



WORKER RIGHTS CONSORTIUM

**WRC INVESTIGATION
Re: COMPLAINT AGAINST KUKDONG (MEXICO)
REPORT AND RECOMMENDATIONS
June 20, 2001**

**5 Thomas Circle NW, 5th Floor
Washington, DC 20005
Phone: 202.387.4884
Fax: 202.387.3292
wrc@workersrights.org
www.workersrights.org**

CONTENTS

I. EXECUTIVE SUMMARY OF REPORT AND RECOMMENDATIONS

Findings of Fact and Compliance

- a. Findings of Fact**
 - b. Findings of Compliance or Non-Compliance with Codes and Law**
- Recommendations for Remedial Actions by Licensees, Contractor and Union**

II. FULL REPORT AND RECOMMENDATIONS

Introduction

The Scope and Methodology of this Investigation

The Purposes of this Report

The Complaints Against Kukdong

The WRC Investigation

- a. Members of the WRC Fact-Finding Delegation**
- b. Methods of Investigation**
- c. Sources of Evidence**

Findings of Fact and Compliance or Non-Compliance with Codes and Law

- a. The Collective Bargaining Relationship between Kukdong and the CROC**
- b. The January 3rd Discharge of Five Workers**
- c. Refusal to Reinstatement Participants in the Work Stoppage**
- d. The Reinstatement Process After January 24th**
- e. Physical and Verbal Abuse**
- f. Minimum Wage**
- g. Prevailing Wage**
- h. Living Wage**
- i. Child Labor**
- j. Maternity Leave and Sick Leave**
- k. Breakfast and Lunch**
- l. Drinking Water and Bathroom Facilities**

Assessment of Remediation Efforts to Date

- a. Assessment of Efforts to Achieve Full Reinstatement**
- b. Assessment of Remediation of Substandard Wages, Benefits and Conditions**
- c. Assuring Workers the Freedom to Choose their own Representative**
- d. Nike Remediation Plan**

Recommendations

- a. Reinstatement**
- b. Wages, Benefits and Working Conditions**
- c. Mechanisms of Internal and External Accountability**
- d. Workers' Free Choice of Bargaining Representative**
- e. Continuing Economic Relationship between Licensees and Contractor**

I. EXECUTIVE SUMMARY OF REPORT AND RECOMMENDATIONS

This report on the Kukdong factory in Atlixco, Mexico is the second and more comprehensive of two reports issued by the Worker Rights Consortium (WRC) in its ongoing investigation of alleged violations of labor rights at that facility. The Kukdong factory (officially “Kukdong International México S.A. de C.V,” hereafter “Kukdong”) produces apparel that bears the names and logos of several WRC-affiliated universities. This apparel is produced for Nike under licensing arrangements between Nike and those universities. Kukdong also produces apparel for Reebok.

Kukdong workers filed complaints with the WRC in January 2001, following Kukdong’s alleged discharge of five workers who asserted several workplace grievances, and following Kukdong’s alleged failure to reinstate hundreds of workers who participated in a work stoppage protesting that discharge and other matters. This report is based on a field investigation conducted by a WRC panel of seven experts on Mexican and international labor law, labor relations, social-science methods, and human rights, with follow-up research by both U.S. and Mexico-based investigators. The members of the panel are enumerated and the panel’s methods of investigation are comprehensively explained in the full report that follows this executive summary.

Findings of Fact and Compliance or Non-Compliance with University and WRC Codes

The WRC Panel of Investigation made findings of fact on evidentiary points only when corroborated by several, credible eyewitnesses and by accurate documentary evidence, using methods of investigation fully described in the full report attached to this executive summary. The full report also provides detailed analysis of the evidence pertaining to each finding of fact capsulated here. On points of fact seriously contested by any party, the full report recounts evidence weighing for and against each finding.

The following findings recount activities and circumstances that constitute non-compliance with university codes. The panel concludes that there were several serious instances of non-compliance and that the contractor and licensee have not, in some cases, fully remediated the non-compliance.

At the same time, the panel wishes to report that there has been substantial remedial progress at Kukdong – including the reinstatement of many workers who participated in the January work stoppage and improvements in other areas where code violations were identified by the WRC investigation.

The analysis of evidence presented in the full report provides a detailed account of both the positive steps that have been taken by Kukdong, Nike, and Reebok toward remediation at Kukdong and the limitations of those measures. Those parties undertook significant constructive steps in initially permitting the WRC panel to enter the factory and to interview Kukdong managers and officers of the Revolutionary Confederation of

Workers and Peasants (Confederación Revolucionario de Obreros y Campesinos), the incumbent union at Kukdong. Without such access, the WRC panel could not have undertaken such an extensive and balanced investigation.

Subsequent to the release of the WRC's first report on the Kukdong complaint, Nike and Reebok undertook significant constructive intervention at Kukdong, urging the reinstatement of workers and other remedial action. Kukdong management has since taken major strides toward reinstatement and achieved significant improvements in other areas where violations of college and university codes of conduct were identified. Of particular importance, Kukdong has taken some steps to begin to create the conditions for a free and fair election that would allow workers to choose between the incumbent labor union and an alternative. Remediation at Kukdong has been partial and is insufficient in important areas – due to the initial reluctance of the licensees to intervene aggressively, the particularly difficult obstacles created by the actions of the incumbent union, and other factors. Serious problems remain and further action by both the licensees and Kukdong management is essential to attain compliance with college and university codes of conduct and to ensure that a free and fair union election process can take place at the factory. However, colleges and universities should be strongly encouraged by the substantial progress that has been made and by the potential for further remediation – and by the effective role that colleges and universities themselves played in encouraging the licensees to take remedial action. The remedial progress made by Kukdong and the constructive intervention by licensees represent important advances toward greater respect for worker rights – both in the specific case of Kukdong and as precedents for action in future situations.

a. Findings of Fact

1. In December 1999, Kukdong signed a collective employment contract with the Puebla affiliate of the nationwide Revolutionary Confederation of Workers and Peasants or “CROC” (The Puebla affiliate is generally known as the FROC-CROC; however the local union at Kukdong is referred to throughout this report simply as “the CROC.”) The CROC did not have the support of a majority of Kukdong workers at the time the Kukdong-CROC contract was signed or at any time thereafter. The Kukdong-CROC collective bargaining relationship and collective contract afforded Kukdong workers no wages or benefits or other entitlements beyond those already mandated by Mexican legislation. The CROC has not performed the most basic functions expected of a legitimate collective bargaining representative. To the contrary, the CROC has engaged in a pattern of threats and coercion against workers who did not support the CROC. Kukdong has acquiesced or participated in certain instances of the CROC's wrongful activities.

2. On January 3, 2001, Kukdong managers discharged five workers in retaliation for their activities asserting workplace grievances and taking steps toward the replacement of the CROC with an independent union. Apart from the harm to those five workers, the discharges threatened to chill the presentation of grievances and organizing activities by other Kukdong workers.

3. A large majority of the Kukdong workforce initiated a work stoppage on January 9, 2001, in protest against the January 3rd discharges. After a violent police action ended the Kukdong work stoppage and protests on January 11th, agents of Kukdong and the CROC denied or impeded the reinstatement of hundreds of workers who were willing to return to work but who were identified as participants in the stoppage and protests. Agents of Kukdong and the CROC coercively required many workers to sign pledges of loyalty to the CROC as a precondition to reinstatement; coercively induced some workers to sign letters of resignation; cancelled the accrued seniority rights of returning workers; threatened that reinstated workers would face greater workloads; threatened cutbacks in production if workers opposed the CROC; and required that returning workers not speak among themselves and not speak ill of the company.

Prior to mid-February, Kukdong continued to deny reinstatement to many workers who participated in the stoppage and to impose penalties and/or conditions on many of those workers who were allowed to return. Since mid-February, under constructive pressure by Nike and Reebok, Kukdong has largely, though not fully, ended this practice – and the majority of workers who participated in the stoppage have now been reinstated. However, a substantial number of workers were not reinstated; and some reinstated workers have been subjected to penalties and preconditions, which have not been remedied. A comprehensive, fully effective, and cooperative program of outreach to idled workers, repeatedly urged by the WRC, was not implemented by the contractor and licensees.

4. Kukdong supervisors and security personnel have committed acts of physical and verbal abuse against workers.

5. The wages paid by Kukdong to some garment sewers are below the legal minimum professional wage for garment sewers promulgated by the Mexican federal government's National Commission on Minimum Wages (Comisión Nacional de los Salarios Mínimos).

6. The wages paid by Kukdong are below the prevailing wage for apparel workers elsewhere in the State of Puebla and throughout Mexico, as calculated by Mexico's National Institute of Statistics and Geography and independent economists of the Autonomous University of Puebla (Benemérita Universidad Autónoma de Puebla).

7. The wages paid by Kukdong to many production workers are insufficient to meet the needs for food, clothing, and shelter of a household with either two or three members.

8. There is insufficient evidence to conclude that Kukdong currently hires workers below the age of sixteen. Kukdong has in the past employed some children aged thirteen through fifteen for workdays of ten hours.

9. Kukdong failed in some instances to afford workers maternity leave and sick leave.

10. When Kukdong recruited new workers, Kukdong agents promised that workers' compensation and benefit package would include reasonable, edible lunches and breakfasts. This was a substantial promise, on which many impoverished worker-recruitees relied. Kukdong failed to provide reasonable, edible lunches and breakfasts.

11. Kukdong occasionally failed to provide potable drinking water, failed to provide bathroom facilities with running water, failed to provide clean bathroom facilities, gave workers insufficient opportunities to use those facilities, and denied access to the facilities altogether as an instrument of disciplinary punishment.

b. Findings of Compliance or Non-Compliance with Codes and Law

Based on the above findings of fact, the panel finds that the contractor and licensees failed to comply with the following provisions of university codes, the WRC model code, international law, and Mexican law, as set forth point-by-point in the full report attached to this executive summary:

1. Imposition of a bargaining representative and a collective contract without the consent of workers violates workers' freedom of association under international law (International Labor Organization Declaration of Fundamental Principles and Rights at Work of 1998, ILO Conventions 87, 98, 154) and Mexican law (Federal Labor Law Articles 357-58, 373, 389, 391). Such actions therefore constitute non-compliance with those provisions of university codes and the WRC model code that require licensees and contractors to respect international and domestic law, and those provisions of the codes that independently require licensees and contractors to respect workers' right of association.

2. Discharges of workers in retaliation against union activity, and attempts to chill the union activity of remaining workers, constitute violations of workers' right of association and their right to be free of discrimination based on their exercise or non-exercise of their right to engage in union activity, under international law (ILO Declaration of Fundamental Principles and Rights at Work of 1998, ILO Convention 87, 98, 154) and Mexican law (Mexican Constitution Articles 9, 123; Federal Labor Law Articles 354, 355). Such actions therefore constitute non-compliance with those provisions of university codes and the WRC model code that require licensees and contractors to respect international and domestic law, and those provisions of the codes that independently require licensees and contractors to respect workers' right of association and to refrain from discrimination based on workers' union activity.

3. Failure to reinstate workers based on their submission of grievances and participation in strike activities violates workers' freedom of association and their right to be free of discrimination based on union activity under international law (ILO Declaration of Fundamental Principles and Rights at Work of 1998, ILO Conventions 87,

98, 154) and Mexican law (Mexican Constitution Articles 9, 123; Mexican Federal Labor Law Articles 354, 355). Such actions also violate the terms of a legally binding agreement signed on January 13, 2001, by Kukdong under the auspices of the Conciliation and Arbitration Board of Puebla (Junta de Conciliación y Arbitraje), thereby violating Mexican law. Such actions therefore constitute non-compliance with those provisions of university codes and the WRC model code that require licensees and contractors to respect international and domestic law, and those provisions of the codes that independently require licensees and contractors to respect workers' right of association and to refrain from discrimination based on workers' union activity.

4. Physical assault against workers constitutes violations of basic Mexican civil and criminal law and international law. Such action therefore constitutes noncompliance with those provisions of university codes and the WRC model code requiring licensees and contractors to respect international and domestic law, and those provisions of university codes and the WRC model code independently requiring licensees and contractors to refrain from physical abuse of workers. Verbal abuse also constitutes non-compliance with those provisions of the codes that require licensees and contractors to refrain from all forms of physical and verbal abuse and to respect the dignity of workers.

5. Minimum wage levels promulgated by the National Commission on Minimum Wages are legally binding minimum wages under Mexican law. Wages below that minimum (whether the general minimum or, as in this case, the professional minimum wage for garment sewers) constitute violations of international labor law (ILO Convention 131) and Mexican law (Federal Labor Law Articles 85, 95 et seq.). The payment of sub-minimum wages therefore constitutes noncompliance with those provisions of university codes and the WRC model code requiring licensees and contractors to respect international and domestic law, and those provisions of the codes independently requiring licensees and contractors to pay minimum wages. Nike has challenged the finding that Kukdong is in violation of the minimum wage law – a finding reached both by the WRC in its initial report on Kukdong and by Verité, investigating on behalf of Nike and Reebok. Nike acknowledges that a significant number of workers at Kukdong were paid less than the professional minimum, but argues that these workers were not eligible for the professional minimum, either because they were general workers rather than sewing operators or because they were trainees. However, a review of both the relevant provisions of Mexican federal labor law and the cases of individual workers substantiates the WRC's and Verité's conclusion that Kukdong has paid some workers less than the professional minimum despite these workers' being legally qualified to earn this wage.

6. Payment of wages below the prevailing wage constitutes non-compliance with those provisions of university codes and the WRC Code requiring that contractors and licensees ensure that workers are paid prevailing wages. Prevailing wage, for these purposes, is defined as the median wage earned by workers who are similarly situated, both geographically and occupationally – i.e. workers in the apparel industry elsewhere in the State of Puebla and throughout Mexico.

7. Wages that do not meet the needs for food, clothing and shelter of a small household fail to comply with those provisions of some university codes and the WRC model code requiring that licensees and contractors ensure that workers are paid a living wage. However, in the absence of a workable and recognized standard for calculating a living wage on a country-by-country basis, the WRC regards this conclusion as preliminary.

8. The employment of children below the age of sixteen for workdays of more than six hours violates Mexican law (Mexican Constitution Article 123(A)(III) and Federal Labor Law Article 177). Such employment therefore constitutes non-compliance with those provisions of university codes and the WRC model code requiring licensees and contractors to comply with domestic law, and those provisions of the codes requiring licensees and contractors to refrain from hiring child labor below the age of sixteen. As noted, the investigate team found that Kukdong had employed child labor in violation of Mexican law in the past but did not find sufficient evidence to conclude that this problem persisted.

9. Mexican law and ILO declarations and conventions require employers to provide extensive maternity leave, pay maternity benefits, and re-assign pregnant women to lighter work. (Federal Labor Law Articles 165 – 172; ILO Convention 183). Failure to do so therefore constitutes non-compliance with those provisions of university codes and the WRC model code that require licensees and contractors to respect domestic law and those provisions of the codes that require licensees and contractors to provide maternity leave and to refrain from gender discrimination. Mexican law also requires employers to provide sick leave, benefits, and, in enterprises with more than 300 employees, adequate medical facilities on-site or, by collective agreement, off-site. (Federal Labor Law Article 504). Failure to do so therefore constitutes non-compliance with those provisions of university code and the WRC model code that require licensees and contractors to respect domestic law and those provisions of the codes that require licensees and contractors to provide sick leave.

10. Failure to provide promised benefits (in this case, substantial, edible breakfasts and lunches) constitutes breach of contract, non-payment, and misrepresentation under Mexican civil law. Such action therefore constitutes non-compliance with those provisions of university codes and the WRC model code that require licensees and contractors to respect domestic law and those provisions of the codes that require licensees and contractors to ensure payment of accrued wages and benefits.

11. Failure to provide adequate drinking water and bathroom facilities constitutes noncompliance with those provisions of university codes and the WRC model code requiring that licensees and contractors ensure that workers have access to sufficient drinking water and sanitary bathroom facilities.

c. Recommendation for Remedial Actions by Licensees, Contractor, and Union; and Remediation Accomplished Since the WRC's First Report

The following list summarizes the WRC Investigative Panel's recommendations for remedial actions by licensees, the contractor, the incumbent union, the affected workers, and various labor-rights and human rights organizations based in Mexico and in the United States. Accompanying each recommendation is a description of any remedial action that has been undertaken since the WRC's first Kukdong report was released at the end of January.

1. *Reinstatement.* Since the WRC's initial report urging a number of steps to facilitate the return of workers who participated in the work stoppage, substantial progress toward reinstatement has occurred. Roughly two-thirds of workers who participated in the stoppage have been able to return to their jobs, including two of the five worker-leaders fired on January 3rd. Some workers have not been able to return, in some cases because of intimidation by the CROC or representatives of the Kukdong management, particularly in the weeks immediately after the end of the work stoppage. Some workers who did return were subjected to penalties and/or conditions upon their return and/or were subsequently subjected to discriminatory treatment. Fuller reinstatement could have been achieved if the licensees and Kukdong had supported the aggressive, collaborative program of community outreach recommended by the WRC in its first report – involving the licensees, the Kukdong management, worker-leaders, and community advocates trusted by the Kukdong workers.

Recommendation: While the prospects for further reinstatement at this point are limited, such an aggressive, collaborative program of outreach can still produce positive results and the WRC recommends that such an effort be undertaken. This is particularly important in ensuring that if and when a union election is held at Kukdong, as many of the members of the pre-stoppage workforce as possible are able to participate. Kukdong should also cease any discriminatory treatment of workers based on their participation in the work stoppage and refrain from imposing any penalties or conditions on any workers who return in the future. One of the five worker-leaders fired on January 3rd has been seeking reinstatement and has been refused. The Kukdong management should reinstate this worker immediately.

2. *Wages.* Kukdong has raised its lowest wage from 38 pesos per day to 43 pesos (this increase was implemented in January) and has raised the wage of the majority of sewing operators to 48 pesos per day or more. However, this did not bring all eligible workers to the level of the legally mandated professional minimum – interviews conducted in February, March, April and May indicated that there were still some sewing operators earning 43 pesos per day, which is below the professional minimum for sewing operators in this region of Mexico in 2001. In addition, the median wage at Kukdong, now 48 pesos per day, remains below the prevailing industry wage.

Recommendation: Kukdong should immediately raise wages for any sewing operators currently being paid less than Mexico's legal professional minimum – 46.3

pesos per day. Kukdong should implement additional, more general increases to ensure that its wages are consistent, overall, with the prevailing industry wage in the Puebla region. Longer term, Kukdong should strive toward the ultimate goal of paying wages sufficient to meet the basic needs of Kukdong workers and their households. To the extent that progress toward meeting the prevailing wage and/or living wage standard requires further data-collection and analysis, Kukdong, Nike, and Reebok should join a cooperative effort with the WRC and rigorous local researchers (including the research team of Professor Huberto Juárez of the Autonomous University of Puebla which has already made substantial progress in the relevant data-collection and analysis). Nike and Reebok must recognize their responsibility to negotiate supply-chain contracts, including prices paid to Kukdong, that ensure Kukdong's capacity to pay these recommended wage increases.

3. *Physical and Verbal Abuse.* Physical abuse appears to have ceased as a means of discipline on Kukdong's production lines; however verbal abuse remains a significant problem.

Recommendation: Kukdong should adopt and enforce a zero-tolerance policy toward physical and verbal abuse of workers by supervisors and managers, including immediate and effective discipline of supervisors and managers who engage in any such abusive activities.

4. *Maternity and Sick Leave and Benefits.* There appear to have been no improvements with respect to Kukdong's failure to grant sick leave and maternity leave.

Recommendation: Kukdong should provide maternity and sick leave and benefits as required by Mexican law, and should implement internal and external controls adequate to safeguard against all forms of gender discrimination, including pregnancy-based discrimination and sexual harassment. Kukdong should maintain records of every reported pregnancy, sickness, leave, and benefit in personnel files accessible for purposes of the internal and external accountability set forth below in Recommendation 8, with requirements of confidentiality to protect the affected workers' right to privacy and dignity.

5. *Breakfast and Lunch Benefits.* There have been significant improvements in the lunches served at Kukdong since the WRC issued its first report. Problems with spoiled food appear to have been corrected and variety has increased. In addition, a new and improved cafeteria facility has been completed, and a portion of the Kukdong workforce is assigned to use this better, more modern facility – others still use the old facility. However, there has not been improvement with respect to the nature of breakfasts available to the Kukdong workers, which still consist exclusively of bread and coffee, and are not the full breakfasts that workers expected based on representations made by Kukdong at the time workers were recruited.

Recommendation: Kukdong should provide full and healthful breakfast and lunch to workers.

6. *Drinking Water and Bathroom Facilities.* There have been improvements with respect to the availability of sanitary bathroom and drinking water facilities and

Kukdong management appears to have curtailed or ceased the practice of limiting access to these facilities as a form of discipline.

Recommendation: Kukdong should ensure that healthful drinking water is always available to workers, that drinking stations are provided at each line of production, and that bathroom facilities are sanitary in all respects. Kukdong should refrain from policing and surveillance of workers making use of those facilities and should not take any other actions impairing the dignity of workers making use of those facilities. Kukdong should adopt and enforce a zero-tolerance policy toward supervisors and managers who deny access to drinking water or bathroom facilities as a disciplinary tool, including immediate and effective discipline of supervisors and managers who engage in any such activities.

7. *Child Labor.* As noted above, the investigative panel did not find sufficient evidence to conclude that Kukdong presently employs underage workers in violation of Mexican law and university codes of conduct. However, given that problems in this area have occurred in the past, Kukdong should implement the following:

Recommendation: Kukdong should not employ workers under the age of sixteen unless parental consent is provided. Such workers should in no case be employed for more than six hours per day and Kukdong should meet all other relevant requirements stipulated in Mexican law. Kukdong should employ no workers under the age of fourteen. Kukdong and its agents should not advise or coach applicants to misrepresent their age for purposes of evading these rules. Kukdong should require workers to submit official school documents, preferably with photographs, indicating the workers' ages, and should keep copies of those documents in personnel files for internal and external accountability. If workers are unable to provide such documents, it is Kukdong's responsibility to inquire at relevant schools and retrieve those documents or equally reliable information about the applicant's age.

8. *Mechanism of Internal and External Accountability.*

Recommendation: Compliance with the above recommendations and with all other applicable rules of Mexican law, international law, and university and WRC codes must be assured by mechanisms of internal and external accountability that maximize the participation of the workers whose rights are to be safeguarded. There is no pre-fabricated template for such mechanisms. By their nature, the development of such mechanisms must be rooted in the organization and efforts of "change agents" within the factory and its immediate institutional environment, particularly Kukdong workers, their advocates, and allied local organizations.

While Kukdong managers have a responsibility to implement the recommendations made by this report under conditions of transparency and accountability "from above," this must be combined with the capacity of the workforce itself to continuously provide accountability based on their own observation and participatory fact-finding. Any mechanism of accountability, if it is to be both effective and lasting, must be suited to the firm's organizational culture, logistical and technological characteristics, and production routines. The actors with both the incentive to safeguard labor rights in the factory and the greatest practical knowledge of these organizational features are the workers themselves.

Hence, such mechanisms of accountability should be designed and implemented

through good faith negotiations between Kukdong and the legitimate bargaining representatives chosen by the majority vote of the workforce pursuant to Recommendation 12 below.

External accountability provided by local labor-rights organizations and advocates is necessary to reinforce and safeguard the exercise of workers' accountability from below. The negotiated mechanism of external accountability should not by-pass or supplant the public agencies of labor-law enforcement, such as the Conciliation and Arbitration Board, but should instead seek to strengthen the capacity and integrity of such agencies.

9. *Oversight and Assistance in the Process of Collective Negotiation.*

Recommendation: The negotiation about participatory mechanisms of internal and external accountability – set forth in Recommendation 8 – should itself be subject to oversight, assistance, and, if necessary, mediation and arbitration. This negotiation should occur by means of the remedial program proposed by the WRC in its first report – that is, a comprehensive ongoing program of remediation, in which Kukdong, Nike and Reebok engage constructively with U.S.-based monitoring and labor rights organizations – including the WRC, the Fair Labor Association (FLA), and the International Labor Rights Fund (ILRF) – and local worker-rights organizations and advocates. This program should assist the parties engaged in the recommended negotiations by, among other support activities, providing information about the “best-practices” in the design and implementation of participatory mechanisms of accountability at similarly situated factories.

10. *Free Association and Speech Prior to a Union Election.* Kukdong management has taken significant steps to provide greater protection for Kukdong workers' right of association and to begin to establish the conditions for a free and fair election. However, in view of past events and the CROC's ongoing use of tactics of intimidation and coercion, in some cases with the collusion of Kukdong security personnel, these steps are not yet sufficient.

Recommendation: Kukdong and other parties should take proactive steps to ensure free communication and deliberation among the workforce regarding their choice of bargaining representative, prior to a fair secret ballot election. Kukdong managers must remain neutral toward workers' organizing activities in support of alternative bargaining representatives; and must vigorously protect workers against intimidation by agents or advocates of any bargaining representative. Until an election is held, Kukdong must strictly limit the CROC's access to the factory and the workers during working time. It is crucial that the CROC's access to the factory not be used for purposes of preferential campaigning through persuasion or intimidation. More specifically, Kukdong must ensure that the CROC's activities in the factory are limited to bona fide administration of the collective contract. In the past, the CROC's acts of bona fide contract-administration have been minimal. Kukdong must not permit the CROC to increase the frequency or scope of those activities prior to an election. If Kukdong managers allow one union to hold campaign meetings and make speeches to an audience gathered on company property, whether during work time or not, then Kukdong must give the same opportunities to other bona fide unions competing for the workers' votes.

Kukdong must not prohibit small-group discussions among workers outside the presence of managers and officials of the CROC and must not place any unjustified constraints on workers' mobility and interaction at the facility during lunch and other breaks, before and after work, and during work time so long as production is not significantly impaired or so long as Kukdong in the past has allowed workers to talk in the same fashion among themselves during working time about matters other than production.

Kukdong must adopt a zero-tolerance policy toward any company personnel who participate in efforts to intimidate workers into supporting or opposing a particular bargaining representative. Given the history of actions by the CROC's parent union in other factories, and reports of Kukdong security personnel supporting the CROC's efforts at intimidation at Kukdong, a fair election process depends on the Kukdong management's actions in this regard. (Kukdong's recent decision to dismiss its human resources director, who had been linked to CROC efforts to intimidate and retaliate against workers who participated in the work stoppage, was a positive step.)

11. *Discrimination Among Proponents and Opponents of the CROC.*

Recommendation: Kukdong managers and CROC officials should not discipline, discharge, or take any other adverse action against any Kukdong worker based on the worker's allegiance or non-allegiance to the CROC including the workers' membership or non-membership in the CROC – regardless whether, in taking such action, Kukdong and the CROC purport to implement the “exclusion” clause of the collective contract. The implications of a recent Mexican Supreme Court decision on the legality of exclusion clauses are discussed in the full report.

12. *Free and Fair Election of Bargaining Representative. Recommendation:*

There should be a fair and free secret ballot election among the workforce to determine the workers' uncoerced choice of a bargaining representative. To the greatest extent possible, members of the pre-stoppage Kukdong workforce must have an opportunity to participate in such an election, which requires further efforts to achieve reinstatement of workers who have not returned to the factory – as outlined in Recommendation 1. The election should be held as soon as possible after the workers formally request that it be held. Kukdong, the CROC, and other parties should take no action to interfere with, coerce, or otherwise impede a free and fair, secret ballot election if and when Kukdong workers request such an election. For reasons elaborated in the full report, such a “consent election” is fully consistent with Mexican law and need not await the expiration of the current Kukdong-CROC contract.

Kukdong and Reebok have expressed to some government officials their support for an election by secret ballot; Nike, if it has not already done so, should take the same action. All three companies should make sure that their position in support of a secret ballot election is clear to all relevant officials of the Puebla state government, including the Puebla Conciliation and Arbitration Board and the Governor of Puebla, and the Mexican federal government. It must be noted that, while a secret ballot election is not specifically mandated by Mexican law, it is a pre-condition for a fair election and is, therefore, required under provisions of university codes and the WRC model code protecting freedom of association.

Kukdong should vigorously oppose any effort by the CROC or its agents or supporters to intimidate, bribe or otherwise coerce workers in regard to their choice of union affiliation or their vote for a bargaining representative – and Nike and Reebok should make this issue a top priority in their communications with Kukdong.

In the period leading up to an election, and during the election itself, Kukdong, Nike, Reebok, the WRC, the ILRF, the FLA and local worker rights and human rights groups should participate in a comprehensive joint election monitoring program – in order to help safeguard workers from intimidation and coercion and promote a free and fair election.

In the Kukdong matter, the Conciliation and Arbitration Board of Puebla should be a full participant, but should not act in such a way as to delay, obstruct or undermine a free and fair secret ballot election. At present, Kukdong workers await the response of the conciliation board to their submission of an application for the recognition of a new union – called SITEKIM, the Independent Union of Kukdong Workers (Sindicato Independiente de los Trabajadores de la Empresa Kukdong Internacional de México). This grant of recognition (called a “registro”) would give the new union the legal standing to seek an election to replace the CROC as bargaining representative for the Kukdong workers.

13. *Continuing Economic Relationship between Licensees and Contractor.*
Recommendation: The intervention by Nike and Reebok has produced substantial positive results. It is important that these licensees maintain their economic relationship with Kukdong, both short- and long-term, and continue to promote remediation at the factory – including the recommendations contained in this report.

II. FULL REPORT AND RECOMMENDATIONS

Introduction

This report on the Kukdong factory in Atlixco, Mexico, is the second and more comprehensive of two reports issued by the Worker Rights Consortium in its ongoing investigation of alleged violations of labor rights at that facility. Our first report, and attendant recommendations, were issued on January 24, 2001.

The Kukdong factory (officially “Kukdong International México S.A. de C.V.,” hereafter “Kukdong”) produces apparel bearing the names and logos of several WRC-affiliated universities. This apparel is produced for Nike under licensing arrangements between Nike and those universities. Kukdong also produces apparel for Reebok.

The WRC began the Kukdong investigation in response to complaints filed in January 2001, by workers alleging serious violations of university codes of conduct, the WRC model code of conduct, Mexican labor law, and international labor law. On January 24, 2001, the WRC issued a first report in this matter, entitled “Preliminary Findings and Recommendations” (hereafter first report). Both the complaints and the first report are summarized below.

If and when warranted by future developments at the Kukdong facility, the WRC shall issue further reports on its ongoing investigation.

The Scope and Methodology of this Investigation

This report contains findings and recommendations regarding the allegations contained in the complaints submitted to the WRC. The report responds to the matters given highest priority by the affected workers themselves and is not an assessment of all working conditions, issues and disputes at the factory. Because this is the first investigation conducted by the WRC, this investigative strategy merits explanation.

The scope of subject matters addressed in this report reflects WRC principles as well as pragmatic realities. It is impossible for any private monitoring organization to conduct a genuinely comprehensive review, at a given factory, of all provisions contained in corporate or university codes of conduct. The WRC addresses the limitations of time and resources inherent in any investigation by selecting a relatively small number of matters and prioritizing those matters. (These constraints are also the main reason why the WRC does not certify factories as being comprehensively code-compliant.)

To better understand this point, consider the following two realities, which are well known to scholars and practitioners of compliance with legal rights and standards, whether those rights and standards are contained in public codes of law or private codes of conduct:

First, the provisions of corporate and university codes – as well as the WRC model code – require that factories comply with workers’ rights in the areas of: freedom of association, collective bargaining, freedom from discrimination, occupational safety and health, minimum wages and maximum hours, payment of wages, child and forced labor, and other areas of labor rights and standards. Apart from the codes’ original provisions on these matters, the codes generally incorporate by reference all applicable domestic and international laws pertaining to labor rights. That is, any violation of the domestic and international law of labor and employment also constitutes a violation of the corporate or university code. The codes therefore embody literally thousands of rules and requirements – perhaps millions, if we take into account the finely meshed rules stated in the administrative regulations and case precedents which interpret and give sufficient specificity to legislatively mandated rules (sufficient, that is, to permit investigators and adjudicators to apply those rules to the infinite and unforeseeable complexities of real-world circumstances).

These rules fill entire libraries. Attempts to collate and state these rules in summary form, even as to only one subject area – for example, “collective bargaining,” “discrimination,” or “occupational health and safety” – typically fill several volumes (or innumerable bytes of digital databases, such as Lexis or Westlaw). But even such multi-volume treatises themselves do not purport to state rules that are sufficiently concrete and detailed to be used as “comprehensive benchmarks” that can be employed by monitors visiting a factory over a period of several days. Such sufficiently specific rules or benchmarks, as mentioned above, would number in the millions.

Second, investigators and monitors visit a factory in order to gather evidence, resolve conflicting evidence, and reach factual conclusions about contested factual allegations. When public agencies undertake this task – such as the National Labor Relations Board (NLRB) or Equal Employment Opportunity Commission (EEOC) or Occupational Safety and Health Administration (OSHA) or the Wages and Hours Division of the Department of Labor, to use examples from the United States – the fact-gathering and fact-finding as to a single disputed event or workplace condition, implicating one or a small number of specific rules or standards, often requires weeks of factual investigation and adjudication. At the same time, these public agencies, unlike private monitors, have powerful weapons in their arsenal of fact-gathering methods, such as the power to subpoena documents and witnesses, and the power to examine and cross-examine witnesses under penalty of perjury. The private monitors can only conduct brief, voluntary “interviews” and make “requests” for documentation – in situations where interviewees are likely to give sharply conflicting accounts of any single event or condition that has contributed to a dispute, and where some parties may have strong incentive to withhold data and documentation damaging to their interests.

A monitor cannot, therefore, purport to resolve all factual disputes pertaining to all the alleged violations of the thousands of specific rules contained in labor and employment laws and codes that may have occurred during a period of months or years preceding the monitors’ factory visit. To do so would be to perform, in a few days and

with a few investigators, the compliance tasks undertaken over months and years by the combined forces of the NLRB, EEOC, OSHA, the DOL, and many other agencies. Reducing the myriad issues of compliance to a manageable list of auditing benchmarks is a common mechanism for making the monitoring process more practical and may be appropriate in some circumstances. But this approach necessarily omits large numbers of rules and standards and generates a blunt instrument – an instrument created by the monitors’ U.S.-based staff for universal “off the shelf” application to workforces whose grievances, priorities, and circumstances cannot be predicted in advance.

These, then, are the reasons for the WRC’s approach. The WRC relies on the affected workers to define the priority of grievances that fall within the many subject areas covered by university codes and the WRC model code. The WRC undertakes investigation of this limited number of key issues with the collaboration of the local workforce, local communities, and local labor-rights organizations and advocates. In these investigations, the WRC seeks the constructive engagement and cooperation of the relevant licensees, manufacturers, and contractors. The WRC makes only those findings of fact and recommendations of remediation that are warranted by the most accurate evidence that can be gathered within the constraints of investigatory resources and time.

The WRC also seeks to gather facts and make recommendations without undermining or supplanting public enforcement of labor rights and standards. To the contrary, the WRC seeks to build the capacity of local organizations, including local public agencies, to monitor and enforce compliance.

The Purposes of this Report

This report has the following three purposes.

a. Findings of Fact as to All Violations Alleged in the Complaints

This report presents findings of fact based on the testimony and documents gathered by a WRC panel of specialists who undertook a delegation to Atlixco on January 19-23, 2001, and on testimony and documents gathered subsequent to that delegation. The findings in this report address all the violations alleged in the complaints submitted to the WRC by Kukdong employees and found, upon investigation, to be given high priority by those workers.

The findings of fact in this second report therefore go beyond the findings contained in the first report of January 24th – in three respects:

- First, this second report is based on evidence gathered after, as well as before, the January 24th first report.
- Second, this second report addresses events occurring after, as well as before, the January 24th first report.

- Third, the first report did not purport to state findings of fact based on “the entirety of the available evidence” regarding all violations alleged in the Kukdong complaint. Rather, the findings in the first report were expressly limited to alleged violations as to which the WRC delegation found “substantial credible evidence” of “severe and irreparable harm” to labor rights, warranting recommendations for immediate remedial action.

The findings of fact in this second report are therefore based on the stricter of two evidentiary standards. That is, the findings in this report state factual conclusions only where the WRC is able to conclude, by a preponderance of all of the available evidence, that violations occurred.

In addition, this second report makes findings as to allegations of violations which, if they truly occurred, would not necessarily have required immediate remedial actions on January 24th (the date the first report was issued) in order to avoid irreparable harm to worker rights. The first report only addressed allegations of violations that threatened irreparable harm and therefore necessitated immediate remediation.

In sum, the first report addressed only matters requiring immediate remedial action, and presented findings only where, prior to January 24th, there was substantial credible evidence of violations requiring immediate remedy. This second report, by distinction, weighs the totality of evidence and presents findings of fact as to both alleged violations requiring immediate remedial action and alleged violations, some of which allegedly occurred after January 24th, that do not entail imminent irreparable harm.

b. Assessment of Remedial Efforts Undertaken in Response to the Recommendations in the WRC’s First Report

The WRC’s January 24th report on the Kukdong complaint recommended – in light of its finding of substantial credible evidence of imminent irreparable harm to fundamental labor rights – that several remedial measures be undertaken immediately by Nike and Reebok and by Kukdong itself. Other organizations subsequently issued recommendations for remediation, including Verité, investigating on behalf of Nike and Reebok, the International Labor Rights Fund (a report prepared by Mexican labor attorney Arturo Alcalde Justiniani), and Korea House International Solidarity.

This second report assesses the remedial efforts actually undertaken since the WRC issued its recommendations of January 24th.

c. New Recommendations

This report makes new recommendations for future remedial action.

The Complaints Against Kukdong

On January 3, 2001, Kukdong discharged five workers who had led efforts to protest working conditions at the factory and to protest the failure of the Revolutionary Confederation of Workers and Peasants, or “CROC” (the Confederacion Revolucionario de Obreros y Campesinos), the union that signed the existing collective employment contract with Kukdong, to take action to address these conditions. The five workers alleged that the CROC is an illegitimate, unrepresentative union.

On January 9 through 11, 2001, the broad majority of workers at the factory engaged in a work stoppage in protest of the January 3rd discharges and other workplace grievances. Workers participating in the stoppage demanded the ouster of the CROC and its replacement by an independent, democratic union. On January 11th, a contingent of riot police dispersed the workers.

Thereafter, several workers at the facility made verbal complaints to the WRC. On January 18, 2001, four workers submitted a written complaint to the WRC and requested that the WRC initiate an investigation. In the course of interviews with workers during the WRC’s investigation, these complaints were amplified. The complaints against Kukdong alleged labor abuses, which, if they truly occurred, would constitute non-compliance with rights and standards set forth in the codes of conduct of many WRC-affiliated universities, in the WRC model code of conduct, in Mexican Constitutional and Labor Law, and in International Labor Law. (The Supreme Court of Mexico has determined that international conventions adopted and ratified by Mexico, including Conventions of the International Labor Organization, have the force of domestic law in Mexico.)

More specifically, the complaints alleged that

- (1) Kukdong signed an illegitimate collective employment contract with a union (the CROC) lacking the support of a majority of the Kukdong workforce, discriminatorily supported the CROC and retaliated against independent-union activities, threatened reprisal against workers who did not support the CROC, and acquiesced or participated in the CROC’s requirement that workers sign oaths of loyalty to the CROC, thereby violating the Kukdong workforce’s freedom of association, their right to be free of discrimination based on union activity, and provisions of Mexican labor law regarding the establishment and implementation of collective labor contracts.
- (2) Kukdong’s January 3rd discharge of five workers was in reprisal for their asserting grievances against the company and their support for the replacement of the CROC with an independent union – thereby violating those workers’ freedom of association and right to be free of discrimination based on union activity.

- (3) Officers of the CROC directed and participated in the January 11th police action, committed acts of excessive and indiscriminate force against workers participating in the work stoppage, and inflicted physical injuries, thereby violating workers' rights to bodily integrity, freedom of association, and right to be free of discrimination based on union activity.
- (4) Participants in the work stoppage were threatened with false charges of criminal activity (e.g. kidnapping) in reprisal against their workplace protests, thereby violating those workers' freedom of association and right to be free of discrimination based on their union activity.
- (5) Kukdong refused to reinstate hundreds of workers who participated in the work stoppage, thereby violating a legally binding, written agreement to reinstate all workers without discrimination, signed by Kukdong under the auspices of the Conciliation and Arbitration Board of Puebla, the government entity with jurisdiction over the labor dispute at Kukdong.
- (6) Officers of the CROC and agents of Kukdong threatened to, and did, deny reinstatement to workers who refused to sign oaths of loyalty to the CROC, thereby violating workers' freedom of association.
- (7) Kukdong managers subjected workers to physical abuse – slapping, pushing and pulling workers as a means of discipline in the workplace, and thereby violating workers' right to bodily integrity.
- (8) Kukdong managers engaged in a pattern and practice of shouting obscenities and racial epithets at workers, thereby violating workers' right to be free of abusive working conditions.
- (9) Kukdong paid production workers a wage insufficient to meet the basic needs of workers and their families for food, shelter, and clothing, thereby violating workers' right to be paid a living wage and/or a basic needs wage.
- (10) Kukdong denied maternity benefits to workers, thereby violating Mexican labor law and workers' right to be free of discrimination based on gender.
- (11) Kukdong provided workers with inadequate breakfast foods, and provided rancid food for lunch, thereby violating contractual promises made by Kukdong that adequate, edible daily breakfasts and lunches would be included in workers' compensation package.
- (12) Kukdong locked workers inside the gates of the factory compound during the workday, thereby violating workers right to freedom of movement.
- (13) Kukdong denied sick leave to infirm workers, thereby violating Mexican labor law and workers' freedom of movement and right to sick leave.

- (14) Kukdong hired workers less than sixteen years of age for periods of nine or ten hours per day, violating Mexican laws limiting the number of hours per day that children 14 and 15 years of age can work.
- (15) Kukdong did not provided workers with sufficient, potable drinking water, thereby violating Mexican labor law.
- (16) Kukdong provided workers with unsanitary bathroom facilities (which sometimes lacked water altogether), provided workers insufficient opportunities to use bathroom facilities, and denied access to bathrooms as a form of disciplinary punishment of workers, thereby violating Mexican labor law.

The WRC Investigation

a. Members of the WRC Fact-Finding Delegation

The WRC assembled a fact-finding panel of specialists to undertake an on-site, fact-finding investigation from January 20th through 23rd. Drawing on the expertise available to the WRC by reason of its university affiliations and its relationships with local non-governmental organizations, the panel includes specialists in Mexican labor law, international labor law, public international law, labor relations, and economic and sociological methods of empirical inquiry. The panel is led by Mark Barenberg, Professor of Law at Columbia University, and a specialist in United States, Mexican, and International Labor Law.

One member of the panel – Rodrigo Olvera, a Mexican labor lawyer affiliated with CEREAL (Centro de Reflexión y Acción Laboral), a respected Mexican labor-rights organization – remained in Puebla after January 23rd. Other members of the panel, who returned to the United States on January 23rd, maintained regular contact with a member of the WRC Board of Directors, Daniel Long, who was in Puebla between February 1st and February 11th to observe remediation efforts and to conduct follow-up interviews, surveys, and document-gathering; with Huberto Juárez Nuñez of the Economics Faculty of the Autonomous University of Puebla (Benemérita Universidad Autónoma de Puebla), who, along with his research staff, conducted extensive interviews with Kukdong workers from late February through May; with representatives of other Mexican non-governmental organizations located in Puebla; and with representatives of Verité, a firm hired by Nike, which placed observers inside the factory for a total of eight days after the WRC issued its preliminary report.

The WRC panel comprised:

- Mark Barenberg, Professor of Law at Columbia Law School; chairperson of the WRC Board; and leader of the delegation

- Marcella David, Professor of Law at the University of Iowa College of Law; representative of the WRC University Caucus on the WRC Board
- Reverend David Dyson, Pastor of Lafayette Avenue Presbyterian Church (Brooklyn, NY); representative of the WRC Advisory Council on the WRC Board
- Marikah Mancini, Graduate student in economics at Purdue University; representative of United Students Against Sweatshops on the WRC Board
- Scott Nova, WRC Executive Director
- Rodrigo Olvera, Coordinator of Labor Rights Office, Center of Reflection and Action on Labor Rights, CEREAL (Centro de Reflexión y Acción Laboral), Mexico City
- *Observer:* Jerry Morales, Professor of Law at University of Arizona School of Law; Partner at Snell and Wilmer, L.L.P.

Also participating in the investigation:

- Daniel A. Long, graduate student in sociology at the University of Wisconsin; representative of United Students Against Sweatshops on the WRC Board
- Huberto Juárez Nuñez, of the Economics Faculty of the Autonomous University of Puebla (Benemérita Universidad Autónoma de Puebla), and his research staff (Professor Juárez was also a member of the Verité Kukdong audit team.)

b. Methods of Investigation

The WRC gathered evidence to enable an assessment of whether, by a preponderance of all the evidence, the allegations in the complaints were or were not true, and whether the true facts constituted compliance or non-compliance with relevant provisions of the codes of conduct of affiliated universities, the model code of conduct of the WRC, Mexican Labor Law, and International Labor Law.

When the sole evidence relevant to particular events or working conditions comprised conflicting oral testimony, the WRC panel, like any fact-finder, necessarily made judgments of the credibility of the witnesses, based on the internal consistency of a witness's testimony, the accuracy of the witness's testimony as to other matters, the witness's demeanor, whether a witness's testimony was corroborated by the independent testimony of other reliable witnesses, and other conventional forensic indicia of credibility.

In no instance, however, does this report make findings of fact where there is oral testimony of a single witness. That is, the report adopts the conservative evidentiary rule

that all findings of fact require, at a minimum, corroboration from two testimonial sources. In the event, all of the findings of fact made in this report (and listed in the section of the report titled “Findings of Fact and Compliance or Non-Compliance with Codes and Law”) are based on evidentiary sources that far exceed this bare threshold. Wherever possible the report indicates the number of interviewees corroborating a point of fact. The report presents a summary and analysis of the evidence material to each finding of fact and an evaluation of the relative strength of the evidentiary basis for each finding.

The methods of gathering evidence in this investigation include:

- Close forensic questioning of all witnesses to specific alleged events that constitute specific alleged violations of codes and law.
- Structured interviews of individuals and small groups of witnesses to events or conditions affecting groups too large for close questioning of all eyewitnesses.
- Corroboration of structured interviews through intensive unstructured interviews of the most knowledgeable and credible actors.
- Collection of relevant original documentation and data.
- Surveys of workers reinstated and not reinstated.
- Critical survey of existing secondary, scholarly, or journalistic reports.

c. Sources of Evidence

The panel interviewed, and sought relevant documentation, from the following parties:

- Members of the Puebla Conciliation and Arbitration Board, vested by Mexican law with jurisdiction over Kukdong labor relations.
- Kukdong workers. The panel and follow-up investigator (Daniel Long) interviewed approximately 58 workers in Atlixco and in six of their home villages (from which workers commute to the factory). These interviewees included both supporters and opponents of the three-day work stoppage that precipitated the complaint to the WRC and supporters and opponents of the CROC. Subsequent to the initial investigation, Profesor Huberto Juárez and his research staff interviewed 203 Kukdong workers in twenty-two towns and villages.
- Approximately five Kukdong managers, including the factory’s general manager and chief human resources manager, and Kukdong’s labor attorneys.

- Officers and delegates of the CROC, the union that is party to the existing collective employment contract with Kukdong.
- Officers of the UNT (Unión Nacional de Trabajadores) and its affiliates, some of whom provided counsel to the participants in the work stoppage at Kukdong.
- Representatives of well-reputed human rights and labor rights organizations that are active in the State of Puebla, including the Jesuit-created CEREAL
- A representative of the Ministry of Social and Economic Development of the State of Puebla.
- Professors of economics and labor relations at the Ibero-American University in Puebla (Universidad Iberoamericana en Puebla), the Autonomous University of Puebla, and the National Autonomous University of Mexico (Universidad Nacional Autónoma de México, UNAM).
- Arturo Alcalde, a Mexican attorney contacted by the International Labor Rights Fund, with the public endorsement of Nike, and asked to conduct an independent investigation and mediate in the aftermath of the work stoppage.
- An on-site representative of Reebok who was in the process of conducting an investigation of the Kukdong labor dispute.

Findings of Fact and Compliance or Non-Compliance with Codes and Law

a. The Collective Bargaining Relationship between Kukdong and the CROC

Finding of Fact: The panel finds that the CROC did not have the support of a majority of Kukdong workers at the time the Kukdong-CROC collective contract was signed or at any time thereafter; that the original Kukdong-CROC collective contract afforded Kukdong workers no wages or benefits or other entitlements beyond those already afforded by Mexican law; that the CROC has not performed the most basic functions expected of a legitimate collective bargaining representative (for example, bringing workers' grievances to the attention of management); and that, to the contrary, the CROC has engaged in a pattern of threats and coercion against workers who did not support the CROC. Kukdong has acquiesced or participated in certain instances of the CROC's wrongful activities.

Finding of Compliance or Non-Compliance with Codes and Law: Imposition of a bargaining representative and a collective contract without the consent of workers violates workers' freedom of association under international law (ILO Declaration of Fundamental Principles and Rights at Work of 1998, ILO Convention 87) and Mexican

law (Federal Labor Law Articles 357-58, 373, 389, 391). Such actions constitute non-compliance with those provisions of university codes and the WRC model code that require licensees and contractors to respect international and domestic law, and non-compliance with those provisions of university codes and the WRC model code that independently require licensees and contractors to respect workers' right of association.

Analysis of the Evidence: The panel closely questioned Kukdong managers, officials of the CROC, and officers of the Conciliation and Arbitration Board of Puebla on the question of the process by which Kukdong entered into its collective bargaining relationship with the CROC. In three separate sessions of questioning, these three parties gave three different accounts of that process. These accounts contradicted one another. The accounts were also contradicted by the testimony of other parties. The credibility of important elements of each account was further undermined by several other indicia of unreliability, including internal contradictions within each account; the substantive implausibility of the account; the three parties' patently inaccurate testimony as to other, closely related matters; the parties' evasive demeanor under close questioning; and reliable Mexican scholarship recounting the CROC's pattern and practice of activities in the State of Puebla.

In order to comprehend the different accounts of the initiation of the Kukdong-CROC bargaining relationship, it is necessary to understand the processes through which a union, under Mexican law, may enter into a binding collective contract with an employer. Under questioning by the panel, the officers of the Conciliation and Arbitration Board (CAB) offered their interpretation of the lawful procedures for establishing a collective contract under Title VII of the Federal Labor Law of Mexico. The WRC panel's specialists in labor law found that, even though those provisions were susceptible to other interpretations, the CAB's interpretation was a reasonable one, especially in light of (1) the high degree of autonomy delegated to the CABs of the several states in Mexico's federal system of labor law, and (2) the deference owed by foreign observers to interpretations of local law by local adjudicatory authorities.

The CAB officers stated that the CAB recognizes two alternative paths by which a registered union may, under Mexican law, become the "holder" of the collective contract with an employer. The first path is that of "willpower" or "voluntary recognition" of the union by the employer. Under this process, a union may approach the employer directly and demand recognition as the collective representative of the employees. If, based on such evidence as the union provides the employer, the latter reasonably believes that the union is the chosen representative of a majority of employees, the employer may voluntarily recognize the union, engage in collective bargaining with the union, and sign a collective contract. That contract legally binds all employees until such time as the employer, the employees, or another union through lawful procedures challenges it, or until such time as the parties consent to a new election resulting in a new collective bargaining representative authorized to bargain a new collective contract. Unless and until there is such a challenge or such consent, the CAB and other government entities play no role in affirming or disaffirming the legality of the collective contract (although it appears to be the local practice for parties to file a copy of

their collective contract with the CAB).

The second, alternative path is that of a “statement of strike and evidentiary hearing.” If the union chooses this path, then the CAB presides over the authorization of the bargaining relationship from its conception. Under this process, the union submits to the CAB a statement of intention to strike on a designated future date and of the union’s intention to establish a collective bargaining relationship with the employer. The CAB then orders the union not to implement the strike pending an evidentiary hearing conducted by the CAB. At the hearing, the union has the burden of proving that a majority of the relevant workforce in fact supports that union as their representative for purposes of collective bargaining. If the CAB finds in the affirmative, then the union and employer enter into bargaining and may lawfully sign a collective agreement.

Under questioning by the WRC panel, the officers of the Puebla CAB stated with certainty that the CROC and Kukdong had chosen to follow the first path, that is, the path of voluntary recognition. Under further questioning, the officers of the CAB stated that the CAB’s official files contained documentary evidence that the CROC had fulfilled the requirements for voluntary recognition. At the same time, the officers of the CAB stated that no party had challenged the legality of the collective contract. The panel was therefore curious about how or why the files of the CAB contained documentary evidence of the legality of the Kukdong-CROC contract since, according to the CAB’s interpretation of the pertinent law, (1) under the path of voluntary recognition the union submits such evidence to the employer but, unless and until the bargaining relationship is later challenged, the union does not submit such evidence to the CAB, and (2) no party had challenged the contract before the CAB. The panel therefore asked to see the documentary evidence to which the CAB officers had referred. At this point the CAB officers stated that they could not show the files to the panel, although the CAB officers had earlier conceded that CAB files were open to the public. The CAB officers were unable to offer any explanation for this denial of access to the public files. Instead, the CAB officers produced a copy of the Kukdong-CROC collective contract. (The CAB permitted the panel to quickly read the contract but not to copy it, although the WRC later acquired a copy of the contract from another source.)

The officers of the CROC, under questioning by the WRC panel, gave an account of the Kukdong-CROC bargaining relationship that contradicted the account given by the officers of the CAB. The two accounts were contradictory as to matters of both fact and law. The officers of the CROC stated that the union had followed the second, not the first, legal path for establishing a collective bargaining relationship. The testimony of the CROC officers on this point was as unequivocal as was the opposite testimony given by the CAB officers. The officers of the CROC insisted that they had in fact gathered evidence – by means of employee signatures – that a majority of Kukdong workers supported the CROC, had submitted a statement of strike to the CAB, and had presented the evidence of majority support to the CAB in a hearing sometime in November or December 1999. (Indeed, the CROC officers insisted that each and every Kukdong worker, not a mere majority, had signed a statement of support for the CROC by December 1999. As recounted below, both pro-CROC workers and anti-CROC workers

testified that no worker had signed such a statement prior to March 2000.) The officers of the CROC denied the request of the WRC panel to see the documentary evidence supporting the CROC's claim to majority support.

The managers of Kukdong, under questioning by the WRC panel, gave yet a third account – an account corroborated in key respects by both pro- and anti-CROC Kukdong workers, and, overall, a somewhat more credible account than that provided by either CROC officials or the CAB. Kukdong's labor lawyer stated, again with certainty, that the CROC had presented no evidence of majority support when the CROC demanded that Kukdong sign a collective contract. The Kukdong managers believed that the CROC was instead obligated to submit to the CAB a list of workers supporting the union. Under Kukdong's account, the CROC had chosen to follow the first path to collective bargaining, contradicting the CROC's insistence that it followed the second path. Moreover, the Kukdong lawyer squarely denied that the CROC had presented to Kukdong managers the kind of evidence that the CAB had stated was required, as a matter of Mexican law, in order to establish a collective bargaining relationship by means of the first path. That is, under the Kukdong lawyer's account, Kukdong managers could have had no reasonable basis for believing that the majority of Kukdong workers supported the CROC at the time Kukdong entered into the collective contract with the CROC. (This is corroborated by the testimony of both pro-CROC and anti-CROC workers, summarized below, to the effect that workers had not signed statements of support for the CROC until several months after the signing of the collective contract.)

Therefore, the testimony of the Kukdong officers not only contradicted the testimony of the CROC officers, it also cast further doubt on the credibility of the CAB officers' claim that their files contained documentary evidence that the CROC was legitimately established by means of "voluntary recognition." (Recall that that claim by the CAB officers was already dubious, in light of the CAB's refusal to show its Kukdong files to the panel even while the CAB insisted that CAB files were open to the public.)

These grounds for doubt about the CROC's claim that it was the freely chosen representative of a majority of Kukdong employees were reinforced by the documentary evidence, by testimony of other parties, and by the CROC officer's testimony as to other, closely related matters. Testimony that either contradicted the CROC's substantive claim or impeached the general credibility of the CROC officers includes the following:

- The CROC officers initially testified that the Kukdong-CROC collective contract was signed on January 15, 2000 and that the parties reached agreement without an actual strike. The WRC panel then asked the CROC officers the date on which they submitted the statement of strike and the date of the strike deadline specified by the CROC in the statement of strike. The CROC officers responded that they submitted the statement of strike in November 1999, and that the specified strike deadline was early- or mid-December 1999. A member of the WRC panel (a Mexican labor lawyer) then stated his understanding that, as a legal matter, the CROC was obligated either to go on strike or sign the collective contract before that deadline. At that point, the CROC officers changed their testimony and

stated that the Kukdong-CROC collective contract was signed before the deadline in December 1999, rather than on January 15, 2000. This equivocation constitutes evidence tending to impeach the overall testimony of the CROC officials, as well as corroborating the CROC's substantive lack of knowledge about and attention to the basic representative activities of a legitimate union.

- At least eighteen employees testified that, sometime after March 2000, agents of the CROC demanded, under coercive threat of discharge, that employees sign statements of allegiance to the CROC. These employees stated that some workers signed such statements under duress, while others refused to sign. Some of those who refused to sign were unilaterally “enrolled” as CROC supporters by the CROC itself or by Kukdong managers. At the same time, no employees – not even the pro-CROC workers who served as delegates to the CROC and who were selected by Kukdong managers and the CROC for questioning by the WRC panel – stated that they or other workers had signed statements of allegiance to the CROC prior to January 15, 2000, the latest of the two dates on which, according to the CROC officials, the Kukdong-CROC collective contract was signed, let alone prior to the November 1999 date when, again according to the CROC officials, the CROC submitted its statement of strike to the CAB. Workers testified that, prior to March 2000, they were entirely unaware of the CROC's claim to represent the workers; and no worker testified to the contrary. The CROC officers testified, incredibly, that every Kukdong worker employed during November and December 1999 voluntarily signed a statement of support for the CROC. In fact, Kukdong had not hired any significant complement of workers prior to January 2000.
- The original collective contract ostensibly “bargained” by the CROC was a standard-form document, which afforded Kukdong workers no rights beyond those already provided by Mexican law. In its provision on wages, the contract required Kukdong to pay only the lowest of any legally applicable minimum wages. The original collective contract violated Mexican Federal Labor Law article 393, which requires that such contracts contain a tabulation of wages. A wage tabulation was added to the contract in early 2001.
- The CROC officers stated that, from the inception of the union at Kukdong, the workers had held half-hour assemblies during working time for purposes of electing union delegates. Kukdong managers and Kukdong workers, including even those pro-CROC workers selected by Kukdong managers and the CROC for interviews with the WRC panel, flatly denied this.
- In the course of close questioning by the WRC panel regarding whether workers had voluntarily signed statements of loyalty to the CROC, the CROC officers stated that the Kukdong-CROC collective contract did not contain an “exclusion” or “closed shop” clause – that is, a clause authorizing the employer to discharge workers or to refuse to hire applicants who are not members of the CROC. In

fact, the collective contract contained such a clause, which was lawful under Mexican labor law until a decision by the Supreme Court of Mexico on April 17th, 2001. In light of the fact that the inclusion or exclusion of such a clause is a matter of the utmost importance to the functioning of any Mexican union, the CROC officers' testimony on this point is most likely attributable either to (1) gross negligence or ignorance of a kind that constitutes at least corroborative evidence that the union is not an organization that legitimately bargains or enforces a collective contract on behalf of a majority of supportive workers, or to (2) equivocation or evasiveness in the face of close questioning by the WRC panel regarding the degree to which workers' supposed support for the CROC was voluntary. The former constitutes material evidence of the CROC's illegitimacy. The latter constitutes evidence that tends to impeach the reliability of the testimony of the CROC officers.

- At least twenty-seven workers testified that one of the workers' most important grievances was that Korean managers had struck workers by hand as a common means of pressuring workers to speed up their work and had struck workers with workplace tools on at least two occasions; that workers had reported this fact to the CROC; and that the CROC had not taken any action to press the grievance on behalf of the workers. The general manager of Kukdong confirmed that on December 13, 2000, a Korean manager struck a worker with a hammer. The general manager further testified (and presented documentary evidence which on its face corroborated) that Kukdong thereafter required all managers to sign a statement acknowledging that Kukdong prohibited managers from physically and verbally abusing workers. The problem of physical and verbal abuse was therefore apparently a matter of widespread and salient knowledge and discussion among both the Kukdong workforce and the Kukdong managerial corps. Officers of the CROC nonetheless testified that the CROC was unaware of any instance of physical or verbal abuse in the Kukdong factory. As with the CROC officers' ignorance of the basic terms of the collective contract, their stated unawareness of grievances regarding physical and verbal abuse suggests either that the CROC did not function as a legitimate union or that their testimony was not credible.
- As to crucial facts about the police action of January 11, 2001, the CROC officers gave testimony that was of dubious credibility in its own right and that also contradicted the testimony of Kukdong managers. The CROC officers testified that the CROC had made a videotape of the police action and had played the tape several times for Kukdong managers. The WRC panel then requested that the CROC make that videotape available to confirm or disaffirm the workers' allegations (a) that the police used excessive and indiscriminate force against the workers; (b) that CROC officers led and participated in the violent police action, and (c) that officers of the CROC and Kukdong had viewed videotapes in order to identify and deny reinstatement to supporters of the work stoppage. The CROC officers initially responded that they would retrieve the tape, which they said was in the possession not of the union but rather of the human resources manager of Kukdong. Shortly thereafter, however, after conferring among themselves, the

CROC officers stated that they would not provide the videotape to the WRC panel. Upon questioning by the WRC panel, the Kukdong managers unequivocally denied that the CROC had ever shown or provided them a copy of any CROC videotape. At the same time, the Kukdong managers admitted that they themselves had videotaped the police action. The managers stated, implausibly, that they had never watched their own videotape or any other videotape of the event. (Videotape excerpts of the police action had been shown on local television.) The managers further stated that they were unable to provide a copy of their videotape to the WRC because, again implausibly, they had given the videotape to the police but had made no record of the particular police office that was in possession of such patently important evidence.

- The workers' written complaint to the WRC alleged that officers of the CROC led and participated in the violent police action on January 11, 2000. At least seventeen workers testified that Rene Sanchez Juárez, the Secretary-General of the Puebla Federation of the CROC, walked at the head of the phalanx of riot police that forcefully dispersed the striking workers, and that he personally battered one of the acknowledged strike leaders, even after that worker had moved off of Kukdong property and stood on a public street. Unaware of the latter testimony, Mr. Sanchez Juárez initially volunteered unequivocally to the WRC panel that he was present at the factory during the police action. When the WRC panel thereafter advised him of the workers' prior testimony that he had personally used force during the police action and asked him for any response he might have, he reversed his testimony and stated that he was not in fact at the factory during the police action.
- Professor Huberto Juárez of the Autonomous University of Puebla presented the WRC panel with a summary of the substantial scholarly and journalistic reports documenting the past and present activities of the CROC in Puebla. Several other Mexican professors corroborated his summary. In capsule, these sources confirm that the CROC is a so-called "protection union," that is, a union that lacks the support of workers but that nonetheless signs "sweetheart" contracts with employers for the mutual profit of the union and the employer, serving the function of obstructing efforts by workers to organize genuine unions. These sources also described the "dynastic" nature of the CROC – that is, the fact that control of the organization has remained in the hands of a single family, passing from generation to generation, without democratic choice or accountability by the purported membership of the union. These sources cited other specific factories where CROC had entered into collective contracts with employers before the workforce was hired and without the knowledge of the workforce. These sources also recounted three instances of vote rigging and violence by CROC agents since September 1999, against workers who sought to organize non-CROC unions, although the WRC panel was unable to confirm or disconfirm these allegations.

b. The January 3rd Discharge of Five Workers

Finding of Fact: On January 3, 2001, Kukdong managers discharged five workers in retaliation for their lawful activities asserting workplace grievances and seeking to replace the CROC with an independent union. Kukdong's post hoc, purportedly legitimate justifications for discharging the workers were pretexts. Kukdong thereby violated the five workers' right of association and right to be free of discrimination on the basis of union activity. The discharges also threatened to chill the presentation of grievances and organizing activities by other workers, thereby violating the latter's right of association and right to be free of discrimination.

Finding of Compliance or Noncompliance with Codes and Law: Discharges of workers in retaliation against union activity, and attempts to chill the union activity of remaining workers, constitute violations of workers' right of association and their right to be free of discrimination based on their exercise or non-exercise of their right to engage in union activity, under international law (International Labor Organization Declaration of Fundamental Rights 1998, ILO Convention 87) and Mexican law (Federal Labor Law Articles 357-58, 373, 389, 391). Such actions therefore constitute non-compliance with those provisions of university codes and the WRC model code that require licensees and contractors to respect international and domestic law, and non-compliance with those provisions of university codes and the WRC model code that independently require licensees and contractors to respect workers' right of association and to refrain from discrimination based on workers' union activity.

Analysis of the Evidence: On January 3, 2001, Kukdong managers discharged five supervisory workers. Those workers were highly visible activists in asserting workplace grievances and supported the replacement of the CROC with an independent union. (Kukdong managers did not deny their awareness that these five workers were in fact the chief leaders of efforts to protest factory conditions. To the contrary, Kukdong managers volunteered that they turned to this small group of workers for negotiations to quell the ensuing work stoppage by hundreds of Kukdong workers.) After the dismissals, Kukdong managers on some occasions accused the five supervisory workers of each embezzling garments on various, unspecified, days during a period well before the date on which they were concurrently discharged. On other occasions, Kukdong managers accused the five supervisory workers of failing to give lunch coupons to rank-and-file workers, or of taking away such coupons, again on a date well before the date of discharge. The workers testified that they had not committed either infraction (though they had organized a one-day voluntary boycott of the cafeteria to protest the quality of the food) and that Kukdong managers had never made these accusations at any time prior to the discharges. Kukdong managers had recently named one of the discharged workers "Employee of the Month." They further testified that Kukdong managers made these accusations only when the five workers themselves approached Kukdong managers and demanded an explanation for their discharge.

Kukdong managers offered no evidence, testimonial or documentary, that the workers had engaged in the alleged infractions. Nor did Kukdong managers offer

evidence that they had apprised the workers of any outstanding charges against them by formal or informal warnings prior to their discharge. Nor did Kukdong managers provide any evidence that the workers had received “letters of dismissal” as required by Mexican labor law. (*See* Federal Labor Law Art. 47.)

At the same time, Kukdong managers told the WRC panel that they considered the five workers to be agitators and “troublemakers” precisely because they spoke among themselves and with non-employee activists about their workplace grievances. Indeed, officers of Kukdong (and of the CROC) made no effort to hide their anger and hostility to these worker-leaders. To the contrary, in their opening statements to the WRC panel, officers of Kukdong and the CROC stated fervently that none of the activities of the hundreds of Kukdong workers who participated in the stoppage would have occurred if not for these activists and their supporters outside the factory, who in the words of the general manager of Kukdong, had thereby “victimized” the company. Significantly, when the general manager concluded that the “real victim” was Kukdong and not the workers, he made no suggestion that the five workers had victimized the company by reason of embezzlement or failure to distribute lunch coupons. Rather, the victimizing activity to which he referred was the encouragement of associational activity by the five workers and the work stoppage.

In an e-mail dated February 9, 2001, Nike acknowledged that Kukdong’s failure to reinstate the five discharged workers had a continuing chilling effect on other workers’ exercise of their right to reinstatement. Because the latter right constitutes a right of remediation for violations of workers’ freedom of association, Kukdong’s failure to reinstate the five discharged workers also had a chilling effect on that underlying freedom. Nike’s February 9th communication stated, “We believe that because the [five discharged workers] have not been invited specifically to return, that [*sic*] other workers are also staying away out of fear of retaliation.”

On the totality of the evidence, then, the WRC panel finds that Kukdong fired the five workers based on hostility to their assertion of workplace grievances and their lawful organizing activity, and not based on the pretextual, post hoc justifications offered by Kukdong managers.

c. Refusal to Reinstate Participants in the Work Stoppage

Finding of Fact: After the January 11th police action ending the Kukdong work stoppage and protests, agents of Kukdong and the CROC denied or impeded the reinstatement of hundreds of workers who were willing to return to work but who were identified as participants in the stoppage and protests. Agents of Kukdong and the CROC coercively required many workers to sign pledges of loyalty to the CROC as a precondition to reinstatement; coercively induced some workers to sign letters of resignation; cancelled the accrued seniority rights of returning workers; threatened that reinstated workers would face greater workloads; threatened cutbacks in production if workers opposed the CROC; and required that returning workers not speak among themselves and not speak ill of the company.

Finding of Compliance or Non-Compliance with Codes and Law: Failure to reinstate workers based on their submission of grievances and participation in strike activities violates the workers' freedom of association and their right to be free of discrimination based on union activity under international law (ILO Declaration of Fundamental Principles and Rights at Work of 1998, ILO Convention 87) and Mexican law (Federal Labor Law Articles 357-58, 373, 389, 391). After January 13th, such actions also violated the terms of a legally binding agreement signed by Kukdong under the auspices of the Puebla Conciliation and Arbitration Board, thereby violating Mexican law. Such actions therefore constitute non-compliance with those provisions of university codes and the WRC model code that require licensees and contractors to respect international and domestic law, and non-compliance with those provisions of university codes and the WRC model code that independently require licensees and contractors to respect workers' right of association and to refrain from discrimination based on workers' union activity.

Analysis of the Evidence: On January 9th, hundreds of Kukdong workers began a work stoppage in protest of the discharge of the five activists who had asserted various workplace grievances. The workers occupied the outdoor patio lying between the factory building and the fence surrounding the factory compound. On January 11th, pursuant to a court order, riot police numbering in the hundreds entered the compound and forced the workers out of the factory gates. The testimony of all parties – Kukdong managers, CROC officials, CAB officials, and workers – was in accord as to these basic facts, although there was conflicting evidence about the number of participants in the stoppage and the size of the police contingent.

There were many points of sharply conflicting testimony about various other aspects of the work stoppage and the police action, including the following:

- *Obstruction of Movement In and Out of Company Buildings.* At least thirteen workers testified that Kukdong managers prevented workers – some of whom wished to join the work stoppage – from leaving the factory and required them to continue working until late in the day on January 9th, the first day of the three-day stoppage. Kukdong managers and CROC officials testified that the reverse was true – that is, that company personnel or CROC officials were trapped in company buildings, their exit blocked by participants in the stoppage.
- *Use of Excessive and Indiscriminate Force During the Police Action.* At least thirty-four workers testified that the police contingent entered factory gates and began indiscriminately assaulting the protesting workers, without giving the workers any warning and opportunity to leave company property without the use of force against them. Workers testified that police beat workers on the head with batons, trampled sleeping workers, crushed a worker with a riot shield, and committed other acts of unjustified violence. Workers testified that many workers suffered injuries, that approximately seventeen

workers required medical treatment and, in one or two cases, extended hospitalization. Kukdong managers and officers of the CROC denied that police used excessive force and that workers suffered serious injuries.

- *Participation in the Police Action and Use of Force by Officers of the CROC.* At least seventeen workers testified that they saw one of the officers of the CROC at the lead of the police contingent, and that that officer first verbally taunted and then physically beat one of the worker-activists with a baton, even though that worker stood lawfully on the public roadway next to the factory and not on the company's private property. The CROC officer initially testified that he was present at the police action. After the WRC panel advised him of testimony by workers that he participated in the action and personally used excessive force, he reversed his testimony and stated that he was not present at the police action.
- *The Use of Videotapes by Kukdong and the CROC to Identify and Retaliate Against Participants in the Work Stoppage.* Thirty-six workers testified that when they and others sought to return to work after the stoppage, Kukdong security personnel and agents of the CROC advised them that they could not return because they were identified on videotapes as participants in the stoppage. As recounted in the previous section of this report, the CROC officers testified that Kukdong managers had repeatedly watched a CROC-made videotape of the police action. The CROC officers denied the request by the WRC panel to see the videotape of the police action made by the CROC. Kukdong managers, on the other hand, denied ever watching the CROC videotape. Kukdong managers reported that they made their own videotape of the police action, but insisted that they had never watched it and could not show it to the WRC panel. The Kukdong managers stated that they had given the videotape to the police and did not know which police office was in possession of the tape.
- *The Legality of the Work Stoppage.* Kukdong managers and CROC officers testified that the strike was an illegal attempt to dislodge the CROC during the term of its collective bargaining agreement with Kukdong. One of the leaders of the stoppage testified that the workers believed that they were engaged in a lawful protest over wrongful company action, because they did not purport to engage in a recognition strike of the kind requiring a prior "statement of strike" or other notice, and because the Kukdong-CROC contract was illegal and void.

There is no need for the WRC to reach conclusions as to any of these specific contested matters for purposes of determining whether Kukdong violated worker rights by refusing to reinstate the participants in the work stoppage – in light of the clear findings that (a) Kukdong committed such a violation by breaching a legally binding agreement to reinstate the participants without discrimination; and (b) Kukdong, by

refusing to reinstate workers and engaging in other threats and reprisals based on the workers' participation in protest activities, violated workers' freedom of association and right to be free of discrimination based on union activity

On January 13th, under the auspices of the Conciliation and Arbitration Board of Puebla, Kukdong's authorized representative signed a written agreement to reinstate all workers who wished to return to their pre-stoppage positions, unconditionally and without discrimination against workers who participated in the work stoppage. In their testimony to the WRC panel, officers of the Conciliation and Arbitration Board, who were quite sympathetic to Kukdong in other respects, confirmed Kukdong's legal obligation to reinstate the workers unconditionally and without discrimination.

After signing the January 13th agreement, Kukdong thereafter refused to reinstate a large number of workers who were willing to return to work but whom Kukdong managers, Kukdong security guards, and CROC officials identified as participants in the work stoppage. This fact was corroborated by the testimony of many workers, but also by the WRC panel's eyewitness observations on January 22nd, when the panel visited the Kukdong factory. Before the work stoppage, Kukdong employed roughly 900 workers. As of January 22nd, although management claimed that roughly half of the employees had returned to work, the WRC delegation observed a workforce that was considerably smaller, approximating 250 workers or less. (Section D, below, recounts further details of Kukdong and the CROC's threats and reprisals against returning workers.)

On January 22nd, the general manager of Kukdong stated to the leader of the WRC panel that the factory had production orders sufficient to employ the same number of workers employed before the stoppage and that, indeed, he urgently desired to recruit new employees to achieve full capacity. Yet Kukdong had not reinstated idled employees, numbering in the hundreds, who worked at the factory before the stoppage.

A substantial but indeterminate portion of those idle employees, likely numbering in the several hundreds as of January 22nd, were ready and willing to return to work if they were given compelling assurance that Kukdong would honor its January 13th agreement to reinstate all workers without discrimination against those who participated in the stoppage. Such assurance would necessarily require not just passive acquiescence by Kukdong officials, but a program of active outreach and recruitment by advocates and leaders who were trusted by the workers, with the good-faith support and cooperation of Kukdong – in light of the lingering, cumulative intimidation caused by the January 3rd discharges, by the January 11th police action, by the discouragement of workers who attempted to return to the factory after January 11th but who were turned away, and by the widespread reports that some workers would be charged with criminal or civil wrongdoing if they were apprehended.

Among labor-law and labor-relations specialists, it is well-accepted that remedial action to achieve actual reinstatement of workers discharged under conditions of workplace contention and intimidation cannot be effective unless reinstatement is expeditious and workers are actively assured that they can return without short-term or

long-term reprisal and recrimination by managers. (*See, e.g.*, Paul Weiler, “Promises to Keep: Securing Workers’ Rights to Self-Organization under the NLRA” 96 Harvard Law Review 1769 (1983).)

For this reason, the WRC’s first report, issued on January 24th, urgently recommended that such a proactive program be immediately implemented through a cooperative effort among the WRC, Kukdong, Nike, Reebok, the International Labor Rights Fund, the Fair Labor Association, and local worker-rights organizations and advocates. After January 24th, one member of the WRC board, Daniel Long, traveled to Puebla to support local advocates engaged in outreach to the workers in their home villages and to work cooperatively with any of the parties who responded positively to the WRC’s recommendation for a joint, proactive outreach effort.

d. The Reinstatement Process After January 24th

Finding of Fact: Prior to mid-February, Kukdong continued to deny full reinstatement without penalties or conditions to many workers who participated in the stoppage. Since mid-February, Kukdong has largely, though not fully, ended this practice and the majority of workers who participated in the stoppage have now been reinstated. However, there are still a substantial number of workers who have not achieved reinstatement and some reinstated workers were subjected to penalties and preconditions, which were not subsequently remedied.

Finding of Compliance or Non-Compliance with Codes and Law: Failure to reinstate workers based on their submission of grievances and participation in strike activities violates workers’ freedom of association and their right to be free of discrimination based on union activity under international law (ILO Declaration of Fundamental Principles and Rights at Work of 1998, ILO Convention 87) and Mexican law (Federal Labor Law Articles 357-58, 373, 389, 391). Such actions also violate the terms of a legally binding agreement signed on January 13, 2001, by Kukdong under the auspices of the Puebla Conciliation and Arbitration Board, thereby violating Mexican law. Such actions therefore constitute non-compliance with those provisions of university codes and the WRC model code that require licensees and contractors to respect international and domestic law, and non-compliance with those provisions of university codes and the WRC model code that independently require licensees and contractors to respect workers’ right of association and to refrain from discrimination based on workers’ union activity.

It should be noted that in some cases, and possibly in the majority of cases, it was officials of the CROC, rather than Kukdong personnel, who played the primary role in preventing or discouraging the reinstatement of workers. But Kukdong personnel were frequently complicit in these cases and regularly failed to take reasonable steps to prevent the CROC’s actions. While it is important to understand that the CROC’s activities often placed (and continue to place) Kukdong managers in a difficult position, this fact does not absolve Kukdong managers of the responsibility to take all reasonable steps to ensure the protection of the rights of Kukdong employees.

Analysis of the Evidence: The WRC's fact-finding regarding the reinstatement process after January 24th relies on interviews with workers and local advocates outside the factory by WRC Governing Board Member Daniel A. Long, observations and interviews with workers conducted by Professor Huberto Juárez and his research staff, the reports of observers granted access to the Kukdong facility under the auspices of Nike and Reebok, interviews with local advocates conducted by the WRC's executive director, and public statements issued by Nike and Verité. This information, together with evidence conveyed by other scholars, lawyers, and advocates on the scene, supplements the WRC panel's on-site fact-finding regarding the reinstatement process prior to January 24th.

There has been substantial progress toward the reinstatement of workers at Kukdong. As of the writing of this report, the WRC estimates that roughly two-thirds of the workers who participated in the work stoppage throughout its duration have returned to their jobs. Two of the five leaders fired on January 3rd have returned. Since mid-February, the Kukdong management has reinstated most workers who have sought reinstatement. The intervention of Nike and Reebok has been instrumental in facilitating this progress.

However, the reinstatement process has been marred by significant problems, including outright denial of reinstatement to many workers by Kukdong and the CROC between January 13th (when Kukdong agreed, in writing, to allow the unconditional reinstatement of all workers) and mid-February; acts of intimidation and threats of legal and physical reprisal against workers seeking to return during this same time period; and the imposition of a variety of penalties and conditions on returning workers. These problems have delayed reinstatement and, in some cases, permanently discouraged workers from seeking reinstatement.

Specifically:

- Kukdong denied reinstatement outright to many workers who attempted to return to the plant after January 13th and before mid-February, selectively excluding, apparently in many cases at the instigation of the CROC, those workers who were viewed as supporters of the formation of an independent union and the replacement of the CROC as the workers' bargaining representative.
- Many workers who were offered reinstatement were required to sign statements of loyalty to the CROC as a condition of reinstatement. Several workers were denied reinstatement because they refused to sign the loyalty statements.
- Many workers were required to sign documents, as a condition of reinstatement, relinquishing the rights deriving from their seniority and salary history. Kukdong also unilaterally cancelled the accrued seniority rights of a substantial number of other returning workers.

- Officers of the CROC permitted only a small number of returning workers to read the collective contract between Kukdong and the CROC, and yet required returning workers en masse to sign statements that they had read and understood the collective contract.
- Kukdong threatened to discontinue transportation service from a village for workers who were entitled to reinstatement.
- Many workers who returned to the factory but were denied reinstatement signed letters of resignation under intimidation and threat of reprisal by agents of Kukdong and the CROC. Because they were made under duress, these resignations constitute constructive discharges by Kukdong. Approximately 130 workers were discharged in this manner on January 16th, the Monday after the stoppage. On January 25th, an additional 70 workers were so discharged. Some of these workers have since been reinstated.
- Many workers who returned to the factory on various dates after January 13th were required to meet individually and in small groups with officers of the CROC. At these meetings, officials of the CROC scolded workers for engaging in the work stoppage; warned workers not to strike again; and told workers that, because the work stoppage caused economic loss to the company, the workers would now be required to work more intensively. Kukdong managers and officials of the CROC also threatened that the factory would reduce production and employment if workers made negative statements about the factory.
- Three security guards escorted one returning worker, who had played an active role in the stoppage, from the dining hall into managerial offices, where Kukdong managers told him that he should switch his allegiance to management and should accept a promotion to a newly created position. He declined and was thereafter assigned a new job that denied him contact with any other workers. Security personnel escorted the worker to and from his isolated workstation and prohibited him from talking with rank-and-file workers. Kukdong managers disallowed other returning workers to talk among themselves in small groups.
- On February 6th, approximately 70 workers attempted to return to work, after rank-and-file workers and shop floor leaders visited workers' home villages and advised them that international monitors – the WRC and Verité – were on the scene; and after Nike and Reebok agreed to the WRC's request that, in order to reassure the workers, Verité's observations inside the factory concerning the reinstatement process be reported immediately and publicly rather than kept confidential.¹ Kukdong officials did not reinstate these workers, but instead

¹ Nike and Reebok partially and temporarily implemented one of the recommendations for remediation made by the WRC in its report of January 24th – the placement at the factory of independent observers to focus on the reinstatement process. Observers were at the plant, under the auspices of Verite, beginning on January 30th and for most of that week and the subsequent week, ending on February 8th. There was no observer presence after that date until February 19th, when Professor Juárez and members of his university research team returned to the plant and served as observers for much of the following two weeks.

required them to sign loyalty oaths to the CROC and to apply for jobs as new job applicants. Kukdong officials told the workers that they would be advised at a later date, by telegram, whether they would be hired. Kukdong managers stated that they would hire the “good” workers and not the “bad” workers who “give headaches.”

The events recounted in the previous paragraphs are all instances of intimidation or threat of reprisal for associational activity and constitute violations of workers’ freedom of association under Mexican law, international labor law, the Nike code of conduct, the WRC model code of conduct and university codes of conduct. The actions also violate Kukdong’s legally binding agreement to reinstate workers without conditions or discrimination. In addition, the CROC’s meetings with work groups constituted “captive audience” speeches that are unlawfully coercive in their own right and are another instance of unlawful discrimination by Kukdong – in this case, unlawful discrimination *among* union organizations, since Kukdong permitted the CROC to make speeches urging the workers to support the CROC in the face of many workers’ demand for independent unionization.

Many other, similar instances of continuing threats, coercion, and reprisal between January 13th and mid-February were recounted in workers’ testimony. In addition to these new acts of intimidation, the lingering effects of intimidation and coercion during the January 11th police action continued to deter workers from returning to their jobs. Many parents of workers expressed fear that their young daughters would again be vulnerable to violence if they returned to the factory.

(Again, in the just-mentioned instances of threats and coercion, the panel is here summarizing evidence corroborated by multiple witnesses. In this and most other instances recounted in this report, ten to thirty-five witnesses, including both pro-CROC and anti-CROC workers, corroborated the allegations. In no instance does this report recount evidence proffered by less than three workers.)

On February 9th, in the wake of Kukdong’s publicly reported refusal to reinstate 70 workers who attempted to return to the factory on February 6th, Nike sent an e-mail to Kukdong managers. The Nike e-mail affirmed some of the key violations found in the WRC preliminary report of January 24th and asked Kukdong to reinstate all workers to their former positions without preconditions or discrimination.

Nike’s February 9th e-mail also asked Kukdong to take two of the proactive steps, which the WRC had urged since January 24th to achieve the reinstatement of the workers. In specific, Nike asked Kukdong (a) to extend to the five worker-leaders discharged on January 3rd specific invitations to return to work, and (b) to make a public announcement that Kukdong was dropping criminal charges against Kukdong strikers.

The Nike e-mail of February 9th stated, *inter alia*:

“We believe that because they [the five leaders discharged on January 3rd] have

not been invited specifically to return, that [*sic*] other workers are also staying away out of fear of retaliation... We understand that as many as 300 workers have not returned to Kukdong. We believe this may in part be a result of the February 2nd deadline you [Kukdong managers] set for workers to return. We understand that the invitation to return cannot be extended into the indefinite future, but because of the fears of retaliation stated above, we believe workers may still be reluctant to return.”

Nike’s February 9th e-mail represented a major enhancement of its intervention at Kukdong and appears to have had a substantial impact. The following week, the Kukdong management began accepting most or all workers applying for reinstatement, and substantial numbers of workers returned that week and during each of the next several weeks. On February 19th, two of the leaders fired on January 3rd returned to the factory and were reinstated without incident. The worker-leaders negotiated matters of reinstatement with officials of Kukdong and the CROC, in the presence of representatives of Reebok and Nike and of Professor Juárez (who returned to the plant as an observer on this date, at the request of Reebok and with the support of the WRC). The workers reached an agreement with Kukdong and the CROC.

Although workers attempting to return to their jobs since mid-February have generally been able to achieve reinstatement, there are, as of the writing of this report, still at least two hundred workers who participated fully in the early January work stoppage who have not returned to the factory. In addition, Kukdong’s practice of penalizing some returning workers in terms of salary and seniority continues at the time of the writing of this report. Also, one of the five worker-leaders dismissed on January 3rd has sought, and continues to seek, reinstatement without success.

e. Physical and Verbal Abuse

Findings of Fact: Kukdong supervisors and security personnel committed acts of physical and verbal abuse against workers.

Finding of Compliance or Non-Compliance with Codes and Law: Physical assault against workers constitutes violations of the most basic international law and Mexican civil law. Such action therefore constitutes noncompliance with those provisions of university codes and the WRC model code requiring licensees and contractors to respect international and domestic law, and those provisions of university codes and the WRC model code independently requiring licensees and contractors to refrain from physical abuse of workers. Verbal abuse also constitutes non-compliance with those provisions of university codes and the WRC model code that require licensees and contractors to refrain from all forms of physical and verbal abuse.

Analysis of the Evidence: At least twenty-eight workers, in individual and group testimony, corroborated that Kukdong supervisors engaged in numerous acts of physical and verbal abuse. According to this testimony, the physical abuse consisted primarily of slaps on the front and back of workers’ heads and the pushing and pulling of workers and

included, in at least two specific instances, the hitting of workers with implements (a screwdriver in one case and a hammer in the other – the supervisor implicated in the screwdriver incident was subsequently terminated). Verbal abuse involved frequent yelling and insults, and included the screaming of racial epithets and obscenities. The workers testified that slaps to the head were more frequent, if not routine, during periods of intensified production before shipment deadlines.

The Kukdong general manager confirmed that a supervisor had struck a worker with what he described as a “small hammer” on December 13, 2000, and that that the company had not disciplined the supervisor at that time. While acknowledging this incident and some other problems with the treatment of workers by supervisors, the general manager strongly disagreed with the workers’ testimony as to the frequency and severity of physical and verbal abuse. He stated that the Mexican workers mistook the Korean supervisors’ tonal speech as screaming. He stated that the physical abuse did not continue after December 14th, when he required each supervisor to sign a statement acknowledging that such abuse violated Kukdong policy. However, numerous workers testified that hitting and slapping of workers on the production lines continued after December 14th. Also, several workers corroborated that a Kukdong security officer had physically assaulted a pregnant woman, dragging her out of the factory, on January 30th, even while outside observers were on-site. Kukdong did not discipline the security officer. Also, as recounted above, many workers testified that CROC officers were permitted on company property during the January 11th police action and that at least one CROC officer participated in the use of excessive force against workers.

f. Minimum Wage

Finding of Fact: The wages paid by Kukdong to some workers sewing on the factories production lines are below the legally-mandated minimum occupational wage for sewers in garment factories in this region of Mexico.

Finding of Compliance or Non-Compliance with Codes and Law: Minimum wage levels promulgated by the Mexican federal government’s National Commission on Minimum Wages (Comisión Nacional de los Salarios Mínimos) are legally binding minimum wages under Mexican law. Wages below that minimum constitute violations of Mexican law (Federal Labor Law Articles 85, 95 et seq.). The payment of sub-minimum wages therefore constitutes noncompliance with those provisions of university codes and the WRC model code requiring licensees and contractors to respect domestic law, and those provisions of university codes and the WRC model code independently requiring licensees and contractors to pay minimum wages.

Analysis of the Evidence: Mexican law required that sewers in garment factories in the region where Kukdong is located be paid a minimum of 42.2 pesos per day during 2000. The rate is set by the National Commission on Minimum Wages. Some workers on the sewing production lines at Kukdong were paid 38.0 pesos per day throughout 2000, 10% below the mandated minimum. The legal minimum for sewers was raised to 46.3 pesos for 2001. While Kukdong management has raised the lowest wage in the

factory to 43.0 pesos per day from 38.0 pesos, this 43.0 peso wage, which was still being paid to some sewing line workers this spring, remains below the current professional minimum.

Subsequent to the release of the WRC's first report on the Kukdong complaint, which cited Kukdong's apparent failure to pay some workers the legally mandated professional minimum, and subsequent to the release of Verité's report on Kukdong, which corroborated this finding, Nike released a memo disputing Verité's conclusions. In this memo, Nike argued that, while there were a significant number of workers at Kukdong earning less than the professional minimum wage, all such workers were either general workers or sewing trainees, and therefore not eligible for the professional minimum wage.

The WRC sought input on the questions raised by Nike's memo from economic and legal experts in Mexico – including Arturo Alcalde Justiniani, a prominent labor attorney who had previously investigated the Kukdong matter at the request of Nike and the International Labor Rights Fund. We also reviewed the cases of individual Kukdong workers, including 32 sewing operators who were among the workers interviewed at length by Professor Huberto Juárez of the Autonomous University of Puebla and his research staff. Our research and analysis yielded the following information:

- Mexican law does not recognize any distinction between regular employees and trainees for the purpose of determining eligibility for the professional minimum wage. If a worker is performing tasks that fit the definition of a particular job classification, then that worker is eligible for the professional minimum wage associated with this classification, regardless of how long the worker has been employed or the level of that worker's training. In a legal memo on this issue by Arturo Alcalde, provided to the WRC, Mr. Alcalde states, "The applicability of the professional salary is determined by whether the worker performs the job described, there being no legal precedent that justifies a lower salary because [the worker] is in a period of training... Thus it is sufficient that the worker be performing that activity, function, or job, independent of the level of performance or efficiency, in order to merit the minimum professional salary" (WRC translation from Spanish).

The definition of the job of sewer in a garment factory is promulgated by the National Commission on Minimum Wages and is as follows: "SEWER PRODUCING APPAREL IN WORKSHOPS OR FACTORIES: This is a worker that assembles or processes by machine material provided by the employer in [the employer's] factory. The worker may not use a machine when the products are produced partially or completely by hand. [The worker] adjusts, lubricates, and assures the correct functioning of the machine, and reports needed maintenance or repairs. The worker uses the tools of the trade." (as cited by Mr. Alcalde, WRC translation from Spanish).

Thus, if a worker is sewing clothing on a production line, this worker must be paid the professional minimum wage. Kukdong management cannot classify this worker as a trainee and, on the basis of this classification, legally pay her/him less than the professional minimum wage.

- There were, both last year and through this spring, significant numbers of Kukdong workers who were sewing garments on Kukdong's production lines and were therefore eligible for the professional minimum wage, but who were paid less than the professional minimum – including 32 workers whose rate of pay and type of work were confirmed by Professor Juárez and his research team in extensive, one-on-one interviews. In 2000, most of these workers received 38 pesos per day. In 2001, most received 43 pesos per day. Kukdong may view some or all of these workers as trainees, but this is not legally relevant. The fact that these workers were sewing on production lines was sufficient to make them eligible for the professional minimum wage.
- Nike argues in its memo that there were some workers who were sewers, but who did not qualify for the professional minimum wage because they were not actually sewing garments on the factory's production lines, but rather were practicing on scraps of cloth. The WRC did not identify any such workers and cannot say definitively whether there are or have been any Kukdong workers in this situation. Nike also argues that Kukdong employed general workers (or "manual workers") not involved in the sewing of fabric and therefore not eligible for the professional minimum wage for sewers. This statement is correct. However, Nike's claim that all Kukdong workers who were paid less than the professional minimum were either trainees working exclusively on scraps of cloth or manual workers not employed in sewing fabric, is incorrect. As noted, there were significant numbers of workers who were eligible for the professional minimum who did not receive it.
- On May 23rd, Verité circulated a response to Nike's memo, indicating that Verité stands by its conclusion that Kukdong failed to pay some eligible workers the legally mandated professional minimum wage. Verité states that Kukdong managers did not identify any of the workers interviewed by Verité as being trainees and that the President of Kukdong's parent corporation specifically affirmed that there were no trainees employed at the factory at the time of Verité's audit (February 5th-7th). Verité also notes that 79% of the workers identified in Nike's memo as being trainees had been employed at the factory for at least six months.

g. Prevailing Wage

Finding of Fact: The wages paid by Kukdong to many production workers are below the median wage for apparel workers in Puebla, and throughout Mexico, in both the *maquiladora* and non-*maquiladora* sectors, as calculated by Mexican federal

government's National Institute of Statistics and Geography (Instituto Nacional de Estadística, Geografía e Informática – INEGI) and independent economists of the Autonomous University of Puebla.

Finding of Compliance or Non-Compliance with Codes and Law: Payment of wages below the median wage for similarly situated workers in the region or country constitutes non-compliance with those provisions of university codes and the WRC model code requiring that contractors and licensees ensure that wages meet or exceed the prevailing industry wage.

Analysis of the Evidence: The lowest wage paid to Kukdong workers at present is 43 pesos per day (the lowest wage in 2000 was 38 pesos per day). The median wage at Kukdong at present is 48 pesos per day – which is the wage earned by the majority of sewing operators on the production lines. The median wage at Kukdong in 2000 was 43 pesos per day.

According to INEGI, the median daily salary of a production worker in Mexico employed in a *maquiladora* that manufactures apparel and/or other textile products was 66.1 pesos per day in 2000.² The median wage for apparel workers in the non-*maquiladora* sector is higher. Production workers employed in *non-maquiladora* firms that manufacture knitted outerwear earned 10.97 pesos per hour in 2000 – 75.4 pesos per day, based on a 48-hour workweek.³ For the state of Puebla, according to INEGI, the median wage for workers producing apparel in *maquiladora* factories was 58.5 pesos per day in 2000.⁴ Data for 2001 is not yet available, but the figures are expected to be higher than those for 2000.

Professor Huberto Juárez and his research staff at the Autonomous University of Puebla, have conducted comprehensive research and analysis of wage levels in the apparel industry in the state of Puebla, where Kukdong is located, and have conducted extensive interviews with 203 workers previously or currently employed at Kukdong. Information provided to the WRC investigative panel by Professor Juárez, based on this research, bolsters the conclusions derived from official government data. Professor Juárez and his research staff found wages to be substantially higher for apparel workers in factories in both the Tehuacán and Teziutlán areas of the State of Puebla – the other significant apparel-producing areas in the state in addition to the Atlixco-Puebla City area, where Kukdong is located. Professor Juárez's data shows that sewing operators in Tehuacán make 64 pesos per day as a starting wage and that most sewing operators make 71 pesos per day. In Teziutlán, sewing operators generally make 57 pesos per day (all figures based on 2001 data). As noted above, sewing operators at Kukdong generally make 48 pesos per day, with some making 43 pesos per day. Other apparel factories in

² INEGI. Dirección General de Estadística. Dirección de Estadísticas Económicas. Estadística de la Industria Maquiladora de Exportación (monthly bulletin, various issues).

³ INEGI. Dirección General de Estadística. Dirección de Estadísticas Económicas. Encuesta Industria. (monthly bulletin, various issues)

⁴ INEGI. Dirección General de Estadística. Dirección de Estadísticas Económicas. Estadística de la Industria Maquiladora de Exportación (monthly bulletin, various issues).

the Atlixco-Puebla City area, also pay higher wages than Kukdong, though not as high as factories in Tehuacán and Teziutlán.

h. Living Wage

Finding of Fact: The wages paid by Kukdong to production workers are insufficient to meet the barest needs for food, clothing, and shelter of a household with either two or three members.

Finding of Compliance or Non-Compliance with Codes and Law: Wages that do not meet the minimum needs for food, clothing and shelter of a small household fail to comply with those provisions of some university codes and the WRC model code requiring that licensees and contractors ensure that workers are paid a living wage. The WRC supports the work of the Collegiate Living Wage Association, and other efforts, to develop a workable living wage standard that can be calculated on a country-by-country basis. In the absence of a broadly applicable and recognized standard, the WRC considers these findings with respect to living wage to be of a preliminary nature, and the WRC is not prepared, at this point, to recommend a specific living wage level for Kukdong.

Analysis of the Evidence: According to testimony by Professor Juárez of the Economics Faculty of the Autonomous University of Puebla, the minimum daily income sufficient to provide a family of three in the Puebla region with food, water, rent, heat and electricity, and transportation is 129 pesos per day – as of January 2001. This intentionally conservative standard underestimates the real cost of living because it does not include the cost of clothing, out-of-pocket health care expenses, or school fees and materials. The lowest wages presently paid at Kukdong, 43 pesos per day, are insufficient to meet this minimum standard. Even with two members of a three-person family working full-time at this wage level, their income would be insufficient. (It should be noted that this and the other standards discussed in this section are designed to measure the minimal needs of a household, which is a significantly lower standard than that generally understood to be implied by the phrase “living wage.”)

The Mexican Secretariat of Labor calculates the daily minimum cost of living for a 4.6-person family for the first quarter of 1999 to be 168.0 pesos.⁵ Reducing this figure by one third to approximate the costs for a three-person family yields a minimum of 112 pesos. Two workers earning the lowest wages paid presently at Kukdong would still be well shy of this minimum requirement, even without accounting for the fact that the cost of living in Mexico has risen since the government’s 1999 report. One worker earning the present Kukdong wage receives a level of income nowhere near sufficient to meet this standard.

⁵ Source: *Informe de Política Laboral de la Dirección Ejecutiva de Estudios del Trabajo (DEET)*, No. 10 (México, DF: Secretaría del Trabajo y Previsión Social (STPS), May 15, 1999), pp. 1-2; copy provided in public submission by the Chicago Religious Leadership Network on Latin America (CRLN) in response to the U.S. Department of Labor’s *Federal Register* notice of June 30, 1999.

An agency of the Mexican federal government, the General Coordination of the National Plan for Deprived Zones and Marginalized Populations (Coordinación General del Plan Nacional de Zonas Deprimadas y Grupos Marginados – COPLAMAR), published poverty lines in the early 1980s that were based on two different "baskets" of goods and services. The "Normative Basket of Essential Needs" (Canasta Normativa de Satisfactores Esenciales – CNSE) takes into account the cost of food, housing, basic health and hygiene products, the costs of participating in basic cultural and recreational activities, transportation and communications, clothing, and small items related to personal presentation. A "Sub-Minimal" basket (Canasta Submínima – CSM) includes only food, housing, and some minor health, hygiene and educational material expenditures. Professor Enrique Hernández Laos of the Autonomous Metropolitan University of Iztapalapa (Universidad Autónoma Metropolitana – Iztapalapa) estimates that in constant 1996 pesos the cost of the "sub-minimal basket" is 7,693 pesos per year per person.⁶ A daily poverty threshold wage based on this data can be estimated by multiplying the cost of the CSM by three (in order to account for the needs of three household members), dividing by the number of work days in a year, and correcting for inflation (based on inflation figures provided by the Banco de México). This method places the *subsistence* wage in Mexico at 139 pesos per day for a family of three. This estimate is roughly consistent with those of the Labor Secretariat and Professor Juárez.

Most Kukdong workers interviewed by the panel stated that the wages paid at Kukdong were insufficient to meet basic needs for even a single person.

i. Child Labor

Finding of Fact: There is insufficient evidence to conclude that Kukdong hired workers below the age of sixteen in 2001. Prior to 2001, the Kukdong factory did, in at least a few instances, employ children aged thirteen through fifteen for workdays of ten hours.

Finding of Compliance or Non-Compliance with Codes and Law: The employment of children below the age of sixteen for workdays of more than six hours violates Mexican law (Mexican Constitution Article 123(A)(III) and Federal Labor Law Article 177). Such employment therefore constitutes non-compliance with those provisions of university codes and the WRC model code requiring licensees and contractors to refrain from hiring workers below the age of sixteen except in the manner set forth in domestic law.

Analysis of the Evidence: At least eight workers testified that they had personal knowledge that Kukdong had, during the past year, hired children aged thirteen through fifteen for workdays of ten hours. (The workers testified that they knew the age of these children because they were close friends or family members.) The employment of

⁶ Enrique Hernández Laos, "Distribución del ingreso y la pobreza en México," in Alcalde, Bensusán, de la Garza, Laos, Rendón and Salas, *Trabajo y trabajadores en el México contemporáneo* (Mexico City: Grupo Editorial Miguel Angel Porrúa, December 2000)

workers under age sixteen for more than six hours per day violates Mexican labor law and Article 123 of the Mexican Constitution.

Kukdong managers denied that in the past year they had intentionally hired workers under the age of sixteen. Kukdong managers admitted to the employment of at least one underage worker in the past, but stated that that case was a result of the worker misrepresenting her age. Kukdong managers also stated that there was a substantial probability that other workers under the age of sixteen were inadvertently hired at the factory in the past, particularly during the period of aggressive recruitment when the factory initially ramped up production. At least five workers, however, testified that Kukdong recruiting agents had coached under-age workers to conceal their real age from Kukdong managers.

There was no firm testimony or documentation indicating that Kukdong currently hires child labor in violation of Mexican labor law and the Mexican Constitution.

j. Maternity Leave and Sick Leave

Finding of Fact: Kukdong failed in multiple instances to afford workers maternity leave and sick leave.

Finding of Compliance or Non-Compliance with Codes and Law: Mexican law requires employers to provide extensive maternity leave, pay maternity benefits and re-assign pregnant women to lighter work. (Federal Labor Law Article 165-172). Failure to do so therefore constitutes non-compliance with those provisions of university codes and the WRC model code that require licensees and contractors to respect domestic law and those provisions of the codes that require licensees and contractors to provide maternity leave and to refrain from gender discrimination. Mexican law also requires employers to provide sick leave, benefits, and, in enterprises with more than 300 employees, adequate medical facilities on-site or, by collective agreement, off-site. (Federal Labor Law Article 504.) Failure to do so therefore constitutes non-compliance with those provisions of university codes and the WRC model code that require licensees and contractors to respect domestic law and those provisions of the codes that require licensees and contractors to provide sick leave.

Analysis of the Evidence: At least seven workers corroborated multiple instances in the past year in which pregnant workers were not permitted maternity leave, were not paid maternity benefits, and were not reassigned to lighter work, as required by Mexican law. (See Federal Labor Law Article 170.) (The panel did not receive testimony from the pregnant workers themselves.)

At least twelve workers testified to specific instances in which sick workers were not allowed to leave company property for medical assistance. (These instances included cases of workers made sick by rancid food served in the company cafeteria. See the following section of this report.) In some of these cases, workers were required instead to see a company nurse whom workers considered incompetent and careless.

Kukdong management denied any instances of workers being improperly denied sick leave or maternity leave.

k. Breakfast and Lunch

Finding of Fact: When Kukdong recruited new workers, it promised that workers' compensation and benefit package would include reasonable, edible lunches and breakfasts. Kukdong failed to provide reasonable, edible lunches and breakfasts.

Finding of Compliance or Non-Compliance with Codes and Law: Failure to provide benefits promised constitutes breach of contract, non-payment, and misrepresentation under Mexican civil law. Such action therefore constitutes non-compliance with those provisions of university codes and the WRC Code that require licensees and contractors to respect domestic law and those provisions of the codes that require licensees and contractors to ensure payment of accrued wages and benefits.

Analysis of the Evidence: At least twenty-two workers testified that, when Kukdong engaged in its aggressive efforts to recruit new workers to the factory, Kukdong agents repeatedly promised workers that company-provided breakfast and lunch was a component of workers' compensation and benefit package. Many workers considered that promise a significant term of employment, in light of their severe poverty and their inability to prepare full breakfasts at home by reason of their long commuting time and long working day. As explained above in section h, the monetary wages paid workers were insufficient to meet the workers' basic needs for food, housing, clothes, and healthcare. Substantial breakfasts (including eggs, meat, tortillas and fruit) are the cultural norm in Puebla. Many workers leave their homes well before dawn and before normal breakfast time to start workdays that are as long as fifteen hours (including ten hours at the factory and up to five hours of commuting between their villages and the factory). They arrive at the factory at breakfast time.

Statements by CROC officials tend to corroborate that company-provided meals were understood as an element of the workers' compensation and benefit package and not as a gratuity. In their captive-audience speeches to returning workers in February 2001, CROC officers stated that Kukdong should pay workers the monetary value of the company meals to enable workers to bring their own food to work. *See Verité Activity Report* (February 6, 2001).

At least nineteen workers independently corroborated that, on more than one occasion, workers developed rashes, fevers, and stomach disorders after eating rancid meats or other unhealthful food for lunch in the factory cafeteria. (One or more of the workers sickened by company food was among the workers denied sick leave in violation of Mexican law.) In addition to the problems with lunchtime meals, the Kukdong "breakfasts" consisted of bread and coffee, in violation of the workers' reasonable expectation that the company would provide a substantial meal consistent with the region's cultural norm.

The seriousness of Kukdong's breach of promise is confirmed by the fact that this issue was a key grievance of the Kukdong workforce, sufficiently important and ranking to set off the chain of events leading to the discharge of the five workers on January 3rd and the subsequent stoppage of January 11th in protest of those discharges. Those five workers, in addition to protesting against the CROC, led a protest against the company's failure to provide adequate, healthful meals, shortly before the workers were discharged.

I. Drinking Water and Bathroom Facilities

Finding of Fact: Kukdong occasionally failed to provide potable drinking water, failed to provide bathroom facilities with running water, failed to provide clean bathroom facilities, gave workers insufficient opportunities to use those facilities, and denied access to the facilities altogether as an instrument of disciplinary punishment.

Finding of Compliance or Non-Compliance with Codes and Law: Failure to provide adequate drinking water and bathroom facilities constitutes noncompliance with those provisions of university codes and the WRC model code requiring that licensees and contractors ensure that workers have access to sufficient drinking water and sanitary bathroom facilities.

Analysis of the Evidence: At least nine workers testified that, from time to time, Kukdong managers failed to provide drinking water or running water in the bathrooms. At least sixteen workers testified that their access to water and bathroom facilities was strictly policed to the point of indignity. Five workers testified that Kukdong managers used their control over access to bathroom facilities as a tool of managerial discipline, at times denying workers access to the facilities altogether as a punishment for alleged infractions. Several workers also reported that the bathroom facilities were, on at least some occasions, unsanitary.

Assessment of Remediation Efforts to Date

This section of the report offers an assessment of remediation efforts to date. The following section then offers recommendations for further action toward full and effective remediation.

a. Assessment of Efforts to Achieve Full Reinstatement

Achieving full reinstatement in cases such as Kukdong, where large numbers of workers have been unlawfully dismissed pursuant to a work stoppage or other workplace dispute, is important not only as a remedy to those dismissed workers who suffer loss of their livelihood – but also as a necessary remedy for the harm to the entire workforce's freedom of association and right to be free of discrimination based on union activity. When workers are not fully reinstated, then the associational rights of all workers are unremedied in at least two important respects. First, without full reinstatement, any

majority vote by the current workforce on the issue of union representation constitutes a less than just determination of the pre-stoppage workforce's associational preferences. Second, the associational activities of all workers is chilled by the continuing absence of many members of the pre-stoppage workforce – an absence which serves as a daily reminder that future severe acts of intimidation may likewise go unremedied. This is a key reason why the WRC stressed the issue of reinstatement so strongly in its first report on the Kukdong case.

Partially as a result of prodding by the WRC investigation and first report – together with other events and efforts, including the ongoing communications by the WRC to Nike, Reebok, and Kukdong; the media spotlights on the Kukdong dispute; the assessment and report by Arturo Alcalde on behalf of the ILRF; the assessment and report by Verité (the monitor selected by Nike and Reebok); and the assessment and report by Korea House International Solidarity – all of which corroborated the WRC's findings; and the strong interventions made by Nike and Reebok vis-à-vis the managers of Kukdong – there has been significant progress toward remediation of the mass discharge.

Kukdong's positive remedial activities include: dissemination of public statements inviting workers to return; specific invitations to some of the worker-leaders discharged on January 3rd; efforts to rein in acts of intimidation by Kukdong security agents and by CROC agents; formal termination of requirements that returning workers reapply for employment; formal termination of Kukdong's policy of extinguishing the accrued seniority of returning workers and in other respects altering the job status of returning workers; willingness to negotiate the terms of reinstatement with worker-leaders on February 19th and 20th, and the dismissal of some Kukdong personnel who had obstructed the free return of workers to the factory and engaged in acts of reprisal. As noted earlier in this report, these actions facilitated the reinstatement of roughly two-thirds of the workers who participated in the work stoppage, including two of the worker-leaders.

It must be noted that the remedial efforts of Kukdong, Nike, and Reebok were partial, and reactive, particularly in the month immediately after the end of the work stoppage and therefore have not been fully effective. Those parties did not choose to cooperate with the WRC (or any other organization) in the kind of comprehensive remedial program that the WRC recommended. As a result, there remain significant numbers of workers who at least originally desired to return to the factory but who did not do so. In some cases this was due to fear of reprisals from the Kukdong management or the CROC – fear that was the predictable result of multiple, cumulative acts of intimidation, threats, and coercion. In some cases workers attempted to return and were discouraged from doing so upon arrival at the factory or rejected outright.

The minimal elements of an effective program of remediation for a mass discharge marked by repeated threats and acts of intimidation are well-established by labor-law professionals, judges, arbitrators, and scholars; by the public national systems of labor law that have refined and tested such remedial programs in countless cases over a period of decades; and by the community of nations, in the ILO standards that have evolved over

the last century. Under these familiar precedents, rooted in years of practical experience, it was not sufficient that Kukdong and the CROC suspend their various acts of reprisal and discrimination against returning workers (which, especially in the case of the CROC, never fully occurred). Nor was it sufficient that Kukdong managers disseminate public statements announcing that they were suspending acts of reprisal and discrimination. Workers who have experienced repeated intimidation, and in some cases physical abuse, cannot be expected to return to work based on a sudden pronouncement of “reassurance” by the very actors who, in the days and weeks immediately preceding the announcement, engaged in a pattern of intimidation *and* who retain continuing, future control over the daily lives and well-being of returning workers. This was especially true at Kukdong, for at least two reasons. First, the Kukdong workers are predominantly very young (aged 16 to 23); many are experiencing their first employment of any kind, let alone industrial employment. Second, Kukdong wages are lower than the wages paid by other apparel facilities in the region and are not significantly higher than alternative work available to the workers in their home villages and farms. In this context, if workers believe they will face continuing coercion and indignity upon return to the factory, they have little incentive to return and much incentive not to return. This is precisely what the parents of many Kukdong workers advised their daughters and sons. Thus, a far more aggressive, collaborative outreach effort of the kind described elsewhere in this report – beginning as soon after the end of the stoppage as possible – would have been necessary to achieve full reinstatement.

It is important to bear in mind that, notwithstanding its limitations and shortcomings, the significant degree of success achieved in the reinstatement effort at Kukdong is remarkable in the Mexican context (and would arguably be so in many other countries as well). The fact that a majority of workers who participated in the work stoppage were able to return to work within roughly two months of the mass dismissals and that two of the original leaders were able to return – thanks in no small part to the intervention of Nike and Reebok and the intervention of major U.S. colleges and universities – is a breakthrough. It defines an important precedent that licensees should and can successfully intervene in such cases.

b. Assessment of Remediation of Substandard Wages, Benefits, and Conditions

In addition to progress toward the reinstatement of workers participating in the work stoppage, significant progress has occurred at Kukdong with respect to some – but not all – other areas where violations have been identified:

- *Breakfasts and Lunches:* There have been significant improvements in the lunches served at Kukdong since the WRC issued its first report. Problems with spoiled food appear to have been corrected and overall variety and freshness have increased. In addition, a new and improved cafeteria facility has been completed, and a portion of the Kukdong workforce is assigned to use this better, more modern facility – others still use the old facility.

However, there has not been improvement with respect to the nature of breakfasts available to the Kukdong workers, which still consist exclusively of bread and coffee, and are not the full breakfasts that workers expected based on representations made by Kukdong at the time workers were recruited.

- *Wages:* As has been discussed, the lowest wage at Kukdong factory was increased from 38 pesos to 43 pesos per year early in 2001. Some workers have received additional increases. These changes are positive, but, as noted above, still leave the median wage at Kukdong below the prevailing industry wage and leave some sewing operators earning less than the legally mandated professional minimum wage to which they are entitled. It should also be noted that Kukdong did recently pay workers a profit-sharing bonus as required by Mexican law. This is noteworthy and laudable, despite being legally required, because the law is often ignored.
- *Physical and Verbal Abuse:* Kukdong appears to have ended the use of physical abuse (i.e. hitting and slapping), as a means of discipline on production lines (though there have been allegations, especially in the weeks immediately preceding the release of this report, of acts of physical abuse initiated by CROC supporters and Kukdong security personnel against members of the Kukdong workforce who do not support the CROC). Verbal abuse continues to be used as a means of discipline, on production lines, by the factory's Korean managers.
- *Bathroom Facilities/Drinking Water:* Unreasonable limits on bathroom breaks and access to drinking water appear to have been discontinued and sanitary conditions appear to have improved.
- *Sick Leave and Maternity Leave:* There has been no apparent improvement in these areas.
- *Freedom of Movement:* Kukdong appears to have discontinued the practice of barring workers from leaving the factory grounds during the lunch break.

c. Assuring Workers the Freedom to Choose their Own Representative

As to the protection of freedom of association at Kukdong, the most urgent remedial measures are proactive steps to ensure free and uncoerced communication and deliberation among the workforce regarding their choice of bargaining representation and a free and fair secret ballot election. Given the coercive treatment to which many workers were subjected by CROC officials and Kukdong security personnel (for example, pressure to sign statements of loyalty to the CROC as a condition of reinstatement; “captive audience” speeches given to returning workers by the CROC and condoned by Kukdong management; threats of legal and physical retaliation against opponents of the CROC and against workers who participated in the work stoppage), substantial remediation is essential to create the basic conditions for a fair election.

Kukdong management has taken steps toward this goal. For example, Kukdong has dismissed its human resources director, an individual who was viewed by many Kukdong workers as closely associated with CROC efforts to intimidate workers, and has pledged to abide by the law and oppose efforts by the CROC to have workers dismissed on the basis of their refusal to continue as CROC members. Kukdong has also urged government officials in Puebla to proceed expeditiously with a fair, secret ballot election that would allow Kukdong workers to choose between the CROC and a new union formed by workers opposed to the CROC as their collective bargaining representative.

These steps are positive and demonstrate good faith but they are not sufficient. Most importantly, Kukdong has failed to take adequate measures to protect Kukdong workers against ongoing psychological and physical intimidation by supporters of the CROC – in some cases, Kukdong security personnel have participated in acts of intimidation. Given the past events at Kukdong, and the common use of tactics of intimidation in union elections in Mexico, vigilance with respect to potential acts of intimidation and coercion and aggressive intervention by Kukdong management to prevent and/or remedy such acts are essential (see Recommendations 10 and 12 below).

It is a commonplace of labor-law compliance that the best and often only location where workers may engage in collective deliberation is the workplace and its immediately contiguous public spaces, either immediately before or after work, during lunch and other breaks, and during work time so long as production is not significantly impaired or so long as the employer in the past has allowed workers to talk among themselves during working time about other non-work-related matters. This is especially true at Kukdong, where the workers live in distant, scattered villages and rural areas. In light of the constraints of transportation, communication, and non-working time, the Kukdong workers cannot engage in full communication and deliberation during their time away from the factory. Thus, ensuring that workers can engage in communication in the workplace and at the same time that the workplace is not a venue for coercion and intimidation is essential to a fair election process.

It is important to note that on March 18, 2001, Kukdong workers seeking to replace the CROC as the bargaining representative at the factory met and formed a new union, Independent Union of Workers at the Company Kukdong International of Mexico (SITEKIM) (Sindicato Independiente de Trabajadores de la Empresa Kukdong Internacional de México). This is an important legal step toward these workers' stated goal of a free and fair election that would afford all Kukdong workers a choice between retaining the CROC as their representative and opting for the newly created union. Leaders of this new union held a constructive meeting with Kukdong management the week of March 19th, itself a sign of progress toward respect for the associational rights of all Kukdong workers. These workers have applied to the Conciliation and Arbitration Board of Puebla for a "registro" – formal recognition as a union. The board has been slow to act on the workers' application and concerns have arisen that pro-CROC bias on the part of the board could lead to unlawful delay and or unlawful denial of recognition to SITEKIM.

d. Nike Remediation Plan

On March 14th, following the release of Verité's report on the Kukdong matter, Nike announced a remediation plan that called for a range of positive steps by Kukdong to address many of the problems that the WRC, Verité and others have identified at the factory. Some of the progress toward remediation discussed in this report reflects the implementation of elements of this plan by Kukdong. The Nike remediation plan has two major weaknesses: 1) The plan does not address the issues of minimum wage and prevailing wage. 2) The plan does not address the need for a secret ballot union election or the need for external monitoring to ensure the fairness of the election process if an election does take place.

Recommendations

a. Reinstatement

RECOMMENDATION 1:

The prospects for further reinstatement at this point are limited, since many of those workers who were unable to return in the weeks after the end of the work stoppage are permanently discouraged and/or have moved on to other jobs. However, there likely remain some workers who would respond to an energetic outreach program that involves trusted co-workers and worker advocates and has the full support of Nike and Reebok. Such a program should therefore be implemented. This is particularly important in ensuring that if and when a union election is held at Kukdong, as many of the members of the pre-stoppage workforce as possible are able to participate. Kukdong should also cease discriminatory treatment of workers based on their participation in the work stoppage and refrain from imposing penalties or conditions on any workers who return in the future. One of the five worker-leaders fired on January 3rd has been seeking reinstatement and has been refused. The Kukdong management should reinstate this worker immediately.

b. Wages, Benefits, and Working Conditions

RECOMMENDATION 2:

Kukdong should immediately raise wages for any sewing operators currently being paid less than Mexico's legal professional minimum – 46.3 pesos per day. Kukdong should implement additional, more general increases to ensure that its wages are consistent, overall, with the prevailing industry wage in the Puebla region. Longer term, Kukdong should strive toward the ultimate goal of paying wages sufficient to meet the basic needs of Kukdong workers and their households. To the extent that progress toward meeting the prevailing wage and/or living wage standard requires further data-collection and analysis, Kukdong, Nike, and Reebok should join a cooperative effort with

the WRC and rigorous local researchers (including the research team of Professor Huberto Juárez of the Autonomous University of Puebla which has already made substantial progress in the relevant data-collection and analysis). Nike and Reebok must recognize their responsibility to negotiate supply-chain contracts, including prices paid to Kukdong, that ensure Kukdong's capacity to pay these recommended wage increases. Again, these parties should enter into cooperative efforts with the WRC to implement any data-collection, drafting of model contracts, and accountability mechanisms necessary to fulfill their responsibilities in this respect.

RECOMMENDATION 3:

Kukdong should maintain and enforce a zero-tolerance policy toward physical and verbal abuse of workers by supervisors and managers, including immediate and effective discipline of supervisors and managers who engage in any such abusive activities.

RECOMMENDATION 4:

Kukdong should provide maternity and sick leave and benefits as required by Mexican law, and should implement internal and external controls adequate to safeguard against any form of gender discrimination, including pregnancy-based discrimination and sexual harassment. (The implementation of such controls is addressed in *RECOMMENDATION 8* below.) Toward this end, Kukdong should include written records as to every pregnant and sick worker in the personnel files of the relevant workers, indicating the leave-time and benefits provided that worker. These records should be accessible for purposes of the internal and external accountability set forth in *RECOMMENDATION 8*, with necessary requirements of confidentiality on the part of internal and external monitors so as not to compromise the affected workers' right to privacy and dignity.

RECOMMENDATION 5:

Kukdong should provide full and healthful breakfast and lunch to workers.

RECOMMENDATION 6:

Kukdong should ensure that healthful drinking water is always available to workers, that drinking stations are provided at each line of production, and that bathroom facilities are sanitary in all respects. Kukdong should refrain from policing and surveillance of workers making use of those facilities and should not take any other actions impairing the dignity of workers making use of those facilities. Kukdong should adopt and enforce a zero-tolerance policy toward supervisors and managers who deny access to drinking water or bathroom facilities as a disciplinary tool, including immediate and effective discipline of supervisors and managers who engage in any such activities.

RECOMMENDATION 7:

Kukdong should not employ workers under the age of sixteen unless Kukdong is provided parental consent, does not employ such workers for more than six hours per day, and meets all other requirements stipulated in Mexican law. Kukdong should employ no workers under the age of fourteen. Kukdong and its agents should not advise or coach applicants to misrepresent their age for purposes of evading these rules. Kukdong should require workers to submit official school documents, preferably with photographs, indicating the workers' ages, and should keep copies of those documents in personnel files for internal and external accountability. If workers are unable to provide such documents, it is Kukdong's responsibility to inquire at relevant schools and retrieve those documents or equally reliable information about the applicants' ages.

c. Mechanisms of Internal and External Accountability

RECOMMENDATION 8:

Compliance with the above recommendations and with all other applicable rules of Mexican law, international law, university codes of conduct and the WRC model code of conduct must be assured by mechanisms of internal and external accountability that maximize the participation of the workers whose rights are to be safeguarded.

There is no pre-fabricated template for such mechanisms. By their nature, the development of such mechanisms must be rooted in the organization and efforts of "change agents" within the factory and its immediate institutional environment, particularly Kukdong workers, their advocates, and allied local organizations. As shown by recent compliance efforts of this sort throughout the world, the development of effective mechanisms require participation, innovation, and experimentation at the local level.

This is true, for at least two reasons. First, any meaningful system of accountability must include "accountability from below." That is, while Kukdong managers have a responsibility to implement the recommendations made by this report under conditions of transparency and accountability "from above," this must be combined with the capacity of the workforce itself to continuously provide accountability based on their own observation and participatory fact-finding.

Second, any mechanism of accountability, if it is to be both effective and lasting, must be enmeshed in, and suited to, the firm's organizational culture, logistic and technological characteristics, and production routines. The actors with both the incentive to safeguard labor rights in the factory and the greatest practical knowledge of these organizational features are the workers themselves.

Hence, such mechanisms of accountability should be designed and implemented through good faith negotiations between Kukdong and the legitimate bargaining representatives chosen by the majority vote of the workforce pursuant to

RECOMMENDATION 12 below. After the workforce has chosen its majority representative in a free and fair election, negotiations should go forward under the mandate that the parties must actually achieve implementation of mechanisms of effective accountability from below, accountability from above, and external accountability. That is, the subject of such mechanisms should constitute a mandatory *subject* of bargaining; and ultimate *contractual agreement* on such mechanisms should be mandatory. If the parties cannot reach agreement, then expeditious mediation and arbitration, through the cooperative program described below, should be implemented.

External accountability provided by local labor-rights organizations and advocates is necessary to reinforce and safeguard the exercise of workers' accountability from below. The negotiated mechanism of external accountability should not by-pass or supplant the public agencies of labor-law enforcement, such as the Puebla Conciliation and Arbitration Board, but should instead seek to strengthen the capacity and integrity of such agencies.

RECOMMENDATION 9:

The good faith achievement of a negotiated agreement about such participatory mechanisms of internal and external accountability should itself be subject to oversight, assistance, and, if necessary, mediation and arbitration, by means of the remedial program proposed by the WRC in its first report – that is, a comprehensive ongoing program of remediation, in which Kukdong, Nike and Reebok engage constructively with U.S.-based monitoring and labor rights organizations – including the WRC, FLA, and the ILRF – and local worker-rights organizations and advocates. This program should assist the parties engaged in the recommended negotiations by, among other support activities, providing information about “best-practices” in the design and implementation of participatory mechanisms of accountability at similarly situated factories.

d. Workers' Free Choice of a Bargaining Representative

RECOMMENDATION 10:

Kukdong should take proactive steps to ensure free and uncoerced communication and deliberation among the workforce regarding their choice of bargaining representative, prior to a free and fair secret ballot election. This requires, among other things, that:

- Kukdong managers must remain neutral toward workers' organizing activities in support of alternative bargaining representatives and must vigorously protect workers against intimidation by agents or advocates of any bargaining representative – this includes a zero tolerance policy toward any Kukdong employees, including factory security personnel, who participate in acts of intimidation, coercion or bribery on behalf of any union.
- Until an election is held, Kukdong must strictly limit the CROC's access to

the factory and the workers during working time. It is crucial that the CROC's access to the factory not be used for purposes of preferential campaigning through persuasion or intimidation.

- More specifically, Kukdong must ensure that the CROC's activities in the factory are limited to bona fide administration of the collective contract. In the past, the CROC's acts of bona fide contract-administration have been minimal. Kukdong must not permit the CROC to increase the frequency or scope of those activities prior to an election, consistent with the fundamental rule of labor law that the employer may not afford new or preferential benefits or arrangements that may influence the outcome of an ongoing union election campaign.
- If, contrary to the preceding paragraph, Kukdong managers allow one union to hold campaign meetings and make speeches to an audience gathered on company property, whether during work time or not, then Kukdong must give the same opportunities to other bona fide unions competing for the workers' votes.
- At the same time, Kukdong managers must ensure that opportunities for free and uncoerced communication and deliberation *among the workers themselves* about their own best interests are maximized. Kukdong must not prohibit small-group discussions among workers outside the presence of managers and officials of the CROC and must not place any unjustified constraints on workers' mobility and interaction at the facility during lunch and other breaks, before and after work, and during work time – so long as production is not significantly impaired or so long as Kukdong in the past has allowed workers to talk in the same fashion among themselves during working time about matters other than production.

RECOMMENDATION 11:

Kukdong managers and CROC officials should not discipline, discharge, or take any other adverse action against any Kukdong worker based on the worker's allegiance or non-allegiance to the CROC, including the worker's membership or non-membership in the CROC – regardless whether, in taking such action, Kukdong and the CROC purport to implement the “exclusion” clause of the collective contract.

The Kukdong-CROC collective contract contains an “exclusion” clause (the equivalent of a “closed-shop” clause in the terminology of United States labor law), requiring Kukdong workers to be members of the CROC. Until a recent Mexican Supreme Court ruling, it was lawful for the parties to include such a clause in the collective contract. Nonetheless, it constituted a violation of Mexican law, international labor law and university codes of conduct for Kukdong or the CROC to deploy that clause in order to discipline, discharge, or otherwise discriminate against

workers who did not support the CROC – because such action constituted a violation of workers’ right to freedom of association. On April 17, 2001, Mexico’s Supreme Court mooted any debate on this point by ruling that “exclusion” clauses are unconstitutional. Thus, any effort to enforce the exclusion clause in the Kukdong-CROC collective contract, for any reason, is now illegal under Mexican law and therefore prohibited by college and university codes of conduct and the WRC model code.

RECOMMENDATION 12:

There should be a fair and free secret ballot election among the Kukdong workforce (including as many members of the pre-stoppage workforce as possible) to determine the workers’ uncoerced choice of a bargaining representative. The election should be held as soon as possible after the workers formally request that it be held. This requires, among other things, that:

- Kukdong, the CROC, and other parties should take no action to interfere with, coerce, or otherwise impede a free and fair, secret ballot election if and when Kukdong workers request such an election. Kukdong, Nike, and Reebok should remain scrupulously neutral as to the outcome of an election.
- The existence of the Kukdong/CROC collective contract – which, as explained above, is itself grounded in an illegitimate bargaining relationship under international labor law, university codes, the WRC model code, and very likely under Mexican law itself – should in no way interfere with the calling and conducting of the election and should not be used as a pretext for delaying the election. Mexican labor law does not preclude the holding of an election to change bargaining representation while a collective bargaining agreement is in effect.
- The election should be called and conducted consistent with Mexican labor law, but this does not preclude the parties from agreeing to waive the exercise of any legal rights that might impede or delay such an election. Kukdong and the CROC should make no appeal to the Conciliation and Arbitration Board of Puebla or any other public or private agency to block or delay an election. Instead, Kukdong, the CROC, and other parties should consent to hold a free and fair secret ballot election if and when the workers challenging the CROC call for such an election. The election should be held in a secure and neutral polling place.
- Kukdong, Nike and Reebok should protest any effort by the CROC or local government authorities to block or delay the faithful implementation of Mexican law – including any action by the Puebla Conciliation and Arbitration board to unlawfully deny the newly formed SITEKIM union the recognition for which they have applied.

- Kukdong and Reebok have expressed to some government officials their support for an election by secret ballot; Nike, if it has not already done so, should take the same action. All three companies should make sure that their position in support of a secret ballot election is clear to all relevant officials of the Puebla state government, including the Puebla Conciliation and Arbitration Board and the Governor of Puebla, and the Mexican federal government. As has been noted, while not legally required, an election can legally be held by secret ballot and this is a prerequisite for a free and fair election. (The recent announcement by the Mexico City Conciliation and Arbitration Board that it will require all union elections to be held by secret ballot, though in no way binding on the Puebla Board, is indicative of a growing recognition in Mexico of the importance of secret ballot votes in union elections).
- In the period leading up to an election, and during the election itself, Kukdong, Nike, Reebok, the WRC, the ILRF, the FLA and local worker rights and human rights groups should participate in a comprehensive joint election monitoring program – in order to help safeguard workers from intimidation and coercion and promote a free and fair election.

e. Continuing Economic Relationship between Licensees and Contractor

RECOMMENDATION 13:

The intervention by Nike and Reebok has produced substantial positive results. It is important that these licensees maintain their economic relationship with Kukdong, both short- and long-term, and continue to promote remediation at the factory – including the implementation of the recommendations contained in this report.

Appendix I

Key Documents Referenced in the Report

- Mexican Federal Labor Law, Articles; 47, 85, 95, 165-172, 177, 354, 355, 357-58, 373, 389, 391, 393, 504
- Mexican Federal Labor Law, Title VII
- Mexican Constitution, Articles 9, 123
 - <http://www.ilstu.edu/class/hist263/docs/1917const.html#TitleVI>
- International Labor Organization Conventions 87, 98, 131, 154, 183
 - <http://ilolex.ilo.ch:1567/english/convdispl.htm>
- International Labor Organization Declaration of Fundamental Principles and Rights at Work (1998)
 - <http://www.ilo.org/public/english/standards/decl/>
- January 24, 2001 Report by the WRC on the Kukdong Investigation
 - <http://www.workersrights.org>
- Collective Contract between Kukdong and the CROC
- WRC Model Code of Conduct
 - <http://www.workersrights.org>
- January 13, 2001 Agreement by Kukdong to Reinstate Workers (Reached under the Auspices of the Conciliation and Arbitration Board of Puebla)
- Wage Table of Mexican Professional Minimum Wage/2001
- December 14, 2000 Memo to Kukdong Supervisors Concerning Harassment and Abuse

The WRC will supply copies of these documents on request.