Rebuffs Companies

On two separate occasions over the last 3 months, the Malaysian Breastfeeding Association (PPPIM) managed to scupper company activities which violate the Malaysian Code. First, PPPIM managed to convince a private hospital to exclude Wyeth from an event on infant and young child feeding. On another occasion, the Deputy Minister of Health prompted by PPPIM declined an invitation to the launch of an Abbott "education programme". Both times, PPPIM sought advice from ICDC. Well done, PPPIM!

9. NEWSFLASH – Laws in Mongolia & Malawi; Honduras in the pipeline

In July both Malawi and Mongolia announced the adoption of Code-based legislation by their Parliaments. We still have not received the full text but having worked on their drafts prior to adoption, ICDC is hopeful they are good laws. ICDC also received news of the impending adoption of the Honduras law.