



#1 The Mexican Context

MAQUILA SOLIDARITY NETWORK

DECEMBER 2014

The right of workers to freely associate and the right to bargain collectively concerning the terms and conditions of their employment are fundamental human rights enshrined in International Labour Organization (ILO) conventions and United National (UN) declarations. Of the two main ILO conventions pertaining 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.¹ These fundamental principles are reflected in the codes of conduct of most leading apparel brands.

Although Mexico's Federal Labour Law is, in general, a progressive piece of legislation, the corporatist structure of the Mexican state and the long-standing relationship between most Mexican trade union organizations and the country's historical ruling political party have 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.²

Despite the independent union movement's continued push for greater freedom of association (FOA), major obstacles to achieving this right persist, including **institutional barriers** in

Mexico's labour relations system, **corruption** in Mexican labour institutions (government officials, employers, leaders of "official unions," and lawyers), and **obstructive practices** by employers, federal and state governments and official unions.

A. INSTITUTIONAL BARRIERS TO FREEDOM OF ASSOCIATION

A number of institutional barriers limit respect for and compliance with the right to freedom of association in Mexico. We refer here to four principal barriers.

- Lack of transparency
- Prevalence of "employer protection contracts"
- Composition of the Conciliation and Arbitration Boards (CABs)
- Lack of democracy in union representation elections

What Should Brands Do?

While brands should not be expected to replace the role of governments or to interfere in the internal affairs of unions or in the collective bargaining process, they can and should take concrete steps to ensure that workers in their Mexican supplier factories can exercise their right to freedom of association and collective bargaining.

1. Lack of transparency

Despite recent changes in Mexico's Federal Labour Law that could result in greater transparency on collective bargaining agreements (CBAs),³ the vast majority of Mexican workers continue to be denied access to their CBAs and the right to know what union is legally recognized as the representative of a group of workers at a given workplace.

2. Prevalence of "protection contracts"

Official unions or corrupt lawyers that may or may not have a relationship with an official union sign collective agreements without the knowledge or consent of the affected workers, but with the complicity of the employer. Often such contracts are signed and an initial payment is made

by the employer to the union before any worker is hired. Mexican labour rights organizations estimate that 80 to 90 percent of collective agreements in Mexico are protection contracts.

In February 2009, the International Metalworkers' Federation (IMF), now known as IndustriALL, presented a formal complaint to the ILO Committee on Freedom of Association, alleging that both formal and practical elements of the Mexican labour justice system – including the "widely-used protection contract system" – deny workers their associational rights and allow employers to choose trade unions of their preference, and therefore constitute violations of ILO Convention 87 on Freedom of Association and Protection of the Right to Organize.⁴

80 to 90 percent of collective agreements in Mexico are protection contracts.

Despite the Mexican government's response that no such protection system exists in Mexico, in 2012 the ILO called on Mexico to investigate and report back on questions related to exclusion clauses in such agreements that require the dismissal of workers that have been expelled from or have chosen to leave the union, minimum representativeness of trade unions in order to bargain collectively, and the alleged lack of impartiality of conciliation and arbitration boards.⁵

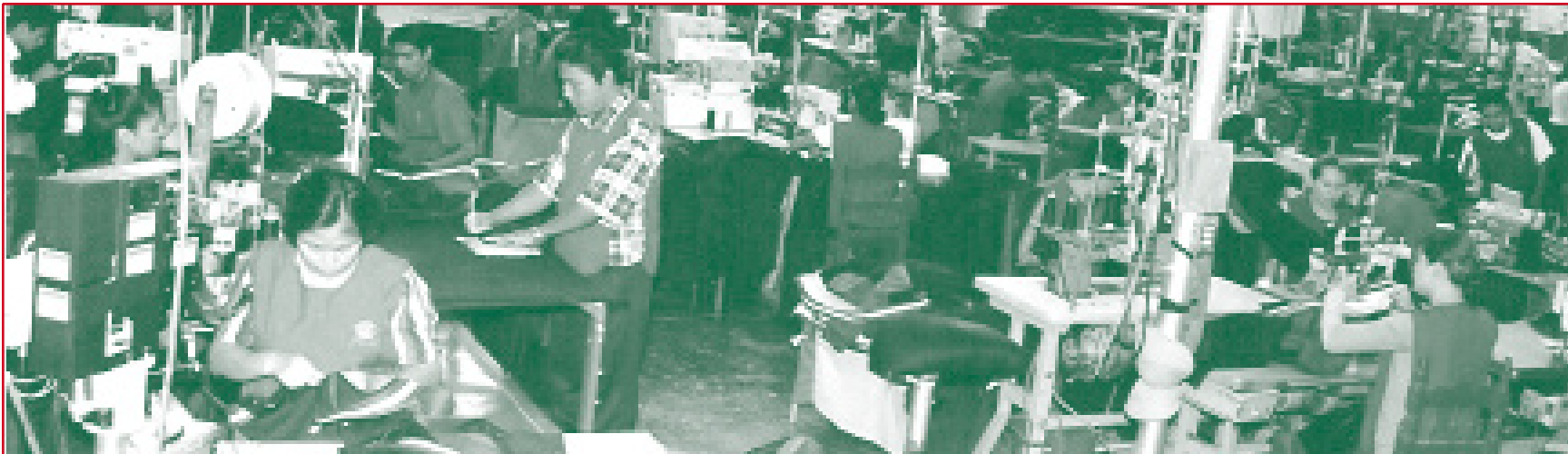
International critiques of Protection Contracts in Mexico

“ ‘Employer protection contracts’ continue to exist. They have been described by the Trade Union Confederation of the Americas (TUCA) as the ‘most grotesque product of the Mexican labour model.’ These ‘protection contracts,’ that is, bogus collective agreements drawn up by the employers and negotiated behind the workers’ backs... constitute a violation of trade union rights, as they prevent any real collective bargaining and the possibility of exercising the right to strike.”

– International Trade Union Confederation, 2010 Annual Survey of Violations of Trade Union Rights: Mexico. Available at: <http://survey.ituc-csi.org/Protection-contracts.html>

“[L]egitimate 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.”

– Human Rights Watch World Report, 2010: Mexico. Available at: <http://www.hrw.org/world-report-2010>



3. Composition of the Conciliation and Arbitration Boards (CABs)

The CABs, which are responsible for administering the Federal Labour Law, 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.

4. Lack of democracy in union representation elections further restricts workers’ ability to be represented by a union of their choice.

When one union challenges another for control of the collective bargaining relation-

ship (*titularidad*), Mexican labour authorities are supposed to conduct a union representation election, known as a *recuento*, to determine which union has greater support. In past *recuentos*, workers were usually 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.⁶

Three rulings of Mexico’s Supreme Court, the first two in 2008⁷ and the third in 2012,⁸ have determined that union representation elections must be held by secret ballot vote in a neutral and secure location based on an updated list of currently employed workers.

As a result of these rulings, secret ballot voting in union representation elections has become more common in recent years, particularly in cases where there is a great deal of public attention to the voting process. However, fraudulent or irregular practices

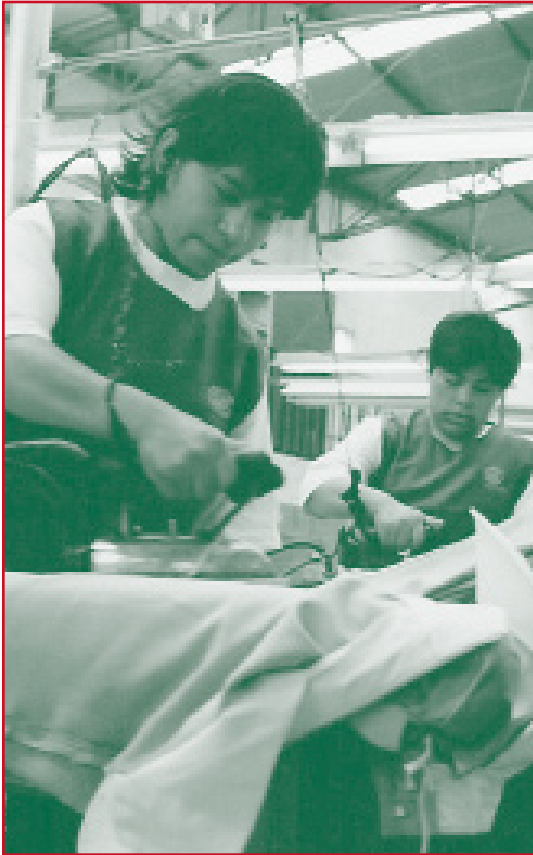
continue to be commonly used to prejudice the results of such elections.

B. COMMON EMPLOYER PRACTICES THAT INHIBIT FREEDOM OF ASSOCIATION

In addition to institutional barriers that restrict FOA in Mexico, employers commonly engage in practices that further impede workers’ right to join or form a union of their free choice and to bargain collectively.

1. Negotiation of Protection Contracts – Impeding Genuine Freedom of Association

The negotiation of protection contracts allows employers to shield themselves against the possibility of workers joining authentic, independent unions. They “protect” the employer because they serve to avoid genuine negotiations on wages and working conditions.



There is a great deal of debate in Mexico about whether protection contracts are legal under Mexico's Federal Labour Law. Some Mexican labour rights experts argue that the signing of a protection contract by an employer without the knowledge or consent of the affected workers is illegal, because the Law prohibits employers from obligating workers through coercion or any other method to affiliate with or resign from a union or other relevant organization.⁹ Others argue that these are legal documents because they have been registered with a Conciliation and Arbitration Board, the appropriate legal body to determine union representation, and because a collective bargaining agreement can lawfully require that only members of the union can be hired by the employer.

Whether or not they are technically legal documents, protection contracts lack legitimacy and impede genuine freedom of association because workers covered by such agreements have no knowledge of their existence or input into their negotiation.

2. Adopting Exclusion Clauses

A related practice that has drawn criticism for denying workers their associational rights is the negotiation of an "exclusion clause" in a collective bargaining agreement. The presence of an exclusion clause in a CBA was used in the past as a justification for dismissing 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 supported the existing 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.¹⁰

In April 2001, the Mexican Supreme Court ruled that the use of an exclusion clause as a justification to dismiss workers who have been expelled from a union is a violation of the Constitution because it infringed upon workers' right to freely associate.¹¹ Changes to the Federal Labour Law in 2012 give this ruling legal weight by prohibiting the use of an exclusion clause to justify the dismissal of workers expelled from or that have chosen to resign from a union. However, exclusion clauses requiring that only members of the union holding title to the collective bargaining agreement be hired are still considered legal.¹²

Despite the changes in the law, in practice both types of exclusion clauses continue to exist in many CBAs and therefore might be used by employers as a pretext to dismiss workers for their organizational activities.

3. 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 continues to be a common practice in Mexico.

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

4. 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.

5. Blacklisting Workers for Union Activities

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.

Blacklisting of union members or supporters is often difficult to document. 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.



The **Freedom of Association in Mexico Toolkit** sets out how brands can strengthen their FOA policies, auditing procedures and corrective action plans, as well as communication with vendors, suppliers and licensees on those policies and expectations. The Toolkit includes four tools:

1. ***The Mexican Context***
2. ***What Brands Can Do to Ensure Respect for Freedom of Association***
3. ***Auditing Checklist***
4. ***FOA Progress Chart***

The Mexico Toolkit is available at www.en.maquilasolidarity.org/node/969

ENDNOTES

¹ However, since the adoption of the ILO's Fundamental Principles and Rights at Work, Mexico is obliged to respect both of these core conventions by virtue of its membership in the ILO.

² References to the Mexico Federal Labour Law in this document correspond to the reformed text passed by Congress November 30, 2012 – <http://www.diputados.gob.mx/LeyesBiblio/pdf/125.pdf>

³ Article 391 Bis, Mexico Federal Labour Law: "Las JCA harán pública, para consulta de cualquier persona, la información de los CCT que se encuentren depositados ante las mismas...deberán expedir copias de dichos documentos...; de preferencia el texto íntegro de las versiones públicas de los CCT deberá estar disponible en forma gratuita en los sitios de internet de las Juntas de Conciliación y Arbitraje."

⁴ Information on the International Metalworkers' Federation Complaint of Violations to Convention 87 on Freedom of Association and Protection of the Right to Organize is available at:

http://www.ilo.org/dyn/normlex/en/f?p=1000:50001:0::NO:50001:P50001_COMPLAINT_FILE_ID:2897749

⁵ 364th report of ILO Committee on Freedom of Association. Available at:

http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_183430.pdf

⁶ There have been numerous publicly documented cases in which thugs have been brought in prior to or during *recuentos* to intimidate workers.

⁷ *Recuento para determinar la titularidad del contrato colectivo de trabajo. Las juntas de conciliación y arbitraje deben ordenar y garantizar que en su desahogo los trabajadores emitan voto personal, libre, directo y secreto (2008); Titularidad del contrato colectivo de trabajo. Condiciones en que se debe efectuar el recuento para garantizar la libertad sindical (2008).*

⁸ *Recuento previsto en la Artículo 931 de la Ley Federal del Trabajo. Cuando se ofrece como prueba para determinar la titularidad del contrato colectivo de trabajo, las juntas de conciliación y arbitraje pueden señalar para su desahogo el domicilio de la empresa donde los trabajadores prestan sus servicios, siempre y cuando no haya objeción fundada de alguno de los sindicatos en conflicto (2012).*

⁹ De Buen Unna, Carlos, "Los contratos colectivos de trabajo de protección patronal en México," Friedrich Ebert Stiftung, agosto 2011, p 10.

http://www.fesmex.org/common/Documentos/Ponencias/Paper_AP_los_ccpp_Carlos_DeBuen_Ago2011.pdf

¹⁰ In addition to providing for the right of workers to organize trade unions, articles 354 and 355 of Mexico's Federal Labour Law provide for the right of workers to form temporary coalitions of workers in order to negotiate with the employer about specific issues over a limited period of time.

¹¹ Supreme Court Press Release #385, *Inconstitucional, La Cláusula de Exclusión en Los Contratos Colectivos de Trabajo: SCJN, México, D.F.*, 17 abril 2001. To view the media release in Spanish, go to: <http://www2.scjn.gob.mx/red2/comunicados/> then type in the number of the release (385), the date (abril, 2001), and the title (Inconstitucional, La Cláusula de Exclusión en Los Contratos Colectivos de Trabajo).

¹² Article 395, Mexico Federal Labour Law: <http://info4.juridicas.unam.mx/juslab/leylab/123/399.htm>