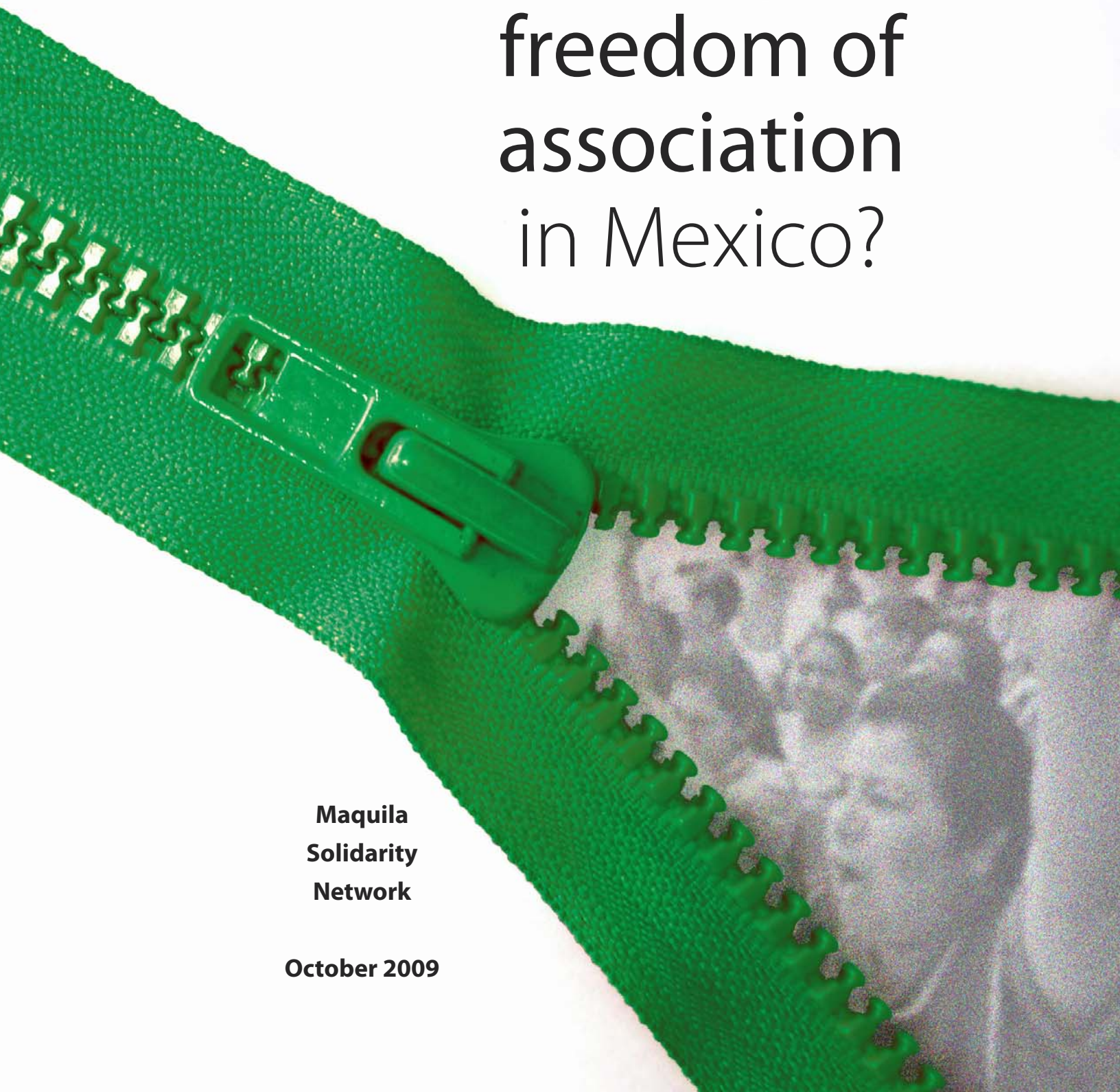
What can brands do to support **freedom of association** in Mexico?



Maquila Solidarity Network

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The Mexico context

Although Mexico's Federal Labour Law is, in general, a progressive piece of legislation, the long-standing relationship of most Mexican trade union organizations with the country's historical ruling political party and the state has made it extremely difficult for workers to exercise their right to form or join a union of their free choice and to bargain collectively with their employer.

Despite the independent union movement's continued push for greater freedom of association (FOA), major obstacles to achieving this right persist, including corruption in Mexican labour institutions and endemic obstruction practices by employers and government.

Furthermore, a number of other structural barriers limit respect for and compliance with the right to freedom of association in Mexico. One major barrier is the composition of the Conciliation and Arbitration Boards (CABs) – responsible for administering the Federal Labour Law – which are made up of representatives of government, employers and "official unions." In practice, this means that in most jurisdictions all three sectors represented on the CABs are united in their opposition to independent unions, which creates conflicts of interest, particularly when adjudicating cases of unfair worker dismissals for supporting independent unions or reviewing applications by independent unions for registrations or title to collective agreements.

Lack of transparency is another major barrier to freedom of association. In most jurisdictions in Mexico, workers are denied access to their collective bargaining agreements and the right to know what union is legally recognized as the representative of a group of workers at a given workplace.

As in many other countries, blacklists are commonly used by employers in Mexico as a way to punish workers who attempt to organize independent unions, as a lesson to other workers, and to prevent the dismissed union supporters from organizing in other workplaces in the future.

Another barrier to freedom of association that is particular to Mexico is the prevalence of "protection contracts," in which official unions or corrupt lawyers who may or may not have a relationship with an official union negotiate collective agreements without the knowledge and/or consent of the workers, but with the complicity of the employer. Sometimes such contracts are negotiated and an initial payment is made to the union before any workers are hired. Protection contracts "protect" employers because they serve to avoid genuine negotiations on wages and working conditions. Mexican labour rights organizations estimate that 80 to 90 percent of collective agreements in Mexico are protection contracts.[1]

International criticisms of protection contracts

Various international bodies have repeatedly drawn attention to the persistent problems that exist with regards to freedom of association in Mexico, including the prevalence of protection contracts.[2]

The US State Department, the International Trade Union Confederation (ITUC) and Human Rights Watch have all recently issued statements on how protection contracts limit freedom of association. All three have been drawing attention to this problem over many years.

The US State Department's most recent (2008) human rights report on Mexico stated: "Credible reports continued to note the use of officially sanctioned protection contracts, which consist of an informal agreement whereby the company pays a monthly sum to the union—which often exists only on paper—in exchange for industrial peace. Workers never democratically chose such unions, and exclusion clauses in these protection contracts gave pro-management unions the right to demand the dismissal of a worker expelled from the union."[3]

The ITUC noted in its 2009 *Annual Survey of Violations of Trade Union Rights: Mexico*: "So-called "employer protection contracts" are continuing… These contracts are fake collective agreements drawn up by the employers and negotiated behind the workers' backs… This is a means of violating trade union rights by preventing real collective bargaining and of preventing workers from exercising the right to strike."[4]

In its 2009 world report, Human Rights Watch observed that "legitimate labour organizing activity continues to be obstructed by collective bargaining agreements negotiated between management and pro-business unions. These agreements often fail to provide worker benefits beyond the minimums mandated by Mexican legislation."[5]

Workers' right to freely associate and bargain collectively – an international norm

The right of workers to freely associate and to bargain collectively concerning the terms and conditions of their employment are key pillars of freedom of association enshrined in and protected by international human rights conventions. Of the two main ILO conventions which pertain to Freedom of Association, *ILO Convention No. 87 on Freedom of Association and Protection of the Right to Organize,* and *ILO Convention No. 98 on the Right to Organize and Collective Bargaining,* Mexico has ratified the former but not the latter.[6] These principles are reflected in the codes of conduct of most leading brands.

While brands should not be expected to replace the role of governments or to judge the legitimacy of any union, they can and should take concrete steps to ensure that workers in their Mexican supplier factories can exercise their rights to freedom of association and collective bargaining.

What can brands do to support freedom of association?

Despite the endemic violations of freedom of association in Mexico, there are proactive steps that brands can and should take to:

- ☐ **encourage respect for freedom of association;**
- ☐ **prevent further violations from taking place; and**
- ☐ **overcome the institutional barriers that prevent workers from exercising their associational rights.**

The following are some of the most important systemic issues that need to be addressed in order to improve FOA in the Mexican context

Brand FOA Check List

- ☐ **Discourage the use of protection contracts**
- ☐ **Promote transparency**
- ☐ **Discourage the use of exclusion clauses**
- ☐ **Respect the right to form temporary coalitions of workers**
- ☐ **Promote secret ballot *recuentos* and a safe voting environment**
- ☐ **Discourage the favouring of one union over another**
- ☐ **Discourage anti-union discrimination and retaliation by management**
- ☐ **Discourage and help eliminate blacklisting**
- ☐ **Promote impartiality in the labour justice system**

1. Protection contracts

In Mexico, protection contracts are a major barrier to freedom of association and the right to bargain collectively. Protection contracts are often used by employers to shield themselves against the possibility of workers joining authentic, independent unions. Although protection contracts are technically legal documents since they have been registered with a Conciliation and Arbitration Board, they lack legitimacy because workers covered by these agreements do not have knowledge of such agreements or input into the negotiation process.

Discourage the Use of Protection Contracts: In order to reduce/prevent the use of protection contracts, brands should communicate to their suppliers that protection contracts are contrary to the basic principles of freedom of association and are therefore strongly discouraged.

Although the Mexican context makes it rare for brands to enter into a relationship with a factory where there is no pre-existing union, if such a situation is presented, brands should:

- ☐ Ensure that the employer informs workers if and when an organization or individual is seeking to negotiate for a first collective agreement; and
- ☐ Make clear to their supplier their expectation that the employer should not enter into such negotiations without the workers' consent nor before workers are hired.

At the public policy level, brands should speak out in favour of changes in government policy and practice to ensure that workers can choose their representatives in a democratic manner, free from employer or government interference.

Promote transparency: The Mexican federal government and the government of the Federal District (Mexico City) make copies of some of the collective bargaining agreements under their jurisdiction available to workers and the public through the internet. In Mexico's 31 states, however, the contracts are not available to workers or to the public in this manner.

Brands should ensure that workers:

- ☐ Have knowledge of and access to their collective bargaining agreements as well as any other written agreements between the employer and the union concerning the terms and conditions of employment;
- ☐ Are informed prior to such negotiations taking place, including the identity of the person/organization that will be negotiating on the workers' behalf; and
- ☐ Are not coerced into signing any documents, or blank sheets of paper that will later be attached to such documents, concerning the terms and conditions of employment, or punished or discriminated against for refusing to sign such documents.

At the public policy level, brands should communicate to the appropriate government authorities and all suppliers the company's belief that freedom of association and the right to bargain collectively cannot exist unless workers and other interested parties have access to information on union registrations and to their collective bargaining agreements, and that your company favours this information being made available through a public registry.

2. Exclusion clauses

Protection contracts sometimes include an "exclusion clause" that prohibits any worker from being employed by the company that is not a member of the union that has title to the collective agreement.

Most unions in Canada and the US would support the concept of a "closed shop" in which all workers in a facility become members of a union once a majority of workers decide to become members of that union. However, in the Mexican context, the presence of an exclusion clause in a protection contract has the perverse effect of allowing employers to fire workers who have been expelled from the union that holds title to the collective bargaining agreement for attempting to form an independent union, even when few if any of the workers support the current union.

Exclusion clauses have also been used as justification for dismissing workers for attempting to form a temporary coalition of workers to negotiate with the employer about specific issues at a particular moment in time.[7]

In April 2001, the Mexican Supreme Court ruled that it is unlawful for an employer to dismiss a worker simply because the worker has been expelled from a union based on the existence of an exclusion clause,[8] however, such clauses continue to be used as a pretext to prevent workers from organizing independent unions or coalitions of workers and to dismiss workers for exercising their associational rights.

Although in Mexico, Supreme Court rulings do not become legal precedent until a number of similar rulings are made, the ruling gives weight to the principle that firing workers for attempting to form or join an alternative worker organization is a violation of freedom of association.

Discourage the use of Exclusion Clauses: In order to reinforce the Supreme Court ruling on exclusion clauses, brands should inform their suppliers that they are aware of the ruling and that the existence of an exclusion clause in a current collective agreement cannot be used as a pretext for firing any workers for attempting to form or join another union or a temporary coalition of workers for the purposes of bargaining collectively about the terms and conditions of their employment.

Respect the right to form temporary coalitions of workers: Brands should make clear to their suppliers that if workers decide to exercise their legal right to form a "temporary coalition of workers" in order to seek solutions to specific problems in the workplace, they expect the employer to respect that decision and negotiate in good faith with the elected worker representatives for a resolution to those problems.

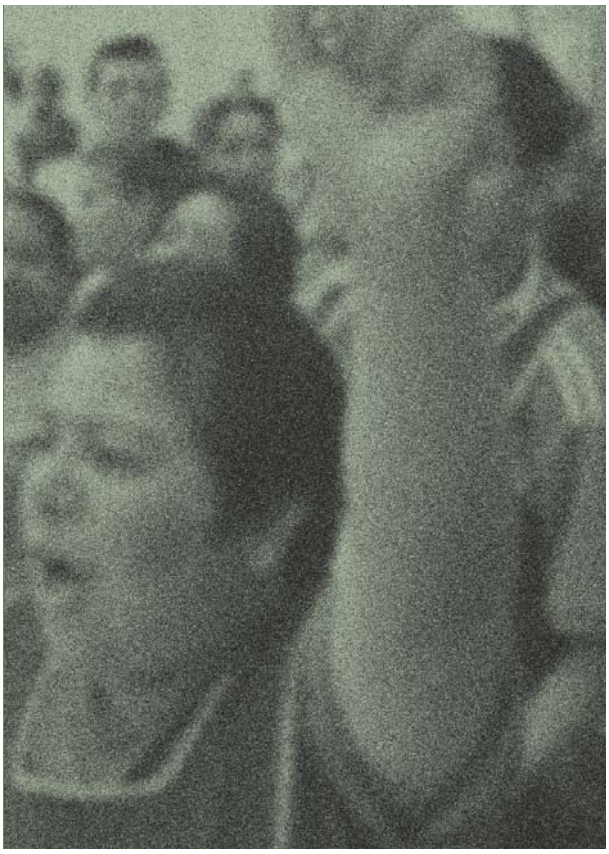
3. Secret ballot votes in *Recuentos*

When one union challenges another for control of the collective bargaining relationship (*titularidad*), Mexican labour authorities are supposed to conduct an election, known as a *recuento*, to determine which union has greater support. In the majority of cases, workers are required to vote publicly in front of labour authorities, the employer, and the incumbent union, which had a chilling effect on the workers' ability to vote freely. A 2008 ruling by Mexico's Supreme Court requiring secret ballot votes in all *recuentos*[9] should strengthen the ability of brands to address this issue.

Promote secret ballot *recuentos* and a safe voting environment: In order to reinforce this Supreme Court ruling, brands should communicate to the appropriate government authorities and to all suppliers that the company is aware of the 2008 Mexican Supreme Court ruling and that they expect their suppliers to respect and comply with this ruling.

In the spirit of the Supreme Court ruling and consistent with various North American Agreement on Labour Cooperation (NAALC) rulings, brands should also communicate to the appropriate government authorities and to all suppliers that *recuentos* should take place in a safe voting environment.

In practice, this would mean that prior to a *recuento* taking place the supplier should inform the relevant unions and labour authorities that it supports a secret ballot vote in a neutral location outside the workplace, free of coercion and intimidation, and under conditions that protect the anonymity of the voters.



4. Favouring one union over another

Employers favouring, and sometimes actively recruiting, official unions or other organizations that do not have the support of the employees are common problems in Mexico.

The benchmarks and guidance documents of the major multi-stakeholder initiatives, as well as the codes of conduct of many individual brands, already prohibit an employer from favouring one union over another, clearly indicating that doing so is a violation of freedom of association.

To discourage favouritism, brands should:

- ☐ Inform suppliers of this company policy and that they are expected to comply with it; and
- ☐ Be prepared to investigate and act on any reliable evidence that a supplier has favoured one union over another.

5. Anti-union discrimination

Anti-union discrimination by employers is commonplace in Mexico. Examples of such discriminatory actions include: threats, intimidation or inducements to discourage workers from forming or joining trade unions of their free choice; any form of discrimination or favouritism based on union membership, union activities or support for a particular union; threats to dismiss workers or close the workplace because of union activities; and encouraging union members or supporters to resign in exchange for severance pay or other benefits.

To discourage anti-union discrimination and retaliation by management in supplier factories, brands should:

- ☐ Communicate to their suppliers their benchmarks and/or guidance documents on employer actions that are considered anti-union discrimination, such as those examples listed above.
- ☐ Require that suppliers maintain complete and accurate records on hiring processes, promotions, transfers, disciplinary action, dismissals and voluntary resignations, including reasons for such actions, in order to ensure that there has been no harassment, discrimination, coercion, favouritism or punishment of workers for union or other organizing activities.
- ☐ Monitor procedures and records to ensure that there is no discrimination based on union activities or association with a union or other worker organization.

In the event that there is evidence that anti-union discrimination has occurred in the hiring process, transfers, disciplinary action, dismissals, or pressure or inducements for workers to resign, brands should:

- ☐ Demand an immediate cessation of such practices; and
- ☐ Ensure that appropriate corrective action be taken, including immediate reinstatement with full back-pay for workers unjustly dismissed or coerced to resign.

6. Blacklisting of workers for union activities

Although often difficult to document, blacklisting of union members or supporters is a very common problem in Mexico. Where blacklisting becomes evident is in hiring processes in which qualified workers who have been involved in union activities at a former workplace are refused employment or are refused job interviews without justification. In some cases, such workers are hired, but dismissed shortly before the end of their probationary period without just cause.

To discourage and help eliminate blacklisting, brands should:

- ☐ Communicate to suppliers that participation in blacklisting of workers based on their actual or suspected union activities or the sharing of lists of union supporters among employers is a violation of their code of conduct as well as Mexican law, and is also a discriminatory labour practice; and
- ☐ Monitor for blacklisting and ensure corrective measures are taken if there is evidence that it has occurred, including cessation of the practice and priority hiring or immediate rehiring of the workers discriminated against.

7. Impartiality in the labour justice system

As noted above, a major roadblock to freedom of association in Mexico is the lack of impartiality in the labour justice system and particularly in the Conciliation and Arbitration Boards, which include representatives of "official unions," governing political parties to which the official unions are affiliated, and employers, all of which have a conflict of interest that prevents them from making fair and impartial decisions when considering applications from independent unions or from worker organizers fired for union activity.

Various NAALC and ILO rulings point to the problem of labour boards blocking or unduly delaying the granting of union *registros* and applications for title to a collective agreement based on minor legal technicalities (what the US NAO called "hyper-technical grounds") or, in many cases, bureaucratic requirements that have no legal weight.

To promote impartiality in the labour justice system, brands should:

Communicate to Mexican federal and state governments and suppliers their support for timely, transparent and impartial decision-making processes concerning

- ☐ union requests for registros;
- ☐ applications for title to collective agreements; and
- ☐ complaints regarding unjust dismissals of worker organizers.

Right to Unionize Guarantee: A Tool to Promote Freedom of Association

The International Textile, Garment and Leather Workers' Federation (ITGLWF) is calling on brands and retailers to encourage or require their suppliers to sign a Right to Unionize Guarantee.

The Guarantee is an agreement signed by the employer to respect the right of all employees to form or join a trade union of their free choice and to bargain collectively without employer interference.

The objective of a Right to Unionize Guarantee is to create a positive climate for freedom of association and collective bargaining. The Guarantee offers workers a commitment that their employer will not retaliate in any way if they choose to exercise their right to freely association and bargain collectively.

Copies of the signed Guarantee must be provided to all current and new employees.

For an example of a Right to Unionize Guarantee, visit: www.maquilasolidarity.org/ROUG

In addition to communicating their expectations to suppliers and government authorities regarding systemic issues, brands should also take the following steps to promote FOA in their supply chains:

Strengthen monitoring on FOA in Mexico

In order to be able to better identify and address the persistent problems particular to the Mexican context, brands should strengthen their own monitoring around FOA in order to identify whether their suppliers are using protection contracts to deny workers their associational rights.

1 Compliance staff or third-party auditors should raise the following questions in interviews with workers and management personnel:

a) Is there a union or individual that holds title to a collective agreement in the factory? Can workers name the union or individual that holds title to the collective bargaining agreement? Did workers have a say in what union/ individual holds title to the collective agreement?

b) Is there evidence that the union holds worker assemblies and/or other meetings? Are workers invited to participate in union activities?

c) Are Worker Commissions established to review and approve any negotiated revisions in wages and/or the CBA and regarding other matters such as profit-sharing, as required by law? How are worker representatives on the Worker Commissions selected?

d) Do workers have access to copies of their collective bargaining agreement?

e) Do workers have access to their union representative? How and under what circumstances (location, frequency, etc.)?

f) Does the CBA contain an exclusion clause? If so, is management aware that, based on the Supreme Court ruling and your company's policy, such a clause can not be used as a pretext for firing workers who try to organize an alternative worker organization?

g) Are workers aware of any negotiations that have taken place regarding additional agreements between union and management (such as *paro tecnico* agreements, redistribution of work week agreements, etc.)? Do workers have access to any and all written agreements established between the two parties? Are workers ever pressured to sign an agreement without being fully informed of what they are signing?

2 Monitors should also look for the following key indicators of the existence of a protection contract when examining company records:

a) Was a first collective agreement negotiated prior to any worker being hired?

b) Is there any evidence of financial payments beyond normal union dues made by the company to the union and/or individual holding title to the collective bargaining agreement?

c) Does the collective bargaining agreement reflect only the company's minimum legal obligations to workers or does it provide for terms and conditions of employment beyond what is legally required?

d) Have there been changes or improvements to the collective bargaining agreement during renegotiations or does each agreement mirror the original?

3 Compliance staff or third-party auditors should examine the following additional factors in reviewing company records and in interviews with workers and management concerning whether the supplier has taken adequate steps to guarantee freedom of association:

a) What training, if any, have workers and/or management personnel received on freedom of association and collective bargaining and by whom?

b) Have there been any attempts to organize an independent union or coalition of workers in the factory, and if so, what has been management's response? Has there been any discrimination, harassment, coercion, favouritism or punishment based on workers' union or other organizing activities?

c) Has any worker been expelled from the union and subsequently fired by management?

d) Has the supplier maintained complete and adequate records on hirings, transfers, disciplinary action, dismissals and voluntary resignations, including reasons for such actions, in order to demonstrate that there has been no harassment, discrimination, coercion, favouritism or punishment of workers for union or other organizing activities?

Demand corrective action

If there is evidence that there has been discrimination in hiring, transfers, disciplinary action or dismissals or pressure or inducements for workers to resign in response to workers' efforts to freely associate and bargain collectively, brands should demand an immediate cessation of such practices and that appropriate corrective action be taken, including immediate reinstatement with full back-pay for workers unjustly dismissed or coerced to resign. Corrective action should also include training for workers and management personnel on freedom of association.

Facilitate training

Due to the lack of communication and knowledge that exists overall in the workplace about Freedom of Association, MSN believes that training for workers and management personnel is essential to begin raising awareness and understanding of international norms, national laws and company policies and expectations.

Brands should facilitate training on freedom of association and collective bargaining, as well as on issues concerning the exercise of associational rights in the Mexican context, for their suppliers, management personnel and workers. Such training should be carried out by credible and independent trade union organizations,[10] labour rights NGOs, or academic institutions of higher learning.

Endnotes

1 Because of the general lack of public/worker access to collective bargaining agreements, it is difficult to estimate the percentage of collective agreements that are protection contracts. However, of those collective agreements that are publicly available, approximately 80% have not been revised in one or more rounds of negotiations since the original agreement was signed, which signals that they are likely protection contracts.

2 For a more detailed description of these problems, see the Solidarity Center Report, *Justice for All: The Struggle for Worker Rights in Mexico,* 2003.
Available at: http://www.solidaritycenter.org/files/SolidarityMexicofinalpdf111703.pdf.

3 US Department of State, *2008 Human Rights Report: Mexico,* available at:
http://www.state.gov/g/drl/rls/hrrpt/2008/wha/119166.htm.

4 International Trade Union Confederation, *2009 Annual Survey of Violations of Trade Union Rights: Mexico.* Available at: http://survey09.ituc-csi.org/survey.php?IDContinent=2&IDCountry=MEX&Lang=EN.

5 *Human Rights Watch World Report, 2009: Mexico.* Available at: http://www.hrw.org/en/node/79216.

6 However, Mexico is obliged to respect both of these core conventions by virtue of its membership in the ILO.

7 In addition to providing for the right of workers to organize trade unions, Mexico's Federal Labour Law also provides for the right of workers to form a "temporary coalition of workers" in order to negotiate with the employer about specific issues over a limited period of time.

8 See Mexican Supreme Court Press Release number 385, *Inconstitucional, La Cláusula de Exclusión en Los Contratos Colectivos de Trabajo: SCJN, México,* D.F., April 17, 2001.

9 Mexican Supreme Court, *La junta de conciliación y arbitraje debe ordenar recuento mediante voto secreto,* September 10, 2008.

10 While this would be challenging in the Mexican context in the short term, there are examples of the global union for garment workers, the ITGLWF, carrying out training in other countries. At some point in the future it might also be possible for a Mexican trade union organization such as the National Union of Workers (UNT) to carry out training in some states.

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