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Financing the World Health Organization: what lessons for multilateralism?

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Abstract

When it comes to financing the work of international organizations, voluntary contributions from both state and nonstate actors are growing in size and importance. The World Health Organization (WHO) is an extreme case from this perspective, with voluntary contributions - mostly earmarked for particular purposes - comprising more than 80 percent of its funds. Moreover, nonstate actors are by now supplying almost half of WHO's funds, with the Bill and Melinda Gates Foundation ranking as the second-highest contributor after the United States. A number of public-health and international relations scholars have expressed alarm over these trends, arguing that heavy reliance on multilateral contributions is inconsistent with genuine multilateralism. Relying on interviews with current and former WHO officials, our study explores the causes and consequences of these trends, and recent efforts by the WHO secretariat to reconcile growing reliance on voluntary contributions with multilateral governance. We describe the headway WHO has made in mitigating the risks associated with heavy reliance on voluntary contributions—as well as the challenges that persist. Most importantly, we argue that multilateralism is not categorically incompatible with reliance on voluntary contributions from both state and nonstate actors. Collective multilateral decisionmaking is not a binary feature, either present or absent. Even if the final decision to provide voluntary contributions is up to individual donors, international institutions have opportunities to regulate them both in terms of substance and process. The more heavily regulated voluntary contributions are, the more embedded they become in collective decisions, the less tension there is between multilateralism and reliance on voluntary contributions.

Keywords

World Health Organization, multilateralism, financing, assessed contributions, voluntary contributions, budget, donors.

1. Introduction

The government officials that negotiated and drafted the charters of the international organizations that make up the UN system articulated grand ambitions for these institutions, including: the maintenance of international peace and security¹, “the expansion and balanced growth of international trade,”² and—in the case of the World Health Organization—“the attainment by all peoples of the highest possible level of health.”³ Yet the financial resources that member states have provided to these organizations to advance these goals have, over the years, remained comparatively limited. Pitched battles over the size and allocation of organizations’ budgets are not uncommon. States often pay their assessed contributions late or not at all. As a result, for most international organizations, scrambling for resources is the norm rather than the exception.

Rather early on, international organizations started turning to voluntary contributions to help fund their work. Usually member states provided these voluntary contributions, but other international organizations, philanthropic organizations, and other private actors have also provided such funds. Often these voluntary contributions were earmarked for particular purposes. The total amount of such contributions and their share of international organizations’ overall budgets has varied over time, both across and within organizations. Still, the overall trends are clear: voluntary contributions from both state and nonstate actors are growing in size and importance.⁴

WHO simultaneously reflects both of these trends. The share of WHO’s budget funded by voluntary contributions has grown steadily over the last several decades and shows no sign of slowing. During 2016-17 (the most recent biennium for which complete data is available), voluntary contributions comprised 80 percent of WHO’s

¹ *Charter of the United Nations* art. 1(1).

² Articles of Agreement of the International Monetary Fund, signed on 27 December 1945, 2 UNTS 39 (entered into force 27 December 1945) art. 1(ii).

³ Constitution of the World Health Organization, opened for signature 22 July 1946, 14 UNTS 185 (entered into force 7 April 1948) art 1 (*‘WHO Constitution’*).

⁴ Henry G. Schermers and Niels M. Blokker, *International Institutional Law* (Brill Nijhoff, 6th rev. ed., 2018) 688 [1022] (noting the overall trend and citing Interpol as an example: “in the mid 1990s, 95 percent of the income of Interpol came from compulsory contributions of the member states; in 2013, this was only 68 percent (32 percent coming from extrabudgetary resources”); Erin R. Graham, ‘Money and Multilateralism: How Funding Rules Constitute IO Governance’ (2015) 7 *International Theory* 162, 183-87 (describing growth of restricted voluntary contributions in the UN system between 1990 and 2012); see also below n 10.

revenue.⁵ Nearly all of these voluntary contributions were earmarked for particular purposes.⁶ At the same time, the share of WHO's revenue supplied by nonstate actors has grown. During the most recent biennium, nonstate actors supplied almost half of WHO's revenue.⁷ Strikingly, the Bill and Melinda Gates Foundation has become the second-highest contributor to WHO, exceeding all member states except for the United States.⁸ Although WHO is hardly alone in relying heavily on voluntary contributions, it is the extreme case among international organizations.⁹ (There are, however, individual programs and funds of other organizations that rely exclusively or almost exclusively on voluntary contributions.¹⁰)

⁵ See WHO Results Report: Programme Budget 2016-2017, 71st World Health Assembly, agenda item 15.1, WHO Doc A/71/28 (May 2018) 5 (noting that total revenue for the 2016-17 programme budget was US\$ 4.756 billion, with \$928 million in assessed contributions from Member States and \$3.828 million in voluntary contributions).

⁶ During the 2017-18 biennium, only 5% of voluntary contributions were flexible. This percentage includes voluntary contributions that the WHO secretariat described as "fully or highly flexible" and "of a medium level of flexibility." *Voluntary contributions by fund and by contributor, 2017*, WHO Doc. A71/INF./2 (19 April 2018) 2.

⁷ *Ibid* 7. Among the nonstate actors, philanthropic foundations provided 17% of revenue for 2016-17; other international organizations provided 15%; partnerships and nongovernmental organizations each provided 7%; private sector entities provided 3%; and academic institutions provided less than 1%.

⁸ *Ibid* 5.

⁹ Joint Inspection Unit, *Voluntary Contributions in United Nations System Organizations*, JIU/REP/2007/1 (2007) 28 (noting that in 2005, extrabudgetary resources as a proportion of total resources were 69.8 percent at WHO, 64.1 percent at UNIDO, 53.3 percent at UNESCO, and 46.3 percent at FAO). Since then, that share has grown, and not just at WHO. See, e.g., Food and Agriculture Organization, *How We Work*, <http://www.fao.org/about/how-we-work/en/> (noting that 39 percent of the total FAO budget planned for 2018-19 comes from assessed contributions, while 61 percent "will be mobilized through voluntary contributions from Members and other partners").

¹⁰ For example, the UN Environment Programme depends on voluntary contributions for 95 percent of its income. UN Environment Program, *Funding and Partnerships*, <<https://www.unenvironment.org/about-un-environment/funding-and-partnerships>>; UNHCR, *Donors*, <<https://www.unhcr.org/en-us/donors.html>> ("UNHCR relies almost entirely on voluntary contributions from governments, UN and pooled funding mechanisms, intergovernmental institutions and the private sector."); United Nations Development Programme, *Our Funding*, <<https://www.undp.org/content/undp/en/home/funding.html>> ("In order to achieve our mandate, UNDP relies entirely on voluntary contributions from UN Member States, multilateral organizations, private sector and other sources, in the form of unrestricted regular resources (core), and contributions earmarked for a specific theme, programme or project."); UNICEF, *UNICEF National Committees*, <<https://www.unicef.org/unicef-national-committees>> ("UNICEF is funded exclusively

As Part 2 describes, advocates, scholars, and even international organizations themselves have for some time been ringing alarm bells about the growing prominence of voluntary contributions. A key concern is that these “extrabudgetary” contributions are hollowing out the collective decision-making and the governance mechanisms set out in organizations’ charters. International organizations are pursuing the disparate projects that individual donors choose to support instead of implementing coordinated and coherent strategies to advance the collective goals for which these organizations were created in the first place.

Our study focuses on recent innovative efforts at the World Health Organization to reconcile growing reliance on voluntary contributions with multilateral governance.¹¹ Part 3 introduces the legal and regulatory framework that governs the financing of WHO; Part 4 describes two key changes initiated by the World Health Assembly, which is the WHO’s plenary organ. In 2013, the World Health Assembly decided that voluntary contributions would no longer be “extrabudgetary.” Until then, the practice of the Health Assembly had been to appropriate only the portion of the budget funded by assessed contributions.¹² Since that year, the Health Assembly has approved the entire budget under *all* sources of funds, including both assessed and voluntary contributions.¹³ Another notable development is the Health Assembly’s adoption of the Framework for Engagement with Non-State Actors (FENSA) in 2016.¹⁴ To address concerns that nonstate actors had become too influential, FENSA established detailed rules to regulate WHO’s interactions with philanthropic foundations, nongovernmental organizations, the private sector, and academic institutions. FENSA is the first example within the UN system of such a comprehensive policy.

To assess the effects of these developments, and to better understand the implications of WHO’s heavy reliance on voluntary contributions, we interviewed

by voluntary contributions”); World Food Programme, *Operations and Resource Situation*, <<https://www.wfp.org/operations-old/resourcing>> (“WFP relies entirely on voluntary contributions to finance its humanitarian and development projects.”).

¹¹ Jason Seawright and John Gerring, ‘Case Selection Techniques in Case Study Research’, 61 *Political Research Quarterly* (2008), 294, 301-02 (noting that the “extreme case method” is useful as an “exploratory method—a way of probing possibly causes of Y, or possible effects on X, in an open-ended fashion”).

¹² An example is resolution WHA58.4 of May 23, 2005, which appropriated US\$995 315 000 and noted VC for US\$2 398 126 000, leading to a total effective budget of US\$3 313 441 000.

¹³ *Programme Budget 2014-2015*, WHA Res. 66.2, WHA66/2013/REC/1, 66th sess, 8th plen mtg, (24 May 2013) 3.

¹⁴ *Framework of Engagement with Non-State Actors*, WHA Res WHA69.10, WHA69/2016/REC/1, 69th sess, 8th plen mtg (28 May 2016).

about 20 current and former WHO officials.¹⁵ The interviews were semi-structured and lasted, on average, about one hour. We selected our interviewees with a range of experiences at the organization in management, leadership, and technical positions at all three levels of the organization: at WHO's headquarters in Geneva, regional offices, and country offices. In some cases, we sought chain referrals and asked our interviewees to identify other individuals who could supply more details about various facets of WHO's operations. Because WHO's financing model has changed quite dramatically in a short period of time, many of our interviewees had personally experienced the consequences of these shifts. Our findings, set out mainly in Part 5, describe the headway WHO has made in mitigating the risks associated with heavy reliance on voluntary contributions—as well as the challenges that persist.

To be sure, our methodology has limitations. A more complete study of WHO's financing model would, among other things, seek out the views and experiences of government officials and philanthropic organizations. Separately, we note that one of the co-authors, who served as the Legal Counsel of WHO, has personal and/or professional relationships with many of the interviewees. We recognize that our interviewees may have been influenced by these relationships; we recognize too that some interviewees may have hesitated to share their experiences or views in every particular. To encourage maximally candid responses, we offered our interviewees anonymity.

Part 6 steps back to take stock, and to consider the implications of our findings for multilateral organizations more broadly. Most importantly, we argue that multilateralism is not categorically incompatible with reliance on voluntary contributions from both state and nonstate actors. As the WHO example demonstrates, decisions about an organization's activities and its budget are multifaceted. Organizations' governance bodies don't necessarily give up all control when voluntary contributions enter the picture. And, indeed, governance bodies can go even further in regulating voluntary contributions and embedding them in a multilateral framework.

Separately, when it comes to evaluating voluntary contributions, it's essential to consider not only their risks but also the advantages—and also to consider the alternatives. Voluntary contributions can play an important role in assuring that international organizations are resilient and can withstand variable support among their member states. Moreover, some of the literature that decries voluntary contributions is built on an unrealistically rosy view of assessed contributions and the “regular” budget process. All financing mechanisms pose risks that international organizations have to manage.

¹⁵ Other legal scholars have demonstrated the value of such an approach for better understanding dynamics within a secretariat and between an IO secretariat and member states. See especially Galit A. Sarfaty, *Values in Translation* (Stanford University Press, 2012).

2. The Risks of Reliance on Voluntary Contributions

For any public organization, budgeting decisions—that is, decisions about how much money to spend, and on what to spend it—are key policy choices.¹⁶ Notwithstanding the importance of this issue, financing of international organizations is a “somewhat neglected” topic in the literature on the law of international organizations.¹⁷ The key question that has occupied legal scholars is under what circumstances, if any, individual member states have a legal right to withhold their assessed contributions.¹⁸ Along this dimension, voluntary contributions do not pose any problems because, by definition, these contributions are voluntary, and thus member states do not have legal obligations to provide them.¹⁹

Across the UN system, voluntary contributions have long been labeled—and treated as—“extrabudgetary” funds.²⁰ Unlike the portion of international organizations’ work that is funded by assessed contributions, the portion funded by “extrabudgetary” contributions is generally not subject to the ordinary process for budgetary decision-making through the governance mechanisms set out in individual organizations’ charters. Instead, the size of voluntary contributions and the nature and extent of any earmarks are determined by individual donors. Some contributions are earmarked for very specific purposes, while others leave considerable discretion to the receiving organization.

¹⁶ As Schermers and Blokker observe in their treatise on international organizations, “The budget contains the financial reflection of the entire policy of the organization. Its adoption, therefore, offers a possibility to discuss and review this policy.” Schermers and Blokker, above n 4, (6th rev. ed 2018) 727 [1100]. Although our focus is international organizations, the same is true of the budgets of national governments and administrative agencies as well. See, e.g., Eloise Pasachoff, ‘The President’s Budget as a Source of Agency Policy Control’ (2016) 125 *Yale Law Journal* 2182 (2016).

¹⁷ Schermers and Blokker, above n 4, 635 [925].

¹⁸ ICJ, *Certain Expenses of the United Nations*; See, e.g., José E. Alvarez, ‘Legal Remedies and the United Nations À La Carte Problem’ (1991), 12 *Michigan Journal of International Law* 229; Elizabeth Zoller, ‘The “Corporate Will” of the United Nations and the Rights of the Minority’ (1987), 81 *American Journal of International Law* 610; Francesco Francioni, ‘Multilateralism à la Carte: The Limits to Unilateral Withholdings of Assessed Contributions to the UN Budget’ (2000) 11 *European Journal of International Law* 43; Allan Gerson, ‘Multilateralism à la Carte: The Consequences of Unilateral “Pick and Pay” Approaches’ (2000) 11 *European Journal of International Law* 61.

¹⁹ James E. Archibald, ‘Pledges of Voluntary Contributions to the United Nations by Member States: Establishing and Enforcing Legal Obligations’ (2004) 36 *George Washington International Law Review* 317.

²⁰ Schermers and Blokker, above n 4, 688 [1022].

Here is the key concern: if an international organization were funded entirely by earmarked voluntary contributions, budgeting decisions would not be made deliberately. Instead, these crucial policy choices would simply reflect the aggregate results of numerous individual decisions made by donors about which activities to fund and how generously to fund them.

Even in less drastic scenarios, there are drawbacks to heavy reliance on earmarked voluntary contributions. It becomes more difficult—if not impossible—to determine the organization’s activities in a thoughtful, coordinated, and coherent fashion. The launching, continuation, and winding down of programs may follow the availability of funding rather than a deliberate strategy. Long-term planning becomes especially challenging because of the unreliability of voluntary contributions.²¹ Setting the course of an organization’s work in this manner undermines—and threatens to altogether eliminate—a key benefit of establishing an international institution in the first place.²² Moreover, the budget deliberations and decisions made through the formal governance mechanisms set out in the organization’s charter risk becoming empty exercises because they do not actually govern the organization’s activities.

Reliance on voluntary contributions also threatens collective decisionmaking with respect to program evaluation and accountability. As a formal matter, the secretariat reports to the governing bodies on its programmatic performance and financial management. But supervision by the governing bodies threatens to become a charade. When it comes to evaluating an organization’s work and making decisions about whether to reward it with additional funds, it is the views of individual donors that will matter rather than those of the governing bodies. Importantly, these donors are not necessarily evaluating the organization’s work against a common standard. Indeed, to facilitate evaluation against their idiosyncratic standards, donors often insist on very particular reporting requirements as condition of providing funds.²³

International relations scholars have recognized that the principal-agent models they have used to analyze dynamics between member states and international organizations need to be revised to account for voluntary contributions. In principal-agent terms, when organizations rely mainly on earmarked voluntary contributions, it

²¹ Thordis Ingadóttir, ‘Financing International Institutions’ in Jan Klabbers and Åsa Wallendahl (eds), *Research Handbook on the Law of International Organizations* (Edward Elgar, 2011) 108, 124 (noting that voluntary contributions are, “by nature highly volatile and unreliable”); Archibald, above n 19, 317.

²² Kenneth W. Abbott and Duncan Snidal, ‘Why States Act Through Formal International Organizations (1998) 42 *Journal of Conflict Resolution* 3, 10-16 (identifying the benefits of centralization through international organizations, including efficiency, economies of scale, rational allocation of efforts and resources so as to avoid duplication and gaps in coverage).

²³ Interview with current WHO official (Telephone Interview, 9 January 2019).

no longer makes sense to model the organization as the agent of a single collective principal comprised of member states.²⁴ Instead, such organizations are more accurately modeled as agents with multiple individual principals. The result, according to some scholars, is that “[o]rganizations that primarily rely on voluntary contributions no longer act as true multilateral organizations.”²⁵

Focusing on global health cooperation, some scholars have decried “Trojan multilateralism”—that is, a veneer of multilateralism that masks the dominance of bilateral goals and interests into multilateral institutions.²⁶ The risks they see are threefold. First, Trojan multilateralism may enhance the capacity of powerful states to impose their priorities while dampening the influence of poorer countries. Second, donors may favor short-term political gains over longer-term public health goals. Finally, channeling expertise and staffing to those areas favored by bilateral donors may deplete organizational resources in other areas.

Other scholars have worried more about the growing volume of voluntary contributions from nonstate actors.²⁷ Because of their size, contributions from philanthropic organizations have garnered particular attention.²⁸ Some international relations and global health scholars have raised questions about the influence the Bill and Melinda Gates Foundation exercises over global health governance. Critics have objected to how the Gates Foundation operates—with little transparency and little input from those who are the targets of its interventions.²⁹ As a substantive matter, they have also criticized the foundation’s preferences for technological solutions while ignoring or diverting attention away from solutions that might challenge intellectual property protections or that seek to address underlying problems like poverty or income inequality.³⁰

²⁴ The key article here is Graham, Money and Multilateralism, above n 4.

²⁵ Jacob Katz Cogan, ‘Financing and Budgets’ in Jacob Katz Cogan, Ian Hurd, and Ian Johnstone (eds), *The Oxford Handbook of International Organizations* (Oxford University Press, 2016), 903, 912.

²⁶ Devi Sridhar and Ngaire Woods, ‘Trojan Multilateralism: Global Cooperation in Health’ (2013), 4 *Global Policy* 325.

²⁷ See, e.g., Christopher G. Bradley, ‘Partner Capture in Public International Organizations’ (2011) 44 *Akron Law Review* 261.

²⁸ *WHO Results Report*, above n 5, 5 (describing contributions from nonstate actors to WHO during this biennium).

²⁹ Anne-Emmanuelle Birn, ‘Philanthrocapitalism, Past and Present: The Rockefeller Foundation, the Gates Foundation, and the Setting(s) of the International/Global Health Agenda’ (2014) 12 *Hypothesis* 6; Lawrence O. Gostin, *Global Health Law* (Harvard University Press, 2014) 164-66; Sophie Harman, ‘The Bill and Melinda Gates Foundation and Legitimacy in Global Health Governance’ (2016) 22 *Global Governance* 349.

³⁰ *Ibid.*

3. Financing of WHO: regulations and practice

The key instruments that govern the financing and financial management of WHO are the WHO Constitution, Financial Regulations adopted by the Health Assembly, and Financial Rules established by the Director-General. According to the WHO Constitution, the process for determining the regular budget is as follows. The Director-General is tasked with preparing, in the first instance, “the budget estimates” for the organization.³¹ He or she submits these first to the Executive Board, which, in turn, submits “such budget estimates, together with any recommendations the Board may deem advisable,” to the Health Assembly.³² The Health Assembly is then tasked with “review[ing] and approv[ing] the budget estimates” and with “apportion[ing] the expenses among the Members in accordance with a scale to be fixed by the Health Assembly.”³³ Each WHO member state has a legal obligation to pay its apportioned share of the regular budget, and is subject to the sanction of losing its vote in the Health Assembly if it fails to do so.³⁴

The WHO Constitution also addresses gifts and bequests, providing:

The Health Assembly or the Board acting on behalf of the Health Assembly may accept and administer gifts and bequests made to the Organization provided that the conditions attached to such gifts or bequests are acceptable to the Health Assembly or the Board and are consistent with the objective and policies of the Organization.³⁵

This provision supplies the legal basis for accepting voluntary contributions.³⁶ The authority to accept gifts and bequests was subsequently delegated to the Director-General, thereby giving him or her the authority to manage voluntary contributions.³⁷

As a matter of practice, WHO has relied on sources other than assessed contributions to fund its activities from the very beginning of its history. Consider some examples. In 1949, WHO explored the possibility of borrowing from the World Bank.³⁸ Starting in the 1950s, WHO experimented with selling world health stamps or

³¹ *WHO Constitution* arts. 34, 55.

³² *Ibid* art. 55.

³³ *Ibid* arts. 18, 56. For a recent example of a resolution apportioning the budget among WHO member states, see *Scale of assessment 2018-2019*, WHA res WHA 70.9, WHA70/2017/REC/1, 70th sess, 9th plen mtg (May 29, 2017) 15.

³⁴ *WHO Constitution* art 7.

³⁵ *Ibid* art 57.

³⁶ *Organizational study on the planning for an impact of extrabudgetary resources on WHO's programmes and policy*, Executive Board, 57th sess, EB57/25 (2 December 1975), [2.3.1]

³⁷ Financial Regulations of WHO 8.1 (2014 edition).

³⁸ John G. Stoessinger, *Financing the United Nations System* (Brookings Institution, 1964) 223-24.

seals to the public in order to raise money.³⁹ In 1960, the World Health Assembly established a Voluntary Fund for Health Promotion, comprised of four separate subaccounts.⁴⁰

Separately, since 1965, WHO has co-sponsored a number of special programs together with the World Bank and other UN organizations to attract resources for health issues that did not otherwise garner sufficient support among member states.⁴¹ Special programs were established to support research on tropical diseases and human reproduction,⁴² and to control river blindness in the African Region.⁴³ As a formal matter, these initiatives were carved out of the WHO governance structures. Instead, they were managed through dedicated governance mechanisms that allowed donors to maintain tight control.⁴⁴

By 1975, extrabudgetary resources made up just over one quarter of WHO's de facto budget, and WHO's governance bodies directed the organization to figure out how to raise even more.⁴⁵ In a strikingly prophetic report, the Director-General pointed out that while extrabudgetary contributions generated uncertainties and the risk of donor bias in programmatic choices, they filled health needs unmet by the regular budget and had to be promoted.⁴⁶

In the years and decades that followed, the size and share of extrabudgetary resources continued to grow. One reason for this increase was the adoption of "zero

³⁹ Ibid 224-25.

⁴⁰ *Organizational study*, above n 36 [2.3.1-5] (describing subaccounts for smallpox eradication, medical research, community water supply, and undesignated contributions).

⁴¹ Gian Luca Burci and Claude-Henri Vignes, *World Health Organization* (Kluwer Law International, 2004), 78-80.

⁴² The Special Programme of Research, Development and Research Training in Human Reproduction (HRP) was established in 1965 and the Special programme for Research and Training in Tropical Diseases (TDR) was established in 1978, in both cases through memoranda of understanding among the co-sponsoring agencies that set up the governance and procedures of the programmes. Both are still operative. See Ibid. 78-80.

⁴³ The Onchocerciasis Control Programme (OCP) was established in 1974. In 2002, the African Programme for Onchocerciasis Control (APOC) replaced OCP. Later, in 2016, APOC was eventually merged into the regular programmes of the Regional Office for Africa. Ibid. 172-174.

⁴⁴ Erin R. Graham, 'Follow the Money: How Trends in Financing Are Changing Governance at International Organizations' (2017) 8 *Global Policy* 15, 20.

⁴⁵ *Organizational study*, above n 36 [2.1.2]

⁴⁶ Ibid.

growth” policies during the 1980s to suppress increases in assessed contributions.⁴⁷ Since then, member states have adamantly refused repeated attempts by successive Directors-General to obtain meaningful increases in assessed contributions. At most, they have granted occasional limited or symbolic increases. During the 1988-89 biennium, for the first time in WHO’s history, extrabudgetary resources exceeded the regular budget.⁴⁸ Over the next 30 years, assessed contributions remained roughly constant in inflation-adjusted terms, coming in at just under \$1 billion for the 2020-2021 biennium, while voluntary contributions continued to grow, reaching about \$4.8 billion for the same biennium.⁴⁹ By the 2020-2021 biennium, assessed contributions made up just over 17% of the total WHO budget.

In describing the governance and financing of WHO, we would be remiss if we ignored WHO’s regional structure, which is unique among international organizations—and which poses special challenges when it comes to both coherent and coordinated decisionmaking within the secretariat and to coherent and coordinated oversight by member states. Per the WHO Constitution, the regional organizations constitute an “integral part of the Organization.”⁵⁰ Each of the six regional organizations enjoys a high degree of autonomy from WHO headquarters. A key reason is that the Director-General does not select the regional directors; instead, the states in each region nominate one candidate who is then formally appointed by the Executive Board.⁵¹ As a result, the historically controversial question of budgetary allocations to each regional office has not been left to negotiations within the Secretariat. Instead, the Health Assembly has adopted a formula based on factors such as health and economic status as well as access to health services.⁵²

⁴⁷ See Yves Beigbeder, *The World Health Organization* (Martinus Nijhoff 1998) 154-55; Interview with Denis Aitken, former Assistant Director-General for General Management (Video Interview, 7 January 2019).

⁴⁸ Beigbeder, above n 47, 165.

⁴⁹ Programme budget 2020-2021, WHA Res WHA72/1, 72nd sess, 6th plen mtg (24 May 2019) available at <http://apps.who.int/gb/ebwha/pdf_files/WHA72/A72_R1-en.pdf>. Historical numbers supplied by Brian Elliott by email dated 27 March 2019. The growth in voluntary contributions coincides with what David Fidler describes as the resurgence of power politics in global health law as a result of the emergence and resurgence of infectious diseases, especially HIV/AIDS, and concerns about bioterrorism in the wake of the terrorist attacks of September 11, 2001. David P. Fidler, ‘Caught Between Paradise and Power: Public Health, Pathogenic Threats, and the Axis of Illness’ (2004) 35 *McGeorge Law Review* 45.

⁵⁰ *WHO Constitution* art 45.

⁵¹ *Ibid*, art. 52.

⁵² *Strategic budget space allocation*, WHA69/2016/REC/1, WHA Dec WHA69(16), 69th World Health Assembly, 28th plen met, (28 May 2016). The current version was adopted by the 69th World Health Assembly in 2016 and is referred to as “strategic budget space allocation” (SBSA).

4. Reasserting Member States' Collective Role at WHO

When it comes to determining WHO's budget and activities, the Health Assembly adopts two types of instruments. Firstly, the Assembly adopts strategic planning documents captioned "General Programmes of Work"; these documents provide a mid-term blueprint for successive budgets and seek to ensure their coherence over time.⁵³ Separately, the Health Assembly adopts resolutions governing the budget for each biennium.⁵⁴ Until 2013, these "appropriation resolutions" separately addressed assessed and voluntary contributions. Take, as an example, Resolution 58.4.⁵⁵ The Health Assembly "resolve[d] to appropriate for the financial period 2006-2007 an amount of US\$ 995 315 000 under the regular budget," to be financed by assessed contributions.⁵⁶ In Resolution 58.4, the Health Assembly also "note[d] that the expenditure in the programme budget for 2006-07 to be financed by voluntary contributions is estimated at US\$ 2 398 126 000, leading to a total effective budget under all sources of funds of US\$3 313 441 000."⁵⁷

This total effective budget was "aspirational" because there was no guarantee whatsoever that the voluntary contributions that made up the majority of WHO's effective budget would actually be forthcoming. WHO member states had no international obligations to supply voluntary contributions, nor did any other actors who might choose to provide funds to WHO. As a result, WHO's effective budget depended on the success of the organization with respect to fundraising or "resource mobilization."

Thus, as a practical matter, WHO's reliance on voluntary contributions cleaved the budget process into two distinct stages. There is the "upstream" process of planning and deciding on a budget and the subsequent "downstream" task of raising funds or mobilizing resources. Until 2013, the two stages were almost completely unrelated. On the upstream side, the budget was not put together with a great deal of care because the stakes were relatively low.⁵⁸ As a practical matter, the approval of the budget mattered because it supplied a license to WHO—and to the individual programs and units that comprise WHO—to raise whatever voluntary contributions

⁵³ See, e.g., *Thirteenth General of Work, 2019-2023*, WHA res. WHA71.1, 6th plen. Mtg (25 May 2018) <http://apps.who.int/gb/ebwha/pdf_files/WHA71/A71_R1-en.pdf>.

⁵⁴ Articles 34 and 55 of the Constitution were amended in 1973 to enable the introduction of biennial budgets in lieu of the previous annual programme budgets. WHA Res. 26.37 (May 1973), 209 OR, 19.

⁵⁵ *Appropriation resolution for the financial period 2006-2007*, WHA Res WHA58.4 WHA58/2005/REC/1, 58th sess, 8th plen mtg (May 23, 2005) 64.

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*

⁵⁸ Interview with Ian Smith, former Executive Director of the Office of the Director General (Video Interview, 13 December 2018) (describing significant changes in the seriousness with which the secretariat has taken the budget past, and describing the historical process as "almost tokenism").

they could.⁵⁹ The sky was the limit: since the Health Assembly merely “noted” the total effective budget, nothing in the budget resolution imposed a ceiling on the total amount of voluntary contributions that could be collected, or in any way limited the purposes for which such contributions could be earmarked. And, indeed, sometimes the secretariat collected more total voluntary contributions than the amounts noted by the Health Assembly.⁶⁰

This “downstream” resource mobilization was largely uncoordinated within WHO and usually led by directors of technical units. And, indeed, some individuals and units enjoyed a great deal of success; one interviewee referred to “kingdoms” within WHO that were run “completely independently” because they “raised their own money.”⁶¹ Such decentralization and personalization with respect to resource mobilization increased the total resources available to WHO, but it also reportedly caused internal competition and lack of communication among WHO units. It also impeded coordinated strategic planning within and among Headquarters and the regional offices.

From an institutional and conceptual point of view, therefore, the cleavage of the overall budgetary process led to a striking contrast between the “upstream” and “downstream” components. The “upstream” component was structured as a collective decision-making process and was run through various layers of WHO’s governance in accordance with its Constitution, regulations and rules and established practices—yet this “upstream” process governed an increasingly small share of WHO’s budget and activities. At the same time, “downstream” resource mobilization was conducted in an unregulated manner largely through bilateral transactions with donors.

Overall, WHO’s heavy reliance on voluntary contributions—coupled with the decentralized process for resource mobilization—caused WHO’s activities to diverge more and more from the programmatic priorities set in the budget. The voluntary contributions were typically “heavily earmarked”—that is, available for only very limited purposes. The Director-General had only very limited authority to reallocate funds and align funding with programmatic priorities. As a result, some programs were chronically over-funded while others were chronically underfunded. As former Director-General Margaret Chan put it to member states in 2010: “given that more than 60% of WHO’s income takes the form of highly-specified funding, an area of work that attracts significantly more, earmarked, voluntary funding than another becomes

⁵⁹ Interview with Ian Smith, former Executive Director of the Office of the Director General (Video Interview, 13 December 2018).

⁶⁰ See, e.g., Financing Dialogue, Geneva, 25-26 November 2013, Mobilizing Targeted Resources for PB 2014-15, the Way Forward (describing the old method of resource mobilization approaches as “[m]obilize as much money as possible without consideration of Programme Budget limits (may lead to over-funded programmes).”

⁶¹ Interview Hans Troedsson, former Assistant Director General for General Management (Telephone interview, 9 January 2019).

de facto a priority in the absence of sufficiently flexible funding to reduce the imbalance.”⁶² At least some member states recognized the problem; as a former official put it, “enlightened member states realized that some of the programmes they considered essential in moving the global health agenda . . . were always handicapped and had insufficient funding.”⁶³

The key example of an essential but underfunded program that our interviewees consistently cited was WHO’s work on noncommunicable diseases—or NCDs in WHO parlance. NCDs include cancer, diabetes, cardiovascular diseases (like heart attacks and stroke), and chronic respiratory diseases. Many member states consider NCDs a “top priority” and they keep repeating that that they “would like to work on NCDs with WHO.”⁶⁴ And for good reason: NCDs kill 41 million people each year, accounting for 71 percent of all deaths globally.⁶⁵ But NCDs have had a notoriously difficult time attracting voluntary contributions.

To help align WHO’s funding with its program budget, Chan argued that WHO’s governance bodies ought to reclaim a bigger role in both budgeting and oversight. The problem, she explained, is that “[m]oney dictates what gets done. It should be the other way around. Money should be allocated to support the work that Member States have prioritized.”⁶⁶ Noting that, at the time, only 25 percent of WHO’s total financing came from assessed contributions, she argued the Health Assembly’s role was insufficient:

Following current practices, when Member States approve the programme budget, they exercise oversight and responsibility for only 25% of what WHO

⁶² Report by the Director-General, *The Future of Financing for WHO*, EB 128/21 (15 December 2010).

⁶³ Interview with Anne Marie Worning, former Executive Director of the Office of the Director General (Email, 15 December 2018).

⁶⁴ Interview with senior WHO official (Geneva, 8 January 2019); see also *Draft Proposed Programme Budget 2020-21*, WHO Doc. EB144/5 (13 Dec. 2018) 3, 18 (showing that 108 countries ranked Outcome 3.2, which addresses risk factors for noncommunicable diseases, as a high priority during the bottom-up budgeting process).

⁶⁵ WHO, *Noncommunicable Diseases* (June 1, 2018), at <https://www.who.int/news-room/fact-sheets/detail/noncommunicable-diseases>. On the global challenges posed by non-communicable diseases and the regulatory measures necessary to prevent them, see Amandine Garde, ‘Global Health Law and Non-Communicable Disease Prevention: Maximizing Opportunities by Understanding Constraints’, in Gian Luca Burci and Brigit Toebes (eds), *Research Handbook on Global Health Law* (Elgar, 2018) 389.

⁶⁶ Director-General addresses reforms in WHO financing, Opening remarks at the Programme, Budget and Administrative Committee of the Executive Board, Second extraordinary meeting Geneva, Switzerland (6 December 2012).

will be spending. Likewise, I can be held accountable for results achieved from only a quarter of the money made available to WHO.⁶⁷

As a possible solution, she proposed:

to have the Health Assembly approve the entire budget. That is, a budget based on all sources of funds and not just the proportion of the budget financed from assessed contributions. Doing so would be a major departure from past practices and would return the responsibility for oversight to Member States.⁶⁸

In short, member states said they wanted realistic rather than aspirational budgets, and Chan proposed a sort of compact.⁶⁹ Member states and other major donors would commit to sustainable, long-term predictable and more flexible funding aligned with programme budget priorities while WHO would commit to a realistic implementable budget, higher budgetary discipline, transparency, accountability, coordination among major offices, and measurable impacts.⁷⁰

In 2013, the Health Assembly implemented the proposal Director-General Chan described above. In Resolution 66.2, the Health Assembly inaugurated a new practice: it approved both the programme of work for the next biennium and, separately, the entire budget for the organization—that is, “the budget for the financial period 2014-2015, under all sources of funds, namely, assessed and voluntary contributions of US\$ 3977 million[.]”⁷¹ In addition, the Health Assembly “allocate[d]” that budget to six categories of work.⁷² Finally, the Health Assembly “resolve[d]” that the budget would be financed by roughly \$1 billion in assessed contributions and roughly \$3 billion in voluntary contributions.⁷³ The approved budget was and continues to be described as “budget space” that has to be largely filled through resource mobilization, rather

⁶⁷ Director-General addresses reforms in WHO financing, Opening remarks at the Programme, Budget and Administrative Committee of the Executive Board, Second extraordinary meeting, Geneva, Switzerland (6 December 2012) <https://www.who.int/dg/speeches/2012/reforms_20121206/en/>.

⁶⁸ Ibid.

⁶⁹ Interview with Ian Smith, former Executive Director of the Office of the Director General (Video Interview, 13 December 2018).

⁷⁰ Ibid.

⁷¹ Programme budget 2014-2015, WHA Res WHA 66.2, WHA66/2013/REC/1, 66th sess, 8th plen mtg (May 24, 2013) 3.

⁷² Those categories are: communicable diseases; noncommunicable diseases; promoting health through the life course; health systems; preparedness, surveillance and response; and enabling functions/corporate services, as well as the emergencies component of the budget. In the 2020-2021 budget, the categories have been replaced by four strategic priorities and other areas, namely, polio eradication, special programs and emergency operations and appeals.

⁷³ WHA 66.2, above n 71.

than an amount backed by the constitutional obligation of member states to pay assessed contributions. Thus, the cleavage between the upstream and downstream parts of the process persists. But the idea was that member states and others would honour their end of the “compact” by aligning their voluntary contributions with the approved programme of work, and thereby align upstream and downstream.⁷⁴

Resolution 66.2 contains two other important features. First, the Health Assembly introduced, for the first time, binding budget ceilings, both for the total budget and for each of six categories of WHO’s work. WHO would no longer have the authority to raise unlimited voluntary contributions.⁷⁵ Second, the Director-General gained the authority to allocate the assessed contributions as she saw fit among the six categories, thereby giving her or him the flexibility to direct a larger share of assessed contributions to those areas of WHO’s work that struggled to attract voluntary contributions. Secretariat officials viewed this new authority as very significant. One current official described this change as “huge.”⁷⁶ Another described the combination of this authority and the development of new streams of flexible funding (described in more detail below) as “game changers” because they gave management “a sizeable pool of flexible funds to be used effectively in aligning priorities and funds and safeguarding against absolute poverty of some programmes and offices.”⁷⁷

The other notable step that the Health Assembly took to reassert collective decisionmaking by member states was to adopt FENSA in 2016. FENSA was motivated by concerns—especially on the part of developing countries—about the influence

⁷⁴ Interview with Ian Smith, former Executive Director of the Office of the Director General (Video Interview, 13 December 2018); see also Opening remarks by Dr Margaret Chan at the second meeting of WHO’s financing dialogue, Geneva, Switzerland (25 November 2013) (“In a sense, the programme budget is a contract that binds the performance of WHO to the expectations of Member States. The obligations are a two-way street. WHO needs adequate funding to meet these expectations. In an era of accountability, donors need for WHO to reliably report on results and clearly demonstrate the impact of its work. . . . We all want to make sure that the programme budget is fully funded. Only then is it truly realistic instead of merely aspirational.”).

⁷⁵ These new budget ceilings are reflected in the authorization to the Director General “to use the assessed contributions together with the voluntary contributions, subject to the availability of resources, to finance the budget as allocated [to each of the six categories], *up to the amounts approved.*” WHA 66.2, above n 71 [7] (emphasis added).

⁷⁶ Interview with senior WHO official (Geneva, 18 June 2019)

⁷⁷ Interview with Anne Marie Worning, former Executive Director of the Office of the Director General (Email, 26 November 2018).

exercised by corporations, the Gates Foundation, and other wealthy donors.⁷⁸ Among other things, FENSA regulates WHO's interactions with certain nonstate actors with respect to fundraising.⁷⁹ The most stringent rules apply to fundraising from private sector entities, although to date their contributions constitute a tiny fraction of WHO's revenues (3 percent).⁸⁰ With respect to philanthropic foundations, FENSA provides that WHO "can accept financial and in-kind contributions . . . as long as such contributions fall within WHO's General Programme of Work, do not create conflicts of interest, are managed in accordance with the framework, and comply with other relevant regulations, rules, and policies of WHO."⁸¹ FENSA goes on to emphasize that philanthropic foundations "shall align their contributions to the priorities set by the Health Assembly in the approved Programme budget" and that "WHO's programmes and offices should strive to ensure that they do not depend on one single source of funding."⁸² FENSA also imposes transparency requirements, requiring public acknowledgement of such contributions and their inclusion in WHO's financial reports and statements.⁸³ Finally, FENSA establishes a public register where all non-state actors engaging with WHO have to disclose their essential information, including membership and sources of funds as a condition for such engagement.⁸⁴

In combination, these changes enacted by the Health Assembly reflect important steps towards reconciling collective governance with heavy reliance on voluntary contributions. Instead of allowing the size of WHO's budget to be determined by the aggregate funding decisions of individual actors, the Health Assembly was, at least, setting maximum limits overall and maximum limits for each category of WHO's work. To say it was deciding the size of WHO's budget is still an overstatement because there was no guarantee that voluntary contributions aligning with the approved budget would actually come through. The combination of allocation flexibility and category-level ceilings, however, promised greater assurance that determining the program budget was not an empty exercise—and that WHO would be able to carry out work in areas that were part of the approved program budget but struggled to attract voluntary contributions.

Yet these changes did not eliminate the influence of major donors. Some of our interviewees indicated that member states' demands for realistic budgets created an

⁷⁸ KM Gopakumar, 'Reform and WHO: The Continuing Saga of FENSA' (2015) *Third World Network* < <https://www.twn.my/title2/resurgence/2015/298-299/cover03.htm>>.

⁷⁹ FENSA, above n 14.

⁸⁰ Ibid, 24-28; 2016-17 Results Report, above n 5, 7.

⁸¹ FENSA, above n 14, 31 [7].

⁸² Ibid, [8], [10].

⁸³ Ibid, 31-32, [13]-[15].

⁸⁴ Ibid, 12-13, [37]-[43].

incentive for the secretariat to build their expectations regarding downstream resource mobilization into the upstream budget planning processes.⁸⁵

5. Digging Deeper

Our interviews with WHO staff have helped us to better understand the causes and the consequences of WHO's heavy reliance on voluntary contributions. Our interviewees pointed to a mix of external and internal forces that have reinforced member states' preferences for voluntary contributions. These interviews have also shed light on the implications of voluntary contributions on WHO's internal management structure.

Notably, the WHO secretariat has not stood by passively as the organization's financing model has shifted. We describe here some of the innovative steps that secretariat officials have taken, both formally and informally, to manage the risks associated with voluntary contributions. Finally, our interviews allow us to detail some of the persistent challenges that WHO faces to aligning its resources and activities with the approved program budget.

1. *The Challenges and Costs of Heavy Reliance on Voluntary Contributions*

Donors' Preferences

Not all aspects of WHO's work are equally attractive to suppliers of voluntary contributions. Although a prominent concern in the academic literature is that voluntary contributions will ignore the preferences of poorer states or reflect the foreign policy priorities of powerful states,⁸⁶ the WHO officials we interviewed emphasized a different kind of distortion. One prominent theme in our interviews was that donors prefer to provide resources to projects with results that were visible, concrete, and easily quantifiable in the short term so that their investment could be justified more easily to domestic audiences.⁸⁷ "Vertical" programs fit these criteria quite well: these are programs that focus on the treatment of or immunization against a particular disease without trying to address broader issues in health care systems.⁸⁸

⁸⁵ Interview with senior WHO official (Geneva, 8 January 2019); Interview with senior WHO official (Geneva, 7 January 2019) ("You can only get money within a particular budget, but if you don't get that money your budget will never get up. At some point you need to break that [vicious] circle.").

⁸⁶ Sridhar and Woods, above n 26, 333; Fidler, above n 49, 96.

⁸⁷ Interview with Denis Aitken, former Assistant Director-General for General Management (Video Interview, 7 January 2019).

⁸⁸ Sridhar and Woods, above n 26, 326

By contrast, it is very difficult to find donors willing to provide voluntary contributions to cover staff salaries or the costs of general administrative infrastructure.⁸⁹

Of course, some of WHO's most important work is not very easy to count. Consider the following example:

. . . WHO does not purchase or distribute antiretroviral medicines. But the AIDS community largely credits the technical work of WHO, especially our constant efforts to simplify and streamline treatment guidelines, as making it possible for nearly 7 million people in low-resource settings to see their lives revived and prolonged by these medicines.

Obviously, it is far easier to count the number of vaccines, bednets, and medicines distributed by single-disease initiatives than it is to measure the impact of WHO's technical work.⁹⁰

When impacts are difficult to measure, voluntary contributions have proved hard to find.

In general, donors' consistent preference for concrete, measurable outcomes has also made it difficult for the organization to fund its normative work—that is, WHO's work on setting standards, generating information about best practices, compiling statistics and the like.⁹¹ As one senior WHO official put it, even though some of the work her unit undertook was “extremely well-funded,” there were always “pockets of poverty”—including, specifically, core normative work.⁹² When it comes to normative work, she continued, “everybody expects that somebody else is going to pay for it.”⁹³ For example, WHO publishes a list of essential medicines - that is, those medicines that “satisfy the priority health care needs of the population.”⁹⁴ The work of updating that list is “entirely dependent on assessed contributions.”⁹⁵

Our interviewees identified another factor that influences the kinds of voluntary contributions that states make: whether the OECD Development Assistance

⁸⁹ WHO 2016-17 Results Report, above n 5, 75.

⁹⁰ Dr Margaret Chan Director-General of the World Health Organization, Address to the Regional Committee for Europe, Sixty-first session, Baku, Azerbaijan, 13 September 2011

https://www.who.int/dg/speeches/2011/euro_rc_2011_09_12/en/ 4/8

⁹¹ The WHO Constitution specifically contemplates WHO engaging in such normative work. WHO Constitution, arts. 2, 19-23.

⁹² Interview with senior WHO official (Geneva, 9 January 2019).

⁹³ Ibid.

⁹⁴ The medicines on the list are selected with due regard to public health relevance, evidence on efficacy and safety, and comparative cost-effectiveness.

https://www.who.int/topics/essential_medicines/en/.

⁹⁵ Interview with senior WHO official (Geneva, 9 January 2019).

Committee will count the contribution as official development assistance.⁹⁶ Contributions to international organizations will qualify if they are “developmental”—that is, if the contributions fund “activities that promote the economic development and welfare of developing countries as their main objective.”⁹⁷ Normative work is not “developmental” because it benefits all states.⁹⁸ The OECD’s statistics on official development assistance are highly influential, in part because they are verified and in part because they make it possible to compare how much assistance different countries give.⁹⁹ National development agencies are an important source of voluntary contributions to WHO. As compared to national health ministries, development agencies are already less focused on the WHO’s normative mission, and the OECD’s accounting methodology reinforces this orientation.¹⁰⁰

Finally, our interviewees suggested that lobbying and interference by industry—especially multinational food and beverage companies—explains why member states decline to provide voluntary contributions for certain kinds of work, especially on NCDs.¹⁰¹ Voluntary contributions for work on NCDs remain very limited: less than 2 percent of all voluntary contributions to WHO are earmarked for work on NCDs.¹⁰² As a result, WHO’s work relies heavily on other sources of funds. In fact, during 2016-17, NCD program areas received more than half (54%) of the total flexible funds the organization had to distribute.¹⁰³ Nevertheless, this flexible funding was not enough to make up for the limited number and size of voluntary contributions. The program

⁹⁶ Interview with Erik Blas, former Chief of Budget (Telephone interview, 8 January 2019); Interview with Meindert van Hilten, Senior External Relations Officer, Office of the Assistant Director-General, Division for Universal Health Coverage/Communicable Diseases and NCDs (Telephone Interview, 18 February 2019).

⁹⁷ OECD, *DAC List of ODA-Eligible International Organizations: General Methodology* (May 2016) <<http://www.oecd.org/dac/financing-sustainable-development/development-finance-standards/DAC%20list%20of%20ODA-eligible%20international%20organisations%20-%20May%202016.pdf>>.

⁹⁸ Ibid.

⁹⁹ <https://www.oecd.org/dac/stats/What-is-ODA.pdf>.

¹⁰⁰ Several interviewees observed that WHO member states do not always speak with one voice, and suggested that part of the explanation was that member states are represented by health ministries on the governing bodies—but that decisions about funding are often made by development agencies, which do not necessarily coordinate or agree with the positions taken by the health ministries. Interview with Nick Jeffreys, former Comptroller (Telephone Interview, 24 September 2018); see also Charles Clift and John-Arne Røttingen, ‘New Approaches to WHO Financing: the Key to Better Health’ (2018) *BMJ* <<https://doi.org/10.1136/bmj.k2218>>.

¹⁰¹ Interview with senior WHO official (Geneva, 7 January 2019); Interview with Meindert van Hilten, Senior External Relations Officer, Office of the Assistant Director-General, Division for Universal Health Coverage/Communicable Diseases and NCDs (Telephone Interview, 18 February 2019).

¹⁰² Interview with senior WHO official (Geneva, 8 January 2019).

¹⁰³ 2016-17 Results Report, above n 5, 47.

budget contemplated \$376 million for work on NCDs, but WHO was only able to raise (and spend) 70 percent of that amount—\$262 million.¹⁰⁴ This dynamic is not limited to funding; reports by the WHO Director-General and UN Secretary-General have pointed to interference by industry to explain why member states have not made more progress in implementing recommended interventions for the prevention and control of noncommunicable diseases.¹⁰⁵

Administrative and Opportunity Costs of Voluntary Contributions

Attracting and sustaining the flow of voluntary contributions is time-intensive and therefore quite costly. Most significantly, it consumes staff time and resources that might otherwise be devoted to implementing WHO's agenda. Some of our interviewees described this opportunity cost as quite high. One senior official indicated that she personally spent 40 percent of her time on resource mobilization and management.¹⁰⁶ In addition, seven people in her office had full-time positions dedicated to various aspects of raising money and managing grants.¹⁰⁷

Once a voluntary contribution is made, keeping track of the money—for example, making sure that the right amount is available at the right time to pay staff salaries, or making sure that spending is consistent with applicable earmarks—is a considerable project. And finally, many donors impose particular and idiosyncratic reporting requirements.¹⁰⁸ Indeed, these reporting requirements are significant not only because of the burden that they impose on staff but also because, as noted above, they contribute to a fragmentation of governance. Instead of WHO's work being assessed by the governing bodies against common standards, at least in the first instance it is assessed against standards set by individual donors. The more individual grants WHO receives, the higher all of these costs are. And the number of individual grants is high. One senior official relied on 140 different awards to put together a \$130 million budget.¹⁰⁹

¹⁰⁴ Ibid, 46.

¹⁰⁵ Report by the Director-General, *Preparation for the third High-level Meeting of the General Assembly on the Prevention and Control of Non-communicable Diseases, to be held in 2018*, UN Doc. A/71/14 (19 April 2018), pages 6-7; Report of the Secretary-General, *Progress on the Prevention and Control of Non-communicable Diseases*, UN Doc. A/72/662 (21 Dec. 2017), at 9 (“Multinationals with vested interests routinely interfere with health policymaking, including by lobbying against the implementation of recommended interventions, working to discredit proven science and pursuing legal challenges to oppose progress.”).

¹⁰⁶ Interview with senior WHO official (Geneva, 9 January 2019).

¹⁰⁷ Ibid.

¹⁰⁸ One interviewee noted that the additional reporting requirements required by the European Union were particularly demanding. Interview with current WHO official (Telephone Interview, 9 January 2019).

¹⁰⁹ Interview with senior WHO official (Geneva, 9 January 2019).

Harder to measure, but still sizeable, are the costs associated with the uncertainty of whether voluntary contributions will materialize, and if so, in what amounts. One interviewee described a “poverty syndrome”: directors of underfunded programmes hesitated to implement activities for fear of running out of funds and having to terminate staff.¹¹⁰ Along similar lines, another interviewee described a “vicious circle” that plagued some offices: “[I]f you don’t have enough money, you cannot afford staff. And if you don’t have staff, you can’t implement” the projects that donors might be interested in funding—making it nearly impossible to attract such funds.¹¹¹

Consequences for the International Civil Service and Internal Management

There is another distortion that may arise from WHO’s reliance on voluntary contributions. Directors and coordinators are increasingly evaluated based on their capacity to mobilize resources rather than their capacity to implement programs.¹¹² In turn, one interviewee cited the possible introduction of bias in favor of hiring individuals from major donor countries, because their own nationals are likely to be—or are likely to be perceived to be—better at raising funds from them.¹¹³ In this way, heavy reliance on voluntary contributions can impede hiring a genuinely international civil service.

Separately, over the course of our interviews, it became clear that sometimes support for earmarked contributions has come—and still comes—from within the secretariat. In some cases, technical directors have encouraged governments to specify that voluntary contributions must be used for the work of their particular units. Upon reflection, it is not surprising that technical directors who devote significant time and personal and staff resources to fundraising would want to reap the rewards of their efforts. Moreover, the ability to raise earmarked voluntary contributions can be an attractive source of autonomy within WHO, making units less reliant on decisions by headquarters to disburse assessed contributions or other flexible funds. Some of our interviewees expressed frustration with the way the Director-General’s office has distributed those funds, citing persistent uncertainty about both when and how much funding might become available from those sources.¹¹⁴ More generally, the point is that reliance on voluntary contributions can fragment the internal structure of international organizations and undermine the responsiveness of various units to top-level management within those organizations.¹¹⁵

¹¹⁰ Interview with senior WHO official (Telephone interview, 7 January 2019).

¹¹¹ Interview with senior WHO official (Geneva, 7 January 2019).

¹¹² Interview with Denis Aitken, former Assistant Director-General for General Management (Video Interview, 7 January 2019).

¹¹³ Ibid.

¹¹⁴ Interview with senior WHO official (Geneva, 9 January 2019).

¹¹⁵ Ruth W. Grant and Robert O. Keohane ‘Accountability and Abuses of Power in World Politics’ (2005) 99 *American Political Science Review* 29, 36 (identifying

Finally, reliance on voluntary contributions has created pressure to rearrange activities and responsibilities among the three levels of WHO to mimic bureaucratic changes made by key donors. Some major donors—notably the European Union and the US Agency for International Development—have recently empowered local offices in developing countries to take final funding decisions.¹¹⁶ As a result, the WHO secretariat has tasked officials in its country offices with increasing responsibility for resource mobilization. Some of our interviewees noted, however, that this transfer of responsibility has not been accompanied by corresponding training and empowerment for heads of WHO country offices, who are professionally not equipped to aggressively pursue donors.¹¹⁷

2. Steps WHO Has Taken to Manage the Risks of Voluntary Contributions

WHO has developed a number of formal policies and informal strategies to manage the risks associated with voluntary contributions. These strategies demonstrate the secretariat's ability to not only adapt to the political environment but also develop an entrepreneurial attitude to managing relations with donors for the purpose of increasing funding, protecting the secretariat's independence, and aligning the organization's activities with the approved program budget. Some of these innovations predate the 2013 change in budgeting practice; others postdate it. This timeline reinforces the point that WHO has long wrestled with the problems associated with voluntary contributions—and has long sought solutions to mitigate them.

Cost-Recovery Strategies

Like all other UN organizations and programmes, WHO has long had in place a formal policy to recoup some of the administrative costs associated with voluntary contributions. In 1975, the Director-General started imposing a 14 percent “charge” on voluntary funds that would be used to cover program support costs.¹¹⁸ In 1981, the Health Assembly decided that a slightly lower standard charge of 13 percent would be applied to extrabudgetary funds by WHO to cover technical and non-technical support and services.¹¹⁹

hierarchical accountability as a source of accountability within international organizations).

¹¹⁶ Interview with Ian Smith, former Executive Director of the Office of the Director General (Video Interview, 13 December 2018); Interview with senior WHO official (Geneva, 7 January 2019).

¹¹⁷ Interview with Head of WHO Country Office (Video Interview, 11 February 2019).

¹¹⁸ 1975 study, above n 36 [2.5].

¹¹⁹ *Collaboration with the United Nations system: general matters: programme support costs*, WHA res WHA 34.17, 34th sess, 14th plen mtg (20 May 1981) [2].

On the one hand, these program support costs are an important source of flexible funds. Once collected, WHO can allocate the program support costs as needed to its various categories of work. In recent years, these program support costs totaled around \$160 million per year.¹²⁰

On the other hand, the program support costs that WHO collects reflect only a partial reimbursement of WHO's actual costs in administering extrabudgetary funds. Different analyses done in the early 1970s indicated that actual administrative costs ranged somewhere between 23 percent and 27 percent of project expenditures.¹²¹ Thus, from the very beginning, the official rate for program support costs built in a subsidy for voluntary contributions. And, in practice, this subsidy is often even greater because some donors refuse to pay the standard rate and the WHO negotiates the rate downward.¹²² On average, WHO actually collects around 9 percent of total voluntary contributions as program support costs.¹²³

To address the shortfall between the amount collected for programme support costs and WHO's actual administrative costs, WHO introduced a post occupancy charge (POC) in 2010.¹²⁴ The POC is an internal charge of 9.5 percent on the gross salaries of all personnel.¹²⁵ In recent years, POC has totaled about \$70 million per year.¹²⁶ These funds are used to cover the costs of information technology, utilities, and building maintenance.¹²⁷ By collecting POC to cover these costs, WHO can free up

¹²⁰ Interview with senior WHO official (Geneva, 8 January 2019); *Audited Financial Statements for the Year Ended 31 December 2018*, WHO Doc. A/72/36 (3 May 2019) 59.

¹²¹ 1975 study, above n 36, [2.5.3] (citing 1973 analysis that the average cost of technical and non-technical support by WHO to UDNP-financed projects was approximately 23 percent of project delivery costs); WHA 34.17, above n 119 (citing an analysis concluding those costs reflected 27% of project expenditures).

¹²² Interview with senior WHO official (Geneva, 8 January 2019); Interview with Antonio Montesor, Senior Technical Officer, Department of Control of Neglected Tropical Diseases (Geneva, 8 January 2019).

¹²³ Interview with senior WHO official (Geneva, 8 January 2019); *Audited Financial Statements*, above n 120, 58.

¹²⁴ Email correspondence from Erik Blas, former Chief of Budget, to authors (21 July 2019); *Financing of category 6 and cost recovery mechanisms: current practices and proposed way forward*, WHO Doc. A70/INF./5 (15 May 2017) 2.

¹²⁵ While programme support costs are collected "at the source," when voluntary contributions come in to WHO, POC is applied "at expenditure"—that is, when staff salaries are paid. Email correspondence with Erik Blas, former Chief of Budget, to authors (20 July 2019).

¹²⁶ *WHO Mid-Term Programmatic and Financial Report for 2016-2017*, WHO Doc. A70/40, 60.

¹²⁷ *Financing of category 6 and cost recovery mechanisms: current practices and proposed way forward*, WHO Doc. A70/INF./5 (15 May 2017) 2.

assessed contributions and redirect them to the core technical work of the organization.¹²⁸

Core Voluntary Contributions

Another innovation, which one former official described as one of two “game changers”¹²⁹ was the development, around 2004, of a specified category of “core voluntary contributions” (CVC)—that is, entirely un-earmarked voluntary contributions that constitute “core resources” that can be used at the almost unfettered discretion of the Director-General.¹³⁰ The Director-General distributes CVC at regular intervals during the biennium, using CVC and other “core resources” as gap-fillers to support programmes receiving insufficient voluntary contributions.¹³¹

CVC totaled just under \$150 million in 2016-2017, with the biggest contributions coming from Sweden, the United Kingdom, Australia, and Norway.¹³² Since the introduction of the CVC account, contributions to it have remained relatively limited. At bottom, one interviewee noted, CVC contributions are “very much built on trust.”¹³³ The WHO’s mishandling of the 2014 Ebola outbreak in West Africa significantly eroded that trust; and, our interviewee noted, it “takes time to rebuild that trust.”¹³⁴

Fees for Services

Some programmes have managed the risks arising from voluntary contributions by establishing different financing structures. In particular, WHO’s program for prequalification of medicines and vaccines¹³⁵ and the management of the

¹²⁸ Email correspondence from Erik Blas, former Chief of Budget, to authors (21 July 2019).

¹²⁹ See above n 77.

¹³⁰ Interview with Anne Marie Worning, former Executive Director of the Office of the Director General (Email to Authors, 15 December 2018).

¹³¹ Results Report, above n 5, 6.

¹³² Ibid, 6.

¹³³ Interview with senior WHO official (Geneva, 7 January 2019).

¹³⁴ Ibid.

¹³⁵ “The World Health Organization’s Prequalification Team ... ensures that active pharmaceutical ingredients (APIs) and finished pharmaceutical products (FPPs) are safe, appropriate and meet stringent quality standards. It does so by assessing product dossiers (for FPPs) or master files (for APIs), inspecting manufacturing and clinical sites, and organizing quality control testing of products.” World Health Organization, *Essential Medicines and Health Products: Prequalification of Medicines*, <<https://extranet.who.int/prequal/content/what-we-do>>.

International Non-Proprietary Names system¹³⁶ (INN) are partly or wholly financed through a system of fees paid by requesting entities. WHO is able to charge a fee for this work because it provides something of value to the fee payers. For example, medicines and vaccines that are prequalified by WHO are more likely to be purchased by other international organizations and governments because WHO has evaluated and approved their manufacturing practices. INN benefits manufacturers, but more widely patients and public health officials, by distinguishing the name of the active ingredient of a medicine as a public good from a trade name that can be registered as a trademark.

Fee-for-service financing has some significant advantages. As one senior official put it, this financing model enables a “huge flexibility where we didn’t have it before.”¹³⁷ But fee-for-service also brings risks, in particular risks of capture or actual or perceived conflicts of interest. In the case of these programs, the relevant WHO officials deliberately designed their fee-for-service agreements to mitigate these risks by, among other things, ensuring that the fees are not used to provide direct technical support to fee-paying manufacturers.¹³⁸

Making Normative Work More Appealing to Donors

In order to garner more attention—and more funds—for normative activities, in 2018 the Secretariat launched a new initiative to identify and compile a comprehensive list of the “global goods” that WHO supplies. This initiative was tied to the preparation for the 2020-2021 budget, which defines global public health goods as including ‘all normative and standard-setting products, data products and products describing priority-setting for innovation and research’.¹³⁹ Generating the list was a significant undertaking. First, individual technical units described their ongoing or proposed normative activities on a web platform open to the entire organization—the number of submissions totaled about 1,000; then a smaller group of technical officials “peer reviewed” these submissions.¹⁴⁰ The goals were to make it possible to describe the breadth of WHO’s contributions, to identify duplications and opportunities for

¹³⁶ ‘WHO has a constitutional mandate to “develop, establish and promote international standards with respect to biological, pharmaceutical and similar products”.

The World Health Organization collaborates closely with INN experts and national nomenclature committees to select a single name of worldwide acceptability for each active substance that is to be marketed as a pharmaceutical.’ World Health Organization, *International Nonproprietary Names*, <<https://www.who.int/medicines/services/inn/en/>>

¹³⁷ Interview with senior WHO official (Geneva, 9 January 2019).

¹³⁸ Interview with senior WHO official (Geneva, 9 January 2019).

¹³⁹ WHO document A/72/4, above n 49, 6.

¹⁴⁰ Interview with senior WHO official (Geneva, 8 January 2019); Interview with senior WHO official (Geneva, 9 January 2019).

coordination, to prioritize the organization’s work—and to facilitate fundraising.¹⁴¹ As one interviewee put it, he expected it to be “much easier to fundraise for a concrete product”—a specific item on the global goods list—than for something like “maternal health in general.”¹⁴²

At the time that this article is being finalized, it remains to be seen whether the global goods list will yield more voluntary contributions. To the extent that it does, though, the risk noted above of real or perceived capture by donors becomes more salient. To some extent, the formal policies in FENSA mitigate this risk: FENSA does not permit financial or in-kind contributions from private-sector entities to be used for normative work.¹⁴³ FENSA does not, however, regulate voluntary contributions from member states, leaving open the possibility that industry will work through member states as described above in the NCD context.¹⁴⁴ One current official we spoke to indicated that such questions would be addressed on a “case-by-case” basis.¹⁴⁵ Another official explained that his office tries to avoid relying on a single donor for its normative projects in order to mitigate such risks.¹⁴⁶

Negotiating Earmarks and Engagement with Donors

As one of the authors can attest based on personal experience, WHO’s legal office has long had a role in screening funding agreements to eliminate conditions or requirements that conflict with WHO regulations or policies. Examples of problematic provisions include those that would require WHO to hire the donor states’ nationals, or that would require WHO to implement unilateral sanctions (as opposed to those imposed by the Security Council).

More recently, since Dr. Tedros Adhanom Ghebreyesus took office in July 2017, WHO has developed another strategy. Recognizing that many states and other donors may be reluctant or unable to provide wholly unrestricted voluntary contributions to WHO, the secretariat has started working with donors to “reshape” their voluntary contributions so that the earmarks are less restrictive with respect to geography, subject matter, or both. Thus, for example, when a donor expresses interest in providing funds for cancer treatment in Darfur, WHO will try to persuade that donor to support the approved country program in Sudan.¹⁴⁷ Along similar lines, another senior official explained to us how she had recently completed negotiations with two donors to fund a specified “body of work” instead of particular individual projects.¹⁴⁸

¹⁴¹ Interview with senior WHO official (Geneva, 8 January 2019).

¹⁴² Interview with senior WHO official (Geneva, 8 January 2019).

¹⁴³ FENSA, above n 14, 26 [14(a)].

¹⁴⁴ See above nn. 105-101 and accompanying text.

¹⁴⁵ Interview with senior WHO official (Geneva, 8 January 2019).

¹⁴⁶ Interview with senior WHO official (Geneva, 7 January 2019).

¹⁴⁷ Interview with senior WHO official (Geneva, 7 January 2019).

¹⁴⁸ Interview with senior WHO official (Geneva, 9 January 2019).

This “lightening” of the conditions attached to funding also extends to reporting in some cases, so that, for example, WHO reports on “key performance indicators and agreed deliverables, not 20 percent of the salary going here, or 50 percent of the salary going there.”¹⁴⁹

Notably, these renewed efforts to engage donors differently have coincided with a change in the secretariat’s vocabulary and tone. Relations with donors are no longer described in transactional terms; instead, relations are defined as a “partnership” with a shared responsibility to “invest” in life-saving priorities. Interviewees have stressed that resource mobilization is an external relations exercise where partnerships have to be built and sustained to generate “investments” in the organization.¹⁵⁰ According to one official, this framing of relations between WHO and its donors helps WHO resist problematic earmark and funding conditions. As she explained: “[B]uilding strong teams that are clearly focused on a relationship basis with a set group of donors brings a much stronger capacity to say ‘no’ because it’s a relationship . . . You’re much more able to tell your friends ‘no’ than people you don’t know.”¹⁵¹ This official recalled at least two instances in which WHO declined proposed voluntary contributions, both from nonstate actors.¹⁵² More often, however, the secretariat worked with donors to “reshape” their proposed contributions to better match WHO’s capacities, limitations, and the approved program budget.¹⁵³

Increasing Coordination and Centralization with respect to Resource Mobilization

To restructure engagement with donors along these lines, Director-General Tedros has transformed the unit at headquarters dedicated to resource mobilization into an “external relations team.”¹⁵⁴ This unit seeks to coordinate requests within WHO to reach out to senior officials in donor agencies with single consolidated funding requests. The stated goal is neither to eliminate the role of technical staff in resource mobilization, nor to centralize authority on resource mobilization. Such steps would be likely be counterproductive: many of our interviewees underscored the importance of personal relationships and trust between senior WHO technical staff and their counterparts in governments and philanthropic organizations.¹⁵⁵ When it came to successful resource mobilization, Director-General Tedros’s key staff are aiming for coordination rather than centralization. That said, there is an element of centralization as well: one of our interviewees mentioned, with some chagrin, that

¹⁴⁹ Ibid.

¹⁵⁰ Interview with senior WHO official (Geneva, 7 January 2019).

¹⁵¹ Ibid.

¹⁵² Ibid.

¹⁵³ Ibid.

¹⁵⁴ Ibid.

¹⁵⁵ Interview with head of WHO country office (Video Interview, 28 January 2019).

several fundraising staff in his office had just been moved to WHO's corporate resource-mobilization team.¹⁵⁶

More generally, the point is that the leaders of international organizations have some capacity to counteract the internal fragmentation that may result from reliance on earmarked voluntary contributions.¹⁵⁷ Within WHO, Margaret Chan's endorsement of budget ceilings and the push for the Health Assembly to approve the organization's entire budget not only served to enhance member states' collective control over the WHO secretariat. It also served to reinforce director-general's supervision and management authority within the organization by reining in the autonomy of its technical units. Indeed, in light of these consequences, it is unsurprising that the proposal to introduce binding budget ceilings was controversial internally.¹⁵⁸

3. *State v. Nonstate Donors*

Finally, one issue is notable for its lack of significance in our discussions with current and former officials given the concerns that motivated the adoption of FENSA: our interviewees did not identify special risks or challenges associated with resource mobilization from non-state actors other than private corporations. In describing their interactions with donors, our interviews did not draw any categorical distinctions between WHO's engagement with member states and philanthropic organizations. One interviewee described the process for engaging with both types of entities with respect to resource mobilization as being "exactly the same."¹⁵⁹

As for the effects of FENSA in particular, our interviewees suggested that FENSA's impacts to date were generally limited, albeit for different reasons. One interviewee described FENSA as a "good educational tool" but one that had "no clear impact."¹⁶⁰ The director of one technical office described its impact as "zero" because the secretariat had already been managing as FENSA requires.¹⁶¹ For example, WHO does not receive funding from food and beverage companies for normative work because of the risk of actual and perceived influence.¹⁶² This is a longstanding practice that predates the adoption of FENSA.¹⁶³ Another interviewee suggested that there was "considerable variation" with respect to implementation of

¹⁵⁶ Interview with senior WHO Official (Geneva, 23 January 2019).

¹⁵⁷ See above n 115.

¹⁵⁸ Interview with Ian Smith, former Executive Director of the Office of the Director General (Video Interview, 13 December 2018).

¹⁵⁹ Interview with senior WHO official (Geneva, 7 January 2019).

¹⁶⁰ Interview with WHO official (Telephone Interview, 9 January 2019).

¹⁶¹ Interview with Meindert van Hilten, Senior External Relations Officer, Office of the Assistant Director-General, Division for Universal Health Coverage/Communicable Diseases and NCDs (Telephone Interview, 18 February 2019).

¹⁶² Interview with senior WHO official (Geneva, 7 January 2019).

¹⁶³ *Ibid.*

FENSA, in part because there was insufficient guidance about how FENSA's provisions should be interpreted, and in part because "for the large majority of cases there is no real repercussion if it is not done."¹⁶⁴ To be sure, FENSA remains a relatively new development and its implementation will be the subject of an initial evaluation in 2019.¹⁶⁵

6. Taking Stock

Even if it is an extreme case, WHO is not unique among international organizations in relying heavily on voluntary contributions.¹⁶⁶ This section considers the broader implications of such reliance for multilateral institutions. Ultimately, we argue that reliance on voluntary contributions is not categorically incompatible with collective governance by member states.

To consider the threat that voluntary contributions might pose to multilateralism—or to the multilateral character of international institutions, it is necessary to unpack exactly what multilateralism means. To start, as John Ruggie has pointed out, it is clear that multilateralism has both quantitative and qualitative dimensions.¹⁶⁷ The quantitative dimension is relatively straightforward: multilateralism suggests something about the number of states involved: surely more than one or two.¹⁶⁸ Defining the qualitative dimension of multilateralism is trickier. Ruggie has suggested that the distinctive qualitative element of multilateralism is that it coordinates behavior among states on the basis of general rules rather than ad hoc judgments about permissible or appropriate conduct.¹⁶⁹ Furthermore, he has argued, multilateralism requires an investment by participating states in responding to breaches of those rules.¹⁷⁰ As explained in Part 3, the WHO Constitution sets out certain rules regarding the financing of WHO. Voluntary contributions don't violate those rules; to the contrary, they are expressly permitted. For this reason, Ruggie's characterization of the qualitative element of multilateralism doesn't quite capture the risk that voluntary contributions pose to international organizations like WHO.

¹⁶⁴ Email Correspondence from Head of WHO Country Office to Authors (9 July 2019).

¹⁶⁵ FENSA, above n 14, 2 [6].

¹⁶⁶ See above n 4, n 9, n 10.

¹⁶⁷ John Gerard Ruggie, 'Multilateralism: The Anatomy of an Institution' (1992) 46 *International Organization* 561, 567.

¹⁶⁸ Harlan Grant Cohen, 'Multilateralism's Life Cycle' (2018) 112 *American Journal of International Law* 47, 50 ("While multilateralism connotes a number larger than one (unilateralism) or two (bilateralism), it cannot be boiled down to a specific number or geometry of states."); Robert O. Keohane, 'Multilateralism: An Agenda for Research' (1990) 45 *International Journal* 731, 731 (defining "multilateralism" as "the practice of co-ordinating national policies in groups of three or more states, through ad hoc arrangements or by means of institutions").

¹⁶⁹ Ruggie, above n 167, 567.

¹⁷⁰ *Ibid* 571.

Instead, the risk is the hollowing out of the governance and decisionmaking mechanisms—that WHO’s member states still go through the motions required by the WHO Constitution, but their decisions are empty and inconsequential. In other words, the main concern about voluntary contributions is that the “real” action is not taking place at the WHO’s governing bodies. Instead, the real action is in the individual, behind-the-scenes decisions that donors take about what kind of earmarked funding they want to provide to the organizations—and therefore individual decisions about what kinds of activities WHO will undertake.

In articulating why this model is not “multilateral,” there seem to be two key problems. First, decisions are being taken individually by donors, not collectively by WHO’s member states. Second, the narrow group of donors that provide most of the voluntary contributions overlaps only partially with the WHO’s formal membership. Poorer member states are de facto excluded from key decisions, while certain nonstate actors, who lack a constitutional role in WHO governance, still get to participate. Such exclusion is inconsistent with the idea of sovereign equality that is expressly affirmed in the charters of some international organizations, and implicitly affirmed in the one-state, one-vote rules codified in most IO charters, including the WHO Constitution.

To be sure, as a practical matter, the commitment of member states to sovereign equality with respect to the governance of international organizations has always been incomplete. Some organizations’ formal rules give certain states special status with respect to voting: the UN Security Council and the international financial institutions are the prime examples. Informally, powerful states have sought, and sometimes succeeded, in influencing organizations by influencing the hiring of top officials.¹⁷¹ As described in more detail below, these states have also withheld contributions (or threatened to do so) in order to secure policy changes.

This observation helps to explain not only what multilateralism is, but also why it matters for organizations like WHO to be genuinely multilateral institutions. While some deviations from sovereign equality can be tolerated, if international organizations stray too far from the value of sovereign equality, they risk losing their legitimacy and their distinctive value as international organizations.¹⁷² International organizations—especially those like WHO, which lack the authority to create binding

¹⁷¹ Thomas M. Franck, *Nation Against Nation* (Oxford University Press, 1985) 94-116; Jacob Katz Cogan, ‘Representation and Power in International Organization: The Operational Constitution and Its Critics’ (2009) 103 *American Journal of International Law* 209.

¹⁷² Thomas M. Franck, *The Power of Legitimacy Among Nations* (Oxford University Press, 1990) 101, 111-16 (noting that “equality of participation” in international organizations “is itself potent symbolism” that contributes to the legitimacy of the international legal system—but also pointing out that these symbols are potent and credible only if they correspond to reality, at least to some degree).

legal rules or to impose sanctions—are influential and effective precisely because they are *not* perceived to be the handmaidens of powerful member states.¹⁷³

1. *The Baseline for Evaluating Voluntary Contributions*

Returning, then to evaluating voluntary contributions and the risks they pose to multilateralism, one essential question is, as always, compared to what? Against what baseline should one evaluate voluntary contributions? Many scholars explicitly or implicitly compare reliance on voluntary contributions to reliance on assessed contributions. It is surely the case that if WHO relied exclusively on assessed contributions under current political circumstances, it would have fewer resources to deploy in service of “the attainment by all peoples of the highest possible level of health.”¹⁷⁴ As one of our interviewees put it, “I truly believe the organization couldn’t be what it is without voluntary contributions.”¹⁷⁵ WHO’s ability to raise money from nonstate actors has helped the secretariat implement the program budget that member states have collectively adopted but only partly funded. Without voluntary contributions, WHO would do less.¹⁷⁶

Moreover, some of the international relations literature that criticizes voluntary contributions simultaneously idealizes assessed contributions in a way that is not entirely warranted. All possible financing mechanisms for international organizations pose some risks and come with some disadvantages—including assessed contributions. While states have legal obligations to pay their assessed contributions, they do not always follow through. Sometimes they threaten to withhold payments—or actually withhold them—to secure policy changes. While the most conspicuous battles over withholding of assessed contributions have taken place at other organizations, WHO has not avoided them altogether.¹⁷⁷ Moreover, delayed payment and nonpayment of assessed contributions have posed persistent problems at WHO.¹⁷⁸

¹⁷³ See, e.g., Abbott and Snidal, above n 22, 18.

¹⁷⁴ WHO Constitution, art. 1.

¹⁷⁵ Interview with senior WHO official (Telephone Interview, 9 January 2019).

¹⁷⁶ Cf Daniel Bodansky, ‘What’s So Bad about *Unilateral Action to Protect the Environment?*’ (2000) 11 *European Journal of International Law* 338, 339 (“In many cases, effective multilateral action to protect the environment is impossible, so the choice is not between unilateralism and multilateralism, but between unilateralism and inaction.”).

¹⁷⁷ Gill Walt, ‘WHO Under Stress, Implications for Health Policy’ (1993) 24 *Health Policy* 125, 132 (describing such a threat by the United States).

¹⁷⁸ See, e.g., Beigbeder, above n 47, 163-64 (describing delayed and non-payment of assessed contributions); J. Patrick Vaughan et al, ‘Financing the World Health Organisation: Global Importance of Extrabudgetary Funds’ 35 *Health Policy* (1996) 229, 232 (“Generally the agreed regular budget is an overestimate of the final expenditure because of non-payment of assessed contributions by an increasing

Indeed, by relying heavily on voluntary contributions, WHO may well have dodged significant and potentially damaging fights over withholding assessed contributions. The point is speculative, but there's reason to think that the magnitude of this benefit is significant. Reliance on assessed contributions requires making collective decisions not only about how much money to spend and on what—but also about how to allocate the budget among member states. This last part can be especially difficult, especially at a historical moment when the state that pays the largest share of WHO's and other organizations' budgets—the United States—elected a president who is quite hostile to multilateral institutions. If the size of WHO's assessed budget were larger, the Trump administration might be more likely to withhold contributions or to pick fights over the apportionment scale. More drastically, the United States might contemplate withdrawal. The Trump administration has already exited other organizations, including UNESCO and the Universal Postal Union.¹⁷⁹

At the same time, voluntary contributions do have some important advantages relative to assessed contributions. They can be mobilized rapidly in the event of a crisis situation, as they were during the Avian Influenza and Ebola outbreaks. In addition, voluntary contributions can mitigate the consequences of individual decisions by member states to not pay assessed contributions. The possibility of seeking voluntary contributions from nonstate actors gives international organizations a more diversified portfolio of potential funders, which should make the organization less dependent on any individual funder. By making international organizations less vulnerable to unilateral (and, in some cases, unlawful) decisions of member states, voluntary contributions bolster multilateralism.

John Stoessinger highlighted another advantage in the book he wrote back in 1964.¹⁸⁰ In short, states might have a range of views about any particular initiative an international organization might undertake. They might support it, they might oppose it. In between they might be indifferent, they might be willing to tolerate certain programs but unwilling to affirmatively support them by supplying funds. If the question is whether to fund a program with assessed contributions, the states in this middle category would oppose it, quite possibly precluding the organization from engaging in the activity.¹⁸¹ But if the organization can solicit voluntary funds, then the states in that middle category may acquiesce to having the organization engage in it. In other words, when international organizations can solicit voluntary

number of member states, which have consistently under-paid their total combined annual contributions by about 20% or more over the past 10 years.”).

¹⁷⁹ Jean Galbraith, ‘United States Gives Notice of Withdrawal from UNESCO, Citing Anti-Israel Bias’, 112 *American Journal of International Law* (2018) 107; Jean Galbraith, ‘Trump Administration Announces Withdrawal from Four International Agreements’ (2019) 113 *American Journal of International Law* 132.

¹⁸⁰ Stoessinger, above n 38.

¹⁸¹ *Ibid*, 30.

contributions, shallow support for an activity among some member states becomes a green light rather than a red light.¹⁸²

The scholars who criticize the lack of collective decisionmaking when it comes to voluntary contributions forget—or perhaps overlook—that international lawmaking and the operation of international institutions often depends on acquiescence rather than affirmative support for a given outcome or decision. For example, there are innumerable examples of decisionmaking by consensus, and almost no examples of decisionmaking by unanimity, which requires an affirmative, visible show of support from all participants.¹⁸³ Or consider the Security Council, which cannot take substantive decisions unless all five permanent members concur.¹⁸⁴ It is now well settled that abstentions satisfy this requirement, and don't preclude the Security Council from taking decisions—even decisions as dramatic as authorizing the use of force. Or think about the role of silence and acquiescence in the formation of customary international law.¹⁸⁵ In general, the possibility of moving forward on the basis of shallow support and acquiescence—in the absence of strong and vocal opposition—is crucial to the way that international law and international institutions operate.

The possibility of moving forward on the basis of acquiescence and shallow support is critical to WHO's work on noncommunicable diseases. Again, the point is necessarily speculative because it is based on a counterfactual, but it is easy to imagine that, if member states had to affirmatively and specifically support WHO's work on noncommunicable diseases, it would be difficult for many of them to do so. Industries concerned would likely rally their forces against governments taking such positions. Instead, these industries have focused on lobbying their governments to preclude or restrict voluntary contributions that are earmarked for work on noncommunicable diseases.¹⁸⁶ This situation is hardly ideal from a policy perspective—

¹⁸² Ibid. (“In any given case, there are likely to be many states that are neither determined to hinder the Organization in carrying out a proposed international project nor willing to help it; if the United Nations were in a position to undertake the project without the financial help of its members, it could treat such an attitude as a positive resource.”).

¹⁸³ For a powerful personal narrative about the role of consensus in multilateral negotiations, see Ambassador Tommy Koh, ‘The Earth Summit’s Negotiating Process: Some Reflections on the Art and Science of Negotiating’, in Nicholas A. Robinson, ed., *Agenda 21: Earth’s Action Plan* (Oceana Publications, 1993).

¹⁸⁴ UN Charter, art. 27(3).

¹⁸⁵ International Law Commission, Draft Conclusions on Identification of Customary International Law (2018), Conclusion 10(3) and commentary.

¹⁸⁶ Interview with Interview with Meindert van Hilten, Senior External Relations Officer, Office of the Assistant Director-General, Division for Universal Health Coverage/Communicable Diseases and NCDs (Telephone Interview, 18 February 2019).

but opposing earmarked voluntary contributions while passively tolerating NCD work that is funded by other sources still allows at least some of this work to go on.¹⁸⁷

All that said, some genuine engagement and investment on the part of member states—including financial investment—remains quite important. There is a paradox here: financial dependence on member states can make international organizations vulnerable and threaten their independence. On the other hand, the financial dependence of international organizations may simultaneously be “essential to [their] being taken seriously by states.”¹⁸⁸ Strikingly, the former director of WHO’s resource mobilization unit insisted that the assessed contributions were a “huge benefit” to the organization, not only because they were a source of material resources, but because of how they affected member states’ perception of the organization: “People feel, much more than in other organizations, that they own it, in a positive way—they’re part and parcel of the organization.”¹⁸⁹

This point raises a question that merits further research and attention: in what particular ways do international organizations that rely entirely on voluntary contributions struggle to—and succeed in—retaining their multilateral character? The next section suggests what part of the answer to the latter question may be, highlighting ways that member states can engage in collective governance in addition to—or independently of—directly providing funds.

2. *Embedding Unilateral Decisions in Multilateral Frameworks*

Even if the final decision to about whether to provide voluntary contributions is up to individual donors, international institutions have opportunities to collectively regulate those voluntary contributions, both in terms of substance and process. The more heavily regulated voluntary contributions are, the more embedded they are in collective decisions, the less tension there is between multilateralism and the acceptance of voluntary contributions.

The Paris Agreement on climate change offers an excellent example of embedding individual, national-level decisions in a multilateral framework. Through the Paris Agreement, states clearly articulated their shared goals, including “[h]olding

¹⁸⁷ Cf. Stoessinger, above n 38, 15 (“Financial nonsupport is the least serious manifestation of opposition to United Nations executive action. If a given action, supported by the United States, arouses only passive resistance by the Soviet Union (as in the case of UNEF), it is open to the United States and others to prevent financial crisis by accepting responsibility for most of the expenses. This may be sound policy; if the United States regards a United Nations undertaking as desirable, it should perhaps be less disturbed by the fact that the Soviet Union refuses to share in the cost than gratified that the latter power permits the United States and other members to use the Organization, at their own expense, for that undertaking.”).

¹⁸⁸ *Ibid*, 33 (making this point with respect to the United Nations).

¹⁸⁹ Interview with senior WHO official (Geneva, 7 January 2019).

the increase in the global average temperature to well below 2 degrees Celsius above pre-industrial levels.”¹⁹⁰ The key issue of how much each party to the Paris Agreement will contribute to meeting this goal is not determined collectively; instead, this is a national decision for each individual party to make.¹⁹¹ Crucially, the Paris Agreement includes a number of provisions to bridge the gap between these nationally-determined contributions and the overarching goal. Each nationally-determined contribution is subject to transparency and reporting requirements.¹⁹² Moreover, the Paris Agreement builds in “global stocktakes”—that is, periodic reviews of the aggregate effects of these national decisions—and opportunities to revise them as needed to meet the collectively agreed goals.¹⁹³

As described above, WHO’s member states have taken some important steps to bolster the multilateral character of decisions about WHO’s funding and activities by incorporating voluntary contributions into the approved budget and by specifically regulating resource mobilization from non-state actors. Our case study also suggests some ways that WHO could go even further. One possibility would be to build on the principles and rules set out in FENSA to further elaborate the terms and conditions under which WHO will accept voluntary contributions from both state and non-state actors. For starters, this instrument might codify existing practices within the WHO secretariat described above in Part 5. Such an instrument might also specify the procedures for deviating from adopted policies as in the case of program support costs. When voluntary contributions are negotiated on a purely bilateral basis and unguided by any rules, the dynamics are too favorable to donors.

Another possibility would be to further enhance transparency with respect to voluntary contributions.¹⁹⁴ WHO has already taken significant steps to make the sources and amounts of voluntary contributions publicly available in its biennial financial reports and on a recently established financing portal in its website.¹⁹⁵ A further step would be to make the actual funding agreements between WHO and donors available to member states and to the public.¹⁹⁶ Making available information

¹⁹⁰ Paris Agreement, art. 2(1)(a).

¹⁹¹ Paris Agreement, arts 3-4.

¹⁹² Paris Agreement, art. 13; see also UNFCCC, The Katowice Climate Package: Making the Paris Agreement Work For All, <https://unfccc.int/process-and-meetings/the-paris-agreement/katowice-climate-package> (describing subsequent decisions of the conference of the parties to the Paris Agreement regarding implementation of key provisions).

¹⁹³ Paris Agreement, art. 14.

¹⁹⁴ Cf Margaret Lemos and Guy-Uriel Charles, ‘Patriotic Philanthropy: Financing the State with Gifts to Government’ (2018) 106 *California Law Review* 1129, 1190-92 (arguing that gifts to government are less troubling when the fact of the gift and processes of offer and acceptance are transparent to the public).

¹⁹⁵ WHO, Programme Budget Web Portal < <https://open.who.int>>.

¹⁹⁶ Gopakumar, above n 78 (noting such agreements are currently not publicly available).

about the nature and extent of the strings that are attached to donors' earmarked contributions could provoke valuable discussions about these voluntary contributions, whether WHO ought to accept them, and whether further across-the-board regulation of voluntary contributions is needed.

These points suggest that a more positive reevaluation of WHO's special programs may be in order.¹⁹⁷ Some commentators have been quite critical of these special programs because they have been largely carved out from WHO's regular governance.¹⁹⁸ Again, when it comes to normative evaluations, the baseline matters. It's not clear that any of these programs would have survived if they could only be funded through WHO's regular budget. Moreover, these special programs have some real advantages over bilateral earmarked contributions: bilateral earmarked contributions are "negotiated" totally behind the scenes, just between WHO and the donor, whereas the special programs are more transparent and institutionalized through multilateral decision-making involving both donors as well as recipient countries, thus increasing their perceived legitimacy.

In short, "collective multilateral decisionmaking" is not a binary feature, either present or absent. Instead, this feature might be stronger or weaker along various dimensions and at multiple points in the budget decisionmaking process as well as resource mobilization.¹⁹⁹

¹⁹⁷ See *supra* nn.41-44.

¹⁹⁸ See Beigbeder, *above* n 47 166-67; Walt, *above* n 177, 138

¹⁹⁹ Cf Lemos and Charles, *above* n 194, 1190-92 (2018) (identifying a number of factors that make acceptance by governments of gifts from private actors more or less troubling).