

SCHOLARLY ARTICLE

## Marketing Ultra-Processed Food and Beverages to Children in Latin America: Business Responsibilities and State Duties†

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### Abstract

Exposure to the marketing of ultra-processed food and beverages has been proven to be detrimental to children's health. This article explores this issue from a business and human rights perspective, with the purpose of understanding businesses' responsibilities and states' duties with respect to the deliberate marketing of ultra-processed products to children. To this end, this article refers to the three pillars of the United Nations Guiding Principles on Business and Human Rights, as well as to international human rights law. Its analysis looks not only at the normative content of obligations, responsibilities and rights under international law, but also at their implementation and at current challenges within the Latin American context.

**Keywords:** children's rights; marketing; obesity; ultra-processed food and beverages

### 1. Introduction

The world is currently experiencing multiple disease outbreaks, many of which interact with one another to threaten public health. The COVID-19 pandemic is a notable example, given that it has devastatingly impacted both human lives and the economy. However, it is not the only one. The World Health Organization (WHO) has declared the increasing rates of overweight and obesity a global epidemic.<sup>1</sup> Sounding the alarm on the potential impacts of the obesity epidemic, the WHO has declared that '[i]f immediate action is not taken, millions will suffer from an array of serious health disorders'.<sup>2</sup> In fact, the literature on public health and nutrition has extensively documented how unhealthy

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† The author is grateful to Julián Gutierrez, Erin Formby, Morgan Stoffregen, Juan Carballo, the organizers and participants of BHRJ's September 2020 workshop, and the anonymous reviewers for their input on previous versions of this article. All errors are the author's.

<sup>1</sup> WHO, 'Controlling the Global Obesity Epidemic' (2003), <https://www.who.int/activities/controlling-the-global-obesity-epidemic> (accessed 30 November 2021).

<sup>2</sup> Ibid. In fact, the obesity epidemic and the COVID-19 pandemic are mutually reinforcing. See Norbert Stefan, Andreas Birkenfeld and Matthias Schulze, 'Global Pandemics Interconnected: Obesity, Impaired Metabolic Health and COVID-19' (2021) 17 *Nature Reviews Endocrinology* 135.

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diets<sup>3</sup> negatively affect health and may lead to the development of chronic non-communicable diseases (NCDs). Obesity and overweight can strongly affect children, who can experience physical<sup>4</sup> and mental health<sup>5</sup> consequences.

Although obesity is rooted in several environmental, social, cultural, and even genetic factors, food marketing is a leading cause of increasingly unhealthy food intake patterns. The sugary beverage and ultra-processed food industry has expanded rapidly in Latin America, particularly through expensive marketing campaigns which facilitate children's exposure and access to unhealthy diets. To discourage the consumption of unhealthy food and beverages, the WHO has recommended restricting the marketing of these products to children.<sup>6</sup> Although many countries have adopted legislation banning these practices, many others have yet to develop such laws, giving the industry vast leeway to market its products directly to children.

Within the field of global health law, the question of how law can be a tool for the prevention of NCDs<sup>7</sup> and obesity<sup>8</sup> – and, particularly, how international human rights law can frame both states' and businesses' duties with regard to the marketing of unhealthy products – has gained increasing attention in recent years.<sup>9</sup> Moreover, from a business and human rights perspective, recent attention has been placed on how businesses can be held responsible for the marketing of certain food and beverages and how the principle of due diligence should be applied.<sup>10</sup> However, most of this literature focuses on legal developments in the Global North, with scant attention to the Global South. Concerning Latin America in particular, there is little work on how businesses and states alike can frame their responsibilities and duties in relation to the marketing of food and beverages.<sup>11</sup> This

<sup>3</sup> In accordance with the Pan American Health Organization's Nutrient Profile Model, this article refers to unhealthy diets as those consisting of 'processed and ultra-processed products, which typically contain elevated amounts of sodium, free sugars, saturated fat, total fat, and trans-fatty acids added by the manufacturer'. Pan American Health Organization, *Nutrient Profile Model* (Washington, DC: PAHO, 2016) 13–14.

<sup>4</sup> Krushnapriya Sahoo et al, 'Childhood Obesity: Causes and Consequences' (2015) 4:2 *Journal of Family Medicine and Primary Care* 187.

<sup>5</sup> Robert Cornette, 'The Emotional Impact of Obesity on Children' (2008) 5:3 *Worldviews on Evidence-Based Nursing* 136.

<sup>6</sup> WHO, *Set of Recommendations on the Marketing of Foods and Non-Alcoholic Beverages to Children* (Geneva: WHO, 2010) 8, recommendations 2 and 3; WHO, *Framework for Implementation of the WHO Set of Recommendations on Marketing of Foods and Non-Alcoholic Beverages to Children* (Geneva: WHO, 2012); WHO, *Ending Childhood Obesity: Securing the Future for Our Children* (Geneva: WHO, 2016). For a presentation of the WHO recommendations on marketing, see Amandine Garde and Godfrey Xuereb, 'The WHO Recommendations on the Marketing of Food and Non-alcoholic Beverages to Children' (2017) 8:2 *European Journal of Risk Regulation* 211.

<sup>7</sup> See Amandine Garde, Joshua Curtis and Olivier De Schutter, *Ending Childhood Obesity: A Challenge at the Crossroads of International Economic and Human Rights Law* (UK: Edward Elgar Publishing, 2020); Amandine Garde, 'Global Health Law and Non-Communicable Disease Prevention: Maximizing Opportunities by Understanding Constraints' in Gian Luca Burci and Brigit Toebes, *Research Handbook on Global Health Law* (UK: Edward Elgar Publishing, 2018).

<sup>8</sup> See Katharina Ó Cathaoir, Mette Hartlev and Céline Brassart Olsen, 'Global Health Law and Obesity: Towards a Complementary Approach of Public Health and Human Rights Law' in Gian Luca Burci and Brigit Toebes, *Research Handbook on Global Health Law* (UK: Edward Elgar Publishing, 2018).

<sup>9</sup> See Sabrina Granheim, Stefanie Vandevijvere and Liv Torheim, 'The Potential of a Human Rights Approach for Accelerating the Implementation of Comprehensive Restrictions on the Marketing of Unhealthy Foods and Non-Alcoholic Beverages to Children' (2019) 34:3 *Health Promotion International* 591; Katharina Ó Cathaoir, 'Children's Right to Freedom from Obesity: Responsibilities of the Food Industry' (2018) 36:2 *Nordic Journal of Human Rights* 109; Elizabeth Handsley and Belinda Reeve, 'Holding Food Companies Responsible for Unhealthy Food Marketing to Children: Can International Human Rights Instruments Provide a New Approach?' (2018) 41:2 *UNSW Law Journal* 2.

<sup>10</sup> Oliver Bartlett, 'Multinational Food Corporations and the Right to Health: Achieving Accountability through Mandatory Human Rights Due Diligence?' in Amandine Garde, Joshua Curtis and Olivier De Schutter, *Ending Childhood Obesity: A Challenge at the Crossroads of International Economic and Human Rights Law* (UK: Edward Elgar Publishing, 2020).

<sup>11</sup> See Isabel Barbosa, Belén Ríos and Ariadna Tovar, 'State Obligations in the Context of Unhealthy Diets: Paving the Way Within the Inter-American Human Rights System' (2021) 11:1 *Revista Internacional de Derechos Humanos* 43.

article seeks to fill this gap by drawing on the Latin American context to analyse businesses' responsibilities and states' duties with regard to the marketing of ultra-processed products. To do this, this article utilizes the three pillars of the United Nations Guiding Principles on Business and Human Rights (UNGPs), as well as standards from international human rights law and the inter-American system of human rights. The article also looks at how these normative duties have been implemented in the region and what challenges lie ahead.

This article is divided into five parts. After the introduction (part I), the article explains the impact of food and beverage marketing on children's health and how changes in Latin American dietary patterns are taking place in the context of a growing and profitable market for ultra-processed food and beverages (part II). It then turns to the role of two key actors in the marketing of unhealthy products to children: businesses and states. Specifically, it analyses the food and beverage industry's responsibilities regarding the marketing of unhealthy products (part III), and Latin American states' duties to regulate, supervise and monitor businesses (part IV). Finally, the last section provides some conclusions (part V).

## II. The Impact of Unhealthy Food and Beverage Marketing on Children's Health

This section explores how ultra-processed food and beverages affect the health of vulnerable populations, such as children. To this end, it explains how consuming such products affects human health in both the medium and long term, and outlines the role of marketing in children's development of dietary habits. It also discusses how Latin America is experiencing rapid changes in its population's dietary habits and its food systems, often as a result of the accelerated use of marketing targeting vulnerable populations in an effort to capture a profitable and growing market.

### *Unhealthy Diets, Obesity, and Marketing to Children: Connecting the Dots*

Unhealthy diets have been proven to be a contributing factor to overweight and obesity. These two health conditions, in turn, increase the risk of developing certain diseases – such as diabetes mellitus, cardiovascular disease, cancer, cavities, and other NCDs – both in children and in adults.<sup>12</sup> Additionally, recent studies have found a relationship between the consumption of ultra-processed products – which are usually high in saturated fat, added sugars, and added sodium<sup>13</sup> – and an increased risk of premature death.<sup>14</sup> Unhealthy dietary patterns have become the third leading risk factor associated with disability-adjusted life

<sup>12</sup> Yara Qutteina, Charlotte De Backer and Tim Smits, 'Media Food Marketing and Eating Outcomes Among Pre-Adolescents and Adolescents: A Systematic Review and Meta-Analysis' (2019) 20:12 *Obesity Reviews* 1708; Rachel Smith et al, 'Food Marketing Influences Children's Attitudes, Preferences and Consumption: A Systematic Critical Review' (2019) 11:4 *Nutrients* 875; Chen Huang et al, 'Sugar Sweetened Beverages Consumption and Risk of Coronary Heart Disease: A Meta-Analysis of Prospective Studies' (2014) 243:1 *Atherosclerosis* 11.

<sup>13</sup> Ultra-processed food products are '[i]ndustrial formulations manufactured with several ingredients. Like processed products, ultra-processed products include substances from the culinary ingredients category, such as fats, oils, salt, and sugar. Ultra-processed products can be distinguished from processed products based on the presence of other substances that are extracted from foods but have no common culinary use (e.g., casein, milk whey, protein hydrolysate, and protein isolates from soy and other foods); substances synthesised from food constituents (e.g., hydrogenated or interesterified oily, modified starches, and other substances not naturally present in foods); and additives used to modify the color, flavor, taste, or texture of the final product'. PAHO, note 3, 24.

<sup>14</sup> Anaís Rico-Campà et al, 'Association Between Consumption of Ultra-Processed Foods and All-Cause Mortality: SUN Prospective Cohort Study' (2019) 365 *BMJ* 1949; Amy Mullee, Dora Romaguera and Jonathan Pearson-Stuttard, 'Association Between Soft Drink Consumption and Mortality in 10 European Countries' (2019) 179:11 *JAMA Internal Medicine* 1479.

years and the second leading risk factor associated with mortality in Latin America and the Caribbean.<sup>15</sup>

Obesity and overweight have serious consequences in children's health, as children tend to remain obese into adulthood and are more likely to develop NCDs such as diabetes and cardiovascular disease at a young age.<sup>16</sup> Childhood obesity is also associated with many comorbid conditions, such as 'metabolic, cardiovascular, orthopedic, neurological, hepatic, pulmonary, and renal disorders'.<sup>17</sup> Children may also face emotional impacts, including low self-esteem and depression.<sup>18</sup>

The social, economic and cultural determinants of health play a role in the development of overweight and obesity.<sup>19</sup> Among them, commercial determinants, which are understood as 'the conditions, actions and omissions by corporate actors that affect health', are key factors.<sup>20</sup> One important commercial determinant is exposure to ultra-processed food and beverage marketing. Such exposure influences an individual's preferences and consumption habits by encouraging the consumption of products that are low in nutritional content and often high in saturated fats, added sugars and sodium.<sup>21</sup> Thus, it is unsurprising that exposure to the marketing of unhealthy food and drinks is linked to a higher caloric intake and, in turn, to childhood obesity.

Psychological and behavioural studies shed light upon how marketing influences children's consumption habits. According to a large body of evidence, children do not have the cognitive capacity to distinguish between information and marketing, which increases the likelihood that marketing will influence their behaviour.<sup>22</sup> Research on child cognitive development reveals that children under 12 years of age are not able to fully appreciate the commercial purpose of advertising and therefore are highly vulnerable to its persuasive techniques.<sup>23</sup> These studies strengthen the argument that marketing products to children, in particular to those under 12, is inherently misleading because it takes advantage of their lack of cognitive development in order to sell products.<sup>24</sup>

<sup>15</sup> Disability-adjusted life years are 'the sum of years of potential life lost due to premature mortality and the years of productive life lost due to disability'. WHO, DALYs/YLDs Definition, [https://www.who.int/mental\\_health/management/depression/daly/en/](https://www.who.int/mental_health/management/depression/daly/en/). For an analysis of unhealthy dietary patterns and their effects in terms of disability-adjusted life years, see University of Washington and Institute for Health Metrics and Evaluation, *Global Burden of Disease Study* (Seattle: IHME, 2017).

<sup>16</sup> Krushnapriya Sahoo et al, 'Childhood Obesity: Causes and Consequences' (2015) 4:2 *Journal of Family Medicine and Primary Care* 187.

<sup>17</sup> Ibid.

<sup>18</sup> Robert Cornette, 'The Emotional Impact of Obesity on Children' (2008) 5:3 *Worldviews on Evidence-Based Nursing* 136.

<sup>19</sup> Odelia Rosin, 'The Economic Causes of Obesity: A Survey' (2008) 22:4 *Journal of Economic Surveys* 617.

<sup>20</sup> WHO, Commercial Determinants of Health, <https://www.who.int/news-room/fact-sheets/detail/commercial-determinants-of-health> (accessed 11 November 2021). See also Ilona Kickbusch and Luke Allen, 'The Commercial Determinants of Health' (2016) 4:12 *Lancet Global Health* e895.

<sup>21</sup> Tatiana Andreyeva, Inas Kelly and Jennifer Harris, 'Exposure to Food Advertising on Television: Associations with Children's Fast Food and Soft Drink Consumption and Obesity' (2011) 9:3 *Economics and Human Biology* 221; Camila Corvalán et al, 'Nutrition Status of Children in Latin America' (2017) suppl 2 *Obesity Reviews* 7.

<sup>22</sup> Michael McGinnis, Jennifer Gootman and Vivica Kraak (eds.), *Food Marketing to Children and Youth: Threat or Opportunity?* (Washington, DC: National Academies Press, 2006); Amika Singh et al, 'Tracking of Childhood Overweight into Adulthood: A Systematic Review of the Literature' (2008) 9:5 *Obesity Reviews* 474.

<sup>23</sup> Owen Carter et al, 'Children's Understanding of the Selling versus Persuasive Intent of Junk Food Advertising: Implications for Regulation' (2011) 72:6 *Social Science & Medicine* 962.

<sup>24</sup> The United States' Federal Trade Commission has upheld a standard based on this argument since 1978. See Federal Register, 46, 48710 (1981). See also Jennifer Pomeranz, *Food Law for Public Health* (Oxford: Oxford University Press, 2016) 148; Elizabeth Handsley, Christopher Nehmy and Kaye Mehta, 'A Children's Rights Perspective on Food Advertising to Children' (2014) 22:1 *International Journal of Children's Rights* 93.

Moreover, several studies have found that two-year-olds are able to recognize brand logos<sup>25</sup> and that five-year-olds can remember brand logos viewed on television.<sup>26</sup> Preferences for certain brands and brand equity characters may persist even when children become adults. Studies have also shown links between food packaging and young children's taste preferences and product preferences.<sup>27</sup>

Although marketing may occur through different media, television is typically the most studied medium.<sup>28</sup> A scoping review regarding food marketing in Latin America found that most of the food and beverages advertised on television are ultra-processed food products with low nutritional value.<sup>29</sup> Moreover, the products advertised during children's programming hours are of lower nutritional value than the ones advertised during general audience programming.<sup>30</sup>

Other forms of marketing – such as digital marketing, which is typically offered through online-based digital technologies and platforms – are growing rapidly in Latin America.<sup>31</sup> Although the evidence on the impact of digital marketing on children's consumption is still emerging given that these technological developments are relatively new,<sup>32</sup> children's exposure to online marketing will likely increase in the near future and therefore require the decisive action of relevant actors.<sup>33</sup>

### **Latin America: Changes in Dietary Patterns and a Growing Market for Ultra-Processed Food and Beverages**

Several studies characterize Latin America as a region undergoing rapid changes in its population's eating habits, including an increasing rate of ultra-processed food and beverage consumption. According to Popkin and Reardon, changes in the food system (led by income growth, market liberalization, infrastructure improvements, urbanization, and the rise of rural nonfarm employment),<sup>34</sup> as well as changes in food production (the decline of homemade food and the increase in industry-processed food), have facilitated these dietary shifts.<sup>35</sup> Food system and food environment transformations have changed consumers' behaviour; this has created an incentive for markets to continue investing in strategies to accelerate consumption, which, in turn, has accelerated the food system's transformation. As Popkin and Reardon state, food system changes '[have] altered their behaviour as food consumers, and that changed behaviour [has] sent a signal to the private

<sup>25</sup> Patti Valkenburg and Moniek Buijzen, 'Identifying Determinants of Young Children's Brand Awareness: Television, Parents, and Peers' (2005) 26:4 *Journal of Applied and Developmental Psychology* 456.

<sup>26</sup> M Carole Macklin, 'Preschoolers' Learning of Brand Names from Visual Cues' (1996) 23:3 *Journal of Consumer Research* 251.

<sup>27</sup> Charlene Elliot and Emily Truman, 'The Power of Packaging: A Scoping Review and Assessment of Child-Targeted Food Packaging' (2020) 12:4 *Nutrients* 958; Lauren McGale et al, 'The Influence of Brand Equity Characters on Children's Food Preferences and Choices' (2016) 177:1 *Journal of Pediatrics* 33.

<sup>28</sup> Smith, *note 12*.

<sup>29</sup> Maria Chemas-Velez et al, 'Scoping Review of Studies on Food Marketing in Latin America: Summary of Existing Evidence and Research Gaps' (2019) 53:107 *Revista de Saúde Pública*.

<sup>30</sup> *Ibid.*

<sup>31</sup> *Ibid.*

<sup>32</sup> Helen Clark et al, 'A Future for the World's Children? A WHO–UNICEF–Lancet Commission' (2020) 395 *Lancet* 10224; A Garde et al, *A Child Rights Based Approach to Food Marketing: A Guide for Policy Makers* (Geneva: UNICEF, 2018).

<sup>33</sup> Mimi Tatlow-Golden and Amandine Garde, 'Digital Food Marketing to Children: Exploitation, Surveillance and Rights Violations' (2020) 27 *Global Food Security* 100423.

<sup>34</sup> Barry Popkin and Thomas Reardon, 'Obesity and the Food System Transformation in Latin America' (2018) 19:8 *Obesity Reviews* 11,12.

<sup>35</sup> *Ibid.*

sector to invest further in the food transformation, so that the process [is] iterative, a snowball'.<sup>36</sup>

In 2015, Latin America boasted the world's highest daily per capita purchases of sugar-sweetened beverages.<sup>37</sup> While economic crises may have changed the region's consumption habits, the beverage industry still identifies Latin America as a growing market for its products.<sup>38</sup> Additionally, from 2009 to 2014, Latin American consumers increased their ultra-processed food purchases, a trend that is expected to grow.<sup>39</sup>

Eating-habit shifts in Latin America have also made market access a coveted goal for the ultra-processed food and beverage industry. The value of the sugary beverage market in Latin America was estimated to be around US\$1.88 billion in 2018, and it is expected to rise to about US\$2.28 billion by 2023.<sup>40</sup> This market takeover serves as an important incentive for companies to continue expanding their advertising and marketing strategies in Latin America, as well as to target new consumers such as children, women and ethnic populations.

To counter the excessive influence of marketing on children's consumption habits, international organizations such as the WHO and the Pan American Health Organization (PAHO) have recommended that countries take measures to restrict the marketing of ultra-processed food and sugary drinks to children.<sup>41</sup> However, the unanimous recommendations of these organizations, while useful for informing state action, are not legally binding.<sup>42</sup> Moreover, solving the problem that the marketing of ultra-processed food and beverages poses for children's health requires concerted action by a range of actors – especially businesses and states. In this light, the following sections focus on the human rights responsibilities and duties held by businesses and states in this area.

### III. Corporations' Responsibilities Regarding Unhealthy Food and Beverage Marketing

Corporations are key actors in the marketing of unhealthy products – after all, they are the ones who conduct such marketing and profit from it. Although most countries have regulated the marketing of other unhealthy products, such as tobacco and alcohol, the marketing of food and beverages remains unaddressed in many Latin American countries. Taking advantage of this regulatory vacuum, some corporations widely market their products to children. This section explores the human rights responsibilities of the food and beverage industry with regard to marketing to children.

<sup>36</sup> Ibid, 32.

<sup>37</sup> Laura Lara-Castor et al, 'Global, Regional and National Consumption of Major Beverages in 2015: Systematic Analysis of Country-Specific Nutrition Surveys Worldwide (P10-038-19)' (2019) 3 (suppl 1) *Current Developments in Nutrition*; Statista 2020, 'Daily per Capita Sales of Sugar-Sweetened Beverages in Selected Countries in Latin America in 2017' (2 July 2021), <https://www.statista.com/statistics/946360/latin-america-sugar-sweetened-beverages-sales/> (accessed 30 November 2021).

<sup>38</sup> Nasdaq, 'How has Coca-Cola Turned Around its Fortunes in Latin America?' (14 December 2017), <https://www.nasdaq.com/article/how-has-coca-cola-turned-around-its-fortunes-in-latin-america-cm892004> (accessed 30 November 2021)

<sup>39</sup> PAHO, *Ultra-Processed Food and Drink Products in Latin America: Sales, Sources, Nutrient Profiles and Policy Implications* (Washington, DC: PAHO, 2019) 15.

<sup>40</sup> Statista, 'Latin America: Soft Drink Concentrates Market Revenue 2018–2023' (2 July 2021), <https://www.statista.com/statistics/979457/soft-drink-concentrates-market-value-latin-america/> (accessed 30 November 2021).

<sup>41</sup> WHO (2010), note 6; OPS, *Recomendaciones de la consulta de expertos de la Organización Panamericana de la Salud sobre la promoción y publicidad de alimentos y bebidas no alcohólicas dirigidas a los niños en la región de las Américas* (Washington DC: OPS, 2016).

<sup>42</sup> See the definition of 'standing recommendations' at WHO, *International Health Regulations* (3rd edn) (WHO: Geneva, 2005) 9.

### *Corporations' Responsibility to Respect Human Rights*

The UNGPs provide the most authoritative framework for business responsibilities with regard to human rights. They are based on three pillars: states' duty to protect human rights; corporations' responsibility to respect these rights; and victims' right to access a remedy. The commentary to the principles clarifies that the nature of this business responsibility 'is a global standard of expected conduct for all business enterprises wherever they operate'.<sup>43</sup> Thus, while the state duty to protect human rights is an obligation under international law, the corporate responsibility to respect human rights is interpreted as a social expectation.<sup>44</sup> Regardless of the differences in origin of these two duties, this interpretation does not lessen the importance of corporate responsibility in the eyes of the global community. To the contrary, by distinguishing social expectations from international obligations, the UNGPs move beyond the discussion of whether corporations have human rights duties under international law, which has been a highly debatable issue.<sup>45</sup>

The second pillar of the UNGPs emphasizes the principle that 'business enterprises should respect human rights'. According to Principle 11, '[t]his means that [business enterprises] should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved'. In terms of how business enterprises might be involved in adverse human rights impacts, Principles 13 and 19, as well as the UN's interpretive guide on the UNGPs, note that such involvement can occur in three ways: causation, contribution, and linkage with a third entity.<sup>46</sup> While food companies are not the sole cause of overweight and obesity, there is sufficient evidence confirming that their aggressive marketing strategies, particularly towards children, play an important role in the creation of unhealthy eating habits and, in the medium and long term, in childhood obesity.<sup>47</sup> Therefore, food and beverage corporations may arguably contribute to the increasing obesity rates among children when targeting their unhealthy products to them. In fact, the interpretive guide includes 'targeting high-sugar foods and drinks at children' as an example of how corporations contribute to adverse human rights impacts.<sup>48</sup> If corporations want to take their commitment to respect human rights seriously, they should not market unhealthy food and beverages to children.

Several human rights bodies have also recognized the responsibility of food and beverage companies to respect human rights, particularly the rights to health and food. The Committee on Economic, Social and Cultural Rights (CESCR), in its General Comment 14, notes that '[w]hile only States are parties to the Covenant and thus ultimately accountable for compliance with it, all members of society [...] – as well as the private business sector – have responsibilities regarding the realization of the right to health'.<sup>49</sup> Similarly, a 2014 report of the Special Rapporteur on the Right to Health states, 'Although international human rights instruments refer to States as primary duty-bearers, non-State actors are also

<sup>43</sup> Human Rights Council, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework', UN Doc A/HRC/17/31 (2011), commentary to Principle 11.

<sup>44</sup> Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, UN Doc A/HRC/8/5 (2008), para 9.

<sup>45</sup> Nadia Bernaz, *Business and Human Rights: History, Law and Policy – Bridging the Accountability Gap* (London: Routledge, 2017) 192–193.

<sup>46</sup> UN, Office of the High Commissioner of Human Rights, 'The Corporate Responsibility to Respect Human Rights. An Interpretive Guide', HRPUB/12/02, 15.

<sup>47</sup> See section II.A.

<sup>48</sup> Interpretive Guide, note 46, 17.

<sup>49</sup> UN Committee on Economic, Social and Cultural Rights, General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12), UN Doc E/C.12/2000/4 (2000), para 42.

charged with the responsibility to respect the right to health'.<sup>50</sup> It has also highlighted that '[I]n light of the negative impact of food marketing and promotion activities on children's diets, the food industry has the responsibility to refrain from advertising unhealthy products to children in accordance with national laws and regulations. Failure to exercise such restraint under domestic law may amount not only to a violation of the law, but also of the right to health'.<sup>51</sup>

From a right to food perspective, the former Special Rapporteur on the Right to Food, Hilal Elver, recognizes that '[p]lacing nutrition governance within the human rights framework also underlines the responsibility of corporations in the food and nutrition industry to respect human rights'.<sup>52</sup> During her tenure as Special Rapporteur, she even referred to the UNGPs that recognize corporations' duty to avoid infringing on human rights. As she notes, '[l]ogically, this responsibility includes the adverse impacts of the food industry with respect to the right to adequate food'.

Thus, food and beverage companies' responsibility to respect human rights is a clearly recognized standard, not just in the UNGPs but also in international human rights law.

### **Corporations' Responsibility to Carry Out Due Diligence**

Human rights due diligence is a key principle by which businesses are expected to abide in order to address any adverse human rights impacts caused by their activities. Such impacts include both actual impacts (impacts associated with existing operations) and potential impacts (those that may occur in the future). While most of the literature recognizes that due diligence must be applied by companies as part of their responsibility to respect all human rights,<sup>53</sup> recent scholarly works highlight the right to health as a silent human rights issue requiring greater attention.<sup>54</sup> This section describes how food and beverage companies can incorporate a right to health due diligence approach in their marketing activities and identifies some of the mis-steps that they have committed in this regard.

According to the UNGPs, businesses should adopt a policy commitment to respect human rights (Principle 15). Such a policy should be approved at the most senior level of the corporation and should be publicly available and communicated to all personnel (principle 16). Furthermore, this decision must be part of a real commitment to society and not simply to shareholders. Mechanisms designed solely to silence critics, or which are implemented only by a company's middle or lower management levels, should not be considered an appropriate application of a company's human rights responsibilities.

The UNGPs also establish that 'in order to identify, prevent, mitigate and account for how they address their adverse human rights impact, business enterprises should carry out human rights due diligence' (principle 17). According to this idea, the due diligence process should include four levels of action: 'assessing actual and potential human rights impacts;

<sup>50</sup> UN General Assembly, Report of the Special Rapporteur of 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 (2014), para 28.

<sup>51</sup> Health Report 2014, note 50, paras 29 and 66.

<sup>52</sup> UN General Assembly, Interim Report of the Special Rapporteur on the Right to Food, UN Doc A/71/282 (2016), para 67.

<sup>53</sup> See, for example, Ludovica Chiussi, 'Corporate Human Rights Due Diligence: From the Process to the Principle' in *Legal Sources in Business and Human Rights* (Brill/Nijhoff, 2020); Mark Taylor, 'Human Rights Due Diligence in Theory and Practice' in Surya Deva and David Birchall, *Research Handbook on Human Rights and Business* (UK: Edward Elgar Publishing, 2020).

<sup>54</sup> See Ana Dangova Hug, *Tool on (Children's) Right to Health and Businesses – Unpacking the Human Rights Due Diligence Standard*; Skopje: INTER PARTES Skopje, 2020; Bartlett, note 10.



integrating and acting upon the findings; tracking responses; and communicating how impacts on human rights are addressed'.<sup>55</sup>

This framework can be interpreted in the context of marketing food and beverages to children. Concerning the first component – policy commitment – it means that business enterprises should include an explicit commitment to respect children's right to health and, as a consequence, to not direct their advertising towards children. However, as Oliver Bartlett has pointed out, according to publicly available databases that track corporate engagement with human rights, with the sole exception of one company, companies operating in the food and agriculture sector have made no 'specific reference to protecting the right to health in [their] human rights, sustainability, or ethics policy statements'.<sup>56</sup>

That said, most multinational food and beverage companies have agreed to 'responsibly market their products to children' by following the International Food and Beverage Alliance's (IFBA) Responsible Marketing Policy. IFBA is a global alliance founded in 2008 by the world's leading food and non-alcoholic beverage companies.<sup>57</sup> According to its Responsible Marketing Policy, all IFBA members commit either to '[o]nly advertise products to children under the age of 13 years that meet common nutrition criteria which are based on accepted science-based dietary guidance; or [n]ot to advertise their products at all to children under the age of 13 years'.<sup>58</sup> They also agree 'not to engage in food or beverage product marketing communications to children in primary schools, early childhood education centers and children's care service centers'.<sup>59</sup>

While such statements seem like a step in the right direction, they cannot be considered substitutes for a business's human rights policy commitment. For one, the IFBA's policy does not adopt the human rights language or a more explicit commitment to respecting children's right to health, instead simply upholding a more modest standard of 'responsible marketing'. The commentary to Principle 12 of the UNGPs states that while the responsibility to respect applies to all rights, 'in practice, some human rights may be at greater risk than others in particular industries or contexts, and therefore will be the focus of heightened attention'.<sup>60</sup> Here, it is important to acknowledge the food and beverage industry's potential to impact children's right to health in a severe manner – not just because of the scope of its impact (the potential for serious health issues and even death) but also because of the scale (given that the increasing numbers have led to a 'global epidemic'). Thus, if companies are to abide by Principle 15 concerning policy commitments to respect human rights, they should include an express commitment to children's right to health in their internal policies given this is one of the rights they will most likely impact.

Concerning the second component – carrying out due diligence – businesses should take a number of specific steps, as mentioned above. First, when assessing the actual and potential impacts, they should rely on the opinions of independent experts and the information available from international technical organizations (such as the WHO). PAHO and other WHO regional offices have extensively documented the negative effects of child-targeted

<sup>55</sup> UNGPs, note 43, Principle 17.

<sup>56</sup> Bartlett, note 10, 291.

<sup>57</sup> IFBA represents global leaders in the food and non-alcoholic beverage industry, including Coca-Cola, Danone, Ferrero, General Mills, Bimbo, Kellogg's, Mars, Mondelez, Nestle, PepsiCo and Unilever. See About us - IFBA ([ifballiance.org](http://ifballiance.org)) (accessed 10 November 2021).

<sup>58</sup> IFBA, IFBA Global Responsible Marketing Policy, 1, available at Responsible Marketing commitments - IFBA ([ifballiance.org](http://ifballiance.org)) (accessed 10 November 2021).

<sup>59</sup> *Ibid.*

<sup>60</sup> UNGPs, note 43, commentary to Principle 12.

marketing and have developed a nutrient profile model to help address this issue.<sup>61</sup> However, marketing policies such as the one published by IFBA fail to adopt this model, leaving the interpretation of nutritional criteria in the hands of companies.<sup>62</sup> This is problematic, as seen by the fact that many companies advertise ‘better for you’ products to children under 12 years old that do not comply with the model; and although such models have been available since 2015, an accountability evaluation published in 2019 ‘found no evidence that IFBA had adopted’ them.<sup>63</sup> Moreover, marketing policies such as IFBA’s Responsible Marketing Policy do not follow the definition of children established in the Convention on the Rights of the Child (which defines a child as anyone under the age of 18), instead limiting their commitment to children under the age of 13, or sometimes even 12. If businesses are to fully commit to respecting children’s rights, they should rely on independent scientific evidence and incorporate all human rights standards of interpretation – not just those that are convenient for their practices.

Finally, the steps of ‘tracking responses’ and ‘communicating how impacts on human rights are addressed’ means that businesses should follow up on their conduct in a rigorous and transparent manner. A good practice in this regard is delegating an independent third party with the collection and analysis of such information. Although IFBA claims that it ‘will conduct third party monitoring to demonstrate compliance with this policy’,<sup>64</sup> independent reports have highlighted the need for more transparency and openness in the sharing of the information gathered.<sup>65</sup> Due diligence requires more than just a statement. It requires the full disclosure of information with third parties, as well as transparency in the actions taken to address impacts on children’s right to health.

### *Latin American Food and Beverage Companies’ Commitments*

Food and beverage companies that operate in Latin America also rely on codes of conduct and statements of commitment to assert their respect for children’s rights. Business marketing associations in Mexico,<sup>66</sup> Brazil<sup>67</sup> and Colombia<sup>68</sup> have published codes of conduct concerning the marketing of products. These instruments are often displayed as examples of companies’ commitment to children’s health. However, their content is often vague and diffuse. For instance, they allow marketing to children as long as it promotes ‘positive social values’, does not promote violence, or is not ‘misleading’. Moreover, they often leave the monitoring of the commitments to the business associations themselves. In the best-case scenarios, they include a commitment to share the findings with the minister of health.<sup>69</sup> All of these factors make these codes of conduct insufficient tools to guarantee that corporations in the food and beverage industry abide by their commitments.

<sup>61</sup> PAHO, note 3.

<sup>62</sup> Vivika Kraak, Sofia Rincón-Gallardo and Gary Sacks, ‘An Accountability Evaluation for the International Food & Beverages Alliance’s Global Policy on Marketing Communications to Children to Reduce Obesity: A Narrative Review to Inform Policy’ (2019) 20 (suppl 2:90) *Obesity Reviews* 106.

<sup>63</sup> *Ibid*, 98.

<sup>64</sup> IFBA Marketing Policy, note 58.

<sup>65</sup> Access to Nutrition Index. Global Index 2018: Marketing (May 2018).

<sup>66</sup> Código de Ética Publicitaria de CONAR, 1987 (Mexico) and Código de Autorregulación de Publicidad de Alimentos y Bebidas no alcohólicas dirigida al Público Infantil, 2009 (Mexico).

<sup>67</sup> Código Brasileiro de Autorregulamentação Publicitária, 1980 (Brazil).

<sup>68</sup> Código Colombiano de Autorregulación Publicitaria de CONARP, 2013 (Colombia). For an in-depth critique of the Colombian Code of Advertising Self-Regulation, see Diana Guarnizo, *Sin reglas ni controles: Regulación de la publicidad de alimentos y bebidas dirigida a menores de edad* (Bogotá: Dejusticia, 2017), 15–18.

<sup>69</sup> Código de autorregulación 2009, note 66, Article 30.

In addition to codes of conduct for advertising, the industry has relied on self-regulation to show its commitment to children's right to health. In Colombia, for example, in 2019, the Chamber of the National Beverage Industry (ANDI in Spanish) published a statement committing to refraining from selling sugary beverages in schools and from directing sugary beverage advertisements to children under 12.<sup>70</sup> The statement also notes that a third party will measure compliance.<sup>71</sup>

Like the IFBA's Responsible Marketing Policy, ANDI's commitment has been criticized for not incorporating the PAHO nutrient profile model into its definition of products that can be advertised. It also limits its protection to children under the age of 12, sidestepping the recommendations of PAHO and the definition of children established in the Convention on the Rights of the Child.<sup>72</sup> Furthermore, the commitment is incomplete in terms of the communications strategies and techniques included, as it fails to limit specific types of product marketing, such as the use of children's characters, promotions, gifts, and other types of strategies which could appeal specifically to children. It also neglects to include product placement restrictions and to ban companies from marketing their products in places where children are often present, such as schools, childcare facilities and playgrounds.<sup>73</sup> Importantly, the statement does not include all members of the sugary beverage industry, meaning that certain companies may continue to freely market their products to children.

Moreover, despite its proclamation that a third party is in charge of monitoring compliance, the statement fails to promote transparency because it reserves for the industry the right to take action and to rectify violations. For example, it does not oblige the industry to publish compliance reports or require companies to disclose all information requested by this third party. Lastly, the statement does not provide a mechanism whereby parents can denounce compliance failures or request non-repetition, thus failing to include an appropriate remedy for parents and children.

The Colombian sugary beverage industry's self-regulatory practices reflect a general global trend in such schemes. A 2014 literature review concluded that 'commitments in industry self-regulation schemes tend to be relatively vague and permissive, that the measurable effects of the self-regulations tend to be relatively small and that some extent of public regulation may catalyse the effectiveness of industry self-regulation'.<sup>74</sup> In fact, and as many authors have shown, some industries may use self-regulatory mechanisms as a discursive strategy to influence public policy and public opinion in a way that is favourable to their interests without having to actually commit to respecting human rights.<sup>75</sup>

<sup>70</sup> Norma de Autorregulación Respecto a Los Compromisos de la Industria de Bebidas En Información Nutricional, Innovación, Publicidad Consciente, Estilos de Vida Saludable y Comercialización Responsable de la ANDI, 2 September 2019 (Colombia).

<sup>71</sup> The Colombian Institute of Technical Standards and Certification reviews businesses' compliance with the statement. *Ibid.*

<sup>72</sup> PAHO, *Recomendaciones de la Consulta de Expertos de la Organización Panamericana de la Salud Sobre la Promoción y Publicidad de Alimentos y Bebidas No Alcohólicas Dirigida a Los Niños en la Región de las Américas* (Washington, DC: PAHO, 2011), 13.

<sup>73</sup> On this particular issue, the statement represents a step backwards compared with a previous statement from 2016, which included a commitment to not market products in schools to children under 12. This commitment disappeared in the 2019 version.

<sup>74</sup> Karsten Ronit and Jørgen Jensen, 'Obesity and Industry Self-Regulation of Food and Beverage Marketing: A Literature Review' (2014) 68:7 *European Journal of Clinical Nutrition* 753; L Sharma, 'The Food Industry and Self-Regulation: Standards to Promote Success and to Avoid Public Health Failures' (2010) 100:2 *American Journal of Public Health* 240.

<sup>75</sup> Michele Simon, 'Can Food Companies Be Trusted to Self-Regulate? An Analysis of Corporate Lobbying and Deception to Undermine Children's Health' (2006) 39 *Loyola of Los Angeles Law Review* 169.

### Corporations' Human Rights Commitments versus Their Use of Tactics to Prevent State Regulation

As discussed above, if corporate commitments to respect human rights are to be effective, they must be taken seriously and embraced by the highest levels of a company. Moreover, they must also be embraced externally to the company, not just internally. In this regard, corporations must avoid taking any action that might interfere with states' efforts to regulate and monitor the marketing of unhealthy food and beverages. As stated in the commentary to the UNGPs, 'just as States should work towards policy coherence, so business enterprises need to strive for coherence between their responsibility to respect human rights and policies and procedures that govern their wider business activities and relationships'.<sup>76</sup> A business that commits to respecting human rights would contradict this effort if it were to actively lobby, either independently or through intermediaries, against laws that seek to protect public health. Similarly, the Inter-American Commission on Human Rights (IACHR) has endorsed this responsibility by criticizing practices of interference used by industries in order to hinder regulatory efforts, such as threatening governments with lawsuits, lobbying policy makers, and funding biased studies in companies' favour.<sup>77</sup>

From a conceptual point of view, some authors have argued that the behaviour of the food and beverage industry can be framed as 'corporate political activity'<sup>78</sup> or 'corporate capture'.<sup>79</sup> Within this framework, and replicating the tobacco industry's anti-regulatory tactics,<sup>80</sup> corporate activities designed to prevent effective regulation may include direct corporate involvement and influence in the political sphere (e.g., lobbying to influence legislation, using 'revolving door' tactics, and funding and providing incentives for politicians), legal actions (e.g., initiating legal proceedings to stifle public policies or opponents or to influence the development of trade and investment agreements), coalition management (e.g., establishing relationships with key opinion leaders, seeking involvement in affected communities, and establishing relationships with the media), and information management (e.g., the production and amplification of information designed to generate industry credibility among the public).<sup>81</sup>

It is beyond the purpose of this article to characterize the food and beverage industry's behaviour in every Latin American country. However, there is a large amount of literature documenting how the industry has utilized the aforementioned strategies to prevent the implementation of public health regulatory measures that limit its ability to freely market its products.<sup>82</sup>

<sup>76</sup> UNGPs, note 43, Principle 16.

<sup>77</sup> IACHR, 'Empresas y Derechos Humanos: Estándares Interamericanos', OEA/Ser.L/V/II. CIDH/REDESCA/INF.1/19 (1 November 2019), para 360.

<sup>78</sup> For a categorization of the different forms of political activity in which the food industry engages, see Melissa Mialon, 'The Policy Dystopia Model Adapted to the Food Industry: The Example of the Nutri-Score Saga in France' (2018) 9:2 *World Nutrition* 109.

<sup>79</sup> According Miller and Harkins, 'capture' operates when 'corporations actively engage in attempting to dominate the information environment, so they can significantly affect decision making'. This is an issue 'not only of "policy" capture but of capturing a wide range of arenas of debate and decision making either because there are seen as intrinsically important or because they are useful for activities in other arenas'. David Miller and Claire Harkins, 'Corporate Strategy, Corporate Capture: Food and Alcohol Industry Lobbying and Public Health' (2010) 30:4 *Critical Social Policy* 564, 566.

<sup>80</sup> WHO, *Tobacco Industry Interference with Tobacco Control* (Geneva: WHO, 2008).

<sup>81</sup> Mialon, note 78.

<sup>82</sup> Melissa Mialon and Fabio Da Silva, 'Public Health and the Ultra-Processed Food and Drink Products Industry: Corporate Political Activity of Major Transnationals in Latin America and the Caribbean' (2019) 22:10 *Public Health Nutrition* 1898; CCAJAR-El Poder del Consumidor, *La interferencia de la industria es nociva para la salud. Estrategias*

The industry's use of direct lobbying techniques aimed at stopping legislative initiatives to regulate food and beverage marketing have been documented in Chile,<sup>83</sup> Mexico<sup>84</sup> and Colombia.<sup>85</sup> In addition, the industry has used other strategies, such as saturating the public with messages favourable to its interests<sup>86</sup> and filing lawsuits to demonstrate apparent incompatibilities between marketing restrictions and intellectual property claims.<sup>87</sup> All of these strategies to influence or hinder marketing regulations may explain the delays of some countries in adopting stricter regulations. If businesses are coherent in their human rights commitments, they must not only refrain from marketing unhealthy food to children but also abstain from utilizing these direct and indirect strategies to prevent the state from regulating.

### *The Way Forward*

This section has outlined the requirements of a human rights due diligence approach with regard to food and beverage companies' marketing of their products. It has also shown how these companies rely mainly on self-regulation and statements of commitment to replace such an approach. In countries where national laws place general due diligence obligations on corporations, these laws could be used to force them to abide by stricter human rights policies that truly respect children's right to health.<sup>88</sup> However, this - although desirable - does not seem feasible in the short term in Latin America, as no country in the region has adopted such a law to date. Although the IACHR has recommended that states adopt legislation that imposes human rights due diligence obligations on businesses,<sup>89</sup> countries in the region are still reluctant to do so. Nonetheless, this does not mean that governments have no role in holding food and beverage companies accountable for their right to health responsibilities. The next section discusses how international human rights laws places particular obligations on states to regulate food and beverage marketing.

## **IV. States' Human Rights Duties regarding Ultra-Processed Food and Beverage Marketing**

Given that efforts to hold businesses directly responsible still face many challenges, the role of states is critical in the design of a framework that protects children from the abusive marketing of unhealthy products. This section analyses the role of states and their obligations under international human rights law in the regulation of food and beverage

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corporativas contra el etiquetado frontal de advertencia: un estudio comparado de Chile, Perú, México y Uruguay (Bogotá, CAJAR, 2020).

<sup>83</sup> Melissa Mialon et al, 'Food Industry Political Practices in Chile: "The Economy Has Always Been the Main Concern"' (2020) 16 *Global Health* 107.

<sup>84</sup> Enai Ojeda et al, 'The Influence of the Sugar-Sweetened Beverage Industry on Public Policies in Mexico' (2020) 65 *International Journal of Public Health* 1037.

<sup>85</sup> Melissa Mialon et al, 'I Had Never Seen So Many Lobbyists': Food Industry Political Practices during the Development of a New Nutrition Front-of-Pack Labelling System in Colombia' (2020) 24:9 *Public Health Nutrition* 2737.

<sup>86</sup> Mialon and Da Silva, note 82; Mialon et al, note 83; Mialon et al, note 85.

<sup>87</sup> In Chile, Kellogg's appealed a public health authority decision aimed at preventing cereal boxes from exhibiting cartoons on their front side, claiming that the decision violated its intellectual property rights with respect to its brand. The appeals court rejected the lawsuit, a decision which the Supreme Court ultimately upheld in 2016. See Secretaría de Salud Pública, *Informe de Evaluación de la Implementación de la Ley Sobre Composición Nutricional de los Alimentos y su Publicidad* (Chile: Ministerio de Salud, 2017) 10.

<sup>88</sup> For a proposal in this regard, see Bartlett, note 10.

<sup>89</sup> IACHR Report, note 77, para 414(3).

marketing. As the focus of this article is on Latin America, the section focuses on the obligations stemming both from international human rights treaties ratified by Latin American countries and from the inter-American human rights system.

International human rights law can be used as a tool to indirectly hold businesses accountable. This body of law – which is based on binding legal instruments – views states as the main duty-bearers and people as right-holders, thus enabling actors to hold states accountable for their actions or omissions. Under this framework, state duties are translated into a tripartite model of obligations according to which states must *respect, protect* and *fulfil* human rights.<sup>90</sup> In particular, the duty to protect – which mandates that states take action to prevent third parties from interfering in the enjoyment of rights – provides a useful tool to hold businesses accountable.

The duty to protect parallels the first pillar of the UNGPs, according to which states have a duty to protect people against corporate human rights harms. The commentary to this pillar emphasizes that '[s]tates must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication'.<sup>91</sup> International human rights law – particularly the provisions stemming from UN bodies on the rights to health and food, the Convention on the Rights of the Child, and the inter-American system – provides a well-established set of state obligations that can be harnessed to ensure corporate accountability.

### States' Human Rights Obligation to Prevent Obesity and Promote Access to Nutritious Foods, according to UN Bodies

Most human rights analyses of obesity prevention have occurred within the context of the right to health and the right to food, both part of the International Covenant on Economic, Social and Cultural Rights (Articles 12 and 11). The work of Special Rapporteurs and the CESCR<sup>92</sup> has focused on the connection with these two rights to denounce the harmful effect of marketing on children's rights and the duty of states to regulate this field.

With respect to the **right to health**, a 2014 report from the Special Rapporteur on the Right to Health clarifies the content of the obligation to *protect* in the context of NCDs by noting that 'States should make sure that advertisements and promotion by food corporations convey accurate and easily understandable information on possible ill effects of their food products. This is important, as withholding or misrepresenting such-information is likely to affect people's diet choices, which impacts on the right to health'.<sup>93</sup>

Moreover, the report emphasizes the different duties states must take in order to *fulfil* the right to health in the context of NCDs. For states to fulfil their obligations and prevent harm to people's health, they should, at a minimum, establish a regulatory framework which

<sup>90</sup> Henry Shue, *Basic Rights, Subsistence, Affluence, and US Foreign Policy* (Princeton: Princeton University Press, 1980), 52. See also the taxonomy developed in UN Economic and Social Council, *The Right to Adequate Food as a Human Right*, UN Doc E/CN.4/Sub.2/1987/23 (1987), para 66; UN Economic and Social Council, *The Right to Adequate Food and to Be Free from Hunger: Updated Study on the Right to Food*, UN Doc E/CN.4/Sub.2/1999/12 (1999), para 52.

<sup>91</sup> UNGPs, note 43, Principle 1.

<sup>92</sup> General Comments of the CESCR are not legally binding but, in practice, they act as one of the most authorized interpretative tools of the Covenant serving as 'normative development' or 'standard setting'. See Manisuli Ssenyonjo, *Economic, Social and Cultural Rights in International Law* (2nd edn) (Portland, Hart Publishing, 2016) 42. Similarly, Special Rapporteurs provide an expert opinion on a human rights issue. Its work may help to illustrate the content of treaty obligations.

<sup>93</sup> UN General Assembly, Report of the Special Rapporteur of 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 (2014), para 15.

restricts children's exposure to unhealthy product marketing.<sup>94</sup> It also points out how companies frequently use insidious marketing strategies to influence dietary habits by encouraging vulnerable groups – such as children – to consume unhealthy diets, thus emphasizing that 'States have a positive duty to regulate unhealthy food advertising and the promotion strategies of food companies'.<sup>95</sup> Finally, the rapport stresses how different countries have embraced this responsibility by instituting laws to 'ban companies from advertising their products to children below a certain age and to limit the availability of unhealthy foods in schools'.<sup>96</sup>

Similarly, from a **right to food** perspective, both the Special Rapporteur on the Right to Food and the CESCR have emphasized the duty to *protect* in order to ensure the right to adequate food; prevent the harmful impact of marketing on the exercise of this right; and establish states' duty to provide regulatory measures that limit the influence of such marketing.

First, the CESCR, in its General Comment 12, notes that the duty to *protect* requires states to take measures to ensure that 'enterprises or individuals do not deprive individuals of their access to adequate food'.<sup>97</sup> It defines 'adequate food' as 'food in a quantity and quality sufficient to satisfy the dietary needs of individuals, free from adverse substances'.<sup>98</sup> Although the expression 'free from adverse substances' was first interpreted as setting requirements only for 'food safety',<sup>99</sup> the Special Rapporteur on the Right to Food has clarified that when 'considering the adverse health impacts, "food safety" should be interpreted to include the nutritional value of food products'.<sup>100</sup>

Second, the Special Rapporteurs on Food have recognized the abusive practices that the food and beverage industry has displayed towards consumers, particularly children, and the damaging effect it has on their health, including increasing levels of childhood obesity. This observation has been consistently included in reports from 2011,<sup>101</sup> 2014<sup>102</sup> and 2016.<sup>103</sup>

Third, the CESCR has recognized that the duty to *protect* the right to food should be understood as a duty to protect people from food companies' actions, such as aggressive marketing strategies, that could infringe upon access to quality and nutritious food. In General Comment 24, the CESCR states that '[t]he obligation to protect sometimes necessitates direct regulation and intervention. States parties should consider measures such as restricting marketing and advertising of certain goods and services in order to protect public health'.<sup>104</sup> In line with this, the Special Rapporteur on the Right to Food has consistently recommended that states regulate marketing as a way to prevent its negative impact.<sup>105</sup>

<sup>94</sup> Health Report 2014, note 50, para 22.

<sup>95</sup> *Ibid*, para 25.

<sup>96</sup> *Ibid*, para 25.

<sup>97</sup> UN Committee on Economic, Social and Cultural Rights, General Comment No. 12: The Right to Adequate Food (Art. 11), UN Doc E/C.12/1999/5 (1999), para 15.

<sup>98</sup> *Ibid*, para 8.

<sup>99</sup> *Ibid*, para 10.

<sup>100</sup> Food Report 2016, note 52, para 74.

<sup>101</sup> UN General Assembly, Report Submitted by the Special Rapporteur on the Right to Food, UN Doc A/HRC/19/59 (2011), para 36.

<sup>102</sup> UN General Assembly, Interim Report of the Special Rapporteur on the Right to Food, UN Doc A/69/275 (2014), para 40.

<sup>103</sup> Food Report 2016, note 52, para 34.

<sup>104</sup> UN Committee on Economic, Social and Cultural Rights, General Comment No. 24 (2017) on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities, UN Doc E/C.12/GC/24 (2017), para 19.

<sup>105</sup> Food Report 2011, note 101, para 42; Food Report 2016, note 52, para 79.

To conclude, the duties to *protect* and *fulfil* the **rights to health** and to **food** provide a strong basis for asserting that states have a human rights duty to regulate the food and beverage industry's marketing of unhealthy products, given that these practices have been proven partly responsible for increasing obesity rates among children and therefore detrimental to their rights.

### *The Convention on the Rights of the Child and States' Duties regarding Childhood Obesity Prevention*

The Convention on the Rights of the Child and its committee's interpretations provide a rich framework for states' duty to prevent childhood obesity.<sup>106</sup> The convention's general principle of the best interest of the child (Article 3.1) and the right to non-discrimination (Article 2), when read in conjunction with the rights to life, health and food, establish a state duty to regulate the marketing of unhealthy products targeted at children. In its General Comment 15, the Committee on the Rights of the Child notes that states have a duty to address obesity in children given that obesity is associated with detrimental impacts to their physical and mental health.<sup>107</sup> It also establishes that 'the marketing of [unhealthy foods] – especially when such marketing is focused on children – should be regulated and its availability in schools and other places controlled'.<sup>108</sup> Moreover, in its General Comment 16, the committee highlights the long-term impact that the marketing of unhealthy foods and drinks may have on children's health and therefore their rights to life and development.<sup>109</sup> It also mentions that in order to implement the right to life with regard to the business sector, states need to take 'preventive measures such as effective regulation and monitoring of advertising and marketing industries and the environmental impact of business'.<sup>110</sup>

Other children's rights – such as the right to privacy (Article 16), the right to education (article 28), the right to rest, leisure, recreation and cultural activities (Article 31), and the right to be protected from economic exploitation (Article 32) – may arguably be impacted by food and beverage marketing as well.<sup>111</sup> As all Latin American countries have ratified the Convention on the Rights of the Child, and many of them recognize it as being of either constitutional hierarchy or relevant for the interpretation of constitutional duties,<sup>112</sup> it becomes a strong instrument for cementing states' duty to regulate food and beverage marketing.

### *The Inter-American Human Rights System and States' Duties Regarding Obesity Prevention*

The inter-American human rights system provides an additional legal framework through which Latin American states can frame their duties regarding the prevention of NCDs, childhood obesity, and the provision of nutritious food.

<sup>106</sup> Several authors have developed in detail the legal framework for childhood obesity prevention. See Cathaoir et al, *note 8*; Handsley et al, *note 24*.

<sup>107</sup> Committee on the 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), UN Doc CRC/C/GC/15 (2013), para 47.

<sup>108</sup> *Ibid.*

<sup>109</sup> Committee on the Rights of the Child, General Comment No. 16 (2013) on State Obligations regarding the Impact of the Business Sector on Children's Rights, UN Doc CRC/C/GC/16 (2013), para 19.

<sup>110</sup> *Ibid.*, para 20.

<sup>111</sup> For an in-depth discussion of the children's rights affected by the marketing of unhealthy products, see Garde et al, *note 32*; Katharina Ó Cathaoir, *A Children's Rights Perspective on Obesogenic Food Marketing* (København: Det Juridiske Fakultet, 2017); Handsley et al, *note 24*.

<sup>112</sup> See, for example, Corte Suprema de Justicia de Panamá, Registro Judicial (20 March 1996).



To begin with, the inter-American system has recently acknowledged the rights to health<sup>113</sup> and to food<sup>114</sup> as autonomous rights within Article 26 of the American Convention on Human Rights and therefore as directly justiciable before the Inter-American Court of Human Rights (IACtHR).<sup>115</sup> Although this recognition is not yet a pacific issue among judges,<sup>116</sup> it could open the door for a discussion on the marketing of unhealthy products and the development of NCDs.<sup>117</sup> Also, even if these rights are not directly justiciable, there is an extensive jurisprudence recognizing indirect protection of the right to health when linked with the right to life and human dignity.<sup>118</sup> As mentioned above, both the scientific evidence and international human rights law have recognized the direct relationship between the marketing practices of the food and beverage industry and the increasing levels of childhood obesity. Thus, it is possible to argue that such marketing may affect both the quality of life and life itself – and therefore that the right to health in connection with right to life is affected by marketing practices. To conclude, whether through the direct application of the rights to health and food or through the indirect application of the right to health in connection with the right to life, the inter-American system stands on promising ground to uphold states' duty to prevent health-related harm caused by the food and beverage industry.

Furthermore, in recent years, the inter-American system has developed a clear and consistent framework for understanding state obligations with regard to business activities. In a 2019 report titled *Business and Human Rights: Inter-American Standards*,<sup>119</sup> the IACHR interprets the general duties of respect and guarantee established in Articles 1 and 2 of the American Convention on Human Rights in the context of corporate activities.<sup>120</sup> In doing so, the commission recognizes that states' duty to *guarantee* human rights within the inter-American human rights system parallels the first pillar of the UNGPs,<sup>121</sup> which establishes states' duty to *protect* human rights.

In the report, the commission highlights four general duties of states in the context of business activities: the duty to *prevent*, the duty to *monitor*, the duty to *regulate or to adopt all domestic measures*, and the duty to *investigate, punish and redress*. In particular, the duties to *prevent* and *regulate* are useful for understanding state obligations regarding the marketing of unhealthy products. First, the *duty to prevent* means that states must adopt all measures necessary to prevent corporate activities that a corporation knows or should have known

<sup>113</sup> *Case of Cuscul Pivaral et al. v Guatemala*, Inter-American Court of Human Rights, Judgment of 14 May 2019, Ser C, 378; *Case of Poblete Vilches et al. v Chile*, Inter-American Court of Human Rights, Judgment of 8 March 2018, Ser C, 349.

<sup>114</sup> *Case of the Indigenous Communities of the Lhaka Honhat Association (Our Land) v Argentina*, Inter-American Court of Human Rights, Judgment of 6 February 2020, Ser C, 400.

<sup>115</sup> Although both rights were originally part of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Articles 10 and 12), neither of them allowed claimants to use the individual petition system established in the American Convention on Human Rights. Thus, the acknowledgement that both rights stem from Article 26 of the American Convention opened the door for their direct protection through the individual petition system.

<sup>116</sup> See, for example, the partially dissenting opinions of Judge Humberto Sierra Port in *Case of Cuscul Pivaral*, note 112; *Caso Guachalá Chimbo y otros v Ecuador*, Inter-American Court of Human Rights, Judgment of 26 March 2021, Ser C, 423.

<sup>117</sup> For an analysis of the ways the inter-American system can integrate the debate on NCDs, see Barbosa et al, note 11.

<sup>118</sup> For a systematic analysis of cases, see Oscar Parra-Vera, 'La protección del derecho a la salud a través de casos contenciosos ante el Sistema Interamericano de Derechos Humanos', in Laura Clérico, Liliana Ronconi and Martín Aldao (coords), *Tratado de Derecho a la Salud* (Buenos Aires: Abeledo Perrot, 2013), 761–800.

<sup>119</sup> IACHR Report, note 77.

<sup>120</sup> *Ibid.*, para 86.

<sup>121</sup> *Ibid.*, para 80.

will result in a human rights violation.<sup>122</sup> As explained in section III, several human rights bodies have already drawn attention to the harmful impacts of the food and beverage industry on children's health. As the absence of regulation facilitates the industry's actions, it could be argued that states that do not regulate this sector are in violation of their duty to prevent human rights violations committed by food and beverage companies.

Second, according to the IACHR report, the *duty to regulate or to adopt all domestic measures* necessary to control corporations' activities covers both substantive and procedural laws, including civil, administrative and criminal laws.<sup>123</sup> The report clarifies that states must regulate business activities and provide an adequate legal framework as part of their human rights duties.<sup>124</sup> The report even goes one step further by interpreting these duties in the context of unhealthy industries. For example, it explicitly highlights how the consumption of ultra-processed food, tobacco and alcohol negatively affects the right to health of children.<sup>125</sup> In this respect, the commission acknowledges that states have a duty to 'establish and enforce regulatory frameworks and to adopt measures that effectively prevent, address and punish the negative commercial negative impacts on the rights of children and adolescents'.<sup>126</sup> In the context of marketing ultra-processed food, this means that states should adopt legislation to restrict the marketing of these products to children, as well as to ensure that victims have effective redress mechanisms in cases where such marketing might occur.

This legal framework has been upheld by the IACtHR in several cases related to the actions of companies involved in dangerous activities. In *Case of the Workers of the Fireworks Factory in Santo Antônio de Jesus and Their Families v Brazil*, concerning the death of 64 people (including 22 children) following an explosion of a fireworks factory, the court confirmed that states have a duty to 'regulate, supervise and monitor the implementation of dangerous activities'.<sup>127</sup> The same standard was included in the recent case of *Buzos Miskitos v Honduras*, which centred on the unsafe working conditions of Indigenous Miskito persons who practised deep diving for several fishing companies, many of whom ended up with serious disabilities and even fatal injuries.<sup>128</sup> In these cases, the court cited the UNGPs, recognizing a correlation between the state duties established under the inter-American system and the UNGPs.<sup>129</sup>

Finally, the IACHR has argued that in order to uphold their duty to regulate, states should adopt a regulatory framework that makes human rights due diligence obligatory for businesses.<sup>130</sup> This is a novel interpretation that can be useful for holding food and beverage companies accountable in the future. As shown in the previous section, human rights due diligence, when applied to the food and beverage industry, could be a useful tool for the prevention of harmful marketing practices. However, given that no Latin American country has adopted human rights due diligence laws to date, this possibility remains a theoretical solution for the regulatory gap.

The above analysis of international human rights law and the inter-American human rights system provides a strong basis for concluding that states parties to the American

<sup>122</sup> Ibid, para 89.

<sup>123</sup> Ibid, para 111.

<sup>124</sup> Ibid, paras 120 and 414(3).

<sup>125</sup> Ibid, para 359.

<sup>126</sup> Ibid, para 361.

<sup>127</sup> *Case of the Workers of the Fireworks Factory in Santo Antônio de Jesus and Their Families v Brazil*, Inter-American Court of Human Rights, Judgment of 15 July 2020, Ser C, 407, para 118.

<sup>128</sup> *Caso de los Buzos Miskitos (Lemoth Morris y otros) v Honduras*, Inter-American Court of Human Rights, Judgment of 31 August 2021, Serie C, 432, para 46.

<sup>129</sup> *Fireworks Factory*, note 127, para 150; *Buzos Miskitos*, note 128, para 47.

<sup>130</sup> IACHR Report, note 77, para 414(3).

Convention on Human Rights have a human rights obligation to regulate, supervise and monitor the marketing of unhealthy food and beverages to children. As a binding legal duty, if not implemented, it may give rise to the utilization of the complaint mechanisms established under the convention, thus opening the door for a deeper analysis of the food and beverage industry's role in the development of NCDs. The next section explores the extent to which this duty has been implemented in select Latin American countries.

### *State Regulations on Food and Beverage Marketing in Latin America*

In recent years, Latin American states have begun developing and implementing regulations on food and beverage marketing.<sup>131</sup> Such regulations can be divided into three groups: those that do not allow any marketing of unhealthy products to children at all; those that restrict marketing to certain media or during specific hours; and those that have very mild restrictions on food and beverage marketing to children.

In the first group is Chile's law establishing a full prohibition on the advertising of food and drinks that are high in certain ingredients (namely saturated fat, added sugars and sodium) to children under 14. It also restricts the use of 'commercial hooks', such as children's characters and games. The law's definition of advertising is broadly worded, suggesting that the regulation extends to all types of media.<sup>132</sup> Studies on the Chilean experience confirm that children's exposure to unhealthy food advertising via television has decreased significantly in the wake of the law's passage.<sup>133</sup> Part of this positive outcome is due to the law's effective implementation, which has involved the imposition of sanctions on some companies.<sup>134</sup>

Brazil's regulation on advertising to children can be also considered to fall under this group. The regulation considers all advertising targeting children as abusive and therefore prohibited under law.<sup>135</sup> It covers all types of products, not just food and beverages, and has been interpreted as encompassing a wide range of marketing practices. In a 2016 decision, the Superior Court of Justice held that any publicity directly or indirectly targeting children is abusive.<sup>136</sup> The case was related to a company's marketing campaign encouraging children to obtain a wristwatch in exchange for five cookie wrappers and a small amount of money. The court found the company responsible for abusive advertising, explaining that this marketing practice violated the constitutional provision protecting children against exploitation, as well as the rights of parents to make free decisions concerning their children's diets.<sup>137</sup> The same law has been also used to sanction companies for improper food advertising. For example, in 2018, McDonald's was fined 6 million reais (approximately US\$1 million) for organizing two Ronald McDonald performances in schools. The country's

<sup>131</sup> For a systematic review, see Paola Bergallo et al, 'Regulatory Initiatives to Reduce Sugar-Sweetened Beverages (SSBs) in Latin America' (2018) 13 *PLoS One* 10, e0205694.

<sup>132</sup> Ley 20.606 sobre Composición Nutricional de los Alimentos y su Publicidad 2012 (Chile).

<sup>133</sup> Francesca Carpentier et al, 'Evaluating the Impact of Chile's Marketing Regulation of Unhealthy Foods and Beverages: Preschool and Adolescent Children's Changes in Exposure to Food Advertising on Television' (2020) 23:4 *Public Health Nutrition* 747.

<sup>134</sup> In 2018, a Chilean tribunal upheld a fine that the Ministry of Health had imposed on two companies, Evercrisp and Carozzi, for displaying animated characters on their product labels. See Diario Uchile, 'Tribunal multa a Evercrisp por mal rotulado de sus productos Gatolate y Cheetos' (20 August 2018), <https://radio.uchile.cl/2018/08/20/tribunal-multa-a-evercrisp-por-mal-rotulado-de-sus-productos-gatolate-y-cheetos/> (accessed 30 November 2021).

<sup>135</sup> Dispõe sobre a abusividade do direcionamento de publicidade e de comunicação mercadológica à criança e ao adolescente, Resolução CONANDA No. 163, 2014 (Brazil).

<sup>136</sup> *PROCON v Pandurata Alimentos Ltda (Bauducco)*, Tribunal de Justiça do Estado de São Paulo (2017).

<sup>137</sup> *Ibid.*

consumer protection agency considered these performances to be abusive given that they were directed mainly at children and were deliberately intended to encourage them to consume McDonald's products.<sup>138</sup>

Peru's legislation is also a remarkable example. The advertising of ultra-processed foods may not utilize techniques that exploit the naivety of children, nor may marketing strategies employ prizes, gifts or children's characters to promote the acquisition of a product.<sup>139</sup> Moreover, those products high in sodium, sugar or fat must include a label of 'high in' and 'avoid its consumption' in both its package and publicity.

In the second category of regulations – those partially limiting the marketing of food and beverages – is Mexico's 2014 regulation limiting the marketing of certain food and non-alcoholic beverages high in sodium, fat or sugar via television and cinemas. For television, it prohibits broadcasting during certain times that are considered children's viewing time. For cinemas, it prohibits such advertisements during the showing of films aimed at families and general audiences.<sup>140</sup> The problem with this legislation, however, is that it leaves several elements unregulated. For example, it does not apply to certain programmes (such as soap operas and sports) that are popular among Mexican children.<sup>141</sup> Moreover, it does not include specific guidelines for digital marketing or for packaging. Concerning this latter aspect, Mexico passed a major reform in 2020 making front-of-package labelling compulsory for products high in certain nutrients and including specific restrictions on packaging. Under this regulation, products with one or more warning labels are not allowed to include children's characters, cartoons, celebrities, athletes, pets or interactive elements (such as visual-spatial or downloadable games) that may incite or promote the products' consumption.<sup>142</sup> This regulation has had a major impact on marketing by limiting an important form of publicity; however, the marketing of ultra-processed food and beverages may still reach children during certain television hours and via digital sites.

Finally, in the third category – countries that have not enacted specific legislation restricting the marketing of ultra-processed products to children – is Colombia. The country has a general regulation stipulating that messages addressed to children may not mislead, deceive or confuse.<sup>143</sup> This has been used to denounce very serious cases of misleading publicity targeting children. In 2020, for example, one of the country's leading sugary beverage companies was fined for displaying misleading messages to children in a television advertisement that promoted sugary drinks as 'fruit juices' when their true fruit content was less than 7%.<sup>144</sup> However, this legislation has not prevented the sugary beverage industry

<sup>138</sup> *Alana v Arcous Dourados Comércio de Alimentos*, Despacho 54/2018 (11 October 2018).

<sup>139</sup> Ley No. 30021, Ley de Promoción de Alimentación Saludable para Niños, Niñas y Adolescentes que Tiene Como Objetivo la Implementación de Quioscos y Comedores Saludables y el Fomento de la Actividad Física en Las Instituciones de Educación Básica Regular, 2013 (Peru).

<sup>140</sup> Lineamientos por los que se dan a conocer los criterios nutrimentales y de publicidad que deberán observar los anunciantes de alimentos y bebidas no alcohólicas para publicitar sus productos en televisión abierta y restringida, así como en salas de exhibición cinematográfica, conforme a lo dispuesto en los artículos 22 Bis, 79, fracción X y 86, fracción VI, del Reglamento de la Ley General de Salud en Materia de Publicidad 2014 (Mexico).

<sup>141</sup> Instituto Federal de Telecomunicaciones, *Estudios Sobre Oferta y Consumo de Programación para Público Infantil en Radio, Televisión Radiodifundida y Restringida* (Mexico), 2015, 30.

<sup>142</sup> Modificación a la Norma Oficial Mexicana NOM-051-SCFI/SSA1-2010, Especificaciones Generales de Etiquetado para Alimentos y Bebidas no Alcohólicas Preenvasados-Información Comercial y Sanitaria, publicada el 5 de abril de 2010 (Mexico), sec 4.1.5

<sup>143</sup> Decreto 975 por el Cual se Reglamentan los Casos, el Contenido y la Forma en que se Debe Presentar la Información y la Publicidad Dirigida a los Niños, Niñas y Adolescentes en su Calidad de Consumidores, 2014 (Colombia), art 3.

<sup>144</sup> In this case, the company received a fine of approximately US\$ 500,000. Superintendencia de Industria y Comercio, Resolución No. 37544/2020, 2020 (Colombia).

from displaying advertisements to children as long as they are not ‘misleading’.<sup>145</sup> Although several bills have been presented to Congress in an effort to incorporate more stringent restrictions on marketing to children, none of them has passed, in large part due to the industry’s influence. Taking into account that Colombia has ratified most international human rights treaties and the American Convention on Human Rights, one could argue that the state’s failure to regulate the marketing of these products is a violation of its international obligations to protect children’s rights to health and food and to prevent, regulate and supervise the marketing activities of the food and beverage industry.

## V. Conclusion

The marketing of unhealthy food and beverages to children is a common practice in Latin America that may contribute to overweight and obesity, both of which are risk factors for NCDs. As the COVID-19 pandemic has already claimed the lives of 5.2 million people,<sup>146</sup> measures to prevent another public health crisis, such as the rise of overweight and obesity, have become more urgent than ever. To this end, businesses and states alike should fulfil their human rights responsibilities and duties as outlined under the UNGPs and international law. This means that businesses should commit to respect human rights and to incorporate a human rights due diligence approach in their internal policies. Such policies, however, cannot be replaced by the self-regulatory commitments that the industry often displays as proof of its interest in children’s rights. While obligatory due diligence laws are not yet in place in Latin America, the responsibility of businesses to act with a right to health due diligence approach in their marketing practices is a globally recognized social expectation. Moreover, given that most Latin American countries have ratified most international human rights instruments and the American Convention on Human Rights, they have a binding legal obligation to regulate the marketing of unhealthy products in a way that prevents children’s exposure to it. The increasing trend among Latin American countries towards regulating the marketing of ultra-processed food and beverages is a promising start, but much remains to be done throughout the region.

**Conflicts of interest.** The author declares none.

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<sup>145</sup> See, for example: Dejusticia, ‘Aparece una versión modificada de comercial Postobón que será investigado por presunta publicidad engañosa’, <https://www.dejusticia.org/aparece-una-version-modificada-de-comercial-de-postobon-que-sera-investigado-por-presunta-publicidad-enganosa/> (accessed 16 November 2021).

<sup>146</sup> WHO, WHO Coronavirus (COVID-19) Dashboard, 29 November 2021, <https://covid19.who.int/> (accessed 30 November 2021).