

On the Legitimacy and Effectivity of the World Bank and Its Pandemic Emergency Financing Facility ('PEF') at the Time of the Covid-19 Outbreak

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Abstract

Pandemic financing has in the current climate of disruption and turmoil of an ongoing global pandemic become the most highly debated and controversial issue within the field of international public health law and policy. From the perspective of international public health law and policy, a precondition for success is that financial resources and funds are employed in an effective manner. Whether the International Bank for Reconstruction and Development ('World Bank' or 'WB') and the Pandemic Emergency Financing Facility ('PEF') – a financing mechanism housed at the WB – may be perceived as effective public health players shall be established by referring to their mandates, their inherent capacity for enhancing accepted global legal standards and rules on public health and their funding methods and practices. After the affirmation and consolidation of its role in the public health sector in the early 1990s, the WB has rapidly accredited itself as the most active intergovernmental institution dealing with pandemic and epidemic financing. Its direct involvement in public health trust funds, such as the Avian Flu Trust Fund Facility and the Health Emergency Preparedness and Response Multi-Donor Fund (the HEPRF), and its lending practices and internal policies and procedures were of crucial significance in this respect. Considering that acceptance of international institutions, including international financial institutions, has always been conditioned by their acknowledgment as legally legitimate, legitimacy is regarded as closely connected to effectiveness. The criteria for establishing legitimacy in relation to international financial institutions are increasingly, amongst others, the respect and promotion of rule of law standards in the recipient states. From this perspective, the WB's functional and management structures, but not the PEF's structures and management, have made noteworthy progress, and notwithstanding some deficiencies and peculiarities they present several elements of legitimate decision-making.

Keywords

international health law and policy – legitimacy – effectiveness – pandemic and epidemic financing – the Pandemic Emergency Finance Facility (PEF) – international financial institutions – public participation – accountability – the Health Emergency Preparedness and Response Multi-Donor Fund (HEPRF).

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Containing a pandemic is a titanic task, requiring the cooperation of modern-day Titans.

LAUREN TONTI

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1 Introduction

The question concerning the legitimacy and effectiveness of the international financial institutions operating in the field of public health is of crucial significance and meaning for the resolution of long-standing as well as of emerging global public health problems, such as the Zika virus¹ and the COVID-19 pandemic.

The present contribution puts special emphasis and attention on the legal perspective of legitimacy and effectiveness of the WB,² the ‘historical rival of the WHO’,³ and of its Pandemic Emergency Financing Facility (PEF)⁴ in the current times of the COVID-19 outbreak. Adopting an international legal approach, the WB’s competence in the financing of global health emergencies is critically assessed and illustrated in Section 2. The structures, operations

1 For an international legal approach to the Zika outbreak, see eg Francesco Seatzu, ‘Zika and International law’, in Maria Isabel Torres Cazorla, José Manuel Sánchez Patrón (eds), *Bioderecho internacional: derechos humanos, salud pública y medio ambiente* (Valencia, 2018) 62.

2 The terms “World Bank” (WB) and “Bank” are used in this work to include not only the International Bank for Reconstruction and Development (IBDR) but also the International Development Association (IDA).

3 For this definition, see Lee Tsung-ling, ‘Making International Health Regulations Work: Lessons from the 2014 Ebola Outbreak’ (2016) 49 *Vanderbilt Journal of Transnational Law*. More in general, on the emergency powers of the WHO, see José Alvarez, *The Impact of International Organizations on International Law* (Brill, 2016) ch iv.

4 WB, *Pandemic Emergency Facility, Frequently Asked Questions* < www.worldbank.org >.

and functioning of the WB and PEF, which constitute the object of the present work, are analyzed in Section 3, with a view to assessing their potential for enhancing public health efficiency. Section 4 provides a discussion of the indicators of the WB's and the PEF's legitimacy and effectiveness as well as of their potential deficiencies in this specific respect. Section 5 sums up the attempts made at the present times of COVID-19 to give an indication of the way forward for effective and legitimate financing of pandemics by the different financial institutions involved in the process.

2 The WB's Involvement in Global Health Emergency Financing

Four of the most important and visible elements that the WB and PEF have in common are: the description of their objects and activities as 'goods';⁵ the combination of country depth and global breadth; the allocation of financial funds and economic and financial resources to development projects that either enhance capability for economically developing countries to diagnose their financing needs arising from pandemics or pursue certain standards on pandemic prevention policies; and, finally, the combination of public and private sector instruments and relationships. The remaining part of this Section focuses on explaining the operations, rules and functioning of the WB and PEF.

2.1 *Global health emergency financing issues as an implied competence of the World Bank*

Article I of the International Bank for Reconstruction and Development (IBRD) Articles of Agreement, as amended in 1989, makes clear that the WB is an international institution whose principal aim is the eradication of extreme poverty and hunger throughout the world.⁶ Drafted and amended prior to

5 See Felix Stein, Devi Sridhar 'Health as a "global public good": creating a market for pandemic risk' (2017) *BMJ* 358, also stressing that the WB's description of objects and activities as 'goods' reflects its economic approach to human health, in which market demand and supply affect healthcare provision. See also I. Kaul and M. Faust, 'Global public goods and health: taking the agenda "forward" (2001) 79 *Bulletin of World Health Organization* 869–874.

6 IBRD *Articles of Agreement* <<http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/ORGANIZATION/BODEXT/0,contentMDK:20049557~menuPK:64020045~pagePK:64020054~piPK:64020408~theSitePK:278036~isCURL:Y,00.html>>. See also Dimitra Manou, 'Assessing the Role of Multilateral Development Banks in the Legal Empowerment of the Poor' (2012) 12 *Legal Working Paper Series on Legal Empowerment for Sustainable Development* <https://cisdl.org/public/docs/Manou_Assessing_the_role_of_Multilateral_Development_Banks.pdf>; World Bank, *Saving Lives, Scaling-up Impact and Getting Back on Track* <<https://documents>.

the development and consolidation of the view that pandemic preparedness and response is a non-exclusive competence and prerogative of the World Health Organization (WHO),⁷ it comes as no surprise that the IBDR's Articles of Agreement contain no mention of pandemic/epidemic preparedness and response principles.

That said, there are two reasons why the IBDR's Articles of Agreement have not been revised to include a reference to public health and public health emergency considerations, as suggested by their close and objective link to the WB's mandate. Perhaps the most important of these reasons lies in the difficulty of revising the IBDR's Articles of Agreement,⁸ as their amendment requires acceptance by three-fifths of the members, or 85% of the votes (Article VIII of the IBRD Articles of Agreement). Professor Rigo Sureda, in particular, considers this requirement as the most apparent reason why the IBDR's Articles of Agreement have only been revised twice since their drafting in the 1940s.⁹ It

worldbank.org/en/publication/documents-reports/documentdetail/136631594937150795/world-bank-group-covid-19-crisis-response-approach-paper-saving-lives-scaling-up-impact-and-getting-back-on-track>, stressing that: 'while the WBG is repositioning from regular operations to mount an exceptional crisis response, its interventions will remain aligned with the strategic directions set out in the Forward Look – first and foremost, the Twin Goals of eliminating extreme poverty and promoting shared prosperity in a sustainable manner'.

- 7 However, what is mentioned above does not mean that the World Bank did not have a role in the health of individuals. On the subject, see Sophie Harman, 'The World Bank and Health', in Adrian Kay, Owain D. Williams (eds), *Global Health Governance. International Political Economy Series* (Palgrave, 2009) <https://doi.org/10.1057/9780230249486_11>, who, after having recalled that: 'the World Bank has played a central role in the health of individuals since the late 1960s'; has also observed that: 'The Bank has helped to both reduce and expand government health spending through its own model of good debt governance, provided leadership within global health governance, and developed models of privatised healthcare throughout developing countries, specifically within Sub-Saharan Africa'.
- 8 For more on the subject, see the contribution by Dimitri Van Den Meerssche, 'Performing the rule of law in international organizations: Ibrahim Shihata and the World Bank's turn to governance reform' (2019) 32 *Leiden Journal of International Law* 47. See also See Dennis Leech and Robert Leech, 'Voting Power in the Bretton Woods Institutions', *Working Paper No 154/04*, 2004 <<http://www2.warwick.ac.uk/fac/soc/pais/research/researchcentres/csgp/papers/workingpapers/2004/wp15404.pdf>>; See Dennis Leech and Robert Leech, 'Voting Power in the Bretton Woods Institutions' (Working Paper No 178, University of Warwick Department of Economic) <<https://www.warwick.ac.uk/fac/soc/economics/research/workingpapers/2008/twerp718.pdf>>.
- 9 See Andres Rigo Sureda, 'The World Bank and Institutional Innovation', in Edith Brown Weiss, Andres Rigo Sureda and Laurence Boisson de Chazournes (eds), *The World Bank, International Financial Institutions, and the Development of International Law: A Symposium Held in Honor of Dr Ibrahim F.I. Shihata* (American Society of International Law, 1999) 12 See also Jim Yong Kim's Efforts to Reform The World Bank Are In Trouble' <<http://www.businessinsider.com/jim-yong-kims-efforts-to-reform-the-world-bank-are-in-trouble-2014-11>>.

my also be that there is no real need for an amendment. Notwithstanding the fact that public health and outbreak responses are not indicated in the text of the IBDR's Articles of Agreement, the WB is seen as having a broad enough mandate to encompass these considerations.¹⁰ In fact, the WB has demonstrated remarkable ability to evolve.¹¹

The main argument supporting the conclusion that public health financing shall be seen as encompassed in the mandate of the WB, lies in the evolved interpretation of the term 'development'. While development initially referred only to economic development,¹² the issues of public health security and safety have gained almost universal acceptance as prerequisites for long-term development. They may be seen as constituting an integral part of development and are thus worthy of promotion by multilateral development organizations.¹³

From the perspective of legitimacy, it follows that one shall distinguish between activities outside the formal mandate, i.e. *ultra vires*, and the consensual interpretation of an existing mandate, as in the case of attributing to the term 'development' new meanings by englobing factors of public health emergencies.¹⁴ While activities *ultra vires* could be regarded as lacking legitimacy, the interpretation of the mandate to encompass issues of concern does not encounter the same criticism: a concept such as development is suitable to be changed and adjusted to the evolution of society, processes, and contexts. The traditional distinction between '*ultra vires*' and '*intra vires*' could, nevertheless, be difficult quite nebulous.¹⁵ In any case, a more flexible adjustment to changes

¹⁰ Amplius, see Jennifer Prah Ruger, 'The changing role of the World Bank in global health' (2005) 95 *American Journal of Public Health* 60.

¹¹ See eg Alain de Janvry, 'The World Bank and Governance: The Bank's Efforts to Help Developing Countries Build State Capacity' (2012) 8 *Policy Research Working Papers* <<https://openknowledge.worldbank.org/handle/10986/12112>>; Philippe Le Prestre, *The World Bank and the Environmental Challenge* (Associated University Presses, 1989) 207.

¹² See recently, Francesco Seatzu, Katerina Akestoridis, 'SDG 8', in Ilias Bantekas, Francesco Seatzu (eds), *Commentary on the Sustainable Development Goals* (2022) (on file with the author).

¹³ See eg Joe L. P. Lugalla, 'Aids, orphans, and development in Sub-Saharan Africa: A review of the dilemma of public health and development' (2003) 26 *Journal of Developing Societies* 26.

¹⁴ For further references on this topic, see recently Enzo Cannizzaro, Paolo Palchetti, 'Ultra Vires Acts of International Organizations', in Jan Klabbers and Åsa Wallendahl (eds), *Research Handbook on the Law of International Organizations* (Edward Elgar, 2011) 245; C.F. Amerasinghe, *Principles of the Institutional Law of International Organizations* (Cambridge University Press, 2005) 163.

¹⁵ See also Ineta Ziemele, 'International Courts and ultra vires Acts', in Lucius Caflisch et al (eds), *Liber amicorum Luzius Wildhaber: Human Rights: Strasbourg Views = Droits de l'homme: regards de Strasbourg* (Engel, 2007) 537–556.

in society and its needs could also enhance effectiveness. This consideration is (if necessary) a further example of the close and direct linkage between the increase of legitimacy and potential drawbacks regarding effectiveness.

2.2 *The WB's attitude towards public health and public health emergencies and crises*

Since the WB started its support of public health sector programmes in the 1980s, public health emergency awareness has led to the progressive strengthening of public emergency issues on the evolving agenda and operations of the Bank.¹⁶ In accordance with a general trend in international law after the WHO's Health Regulations (IHRs) of 2005,¹⁷ the WB has widened not only its institutional mandate but more specifically its internal policies to tie public health and public health emergency preparedness and response to the promotion of a proper investment climate in developing countries.¹⁸ This process is generally described as a switch in the patterns of strategies and policies by the WB.¹⁹ Critical views have, either directly or indirectly, contested this prevailing assumption by claiming that this was a process that only introduced small changes without substantial adaptation to the WB's Investment Policy.²⁰ Notwithstanding these debates, the WB may currently be considered as promoting global public health, and the extent to which the WB continues to incorporate the imperatives of public health preparedness and response should not be overlooked.²¹

The WB itself defines its public health emergency role to a significant extent by reference to its engagement in the World Bank's Multi-Donor Trust

16 *Amplius*, see Sophie Harman, 'The World Bank and Global Health' <<https://qmro.qmul.ac.uk/xmlui/bitstream/handle/123456789/7865/HARMAN%20World%20Bank%20and%20Health%202009.pdf?sequence=2&isAllowed=y>>.

17 The texts of the IHRs are available at: <https://www.who.int/publications/i/item/9789241580496>.

18 See World Development Report 2005, 'A Better Investment Climate for Everyone' <<https://openknowledge.worldbank.org/handle/10986/5987>>. See also generally, Armin von Bogdandy and Pedro A. Villarreal, 'International Law on Pandemic Response: A First Stocktaking in Light of the Coronavirus Crisis' (2020) *MPIL Research Paper Series*.

19 See David Wilsonmaitreyi, Bordia Dasmarelize Gorgens, 'What health emergencies and disaster risk recovery efforts have in common' (2020) *World Bank Blogs* <<https://blogs.worldbank.org/health/what-health-emergencies-and-disaster-risk-recovery-efforts-have-common>>.

20 For further references on these views, see Tracy Alloway, Tasos Vossos, 'Why World Bank's Controversial Pandemic Bonds Didn't Function as Hoped' <<https://www.insurancejournal.com/news/international/2020/12/10/593490.htm>>.

21 'Comoros: World Bank Provides \$10 Million to Support Emergency Response to COVID-19 and Recovery' (*Reliefweb*, 11 December 2020) <<https://reliefweb.int/report/comoros/comoros-world-bank-provides-10-million-support-emergency-response-covid-19-and>>.

Fund (MDTF) and other trust funds with a primarily public-health function.²² However, the increased focus of the WB policies on public health and public health emergency preparedness issues, though an essential part of the current operations of WB lending practices, as of itself does not automatically lead to public health effectiveness.

Therefore, to ascertain if current lending practices may be considered as effective on the public health side, it is of crucial importance to understand the process that has led to the integration of a variety of public health and public health emergency preparedness policies into the operational framework of the WB. One issue that leads to the establishment of public health safeguards is public criticism towards the effects of WB financed projects as WB lending practices may lead to projects with disastrous public health effects. A possible example of development projects in which the WB is often involved, and which are likely to have serious negative effects on the public's health, are urban development projects.²³ The issue of urban development projects and their effects on the public's health remain an extremely complex issue on the international agenda.²⁴

In addition to criticism by the public, another, and perhaps stronger reason behind the incorporation of public health criteria, are economic considerations. Damages and losses due to public health emergencies are significant and may lead to poverty, as the experience with COVID-19 has demonstrated and is demonstrating. This is so – especially – in economically developing countries.²⁵ Therefore, the control and prevention of public health emergencies promotes the alleviation of poverty, that is currently the main priority of the WB.

The acknowledgment of this link helped in overcoming the absence of adequate efforts on the part of many developing countries (and not only of these) regarding public health and public health emergency preparedness issues. Regarding the initial hesitation to encompass these issues into the WB's lending policies, the reasons do not rest on the absence of interest of public health policies but on statutory factors, namely – as indicated above – the perceived

22 On the trust funds from an international legal perspective, see Ilias Bantekas, *Trust Funds Under International Law* (Amsterdam, 2009).

23 Further information is available at World Bank, 'Urban Development', available at: <https://www.worldbank.org/en/topic/urbandevelopment>.

24 Amplius, see Enrico Gualini, Stan Majoor, 'Innovative practices in large urban development projects: Conflicting frames in the quest for "new urbanity"' (2007) 8 *Planning Theory & Practice* 297.

25 See Hiruni Jayasena, Wajira Chintaka, 'COVID-19 and developing countries: lessons learnt from the Sri Lankan experience' (2020) 113 *Journal of the Royal Society of Medicine* 464.

need to prioritize the support of post-war reconstruction that hindered the successful enforcement of policies.²⁶ Today, public health and public health emergency preparedness policies are essential components of the general lending strategies of the WB.²⁷

The WB's alliances with non-state actors, national governmental agencies and other networks in the public health/emergency preparedness sector also deserves to be recalled at this point. The WB is amongst other things involved in the activities of the *Agence nationale d'inclusion économique et sociale* (ANIES), the *Agence Nationale de Financement des Collectivités Locales* (ANAFIC) in Guinea and also of the *Operational Framework for Strengthening Human, Animal, and Environmental Public Health Systems at their Interface*.²⁸ This approach further shows the WB's determination to focus on public health/emergency preparedness issues as part of its development mandate.

2.3 *The current WB emergency policy and its implementation*

In 2007, in an attempt to align the WB's outdated prior emergency policy with its evolving role in responding to crises and public emergencies, and to improve the impact of the WB's support of emergency recovery efforts, the WB adopted its Operational Policy/Bank Procedure OP/BP 8.00 Rapid Response to Crises and Emergencies (Rapid Response to Crises and Emergencies Policy).²⁹ This groundbreaking policy represents the first time the Bank has laid out specific guidance on how to address the relationship between public emergencies, socio-economic development and poverty.³⁰ Under this policy the WB also approaches general questions as to how the mobilization of donor assistance including the establishment of multi-donor trust funds may strengthen public health preparedness and response at a global level. Yet, in order to assess effectiveness it is necessary to establish whether the theoretical considerations

26 Amplius, see Jonathan Pincus and Jeffrey Alan Winters (eds), *Reinventing the World Bank* (Cornell University Press, 2002) vii; Francesco Seatzu, 'Speculating on the World Bank's Involvement in Post-Conflict Reconstruction Operations and Activities' (2018) 10 *International Organizations Law Review* 9.

27 'World Bank Group to Launch New Multi-donor Trust Fund to Help Countries Prepare for Disease Outbreaks' (*World Bank*, 17 April 2020) <<https://www.worldbank.org/en/news/statement/2020/04/15/world-bank-group-to-launch-new-multi-donor-trust-fund-to-help-countries-prepare-for-disease-outbreaks>>.

28 See the World Bank Guinea COVID-19 Crisis Response Development Policy Financing (P174063) <<http://documents1.worldbank.org/curated/en/976771596420023115/text/Guinea-COVID-19-Crisis-Response-Development-Policy-Financing.txt>>.

29 The text of the report is available at <<https://media.nti.org/documents/115271-REVISED-IWG-Report-Conference-Edition-5-25-2017-1-1-optimized-low.pdf>>.

30 Ibid.

are reflected and incorporated in the lending practice. In addition to the 'general' Rapid Response to Crises and Emergencies Policy, some more specific instruments and tools, such as the 'Regional Disease Surveillance Systems Enhancement Program of the World Bank,' with a corresponding sectoral disease surveillance policy, have to be mentioned as policy changes.³¹

In parallel to the implementation of the *Rapid Response to Crises and Emergencies Policy*, efforts to incorporate the recommendations and suggestions of the 2017 report (the 'report') by the International Working Group on Financing Pandemic Preparedness (IWGFPP)³² into existing lending policies indicate a further change of policies. This has contributed to an overall strengthening of public health and public health emergency preparedness considerations in WB funding. Implementation of the objectives of the report aims at combining the eradication of poverty as the primary aim with inter alia public health protection. In fact, the report tries to reach even further, in order to incorporate a role for international development assistance in reinforcing pandemic preparedness and response.³³ Moreover, it also aims at assisting States in complying with the IHRs.³⁴ The IHRs, the final result of a long series of attempts made by States to cope with the international spread of diseases,³⁵ emphasize the importance of capacity development and public accountability in the response to emergencies.³⁶

31 For further informations on these instruments, see Andreas De Guttry, 'Is the International Community Ready for the Next Pandemic Wave? A Legal Analysis of the Preparedness Rules Codified in Universal Instruments and of their Impact in the Light of the COVID-19 Experience' (2020) 3 *Global Jurist* 30–67.

32 The text of the report is available at: <<http://documents1.worldbank.org/curated/en/979591495652724770/pdf/115271-REVISED-FINAL-IWG-Report-3-5-18.pdf>>.

33 See INTERNATIONAL WORKING GROUP ON FINANCING PREPAREDNESS, 'From Panic and Neglect to Investing in Health Security: Financing Pandemic Preparedness at a National Level' <<https://media.nti.org/documents/115271-REVISED-IWG-Report-Conference-Edition-5-25-2017-1-1-optimized-low.pdf>>.

34 On the current difficulties of implementing the IHRs (that constitute binding law for all WHO members), see eg Lauren Tonti, 'The International Health Regulations: The Past and the Present, But What Future?' <<https://harvardilj.org/2020/04/the-international-health-regulations-the-past-and-the-present-but-what-future/>>; Gian Luca Burci, 'The Outbreak of covid-19 Coronavirus: Are the International Health Regulations Fit for Purpose?' *EJIL: Talk!*, 27 February 2020 <www.ejiltalk.org/the-outbreak-of-covid-19-coronavirus-are-the-international-health-regulations-fit-for-purpose/>.

35 See Giulio Bartolini, 'The Failure of 'Core Capacities' Under the WHO International Health Regulations' (2021) 70 *International and Comparative Law Quarterly* 233–250.

36 See Jon Kim Andrus, Ximena Aguilera, Otavio Oliva, Sylvain Aldighieri, 'Global health security and the International Health Regulations' (2010) 10 *BMC Public Health* <<https://bmcpublichealth.biomedcentral.com/articles/10.1186/1471-2458-10-S1-S2>>.

Because there are no fully applicable project criteria in the above-mentioned report, it may be said to reflect the general strengthening of public health and public health emergency preparedness considerations in the WB's lending approach rather than operating as guidance for selecting an alternative category of development projects in lending activities. Moreover, uncertainties regarding cause-and-effect relationships have a role in this regard. In fact, although the WB registers an increase in development projects with a public health focus, it remains uncertain if this trend is the outcome of a change of its lending approach or a growing public health and public health emergency awareness in recipient countries and their project proposals, or a combination of both.

What could also be of relevance to the consideration of public health and public health emergency preparedness factors in lending practices is the fact that – in order to properly reflect the articulation of its operations – the WB is moving towards an original system of qualification of its lending and non-lending activities. According to this system, each operation may have up to five sectoral assignments and five thematic purposes.³⁷ The selection of the sectors is based on the sectors of the real economy that receive the WB's financial aid and support. The selection of themes is based on the objectives of the operation. The thematic and sectoral assignments constitute two dimensions of the same operations. In the current system, 'Health' is one of eleven thematic groups, and encompasses public health, health facilities and construction and public administration.³⁸ Under such a classification, public health projects, i.e., projects that have inter alia been assigned the thematic group 'Health', may be targeted in a more focused manner, because the classification clarifies that various interrelated public health issues are a major concern in the process of the operation of the relevant project. Future lending practice will prove what percentage of operations is classified under the 'Health' thematic group. Whether the qualification of a project as a public health emergency project under the new qualification framework will also result in the general enhancement of public health and public health emergency preparedness considerations still remains to be determined.

2.4 *The WB Pandemic Emergency Financing Facility (PEF) and beyond*

The PEF is an expression of the trend that became more apparent after the second half of the 1990's of the proliferation of public-private partnerships in the

37 For information, see World Bank, 'Products and Services' <<https://www.worldbank.org/en/projects-operations/products-and-services>>.

38 'Health' (*World Bank*, Web Page, 2021) <<https://www.worldbank.org/en/topic/health>>.

global health landscape.³⁹ However, PEF is not just an example of this trend, it is one of the leading examples. Indeed, PEF is, if not the most important, certainly the most widely-known and, after the onset of the COVID-19 pandemic, also the most discussed global public emergency financing facility.⁴⁰

The PEF was adopted and launched in late 2017 for an initial phase from July 2017 to June 2020 and was subsequently renewed. It draws its motivation from the tragic experience of the West Africa Ebola outbreak, which claimed more than 11,000 lives.⁴¹ In support of the importance of the instrument, some commentators and global health practitioners have acknowledged the beginning of a new and more satisfactory era in global health security and cooperation as a result of the establishment and functioning of PEF.⁴² In the same spirit, others have raised concerns that the operations and functioning of this financial facility would be hindered (if not compromised) by its lack of an independent budget within the WHO.⁴³ There is however no unanimous support of the mechanism, as it can be inferred from the preference of public donors to focus on more concrete preventive measures rather than insurance and/or from the

39 On the subject, see Kent Buse, *Global public-private partnerships: Part. I- a new development in health?* (2000) 78 *Bulletin of the World Health Organization* 549; Gian Luca Burci, 'Public-Private Partnerships in the Public Health Sector' (2009) 2 *International Organizations Law Review*, 359; Stéphanie Dragon, 'Global harmonization through public-private partnership: The case of pharmaceuticals' (2012) 2 *Global Administrative Law Working Papers* <<https://images.irpa.eu/wp-content/uploads/2019/03/IRPA.WP.2012.2.Dagron.pdf>>.

40 See Concetta Maria Pontecorvo, above n 64, 595.

41 Amplius, see eg Concetta Maria Pontecorvo, 'Sulla recente azione della Banca Mondiale in tema di finanziamento della risposta alle emergenze sanitarie a carattere pandemico', in Angela Di Stasi, Giuseppe Fauceglia, Gerardo Martino, Piero Pennetta (a cura di), *Scritti in Onore di Massimo Panebianco* (Kluwer, 2020) 595; 'Fact Sheet: Pandemic Emergency Financing Facility' (World Bank, Web Page, 2021) <<https://www.worldbank.org/en/topic/pandemics/brief/fact-sheet-pandemic-emergency-financing-facility>>., also recalling that: 'To present, the PEF has paid out US\$61.4 million from its cash window to fight Ebola in DRC, including \$50 million for the current 10th outbreak'.

42 See eg Bangin Brim, 'Pandemic Emergency Financing Facility: struggling to deliver on its innovative promise' (2019) *BMJ* 367 ff; Rebecca Katz, Richard Seifman, 'Opportunities to finance pandemic preparedness' (2016) 11 *The Lancet Global Health* <[https://www.thelancet.com/journals/langlo/article/PIIS2214-109X\(16\)30202-9/fulltext](https://www.thelancet.com/journals/langlo/article/PIIS2214-109X(16)30202-9/fulltext)>. See also Suhas Ketkar, Dilip Ratha, 'Innovative Financing for Development: Overview', in Suhas Ketkar, Dilip Ratha (eds), *Innovative Financing for Development* (World Bank Group, 2009) <<https://pubdocs.worldbank.org/en/335011444766662755/e-book-Innovative-Financing-for-Development.pdf>>, stressing that the growth of innovative financing for development over the last decade has demonstrated the enormous potential of new mechanisms for generating resources beyond traditional official development assistance.

43 On the ecology and functioning of the World Health Organization in a time of crisis, see Jan Klabbers, 'The Second Most Difficult Job in the World. Reflections on Covid-19' (2020) 11 *Journal of International Humanitarian Law Studies* 270.

difficulties to integrate PEF with the existing international infectious disease control regime.⁴⁴

The PEF operates as a trust fund (the ‘Trust Fund’) in the form of a financial intermediary fund to be administered by the IBRD as trustee (the ‘Trustee’). The purpose of this Trust Fund is to make funds promptly available for responding to high-severity infectious disease outbreaks before they turn into pandemics.⁴⁵ To this end, the PEF channels efforts to raise new and additional financial resources for public health emergencies, in the face of growing reluctance by economically developed countries to contribute to a large number of different funds with questionable success, due to limitations regarding size and organization. Another and complementary objective that is pursued by PEF, according to its establishing framework, is the ‘creation of a global market for pandemic insurance instruments by drawing on resources from insurance, bonds and/or other private sector financial instruments’ (the ‘PEF framework’) (Article II, b) of the PEF Framework.)

From an institutional perspective, PEF complements the role that the International Development Association (IDA) – the WB’s fund for the poorest countries – and other international institutions and donors play in financing outbreak response. However, unlike the WB IDA funding, which deploys money and financial resources only to governments in the poorest countries,⁴⁶ PEF funds governments as well as other multilateral and civil society organizations that need to be involved in a crisis response. This is not its only peculiarity. PEF has an original institutional design and framework that allows it to function and operate as a quick-disbursing financing mechanism. It follows the legal format of the so-called ‘international soft or informal organizations’ composed of representatives of private contributors on the one hand and of the WB and WHO agencies on the other.⁴⁷ PEF functions as a mechanism for

44 For further references to these views and criticism, see Lee Tsung-ling, above n 2, observing that: ‘While the PEF could channel the funds necessary to finance efforts in containing global epidemic outbreaks, if the PEF is not properly integrated with the existing infectious disease control regime, it could risk further undermining the coherence of the regime.’

45 See also WB, *Saving Lives, Scaling-up Impact and Getting Back on Track*, above n 20, stressing that safeguarding global public health requires boosting capacity to stem the spread of the virus everywhere – including in fragile settings and refugee communities.

46 See Ibrahim Shihata, ‘The World Bank and “Governance” Issues in its Borrowing Members’ (1991) 1 *The World Bank in a Changing World* 53, 58.

47 See eg Nicholas Bayne, ‘Hard and soft organizations in international institutions: complements not alternatives’, in Kirton, Trebilcock (eds), *Hard Choices, Soft Law* (Routledge, 2004) 347; Brölmann, ‘Flat Earth? International Organizations in the System of International Law’ (2001) 11 *Nordic Journal of International Law* 319; Jan Klabbers, ‘Institutional Ambivalence by Design: Soft Organizations in International Law’ (2001) 11 *Nordic Journal*

the direct transfer of money and payments to governments and pre-approved frontline ‘responding agencies’ such as WHO and UNICEF through the conclusion of financial procedures agreements between them and the Trustee (the IBRD).⁴⁸ Its original design and framework consist of two so-called ‘windows’: an insurance window⁴⁹ and a cash window.⁵⁰ The two windows are triggered in different ways and are specifically aimed at mutually complementing each other.

The insurance window is the most innovative of the two, given that funding and resources to the other window are provided from a traditional donor-funded trust fund.⁵¹ The main innovation of the insurance window lies in the fact that the WB’s development partners are only requested to correspond the interest needed to attract private investment while in return investors on capital markets and reinsurance companies provide them with a multiple of their payments in risk coverage (that is, a premium payment).⁵² A second innovation is that the insurance window enables an ‘objective benchmarking of risk’, given that payout criteria are not explicitly linked to the political or economic situation of covered countries. A third, not less relevant innovation of the insurance window is that it also incentivizes countries to improve surveillance and early warning systems, in line with the International Health Regulations

of International Law 403–421; Raphaële Rivier, ‘L’utilisation d’autre formes d’organisation internationale’ (2012) 76 *Revue General de Droit International Public*, 483–510.

48 “Responding Agency”: means subject to entering into a Financial Procedures Agreement with the Trustee, any entity that is identified as a Responding Agency in the Operations Manual, as such entity shall have been named or accredited by the Steering Body for the Country Implementation Modality or Responding Agency Implementation Modality in accordance with the accreditation criteria and procedures developed and approved by the Steering Body in conjunction with the Trustee, pursuant to the terms of this PEF Framework. (Article I, para. 1, ff) of the PEF Agreement.

49 “PEF Insurance Window”: means a component of the PEF, which is established for the purpose of providing PEF funding, funded by and up to the Pandemic Bond/Insurance Payout Amount received in the Trust Fund (art I, para 1, bb) of the PEF Framework.

50 “PEF Cash Window”: means a component of the PEF, which is established for the purpose of providing PEF funding, where funding from the PEF Insurance Window is not available (Article I, para. 1, v) of the PEF Framework.

51 The idea of pre-financed sovereign risks in large-scale disasters through an established insurance mechanism is innovative, but not completely new. *Amplius*, see eg Jeffrey McGee et al., ‘Writing the Fine Print: Developing Regional Insurance for Climate Change Adaptation in the Pacific’ (2014) 15 *Melbourne Journal of International Law* 444.

52 See Tsung-Ling Lee, above n 2, 976, also stressing that: ‘Beyond developing insurance against pandemic threats, the World Bank also points out that private sector participation will be essential in ensuring that pandemic responses are effective and timely’.

(IHRs). The insurance window is triggered once the parametric triggers such as outbreak size, growth rate and spread across border are met, and it functions as a financial tool for providing coverage of up to \$425 million to all IDA-eligible countries for diseases that are listed by the WHO as likely to cause major epidemics if contagion spreads across national borders. These include new pandemic influenza, SARS, MERS, Ebola, Marburg and Crimean Congo hemorrhagic fever, Rift Valley fever and Lassa fever. Outbreaks from diseases other than those listed are, however, considered as ineligible for a payout from the insurance window.⁵³

Indeed, the current COVID-19 pandemic was not covered by the insurance window but by the cash window which is triggered by expert advice,⁵⁴ based on the pathogen type and epidemiological thresholds with a final decision by the PEF Steering Body (the PEF Steering Body or the Body). The PEF Steering Body is also in charge of deciding on the payout amounts from the window (Article VIII of the PEF Framework).⁵⁵ The rationale behind this determination (and also behind the power of the Body to review periodic reports received from Responding Agencies)⁵⁶ is clear, especially if one considers that the PEF Steering Body is exclusively composed of representatives from Contributors (or a constituency(-ies) of Contributors)⁵⁷ as voting members,⁵⁸ and that it is the only body in the PEF's organigram⁵⁹ that is in charge of overseeing the PEF's financial operations and activities.⁶⁰ Until the end of its operation and activities, the PEF cash window has only been triggered and activated three times, namely for the 9th and 10th Ebola outbreaks in the Democratic Republic of Congo (DRC)⁶¹ and most recently for the Coronavirus Disease (COVID-19)

53 PEF Manual <<http://pubdocs.worldbank.org/en/134541557247094502/PEF-Operational-Brief-Feb2019.pdf>>.

54 But not directly by the WHO Director-General, as recommended by at least one author (See Jeffrey Mc Gee et al., above n 69, 936–37).

55 The *Steering Body* is the decision-making body responsible for setting the strategic direction, policy-making, allocation of payouts and monitoring and evaluation.

56 Article VIII, para 3, 1).

57 The Trustee may accept contributions to the Trust Fund from sovereign donors and other donors acceptable to the Trustee (collectively, the “Contributors”, each a “Contributor”) (Art III, para 1).

58 The World Bank and the WHO may also sit in the Steering Body, but as non-voting members. (Art VIII, para 2).

59 The governance structure of the PEF consists of a Steering Body, an Advisory Committee, the PEF Coordinator and the Trustee, and is supported by the services of the Treasury Manager and Technical Experts. (Art VIII, para 1).

60 Ibid.

61 Amplius, see Concetta Maria Pontecorvo, ‘La riforma dell’azione internazionale di risposta alle emergenze sanitarie globali all’indomani del ‘caso Ebola’: “quo vadis?” (2019) 18 *Diritto*

outbreak.⁶² And surprisingly, this is despite the fact that the ease of the decision-making process of the PEF Steering Body (but perhaps not also of its trigger requirements) would have allowed a more frequent activation of this window, and therefore a wider recourse to its financial resources and funding. The reference is here to the voting procedures of the Steering Body as regulated by Article VIII, para. 4 of the PEF Framework, where ‘consensus’ among voting members⁶³ is accepted and indicated as the rule for decision-making.⁶⁴

The interruption of the PEF’s operation and activities in 2021 as a result of its non-renewal did not signify the end of the World Bank Group’s Response to the COVID-19 Pandemic. In fact, a few other, though less ambitious, initiatives were launched by the World Bank to support developing countries in their efforts to fight COVID-19. Chief amongst these initiatives is the Fast-Track COVID-19 Facility (FTCF).⁶⁵

Formally endorsed by the WB Executive Directors in March 2020, the FTCF pursues the practical objective of freeing up existing financial resources to help member countries during the continuation of the pandemic.⁶⁶ Unlike in the case of the PEF, all the economic resources conferred to the FTCF (currently US\$14 billion) come from the financial institutions belonging to the WB Group.⁶⁷ The idea behind this initiative, in light of the modesty of the objective

umani e diritto internazionale 363; A. Kamradt-Scott, ‘WHO’s to blame? The World Health Organization and the 2014 Ebola Outbreak in Africa’ (2016) 3 *Third World Quarterly* 401.

62 The PEF is expected to contribute US\$196 million that will be made available to countries with greatest need (Amplius, see WB, *Saving Lives, Scaling-up Impact and Getting Back on Track*, above n 20, 102).

63 On the subject, see eg. Dapo Akande, ‘What is the Meaning of “Consensus” in International Decision Making?’ (2013) *EJIL Talk!* <<https://www.ejiltalk.org/negotiations-on-arms-trade-treaty-fail-to-adopt-treaty-by-consensus-what-is-the-meaning-of-consensus-in-international-decision-making/>>.

64 Only when, despite all efforts, ‘consensus’ in the Steering Body cannot be attained, may a formal vote be taken. In such cases, according to Article VIII, para. 4, decisions shall be conducted by majority vote on the basis of one voting member one vote.

65 World Bank COVID-19 Response under the Fast Track COVID-19 Facility <<http://documents1.worldbank.org/curated/en/271831585274457435/pdf/World-Bank-COVID-19-Response-under-the-Fast-Track-COVID-19-Facility-and-Proposed-Investment-in-IFC-Fast-Track-COVID-19-Facility-Chair-Summary.pdf>>.

66 See DEVELOPMENT COMMITTEE (Joint Ministerial Committee of the Boards of Governors of the Bank and the Fund on the Transfer of Real Resources to Developing Countries), ‘Update on World Bank Group Response to the COVID-19 Emergency’ <<https://www.devcommittee.org/sites/dc/files/download/Documents/2020-04/Final%20DC2020-0003%20COVID-19%20emergency.pdf>>.

67 Of this amount, US\$6 billion come from IBRD and IDA, while the rest come from IFC. See DEVELOPMENT COMMITTEE (Joint Ministerial Committee of the Boards of Governors of the Bank and the Fund on the Transfer of Real Resources to Developing Countries), above n 64.

pursued, is evident – to avoid the difficulties experienced by the Bank in achieving resources from financial markets and private investors during the implementation and enforcement of the PEF. If this can perhaps be understood, it cannot be justified. At the moment of writing, the FTCF has been used to support some emergency health responses and investment projects such as the Guyana's COVID-19 Emergency Response Project⁶⁸ and the Morocco's Results-based Programme for Improving Health Sector's Efficiency in managing pandemic impact.⁶⁹ The WB is also in the process of using the FTCF again to sponsor few other emergency health initiatives and investment projects to contain the effects of COVID-19.⁷⁰

Another initiative to be mentioned is the IFC's prompt support on health products and services – including vaccines – to economically developing countries.⁷¹ This support includes, in particular, direct investments in vaccine manufacturers to foster expanded production of COVID-19 vaccines in low- and middle-income countries, with production reserved for emerging markets, and aid for mapping COVID-19 vaccine manufacturing capacity, focusing on potential bottlenecks in manufacturing processes.⁷²

68 See Early Warning System, 'Guyana COVID-19 Emergency Response Project (WB-P175268)' <<https://ewldata.rightsindevelopment.org/projects/p175268-guyana-covid-19-emergency-response-project/>>.

69 See OCHA Services, 'The World Bank Supports Morocco's Health Sector in Managing Pandemic Impact' <<https://reliefweb.int/report/morocco/world-bank-supports-morocco-s-health-sector-managing-pandemic-impact>>.

70 *Amplius*, see IDA, 'Update on IDA18: Implementation and Delivery' <https://www.parlament.gv.at/PAKT/VHG/XXVII/III/III_00242/imfname_881865.pdf> that, after having recalled that: 'Between April and September 2020 alone, the World Bank has committed \$43 billion, or 41 percent of the \$104 billion of lending capacity indicated in March for the 15 months from April 2020 to June 2021', indicates that: 'More recently, on October 13, 2020, the Board of Executive Directors approved an envelope of \$12 billion to finance developing countries' acquisition and deployment of COVID-19 vaccines, when they are deemed safe and effective'.

71 See 'Key Facts: World Bank Group Vaccine Announcement' (*World Bank*, Web Page, 2021) <<https://www.worldbank.org/en/news/factsheet/2020/10/15/world-bank-group-vaccine-announcement--key-facts>>.

72 *Ibid*

3 Analysing Indicators of Legitimacy and Effectiveness in WB and PEF Operations and Functioning

To analyse indicators that might either reflect the notions of legitimacy⁷³ and effectiveness⁷⁴ or signal deficiencies in such regards, we shall quickly recall the most relevant parameters generally used for defining these two notions. Legitimacy involves different elements such as increasingly, above all, the respect and promotion of the rule of law in recipient countries in order to justify public authority⁷⁵ or to establish voluntary acceptance and compliance.⁷⁶ Effectiveness, at least if considered in the specific context of international public health law and policy,⁷⁷ mainly refers to the potential to introduce positive changes in the public health situation in line with pre-set purposes and objectives.⁷⁸ This potential may be reflected by the internal acts and policies

73 See eg Christopher A. Thomas, 'The Uses and Abuses of Legitimacy in International Law' (2014) 34 *Oxford Journal of Legal Studies* 729; See Daniel Bodansky, 'The Concept of Legitimacy in International Law', in R. Wolfrum, V. Röben (eds), *Legitimacy in International Law. Beiträge zum ausländischen öffentlichen Recht und Völkerrecht* (Springer, 2008) 309.

74 On the meaning of effectiveness in international law, see eg Jean d'Aspremont, 'Effectivity' in International Law: Self-Empowerment Against Epistemological Claustrophobia' (2014) 108 *Proceedings of the Annual Meeting of the American Society of International Law* 165–168; Mortimer N. S. Sellers, 'The Effectiveness of International Law', in M.N.S. Sellers (ed), *Republican Principles in International Law* (London, 2006) 52 ff; Ademola Abbass, 'Challenges to the effectiveness of international law' (2006) *OUP Blog* <<https://blog.oup.com/2014/04/challenges-to-the-effectiveness-in-international-law-pil/>>.

75 See Karen J. Alter, 'The Contested Authority and Legitimacy of International Law: The State Strikes Back', in Christopher Daase, Nicole Dietelhoff (eds), *Beyond Anarchy: Rule and Authority in the International System* (2018) 134 *iCourts Working Paper Series* 1.

76 See Samantha Besson, 'The Authority of International Law – Lifting the State Veil' (2009) 31 *Sydney Law Review* 344. See also José Luis Martí, 'Sources and the Legitimate Authority of International Law: Democratic Legitimacy and the Sources of International Law', in Samantha Besson, Jean d'Aspremont (eds), *The Oxford Handbook of the Sources of International Law* (Oxford University Press, 2017) 724; See also Thomas Franck, *The Power of Legitimacy among Nations* (Oxford University Press, 1990) 16.

77 On the meaning, scope and main peculiarities of 'international health law and policy' see e.g. David P. Fidler, 'International Law and Global Public Health' <<https://www.repository.law.indiana.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1655&context=facpub>>. See also (though with a focus on international law in times of pandemics) Russell Buchan, Emily Crawford, Rain Liivoja 'International Law in a Time of Pandemic' (2020) 11 *Journal of International Humanitarian Legal Studies* 187.

78 See eg Theodore M. Brown, Marcos Cueto, Elizabeth Fee, 'The World Health Organization and the Transition From "International" to "Global" Public Health' (2006) 96 *American Journal of Public Health* 62–72; Thomas R. Frieden, 'Six Components Necessary for Effective

under which international financial institutions operate but above all by their practice.⁷⁹

The following sections will be devoted to the analysis of the role of these and other criteria in the perception of the legitimacy and effectiveness of the WB and PEF.

3.1 *Lending practices and policies in the WB and PEF*

While the discussion of the inclusion of public health emergency considerations in the WB's lending policies and practices has proven that considerable efforts have been made, this does not automatically imply public health emergency effectiveness. First, the nature of the policies and their capacity to effectively enhance the improvement of public health emergency has to be ascertained. Furthermore, the issue of whether changed policies also lead to changed lending practices is of strategic relevance in evaluating indicators for enhanced effectiveness.

What most of the WB's public health policies and documents have in common is that they contain procedural or substantive safeguards to prevent damage. The enhancement of global public health, e.g., the funding of a project to meet some elaborated public health standards, is quite distinct from the prevention of (future) damage. Safeguard measures are an important part of WB's operations concerning public health impacts and are aimed at meeting the popular criticism that the WB's developmental projects negatively affect the public health situation in financially assisted countries. Nevertheless, when selecting and evaluating indicators for assessing effectiveness, the change in policies regarding stricter safeguards against future damage cannot constitute the only parameter. Rather the issue to be tackled will be whether public health rules and standards are one of the main objectives of the project and whether the project is effective in achieving them, so as to result in improvements in public health.

Policies that do not qualify as safeguard measures, e.g., the OP/BP 8.00 or the WB's *Rapid Response to Crises and Emergencies Procedural Guidelines*, only lead to public health emergency effectiveness if they are reflected in the lending practices, namely in the project eligibility and requirements for project enforcement. Nevertheless, the development projects supported by the WB at

Public Health Program Implementation' (2014) 13 *American Journal of Public Health* <<https://ajph.aphapublications.org/doi/abs/10.2105/AJPH.2013.301608>>.

79 See also Stefan Brunnhuber, Garry Jacobs, 'Innovative Financial Engineering to Fund the SDGs – A WAAS Initiative' (2020) 4 *Cadmus* <<http://www.cadmusjournal.org/article/volume-4/issue-2-part-2/innovative-financial-engineering-fund-sdgs-waas-initiative>>; BSR, 'Innovative Finance to Expand Access to Healthcare' <https://www.bsr.org/reports/BSR_Healthcare_Innovative_Finance_Final_September_2017.pdf>.

the moment do not explicitly refer to the public health's sustainability criteria that are elements of the OP/BP 8.00. Instead, they refer to Operational Policies (Ops), especially to the OP/BP 8.00. Whether projects funded after the drafting of the OP/BP 8.00 differ with regard to the degree they refer to public health and public health emergency issues is hard to establish, because public health and public health emergency elements have been encompassed for a long time due to the other public health strategies that were in place before the OP/BP 8.00. To this extent the OP/BP 8.00 rather seems to be a political statement on all cross-cutting issues that proves the necessity to tackle human rights and public health and public health emergencies issues as interlinked concerns, though without providing for concrete enhancement of public health emergency effectiveness.

The increase in financing of emergency response projects in 2020 illustrates a current evolution in lending practice that is clearly imputable to enhanced public health emergency awareness. Furthermore, the projects sponsored in the 2020 stipulated strict requirements concerning health emergency impact assessment.

Certain development projects necessarily involve negative effects and consequences. In terms of effectiveness, the reduction of such impacts is strategic in preventing wider damage but does not generate any positive development. For the assessment of effectiveness this might imply that, though the WB has recently evolved to become more public health emergency-oriented, it is not necessarily public health emergency effective in the sense that it leads to positive evolutions. A possibility would be to reject project proposals for public health emergency reasons. Yet, a lack of documentation obstacles the evaluation of a rejection practice of the WB motivated by public health emergency considerations.

Not only in the realm of the PEF but also as part of its ordinary lending practice, the WB has started to encompass emergency response projects that, as suggested by their denomination, are not confined to safeguard measures but that aim at some public health improvements and health advances. Recent examples of such more public health-oriented projects are the Emergency Health and Nutrition Project in Yemen, which aims to contribute to the provision of basic health, essential nutrition, water and sanitation services for the benefit of the population of the Republic of Yemen, and the COVID-19 Emergency Response project in Mali (approved on April 10, 2020).⁸⁰ The latter aims at improving access to health care services and enhance an integrated

80 'Mali to Receive \$25.8 Million for COVID-19 Response' (*World Bank*, 10 April 2020) <www.worldbank.org/en/news/press-release/2020/04/10/mali-to-receive-25-8-million-for-covid-19-response>.

response to COVID-19 through inter alia better screening, detection and treatment of patients.⁸¹

Despite the changes in the WB portfolio towards public emergency response projects, an important part of the WB's activities in support of public health emergency response operations refers to its involvement in the PEF.⁸² Involvement in the PEF has the potential to lead to a process of reciprocal strengthening and useful exchanging experience with pandemic financing that may evolve into effective measures and actions. With specific respect to PEF's lending policies, the same considerations apply as for changes in WB policy: the central issue of effectiveness concerns lending practices. Because the PEF is only in its fourth year of activities, effectiveness is hard to establish as measurable project results are still missing.

The PEF is by its institutional structure significantly different from the WB's regular lending practices. Nevertheless, the PEF shares with the WB a specific focus on preventing a high-severity infectious disease outbreak from becoming a pandemic. When public–private partnerships are specified to prevent an infection disease from becoming a pandemic like COVID-19, they have the potential to contribute to positive changes to public health and may thus be regarded as effective. Nevertheless, as with all other financial devices, if a financial institution like the PEF may be considered effective depends upon the relevant lending practices.

3.2 *The rule of law as a legitimacy-conferring doctrine*

In the case of the WB, legitimacy is increasingly an issue of respect and promotion of the rule of law standards in the recipient states. Yet, the adherence by the Bank to the so-called 'rule of law' doctrine has, in fact, been strategic for legitimising its growing involvement in reforming developing countries'

81 Incidentally, it is also worth recalling that the WB is working closely with partners on a *COVID-19 Accelerator*, which aims to speed up the development and deployment of universally available and affordable vaccination, treatment and diagnostics accompanied by health system strengthening. On the issue, see WB, *Saving Lives, Scaling-up Impact and Getting Back on Track – World Bank Group COVID-19 Crisis Response Approach Paper*, <<http://documents1.worldbank.org/curated/en/136631594937150795/pdf/World-Bank-Group-COVID-19-Crisis-Response-Approach-Paper-Saving-Lives-Scaling-up-Impact-and-Getting-Back-on-Track.pdf>>.

82 But see also the WB's participation to the HEPRTF. The HEPRTF is a trust fund that provides funds to support countries to prevent, respond to and mitigate the impact of COVID-19 and future epidemic outbreaks. See 'Group to Launch New Multi-Donor Trust Fund to Help Countries Prepare for Disease Outbreaks' (*World Bank*, 15 April 2020) <<https://www.worldbank.org/en/news/statement/2020/04/15/world-bank-group-to-launch-new-multi-donor-trust-fund-to-help-countries-prepare-for-disease-outbreaks>>.

judicial and legal systems⁸³ and to describe this endeavor not only as ‘good per se’ but also as legally compatible with the WB’s non-political character (Article V, section 5 (c) of the World Bank’s Articles of Agreement).⁸⁴ While not the only mechanism to establish or enhance legitimacy,⁸⁵ the rule of law doctrine is indeed an important, almost decisive, factor. Due to its dual function of providing legitimacy for the WB’s operations and activities on rule of law projects as well as legitimacy for the setting up and implementation of the WB’s agenda for combating corruption,⁸⁶ the rule of law’s role becomes even more important and influential because it is not limited to economic considerations.⁸⁷ And, in fact, the rule of law doctrine also works as a powerful conceptual tool for supporting substantive legal and judicial reforms that have political and social implications in the countries they were implemented.⁸⁸

One of the major challenges for the rule of law doctrine is that, despite numerous efforts to clarify the concept and its core components, and

83 The WB estimates to have supported 330 “rule of law” projects dealing with legal and judicial reform in over 100 countries. The World Bank, ‘Legal and Judicial Reform Observations, Experiences, and Approach of the Legal Vice Presidency, Legal Vice Presidency’ <<http://www4.worldbank.org/legal/publications/ljrobservations-final.pdf>> [Observations, Experiences and Approach], as quoted by Alvaro Santos, above n 92, 253, n 1.

84 On the subject, see eg Hassane Cissé, ‘Navigating the Muddy Waters of Politics in International Development Finance: Should the Political Prohibition in Charters of International Financial Institutions be Revisited? The Case of the World Bank’ <http://siteresources.worldbank.org/INTLAWJUSTICE/Resources/HCissePresentation_Nov7.ppt>; ID, ‘Should the Political Prohibition in Charters of International Financial Institutions Be Revisited? The Case of the World Bank’ (2011) 10 *The World Bank Legal Review* 59–92, who stresses the need that the Bank’s business continues the institutional practice of adapting political prohibition through creative but responsible interpretation; Joel M Ngugi, ‘The World Bank and the Ideology of Reform and Development in International Economic Development Discourse’ (2006) 14 *Cardozo Journal of International and Comparative Law* 313. On the inherent political character of the international organizations, see the seminal work by Jan Klabbers, ‘The EJIL Foreword: The Transformation of International Organizations Law’ (2015) 26 *European Journal of International Law* 9.

85 See above Section 2.

86 See Ibrahim Shihata, ‘Corruption: A General Review with an Emphasis on the Role of the World Bank’ (1993) 5 *Journal of Financial Crime* 12–29; Susan Rose-Ackerman, ‘The role of the World Bank in controlling corruption’ (1998) 29 *Law and Policy in International Business* 93 ff; Heather Marquette, ‘The creeping politicization of the World Bank: the case of corruption’ (2004) 52 *Political Studies* 413–430.

87 Amplius, see, Matthew Stephenson, ‘The Rule of Law as a Goal of Development Policy’ <<http://www.worldbank.org/lji>>.

88 See Richard Messick, Judicial Reform and Economic Development: A Survey of the Issues, 14 *The World Bank Research Observer* 117 (February 1999) <<http://www1.worldbank.org/publicsector/legal/Research%20Observer%20Paper.doc>>.

notwithstanding its global acknowledgement as an enabler of development⁸⁹ some governments contest its implementation in practice.⁹⁰ And it is precisely because of this that the meaning of ‘rule-of-law’ – domestic, international, or any other – has been and still remain the subject of harsh disagreement and heated discussion among international legal scholars, legal philosophers and political scientists.⁹¹ Practice shows, nevertheless, that this uncertainty and ambiguity has not compromised the fulfillment of the above-mentioned dual functions of the rule of law doctrine. Another more significant shortcoming is the fact that the rule of law doctrine has not developed any substantive rules by which the negative consequences of the implementation of public health emergency projects may be limited. Since the rule of law has a major role to play in public emergency contexts,⁹² the restrictions concerning the use of the rule of law doctrine in relation to development projects that are not rule-of-law and judicial projects are difficult, if not impossible, to justify.

4 Concluding Remarks

In the light of the analysis above, one may conclude that the WB has evolved as one of the main players in the field of public health emergency preparedness and response through the variety of models it employs to channel financial resources for specific public health emergency objectives. The WB has indeed established itself as the most influential player with respect to international public health emergency policies, even above WHO, and this is due to its capacity and its involvement in several public health emergency funds, networks and development projects.

The PEF, in view of its particular institutional design and setting, remains exceptional and also exceptionally contested as a financing mechanism for

89 UN, Transforming our world: the 2030 Agenda for Sustainable Development, 2015, A/Res/70/1.

90 Amplius, see eg Jan Reestman, Thomas Vandamme (eds), *Ambiguity in the Rule of Law: The Interface Between National and International Legal Systems* (Europa Law Publishing, 2004).

91 For more on this issue, see e.g., Alvaro Santos, The World Bank's Uses of the “Rule of Law” Promise in Economic Development, in David Trubek & Alvaro Santos (eds), *The New Law and Economic Development: A Critical Appraisal* (Cambridge University Press, 2006) 257.

92 United Nations and the Rule of Law, ‘United Nations Rule of Law support in the context of COVID-19 pandemic’, available at: <https://www.un.org/ruleoflaw/blog/2020/05/united-nations-rule-of-law-support-in-the-context-of-covid-19-pandemic/>; Diego García-Sayán, ‘Courts, States of Emergency and Rule of Law’ <<https://www.unodc.org/dohadeclaration/en/news/2020/05/courts--states-of-emergency-and-rule-of-law.html>>.

preparadness and response to global pandemics like the current COVID-19 crisis. And in fact, while initially acclaimed for its ability to make prompt payments and its potential effectiveness in responding to the needs of pandemic-affected populations, reactions to PEF from large segments of civil society and many economic and social observers have quickly turned substantially negative,⁹³ leading to its non-refinancing at least for the time being. There were concerns that the private sector involvement in pandemic insurance provision could further complicate the already complex structures of the health development sector. Supporting these concerns, some commentators and observers suggested that introducing private investors with their own set of interests and a penchant for privatising knowledge into an industry filled with multilateral development agencies, charities, non-governmental organisations, health-care providers, pundits, and state officials does not lead to great efficiency.⁹⁴ Moreover, it has also been claimed that it could be difficult, if not even impossible, for donors to ensure that reinsurers and investors do not overcharge them as the latter have been in the business of risk assessment for decades.⁹⁵ And that is not all. Additional concerns relate to insurance cover and payout thresholds that have been established 'based on the epidemiological characteristics of the diseases [as well as the] affordability and risk appetite of investors and reinsurers' with little to no public oversight.

Although it seems unlikely that further institutions like the PEF will be created, the PEF could be developed and reformed in several important aspects, including simplifying its activation criteria, applying its institutional framework to a wider list of diseases and modifying its payout methods and well as the underlying risk models.

The effectiveness of the PEF in enhancing agreed public health emergency standards should also be credited to the WB as its implementing agency. Although the WB is not responsible for the assessment of development projects eligible for funding, it contributes its organisational experience and

93 For further references on these criticisms see eg Daniel Clarke, 'Opinion: Now is not the time for the World Bank to step back on pandemic financing' <<https://www.devex.com/news/opinion-now-is-not-the-time-for-the-world-bank-to-step-back-on-pandemic-financing-97837>>.

94 See eg Euan Ritchie and Mark Plant, 'A Good Idea Executed Badly: Why the World Bank Should Not Renew the Pandemic Emergency Facility Insurance Window' <<https://www.cgdev.org/blog/good-idea-executed-badly-why-world-bank-should-not-renew-pandemic-emergency-facility-insurance>>.

95 See eg Ben Parker, 'In the news: Investors take a hit in World Bank pandemic insurance scheme' (*The New Humanitarian*, 20 April 2020) <[newhumanitarian.org/news/2020/04/20/coronavirus-pandemic-insurance-world-bank](https://www.newhumanitarian.org/news/2020/04/20/coronavirus-pandemic-insurance-world-bank)>.

public accountability as the main multilateral financial institution for sustainable development. In addition to its function as implementing agency for the PEF Trust Fund, the World Bank also cofinances a significant number of PEF projects. As a result, the WB is a link between PEF activities and ODA.⁹⁶ This linkage between PEF activities and regular lending policies is another factor that strengthens the WB's position as a strategic actor in pandemic financing.

As far as voting procedures are concerned, the consensus voting of the PEF appears to guarantee a good balancing of potentially conflicting interests. Therefore, from the perspective of legitimacy, such a procedure may well be a model for the future in contrast to the decision by majority. Legitimacy in decision-making should be considered when elaborating new financial mechanisms such as public–private partnerships.⁹⁷ In this respect the model of the PEF, because of its peculiar design and setting, is open to criticism, for instance as concerns the non involvement of the WB and WHO in decision-making of the PEF Steering Body.

In general the PEF does not fit the traditional trust fund model through which financial resources were allocated for certain public health purposes, especially because it is no longer focused on the involvement of states as the main actors, so criteria to assess legitimacy are hard to develop. Even so, in view of the advantages offered by the private–public partnerships model and with the benefit of the experience of the WB as trustee, such models may become a future option for epidemics and pandemic financing. In evaluating this option, nevertheless, account shall be given to the fact that its introduction would significantly complicate the already rather complex PEF's institutional

96 On the role of the World Bank in the provision of official assistance, see Doug Ierley, 'Private Capital Flows as a Springboard for World Bank Reform' (2002) 23 *University of Pennsylvania Journal of International Economic Law* 1.

97 On the issue, see e.g. Davinia Aziz, 'Global Public-Private Partnerships and International Law' (2012) 2 *Asian Journal of International Law* 1; Antonello Tancredi, 'L'ibridazione pubblico-privata di alcune organizzazioni internazionali', in Michele Vellano (ed), *Il futuro delle organizzazioni internazionali. Prospettive giuridiche, XIX Convegno SIDI di Courmayeur 26–28 giugno 2014* (SIDI, 2014); Gian Luca Burci, above n 57, 359; Benedict Kingsbury, Lorenzo Casini, 'Global administrative law dimensions of international organizations law' (2009) 6 *International Organizations Law Review* 319; Kent Buse, G. Walt, 'The World Health Organization and Global Public-Private Health Partnerships', in Michael R. Reich (ed), *In Search of 'Good' Global Health Governance, in Public-Private Partnerships for Public Health* (National Centre for Biotechnology Information, 2002) 169; Enza Maria Tramontana, 'Partnership pubblico-privata in materia di salute globale e responsabilità internazionale per violazione dei diritti umani', in Laura Pineschi (ed), *La tutela della salute nel diritto internazionale ed europeo tra interessi globali e interessi particolari, XXI Convegno SIDI di Parma 9–10 giugno 2016* (SIDI, 2017) 359.

framework and that issues of legitimacy will arise, especially in relation to the rules applicable to reinsurers and investors. In this respect, the balancing of legitimacy and effectiveness will be an enduring challenge for the future of international pandemic and epidemic financing.