
Between Participation and Capture in International Rule-Making: The WHO Framework of Engagement with Non-State Actors

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Abstract

There has been a tremendous rise in the participation of non-state actors – notably business – in international rule-making. While such participation has many benefits, the risk that rule-making gets captured – that is, that rules are made in line with business' profit-driven interest rather than in the public interest – has increased too. This article, first, explores the growing problem of capture in international rule-making and identifies three modes of capture that have become particularly prevalent in international policy-making: information capture, representational capture and resource capture. The article then explores the World Health Organization's (WHO) 2016 Framework of Engagement with Non-State Actors (FENSA) and how effectively it manages these risks. FENSA is interesting because it is the first policy by an international organization seeking to comprehensively and systematically regulate non-state actor engagement and to prevent related risks. In assessing FENSA, the article focuses on the WHO's engagement of two main actors: the Big Food industry and voluntary donors. Finally, the article seeks to draw more general lessons as to the capacity of FENSA-like reforms to prevent capture in international rule-making.

1 Introduction

With rates of obesity, diabetes and cardiovascular diseases soaring, the World Health Organization (WHO) decided to update its sugar intake restrictions in 2013. Having opened guideline development to public consultation, multinational food and beverage companies, such as Coca Cola and McDonalds, which are in the business of

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producing and selling highly processed foods and beverages that are high in sugar, salt and trans fat ('Big Food'), submitted their positions and vigorously fought the WHO guideline. In making their case, the companies attacked the validity of scientific studies on the health effects of sugar.¹ Within the global health community, this action raised concerns that the industry's profit-driven interests would undermine the public interest in addressing the epidemic of diseases caused by sugar. For international lawyers, this raises the question: does the WHO have the regulatory tools required to resist industry pressure and guard public health?

The WHO is hardly alone in facing this challenge. Rather, the challenge increasingly affects many other international organizations (IOs) (understood to include treaty-based and non-treaty-based inter- or trans-governmental bodies) in diverse fields such as finance² or the environment.³ Following demands for more democratic legitimacy and given the growing dependency of IOs on external information and resources, IOs have opened up their rule-making to non-state actor (NSA) participation in the past decade and a half – that is, to the participation of civil society, business, academia and philanthropic foundations. In a broad sense, this participation trend tracks the 20th-century administrative law revolution in many democracies, whereby an expanding and more powerful administrative state has engendered greater demands for transparency and citizen participation in rule-making.

Such opening up would appear to improve the democratic responsiveness of IOs, yet the current international legal literature has not paid sufficient attention to the problem that participation also increases the risk that rule-making becomes captured by the interests of narrow groups, so that the rules come to favour the groups' interests over the public interest. Being profit driven, this risk is particularly high when business participates, with three main types of capture risks having become particularly prevalent: capture caused by the dependency of IOs on the information held by business, capture caused by the overrepresentation of business and capture caused by the financial contributions of business.

Most IOs, however, lack a comprehensive and detailed framework for addressing such risks. In 2016, the WHO became one of the first IOs to adopt a comprehensive policy for encouraging NSA engagement while simultaneously mitigating the accompanying risks – the Framework of Engagement with Non-State Actors (FENSA).⁴ The purpose of this article is to examine how and whether FENSA manages capture risks – on paper and in practice. Moreover, FENSA is a compelling case not only in its own right but also for informing the growing number of public-private initiatives.⁵ NSA

¹ Stuckler et al., 'Textual Analysis of Sugar Industry Influence on the World Health Organization's 2015 Sugars Intake Guideline', 94 *Bulletin of the World Health Organization* (2016) 566.

² Young, 'Transnational Regulatory Capture? An Empirical Examination of the Transnational Lobbying of the Basel Committee on Banking Supervision', 19 *Review of International Political Economy* (2012) 663, at 666.

³ Dambacher, Stilwell and McGee, 'Clearing the Air: Avoiding Conflicts of Interest within the United Nations Framework Convention on Climate Change', 36(2) *Journal of Environmental Law* (2020) 53.

⁴ Framework of Engagement with Non-State Actors (FENSA), Doc. WHA 69.10 (2016).

⁵ E.g. United Nations (UN) Joint Inspection Unit, *The United Nations System: Private Sector Partnerships Arrangements in the Context of the 2030 Agenda for Sustainable Development*, Doc. JIU/REP/2017/8 (2017).

engagement is a central feature of the Sustainable Development Goals (SDGs),⁶ and many IOs are adapting their work plans towards more NSA engagement. In the process, IOs are considering ways to develop engagement policies, and they will likely look to FENSA for inspiration. FENSA thus serves as a case from which to draw more general conclusions as to the capability of FENSA-like reforms to prevent capture.

This article assesses FENSA against the principles emerging from the Organisation for Economic Co-operation and Development's (OECD) capture prevention best practices. Such practices reflect an emerging consensus regarding procedures for preventing capture in the domestic context, and IOs might look to them for inspiration too. Four principles emerge from these best practices: balanced inclusiveness, transparency, integrity policies and enforcement. On paper, out of the four principles, FENSA mainly endorses two of them: transparency, by setting up a register of NSAs, and integrity, by setting up a due diligence and risk management process. It does not advance balanced inclusiveness or enforcement. Further, in practice, the WHO Secretariat's interpretation of risk has been lenient, and FENSA's implementation has been slow. FENSA's impact thus appears to be minimal. Worse still, some individuals view FENSA as a 'Trojan horse' that, by giving a false impression of legitimacy, enables more participation without adequate safeguards, resulting in more problematic entanglements with business. In fairness, however, FENSA is still in its infancy, and it might be too early to pass judgement.

Regarding more general lessons for IOs, the article concludes that certain structural features shared by most IOs – the lack of enforcement mechanisms, resource constraints, the two-level nature of international rule-making and delegation – will likely continue challenging the ability of IO engagement reforms to prevent capture. Thus, at best, such reforms have the potential to mitigate capture risks but are unlikely to effectively prevent them. At worst, by giving a false sense of legitimacy, the reforms may actually worsen risks. The article is structured as follows: Part 2 describes the rise in NSA participation; Part 3 lays out the problem of capture; Part 4 gives a brief overview of prevailing IO practices; Part 5 outlines the four principles emerging from the best practices for preventing capture; Part 6 describes FENSA; Part 7 assesses FENSA's effectiveness; and Part 8 concludes regarding international rule-making more generally.

2 The Democratic Deficit and the Rise in NSA Participation

Since the 1990s, rule-making (used interchangeably with policy-making and standard setting) by IOs has increased. Examples include the Basel Committee on Banking Supervision's capital accords or the Codex Alimentarius' food standards. A 2018 OECD survey of 50 IOs found that they had over 70,000 instruments.⁷ Such

⁶ Sustainable Development Goals (SDGs), 2017, Goal 17, available at <https://sdgs.un.org/goals>.

⁷ Organisation for Economic Co-operation and Development (OECD), *The Contribution of International Organizations to a Rule-Based International System: Key Results from the Partnership of International Organizations for Effective Rulemaking* (2019), at 9, available at <https://www.oecd.org/gov/regulatory-policy/IO-Rule-Based%20System.pdf>.

rules affect states, companies and individuals. Because the delegation chain between affected citizens and IOs is so long, IOs suffer from a democratic deficit.⁸ Drawing on participatory and deliberative democratic theory,⁹ which emphasizes citizen participation in public decisions that affect their lives,¹⁰ commentators have called for closing this deficit through greater participation in rule-making.¹¹ Proponents of ‘global stakeholder democracy’ have called for ‘stakeholder communities’ to participate.¹² ‘Global deliberative democracy’ scholars have called for better deliberation.¹³ Global administrative lawyers have demanded that global institutions be ‘responsive to the interests of all of those upon whom their activities impact’,¹⁴ in particular towards those stakeholders whom they have ‘disregarded’.¹⁵ The SDGs instruct to ‘ensure responsive, inclusive, participatory and representative decision-making at all levels’.¹⁶

In response to these pressures, and due to being more dependent on external expertise and resources, IOs have, in the past two decades, significantly opened rule-making to NSA participation. Empirical studies by Jonas Tallberg and collaborators show that ‘one of the most profound changes in global governance in recent decades’ has been the opening up to NSAs and that, since the 1950s, NSA access to IOs has grown from 20 per cent to over 70 per cent. This transformation spans ‘all issue areas, policy functions, and world regions’. Today, almost all IOs offer access, and an absolute absence of NSAs is very rare. While IOs with a historical record of no or limited access to rule-making, such as the World Bank and World Trade Organization (WTO), have gradually opened up, organizations that already had a tradition of engagement, such as the United Nations (UN), have become even more open.¹⁷ An OECD survey of 50 IOs similarly highlights the significant rise in participation opportunities in the past decade alone.¹⁸ For example, in 2011, some 3,500 non-governmental organizations (NGOs) had consultative status with the United Nations Economic and Social Council

⁸ J. Pauwelyn, R.A. Wessel and J. Wouters (eds), *Informal International Lawmaking* (2012).

⁹ Olson, ‘Deliberative Democracy’, in B. Fultner (ed.), *Jürgen Habermas: Key Concepts* (2011) 140; Bächtiger et al., ‘Deliberative Democracy: An Introduction’, in A. Bächtiger et al. (eds), *The Oxford Handbook of Deliberative Democracy* (2018) 1.

¹⁰ Fischer, ‘Participatory Governance: From Theory to Practice’, in D. Levi Faur (ed.), *The Oxford Handbook of Governance* (2012) 457; Ferree et al., ‘Four Models of the Public Sphere in Modern Democracies’, 31(3) *Theory and Society* (2002) 289, at 295–296.

¹¹ A. von Bogdandy et al., *The Exercise of Public Authority by International Institutions: Advancing International Institutional Law* (2010); Peters, ‘Membership in the Global Constitutional Community’, in G. Ulstein, J. Klabbers and A. Peters (eds), *The Constitutionalization of International Law* (2009) 153.

¹² T. Macdonald, *Global Stakeholder Democracy: Power and Representation beyond Liberal States* (2008).

¹³ J. Bohman, *Democracy across Borders: From Dêmos to Dêmoi* (2007); Dryzek, ‘Global Civil Society: The Progress of Post-Westphalian Politics’, 15 *Annual Review of Political Science* (2012) 101.

¹⁴ Kingsbury, Krisch and Stewart, ‘The Emergence of Global Administrative Law’, 68 *Law and Contemporary Problems* (2005) 15.

¹⁵ Stewart, ‘Remedying Disregard in Global Regulatory Governance: Accountability, Participation, and Responsiveness’, 108 *American Journal of International Law (AJIL)* (2014) 211.

¹⁶ SDGs, *supra* note 6, Target 16.7.

¹⁷ Tallberg et al., ‘Explaining the Transnational Design of International Organizations’, 68 *International Organization* (2014) 741, at 768.

¹⁸ OECD, *International Regulatory Co-Operation: The Role of International Organisations in Fostering Better Rules of Globalisation* (2016), at 85; OECD, *supra* note 7, at 14.

(increasing from 41 in 1948). Even the UN General Assembly has opened up: in 2016, it granted the International Chamber of Commerce – the world’s largest business association – observer status.

Moreover, multi-stakeholder partnerships – that is, arrangements in which diverse public and private stakeholders collaborate towards a common purpose – have been multiplying.¹⁹ The SDGs have embraced such partnerships, calling to ‘encourage and promote ... public-private and civil society partnerships’²⁰ and to ‘enhance ... multi-stakeholder partnerships ... to support the achievement of the SDGs’.²¹ In addition to the many existing partnerships such as the Internet Corporation for Assigned Names and Numbers (ICANN) or the Global Fund to Fight AIDS, Tuberculosis and Malaria, many UN organizations have been updating their work programmes to collaborate through partnerships.²²

3 Capture in International Rule-Making

From a democratic legitimacy perspective, this rise in participation would appear to be good news. However, it also increases the risk that special interests capture, or are perceived to capture, rule-making. Capture occurs when a public authority makes a decision in the interest of a special group rather than in the public interest.²³ Nevertheless, most IOs have barely regulated the terms and conditions under which participation takes place, and they have not set rules for preventing capture. Capture is not a new phenomenon, yet growing openness amplifies it, or as Jens Steffek says, ‘strengthening certain avenues of input [legitimacy] may in the end give more power to factions that are well funded and well organized’ and ‘may aggravate imbalances in access to global policy making’.²⁴

Capture undermines core democratic values. By undercutting the equal participation of all who have a stake, capture undermines input legitimacy.²⁵ Moreover, while standards – on matters such as climate change or vaccines – are often of a technical nature, they have distributional consequences, determining winners and losers in terms of risk and resources. Hence, by negatively affecting society or the economy, capture also risks undermining ‘output democratic legitimacy’.²⁶ Capture can be

¹⁹ Berman, ‘The Rise of Multi-Stakeholder Partnerships’, in *Proceedings of the ASIL Annual Meeting* (2017).

²⁰ SDGs, *supra* note 6, Target 17.17.

²¹ *Ibid.*, Target 17.16.

²² UN Joint Inspection Unit, *supra* note 5, at 10–13.

²³ OECD, *Preventing Policy Capture: Integrity in Public Decision Making (Capture Strategy)* (2017), at 19; D. Carpenter and D. Moss, *Preventing Regulatory Capture: Special Interest Influence and How to Limit It* (2014).

²⁴ Steffek, ‘The Output Legitimacy of International Organizations and the Global Public Interest’, 7(2) *International Theory* (2015) 263, at 264.

²⁵ Bächtiger et al., *supra* note 9, at 5–7; Habermas, ‘A Reply to My Critics’, in J.B. Thompson and D. Held (eds), *Habermas: Critical Debates* (1982) 219.

²⁶ Baxter, ‘Capture in Financial Regulation: Can We Channel It Toward the Common Good?’, 21 *Cornell Journal of Law and Public Policy* (2011) 175; D. Estlund and H. Landemore (eds), *The Epistemic Value of Democratic Deliberation: The Oxford Handbook of Deliberative Democracy* (2018), at 12.

caused through illegal measures, such as bribery.²⁷ However, I focus on the legal, subtle ways that are increasingly prevalent in international rule-making: information, representation and resources. Although they may overlap, they are analytically distinct. Further, while these modes of capture potentially apply to all kinds of NSAs, being profit-driven, the risks associated with capture are arguably the highest when it comes to business. I, therefore, with a few exceptions, mostly focus on business.

A Information Capture

In light of growing complexity and the absence of sufficient resources to develop their own expertise, IOs are increasingly dependent on industry knowledge (and big data held by corporations will likely further increase this dependency).²⁸ Consequently, business provides much of the expertise underlying international standards.²⁹ While, on its face, such information allows policy-makers to make more informed decisions, business often uses information as a strategic tool for advancing its profit-driven interests. By providing information, industry increases the likelihood that its information will determine the outcome.³⁰ As Yuval Noah Harari says, ‘those who own the data own the future’.³¹ The data provided often represents one side of an issue or, worse, misrepresents the facts. Thomas McGarity, Sidney Shapiro and David Bollier call the use of ‘respectable’ industry data ‘sophisticated sabotage’.³² Industry also often sponsors research by what appear to be non-profit front groups, which obscure the agenda of the business entity backing it, thereby giving a false impression of independent expertise and improving the credibility of the information (‘astroturf activism’).³³ For example, the tobacco industry funded the Center for Indoor Air Research, which published research that challenged studies linking tobacco with cancer.

There is mounting evidence on the potentially severe consequences of information capture. For example, the recent crashes of two Boeing 737 Max planes have been linked to the US Federal Aviation Administration having relied, in the approval process, on Boeing safety data.³⁴ Also, information provided by financial institutions played an

²⁷ Brewster and Huneus, ‘Introduction to the Symposium on New Directions in Anticorruption Law’, 113 *AJIL Unbound* (2019) 315.

²⁸ Saliternik, ‘Big Data and the Right to Political Participation’, 21(3) *Journal of Constitutional Law* (2019) 721.

²⁹ Durkee, ‘Industry Lobbying and “Interest Blind” Access Norms at International Organizations’, 111 *AJIL Unbound* (2017) 119; Berman, ‘Industry, Regulatory Capture and Transnational Standard-Setting’, 111 *AJIL Unbound* (2017) 112.

³⁰ Carpenter and Moss, ‘New Conceptions of Capture: Mechanisms and Outcomes’, in D. Carpenter and D.A. Moss (eds), *Preventing Regulatory Capture: Special Interest Influence and How to Limit It* (2013) 69; McCarty, ‘Complexity, Capacity, and Capture’, in Carpenter and Moss, *ibid.*, at 102.

³¹ Y.N. Harari, *21 Lessons for the 21st Century* (2018), at 73.

³² T. McGarity, S. Shapiro and D. Bollier, *Sophisticated Sabotage: The Intellectual Games Used to Subvert Responsible Regulation* (2004), at 4, 5.

³³ Durkee, ‘Astroturf Activism’, 69 *Stanford Law Review* (2017) 201, at 241; J. Braithwaite and P. Drahos, *Global Business Regulation* (2000).

³⁴ N. Kitroeff, D. Gelles and J. Nica, ‘The Roots of Boeing’s 737 Max Crisis: A Regulator Relaxes Its Oversight’, *New York Times* (27 July 2019).

important role in the 2008 financial crisis.³⁵ Similarly, at Codex Alimentarius' food labelling discussions, industries have denounced the science on genetically modified food labelling,³⁶ greenhouse gas industries have sought to undermine climate science at the United Nations Framework Convention on Climate Change (UNFCCC)³⁷ and the sugar industry has attacked the validity of scientific studies on the health effects of sugar.

B Representational Capture

When a group is quantitatively overrepresented, it becomes more likely that its interests, and the information it provides, prevail and that the rule-making is done in its favour – causing representational capture.³⁸ Since taking advantage of participation opportunities requires resources, business is often overrepresented.³⁹ There is, thus, often a greater likelihood that profit-driven interests will prevail. Ample examples exist. At Codex Alimentarius, industry vastly outweighs consumer and environmental groups.⁴⁰ At the UNFCCC's treaty negotiations, fossil fuel corporations have an out-sized presence.⁴¹ Moreover, inasmuch as the Basel Committee on Banking Supervision held public consultations, most of the comments were submitted by the international banking sector.⁴² Businesses also often have more seats in multi-stakeholder partnerships, with recent studies finding that partnerships institutionalize conflicts of interest⁴³ and empower commercial interests.⁴⁴

³⁵ Baker, 'Restraining Regulatory Capture? Anglo America, Crisis Politics and Trajectories of Change in Global Financial Governance', 86(3) *International Affairs* 647.

³⁶ Smythe, 'In Whose Interests? Transparency and Accountability in the Global Governance of Food: Agribusiness, the Codex Alimentarius, and the World Trade Organization', in J. Clapp and D. Fuchs (eds), *Corporate Power in Global Agrifood Governance* (2009) 107; Scarbrough, 'Codex: What's All the Fuss?', 65 *Food and Drug Law Journal* (2010) 631, at 783.

³⁷ Dambacher et al., *supra* note 3, United Nations Framework Convention on Climate Change 1992, 1171 UNTS 107.

³⁸ U.S. Senate, Committee on the Judiciary, Subcommittee on Administrative Oversight and the Courts, *Protecting the Public Interest: Understanding the Threat of Agency Capture* (HRG 111-905, 3 August 2010), at 8, available at <https://www.govinfo.gov/content/pkg/CHRG-111shrg64724/html/CHRG-111shrg64724.htm>.

³⁹ Shapiro and Murphy, 'Public Participation without a Public: The Challenge for Administrative Policymaking', 78(2) *Missouri Law Review* (2013) 504; Capture Strategy, *supra* note 23, at 15, 17.

⁴⁰ Duquet and Gereats, 'Food Safety Standards and Informal International Lawmaking', in A. Berman et al. (eds), *Informal International Lawmaking: Case Studies* (2012) 395.

⁴¹ Corporate Accountability International, *Inside Job: Big Polluters' Lobbyists on the Inside at the UNFCCC* (2017); H. Tabuchi, "'Vulnerable Voices" Lash Out as Companies Sway Climate Talks', *New York Times* (16 May 2017); S. Roger, 'The Role of Industry Lobbies in the Climate Negotiations', *Le Monde* (11 May 2017), English translation available at <https://www.corporateaccountability.org/media/the-rolw-of-industry-lobbies-in-the-climate-negotiations/>.

⁴² D. Tarullo, *Banking on Basel: The Future of International Financial Regulation* (2008), at 104; Chalmer, 'When Banks Lobby: The Effects of Organizational Characteristics and Banking Regulations on International Bank Lobbying', 19 *Business and Politics* (2017) 107.

⁴³ J. Richter, *Public Private Partnership and International Health Policy Making: How Can Public Interests Be Safeguarded?* (2004).

⁴⁴ L.O. Gostin, *Global Health Law* (2014), at 146.

There is also more evidence on how this asymmetry is actually generating decisions in favour of the better-represented actors. For example, while the multinational pharmaceutical industry has a seat on the International Council for Harmonization (ICH), which sets pharmaceutical standards, non-commercial developers and generic drug companies are largely excluded. The result has been ICH standards that give patented drugs a competitive advantage over generic drugs⁴⁵ and drugs for neglected, paediatric and orphan diseases.⁴⁶ Further, Basel Committee standards have been seen as harming the competitiveness of certain developing country banks, increasing the cost and volatility of capital flows to their markets and negatively affecting their credit-risk ratings.⁴⁷

C Resources Capture

Voluntary IO funding is an additional way of gaining influence that is growing in importance. Whereas mandatory country contributions have been the UN system's main revenue source, they have been declining, while voluntary donations – by states, IOs and NSAs – have been increasing.⁴⁸ Most voluntary funding is earmarked, meaning that the donors place specific conditions on the funding's use or link it to certain projects.⁴⁹ Whereas, historically, earmarking has been prohibited, as of 2017, earmarked contributions have made up approximately 56 per cent of the UN system's budget and as much as 75–85 per cent of the budget of the largest agencies (for example, the UN Development Programme [UNDP] and the UN Children's Fund [UNICEF]).⁵⁰ Of these funds, approximately 15 per cent are by 'global vertical funds, foundations, corporations and civil society'.⁵¹ Although disaggregated information about the amount of UN-wide corporate funding is not available and corporate and philanthropic funding varies across IOs (and is still relatively low), overall corporate funding is steadily growing.⁵²

⁴⁵ De Mello e Souza, 'Patents and Access to Medicines: The Politics of AIDS Treatment in Brazil', in H. Löfgren (ed.), *The Politics of the Pharmaceutical Industry and Access to Medicines* (2012) 272; World Health Organization (WHO), Report of a WHO Meeting: The Impact of Implementation of ICH Guidelines in Non-ICH Countries, Regulatory Support Series no. 9 (2001).

⁴⁶ Yusuf, 'Damage to Important Clinical Trials by Over-Regulation', 7 *Clinical Trials* (2010) 622; White, 'Clinical Trials in Tropical Diseases: A Politically Incorrect View', 11 *Tropical Medicine and International Health* (2006) 1483.

⁴⁷ Claessens et al., 'The Political Economy of Basle II: The Costs for Poor Countries', 31 *World Economy* (2008) 313.

⁴⁸ UN General Assembly, Budgetary and financial situation of the organizations of the United Nations system, Note by the Secretary-General, UN Doc.A/73/460, 29 October 2018, at 13–44; Graham, 'Follow the Money: How Trends in Financing Are Changing Governance at International Organizations', 8(5) *Global Policy* (2017) 15; Browne, 'Vertical Funds: New Forms of Multilateralism', 8 *Global Policy* 36.

⁴⁹ Dag Hammarskjöld Foundation and United Nations Multi-Partner Trust Fund Office (MPTFO), *Financing the UN Development System: Opening Doors* (2018), at 23–24, available at https://www.daghammarskjold.se/wp-content/uploads/2018/09/financial-instr-report-2018-interactive-pdf_pj.pdf.

⁵⁰ Seitz and Martens, 'Philanthrolateralism: Private Funding and Corporate Influence in the United Nations', 8 *Global Policy* (2017) 46; Reinsberg, 'Trust Funds as a Lever of Influence at International Development Organizations', 8 *Global Policy* (2017) 85.

⁵¹ UN Budget, *supra* note 48, at 43–44.

⁵² Goetz and Patz, 'Resourcing International Organizations: Resource Diversification, Organizational Differentiation and Administrative Governance', 8 *Global Policy* (2017) 5; McCoy, Chand and Sridhar, 'Global Health Funding: How Much, Where It Comes from and Where It Goes', 24(6) *Health Policy and Planning* (2009) 407.

While such funding benefits IOs because they are in dire need of funds, the downside is that any funding creates an abstract sense of obligation and loyalty to the funder.⁵³ Moreover, earmarking effectively hands decision-making to the donors.⁵⁴ Although donors cannot donate for purposes contrary to the purposes of the IOs, they decide on directing resources to their desired projects. Critics have thus called earmarking ‘Trojan multilateralism’, which ‘creates the illusion of multilateral intent’ while ‘covertly introducing the goals of individual donors’.⁵⁵ With business financing an integral part of advancing the SDGs,⁵⁶ resource capture risks will likely increase.

4 IO Practices for Preventing Capture

Despite these risks, most IOs have not systematically or comprehensively addressed them. An OECD survey similarly concludes that ‘despite its recognised importance, so far few IOs have developed a whole of organisation policy ... for stakeholder engagement ... manag[ing]risks’.⁵⁷

There are some partial exceptions. For example, the UN Guidelines on a Principle-based Approach to Cooperation between the UN and the Business Sector are intended to cover UN partnerships with business. The instrument’s central concern is protection against reputational risks by requiring that the UN shall only partner with businesses that respect human rights, labour, environment and anti-corruption principles, as reflected in the UN Global Compact and the UN Guiding Principles on Business and Human Rights.⁵⁸ It is also a principle-based approach (stressing integrity, transparency and accountability). Some UN organizations have developed additional internal policies, such as the UNDP’s Policy for Due Diligence and Partnerships with the Private Sector, UNICEF’s Strategic Framework for Partnerships and Collaborative Partnerships and the UN Industrial Development Organization’s Policy on Business Sector Partnerships. FENSA, which I address below, is more comprehensive because it covers a wide range of engagements (not only partnerships) with all types of NSAs (not only business) and operationalizes these principles, including by creating a register of NSAs.

Some IOs have sought to become more inclusive, such as by carrying out public consultations (for example, the Basel Committee) or by setting up a multi-stakeholder

⁵³ Costello et al., ‘Health Professional Associations and Industry Funding’, 389 *The Lancet* (2017) 597.

⁵⁴ Graham, ‘Money and Multilateralism: How Funding Rules Constitute IO Governance’, 7(1) *International Theory* (2015) 162; Graham, ‘The Institutional Design of Funding Rules at International Organizations: Explaining the Transformation of Financing at the United Nations’, 23(2) *European Journal of International Relations* (2017) 365. UN Industrial Development Organization (UNIDO), *Independent Thematic Evaluation: UNIDO’s Partnerships with Donors* (2017), at ix, available at https://www.unido.org/sites/default/files/2017-11/THEM_UNIDOS_Partnerships_with_Donors.pdf.

⁵⁵ Sridhar and Woods, ‘Trojan Multilateralism: Global Cooperation in Health’, 4(4) *Global Policy* (2013) 325, at 326; Graham, ‘Money and Multilateralism’, *supra* note 54, at 162–164.

⁵⁶ E.g. Group of Friends of SDG Financing.

⁵⁷ OECD, *supra* note 7, at 15.

⁵⁸ UN Guiding Principles on Business and Human Rights, (2011) s. 15, available at https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf.

structure (for example, ICANN and Gavi, the Vaccine Alliance). In theory, these consultations and governance structures enhance balanced inclusiveness, thereby curtailing representational capture. In practice, however, as noted above, many end up reinforcing business over-representation. Finally, many IOs have conflict-of-interest (COI) policies.⁵⁹ A COI arises when a 'public official has private capacity interests which could improperly influence the performance of their official duties and responsibilities'.⁶⁰ Such policies, however, only address private COIs (that is, when the official could gain something personally from the decision [for example, employment, family, finances]). The policies do not address the institutional conflicts of interest described above, such as between the sugar industry's profit and the WHO's public health interests (which FENSA, as I explain below, does cover).

5 Principles for Preventing Policy Capture

This part maps the principles emerging from best practices for preventing policy capture.⁶¹ These principles provide a framework against which I assess FENSA. These best practices go beyond anti-corruption rules and aim to prevent capture arising from diverse engagements, including stakeholder consultations, lobbying (intense and organized efforts by special groups to influence policy-making) or donations to political campaigns. As I demonstrate below, irrespective of the particular type of engagement, four principles emerge from these best practices: balanced inclusiveness, transparency, integrity and enforcement.⁶²

I mostly draw from three OECD best practices. The OECD's 2017 Strategy on Preventing Policy Capture (Capture Strategy) presents evidence on how capture has been repeatedly directing policies towards special interests, thereby exacerbating inequalities and undermining democratic values, economic growth and trust in governments.⁶³ The Capture Strategy also provides guidance on identifying and mitigating capture risks. Furthermore, illustrating the immense size and the adverse impacts of lobbying on policies, including the role of lobbying in causing the 2008 financial crisis, the 2013 OECD's Transparency and Integrity in Lobbying: 10 Principles for Transparency and Integrity in Lobbying (Lobbying Principles) set out principles for lobbying.⁶⁴ Moreover, to prevent capture caused by the funding of political parties

⁵⁹ United Nations Joint Inspection Unit, Review of Mechanisms and Policies Addressing Conflict of Interest in the United Nations System, UN Doc. JIU/REP/2017/9 (2017).

⁶⁰ OECD, *Managing Conflict of Interest in the Public Service: OECD Guidelines and Country Experiences* (2003), at 15.

⁶¹ Durkee, 'International Lobbying Law', 127(7) *Yale Law Journal* (2017) 1742.

⁶² Other notable non-governmental guidelines that share the same principles include Sunlight Foundation, *International Lobbying Disclosure Guidelines* (2013), Transparency International Report on Lobbying in Europe and the EU (2015) and the Venice Commission, *Report on the Role of Extra-Institutional Actors in the Democratic System* (2013).

⁶³ Capture Strategy, *supra* note 23.

⁶⁴ OECD, *Transparency and Integrity in Lobbying: 10 Principles for Transparency and Integrity in Lobbying* (Lobbying Principles) (2013), available at <https://www.oecd.org/corruption/ethics/Lobbying-Brochure.pdf>.

and electoral campaigns, the 2016 OECD's Framework on Financing Democracy (Financing Framework) develops funding principles.⁶⁵ Taken together, these three policies create a framework for preventing capture in diverse engagement situations. Recently, Western democracies have also been adopting capture prevention policies along similar lines, such as the European Commission's (EC) Better Regulation Guidelines and Minimum Standards for Consultation.⁶⁶

The backdrop to these best practices is the 2008 financial crisis and its aftermath. Although capture has long been identified as a problem,⁶⁷ there has been widespread consensus that financial industry lobbying had enabled lending practices that had provoked the financial crisis. This triggered government action to monitor lobbying activities more closely.⁶⁸ Further, the growing distrust of people who had not reaped the benefits of globalization has sparked anxiety in Western capitals about a backlash against the 'rigged' system. These fears have triggered action by OECD member states in recent years to better protect the system from capture, leading to the development of these practices. These practices – largely drawn from domestic practices – arguably reflect an emerging consensus or a global administrative law on the measures that democratic public authorities should have in place to prevent capture. They provide an inspirational framework against which to measure FENSA. Other IOs might also draw on them in developing new engagement reforms. In what follows, I sketch out the four emerging principles.

A Balanced Inclusiveness

The existence of offsetting interests is key to limiting informational or representational capture.⁶⁹ Levelling the playing field through inclusiveness, which is a balanced composition of a plurality of voices with diverging interests, is thus necessary. The Capture Strategy accordingly determines that 'ensuring the inclusive and fair participation of different interests in public decision-making is a key tool against policy capture', and the Lobbying Principles determine that 'all stakeholders [should have] fair and equitable access to the development and implementation of public policies', including

⁶⁵ OECD, *Financing Democracy: Funding of Political Parties and Election Campaigns and the Risk of Policy Capture* (Financing Framework) (2016).

⁶⁶ European Commission, Communication from the Commission: Towards a Reinforced Culture of Consultation and Dialogue: General Principles and Minimum Standards for Consultation of Interested Parties by the Commission, COM (2002) 704 final, 11 December 2002; European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Better Regulation for Better Results – An EU Agenda, COM (2015) final, 19 May 2015; European Commission, Commission Staff Working Document: Better Regulation Guidelines, SWD (2017) 350, 7 July 2017.

⁶⁷ Stigler, 'The Theory of Economic Regulation', 2 *Bell Journal of Economics and Management Science* (1971) 3.

⁶⁸ D. Igan, P. Mishra and T. Tresselt, 'A Fistful of Dollars: Lobbying and the Financial Crisis', IMF Working Paper no. WP/09/287 (2009).

⁶⁹ Warren, 'A Problem-Based Approach to Democratic Theory', 111 *American Political Science Review* (2017) 39.

promoting ‘fair and equitable representation of business and societal interests’.⁷⁰ To operationalize inclusiveness, the EC must seek the whole spectrum of views⁷¹ and must balance between contrasting groups (for example, social and economic groups, small and large companies and marginalized groups such as women and elderly people).⁷²

The Financing Framework likewise recommends balancing between private and public funding, stating that ‘private donation is a ... means for ... policy capture by powerful special interests ... public support strengthens the capacity of political parties to level the electoral playing field’.⁷³ That said, the framework recommends banning certain private contributions, notably corporate or trade union donations.⁷⁴ Further, the EC’s framework requires being proactive about identifying stakeholders (defined as those affected by, implementing or interested in the policy) and actively seeking their input.⁷⁵ In determining stakeholders, the EC must assess the wider impact of the policy, including on other policy areas (such as environmental or consumer interests) and scan diverse stakeholder categories, including businesses, civil society, academia and individuals.

B Transparency

Transparency mitigates capture because transparency deters wrongdoing.⁷⁶ The Lobbying Principles determine that ‘countries should provide an adequate degree of transparency to ensure that public officials, citizens and businesses can obtain sufficient information on lobbying activities’.⁷⁷ What kind of information should organizations share? The Capture Strategy highlights how transparency measures should be enacted throughout the entire policy circle process, from agenda setting through to policy development, adoption, implementation and evaluation.⁷⁸ The Lobbying Principles determine that states should be transparent about whom they engage, the objective of the engagement, the issues deliberated, the funding sources, when and how stakeholders participated, their input and the results of the engagement.⁷⁹ The

⁷⁰ Lobbying Principles, *supra* note 64, Principle 1.

⁷¹ Article 11, Consolidated Version of the Treaty on European Union, OJ 2010/C 83/01. European Commission, ‘Minimum Standards’, *supra* note 66, at 5, 11, 16, 17; European Commission, ‘Better Regulation Guidelines’, *supra* note 66, at 75; Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making, OJ L 123, 12 May 2016, para. 19.

⁷² European Commission, ‘Better Regulation Guidelines’, *supra* note 66, at 72–75 (sect. 6.1.2); European Commission, ‘Minimum Standards’, at 11, 12, 19–20; European Commission, *Better Regulation: Why and How?*, available at https://ec.europa.eu/info/law/law-making-process/planning-and-proposing-law/better-regulation-why-and-how_en.

⁷³ Financing Framework, *supra* note 65, at 37–38.

⁷⁴ *Ibid.*, at 30.

⁷⁵ Beauvais, ‘Deliberation and Equality’, in A. Bächtiger et al. (eds), *Oxford Handbook of Deliberative Democracy* (2018).

⁷⁶ Risse, ‘Arguing and Deliberation in International Relations’, in Andre Bächtiger et al. (eds), *The Oxford Handbook of Deliberative Democracy* (2018) 8.

⁷⁷ Lobbying Principles, *supra* note 64, Principle 5.

⁷⁸ Capture Strategy, *supra* note 23.

⁷⁹ Lobbying Principles, *supra* note 64, Principle 5.

principles further recommend creating a formal policy-making ‘footprint’, which captures all of this information, as this would facilitate public scrutiny as to who has sought to influence the process.⁸⁰ In 2019, the European Parliament adopted a ‘legislative footprint’ in the Parliament’s registry.⁸¹ The Financing Framework similarly requires comprehensive reporting on all donations.⁸²

To promote scrutiny, such information should be easily accessible to the public via the Internet.⁸³ The Lobbying Principles determine that ‘countries should enable stakeholders – including civil society organizations, business, the media and the general public – to scrutinize lobbying activities’. In addition, ‘countries should consider using ... the internet, to make information accessible’.⁸⁴ To this end, lobbying registers – online databases of entities whose goal is to influence policy-making – have grown in popularity and are prevalent in European countries⁸⁵ and in North America.⁸⁶ The Financing Framework likewise requires using online technologies for the ‘timely, reliable, accessible and intelligible public disclosure of reports’.⁸⁷

C Integrity Policies

To foster a culture of integrity, there should be ‘clear rules and guidelines of conduct for public officials’, which would give ‘public officials clear directions on how they are permitted to engage’ with lobbyists,⁸⁸ donors or other private actors.⁸⁹ Such codes of conduct should identify the standards of behaviour expected of public officials.⁹⁰ Moreover, stakeholders, lobbyists or donors should also ‘share responsibility for fostering a culture of transparency and integrity’⁹¹ and should be subject to codes of ethical conduct and loyalty to the organization.⁹² Except for lobbyists in the EC,⁹³ such codes

⁸⁰ *Ibid.*, Principle 6.

⁸¹ European Parliament Decision of 31 January 2019 on Amendments to Parliament’s Rules of Procedure Affecting Chapters 1 and 4 of Title I; Chapter 3 of Title V; Chapters 4 and 5 of Title VII; Chapter 1 of Title VIII; Title XII; Title XIV and Annex II, 2018/2170(REG); Association of Accredited Public Policy Advocates to the European Union, *Making the Case for a Legislative Footprint in the European Parliament* (2014), available at <http://www.aalep.eu/making-case-legislative-footprint-ep>.

⁸² Financing Framework, *supra* note 65, at 30, 66.

⁸³ Lobbying Principles, *supra* note 64, Principle 6.

⁸⁴ *Ibid.*

⁸⁵ European Union, *Transparency Register*, available at <http://ec.europa.eu/transparencyregister/public/homePage.do>.

⁸⁶ Transparency International, *supra* note 62, at 8, 31.

⁸⁷ Financing Framework, *supra* note 65, at 30, 72.

⁸⁸ Lobbying Principles, *supra* note 64, Principle 7.

⁸⁹ Financing Framework, *supra* note 65, at 72, 83.

⁹⁰ Capture Strategy, *supra* note 23. The European Commission’s Code of Conduct is available at https://ec.europa.eu/info/about-european-commission/service-standards-and-principles/codes-conduct/ethics-and-integrity-eu-commissioners/code-conduct-members-european-commission_en.

⁹¹ Lobbying Principles, *supra* note 64, Principle 7.

⁹² See, e.g., OECD Council on Public Integrity, *Recommendation on Public Integrity*, at Recommendation 4, available at <https://www.oecd.org/gov/ethics/OECD-Recommendation-Public-Integrity.pdf>. Financing Framework, *supra* note 65, at 89.

⁹³ Agreement between the European Parliament and the European Commission on the Transparency Register for Organizations and Self-Employed Individuals Engaged in EU Policy Making and Policy Implementation, OJ L 277, 19 September 2014.

of conduct are rare. Further, COI policies – determining how to identify COIs, assess their risk and how to manage them – should also be in place.⁹⁴

D Enforcement

To encourage implementation and compliance, oversight mechanisms, such as reporting and monitoring, should be in place.⁹⁵ Enforcement mechanisms that can impose sanctions in case of breaches and deal with third party complaints are also critical.⁹⁶ Such external oversight mechanisms are playing an increasingly significant role in the EU,⁹⁷ such as the European Court of Arbitrators, the European Court of Justice and the European Ombudsman.⁹⁸ Canada also has a commissioner of lobbying.

6 FENSA

Having laid out the four emerging principles, this section describes FENSA's background and main features.

A Background

The WHO is the UN agency⁹⁹ in charge of global health.¹⁰⁰ While the WHO Constitution has historically permitted NSA engagement, the scope and range of such engagement has significantly increased in the past two decades.¹⁰¹ Initially limited to NGOs with official relations (NSAs that fulfilled certain criteria and whom the Executive Board awarded the privilege),¹⁰² ‘thousands of engagements [are now] regularly entered into’, including through partnerships.¹⁰³ NSA engagement is now an integral part of the WHO's work.¹⁰⁴ The WHO benefits from NSA engagement in diverse ways. NSAs contribute to the WHO's work or provide additional resources. Engaged NSAs comply better with WHO policies, and they support the wider dissemination of WHO policies.¹⁰⁵ However, over time, scandals have highlighted the risks of engagement. NSAs have tried to unduly influence the WHO's work, such as when the tobacco industry attempted to undermine the WHO's efforts to control tobacco use by

⁹⁴ Capture Strategy, *supra* note 23.

⁹⁵ Lobbying Principles, *supra* note 64, Principle 9.

⁹⁶ *Ibid.*, Principle 9; Capture Strategy, *supra* note 23.

⁹⁷ OECD, *Supreme Audit Institutions and Good Governance: Oversight, Insight and Foresight* (2016).

⁹⁸ European Union, *European Ombudsman*, available at https://europa.eu/european-union/about-eu/institutions-bodies/european-ombudsman_en.

⁹⁹ Article 2, Constitution of the World Health Organization, 1946.

¹⁰⁰ *Ibid.*, Art. 1.

¹⁰¹ *Ibid.*, Arts 2, 18(h), 33, 41, 71.

¹⁰² WHO Executive Board, Principles Governing Relations with NGOs, EB93/NGO/Note, 1993.

¹⁰³ WHO Executive Board, Engagement with Non-State Actors: Report by the Director General, EB 144/36, 23 November 2018, at 2.

¹⁰⁴ WHO, *13th General Programme of Work 2019-2023*, available at <https://apps.who.int/iris/bitstream/handle/10665/324775/WHO-PRP-18.1-eng.pdf>.

¹⁰⁵ Framework of Engagement with Non-State Actors, *supra* note 4, Art. 6.

manipulating scientific evidence on the harmful effects of smoking.¹⁰⁶ Another investigation revealed that Monsanto (which produces Roundup, a controversial herbicide) had sought to influence WHO guidelines determining the herbicide's carcinogenic nature.¹⁰⁷ In the swine flu scandal, the pharmaceutical industry was a member of the committee that made recommendations affecting the purchasing of vaccines.¹⁰⁸ A Reuters report similarly found that members of the WHO's Nutrition Guidance Expert Advisory Group had financial ties to the food industry.¹⁰⁹ These and other incidents have risked undermining the WHO's reputation and credibility.

Despite these risks, the need to engage NSAs has only grown.¹¹⁰ The WHO's director general Tedros Adhanom Ghebreyesus recently proclaimed that the 'WHO cannot do everything. Partnerships have always been vital, and even more so in the SDG era. ... Let's learn to work with civil society, private sector and others. ... And we must also engage more proactively with private sector companies, who have the products and services the world needs, and who can teach us a lot'.¹¹¹ Against this background, in 2016, the World Health Assembly adopted FENSA,¹¹² replacing previous policies that had not proved robust enough.¹¹³ FENSA was born out of the WHO's desire to reap the benefits of engagement needed in the SDG era while simultaneously preventing the associated risks and protecting the formulation of health policies 'from distortion by commercial or vested interests'.¹¹⁴ In the following sections, I assess FENSA, highlighting two main cases that pose particular challenges: Big Food and earmarked donations.

¹⁰⁶ N. Oreskes and E.M. Conway, *Merchants of Doubt: How a Handful of Scientists Obscured the Truth on Issues from Tobacco Smoke to Global Warming* (2010); Weishaar et al., 'Global Health Governance and the Commercial Sector: A Documentary Analysis of Tobacco Company Strategies to Influence the WHO Framework Convention on Tobacco Control', 9 *PLOS Med* (2012) 1.

¹⁰⁷ Baby Milk Action, *WHO in the Claw of the Lobbyists*, <http://www.babymilkaction.org/archives/16657>.

¹⁰⁸ Cohen and Carter, 'WHO and the Pandemic Flu "Conspiracies"', 340 *British Medical Journal (BMJ)* (2010) c2912; Godlee, 'Conflicts of Interest and Pandemic Flu', 340 *BMJ (Clinical research edition)* (2010) c2947.

¹⁰⁹ D. Wilson and A. Kerlin, *Special Report: Food, Beverage Industry Pays for Seat at Health Policy Table* (2012), available at <http://www.reuters.com/article/2012/10/19/us-obesity-who-industry-idUSBRE89I0K620121019>.

¹¹⁰ Ollila, *Global Health Related Public Private Partnerships and the United Nations. Globalism and Social Policy Programme Policy Brief* (2003); Collins, Mikkelsen and Axelrod, 'Interact, Engage or Partner? Working with the Private Sector for the Prevention and Control of Non-communicable Diseases', 9(2) *Cardiovascular Diagnosis and Therapy* (2018) 158.

¹¹¹ WHO Director General Speech, *Transforming for Impact* (6 March 2019), available at www.who.int/dg/speeches/detail/transforming-for-impact.

¹¹² FENSA, *supra* note 4.

¹¹³ Resolution of the Executive Board of the WHO, Principles Governing Relations Between the World Health Organization and Nongovernmental Organizations, EB 79.R22, 23 January 1987; WHO Executive Board, Guidelines on Working with the Private Sector to Achieve Health Outcomes, EB107/20, 30 November 2000; World Health Organization, Policy on WHO's Engagement with Global Health Partnerships and Hosting Arrangements, A63/44, Annex, 22 April 2010, A63/44 Corr1 13 May 2010.

¹¹⁴ 'Global Efforts to Promote Health Face Serious Challenges from "Big Business" – UN Official', *UN News* (10 June 2013), available at <https://news.un.org/en/story/2013/06/441852-global-efforts-promote-health-face-serious-challenges-big-business-un-official>; FENSA, *supra* note 4, Art. 4.

1 Big Food

Engaging Big Food poses particular risks. Non-communicable diseases (NCDs), including diabetes, heart disease and obesity, are the leading cause of death worldwide. There is scientific consensus that diets high in sugar, salt and trans fats increase the risk of NCDs.¹¹⁵ There is also consensus that Big Food companies are the ‘corporate vectors of disease’¹¹⁶ and that they are the ‘primary driver of diet-related NCDs’.¹¹⁷ Against this background, attempts to regulate this industry have increased, such as by labelling requirements, imposing soda taxes or setting sugar limits.

Big Food, being a multi-billion-dollar industry,¹¹⁸ has a lot to lose. As the former Director-General of the WHO Margaret Chan stated, ‘efforts to prevent NCDs go against the business interests of powerful economic operators. ... Public health must ... contend with Big Food, Big Soda and Big Alcohol’.¹¹⁹ Big Food thus has a long history of trying to sabotage regulation, using a range of tactics.¹²⁰ Attempts at information capture have been at the heart of Big Food’s strategy. For example, Coca Cola spent approximately US \$120 million on research, including funding the Global Energy Balance Network, whose findings downplayed the role of sugar in causing obesity and claimed that a lack of exercise was causing it.¹²¹ Other tactics include lobbying governments or litigating. For example, the sugar industry threatened that they would lobby the US government to reduce financial support for the WHO if the sugar guidelines were not withdrawn.¹²² The industry also lobbied governments to challenge Chile’s food labelling law before the WTO.¹²³

Global health advocates have thus long flagged that engaging with Big Food is risky.¹²⁴ In 2011, NGOs called on the UN High-Level Meeting on Non-Communicable Diseases to adopt a Conflict of Interest Statement, an ethical framework to safeguard

¹¹⁵ George, ‘An Unwelcome Seat at the Table: The Role of Big Food in Public and Private Standard Setting and Its Implications for NCD Regulation’, 18(1) *QUT Law Review* (2018) 159.

¹¹⁶ Gilmore, Savell and Collin, ‘Public Health, Corporations and the New Responsibility Deal: Promoting Partnerships with Vectors of Disease?’, 33(1) *Journal of Public Health* (2011) 2.

¹¹⁷ UN Human Rights Council, Report of the Special Rapporteur on the Right of Everyone to Enjoyment of the Highest Attainable Standard of Physical and Mental Health, A/HRC/26/31 2014, 1 April 2014, at 12.

¹¹⁸ University of Oslo Commission on Global Governance for Health, ‘The Political Origins of Health Inequity: Prospects for Change’, 383 *Lancet* (2014) 630.

¹¹⁹ ‘Global Efforts to Promote Health’, *supra* note 114.

¹²⁰ Miller and Harkins, ‘Corporate Strategy, Corporate Capture: Food and Alcohol Industry Lobbying and Public Health’ 30(4) *Critical Social Policy* (2010) 564; M. Nestle, *Food Politics: How the Food Industry Influences Nutrition and Health* (2007).

¹²¹ A. O’Connor, ‘Coca Cola Funds Scientists Who Shift Blame for Obesity Away from Bad Diets’, *New York Times* (9 August 2015); Mahani, Ruckert and Labonte, ‘Could the WHO’s Framework on Engagement with Non-State Actors (FENSA) Be a Threat to Tackling Childhood Obesity?’, 13(9) *Global Public Health* (2018) 1337; Bes-Rastrollo et al., ‘Financial Conflicts of Interest and Reporting Bias Regarding the Association Between Sugar Sweetened Beverages and Weight Gain: A Systematic Review of Systematic Reviews’, *PLOS Medicine* (2013) e1001578.

¹²² Stuckler, Basu and McKee, ‘UN High Level Meeting on Non-Communicable Diseases: An Opportunity for Whom?’, 343 *BMJ* (2011) d5336; Bosley, ‘Political Context of the WHO: Sugar Industry Threatens to Scupper the WHO’, 33(4) *International Journal of Health Services* (2003) 831.

¹²³ R. Perl, ‘WHO Decision Is Critical to the Fight Against Obesity and Non Communicable Diseases’, *The Lancet Global Health Blog* (2015).

¹²⁴ George, *supra* note 115, at 158; Gilmore, Savell and Collin, *supra* note 116, at 2–4.

the development of NCD policies against the conflicting interests of Big Food, alcohol and other industries.¹²⁵ Further, in the FENSA negotiations, public health advocates and some developing countries demanded the prohibition of any Big Food engagement.¹²⁶ Yet, despite the risks, the WHO has continued partnering with Big Food, such as in its WHO Coordination Mechanism on the Prevention and Control of Non-communicable Diseases.¹²⁷ Indeed, in its final form, FENSA does not prohibit Big Food engagement and only requires the WHO to undertake ‘particular caution’ when ‘engaging with private sector entities ... whose policies ... are negatively affecting human health ... in particular those related to non-communicable diseases’.¹²⁸

2 Earmarked Financing

With the transformation of its funding model, the WHO has become more vulnerable to resource capture. Historically, compulsory contributions by member states made up 80 per cent of the budget, but now earmarked voluntary funding makes up approximately 75 per cent of the budget (in addition, approximately 5 per cent of the voluntary funding is flexible and not earmarked).¹²⁹ Approximately half of the voluntary funding comes from member states, and the other half comes from NSAs (foundations, the private sector and NGOs).¹³⁰ The Bill and Melinda Gates Foundation is the second largest voluntary contributor (after the USA). Pharmaceutical (such as Roche, Merck and Sanofi), pesticide and chemical companies also donate¹³¹ – though their contributions are relatively small, approximately 3 per cent of the budget.¹³² The previous

¹²⁵ Conflict of Interest Coalition, *Statement of Concern* (2011), available at <http://info.babymilkaction.org/sites/info.babymilkaction.org/files/COIC%2019.9.11.pdf>.

¹²⁶ Proposal from India on the Draft Framework, available at www.who.int/docs/default-source/documents/fensa/proposals-from-member-states/india.pdf?sfvrsn=lad9a65a_2; Centre for Health Science and Law, *WHO Weakens Conflict of Interest Safeguards* (2016), available at <http://healthscienceandlaw.ca/wp-content/uploads/2016/06/WHO.Critique.Conflicts-of-Interest.pdf>.

¹²⁷ WHO, *Global Action Plan for the Prevention and Control of NCDs 2013–2020* (2013), available at <https://www.who.int/publications/i/item/9789241506236>

¹²⁸ ‘Health Professionals and Industry Funding: Reply from Modi’, 389 *The Lancet* (2017) 1693.

¹²⁹ The WHO Programme Budget Portal, available at <http://open.who.int/2018–19/contributors/contributor>; UN Budget, *supra* note 48, at 14; Browne, *supra* note 48, 36–44.

¹³⁰ WHO, *Voluntary Contributions by Fund and by Contributor*, A72/INF/5, 9 May 2019; Browne, *supra* note 48, at 36–44.

¹³¹ *ibid.*

¹³² Some examples for comparison (source: *ibid.*).

Contributor	Percentage of voluntary contributions (%)
USA	15.39
BM Gates Foundation	12.68
European Commission	3.22
Sanofi Aventis	0.21
Merck	0.1
GlaxoSmithKline	0.08
Novartis	0.04
Eli Lilly	0.01

director general admitted that, through earmarking, the ‘money dictat[es] what gets done’ at the WHO.¹³³ Topics that are important for global health but not attractive to donors are being neglected by the WHO.¹³⁴ For example, despite the high NCD priority, only a few voluntary contributions for NCD-related work have been made, resulting in much less NCD-related work.¹³⁵

B FENSA’s Main Features

FENSA is an overarching framework, which applies to WHO headquarters, regional and country offices as well as partnerships. The purpose of this section is to describe FENSA’s main features. First, FENSA distinguishes between four types of NSAs: NGOs, the private sector, philanthropic foundations and academic institutions. NGOs are ‘[n]on-profit entities that ... are free from concerns which are primarily of a private, commercial or profit-making nature’.¹³⁶ Private sector entities are ‘[c]ommercial enterprises, that is to say businesses that are intended to make a profit for their owners’. Further, since the private sector often tries to gain influence through industry associations (which, *per se*, are non-profit but whose goal is to promote the business interests of its members), FENSA also ‘refers to entities that represent, or are governed or controlled by, private sector entities’. This group includes, but is not limited to, ‘business associations representing commercial enterprises, entities not “at arm’s length” from their commercial sponsors. ... This also includes international business associations’.¹³⁷ Philanthropic foundations are ‘[n]on-profit entities whose assets are provided by donors and whose income is spent on socially useful purposes. They shall be clearly independent from any private sector entity in their governance and decision making’.¹³⁸ And academic institutions are engaged in ‘the pursuit and dissemination of knowledge through research, education and training’.¹³⁹ Each of these NSAs also has a specific policy.¹⁴⁰

Second, FENSA distinguishes between five types of engagement: participation, resources, evidence, advocacy and technical collaboration. Participation means attendance of the governing bodies, consultations, hearings and other meetings. Provision of resources means provision of financial or in-kind contributions. Evidence means providing information and knowledge on technical issues and consideration of scientific facts. Advocacy concerns increasing awareness on health issues. And technical

¹³³ WHO, *Director-General Addresses Reforms in WHO Financing*, 6 December 2012, available at <https://www.who.int/director-general/speeches/detail/director-general-addresses-reforms-in-who-financing>.

¹³⁴ Daugirdas and Burci, ‘Financing the World Health Organization: What Lessons for Multilateralism?’, 16(2) *International Organizations Law Review* (2019) 299.

¹³⁵ *Ibid.*

¹³⁶ FENSA, *supra* note 4, at Art. 9.

¹³⁷ *Ibid.*, at Art. 10.

¹³⁸ *Ibid.*, at Art. 11.

¹³⁹ *Ibid.*, at Arts 9–12.

¹⁴⁰ WHO Policy and Operational Procedures on Engagement with Private Sector Entities/NGOs/Philanthropic Foundations/Academic Institutions, WHA69.10, 28 May 2016.

collaboration refers to collaborative work on capacity building, emergencies and so forth.¹⁴¹

Third, FENSA identifies several risks of engagement, including conflicts of interest, exercise of undue influence in policy-making and negative impacts on the WHO's integrity, credibility or reputation.¹⁴²

Fourth, FENSA sets up a process for identifying, assessing and managing the risks of engagement. The WHO must carry out due diligence, screening every candidate on a case-by-case basis¹⁴³ to detect private sector influence.¹⁴⁴ To this end, the WHO must investigate the NSA's interests, objectives, governance, sources of funding and affiliations.¹⁴⁵ The investigation must be independent (by gathering information from sources other than the NSA itself).¹⁴⁶ Following this process, the WHO will determine within which type the NSA falls.¹⁴⁷ Even if a NSA does not classify itself as a private sector actor, the WHO may determine otherwise if it finds private sector influence.¹⁴⁸ To assess private sector influence, the WHO will consider, among other factors, whether a significant portion of the funding is from the private sector or whether the private sector is represented in the governing body.¹⁴⁹ Thus, the Secretariat is expected to 'dig' and uncover the hidden influence structures underlying NSAs (a problem addressed in the section on information capture above).

Thereafter, the Secretariat must carry out a risk assessment to identify the specific risks associated with a NSA with respect to a specific engagement.¹⁵⁰ FENSA highlights that the potential risk is the highest in situations where the economic, commercial and financial interests are in conflict with the WHO's public health policies, particularly when setting policies.¹⁵¹ Further, the 'WHO will exercise *particular caution* ... when engaging with private sector entities ... whose policies or activities are negatively affecting human health ... in particular those related to non-communicable diseases and their determinants'.¹⁵² This provision was, as mentioned above, a compromise with regard to Big Food and other multinational industries (sugar, soda, alcohol). The tobacco and arms industry are entirely banned.¹⁵³ The WHO then decides whether to engage measures to mitigate risks or to not engage or disengage.¹⁵⁴ Engagement will

¹⁴¹ *Ibid.*, at Arts 14–20.

¹⁴² *Ibid.*, at Art. 7.

¹⁴³ *Ibid.*, at Arts 33–36.

¹⁴⁴ *Ibid.*, at Art. 13.

¹⁴⁵ *Ibid.*, at Art. 31.

¹⁴⁶ *Ibid.*, at Art. 30; WHO, *Handbook for Non-state Actors on Engagement with the World Health Organization* (2018), at 24, available at <https://apps.who.int/iris/handle/10665/329431>.

¹⁴⁷ FENSA, *supra* note 4, at Art. 32.

¹⁴⁸ WHO, *supra* note 148, at 25–26.

¹⁴⁹ WHO, *Guide for Staff on Engagement with Non-state Actors*, available at https://www.who.int/about/collaborations/non-state-actors/FENSA_guide-for-staff.pdf, at 39.

¹⁵⁰ FENSA, *supra* note 4, at Arts 29, 33.

¹⁵¹ *Ibid.*, at Art. 26.

¹⁵² *Ibid.*, at Art. 45 (emphasis added).

¹⁵³ *Ibid.*, at Art. 44.

¹⁵⁴ *Ibid.*, at Art. 34–35.

only be entered into where the benefits to public health and the WHO's mandate outweigh any risks of engagement as well as the time and expenses involved.¹⁵⁵

Fifth, FENSA establishes a Register of NSAs.¹⁵⁶ This public Internet database contains information provided by the NSAs (membership, legal status, objective, governance structure, composition of decision-making bodies, assets, income, funding sources and so on) and a description of the engagement.¹⁵⁷

Sixth, FENSA sets funding rules. The framework distinguishes between funding by the private sector and other NSAs and is more restrictive regarding the former. Private sector entities may contribute as long as their 'business is unrelated to that of WHO' and 'provided they are not engaged in any activity or have close ties with any entity that is incompatible with WHO's mandate and work'.¹⁵⁸ Earmarking by the private sector is permitted, with a few exceptions: the private sector may not contribute funds 'for normative work'¹⁵⁹ or towards a project regarding which it has a 'direct commercial interest in the outcome of the project'.¹⁶⁰ Moreover, when the private sector has an 'indirect interest in the outcome of the project', 'caution should be exercised'.¹⁶¹ However, the private sector may contribute to activities (other than normative work) in which the private sector could have a commercial interest if 'the public health benefit of the engagement needs clearly outweigh its potential risks'.¹⁶² Philanthropic foundations may contribute 'as long as such contributions fall within WHO's General Programme of Work, and do not create conflicts of interest'.¹⁶³ Philanthropic foundations may earmark yet shall 'align their contributions to the priorities set by the Health Assembly in the approved programme budget'.

Finally, in regard to implementation and oversight, the Executive Board's Programme, Budget and Administration Committee oversees implementation.¹⁶⁴ The Secretariat may terminate engagement in cases of non-compliance,¹⁶⁵ such as if the engagement is used for commercial purposes or in case of attempts at undue influence.¹⁶⁶ The WHO must also issue an annual report.¹⁶⁷

¹⁵⁵ *Ibid.*, at Art. 36; WHO, *supra* note 149, at 26.

¹⁵⁶ FENSA, *supra* note 4, at Art. 74; WHO Register of NSAs, available at <https://publicspace.who.int/sites/GEM/default.aspx>.

¹⁵⁷ FENSA, *supra* note 4, at Arts. 37–41.

¹⁵⁸ *Ibid.*, at Art. 13(a); WHO Policy and Operational Procedures on Engagement with Private Sector Entities, *supra* note 140.

¹⁵⁹ FENSA, *supra* note 4, Art. 14(a).

¹⁶⁰ *Ibid.*, at Art. 13(b).

¹⁶¹ *Ibid.*, at Art. 13(d).

¹⁶² *Ibid.*, at Art. 14(b).

¹⁶³ WHO, Policy and Operational Procedures on Engagement with Philanthropic Foundations, *supra* note 140.

¹⁶⁴ FENSA, *supra* note 4, at Arts. 67–68. The Independent Expert Oversight Advisory Committee reviews the implementation of FENSA and reports to the Executive Board through the Programme, Budget and Administration Committee. See World Health Assembly, Engagement with non-State Actors: Report by the Director General, A70/52, 24 April 2017, Doc. WHA 70/52 (24 April 2017).

¹⁶⁵ FENSA, *supra* note 4, at Art. 70.

¹⁶⁶ *Ibid.*, at Art. 69.

¹⁶⁷ *Ibid.*, at Art. 37.

7 Assessing FENSA

Having described FENSA's main features, this part assesses FENSA's robustness – formally and in its implementation so far – in managing the informational, representational and resource capture risks. To this end, I discuss FENSA against the four principles established above: balanced inclusiveness, integrity, transparency and enforcement.

A *Balanced Inclusiveness*

Although FENSA, as mentioned above, distinguishes between different types of NSAs, it does so for the purpose of assessing their respective risks and not for advancing balanced inclusiveness. It does not include any provisions for achieving a balanced composition of diverging and offsetting interests. The Big Food debate has brought this problem to the fore, with Kent Buse and Sarah Hawkes arguing that ‘for FENSA to be effective in preventing adverse impacts of Big Food on health outcomes, the WHO must embrace the public interest NGOs’.¹⁶⁸

B *Integrity*

Measured against the best practices, FENSA does not set out codes of conduct and does not cover private COIs. These remain regulated by previous COI policies.¹⁶⁹ That said, FENSA introduces the due diligence, risk assessment and risk management process, described earlier, which identifies and manages institutional COIs and other risks of engagement. Institutional conflicts are situations where the ‘WHO’s primary interest as reflected in the Constitution may be unduly influenced by the conflicting interest of an NSA in a way that affects, or may reasonably be perceived to affect, the independence and objectivity of WHO’s work’.¹⁷⁰ Such conflicts could occur, for example, between Big Food’s profit-driven interests and the WHO’s public health interests.

Further, FENSA identifies two high-risk NSA groups: (i) private sector entities whose activities negatively affect human health – in particular, those related to NCDs – and (ii) the tobacco and arms industry. When engaging with the first (presumably including Big Food), ‘particular caution’ is required. Engaging the second group is banned. Tobacco banning has been justified by the ‘fundamental and irreconcilable conflict between the tobacco industry’s interest and public health policy interests’ and has its origin in the Framework Convention on Tobacco Control.¹⁷¹ Some civil society organizations have demanded, as noted above, the equal banning of Big Food. However, other policy-makers view Big Food as instrumental for implementing solutions.

¹⁶⁸ Buse and Hawkes, ‘Sitting on the FENSA: WHO Engagement with Industry’, 388 *The Lancet* (2016) 446, at 446–447.

¹⁶⁹ FENSA, *supra* note 4, at Art. 49(b): (i) Staff Regulations and Staff Rules; (ii) Regulations for Expert Advisory Panels and Committees; and (iii) the Guidelines for Declaration of Interests (WHO Experts).

¹⁷⁰ FENSA, *supra* note 4, at Art. 24.

¹⁷¹ Art. 5.3, WHO Framework Convention on Tobacco Control 2003, 2302 UNTS 166.

Whether Big Food should be banned too, or whether banning is a counterproductive strategy, are important questions that go beyond the scope of this article.

Despite FENSA's detailed integrity process, it remains vague on many terms, leaving the Secretariat much discretion to make decisions on a case-by-case basis.¹⁷² FENSA does not determine the criteria for identifying private sector influence, for identifying conflicts of interest, for carrying out the risk assessment, for determining which entities 'negatively affect human health' and for exercising 'particular caution'. Thus, whether, and how, to engage Big Food or donors falls within the remit of the Secretariat. The robustness of the integrity process thus ultimately depends on the Secretariat's interpretation thereof. The Secretariat's approach, as argued below, appears to have been lenient so far. The director general has repeatedly expressed his reservations regarding FENSA and has stated that the WHO should move 'from risk aversion to risk management', highlighting that '*FENSA is not a fence. We must use whatever partnerships are open to us ... to achieve our goal*'¹⁷³ and that 'historically we have been afraid of partnerships. *We have developed a culture of control and risk-aversion. We need to change that... We don't need to be paranoid and risk averse*'.¹⁷⁴ Although the Secretariat has not made explicit proclamations,¹⁷⁵ or explained its acceptance or rejection decisions,¹⁷⁶ anecdotal examples, in line with the director general's leadership, suggest that the Secretariat has taken a lenient interpretative approach. For example, even if a NSA does not classify itself as a private sector, the Secretariat may determine otherwise if it finds that a significant portion of the NSA's funding is coming from the private sector or if the private sector is represented on its governance bodies. Thus, FENSA gives the Secretariat the authority to probe hidden influence structures, and this authority is important because, as mentioned above, many entities that appear to be non-profit in fact work to advance business interests.

Evidence suggests, however, that the Secretariat has not applied this investigative authority strictly. FENSA determines that official relations are a privilege that the WHO may grant to 'NGOs, international business associations and philanthropic foundations' but not to the private sector.¹⁷⁷ The official relations status permits these NSAs to attend and make statements during governing meetings such as the World Health Assembly, the Executive Board and other committees. My review of over 200 NSAs with official relations that are found in the register indicates that many non-profit NGOs and philanthropic foundations receive much of their funding from the private sector. The American Society of Reproductive Medicine, Drugs for Neglected Diseases,

¹⁷² See, e.g., Garde, Jeffery and Rigby, 'Implementing the WHO Recommendations whilst Avoiding Real, Perceived or Potential Conflicts of Interest', 8 *European Journal of Risk Regulation* (2017) 237.

¹⁷³ World Health Assembly, Address by Dr Tedros Ghebreyesus, Director General, A71/3, 21 May 2018.

¹⁷⁴ WHO Director General, *supra* note 111 (emphasis added).

¹⁷⁵ WHO Executive Board, *supra* note 103, at 2.

¹⁷⁶ Third World Network (TWN), WHO: *Restructuring Fails to Address Conflict of Interest in FENSA Implementation* (24 April 2019), available at <https://www.twn.my/title2/health.info/2019/hi190406.htm>.

¹⁷⁷ FENSA, *supra* note 4, at Arts. 50, 55. Non-state actors (NSAs) in official relations are subject to the same FENSA rules.

the International Water Association and the Bloomberg Foundation are among the many examples.¹⁷⁸ This suggests that, despite the authority to investigate and classify organizations as private sector even if the entity has not classified itself as such, the Secretariat has not taken a strict approach in assessing private sector influence. Indeed, a group of 30 NGOs wrote an open letter to the Executive Board against the decision to grant the Gates Foundation the status of official relations. The NGOs argued that most of the foundation's revenues come not only from investments in the private sector but also from investments in Big Food (for example, Coca Cola, Kraft, Walmart) and Big Pharma (for example, Pfizer, GlaxoSmithKline), creating further conflicts of interest.¹⁷⁹

Further, the *Guide for Staff on Engagement with NSAs*, which was issued by the Secretariat for implementing FENSA, scales down the FENSA integrity requirements by determining that, with the exception of certain NSAs (where potential risks have already been identified, those towards which 'particular caution' is sought and engagements for normative work), NSAs will undergo a 'simplified', rather than the standard, due diligence and risk assessment procedure.¹⁸⁰ Thus, while any engagement with Big Food would likely undergo the standard procedure, donors and most other entities will likely undergo a simplified procedure. Moreover, insufficient human and financial resources have also undermined implementation, with the Secretariat professing how challenging and resource intensive the risk assessment has proved to be.¹⁸¹ Unearthing the background of each NSA demands resources that the WHO does not have and in the world's current geopolitical situation, it remains unclear whether states will increase contributions.

Regarding the risks caused by voluntary funding, FENSA's regulation of private sector funding, on paper, is relatively strict.¹⁸² Examining the 2017 and 2018 financial reports and the register, however, Big Pharma, including Roche, Johnson & Johnson, Sanofi, Merck and others, have made contributions. Although the contributions have been low, such funding would appear to contravene FENSA, which only allows contributions from companies whose 'business is unrelated to that of WHO'.¹⁸³ With respect to Big Food, the WHO has been stricter as no contributions have been made.¹⁸⁴ Regarding philanthropic foundations, FENSA has sought to reduce risks by requiring that donations align with the WHO's priorities as set by the member states in the work programme.¹⁸⁵ However, critics argue that, rather than eliminating donor influence, FENSA has incentivized the Secretariat to plan its budget in accordance with expected sources of contributions.¹⁸⁶

¹⁷⁸ WHO Register of Non-State Actors, *Non-State Actors in Official Relations*, available at <https://publicspace.who.int/sites/GEM/default.aspx#>.

¹⁷⁹ Third World Network, *WHO: Civil Society Calls for Deferment of Official Relations Status to Gates Foundation* (30 January 2017), available at <https://www.twn.my/title2/health.info/2017/hi170104.htm>.

¹⁸⁰ WHO Guide for Staff, *supra* note 149, at para. 4.2.

¹⁸¹ WHO Executive Board, *supra* note 103, at 2.

¹⁸² FENSA, *supra* note 4, at Art. 17.

¹⁸³ *Ibid.*, at Art. 13(a).

¹⁸⁴ WHO, *supra* note 130.

¹⁸⁵ Daugirdas and Burci, *supra* note 134.

¹⁸⁶ *Ibid.*

Moreover, voluntary member state funding is not regulated, which allows businesses to circumvent the restrictions and lobby their governments to direct funding to certain causes. To summarize, while, on paper, FENSA introduces important integrity measures, in practice, overall, its implementation so far appears to have been weak.

C Transparency

FENSA introduces more transparency. Notably, on paper, the register is a promising innovation. The register is publicly accessible, mandatory for all NSAs and includes information about governance, funding, affiliations and links with industries. NSAs with official relations must also include plans of collaboration and implementation reports. Moreover, FENSA also requires that all contributions be listed in the financial reports and the register.¹⁸⁷ At the time of writing, however, and despite the May 2018 deadline, the register has not been properly implemented. Only 200 NSAs in official relations and four other NSAs are listed. Moreover, information about some NSAs remains missing. The periodic implementation report finds that the main reason for this implementation delay are human and financial resource constraints.¹⁸⁸ In the absence of enforcement mechanisms, discussed below, transparency is even more critical for deterrence and accountability. Thus, bolstering and properly implementing the register is absolutely crucial if FENSA is to safeguard against engagement risks.

D Enforcement

FENSA has weak oversight and enforcement. The Independent Expert Oversight Advisory Committee must issue implementation reports, yet reports so far have provided little information about implementation status.¹⁸⁹ Indeed, the advisory committee has issued an alert that, given the absence of a structured implementation plan with concrete deliverables and a timeline, it is unable to properly assess implementation¹⁹⁰ and that implementation has been slow (although the implementation should have been completed by the end of 2018). The annual reports have likewise been thin.¹⁹¹ Further, the WHO is not subject to any enforcement mechanism that would impose sanctions in case of non-compliance. Inasmuch as FENSA, as described above, adopts certain transparency and integrity practices, this enforcement gap potentially jeopardizes FENSA's entire risk-management purpose. Indeed, WHO officials have found that implementation across the WHO has varied considerably and that FENSA's impact has been 'zero' because 'for the large majority of cases there is no real

¹⁸⁷ *Ibid.*, WHO Policy and Operational Procedures on Engagement with Private Sector Entities, *supra* note 140, at Arts. 16, 18.

¹⁸⁸ WHO Executive Board, *supra* note 103, at 3.

¹⁸⁹ E.g. Report of the 26th Meeting of the Independent Expert Oversight Advisory Committee (IEOAC) of the World Health Organization (16–18 October 2018), available at https://apps.who.int/gb/ieoac/PDF/26/26th_Report.pdf, at item 29.

¹⁹⁰ *Ibid.*, at item 27. WHO Programme, Budget and Administration Committee of the Executive Board, Report of the Independent Expert Oversight Advisory Committee, EBPBAC27/2, 8 December 2017, 6.

¹⁹¹ WHO Executive Board, *supra* note 103.

repercussion if it is not done'.¹⁹² Given the absence of enforcement, the transparency register is even more important for deterring breaches.

8 Conclusion: FENSA and Beyond

Although the increase in NSA access to international rule-making appears to enhance democratic legitimacy and although NSA engagement has recognized benefits, the risk that NSAs capture rule-making – through information, representation or resources – has also increased. The current challenge to IOs thus hinges on their ability to open up while keeping special interests in check. With more NSA engagement and partnerships likely under the 2030 agenda, these problems must be addressed. Most IOs lack policies for managing these risks and so by setting out a comprehensive framework, FENSA is, in principle, a praiseworthy accomplishment. Measured against common capture prevention principles, FENSA does not incorporate balanced inclusiveness and enforcement. FENSA's main achievement, on paper, is the introduction of a transparency register and a due diligence and risk management process. Absent enforcement, strong transparency is particularly important for deterrence and accountability.

FENSA is, moreover, vague, leaving the Secretariat much discretion. The effectiveness of the safeguards thus depends on how strictly the Secretariat applies FENSA. In practice, so far, the Secretariat's approach appears to have been lenient and FENSA's implementation weak. FENSA's impact so far, therefore, appears to be minimal. Worse still, some critics have called FENSA a 'Trojan horse', saying that, by giving a false impression of legitimacy, more participation without adequate safeguards is enabled, resulting in more problematic entanglements with business.¹⁹³ That said, in fairness, it may be too early to pass judgment.

With the SDGs, many IOs, certainly in the UN system, are engaging NSAs and are considering developing engagement policies. Since the WHO is one of the first IOs to adopt a new policy, other IOs will likely turn to FENSA (and/or to best practices) for inspiration.¹⁹⁴ FENSA thus serves as a case from which this article also seeks to draw more general lessons as to whether such reforms can effectively prevent capture in international law-making. What emerges is that even were an IO engagement reform to follow or implement best practices more stringently, certain structural features shared by most IOs will likely continue challenging the ability of such reforms to prevent capture in international rule-making. Thus, at best, such reforms have

¹⁹² Daugirdas and Burci, *supra* note 134.

¹⁹³ Gupta and Lhotska, "A Fox Building a Chicken Coop?" WHO Reform: Health for All or More Corporate Influence? (5 December 2015), available at <http://www.policyforum.net/a-fox-building-a-chicken-coop/>. Civil Society Has No Confidence in the Stalled Framework for Engagement with Non-State Actors Process: Open Letter to Members of the 138th Executive Board of the World Health Organization, available at <https://haiweb.org/publication/civil-society-fensa/?pdf=10738>; Brown et al., 'Open Letter to WHO DG Candidates: Keep Policy and Priority Setting Free of Commercial Influence', 389 *The Lancet* (2017) 1879.

¹⁹⁴ Joint Inspection Unit, *supra* note 5, at 29–30.

the potential to mitigate capture risks but are unlikely to effectively prevent them. At worst, by giving a false sense of legitimacy, such reforms could actually worsen the situation.

In the following sections, I highlight the main structural limitations that have emerged in FENSA's case and are shared by most, if not all, IOs: a lack of enforcement, resource constraints, the two-level nature of international rule-making and delegation concerns.

A Lack of an Enforcement Mechanism

FENSA's transparency register is meant to improve accountability. But FENSA lacks an enforcement mechanism to which the public or member states could file complaints and that would sanction the WHO in cases of non-compliance. Indeed, absent a mechanism for enforcing FENSA rules, some commentators have found that FENSA's impact has been 'zero'. With very few exceptions (such as the World Bank Inspection Panel), this accountability deficit – the lack of a sanctioning mechanism – is an inherent feature of most IOs.¹⁹⁵ IOs might have other incentives to comply: reputational, peer or fiscal concerns might strengthen accountability.¹⁹⁶ But the capacity of legally unenforceable rules to effectuate change is far from straightforward. In the COVID-19 context, the weakness of the WHO's International Health Regulations, absent a legally enforceable mechanism, has become evident.¹⁹⁷

B Resource Constraints

FENSA further illustrates how resource constraints, which plague most IOs,¹⁹⁸ are not only the source of many capture concerns but also undermine sincere attempts at implementing reforms. First, with more resources, IOs could develop their own expertise and require fewer donations, and many of the capture problems caused by information and resource dependency would become less important. Second, as described earlier, implementing FENSA (or any other best-practice-based reform, for that matter) involves considerable costs. Uncovering hidden interests embedded in the financing or governance structures of NSAs – running a transparency register, mapping and identifying stakeholders for balanced inclusiveness and so on – requires human and financial resources. Indeed, some countries had intended to block FENSA before its adoption due to the resource implications.¹⁹⁹ Thus, although the intentions

¹⁹⁵ Kingsbury et al., *supra* note 14.

¹⁹⁶ Grant and Keohane, 'Accountability and Abuses of Power in World Politics', 99 *American Political Science Review* (2005) 29.

¹⁹⁷ Ayelet Berman, *The World Health Organization and COVID-19: How Much Legal Authority Does the WHO Really Have to Manage the Pandemic?*, available at <https://cil.nus.edu.sg/the-world-health-organization-and-covid-19-how-much-legal-authority-does-the-who-really-have-to-manage-the-pandemic-by-dr-ayelet-berman/>.

¹⁹⁸ See notes 48–56 above.

¹⁹⁹ Third World Network, *WHO: Developed Countries Turning against Non-State Engagement Framework* (21 April 2016), available at <https://www.twn.my/title2/health.info/2016/hi160405.htm>.

to create better governance may be sincere, implementing ambitious reforms in IOs will be challenging, even more so in the current political environment where states are contributing less to IOs.²⁰⁰

C Two-level Game

FENSA further reflects the challenge caused by the two-level nature of international rule-making and by the inability of IO reforms to curtail national points of influence.²⁰¹ Domestic consultations, business participation in state delegations and, most notably, domestic lobbying of member governments (with lobbying spending breaking records in recent years)²⁰² remain important points of immense influence on IOs.²⁰³ Big Food, for example, has been lobbying member governments to curtail progress on matters pertaining to NCDs and has lobbied members not to make any voluntary contributions to NCD matters (resulting, in turn, in fewer NCD projects).²⁰⁴ FENSA, however, does not address such domestic points of influence. From a political standpoint, it is highly unlikely that member states would agree to an IO engagement reform that would interfere with domestic affairs. The ability of IO reforms to safeguard, thus, is not comprehensive.²⁰⁵

D Delegation

Another point of tension that FENSA highlights is the principal-agent problem – shared by most IOs – as to how much discretion member states are willing to give Secretariats, including regarding the management of engagement risks.²⁰⁶ On the one hand, as described above, FENSA leaves the Secretariat much discretion as to how strictly to apply the framework, and the Secretariat has taken a lenient approach.²⁰⁷ On the other hand, an intrusive policy would undermine the needed flexibility to

²⁰⁰ Shendruk et al., *Funding the United Nations: What Impact Do U.S. Contributions Have on UN Agencies and Programs?* (2020) available at www.cfr.org/article/funding-united-nations-what-impact-dous-contributions-have-un-agencies-and-programs.

²⁰¹ Putnam, 'Diplomacy and Domestic Politics: The Logic of Two-Level Games', 42(3) *International Organization* (1988) 427.

²⁰² C. Kang and K. Vogel, 'Tech Giants Amass a Lobbying Army for an Epic Washington Battle', *New York Times* (5 June 2019).

²⁰³ Buse and Hawkes, *supra* note 168.

²⁰⁴ Daugirdas and Burci, *supra* note 134; WHO World Health Assembly, 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: Report by the Director-General, A71/14, 19 April 2018, 6–7; UN General Assembly, Progress on the Prevention and Control of Non-communicable Diseases: Report of the Secretary-General, UN Doc. A/72/662 (21 December 2017), at 9.

²⁰⁵ Buse, Tanaka and Hawkes, 'Healthy People and Healthy Profits? Elaborating a Conceptual Framework for Governing the Commercial Determinants of Non-Communicable Diseases and Identifying Options for Reducing Risk Exposure', 13(1) *Globalization and Health* (2017) 34; Buse, Tanaka and Hawkes, 'Healthy People and Healthy Profits? Elaborating a Conceptual Framework for Governing the Commercial Determinants of Non-Communicable Diseases and Identifying Options for Reducing Risk Exposure', 13(1) *Globalization and Health* (2017) 13, at 34.

²⁰⁶ Vaubel, 'Principal-Agent Problems in International Organizations', 1(2) *Review of International Organizations* (2006) 125.

²⁰⁷ Daugirdas and Burci, *supra* note 134.

determine engagement on a case-by-case basis, and the process would likely be slower and inefficient. Any reform will thus require thoughtful consideration in designing the balance between member state control and efficiency.

To conclude, FENSA's case illustrates that, at best, IO engagement reforms have the potential to mitigate capture risks but that, given the structural characteristics of international governance, such reforms are unlikely to prevent them. At worst, by giving a false sense of legitimacy, they could lead to more unchecked participation, thereby worsening the situation.