

PART FOUR

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PART FOUR

SECTORAL COMPATIBILITY REVIEW

Even if the right to food is recognized through the state constitution or a framework law on the right to food, or both, it will still be necessary to ensure that sectoral laws do not have a negative impact on the exercise of the right to food. Regardless of whether a state decides to pursue one or both of the other legislative options for implementing the right to food, governments should review all relevant sectoral legislation that does or could affect the various components of the right to food (e.g. accessibility, availability, adequacy) in order to ensure that the country's legislation creates an enabling framework that allows people to feed themselves with dignity.

The first step towards ensuring that sectoral legislation is conducive to the exercise of the right to food in the country is a review of the relevant laws with regard to both right to food standards and human rights principles. Problematic features of a sectoral law could include, for instance, the failure to establish clear entitlements, inadequate mandates or powers assigned to administrative authorities, the lack of a monitoring requirement accompanied by appropriate procedures or the lack of remedies for violations of the right to food. The second step requires a modification or repeal of those legislative provisions found contrary to right to food standards and human rights principles, in order to optimize the legislative framework to support the realization of the right to food. In order to present a balanced picture, the review should also note the positive features.

Following a brief discussion of the review planning process, Part Four explores selected areas of sectoral regulation, assessing possible effects on and implications for the realization of the right to food. In addition to highlighting some of the key issues relevant to the right to food in these sectoral areas, the analysis should serve as an illustration of how the regulation of sectoral areas can affect, positively or negatively, the ability of people to feed themselves by their own means and through their own efforts.

4.1 PLANNING THE REVIEW

4.1.1 CONTEXT AND SCOPE

A compatibility review can be undertaken with respect to existing legislation (*ex post* review) or future, draft legislation (*ex ante* review). An *ex ante* review is generally narrow and examines the technical legal compliance of the normative contents of a given future piece of legislation with the right to food. An *ex post* compatibility review can range from a very narrow “on paper” evaluation to a very detailed analysis of the “on the ground” effectiveness of legislative provisions, and can include the undertaking of extensive field research. In practice, an *ex post* review most often takes into account at least some aspects related to the implementation of an existing piece of legislation on the ground.

Because the right to food cuts across many different sectors, undertaking a compatibility review will be an ambitious challenge for many countries in terms of resources. However, it is one of the key elements for the realization of the right to food. Addressing implementation is more difficult than analysing the legal consistency of laws with the human right to food on paper; yet, only by examining existing laws on paper and in practice can governments and civil society actors fully understand how the legislation facilitates or hinders the realization of the right to food. Therefore, whenever possible, an *ex post* compatibility review should address both the technical legal consistency of its contents and its implementation aspects.

There are two types of compatibility review: (i) a stand-alone right to food review, and (ii) a right to food review that is included in a larger legislative review and evaluation process. A stand-alone review has the advantage of allowing for a more in-depth evaluation of laws with regard to the right to food, but would be costly to establish as a continuous process. It would be most suitable for one-off *ex post* evaluation. Integrating right to food components into existing processes

has the advantage of being less costly and providing for more holistic and comprehensive reviews, but the disadvantage of perhaps not being thorough enough from a right to food perspective.

If a right to food compatibility review is incorporated into existing *ex ante* processes, this helps ensure that the future legislation will create no hindrance to the realization of the right to food. Many countries have *ex ante* legislative evaluations of the future law's consistency with human rights generally.¹⁹⁰ Where the human right to food is not already among the rights considered in an existing *ex ante* evaluation process, more specific and tailored questions will need to be added.

In recent decades, many countries have begun reviewing their legislation in specific sectors to improve its effectiveness and, often, its compliance with international standards. This has been the case, for example, in the areas of land reform, agriculture, fisheries, food safety and water legislation. Incorporating the right to food compatibility assessment into these existing *ex post* reviews would be very useful, and may be a better option for countries with limited resources (rather than undertaking a stand-alone right to food review).

Section 4.2 (methodology for the compatibility review) and Tables 3 (right to food standards) and 4 (human rights principles) provide some guidance on the types of questions and the criteria that should be incorporated into existing legislative review procedures to take account of the effects of laws or regulations on the realization of the right to food in a country. As to questions specific to the different sectors, sections 4.3-4.10 review some key issues.

Eight areas of regulation have been selected on the basis of the Right to Food Guidelines, which are also used as a support for analysis.

For many of the selected sectors the international dimension is significant: countries are parties to a variety of international agreements with different objectives (i.e. trade, agriculture, environment, food safety) as well as to human rights treaties. Thus, specific national legislative choices in a particular sectoral area affecting the right to food can be – and frequently are – determined by the country's international commitments. Although there is no hierarchy among international agreements, some think that there may be arguments for considering that, in the case of a conflict, human rights should take precedence.¹⁹¹ The most relevant international instruments governing the sector are therefore mentioned as well.

190 In most cases, it will be a national human rights institution (i.e. ombudsperson or human rights commission) that will be in charge of this aspect of evaluation.

191 See Cullet, P. 2003, p. 37.

4.1.2 INSTITUTIONAL RESPONSIBILITY

Before carrying out a right to food compatibility review, it will be necessary to identify the institution or institutions responsible for it. Evaluating the compatibility of sectoral legislation with the right to food requires knowledge of the sector as well as legal and human rights expertise. In addition, a compatibility review requires a broad understanding of social and economic impacts, in order to assess the on the ground effects of the legislation in question. This argues for a more technical body to carry out the compatibility review. On the other hand, high-level political support is critical to implementing and acting upon the recommendations and the action plan that result from the review. This would argue for assigning responsibility for carrying out the review to one body and supervisory responsibility to another, higher entity with real power to mandate and implement change. The supervisory and operational bodies would jointly identify legislation for review, while the supervisory body would set priorities, establish deadlines and oversee the work of the specially constituted operational team that would carry out the review.

The supervisory entity could be parliamentary, governmental or independent; each option has its advantages and disadvantages and the choice will ultimately depend on the specific circumstances of each country. Where there is already a specific parliamentary committee charged with scrutinizing legislation for its compatibility with human rights or with monitoring the implementation of international human rights instruments, it could be assigned the responsibility for supervising and coordinating a right to food compatibility review. Because it is housed within the parliament, this option would have the benefit of producing an authoritative final plan of action and ensuring political support for the implementation of the recommended changes (see below, section 4.2.3).

Another option could be assigning a governmental unit to supervise the review of legislation for its compatibility with the right to food. A national authority on the right to food where established (see above, section 3.11), or another interministerial coordinating body, may be well placed to take on this responsibility. One advantage is closer access to information regarding the actual impacts of particular legislation on the enjoyment of the right to food in the country. Governmental oversight of the review may also help with mainstreaming the right to food within various government departments and strengthening governmental officials' commitment to this human right. On the other hand, as the government will often be at the origin of legislation examined and bear the responsibility for its implementation, it may lack the necessary objectivity and critical perspective to supervise its review.

Yet another possibility may be entrusting an independent body with this responsibility. This could be a national human rights institution, an independent research body or a university, whichever entity has the real authority to oversee and implement the recommended changes. In many countries, national human rights institutions already play a role in the evaluation and review of national legislation

for its compatibility with human rights (see above, section 3.12.1). Most often, these institutions review draft laws, although there are some that also have responsibility for reviewing existing legislation on paper and in practice.

In all cases, the responsibility for carrying out the review itself should be given to a specialized team, which would report to the supervisory body. This review team should work in close cooperation with other governmental institutions, including those involved in monitoring food security and those dealing with human rights, as well as with non-governmental bodies and civil society (see above, sections 3.1.3 and 3.13). The team should have broad representation and expertise, as well as objectivity and commitment to the realization of the right to food in a country. Members of the review team should include experts from various disciplines and origins: legal experts, including at least one right to food expert, and technical representation from the sector that is the subject of review.

Most of the preceding discussion concerns the operation and supervision of a right to food specific review. Where a decision is taken to integrate consideration of the right to food and human rights principles into an existing process of legislative evaluation, it may only be necessary to amend the duties of the institution or institutions responsible for the review, and ensure that the composition of the operational team that will carry out the review includes right to food expertise.

4.1.3 PARTICIPATORY PROCESSES

With respect to the drafting of the framework law, section 3.1.3 of this Guide discussed the need to involve actively all relevant stakeholders and set out some possible procedures and mechanisms to guarantee that participation and consultation. In the case of a compatibility review process, participation will be essential in an *ex post* context, where the review includes an evaluation of the effectiveness of the legislation in practice (see below, section 4.2.2). This is because input and comments from persons, groups and local communities affected directly by a particular sectoral law (e.g. farmers, indigenous peoples and communities, fisherfolk or consumers) will be crucial to evaluate how the legislation affects their capacity to feed themselves by their own means and thus realize their right to food. The affected stakeholders should be given the opportunity to provide their input throughout the review process, also making comments on the final report and plan of action resulting from the review (see below, 4.2.3).

4.2 METHODOLOGY

As noted earlier, the objectives of a right to food compatibility review are to identify legislative provisions that support¹⁹² or constrain the ability of persons to enjoy their right to food, and to support the development of positive legal measures to strengthen people's self-sufficiency. This section discusses a possible review methodology and gives some examples of questions that should underpin the review.

4.2.1 SELECTING SECTORS FOR REVIEW

Ideally, the review should cover all national legislation that affects or is likely to affect the capacity of people to feed themselves by their own means. In practice, however, this will often not be possible as the amount and type of legislation will be vast, including primary laws, subsidiary laws, governmental regulations, ministerial decrees, schedules and other instruments. In some countries, customary rules and practices may also be relevant.¹⁹³ The relevant sectoral areas will be equally wide and diverse. Selecting legislation for review and setting priorities will thus be crucial for the effectiveness of the compatibility review. Where resources are limited, it would be preferable to have an effective review of a few pieces of legislation in one sector than a perfunctory review of many sectors and many acts.

As mentioned earlier in this guide, states are required to progressively realize the human right of every person to access sufficient and adequate food. At the same time, they should prioritize the most vulnerable segments of the population who face the greatest difficulties in realizing their rights.

192 While the main objective is to identify problems with a view to addressing them, positive features could also be highlighted in the interest of balance or preventing such aspects being lost.

193 In many countries, access to resources such as land and water is regulated not only by statute but also, to a large extent, by customary law. Although the compatibility review is unlikely to cover customary law (among other reasons, because it is unwritten), it should try to identify whether right to food problems originate from the content of customary law or its interface with statutory law and whether they merit a more detailed analysis.

These should be given “first call” when selecting sectoral areas for review. At the global level, the majority of hungry people live in rural areas. About half of them live in smallholder farming households. Roughly two-tenths are landless. One tenth is pastoralists, fisherfolk and forest users. The remaining two-tenths are the urban poor.¹⁹⁴ This roughly indicates priority areas that can be targeted for review. Nonetheless, it does not mean that a right to food compatibility review is unnecessary in countries with little food insecurity; at the national level, each country has its own peculiar hunger and right to food problems and causes. These must be analysed in detail and mapped adequately, in order for the review team to decide on the sectoral areas to examine as a priority.

A good knowledge of the main factors of food insecurity in a country is a condition *sine qua non* for identifying areas where corrective legislative action is or might most urgently be needed and thereby selecting priority laws to be reviewed. In many cases, the roots of the problem are not lack of available food, but lack of access to available food (see section 3.1.2). Consequently, legislation that establishes an *entitlement* (e.g. land, fishing licence, employment, social assistance) should be made a high priority in the review. In other cases, the inability to enjoy the right to food freely may be a consequence of certain *economic activities* affecting access to adequate food or the means for its procurement (e.g. natural resource extraction, building and construction, food production, food processing, food marketing, foreign investment). The Right to Food Guidelines provide a useful tool for this exercise as they identify the main sectoral areas where action, including through legislation, may be needed to facilitate the realization of the right to food.

Where possible, the compatibility review should also include an examination of national legislation relevant for the free exercise of human rights and freedoms (e.g. laws on association, administrative and civil codes, criminal code, laws on human rights institutions). These rules and regulations may ultimately determine the ability of persons to participate actively in the process of implementation of the right to food in a country, to exercise their human right to food effectively and to claim its protection in case of its violation.

4.2.2 ASSESSING LEGISLATION FROM THE RIGHT TO FOOD PERSPECTIVE

The main task of the review will be to identify laws, regulations or provisions within them that could affect people’s capacity to access sufficient and adequate food. More specifically, the review team should strive to identify:

- Provisions that directly or indirectly limit (or are likely to result in limiting) the capacity of people to exercise their right to food, and whether those limits are justified (see Table 3).

194 UN Millennium Project. 2005a, p. 6.

Some examples of provisions that directly limit a person's capacity to access food include: insufficient minimum wage; discriminatory conditions for access to land and natural resources; cumbersome procedure and/or conditions in place for eligibility for social assistance payments or small business licences. Other legal provisions, such as incentives for foreign investments or natural resource-based economic activities, price interventions or insufficient food safety standards, can also limit or are likely to result in limiting a person's capacity to exercise his or her right to food.

- Apparently positive or neutral norms that could limit the freedom of a person to exercise his or her right to food.

A typical example of such norms would be provisions that do not distinguish between men and women in issues dealt with by a law at hand. In fact, even when formally equal, the exercise of women's rights is often affected by entrenched cultural attitudes and perceptions. For example, having in mind that resources such as time, money and power are unequally distributed in practice, land tenure regimes based on the assumption of equality and community unity may result in *de facto* discrimination of women.

- Gaps and inconsistencies in the legislative provisions or in the institutional set-up that may constrain the realization of the right to food and require remedial action.

An example of a gap in the legislative provisions would be a law that imposes ceilings on the allowable size of landholdings but does not provide for any sanction in case of non-respect (which can prevent someone from realizing his or her right to food). An example of inconsistencies would be a law establishing a natural reserve within a forest area in order to improve availability and accessibility of food sources for the forest communities, and at the same time providing incentives for land cultivation within the reserve, including for non-forest communities.

- Gaps in regulation and issues that should be addressed through legal action.

The review team should also be mindful of possible gaps in regulation and issues that should be regulated by law in order to implement the right to food fully in a country. For example, the absence of legislation on nutrition standards and consumer protection would be a gap in ensuring the right to adequate food.

In an *ex post* review that goes beyond technical analysis of legal compliance of normative contents of a given piece of legislation, the review team should also determine:

- Whether the norms established by the legislation are both implemented and respected by the relevant group (public officials, individuals, private actors).

- ✓ Non-intended and unforeseen consequences of a law or regulation.
- ✓ Actual effects of any non-respect in practice;
- ✓ Importance of those effects with respect to hindering the realization of the right to food.

Selected legislation should be examined in detail against right to food standards and human rights principles set out in international law. These have been discussed in detail in parts one and three of this guide, notably sections 3.3 and 3.5. The recommendations given by the Right to Food Guidelines as to the implementation of the right to food at the national level should also be used as a support for analysis.

The assessment should start by identifying possible implications of legal provisions for various elements of the right to food (i.e. availability, stability, accessibility, adequacy and utilization of food in a country) in order to determine whether it hinders or is likely to hinder progressive improvement of living conditions in a country and people's self-sufficiency. Table 3 illustrates an example of this type of assessment.

Table 3. Assessing a legal provision with respect to elements of the right to food

LEGAL PROVISION	ASSESSMENT WITH RESPECT TO ELEMENTS OF THE RIGHT TO FOOD		
	Availability, stability and sustainability of supply	Accessibility	Adequacy and utilization
Charging for water services	Can contribute positively by discouraging theft and wasteful use, thus improving the availability of water for food preparation and irrigation purposes.	Better water management and piped water can improve people's access to water for food preparation. Accessibility can be hindered when price is fixed too high, and no exemptions are provided for low income households and areas, or both.	Better water management and piped water closer to households can improve hygiene and thus also the adequacy of food people consume. When charges are set too high, people may limit their water use, which can have negative implications on the adequacy and utilization of food.

As said above, assessing legislation from the right to food perspective should also include the assessment of legal provisions against general principles of human rights. More specifically, the review process should evaluate whether these principles are expressed in the selected sectoral legislation, and to what extent. Sectoral legislation, where it conforms with human rights principles, empowers people to assert their right to food and hold their governments to account for their acts or omissions.

Table 4 gives some examples of questions that can guide the team in the assessment of selected legal provisions against human rights principles. The questions are given here in order to stimulate discussion and analysis and should be complemented by other more specific questions tailored for each relevant sector (see sections 4.3–4.10).

Table 4. Assessing legislation against human rights principles

HUMAN RIGHT PRINCIPLE AND DEFINITION	QUESTIONS TO ASK WITH RESPECT TO THE LEGISLATION
<p>PARTICIPATION</p> <p>People should be able to participate in the planning, design, monitoring and evaluation of decisions that concern them. Participation should be active, free and meaningful.</p>	<ul style="list-style-type: none"> • Do the beneficiaries of the law and the concerned stakeholders have the right to participate in the implementation of the law? • Who can participate and how? Are there any exceptions? • Is a participation procedure provided for expressly? • Does the law provide for any institutional participation mechanism? • Is the selection process non-discriminatory and transparent? • Is there a legal requirement for the competent authorities to consult the relevant stakeholders? • What forms of consultation are provided for? • Are the roles of beneficiaries and stakeholders clearly established?
<p>ACCOUNTABILITY</p> <p>Public officials should be answerable to their superiors and to the people they serve for their actions in carrying out their mandates and assigned roles. Such accountability can be ensured through social, administrative, political and judicial processes and controls.</p>	<ul style="list-style-type: none"> • Are the competent authorities in charge of implementation and enforcement clearly indicated? Are their mandates and responsibilities established? • What is their level of discretion in decision-making, for example, with respect to delivering established entitlements, services or benefits? • Are there any deadlines for implementation of different provisions? Are they realistic? • Is there a legal obligation to inform the intended beneficiaries about the law's provisions? • Are accountability mechanisms provided by the law accessible to the public? • Are appropriate sanctions and remedies in case of non-compliance by authorities provided for? • Are accountability procedures and mechanisms effective (or likely to be effective) in practice? • Is there a monitoring and/or evaluation mechanism established by the law? If so, does it monitor and evaluate according to human rights principles? • Do the competent administrative authorities have adequate powers and resources to implement the legislation under review?
<p>NON-DISCRIMINATION</p> <p>No person or group should be discriminated against on any ground, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Particular attention needs to be given to those who cannot enjoy their rights as fully as other persons or groups.</p>	<ul style="list-style-type: none"> • Do certain provisions of the law explicitly disadvantage any particular category of person or group? • Does the law entail any different treatment of persons or groups on prohibited grounds? • Are there any apparently neutral provisions that have resulted or are likely to result in a disadvantage for a particular category or group of persons? Do established procedures ensure effective equality of persons? • Does the legislation provide for some special measures aiming at contributing to tackling/correcting existing discrimination against certain categories of persons (e.g. women, indigenous peoples, subsistence fishers or farmers)? • Is the legislation supportive of discriminatory customary laws, traditions and practices, or does it aim at correcting discriminatory practices? • Are established entitlements, system of services or benefits genuinely accessible by and to all? • Where there are several official languages in a country, does the law exist in all relevant languages and do all the language versions say the same thing? ▼

Table 4. Assessing legislation against human rights principles (cont.)

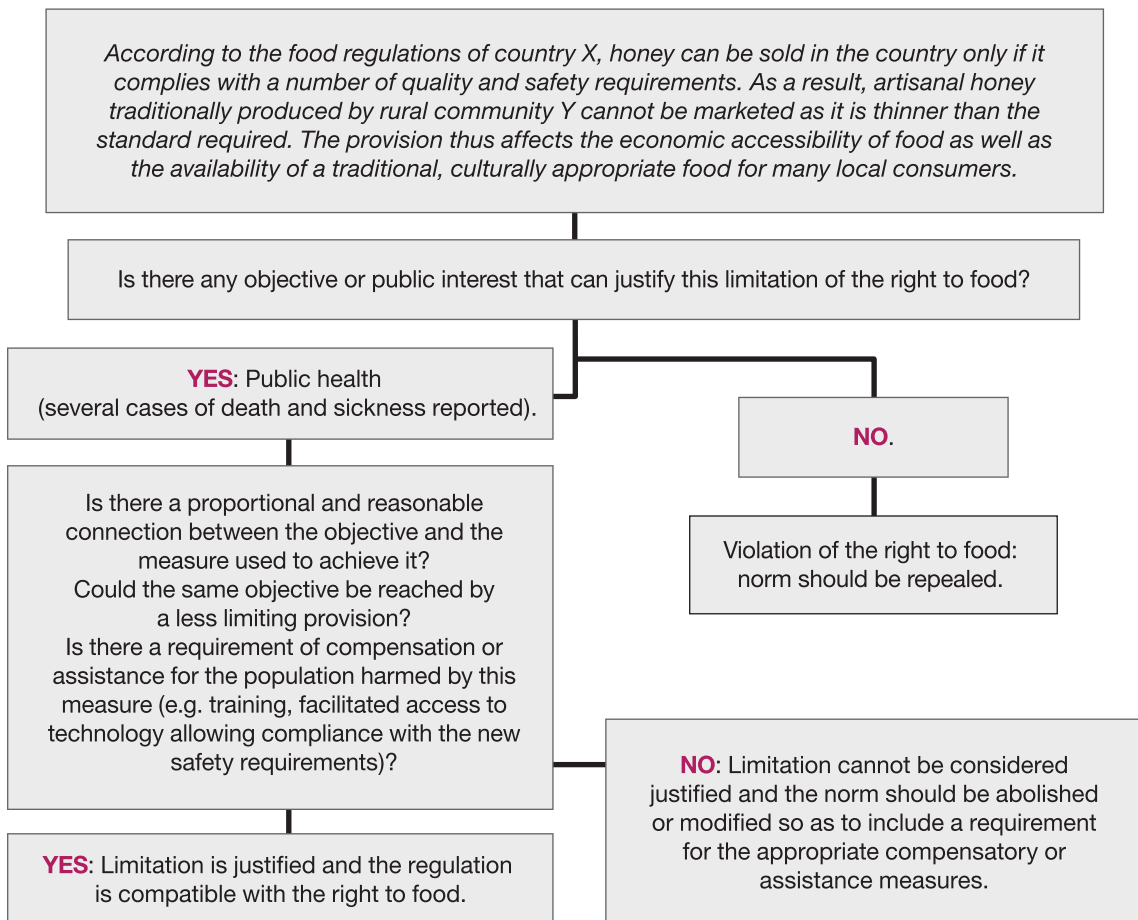
HUMAN RIGHT PRINCIPLE AND DEFINITION	QUESTIONS TO ASK WITH RESPECT TO THE LEGISLATION
<p>TRANSPARENCY</p> <p>Concerned persons must have the necessary information about decision-making processes and who is accountable and responsible for what.</p>	<ul style="list-style-type: none"> • Is there a legal requirement to inform the concerned beneficiaries/affected persons about the established entitlements/services/norms? • Does the law provide for the right of persons to seek information and the obligation of the competent authorities to provide it? • Is the law clear about the bodies responsible for its implementation? • Where an established entitlement/service/benefit is subject to predetermined criteria, are these criteria defined with sufficient precision? • Is there an obligation to ensure that information is available not only in official languages but also in all relevant languages in a country? • Where the law provides for the loss of rights (expropriation, revocation of licence, etc.) are conditions enumerated with sufficient precision?
<p>HUMAN DIGNITY</p> <p>Human dignity refers to the absolute and inherent worth that a person has simply because they are human, not by virtue of any social status or particular powers. This principle is of particular importance for children, persons with disabilities and the elderly.</p>	<ul style="list-style-type: none"> • Can the established requirements, procedures or other provisions affect people's dignity? • Are there provisions requiring officials to treat beneficiaries of services with respect, and to respect individuals' dignity in case interventions are necessary that restrict their access to food? • Where the law at hand establishes an entitlement or relates to service delivery, does it provide for the obligation to inform the concerned beneficiaries in a way that is accessible also to illiterate persons? • Does the law or regulation under review provide for an individualized assessment of needs where appropriate (e.g. food assistance for infants, children, pregnant or breastfeeding women)?
<p>EMPOWERMENT</p> <p>People should have the power, capacities, capabilities and access needed to change their own lives, including the power to seek from the state remedial actions for violations of their human rights.</p>	<ul style="list-style-type: none"> • Are there provisions that enable individuals to know and claim their rights? • Is public education and awareness raising part of the obligations of the responsible entity or officials? • Are monitoring reports and findings widely disseminated and accessible to the concerned persons and groups? • Are enforcement proceedings and remedies available and accessible in practice?
<p>RULE OF LAW</p> <p>Every member of society, including the state, must follow the law. Legal rules must be clear, well understood and fairly enforced. People should have: the right to complain in front of an independent judicial or equivalent body; the right to due process; and the right to adequate redress.</p>	<ul style="list-style-type: none"> • Does the law equally apply to everyone including public officials? • Is the law drafted as clearly and simply as possible? Are its provisions ambiguous or unduly vague? • Are there provisions on the right to complain about decisions taken by the competent bodies? Are the relevant bodies independent and impartial and do they have the power to impose measures to redress violations of the right to food they have found? • Is there a right of appeal? • Are there specific remedies determined for violations under the law? What kind of remedies? Are they adequate, prompt and effective?

The review team is likely to find provisions in sectoral laws that limit the exercise of the right to food. For various reasons, a state may have to adopt measures that can interfere with the human rights of its people, in the interest of achieving what it considers a compelling public interest. However, international human rights law requires that states strike a balance between the interests of the community as a whole (e.g. the general well-being of the country) and the individual's effective enjoyment of his or her right to food (see above, section 3.3.3). Once it has identified a provision it considers a potential limitation on the right to food, the review team's role will be to determine:

- ✓ Whether the limitation could be considered justified because it is necessary for achieving a pressing public interest and the general well-being of the country.
- ✓ Whether the law contains an express requirement to adopt adequate accompanying measures that are necessary for preserving the right to food of the concerned persons.

Figure 3 gives an example of this type of assessment.

Figure 3. Assessing a legal provision potentially limiting the right to food



4.2.3 FOLLOW-UP TO THE REVIEW – REPORTING AND CREATING A PLAN OF ACTION

Once the review team has completed its work and identified the weaknesses of the selected sectoral legislation, it should make a written report and a plan of action to be submitted to the supervisory body. While the report should note the main positive aspects, its focus should be on problematic features of examined legislation and the main issues where remedial action is needed. The report should also contain the reasoning and motives for the proposals made, as well as their precise objectives and goals.

The plan of action might contain recommendations with regard to the following:

- Suggested amendments to the legislation to ensure conformity with right to food standards.
- Modifications to the mandate of public authorities responsible for implementation or enforcement.
- Governmental action needed to improve implementation.
- Issues and areas that require further work and regulation.

Before submitting the report and proposed plan of action to the supervisory body the review team should disseminate draft versions for consultation and comments to the relevant ministries and other concerned stakeholders (and possibly, also to state parliament).

4.3 LAND

The Right to Food Guidelines require states to respect and protect the rights of individuals with respect to resources such as land, water, forests, fisheries and livestock without any discrimination. States should also carry out land reforms consistent with relevant human rights obligations and in accordance with the rule of law, in order to secure efficient and equitable access to land (Guideline 8.1).

Access to agricultural and forest land provides not only a means of food production and a source of employment but is also a means for accumulating other assets and recuperating after natural or human-induced crises. According to the Special Rapporteur on the right to food, “Access to land and agrarian reform must form a key part of the right to food given that access to land is often fundamental for ensuring access to food and to a livelihood and therefore freedom from hunger”.¹⁹⁵ The need for secure rights over land and resources and the need to improve access for the landless, poor and disadvantaged segments of society are acknowledged in several international instruments (see Box 63). They should therefore also be taken into account during the review process in countries that have committed to them. The right to food implications are likely to be particularly acute where there is a very uneven and unequal distribution of access to land and at the same time a large part of the rural population is facing hunger and poverty.¹⁹⁶

195 See UN Special Rapporteur on the right to food, 2002b.

196 See Coomans, F. 2006.

BOX 63. Access to land and international instruments

ICESCR Article 11.2 (a) requires states to improve methods of production, conservation and distribution of food by, among other issues, “developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources /.../”.

In its GC 12 on the right to food, the CESCR states that strategies to realize the right to food “should give particular attention to the need to prevent discrimination in access to food or resources for food. This should include: guarantees of full and equal access to economic resources, particularly for women, including the right to inheritance and the ownership of land and other property, credit, natural resources and appropriate technology...”.

Agenda 21, adopted during the UN Conference on Environment and Development, states that “the main tools of sustainable agriculture and rural development are policy and agrarian reform, income diversification, land conservation and improved management of inputs”. States are required to “review and refocus existing measures to achieve wider access to land” and urged to “ensure equitable access of rural people, particularly women, small farmers, landless and indigenous people, to land, water and forest resources” (Chapter 14).

CEDAW provides for the right of rural women to have access to agricultural credit and loans, marketing facilities, appropriate technology and equal treatment in land and agrarian reform as well as in land resettlement schemes (see Article 14(2)g).

With regard to indigenous peoples, the ILO Convention No. 169 states that collective “rights of ownership and possession of indigenous peoples over the lands which they traditionally occupy shall be recognized”. Governments are required to “take steps necessary to identify” these lands and to “guarantee effective protection” of the recognized rights. In addition, recent jurisprudence under the International Covenant on Civil and Political Rights interprets the Covenant’s Article 27 (relating to the right of indigenous peoples to enjoy their culture) to include rights to land and resources when they are an essential element of a community (see among others, *Lubicon Lake Band v. Canada*, HRC Communication No 167/1984, Views adopted on 26/03/1990, para. 32.2; *Kitok v. Sweden*, HRC Communication No 197/1985, Views adopted on 27/07/1988, para. 9.2).

Finally, the recent UN Declaration on the Rights of Indigenous Peoples requires governments to protect indigenous peoples’ rights over lands and to title and demarcate such lands.

At the national level, several countries have recently engaged in land law reform.¹⁹⁷ How land reform should be carried out is for each state to decide according to its own historic, legal, social, economic and other circumstances,¹⁹⁸ and this is not the focus of the present Guide. The next sections identify the main issues within national land law that can have significant implications for the right to food and that bear close examination by the national review team.

4.3.1 CHARACTERISTICS OF LAND RIGHTS

The Right to Food Guidelines invite states to facilitate sustainable, non-discriminatory and secure access and utilization of resources and protect the assets that are important for people's livelihoods (Guideline 8.1). The right to food compatibility review of the land law should thus focus on: legal provisions that establish land rights and their content (e.g. right to use, mortgage, sell); those concerning leasing of land, duration of a land right, obligation to use land in a certain way; provisions reserving the right of the state to allocate concessions for economic activities; and other provisions leaving space for broad state interference.

Land rights (also called "tenure rights") define what rights are held with respect to land, by whom, for what length of time and on what conditions. Land rights include ownership as well as other landholding and use rights (e.g. leasehold, usufruct, servitudes and grazing rights), which may coexist in the same plot of land.¹⁹⁹ These rights may be held by individuals or groups or by the state. The form of a land right and its characteristics can significantly affect the enjoyment of the human right to food by influencing the capacity of persons to produce food or to generate the income needed to purchase it, and by restricting people's ability to prevent the state or other actors from interfering with their rights related to land, which in turn affect their ability to feed themselves.

In many parts of the world, land rights are weak or unclear; in addition, several different types of legal system (statutory, customary or a combination) may apply to the same territory, resulting in overlapping rights, contradictory rules and

197 Among the concerns that have driven the moves towards land reform over the last decades were: market liberalization; poverty alleviation and food security; strengthening of democracy; decentralization; customary and indigenous tenure rights; and sustainable management of land and natural resources. In some countries, a national constitution establishes the right to land restitution (South Africa) or the obligation to make productive, socially beneficial use of land (Brazil), creating a clear legal basis for land reform. See also Quan, J. 2006; Ziegler, J., Way, S.A. & Golay, C. 2006.

198 According to the UN Secretary-General, there are four areas of land reform that could be considered politically feasible and economically sustainable. These are: (i) transforming tenancy rights; (ii) redistributing ownership of uncultivated land; (iii) giving title to lands and watercourses owned by the state; and (iv) redistributing land based on the willing-buyer willing-seller principle. See UN. 2003b, para. 48.

199 See Hodgson, S. 2004; Cotula, L. (ed.) 2006.

competing authorities (“legal pluralism”).²⁰⁰ Unclear rights and legal pluralism within a country can cause insecurity with regard to land and natural resources, as well as to their use and management.

Tenure insecurity can affect the right to food by discouraging investment in and improvement of the resource, as the holder does not expect to retain tenure rights for a sufficient time period. Furthermore, land cannot be used as collateral for credit, which can affect the availability of food in a country.²⁰¹ Tenure insecurity can also affect the (environmental) sustainability of the use of the resource, its productivity and eventually its value, as the right holder may extract the maximum value from the resource in a shorter period of time, not knowing how long he or she may hold the right. Tenure insecurity also makes people less inclined to lease land as they may fear the land will not be returned to them. This can result in limited access to land for tenants, lessees or purchasers, and eventually increased food insecurity.

It is widely acknowledged that securing land rights does not require establishing individual land ownership.²⁰² In fact, individual titling and registration may itself contribute to tenure insecurity, by raising the spectre of land being lost to outsiders and creditors and by disrupting locally recognized systems without replacing them with other institutions that can or will effectively protect the newly delineated rights.²⁰³ A given land law can be compatible with the right to food regardless of whether it establishes individual or collective rights and regardless of the particular forms of use rights. What is relevant is that the established rights are clear with respect to their content, duration and enforcement, thus complying with the principles of transparency and the rule of law (see above, Table 3). When tenure rights are weak or not well defined in the legislation, the competent officials will have more discretion in interpreting and enforcing the law, which can have negative effects. For example, weakly defined land rights may be ignored in practice where more specific powers are given to government officials under forestry, mining or other laws regulating exercise of economic activities. Box 64 gives two examples of recent land laws securing land tenure in a country through establishing land rights for individuals and communities on land in state property.

200 See Cotula, L., Toulmin, C. & Quan, J. 2006, p. 19. See also Meinzen-Dick, R., Pradhan, R. & Di Gregorio, M. 2004.

201 For an interesting study of the effects and consequences of land tenure insecurity on food security and the role of national legislative frameworks, see Unruh, J.D. & Turray, H. 2006.

202 Efforts to secure tenure rights through systems of individual private ownership were initiated by the state in many parts of Africa, Asia and Latin America. However, in many cases, most notably in Africa, they proved to be ineffective. See Cotula, L. Toulmin, C. & Quan, J. 2006; FAO, 2002b.

203 *Ibidem*. See also Quan, J. 2006.

BOX 64. Characteristics of land rights – examples from state practice

A number of countries in Africa have recently adopted laws aimed at securing land rights on land that remains the property of the state.

The **Mozambique** Land Law (1997) upholds the principle that ownership of all land and natural resources is vested with the state, but recognizes “a right of use and benefit” over land, by individuals (men and women), local communities and companies (Art. 10). Any nationals who occupy land on the basis of customary norms and practices or who have been using “free” land in good faith for more than ten years can acquire the right of use and benefit from land (Art. 12). Individuals have the right to occupy the land and are entitled to legal recognition without having to formally register it. The landholder can transfer, including by inheritance, and under certain conditions can mortgage the right, but cannot sell it (Art. 16). The Land Law also provides for mandatory community consultation processes before investors are allocated land-use rights and forest concessions (Arts 13 and 24).

According to the **Angolan** Land Law (2004), the state holds “direct domain” and can confer or transfer the “useful domain” of land to individuals and entities. Rural communities can obtain a “perpetual right of useful customary domain”. The transfer, however, does not automatically include a right to natural resources (Art. 10). The law requires that effective use of the land, according to custom, be defined by the relevant authority at the moment of the transfer of the right. However, the recognition of a land right subject to specific uses (e.g. “traditional or customary”) can preclude the holders from using land for other purposes (as opposed to only those that exist as a matter of custom or as currently practised) and possibly result in loss of land rights in the case of a subsequent change of land use.

As in the examples in the box, formal documentation and thus legal security of their lands empowers individuals and communities to assert their rights and to claim protection from interference from others, including the state itself.

Another important issue for the review team to examine is which persons or groups can acquire the land rights established by a land law. The definition of “eligible land right holders” in the legislation can raise right to food compatibility concerns as it may preclude certain persons or groups from obtaining a land right and thus also affect their ability to enjoy their right to food. For example, definitions requiring that the land be used in a certain way may leave some persons or communities, such as those who migrate (e.g. pastoralists or hunter-gatherers) outside the scope of the law, and preclude them from seeking recognition of their land-use rights (see Box 64). Similarly, when a law recognizes

and protects the land rights of “communities” (e.g. “local communities” in Mozambique, “rural communities” in Angola, “villages” in the United Republic of Tanzania), the definition should not unduly privilege or disadvantage some persons within a community (see below).²⁰⁴

Women’s land rights

The Right to Food Guidelines require states to promote women’s full and equal participation in the economy and to introduce (where it does not yet exist) and implement gender sensitive legislation providing women with the right to inherit and possess land and other property (Guideline 8.6). Although they are responsible for most of the food production in developing countries, women farmers most often do not enjoy independent access to and management control of land and land-based resources. In many instances they are only able to access land or resources through relationships with men (e.g. through marriage or through allocations made to their male relatives). Yet, without land and secure land rights in their own name women cannot build or strengthen their autonomy, they risk remaining dependent on their relationships with men and so cannot freely exercise their right to food.²⁰⁵ Single women are particularly vulnerable. The importance of women’s access to land, credits and extension services has been recognized at the international level not only within human rights treaties, but also in instruments relating to the environment and sustainable development (see above, Box 63).

Even where national laws contain a general equality clause, their implementation in practice can and often does result in women being worse off than men. The legislative review should focus not only on the stated requirements for acquiring, registering and titling land, but also on how the rules apply in practice, i.e. whether they discriminate against women in favour of men. Where a law recognizes land rights derived from plural and customary regimes, this should not mean enshrining discriminatory practices that may exist under such regimes. Thus, laws that allow customary authorities to allocate and manage community land should explicitly require them to do so in a non-discriminatory manner notably with respect to women.²⁰⁶ Appropriate safeguards and mechanisms preventing or correcting existing discriminatory practices should be in place (e.g. obligatory representation of women in traditional structures at community level). Box 65 gives some examples of relevant legal provisions from recently adopted laws.

204 On the implications of a definition of “communities”, see Cotula, L. 2007, pp. 55–58.

205 On the relevance of women’s rights for the enjoyment of the right to food, see UN Special Rapporteur on the right to food. 2003b.

206 See Ikdahl, I., et. al. 2005.

BOX 65. Securing women's land rights – example from United Republic of Tanzania

The **Tanzanian** Village Land Act (1999) breaks new ground in women's rights to land. With the stroke of a pen the Act renders invalid any customary practices that discriminate against women: “[Any] rule of customary law or any such decision in respect of land held under customary tenure shall be void and inoperative and shall not be given effect to by any village council or village assembly or any person or body of persons exercising any authority over village land or in respect of any court or other body, to the extent to which it denies women, children or persons with disability lawful access to ownership, occupation or use of any such land” (section 20 (2)).

Another provision of the Act is worth mentioning: the Village Land Council (competent for dispute settlement) shall consist of seven people, to be nominated by the Village Council and approved by the Village Assembly. Three of the members shall be women (section 60).

In addition to land laws, the review team should examine legislation in related areas such as family and succession and access to credits and markets, as these too can have negative implications for women's equality.

Indigenous and tribal peoples' land rights

Due to long historical processes of colonial and non-indigenous expansion, political and economic exclusion, indigenous peoples are among the most vulnerable to poverty, hunger and malnutrition.²⁰⁷ The risks are heightened by the widespread failure of state legal regimes to recognize effectively indigenous forms of land rights. Furthermore, indigenous lands and territories are often endowed with substantial oil and gas, mining, timber and other valuable natural resources. Some believe that this often leads to “tensions with governments and outside interests who do not wish to grant indigenous people substantive control over this wealth”.²⁰⁸ Whatever the cause, indigenous and tribal peoples need land rights in order to feed themselves and preserve their culture and distinct identity through traditional economic and subsistence activities such as hunting, gathering, farming or fishing.²⁰⁹ Moreover, without secure land rights, indigenous peoples cannot participate in the design or management of projects affecting their lands, even though these often result in the depletion of

207 See Ziegler, J. Way, S.A. & Golay, C. 2006.

208 See Cotula, L. Toulmin, C. & Quan, J. 2006, p. 31.

209 See Ziegler, J. Way, S.A. & Golay, C. 2006.

their lands and resources and, in many cases, in displacement of communities without adequate compensation. The legal recognition and protection of indigenous peoples' land rights are thus fundamentally important for the realization of their right to food.²¹⁰

Land rights issues relating to indigenous peoples are specifically protected by international law (see above, Box 63). The Right to Food Guidelines invite states to give special attention to indigenous peoples and their relation to natural resources (Guideline 8.1). Although several countries have taken steps legally to recognize the rights of members of indigenous and tribal peoples to their communal land, territories and resources, considerable constraints remain. The review team should first look at the nature and content of indigenous peoples' rights to their land, territories and natural resources and their duration – for example, whether statutory or customary law guarantees legal title to land and territories allowing their permanent use and enjoyment. The team should also examine the requirements and time scale for delimiting and demarcating indigenous lands,²¹¹ in particular whether the concerned indigenous and tribal peoples are actively involved and consulted in that demarcation.

More generally, the review team should assess whether established mechanisms and procedures allow the concerned indigenous and tribal peoples to participate, in an effective and meaningful way, in decision-making processes concerning resource exploitation or conservation in their territories. The right to use and enjoy their territory would be meaningless if not connected to the natural resources that lie on and within the land, as these are necessary for the peoples' development and survival. Where the legislation or customary law restricts indigenous peoples' rights, it must establish safeguards including consultation (and where applicable, a duty to obtain consent), benefit sharing and environmental and social impact assessment. Where there is no specific legislation in place, the review team might wish to recommend its adoption and include it in the plan of action.

210 On the links and relationships between the right to food and indigenous peoples, see Knuth, L. 2009.

211 See Quan, J. 2006, p. 29.

4.3.2 INTERFACE BETWEEN STATUTORY LAWS AND CUSTOMARY RULES

In many countries, customary law interplays with statutory law in the field of access to land and natural resources. One of the key challenges in land law is the status of land rights derived from customary law. Some statutory laws recognize customary land rights; others do not. In either case, the customary law rules will be relevant for the right to food compatibility review as many people depend for their livelihoods on land and other resources governed by complex and often overlapping customary rights.

As noted above, a number of recent national laws have recognized land rights of “communities” (see Box 64). When title over land is given to a community, in most cases within a community area demarcated under the law, the allocation of individual plots of land and their use will be governed by customary rules or traditional practices. However, community-based systems of tenure are often very complex, with overlapping rights over the same resource held by different users. In many contexts, these systems may be inconsistent with human rights principles, most notably, non-discrimination, accountability and transparency (even when those are enshrined in the state constitution or laws). Some degree of formalization of individual holdings within a community area, and a clearer legal definition of the powers and responsibilities of traditional leaders may be needed to ensure non-discrimination – in particular, against women and minorities – and a minimum level of accountability, transparency and empowerment within traditional and customary structures.²¹² Another issue that can raise concerns from the right to food perspective: when a recognized land right is transferred to a community, this can undermine decision-making power and control at other levels (e.g. family level). For example, the traditional leader(s) of the community can ignore the existing arrangements, and sell land plots to outside people. Box 66 gives an example of a recent legal claim before the South African High Court challenging the constitutionality of the recently adopted Communal Land Rights Acts of South Africa, which allowed Traditional Councils to become Land Administration Committees.

BOX 66. Dealing with the interface between statutory law and customary law – example from South Africa

The Communal Land Rights Act (2004) of South Africa was adopted with the aim of securing land rights of persons and communities whose land tenure is insecure as a result of past racially discriminatory laws or practices. Among others, the Act says that where Traditional Councils exist, they will represent communities “as owners of communal land” and will have the power to allocate and register “new order” rights on communal land.

212 See FAO, 2002b, pp. 230–231.

BOX 66. Dealing with the interface between statutory law and customary law – example from South Africa (cont.)

This provision was controversial because tribal authorities were the building blocks of the Bantustan political system, and their boundaries were drawn to elicit cooperation from traditional leaders and punish those who refused to cooperate with “separate development”. While some tribal authorities are more legitimate than others and coincide with historical community boundaries and identities, many others are hotly disputed or dysfunctional.

Four groups of rural people introduced a legal claim before the High Court complaining that transferring title to old tribal authorities undermines their ability to control and manage their land at different levels of social organization. Another key complaint regards the risk of reinforcing the patriarchal power relations that render women vulnerable. As of April 2008, the legal process is in course before the High Court.

Source: See Claasens, A. 2008, pp. 107–119.

4.3.3 LAND ADMINISTRATION

Another area of regulation with right to food implications is in land administration. The compatibility review will need to focus on the roles and responsibilities of the administrative authorities in charge of the law’s implementation and the procedures followed in the land administration system. For example, legal provisions establishing high registration fees or rigid title or registration requirements may discourage persons and communities from applying to acquire land rights, thus reducing availability of land and eventually affecting the accessibility of food for many. Poorly designed, overly sophisticated or socially inappropriate land administration systems may reduce tenure security or exacerbate conflict, again affecting the availability and accessibility of food. Transparent land administrations prevent corruption and discriminatory practices with a positive effect on tenure security.²¹³ An explicit requirement for the competent authorities to inform stakeholders of their established rights and to provide legal advice where needed will contribute to legal empowerment of people and facilitate the realization of their right to food. Legally providing the acceptance of verbal evidence for acquiring established land rights will be useful in countries with high levels of adult illiteracy. Box 67 gives some examples of relevant legal provisions from recently adopted laws.

213 See FAO. 2007c.

BOX 67. Acquisition of land rights and land administration – example from state practice

According to the **Mozambique** Land Law (1997), the issuance of a title is not a prerequisite for claiming the established right of use and benefit over land (Art. 13). This provision is particularly useful for those who do not possess title documents to prove their occupancy of land. Furthermore, the absence of registration does not prejudice the right of land use and benefits; the right can be proved also by means of “testimonial proof presented by members, men and women of local communities” (Arts 13–15).

The **Tanzania** Village Land Act (1999) vests all village land in the village. The village council is the Village Land Manager, responsible for making decisions concerning the allocation of village land, the issuance of Certificates of Customary Rights of Occupancy and the maintenance of a village land register. Both villagers and non-villagers may apply for registration and issuing of this certificate. The application is to be submitted to the village council, which, in the case of non-village applicants, is required to seek advice from the Commissioner. The council deliberates the application, taking into account, *inter alia*, the availability of the land and the applicant’s ability to make productive use of the land (section 23). The Act also makes special provisions for the establishment of a Village Land Council “to mediate between and assist parties to arrive at a mutually acceptable resolution on any matters concerning village land” (section 60).

Along with secure land rights, easy access to dispute settlement institutions (formal or customary or both) is essential for persons or communities to protect their entitlements to land and resources as well as their right to food when facing competing claims from others, including the state itself.²¹⁴ The relevant land law should therefore provide for an enforcement mechanism and conflict management systems, where the roles of the formal courts and customary dispute resolution systems are clearly defined, and where appropriate mechanisms are provided to facilitate their use by the poor. Further, whether a customary decision can be final is also an issue that should be considered when addressing this topic.

4.3.4 REGULATION OF ECONOMIC ACTIVITIES

The protective role of the state under the human right to food requires it to ensure that private actors do not deprive people of their access to food or the means for its

214 For an interesting paper comparing the costs and processes of formal and informal methods of property rights adjudication, see Henrysson, E. & Joireman, S.F. 2007.

procurement. The way the state allocates concessions or licences for commercial resource exploitation (e.g. agro-industrial, fishery, mining, tourism), notably within lands used by communities and indigenous peoples, can have significant right to food implications. In many countries, impoverishment and food insecurity have resulted from hazardous industries and harmful activities undertaken by private actors and authorized by the state. Although promoting economic activities and facilitating investment projects can contribute to the well-being of a country and thus to realizing the human right to food (including by generating employment opportunities), they can negatively affect livelihoods by reducing the availability, accessibility and/or adequacy of natural resources on which the affected persons and communities depend. Thus, appropriate requirements and safeguards must be in place.

From the right to food perspective, the conditions under which a concession or permit for undertaking a resource-based activity can be issued are of particular concern. To conform to right to food standards, the relevant legislation should include, for example, the requirement of an impact assessment, the informed consent of the affected persons to the intended use of their land and environments, and negotiation – on an equal footing – to share the benefits from the activity with the concerned persons and communities. When there is a risk of harmful effects on people’s livelihoods, the relevant legislation should impose appropriate restrictions on the exercise of a given economic activity. These can include, for instance, geographical limitations and the use of certain methods and technologies to prevent or minimize negative effects on people’s food sources and their ability to sustain their livelihoods in an autonomous manner, including through just and equitable compensation for taking of land and for any damage resulting from the activity, such as pollution and depletion of resources.²¹⁵

In some cases, the exercise of a resource-based economic activity can require the expropriation of land. Neither the right to food nor other human rights imply prohibition of expropriation *per se*. The state, as the guarantor of established legal rights, can oblige an individual or group to cede or lose his or her land rights for the sake of a higher public interest, although in most countries expropriation is subject to adequate compensation.

Where a dispossession of land used for subsistence purposes is unavoidable for a higher public interest, it should be executed in accordance with several key principles in order to respect the right to food: reasonable notice for the concerned persons; full information; adequate balancing measures determined with full involvement of the concerned persons; prohibition of discrimination;

215 Examples of such provisions include requiring and publicizing environmental and social-impact assessments, facilitating active and informed participation of the concerned persons and communities in the decision-making processes and providing for a right to ask and obtain relevant information and appropriate monitoring after issuance of the licence. Ultimately, the government should not be allowed to issue a required licence or concession if the concerned community has not consented to it. For more information on this issue, see Cotula, L. Toulmin C. & Quan, J. 2006.

and the right of appeal before an independent authority (against the expropriation as well as the amount or form of compensation).²¹⁶ That the land has ensured a person's or a group's self-sufficiency is particularly relevant for the determination of the accompanying balancing measures. For example, in some circumstances monetary compensation or a food safety net may not be compatible with right to food standards, as neither of these would preserve the capacity of the concerned persons or groups to provide for themselves; it would be more in line with human right to food to respect and protect the functioning entitlements of groups who would otherwise become vulnerable.²¹⁷ In such cases, the legislation should thus explicitly require that the balancing measures preserve the ability of the persons concerned to sustain their livelihoods in an autonomous and dignified manner (see Box 68 and Table 3 above).

BOX 68. Expropriation and compensatory measures – example from South Africa

In **South Africa**, laws are particularly strong with regard to limits on expropriation. The Extension of Security of Tenure Act (1997) makes eviction from land in certain instances more difficult, by requiring that a court, before granting an eviction order, consider whether the eviction would be just and equitable in the light of all relevant circumstances. Although the Act does not say so explicitly, where the land in question is used to produce food, courts could take into account whether eviction would affect the evicted person's exercise of the constitutional right to food (sec. 8.1).

In a recent decision by the South African Land Claims Court, the compensation received by the Kranspoort community for the loss of rights in land at the time of their dispossession was not "just and equitable" as it covered only improvements to the land, and not the loss of "beneficial occupation", i.e. loss of communities' grazing and cultivation rights, which constituted their entitlements to food. (*In Re Kranspoort Community* 2000 (2) SA 124 (LCC).)

Another important issue is the scope of the expropriation provisions: given that in many countries the land is formally owned by the state and occupied and used in terms of informal rights (e.g. tenancy, customary rights), compensation for expropriation should not be limited to ownership rights backed by legal title,

216 See CESCR GC 4 on the right to adequate housing of 13 December 1991 and GC 7 on the right to adequate housing: forced evictions of 20 May 1997; See also UN. 1997.

217 See Eide, A. 2007, p. 149.

but also cover use rights.²¹⁸ Where appropriate, compensation rights should extend to owners, tenants, workers or any person who can demonstrate an interest lost as a result of expropriation. In addition to the right to food standards and human rights principles previously examined, the review team should also look at the relevant standards developed at the international level with regard to the right to housing and forced evictions.²¹⁹

In some cases, expropriation can be a measure to facilitate access to land for the poor and the landless,²²⁰ and as such it can contribute to the realization of their right to food. Appropriate safeguards must be in place, however, to protect the accessibility of food for agricultural workers, farmers and consumers, among others, even in these cases.²²¹

218 See Cotula, L. Toulmin, C. & Quan, J. 2006.

219 See, in particular, GCs 4 and 7 of the CESCR; see also UN. 1997.

220 See UN Special Rapporteur on the right to food. 2002b.

221 One of the best-known examples of such legislation is Zimbabwe's Land Acquisition Act (1992), which has dramatically increased the powers of the President to acquire land without ensuring the necessary procedural safeguards and compensation requirements. It has had significant negative impacts on the agricultural production and food situation in the country causing massive right to food violations. See Amnesty International. 2004.

4.4 WATER

The Right to Food Guidelines call upon states to, among others, improve access to, and promote sustainable use of, water resources and their allocation among users (Guideline 8C).

Water is vital to human beings as household water: individuals need 20 to 50 litres of water that is free from harmful contaminants each and every day in order to ensure their basic needs. It is essential for drinking, for washing food and cooking food items and also for sanitation. Water is also a primary input for food production in agriculture; almost 70 percent of all available freshwater is used for agriculture, and it is estimated that more than one-third of global food production is based on irrigation.²²² Although hunger and malnutrition today stem more from a lack of purchasing power or lack of access to land and productive resources than from the overall national availability of food, a return of scarcity due to lack of irrigation water would dramatically increase the number of hungry and undernourished. Thus, the importance of access to water in relation to food security²²³ is undeniable. International instruments have increasingly confirmed the significance of access to water for people's livelihoods and human rights (see Box 69).

222 See UN. 2003a.

223 See Villan Duran, C. 2000. He argues that the right to food and the right to water should be treated as one right.

BOX 69. Right to water in international law

In 2004, in its GC 15, the CESCR defined the right to water as the right of everyone “to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses” (para. 2). It also noted “the importance of ensuring sustainable access to water resources for agriculture to realize the right to adequate food. Attention should be given to ensuring that disadvantaged and marginalized farmers, including women farmers, have equitable access to water and water management systems, including sustainable rain harvesting and irrigation technology” (para. 7).

Article 14 of CEDAW requires states to guarantee to women the right to “enjoy adequate living conditions, particularly in relation to /.../ water supply”.

Article 24 of the CRC requires States Parties to combat disease and malnutrition “through the provision of adequate nutritious food and clean drinking water”.

Furthermore, international water law clarifies that in the event of conflicts over the resources of international rivers, human needs must be prioritized, which means that “special attention is to be paid to providing sufficient water to sustain human life, including both drinking water and water required for production of food in order to prevent starvation” (Statement of Understanding accompanying the UN Convention on the Law of Non-navigational Uses of Watercourses, UN Doc. A/51/869 of 11 April 1997).

As mentioned earlier, although the right to drinking-water is generally discussed within the human rights community as a separate human right, according to the Special Rapporteur on the right to food, the right to food should include “not only the right to solid food, but also the right to liquid nourishment and to drinking water”.²²⁴ On the other hand, in its GC 15 on the right to water, the CESCR recognized that *water used for irrigation* by vulnerable people who only have access to the food they grow themselves must be among key elements of the right to water, as well as of the right to food.²²⁵ In practice, water is very unevenly distributed not only between countries but also within countries; individuals’ access to water and water services depends on their geographic location, whether they live in a rural or urban area and what position in society they have.²²⁶

224 See UN Special Rapporteur on the right to food. 2002a, para. 25.

225 See GC 15 on the right to water, para. 7 and GC 12 on the right to adequate food, paras 12–13. See also UN Special Rapporteur on the right to food. 2003a.

226 Currently, 1.1 billion people lack sufficient access to safe drinking water, and 2.6 billion lack access to basic sanitation. See UN Millennium Project, 2005b.

Domestic water legislation, although guided by standards established in regional and international instruments, is largely guided by the specific national context. The issues and concerns surrounding the nation's water resources are complex and many. Given the strong links between water and food, almost any law dealing with water is likely to have right to food implications and should be looked at in depth by the national review team. The following paragraphs point out only a few legislative issues in water law that can affect the ability of persons to provide for themselves and should be assessed for their compatibility with the right to food and human rights principles.

4.4.1 WATER DISTRIBUTION AND DELIVERY SYSTEMS

Traditionally, drinking-water is provided through water systems and facilities managed by the state (in most cases, by local authorities). In order to be right to food compliant, water distribution systems should be structured so as to ensure that all water facilities and services are of sufficient quality and water is equitably distributed, allowing all individuals and households access to water and sanitation services. Human rights law requires that particular focus be given to the status of marginalized and vulnerable groups, including the facilitation of small-scale providers to expand their operations or build facilities in new areas. The review team should pay particular attention to provisions that may result in preventing access by certain persons or groups to water sources or piped water.

Several factors, including the shortfall of funds for infrastructure maintenance and development, have led many national and local governments to look to the private sector for assistance in water system management and development.²²⁷ Privatization of public service is a challenging issue and can adversely affect people's access to water and thus their right to food. While private sector involvement in drinking-water delivery is not contested in itself, the privatization process should not negatively affect the existing safety, affordability and accessibility of drinking-water for the concerned persons (GC 15, para. 24). In addition, water should be delivered in an equitable and non-discriminatory manner consistent with human rights standards. It is also fundamental that all stakeholders be appropriately informed and actively involved in the privatization process from the beginning. Ultimately, its success will depend on the capacity of the state to ensure that provision of water is adequately regulated and monitored. The right to food compatibility review can in its turn contribute to achieving this.

²²⁷ Between 1995 and 1999, governments around the world privatized an average of 36 water supply or wastewater treatment systems annually. See UNDP/IFAD, 2006, p. 48.

Affordability of water services

Charging for (household and irrigation) water services is increasingly promoted as an appropriate response to the urgent need to improve water services. Charging can improve access and quality of service, discourage theft and wasteful use, and reinforce a feeling of ownership among people. However, to comply with the right to food, the charges must not prevent access to food or be structured unfairly. Furthermore, in accordance with a state's duty to prioritize the most vulnerable, legislation should ensure that low-income households and areas have the least expensive services. There should also be appropriate legal provisions preventing local authorities or service providers from disconnecting the water supply and thus depriving users of access to a sufficient amount of safe water per person per day. Disconnection should only be permitted in very restricted circumstances and where a just and adequate alternative is available.²²⁸ Regular access to a certain quantity of safe drinking-water is in fact required to prevent starvation and disease.²²⁹

Several national courts (e.g. in Argentina, Brazil, India and South Africa) have, in some cases, reversed decisions to disconnect water supply to poor people who could not pay.²³⁰

Ensuring the minimum quantity of safe drinking-water through relevant water legislation can be seen as one of the key elements for the realization of the right to food. Box 70 gives two examples of states/regions that have already legally recognized the right to a minimum supply of water. Countries that are envisaging establishing an entitlement to a minimum amount of food should evaluate whether also to include a minimum quantity of safe drinking-water (see above, sections 3.2.4.a and 3.5.4.a).

BOX 70. Access to a minimum supply of water – examples from state practice

In the Flanders Region of *Belgium*, legislation recognizes a right to a minimum supply of water, meaning that every person is entitled to receive a minimum amount of drinking-water free of charge per year, the amount based on WHO's recommendations.



228 See, for example WHO. 2003a, p. 29.

229 See World Summit on Sustainable Development, Plan of Implementation 2002, para. 25c.

230 See Dubreuil, C. 2006. p. 64.

BOX 70. Access to a minimum supply of water – examples from state practice (cont.)

South Africa's Water Services Act of 1997 codified the constitutional right to access basic water supply and sanitation, mandating the construction of sufficient pipes to bring piped water to within 200 metres of every household. The Act also recognizes a single national water right, called the Reserve, which is designed to satisfy the constitutional mandate to protect basic human needs and the environment by setting aside enough water to sustain functioning ecosystems and to provide each person with sufficient water for drinking, food preparation and personal hygiene. This has subsequently been quantified as a minimum of 25 litres of water per person per day. This amount has recently been reviewed by the High Court of South Africa in a case concerning the City of Johannesburg's practice of forced installation of prepayment water meters in Phiri. In its final judgement of 30 April 2008, the High Court ruled that the contested practice is unconstitutional and unlawful, and ordered the City to provide residents of Phiri with 50 litres of free basic water per person per day, setting aside the City's decision to limit free water to 25 litres per person per day (*Lindiwe Mazibuko & ors v. The City of Johannesburg & ors*, case No 06/13865, High Court of South Africa; judgment available at www.cohre.org/watersa).

Access to and use of water for irrigation

The availability of water for irrigation confers opportunities on individuals and communities to boost food production, both in quantity and diversity; to satisfy their own subsistence needs and to generate income from surpluses.²³¹ As competition for water increases, water-use-allocation regulations and mechanisms can thus significantly affect the realization of, in particular, poor farmers' right to food.

In most countries, water resources (surface water such as rivers or streams as well as groundwater) fall increasingly under the scope of the government's allocative authority.²³² Beyond *de minimis* use, individuals can generally claim a right to take and use water from natural sources (whether from surface waterbodies or groundwater) subject to the terms and conditions of the governmental grant or permit (a "water right"). As with land rights (see above, section 4.3.1), water rights differ significantly between countries and within a single country. Water rights, however, also relate to the supply of water through a canal for irrigated agriculture or industrial use. This type of right is quite different from classical

231 See UNDP/IFAD. 2006.

232 This is largely a consequence of the growing complexity of water resources management and the desire to satisfy all of society's demands. This complexity stems from the increasing interdependence of water quantity-related and water quality-related factors, and the intense interface between water and other environmental resources. See Burchi, S. & D'Andrea, A. 2003.

water rights inasmuch as it is a “contractual water right” giving an entitlement to a service supplied in consideration for payment.²³³ The review team should examine how subsistence farmers and other vulnerable persons secure water rights and access to water for irrigation. In order to be right to food compliant, irrigation laws should put in place mechanisms to ensure reliable delivery of water and transparency in its management in addition to appropriate balance in equity and efficiency in access to water for irrigation purposes. For this, it is fundamental that appropriate procedures and mechanisms exist that allow for ensuring informed, active and participatory decision-making with regard to water use allocation and water resources management.

As is the case with land rights (see above, section 4.3.1), water rights differ significantly between countries and within a single country; most often, statutory water rights coexist with customary or traditional water rights.²³⁴ When addressing the water issue, the review team should thus also evaluate the interaction between statutory water rights and customary rights in general and minimize opportunities for conflict, which could open the way also to right to food infringements.

4.4.2 PARTICIPATION AND INTEGRATED WATER MANAGEMENT

One of the challenges within the water sector is to determine how certain decisions are made, which stakeholders are involved and what principles, rules, regulations (formal and informal) and institutions apply. Participation is a fundamental principle of the human rights-based approach and can assist in improving water management. The application of participation and transparency principles in the context of water management would require that water users are able to take an active part in the internal structure of the government water administration. The formation of groupings of water users (e.g. water users’ associations) for the development and management of sources of irrigation water is widely known and indeed provided for in many recent national laws.²³⁵ Where a national legislation provides for the establishment of water users’ groupings, their legal status should be clearly defined, in particular with regard to their decision-making authority. Involving stakeholders in water management should extend, for example, to decisions about whether to install water points and where, what technology should be used, and what management arrangements should be introduced, as well as how costs will be divided. Such participation would build consensus and support for water allocation and management decisions, and would be consistent with human rights principles.

233 *Ibidem*. See also Hodgson, S. 2006. For a comparison of different rights related to water, see Newborne, P. 2006 and O’Neil, T. 2006, p. 131.

234 See for example, Hodgson, S., 2004

235 See FAO, 2002b and see also Hodgson, S. 2003.

4.5 FISHERIES

The Right to Food Guidelines require states to respect and protect the rights of individuals with respect to resources such as fisheries (Guideline 8.1). Fisheries provide food and livelihoods for both communities living in coastal areas and inland communities dependent on freshwater fishing. The fisheries sector is a source of livelihood for 41 million fishers and fish farmers in the world,²³⁶ and approximately 95 percent of this figure pertains to developing countries.²³⁷ Fish has a high nutritional value and is a source of vitamin A, D, B1 and B2, iron, phosphorus, calcium, iodine and fatty acids, in addition to proteins.

Fishing communities in most regions are characterized by social and economic vulnerability, particularly among subsistence and small-scale fishers who compete with industrial fishers for access to declining resources and who may not have access rights to these resources. Besides fishers and fish workers, other groups are also affected by the availability of fish to meet their food needs, including better-off fish consumers. These considerations highlight the most salient link between the fisheries sector and the realization of the right to food: the sustainability of the resource. Conservation and sustainable use of fisheries resources are therefore key elements for achieving respect and protection of the right to food for fishing communities and consumers, and failing to achieve these means that the ability of future generations to access this food resource will be jeopardized significantly.

Aquaculture is recognized as the fastest growing source of food production, contributing to half of the world's fish production, and it has expanded in recent years to meet growing demand and high levels of fish consumption. Aquaculture offers a number of opportunities to contribute to poverty alleviation, employment,

236 See FAO. 2006d.

237 Asia accounts for 85 percent and Africa for 7 percent. In terms of nutrition, the average consumption of animal protein in the diet (23.1 percent in Asia and 19 percent in Africa) derives mainly from fish, with the consumption of fish in coastal communities considerably higher. See Kent, G. 2003.

community development, reduction of overexploitation of natural aquatic living resources and food security, in tropical and subtropical regions. As much as 40 percent of global fish production is traded internationally, and exports exceed those of meat, dairy, cereals, sugar and coffee. Much of this derives from aquaculture.²³⁸

The importance of fisheries and aquaculture to ensuring food security for coastal people and communities requires the integration of the right to food standards and human rights principles into national fisheries legislation. As many countries are currently reviewing their policies and legislation with a view to managing their fisheries resources in a sustainable way and ensuring compliance with international fisheries instruments (see Box 71), the time is ripe for integrating these standards and principles into fisheries reviews as well.

BOX 71. International fisheries instruments

Several international fisheries instruments allude to elements relevant for the realization of the right to food, including responsible fisheries management, consideration of the special needs of developing countries and the need for protection of small-scale fisheries.

The United Nations Convention on the Law of the Sea (UNCLOS, 1982) is the primary binding international instrument governing the peaceful, equitable and efficient utilization and conservation of marine resources. UNCLOS grants coastal states sovereign rights to manage fish stocks in their exclusive economic zone (EEZ), but obliges them to manage these resources in a way that maintains or restores these stocks at levels that can produce the maximum sustainable yield, taking into account, *inter alia*, the economic needs of coastal fishing communities and the special requirements of developing states (Art. 61). At the same time, states shall meet the objective of optimum utilization (Art. 62), which implies that coastal states have a duty to give other states access to the surplus of the allowable catch in their EEZ when they do not have the capacity to harvest the entire allowable catch. Among the factors for consideration in providing access are the requirements of developing states; the need to minimize economic dislocation in states whose nationals have habitually fished in the zone; and the needs of landlocked and geographically disadvantaged states and the nutritional needs of the populations of those states.

Subsequent agreements also accord special recognition to the needs of poorer countries and the need for protection of small-scale fisheries. These include the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks.



238 See FAO. 2006d.

BOX 71. International fisheries instruments (cont.)

Referring to the duty to cooperate in the establishment of conservation and management measures, the Agreement calls upon states to take into account “the vulnerability of developing States which are dependent on the exploitation of living marine resources, including for meeting the nutritional requirements of their populations [...]; the need to avoid adverse impacts on, and ensure access to fisheries by, subsistence, small scale and artisanal fishers and women fish workers, as well as indigenous people in developing States “[...] (Art. 24(2)).

The FAO Code of Conduct for Responsible Fisheries (1995), although not legally binding, enjoys recognition as one of the most important and authoritative fisheries instruments through its accommodation of principles and criteria for responsible fisheries and aquaculture management and development. The Code explicitly recognizes the important contributions of artisanal and small-scale fisheries to employment, income and food security and calls upon states to “appropriately protect the rights of fishers and fish workers, particularly those engaged in subsistence, small scale and artisanal fisheries, to a secure and just livelihood, as well as preferential access, where appropriate, to traditional fishing grounds and resources in the waters under their national jurisdiction” (Art. 6.18).

Lack of fisheries legislation, inadequate legislation and the inability of states to enforce their legislation properly open the way to depletion of fish stocks, which can translate into economic shortfalls, hardship to fishers and disruption of traditional ways of life, and thus loss of livelihood in fishing communities. This prevents persons from feeding themselves with dignity. The following subsections address key issues in national fisheries legislation relevant to the right to food.²³⁹

4.5.1 FISHERIES MANAGEMENT

The Right to Food Guidelines invite states to “consider specific national policies, legal instruments and supporting mechanisms to protect ecological sustainability and /.../ promote the sustainable management of fisheries” (Guideline 8.13). An affordable and stable supply of fish requires good fisheries management, i.e. a management system that ensures that the fisheries resources are maintained at biologically, environmentally and economically sustainable levels. The relevant international instruments require national authorities to manage fisheries “responsibly”, and thus a number of more recent laws have already included a

239 Linkages between the right to food and national fisheries legislation are explored in more detail in the Right to Food Study, see FAO. 2009

sustainable approach to fisheries management as a stated purpose of the law (see above, Box 71). Because “responsible fisheries management” privileges sustainability as well as accountability of state authorities, it *prima facie* facilitates realization of the right to food. The review team should assess whether the legislation establishes a fisheries management system that ensures that fisheries resources are maintained at biologically, environmentally and economically sustainable levels, and are managed in a transparent and accountable way.

Access to and allocation of fisheries resources

Limiting access to fisheries resources preserves the availability and accessibility of fish for human consumption and helps combat the effects of open access regimes, for instance, depletion of stocks, shortened fishing seasons and related negative social and economic effects. User rights may be allocated to a community, individual, company or vessel and the fisheries legislation should clearly define and protect these rights. In general, allocation of user rights to a community is carried out in order to serve social goals (providing employment and income for instance). As such, it can be seen as a step towards strengthening people’s capacity to feed themselves in an autonomous and dignified manner. However, if user rights are allocated to individuals or companies, combined with the right to transfer these rights, this can cause a drop in employment opportunities because of economic rationalization, the formation of monopolies and the transfer of ownership from coastal communities.²⁴⁰

Limitations on user rights should be used in combination with other limitations on the entry to fisheries, such as catch quotas. This means that the fisheries legislation should provide for a total allowable catch (TAC) to be determined for each commercial fishery based on scientific data, usually for one year at a time. As scientific data about fish stocks are often inadequate, TACs can be set too high and thus cause overexploitation of the resources. To mitigate this, the law could require the application of the precautionary approach when setting the TACs, which means that a lack of scientific certainty should not justify inaction in the face of risks to fisheries resources. To avoid a race to fish, resulting in unsustainable levels of fishing capacity, the legislation should require that determined TACs be divided into individual quotas. As industrial and small-scale fishers often compete for the same resources, the review team should assess whether the criteria for allocating these quotas reflect a concern for securing the right to food of vulnerable groups (see below, section 4.5.3).

When reviewing provisions on user rights and quota allocations, the team should consider in particular whether established criteria, conditions and procedures are clearly defined, non-discriminatory and accessible; whether information is readily available to potential right holders; and whether there are mechanisms

240 See FAO. 1997.

for individuals to complain against negative administrative decisions. The laws should not contain lengthy, complicated or costly licence application procedures, particularly in areas where the relevant population is largely illiterate or unaware of how to obtain fishing licences. As already noted, fisheries laws should ensure that officials are accountable for their actions and foster the rule of law.

Spatial and temporal controls on fishing – species and habitat protection

Fishing mortality can be reduced by restricting fishing activities to certain times or seasons, or by restricting fishing to particular areas.²⁴¹ As a way of rehabilitating stocks, such restrictions can play an important role in sustainable fisheries management and hence in the realization of the right to food.

Such measures are particularly important for vulnerable fishers, and states' obligation to protect under the right to food would require them to preserve the existing availability and accessibility of food from interference by private actors. Closures that allow only small-scale and subsistence fishers to fish in the marine waters closest to shore while restricting trawling that is detrimental to the environment would be a good example of appropriate protection by the state. Regulating fishing methods and gear would also minimize the harmful impacts of fishing on the marine environment and resources.

Monitoring, control and surveillance

Illegal, unreported and unregulated fishing undermines national and regional efforts to manage fisheries in a sustainable way significantly, and causes a rapid depletion of fish stocks. Monitoring, control and surveillance (MCS) are key means of combating this, through legislation providing for the collection, measurement and analysis of fishing activities (catch, species composition, fishing effort, by-catch, area of operation, etc.), and the regulation and supervision of these activities to verify proper enforcement.²⁴² A lack of appropriate MCS mechanisms can strongly affect the realization of the right to food as they are instrumental for protecting fishery resources through which individuals can meet their nutritional needs.

Mechanisms for participation in fisheries management

The human rights principles of participation and empowerment require that fisheries legislation provide mechanisms for engaging, as much as possible, the local fishers' communities and other stakeholders in fisheries management. Accommodating the interests of a wide range of stakeholders, who often represent competing or conflicting interests, implies the recognition that the efficiency of management measures often depends on the support gained from the interested parties.

241 See FAO. 2003a.

242 For more information about key tools for MCS, see FAO. 2003b.

Increased stakeholder participation in fisheries management encompasses a wide range of arrangements, from granting all interested parties the right to have a say in consultative rounds regarding policy documents and legislation, to setting up advisory bodies for stakeholder consultation and the establishment of cooperative management mechanisms. This kind of legal provision could contribute significantly to the empowerment of fishing dependent communities, i.e. by making them more skilled and eventually more able to use legal institutions and procedures to assert and defend their rights, including the right to food. However, these participatory mechanisms must be accompanied by institutions and procedures that ensure the enforceability of the rights granted.

4.5.2 AQUACULTURE – POST-HARVEST PRACTICES AND TRADE

The rapid and largely unregulated expansion of aquaculture is causing considerable environmental damage, and increasingly governments are recognizing that inappropriate legislative arrangements are hindering the sustainable development of the sector.²⁴³ Environmental risk factors contribute to fish diseases and related health problems, which are associated with lower production levels and economic losses. This is a challenge to food security and in turn for the realization of the right to food. A legal framework for aquaculture should therefore contain measures to mitigate environmental impacts, including provisions related to aquatic animal health and disease control. In addition, the highly perishable nature of fish and fish products makes them vulnerable to pathogens. Laws that adequately protect the hygiene and quality of fish and fish products are therefore essential for ensuring the adequacy component of the right to food, as well as for protecting the health of consumers. Finally, because facilitating access to resources is an important element of the realization of the right to food, the aquaculture legislation should establish mechanisms for granting fish farmers access to waterbodies and land for aquaculture production.

Given the importance of the foreign exchange revenue generated from exports of fish products for developing countries, the implementation into national legislation of standards adopted by the Codex Alimentarius Commission (for food) and the World Organization for Animal Health (OIE) (for animal health), which have both become reference points for international standards under the World Trade Organization (WTO) Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement), has become increasingly important. However, problems arise when national standards are not clearly established or are used arbitrarily to deny imports from certain countries by applying excessively stringent requirements under the guise of sanitary or veterinary protection. Small-scale fishers face challenges in meeting the standards laid down by some import countries as implementation is resource and capital intensive; high certification costs and complex procedures can also marginalize these groups.²⁴⁴

243 See FAO, 2002b.

244 See Samudra. 2003.

Trade also plays a role in food security and the right to food, where fish commodities may be diverted from the local population to overseas markets, or when certain types of products, such as octopus and shrimp, are exported to generate higher revenues. On the one hand, the extra revenues might augment the ability to import more culturally appropriate fish or other food products for consumption by the local population;²⁴⁵ on the other, incentives for cultivating “cash crops” for export might be a challenge to national food security and the right to food if revenues are not cycled back into the local communities, or if the availability of fish products at the local markets is affected negatively by export practices. Therefore, the legislation should provide for safeguard mechanisms in case of adverse effects, or for mitigation measures.

4.5.3 SPECIAL MEASURES FOR DISADVANTAGED GROUPS

According to the Right to Food Guidelines, states should give special attention to indigenous people and their relation to natural resources, and take steps so that members of vulnerable groups can participate fully and equally in the economy (Guidelines 8.1 and 8.2). In some cases, national legislation does not acknowledge the existing access to fisheries resources of indigenous fishing communities, or even reallocate their traditional fishing areas, thus limiting their capacity to provide for themselves. When regulating a previously unregulated fishery, legislation should take account of any traditional user rights already in place.

In many parts of the world, women have a significant role in small-scale fish processing and marketing activities. However, many fisheries laws neither recognize this role nor contain adequate social protection measures for women, such as maternity leave. The review team should closely examine the gender context in which fisheries legislation is being or is to be implemented. For example, the gains from increased employment brought about through trade (for example by including women in fish processing facilities) may be offset by the loss of fish for female artisanal fish processors who cannot compete with larger export destined processors.²⁴⁶ Those in poor fishing communities can, as a result, become further entrenched in poverty where there are no education or capacity-building options created for them by the law.

245 See Kurien, J. 2003.

246 See FAO. 2004b.

The obligation of states to prioritize the most vulnerable groups calls for special measures to compensate them for the disadvantages they suffer. Preferential treatment, where the law confers an explicit benefit on disadvantaged groups, would facilitate the realization of their right to food (see above, section 4.5.1). Where the law envisions this kind of incentive and support measures for disadvantaged fishers, these groups should be promptly and appropriately informed about such measures and how to benefit from them. This ensures compatibility with human rights principles of participation, transparency and the rule of law.

4.6 GENETIC RESOURCES FOR FOOD AND AGRICULTURE

As mentioned earlier, the Right to Food Guidelines require states to “facilitate sustainable, non-discriminatory and secure access and utilization of resources consistent with their national law and with international law and protect the assets that are important for people’s livelihoods” (Guideline 8.1). States are also called to “consider legal instruments and supporting mechanisms to prevent the erosion of, ensure the conservation and sustainable use of genetic resources for food and agriculture, including, as appropriate, for the protection of relevant traditional knowledge and equitable participation in sharing benefits arising from the use of these resources” (Guideline 8.12).

Biological resources (biodiversity), with agrobiodiversity as their vital subset, are a prerequisite for human survival and food security. Genetic resources for food and agriculture (GRFA) are the raw material contained in plants and animals that farmers and breeders all over the world have used to develop their crops and raise new breeds.²⁴⁷ Traditionally, genetic resources have been freely and widely exchanged, not only among farmers in a particular place, but also more widely across the world’s continents and regions. This is most notably true for genetic material of plant origin. All regions and countries are today dependent, to a greater or lesser degree, on plant GRFA from other regions or countries.²⁴⁸

247 Genetic resources comprise the wide variety of living organisms; they constitute material of actual or potential value for food and agriculture that is contained in plants and animals. As such, they are to be differentiated from crops, trees and animals as commodities, i.e. biological resources. Every state has a different combination of *in-situ* (i.e. within ecosystems and natural habitats or on-farm) and *ex-situ* (i.e. outside the natural habitat, in base collections) genetic resources.

248 See Palacios, X.F. 1998.

Continued and not unduly restricted access to and use of genetic resources is vital to food security: a high genetic diversity allows breeders to increase productivity of plant varieties and animal breeds, to adapt them to new pests and diseases and to respond to environmental challenges (e.g. drought, flood, salinity) and new climatic conditions. In this way, access to a diverse range of plant and forest varieties, animal breeds and fish breeds strengthens resilience of people and assists in risk management.²⁴⁹ Access to genetic diversity also facilitates the development of new crops or animal breeds with features better adapted to local needs and demands. Wild, weedy and local crops contribute substantially to livelihood security, especially through to a nutritious diet of rural and poor communities which have limited capacity to produce food or to access market mechanisms.²⁵⁰

Ensuring that all final users – farmers, breeders, pastoralists and the research community – have regular access to GRFA is thus one of the key mechanisms for realizing the right to food for all. As in some other sectors, national norms regulating control over access and use of genetic resources have been greatly influenced by the relevant instruments developed at the international level (see Box 72).

BOX 72. International legal instruments dealing with plant genetic resources

As plant genetic resources have historically been defined as a common heritage of humankind and thus freely accessible to everyone, the users of genetic resources have not been required to share the benefits deriving from their use with the country of origin or with those individuals or communities that may have been the ultimate providers. Between 1989 and 1991, the issue was discussed within FAO, and a series of “agreed interpretations” of the International Undertaking on Plant Genetic Resources (which had been adopted by FAO Conference in 1983) were adopted in order to reach an equitable balance between the interests of developing and developed countries. In 1989 FAO Conference Resolution 4/89 recognized farmers’ rights, and in 1991 Resolution 3/91 recognized the sovereign rights of states over their plant genetic resources. At about the same time, during the negotiations that led in 1992 to the adoption of the UN Convention on Biological Diversity, developing countries pressed for redefining historic benefit flows from the use of genetic resources, including plant genetic resources, in a legally binding international treaty. The Convention recognizes the sovereign rights of states over their genetic resources and defines the rights and obligations of contracting parties regarding access to these resources and “fair and equitable” sharing of benefits derived from their use (Art. 15).



249 See Hawtin, G.C. 2000.

250 See Mechlem, K. 2005 and Moore, G. & Tymowski, W. 2005. See also Seshia, S. & Scoones, I. 2003.

BOX 72. International legal instruments dealing with plant genetic resources (cont.)

The International Convention for the Protection of New Varieties of Plants (UPOV Convention) establishes plant breeders' rights, which aim to protect new varieties of plants in the interests of both agricultural development and commercial breeding. There are two exemptions to the right conferred by plant breeders' rights: farmers' privilege, which amounts to a right to save seed for replanting; and breeders' exemption, i.e. the right to freely use protected varieties for research and development. The most recent revision of the UPOV Convention (1991) increased the list of prohibited acts relating to the protected varieties and introduced a requirement that all plant varieties fulfilling the criteria be eligible for protection.

In 1994, member countries of the World Trade Organization adopted the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). The TRIPS Agreement calls on states to introduce patent protection for inventions, whether products or processes, in all fields of technology – including agriculture (Art. 27.1). Some exceptions are granted and states can, for example, exclude plants and animals from patentability. With regard to plant varieties, they should be protected “either by patents or by an effective *sui generis* system or by any combination thereof” (art. 27.3b). While the UPOV system can be seen as a *sui generis* system, there may be other ways of introducing an effective *sui generis* system.

The special nature of plant genetic resources for food and agriculture (PGRFA) and the need to seek special solutions for these resources as separate from other genetic resources led to the adoption of the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA) in 2001. The Treaty provides for the conservation and sustainable use of PGRFA, recognizes farmers' rights as the rights of farmers to be rewarded for their contribution to the conservation and development of PGRFA and establishes the Multilateral System of Access and Benefit-Sharing (MLS) to facilitate access to genetic resources of major food crops and forage species and to share, in a fair and equitable way, the benefits arising from their use. The MLS includes resources of major food crops and forage species that are in the public domain and under the management and control of the states that are contracting parties to the Treaty. Annex I to the Treaty sets out a list of crops to be included in the MLS, selected according to their importance for food security and their interdependence.

Legal provisions relevant for GRFA can be found in many different national laws: some countries have included provisions on genetic resources in general environmental and nature conservation laws, laws on sustainable development or biodiversity laws, while others have adopted specific legislation on access to genetic resources. Some countries have also modified their existing intellectual property laws or developed new ones, in order to reflect new standards developed at the international level.

There will thus be many laws and many different issues that can have right to food implications in this area, and the constellation of laws and regulations will depend on specific national circumstances. The next sections explore some of the issues either raised by existing national legislation or which governments should address when implementing the right to food, and which a national review team should look at in depth. Although the topics covered here are relevant for all genetic resources, they are most applicable to resources of plant origin.

4.6.1 ACCESS TO RESOURCES AND SHARING THE BENEFITS DERIVING FROM THEIR USE

Since the adoption of the Convention on Biological Diversity, some 50 countries have adopted or are in the process of developing national legislation to regulate access to genetic resources and the sharing of benefits derived from their use²⁵¹ (e.g. research results, development, technological and economic benefits). Where access to genetic resources is regulated through national legislation, the relevant laws should be examined for their right to food compatibility.

From the right to food perspective, conditions under which access is granted and the applicable procedures are among the primary issues that may raise concern as they can make more difficult and more expensive the exchange and use of genetic resources by farmers and breeders. Most existing and proposed national laws subject access to genetic resources to mutually agreed terms between the applicant and the state; the terms include the requirement of prior informed consent of state authorities and concerned persons or communities, or both, and negotiating how to share the benefits deriving from the use of the resources. Many laws and draft laws cover *all* genetic resources (of both plant and animal origin), including those for food and agriculture, from *in-situ* and *ex-situ* sources, as well as those of the Consultative Group

251 They include: the Andean Pact (Bolivia, Colombia, Ecuador, Peru and Venezuela [Bolivarian Republic of]), Australia, Brazil, Cameroon, Costa Rica, Fiji, Malaysia, Mexico, the Philippines, Seychelles and Uruguay. A number of countries are also envisaging adopting specific legislation on access to plant genetic resources for food and agriculture (e.g. Madagascar, Pakistan, Syrian Arab Republic and United Republic of Tanzania). Potential measures by which access to resources can be ensured and benefit sharing can take place can be very different and vary according to different types of genetic resources. See FAO. 2007d; GRAIN. 2002 and see also Glowka L. 1998.

on International Agricultural Research (CGIAR) centres;²⁵² some also apply to traditional knowledge, innovations and practices of indigenous peoples and local communities related to genetic resources.²⁵³ Subjecting access to PGRFA, which are vital for global food security, to rigid conditions may significantly affect the capacity of persons to exercise their right to food. Similarly, having to negotiate agreements for access to genetic resources on a case by case basis may be deleterious for both farmers and breeders because of the consequent high transaction costs and difficulties associated with estimating the value of genetic material to be incorporated in the future variety. In this sense, stringent conditions under which access is being granted as well as the coverage of a whole range of activities, including research, non-commercial or customary use of resources, respectively a lack of appropriate exemptions for small farmers and informal breeders, local communities and indigenous peoples may prevent the sustainable use of genetic resources and hinder the realization of the right to food in a country.

Participation is another area where existing legislation can be weak. According to the Right to Food Guidelines, states should ensure “participation of local and indigenous communities and farmers in making national decisions on matters related to the conservation and sustainable use of genetic resources for food and agriculture” (Guideline 8.12). Relevant regulations should thus reflect simple and accessible procedures allowing concerned populations to be actively involved in decision making regarding the conservation and use of resources found within land and territories they hold or occupy and regarding sharing the benefits deriving from such resources. This would guarantee the application of the principles of participation and empowerment in the legislation.

Farmers’ rights

The concept of farmers’ rights, internationally recognized in the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA)²⁵⁴ (see above, Box 72), is based on the idea that farmers should be rewarded for their contribution to the conservation and development of agricultural biodiversity, and thus to global food security. Farmers’ rights are seen as one of the main means of ensuring their participation in the sharing of benefits deriving from the use of genetic resources, and as a counterbalance to the expansion of intellectual property rights (IPRs), which were considered major threats to the rights and practices of farmers of saving, exchanging and reusing seeds (see below, section 4.6.3). Legal recognition and implementation of farmers’ rights at

252 International Agriculture Research Centres of the Consultative Group on International Agricultural Research.

253 For example, Andean Pact Decision No. 391, Costa Rica’s Law on Biodiversity.

254 Although the Treaty does not give a precise definition of this concept, it does elaborate on its three main components: protection of traditional knowledge relevant to PGRFA; the right to participate equitably in sharing the benefits arising from their use; and the right to participate in making decisions, at the national level, on matters related to the conservation and sustainable use of PGRFA (Art. 9). The responsibility for the realization of farmers’ rights is, however, devolved to the Contracting Parties to the International Treaty.

the national level can be seen as a vital means contributing to the realization of the right to food, as they can enable farmers to continue to live off traditional agriculture and to strengthen traditional agricultural systems.

Few countries have reaffirmed support for farmers' rights through their national legislation although several proposals are emerging (see Box 73 for two examples). From the right to food compatibility review perspective, the absence of a provision on farmers' rights in the national legislation relating to genetic resources, in IPR laws or in seed laws, can be seen as a gap in the assessed legal framework; the review team should thus include it in its final report and plan of action.

BOX 73. Implementation of farmers' rights – examples from state practice

The Protection of Plant Varieties and Farmers' Rights Act of **India** (2001) aims at putting farmers' rights on a par with plant breeders' rights. The Act gives farmers the entitlement to apply for registration of a plant variety as well as for registration of a farmer's variety (Section 39(1)(i)). Under the definition of farmer's variety the Act includes also a variety that has been traditionally cultivated and evolved by the farmers in their fields, and a wild relative or landrace of a variety about which the farmers possess common knowledge (Section 2 (k)). Furthermore, the Act gives protection to existing varieties (Section 2(j)). The Act also provides for reward and recognition, and establishes a benefit sharing mechanism.

Another example is the Plant Variety Protection Act of the **Philippines** (2002), which recognizes the "traditional right" of small farmers to save, use, exchange, share or sell their farm produce of a variety protected under the Act. It also provides for the possibility of establishing inventories to protect locally bred varieties from misappropriations and unfair monopolization.

Source: See Swaminathan, M.S. 2006. See also Moore, G. & Tymowski, W. 2005.

4.6.2 COMMERCIALIZATION OF SEEDS

In general, seed laws regulate the commercialization of seeds, i.e. what materials can be sold on the market and under what conditions (see Box 74). By ensuring that an adequate supply of good quality seed is supplied to farmers, seed legislation can contribute to increased food availability and to strengthening people's capacity to feed themselves by their own means and thus enhance their right to food. Nonetheless, seed laws can act as an obstacle to the development of a diversified seed system, thus hindering the availability of food sources. Strict variety release regulations that tend to delay the approval of seeds can limit the number of varieties available on the market. The registration system may favour highly homogenous varieties for large-scale high-input production but fail to approve varieties adaptive to marginal and ecologically diverse conditions. Mandatory registration of all seeds and strict restrictions on commercialization of seeds can thus favour private seed industries to the disadvantage of small-scale farmers, particularly in developing countries where agriculture relies on the informal seed sector, i.e. on seeds saved and exchanged and sold by farmers themselves. This may especially be the case when the requirements for registration strongly resemble those for plant variety rights.

BOX 74. Seed laws – example from India

The 2004 Seed Bill of **India** introduces the concept of mandatory registration of all seeds for sale (domestic or foreign). The aim of the bill is “to provide for regulating the quality of seeds for sale, import and export and to facilitate production and supply of seeds of quality and for matters connected therewith or incidental thereto”. All registered varieties are to be recorded in a National Register of Seeds database. Registration will be granted for new varieties for a period of 15 years in the case of annual and biennial crops and 18 years for long duration perennials. As with registered varieties in other parts of the world, varieties need to be field tested to determine their value for cultivation and use. Furthermore, seed producers, seed processing units, seed dealers and horticulture nurseries all have to be registered with the government of the state in which they operate. The bill protects the right of a farmer to save, use, exchange, share or sell his or her farm seeds and planting material. However, the farmer cannot sell seeds or planting material under a brand name. Also, all seeds sold by farmers need to conform to the minimum standards regarding germination, physical purity and genetic purity applicable to registered seeds.²⁵⁵

255 For a brief analysis of the bill, see Madhavan, M.R. & Sanyal, K. 2006. For a critical view, see Kuruganti, K. 2005.

In the review of seed laws for their right to food compatibility, special attention should be paid to provisions intended to prevent or minimize the possible negative effects of seed certification and quality control regulations on small farmers and communities whose livelihood depends on the free exchange and use of seeds. For example, providing for more flexible seed certification procedures, provisions allowing compensation to farmers for failed seeds, recognizing and promoting diversified seed systems can strengthen the ability of farmers and communities to provide for themselves, and thus realize their right to food.

4.6.3 INTELLECTUAL PROPERTY RIGHTS IN THE AGRICULTURE SECTOR

The introduction and strengthening of IPRs in the agriculture sector, notably in developing countries²⁵⁶ has been – and remains – a contentious issue. This is particularly the case for patents, as plant variety rights are more limited in their scope and level of protection. The 1999 United Nations Development Program (UNDP) Human Development Report raised concerns about the impacts of the TRIPS Agreement (see above, Box 72), particularly in relation to food security, indigenous knowledge and access to health care.²⁵⁷ The Sub-Commission on the Promotion and Protection of Human Rights as well as the Special Rapporteur on the right to food have addressed IPRs and the TRIPS Agreement in several reports.²⁵⁸

The human right to food requires states to respect the existing access to food, to protect it from interferences from private parties as well as to fulfil it by strengthening people's access to resources. Strong IPRs can provide incentives for agricultural research and improvement of conditions for more effective food production. The opportunities of agro-biotechnology to contribute to various components of food security and the right to food seem boundless: higher productivity on the same amount of land and an increase in the overall availability of food; improved nutritional values thus contributing to ensuring adequate and nutritious food for all; the development of crops for saline, dry and other marginalized soils, etc., thus facilitating the realization of the right to food in a country.²⁵⁹ At the same time, however, IPRs encourage the cultivation of a narrow range of modern varieties that offer higher yields, which tend to

256 There are many different forms of IPRs; the two main forms relevant for genetic resources are plant variety rights and patents. Until relatively recently, most developing countries had no form of intellectual property protection for agro-biotechnology. This changed with the adoption of the TRIPS Agreement, coupled with other factors. See Chapman, A.R. 2002. and UNDP. 2000.

257 See UNDP. 1999, p. 68.

258 See, for example, UN Sub-Commission on Human Rights. 2000 and UN Economic and Social Council. 2001, para 73.

259 See Mechlem, K. & Raney, T. 2007, p. 132.

displace landraces; this process of displacement in turn promotes homogenization in agricultural fields (i.e. monocultures), which leads to a loss in diversity and generally reduces the crops' resilience to pests and diseases.²⁶⁰ Strong plant variety rights and patents applied to agricultural innovations can also prevent farmers from engaging in traditional practices of saving, replanting, sharing or selling seed. If a plant variety is patented, unless exceptions are provided for, seeds of the patented variety may not be resown or exchanged for cultivation purposes, and thus farmers may be required to purchase new seeds every year. This can negatively affect small farmers and rural populations that base their livelihoods on traditional farming systems based on free exchange and use of seeds and thus limit their capacity to feed themselves and their communities.²⁶¹ Where product patents on genes are granted, and the scope of such patents embraces any uses of the patented gene, patents may considerably increase costs of agricultural research and hinder progress,²⁶² and thus also the accessibility and availability of new and improved seeds.

When assessing the IPR laws from the right to food perspective, the review team should focus especially on provisions regarding their scope, conditions for the granting of protection and exemptions. In order to be right to food compliant, the legislation should provide for mechanisms ensuring the right balance between the need to protect agricultural innovations and the need to protect interests of both farmers (in particular, small-scale and subsistence farmers) and researchers,²⁶³ including by using the flexibility of the TRIPS Agreement²⁶⁴ (see above, Box 72). As in the case of seed laws, the conditions of the seed market and agriculture sector in a country will also play a role in the assessment of the right to food compatibility of a given IPR law.

260 See, for example, Swaminathan, M.S. 1997, p. 7; Cullet, P. 2003.

261 See Haugen H.M. 2007, Rajotte, T. 2008. It should be noted that patent laws can provide for exceptions to the exclusive rights conferred by a patent.

262 See Mechlem & Raney, 2007, pp. 151–152.

263 See, for example, The Crucible Group. 2001.

264 Notably its Articles 27.3(b) and 30. The recognition of a broad farmers' privilege in national laws may also be seen in the context of Article 8(1) of the TRIPS Agreement that invite states to "adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development /.../" (See Mechlem, K. & Raney, T. 2007, p. 157).

4.7 TRADE IN AGRICULTURAL PRODUCTS

The Right to Food Guidelines invite states to improve the functioning of their markets, in particular their agricultural and food markets, to put legislation, policies, procedures and regulatory and other institutions in place to ensure non-discriminatory access to markets, and to prevent non-competitive practices (see Guideline 4). States are also asked to increase productivity and to revitalize the agriculture sector including livestock, forestry and fisheries (Guideline 3.7). This should be carried out in consultation with CSOs and other key stakeholders at national and regional levels, including small-scale and traditional farmers (Guideline 3.8).

For a large number of developing countries, agriculture remains a pivotal sector that underpins food security, foreign exchange earnings, industrial and rural development and employment generation. It typically represents the basic economic activity on which other economic activities are subsequently built; growth in agriculture can therefore have huge positive impacts.²⁶⁵ As such, agriculture remains critical to realizing the human right to food, i.e. ensuring that every person has access to sufficient and adequate food.

In 1996, the Rome Declaration on World Food Security recognized that, in today's globalized world, "trade is a key element in achieving world food security". While generally trade in agricultural products has positive impacts on economic growth and food security, there are no automatic correlations. Developing countries with similar levels of agricultural trade show very different amounts of hunger and poverty, which suggests that the impact of agricultural trade on food security depends on factors such as markets, natural resource endowments, human capacity, institutions and policies, and the degree of equity with which benefits are distributed.²⁶⁶

265 See Byerlee, D. Diao, X. & Jackson, C. 2005, p. viii.

266 See FAO. 2003d, p. 18.

Many important changes have taken place in the agricultural sector in particular throughout the developing world since the 1980s and notably since the WTO came into existence in 1995.²⁶⁷ Many governments have implemented market reforms and extensively liberalized the domestic economic environment by dismantling existing trade restrictions and transferring to private players many of the functions previously undertaken by governments. Liberalization of trade has been said to contribute to economic growth and thus to poverty reduction and food security;²⁶⁸ it has also been said to help expand the sources of food supply, in particular, for the least developed countries.²⁶⁹ Indeed, the opening of markets does have the potential to help the realization of the right to food by improving income and employment opportunities, and diffusion of technology and capital; agricultural imports can complement local production, increase dietary choices and provide alternative sources of nutrition. At the same time, the potential gains from trade liberalization are not guaranteed and will not necessarily be reflected in improved food security in a country: in particular, there are likely to be significant differences between the impacts on small-scale versus commercial farmers, and rural non-farm producers versus urban consumers, both within and across countries.²⁷⁰ In many developing countries, the livelihoods of small-scale farmers and agricultural labourers as well as the urban poor have worsened due to import competition following liberalization processes and their inability to compete with imports or larger farmers that can access international markets.²⁷¹

The international dimension is therefore particularly important in this sector; sometimes multilateral commitments oblige countries to effect particular changes to the existing national legal framework or to devise laws where none existed.²⁷² Policies, laws and decisions of individual states can have significant consequences for the lives of people in other countries.

267 See Mosoti, V. & Gobena, A. 2007.

268 See FAO. 2003e.

269 See UNCTAD. 2002; UN Economic and Social Council. 2002, para. 3.

270 See FAO. 2003e, Ch. 1, p. 16.

271 See 3Dthree/IATP. 2005, p.2. FAO has studied the impact of the WTO Agreement in Agriculture on 14 developing countries, finding possible negative impacts of liberalization on certain individuals and groups. See FAO. 2000, p. 25. See also UN. 2002, para. 35 and UN Special Rapporteur on the right to food. 2008, para. 7.

272 See Mosoti, V. & Gobena, A. 2007, p. 13.

In the Declaration of the World Food Summit: five years later, FAO members urged “all members of the WTO to implement the outcome of the Doha conference, especially commitments regarding the reform of the international agricultural trading system /.../ given that international agricultural trade has a role to play /.../ in promoting economic development, alleviating poverty and achieving the objectives of the World Food Summit, in particular in developing countries” (para. 12). Despite multilateral rules for the liberalization of agricultural trade negotiated within WTO and adopted through the Agreement on Agriculture (AoA),²⁷³ and the Marrakesh Decision,²⁷⁴ agriculture remains one of the most distorted areas of international trade.²⁷⁵ Trade distorting agricultural policies of developed countries are often mentioned as being among the key factors constraining the development of the agriculture sector in developing countries.²⁷⁶ A compatibility review in developed countries could thus also assess the extraterritorial effects of their legislation on the right to food in other countries.

There are many issues related to trade in agricultural products that can affect the availability, accessibility or adequacy of food, and thus the realization of the right to food at the national level. The number of laws dealing with these issues or some aspects thereof is equally high. Selection was therefore necessary; the following sections examine some of the issues linked to legislation governing trade in order to assess their effects on the realization of the right to food.

4.7.1 DOMESTIC SUPPORT FOR LOCAL FOOD PRODUCTION

Enhancing the capacities of the agriculture sector is crucial for achieving food security and realizing the human right to food for all. From the right to food perspective, in promoting the agriculture sector, the national law should not only reflect policy proposals geared towards greater productivity, but should also support the creation of an enabling environment allowing people to achieve these objectives in a way that strengthens their capacity to provide for themselves.

273 The AoA came into force in 1995.

274 The Marrakesh Ministerial Decision on Measures Concerning the Possible Negative Effects of the Reform Programme on Least-Developed and Net Food-Importing Developing Countries.

275 See Mechlem, K. 2006, p. 118.

276 These policies include price guarantees, income support measures, and input-related and crop insurance subsidies that stimulate farm production. They also include tariffs and tariff-rate quotas and export subsidies. According to IFPRI, “by blocking market access and driving down world prices for agricultural commodities, developed country policies reduce agricultural exports from the developing world by \$37 billion (25 percent) annually”. See Von Braun, J., Gulati, A. & Orden, D. 2004. See also, for example Tyers, R. & Anderson, K. 1992 and Mowbray, J. 2007.

In many developing countries, agricultural policies prioritize high value crops for export over staple crops for domestic production. Because a large majority of small-scale farmers in developing countries lack the necessary support and capacity, the burgeoning export markets mainly benefit large-scale farmers and agro-industries, leading to the marginalization of poorer producers and farm labourers. Under international human rights law, special measures are necessary to ensure protection of the most vulnerable persons and groups. There is solid evidence²⁷⁷ today to suggest that measures targeted towards basic food staples, as opposed to other food crops, are critical to realizing the right to food. Using existing flexibilities under the AoA, a degree of domestic support and protection providing incentives for local, small-scale and subsistence production would assist in fulfilling the realization of the right to food in a country.²⁷⁸ Indeed, food security crops are often cultivated for local consumption more than for export; where this is the case, special measures targeted at such crops should improve food security at the national level, while remaining minimally trade distorting in world markets.²⁷⁹

In its compatibility review of agricultural trade rules, the team should therefore look, among other issues, at whether there are agricultural input subsidies, credit support measures, crop insurance programmes, measures for improving transport and functioning of local, regional and national markets, and environmental protection subsidies, all of which would contribute to creating an enabling environment for the realization of the right to food in a country.²⁸⁰ Box 75 provides some examples of successful national domestic support measures.

BOX 75. Domestic support measures – example from state practice

In *Malawi*, according to government crop estimates, significant fertilizer subsidies and lesser ones for seed, abetted by good rains, helped farmers produce record-breaking maize harvests in 2006 and 2007. Maize production leapt to 2.7 billion metric tons in 2006 and 3.4 million in 2007 from 1.2 million in 2005, according to the governmental report. Malawi's successful use of subsidies is contributing to a broader reappraisal of the crucial role of agriculture in alleviating poverty in Africa and the pivotal importance of public investment into the basics of a farm economy: fertilizer, improved seed, farmer education, credit and agricultural research.

277 See UN Special Rapporteur on the right to food. 2002b, para. 48. The report also states that the existing trade rules should be improved and modified so as to bring in social, cultural and human rights concerns. See also 3Dthree/IATP, 2005.

278 See, for example, Article 6 and Annex 2 (1) of the AoA. See, e.g. FAO. 2000.

279 See UN, 2002, para. 48.

280 Such measures can be used under the AoA flexibility provisions (e.g. exemptions under the de minimis threshold, special and differential treatment provisions, and the "green box"). See FAO. 2000.

BOX 75. Domestic support measures – example from state practice (cont.)

Following a substantial reduction in agricultural production in the 1990s, the Government of **Kazakhstan** changed its policy and decided that developing the agriculture sector would require a sound regulatory framework coupled with a certain amount of state support. Thus, for example, Article 10 of the Law on State Regulation in Agriculture provides for a state loan programme to agricultural producers to finance investments in infrastructure and agricultural machinery. According to Article 10(2)(3-6), the state provides loans to credit companies, which in turn provide loans to farmers, non-agricultural companies in rural areas and microfinance organizations.

Source: See Mosoti, V. & Gobena, A. 2007, pp. 280–287 (Kazakhstan); see also Dugger, C.W. 2007.

From a human rights perspective, the relevant laws and regulations should ensure that the domestic support measures target small-scale farmers and producers, rural communities and other vulnerable groups. This conforms to the Right to Food Guidelines, which require states to “adopt measures to ensure that the widest number of individuals and communities, especially disadvantaged groups, can benefit from opportunities created by competitive agricultural trade” (Guideline 4.6).

4.7.2 PRICE SUPPORT

Food price instability raises particular concerns for producers and consumers: high unstable prices can induce ineffective production decisions; commodity price instability can distort resource allocation when markets for credit and risk are incomplete or weak. Poor producers and consumers are most exposed to instability in the prices of a dominant food staple as staples often constitute a large share of small farm incomes or poor consumers’ expenditures (up to 70 percent). Price stability is therefore an important element in protecting the welfare of the poor and accordingly their right to food.²⁸¹ Although price instability on world markets affects all countries, the consequences are much greater for a rural population that earns a living from food production and for those who spend a relatively large share of household income on food.²⁸²

In many developing countries, state trading enterprises (also known as statutory marketing boards, marketing authorities or control boards) are the most commonly used means to ensure domestic price stability. Trade reforms have already significantly reduced the powers of state trading enterprises (STEs), and

281 See FAO. 2003e.

282 For more information see www.fao.org/Worldfoodsituation

further constraints to statutory powers are strongly advocated within the WTO.²⁸³ This may, however, in some circumstances be inconsistent with the state obligations to respect and fulfil the right to food. In the developing world, the role of STEs is not limited to trade and market issues but extends into rural development and food security. Considering that the impact of most developing country STEs globally on price distortion and international markets is minimal, some argue that STEs can and should be used to ensure a base price for commodities and augment farm incomes.²⁸⁴

From the human rights perspective, any state intervention in price control should guarantee that both producers and consumers benefit, including by introducing, where needed, compensatory mechanisms and safety nets for the most vulnerable categories of persons.

4.7.3 BORDER PROTECTION AND MARKET ACCESS

In the last decade or so, there has been an increase in the incidence of import surges and many observers relate this phenomenon to the opening up of domestic markets with the implementation of the AoA. The effect of these liberalization reforms in developing countries combined with the export and domestic subsidies of developed countries has left the former vulnerable to the flooding of their domestic markets with products sold on the world market at less than their cost of production.²⁸⁵ In some cases, this has resulted in increasing food insecurity by displacing much of the domestic production and increasing dependency on imported foods.²⁸⁶ Difficulties for small farmers' and producers' livelihoods are exacerbated when the dumped agricultural product affects the country's staple food production, where farmers and other agricultural workers are dependent on such production.²⁸⁷ In other instances, the influx of cheap imports has also resulted in changed local diets, which in some cases affected people's access to *adequate* food.²⁸⁸

283 See Ackerman, K.Z. 1998, pp. 43-47 and FAO, 2002a.

284 See Mosoti, V. & Gobena, A. 2007.

285 See FAO. 2003f.

286 See 3DThree/IATP. 2005; see also, UN Special Rapporteur on the right to food, 2008, para. 6.

287 See Gray, K.R. 2003, p. 12.

288 See for example, Paasch, A., Garbers, F. & Hirsch, T. eds. 2007.

Market access restrictions present another area of concern with regard to a country's right to food commitments. High tariff and non-tariff barriers in place in developed countries have traditionally made it difficult for developing countries' food producers to access those markets.

In the context of compatibility review of legislation relating to trading, the application of human rights principles would require that relevant legislation clearly defines the roles, responsibilities and powers of institutions dealing with unfair trade practices such as dumping, subsidies, predatory pricing²⁸⁹ or import surges, in both countries that are implementing these policies as well as in those being affected by them. This includes in particular the responsibility for establishing appropriate safeguard measures to counter their negative effects, and rational procedures and sanctions for violations of the law.²⁹⁰

289 Generally speaking, predatory pricing is the practice of a firm selling a product at very low price with the intent of driving competitors out of the *market*, or creating a *barrier to entry* into the market for potential new competitors.

290 See Mosoti, V. & Gobena, A. 2007, p. 210.

4.8 LABOUR

As noted earlier, the right to food is interrelated with other economic, social and cultural rights, including the human right to work.²⁹¹ The Right to Food Guidelines invite states to provide opportunities for remunerative work that allow for an adequate standard of living for rural and urban wage earners and their families, and to promote and protect self-employment (Guideline 8.8). Employment and protection from unemployment ensuring the procurement of food constitute the primary means for the realization of the right to food for many people.

Box 76 gives an overview of the main international instruments relating to the right to work and labour standards (also called “labour rights”). These instruments should be used as a support for analysis when assessing the selected national labour legislation.

BOX 76. The human right to work and international labour standards

The Universal Declaration of Human Rights guarantees everyone “the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment” (Art. 23). All these rights are reiterated in the ICESCR, which extends this right to include “the right of everyone to the opportunity to gain his living by work” (Art. 6) and the right to “fair wages and equal remuneration for work of equal value without distinction of any kind” (Art. 7).



291 On the relation between the right to food and the right to work, see Vidar, M. 2005.

BOX 76. The human right to work and international labour standards (cont.)

The right to work thus includes several interdependent rights, such as the right to free choice of work, to just and favourable conditions of work, to a safe and healthy working environment, to equal rights for men and women with respect to access to work, working conditions and equal remuneration for work of equal value. The right to work also includes the corollary right to form and join trade unions for the promotion and protection of class interests as well as the right to strike. Of course, states must also prohibit forced or compulsory labour and prevent child labour. State Parties to the ICESCR are also committed to taking appropriate steps to promote full, productive and freely chosen employment; such steps include supporting vocational guidance and training programmes as well as protection from unemployment.

Moreover, the ILO has adopted an important number of international labour conventions and recommendations relevant to the promotion and protection of the right to work and rights at work. The ILO's eight fundamental labour conventions related to freedom of association and collective bargaining, non-discrimination in employment and occupation, the elimination of forced labour and child labour are very widely ratified.

The main issues linked to labour rights that will affect the right to food are wage rates and remuneration, and increased employment opportunities, especially for women. Each of these will now be addressed in turn.

4.8.1 WAGE RATE AND REMUNERATION

According to the African Commission on Human and Peoples' Rights, "unremunerated work is tantamount to a violation of the right to respect for the dignity inherent in the human being".²⁹² Many states guarantee the right to just and favourable remuneration, aiming at ensuring an existence worthy of human dignity and an income at least sufficient to meet one's basic needs. The primary objectives of setting a wage floor are: achieving greater fairness by restricting the degree of wage inequality; fighting poverty by guaranteeing a minimum level of earnings to workers; avoiding exploitation by reducing the power imbalance in employment relations between employers and vulnerable groups of the workforce; and shaping work incentives through coordination with the tax and

²⁹² See *Malawi African Association vs. Mauritania*, Nos. 54/91, 61/91, 98/93, 164/97 & 210/98, 1999–2000.

welfare systems.²⁹³ According to the Indian Supreme Court, “non payment of minimum wages amounts to ‘forced labour’ /.../ and an employer has no right to conduct his enterprise if he cannot pay his employee a minimum subsistence wage”.²⁹⁴ Many countries have adopted a minimum wage, in the form either of a single national minimum wage or a system of legally backed minimums set by employers and workers and applicable to certain industries or regions.²⁹⁵ These “minimums” generally comprise food, clothing and housing, and in certain cases health, medical care, social service and security. Box 77 gives some examples of legislative provisions on minimum wage. By enabling people to feed themselves by their own means, minimum wage legislation can facilitate the realization of the right to food.²⁹⁶ By establishing comparable wages across sex-segregated occupations and dissimilar workplaces, minimum wage legislation can also address discrimination embedded in the overall structure of pay and rewards,²⁹⁷ since women, migrants and other disadvantaged groups are most often disproportionately represented and most often remain in low paying jobs.

BOX 77. Minimum wage in national legislation

In **Argentina**, the National Council for Employment, Productivity and the Adjustable Minimum Living Wage periodically determines, among other issues, the adjustable minimum wage. Wages are set by collective agreement. Wage rates may not be lower than the minimum wage determined by the Government or the National Council. The legal definition of minimum wage implies the minimum salary in cash that all workers over 18 years of age must receive irrespective of the category of labour or the activities carried out, so that adequate food, respectable living conditions, education, clothing, sanitary assistance, transport, recreation, vacations and provisions are assured (National Employment Law, Art. 139; Law on Contract on Employment, 1976, last amended in 1991, Art. 116).



293 See Saget, C. 2001.

294 Quoted by Chamaraj, K. 2006.

295 The ILO’s database on minimum wage provides information on the minimum wage systems in different countries, including the criteria used for the determination of the level of the minimum wages (<http://www.ilo.org/travaildatabase/servlet/minimumwages>).

296 See Rubery, J. 2003.

297 See Rodgers, J. & Rubery, J. 2003 and Gregg, P. 2000. pp. 133-146.

BOX 77. Minimum wage in national legislation (cont.)

In the **United Kingdom of Great Britain and Northern Ireland**, the minimum wage is a legal right that covers almost all workers above compulsory school-leaving age. There are different minimum wage rates for different groups of workers (for example, the main rate for workers aged 22 and over increased on 1 October 2006 to £5.35 an hour, the development rate for 18–21 year olds increased to £4.45 an hour and the development rate for 16–17 year olds increased to £3.30 an hour) (see National Minimum Wage Act 1998, last amendment 2003).

In the **Russian Federation**, a minimum wage cannot be lower than the minimum subsistence level for an able-bodied individual (see Labour Code (N 197-F) of 30 December 2001, last amendment 30 June 2006 and Act on Minimum Wage (Text No. 3818), last amendment October 2003).

To ensure right to food compatibility, the established minimum wage must be clearly defined, must not be lower than the subsistence level²⁹⁸ and must be applied in accordance with human rights principles. When assessing minimum wage legislation, the review team should take into account the relevant ILO instruments relating to minimum wage standards.²⁹⁹ For example, the absence of clear criteria for setting the minimum wage can open the way to administrative discretion and possible discrimination. To ensure subsistence, the minimum wage should consist of a basic food basket, and legislation should include specific criteria for determining what constitutes a basic food basket. Legislation should not overlook certain employment sectors, so as not to widen the gap between workers in regulated and non-regulated sectors (e.g. non-standard forms of work, home work and work in the informal sector). Specific measures may be needed to ensure that persistent wage gaps between men and women are eliminated. Of course, the process of calculating the minimum wage should be based on the principles of participation and transparency, and ensure that all social partners are actively involved.

To be effective, a minimum wage must be updated regularly, either by being linked to the consumer price index or by comparison with a reference wage.³⁰⁰ To comply with the state's protective role under the right to food, the relevant legislation should include clear and fair procedures, accessible recourse mechanisms and real penalties for non-compliance with the established minimum wage.

298 See, for example, Minimum Wage Fixing Machinery Convention of 1928 (No. 26) and Minimum Wage Fixing Convention 1970 (No 131).

299 Notably, Minimum Wage Fixing Machinery (Agriculture) Convention, 1951 (No. 099), Equal Remuneration Convention, 1951 (No 100), and Minimum Wage Fixing Convention, 1970 (No. 131).

300 See Grimshaw, D. & Miozzo, M. 2003.

To improve the economic productivity, some countries have adopted specific legislation on worker's access to food. Such legislation provides for the right of certain categories of workers to receive a so called "food bonus".³⁰¹ This type of measure contributes to the realization of the right to food of low-paid workers, enabling them to work fruitfully by fulfilling their basic food needs.

4.8.2 WOMEN WORKERS AND WORKERS IN THE INFORMAL SECTOR

Employment opportunities for women are critical for empowerment and food security as well as for the realization of their right to food. Studies show that increasing the share of women's income in the household considerably improves family and social welfare, and accordingly the realization of the right to food, given women's tendency to apply their income towards the nutrition and health of their family members and the schooling of their children.³⁰² Legislative measures to strengthen women's literacy, education and training can improve their access to the labour market and thus strengthen their capacity to enjoy their right to food. At the same time, one of the major constraints for women's access to employment is the division of their time between economic work and family responsibilities. Thus, labour legislation should include provisions relating to women's specific workplace needs (i.e. maternity entitlements including maternity leave, breastfeeding time and facilities for childcare).

In many countries, the majority of poor and extremely poor workers are employed in the informal economy, where the proportion of women is particularly high. In developing countries, the informal sector represents from 50 to 75 percent of non-agricultural employment; its proportion of overall employment is even greater when agriculture is taken into account. The contribution of the informal sector is thus critical both in terms of providing employment as well as in creating income to procure food. Yet, the vast majority of these workers have low pay and are not covered by minimum wage legislation. Female workers do not have maternity entitlements. Such workers are therefore at greater risk of becoming food insecure and being unable to provide for themselves.

To ensure the right to food of workers in the informal sector, a proper legal framework consistent with human rights principles is needed. When addressing this issue, the review team should prepare its recommendations taking into

301 A food bonus may be given in the form of a meal, food stamps or an electronic debit card. See for example, Venezuela (*Ley de Alimentación para los Trabajadores* (2004), and *Reglamento de la Ley de Alimentación para los Trabajadores*, 2006).

302 See, for example Jahan, S. 2005; see also Deutsch, R., Duryea S. & Piras, C. 2001.

account the recent developments at the international level relating to work in the informal economy, in particular within the ILO.³⁰³

Beyond applying minimum wage regulations to the informal sector, some countries have explored social assistance-based, community-based and other non-formal security schemes.³⁰⁴ Social security legislation is related to labour legislation and is explored in section 4.9.

4.8.3 PUBLIC WORKS

The right to food requires states to respect and protect people's existing access to adequate food and to provide food directly to those persons or groups that are not able to provide for themselves, which would include unemployed people. While developed countries generally have well-established unemployment benefit legislation, in developing countries protection for unemployed and underemployed people often consists of employment intensive programmes, introduced during periods of crisis. "Food for work" schemes have also blossomed in chronic food-deficit regions as a means of ensuring access to food while simultaneously contributing to a country or region's development by creating or improving infrastructure.³⁰⁵

Box 78 gives a few examples of government schemes that improve food security and assist in the realization of the right to food by providing working opportunities.

303 See ILO. 2002.

304 See Reynaud, E. 2006. See also Vidar, M. 2005, pp. 147–148. Generally speaking, "non-formal" security schemes cover informal and traditional approaches to social security: traditional security systems refer to those forms of security that have a close link to social tradition, and that are frequently binding for members of the community on the basis of common law or custom. By contrast, informal social security systems tend to develop independently from traditional origins, and are based on principles of solidarity and reciprocity, which arise from circumstances imposed by social and economic change. Various kinds of non-formal social security schemes exist. An example of informal security schemes are market associations in Zambia: they are generally semi-formal associations of marketers often established with government assistance, which look after the welfare and needs of their members mainly through provision of loans (see Mukuka, L., Kalikiti, M. Musenge, D.K. 2002.

305 On food for work programmes, see for example, Barrett, C.B., Holden, S. & Clay, D.C. 2004 and Lorge Rogers, B. & Coates, J., 2005.

BOX 78. Public employment guarantees and food for work programmes – examples from state practice

South Asia pioneered public employment programmes aimed at ensuring food security for poor households. The most well-known programme was initiated during a severe drought in the early 1970s in the **Indian** state of **Maharashtra**. The Maharashtra Employment Guarantee Scheme provided opportunities for unskilled, manual labour on a small-scale, labour-intensive rural infrastructural project. Studies showed that the scheme targeted the poor and reduced poverty. The scheme is internationally known as one of the most effective attempts to make the right to work a reality and thus enable people to provide for themselves. In 1977, the scheme was given a legal basis through the Maharashtra Employment Guarantee Act, which established the right of any adult person registered in the scheme to unskilled work. The Act is often quoted as an example of how sectoral legislation can be conducive to and facilitate the realization of the right to food in a country.

In 2005, the **Indian** Parliament adopted the National Rural Employment Guarantee Act,³⁰⁶ according to which every household in rural India has a right to at least 100 days of guaranteed employment every year for at least one adult member (willing to do unskilled manual labour) at the statutory minimum wage (Art. 3). If employment is not provided the applicant will receive a daily unemployment allowance (Art. 7). The Act also includes various provisions for transparency and accountability: it requires, for example, that: the process of registration is carried out in public, with facilities for people to verify their own details, or those of others; every work sanctioned under the Act has a local Vigilance and Monitoring Committee, details of work are displayed on a board at every worksite, in a reader friendly manner, and wages are paid directly to the person concerned and in the presence of independent persons of the community on pre-announced dates.

In **Africa**, such programmes are less common, although there are exceptions.

In **Ethiopia**, for example, between 1999 and 2003, the food for work programme employed an average of 1.4 million people per year.

Public employment programmes have also been developed in **Bangladesh**, **Sri Lanka** and **the Philippines**, as well as in **Argentina**, **Brazil**, **Bolivia**, **Chile** and **Peru**.

Source: See Subbarao, K., Braithwaite, J. & Jalan, J. 1995, pp. 10–13; Dey, N., Drèze, J. & Khera, R. 2006 and Seekings, J. 2006.

306 For a critical analysis of the Act, see www.sentinel-venugopal.in/reports.html#eight

These kinds of measures can be instrumental for fulfilling the right to food of those who are not able to provide for themselves,³⁰⁷ so long as they are managed properly, implemented in full respect of human dignity, and susceptible to achieve a double function: providing a safety net to persons in times of stress and facilitating the desired transition to autonomy, i.e. the capacity to feed oneself. It is equally important that adequate childcare facilities be provided so that women can also participate. In India, the Maharashtra Employment Guarantee Scheme registered participation of about 45 to 60 percent of women. This high participation rate has been achieved with the help of childcare services provided near the workplace and the contribution of non-governmental and community organizations building awareness among women and ensuring accountability for women's participation.³⁰⁸ The recently adopted National Rural Employment Guarantee Act of India (see Box 78), with the objective of ensuring people's "livelihood security" by establishing an entitlement to work as a legal right, enforceable in court, is potentially a powerful tool for the realization of the right to food.

There is a strong link between labour legislation and social security legislation; it is therefore necessary, when reviewing national legislation, also to look at synergies between these two areas and ensure that they both support the poor and disadvantaged in achieving the income security needed to access sufficient and adequate food.

307 Affirmative action measures are generally temporary and are intended to last only until the structural disadvantages have been overcome, either through compensation or through the creation of a more equitable system.

308 See Howell, F. 2001, p. 298.

4.9 SOCIAL SECURITY

Alongside paid employment and reliance on savings and assets (such as land and resources), a person can achieve the security of income needed to realize his or her right to food through social security mechanisms. The Right to Food Guidelines invite states to consider establishing and maintaining social safety and food safety nets to protect those who are unable to provide for themselves (Guideline 14). The Guidelines also provide practical suggestions for using a right to food approach when designing, implementing and financing social safety nets. Box 79 provides an overview of the main international human rights instruments that recognize social security as a basic human right, and which should also be taken into account by the review team when assessing social security legislation. The objective of most social security mechanisms is to prevent deprivation or vulnerability to deprivation,³⁰⁹ through formal (government regulated or public) and informal arrangements (e.g. family self-support structures, community based supports).

BOX 79. Human right to social security

At the international level, social security is recognized in the UDHR (Art. 22) and the ICESCR (Art. 9). More detailed standards in the field of social protection are established in the ILO Convention No. 102 on Social Minimum Standards (1952). The Convention identifies nine branches of social security and defines the corresponding contingencies covered: (i) medical care; (ii) sickness; (iii) unemployment; (iv) old age; (v) employment injury; (vi) family; (vii) maternity; (viii) invalid; and (ix) survivor's benefits. ▼

309 See Drèze, J. & Sen, A. 1991, pp. 3-5.

BOX 79. Human right to social security (cont.)

The Convention allows for the step-by-step extension of social security coverage by ratifying countries. The minimum objectives of the Convention relate, for all the nine branches, to the percentage of the population protected by social security schemes and the level of the minimum benefit to be secured to protected persons, as well as to the conditions for entitlement and the period of entitlement to benefits. In order to take account of the situation of countries “whose economy and medical facilities are insufficiently developed”, temporary derogations are allowed as regards the population covered and the level of benefits. Other conventions and recommendations adopted after Convention No. 102 set out higher standards for particular branches of social security.³¹⁰ Drawing on the model of Convention No. 102, they offer a higher level of protection, both in terms of the population covered and of the level of benefits.

In general, social security covers health care and family benefits and provides income security in cases of old age, unemployment, sickness, invalidity, work injury, maternity or loss of a main income earner. The concept of social security combines the idea of social insurance (protecting people against risks on the basis of their contributions) with social assistance (providing benefits to those who lack resources) (see above, section 4.8.3). The latter has greater right to food implications, as the right to food implies a state obligation to directly assist those who are not able to provide for themselves (see above, sections 1.1 and 3.5).³¹¹ As noted above, in such circumstances, the government has a duty to provide to everyone at least the minimum amount of food needed to ensure freedom from hunger (see above, section 3.5.4). The following sections explore some of the issues related to providing social assistance.

4.9.1 LEGAL GUARANTEE

Whereas developed countries generally have strong social security legislation, in most developing countries food safety nets have generally been set up through governmental regulations or decrees adopted by various state agencies on a temporary basis. From the human right to food perspective, ensuring that everyone has access to

310 Employment Injury Benefits Convention (No. 121) and Recommendation (No. 121), 1964; Invalidity, Old Age and Survivors' Benefits Convention (No. 128) and Recommendation (No. 131), 1967; Examination of Grievances Recommendation (No. 130), 1930; Employment Promotion and Protection against Unemployment Convention (No. 168) and Recommendation (No. 176), 1988; Equality of Treatment (Social Security) Convention (No. 118), 1962; Maintenance of Social Security Rights Convention (No. 157, 1982) and Recommendation (No. 167, 1983).

311 There is some controversy about the social and economic effects of social assistance and its supposed negative effects on the capacity of people to ensure their livelihoods by their own means and efforts. For a summary of the main arguments, see, for example, ILO. 2001.

food is not enough. It is also important that they have so as a matter of *right*, and that corresponding obligations be imposed on public and private actors who may have an impact on the enjoyment of that right. When such food schemes are not established by law, they leave the identification of beneficiaries to the discretion of government officials and do not provide for the procedures and sanctions for non-implementation or violations.³¹² Establishing social assistance benefits including food safety nets as a legal entitlement empowers people to claim their rights and makes the administration accountable for complying with its obligations. In this sense, when reviewing social assistance schemes from the right to food perspective, countries should ensure they have a clear legal basis, stability, regularity and effective mechanisms for the protection and vindication of rights. Box 80 gives an example of a legislation serving as a framework for various social assistance programmes in a country.

BOX 80. Providing a legal framework for food safety nets in Argentina

The Law on the National Programme on Food and Nutrition of **Argentina** (2003) was adopted to coordinate all existing social welfare programmes related to food security in a holistic manner. The Law states as its purpose the implementation of “a duty of the state to guarantee the right to food for all”. The law targets children under 14 years, pregnant women, disabled people and the elderly living below the poverty line. The Law promotes decentralization by creating a national framework to which the provinces adhere through an agreement. The designated implementing authorities are the Ministry of Health and the Ministry of Social Development while national, provincial and municipal commissions on food and nutrition function as coordinating bodies. The National Commission on Food and Nutrition is charged with, among other issues, setting criteria and conditions for receiving benefits from the National Programme, ensuring equity in distribution, setting up a single registry of beneficiaries and establishing mechanisms of control and evaluation of the state of nutrition in the country.

4.9.2 TARGETING AND DESIGN OF BENEFITS

Unlike public health services, which are broadly applicable, social assistance is generally targeted at those most in need. There are many different targeting methods, including targeting based on means, demography (children, elderly, disabled) or geography, along with self-targeting and community-based targeting.³¹³ On the whole, targeting has often failed to reach many of those in greatest need,³¹⁴ thus failing to facilitate the realization of the right to food. Among the reasons are:

312 See Coady, D. Grosh, M. & Hoddinott, J. 2004.

313 See Subbarao, K., Braithwaite, J. & Jalan, J., 1995 and Coady, D. Grosh, M & Hoddinott, J. See also, FAO, 2006b. pp. 26–27.

314 See, for example, ILO, 2001, Krishna, A. 2007.

complicated and time-consuming procedures; costs and difficulties in obtaining accurate information; lack of awareness among possible beneficiaries; lack of legal identity documentation; wide administrative discretion opening the way to favouritism and discrimination; and poor implementation. Targeting has also had perverse effects, including social stigmatization of intended beneficiaries.

Universal assistance is advocated by some as a possible solution³¹⁵ to targeting problems, since it can reduce official discretion to determine whether a person qualifies for benefits or not. It can also prevent stigmatization, discriminatory practices and abuses, and enhance equality, in particular gender equality. As such, universal assistance could be instrumental in implementing the right to food. On the other hand, universal assistance could be a challenge in terms of costs, organization and resources, and might not be realistically possible in many countries.³¹⁶

To ensure a rights-based approach and compatibility with the right to food, the targeting mechanism must cope with increasing complexity: it should focus not only on households but also on groups and individuals. This would facilitate ensuring that each person and group receives the type and form of assistance most adapted to their needs. This implies, *inter alia*, identifying different types of vulnerability among the right holders and the severity of the difficulties they face. This requires an adequate level of data disaggregation (e.g. gender, age distribution, membership of certain ethnic groups and indigenous peoples). Such identification and characterization of the right holders may also involve significant costs; at the same time, however, the advantages of this approach in terms of reducing food insecurity and hunger and, more generally, improving people's autonomy in the short term and their income earning potential in the future may be far more important.

Furthermore, the established eligibility requirements should be transparent, fair and non-discriminatory; they should be made public and easily accessible to all; all registration or application procedures should be fair, simple and accessible and accompanied by proper safeguards, access to independent review and adjudication of complaints. It is particularly important that authorities in charge, their mandates and responsibilities are clearly designated without excessive discretion and that people are duly informed about their rights under the established forms of assistance. Affording competent authorities discretion with regard to benefits delivery would be contrary to human rights

315 See, for example, Künnemann, R. 2005; ILO. 2001; and Seekings, J., 2006.

316 Nonetheless, the idea of establishing a universal basic income as a tool to eradicate hunger and combat poverty has attracted much interest in recent years and a number of countries, including Namibia and South Africa, are currently envisaging its introduction. Brazil adopted a law in 2004 to introduce universal basic income (Law No 10.835). See Seekings, J., 2006. The Basic Income Earth Network (originally created in 1986 as "Basic Income European Network") has recently been created to serve as a link between individuals and groups committed to or interested in basic income, and to foster discussion on this topic worldwide (see www.basicincome.org; see also www.usbig.net).

standards, which require that assistance be provided to every person who fulfils the eligibility criteria. Thus designed, social safety nets would ensure the implementation of right to food standards and human rights principles.

In the context of the review of relevant legislation, the review team should also keep in mind that, in some situations, direct assistance is the necessary response on a continual basis: about a quarter of people suffering hunger and food insecurity are unable to work due to undernourishment, infirmity or responsibilities such as family care (e.g. HIV-positive people).³¹⁷ They should be entitled to receive the minimum food entitlement irrespective of age, employment status or other requirements to ensure freedom from hunger (see above, section 3.5.4).

Design of benefits

Social assistance varies from one country to another; in some, it is the sole safety net, while in others it is part of a wider safety net including other allowances and associated rights. In developed countries, social assistance benefits generally guarantee an income intended to support a “decent standard of living” (e.g. consisting of food, housing, clothing, health care, education) thus going beyond the right to food. In most developing countries, food safety nets aim mainly to ensure a minimum amount of food consumption and to protect households against shocks (see above, section 4.8.3).³¹⁸ In some countries established benefits are provided in kind (i.e. food products); in others, they are delivered through cash-like instruments (food stamps, coupons) or cash transfers.³¹⁹ In some countries, social assistance contains a mixture of both in kind and cash benefits.

Each option has advantages and disadvantages. In general, distributing food in kind is costly.³²⁰ In addition, it is frequently not possible to provide fresh food, which can result in not giving food that is nutritionally adequate. Providing food free of charge may also distort local food markets and harm farmers’ livelihoods, thus worsening their living conditions. However, where food is

317 See Künnemann, R. 2005.

318 See FAO, 2006b. These include supplementary feeding programmes such as school lunch programmes, maternal and child nutrition programmes, community kitchens, emergency feeding programmes, food for work programmes, feeding and health programmes and conditional or unconditional income transfers (See Lorge Rogers, B. & Coates, J. 2005).

319 For more detailed information, see FAO. 2006a.

320 For example, in a maternal-child health programme in Honduras, it cost 1.03 lempiras to deliver 1 lempira of income transfer in the form of a cash-like coupon, while it cost 5.69 lempiras to deliver the same income transfer in the form of food (see Lorge Rogers & Coates. 2005, p. 2). For more information see, for example, Howell, F. 2001.

not available, it may be necessary to provide the assistance in kind. In the light of human rights principles, deciding on the most appropriate option for social assistance legislation requires a sound assessment of needs, including thorough consultation with and active participation of the people concerned.³²¹ To the extent possible, determination of appropriate assistance benefits should be centred on an individualized assessment of needs, to comply with international human rights standards (see above, Box 79). This implies, *inter alia*, that specific needs of infants, children, pregnant and breastfeeding women, disabled or sick persons should be taken as a basis for determining the amount of established benefits. The established level of benefits should also be regularly reviewed and adjusted in order to correspond to the determined minimum quantity of food. When benefits are given in kind, legislation should require that such food be nutritionally adequate and safe, bearing in mind local circumstances, dietary traditions and cultures (see Right to Food Guideline 14.5).

Whereas all benefit design options can increase the accessibility of food for the concerned individuals, they can affect their *ability to realize* their human right to food differently, i.e. their capacity to become self-reliant when they are able-bodied adults (see above). As noted above, the obligation to fulfil people's right to food also requires measures to facilitate people's gradual social and economic integration. The Right to Food Guidelines invite states to consider accompanying food assistance in safety net schemes with complementary activities to maximize benefits towards ensuring people's access to and use of adequate food (Guideline 14.6). In the context of the review of social assistance legislation, combining direct assistance with facilitating measures – such as access to health care, social integration programmes or employment opportunities – can assist in ensuring transition from relief to self-sufficiency and thus in realizing people's right to food.³²²

321 However, in practice, the most appropriate form for each country will also depend, among other factors, on its institutional and administrative capacity, legal and economic system, state of corruption and insecurity, and coverage of benefits.

322 Conditional cash transfer programmes like *Oportunidades* in Mexico and *Bolsa Familia* in Brazil that link direct financial aid to the enrolment and regular attendance of children at school and attendance at the local health centre are increasingly being promoted as best practice in the social sector for developing countries in other parts of the world. At the same time, some have raised concerns about conditionality: among other issues, it is costly, difficult to monitor and can also impose costs on beneficiaries. See, for example, Reynaud, E. 2006; Davis, B. 2006.

4.10 NUTRITION, FOOD SAFETY AND CONSUMER PROTECTION

The right to adequate food means food that is not only sufficient in quantity but also safe and nutritious (see above, Part One). The Right to Food Guidelines therefore require states to ensure that all food, both locally produced and imported, is safe and consistent with national food safety standards (Guideline 9.1). Countries are also invited to increase the production and consumption of healthy and nutritious foods, especially those rich in micronutrients. To this end, the planting of gardens at home and at school can be central to combating micronutrient deficiencies and promoting healthy eating (Guidelines 10. 2 and 10.3).

Good nutrition and health depend, in large part, on the consumption of adequate amounts of good quality, safe food. Nutrition is essential for a person to grow, develop, work, play, resist infection and aspire to the realization of his or her fullest potential as an individual and as a member of society. In contrast, malnutrition increases the susceptibility to diseases, stunts mental and physical development and can lead to disability and death and, as a result, slows national development.³²³ At the same time, malnutrition stemming from an excessive or unbalanced intake of food or certain types of food is emerging among all age and socio-economic groups, in both developed and developing countries and especially in those caught up in the swiftest societal transition. As a result, diet-related diseases, such as diabetes, cardiovascular disease, hypertension and stroke are escalating, placing an additional burden on precarious health systems. Poor food safety and inadequate nutritional quality are also major causes of undernutrition.

Furthermore, food-borne diarrhoeal diseases are estimated to kill more than 2 million people a year, mostly children, in developing countries.³²⁴ Food-borne illnesses have serious social and economic consequences, including losses in income and income generating capacity. Unsafe food and food-borne illnesses contribute

323 See WHO. 2000.

324 See FAO. 2003g.

to decreased worker productivity, disability and even early death, thus lowering incomes.³²⁵ On the other hand, the application of good agricultural and hygienic practices in food production, processing and distribution improves food safety and reduces food losses, thereby increasing food availability and food security. Countries that are able to ensure food safety standards can also take advantage of international trade opportunities.³²⁶ Labelling requirements can enable consumers to choose foods that are appropriate for their health needs and to avoid diets that can lead to undernutrition, obesity or chronic diseases. National legislation relating to food safety and nutrition is thus a key sectoral area relevant to the fulfilment of the right to food. The following sections examine a selected number of issues in this area.

4.10.1 FOOD SAFETY STANDARDS

Many countries have adopted specific food laws and standards; in many others, food safety has been pulled under the umbrella of human health, addressed under a public health law or health protection law. Some countries do not have a specific legislation but rely on international instruments. Box 81 gives a short overview of the two main international instruments dealing with the formulation and application of food safety standards.

BOX 81. International food standards

Among various instruments developed at the international level, two are the most influential for national law and policy-makers: the Codex Alimentarius and WTO Agreements.

Codex Alimentarius

The Codex Alimentarius is a collection of international food standards, codes of practices, guidelines and other recommendations that have been adopted by the Codex Alimentarius Commission, a joint body of FAO and WHO. The Commission develops international food standards with the objective of protecting consumer health and ensuring fair practices in the food trade. Codex standards and related texts cover all the main foods, whether processed, semi-processed or raw.



325 See FAO. 2003h.

326 *Ibidem*.

BOX 81. International food standards (cont.)

They address, among other issues, food additives, contaminants, veterinary drug and pesticide residues and microbiological hazards. Codex standards also address food hygiene, nutrition, labelling and sampling methods. The use of Codex standards ensures that standards implemented at the national level are based on science. The SPS and TBT Agreements of the WTO (see below) have recognized the importance of Codex standards as a benchmark for international harmonization of food standards, for developed and developing countries alike.

WTO Agreements

The Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) sets out the rights and obligations of WTO members wishing to apply measures to protect human and animal life and health (sanitary) and plant life and health (phytosanitary). Food safety measures must be justifiable on the grounds of protecting public health and must be based on a sound, scientific risk assessment. National SPS measures must not be applied in a manner that constitutes arbitrary or unjustifiable discrimination or a disguised restriction on trade. The SPS Agreement also encourages the participation of member states in the relevant international organizations (the Codex Alimentarius Commission, for food safety).

The Agreement on Technical Barriers to Trade (TBT Agreement) seeks to ensure that technical regulations and standards, including packaging, marking and labelling requirements as well as testing and certification procedures, do not create unnecessary obstacles to international trade. It covers all technical standards not covered by the SPS Agreement, and applies to all food products, including agricultural products. The product definitions, including essential quality provisions, and the food labelling requirements in the Codex Alimentarius, are considered as the relevant international benchmark for foods.

Sources: See Vapnek & Spreij, 2005, pp. 19–20.

www.who.int/foodsafety/codex/general_info/en/index.html

www.codexalimentarius.net/web/index_en.jsp

www.wto.org/english/thewto_e/whatis_e/tif_e/agrm4_e.htm#TRS

Food safety legislation is necessary to reduce the risk of food-borne diseases. Although it was not conceptualized with the right to food in mind, food safety legislation ensures that all food produced, imported and consumed is safe, and thus consistent with the adequacy dimension of the right to food. While an absence of law regulating food safety would constitute a serious gap in the protection of the right to food, such legislation may also have a negative impact on the realization of the

right to food by affecting the accessibility and the availability of food. This is because adherence to food safety rules involves very high costs (e.g. investments in food production and processing, and establishment of quality monitoring processes). Such rules can cause hardship to small producers who might lack the resources to move to compliance, and who can as a result lose their ability to provide for themselves. Compliance with stringent food safety standards may also increase food prices, with negative consequences for economic accessibility of food or accessibility of adequate food for poor consumers who may opt for cheaper and possibly less safe food. Food safety measures can also have a negative impact on trade, by making market access more difficult for poor producers and poor countries, which in many cases lack the capacity to comply with international standards applicable to exports.³²⁷

The review team should thus consider whether legislation or other policies take account of those actors in the food chain that may have difficulties complying with established food standards: small farmers, traders and processors, market sellers and street vendors. To ensure that food is adequate and safe while at the same time available and accessible, governments should adopt parallel measures (e.g. facilitating access to technology for small producers, providing support for investments) that prevent or minimize possible detrimental effects on the livelihoods of actors through the food chain, while keeping in mind applicable international trade rules. Box 82 illustrates the importance of careful balancing of possible trade-offs resulting from the application of high food safety standards.

BOX 82. Trade-offs linked to high food safety standards – examples from state practice

Brazil

The application of food safety regulations in *Brazil* led to several minor crops and products being excluded from formal markets as they did not comply with established standards. Honey produced by small farmers in the Amazon is one example. Brazil has a great diversity of native bees. To take account of varying environmental conditions, a local farmer might keep 15 species of 6 genera of bees, harvesting honey with different flavours, colours and nutrition quality. But because of strict standards regarding moisture content, small farmers from the Amazon cannot sell most of their honey as it does not meet the high food quality standards. Complying with them would require buying very expensive equipment for dehumidification, something that small farmers and poor rural communities that still keep these bees cannot afford. Moreover, most of the rural communities that conserve native bees do not even have electricity.

327 See FAO. 2003h, para. 7.

BOX 82. Trade-offs linked to high food safety standards – examples from state practice (cont.)

Although the established standards were considered necessary to ensure the higher public interest (i.e. public health), by not providing the necessary safeguards (e.g. facilitating access to the necessary equipment, proposing possible alternatives to honey production and other support measures for the small producers), the legislation resulted in hindering their capacity to exercise their right to food.

Source: see Rodriguez-Amaya, D.B. 2005.

India

In 1998, the *Indian* Government issued the Edible Oil Packaging (Regulation) Order, which provides that edible oils including mustard oil can only be sold in packed form and the packers must be registered with a registration authority. The Order also requires packers to have their own analytical facilities for testing samples of edible oils to the satisfaction of the government. The Order states that only oils that conform to the quality standards specified in the Prevention of Food Adulteration Act, 1954, may be packed. Under the Order, each container or pack will have to show all relevant particulars so that the consumer can identify the packer and is not misled. The Order was adopted in response to outbreaks of “epidemic dropsy”³²⁸ caused by contamination of mustard oil and other edible oils with argemone oil. Although the measure was necessary for protecting public health, imposing the ban on sale of edible oils in unpackaged forms had serious economic and social consequences for many small scale local oil mills and producers of local edible oils, as well as for the consumers. Producers who lacked the capacity to comply with the Order suffered negative impacts on their livelihoods whilst consumers lost access to food products they traditionally consumed. A careful balancing of interests was needed to ensure that the ban be accompanied by appropriate compensatory measures for those affected.

Source: *Tribune (India)*. 1998. (Online edition) 18/9; see also Shiva, V. 2005.

Another possible solution is a dual food production and distribution system – one for the local and another for the export market. The international standards used in international trade are very high and may in some cases be lowered with little or no risk to consumers, justifying a dual system. This may help ensure that the positive effects of food safety standards are maximized (so that food is safe and nutritionally adequate) while unwanted negative effects (on poor producers

328 Epidemic dropsy is a form of oedema due to intoxication with *Argemone mexicana* (Mexican prickly poppy).

and on consumers' food security and right to food) are avoided.³²⁹ Of course, the legislation should ensure that the standards for national markets remain high enough to protect people's right to adequate food. To conform to the human rights principle of transparency, standard setting procedures should be transparent and representatives of consumer groups, farmers and producers duly informed and, where appropriate, actively involved in taking decisions on food safety issues. This would also help with the difficult balancing of safety and affordability. Individuals must also be protected against harm caused by unsafe or adulterated food, including food offered by street vendors (see below, section 4.10.3).³³⁰

Protection of consumers

Another relevant dimension of food safety is the protection of consumers. The Right to Food Guidelines require states to ensure that education on safe practices is available for food business operators so that their activities neither lead to harmful residues in food nor cause harm to the environment. States should also take measures to educate consumers about the safe storage, handling and utilization of food within the household (Guideline 9.6). The provision of advice to consumers on the storage, handling and preparation of foods is also a key element of the food chain approach,³³¹ and essential to ensuring the adequacy of food. Improper handling and preparation can negate food safety measures introduced at earlier stages of the food chain; thus, food safety legislation should address all stages of the chain. Although under the modern conception of food safety, producers bear the ultimate responsibility for the placement of safe food on the market,³³² states retain their obligation under the right to food to regulate their conduct, to ensure that food safety standards are effectively enforced³³³ and to provide consumers with accurate information. The FAO Legal Office has prepared a legislative study containing a new model food law³³⁴ that could be used as a

329 See FAO. 2003h, paras 18, 19.

330 See Mechlem, K, Muehlhoff, E. & Simmersbach, F. 2005.

331 FAO defines the "food chain approach" as recognition that the responsibility for the supply of food that is safe, healthy and nutritious is shared along the entire food chain - by all involved with the production, processing and trade of food. See FAO. 2003g.

332 *Ibidem*.

333 See Vapnek and Spreij, 2005, p. 129.

334 According to Vapnek and Spreij, "food law" is generally used to refer to legislation regulating the production, trade and handling of food. The broader view would also look at all other legislative provisions, wherever they may be found, which are relevant to ensuring safe food. Falling into this category would be consumer protection or fraud deterrence laws, laws on weights and measures, customs laws, import and export rules, meat inspection laws, etc. It would also include regulation of food security as well as implementation of the right to food. See Vapnek & Spreij, 2005, p. 13.

reference during the review process.³³⁵ WHO has also developed several guidance documents applicable to this sector.³³⁶

4.10.2 NUTRITION STANDARDS

Implementing the right to adequate food means ensuring that all food that is available in the country is not only safe but also nutritionally adequate and in conformity with individual nutritional needs according to age, sex, health and occupation. The Right to Food Guidelines recommend that states maintain or strengthen dietary diversity (e.g. through the production of nutritious and culturally appropriate foodstuffs), and also improve production and consumption of a variety of nutritious foods (Guideline 10). States are also invited to consider adopting regulations to fortify foods to prevent and cure micronutrient deficiencies, in particular of iodine, iron and Vitamin A (Guideline 10.3).

To ensure that food is nutritionally adequate, countries should have legislation regulating its nutritional content. This will be especially important with respect to food for vulnerable persons and groups (e.g. adolescent girls, pregnant and breastfeeding women, infants and young children, people living with HIV/AIDS, people in institutional settings such as schools or hospitals). Nutrition standards should be in line with international dietary guidelines and rules on the composition and labelling of food products and health claims (see below). A number of jurisdictions are currently envisaging adopting or have adopted national rules on specific food ingredients considered as having deleterious effects on human health (see Box 83). In the context of the right to food compatibility review, the absence of adequate norms regulating nutritional content of food in a country can be considered by a review team as a gap to be addressed in the final report and a plan of action.

BOX 83. Regulating trans fats in food products – examples from state practice

In 2003, **Denmark** became the first country to enact legislation making it illegal for oils and fats to contain more than 2 grams per 100 grams of trans fats. This restriction applies to the ingredients rather than the final products. While it is still too early to assess the effect of the trans fat restriction on the health of Denmark's population (as the law only entered into force in 2004), the health ministry reported that cardiovascular disease has dropped by 20 percent from 2001 to 2006. **Switzerland** followed with a ban in April 2008.

335 *Ibidem*. Countries could also usefully refer to the joint FAO/WHO, 2003.

336 See the WHO Web site: www.who.int/foodsafety/codex/general_info/en/index.html

BOX 83. Regulating trans fats in food products – examples from state practice (cont.)

Other countries, including Canada, are also considering setting limits on trans fat contents in food products. In both **Canada** and the United States of America, trans fat labelling is mandatory, and several cities, including Calgary, New York City and Philadelphia, have banned the use of trans fats in restaurants. **California** became the first state in the **United States of America** to ban all trans fats in restaurants, adopting legislation in 2008 that will be implemented starting in 2010.

Source: See Brady, M. 2008; Kage, B. 2006.

In some countries, fortification of some foods (e.g. wheat flour) with specific nutrients at specific levels is made mandatory through legislation. The fortification of foods with iodine, iron and vitamin A can be essential to ensuring adequate nutrition where there is a demonstrated need to increase the intake of an essential nutrient by one or more population groups.³³⁷ Fortification of food with micronutrients is considered a valid technology and strategy when and where existing food supplies and limited access fail to provide adequate levels of essential nutrients in the diet, and where the fortified food is highly likely to be accessible to the target population.³³⁸ When legislation relating to fortification includes provisions banning the sale of unfortified products, the review team should consider the impact on small producers and their right to food.

Although fortification is useful, it should be combined with strategies to increase the variety of foods consumed, with particular emphasis on fruits and vegetables and with a focus on physiologically vulnerable persons such as children, pregnant and breastfeeding women. A complementary longer-term approach is

³³⁷ *Food fortification* has been defined as the addition of one or more essential nutrients to a food, whether or not it is normally contained in the food, for the purpose of preventing or correcting a demonstrated deficiency of one or more nutrients in the population or specific population groups. Other terminology exists for the addition of nutrients to foods. *Restoration* means the addition to a food of essential nutrients that are lost during the course of good manufacturing processes (GMP), or during normal storage and handling procedures, in amounts that will result in the presence in the food of the levels of the nutrients present in the edible portion of the food before processing, storage or handling. Enrichment has been used interchangeably with fortification, but elsewhere it has been defined as the restoration of vitamins and minerals lost during processing (see FAO. 1996).

³³⁸ See FAO. 2003i.

to promote a diversified dietary intake.³³⁹ A more diversified diet and increased consumption of plant foods will provide most missing vitamins and minerals in addition to phytochemicals.³⁴⁰ This is particularly true for population groups that suffer from multiple micronutrient deficiencies that – because they are mainly a result of insufficient total energy intake – cannot all be addressed by fortified foods.³⁴¹ The review team can thus consider including into the final report also recommendations in this regard.

4.10.3 FOOD LABELLING, ADVERTISING AND MARKETING

In the context of the human right to food, the transparency principle requires states to protect consumers against deception and misrepresentation in the packaging, labelling, advertising and sale of food.³⁴² Consumers cannot procure an adequate supply of safe and nutritious food without clear and reliable nutrition information, and without protection from advertising and marketing campaigns that misleadingly represent foods as being nutritious and healthy. The Right to Food Guidelines require states, among other, to facilitate consumers' choice by ensuring appropriate information on marketed food, and provide recourse for any harm caused by unsafe or adulterated food, including food offered by street sellers (Guideline 9.7). Legal developments concerning regulation of nutrition and health claims on food labels and in advertising at the international and regional levels, in particular within the EU, can be a useful reference during the compatibility review of legislation relating to this issue (see Box 84).

Although all members of society, including the private sector, have responsibilities in the realization of the right to adequate food (GC 12, para. 20), the ultimate responsibility for its realization remains with states – under their obligation to protect this human right. States must ensure that activities by private actors do not infringe on people's right to adequate food. Because food labelling, advertising and marketing may affect the enjoyment of the right to food, they must be carefully regulated by the state. A label enables consumers to exercise choice in the food they buy. Most countries have enacted legislation requiring nutrition labelling. The review team should keep in mind that consumers can only make proper

339 FAO's Nutrition Division is currently preparing a publication intended to document the benefits of food-based approaches (FBAs), particularly of dietary improvement and diversification interventions, in controlling and preventing micronutrient deficiencies. The publication will focus on practical actions for overcoming micronutrient deficiencies through increased access to, and consumption of, adequate quantities and variety of safe, good quality food. It will also gather a variety of relevant advocacy and technical material under one cover to encourage and promote further attention to and investment in such activities.

340 See FAO. 2003i.

341 *Ibidem*.

342 See GC 12, para. 11 and Right to Food Guideline 9.7.

choices if the food label conveys meaningful nutritional information about foods in a simple, clear, consistent format allowing them to understand the ingredients and use the food correctly. Legislation should require that labels be in the language or languages of the country or have a translation attached. This ensures the compatibility of the concerned legal provisions with human rights principles of transparency and empowerment.

BOX 84. Regulating food labelling and nutrition and health claims – international and regional standards

The Codex Committee on Food Labelling develops international guidelines on nutrition labelling and health claims. The 1979 General Guidelines on Claims were supplemented by the Guidelines for Use of Nutrition and Health Claims in 1997.³⁴³ The Guidelines define the circumstances under which nutrients, nutrient content and nutrient comparative claims are permitted. Health claims are not as yet covered by a Codex standard or guideline although discussions are ongoing.

EU Regulation No. 1924/2006 on nutrition and health claims made on food is based on the principle that such claims may only appear on foods introduced into the Community market if they are not false or misleading and if they can be supported by scientific evidence, and the regulation aims to provide a higher level of consumer protection as well as harmonize legislation across the EU to facilitate intra-Community trade. More specifically, the regulation controls nutrition and health claims by means of positive lists of authorized claims that can be made on food together with the criteria a product must meet to use them. The annex of the Regulation contains a list of permitted nutrition claims and the Regulation puts in place processes for the compilation of the list of authorized claims.

Advertising is another key area requiring state regulation. A growing number of countries prohibit advertising food in a manner that is false or misleading (i.e. implying for example, that a product is nutritionally beneficial and part of a healthy lifestyle if regularly consumed, or failing to disclose the use of certain substances or manner of processing). In addition, advertising directed at children requires particular attention.

Advertising and marketing to children

Proper nutrition during childhood and adolescence is essential for growth and development, health and well-being, and eating behaviours established during childhood track into adulthood and contribute to long-term health and chronic

³⁴³ See Codex Guidelines for Use of Nutrition and Health Claims (CAC/GL 23-1997, Rev. 1-2004).

disease risk. A joint report of a WHO/FAO Expert Consultation concluded in 2002 that the heavy marketing of fast food and energy dense, micronutrient poor foods and beverages is “probably” a causal factor in weight gain and obesity in children.³⁴⁴

Although many factors, including parental responsibility, influence childhood eating behaviours and food choices, one potent force is food advertising.³⁴⁵ There is a growing trend to regulate marketing and advertising of food and drink to children (see box 85).³⁴⁶

BOX 85. Legislation on marketing and advertising to children

The Children’s Food Campaign in the **United Kingdom of Great Britain and Northern Ireland** calls for a ban on marketing and vending machine sale of junk foods and fizzy drinks at schools, for mandatory quality guidelines regarding school meals and for providing food and nutrition education.³⁴⁷ The campaign has twice introduced a Children’s Food Bill in Parliament, which garnered significant support.³⁴⁸

The Government of **France**, after the adoption of the Public Health Act (2005), removed vending machines from schools. **California (United States of America)** has also banned vending machines from schools.

Québec (Canada) has taken a particularly strong stance, completely banning *all forms of advertising* to children under 13. A push for a ban of junk food advertising is also in progress in **Australia**, and is being seriously debated or already on the way to implementation in, among other countries, **Brazil, Malaysia, South Africa** and the **Republic of Korea**.

Source: See Garde, A. 2006; Hawke, C. 2007.

344 See WHO. 2003b. Other causes include inadequate breastfeeding, changing dietary consumption towards high-energy, low-nutrient-dense food items including fat-rich snacks and drinks containing high levels of sugar or salt.

345 A systematic review commissioned by the United Kingdom’s Food Standards Agency found that advertising does affect food choices and does influence children’s dietary habits. See Hastings Report. 2003.

346 Of course, appropriate regulation must be accompanied by other measures such as, for example, the provision of healthy school meals, education and awareness raising about food nutrition standards and labelling, and measures ensuring that the private sector is also working to protect children’s best interest.

347 See <http://www.sustainweb.org/childrensfoodcampaign/>

348 See www.publications.parliament.uk/pa/cm200506/cmbills/023/2006023.pdf

A useful resource for the review team will be the so-called “Sydney Principles” on marketing to children. These seven principles, adopted in 2008 by the International Obesity Taskforce, provide that actions to reduce marketing to children should: support the rights of children; afford substantial protection to children; be statutory; take a wide definition of commercial promotions; guarantee commercial-free childhood settings; include cross-border media; and be subject to evaluation, monitoring and enforcement. Box 86 provides a brief overview of the development of the Sydney Principles.

BOX 86. “Sydney Principles” on marketing to children

Subsequent to a WHO Forum and Technical Meeting on the issue of marketing to children in May 2006, the International Obesity Taskforce (IOTF)³⁴⁹ developed a set of seven principles to guide action on changing marketing practices to children. The first draft of the so-called Sydney Principles was circulated to various persons and organizations active in the field, with the resulting study confirming that the vast majority of professional and scientific associations, consumer bodies, industry bodies, health professionals and other interested parties agree that a set of principles is needed. There was also wide support for each of the draft principles circulated except the third principle, which calls for statutory regulation, and not all industry respondents agreed with this. According to the study author, Professor Boyd Swinburn: “The momentum is building for an international code on marketing to children, so we expect that the Sydney Principles will underpin the content such a code.”

Source: International Association for the Study of Obesity (see www.iaso.org); 2008.

Marketing of breastmilk substitutes

The marketing of infant nutrition also warrants careful attention. For babies and infants, exclusive breastfeeding for the first six months of life, thereafter complemented by nutritionally adequate and safe complementary foods,

349 The International Obesity Taskforce (IOTF) is a global network of expertise and the advocacy arm of the International Association for the Study of Obesity. It works to raise awareness of the risks of obesity and encourage governments to act.
See: www.iotf.org/whatisiotf.asp

is – according to current knowledge and except in specific cases³⁵⁰ – the best way to ensure babies’ optimal growth, development and health.³⁵¹ Growing commercialization of infant food and the relative decline of breastfeeding in many countries led to the adoption of the International Code of Marketing of Breast-milk Substitutes under the auspices of WHO and UNICEF that aims at protecting and promoting breastfeeding (see Box 87).

BOX 87. International Code of Marketing of Breast-milk Substitutes

The International Code of Marketing of Breast-milk Substitutes was prepared by WHO and UNICEF after a widespread consultation process among health professionals, civil society, NGOs and the baby-food industry. The aim of the Code is to encourage safe and adequate nutrition for infants by protecting and promoting breastfeeding, and by ensuring the proper use of breastmilk substitutes, where these are necessary, on the basis of adequate information and through appropriate marketing and distribution (Art. 1). It was adopted in 1981 by the World Health Assembly which includes the Ministers of Health of the world’s governments (Resolution WHA34.22) as a “minimum requirement” to protect infant health and is to be implemented “in its entirety.”

Manufacturers and distributors of products within the scope of the Code are invited to comply with it on a voluntary basis. However, under the obligation to protect the right to food of vulnerable groups such as children, states should adopt appropriate measures, including legislation, to implement the right at the national level.

The UN Committee on the Rights of the Child increasingly looks to whether governments have implemented the Code in assessing compliance with the Convention on the Rights of the Child.

Source: Brady, M. 2008; The International Baby Food Action Network (IBFAN), What is the International Code? (available at: <http://www.ibfan.org/english/issue/code01.html>).

350 For example, mothers suffering from stark undernutrition, probability of virus transmission (e.g. HIV/AIDS) through breastmilk.

351 See WHO. 2006.

A number of countries have adopted specific legislation to promote breastfeeding and to regulate the marketing of breastmilk substitutes. Good resources for the review team will be the International Code mentioned earlier (see Box 87) as well as subsequent World Health Assembly Resolutions on how infant food marketing can and should be regulated.³⁵²

³⁵² Among others, Resolutions on infant and young child nutrition WHA 43.3, WHA 49.15, WHA 54.2 and WHA 55.25 (which endorsed the WHO Global Strategy on Infant and Young Child Feeding (A.55/15) of 16 April 2002).