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Laurence Boisson de Chazournes

Responsibility of International Organizations  
in Financial Partnerships:  
Some Remarks

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**RESPONSIBILITY OF INTERNATIONAL ORGANIZATIONS  
IN FINANCIAL PARTNERSHIPS:  
SOME REMARKS**

By Laurence Boisson de Chazournes \*

**Abstract**

Partnerships between international organizations serve a practical function in coordinating institutional actions and supporting mutually shared objectives. However, international law has thus far struggled to address key issues that arise in such scenarios, particularly in the allocation of legal responsibility among these actors. This contribution outlines the complex character of resource-based collaborations established by international financial institutions. The author analyzes such partnerships in light of both their constitutive legal instruments and the International Law Commission's 2011 Draft Articles on the Responsibility of International Organizations, ultimately advocating for greater synergy between these rules and the activities such relationships entail in practice.

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The present contribution builds on L. Boisson de Chazournes, 'United in Joy and Sorrow: Some Considerations on Responsibility Issues under Partnerships among International Financial Institutions', in M. Ragazzi (ed.), *Responsibility of International Organizations. Essays in Memory of Sir Ian Brownlie* (Leiden/Boston: Martinus Nijhoff, 2013), 213.

## **1. Introductory remarks**

In the sprawling system of global governance, collaboration is widely sought to curb inefficiencies in resource allocations. That gives rise to complex and fast-changing bundles of relationships. Partnerships between international organizations are one of the best examples of this: multi-purpose and flexible, they have come to represent an ideal tool to accommodate pragmatic needs flowing from the common or parallel action of organizations.

That international law struggles to apprehend such manifestations of collaboration is palpable when one takes up the topic of responsibility. The International Law Commission tried to grapple with this problem in the articles on the responsibility of international organizations it adopted in 2011.<sup>1</sup> From the outset, the acknowledgement that an international organization can incur responsibility in connection with a conduct other than its own, particularly in the cases spelt out in chapter IV of the articles,<sup>2</sup> ushers in a concept of responsibility more balanced and potentially more ambitious than its equivalent in the field of State responsibility. It is more balanced because derived responsibility stands on an equal footing with responsibility for one's own acts, while this is a mere exception in the articles on State responsibility, which the International Law Commission had adopted in 2001.<sup>3</sup> It is also more ambitious because, in trying to frame the relational networks of international organizations, the 2011 articles bring the topic of shared responsibility to the forefront.

Yet, the solutions offered by these articles have only stirred mild enthusiasm. Some international organizations have voiced doubts on whether the provisions in chapter IV will have a true grip on reality;<sup>4</sup> others have conversely warned about the risk

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<sup>1</sup> Responsibility of International Organizations (A/RES/66/100). See Annex I for the text of those articles referenced throughout this essay.

<sup>2</sup> See particularly articles 1(1) and 14-19. Aside from chapter IV-type of situations, the Commission stated: 'Another case in which an international organization may be held responsible is that of an internationally wrongful act committed by another organization of which the first organization is a member.' 'Draft articles on the Responsibility of International Organizations, with commentaries 2011' [ARIO Commentaries], Report of the International Law Commission on the Work of its Sixty-third Session, Gen. Ass. Off. Recs., Sixty-sixth Session, Supp. No. 10 (A/66/10), 69-172, at 72, para. (4).

<sup>3</sup> Article 1 on State responsibility speaks of responsibility for 'every international wrongful act of a State', contrary to the Special Rapporteur's proposal that 'every international wrongful act by a State gives rise to international responsibility'. (R. Ago, 'Second report on State responsibility' (A/CN.4/233), YILC (1970), vol. II, 177-97, at 187, para. 29.)

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that some articles may have a chilling effect on the activities of international organizations.<sup>5</sup> Doctrinal voices are also sceptical, pointing out that, notwithstanding the improvements over the 2001 articles, responsibility in multi-actor scenarios remains rather uncertain.<sup>6</sup>

Indeed, a glance at the commentaries to chapter IV of the articles on the responsibility of international organizations suffices to demonstrate the close kinship with their correlative provisions in the articles on State responsibility,<sup>7</sup> the only novelty being responsibility of an international organization for the circumvention of its own obligations through decisions or authorisations implemented by its members.<sup>8</sup> Such a strong reliance on the 2001 articles transposes into the 2011 articles the uncertainties riddling States' derived responsibility. Additionally, the Commission's rules do not address the possible consequences of acts adopted in contexts other than membership. The question therefore arises how to situate relations between international organizations and their members other than through membership within a general regime of responsibility.

Here, partnerships between international organizations offer an interesting angle of analysis. The broad range of circumstances they cover permits testing the link among the exercise of normative power, the implementation of operational activities, and the occurrence of wrongful acts in a framework distinct from membership and yet of a certain degree of formality and of continuity over time. That seems a promising approach to clarify the conceptual underpinnings of the derived responsibility of international organizations and, more generally, the scope of their shared responsibility. The analysis will focus on partnerships set up by international financial institutions

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<sup>4</sup> Concerning draft article 14 (direction and control), which was later incorporated into the 2011 Draft Articles as article 15, the UN Secretariat was of the view that 'the draft Article has little practical effect for the Organization.' Responsibility of international organizations. Comments and observations received from international organizations (A/CN.4/637/Add.1), 20.

<sup>5</sup> On draft article 13 (aid and assistance), which was later incorporated into the 2011 Draft Articles as article 14, the World Bank commented that the provision 'is worrisome and may create a dangerous chilling effect for any international financial institution providing economic assistance to eligible borrowers and recipients.' Responsibility of international organizations. Comments and observations received from international organizations (A/CN.4/637), 27.

<sup>6</sup> On the hurdles posed by the Commission's articles with respect to shared responsibility, A. Nollkaemper and D. Jacobs, 'Shared Responsibility in International Law: A Conceptual Framework', Amsterdam Law School Research Paper No. 2011-17.

<sup>7</sup> Articles 14-16, ARIO Commentaries, 103-7.

<sup>8</sup> Article 17, ARIO Commentaries, 107-10; and G. Gaja, 'Third report on responsibility of international organizations' (A/CN.4/553), para. 29.

(IFIs) – which have voiced strong concerns about the potential effects of chapter IV– and it will touch upon the circumstances for engagement of responsibility, while leaving aside issues concerning implementation.

## **2. Partnerships among IFIs: a Vector for Institutional Emulation**

Partnerships among IFIs have grown out of a need for effectiveness in the pursuance of a wide range of activities and objectives.<sup>9</sup> IFIs may receive logistical, material, or financial aid from each other for operational purposes, exchange information and participate in their respective fora of discussion, or establish institutional arrangements to implement a given activity and provide a framework for common goals. Flexibility and low costs of establishment have driven the growing success of partnerships in domains such as environmental protection and sustainable development.

Financing is a crucial issue in such domains and is usually pursued through ad hoc arrangements, ranging from full-fledged formal agreements,<sup>10</sup> informal instruments such as Memoranda of Understanding (MOUs),<sup>11</sup> to agreements incorporating the standard conditions adopted by one organization.<sup>12</sup> Regardless of their legal nature, these instruments combine provisions of a more contractual type, e.g. on termination or arbitration with typical administrative law mechanisms, such as monitoring and reporting on project implementation. These similarities show that partnership agreements represent an important vector of emulation and procedural

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<sup>9</sup> L. Boisson de Chazournes, 'Les relations entre organisations régionales et organisations universelles', *Collected Courses of the Hague Academy of International Law*, vol. 347 (2010) (Leiden/Boston: Martinus Nijhoff, 2011), 79-406, at 346, stating: 'While concern for pragmatism demands flexibility to render cooperation between the UN and regional organizations more efficient, the diverse relations between organizations creates more complexity, at times obscuring their legal profiles.' (Original in French; translation by the author.)

<sup>10</sup> See, for example, the Co-financing Agreement between the Nordic Development Fund, the African Development Bank, and the African Development Fund (1995), at <[www.afdb.org](http://www.afdb.org)>.

<sup>11</sup> See, for example, the MOU on an Enhanced Strategic Partnership for Cooperation in the African Countries between the European Commission, the European Investment Bank, and the African Development Bank (2005), at <[www.afdb.org](http://www.afdb.org)>. See also the MOU between the European Bank for Reconstruction and Development, the African Development Bank and the African Development Fund (2011), at <[www.afdb.org](http://www.afdb.org)>.

<sup>12</sup> See, for example, the World Bank Standard Conditions for Grants Made by the World Bank out of Various Funds (2010), at <[www.worldbank.org](http://www.worldbank.org)>.



harmonisation among IFIs.<sup>13</sup> Emulation helps, in fact, to reduce transaction costs and, in turn, to facilitate collaboration among IFIs.

Financing may also be foreseen in the constitutive agreements of international organisations. For instance, the statute of the International Development Association (IDA), a member of the World Bank Group, provides a channel for preferential financing to 'a public or regional organization'.<sup>14</sup> On this basis, the IDA has granted loans at privileged rates to the West African Development Bank (WADB) and to the Caribbean Development Bank.<sup>15</sup> For example, the IDA in 2004 approved funding for the WADB as part of its efforts to develop financial infrastructure and economic integration in the region.<sup>16</sup>

Partnerships are also the building blocks of more institutionally complex multilateral schemes. Trust funds for concessional financing are a good example. Conceived as a less burdensome alternative to the proliferation of autonomous organizations,<sup>17</sup> most trust funds are set up jointly by two or more international organizations and administered by one of them, acting as trustee. In this context, the Global Environment Facility (GEF) represents a rather unique case of institutional engineering.<sup>18</sup> Established in 1991 (and restructured in 1994 with the World Bank acting as trustee, and the latter, together with the United Nations Development Programme (UNDP) and UNEP, acting as implementing agencies), it provides financing to developing countries for projects dealing with the protection of the global environment (including, inter alia, climate change and biodiversity issues). Moreover, institutions

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<sup>13</sup> L. Boisson de Chazournes, 'Partnerships, Emulation, and Coordination: Toward the Emergence of a Droit Commun in the Field of Development Finance', H. Cissé et al. (eds.), *The World Bank Legal Review*, vol. 3 (International Financial Institutions and Global Legal Governance) (Washington, DC, 2012), 173-87, at 179-82.

<sup>14</sup> See IDA Articles of Agreement, Article V, Section 1E, at <http://siteresourcesworldbank.org/IDA/Resources/ida-articlesofagreement.pdf>.

<sup>15</sup> See I. Shihata, *The World Bank Legal Papers* (The Hague: Martinus Nijhoff, 2000), p. 812.

<sup>16</sup> See L. Boisson de Chazournes, 'Les relations entre organisations regionales et organisations universelles', op. cit., p. 201.

<sup>17</sup> G. Droesse, 'Organizational Structures, Institutional Frameworks and Decisions-Making Procedures of Multilateral Concessional Financing', Id. (ed.), *Funds for Development* (Manila, 2011), 59-295.

<sup>18</sup> L. Boisson de Chazournes, 'The Global Environment Facility (GEF): A Unique and Crucial Institution', *Review of European Community and International Environmental Law*, vol. 14 (2005), 193-201.

such as the African Development Bank (AfDB), the Asian Development Bank (ADB), the European Bank for Reconstruction and Development (ERDB), and the Inter-American Development bank (IDB) can act as executing agencies, thus being directly involved with projects of the GEF.

In addition to the above-mentioned types of partnerships, IFIs have engaged in further forms of collaboration, such as the Heavily Indebted Poor Countries (HIPC) Initiative, set up by the International Monetary Fund (IMF) and the World Bank in 1996. This initiative was established to avoid situations in which poor countries may have to grapple with an unsustainable debt. In 2005, the objectives of the HIPC were reiterated through the creation of the Multilateral Debt Relief Initiative (MDRI), a G8-promoted programme taken in view of the UN Millennium Development Goals.<sup>19</sup> In practice, the management of this initiative can be seen as fostering partnerships between international organizations, in particular between universal and regional organizations such as the Inter-American Development Bank (IDB).<sup>20</sup>

### **3. Responsibility Issues under IFIs' Partnerships**

#### **a. Issues of responsibility**

Partnerships formed by IFIs may seem of dubious relevance for articulating the conceptual underpinnings of a general regime of responsibility. Admittedly, the diversity one faces discourages against venturing into more than case-specific considerations, whereas the lack of practice on responsibility for partnership-related activities risks confining a reflection on the matter to a purely theoretical discussion. Yet, the tendency to reproduce certain patterns of collaboration out of institutional emulation pleads for adopting a more than case-based approach towards collaboration through partnerships. In any event, the IFIs' difficulty in translating the articles on the responsibility of international organizations into their everyday operations demonstrates the need for a theoretical approach that may be capable of linking the articles to the overarching legal framework of partnerships.

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<sup>19</sup> See L.F. Guder, *The Administration of Debt Relief by the International Financial Institutions: A Legal Reconstruction of the HIPC Initiative* (Berlin, 2009).

<sup>20</sup> See L. Boisson de Chazournes, *Les relations entre organisations regionales et organisations universelles*, op. cit., p. 203.

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To this end, the model of derived responsibility comes to mind first, but that of independent responsibility also deserves attention. Such paradigms, in fact, complement and eventually overlap one another to grasp the many modes of partnership-based collaboration. The shared responsibility of partner international organizations could arise from a single wrongful act attributable to more than one organization, from the sum of the distinct, individual wrongful acts of two or more organizations, as well as from the contribution of one international organization to the wrongful conduct of another. We thereby consider what is ‘shared’ to characterize the responsibility of multiple organizations for a certain injury related to a partnership. Part of the analysis here will thus assess what room is available in the Commission’s articles for the latter conception of shared responsibility.

Before doing so, however, one must reflect on the instruments establishing financial partnerships. Could they provide the direct source of the obligations, which, if breached, trigger the responsibility of partner international organizations? The answer is clearly in the affirmative if the instruments are binding in international law. However, that is rarely the case: most partnerships are created by MOUs, although the mere choice of terms does not imply the parties’ lack of intent to be bound.<sup>21</sup> A somewhat unorthodox option would be to qualify such MOUs as ‘rules of the organisations’ under article 2(b) of the articles on the responsibility of international organizations. There is room to debate whether the broad formulation of article 2(b) can accommodate such a line of reasoning,<sup>22</sup> but the true problem is that, were such acts deemed to have an international legal character, it would overstretch the scope of the obligations defining the responsibility of international organizations.<sup>23</sup>

Nevertheless, the MOUs constitutive of partnerships can affect responsibility for reasons other than their binding nature. First, notwithstanding the soft law character of some MOUs, certain provisions may still give rise to obligations for an international

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<sup>21</sup> According to the International Law Commission, MOUs could qualify as ‘treaties in simplified form’: Report of the International Law Commission on the Work of its Eighteenth Session (A/6309/Rev.1), YILC (1966), vol. II, 172-363, at 188, para. (2).

<sup>22</sup> Article 2(b) on the responsibility of international organizations refers to any act ‘adopted in accordance with those instruments [the constituent instrument, decisions and resolutions of an international organization]’.

<sup>23</sup> C. Ahlborn, ‘The Rules of the Organizations and the Law of International Responsibility’, 8 IOLR (2011), 397-482, at 405-33.

organization. The distinction between the soft law character of the instrument and that of the negotium is in place,<sup>24</sup> provided the MOU does not explicitly exclude any implications in terms of responsibility.<sup>25</sup> Second, if conceived as part of the internal legal order of international organizations, MOUs can still entail factual effects in the international legal order. Quite importantly, they can set the stage to assess the behavior of an international organization, while the source of obligation allegedly breached resides elsewhere. More specifically, they allow grasping the mutual expectations related to the relational context of the partnership. That, in turn, provides guidance in determining issues of attribution of conduct and responsibility, or of the latter only.

b. Independent responsibility

In the broad panorama of partnerships, the category of independent responsibility may prove valuable to address one of the most common forms of collaboration among IFIs, namely project co-financing. Under a legally binding framework, the conditions for engaging responsibility would much resemble those the International Court of Justice had to grapple with in the East Timor case.<sup>26</sup> The allegedly wrongful conduct had occurred in conjunction with a joint exploitation regime of East Timor's resources. The Court's decision to proceed on the merits of the case implies it deemed the respondent potentially responsible for its conduct, notwithstanding the contribution of another actor to the wrongful act. This supports a conceptual division of collaborative conduct that imputes responsibility to each of the partner international organizations.<sup>27</sup> The case

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<sup>24</sup> G. Abi-Saab, 'Eloge du "droit assourdi": quelques réflexions sur le rôle de la soft law en droit international contemporain', *Nouveaux itinéraires en droit: hommage à François Rigaux* (Brussels, 1993), 59-68, at 66.

<sup>25</sup> For example, section 9.1 of the MOU between the European Bank for Reconstruction and Development, the African Development Bank and the African Development Fund. See also article XI of the MOU between the African Development Bank, the African Development Fund and UNIDO, at <[www.afdb.org](http://www.afdb.org)>.

<sup>26</sup> *East Timor (Portugal v. Australia)*, Judgment, ICJ Reports 1995, 90. (See also the dissenting opinion by Judge Weeramantry, at 172.)

<sup>27</sup> Concerning State responsibility, the Special Rapporteur Roberto Ago also stated that, if 'the actions constituting participation by a State in the commission of an internationally wrongful act by another State constituted a breach of an international obligation in themselves, they would on that account already engage the international responsibility of the State which performed those actions, irrespective of any consequences that might follow from the part taken in the internationally wrongful act of another State.' ('Seventh report on State responsibility' (A/CN.4/307), YILC (1978), vol. II, Part One, 31-60, at 52-3, note 99.) See also I. Brownlie, *System of the Law of Nations: State Responsibility*, Part 1 (Oxford, 1983), 190.

for doing so is even stronger when co-financing rests upon a looser basis: if the shared character of collaboration is weak, nothing prevents reliance on independent responsibility.

Reasoning along these lines also makes room for dual/multiple attribution. That does not seem at odds with the conceptual underpinnings of responsibility,<sup>28</sup> especially the assumption that control over a wrongful act can rest only upon one subject. It is uncontested that each partner organization fully controls its contribution to financing. The thorny point is rather whether one is willing to concede that the principles on attribution hold the same notwithstanding that the wrongful conduct arises from the joint, and therefore intertwined, action of its co-actors. In truth, the conceptual hurdles one may think of are related to the implementation, as opposed to the engagement, of co-authors' responsibility. If independent responsibility seems possible in the case of co-financing, the de facto shared responsibility ensuing from dual attribution satisfies the criteria of article 48 on the responsibility of international organizations, which grounds joint responsibility upon the occurrence of a single wrongful act.

Multiple wrongful acts can arise, instead, under a further scenario that one can imagine in terms of independent responsibility for looser schemes of collaborative action. For instance, certain partnership agreements identify the implementation of the Poverty Reduction Strategy Papers (PRSP) as an area of collaboration, notably through parallel disbursements.<sup>29</sup> If an outcome contrary to the respective obligations of partner organizations were to occur, the injured party should be able to bring a claim against partner organizations, notwithstanding that the PRSP provided an overall working framework rather than a true scheme of collaborative action. As pointed out at the outset, partner organizations could incur de facto shared responsibility with respect to a single outcome related to a partnership-activity, but the latter situation would not qualify as joint responsibility for the purposes of the Commission's articles.

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<sup>28</sup> As the Commission's commentary clarified, 'dual or even multiple attribution of conduct cannot be excluded' (ARIO Commentaries, 83). It has also been argued that nothing in the articles 'prevents such contemporaneous application of the rules (on attribution) to more than one subject in international law'. (F. Messineo, 'Multiple Attribution of Conduct', SHARES Research Paper No. 2012-11.)

<sup>29</sup> For example, point 2 of 'Priority areas of cooperation' in the MOU between the European Development Bank, the European Commission and the African Development Bank (2005), at <[www.afdb.org](http://www.afdb.org)>.

c. Derived responsibility

A further option to frame the relationship between two or more partner organizations under the articles on the responsibility of international organizations is to attribute responsibility to an organization in connection with the wrongful acts of others. The provisions in question – namely, articles 14, 15 and 16 – have not generated much debate, the assumption being widely shared that international organizations could incur responsibility without being attributed the acts of other States or organizations, much in the same manner as States.<sup>30</sup> Yet, despite an apparent consensus, derived responsibility is hardly straightforward. The circumstances under which it arises and its consequences have largely remained underdeveloped, in the shade of the dominant paradigm of independent responsibility.<sup>31</sup>

Several issues, which are controversial in the context of State responsibility, riddle in turn the Commission's articles on the responsibility of international organizations. The lack of a principle common to the categories of derived responsibility is one such issue. Factual control over the conduct of the wrongdoer seems crucial to direction and control (article 17) as well as coercion (article 18), but that hardly holds for aid and assistance (article 16). Whereas significance of contribution could replace control, one may reasonably object that knowing participation in the wrongful act of another should suffice to trigger responsibility.<sup>32</sup> Regardless of one's position on this point, the link between the conduct of the third party and wrongfulness remains vague, with the risk of placing the application of responsibility at odds with its premises.<sup>33</sup> That the conditions of derived responsibility rest on a shaky basis also affects the implementation of joint responsibility. As noticed by some commentators,<sup>34</sup> article 47 – which requires responsibility for the same internationally wrongful act – encompasses cases of aid or assistance only if considerably overstretched; the conduct of the aiding or assisting subject is, in fact, distinct from that of the wrongdoer.

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<sup>30</sup> G. Gaja, 'Third report on the responsibility of international organizations' (A/CN.4/553), 11.

<sup>31</sup> According to Ian Brownlie, the principles of allocation of responsibility among multiple actors are 'indistinct'. (Principles of Public International Law (7<sup>th</sup> edn., Oxford, 2008), 457.)

<sup>32</sup> A. Reinisch, 'Aid or Assistance and Direction and Control between States and International Organizations in the Commission of Internationally Wrongful Acts', 7 IOLR (2010), 63-77, at 71-2.

<sup>33</sup> Under article 18, the coercing subject could incur responsibility even in the absence of any wrongful act. (J. Fry, 'Coercion, Causation, and the Fictional Elements of Indirect State Responsibility', 40 Vanderbilt Journal of Transnational Law (2007), 611-41, at 629-38.)

<sup>34</sup> A. Nollkaemper and D. Jacobs, 'Shared Responsibility', 48-55.

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When moving to the 2011 articles, the above hurdles become even more serious due to the structural differences between States and international organizations. Let us start from the crucial issue of control. The reference to the articles on State responsibility, which enshrines a factual type of control, proves tricky when measured against the powers of international organizations. Tellingly enough, the UN Secretariat has expressed doubts that ‘a binding decision could constitute “direction and control” within the meaning of Draft Article 14’ and that a resolution could impose the commission of a wrongful act meeting the conditions for coercion.<sup>35</sup> Moreover, stressing factual control may turn derived responsibility for ‘direction and control’ into direct responsibility for the acts effectively controlled by an international organization.<sup>36</sup> As to aid and assistance, the risk exists of its overstretching in light of the manifold contribution organizations provide to one another, coupled with the difficulty of tailoring a test of importance of contribution when it comes to normative decisions. Finally, the lack of clarity as to the subjective elements of knowledge and fault further blurs the circumstances of derived responsibility.

It is not much of a surprise, then, that the chapter IV provisions of the 2011 articles have met with concern among IFIs, notably the World Bank and the IMF. Such concern has nonetheless considerably evolved over the eight-year study period before the Commission. At first, the IMF maintained that only ‘assistance that is earmarked for the wrongful conduct could qualify as aid and assistance’. Lending by the IMF could never prove essential nor contribute significantly to wrongful conduct because ‘a member always has an effective choice not to follow the conditions on which IMF assistance is based... and IMF financing is not targeted to particular conduct.’<sup>37</sup> Along the same lines, the IMF also pointed out that ‘a legally binding decision upon its

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<sup>35</sup> Responsibility of international organizations. Comments and observations received from international organizations’ (A/CN.4/637/Add.1), 20-1. On coercion, the UN Secretariat stated that ‘the probability of adoption of a binding resolution which would meet the conditions of draft article 15 – namely, a resolution not only binding a State to commit an international wrongful act, but through “coercion” having the effect of force majeure – is virtually non-existent’ (at 21).

<sup>36</sup> A. Reinisch, ‘Aid or Assistance’, 76.

<sup>37</sup> The IMF added that the ‘fungible character of financial resources also means that IMF financial assistance can never be essential, or contribute significantly, to particular wrongful conduct of a member State, for the purposes of this draft article 13.’ Responsibility of international organizations. Comments and observations received from international organizations (A/CN.4/582), 10-11.)

members is not the same as direction and control'.<sup>38</sup> In the latest comments submitted to the Commission, the World Bank took a somewhat milder stance. Concerning aid and assistance, the World Bank invited the Commission to recognize the negative presumption that 'organizations providing financial assistance do not, as a rule, assume the risk that assistance will be used to carry out an international wrong'.<sup>39</sup> On 'direction and control', it broached the operative relationship with a borrower to argue that, whether or not control is completely ceded, the World Bank 'engages at most in the exercise of oversight. Oversight is neither "control" nor "direction" though.'<sup>40</sup>

To be sure, scattered and organization-specific as they are, the comments by international organizations are to be put in perspective. The Special Rapporteur himself has done so by emphasizing the difference between general lending to a State or another international organization and project financing with some control over the activities of the borrowing subject, the latter case being more germane to the potential responsibility flowing from IFIs' lending policies.<sup>41</sup> Still, the IFIs' comments show what aspects are of greater relevance to their specific activities, particularly in light of the normative hurdles discussed above. The framework of partnerships seems ideal for addressing these aspects.

Let us consider the issue of aid and assistance. The IMF's stance recalled above has more to do with the case of general lending than project financing. Yet, the idea that a contribution needs to be 'essential or significant' to trigger responsibility for acts to which such contribution is made finds place in the Commission's commentaries.<sup>42</sup> Whereas significance of contribution is hardly amenable to a standard criterion of assessment, partnership agreements may nonetheless offer valuable clues as to their covered domain. A good example is preferential financing: the conditions offered in such contexts are most probably determinant in implementing a project or engaging in a given activity, which would suffice to presume the test of significance is satisfied. More generally, by establishing the features of collaboration among international

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<sup>38</sup> Ibid., 11.

<sup>39</sup> Responsibility of international organizations. Comments and observations received from international organizations (A/CN.4/637), 28.

<sup>40</sup> Ibid.

<sup>41</sup> G. Gaja, 'Third report on responsibility of international organizations' (A/CN.4/553), 11, note 35.

<sup>42</sup> ARIO Commentaries, 104.



organizations, partnership agreements help apprehend significance of contribution in terms of a relational rather than quantitative context.

Concerning the subjective circumstances of aid and assistance, the position of the World Bank is not only compatible with the 2011 articles,<sup>43</sup> but also insightful in the context of project financing through partnerships. A generic knowledge of the circumstances of financing may not seem enough to reverse the presumption against assumption of risk for a possibly wrongful act; some proof of intent is necessary to that end.<sup>44</sup> When assessed in the context of partnerships, some further considerations prove relevant. For instance, co-financing agreements often foresee mechanisms of consultation and monitoring.<sup>45</sup> If the parties abide by their duty to exchange information concerning the implementation of the co-financed project, each of them can keep abreast of the injurious developments potentially arising from the project. In such conditions, the partner organizations possess, at least in principle, enough knowledge to argue that maintaining the contractual relationship concerning the injurious project is tantamount to willingly providing aid and assistance to a wrongful act. However, that does not hold when the instrument establishing a partnership only foresees a generic exchange of information among the parties.

Besides aid and assistance, IFIs also tackled direction and control in their comments. The position of the IMF, claiming that its normative acts never entail direction and control, deprives the latter category of almost any utility and is therefore of little help in deciding whether derived responsibility arises under the articles on the responsibility of international organizations. The World Bank, instead, touched upon issues of control from a more operational perspective when it excluded that oversight, the only form of control allegedly exercised by the World Bank, could trigger derived

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<sup>43</sup> M. Ragazzi, 'The ILC Draft Articles and International Financial Institutions: Select Considerations', 105 ASIL Proceedings (2011), 353-6.

<sup>44</sup> The European Commission noted that as 'the threshold for the application of the rule seems low (knowledge) one should add in the commentary some limitative language (intent)'. (Responsibility of international organizations. Comments and observations received from international organizations (A/CN.4/637), 27.)

<sup>45</sup> For example, article IV of the Co-financing Agreement between the Nordic Development Fund, the African Development Bank and the African Development Fund provides that the parties 'shall promptly inform each other of any condition or development which, in its opinion, is likely to interfere with the implementation or the successful completion of a project or programme being co-financed hereunder and shall consult with each other regarding the appropriate remedial action to be taken by the parties.' See also Sections 2.06 and 2.08 of the World Bank Standard Conditions for Grants.

responsibility. To be sure, the World Bank's position finds support when one combines the commentaries on the 2001 articles with those of the 2011 articles:<sup>46</sup> oversight is in principle not to be identified with either direction or control. Yet, one must also put that in context. Oversight is a term of art, which does not necessarily cover the different types of control IFIs may exercise when involved in a partnership. The example of development funds with separate legal personality and administered by an IFI is telling. The decisions of the trustee imply a degree of control over an activity formally implemented through the fund and its executing agencies. Incidentally, such a scenario finds support also in the articles on the responsibility of international organizations, hinting at the possibility of a joint exercise of direction and control.<sup>47</sup>

#### **4. Conclusion**

The means through which international organizations jointly carry out their activities are rarely the subject of reflection. The reason is, in part, that an analysis of such complex collaborative settings proves hard as long as some crucial features of the general regime of responsibility remain controversial. In this connection, one may think in particular of the scope of the obligations binding on international organizations and the place of the internal rules of the organizations in relation with them. Other major issues – such as the possibility of multiple attribution, the circumstances of derived responsibility as well as the defining criteria of joint responsibility – either have been broached at too high a level of abstraction or are still underdeveloped. Hence, a shift in the focus of attention seems necessary. To make the 2011 articles operational in this respect, one needs to identify the recurrent features of collaboration among international organizations and thus to devise gateway concepts between the articles and IFIs' activities. We have attempted to do so by referring to a number of partnership agreements in conjunction with the main scenarios of both independent and derived responsibility. Such an approach also brings to light the close link between the mechanisms foreseen to ensure accountability under a partnership agreement and

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<sup>46</sup> ARIO Commentaries, 106.

<sup>47</sup> Ibid., 105-6.

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issues of responsibility under general international law.<sup>48</sup> In the case of aid and assistance, the implications stemming from the monitoring procedures foreseen under financing agreements are particularly telling. Incidentally, although we did not explore this aspect, provisions of a contractual character may also help to clarify joint responsibility. To be sure, more practice is yet to be analyzed and further systematized.

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<sup>48</sup> P. Klein, 'Médiateurs et Mécanismes Informels de Contrôle des Organisations Internationales : Entre Accountability et Responsibility', J. Crawford and S. Nouwen (eds.), *Select Proceedings of the European Society of International Law* (Cambridge, 2012), 217-29.

## **Annex I**

### **Draft articles on the responsibility of international organizations 2011**

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Adopted by the International Law Commission at its sixty-third session, in 2011, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/66/10, para. 87). The report appears in Yearbook of the International Law Commission, 2011, vol. II, Part Two.

#### **Responsibility of international organizations**

##### **Part One**

##### **Introduction**

##### **Article 1**

##### **Scope of the present draft articles**

1. The present draft articles apply to the international responsibility of an international organization for an internationally wrongful act.
2. The present draft articles also apply to the international responsibility of a State for an internationally wrongful act in connection with the conduct of an international organization.

##### **Article 2**

##### **Use of terms**

For the purposes of the present draft articles,

(a) “international organization” means an organization established by a treaty or other instrument governed by international law and possessing its own international legal personality. International organizations may include as members, in addition to States, other entities;

(b) “rules of the organization” means, in particular, the constituent instruments, decisions, resolutions and other acts of the international organization adopted in accordance with those instruments, and established practice of the organization;

(c) “organ of an international organization” means any person or entity which has that status in accordance with the rules of the organization;

(d) “agent of an international organization” means an official or other person or entity, other than an organ, who is charged by the organization with carrying out, or helping to carry out, one of its functions, and thus through whom the organization acts.

**Part Two**

**The internationally wrongful act of an international organization**

[...]

**Chapter IV**

**Responsibility of an international organization in connection with the act of a State or another international organization**

**Article 14**

**Aid or assistance in the commission of an internationally wrongful act**

An international organization which aids or assists a State or another international organization in the commission of an internationally wrongful act by the State or the latter organization is internationally responsible for doing so if:

- (a) the former organization does so with knowledge of the circumstances of the internationally wrongful act; and
- (b) the act would be internationally wrongful if committed by that organization.

**Article 15**

**Direction and control exercised over the commission of an internationally wrongful act**

An international organization which directs and controls a State or another international organization in the commission of an internationally wrongful act by the State or the latter organization is internationally responsible for that act if:

- (a) the former organization does so with knowledge of the circumstances of the internationally wrongful act; and
- (b) the act would be internationally wrongful if committed by that organization.

**Article 16**

**Coercion of a State or another international organization**

An international organization which coerces a State or another international organization to commit an act is internationally responsible for that act if:

- (a) the act would, but for the coercion, be an internationally wrongful act of the coerced State or international organization; and
- (b) the coercing international organization does so with knowledge of the circumstances of the act.

## **Article 17**

### **Circumvention of international obligations through decisions and authorizations addressed to members**

1. An international organization incurs international responsibility if it circumvents one of its international obligations by adopting a decision binding member States or international organizations to commit an act that would be internationally wrongful if committed by the former organization.
2. An international organization incurs international responsibility if it circumvents one of its international obligations by authorizing member States or international organizations to commit an act that would be internationally wrongful if committed by the former organization and the act in question is committed because of that authorization.
3. Paragraphs 1 and 2 apply whether or not the act in question is internationally wrongful for the member States or international organizations to which the decision or authorization is addressed.

## **Article 18**

### **Responsibility of an international organization member of another international organization**

Without prejudice to draft articles 14 to 17, the international responsibility of an international organization that is a member of another international organization also arises in relation to an act of the latter under the conditions set out in draft articles 61 and 62 for States that are members of an international organization.

## **Article 19**

### **Effect of this Chapter**

This Chapter is without prejudice to the international responsibility of the State or international organization which commits the act in question, or of any other State or international organization.

[...]

## **Part Four**

### **The implementation of the international responsibility of an international organization**

#### **Chapter I**

##### **Invocation of the responsibility of an international organization**

[...]

**Article 47**

**Plurality of injured States or international organizations**

Where several States or international organizations are injured by the same internationally wrongful act of an international organization, each injured State or international organization may separately invoke the responsibility of the international organization for the internationally wrongful act.

**Article 48**

**Responsibility of an international organization and one or more States or international organizations**

1. Where an international organization and one or more States or other international organizations are responsible for the same internationally wrongful act, the responsibility of each State or organization may be invoked in relation to that act.

2. Subsidiary responsibility may be invoked insofar as the invocation of the primary responsibility has not led to reparation.

3. Paragraphs 1 and 2:

(a) do not permit any injured State or international organization to recover, by way of compensation, more than the damage it has suffered;

(b) are without prejudice to any right of recourse that the State or international organization providing reparation may have against the other responsible States or international organizations.

[...]

