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ICDC LEGAL UPDATE

May 2003



From ICDC's desk in Penang:

As in previous years, ICDC is preparing for another World Health Assembly in May. It is a good time to inform you of major events in 2002.

Since we want to keep Legal Update to four pages, this issue will summarise happenings in Australia, Brazil, Cape Verde and Switzerland and carry a preliminary listing of countries with national policies/legislation recommending exclusive breastfeeding for six months.

Annelies Allain & Yeong Joo Kean

HIGHLIGHTS

- Self praise in Switzerland
- New Brazilian regulations and bill
- Cape Verde drafts a law
- WTO and the Code
- List of countries with six months exclusive breastfeeding policy
- Fighting companies Down Under
- Diary of Events - 2002
- Announcements

A hatchet job - portrait of self praise in Switzerland

Since 1994 Switzerland has a voluntary industry code - *Code de conduite des fabricants concernant la commercialisation des préparations pour nourrissons* - which regulates the activities of members of the Swiss Association of Dietary Food Manufacturers (Galactina, Milupa, Nestlé, Wander, Schweiz. Milchgesellschaft, Säntis Milchpulver, Holle Nahrungsmittel, Vivosan).

The Swiss Codex Panel which monitors the activities of these companies recently distributed a booklet entitled **Codex Panel Portrait** to showcase the "remarkable" achievements of the Panel in self-regulation.



Photo: Patti Rundall

Portrait touts the Swiss Agreement as a model to those countries "that so far have refrained from implementing the International Code". However, the Agreement has only four short articles which incorporate a small part of the International Code and completely ignore the subsequent relevant World Health Assembly Resolutions. It covers only infant formula leaving out an entire range of commercial food products which are marketed for babies below six months.

The Swiss Agreement's half-hearted ban on promotion allows advertising in infant care journals. **Portrait** defends this by claiming that advertising is not intrinsically bad and undesirable and that "a general ban does not constitute an appropriate means to achieve the objectives of the Code". It allows samples on

Five of the ten Panel members are companies, among them an unrepentant Code violator, Nestlé, which promoted **Portrait** at its recent AGM.



request (when mothers are weaning, have fear of insufficient milk, or suffer illness, accident, use of medications). Both run against the very purpose of the International Code.

Contradicting WHA Resolution 54.2 (2001) which recommends exclusive breastfeeding for six months, the Swiss Panel only calls on members not to discourage mothers from breastfeeding during the first **four to six** months. While claiming that “double standards” are not desirable, **Portrait** maintains that the International Code is meant mainly for developing countries and rejects its universality.

The Panel attempts to exempt Switzerland from the requirement of independent monitoring by concluding there is “*consensus and cooperation on all essential matters of the Code*” and that “further monitoring of the self-monitoring seems unnecessary”.

ICDC has alerted WHO, UNICEF and the Swiss Government that the **Portrait** booklet may mislead other governments and undermine the International Code.

ICDC Verdict:
Switzerland had better
stick to chocolates.



New Brazilian regulations and bill

In August 2002 Brazil adopted two innovative and comprehensive Regulations, one prohibiting promotion; the other on dummies, teats, bottles and nipple shields - *Resolução-rdc nº 222, de 5 de agosto de 2002 - Regulamento técnico para promoção comercial dos alimentos para lactentes e crianças de primeira infância* and *Resolução-rdc nº 221, de 5 de agosto de 2002 - Regulamento técnico - chupetas, bicos, mamadeiras e protetores de mamilo*. The entry into force of these regulations was delayed to give time to draft a new law that will give them a stronger status.

The new bill has now been passed by the Senate and is awaiting passage through the lower house (*Camara de Deputados*). Once adopted, Brazil will have a law which is much more difficult to change or to overturn than the existing Ministerial Regulations.

Brazil is often held up as an example of how a government can and should exercise its sovereignty over companies operating within its borders in its endeavour to promote infant and young child health. The many IBFANers who helped to get the regulations and the law adopted are anxious to see how compliance with the new measures in Brazil will develop.

Cape verde drafts a law

Another Portuguese-speaking country working on a law is Cape Verde which recently submitted an excellent draft based on ICDC's Lei Modelo. Three government officials from Cape Verde participated in the Regional Training Course on Code Implementation in March 2000 in Maputo.



The International Code and WTO

We hear from time to time of internal and external pressures put on governments to not fully implement or enforce the International Code and Resolutions on grounds that such measures are 'barriers to trade'. WEMOS, IBFAN's member in Holland recently obtained a legal opinion from Dr J.D. Mathis, lecturer at the Amsterdam Law School which sheds light on the health versus trade debate.

Mathis considered the Code provisions in the framework of the WTO agreements, notably the General Agreement on Tariffs and Trade 1994 (GATT), the General Agreement on Trade in Services (GATS), the Agreement on Sanitary and Phytosanitary Measures (SPS) the Agreement on Technical Barriers to Trade (TBT).

Mathis is of the view that GATT (which outlawed discrimination among members and between imported and domestically produced goods) and GATS (which requires similar treatment for media, materials, and persons internationally and domestically) can accommodate all of the Code's provisions regarding the marketing of breastmilk substitutes, including education requirements, advertising restrictions, distribution requirements and restrictions, point of sale information and conduct, and any other "requirements" that would "affect" the sale or offer of sale of products under the scope of the Code.

Prof. Mathis confirms ICDC's long-standing approach that so long as a national measure is applied equally to foreign and domestic breastmilk substitutes, it cannot be argued that it impinges on any WTO rule. The requirement for goods and services to be accorded "national treatment" no less favourably than equivalent domestically produced goods or services is not violated by any measure which seeks to protect and promote the domestic use of breastmilk, since breastmilk is simply not a product that can be considered a comparative "like" as intended by both GATT and GATS.

Comparing the Code to the SPS, Mathis concludes that since the Code relates to the way products are marketed, labelled, and distributed and not to risks that

may be introduced by additives, contamination, or pests, national measures which implement the Code are not "sanitary and phytosanitary measures" which may, directly or indirectly, affect international trade as defined under the SPS.

Regarding the TBT, which provides for non-discriminatory treatment as between domestic and imported products in the preparation, adoption and application of technical regulations, Mathis is of the view that only labelling provisions in the Code which relate directly to the characteristics of products are "technical regulations" under TBT. Code provisions dealing with positive or negative marketing restrictions which do not relate directly to the characteristics of products are not covered by TBT.

Furthermore, under the TBT, when a country has adopted a technical regulation in conformity with relevant international standards (such as the Code), it is not viewed as an unnecessary obstacle to international trade. This provision, in Mathis's view, grants countries a "legal cover" from challenges based on the presumption that their domestic requirements are unnecessary obstacles to trade.

In summary, Mathis concludes and ICDC concurs that national Code implementation does not constitute a barrier to trade that would be actionable within the legal provisions of the WTO.



Exclusive breastfeeding for six months - 69 countries are up to date

ICDC compared lists compiled by UNICEF, ICDC and information collated by Baby Milk Action UK (BMA) and found that the following 69 countries have incorporated into their national policies or legislation the conclusions of the latest research and knowledge on exclusive breastfeeding for six months:

Africa - Cameroon, Cape Verde, Central African Republic, Cote d'Ivoire, Djibouti, Egypt, Eritrea, Gambia, Ghana, Guinea, Kenya, Liberia, Malawi, Morocco, Mozambique, Niger, Nigeria, Rwanda, São Tomé e Príncipe, South Africa, Uganda, Zambia and Zimbabwe.

Americas - Argentina, Belize, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Nicaragua, Panama, Paraguay, Peru, Uruguay and Venezuela.

Oceania - Australia, Kiribati, Micronesia and Palau.

Asia - Cambodia, India, Iran, Hong Kong, Jordan, Kazakhstan, Kyrgyzstan, Maldives, Mongolia, Philippines,

Singapore, Tajikistan, Turkmenistan, Uzbekistan and Yemen.

Europe - Bosnia, France, Belarus, Bulgaria, Czech Republic, Georgia and Slovakia.

Although 69 countries is an impressive number, it still leaves 65% of WHO member countries dragging their feet on this very important recommendation.



Fighting companies Down Under - David takes on another Goliath

Even before the 6-months exclusive breastfeeding recommendation was adopted by the WHA, Australian breastfeeding advocates, Mark Dunstone and Julie Smith succeeded, in January 2000, in forcing food giant Heinz Watties to remove misleading statements from labels which said "Around 4 to 6 months baby needs more than breastmilk or formula to suit increased energy needs".

Mark has since gone on to wage another "David vs. Goliath" battle against another food giant, Wyeth which markets the S-26 formula, for its brochure entitled "26 ways to settle your baby". The brochure contains the statement: "Breastmilk is best for babies. Good maternal nutrition is important for preparation and maintenance of breastfeeding."

Mark argues the statement falsely implies that mothers need a 'good diet' as opposed to an average or adequate diet to successfully breastfeed. Importantly, the Wyeth brochure fails to mention a) that breastfeeding is still advised when a mother's diet is inadequate; b) factors which are important for successful breastfeeding (eg, frequency and duration of suckling, positioning of the infant etc); and c) the real and substantial increased risks of ill health from artificial infant formula feeding.

Wyeth opposed Mark's arguments claiming the maternal nutrition statement is required by the Code. The Australia New Zealand Food Authority, an industry stronghold, disputed the contention that Wyeth's representations were false. The Director of Public Prosecutions was disinclined to prosecute Wyeth for breaches of local laws which prohibits false advertising because of legal doubts as to whether the Wyeth brochure was in law an advertisement.

Despite this setback, the Health Protection Service has asked Wyeth "to remove the sentence in question from all future publications, including those current publications requiring a reprint." Advice is being obtained from the DPP about seeking an injunction from the court restraining Wyeth if it fails to comply with the request.

Diary of events - 2002

1. ICDC's Legal Advisor and Director spoke on behalf of Consumers International and IBFAN at the WHO Executive Board Meeting in January and at the WHA in May. Our focus at the WHA was on minimising the influence of industry in the Global Strategy on Infant and Young Child Feeding.
2. February 2002, Mexico, ICDC organised an Expert Meeting in Tlaxcala, Mexico to draft a Model Law for Latin American countries, in Spanish. Lawyers, health professionals and economists from Argentina, Guatemala, Mexico, Costa Rica, Peru, Brazil and two staff of ICDC attended the meeting.
3. March 2002, ICDC participated in the WABA Global Initiative for Mother Support (GIMS) Conference in Kuala Lumpur and conducted a Code workshop.
4. April 2002, Taiwan. ICDC conducted a two-day Code Awareness Seminar at the invitation of the Chinese Women Consumers' Association, an IBFAN group in Taipei.
5. May 2002, Monitoring Training in Cairo and Aswan, Egypt, with the Association of Studies of Women in Civilisation (ASWIC) and Terre des Hommes.
6. June 2002, Swaziland. ICDC and IBFAN Africa provided monitoring training for participants from Botswana, Kenya, Malawi, Mozambique, Namibia, Swaziland, South Africa, Tanzania, Uganda, Zambia and Zimbabwe.
7. June 2002, Cambodia. At the invitation of the Government of Cambodia, ICDC sent two staff to Phnom Penh to sensitise officials from different Ministries on the Code. The visit was supported by UNICEF Phnom Penh.
8. July 2002, Laos. ICDC conducted a three-day training course for government officials, sponsored by UNICEF. Based on input from participants, ICDC's Legal Advisor submitted a revision of the Laotian law.
9. September 2002, Thailand. ICDC joined UNICEF to hold a Code Awareness Workshop for health professionals in collaboration with the Thai Ministry of Health.
10. September 2002, WABA Forum II, Tanzania. ICDC's Director addressed the plenary on challenges to the Code. ICDC also conducted four Code theme workshops which attracted a large number of participants.
11. October 2002, China. ICDC's Legal Advisor went on a fact finding mission to verify reports of outrageous commercial promotion. Contacts established resulted in two proposed Code training sessions in 2003.
12. November 2002, Egypt and the UAE. ICDC joined GIFA and many IBFAN associates in the Middle East in launching the IBFAN Arab World (IAW) region. ICDC welcomed IAW Coordinator, Dr Muhammad Marwan. The ICDC Director stopped in Abu Dhabi to deliver a talk on the Code to breast feeding advocates.
13. November 2002, Thailand. ICDC received an assignment from UNICEF to assess the Thai legal system and identify ways and strategies to implement the Code as law. ICDC's Legal Advisor also developed a legal draft for Thailand.
14. November 2002, Mekong Basin countries. The ICDC Director spoke on the Code at the sub-regional IBFAN meeting in Hanoi in November 2002.

Throughout 2002 the Standard IBFAN Monitoring (SIM) database devised by LACMAT Argentina was tested, by collating and documenting violations. SIM should be fully operational by May 2003. The SIM database allows quick information retrieval and rapid response to enquiries from around the world. The SIM Manual and Monitoring Forms are available upon request from ICDC.

Announcements

ICDC's best seller publication ***The Health Workers Guide to the Code*** went into its 10th edition in 2002. It contains a new section on "HIV, Breastfeeding and the Code" as well as the full text of the Code and all relevant subsequent WHA Resolutions.

ATC 2003 – ICDC will hold its Annual Training Course on Code implementation from 14-25 September 2003 in Penang. Registration closes 1 August 2003.

RTC Caribbean – ICDC in collaboration with UNICEF and the Pan American Health Organisation (PAHO) will hold a Regional Training Course on Code implementation in November in Port of Spain, Trinidad. The exact dates have yet to be fixed. This will be the first time ICDC is working in the Caribbean.

STOP PRESS • STOP PRESS

On May 7, 2003 the Breastfeeding Promotion Network of India announced that the Indian Parliament passed an amendment to the Infant Milk Substitutes, Feeding Bottles and Infant Foods Act which extends the ban on advertising to cover all commercial foods for babies under the age of two years. The amended Act also prohibits companies from sponsoring meetings and conferences which is an improvement on the Code. We congratulate BPNI on the success of 10 years hard work.