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## Submission to the Committee on World Food Security

### Voluntary Guidelines on Food Systems and Nutrition (VGFSyN) Draft One

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## General comments

### Align with international legal obligations on the right to food

United Nations (UN) Member States have legal obligations in relation to adequate food, and hence food systems and nutrition, which derive from their voluntary ratification of international and regional treaties, and other sources of international law.<sup>1</sup>

It is applauded that the Voluntary Guidelines (VG) are explicitly embedded in the SDGs and the 'right to adequate food', including as explained by the Committee on Economic, Social and Cultural Rights (CESCR) General Comment 12 (1999) (draft VG para. 31 p. 8 footnote 19).

In order to underline the broad and authoritative international support that already exists for the right to food, the VG should acknowledge other important legal documents which protect this right and detail States' legal obligations, such as:

- The UN Charter and Universal Declaration of Human Rights
- International Covenant on Economic, Social and Cultural Rights (ICESCR) – 170 parties
- Convention on the Rights of the Child (CRC) – 196 parties
- Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) – 189 parties<sup>2</sup>

In line with these instruments, the VG may show greater ambition and precision in aligning with the responsibilities for the realization of the right to food already recognized in international law.

This commentary includes a number of examples where the VG can be strengthened in reaffirming States obligations under international human rights law, especially in relation to the adoption of domestic law and policies on food systems and nutrition.

The VG should therefore be strengthened through the inclusion of references to the relevant international legal obligations of States, and an explanation of how the VG should be understood with reference to these obligations.

This submission will only address the obligations arising from UN treaties; however, we acknowledge that States also have legal obligations from regional treaties and other sources of international law such as customary international law.

As noted above, in 1999 the UN Committee on Economic, Social and Cultural Rights (CESCR) issued specific guidance on States' legal obligations to implement the right to adequate food.<sup>3</sup>

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<sup>1</sup> See generally 'Toolkit on the right to food', OHCHR. Available at <https://www.ohchr.org/EN/Issues/ESCR/Pages/Food.aspx> accessed 21 January 2020.

<sup>2</sup> See generally the section on the right to food in international law in 'Guide on Legislating for the Right to Food', FAO, 2009. Available at <http://www.fao.org/3/i0815e/i0815e.pdf> accessed 3 February 2020.

<sup>3</sup> The right to adequate food (art.11). General Comment 12 E/CN.4/199/5. Available at [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=9&DocTypeID=11](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=9&DocTypeID=11) accessed 21 January 2020.

In 2013, the UN Committee on the Rights of the Child, in General Comment No. 15 on the right of the child to the enjoyment of the highest attainable standard of health (art. 24), noted regarding art. 24(b) of the Convention on ‘the provision of adequate nutritious foods’:

States are required to introduce into domestic law, implement and enforce internationally agreed standards concerning children’s right to health, including the International Code on Marketing of Breast-milk Substitutes and the relevant subsequent World Health Assembly resolutions...

Relevant World Health Assembly resolutions include the endorsement of the WHO Set of Recommendations on the Marketing of Food and Non-alcoholic Beverages to Children.<sup>4</sup>

UN human rights treaty bodies, which monitor States’ compliance with the treaties, are taking an increasing interest in the steps by States to realize the right to adequate food. For example, the CESCR has explored State obligations in respect of the right to adequate food in its examination of States’ periodic reports under the Convention. In 2018 the CESCR recommended that Argentina

...(a)dopt a regulatory framework that expressly recognizes the right to food and steers public policies that ensure access to healthy, nutritious and sufficient food, especially for disadvantaged groups...

The Committee also recommended that Argentina

...(t)ake effective measures to discourage the consumption of unhealthy foods and beverages, including an increase in the tax on sugary beverages, strengthening of regulations under the Argentine Food Code with regard to front-of-pack food labelling that includes information on sugar content, and restrictions on the advertising of unhealthy foods and beverages, especially those directed towards children.’<sup>5</sup>

There is thus an important link between States’ legal obligations and the VG. Whereas the obligations in international treaties are of a general nature, the treaty body committees and the VG can provide specific guidance as to measures to be taken to meet these obligations. It is important to note that the obligations themselves are *not* voluntary – however each Member State must implement these obligations in its national context taking into account the authoritative guidance provided.

In all cases, however, the ICESCR (art. 2) requires that States take steps to the maximum of their available resources to achieve progressively the right to adequate food. This must be assured without discrimination, even in the most resource poor contexts.

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<sup>4</sup> The Recommendations were endorsed by the World Health Assembly in 2010 in resolution WHA63.14. Available at <https://www.who.int/dietphysicalactivity/publications/recsmarketing/en/> accessed 21 January 2020.

<sup>5</sup> United Nations. Committee on Economic, Social and Cultural Rights. Concluding observations of the fourth periodic report of Argentina. E/C.12/ARG/CO/4. United Nations Economic and Social Council: 2018

## Alignment with other authoritative guidance

In addition to international legal instruments, the VG should reference other existing authoritative guidance to ensure coherence and a holistic approach. Relevant guidance includes the 2004 FAO Voluntary Guidelines to support the progressive realization of the right to adequate food in the context of national food security<sup>6</sup>; the UN Global Strategy on women's, children's and adolescents' health (2016-2030)<sup>7</sup>; the UN Guiding Principles on business and human rights (noted below)<sup>8</sup>; the WHO set of Recommendations on the marketing of food and non-alcoholic beverages to children<sup>9</sup>; and the UN Guiding Principles on extreme poverty and human rights.<sup>10</sup>

Many of the issues addressed in the draft VG have also been addressed in authoritative reports, such as by the UN Special Rapporteurs on the right to food (SRRF). For example, in 2011 the SRRF recommended the statutory regulation of the marketing of food products.<sup>11</sup> The VG should reference and incorporate these recommendations.

Similarly, authoritative studies, such as the report *Food in the Anthropocene; the EAT-Lancet Commission on healthy diets from sustainable food systems*<sup>12</sup> and *The Global Syndemic of Obesity, Undernutrition and Climate Change: The Lancet Commission Report*<sup>13</sup> contain recommendations based on sustainable approaches which should be noted in the VG. The EAT-Lancet Commission recommendations include: develop strategies to build international and national commitments; reorient agricultural priorities from producing large quantities of food to producing healthy food; sustainably intensify food production; strengthen governance of land and oceans; and at least halve food loss and waste.

## Human rights-based approaches and obligations of process

It is now widely acknowledged that States have obligations of process in the realization of the right to adequate food and other human rights. For example, regarding the development of national strategies on food and nutrition, the CESCR has noted:

...The formulation and implementation of national strategies for the right to food requires full compliance with the principles of accountability, transparency, people's participation, decentralization, legislative capacity and the independence of the judiciary. Good governance is essential to the realization of all human rights, including the elimination of poverty and ensuring a satisfactory livelihood for all.

...Appropriate institutional mechanisms should be devised to secure a representative process towards the formulation of a strategy, drawing on all available domestic

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<sup>6</sup> Available at <http://www.fao.org/3/a-y7937e.pdf> accessed 21 January 2020.

<sup>7</sup> <https://www.who.int/life-course/partners/global-strategy/en/> accessed 21 January 2020.

<sup>8</sup> United Nations. 'Guiding Principles on Business and Human Rights' [https://www.ohchr.org/documents/publications/GuidingprinciplesBusinesshr\\_eN.pdf](https://www.ohchr.org/documents/publications/GuidingprinciplesBusinesshr_eN.pdf) accessed 21 January 2020.

<sup>9</sup> <https://www.who.int/dietphysicalactivity/publications/recsmarketing/en/> accessed 21 January 2020.

<sup>10</sup> <https://www.ohchr.org/en/issues/poverty/pages/dgpintroduction.aspx> accessed 21 January 2020.

<sup>11</sup> *Report submitted by the Special Rapporteur on the right to food, Olivier De Schutter*. Human Rights Council, 2011 UN Doc. A/HRC/19/59.

<sup>12</sup> Available at <https://www.thelancet.com/commissions/EAT> accessed 21 January 2020.

<sup>13</sup> Available at <https://www.thelancet.com/commissions/global-syndemic> accessed 21 January 2020.

expertise relevant to food and nutrition. The strategy should set out the responsibilities and time-frame for the implementation of the necessary measures.<sup>14</sup>

The VG should thus note the importance of the principles of accountability, transparency, people's participation etc. in the section on Key Concepts and Principles. Collectively these principles are reflected in the 'human rights-based approach'.<sup>15</sup> The UN Statement of Common Understanding on Human Rights-Based Approaches to Development Cooperation and Programming (the Common Understanding) was adopted by the United Nations Development Group (UNDG) in 2003.<sup>16</sup>

In summary, there is already substantial guidance for States on practical measures to implement the right to adequate food. The VG on food systems and nutrition should acknowledge, complement and build on this guidance.

### Private sector engagement

There is a marked difference in the proposed engagement of the private sector in the draft VG when compared with the approach of UN agencies such as WHO and UNICEF. Both the WHO, through the World Health Assembly,<sup>17</sup> and UNICEF<sup>18</sup> have adopted comprehensive guidance for engagement with the private sector which acknowledges the risks of the inherent conflicts of interest involved.

The draft VG simply list the 'private sector' as one of a number of relevant stakeholders (VG para. 27 page 7). The draft VG note the need for an 'inclusive dialogue' with the private sector and other stakeholders working with or in food systems (page 10). However, the draft VG fail to acknowledge that private sector commercial interests may well conflict with public health and other public interests, such as in the environment. For example, the draft VG propose:

States and **private sector food actors** should protect the biodiversity of forests and fisheries that are currently over-sourced, over-exploited, and endangered, by implementing the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (VGGT) and other relevant international agreements.(page 12)

States, **private sector food actors** and development partners should support and incentivize smallholders, particularly within developing countries, to adopt sustainable production practices and to produce diverse crops that will contribute to the availability, affordability and accessibility of nutritious food, while enhancing farmers' income and livelihood.(page 12)

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<sup>14</sup> General Comment 12, *supra* art.23-24.

<sup>15</sup> See, e.g. UNICEF, Human Rights-based Approach to Programming. Available at [https://www.unicef.org/policyanalysis/rights/index\\_62012.html](https://www.unicef.org/policyanalysis/rights/index_62012.html) accessed 21 January 2020.

<sup>16</sup> Contained in 'Frequently asked questions on a human rights-based approach to development cooperation' (OHCHR, 2006) available at <https://www.ohchr.org/Documents/Publications/FAQen.pdf> accessed 5 February 2020.

<sup>17</sup> Framework of Engagement with Non-State Actors (FENSA). See <https://www.who.int/about/collaborations-and-partnerships/who-s-engagement-with-non-state-actors> accessed 21 January 2020.

<sup>18</sup> Engagement with Business. Programme Guidance for Country Offices (UNICEF, 2019).

States, **private sector food actors** and development partners should support sustainable livestock, small animal and fishery systems (including artisanal fish and other aquatic systems) because they contribute to the protection and development of livelihoods, provide income, and supply key nutrients for health and wellbeing.(page 12)

However, the primary audience for the VG is **UN Member States**. Rather than exhorting the private sector to act in ways which may well be against their (short-term) commercial interests, the VG should expand on **steps States can take to support, encourage and ultimately require the private sector to act in the broad social interest**. The CESCR has expanded on States' obligations in General Comment 12 (art. 15):

The right to adequate food, like any other human right, imposes three types or levels of obligations on States parties: the obligations to *respect*, to *protect* and to *fulfil*. In turn, the obligation to *fulfil* incorporates both an obligation to *facilitate* and an obligation to *provide*.

The obligation to *respect* existing access to adequate food requires States parties not to take any measures that result in preventing such access. The obligation to *protect* requires measures by the State to ensure that enterprises or individuals do not deprive individuals of their access to adequate food. The obligation to *fulfil (facilitate)* means the State must pro-actively engage in activities intended to strengthen people's access to and utilization of resources and means to ensure their livelihood, including food security. Finally, whenever an individual or group is unable, for reasons beyond their control, to enjoy the right to adequate food by the means at their disposal, States have the obligation to *fulfil (provide)* that right directly.

As further example, the draft VG state 'States should incentivize **private sector food actors** to work towards more sustainable and safe packaging of products such as nanotechnology, waxing, plant-based wrapping, and biodegradable plastics.'(p13)

Given States' power and obligations, this language should be strengthened, for example to recommend that '**States should adopt legislation and fiscal measures** to ensure that food sector actors adopt sustainable and safe packaging...'

### **UN Guiding Principles on Business and Human Rights**

The UN Guiding Principles on Business and Human Rights were endorsed by the Human Rights Council in resolution 17/4 of 16 June 2011.<sup>19</sup> They note that although the private sector does not have legal obligations to respect human rights under international law (as these treaties are agreed to by States), the responsibility to respect human rights is a global standard of expected conduct for all business enterprises wherever they operate. States have a duty to clarify the expectation that enterprises will respect human rights. States should also ensure adequate monitoring and accountability mechanisms to effectively oversee enterprises' activities. The VG should acknowledge this authoritative guidance by the Human Rights Council and incorporate these principles into the text.

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<sup>19</sup> United Nations. 'Guiding Principles on Business and Human Rights'  
[https://www.ohchr.org/documents/publications/GuidingprinciplesBusinesshr\\_eN.pdf](https://www.ohchr.org/documents/publications/GuidingprinciplesBusinesshr_eN.pdf)

## Draft treaty on business and human rights

International law in this area is evolving. In July 2019 the United Nations circulated a draft treaty titled 'Legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises.'<sup>20</sup> The draft treaty has implications for transnational corporations and other business enterprises working in the food systems and nutrition sectors. It refers specifically to both human rights and the environment, with direct implications for climate change.

The VG should support the broad intentions of the draft treaty. For example, the VG should recommend that States

- Regulate effectively the activities of business enterprises within their jurisdiction and require all persons conducting business activities to respect human rights and prevent human rights violations or abuses...;
- Identify and assess any actual or potential human rights violations or abuses that may arise from their own business activities (i.e. State-run enterprises and State contracts);
- Undertake environmental and human rights impact assessments...;
- Consult meaningfully with groups which may be potentially affected by business activities, including groups at heightened risk of violations...;
- Report publicly...;
- Provide mechanisms for legal redress for victims of violations or abuses...

## The importance of the indivisibility of all human rights

While it is understandable that the VG are grounded in the right to food, it is important to acknowledge and (re)affirm that many of the VG' objectives are underpinned by other human rights as well. These include at least the human rights to life and health. The concept of the indivisibility of human rights, and especially the importance of the right to life and the right to health to the provision of safe and nutritious food, should be underscored by the guidelines.

In terms of important support for States' legal obligations in the sphere of food and nutrition, the UN Human Rights Committee has stated that the **human right to life** in Article 6 of the International Covenant of Civil and Political Rights implies a duty for States Parties to address any general conditions in society that may give rise to direct threats to life or prevent individuals from enjoying their **right to life with dignity**, including measures related to **widespread hunger and malnutrition**.<sup>21</sup>

The **right to the enjoyment of the highest attainable standard of physical and mental health** ('right to health') implies that States take measures on food and food systems in the sphere of

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<sup>20</sup> United Nations. Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises With Respect to Human Rights (IGWG). (2019). *Revised draft of a legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises*. Available at [https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/OEIGWG\\_RevisedDraft\\_LBI.pdf](https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/OEIGWG_RevisedDraft_LBI.pdf) accessed 21 January 2020.

<sup>21</sup> UN Human Rights Committee. General comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life. UN Doc. CCPR/C/GC/36.

industrial and environmental hygiene and for the prevention of disease and child and maternal mortality. The right to health embraces the most important underlying **socio-economic factors that enable people to lead healthy lives**, including **food and nutrition as underlying determinants of health**.<sup>22</sup>

The UN Committee on the Rights of the Child has explained the links between the human right to health and access to nutritious foods in considerable detail, as follows:<sup>23</sup>

43. Measures for fulfilling States' obligations to ensure access to nutritionally adequate, culturally appropriate and safe food and to combat malnutrition will need to be adopted according to the specific context. Effective direct nutrition interventions for pregnant women include addressing anaemia and folic acid and iodine deficiency and providing calcium supplementation. Prevention and management of pre-eclampsia and eclampsia should be ensured for all women of reproductive age to benefit their health and ensure healthy foetal and infant development.

44. Exclusive breastfeeding for infants up to 6 months of age should be protected and promoted and breastfeeding should continue alongside appropriate complementary foods preferably until two years of age, where feasible. States' obligations in this area are defined in the "protect, promote and support" framework, adopted unanimously by the World Health Assembly. States are required to introduce into domestic law, implement and enforce internationally agreed standards concerning children's right to health, including the International Code on Marketing of Breast-milk Substitutes and the relevant subsequent World Health Assembly resolutions, as well as the World Health Organization Framework Convention on Tobacco Control. Special measures should be taken to promote community and workplace support for mothers in relation to pregnancy and breastfeeding and feasible and affordable childcare services; and compliance with the International Labour Organization Convention No. 183 (2000) concerning the revision of the Maternity Protection Convention (Revised), 1952.

45. Adequate nutrition and growth monitoring in early childhood are particularly important. Where necessary, integrated management of severe acute malnutrition should be expanded through facility and community-based interventions, as well as treatment of moderate acute malnutrition, including therapeutic feeding interventions.

46. School feeding is desirable to ensure all pupils have access to a full meal every day, which can also enhance children's attention for learning and increase school enrolment. The Committee recommends that this be combined with nutrition and health education, including setting up school gardens and training teachers to improve children's nutrition and healthy eating habits.

47. States should also address obesity in children, as it is associated with hypertension, early markers of cardiovascular disease, insulin resistance, psychological effects, a higher likelihood of adult obesity, and premature death. Children's exposure to "fast foods" that are high in fat, sugar or salt, energy-dense and micronutrient-poor, and drinks containing high levels of caffeine or other potentially harmful substances should

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<sup>22</sup> See also UN Convention on the Rights of the Child, article 24.

<sup>23</sup> UN Committee on Rights of the Child, General Comment No. 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health (art. 24) (17 April 2013) paras. 43-47.



be limited. The marketing of these substances – especially when such marketing is focused on children – should be regulated and their availability in schools and other places controlled.

### **Sustainability and the climate crisis**

We note that the climate crisis is the most significant and urgent development challenge of the 21<sup>st</sup> century. All development actors must urgently explore how the international community can jointly achieve the targets of the 2016 Paris Agreement. This means mainstreaming climate action across every sector, including food systems and nutrition sectors.

The Committee on the Elimination of all Forms of Discrimination against Women (CEDAW) has addressed the impact of climate change and resulting food insecurity in at least two General Recommendations:

- CEDAW General Recommendation No. 34 on Rural Women's Rights (2016)

#### 3. Food and nutrition

63. Rural women are critical to achieving food security, reducing poverty, malnutrition and hunger and promoting rural development, yet their contribution is often unpaid, unacknowledged and poorly supported. Rural women are among those most affected by food insecurity, exposed to food price volatility, malnutrition and hunger, and likely to suffer when food prices escalate.<sup>24</sup>

64. States parties should ensure the realization of the right to food and nutrition of rural women within the framework of food sovereignty and ensure that they have the authority to manage and control their natural resources.

65. States parties should pay particular attention to the nutritional needs of rural women, in particular pregnant and lactating women, putting in place effective policies ensuring that rural women have access to adequate food and nutrition, taking into account the Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security.

66. States parties should adopt laws, policies and measures to promote and protect the diverse local agricultural methods and products of rural women and their access to markets. They should ensure the diversity of crops and medicinal resources to improve rural women's food security and health, as well as access to livestock.

- CEDAW General Comment 37 on Gender Related Aspects of Disaster Risk Reduction in the Context of Climate (2018)

#### E. Right to an adequate standard of living

Food, land, housing, water and sanitation

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<sup>24</sup> See Report submitted by the Special Rapporteur on the right to food, Olivier De Schutter: Women's rights and the right to food. 2012. UN Doc. A/HRC/22/50)

69. The impacts of climate change are already being experienced in many areas, in connection with decreased food security, land degradation and more limited availability of water and other natural resources. There is evidence that the effects of food, land and water insecurity are not gender-neutral and that women are more likely to suffer from undernourishment and malnutrition in times of food scarcity. It has also been shown that women and girls, who are those with the primary responsibility for growing, gathering and preparing food and collecting fuel and water in many societies, are disproportionately affected by a lack of available, affordable, safe and accessible drinking water and fuel sources. The additional burden placed on women and girls by such climate-related resource scarcity drains time, causes physical hardship, increases exposure to the risk of violence and increases stress.

70. Women, in particular rural and indigenous women, are directly affected by disasters and climate change, as food producers and as agricultural workers because they make up the majority of the world's smallholder and subsistence farmers and a significant proportion of farmworkers. As a result of discriminatory laws and social norms, women have limited access to secure land tenure, and the farmland that they are allotted tends to be of inferior quality and more prone to flooding, erosion or other adverse climatic events. Owing to the increasing rate of out-migration among men in climate change-affected areas, women are left with the sole responsibility for farming, yet they do not possess the legal and socially recognized land ownership necessary to adapt to the changing climatic conditions effectively. Women are also indirectly affected by the impacts of weather-related events on the price of foodstuffs.

71. Articles 12 and 14 of the Convention contain specific guarantees on nutrition and the equal participation of women in decision-making about food production and consumption. In addition, the core obligations of States parties to eliminate discrimination, outlined in article 2, to modify cultural patterns of behaviour based on discriminatory stereotypes, in article 5 (a), to ensure equality before the law, in article 15, and to guarantee equality within marriage and family relations, in article 16, are of central importance to addressing women's rights to land and productive resources, which are vital to ensuring the right to food and sustainable livelihoods.

72. States parties should:

(a) Promote and protect women's equal rights to food, housing, sanitation, land and natural resources, including adequate drinking water, water for domestic use and for food production, and take positive measures to guarantee the availability and accessibility of those rights, even during times of scarcity. Particular attention should be paid to ensuring that women living in poverty, in particular those in informal settlements in both urban and rural areas, have access to adequate housing, drinking water, sanitation and food, especially in the context of disasters and climate change;

(b) Increase resilience to the impacts of disasters and climate change among women by identifying and supporting livelihoods that are sustainable and empowering, and develop gender-responsive services, including extension services to assist women farmers, that enable women to gain access to and benefit from those livelihoods;

(c) Develop participatory, gender-responsive development plans and policies that integrate a human rights-based approach, in order to guarantee sustainable access to

adequate housing, food, water and sanitation. Priority should be given to ensuring the accessibility of services for all women;

(d) Adopt legislation, programmes and policies and allocate budgets to eliminate homelessness and to ensure that adequate and disaster resilient housing is available and accessible to all women, including those with disabilities. Measures must be taken to protect women against forced eviction and to ensure that public housing and rental assistance schemes accord priority and respond to the specific needs of groups of women.

The VG should therefore put the climate crisis front and centre – noting how States should mitigate climate change by reducing the emission of greenhouse gases in food systems, and also ways in which States should adapt food systems to ensure access to adequate food in the changing climate context.

The report of the High Level Panel of Experts (HLPE) notes that ‘Food systems need to adapt to climate change and can make a significant contribution to its mitigation... *Climate-smart and nutrition-sensitive* approaches that can maintain necessary levels of nutritious food production while minimizing the environmental effects of agriculture must be scaled up.’<sup>25</sup>

FAO has estimated that the livestock sector alone contributes to 14.5% of human-induced global greenhouse gas emissions.<sup>26</sup> The VG should note that climate-smart approaches must include a reduction in livestock production and a shift towards greater nutritious plant-based diets.

#### **Note on the consultation process**

We note that the 2019-2020 workplan to develop the VG includes consultations with State delegations.

We recommend that representatives of national civil society human rights organizations be included in national delegations to in-person consultations such as the Food Systems and Nutrition Open Ended Working Group (OEWG) and related meetings and consultations.

## **Specific comments**

### **Key concepts and guiding principles**

(page 7) This section is very welcome. The human rights-based approach is reflected in some of the guiding principles, such as the principle of governance and accountability. The section should be strengthened to note the primacy of people and the environment over private sector interests. The international community has affirmed this principle in other contexts, such as in access to essential medicines.<sup>27</sup>

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<sup>25</sup> HLPE report 12 *Nutrition and Food Systems* <http://www.fao.org/3/a-i7846e.pdf> accessed 21 January 2020.

<sup>26</sup> *Tackling climate change through livestock: a global assessment of emissions and mitigation opportunities* FAO, 2013 <http://www.fao.org/3/a-i3437e.pdf> accessed 21 January 2020.

<sup>27</sup> WHO. The Doha Declaration on the TRIPS Agreement and Public Health. Available at [https://www.who.int/medicines/areas/policy/doha\\_declaration/en/](https://www.who.int/medicines/areas/policy/doha_declaration/en/) accessed 21 January 2020.

## Trade and investment agreements

(page 4, para. 14; page 6 paras. 22 and 24; page 11, 3.1.2(c) and 3.1.3(b) and page 16, 3.3.1(d)) The VG should aim to recommend specific areas for enhanced cooperation amongst public health, trade and investment stakeholders in the context of food and nutrition policies. Currently, international trade law, including the World Trade Organization Agreement (WTO Agreement) and the network of preferential trade agreements, contains minimal references to health protection, despite their interconnected nature. In the trade regime human health protection has traditionally been addressed through what is known as a “general exception”, modelled after Article XX of the General Agreement on Tariffs and Trade. General exceptions permit States to deviate from trade obligations in the interest of, among other areas, the protection of human health. However, meeting the requirements of a general exception clause has proven difficult in past cases.

The VG should recommend that newly negotiated trade agreements should actively incorporate health into agreements and move beyond the status quo of framing health (including nutrition, food and agriculture policies) as an exception. This includes, *inter alia*, avoiding the inclusion of potential regulatory hurdles to the adoption public health measures (e.g. provisions that would restrict States’ regulatory freedom to adopt nutrition labelling requirements). The VG should recommend that this be facilitated through the inclusion of public health officials in trade negotiations. In other words, the VG should recommend a whole-of government approach to the adoption or renegotiation of trade agreements. This will also entail equipping public health officials with the tools and expertise necessary to effectively negotiate and advocate for the inclusion of a health-oriented nutrition, food and agriculture agenda in trade agreements.<sup>28</sup>

To decrease the probability that a regulation is challenged in trade or investment litigation, States should seek to base measures on scientific evidence. For example, reliance on the Framework Convention for Tobacco Control and its Guidelines for Implementation for evidentiary support have proven effective in past WTO dispute settlement.<sup>29</sup>

In the context of international investment law, foreign investors have shown that they are fully equipped to utilize international investment arbitration as a tool to challenge public health measures.<sup>30</sup> The VG should recommend that bilateral investment treaties (BITs) should be improved by clarifying when a measures may be challenged by foreign investors in investor state dispute settlement. This can be clarified by clearly defining the substantive standards provided for in an international investment agreement. Further, international investment agreements should contain prohibitions on the lowering of health standards to encourage investment. Lastly, these agreements should include specific health exemptions.

The VG should further highlight that it is essential that States consider all existing obligations when adopting public health measures and adopting trade and investment agreements. On the

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<sup>28</sup> Industries utilize heavy lobbying in order to influence the text of new trade agreements. Public health officials should therefore insist on a seat at the negotiating table in order to, *inter alia*, effectively counter industry lobbying while simultaneously seeking to advocate for the harmonization of public health measures in the area of food systems and nutrition.

<sup>29</sup> See for example: WTO, *Australia- Tobacco Plain Packaging- Panel Report* (adopted 28 June 2018) WT/DS435/R, WT/DS441/R, WT/DS458/R, WT/DS467/R.

<sup>30</sup> See for example: International Centre for the Settlement of Investment Disputes *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v Oriental Republic of Uruguay* (2016) ICSID Case No. ARB/10/7; Permanent Court of Arbitration *Philip Morris Asia Limited v The Commonwealth of Australia* (2015) PCA Case No. 2012-12.

one hand, States must consider human rights obligations when adopting trade and investment agreements. On the other hand, States must ensure that they meet trade and investment obligations when adopting public health measures. Doing so will decrease the likelihood of costly litigation or alternatively strengthen a State's defence in the event of litigation.

### **Reformulation**

(page 13) We note the reference to reformulation:

Private sector food and beverage actors should strive to meet public health goals by reformulating food to ensure less nutritious ingredients – such as sugars, salt/sodium and unhealthy fats such as trans fats – are minimized or eliminated in food and beverage products and nutritious ingredients such as fibre, fortificants, and other health promoting ingredients are increased.(p14)

Given the primary role of States in managing the food environment, we suggest that the VG should be more directive, noting for example that '**States should adopt legislation and fiscal measures** to require private sector food and beverage actors to contribute to public health goals by reformulating...'

### **The context of climate change**

(page 14) Section 3.2.6 should be revised to separate the concepts of climate change mitigation and climate change adaptation. Climate change mitigation should be a cross-cutting principle for the VG. Guidance on climate change mitigation should address actors across the food sector, not only farmers, such as the packaging, transport and retail sectors.

Guidance for States on climate change adaptation should include reference to South-South cooperation and international aid.

### **Equitable access to sustainable and healthy diets**

(page 16) Replace the reference to 'citizens' with 'people' regarding State obligations in paragraph 40. States owe obligations to all people within their jurisdictions, not only citizens.

### **Acknowledgments**

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