

JUSTITIA ET PACE
INSTITUT DE DROIT INTERNATIONAL

Session of Lisbonne - 1995

**Obligations of Multinational Enterprises
and their Member Companies**

(Fifteenth Commission, Rapporteur : Mr Andreas Lowenfeld)

(The English text is authoritative. The French text is a translation.)

The Institute of International Law,

Recognizing that the principles of company law, as developed in the States of Europe and the Americas in the Nineteenth Century, do not address the modern phenomenon of large groups of companies incorporated in different States but operating under common ownership, common or related trade names, and common management or control ;

Aware that different States have adopted different and sometimes inconsistent laws in regard to the exercise of jurisdiction over groups of companies ;

Persuaded that no single rule can cover all situations in which multinational enterprises are sought to be held responsible for the acts of member companies established under the law of a given State, but that it is desirable to give guidance to States and to multinational enterprises concerning the consistency of such rules with international law ;

Proposes (without prejudice to special rules of liability in bankruptcy or insolvency proceedings) the following Guidelines concerning the responsibility of multinational enterprise :

I. Definitions

For purposes of these Guidelines

1. A *multinational enterprise* is a group of companies operating under common ownership or control, whose members are incorporated under the laws of more than one State. Generally, the members of the group of companies operate under common or related trade marks or trade names and produce or distribute common or related products or services, but the absence of such integrated activity does not, by itself, deprive a group of companies of the character of a multinational enterprise. A multinational enterprise may, but need not, appear to the public to be linked to a particular State in which the parent company has its headquarters ; and the multinational enterprise may be operated under a hierarchical or under a decentralized system of management. While some holding of shares of companies forming part of the multinational enterprise by non-members is not excluded, an essential characteristic of a multinational enterprise is that shares of companies that are members of the group are not dispersed, and that management of the companies constituting the multinational enterprise is exercised by the parent company, whether through controlling shareholding, direct or indirect, or by other means.

2(a) *Control* is the power to exercise decisive influence over the activities of a company, whether by appointment of its directors or principal managers or otherwise ; a *controlling entity* is a company or other entity that has or exercises control over another member of the group of companies that constitute the multinational enterprise. A controlling entity may, but need not, be the parent company of the multinational enterprise.

(b) If the parent company, another controlling entity, or several members of the group of companies constituting the multinational enterprise taken together hold a majority of the voting shares of the company in question, control by the parent company or the group of companies is assumed ; control meeting the test of paragraph (a) may also rest in an entity holding less than a majority of the shares of a company, if by virtue of management contracts, conditions in credit arrangements, voting trusts, license or franchise agreements, or other elements, it has the power to exercise decisive influence over the activities of the company in question.

3(a) A *parent company* is a company or other entity that directly or indirectly owns a majority of the shares of, or otherwise exercises control over, other companies that constitute a multinational enterprise. A parent company may, but need not, be an operating enterprise engaged in the production or distribution of goods or services. Ownership of a parent company may be confined to a small group or even an individual ; more commonly, ownership of a parent company is dispersed through shares held by the public and traded on securities markets.

(b) A *subsidiary* is a company that is owned or controlled by another company belonging to the same group of companies. Usually, a subsidiary is incorporated under the laws of the State in which it is established.

(c) A *branch* is a unit of a larger entity not separately incorporated in the State where it is established or engaged in operation.

II. Principles

1. As a general rule, shareholders of a company or similar entity are presumed not to be liable for the obligations of the company whose shares they hold. However, it is open to States, in limited circumstances, such as those illustrated in the following paragraphs, to apply their law (including their conflict of laws) to impose liability for the obligations of a company on an entity that alone, or as a member of a group of companies constituting the multinational enterprise, holds all or substantially all of the shares of the company in question or exercises control over it.

2(a) Liability for claims arising out of contractual relations between a company and a third party may be imputed by a court or arbitral tribunal to the parent company or other controlling entity of a multinational enterprise when

(i) the controlling entity has taken part in the negotiation, performance, or termination of the contract on which the claim is based in such manner as to lead the claimant reasonably to rely on its responsibility ;

(ii) the company in question or the controlling entity has engaged in fraud or deceptive practice in respect of the obligation on which the claim is based ; or

(iii) a member of a multinational enterprise ceases its activity, enters into liquidation, or is put into bankruptcy, in order to contribute to the compensation due to its employees in accordance with the law applicable at the place of the activity or employment.

(b) Liability for claims arising out of non-contractual obligations may be imputed to the controlling entity in circumstances, such as mass disasters, in which the resources of the member or members of the multinational enterprise directly involved appear likely to be insufficient to respond to the claim in full.

(c) Liability for claims arising out of contractual or non-contractual relations may also be imputed to another member of the multinational enterprise in circumstances under which the controlling entity could be held responsible in accordance with paragraphs (a) or (b) when that other member has participated in the activity on which the claim is based or has derived direct economic benefit from that activity.

3. In addition to such other bases of judicial jurisdiction as it may provide over persons not established in its territory, including jurisdiction based on injury sustained or contracts made or breached in the State, it is open to a State, when a claim for which jurisdiction is asserted arises out of or is closely related to the activities conducted by, or on behalf of, a multinational enterprise in that State, to provide that

(a) a parent company or a controlling entity of a multinational enterprise is subject to the jurisdiction of its courts on the basis

(i) of the permanent presence in the State of a branch or comparable establishment of the multinational enterprise ; or

(ii) of the permanent presence in the State of a subsidiary so closely linked to the multinational enterprise by common ownership, control, personnel, management, or activity as to be fairly regarded as a mere department or *alter ego* of the multinational enterprise ; or

(iii) of the existence of circumstances that could justify imputation of liability of the parent company or controlling entity in accordance with Paragraph 2(a) or (b) of these Principles,

(b) another member of the multinational enterprise is subject to the jurisdiction of its courts on the basis of the existence of circumstances that could justify imputation of liability to that member in accordance with Paragraph 2(c) of these Principles.

4. A judgment or arbitral award that has imposed liability on a parent company, controlling entity, or other member company of a multinational enterprise - if it otherwise fulfils the conditions for recognition and enforcement under the rules in effect in the State where recognition and enforcement are sought - should not be refused in that State if liability has been imposed consistently with these Principles.

5. If a subsidiary of a multinational enterprise is established in a State and regularly engages in economic activity with the parent company or other members of a multinational enterprise, that State may impose reasonable requirements on a multinational enterprise and its member companies to disclose information, submit financial statements, and comply with economic regulations having direct effect in the regulating State.

6(a) A State may impose reasonable regulations on a multinational enterprise whose parent company is established in that State with regard to the activity of its subsidiaries established in other States, provided such regulations are part of a program of general application. In applying such regulations a State should seek to avoid conflict with the law or regulations of the States in which the subsidiaries are established or the activities take place.

(b) In the event of a conflict between regulations imposed by two or more States on a multinational enterprise or its component units,

(i) each State is required to weigh the interests of the other State in the regulation in question ;

(ii) where accommodation between or among the conflicting regulations is not possible, the greatest weight is generally to be given to the law of the State where the activity to be regulated takes place, or where the member company of the multinational enterprise whose activity is sought to be regulated is incorporated or established.

*

(1st September 1995)