ICDC LEGAL UPDATE
July 2012

From ICDC’s desk in Penang...

Fighting for infant survival in Botswana

In Feb. 2012, seven years after the strong Botswana law (SI 37/2005) was adopted, ICDC was invited by the government for two week’s of Code activity in the country. So for ICDC, 2012 kicked off with preparatory work for Botswana. The country has performed well on the Code front despite having to face down a constant barrage of opposition from industry.

During their time in Botswana, ICDC’s Director and Legal Advisor conducted several training courses for government officials, health workers and NGOs to reacquaint them with the Code. It soon became apparent that the challenge in Botswana lies not in implementation, monitoring and enforcement of its law as is often the case elsewhere, but in a government programme that provides free formula to prevent mother to child transmission of HIV.

While the prevention programme has been a huge success, there have been problems with spillover and high mortality rates among formula-fed infants. This led to a high level meeting with the Minister of Health, Dr John Seakgosing (pictured above), the Permanent Secretary and several Deputy P.S. and Directors where Minister of Health, Dr John Seakgosing (pictured above), the Permanent Secretary and several Deputy P.S. and Directors where

Publications

During the first half of 2012, ICDC published two Look What They’re Doing (LWTD) monitoring reports; Armenia with the Armenian IBFAN group, Confidence and Alberta with the Alberta Breastfeeding Committee and INFACT Canada.

LWTD is a 4-page format, designed by ICDC for groups to present monitoring results as an advocacy document. All LWTD reports can be downloaded at http://www.ibfan.org/code_watch-reports.html

HIGHLIGHTS
- WHA tackles conflicts of interest
- Courting mothers in the Gulf
- Ever-changing Evenflo
- Nestle’s PPP: where they stumbled
- USA:
  - States go bag free
  - Newark Mayor takes money from Nestle
- Philippines:
  - DOH versus multinationals
  - Revealing studies

Also in the first half of this year, the latest in the Code Essentials series, Code Essentials 4 on Code Compliance, was completed. The publication will be sent for printing as soon as reviewers finish vetting the manuscript. We are delighted to give readers a preview of its cover now.

In the meantime, ICDC is happy to announce that Code Essentials 3: Responsibilities of Health Workers under the International Code is being used by the International Lactation Consultants Association (ILCA) as a study module for its on-line continuing education. Those who complete the module will earn credit points towards certification as lactation consultants, emphasising the importance of Code knowledge among health workers.

A new WHA resolution

A small IBFAN team, including ICDC’s Director, took part in the 2012 World Health Assembly in May to advocate for better protection of infant health. The end result was a new resolution, adopted by consensus and calling on governments to strengthen controls on the marketing of breastmilk substitutes and to establish ‘adequate mechanisms’ to deal with conflicts of interest. More on page 2.

Have a pleasant read!
Raja Razak,
Publication Support

STOP PRESS
USA interferes with national legislation.

Pushed by Abbott, Mead Johnson and Pfizer, the US Embassy in Hanoi wrote to Vietnam’s National Assembly, urging that it stop any decision to extend the ban on advertising for baby foods from 12 months to 24 months. Ignoring the letter, the Assembly strengthened marketing regulations in Vietnam by voting in favour of the extension.

Read the Press Release/See the letter: www.ibfan.org/news-2012-0720.html
WHA tackles conflicts of interest

This year’s World Health Assembly (WHA) adopted the WHO Comprehensive Implementation Plan on Maternal, Infant and Young Child Nutrition (the Plan). Swaziland and Uganda submitted a draft resolution moving to adopt the Plan and also warning against public-private partnerships. Taken by surprise, Canada and the US proposed their own text in the form of a very short ‘decision’ instead of a resolution, with just one short line to adopt the Plan. Several days of frantic wrangling and debate resulted in the adoption of a new resolution: WHA 65.6 [2012] which contained compromise text.


The Plan endorsed by WHA 65.6 focuses on micronutrients and technical fixes almost overshadowing the need to protect, promote and support breastfeeding.

During the Assembly, several Member States expressed concerns that breastfeeding and nutritious, affordable, culturally appropriate and sustainable local foods are being undermined. Many feared that the market-led approaches to "prevent" malnutrition championed by ‘public-private-partnerships’ could actually worsen the double burden of malnutrition: both under- and over-nutrition.

WHA 65.6 [2012] therefore calls for the establishment of mechanisms to safeguard against potential conflicts of interest. This will provide a useful tool for the scrutiny of multi-stakeholder initiatives and ensure that they work truly in the interests of child health. Such mechanisms are important in view of "multi-stakeholder" arrangements, like SUN (Scaling Up Nutrition) that are springing up like mushrooms to tackle the problems of malnutrition. Many of them are pushing fortified, processed baby foods that turns the challenge of overcoming malnutrition into a multi-billion dollar business.

WHA 65.6 also mandates WHO "to provide clarification and guidance on the inappropriate promotion of foods for infants and young children".

ICDC congratulates Swaziland for resisting enormous pressure to delete a number of important paragraphs in the resolution.

Courting mothers in the Gulf

It was only a few years ago that Pfizer-Wyeth was warned by the Omani government to de-activate its Careline service for mothers. Now UAE has been targeted, this time around by Danone-Nutricia. When the Ministry of Health decided no helpline should reach mothers of children under two years, Danone argued, (wrongly, as usual), that the scope of the Code is limited to products for infants below 6 months, citing the definition of infant formula in the Code. Luckily for breastfeeding, Ministry officials were knowledgeable about the Code and stuck to their decision.

Kudos to the UAE MoH for setting a bar that is higher than the six months Danone was shamefully pushing for.

Ever-changing Evenflo

Back in September 2008, Legal Update reported on Evenflo’s endeavour to be Code compliant. The company consulted with IBFAN partners in North America, the National Alliance for Breastfeeding Advocacy (NABA) and INFACt Canada to revise the labelling of Evenflo products. ICDC advised from the background. Evenflo agreed to cease advertising bottles and teats to consumers and giving breastfeeding advice on their website. Result: Evenflo became the first baby bottle manufacturer well on its way to become compliant with the Code.

The elation was short-lived. In July 2011, under new management and pressure from falling bottle sales, Evenflo announced that it would no longer be Code compliant and revealed plans for a new line of bottles and teats it would market in a competitive manner. No amount of persuasion was able to reverse this decision. Buckling under pressure to make profit, Evenflo showed that it cared more about increased sales than it did about truly supporting breastfeeding.

In January 2012, there was another about turn. News broke that Evenflo sold its “global feeding assets” including feeding bottles and teats, to Kimberly Clark Mexico (KCM). With this announcement, Evenflo declared that it would no longer sell or distribute products covered under International Code of Marketing of Breastmilk Substitutes but would retain the Ameda breast pump and accessory business. In short, Evenflo deems itself exempted from the Code and started to approach professional associations about exhibiting in breastfeeding conferences. It dedicated resources and money to court lactation consultants who favour the Ameda brand. ICDC fielded many questions from around the world as to whether Evenflo is a “safe” company for health workers to work with. We advised a wait-and-see approach.

Due diligence by some professional associations approached by Evenflo revealed that the company has agreed to market products for KCM for an unknown period of time under a “Transitional Services Agreement”. On its website (pic below) is one example of such marketing practices.


It is clear from the website that in whatever capacity Evenflo does its marketing, it is a Code violator. Health workers are reminded that it is premature to think about collaboration with Evenflo or Ameda until the end of the transition period. Only time will tell if the company will morph to become Code exempt if not Code compliant.
**Nestle’s Popular Position Products: Where they stumbled**

In *Breaking the Rules, Stretching the Rules 2010*, ICDC observed that Nestle’s Popular Position Products (PPP) strategy, is being used to reach lower income segments. PPP products, a major growth driver for Nestlé businesses, are packaged in small sachets and sold at prices which enable consumers to buy a little a day.

ICDC anticipated that there would be grave implications for health when disadvantaged populations which have hitherto not been able to afford formula products can now buy them one packet at a time. PPP products have been seen in far flung and deprived areas of countries like Papua New Guinea and Lao PDR where infant mortality rates are high and where conditions make formula preparation a real hazard. Since PPP could be argued to be “a long term pricing policy”, we had stopped short of calling the PPP strategy a Code violation.

Imagine our dismay when a vigilant Nestle watcher drew ICDC’s attention to a link on the Nestle website www.research.nestle.com/Pages/nestle.aspx which featured a Nestle publication that highlighted the work by its research arm in charting consumer behaviour. This includes consumers’ expressed and imagined needs, how they shop and what they buy. Nestlé featured two infant formula products in the publication: **Nestogen** and **Lactogen** – common brands marketed in low-income countries but re-sized to reach the poorest of the poor. See reconstructed ads below.

![PPP Infant Formula – For Complete Nutrition](Image)

**Lactogen Recover – Fighting Infant Diarrhoea**

If you can’t afford infant formula at regular prices, Nestlé offers a choice but at what price?

To fight diarrhoea or will it cause diarrhoea?

![PPP Infant Formula – For Complete Nutrition](Image)

To ICDC, this is advertising pure and simple and Nestlé has taken its PPP strategy a step too far. A complaint was lodged post haste with Nestlé in April 2012. A month later, Nestlé issued a response that a decision at the highest level had been taken not to refer to infant formula as a PPP. Nestlé replied, “In no way did we mean for this to be promotional, but we agree that this could be misinterpreted and we appreciate your calling this to our attention.”

Not quite an apology but about as much as we can expect. The link to the publication was removed, not soon enough but ICDC welcomes the damage control by Nestlé when they were found out. There was no promise to recall any hard copies of the publication which no doubt have been distributed far and wide and will continue to gather promotional mileage for **Nestogen** and **Lactogen**.

**US: Massachusetts goes 'bag-free'**

In July 2012, all 49 birthing hospitals in Massachusetts voluntarily banned free infant formula goody bags when sending new mothers home. It was the second US state to do so. In November 2011, Rhode Island became the first US State to go bag free when its seven birthing hospitals ended the practice. The goal is to encourage mothers to breastfeed rather than to artificially feed their babies.

According to NABA, the US IBFAN group, the ban was a voluntary process that took pro-breastfeeding groups six years of educating, cajoling, petitioning and public shaming to accomplish. This victory is sweet because when the Massachusetts Department of Public Health tried to ban formula gift bags in December 2005, the then-Governor Mitt Romney, rescinded that ban. (See Legal Update April 2006). His press people explained then that it was to give mothers a ‘choice’, but obviously Romney aimed to please the makers of baby foods. Now that he is the Republican candidate for the US presidency, breastfeeding advocates are asking him about this business-friendly position, but the Romney campaign has so far avoided comment.

Giving formula samples or vouchers to mothers is a practice prohibited by the Code. Research has shown a clear link between free samples and mothers ceasing to breastfeed. When they are given in hospitals there is implicit medical endorsement. US mothers have been subjected to this practice for decades because the Code has not been implemented in the US.

There are now over 600 hospitals in the US out of approximately 3200 that have eliminated discharge bags. Many more will do so as they are working on achieving Baby Friendly status. A belated exciting time for US mothers.

The move to halt the distribution of sample bags is part of a renewed effort to boost breastfeeding rates in a country that voted against the International Code in 1981. The US government may have supported subsequent resolutions relating to the Code and some of its agencies have expressed support, but the Code has still not been implemented as law. ICDC’s State of the Code by Country chart shows the US at the bottom of the pile, with a measly 'no action' score.

**Newark Mayor takes Nestlé money**

Nestlé’s partnership with the US city of Newark on initiatives meant to fight childhood obesity has been criticised in a spirited campaign. A petition asks Mayor Cory Booker to stop opening city health facilities to a company that has obvious commercial motives. Gerber formula logos were part of the backdrop when a mock cheque of USD100,000/- was presented. Lactation consultant Renée Hefti says, “We must STOP Nestlé. It has also partnered with the state of Michigan to ‘educate’ medical schools, hospital, communities and parents. This is outrageous.”
Philippines: DoH versus multinationals

The saga of Code implementation in the Philippines is like a roller coaster ride with many ups and downs. (See Legal Update, January 2008, for analysis of the Philippine Supreme Court Case on the mixed outcome of the legal battle between government and industry.) Legal Update is happy to report another “up” moment during a general period of down time where the Milk Code [Executive Order (EO) 51] and the Revised Implementation Rules and Regulations [RIRR:A.O 2006-0012] appeared to have more detractors than champions.

In the face of a weakening breastfeeding culture, the Inter-Agency Committee (IAC) on EO 51 under the Department of Health (DoH) issued a Memorandum in September 2011 to reiterate the existing law and policies which prohibit companies from using registered trademarks that contain health and nutrition claims or that may undermine breastfeeding. This is a valiant effort to protect breastfeeding against a backdrop of companies glamourising their products through “cunning marketing strategies”. According to the IAC, companies try to legitimise a variety of claims and marks (i.e. the use of figures, emblems, logos, graphic, marks, words, characters or icons) by registering them with the Intellectual Property Office. The “total effect” of the registered marks undermines the superiority of breastfeeding and breastmilk.

The Memo prompted the Infant & Pediatric Nutrition Association (IPNAP) to submit a 13 page letter calling for the IAC to reconsider. IPNAP is a trade association whose members are multinationals Abbott, Fonterra, Mead Johnson, Nestlé and Wyeth.

IPNAP protested about “far reaching effects” on their members’ vested intellectual property rights. It questioned the legality of the Memorandum vis-à-vis the Intellectual Property Code of the Philippines and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and the Agreement on Technical Barriers to Trade (TBT). It quoted chapter and verse from these instruments but avoided all mention of health and the Prevention of Deceptive Marketing practices. IPNAP members are not prohibited to engage in business or to advertise their products, provided that their marketing materials, including the labels of their milk products comply with DoH rules and regulations.

• with regard to the TBT Agreement: The rules and regulations issued by DoH are not unnecessary obstacles to international trade but are legitimate regulatory goals allowed by the TBT Agreement for the protection of human life/safety and the prevention of deceptive marketing practices. IPNAP members are not prohibited to engage in business or to advertise their products, provided that their marketing materials, including the labels of their milk products comply with DoH rules and regulations.

• with regard to the argument that prohibiting the use of a registered trademark was tantamount to deprivation of property without due process: The wider public interest needs to be weighed against the interest of the few. IPNAP members have a responsibility to the public. Just because they had the marks containing health and nutrition claims registered does not mean that their use cannot be regulated for the greater good.

Revealing studies from the Philippines

Two recently published studies, initiated by WHO, are helpful in advocating for breastfeeding and the Code. One found a strong association between recall of advertising messages as well as doctor recommendations and the use of formula.1 The second study found that almost half of Filipinos families with a young child and one-third of families living on less than $2 per day purchase formula. Formula-buying families with young children had spent an aggregate of $143.9 million on medical care compared to $56.6 million by non-formula-buying families.2

Another study3, by the Food and Nutrition Research Institute found that three out of 10 Filipino children under-five are stunted. Two out of 10 are underweight. This problem of chronic malnutrition could be solved with optimal breastfeeding and appropriate and timely complementary foods, preferably home-prepared.


(3) Reported in the article “Next Generation of Filipinos will be Shorter, says study”, Uy, J.R., Philippine Daily Enquirer, July 21 2012.