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A Trouble Shared is a Trouble Halved

How the Structure of Cooperation Matters for the Engagement of Responsibility in the World Bank Partnership Programmes

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Abstract

The World Bank has a large partnership portfolio, including international organizations and private actors. Due to their diversity and to the ambitious programs they pursue, partners are highly exposed to financial and operational risk. Curbing this risk takes different shapes in the legal design of partnerships. In particular, partnerships differ in terms of the degree of legal continuity along the stages of decision-making, management of funds and program implementation. This configuration raises several problems for the attribution of international legal responsibility for partnership-related activities. In some cases, the problem is one of attribution of conduct at the level of the partnership's governing body as well as at that of implementation. More broadly, the policy of risk management leads to a dilution of control within the partnership chain. This means that one can construe only certain partnership programmes, or certain segments of a partnership, as amassing enough control for responsibility to arise.

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Keywords

World Bank – partnership programs – risk management – financial intermediary funds – trust funds – Trustee – implementing agencies – common organ – attribution of conduct – attribution of international responsibility – normative control – oversight

1 Introduction

The work of the International Law Commission ('ILC') on the responsibility of international organizations was met with a cold welcome from International Financial Institutions ('IFIs').¹ Between the indifference of most, and the vocal criticism of a few,² the World Bank ('Bank') has occupied somewhat of a middle ground. In its comments on the first reading of Draft Articles 13 (aid or assistance) and 14 (direction and control), the Bank settled for urging two relatively modest points. First, it stated that IFIs do not, as a rule, assume the risk that the assistance they provide will be used to carry out an international wrong; and, second, it contended that the exercise of oversight over the implementation of projects does not satisfy the threshold (and nature) of control under Draft Article 14.³

These points received some endorsement in the ILC's final Articles on the Responsibility of International Organizations ('ARIO').⁴ Such a convergence, however, conceals what is in fact a fundamental divergence in the Bank's and the ILC's respective approaches. Given its high exposure to financial, operational and reputational risk, the Bank places a high premium on anticipating, mitigating, and excluding *ex-ante* the potential adverse consequences of its activities. This concern informs both the negative presumption concerning aid and assistance and the qualification of oversight as different from control.

1 For a broader, comparative analysis, M. Ragazzi, 'The ILC Draft Articles and International Financial Institutions: Select Considerations' (2011) 105 *Proceedings of the Annual Meeting (American Society of International Law)* pp. 353–356.

2 For instance, the International Monetary Fund has denied that, due to its fungible nature, financial assistance could ever qualify as aid and assistance. See ILC, 'Responsibility of International Organizations: Comments and Observations received from International Organizations', UN Doc. A/CN.4/637 (2011) paras. 10–11.

3 *Ibid.*, paras. 27–28.

4 In its commentary on final Art. 14 ARIO (aid or assistance), the ILC does not follow-up on the Bank's reference to risk. On the contrary, the ILC explicitly excluded oversight from the scope of final Art. 15 ARIO (direction and control): ILC, *Report on the Work of its Sixty-Third Session*, 'Articles on the Responsibility of International Organizations, with commentaries' UN Doc. A/66/10 (2011) ('ARIO commentary') pp. 36–38.

The ARIO rest on a very different basis. Their approach is reactive, rather than proactive, towards the occurrence of an outcome that the law seeks to prevent. Differently put, the notion of risk is marginal for the engagement of international responsibility, whereas risk management shapes the design of the Bank's activities.

This difference points to a more general divergence. The ARIO give expression to the need for greater control over, and accountability of, international organizations. This need has gained urgency only recently, in the wake of what has aptly been described as a shift in the focus of international institutional law from managerialism towards more responsible politics.⁵ The ARIO can thus be seen as an attempt to confront the power and authority issues involved in the activities of international organizations. The downplaying of such issues is instead at the core of the Bank's focus on the management of daily business. The question is therefore how the persistence of an attitude of managerialism, as reflected in the schemes and structures of the Bank, stands to the shift towards control, as embodied in the mechanisms of responsibility.

The vast world of partnerships offers an ideal setting for investigating this question. Embarking on a stable collaborative enterprise is far from risk free to the would-be partners. It is thus no surprise if, notwithstanding their variety, all partnerships incorporate the principle that risk management should be pursued from as early as the design phase. This has an important impact on how one is to assess issues of responsibility. In particular, it is relevant to whether one can see the harmful outcomes resulting from the collaboration between the Bank and its partners as a unity. There is indeed a close link between the concrete expression that the principle of risk management will take and the degree of factual and legal continuity across the different stages of a partnership programme ('PP').

Before going any further, a few clarifications are necessary. An extensive policy reflection on the part of the Bank has consolidated a core of standard understandings and phraseology. In particular, the term 'partnership programme' has come to designate partnerships with the following characteristics:

- (a) a partnership body that facilitates agreement among the partners;
- (b) a multi-donor scope; and
- (c) dedicated funding for the implementation of a programme of activities over time.⁶

5 J. Klabbers, 'The EJIL Foreword: The Transformation of International Organizations Law' (2015) 26 *European Journal of International Law* p. 10.

6 World Bank, *Management Framework for World Bank Partnership Programmes and Financial Intermediary Funds: Strategic Engagement, Oversight, and Management* (World Bank,

In aligning ourselves with this standard use, we will exclude from our analysis a considerable portion of the relationships grouped under the umbrella of ‘partnerships.’⁷ The rationale is simple: the intensity and shape of cooperation change completely, depending on the existence of a collective body of decision-making and of an administrative branch. When there is none, partners act largely autonomously, rather than along a chain of identifiable, stable and distinct stages. In such circumstances, the most realistic possible scenario would be a harmful outcome resulting from a co-financed project. However, should this happen, each partner would incur responsibility for its independent conduct.⁸ The added value of the partnership label would therefore be relatively limited. On the contrary, PPs present a number of features that make collaboration more complex, and thus difficult to handle for the purposes of responsibility.

The article develops as follows. The next section illustrates how the logic of risk management shapes PPs in their relational dimension and legal design. We will see that separate, and often parallel, threads of accountability correspond to the bundles of relationships among partners. This will pave the way for some considerations on issues of responsibility. Notwithstanding the existence of specific apportionment arrangements, general rules of responsibility are not altogether displaced. These have, however, few chances to cover those PPs in which risk allocation is, if not necessarily thorough, still pervasive. In such cases, partners exercise virtually no factual control over one another. It is thus easy to realize the limited utility of the ARIO, whose approach to attribution hinges on a factual notion of control. The main difficulty, however,

Washington, DC, 2013) p. 4. This definition owes to the Impact Evaluation Group of the World Bank.

7 For instance, the World Bank and Regional Development Banks have concluded partnerships to loosely coordinate their activities, particularly of project co-financing. An example is Art. XII para. 22 of the Memorandum of Understanding on Administrative Arrangements between the Asian Development Bank and the International Bank for Reconstruction and the International Development Association, according to which: “[N]o provision herein shall be construed so as to in any way interfere with ADB’s and the World Bank’s independent decision-making autonomy with regard to their own respective affairs and operations”. A copy of the Memorandum of Understanding is available from the Asian Development Bank’s web site at: <<http://www.adb.org/sites/default/files/institutional-document/33443/files/mou-wb.pdf>>.

8 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* (Martinus Nijhoff Publishers, Leiden, 2013) p. 218.

lies elsewhere. The arrangements translating risk management dilute legal and factual continuity across the different stages of PPs. This makes it difficult to trace a continuous thread of factual control across PPs, and to pin down a notion of control that would be an adequate trigger for responsibility. To say it with the wisdom of common sense, sharing the trouble of risk is thus, in a way, a means for partners to halve the trouble of responsibility.

2 The Anatomy of the World Bank's Partnership Programmes

Each PP is unique, based on its own establishing texts and influenced by its own specific configuration. Most in-house policy papers, however, are organized around one basic distinction, namely, PPs financed through trust funds ('TFs') and PPs financed through financial intermediary funds ('FIFs').⁹ While this classification puts a far from neutral emphasis on the financial component of PPs, it nonetheless has some merit for our present purposes. The distinction between TF-supported and FIF-supported PPs reflects a difference in the approach to risk management and, in turn, a difference in the legal design of PPs. Before discussing these issues (Section 2.1), and accountability threads in particular (Section 2.2), some more general background is in order.

Both TFs and FIFs are financing mechanisms supporting PPs. There is no clear-cut correspondence between the nature of the financed programmes and the choice of a specific financing mechanism. TFs are mechanisms to accept contributions from donors for activities implemented or supervised by the Bank: respectively, bank-executed trust funds ('BETFs') and recipient-executed trust funds ('RETFs'). FIFs are multilateral financial tools that typically pool together a larger amount of resources than TFs, in view of supporting global development initiatives. Over the past few years, FIFs have been used for an unprecedented range of purposes, from addressing market failures (e.g., for vaccine procurement), to supporting climate-change mitigation efforts, and pooling resources for country-specific situations.¹⁰ FIFs have witnessed a diversification not only in their purposes, but also in the types of financial services provided by the Bank, as compared to its classical trustee

9 There is a third financing mechanism used to finance PPs, namely, Development Grants and other external grants made from the Bank's resources. This model will not be taken into account in the rest of the article insofar as most functions of the PP—and notably management and implementation—do not see the involvement of the Bank.

10 World Bank, *Financial Intermediary Funds: An Information Note* (World Bank, Washington, DC, 2011) pp. 9–10.

functions in TFS.¹¹ Still, as we will see later, the Bank has maintained a policy of low involvement in the implementation of FIF-supported activities, as opposed to what it does in the case of TF-supported ones.

These financing mechanisms are only one element of a broader picture. Collaboration indeed unfolds as a process with three principal levels: decision making as to the allocation of funds; programme management; and administration of the fund; and the implementation of development activities. The Bank is often involved in more than one level; and at each level, it usually sits along with other actors. Whether and in what sense there is legal continuity through a PP calls, however, for a more accurate analysis.

2.1 *The Conceptual Underpinnings of Partnership Programmes: Risk Management and Its Forms*

PPs involve high financial, operational and reputational stakes. Partners are certainly not all in the same position in terms of their degree and type of exposure to risk. For instance, while operational risk is felt the most at the programme implementation stage, financial risk comes to the fore at the stage of funds gathering and administration. At the same time, the different types of risk are closely intertwined, especially considering that a partner may occupy multiple roles across a given PP.

This tension notwithstanding, the Bank has anchored its policies and procedures in fiduciary controls, thus making financial risk its primary target for mitigation. The implications of this approach are more profound than they may first appear. In addition to being the provider of crucial services, the Bank is sought as a partner because of its broad expertise. This kind of soft power ensures the Bank an unmatched influence, not only regarding the design of the PPs in which it partakes, but also on the evolution of the very concept of a partnership. Such influence concerns first and foremost the design of the financial mechanism supporting PPs, namely TFS and FIFs. Yet, due to the centrality of the financial components of PPs, the Bank's choices in this domain affect the overall architecture of PPs.

2.1.1 Financial Risk Management: TFS and FIFs

Against the backdrop of the above considerations, it is now time to expound on the differences between TFS and FIFs. Most in-house policy papers

¹¹ A good example of the diversification of the Bank's role in FIFs is provided by the International Financial Facility for Immunisation ('IFFI') and Advance Market Commitment ('AMC'). In the former, the Bank plays the role of intermediary of the hedges of the facility. In the second, the Bank manages a complex scheme of donor credit risk to finance vaccine procurement.

contrast the limited role of the Bank under FIFs with its broader responsibilities under TFS. In the former, the Bank's distinctive role is the provision of financial intermediary services as Trustee of the fund. This does not entail any involvement in the supervision of FIF-related activities, although the Bank may still have such supervision functions if it also acts as an implementing agency for the fund. On the contrary, in the case of TFS, the Bank's contribution spans the entire chain from decision making through to management and implementation. This holds true also when implementation is outsourced: executing agencies are indeed bound to abide by the Bank's operating policies and standards.

Financial risk is thus at the backbone of both TFS (bank and recipient executed ones) and FIFs. The key difference between these two schemes rests in how, for the purposes of mitigation, financial risk is articulated with respect to the other dimensions of exposure. In the context of TFS, involvement in financial and operational issues stands in a continuum. FIFs, on the contrary, reflect the objective of isolating financial risk from other sources of exposure. The allocation of financial risk itself can be so pervasive that it does not necessarily rest on the Trustee exclusively. In certain FIFs, indeed, as soon as funds have been disbursed, financial risk shifts to the implementing agencies in charge of the liaison with the final recipients.¹² Broadly speaking, from the Bank's perspective, the obvious rationale behind FIFs is to narrow the scope

¹² For instance, at its point 5, the Global Partnership for Education Governance Document provides that:

(d) The Trustee shall enter into Financial Procedures Agreements/Arrangements or Financial Procedures Memorandum, as appropriate, with Supervising Entities and Managing Entities.

...

(f) *Upon the transfer of such funds to the relevant Supervising Entity or Managing Entity, the Trustee shall have no responsibility, fiduciary or otherwise, for the use of these funds including to the Supervising Entity, the Managing Entity, the Contributors or the Board.* [emphasis added]

The Governance Document of the Global Partnership for Education can be found on the Partnership's web site at: <<http://www.globalpartnership.org/content/gpe-fund-governance>>. In a similar, if more nuanced vein, see point 40 of the Governance Framework for the Clean Technology Fund:

[U]pon the transfer of funds to the MDBs, the Trustee will have no responsibility for the use of the CTF resources transferred and activities carried out therewith. *The Trustee will require, and accept from the MDBs, certain periodic financial reports, as agreed between the Trustee and the CTF Trust Fund Committee. Each MDB will be responsible for the use of funds transferred by the Trustee and activities carried out therewith in accordance with i) its own policies, guidelines, and procedures and ii) the applicable decisions*

and nature of risk in a multilateral context aimed at broad development objectives. Thus, the singling out of the role of the Trustee specifically testifies to the conceptual priority of financial risk. Without anticipating too much of our later discussion, one side note may be worth emphasizing.

2.1.2 Beyond Financing Mechanisms: The Other Side of PPs

If we consider the broader PP dimension, however, we get a more mixed comparison. To begin, the slicing up of risk does not always work well for the Bank as a mitigation policy in the context of PPs. Here is one concrete example: a few years ago, the Global Fund, a FIF-supported PP, made headlines for the reported misuse of its grants.¹³ Criticism has been directed primarily at the final recipients of the funds. Yet the Bank has not gone unharmed, notwithstanding that it acts exclusively as Trustee of the Global Fund, and its financial exposure is relatively limited in exercising this role.¹⁴ As this unhappy episode shows, adverse events at the project implementation level easily spill over to other stages of a PP in the form of reputational damage for the partners involved. The Bank's attempt to limit its exposure through the isolation and containment of financial risk suffers from an underestimation of how fluid risk can prove to be in PPs.

This prompts a more general point. Fiduciary controls have little relevance as a way of guiding and accounting for the trust funds' uses and results. Tellingly, TFS and FIFs serve as a financing tool for project-specific activities and non-project-specific technical assistance alike.¹⁵ Certain aspects of exposure, and particularly those related to decision making and project implementation,

of the CTF Trust Fund Committee, including the purpose for which the allocations of the funds have been approved. [emphasis added]

Similar provisions, if not necessarily mentioning fiduciary responsibility, are characteristics of FIFs operating on the basis of transfer agreements with implementing and supervising agencies. For an illustrative list of such FIFs, see note 24 below. The Governance Framework for the Clean Technology Fund can be found on the Fund's web site at: <https://www-cif.climateinvestmentfunds.org/sites/default/files/CTF_Governance_Framework_jan_o.pdf>.

13 See e.g. C. W. Dugger, 'Aid Group Says Zimbabwe Misused \$7.3 Million', *New York Times*, 2 November 2008.

14 In the context of the Global Fund the Bank limits itself to the classical Trustee function of transferring the allocated funds to their final recipients. Financial exposure is much higher in some more recent initiatives, such as the IFFI and the AMC discussed above in note 11.

15 World Bank, *Trust Fund Support for Development: An Evaluation of the World Bank's Trust Fund Portfolio* (World Bank, Washington, DC, 2011) p. 24.

seem therefore to have played second fiddle to financial risk in reflections on the partnership concept. This leads to a rather paradoxical conclusion. In principle, FIFs reflect a clearer definition of the role of financial mechanisms within the broader PP enterprise. In fact, the relative dearth of attention to operational risk translates into higher and less managed overall reputational exposure. TFS, as noted, still hinge conceptually on financial risk. However, the role of the Bank within the PP is not conceived against the backdrop of a clear-cut distinctiveness of financial risk. Exposure is seen as being very high and diverse in nature across the PP. As a result, the adoption of fiduciary control entails—and we refer here to RETFS in particular—some involvement in the operational side of the PP.

The foregoing is a simplified account of the approach to risk management in the context of PPs. It nonetheless provides an understanding of some of the ideas at work. This is in turn crucial to understanding the architecture and the logic of accountability of PPs.

2.2 *Accountability Lines and Ex-Ante Arrangements: Differences and Similarities in the Legal Design of Partnership Programmes*

2.2.1 The Legal Instruments Underpinning Partnerships

The managerial conception sketched out above pervades the legal design of PPs. Before saying more about this, however, a few words are necessary on the legal instruments underpinning PPs. One finds the widest possible gamut of options. Several PPs are based on classic legal agreements, as in the case of the treaties establishing the Consortium of the Consultative Group on International Agriculture ('CGIAR').¹⁶ Still, the majority of PPs are based on instruments of a hybrid legal nature. This includes some well-known instruments, such as the decisions of the Conferences of the Parties ('COPS') to the United Nations Framework Convention on Climate Change ('UNFCCC'),¹⁷ but also the less familiar plethora of documents framing cooperation among partners. In addition to their main founding document, PPs comprise a whole host of other legal instruments. Generally, the trust fund is established through a unilateral

16 On the latter initiative, and its transformation into a fully-fledged international organization, see C. Beaucillon, 'Le Consortium des centres internationaux de recherche agricole: du partenariat public/privé à l'organisation internationale' (2013) 58 *Annuaire français de droit international* pp. 319–330.

17 The Governing Instrument for the Green Climate Fund was approved by the Conference of the Parties to the 1992 *United Nations Framework Convention on Climate Change* (which was opened for signature 9 May 1992, 1771 UNTS 107, entered into force 21 March 1994 ('UNFCCC')) on 11 December 2011 in Durban, South Africa, and is annexed to decision 3/CP.17 presented in UN Doc. FCCC/CP/2011/9/Add.1 (2012).

act of the Bank,¹⁸ which finds a complement in the separate agreements between the Bank as Trustee and the contributors to the fund. Certain FIFs also include implementation agreements between the governing body of the PPs, whose legal nature is in certain cases fairly dubious, and implementing agencies.¹⁹ In sum, the legal architecture of PPs looks more like a patchwork than a cohesive unity. The Trustee-related provisions generally find expression in formal or quasi-formal documents.²⁰ Other elements of PPs, including the provisions on the common PP body, are instead often contained in informal or domestic law instruments.²¹

Several questions arise: the first, which is hardly distinctive of our context, concerns the implications of the hybrid nature of the instruments underpinning PPs. Can these instruments serve, in principle, as the *ex-ante* allocation of responsibility among partners? Second, can they contain obligations for the breach of which the Bank and its partners may incur responsibility? It would be difficult and inaccurate to provide an absolute answer, either in the affirmative or in the negative. Some of these documents are concluded between the Bank and other international organizations or States, while others also include private parties. In the first case, a lack of formality is relatively unimportant. The legal nature of these instruments emerges from the terms used, often comprising modification and termination clauses. Insofar as they are concluded among international actors, these instruments should not be considered as being exclusively of an internal nature.²²

18 The usual practice of establishment is through a resolution of the board of governors. One exception is the Technical Assistance Trust Fund for Gaza, which was established on the basis of a decision by the Executive Directors. See I. Shihata, H. Abushakra, and H.-J. Gruss, 'Legal Aspects of the World Bank's Assistance to the West Bank and Gaza Strip', in I. Shihata, F. Tschofen, A. R. Parra (eds.), *The World Bank in a Changing World. Selected Essays* (Martinus Nijhoff Publishers, Dordrecht, 1991) p. 384.

19 See e.g. the Agreement between the Adaptation Fund ('AF')'s board and implementing entities, available at <www.adaptationfund.org/sites/default/files/Revised%20AGREEMENT%20as%20of%20Oct%202014.pdf>. This case is not too problematic, as the Adaptation Fund is based on a decision of the COP of the UNFCCC, *supra* note 17.

20 But they may also formally derive from a decision of the governing body of the PP, as in the case of the Trust Fund for the Global Partnership for Education.

21 IFFI, for instance, was established in 2006 as a United Kingdom Charity and registered with the Charity Commission for England and Wales.

22 On the internal law argument, C. Ahlborn, 'The Rules of International Organizations and the Law of International Responsibility' (2011) 8 *International Organizations Law Review*, pp. 397–482, p. 438.

Different considerations apply in the second case. Certainly, private parties can be involved in legal documents. It is not obvious, however, that the documents encountered in the context of PPs should have a bearing on a responsibility regime. These documents often lack provisions such as those on modifications and termination, which might suggest their legal nature. Not least, collaboration among partners is framed as an eminently political endeavour. Even without attributing decisive significance to these indicators, documents involving private parties in the context of PPs could hardly provide the direct legal basis for *ex-ante* allocation provisions, or for obligations relevant to a responsibility regime. Provisions of an hortatory character are virtually non-existent in these documents. Moreover, it does not seem convincing to consider provisions that may involve actors unable to incur international legal responsibility as *lex specialis* for a regime of international responsibility.

A further hurdle is more specific to our context. As we already stressed, a single PP can comprise instruments with different degrees of formality. This will shape the scope of any potential *ex-ante* allocation of responsibility. Let us take the Global Partnership for Education as an example. Its founding document includes public and private actors and it regulates, *inter alia*, the functioning of the PP governing body. This latter entity has adopted the key governance document of the trust fund supporting the partnership. The Bank as Trustee has concluded several agreements with States concerning their contribution to the fund. If these contribution agreements are not controversial, the former cluster of documents seems to be either political in nature or merely internal, if one concedes the legal personality of the PP governing body.²³ As a result, supposing the existence of pre-allocation provisions, these might well fail to cover the entire spectrum of the PP.

There is one last point worth mentioning. Supposing that *ex-ante* arrangements do exist in the framework of a PP, would these arrangements be of any relevance for third parties? At a straightforward level, the answer should be in the negative. These arrangements are, in principle, devoid of legal effects for third parties. Let us think, for instance, of a Trustee agreement shielding the Bank from all responsibility for the use of funds. This would not offer protection against the action of a subject suffering harm from PP-related activities at the project implementation level. Yet the issue does not necessarily end here. While lacking objective legal effect, *ex-ante* arrangements are still of crucial importance because of their factual implications. To understand in what sense

23 In this respect, specific considerations apply depending on the composition of the PP governing body. For a more in-depth discussion, see below section 3.1.

the actual shape of PPs matters for the engagement of responsibility, we first need to unpack the relationships within PPs.

2.2.2 The Relationships and Lines of Accountability within Partnerships
The attempt to curb risk finds concrete expression in the structure of the relationships within PPs. Let us start from TF-supported PPs. Here, the decision-making stage is shared among the partners. The Bank answers to the governing body for its conduct as Trustee of the fund, manager of the PP, and implementer of the PP-funded activities. RETFs differ in that they comprise a further relational chain. The Bank supervises project implementation, thus playing an intermediate role in the relationship between the PP body and implementing agencies.

More complex is the architecture of FIF-supported PPs, which contemplates two basic models. In most FIFs, the Bank concludes transfer agreements with implementing or supervising agencies, and transfers funds to these agencies upon instruction from the governing body.²⁴ These agencies enter into a grant agreement to disburse funds to the final recipients, and are responsible for monitoring the use of funds. In other FIFs, the Bank as Trustee makes a direct transfer of the funds to the final recipients.²⁵ The oversight and overall control over the use of funds rests in the PP governing body. In both models, the governing body decides upon the allocation of funds, and the Bank as Trustee answers to this governing body regarding its financial management of the fund. This brief overview sets the stage for a closer examination of the provisions translating financial and operational accountability in PPs.

2.2.3 The Role of the Trustee

In line with our previous discussion, the relational aspects involving financial exposure are prominent in the legal design of PPs. The role of the Trustee in particular stands out as having extensive consideration, yet different legal expressions. In TFs, and notably in RETFs, there are no specific provisions aimed at keeping the Bank's role as Trustee separate from its supervisory role over the implementation of funded activities. The Bank usually imposes its own policies and procedures on implementing agencies. These are quite exacting, and not necessarily to the benefit of aid effectiveness in crisis and post-crisis situations.

A telling exception is the relationship between the Bank and United Nations ('UN') agencies under the 2008 Fiduciary Principles Accord ('FPA'), which are

²⁴ E.g. AMC, CGIAR, Clean Technology Fund, Partnership for Global Education.

²⁵ E.g. Global Fund or the Green Climate Fund.

part of the World Bank–UN partnership in crisis and post-crisis situations.²⁶ Rather than seeking convergence of the details and specifics of particular UN and Bank policies, the FPA identifies a number of shared fiduciary principles that form the basis of each organization's internal requirements. In that spirit, the FTA recognizes that implementing agencies apply their own procedures and standards. The basic role of the Bank as Trustee is limited to receiving periodic reports on project implementation. In the event of suspected misuse of the funds, the Bank can nonetheless go a step further: if it believes that no appropriate action has been taken over the alleged misuse, the Bank can initiate consultations with the concerned UN agency and may, upon consultation with the fund governing body, eventually suspend the disbursement of funds. The crucial provision concerning the respective accountability of the Bank and the UN reads as follows:

Following consultation between the Receiving Organization, the Disbursing Organization, and the Trust Fund Steering Committee, the Receiving Organization will, to the extent the information [on alleged misuse] relates to action within the authority or accountability of the Receiving Organization [a UN Agency], take timely and appropriate action in accordance with its accountability and oversight framework.²⁷

Except for the FTA example, the role of the Trustee receives more extensive treatment in FIFs than it does in TFS. If there is any common feature of FIFs, it is the legal regulation of the role of the Trustee and, more broadly, of the trust-related aspects of the PP. Generally, both the contributors to the fund and the Bank as Trustee bear no responsibility for the use of the disbursed funds.²⁸

26 World Bank, *World Bank and United Nations Fiduciary Principles Accord for Crisis and Emergency Situations* (World Bank, Washington, DC, 2008).

27 See Art. 7.1 (c) of the Fiduciary Principles Accord. The article also specifies that “for greater clarity on this matter, the Parties agree and acknowledge that the Receiving Organization has no authority, and accordingly shall have no responsibility, to investigate any Government official or officials or consultants of the Disbursing Organization”.

28 E.g. Art. 2.9 of the CGIAR Fund:

The Fund Donors acknowledge and agree that neither the Trustee nor the Fund Office, nor any part of the World Bank, has responsibility under the Contribution Agreements and Arrangements or otherwise for (i) confirming that funds from the CGIAR Fund were used for intended purposes; (ii) implementing, monitoring, supervising, evaluating, or providing quality assurance for activities funded by the CGIAR Fund.

Similar provisions are found in: point 38 of the Governance Framework for the Clean Technology Fund; point 7.2 of the Framework Document for a Global Agriculture

Provisions to this effect are routine in both contribution agreements and the legal agreements concluded with implementing agencies. The result is the creation of a legal buffer, separating the fund management stage from that of implementation of the funded activities. In certain cases, the Bank as Trustee is empowered to withhold disbursements upon instructions from the governing body or a contributor to the fund.²⁹ The main management strategy against financial risk remains anchored in the establishment of *ex-ante* arrangements on the allocation of responsibility among partners. A somewhat different approach is pursued in managing operational risk, to which we shall now turn.

2.2.4 The Fragmentary Management of Operational Risk

In TF-supported PPs, fiduciary controls are meant to mitigate not only financial, but also operational risk. FF-supported PPs pursue very different mitigation schemes, shaped after the principle of isolating financial from operational risk. In some FIFs, as we noted, the downstream chain comprises both implementing and executing agencies. The former are generally in charge of supervising programme implementation, while the governing body retains a limited monitoring role. This scheme implies much decentralization to implementing agencies, yet it does not provide for an explicit allocation of responsibility among partners. In particular, the position of implementing agencies is left somewhat undefined. Provisions on this respect exist both in upstream and downstream agreements. None of these instruments, however, regulates the role of implementing agencies in its entirety. There is thus a gap

and Food Security Programme; paragraphs 21–22 of the Middle East and North Africa Transition Fund under the Deauville Partnership with Arab Countries in Transition; point C.20 of the Governance Document For Haiti Reconstruction Fund. These documents are available at: <<http://www.cgiar.org/resources/main-legal-documents-of-cgiar>> (CGIAR); <<https://www-cif.climateinvestmentfunds.org/about/governance>> (Clean Technology Fund); <<http://www.gafspfund.org/library>> (Global Agriculture and Food Security Programme); <<https://www.menatransitionfund.org/documents>> (MENA Trust Fund); <<http://www.haitireconstructionfund.org/node/4>> (Haiti Reconstruction Fund).

- 29 Art. 7.2 of the Administration Agreement (Guyana REDD-Plus Investment Fund) between Norway and the World Bank (available at: <<http://www.guyanareddfund.org/>>) foresees that:

If a Contributor notifies the Trustee that such Contributor has determined, following consultation with the Partner Entity and Guyana, that GRIF funds transferred to the Partner Entity have been used in a manner inconsistent with the terms of the corresponding Transfer Agreement or the applicable decisions of the Steering Committee, the Trustee shall withhold disbursements to such Partner Entity and/or require the Partner Entity to promptly return such funds to the Trustee as instructed by such Contributor.

between the high operational exposure of implementing agencies and the discontinuous, and ultimately scattered, legal regulation of their role.

Let us now turn to the second model of FIFs, which provides for the direct allocation of funds from the governing body to final recipients. Here, not surprisingly, the governing body has the overall responsibility for the use of funds and the conduct of recipients. This relationship, however, translates fairly rarely into an *ex-ante* allocation of responsibility. One example can be found in the Adaptation Fund ('AF'), which excludes the board from responsibility for acts of the implementing entities.³⁰ Another example is the mutual exclusion of responsibility in the Advance Market Commitment, in which the Bank and Gavi, The Vaccine Alliance have agreed that "[n]either Party to this Agreement is responsible for the obligations of the other Party to this Agreement. The rights and obligations of each Party under or in connection with this agreement are separate and independent".³¹ The implementation agreements in the context of the CGIAR provide for an even more sweeping exclusion of responsibility to the benefit of the respective governing bodies of the PP and the Trust Fund.³²

The examples above concern relatively new PPs. In recent years, we have seen a growing attention towards programme implementation and its related risks in the context of PPs. This does not necessarily concern the establishment of *ex-ante* arrangements for the allocation of responsibility among partners. A good illustration is the previously mentioned Global Fund. Here, the most prominent source of operational risk is how the governing body selects the

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- 30 E.g. point of the standard implementation agreement concluded by the AF's Board:
4.05. The Implementing Entity shall be fully responsible for the acts, omissions or negligence of its employees, agents, representatives and contractors under the Project. The Board shall not be responsible or liable for any losses, damages or injuries caused to any persons under the Project resulting from the acts, omissions or negligence of the Implementing Entity's employees, agents, representatives and contractors.
The Standard Implementation Agreement of the AF's Board is available at: <<http://www.climatefundsupdate.org/listing/adaptation-fund>>.
- 31 Art. 4 of the Offer Agreement between GAVI Alliance and the World Bank. The Offer Agreement between GAVI Alliance and the World Bank is available at: <<http://www.gavi.org/library/gavi-documents/>>.
- 32 Art. 8.2 of the Trustee Provisions for the CGIAR Fund, *supra* note 28:
8.2 Liabilities. None of the Fund Donors, the Trustee, the Fund Office or the Consortium shall be responsible for the activities of any person or third party engaged by the Lead Center, any Center or any Programme Participants with use of Windows 1 and 2 Funds or as a result of this PIA, or any Window 3 Transfer Agreement or Subagreement; nor will the Fund Donors, the Trustee, Fund Office or Consortium be liable for any costs incurred by such recipients in terminating the engagement of any such person.

final recipients and monitors their performance in the use of funds. The latest version the Fund's instrument establishes some safeguard procedures in this respect. In particular, the Bank will be consulted concerning the expenditure and financial management capacity of the recipient partners selected by the board.³³ A similar mitigation approach is found in the context of several climate-change related FIFs. This attention reflects the awareness that operational risk has increased with the extension of the subjects having access to the fund's resources. With the endorsement of the 'direct access' option, not only multilateral agencies, but also national, regional and subnational entities have directly access to the fund's resources.³⁴ Interestingly, the guidelines developed so far put the accent, *inter alia*, on the recognition of the personality (and monitoring capacity) of the governing body in the countries that are granted 'direct access'.³⁵

Having said this, there still remains an imbalance in the legal design of PPS: financial-related relationships receive a more pervasive regulation than the operational-related ones. The establishment of *ex-ante* arrangements in particular is more common as a means of giving effect to financial, as opposed

33 E.g. Global Fund Framework, Point d) 3:

In order to clarify the responsibility for the preparation, assessment, implementation and monitoring of programmes and the use of funds made available by the Global Fund, the Board will base its decisions regarding funding procedures and disbursement channels on an independent assessment of the expenditure and financial management capacity of recipient partners involved. The Board will consult with appropriate parties, including the Trustee, for this purpose.

The document is available at: <<http://www.theglobalfund.org/en/governance/>>.

34 See Additional Modalities that Further Enhance Direct Access: Terms of Reference for a Pilot Phase, GCF/B.09/05 (5 March 2015), available at <www.gcfund.org/fileadmin/00_customer/documents/MOB201503-9th/05_-_Additional_Modalities_20150305_fin.pdf>. See also A. Michaelowa and S. Hoch, 'Fit for Renewables? Design Options for the Green Climate Fund to Support Renewable Energy Feed-In Tariffs in Developing Countries', World Future Council, September 2013.

35 An interesting example of direct access is the Adaptation Fund. Under 'direct access', the Trustee transfers funds to both multilateral and national implementing entities (including, potentially, non-governmental organizations), upon instruction from the Adaptation Fund Board. Implementing entities bear all financial, monitoring, and reporting responsibilities and need to follow the accreditation process adopted by the AF Board in the Operational Policies and Guidelines for Parties to access resources from the Adaptation Fund (see para. 27 of the Policies and Guidelines). The adaptation Fund has sought advice from the Bank on how to devise direct access: see World Bank, *The Adaptation Fund under the Kyoto Protocol to the UN Framework Convention on Climate Change: Invitation to the World Bank to Act as Interim Trustee* (SecM2008-0361), 26 August 2008.

to operational, risk management. This reflects the Bank's profound influence over the legal design of PPs. Its risk management strategies find concrete expression in the establishment of separate accountability lines for the distinct, yet related, stages of the partnership enterprise. As a result, not only does no partner have control over all other partners, but the degree of control that a partner may have over some other partners also depends on the specific accountability line one considers. This matters for the possible reach of a responsibility regime. The question then arises of how one is to conceive of control when it is fragmented along the PP spectrum. The next section will further examine this and some related issues.

3 General Rules of Responsibility: A Limited Application to the World Bank's Partnership Programmes?

Thus far we have focused on the legal design of PPs and how they have been structured around the principle of risk management. Our discussion has placed relatively little emphasis on the position of actors external to the PP. We have spoken of the adversarial implications of PP-related activities, without discussing whether those implications could be in the nature of international wrongs. More broadly, we have not yet considered how external actors are taken into account, and how they are affected by the inter-partner arrangements on risk allocation. These questions take on central importance as soon as one turns more specifically to issues of international responsibility. The complete lack of international practice on the matter forces us to confine ourselves to the theoretical level. This kind of analysis lends itself well to addressing issues of principle. The rest of the article will deal in particular with the attribution of conduct and responsibility in the context of PPs, while leaving out issues such as an apportionment among partners for the purposes of reparations, which would necessarily call for consideration of issues specific to a particular PP.

Before going further, let us first try to flesh out more precisely the terms on which the problem of attribution presents itself in our context. On the surface, PPs look like a factual continuum. A clear thread runs from the allocation of funds for a programme, through the disbursement of funds, and their use for the implementation of the financed activities. Our previous discussion, however, suggests that the legal design of PPs does not quite corroborate this factual continuity. The position of each partner *vis-à-vis* other partners depends on the existence and nature of a specific accountability line between them. Should we then see the adversarial implications of a PP as a single harmful outcome of the PP, or rather as multiple wrongs attached to the different

levels of a PP? The snapshot of the legal and factual relationships, and accountability lines existing in PPs, offers only a starting point to broaching this question. Collaboration is indeed a process and, as such, it has a dynamic quality that is not quite captured by the picture we have drawn so far. To find this missing dimension, one needs to reflect on two major aspects. The first is control: what does control look like, when one weighs the apparent factual continuity within PPs against the more or less stringent legal separation between the different levels of PPs (see Section 3.1)? The second aspect concerns the different relationships within PPs. If we have previously considered each relationship in isolation, we now need to consider the links among them and the influence of one over another. This is crucial to assessing the extent to which general rules of responsibility can apply to PPs (see Section 3.2).

3.1 *A Single Harmful Outcome? Issues of Attribution of Conduct and Responsibility in the World Bank's Partnerships*

As we have noted, PPs consist of different levels, ranging from decision-making to implementation. If this is so, to what extent can one attach a single harmful outcome to the PP seen as a whole? More particularly, does a single thread run from the downstream operational pole to the upstream decision-making pole of a PP? The answers to these questions are crucial to understanding in what terms we can speak of a shared responsibility among partners. Obviously, much depends on how one ties the notion of shared responsibility to that of a harmful outcome, and in turn on how one conceives of a harmful outcome. We shall here endorse the definition of 'outcome' as the result of the joint or parallel action of multiple actors.³⁶ Upon that basis, and in order to provide an answer to the above questions, we will deal with two distinct sets of issues. The first pertains to attribution, and the second to control.

There is an intimate link between these two dimensions. The notion of attribution comprises two subcategories: attribution of conduct and attribution of responsibility. Although conceptually different, both these notions are concerned with control. The former notion is about a transfer of conduct: by exercising effective control over the immediate perpetrator, the seconding party makes the conduct its own. The latter notion is about a transfer of authority: by exercising factual or legal control over the party to which a conduct is attributed, the controlling party incurs responsibility, without making the conduct

36 See, for the notion of shared responsibility, P. A. Nollkaemper and D. Jacobs, 'Shared Responsibility in International Law: A Conceptual Framework' (2013) 34 *Michigan Journal of International Law* pp. 359–438, pp. 366–368.

its own.³⁷ It is argued that the composition of PPs raise peculiar problems of attribution,³⁸ which prevents, at least to some extent, construing PPs as capable of producing a single harmful outcome. Aside from formal issues of attribution, there is an even more serious problem with regard to the nature of control. Insofar as control is tailored to reflect the division of risk across PPs, it is also fragmented. This has dramatic consequences on how to frame the relationships among partners for the purposes of responsibility.

3.1.1 On the Hurdles of Attribution

PPs are slippery creatures when it comes to attribution, and not surprisingly so considering the variety of actors they involve. The financed activities may, in some cases, be implemented by hybrid entities incorporated within a domestic legal system, such as Gavi. In other cases, implementation is the task of private entities with a purely domestic mission and scope of action: think, most notably, of 'direct access' in climate-change-related FIFs. Both groups of entities lack international legal personality,³⁹ thus making the question of attribution for the purposes of international responsibility altogether redundant. More intricate is the question of attribution at the level of decision making. Three scenarios particularly stand out.

First, the governing body is the organ of an international organization.⁴⁰ This case poses no particular problem in terms of legal personality, nor does the case of a governing body established by the COPs under the UNFCCC.⁴¹ The personality of the COP would indeed plausibly extend to the governing body.

Second, the governing body is composed of states only, or of states and international organizations, but the PP lacks legal personality. The notion of a common organ seems well suited to this scenario.⁴² All subjects are indeed

37 J. D. Fry, 'Attribution of Responsibility', in P. A. Nollkaemper and I. Plakokefalos (eds.), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (Cambridge University Press, Cambridge, 2014) pp. 98–133, p. 103.

38 For a partially different view on this aspect, see the contribution of P. Palchetti to this special forum entitled 'Applying the Rules of Attribution in Complex Scenarios: The Case of Partnerships among International Organizations'.

39 In Switzerland, Gavi is recognized as having international legal personality, see L. Clarke, *Public-Private Partnerships and Responsibility under International Law: A Global Health Perspective* (Routledge, Abingdon, 2014) p. 59.

40 E.g. Consortium in CGIAR.

41 E.g. the board of the AF and the Green Climate Fund.

42 On the notion of the common organ, see C. Santulli, 'Retour à la théorie de l'organe commun' (2012) 116 *Revue générale de droit international public* pp. 565–578.

capable of bearing responsibility. Each of them individually could, therefore, incur responsibility *in lieu of* the collective governing body.

Third, the governing body is composed of States, international organizations and private actors. In spite of first appearances, this case does not lend itself to the same treatment as the previous one. Applying the common organ notion would entail an inevitable asymmetry between those members who have international legal personality and those who do not. To uphold such an asymmetry would be to ignore and twist the functioning of the collective bodies at hand.⁴³ Consensus is indeed their usual mode of decision-making, which means that all decisions require the contribution of actors devoid of legal personality. It thus seems difficult to de-bundle the collective conduct into the separate participation of only those entities that have legal personality.

The implications of the above discussion are weighty. In PPs whose governing body falls into the third scenario, attribution of conduct is particularly problematic. For the reasons we have just illustrated, we shall not attribute the collective decisions of the governing body to only those of its members who have legal personality. If this is so, and the governing body has no legal personality, then its collective decisions will not be attributable to any subject. Somewhat different is the case of inaction at the level of the governing body, e.g., in the exercise of its monitoring function. Here, the question of attribution would not concern the acts adopted by an entity that represents its members. The hurdles we have just identified—the lack of personality of the collective body and the impossibility to pierce its veil—would, therefore, not necessarily exhaust the matter. The category of attribution of conduct would still be of little significance, insofar as the inaction of a single partner can hardly be distinguished from that of the collective body. Attributing conduct turns out to be particularly difficult in these circumstances.⁴⁴

Two principal implications follow. First, when the governing body and the executing entities lack international legal personality, the paradigm of independent responsibility cannot reach the partners involved at the level of decision-making and implementation. Second, the fact that no wrongful act

43 In the same vein, P. Jacob, 'Imputation et modes informels d'institutionnalisation des relations internationales', in L. Dubin and M. C. Runavot, *Le phénomène institutionnel international dans tous ses états: transformation, déformation ou reformation?* (Pedone, Paris, 2014) p. 224.

44 On the tricky link between the expansion of legal personality and the parallel expansion of international responsibility, A. A. Cançado Trindade, 'Some Reflections on Basic Issues Concerning the Responsibility of International Organizations', in Ragazzi (ed.), *Responsibility of International Organizations*, *supra* note 8, pp. 3–7.

would arise at the extreme poles of the PP chain also affects the potential reach of derived responsibility. While this paradigm concerns the responsibility of states and international organizations for the wrongful conduct of another, if no wrongful act has occurred, no derived responsibility will possibly arise either.

As one easily realizes, of all the above issues, the most problematic is having a gap in legal personality at the downstream end of a PP chain. This prevents the wheel of indirect responsibility from reaching the different upstream levels of the PP. On the contrary, one can still live with the governing body's possible lack of legal personality. The cases falling under the third scenario above are quite problematic because there are virtually no avenues for attributing conduct directly to the governing body. Still, one can consider participation in the common organ as the basis for assessing the factual relationship among partners. The fact of sitting within the common organ would provide an indicator of the authority exercised by one partner over another. Such a *démarche* would entail a shift in focus. Rather than attempting to establish the direct responsibility of the collective body, we would consider the derived responsibility of the single members of the governing body in their individual relationships with other partners.

To be sure, attribution of conduct is not always that difficult in the context of PPs. Still, due to issues of personality, the formal mechanism of attribution may fail to reach to the crucial stages of decision making and implementation. When this is the case, one can hardly see the partnership as forming a continuum from its upstream to its downstream pole. This leads to a more general conclusion. When considered in relation to the engagement of international responsibility, the notion of partnership is not homogenous, in that it does not necessarily correspond to a situation in which collaboration results in the production of a single harmful outcome.

3.1.2 The Shape of Control under Partnerships

Collaboration as expressed in PPs may also fail to form a continuum in another sense. As a result of the different forms of allocation of risk among partners, control is fragmented, and it does not run through the entire PP chain with the same intensity. Nor is control necessarily of the same nature throughout the PP chain, and it surely is not of the factual and material kind envisaged in the ARIO. Let us try to unpack these claims.

As we previously noted, control is the conceptual linchpin of both attribution of conduct and attribution of responsibility. In its codification effort on the responsibility of international organizations, the ILC has followed in its own footsteps and placed the highest premium on factual control. It is true

that Article 17 of the ARIO attempts to flesh out a normative form of control and its implications for responsibility.⁴⁵ Albeit deserving, this attempt nonetheless remains somewhat myopic. Insofar as Article 17 covers only the relationships between an international organization and its member States, it fails to alleviate the shortcomings that the ARIO were meant to alleviate, namely, the neglect of the relationships between international organizations and third parties.⁴⁶

One may reproach the ILC for having failed to take into account a further element. It can be argued that for different international organizations, control is derived from different sources. Taking into account a uniform source of control—i.e. material control—is highly questionable when it comes to international organizations in particular.⁴⁷ For the purposes of a general responsibility regime, going beyond the ARIO, the forms through which control finds expression would be tailored to the nature of the organization. In this vein, the nature of the Bank as a financial institution would have a bearing on the type of control it can exercise. As our previous discussion shows, the Bank is highly influential, for instance, through the imposition of its policies and procedures upon executing agencies, when acting as an implementing agency. Still another source of authority would be the Bank's know-how, which finds expression, for instance, in the exercise of an advising function towards the governing body of a PP.

Having said this, one has to be mindful that, whatever its source may be, control still has to meet an intensity threshold for the engagement of responsibility to be justified. This is the case for the attribution of both conduct and responsibility, and it is at this point that the context of PPs becomes somewhat problematic. As we have seen, the legal design of PPs tends to dilute control and authority. The creation of parallel lines of accountability, the isolation of certain roles from the rest of the PP chain: all these techniques for mitigating financial (and less prominently) operational exposure contribute to the fragmentation of authority. This is particularly visible in the case of FIFs. In the case of TFS, some continuity exists insofar as the Bank cumulates several roles, and none is legally isolated from the others. Still, PPs do not seem to form a

45 For an overall assessment of Art. 17 ARIO, see N. Voulgaris, 'Rethinking Indirect Responsibility: A Study of Article 17 of the Draft Articles on the Responsibility of International Organizations' (2014) 11 *International Organization Law Review* pp. 5–52.

46 On the limits of this conception axed on the relationship between international organizations and their member states, see J. Klabbbers, *International Organizations Law* (3rd ed.), (Cambridge University Press, Cambridge, 2015) pp. 36–39.

47 Fry, *supra* note 37, p. 121.

continuum in terms of the distribution and the type of authority that partners exercise over one another. This invites us to look at each of these relationships in turn, in order to assess to what extent they can still give rise to situations of shared responsibility.

3.2 *Applying the Rules of Responsibility to De-Bundle the Relationships among Partners*

This last part of our analysis illustrates how the legal design of PPs affects the application of the rules for the engagement of international responsibility. To that end, we shall return to the distinction between TFS and FIFs. The underlying hypothesis is that such a distinction matters for the possible scope and reach of general rules of responsibility.

Let us then start with TFS. The relationship between the WB and the PP governing body is easy to de-bundle. The individual conduct of the Bank runs parallel to that of the governing body. Insofar as the governing body does not fall in the third previously-described category—i.e. the scenario in which its decisions cannot be attributed to any international legal subject—both actors could see their independent responsibility engaged in conjunction with the activities of the partnership. More delicate is the link between the Bank and executing agencies in the case of RETFS. As noted at the beginning of the article, the Bank denied that oversight over the implementation of projects qualifies as control in the meaning of direction and control. The Bank's position is not fully convincing, considering that oversight is not always associated with the same degree of control. As the WB-UN FPA illustrates, the Bank can exercise less oversight in some cases than in others.

Having said that, let us first discuss the case in which the executing agency has international legal personality. Obviously, the Bank would not exercise sufficient control for a transfer of conduct, nor would the Bank exercise factual direction and control. However, the Bank requires executing agencies to respect its policies and procedures. As hinted at above, this entails the exercise of some normative control that is tailored to the nature of the Bank as a financing entity. If this is so, the Bank could incur indirect responsibility for the conduct of executing agencies, depending on the degree of oversight exercised on the financed activities. In the case of the executing agency having no personality, the Bank may still incur responsibility. This would presuppose a shift in the conception of aid and assistance as a primary wrongful act, rather than a secondary rule for the engagement of derived responsibility.⁴⁸ If we consider the

48 In a similar vein, see e.g. B. Graefrath, 'Complicity in the Law of International Responsibility' (1996) 29 *Revue belge de droit international* p. 370, at p. 371.

continuity running from the thread of decision making to that of implementation, the occurrence of a harmful outcome at the downstream end of the PP spectrum could engage the responsibility of the partners.

Different considerations apply to the case of FIFs. The special role of the Trustee ends up creating a legal gap in the chain running from decision making through implementation. Of course, if the governing body has personality, then both the Trustee and the governing body would be responsible for any financial harm not related to the operational side of the PP. If we consider the relationship between the governing body and implementing agencies, assuming they are both personified, it is still difficult to think of direction and control, even in the specific sense of normative control we referred to above. The governing body rarely adopts the same stringent policies of the WB when it comes to its supervisory role. Mild monitoring activity, as well as the indication of an overall normative guidance, does not create a sustained exercise of authority. This precludes the possibility that the governing body may incur responsibility for the conduct of implementers. It is also not evident that the decision as to the allocation of funds can in itself be considered as a basis to engage the responsibility of the governing body, in conjunction with the activity of the implementers. This is owing to two concurrent facts: first, the chain is interrupted by the isolation of the Trustee; and second, the governing body only has weak control over implementing agencies.

4 Conclusions

In this article, we have explored how the form of cooperation embodied in PPs matters for the purposes of a responsibility regime. I have also tried to de-bundle the relationships within PPs, and see to what extent they could be brought within the reach of general rules of responsibility. The pervasiveness of a managerial approach to risk mitigation affects the possibility of construing a PP as a continuum. It is not only that *ex-ante* arrangements create a legal buffer around certain components of the PP, but also that certain relationships are too loose for responsibility to be shared among partners. This is notwithstanding that PPs as a whole are a tremendous concentration of resources and power. The logic of risk management proves quite effective in fragmenting or diluting power and authority. Unfortunately, the ARIO have few opportunities to curb this imbalance. The key limitation rests perhaps in the lack of a notion of normative control concerning the relationships other than those between international organizations and their member States. In this sense, the ARIO perpetuate the underestimation of the relationships between international

organizations and third parties, and the possible harmful consequences of these interactions. Thinking outside the ARIO box is not of great help either.⁴⁹ Insofar as the linchpin of responsibility is control, one can construe only certain PPs, or certain segments of a partnership, as amassing enough control for responsibility to arise. What is more, PPs are becoming increasingly refined in their design. This process is most likely to head towards two (not mutually exclusive) directions: a further increase in the *ex-ante* apportionment of responsibility; and the devising of new ways to domesticate risk, and, indirectly, to escape the reach of a general responsibility regime.

49 As noted by Pronto, the ILC Articles were based on a classic scenario, and “model scenarios are not always relevant in dealing with complex scenarios”: A. N. Pronto, ‘Reflections on the Scope of Application of the Articles on the Responsibility of International Organizations’, in Ragazzi (ed.), *Responsibility of International Organizations*, *supra* note 8, pp. 153–155.