

U.S. National Contact Point for the OECD Guidelines for Multinational Enterprises



Final Statement

Specific Instance between the International Union of Food, Agricultural, Hotel, Restaurant, Catering, Tobacco and Allied Workers' Associations (IUF) and PepsiCo, Inc.

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I. Summary of the Outcome of the Specific Instance

This Final Statement concludes consideration by the United States National Contact Point (USNCP) for the OECD Guidelines for Multinational Enterprises ([the Guidelines](#)) of the Specific Instance submitted by the International Union of Food, Agricultural, Hotel, Restaurant, Catering, Tobacco and Allied Workers' Associations (IUF) regarding the actions of PepsiCo Inc. (PepsiCo), through its subsidiary in India. This Final Statement succeeds a [previous Final Statement](#) regarding this Specific Instance issued by the USNCP on May 19, 2014. That Final Statement was issued when PepsiCo declined the offer of mediation the USNCP had made.

Though mediation could not be established through the USNCP mechanism at that time, IUF and PepsiCo continued discussions of the allegations in the Specific Instance. In November 2015, PepsiCo reached out to the USNCP to ask if mediation would still be available. The USNCP agreed to mediate the case and both parties returned to the table. The parties entered into three days of mediation under the USNCP and facilitated by the Federal Mediation and Conciliation Service (FMCS) in February, 2016. Although they were not able to reach a mediated agreement, the parties and the USNCP found the dialogue and mediation process to be productive and useful. The USNCP believes that the process did lead to greater understanding of the Guidelines and will result in a quicker recognition of and easier solution of such issues when they arise in the future.

Note: For more information on the USNCP, its mandate, function, and processes, please reference the [NCP Guide](#).

II. Substance of the Specific Instance

IUF's Submission

On November 18, 2013, the Office of the USNCP received a Specific Instance from the IUF citing inconsistencies with Chapters IV (Human Rights) and V (Labor) of the [Guidelines](#) alleging that between January 5 and April 30, 2013, 162 of the 170 workers employed at three West Bengal warehouses contracted exclusively by PepsiCo were dismissed or compelled to resign solely as a consequence of exercising their right to join a union. IUF stated that the PepsiCo subsidiary in India contracts for warehouse services with the Radhakrishna Food Land Pvt. Ltd. (RKFL), which, in turn, contracts with Weavings Manpower

IUF – PepsiCo, Inc.

Solutions, a closely related company, to provide labor for the warehouses. IUF alleges that PepsiCo has facilitated the violation of workers' rights through this subcontracting relationship.

In its submission, the IUF specifically alleged that:

- Between January 5 and April 30, 2013, 162 out of the 170 workers employed at three West Bengal warehouses exclusively contracted by PepsiCo were dismissed or compelled to resign solely as a consequence of exercising their right to join a union.
- By “double outsourcing” its employment relationship, PepsiCo invited abuses of basic rights of the workers.
- PepsiCo’s contract with RKFL contained no provisions concerning compliance with national and international labor standards, penalties for non-compliance, monitoring or reporting mechanisms or the responsibilities of labor contractors.
- Union members at the warehouses were the subject of harassment, threats and intimidation at the hands of “thugs” brought in by management.
- Union members were dismissed from work for their union activity, and then invited to return to work only on the condition that they renounce their union membership and activities.

IUF requested that the USNCP offer mediation to facilitate a resolution including the re-employment of 28 workers who had refused to renounce their union activity and thus had not been re-employed. They further asked for compensation for the workers and for the establishment of conditions which would guarantee the exercise of the right to form or join a union without fear of reprisal.

PepsiCo Response

In its written response, submitted on January 23, 2014, PepsiCo did not enter into a detailed discussion of the specific allegations contained in the Specific Instance. Rather, the company made three arguments:

- First, PepsiCo argued that in response to the IUF’s allegations, and before the submission of the Specific Instance, the company had gone to great lengths to investigate the allegations. PepsiCo reported that the company had received satisfactory answers to its inquiries of RKFL regarding all of the allegations and that PepsiCo had not been able to substantiate any of the allegations. PepsiCo also reported that audits of RKFL by the India Labor Commissioner in May, 2013 and by Price Waterhouse Cooper in late 2013 unearthed no evidence to support the allegations.
- Second, PepsiCo emphasized that the Specific Instance focused on the alleged actions of its contractor, and not actions by PepsiCo or its subsidiary. PepsiCo stated that regardless of the merit of IUF’s allegations against the contractor, PepsiCo had neither the ability nor the obligation under the Guidelines to require reemployment of the workers dismissed by its contractor. PepsiCo maintained that the workers had been terminated as the result of an illegal strike, as employees had implemented a work stoppage without providing the notice required under Indian law. However, PepsiCo also stated that it had leveraged its relationship with RKFL to secure offers of reemployment for all of the workers referred to in the Specific Instance, including the 28 who have not been reemployed. Given the efforts that PepsiCo had already undertaken, including the leveraging of its relationship with RKFL, to obtain offers of reemployment for the workers, PepsiCo concluded that it had fully complied with its obligations and commitments under the OECD Guidelines, “even if one believes all of the allegations” in the Specific Instance.
- Finally, PepsiCo claimed that the true motivation of the IUF in submitting the Specific Instance was not the redress of violations of the Guidelines, but PepsiCo’s refusal to enter into a formal global “relationship” with IUF. PepsiCo asserted that this was an abuse of the Specific Instance process.

PepsiCo also noted that prior to the submission of the Specific Instance, the IUF publicized the complaint through social media and engaged in intentional “spamming” of PepsiCo executives through an auto-email system, thus harassing its employees and exhibiting bad faith with regard to the confidentiality of the USNCP process.

III. Initial Assessment and Offer of Mediation

The USNCP does not make judgments as to whether parties have or have not violated the Guidelines. As the issues raised by IUF appeared to merit further consideration, despite information PepsiCo had provided noting its efforts to adhere to and promote the Guidelines, the USNCP made a decision to accept the Specific Instance. On February 12, 2014, the USNCP informed both parties of this decision and offered its good offices for mediation with the view that mediation might further dialogue between RKFL and its employees, supported by IUF and PepsiCo.

On March 14, 2014, PepsiCo declined the USNCP's offer of mediation. In declining the offer, the company argued that the remedy sought by the IUF -- reinstatement of the workers with back pay -- was not something PepsiCo could effectuate. The company stated that it had no ability or obligation under the Guidelines to require that a contractor re-employ workers with back pay. PepsiCo emphasized that it had been in extensive dialogue with IUF before the submission of the Specific Instance, and stated that the issues had not changed and PepsiCo saw no likelihood that a mediated solution could be reached. PepsiCo reiterated its concern regarding the motivation of IUF in submitting the Specific Instance. Finally, PepsiCo reiterated its concerns regarding the IUF's respect for the confidentiality of the process, providing a copy of a circular letter IUF had sent to its affiliates which informed them of the submission of the Specific Instance.

In a response to the PepsiCo decision submitted on April 2, 2014, the IUF regretted the decision by PepsiCo and expressed hope that PepsiCo might reconsider. The IUF acknowledged its ongoing and widely known policy of seeking relationships with multinational companies operating in the sectors in which IUF is active in order to resolve issues such as those raised in this Specific Instance. However, IUF stated that its intention with this Specific Instance was not to make its solution contingent on a more general relationship with PepsiCo, but rather to "seek just solutions to specific abuses" raised in the Specific Instance. IUF highlighted the fact that PepsiCo had chosen not to respond in detail to the allegations included in the Specific Instance, and argued that the audits which had been undertaken provided little assurance about the operations of RKFL, particularly given that the Price Waterhouse Cooper audit was not shared with IUF or the USNCP.

On the basis of the PepsiCo decision to decline the offer of mediation, the USNCP issued a Final Statement on May 19, 2014 closing this Specific Instance. That Final Statement is being supplemented by this Statement.

No other NCPs have been involved in this Specific Instance. In accordance with its procedures, throughout this process the USNCP consulted and received input from the U.S. government Interagency Working Group.

Note: Acceptance of a Specific Instance is in no way a determination on the merits of the claims presented in the Specific Instance, but merely an offer to facilitate neutral, third-party mediation or conciliation to assist the parties in voluntarily, confidentially, and in good faith, reaching a cooperative resolution of their concerns.

IV. Acceptance of the Offer of Mediation

Notably, in November, 2015, PepsiCo contacted the USNCP to express interest in exploring the possibility of USNCP-facilitated mediation with IUF. The company informed the USNCP that the parties had engaged in extensive dialogue in an effort to resolve the dispute since the closing of the 2013 Specific Instance. While they had not been able to reach a settlement on their own, both parties hoped mediation might help them to resolve their differences. Seeing both parties come back in good faith to mediate, the USNCP renewed its offer of mediation. Three days of mediation, under the auspices of the Federal Mediation and Conciliation Service, took place in February, 2016. IUF, PepsiCo, and PepsiCo contractor RKFL participated in the mediation. Unfortunately, while the parties showed a desire to reach agreement, they were ultimately unable to bridge their differences.

V. Conclusions and Recommendations

While it was not ultimately possible for the parties to reach an agreement in mediation, the USNCP and the parties were pleased with the impact of this Specific Instance and the dialogue that was fostered. The Specific Instance brought the parties into a conversation which has continued (to date) for two years, and while a consensual resolution to the particular issues of this case has eluded the parties, the USNCP believes that the process did lead to greater understanding of the Guidelines and will result in a quicker recognition of and easier solution of such issues when they arise in the future.

The USNCP commends both parties for their willingness to continue to work to resolve these issues and for their decision to return to the Specific Instance, even after it had been declared concluded, to make an attempt at a mediated solution. Although disappointed by their initial decision not to enter into mediation, the USNCP would like to commend PepsiCo for coming back to the table and attempting to resolve the issues raised in the Specific Instance after initially turning down mediation.

The USNCP notes PepsiCo's actions to improve its responsible business conduct work over the time since the filing of the Specific Instance. PepsiCo reported that since June, 2015 when it launched its [Sustainable Supplier Program](#) to assesses PepsiCo suppliers and contractors against international human rights standards, 1,765 PepsiCo supplier/contractor sites have been added to the program and undergone a preliminary risk assessment. Of those, 1178 sites have completed human rights self-assessments (modeled after the [SEDEX SMETA](#) self-assessment), and 163 have been audited against international human rights standards.

PepsiCo has also engaged an internationally recognized human rights non-governmental organization to provide guidance to further strengthen its policies and programs. The company has shared that it in the process of updating its Human Rights policy and its Supplier Code of Conduct to better communicate PepsiCo's expectation of its suppliers and contractors. The USNCP hopes that PepsiCo's efforts will help promote the Guidelines by ensuring workers in PepsiCo supplier and contractor sites are able to fully exercise their human rights without fear of retaliation.

Issues Raised in this Specific Instance

This Specific Instance raised three important issues on which the USNCP wishes to comment. Specifically:

- the supply chain responsibilities of companies and the use of leverage over suppliers to advance compliance with the Guidelines;
- the value of mediation and the importance of flexibility and open-mindedness in considering mediation; and
- the issue of confidentiality.

Suppliers and Leverage

The Guidelines have this to say about supply chain responsibility:

“If the enterprise identifies a risk of contributing to an adverse impact, then it should take the necessary steps to cease or prevent its contribution and use its leverage to mitigate any remaining impacts to the greatest extent possible. Leverage is considered to exist where the enterprise has the ability to effect change in the wrongful practices of the entity that causes the harm.”

(Commentary on General Principles, p.19)

This supply chain responsibility is further clarified in paragraph 20 of the Commentary on General Principles:

“Meeting the expectation in paragraph A.12 would entail an enterprise, acting alone or in co-operation with other entities, as appropriate, to use its leverage to influence the entity causing the adverse impact to prevent or mitigate that impact.”

From these passages it is clear that enterprises are responsible for their supply chains even while suppliers remain responsible for their own actions. These two separate responsibilities do not contradict each other. The local contractor is responsible for any labor rights violations it commits (Guidelines, General Policies, para 12). However, that does not absolve the company contracting with it from the responsibility to do what it can to keep its supply chain free from such abuses, and ensure such a contracting arrangement does not dilute workers’ access to their rights. The need for due diligence flows from this responsibility.

It is also clear that the enterprise is responsible for using its leverage to prevent or mitigate adverse impacts. Leverage is a complex issue. How much leverage a company may have in any given supplier relationship depends upon all the variables in play in that specific situation. In many cases, a company may not even be aware of the full extent of (or the limits to) its leverage until it attempts to wield that leverage in that particular case. However, the Guidelines also imply that a lack of leverage does not justify inaction.

The Guidelines recognize that there can be practical limitations on the ability of enterprises to effect change in the behavior of their suppliers, related to,

amongst other issues, product characteristics, the number of suppliers and the structure and complexity of the supply chain. Nonetheless, enterprises are expected to influence their suppliers in any way they can, such as through contractual arrangements, voting trusts, and participation in industry-wide collaborative efforts with other enterprises with which they share common suppliers (The OECD Guidelines for Multinational Enterprises, Chapter II, Commentary on General Policies, paragraph 21 and 23). The UNGPs (Guiding Principles on Business and Human rights: Implementing the United Nations “Protect, Respect and Remedy” Framework, p. 22) refer to this as increasing leverage.

PepsiCo maintains it acted consistent with the leverage elements of the OECD Guidelines. PepsiCo also shared that it investigated IUF’s claims against PepsiCo’s contractor RKFL and that its own representatives have spent a significant amount of time interviewing RKFL leaders and reviewing RKFL documentation, both before and after the filing of the Specific Instance. PepsiCo has also stated that it has conducted an additional independent human rights audit – conducted by Intertek – since the original closing of the Specific Instance. PepsiCo used its leverage to secure the participation of RKFL in the mediation process.

Mediation, Flexibility and Openness

Submitters of Specific Instances sometimes make explicit within their initial submission the objectives they have for the Specific Instance and any mediation process which may result. This can be useful, as it helps to define the parameters of the Specific Instance and of any mediation up front. However, such objectives should be seen as a starting point for approaching mediation. Mediation, as a process, looks for mutually agreeable solutions to disputes between the parties. Rarely will mediation result in the starting position of one of the parties being adopted in its totality by the other. It is important for both submitting parties and responding parties to recognize this. A submitter should not start the process by putting a “best and final offer” on the table. Likewise, a responder should not reject the offer of mediation simply because it is unwilling or unable to meet the stated objective of the submitting party. A successful mediation may result in a solution which neither party had imagined before entering the process and which improves the situation of both parties.

Confidentiality

The USNCP does not consider that confidentiality was violated in this case, but wants to take the opportunity to clarify our views on this important requirement. USNCP procedures provide that the parties are expected to strictly respect the confidentiality of all communications during the entire Specific Instance process – from submission of the Specific Instance to the issuance of the Final Statement. The purpose of this confidentiality policy is to facilitate the building of mutual trust, which is an important element for reaching any mediated solution. Similarly, and with the same objective in mind, the USNCP recommends that any “campaigning” be suspended for the duration of the Specific Instance process, especially if mediation is offered.

Most Specific Instances come to the USNCP after the substance of the dispute is already public. That is to be expected, and the USNCP takes no position on communications strategies used by the parties before a Specific Instance is submitted. Likewise, the USNCP has no objection to parties informing the public that a Specific Instance has been submitted, though the USNCP does recommend that parties consider whether such an announcement and the way in which it is made might affect the likelihood of successful mediation, if mediation is offered.

Non-public information learned through the process should not be disseminated publicly, and documents internal to the process should not be made public either during or after the process. After the Specific Instance has concluded, information learned through the Specific Instance process should not be made public.

Recommendations

PepsiCo’s Human Rights Workplace Policy, which was reviewed by the USNCP in connection with this Specific Instance, dates back to 2009 and establishes compliance with local laws and regulations as the minimum standard for PepsiCo activities. In 2011, the OECD Guidelines were updated to incorporate a new chapter on human rights and a new general principle on the need to exercise due diligence to avoid or mitigate negative impacts, notably with respect to the management of supply chains and other business relationships. The USNCP recommends that PepsiCo update its Human Rights Workplace Policy, committing itself explicitly to the Guidelines and incorporating the human rights and labor chapters of the Guidelines as the standard for PepsiCo activities. PepsiCo has informed the USNCP that an update is already underway.

With this Final Statement, the USNCP brings this Specific Instance to a close.

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