

**Chicago-Kent College of Law**

---

**From the Selected Works of César F. Rosado Marzán**

---

2016

# NCP Starbucks Decision Helps Advance Compliance with OECD Guidelines

César F. Rosado Marzán

## Commentary



# NCP Starbucks Decision Helps Advance Compliance with *OECD Guidelines*

By César F. Rosado Marzán, Associate Professor Law, IIT Chicago-Kent College of Law, United States<sup>1</sup>

The Central Unitaria de Trabajadores de Chile (CUT) and the Sindicato de Trabajadores de Starbucks Coffee Sociedad Anónima (Starbucks Union) submitted a case to the Chilean National Contact Point (NCP) regarding the antiunion practices of Starbucks, Inc., in Chile (Starbucks). The complaint involved antiunion campaigns and interference with the right to organize and to bargain collectively. Allegations included termination of union members and refusals to recognize the union as a representative of the employees. Starbucks initially challenged the competence of the NCP on grounds that the *OECD Guidelines* (the *Guidelines*) did not cover the Chilean subsidiary. The NCP disagreed. It determined that the firm, a multinational enterprise (MNE), was *horizontally integrated* and as such included both the US parent and the Chilean subsidiary.

Starbucks then acceded to NCP mediation. However, during the mediation, the CUT attended a Trade Union Advisory Committee training event where the CUT disclosed the case to other participants. Starbucks alleged that such disclosure violated NCP good faith and confidentiality rules. The NCP determined that neither were violated and that Starbucks had lost confidence in the process. It therefore closed the case.

The NCP then found that Starbucks had a baseline problem in its corporate policies that complicated its recognizing the Starbucks Union. The policies

---

<sup>1</sup> The author thanks Professor Lance Compa for comments made to a prior version of this commentary. He also thanks Philip Vieira, Laura Caringella, and the editors of *International Labor Rights Case Law* for their assistance.

referred to employees as *partners* even though they were not stockowners and did not share in company profits, and identified unions as unnecessary if management behaved benevolently. Starbucks and the union were able reach an agreement.

### Commentary

Despite being sometimes ambiguous, the NCP's Final Declaration is useful to advance MNE compliance with the *Guidelines* and international labor standards. It demonstrates specificity in the *Guidelines* that MNEs can either comply with or breach. Second, the NCP frowned on Starbucks' referring to its employees as *partners* and its attempt to cast unions as unnecessary. Both practices are commonly part of US-based MNEs. Global diffusion of such violations of international standards could be curbed by continued NCP disapproval and mediation. Moreover, the declaration helped buttress national labor court opinions and settlements related to the presented issues. Finally, in declaring that Starbucks Chile was part of the MNE Starbucks, the NCP contributes to limiting the continued global "fissuring" of work.

First, the NCP was explicit that the company needed to move toward compliance. Its recommendations underscored that "the company was slow to develop within the boundaries of international norms that regulated corporate social responsibility, as provided for by the *OECD Guidelines*." The NCP further stated that the settlement was "progress toward changing Starbucks' corporate policies and to compliance with the *Guidelines* to respect recommendations relevant to corporate social responsibility." Both statements are clear that Starbucks either did not fully comply with or breached the *Guidelines*, particularly in regard to freedom of association.

Second, the NCP frowned on Starbucks' attempt to call workers anything other than employees or workers. Starbucks is only one of many companies that use any term but the statutory one. Statutory terms generally connote legal meanings that provide specific, protective rights. Many companies that use nonlabor terms to refer to their employees are headquartered in the United States, which is more lax than other countries in this regard.<sup>2</sup> These companies attempt to extend the same labels to their overseas employees. The Starbucks case shows how the practice violates international norms. The NCP's decision may help curb the practice.

---

2 Walmart and the Home Depot, for example, use the term *associates* ("Working at Walmart," <http://corporate.walmart.com/our-story/working-at-walmart>; "Our Associates," <https://corporate.homedepot.com/Associates/Pages/default.aspx>).

Third, the NCP frowned on company policies casting labor unions in a negative light. Opposing unions is commonplace in the US and has even generated an industry to evade unionization.<sup>3</sup> By requesting that Starbucks refrain from stating that unions could be unnecessary, the NCP directly attacked an accepted US practice that US companies may, in violation of international standards, attempt to export.

Fourth, the NCP's decision buttressed a labor court's determination of liability in *Paez with Starbucks Coffee*,<sup>4</sup> further nudging Starbucks to change its behavior. In *Paez*, a Santiago Labor Court issued a decision that a Starbucks employee and union member had been unfairly terminated.<sup>5</sup> Starbucks argued that the termination was for "necessities of enterprise," which under Chilean labor law allows an employer to terminate the employee but not incur the usual severance liability. On the basis of evidence presented by the employer about the employee's lack of timeliness and use of company uniform, causes not covered under Chilean law, the Santiago court decided otherwise.<sup>6</sup>

After *Paez*, Starbucks settled similar claims by other Starbucks union members and the Starbucks Union.<sup>7</sup> In one, it agreed to change its company manual to reflect that it did not oppose freedom of association rights and to start a program to regularly discuss workplace matters with the Starbucks Union and to evaluate lack of promotion of union members.<sup>8</sup>

The Starbucks Chile website, however, continued to show antiunion language. Because Starbucks Chile had no control over what its US parent posted, it could not effectively comply with its Union agreement. After the NCP produced its draft recommendation, the firm and the union reached another agreement to resolve many of the issues.

---

3 For one of the best comprehensive analyses of how US firms violate international standards, see Lance Compa, *Unfair Advantage: Workers' Freedom of Associations in the United States Under International Human Rights Standards* (Ithaca, NY: Cornell University Press, 2004), pp. 17–39.

4 Second Labor Court of Santiago, "Paez con Starbucks Coffee," RIT S-12-2012 (12 June 2012).

5 Ibid.

6 Ibid. at para. 40.

7 Second Labor Court of Santiago, "Sindicato de Trabajadores Starbucks y Starbucks Chile," RIT S-94-2012 (April 14, 2013). In the following cases labor courts approved settlements of unfair labor practice and dismissal cases against Starbucks: Chile Second Labor Court of Santiago, "Parra con Starbucks Coffee Chile SA," T-175-2014 (May 12, 2014); First Labor Court of Santiago "Beltran con Starbucks Coffee Chile Sa," S-11-2012 (April 13, 2012); First Labor Court of Santiago, "Orellana con Starbucks Coffee Chile SA," S-5-2014 (March 4, 2014).

8 Second Labor Court of Santiago, "Sindicato de Trabajadores Starbucks y Starbucks Chile," RIT S-94-2012 (April 14, 2013).

Fifth, the NCP determined that Starbucks Chile was part of Starbucks, the MNE. One of the most difficult challenges facing labor today is fragmentation of production, what Professor David Weil of the US Department of Labor has called “fissuring.”<sup>9</sup> Fissuring involves contracting out, franchising, or closely managing production chains. In all these circumstances, lead firms attempt to escape labor and employment law liabilities, claiming that those who provide services under those relationships are not employees. However, as Weil argues, lead firms that exert control over such workers should remain liable for related labor and employment obligations.<sup>10</sup>

The Starbucks case shows that fissuring can also happen through corporate subsidiaries. However, as the Chile NCP determined, parent corporations that control subsidiaries should similarly remain liable for the labor practices of subsidiaries. In this manner, the *Guidelines* can help rein in aspects of global fissuring related to corporate horizontal integration.

Finally, the NCP finding that dissemination of the proceedings during the TUAC meeting did not violate confidentiality and good faith obligations is significant. That a party has requested mediation by the NCP is not a protectable confidence. The Chilean NCP struck the right balance. On the one hand, effective implementation of the *Guidelines* requires voluntary submission to mediation. In such processes, confidential information about the parties may be exposed. Parties must be guaranteed that such confidential information will not be leaked. On the other hand, complete gag orders regarding the existence of such cases before the NCPs could effectively exclude from the public eye any matter that parties agree to mediate, even those that do not include any real intent to resolve the dispute. Complete gag orders may thus silence otherwise legitimate claims.

In this case, Starbucks argued that confidentiality principles were violated when the CUT and the NCP disclosed the existence of the case to other parties at the training. The NCP asserted that confidentiality was in fact not breached because although the case had been mentioned no actual communications between the parties were disclosed. Because human rights claims rely on public scrutiny and support,<sup>11</sup> total gag orders would limit the NCP's

---

9 David Weil, *The Fissured Workplace: Why Work Became So Bad for So Many and What Can Be Done to Improve It* (Cambridge, MA: Harvard University Press, 2014).

10 Ibid.

11 See generally Thomas Risse and Kathryn Sikink, “The Socialization of International Human Rights Norms into Domestic Practices: Introduction,” in *The Power of Human Rights: International Norms and Domestic Change*, eds. Thomas Risse, Stephen C. Ropp, and Kathryn Sikink (Cambridge: Cambridge University Press, 1999).

effectiveness.<sup>12</sup> The NCP struck the right balance under the *Guidelines* by simultaneously protecting both confidential information of the parties and the integrity of the process as a human rights matter.

The Starbucks case demonstrates that the *Guidelines* have practicable meaning and can be breached. The NCP provided recommendations to bring the company into compliance and frowned on the term *partners* to refer to employees and the suggestion that unions are unnecessary. Both practices violate international standards though they are common to US-based MNEs. The *Guidelines* thus help curb further global dissemination of such practices. Last, the Final Declaration helps buttress national labor court opinions and settlements related to the issues presented to the NCPs and helps limit continued global fissuring of the workplace.

---

12 Moreover, as in the present matter, a complete gag order would make it harder for labor activists to learn from others' experiences and be trained in international labor advocacy, which remains alien to many traditional labor activists and even to human rights advocates, who seldom propagandize for labor rights as human rights. For a description of the relationship between labor rights and human rights see James A. Gross, *A Shameful Business: The Case for Human Rights in the American Workplace* (Ithaca, NY: ILR Press, 2010). For a detailed explication on how labor rights and human rights still do not always sit comfortably next to each other see Virginia A. Leary, "The Paradox of Workers' Rights As Human Rights," in *Human Rights, Labor Rights, and International Trade*, eds. Lance A. Compa and Stephen F. Diamond (Philadelphia: University of Pennsylvania Press, 1996), p. 22.