1. Ending childhood obesity: Introducing the issues and the legal challenge

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In June 2014, in advance of the Second United Nations (UN) High Level Meeting on NCDs, the Director-General of the World Health Organization (WHO) established the Commission on Ending Childhood Obesity (ECHO), noting that progress in tackling childhood obesity had been 'slow and inconsistent'. ECHO was entrusted with producing a report specifying which approaches and combinations of interventions were likely to be most effective in tackling childhood and adolescent obesity in different contexts around the world.[1] In May 2016, the 69th World Health Assembly (WHA) welcomed ECHO's report and asked the WHO to develop an action plan for the implementation of its recommendations.[2] Following consultation with member States and relevant stakeholders, an implementation plan was submitted to the 70th WHA in May 2017,[3] which the member States welcomed.[4] Using the Commission's report as its starting point, this edited collection reflects on the problem of childhood obesity as a legal challenge and calls for the robust, evidence-based regulation of the food industry, not least multinational

[1] Two ad hoc working groups were convened to provide guidance to the Commission, focusing respectively on the science and evidence for ending childhood obesity and on implementation, monitoring and accountability frameworks. On ECHO and its working groups, see www.who.int/end-childhood-obesity/en (accessed 15 May 2020).

[2] WHA, 'Report of the Commission on Ending Childhood Obesity', Resolution A69/8, World Health Organization, 24 March 2016. Following consultation with member States and relevant stakeholders, an implementation plan was submitted to the 70th WHA in May 2017 ('Report of the Commission on Ending Childhood Obesity: Implementation Plan Report by the Secretariat', EB140/30, 13 January 2017), which the member States welcomed: Resolution WHA 70.31.

[3] In this regard, the WHO Secretariat has submitted a report to the 140th session of the Executive Board: WHO, Executive Board.

[4] Resolution WHA 70.31.

corporations that operate at a global level and have been identified as major contributors to the problem.

1. CHILDHOOD OBESITY AS A GROWING PUBLIC HEALTH CHALLENGE

1.1 The Global Rise of Childhood Obesity

Many children are growing up in 'obesogenic' environments that encourage weight gain and deter weight loss.[5] The WHO estimates that the prevalence of worldwide obesity has nearly tripled in the last four decades. It is fuelled by the rising prevalence of overweight among children. In 2016, over 340 million children and adolescents aged five–19 were overweight or obese – an increase from 4 per cent in 1975 to around 18 per cent in 2016; whilst an estimated 38.2 million children under the age of five years were overweight or obese in 2019.[6]

Once considered a problem only for high-income countries, overweight and obesity rates are rising rapidly in low- and middle-income countries (LMICs). The vast majority of overweight or obese children now live in developing countries, where the rate of increase has been more than 30 per cent higher than that of developed countries.[7] Consequently, several LMICs face the 'double burden' of malnutrition. While they continue to deal with infectious diseases and undernutrition, they are experiencing a rapid upsurge in chronic disease risk factors such as overweight and obesity. It is increasingly common to find undernutrition and obesity existing side by side within the same country, the same community and even within the same household. This double burden may reflect inadequate prenatal and infant nutrition predisposing individuals to weight gain and metabolic risks from later exposure to unhealthy food[8] and lack of physical activity. It also reflects the 'nutrition transition',[9] character-

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5 G Egger and B Swinburn, 'An "Ecological" Approach to the Obesity Pandemic' (1997) 315 *British Medical Journal* 477.

6 WHO, 'Obesity and Overweight: Key Facts and Figures', WHO, Geneva, 1 April 2020.

7 WHO, 'Obesity and Overweight: Key Facts and Figures', WHO, Geneva, 16 April 2018.

8 The term 'unhealthy food', which is used increasingly in WHO documents, means highly processed, nutritiously poor food and non-alcoholic beverages which are high in fat, sugar or salt. ECHO has urged States to 'develop nutrient-profiles to identify unhealthy foods and beverages' (recommendation 1.4).

9 B Popkin, 'Nutrition, Agriculture and the Global Food System in Low- and Middle-Income Countries' (2014) *Food Policy* 91; C Monteiro and G Cannon, 'The Impact of Transnational "Big Food" Companies on the South: A View from Brazil' (2012) 9 *PLoS Medicine* e1001252.

ized by the shift to processed food richer in salt, sugar and saturated fats – food that has a long shelf life and is attractive to urban populations and younger generations, but is often less nutritious.[10]

1.2 The Costs Associated with Obesity

In addition to their psychological consequences and the risks of harassment and bullying children with severe overweight face, overweight and obesity are major risk factors for a broad range of non-communicable diseases (NCDs), including high blood pressure and cardiovascular diseases, diabetes and resistance to insulin, musculoskeletal disorders, and some forms of cancer.[11]Obese children also experience breathing difficulties, increased risk of fractures, hypertension, early markers of cardiovascular disease, insulin resistance and psychological effects. Childhood obesity is also associated with increased future risks of obesity, premature death and disability in adulthood.[12]It therefore has the potential to reverse many of the health benefits that are contributing to increased life expectancy,[13]whilst undermining the physical, social and psychological well-being of children.

Obesity is a threat to sustainable development, with high economic, social and ecological costs, directly affecting each element in the 'triple bottom line' of development.[14] It is associated with inequality, low social cohesion, low economic status, poor quality of life, reduced mobility, poorer employment opportunities, poor health and a lower life expectancy.[15] Obesity gives rise to high economic costs, with its high toll on public health systems and budgets and negative impact on labour markets due to lower productivity, premature death and lower employment rates.[16]

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[10] O De Schutter, 'The Transformative Potential of the Right to Food', Final Report to the UN General Assembly, UN Doc A/HRC/25/57, 24 January 2014, 7.

[11] WHO, 'Obesity and Overweight: Key Facts and Figures', WHO, Geneva, 1 April 2020.

[12] ECHO Report, n2, 40.

[13] Ibid., 2.

[14] UN Standing Committee on Nutrition, 'Nutrition and the Post-2015 Sustainable Development Goals', Technical Note, UNSCN Secretariat, October 2014; B Swinburn, et al., 'The Global Obesity Pandemic: Shaped by Global Drivers and Local Environments' (2011) 378 *Lancet* 815; World Bank, 'Non-Communicable Diseases in the Caribbean: The New Challenge for Productivity and Growth', World Bank LAC Caribbean Knowledge Series, June 2013.

[15] Political Declaration of the UN High-Level Meeting on the Prevention and Control of Non-Communicable Diseases, 20 September 2011, Document A/66/L 1.

[16] The current costs of obesity are estimated at about US $2 trillion annually from direct healthcare costs and lost economic productivity. These costs represent

1.3 Calls from the International Community to End Childhood Obesity

In the late 1990s, the WHO recognized obesity as a major global health problem.[17] However, it was only in September 2011 that the issue of childhood obesity and NCDs became prominent on the global scene, when the UN General Assembly convened the first High Level meeting on Non-Communicable Diseases[18]and the international community acknowledged the scope of the challenge it was facing.[19]This meeting paved the way for the adoption of a series of global declarations, action plans and recommendations, as well as the establishment of commissions, working groups and taskforces committed to addressing NCDs, including ECHO.

The WHO Global Action Plan for the Prevention and Control of Non-communicable Diseases 2013–2020 includes a monitoring framework with nine voluntary global targets to be reached by 2025, including three that are particularly relevant to this book: a 25 per cent reduction in the overall mortality from cardiovascular diseases, cancer, diabetes or chronic respiratory diseases; a 30 per cent relative reduction in mean population intake of salt/sodium; and a halt in the rise of diabetes and obesity.[20] Since then, the UN

2.8% of the world's gross domestic product (GDP) and are roughly the equivalent of the costs of smoking or armed violence and war.

[17] See the WHO Consultation on Obesity carried out in 1999 and published in *Obesity: Preventing and Managing the Global Epidemic* (WHO, first published in 2000 and reprinted in 2004), Technical Report Series 894.

[18] President of the General Assembly, 'Political Declaration of the High-Level Meeting of the General Assembly on the Prevention and Control of Non-Communicable Diseases', A/66/L.1, UN, New York, 16 September 2011.

[19] In 2000, the WHA adopted the WHO Global Strategy for the Prevention and Control of NCDs: Resolution WHA 53.14, whilst in September 2007, the Heads of Government of the Caribbean Community (CARICOM) adopted the Port of Spain NCD Summit Declaration, in which they committed to provide the critical leadership required for implementing strategies for the reduction of and which was influential in setting a global agenda on NCDs: J Kirton, et al., 'Controlling NCDs through Summitry: The CARICOM Case', 2011. On obesity and healthy diets more specifically, note the adoption of the Strategy on Diet, Physical Activity and Health in 2004 which called on States and other 'stakeholders' to improve nutrition and help tackle obesity prevention: WHA Resolution WHA 57.17.

[20] WHO, 'Global Action Plan for the Prevention and Control of Noncommunicable Diseases, 2013–2020', Resolution WHA66.10, WHO, Geneva, 2013, 5.

General Assembly has held two further meetings devoted specifically to the prevention and control of NCDs, in 2014[21] and in 2018.[22]

In November 2014, the Food and Agriculture Organization (FAO) and the WHO convened the Second International Conference on Nutrition (ICN2). ICN2 led to the adoption of the Rome Declaration on Nutrition, in which ministers and representatives of the member States acknowledge that all forms of malnutrition – including overweight and obesity – not only affect people's health and well-being, but in addition carry a high burden in the form of negative social and economic consequences to individuals, families, communities and countries.[23] In April 2016, the UN General Assembly endorsed the ICN2 declaration and proclaimed 2016–2025 the UN Decade of Action on Nutrition.[24]

In September 2015, the UN General Assembly also adopted the 2030 Agenda and the Sustainable Development Goals (SDGs). In sharp contrast with their predecessors, the Millennium Development Goals, the SDGs address concerns such as NCDs and malnutrition, thus reflecting the increasing attention that obesity, and childhood obesity more specifically, has received over the last 20 years.[25] In particular, SDG 2 urges 'all countries and all stakeholders' to 'end hunger, achieve food security and improved nutrition and promote sustainable agriculture', while SDG 3 calls on them to 'ensure healthy lives and promote well-being for all at all ages'.[26]

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[21] Resolution 68/300 of 17 July 2014 (A/68/L.53) adopting the outcome document of the high-level meeting of the General Assembly held on 10 and 11 July on the comprehensive review and assessment of the progress achieved in the prevention and control of non-communicable diseases.

[22] Resolution 73/2 of 10 October 2018 (A/73/L.2) adopting the Political declaration of the third high-level meeting of the General Assembly on the prevention and control of NCDs, following the High-level meeting held on 27 September 2018 to undertake a comprehensive review of the prevention and control of NCDs.

[23] Second International Conference on Nutrition, 'Rome Declaration on Nutrition', Conference Outcome Document, ICN2 2014/2, FAO and WHO, Rome, November 2014, para 4.

[24] UN General Assembly, 'United Nations Decade of Action on Nutrition (2016–2025)', A/RES/70/259, 15 April 2016.

[25] The MDGs called for the eradication of hunger and extreme poverty, and Target 1.c more specifically called for halving between 1990 and 2015 the number of people who suffer from hunger. The focus therefore was on undernutrition rather than malnutrition more broadly defined.

[26] UN General Assembly, 'Transforming Our World: The 2030 Agenda for Sustainable Development', UN Doc A/RES/70/1, 25 September 2015.

2. THE MULTISECTORAL RESPONSE REQUIRED TO ADDRESS CHILDHOOD OBESITY EFFECTIVELY

Widespread changes in food type, availability, affordability and marketing, as well as a decline in physical activity, with more time being spent on screen-based and sedentary leisure activities, have resulted in an 'energy imbalance', with the ingestion of more calories than the body can use effectively. However, because the problem is multifactorial, there is no 'magic' or 'silver' bullet, to coin the phrases often used in this context, and unravelling the complex combination of factors is key to tackling the problem effectively.[27] As ECHO has noted, 'it is only by taking a multisectoral approach through a comprehensive, integrated package of interventions that address the obesogenic environment, the life-course dimension and the education sector, that sustained progress can be made'.[28] ECHO therefore recommends that States 'coordinate contributions of all government sectors and institutions responsible for policies, including, but not limited to: education; food, agriculture; commerce and industry; development; finance and revenue; sport and recreation; communication; environmental and urban planning; transport and social affairs; and trade'.[29]

The WHO Global Action Plan on NCDs, the ECHO Report and related WHO and other UN documents urge States around the world to adopt a broad range of measures with a view to promoting healthy diets and ending childhood obesity. Some of these measures are intended to ensure that consumers are well informed and therefore 'empowered' to make healthier choices.[30] Several other recommendations call for measures going beyond informational rules, addressing more radically the food environment, to promote the availability, accessibility and affordability of healthier food, whilst reducing that of unhealthy food. Priority areas which member States should consider as part of effective obesity prevention strategies should include the promotion

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[27] For a very striking map of the causal web of obesity, see Fig. 5.2 'The full obesity system map with thematic clusters' in the Foresight Project Report, *'Tackling Obesities: Future Choices'* (UK Government Office for Science 2007) 84.

[28] ECHO Report, n2, 40.

[29] Ibid., xii.

[30] For example, ECHO has called on States to 'implement a standardized global nutrient labelling system' (ibid., recommendation 1.6) and 'implement interpretive front-of-pack labelling supported by public education of both adults and children for nutrition literacy' (ibid., recommendation 1.7).

of breastfeeding[31] and the regulation of food marketing,[32] the use of economic instruments such as food subsidies and food taxes,[33] food reformulation, food procurement,[34] and, more broadly, trade and agricultural policy.[35]

Overall, however, inertia has prevailed. Despite years of mounting concern for growing rates of child obesity and related NCDs, progress has been slow and inadequate. As the 2018 UN Political Declaration states: 'The world has yet to fulfil its promise of implementing, at all levels, measures to reduce the risk of premature death and disability from NCDs.'[36] Ending childhood obesity and related NCDs requires 'enhanced political leadership to advance strategic, outcome-oriented action across sectors and policy coherence for the prevention and control of NCDs, in line with whole-of-government and health-in-all policies approaches'.[37]

3. CHILDHOOD OBESITY AS A LEGAL CHALLENGE

In October 2017, States gathered in Montevideo to prepare the Third UN High Level Meeting on NCDs where they reiterated their 'commitment to take bold action and accelerate progress to, by 2030, reduce by one-third the premature mortality from [NCDs] in line with the 2030 Agenda for Sustainable

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[31] In light of evidence that exclusive breastfeeding for the first six months of life is a significant factor in reducing the risk of obesity, ECHO has called on States to promote breastfeeding; to this effect, they should in particular implement the Code of Marketing of Breastmilk Substitutes and subsequent WHA resolutions (recommendation 4.1) and 'support mothers to breastfeed, through regulatory measures such as maternity leave, facilities and time for breastfeeding in the work place' (recommendation 4.4).

[32] ECHO has called on States to 'implement the Set of Recommendations on the Marketing of Foods and Non-alcoholic Beverages to Children to reduce the exposure of children and adolescents to, and the power of, the marketing of unhealthy foods' (recommendation 1.3).

[33] ECHO recommendation 1.2 calls for the implementation of an effective tax on sugar-sweetened beverages.

[34] ECHO recommendations 5.1 to 5.3 focus on increasing the availability of healthy food and water fountains, whilst eliminating the provision or sale of unhealthy food in schools.

[35] See also C Hawkes, et al., 'Smart Food Policies for Obesity Prevention' (2015) 385 *Lancet* 2410.

[36] Resolution 73/2 of 10 October 2018, at para 4.

[37] WHO Montevideo Road Map 2018–2030 on NCDs as a Sustainable Development Priority, 18–20 October 2017, para 3 (emphasis added).

Development'. For the first time, they explicitly acknowledged the need for legal expertise in this field:

> We will enhance policy and legal expertise to develop NCDs responses in order to achieve the SDGs. We call upon the UN Inter-Agency Task Force on the Prevention and Control of NCDs and its Members, within their mandates, to scale up and broaden intersectoral work integrating expertise relevant to public health-related legal issues into NCD country support, including by providing evidence, technical advice, and case studies relevant to legal challenges. We encourage the UN Inter-Agency Task Force on the Prevention and Control of NCDs to explore the relationship between NCDs and the law to improve support to Member States in this area and to raise the priority it gives to this work.[38]

Law as an Opportunity: The Added Value of a Human rights-Based Approach to Childhood Obesity

With an increased focus on 'NCD promoting' environments, the question of the role of law has gained prominence in the obesity and NCD prevention debate. Not only do the international commitments of States to reduce obesity often call for a legislative or regulatory intervention, but there is a growing recognition that law as a discipline has a major role to play in the development and implementation of effective obesity and NCD prevention strategies at global, regional, national and local levels.

The importance of reflecting on the role that law can play in promoting healthier diets becomes even more acute when the issue of childhood obesity is framed as a children's rights issue. Policy documents increasingly refer to the added value of a human rights approach to the prevention and control of NCDs, which the WHO NCD Global Action Plan mentions as one of its nine overarching principles.[39] ECHO highlighted that the child's right to health should be the first guiding principle of interventions intended to end childhood obesity:

> Government and society have a moral responsibility to act on behalf of the child to reduce the risk of obesity. Tackling childhood obesity resonates with the universal acceptance of the rights of the child to a healthy life as well as the obligations assumed by State Parties to the Convention of the Rights of the Child.[40]

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[38] Ibid, para 21.

[39] It should be recognized that the enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being, without distinction of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, as enshrined in the Universal Declaration of Human Rights.

[40] ECHO Report, n2, 8, see also 10 and 40.

A children's rights approach to obesity and NCD prevention implies that the UN Convention on the Rights of the Child (CRC)[41] – the most ratified human rights instrument in the world – and other international human rights instruments should guide all policies that have a foreseeable impact on children, including the regulation of commercial practices that negatively affect them. Adopting such an approach has several benefits:

- Accountability – A children's rights approach guarantees a degree of State accountability, making effective remedies more likely where rights are violated. This, in turn, facilitates the translation of the commitments and obligations established in the CRC into practicable, long-lasting and realizable entitlements, guaranteed by independent monitoring bodies, including courts and national human rights institutions.
- Empowerment – Once the concept of 'rights' is introduced in policy-making, the rationale for preventing childhood obesity no longer comes only from the fact that children have needs but also from the fact that they have rights – entitlements that give rise to legal obligations on the part of States.
- Legitimacy – Because children's rights are inalienable and universal, there is an inherent legitimacy to the language of human rights. Consequently, arguments based on children's rights can ensure that an issue is given special consideration and that competing interests lose legitimacy if they are incompatible with children's rights.
- Advocacy – An approach based on human rights provides an opportunity to build strategic alliances, coalitions and networks with other actors who share a similar vision and pursue common objectives. In relation to childhood obesity, a children's rights approach is likely to encourage the involvement of a broad range of actors who may not have viewed marketing of unhealthy food to children as a concern of children's rights. In turn, this is likely to help galvanize political will and increase pressure on governments to ensure that they comply with their human rights obligations, particularly under the CRC.[42]

The CRC was adopted 40 years ago, when obesity was not seen as a major global public health problem. Like other human rights instruments, however, it should be interpreted in order to provide guidance to States facing new challenges: as noted by the Committee on the Rights of the Child, which is

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[41] United Nations, 'Convention on the Rights of the Child', adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989, entry into force 2 September 1990.

[42] *A Child Rights-Based Approach to Food Marketing: A Guide for Policy Makers* (Unicef 2018), at para 3.1.2.

entrusted with the interpretation and monitoring of the CRC, 'children's health is affected by a variety of factors, many of which have changed during the past 20 years and are likely to continue to evolve in the future'.[43] States should therefore prioritize issues, such as the availability of 'safe and nutritionally adequate food' and the shaping of 'a healthy and safe environment', which have gained in prominence in recent years.[44] It has also been argued that the set of WHO recommendations on the marketing of foods and non-alcoholic beverages to children should guide the interpretation of what the CRC requires from countries to ensure that they uphold their legal obligation to protect children's rights from harmful business practices.[45] More generally, global health law and policy should guide the interpretation of what the CRC and other international human rights instruments require from State Parties to ensure that they uphold their legal obligation to respect, protect and fulfil human rights, including where necessary by regulating the food industry and prohibiting harmful commercial practices.[46]

Nevertheless, despite the growing interest in, and potential of, human rights-based approaches to obesity and NCD prevention, few States are likely to meet their commitment to halt the rise of obesity given existing policies and practices.

4. THE GLOBAL AGRI-FOOD INDUSTRY AND CHANGING FOOD SYSTEMS: MOVING TARGETS FOR EFFECTIVE REGULATORY INTERVENTION

The incidence of obesity is directly related to the nature of food environments,[47] and to food systems at the local and national levels that have been

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[43] CRC, General Comment No. 15, on the right of the child to the enjoyment of the highest attainable standard of health, UN Doc CRC/C/GC/15, 17 April 2013, para 5.

[44] Office of the United Nations High Commissioner for Human Rights, 'The Right of the Child to the Enjoyment of the Highest Attainable Standard of Health', Geneva, 2013, para 99.

[45] Unicef, n42. See also K Ó Cathaoir, *A Children's Rights Approach to Obesogenic Marketing* (2017) PhD thesis (mimeo), University of Copenhagen.

[46] A Garde, 'Global Health Law and Non-communicable Disease Prevention: Maximizing Opportunities by Understanding Constraints', in G Burci and B Toebes, *Research Handbook on Global Health Law* (Edward Elgar 2018), 420. See also Unicef, *Advocacy Brief for 30th Anniversary of the CRC: Protecting Children's Right to a Healthy Food Environment*, Geneva, November 2019.

[47] K Witten and J Pierce (eds), *Geographies of Obesity: Environmental Understandings of the Obesity Epidemic* (Routledge 2010).

described as 'toxic'.[48] These environments are heavily shaped by the operations of multinational agricultural and food corporations (agri-food MNCs) at the global level.[49] Taken collectively, agri-food MNCs have structured food production, distribution and retail systems around the world that promote the increased consumption of processed and ultra-processed food,[50] and the widespread westernization of diets.[51] Such 'international forces' are key drivers of the 'obesity engine'.[52] As Swinburn and colleagues have noted, obesity results mainly from 'changes in the global food system', making it a 'predictable outcome of market economies predicated on consumption-based growth'.[53]

This form of growth has been promoted by decades of economic policies at national and international levels, prioritizing trade and investment liberalization, marketization and deregulation. The resulting globalized food system has, in turn, catalysed the growth of obesity,[54] through intensified trade in a broadened range of food commodities, global sourcing, foreign investment, global food marketing, retail restructuring and the rise of supermarkets, urbanization, westernization, and the development of global economic rules

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[48] K Brownell and K Horgen, *Food Fight: The Inside Story of the Food Industry, America's Obesity Crisis and What We Can Do About It* (McGraw-Hill 2003). On obesogenic environments see also, A Lake (et al. eds), *Obesogenic Environments: Complexities, Perceptions and Objective Measures* (Wiley-Blackwell 2010).

[49] C Hawkes and S Murphy, 'An Overview of Global Food Trade' in C Hawkes (et al. eds), *Trade, Food, Diet and Health: Perspectives and Policy Options* (Wiley-Blackwell 2010).

[50] C Monteiro, et al., 'Ultra-Processed Products are Becoming Dominant in the Global Food System' (2013) 14 *Obesity Reviews* 21; J Wilkinson, 'The Food Processing Industry, Globalization and Developing Countries' (2004) 1 *e-Journal of Agricultural and Development Economics* 184; C Monteiro, 'The Big Issue is Ultra-Processing' (2010) 1 *World Nutrition* 237.

[51] P Pingali, 'Westernization of Asian Diets and the Transformation of Food Systems: Implications for Research and Policy' (2006) 32 *Food Policy* 281. As Etilé and Oberlander have noted, the concerns relating to trade openness are compounded by the social aspects of globalization, such as exposure to foreign cultures, which are important in explaining the change in dietary habits: 'The Economics of Diet and Obesity: Understanding the Global Trends', Oxford Research Encyclopaedia of Economics and Finance, March 2019.

[52] B Popkin, 'Global Dynamics in Childhood Obesity: Reflections on a Life of Work in the Field' in M Freemark (ed.), *Paediatric Obesity: Etiology, Pathogenesis and Treatment* (Springer 2010), 3.

[53] B Swinburn, et al. 'The Global Obesity Pandemic: Shaped by Global Drivers and Local Environments' (2011) 378 *Lancet* 804, 804

[54] C Hawkes, 'Uneven Dietary Development: Linking the Policies and Processes of Globalization with the Nutrition Transition, Obesity and Diet-Related Chronic Diseases' (2006) 2 *Global Health* 4.

and governance institutions conducive to the emergence of the transnational agri-food industry.[55]

This industry is now highly concentrated;[56] 50 large food manufacturers, mostly controlled by firms from the global North, account for half of global food sales,[57] and the prevailing trend is currently towards even greater concentration.[58] The biggest year ever for mergers and acquisitions globally in the agri-business field was 2015,[59] seeing 42,300 known deals with a total value of US$ 4.7 trillion.[60] In 2017, the four largest manufacturers of breakfast cereals controlled 62 per cent of the global market and the four largest baby food producers controlled 60 per cent.[61] The power of the industry has been enhanced by the intense lobbying of agri-food MNCs in Northern policy-making centres such as Brussels and Washington DC, backed by capacious budgets and economic power.[62]

The intense re-structuring of local food systems in line with global demands, led by increasingly concentrated and powerful agri-food MNCs, strengthens the industrial and processed food model.[63] Local food environments are more obesogenic as a result and efforts to protect public health undermined.[64] In

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[55] Ibid., 5; M Qaim, 'Globalisation of Agrifood Systems and Sustainable Nutrition' (2017) 76 *Proceedings of the Nutrition Society* 12, 19; A Drewnowski, et al., 'International Trade, Food and Diet Costs, and the Global Obesity Epidemic' in C Hawkes (et al. eds), n49.

[56] T Weis, *The Global Food Economy: The Battle for the Future of Farming* (Zed Books 2007).

[57] *Agrifood Atlas: Facts and Figures about the Corporations that Control What We Eat* (Heinrich Böll Foundation 2017), 28.

[58] Ibid., 6–12.

[59] M Farrell, '2015 Becomes the Biggest M&A Year Ever', *Wall Street Journal*, 3 December 2015.

[60] 'Mergers and Acquisitions Review: Financial Advisors – Full Year 2015', Thomson Reuters, 2015.

[61] *Agrifood Atlas*, n57, 29. These figures might be compared to a general rule of thumb accepted by most economists that a market is no longer competitive when four actors control more than 40 per cent of it, at which point collusive and coercive behaviour is deemed to have become 'unproductive'. See, P Howard, *Concentration and Power in the Food System: Who Controls What We Eat* (Bloomsbury 2016).

[62] *Agrifood Atlas*, n57, 44–5. On the soda industry more specifically, see M Nestle, *Soda Politics: Taking on Big Soda (and Winning)* (OUP 2015); and A Taylor and M Jacobson, 'Carbonating the world: the marketing and health impact of sugar drinks in low-and-middle income countries', Center for Science in the Public Interest, Washington DC, 2016.

[63] G Kennedy, et al., *Globalization of Food Systems in Developing Countries: Impact on Food Security and Nutrition* (Food and Agricultural Organization 2004).

[64] W James, et al., 'An International Perspective on Obesity and Obesogenic Environments' in A Lake (et al eds), n48.

particular, LMICs are undergoing a significant nutrition transition as a result of their increased reliance on food imports, and the incidence of obesity and other NCDs is forecast to continue to rise sharply due to a homogenization of the global food system and the restructuring of traditional production, markets and diets.[65]

Incessant and aggressive expansion into developing markets is driven by a fall in the profits of agri-food MNCs in the developed North due to market saturation, and by some change in consumption patterns towards healthier products.[66] To maintain desired levels of shareholder value and the rates of profit needed to sustain it, many of the leading agri-food MNCs have adopted business models that rely heavily on rapid expansion into developing countries.[67] As a result, for example, in the Latin American and Caribbean (LAC) region overall sales from fast food chains roughly doubled in the period 2008–16, from US$ 8.9 billion to 16.3 billion.[68] Similar patterns are replicated across the developing world.[69] Obesogenic food environments are therefore intensifying in the wake of major transformations aligning local food systems with the needs of the global agri-food industry.[70] Ubiquitous policies of liberalization and agri-food privatization throughout the LAC and other developing regions have realigned local goals and practices to the demands of a global economy, ushering in 'the rapid rise of supermarkets, large processors, fast food chains and food logistics firms'.[71] Government control of the food system has been routinely dismantled without any effective regulation to replace it, leading to the creation of a largely unmanaged private system with serious social consequences and health impacts.[72]

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[65] S Anand, et al., 'Food Consumption and its Impact on Cardiovascular Disease: Importance of Solutions Focused on the Globalized Food System' (2015) 66 *Journal of the American College of Cardiology* 1590, 1591.

[66] M Christian and G Gereffi, 'Fast-Food Value Chains and Childhood Obesity: A Global Perspective' in M Freemark (ed.), *Paediatric Obesity: Etiology, Pathogenesis and Treatment* (2nd edn, Springer 2018), 723–6; *Agrifood Atlas*, n57, 28.

[67] Nestlé generated 70 per cent of its sales outside Europe and North America in 2015, and the figure for Unilever was 75 per cent. *Agrifood Atlas*, n57, 42.

[68] B Popkin and T Reardon, 'Obesity and the Food System Transformation in Latin America' (2018) 19(8) *Obesity Reviews* 1028.

[69] For further discussion on China and Russia, e.g., see Christian and Gereffi, n66, 723–5; D Berman, 'When Global Value Chains are Not Global: Case Studies from the Russian Fast-Food Industry' (2011) 15 *Competition and Change* 274; G Gereffi and M Christian, 'Trade, Transnational Corporations and Food Consumption: A Global Value Chain Approach' in C Hawkes (et al. eds) n49, 99.

[70] Popkin and Reardon, n68, 1.

[71] Ibid.

[72] See further, R Vogli, et al., 'The Influence of Deregulation on Fast Food Consumption and Body Mass Index: A Cross-National Time Series Analysis' (2014) 92 *Bulletin of the World Health Organization* 99.

The 'global value chains' (GVCs) on which the agri-food industry relies are among the most important drivers of obesity; therefore the responses, including the legal responses, should be transnational in nature.[73] A GVC perspective clarifies how 'corporate strategies and international processes relating to the production, distribution and marketing of fast-food (and agri-food) companies are linked to childhood obesity as a health problem'.[74] In short, the main features of a GVC approach place the macro-level of operations and processes within the global economy in the foreground,[75] through identification and analysis of 'lead' agri-food MNCs as major actors and drivers in the field. It then links this analysis to a theoretical framework on 'dietary dependence'. The latter framework refers to the mode of integration of a particular country or locality into the global economy via GVCs. It assesses the extent to which local diets are dependent on imported products and processed food supplied by agri-food MNCs and otherwise heavily shaped by their practices,[76] fundamentally determining patterns of local food availability, consumption, habits and food choices in favour of unhealthy options.[77]

The observed power differential between agri-food MNCs and local institutional actors, including regulators, consumers and producers, also tilts the balance of social, political and even legal decision-making in favour of an economic rationale (jobs, investment, growth, reduced prices…) over public health. This, again, privileges the interests of agri-food MNCs, expands their reach and further entrenches their influence. Importantly, agri-food MNCs can systematically take advantage, through their cross-border GVCs, of weaker regulatory environments in developing markets, enabling resistance, avoidance or the undermining of nationally based initiatives to combat obesogenic environments and control harmful business practices.

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[73] See Gereffi and Christian, n69; G Gereffi, et al., 'US-Based Food and Agricultural Value Chains and Their Relevance to Healthy Diets' (2009) 4 *Journal of Hunger Environment and Nutrition* 357. See also, T Sturgeon, 'From Commodity Chains to Value Chains: Interdisciplinary Theory-Building in the Age of Globalization' in J Bair (ed.), *Frontiers of Commodity Chain Research* (Stanford University Press 2009).

[74] Christian and Gereffi, n66, 726.

[75] Ibid., 719.

[76] D Stuckler, et al., 'Manufacturing Epidemics: The Role of Global Producers in Increased Consumption of Unhealthy Commodities Including Processed Foods, Alcohol and Tobacco' (2012) 9 *Policy Forum* 1.

[77] G Rayner, et al., 'Trade Liberalization and the Diet Transition: A Public Health Response' (2006) 21 *Health Promotion International* 67.

The Need to Address the Globalization of Food Systems Through International Cooperation

The causes of, and the structure of appropriate solutions to, growing rates of childhood obesity cannot be approached without a fundamental appreciation of this global, cross-border context.[78] Yet, insufficient attention has been paid to the global dimension of the fight against obesity. As Hawkes and Popkin have noted, while many countries are taking actions to promote healthier eating at the national level, few of them are truly taking on the broader food system, its priorities and its entire structure.[79] The search for solutions must be attentive to the power imbalance that now applies between agri-food MNCs and many public institutions, particularly in LMICs.

The cross-border dimension of childhood obesity is now increasingly acknowledged,[80] and so is the need for transnational cooperation to address it. For example, ECHO has called for the implementation of 'a standardized global nutrient labelling system', as recommended by the Codex Alimentarius Commission[81] (Recommendation 1.6) and to 'establish cooperation between member States to reduce the impact of cross-border marketing of unhealthy foods and beverages' (Recommendation 1.5). To date, however, little has been done to effectively address the transnational impact of agri-food MNCs on the scale that this challenge demands.

The Ambiguous Status of MNCs in the Development and Implementation of obesity and NCD

In part, the difficulties encountered may stem from the ability of agri-food MNCs to capture State power and use it to their advantage. Certain WHO instruments seek to address the risk of corporate capture and conflicts of interests. Most notably, the Framework Convention on Tobacco Control (FCTC) contains a specific and unequivocal prohibition against the involvement of the tobacco industry in the development and implementation of tobacco control

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[78] Qaim, n55, 12.

[79] C Hawkes and B Popkin, 'Can the Sustainable Development Goals Reduce the Burden of Nutrition-Related Non-Communicable Diseases Without Truly Addressing Major Food System Reforms?' (2015) 13 *BMC Medicine* 143, 145.

[80] Lancet Report, n16.

[81] Resolution WHA 56.23 Joint FAO/WHO evaluation of the work of the Codex Alimentarius Commission. In May 2019, the Codex Alimentarius Committee on Food Labelling began formal negotiations on guiding principles for the development of front-of-pack nutrition labelling.

policies.[82] Similarly, the International Code of Marketing of Breast-milk Substitutes calls upon member States to ban all commercial marketing of breast-milk substitutes in consideration of the special vulnerabilities of mothers to commercial influence, implicitly recognizing that governments had been hitherto insufficiently willing to challenge the ability for food manufacturers to shape consumers' choices.[83] Similarly, the WHO set of recommendations on the marketing of foods and non-alcoholic beverages to children also highlight that Governments should be the key stakeholders in the development of policy and that they should protect the public interest and avoiding conflict of interest.[84]

However, the 2004 WHO Strategy on Diet, Physical Activity and Health is less clear on the role that it envisages for the food industry in the prevention and control of overweight and obesity.[85] The main aim of the WHO strategy was to encourage the food and beverage sectors primarily in Europe and the USA to do far more to improve nutrition and help tackle obesity prevention. Led by both European and US sugar trade lobbyists, these powerful sectors had adopted confrontational positions. Prior to the WHO Executive Board meeting in Geneva where the draft strategy was to be considered, they appeared to have secured strong support from the US Government. This attempt to derail the WHO Strategy was effectively blocked by an open letter from Professor Kaare Norum, the Norwegian chair of the WHO's strategy reference group.[86] The wording of the WHO Strategy nonetheless remains ambiguous concerning the involvement it foresees for food companies and their associations. Not only does it explicitly encourage governments to consult stakeholders on policy, including the private sector and the media, but it also encourages them to establish mechanisms to promote their participation in activities related to diet, physical activity and health,[87] thus increasing the risk that conflicts of interest impede change. It also provides that '[WHO] will hold discussions with the transnational food industry and other parts of the private sector in support of the aims of the Strategy, and of implementing the recommendations in countries'.[88] In other words, it starts from the premise that the food industry

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[82] FCTC, Art 5(3).

[83] WHO International Code of Marketing of Breast-milk Substitutes, Art 5(1).

[84] Resolution WHA 63.14, Recommendation 6. Discussed in A Garde et al., 'Implementing the WHO Recommendations whilst Avoiding Real, Perceived or Potential Conflicts of Interest' (2017) 8(2) *European Journal of Risk Regulation* 237.

[85] WHO, n19.

[86] K Norum, 'World Health Organization's Global Strategy on Diet, Physical Activity and Health: The Process Behind the Scenes' (2005) 49 *Scandinavian Journal of Nutrition* 83.

[87] WHO, n19, para 44.

[88] Ibid., para 50.

can play a positive role in the prevention and control of overweight and obesity worldwide, even though it has not defined in any specific terms what this role could be. Of course, hearing from industry is, of itself, not problematic. However, putting already powerful and influential companies in an institutionally privileged position to shape opinions, advice, or standards upon which governments rely may be seen as an abdication of responsibility against the public interest.[89]

A 2018 UN Political Declaration on NCDs calls on States and the international community to:

> [e]ngage with the private sector, taking into account national health priorities and objectives for its meaningful and effective contribution to the implementation of national responses to non-communicable diseases in order to reach Sustainable Development Goal target 3.4 on non-communicable diseases, while giving due regard to managing conflicts of interest.[90]

Unfortunately, however, the specific terms of engagement with the food industry remain undefined. There is still no consensus on what the phrase 'giving due regard to managing conflicts of interest' should mean. Clear rules are needed to ensure that real, potential and perceived conflicts of interest are acknowledged and carefully managed.[91]

In this ambiguous context, States and international institutions have often relied extensively on 'agri-food' MNCs to take the organizational lead, drive change and solve problems through public-private food 'partnerships'.[92] Even the most powerful States, such as the US, feel compelled to do so by the influence of the industry.[93] As a result, not only food production and delivery but also the response to childhood obesity becomes overwhelmingly designed according to the needs of the agri-food industry rather than the requirements of the environment, sustainability or public health.[94] In fact, given the dominant

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[89] A Garde et al., n84.

[90] Political declaration of the 3rd High-Level Meeting of the General Assembly on the Prevention and Control of Non-Communicable Diseases, UN Doc A/RES/73/2, 17 October 2018, para 43.

[91] Note that some WHO instruments use the language of conflicts of interest avoidance rather than conflicts of interest management. See, e.g., the set of WHO recommendations on the marketing of food and non-alcoholic beverages to children, n84.

[92] Monteiro and Cannon, n9, 3.

[93] E Fried, 'The Potential for Policy Initiatives to Address the Obesity Epidemic: A Legal Perspective from the United States' in D Crawford (et al. eds), *Obesity Epidemiology: From Aetiology to Public Health* (OUP 2010) 324.

[94] Anand, et al., n65, 1593.

form of development shaped by economic globalization, 'obesity and serious chronic diseases can be seen as an integral part of economic development'.[95]

This ambiguity concerning the role agri-food MNCs may be able to play in preventing childhood obesity has systematically been used by the industry: it explains the adoption of 'pledges' and voluntary commitments, ostensibly to 'partner' in addressing the challenge, in fact to remove the need for more robust regulatory interventions. However, and as Anand Grover, UN Special Rapporteur on the right to the highest attainable standard of health between 2008 and 2014, stated:

> Owing to the inherent problems associated with self-regulation and public–private partnerships, there is a need for States to adopt laws that prevent companies from using insidious marketing strategies. The responsibility to protect the enjoyment of the right to health warrants State intervention in situations when third parties, such as food companies, use their position to influence dietary habits by directly or indirectly encouraging unhealthy diets, which negatively affect people's health. Therefore, States have a positive duty to regulate unhealthy food advertising and the promotion strategies of food companies. Under the right to health, States are especially required to protect vulnerable groups such as children from violations of their right to health.[96]

More work is urgently needed to determine what role the food industry should have and what would amount to conflicts of interest.[97] The assumption cannot be that because food is different from tobacco, partnerships with the food industry in addressing unhealthy diets are appropriate and likely to be

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[95] Monteiro and Cannon, n9, 3.

[96] Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, Anand Grover, 'Unhealthy Foods, Non-communicable Diseases and the Right to Health', UN Doc A/HRC/26/31, 1 April 2014, para 25. This statement follows from an earlier statement made by Olivier De Schutter, the UN Special Rapporteur on the Right to Food, in 2011:

> It is unacceptable that when lives are at stake, we go no further than soft, promotional measures that ultimately rely on consumer choice, without addressing the supply side of the food chain. […] Food advertising is *proven* to have a strong impact on children and must be strictly regulated in order to avoid the development of bad eating habits early in life.

'World Leaders Must Take Binding Steps to Curb Unhealthy Food Industry – UN Expert', *UN News*, 16 September 2011. See further, Report Submitted by the Special Rapporteur on the Right to Food, Olivier De Schutter, UN Doc A/HRC/1/9/59, 26 December 2011. More recently, see also Unicef, n46.

[97] Some work has been done, in particular: WHO, 'Addressing and Managing Conflicts of Interest in the Planning and Delivery of Nutrition Programmes at Country Level', WHO, Geneva, 2016; and M Mwatsama (ed.), *Public Health and the Food and Drinks Industry: The Governance and Ethics of Interaction. Lessons from Research, Policy and Practice* (UK Health Forum 2018).

effective. Public-private partnerships with the food and alcohol industries have inherent limits. States should adopt laws and regulations that will allow them to provide the level-playing field that MNCs require to operate fairly in a globalized world, whilst meeting their obligation to ensure the enjoyment of the highest attainable standard of health for all.

5. INTERNATIONAL ECONOMIC LAW AS A CATALYST TO CHILDHOOD OBESITY AND A CONSTRAINT ON STATES

As Magnusson has put it, 'with large profits at stake, there is a struggle for regulatory control',[98] and history has shown that the tobacco, alcohol and food industries deploy a broad range of corporate tactics,[99] including legal challenges against measures which could reduce their profit margins. In particular, they have argued that a range of NCD prevention policies adopted by States, as part of their attempts to promote public health, infringe international trade and/or investment law. Such legal arguments are based on claims that State policy in the public interest unjustifiably reduces the consumption of goods freely traded across the world, including tobacco products, alcoholic beverages and unhealthy food – the products most directly implicated in growing rates of NCDs around the world.

Obesity and Economic Liberalization

International trade and investment law rests on the premise that economic liberalization, by allocating resources efficiently, leads to greater competition and lower prices, and therefore increases opportunities for States, consumers and businesses alike.[100] However, several empirical studies have established

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[98] R Magnusson, 'What's Law Got to Do with It? Part 1: A Framework for Obesity Prevention' (2008) 5 *Australia and New Zealand Health* Policy.

[99] The tactics used by the food industries, and their comparison with those used by the tobacco industries, are increasingly well documented. See, e.g., R Moodie et al., 'Profits and Pandemics: Prevention of Harmful Effects of Tobacco, Alcohol, and Ultra-Processed Food and Drink Industries', (2013) 381 *The Lancet* 670; S Steele, et al., 'The Role of Public Law-Based Litigation in Tobacco Companies' Strategies in High-Income, FCTC Ratifying Countries, 2004–14' (2016) 38 Journal of Public Health 516; and M Nestle, n63; A Taylor and M Jacobson, n63; R Moodie, 'What Public Health Practitioners Need to Know About Unhealthy Industry Tactics' (2017) 107 *American Journal of Public Health* 1047.

[100] For an introduction to international trade law and its rationale, see M Trebilcock, *Advanced Introduction to International Trade Law* (Edward Elgar 2015). See also, V Lowe, *International Law* (OUP 2007) chapter 6.

a link between trade liberalization and increasing rates of obesity[101] and the expansion of processed food markets in developing countries.[102] Although this is a general phenomenon, Small Island Developing States (SIDS) in the Pacific and the Caribbean regions are spectacular illustrations, due to their high reliance on imports of processed and semi-processed food which have grown much faster than imports of raw foodstuffs, and have led to a dramatic increase in obesity and related NCDs.[103]

Heightened dependence on food imports seriously threatens the viability of local food systems, a phenomenon that is particularly worrisome in LMICs. The UN has predicted that for developing countries as a whole the deficit between food imports and exports will widen markedly by 2030, to an overall net import level of US$ 31 billion.[104] ECHO highlighted the impact of trade policies and the globalization of the food system on food affordability, availability and quality at national and local levels,[105] calling for the consideration

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[101] See A Thow and W Snowdon, 'The Effect of Trade and Trade Policy on Diet and Health in the Pacific Islands' in C Hawkes et al. (eds), n49, 147–68.

[102] A Thow and C Hawkes, 'The Implications of Trade Liberalization for Diet and Health: A Case Study from Central America' (2009) 5 *Global Health*. See also P Baker, A Kay and H Walls, 'Trade and Investment Liberalization and Asia's Non-communicable Disease Epidemic: A Synthesis of Data and Existing Literature' 92014) 10(1) *Globalization and Health* 66; A Schram, et al., 'The Role of Trade and Investment Liberalization and the Sugar-sweetened Carbonated Beverages Market: A Natural Experiment Contrasting Vietnam and the Philippines', *Globalization and Health* 11(1) (2015) 41; and P Baker, et al., 'Trade and Investment Liberalization, Food Systems Change and Highly Processed Food Consumption: A Natural Experiment Contrasting the Soft-drink Markets of Peru and Bolivia' (2016) 12(1) *Globalization and Health* 24.

[103] For Caribbean SIDS, see A Yearwood and A Samuels, 'Evidence Brief: Improving the Healthiness of Food Environments in the Caribbean', Caribbean Public Health Agency, June 2016. On the evaluation of the Port of Spain Declaration on NCDs, see A Samuels and N Unwin, 'Accelerating Action on NCDs', PAHO/WHO and CARICOM, September 2016. For Pacific SIDS, see A Thow, et al., 'Trade and Food Policy: Case Studies from Three Pacific Island Countries' (2010) 35 *Food Policy* 6.

[104] J Bruinsma (ed.), *World Agriculture: Towards 2015/2030 – An FAO Perspective* (FAO/Earthscan 2003) 235–6. See further, P Pingali, n51, 286–7. The islands of Trinidad and Tobago demonstrate how an entire country's food supply system can become dependent on imports; Gereffi and Christian, n69, 101–2.

[105] See ECHO Report, n2, 8. For more detail, see also: WHO, *Consideration of the Evidence on Childhood Obesity for the Commission on Ending Childhood Obesity: Report of the Ad hoc Working Group on Science and Evidence for Ending Childhood Obesity* (WHO 2016) 117.

of the health and equity impacts of national and international economic agreements and policies.[106]

> The Commission has noted the important influence that trade policies can have on the obesogenic environment. This is particularly the case for [SIDS] that are highly dependent on imported foods and where the nature of the food supply and pricing are largely determined by the trade dynamics. The Commission acknowledges the complexity of international trade, particularly in food and agricultural products, but urges member States and those involved in international trade arrangements to seek ways to address the trade issues that impact on child obesity.[107]

International Economic Law and Childhood Obesity Prevention

Notwithstanding its complexity, the fact remains that international trade law does recognize that member States can invoke public interest objectives, not least public health protection, to justify exceptions to the general principle that goods should move freely across national borders.[108]In particular, World Trade Organization (WTO) agreements (not least the 1994 General Agreement on Tariffs and Trade) acknowledge that WTO Members are primarily responsible for protecting the health of their citizens, and should therefore have a broad margin of discretion as to both the level of protection they intend to achieve and the means they intend to use to do so.

However, this discretion is subject to compliance with WTO rules, including the principles of non-discrimination and proportionality. First, WTO Members must ensure that the measures they take to protect public health are non-discriminatory, i.e., they must not distort free trade by putting imported goods at a disadvantage over domestic goods in a competitive relationship. Health promoting measures must be neutral in this regard and should not favour domestic producers – except when there is a health rationale for doing so, as opposed to a protectionist intent.[109] Secondly, when a State adopts

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[106] ECHO Report, n2, 17. ECHO referred to the work of the Commission on Social Determinants of Health: Closing the gap in a generation: health equity through action on the social determinants of health. Final Report of the Commission on Social Determinants of Health. Geneva, WHO, 2008.

[107] ECHO Report, n2, 37.

[108] See, inter alia: B McGrady, *Trade and Public Health: The WTO, Tobacco, Alcohol, and Diet* (CUP 2011). See also T Voon, 'WTO Law and Risk Factors for Non-Communicable Diseases: A Complex Relationship', in G Van Calster and D Prevost (eds), Research Handbook on Environment, Health and the WTO (Edward Elgar 2013); O De Schutter, *Trade in the Service of Sustainable Development* (Hart 2015).

[109] The notion of discrimination has been construed broadly to cover both direct and indirect discrimination.

a potentially trade-restrictive measure, it must ensure that this measure pursues a legitimate objective (such as the protection of public health) and is necessary to achieve it. The means employed must therefore be proportionate, or in other words adapted to the policy objective, as defined by the State, and free trade may only be restricted to the extent necessary to achieve this objective.[110] International investment law also requires a similar attention to principles of non-discrimination and proportionality with respect to the treatment of foreign investors, as well as adherence to an evidence-based and legitimate policy objective. There are some additional considerations, however, in relation to investment law, including the need for States to clarify that investors may face future regulation as may be required to adhere to human rights and other State obligations mandating the protection of the population. These issues are discussed thoroughly in Part II and recapped in the Conclusion.[111]

Therefore, and importantly, the opportunities highlighted above that the law offers to promote healthier food environments and regulate agri-food MNCs will only be maximized if the constraints that international economic law imposes are well understood.[112]The more robust the regulatory rules and their evidence base, the less likely it is that agri-food MNCs will be able to challenge them successfully. The developing global consensus on what should be done to tackle NCDs, and child obesity more specifically, provides a solid foundation of evidence that States could adduce to support their regulatory strategies and, where necessary, defend any challenges to national rules that may restrict free trade and foreign investment. Global health law, international human rights and international economic law should be complementary and mutually supportive with a view to ensuring an optimal balance between potentially competing interests, putting the SDGs and the rights of the child at their heart.[113]

6. STRUCTURE OF THIS EDITED COLLECTION

The contributions this volume brings together discuss the role of law in promoting healthier diets and the interaction between international human rights

[110] In the absence of a detailed set of principles against which to test the necessity of regulatory action, the scope of this principle has largely been defined by the Dispute Settlement System of the WTO.

[111] On the interaction between international investment law and NCD prevention, see also A Garde and J Zrilic (eds), Special Issue, *Journal of World Investment and Trade* (forthcoming, autumn 2020). See in particular the contribution by Marcelo Campbell on the challenges to Chile's food labelling and advertising legislation.

[112] A Garde, n46.

[113] Ibid, 418.

and economic law in the protection of children and the prevention of childhood obesity. This collection does not purport to offer a comprehensive account of all the legal issues relevant to childhood obesity: in particular, it does not focus on physical activity (e.g., local planning laws, employment law…) or on the medical treatment of obesity and related NCDs (access to medicines…). These omissions should not be read as suggesting that these issues are not important components of health promotion and childhood obesity prevention strategies. The emphasis of this book, however, is on the regulation of the food industry as an essential component of a broader strategy to halt the rise of childhood obesity. We have aimed to provide a range of tools that States and other policy actors may want to use in the development and implementation of obesity prevention strategies at national, regional or global levels, including those intended to promote a more systematic reliance on human rights discourses and enforcement mechanisms.

We believe that part of the originality of this volume mirrors some of the difficulty encountered in constructing it: we have tried to reflect not only on international human rights law and on international economic law in isolation, but also on their relationship. This is difficult because there tends to be little overlap between human rights lawyers and international economic lawyers. Nevertheless, we have attempted to bridge the gap in order to demonstrate how human rights instruments can shed light on inherently economic issues. If we accept that business activities do have an impact on children's rights, then such engagement is indeed paramount. We hope that our complementary expertise and interests will have helped bring a wider range of issues and ideas to the fore than each one of us could have done alone.

This book should therefore be seen as complementing existing literature on the relationship between NCD prevention and international economic law, on the one hand, and NCD prevention and human rights law, on the other. As such, it is intended to contribute – modestly – to the ongoing efforts deployed to build legal capacity to address NCDs, and childhood obesity more specifically. There is a large spectrum of regulatory measures that States may take in order to combat child obesity. The potential for legal reform in this area is largely untapped, however. This is due, in part, to the powerful lobbying efforts of the food industry. It is also the result of an ideological belief in the virtues of 'consumer sovereignty', and in the correlative suspicion towards what libertarians call the 'nanny State'. Nevertheless, even where the democratic process is protected from undue influence by economic actors and where the libertarian ethos – individualistic, market-oriented, and suspicious of governmental intervention – is weak, States are hesitant to adopt a number of legal measures that could effectively transform the food environment and ensure that children adopt healthier eating habits: they may fear, indeed, that the regulation of food marketing or food composition, or the reshaping of food envi-

ronments to encourage people to eat fresh and locally produced foods, violate commitments under free trade or investment agreements, for instance because they will be seen as discriminatory or as violating the rights of foreign investors. In many cases, a 'chilling effect' operates: even though certain regulatory measures would be perfectly compatible with their international undertakings, States may be hesitant to adopt such measures, in order to avoid the risk to its reputation that would result from being sued before an international court or an arbitral tribunal. Thus, a clear understanding of the relationship between the human rights duties of States, including their duty to protect the right to health, and international trade and investment law is a first and essential step towards a child obesity prevention strategy that uses the regulatory toolbox to its full potential. This book aims to contribute to this objective.

This book primarily addresses the role of law in preventing obesity. We are convinced, however, of the need for a broader interdisciplinary engagement to meet this challenge. Obesity is multifactorial, and as such it necessarily requires a trans-sectoral response. Interdisciplinarity must therefore be the foundation to meaningful work in this area, and it permeates the following collection. Nevertheless, we feel that the role of law is often insufficiently acknowledged and promoted, sometimes leading to an impoverished understanding and some confusion in the response to obesity. Our primary focus on the law is aimed at remedying this perception. However, law can only make an effective contribution if it properly incorporates existing evidence gathered and analysed by other disciplines. This book should therefore be seen as an attempt to promote the role of law; not to limit in any way the role of other disciplines or the role of non-legal tools, such as economic incentives, public information campaigns and the use of 'nudges' to encourage healthy diets and the promotion of a different, healthier food culture.

Chapter Outlines

The book follows a tripartite structure with respect to combatting childhood obesity: from an overarching treatment of the role of human rights law, to an in-depth appreciation of the nature and scope of international economic law, and finally to a more detailed examination of some regulatory aspects and actors suggested by a thorough commitment to human rights in the face of an ascendant global agri-food industry.

Three chapters in Part I highlight the essential contribution and distinct nature of a human rights approach to ending childhood obesity, and in particular the added value of adopting an approach grounded in human rights, and how such an approach can be complementary to approaches based in health science, behavioural science and economics.

Oscar Cabrera and Sarah Roache introduce the broad relevance of international human rights law, enumerating and expanding on the rights most relevant to this inquiry, not least the rights to health and food. They explain the different levels of obligation involved in the duties of States towards human rights, and they clarify the mutually supportive relationship between rights and obesity prevention. The chapter then digs deeper into the precise manner by which human rights interact and are balanced with each other, attending to conflicts between individual autonomy and the right to health or consumer's human rights and corporate claims to their own 'human' rights.

Katharina Ó Cathaoir and Mette Hartlev narrow the focus to specific health aspects of child rights. They draw on and meld together the CRC and the ECHO final report, proposing a child rights approach exhorting States to pursue three key policy goals: providing an enabling environment, pursuing empowerment through societal and legal transformation, and ensuring accountability. They conclude that human rights and public health can be mutually reinforcing, arguing that the WHO provides evidence-based technical guidance, while the CRC legally binds states. The WHO's recommendations can therefore concretize States' sometimes vague obligations under the child's right to health.

Marine Friant-Perrot and Nikhil Gokani then shine a spotlight on the relevance of human rights within the existing context of health inequality both across and within States. Widespread, systematic and entrenched inequalities in childhood obesity are noted between and within societies. Corrective action is required as a matter of social justice to restore children's autonomy, dignity and freedom in food choices. Friant-Perrot and Gokani argue that the right to non-discrimination offers an effective avenue to promote the protection of children from the causes of inequalities in obesity, obliging States to create an environment which grants every child the capacity to choose healthy food.

Part II turns to the precise nature of international economic law, teasing out the scope of the legal space available for States to implement regulatory and other measures to prevent obesity, both through analysis of theory and by providing important empirical context. The four chapters address some misunderstandings and oversimplifications often encountered in debates on economic law and public health policy, seeking a clarity that should encourage government action. This part also aims to indicate where the re-design of international economic law may be warranted to allow greater space for governments to end childhood obesity where it is needed.

Gregory Messenger clarifies the legal limits and nature of international trade law, in large part through a historical treatment of the regulation of sugar markets, from their colonial heritage to their current regulation by international institutions. Messenger questions the often-heard view according to which trade law presents an insurmountable barrier to the introduction of public health measures related to obesogenic goods. He argues that trade law has

developed to accommodate the pursuit of legitimate public policy objectives and identifies sugar, in particular, as a possible catalyst for further accommodation in trade law between the pursuit of economic liberalization and public health policies by governments.

Caoimhín MacMaoláin then focuses on food labelling laws and guidelines, ascertaining which measures have been, or could be, effective in the context of restrictions imposed by trade law. He argues that existing trade obligations can act more as an impediment than as an aid to the use of labelling laws. Individual States have devised their own national labelling schemes, but trade obligations may make it difficult for them to compel or encourage anyone to use these schemes. MacMaoláin identifies which labelling types might therefore be the best ones to use to help to reduce childhood obesity in the current legal environment and points to alternative approaches that could facilitate the application of more meaningful and successful measures.

Mavluda Sattorova clarifies the effects of international investment law on potential government measures intended to prevent childhood obesity. She does so by revisiting an ongoing debate over the 'chilling effect' of investment treaties, situating the debate within some recent empirical case-studies. It is often argued that investment treaties may cause governments to abandon the adoption of public health regulations – 'regulatory chill' – but this may be avoided through reforms of investment treaty provisions as well as national laws on foreign investment. The chapter concludes by outlining the key issues that those implementing national childhood obesity measures need to be aware of in order to overcome any possible chilling factor and to ensure that new regulations are immune to legal challenges from affected investors.

Nicole Foster concludes this part by examining the problem of childhood obesity from a regional perspective using the experience of members of the Caribbean Community (CARICOM). The chapter explores whether CARICOM States' regional and multilateral trade commitments constitute significant legal obstacles to regional efforts to tackle childhood obesity, and comments on the potential role of international human rights law in accelerating action in this area. Foster ultimately concludes that while trade obligations do constrain their choice of public health measures and how they implement them, sufficient policy space still remains to take meaningful action. She also recommends leveraging international human rights and its enforcement mechanisms to push Caribbean governments to act more promptly and decisively, while still respecting their international trade obligations.

Following on from Foster's suggestion, Part III addresses certain additional tools provided by human rights law (and associated bodies and mechanisms) to move States in a regulatory direction and to provide them with useful and appropriate institutional and theoretical frameworks through which to act, particularly in controlling global agri-food MNCs and reshaping the global food

system. Aside from expectations that States will act within the space allowed by economic law, human rights law suggests, and in some cases may require, additional regulatory, procedural, technical and institutional measures should States and other stakeholders choose to prioritize a human rights approach to childhood obesity prevention.

Wenche Barth Eide and Asbjørn Eide describe a broad set of institutional responses to childhood obesity that should be implemented within the UN system to maximize the benefits of a human rights approach. The chapter describes some obstacles within the UN to ensuring a coherent and effective human rights-based approach to development, emphasizing differences in the orientation of UN agencies. The authors focus on the WHO and the Food and Agriculture Organization (FAO), and argue that the General Assembly's proclamation of the UN Decade of Action on Nutrition 2016–2025 provides a new and promising impetus. They conclude with some ideas for further action which require new and reinforced alliances to strengthen the UN's work with a rights-based approach to malnutrition and childhood obesity.

Amandine Garde and Seamus Byrne pursue in further detail the balance of competing rights earlier introduced in the chapter by Cabrera and Roache. They elaborate on how a thorough and progressive implementation of the principle of the best interests of the child could provide an important device for balancing the competing interests of children and industry operators. The chapter demonstrates the importance of the principle of the best interests of the child in framing an acceptable legal space for regulatory measures, arguing that children's rights should be used throughout the policy process – from policy formulation to policy implementation, monitoring and evaluation – not only as a 'shield' against food industry challenges but also as a 'sword' to carve out space for appropriate regulation.

Oliver Bartlett considers the responsibility resting on MNCs to respect the right to health. Although international human rights law is addressed to States and does not impose direct legal obligations on corporate entities, the UN Guiding Principles on Business and Human Rights adopted by the Human Rights Council in June 2011 require MNCs to conduct human rights due diligence to reduce the risks that their business practices pose to the enjoyment of human rights. Bartlett argues that MNCs have a responsibility to engage in right to health due diligence, to address the ways in which their business practices contribute to the creation of obesogenic environments undermining the child's right to health. He also takes the position that if MNCs are unwilling to voluntarily conduct right to health due diligence, States should oblige them to do so. Furthermore, the 'horizontal effects' of constitutional rights to health on private actors might even provide grounding for courts to mandate such State regulation.

Maintaining Bartlett's focus on the primary corporate actors in the global food system, Joshua Curtis elaborates on the transnational procedures necessary to provide an effective legal remedy for the acts of agri-food MNCs in cross-border contexts that violate children's rights to be free from obesogenic environments. Strengthened transnational corporate accountability is a necessary element in the fight against childhood obesity given the global structure of the agri-food industry. Open and effective access of victims to courts in the home State of agri-food MNCs is a necessary element in such accountability. This chapter explores the feasibility and obstacles to the further opening of access to home State courts through a potential transnational case against Nestlé in Switzerland for aggressive marketing of breast-milk substitutes in the Philippines. Curtis argues that evolving conceptions of extraterritoriality and the development of extraterritorial human rights obligations provide a crucial normative framework supporting calls for the mandatory opening of home State courts and the broader construction of an international order capable of controlling corporate power.

Joshua Curtis and Amandine Garde's Concluding chapter draws out and weaves together the major themes and findings of the collection as a whole, with a particular eye to policy relevance and future orientation. This chapter takes an expressly forward-looking stance, reflecting specifically on the added value of a WHO Framework Convention on Obesity Prevention.

We are most grateful to our colleagues who have contributed to this volume, many of whom have been long-standing friends of the Law & NCD Unit[114] and without whom this endeavour would not have been possible. It has been a pleasure working with you all and we thank you for your patience: this project has been much longer in the making than we originally anticipated. We hope that you are nonetheless pleased with the result. We would also like to thank Edward Elgar for their support and for publishing this book in their Health and the Law series.

[114] For information on the activities of the Law & NCD Unit which sits in the School of Law and Social Justice at the University of Liverpool, see: https://www.liverpool.ac.uk/law/research/law-and-non-communicable-diseases/ (accessed 15 May 2020).