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Promoting responsible business through the revised ILO Tripartite Declaration

by
Peter Muchlinski*

The ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (MNE Declaration)—covering employment, training, work and life conditions, industrial relations—was last revised in March 2017. Significantly, the revised MNE Declaration incorporates the UN Guiding Principles on Business and Human Rights (UNGPs) which, pursuant to paragraph 10(b), apply "to all States and to all enterprises."

Despite the revisions, the MNE Declaration is not a fully effective safeguard of workers' rights. In particular, the MNE Declaration has been criticized for lacking effective remedies for workers' grievances and for using general and conditional language even when referring to established international and national legal norms (e.g., the prohibition of forced or compulsory labor, the abolition of child labor, health and safety rights, and freedom of association).[1]

Given that the UNGPs demand access to an effective remedy for human rights violations, and given that the core labor rights established in the MNE Declaration and listed in the 1998 ILO Declaration on Fundamental Principles and Rights at Work are recognized also as fundamental human rights,[2] the need for the MNE Declaration to provide effective remedies for corporate violations of such rights has become pressing.

This is consistent with the MNE Declaration which, by paragraph 66, requires MNEs to respect the rights of

> *"any worker who, acting individually or jointly with other workers, considers that he or she has grounds for a grievance should have the right to submit such grievance without suffering any prejudice whatsoever as a result, and to have such grievance examined pursuant to an appropriate procedure."*

Furthermore, Annex II of the MNE Declaration lists three "Operational Tools" that can be used to enhance compliance by MNEs: promoting the MNE Declaration, including through the establishment of "national focal points" to further stakeholder dialogue on fundamental labor rights; a "company-union dialogue" that involves MNEs' and workers' representatives on the application of the principles of the MNE Declaration; and an "interpretation procedure" of the MNE Declaration's provisions. The last is currently limited to general interpretations of provisions of the MNE Declaration and can only be used by representatives of governments or national or international representatives of employers or workers—not individual workers affected by infringements of the MNE Declaration.

Certain reforms should be considered when the next revision of the MNE Declaration takes place:

- Despite the mandatory nature of the core labor standards it contains, the MNE Declaration refers to what MNEs "should do" on the grounds that this is a voluntary instrument. Mandatory language, stressing what MNEs "shall do", is required to ensure greater consistency with ILO Conventions and the legal status of core labor rights as legally recognized fundamental human rights.[3]
- Under the "company-union dialogue" provision, some 100 Framework Agreements between MNEs and Global Union Federations have been recognized. It would be useful for these to be published in an Annex to the MNE Declaration.
- The "national focal points" could emulate the OECD "national contact points" established under the OECD Guidelines for Multinational Enterprises by allowing individual complaints to be admitted and potentially leading to recommendations covering possible violations of the MNE Declaration.[4]
- The "interpretation procedure" mentioned above could be extended so that workers or informal groups of workers can bring individual complaints.[5]
- The multistakeholder approach to business and human rights that was key to the success of the UNGPs should be enhanced in the MNE Declaration with new participation rules. While under the traditional ILO tripartite approach only governments, business and trade union participate, civil society, indigenous communities and informal workers groups should be included, too. Many labor rights issues now take place outside the formal employer-employee relationship and the traditional tripartite collective bargaining structures, but within a broader labor and human rights framework. Participation in the MNE Declaration process should reflect this.
- Finally, paragraph 3 of the MNE Declaration supports public labor inspections. This support should be strengthened through a specific provision requiring that such inspections are based on the ILO Labour Inspection Convention, 1947 (No. 81) and Labour Inspection (Agriculture) Convention, 1969 (No. 129). This will add an important process to the protection offered to workers under the MNE Declaration.

The MNE Declaration was first adopted as a leading international instrument outlining the substance of responsible business conduct. It now exists in a much-changed normative environment. New national mandatory human rights due-diligence laws are emerging, and negotiations continue in the

UN on a legally binding international business and human rights instrument. The MNE Declaration must evolve, taking cognizance of contemporary developments to remain a leading source of standards.

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[1] See Jernej Letnar Černič, "The ILO Tripartite Declaration of Principles Concerning Multinational Enterprise and Social Policy revisited: Is there a need for its reform?," in Marc Bungenberg et al., eds., *European Yearbook of International Economic Law 2019* (Cham: Springer, 2020), p. 193.

[2] These are: the freedom of association; the recognition of the right to collective bargaining; the elimination of all forms of forced or compulsory labor and employment discrimination, and the abolition of child labor.

[3] See Andrew Clapham, *Human Rights Obligations of Non-State Actors* (Oxford: OUP, 2006), pp. 213-218.

[4] Černič, *id.*, at 206-207.

[5] *Ibid*.

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