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## Toward a Democratic Model of Transnational Labour Monitoring?

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In the field of international labour law, the International Labour Organisation (ILO) is the predominant actor. A specialised agency of the United Nations, the ILO enacts and ‘supervises’ the enforcement of global labour rights. But in light of manifest weaknesses in the ILO’s enforcement function, the last decade has seen the emergence of two new developments in the transnational enforcement of labour rights and standards. The first is the inclusion of labour rights provisions in bilateral and plurilateral trade agreements. The second is the diffusion of privatised systems for enforcing labour rights across borders, through corporate codes of conduct monitored by corporate managers, for-profit consultants, and non-profit consortia.

This Chapter assesses the performance of the privatised systems of labour monitoring. It does not purport to offer an overall survey of the field. Instead, it examines the most rigorous model of monitoring that has yet to emerge. Using an ethnographic method, the Chapter presents two case studies in which that model was implemented and tested. The case studies, in which I was a participant-observer, describe interventions at factories in Mexico and Indonesia by the Worker Rights Consortium (WRC), an organisation supported by more than one hundred universities and colleges in the United States.

The Chapter highlights those aspects of the two case studies that may shed light on two practical questions: What are the key institutional challenges to conducting transnational labour monitoring in a manner that is not only effective in enforcing basic rights but also meets basic norms of democratic governance? Are the decisions of local monitoring teams accountable, either to one another or to a legitimately constituted central organ that announces evolving understandings of the universal norms in light of their local specifications and re-specifications?<sup>1</sup>

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<sup>1</sup> The cases raise other crucial questions of legitimacy and effectiveness. The WRC monitors factories through multiparty teams that include Northern labour-rights experts representing the university communities, and representatives of local workers and their communities. As the WRC has evolved, local representatives have constituted a growing super-majority of team membership. This methodology raise several questions: To what degree do the WRC teams in fact constitute effective, participatory arenas for the specification of norms? Do the teams include and empower representatives of all relevant local interests to deliberate over norm-specification and remediation—to make autonomous

To answer these questions, I focus on the WRC teams' investigation in the area of freedom of association—a basic right that many private monitors fail to address. More specifically still, I examine the WRC's encounter with company-dominated or state-dominated unions. In both cases, the WRC teams achieved substantial improvements in working standards—such as overtime hours and pay, safety and health, and sexual and physical abuse. But it is the WRC's assessments of the legitimacy of labour organisations that most pointedly test the teams' own legitimacy. The implications for institutional design of transnational labour monitoring are significant, in light of the pervasive problem of 'protection unionism' in both the export and non-export sectors in low-wage countries.

The Chapter concludes that the WRC teams have taken some significant steps toward effective, democratic monitoring at the local level, but are likely to fulfil that potential only if they are integrated with democratic national or regional bodies.

### 'Managerialist' and 'Participatory' Models of Labour Monitoring

There is general recognition among corporate monitors, non-governmental organisations, and academicians that the WRC has developed the most effective, transparent, and 'participatory' model of transnational labour monitoring. But then, it may not take much to surpass the performance of other private monitors, which generally adhere to a 'managerialist' model.<sup>2</sup> In fact, the WRC's participatory model emerged self-consciously in response to the flaws of the managerialist models. A quick description of the WRC's genesis, then, reveals the key distinctions between the two models.

Universities and colleges in the United States organised the WRC in 2000, largely in response to student protests over 'sweatshop' conditions in the factories that produce apparel bearing university names and logos. Those goods are sold to students, faculty, and alumni, and have a high profile among American consumers more generally, especially among supporters of the big-name college football and basketball teams. The universities act as licensors or buyers vis-à-vis manufactur-

choices about the organisation of production, distributional shares, tradeoffs between levels of employment and wages, and ultimately the path of local development? Are the composition and methods of the teams well-suited to draw on local knowledge of worker preferences, production systems, and market constraints? A reader seeking decisive answers to these questions might justifiably demand ethnographic 'thick description' of (1) the actual interaction and deliberations among team members over the weeks and months of fact-finding, norm-specification, and remediation, and (2) the organisational norms of the factory and their transformations. I save these issues for another time.

<sup>2</sup> The description of managerialist monitoring in this subsection is based principally on the author's in-depth interviews with eighty-seven social-compliance managers of factories and multinational brands in the apparel, footwear, and retail sectors in Thailand, Hong Kong, Mexico, Indonesia, China, and the United States over the period 2001 to 2003.

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ers. Manufacturers out-source their production of collegiate merchandise to factories owned by vendors, whose headquarters are most frequently found in South Korea, Taiwan, Hong Kong, and Singapore. Conceptually, universities can be viewed either as retailers that serve as the final step in global supply chains, or as collective consumers, analogous to government procurement departments.

In response to student protests in the late 1990s, many US universities announced their intention to affiliate with the Fair Labour Association, a US-based labour-monitoring consortium. The student protestors found the FLA unacceptable. Their objections were similar to those levelled against the FLA by several human rights, religious, and labour organisations.<sup>3</sup> They objected to: (1) the financial and voting power of major manufacturers in FLA governance, creating a conflict of interest with the FLA's mandate to report on those corporations' own factories ('the fox guarding the henhouse', according to FLA critics); (2) a second conflict of interest stemming from the manufacturers' right to choose and pay the particular second-party monitor to audit any given factory (a practice that the FLA ultimately abandoned in spring of 2002); (3) the limits that the FLA placed on full reporting of data gathered by factory auditors; (4) the absence of a 'living wage' requirement in the FLA code of conduct; and (5) the FLA's authorisation of factories to operate in countries with highly repressive labour policies, so long as factory managers do not actively aid those policies. Many universities responded to the student protests by affiliating with both the FLA and the newly established WRC.

The WRC governing board comprised representatives of three constituencies— university administrators; an advisory council made up of faculty and independent specialists in labour-rights; and graduate and undergraduate students. The three groups reached agreement on a set of principles that would animate the WRC—and that would sharply distinguish it from the FLA and other managerialist monitors.

The WRC would remain independent of management and labour-union interests in the apparel industry, in terms both of voting rights within the WRC Board and of WRC funding sources;<sup>4</sup> would engage, to the maximum feasible extent, local workers and communities in the process of factory assessment and in revision of the substantive terms of the WRC Code; would strive to ensure that factories provide a 'living wage' to their workforces; would insist that retailers and vendors maintain or increase their investment while improving labour

<sup>3</sup> Based on these objections, the organisations refused to participate in FLA. Several other important human-rights and labour-rights groups supported the FLA.

<sup>4</sup> The establishment of the WRC as a counter-model to the industry-supported FLA had the tacit support of US labour unions. But once the WRC became a functioning organisation rooted in the university community, it kept its distance from both industry and labour unions as a matter of internal governance, although it necessarily interacted with companies and unions in the course of its monitoring activities. Unlike other private monitors, the WRC does not take funding from corporations or unions. Although one member of its 15-member Board of Directors is a union official, she sits as an expert in labour rights and not as a representative of her organisation. No other union or corporate official sits on the WRC Board.

compliance in factories being assessed, rather than ‘cutting and running’ at the expense of local job-creation; would afford full public access to information gathered in factory assessments; and would seek to improve those conditions given highest priority by a factory’s workforce but would not seek to ‘certify’ that a factory, product line, or brand was comprehensively compliant with labour rights.

The latter principle entails that, unlike most managerialist monitors, the WRC will not provide ‘no-sweat’ labelling or its equivalent to university licensees and factories. The WRC maintains, accurately, that any such warrant of full compliance will likely give consumers a misleading picture. Private monitors currently lack the capacity to investigate all potential claims of non-compliance, across all areas of labour and employment law and across all domestic and international codes, covering the months or years since the previous audit. These are tasks that have proven difficult even for multiple sovereign agencies such as, in the United States, the National Labour Relations Board (covering collective bargaining), the Equal Employment Opportunity Commission (covering antidiscrimination rights), the Department of Labour (covering wages, hours, and child labour), the Occupational Safety and Health Administration, and so on. These agencies have many professionally trained investigators and adjudicators who can devote days and weeks to single claims of non-compliance. By contrast, managerialist auditors generally spend one or two person-days on each factory audit. Interviews of workers generally occur on company property and last only 15 to 30 minutes. Workers’ interviews are not preceded by periods of trust-building between auditors and workers. Although auditors select workers to be interviewed, workers are pulled from their stations by managers and fear they will be held responsible for any loss of purchase orders or other adverse consequences that may result from auditors’ negative findings. Auditors are generally not professionally trained in labour law enforcement or industrial health and hygiene. They lack the power to subpoena documents and cross-examine witnesses under oath, in the face of predictable conflicts in testimony among workers and managers over sensitive subjects.

Rather than claiming to engage in comprehensive audits of factories’ compliance with all labour and employment rights over the relevant audit period, the WRC prioritises workers’ grievances based on the workforces’ own preliminary complaints. The WRC then seeks to investigate and remedy only those problems, or other high-priority problems that emerge during the assessment, within the concededly limited resources of a private monitoring organisation.

At the same time, the WRC seeks to conduct audits that are particularly (1) resource intensive and (2) participatory, compared to managerialist monitors. The WRC assembles teams of five to eight members, who undertake hundreds of hours of interviews during four to eight days of on-site fact-finding and months of subsequent remediation activity for a single factory assessment. Prior to the formal interviewing, WRC staff, consultants, or allied non-governmental organisations may spend weeks or months in trust-building communication with local workers, managers, and civil-society groups. Following the on-site investigation, the WRC maintains regular contact with on-site groups of workers, labour

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organisations, community members, local academics, and supply-chain managers.<sup>5</sup>

The composition of the WRC teams is designed to maximise participation by representatives of worker and community interests most vitally affected by the operation of the factory—worker advocates, women’s organisations, village associations, informal worker organisations, and others. In composing the teams, the primary goal is to embody within the team a ‘deliberative arena’ in which local actors may participate equally with US-based or other Northern-based team members. Each day of the week-long, on-site assessment, the team members conduct several hours of interviews and several hours of discussion within the team. Within that social space, the relatively abstract norms embodied in international labour rights and university codes of conduct, and the less abstract norms embodied in domestic law will be given specific local content and effect—as team members deliberate over fact-finding, interpretation and application of labour rights, and recommendations for remediation. The substantive goal is to generate compliance norms that are, in some meaningful sense, *autonomously* shaped by local interests, and *pragmatically* suited to local problem-solving within the functional constraints and ‘moral codes’ of the factory organisation and supply chains—but also accountable to the more general international and domestic legal norms.<sup>6</sup>

In addition to interviewing managers and workers, the WRC teams interview local government officials, including labour ministers, conciliation boards, labour judges, economic development officers, and police. Although the WRC is, of course, a private organisation, it has a paradoxical attitude toward privatisation of labour-rights enforcement. It seeks to develop an intensive model of private monitoring, but it opposes the displacement of legitimate sovereign authorities and workers’ organisations by private organisations. It therefore seeks to cooperate with and build the capacity of local labour ministries and tribunals, just as it and other private monitors attempt to build the capacity of local NGOs.

Unlike managerialist monitors, the WRC assesses workplace grievances in contexts where local workforces are ‘in motion’—that is, where factory workers are in

<sup>5</sup> The WRC seeks to develop a global network of NGOs, experts, and labour-rights advocates who can collaborate with the WRC in the assessment process as well as in other educational, outreach, and capacity-building activities.

<sup>6</sup> Before, during, and after each factory assessment, the WRC staff presents the university constituents with Reports that include fact-finding, findings of compliance or non-compliance with Codes, and recommendations for remediation. The WRC staff as well as officials of the affiliated universities communicate with manufacturers, vendors, and factories about the unfolding assessment processes and means of remediation. The authority to deploy the leverage of university licensing or buying power vis-à-vis the manufacturers, however, rests only with the universities, not with the WRC Board or staff.

In practice, a sub-group of university administrators plays a proactive role in demanding that licensees take the remedial measures recommended by the WRC; and the university administrators authorise the WRC Executive Director to communicate directly with the brands and factories to achieve remediation. At the same time, student activists and interested faculty members independently point to the WRC Reports in their frequent campaigns urging the university administrators and licensees to act aggressively toward factories that are found non-compliant.

fact attempting to address factory non-compliance through their own associational activities. The WRC attempts to engage in robust enforcement of labour rights and thereby 'open political space' for legitimate public authorities, worker organisations, and other collective actors to engage in long-term, self-sustained monitoring.

The principle of maximum local participation is constrained by three other objectives: First, the WRC teams include experts on international labour rights and domestic labour rights of the host country, and on technical matters such as occupational safety and health and wage-and-hour compliance—in order to conduct the investigation effectively and to ensure credibility in the eyes of the US media and university officials. Second, while the teams include worker representatives from the local area, they do not include workers employed at the factory or union officials seeking to organise the factory—in order to avoid conflicts of interest. Third, each team includes at least one staff member or board member of the WRC—since the WRC is ultimately responsible for the findings of fact and law and recommendations for remediation that it forwards to the university licensors.

From the point of view of the WRC's strategies, the role of the mass media is complex.<sup>7</sup> The WRC does not seek consumer boycotts of university licensees, since the WRC does not aim to take jobs away from non-compliant factories. Nonetheless, media coverage of WRC factory reports undoubtedly increases the pressure on licensees to take remedial action at factories and to follow the WRC recommendations to 'stay and improve' rather than 'cut and run'. In addition, media coverage shines an international spotlight on factories where workers face imminent threats and abuse, thereby protecting workers against such intimidation. Favourable stories about WRC efforts in *The New York Times*, *The Washington Post*, and other influential newspapers also played an important role in establishing the legitimacy and credibility of a monitoring organisation devoted to robust monitoring of rights that, at least in the United States, are politically controversial—particularly workers' right of association. Establishing this kind of credibility was especially important for the WRC, which, as a matter of principle, had no organisational ties to corporations and unions and which had emerged as a result of protests by 'militant' students.

## Kukdong

The Kukdong factory is located in Atlixco, a village in the Mexican State of Puebla. It is owned by a South Korean corporation that also has apparel facilities in other

<sup>7</sup> The mass media are generally not viewed as a constitutive actor in the field of social compliance; yet their role is often important and sometimes decisive. This role stems from the fundamental fact that private monitoring gains much of its leverage over factories through the actual or latent purchasing decisions of consumers. The mass media, as the term suggests, are the central channel for transmitting information from monitors to consumers, alongside the increasingly important channel of websites created by monitors and independent NGOs.

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low-wage countries. In late 2000 and early 2001, the facility employed approximately 900 workers, mostly very young women recruited from small rural villages within a two-hour drive from the factory. It produced sweatshirts for Nike, under license from universities affiliated with the WRC. Kukdong also produced for Reebok and other retailers.

On January 18, 2001, Kukdong workers filed a complaint with the WRC, alleging that the factory violated Mexican and international law and university codes of conduct in several areas: sick leave, maternity leave, minimum wages, physical assault and abuse, child labour, food provision, and rights of association. A large segment of the Kukdong workforce sought to organise an independent union and oust the incumbent CROC union, an affiliate of a government-controlled federation. The workers charged that the CROC was a corrupt 'protection union' that signed a contract with Kukdong managers, took payments from the factory, but provided no benefits or services to the workers.

The complaint to the WRC was triggered by the factory's discharge of five leaders of the independent union on January 3, 2001. A large majority of the Kukdong workers began a strike in protest of the discharges and other grievances, and in support of the independent union drive. On January 11th, Kukdong managers and CROC officials led a violent police action against the striking workers.<sup>8</sup> On January 13th, as transnational scrutiny of the dispute began, Kukdong managers signed an agreement to reinstate all striking workers without discrimination. Subsequently, the managers required returning workers to sign loyalty oaths to the CROC and refused to reinstate several hundred workers who were active in the strike.

The WRC assessment team spent five days in the State of Puebla, beginning eight days after the January 11th police action against the striking workers (January 19–23).<sup>9</sup> During that time, the team interviewed fifty-eight workers in six of their home villages, including both supporters and opponents of the strike; five Kukdong managers, including the general manager, human resources manager, and labour attorney; the chief officers of the incumbent union and other unions in

<sup>8</sup> As is customary in Mexico, the striking workers did not leave company property, but instead stayed within the factory compound, standing in an area between the factory and the compound fence. Riot police entered the compound and forced the workers off of company property, striking workers with batons.

<sup>9</sup> Because the Kukdong assessment was its first and because the WRC had not yet formulated its Protocols of Assessment, the composition of the assessment team was somewhat improvised. The membership of the team also reflected the still sensitive political relations among the WRC's internal constituencies. Apart from the WRC Executive Director, the team included representatives of all three WRC constituencies—university administrations, the advisory council (including university faculty), and students. Only one team member was a local worker advocate—a former worker and Mexican labour lawyer affiliated with a Jesuit-based organisation that focused on the rights of women workers. The WRC Board viewed this as a significant defect, of course, in light of the organisation's aspirations to create a participatory model of monitoring. Drafted after completion of the Kukdong assessment, the WRC Protocols of Assessment required that at least half of team members represent local parties. The Protocols mandate that the WRC Executive Director appoint team members, drawing from local and foreign labour-rights experts, community advocates, women's organisations, village associations, and other non-governmental organisations, with priority given to local over foreign representatives.

the region; officers of the Puebla Conciliation and Arbitration Board and the Ministry of Economic Development; local academic researchers, worker advocates, and others. The team also conducted an inspection of the factory premises.<sup>10</sup>

After completing the five days of interviews, the team deliberated and concluded that there was substantial evidence that workers' right of association would be irreparably harmed if Kukdong did not take immediate remedial action. The team's Preliminary Report,<sup>11</sup> issued on January 24th, stated:

[I]f the idled workers are not quickly reinstated, there is a great risk of irreparable damage to their right of association. To the extent that the idled workers are disproportionately supporters of an independent union at Kukdong, failure to reinstate those workers will likely extinguish the associational activities of those Kukdong workers—whether idled or still working—who seek an alternative to the CROC union, which they firmly believe to be corrupt and undemocratically entrenched . . . [A] failure to reinstate idled Kukdong workers will also likely chill the associational activities of workers throughout Puebla who wish to replace unions they perceive to be corrupt and illegitimate with democratic unions of their own choosing.<sup>12</sup>

The Report concluded that it was necessary to undertake a proactive program of 'outreach' to idled workers, and urged 'a cooperative effort among itself, locally affected workers, local workers rights and other human rights organisations, the Fair Labour Association, the International Labour Rights Fund, Nike and Reebok'. The brands did not accept the WRC's invitation to establish a formal remediation program. Instead, the WRC worked with local village and worker organisations to help strikers return to their jobs, while university administrators and students maintained pressure on the brands and factory managers to take positive action.

In a Second Report issued in June, 2001,<sup>13</sup> the WRC team reached findings on issues ranging from minimum wage to new questions of freedom of association, and recommended a democratic process to determine the workers' genuine preference as between the CROC and the independent union.

<sup>10</sup> The WRC team interviewed workers in groups of two to eight in locations outside the factory, mostly in homes, courtyards, and cafes in the workers' villages. The interviews ranged from one to three hours in length. The interviews combined 'structured' and 'unstructured' methodologies. That is, workers were asked a series of common questions, but were also encouraged to give testimony about events that they had experienced, followed by questions designed to clarify, probe, and test those narratives. The team interviewed top managers, supervisors, legal counsel, and incumbent union officers in the factory itself.

<sup>11</sup> The team collected further testimonial and documentary evidence before releasing a Second Report making final findings of fact and recommendations on June 20, 2001. This two-stage model is analogous to the practice of the US and other legal systems, in which judges order preliminary relief where there is a probability that rights are being violated and where damage to those rights will be irreparable if not remedied prior to the court's final ruling in a case. This model was logically adapted to the WRC's intervention in a 'real time' dispute. In subsequent assessments, the WRC continued to follow this two stage procedure, releasing a First Report that makes recommendations for remediation necessary to avoid irreparable harm to workers' rights and a Second Report that makes recommendations for remediation as to all allegations. In practice, the Second Report also assesses the degree to which the factory has implemented the recommendations in the First Report.

<sup>12</sup> Worker Rights Consortium, 'Kukdong Investigation: Preliminary Findings and Recommendations' (January 21, 2001).

<sup>13</sup> Worker Rights Consortium, 'Kukdong Investigation: Second Report' (June 20, 2001).



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### Intervention by a Private Monitor on Behalf of Freedom of Association.

The WRC intervention into the events at Kukdong was not a typical instance of private monitoring. The managerialist model of monitoring takes the form of routinely scheduled audits that check for compliance with a list of rights and standards. The WRC assessment at Kukdong, to the contrary, was a ‘real time’ intervention into allegedly ongoing labour-rights violations—namely, Kukdong’s failure to reinstate strikers.

The WRC decided to intervene in real time because of the nature of the right of association.<sup>14</sup> It is a commonplace among industrial relations scholars and practitioners that a mass discharge of workers striking in support of unionisation must be remedied immediately or it is unlikely to be remedied at all. The Kukdong case was a classic illustration. It was likely that many Kukdong workers would simply give up their effort to return to a factory where they had faced so much intimidation and fear; the young women workers could return to their village lives or seek employment in other factories or in the informal sector. As a result, the campaign to oust the incumbent union and establish an independent union would dissipate and would not be easily revived for a long time to come.

Indeed, many managerialist monitors take the position that they should distance themselves from questions of freedom of association because questions of the validity of union formation—including requirements that employers not support or dominate incumbent unions—are not only too difficult to remedy but too sensitive to decide. Other managerialist monitors, on the other hand, take the position that freedom of association is easily measurable and reportable through quantitative ‘metrics’. Some monitors, for example, measure freedom to organise unions by a proxy indicator of ‘good labour-management communication’, without inquiring into compliance or non-compliance with specific rules of free unionisation and collective bargaining.

The WRC, to the contrary, chooses to treat ‘freedom of association’ like any other worker right or standard in the sense that it is a right that can be defined with sufficient precision to allow a determination whether the factual record indicates compliance or non-compliance. On the other hand, the WRC recognises that freedom of association is a qualitative, multidimensional right that requires fact-intensive, context-specific inquiry and is not reducible to a quantitative metric in individual cases (even if compliance may be measured quantitatively in aggregate

<sup>14</sup> The WRC’s intervention in a situation in which workers were exercising their right of association would, as mentioned above, set a pattern for the WRC’s early work that distinguished it from other private monitoring organisations. Before its decision to launch an assessment, the WRC communicated with workers and their local advocates to ensure that Kukdong workers fully understood the potential risks and benefits of such an intervention and consented to it—a practice later codified in the WRC Protocols of Assessment. This type of intervention poses organisational risks as well. If a WRC assessment is followed by increased managerial repression or job loss, the hard-won credibility and legitimacy of the organisation may erode.

samples). In the Kukdong case, therefore, there was no escaping an inquiry into whether the CROC union had in fact been established and administered in compliance with the Mexican labour code, ILO conventions, university codes, and the WRC code. At the same time, the WRC team was cognisant that the very nature of that right (freedom of association) requires external organisations—whether public labour boards or private monitors—to defer to expressed preferences and practices of local workforces.

The WRC team therefore reached a finding that questioned the *factual* basis of the CROC's bargaining relationship with Kukdong only after taking meticulous testimony and gathering corroborating evidence from multiple credible sources. Equally important, after the factual investigation, the WRC team reached a *legal* conclusion that the CROC's bargaining relationship was invalid only after finding a 'clear and incontrovertible basis' for that conclusion.

In light of the sensitivity of the question and the relative rarity of this type of inquiry by a private monitor, it is worth summarising the WRC's inquiry. The WRC team began with lengthy interviews with members of the Puebla Conciliation and Arbitration Board (CAB), the body that oversees unionisation in the State of Puebla. The CAB is a classic tripartite body, comprised of representatives of government, employers, and unions. The particular members of the Puebla CAB were representatives of the ruling party and of labour unions affiliated with the ruling party—to which, of course, the CROC was affiliated. The WRC team then closely questioned CROC officials about the process through which the Kukdong-CROC bargaining relationship was allegedly established. Finally, the team questioned Kukdong managers and attorneys. The testimony of these three actors—managers, union officials, and CAB members—was mutually contradictory and incredible in the extreme.<sup>15</sup> Their testimony pointed clearly to the conclusion that the CROC had not met the legal formalities of entering into a collective bargaining relationship with Kukdong.

There was also overwhelming evidence that the CROC had carried out no functions of a labour union. No Kukdong worker—whether a supporter of CROC or the new independent union—had heard of the CROC union prior to March 2000, long after the CROC officers signed the collective agreement with Kukdong. Thereafter, according to dozens of workers, agents of the CROC threatened workers with firing and worse, if they did not sign membership statements. The CROC-Kukdong contract afforded workers no rights or benefits beyond those already provided by Mexican statutory law. According to workers' testimony, the CROC had pressed no grievances on behalf of Kukdong workers. Even when workers complained that Kukdong supervisors struck them with hammers as a disciplinary measure (a shocking practice that Kukdong managers admitted to the WRC team), CROC officers failed to pursue the grievance. Further, the CROC officers denied any knowledge of such physical abuse, even though it was among the most

<sup>15</sup> The team's close interrogation of these parties, their contradictory testimony, and the crucial role played by the Mexican member of the team, are chronicled in detail in the Kukdong Preliminary Report, above.

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widely discussed issues at Kukdong—discussed not only among workers but among Kukdong managers and supervisors as well.

Perhaps most important, there was overwhelming evidence that the vast majority of Kukdong workers had ‘cast their votes’ against the CROC by joining the walkout in support of a new union. And the CROC officers had instigated and marched in the lead of the violent police action against their own ‘members’. This direct evidence that the CROC was a protection union made it unnecessary for the WRC team to rely on the large body of secondary documentation and evidence that the CROC had acted in this corrupt and violent manner for many years and at many factories in Puebla, under the protection of the ruling party in that state.<sup>16</sup>

The corrupt alliance between the CROC and the state government was also corroborated during the remediation phase of the WRC assessment. To unclamp the CROC’s grip on the factory, it was necessary for Nike and Kukdong managers to use their economic clout to obtain the *de facto* approval of state party officials, local notables, and CROC officials.

Nike would not have used its considerable economic and political leverage to crack open the labour-repressive regime in Puebla if not for the second-order leverage exerted by the WRC assessment, as described in the next section.

### Remediation—Transparency, Legal Competence, and Economic Leverage.

In March, 2000—several months before the mass walk-out—PricewaterhouseCoopers (PWC), a financial accounting firm, conducted a labour audit at Kukdong on behalf of Nike. The PWC Report stated that Kukdong management ‘has established relations with employees that are both flexible and transparent’ and that ‘workers felt they could air their grievances in a fair and effective way’. That Report did not address what the WRC assessment team identified, nine months later, as the most important ongoing question involving the right of association at Kukdong—the question of the collective bargaining relationship between Kukdong and the CROC.

On January 14, 2001, the WRC sent a letter to Nike’s Global Director of Labour Practices informing Nike of the complaint submitted to the WRC by Kukdong workers and assuring Nike that the WRC had ‘reached no conclusions concerning the accuracy’ of the allegations of labour-rights violations at Kukdong.<sup>17</sup> The WRC also initiated communication with Reebok’s regional compliance officer.

<sup>16</sup> Under the pressure of WRC scrutiny, Nike chose the respected Mexican labour lawyer and democratic activist Arturo Alcalde to make a preliminary investigation of the Kukdong dispute. Alcalde rendered an even broader judgment against the CROC and its relationship with local authorities. See ‘Opinion Presented by Arturo Alcalde Justiniani Regarding the Case of Kuk Dong International’, January 30, 2001.

<sup>17</sup> Letter from Scott Nova, WRC Executive Director to Nike, Global Director of Labour Practices (January 14, 2001).

In its initial responses, Nike harshly attacked the WRC, questioned the WRC's objectivity and fact-finding methodology, and demanded that it not 'politicis[e]' the dispute.<sup>18</sup> The industry-governed FLA—in which Nike played a substantial role—chose not to formally intervene in the dispute, on the grounds that its function was to conduct routine auditing and not dispute-resolution. At the same time that Nike expressed concerns about the fact-finding methodology of the WRC, however, Nike publicised a press release by the Executive Director of the FLA who—prior to any fact-finding by any organisation—called for the extraordinary remedial measure of a new process for Kukdong workers to elect their union representative.<sup>19</sup>

Nike managers announced that, rather than cooperating with the WRC, they would 'work with' a Mexican attorney in order to 'gather information' and 'assist in the resolution of this [Kukdong] situation'. The attorney briefly visited the factory and received reports from an associate who observed workers' attempt to enter the factory on another occasion. His January 30th Opinion, was consistent with the WRC team's Preliminary Report issued on January 24th.<sup>20</sup> Nike, however, did not undertake effective remediation based on its own investigators' fact-finding until the WRC and affiliated universities applied sustained pressure and the US media gave attention.

The WRC urged Nike and Reebok to help the WRC assessment team gain access to the Kukdong factory and help to make Kukdong managers available for interviews. Nike initially refused, but, after the urgings of university licensors, allowed the WRC team to interview Kukdong managers and CROC union officials. This represented the first vital concession by Nike and Kukdong to the universities' transnational scrutiny.

As recounted above, Nike declined the WRC's recommendation that a proactive remedial program of outreach to workers' home villages be implemented through a cooperative effort with the WRC and other groups. Instead, with the approval of Reebok and the Kukdong management itself, Nike selected and paid a US-based, FLA-certified auditor to undertake the two distinct tasks of (1) 'observing' the reinstatement process at Kukdong and (2) conducting a general 'audit' of Kukdong's practices regarding 'child labour, working conditions, disciplinary practices, grievance procedures, harassment and abuse, wages and compensation'.<sup>21</sup> The Kukdong managers gave the auditors access to the factory to observe the reinstatement process but denied such access to WRC observers.

Nike warned its auditors that they were contractually bound to maintain the confidentiality of all information gathered inside the factory. Upon learning of the confidentiality requirement, the WRC advised the auditors that failure to publicise conditions in the factory on a continuing, real-time basis would defeat the avowed purpose of the 'observation'. The purpose was precisely to provide immediate,

<sup>18</sup> See Nike Statement, 'Update on Labour Dispute at Kukdong Apparel Factory' (January 16, 2001).

<sup>19</sup> See Statement of Sam Brown (FLA), 'Attachment to Nike Statement Update' (January 16, 2001).

<sup>20</sup> See note 16, above.

<sup>21</sup> See Nike Press Release (February 8, 2001).

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credible, public assurance to workers outside the factory that returning workers were not subject to intimidation or discrimination inside the factory. This assurance would be meaningless if it were never published or were contained in public reports issued days or weeks after workers—owing to prior intimidation—abandoned their efforts to exercise their legal right to return to the factory and to continue their associational activities. After the WRC Executive Director and university administrators communicated their concerns about its confidentiality policy, Nike authorised its auditors to issue daily ‘Activity Reports’ during the observation period.

This change in policy—affording (limited) transparency—was the second constructive action taken by Nike, again under the pressure of independent monitoring by the WRC. However, Nike prohibited the auditors from answering questions or otherwise communicating or cooperating with representatives of the WRC and other organisations on the ground. Informal communication nonetheless continued among the WRC Executive Director and representatives of Nike, Reebok, and the auditors. At that level, the WRC and Nike’s auditors developed good working relationships while conducting their ‘parallel’ activities at Kukdong.

Nonetheless, the WRC team’s specialists on Mexican labour law and the Nike auditors (who lacked professional training in labour law) took differing positions about the fundamental legal issues at stake. First, in their daily Activity Report of February 6th, Nike’s auditors stated that their first goal was to ‘[o]bserve and note how workers who had left the factory during the work stoppage were being received when re-applying for a job at the factory’.<sup>22</sup> The WRC assessment team took the position that the legal remedy for Kukdong’s illegal discharge of five workers on January 3rd was *reinstatement* to their existing jobs, not ‘*re-appl[ication]* for a job at the factory’ and that Kukdong’s legally binding agreement of January 13th similarly required Kukdong to reinstate, not to accept re-applications from, the hundreds of participants in the work stoppage. The WRC team believed that the distinction between reinstatement and re-application constituted the heart of the substantive dispute over labour rights at Kukdong. The Kukdong managers demanded that returning workers re-apply for a job at the factory and await notice from Kukdong whether their applications had been accepted. On the occasion of their reapplication, Kukdong denied jobs to many strike-supporters. The WRC team concluded that Kukdong’s imposition of *any* process of re-application itself constituted a continuing violation of workers’ right of association and right to be free of discrimination, and could not constitute a *remedial process*, contrary to Nike’s auditors’ statement that its primary objective was to observe a process of reapplication on behalf of Nike.

Second, Nike’s auditors stated that all of a large contingent of Kukdong workers had ‘resigned’. The WRC concluded, to the contrary, that as a matter of Mexican labour law those workers had been ‘constructively discharged’ and therefore had no obligation to reapply. The auditors’ intervention on behalf of Nike and

<sup>22</sup> See Verite, ‘Activity Report’ (February 6, 2001).

Kukdong seemed to mark a step backward, as a result of their manifest lack of legal competence. Indeed, the auditors' first Activity Report conceded that they had not yet consulted any specialists in Mexican labour law although they 'hoped' they would have the chance to do so at some later time.

Alongside these interactions among the WRC, Nike, and Nike's auditors, there were also communications between the AFL-affiliated Solidarity Center and Nike, including disagreements about the proper application of Mexican law regarding closed shops. In a statement dated February 1, 2001, a Nike public relations officer stated that Kukdong was permitted to require returning strikers to sign loyalty oaths to the incumbent union, since Mexican law permitted the CROC to implement a closed shop.<sup>23</sup> In an email dated February 3, 2001, a representative of the AFL's Solidarity Center stated: 'In this case, the Kukdong workers who are seeking to return to work were long ago forced to become members of the CROC, and were forced to pay dues to the CROC up to their last pay check. The only way they could be considered to be required to re-join the CROC is if they were fired for participating in the walkout, and are now being rehired as new workers, a clear violation of Nike and Kukdong's commitment to return workers to their original jobs without discrimination or reprisals'.<sup>24</sup>

On February 6th, Kukdong refused to reinstate 70 workers who attempted to return to their jobs. This was publicly reported, and on February 9th, Nike finally took decisive action—the third major instance when Nike used its economic leverage as a result of the WRC's scrutiny in the remediation phase. On that date, Nike sent an email to Kukdong managers asking that they take three remedial steps that the WRC had urged in its January 24th Preliminary Report: (1) reinstate all striking workers without discrimination or preconditions, (2) extend a specific invitation to return to work to the five worker-leaders discharged on January 3rd, and (3) make a public announcement that Kukdong was dropping criminal charges against Kukdong workers.<sup>25</sup>

Substantial numbers of workers returned to Kukdong during the next several weeks. Under the supervision of Nike, Reebok, and Professor Huberto Juarez (who undertook continued observation of the factory at the request of Reebok and with the support of the WRC), two of the five discharged leaders reached a negotiated reinstatement agreement with Kukdong managers. Another of the leaders had tried but not succeeded to gain reinstatement; and approximately two hundred of the rank and file strikers had not returned to the factory.

Throughout these events, the WRC Executive Director was in regular contact with the university and student representatives sitting on the WRC Board of Directors. The administrators of several university affiliates took an active interest and repeatedly communicated their own concerns about the workers' grievances to the licensees and the factory managers. A student organisation with chapters on individual campuses, United Students Against Sweatshops, launched activist

<sup>23</sup> See Nike, 'Update Regarding Kukdong Mexico Factory' (February 1, 2001).

<sup>24</sup> See Email, Jeff Hermanson to Nike (February 3, 2001).

<sup>25</sup> See Email, Nike to Kukdong Managers (February 9, 2001).

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campaigns to press university administrators to act more aggressively. These interventions by students and university administrators, and the latent threat of more bad press, induced Nike to take the decisive remedial action on February 9th, and to take the political action ultimately required to remove the CROC from the factory. Without the WRC's intensive investigation, transparent reporting of 'real time' events, and economic pressure, Nike and its chosen monitors would almost certainly have failed to exert the necessary leverage against the factory and vendor managers and the authoritarian ruling party in Puebla.

### Long-term Accountability—Local Monitoring Capacity and Transnational Media Politics

An independent monitor such as the WRC does not have automatic, continuing access to a factory in the way that a brand's internal supply-chain monitors or industry-governed consortia generally do. In each case, the WRC must therefore construct a system for follow-up monitoring of remediation efforts at a factory, after the period of intensive on-site interviewing by the WRC assessment team. In the case of Kukdong, the WRC's long-term remediation efforts were channelled through a two-member team located in the region—a United States researcher and a Mexican Professor of Economics specialising in the manufacturing clusters in the State of Puebla. They conducted more than 150 worker interviews in the months after the WRC assessment team's on-site fact-finding. The WRC staff and Board kept apprised of developments at the Kukdong facility through their reports and through less formal communication with advocates, managers, trade unionists, and workers located in the region.

In September, 2001, Kukdong managers revoked their collective agreement with the CROC (after Nike brokered a deal between Kukdong managers, officials of CROC, and the Puebla political elite). Kukdong workers formally elected an independent union that had the support of eighty percent of the workforce. The newly established union of Kukdong workers succeeded in securing a collective agreement with Kukdong, now re-incorporated under the name Mexmode. The rights and benefits in the collective agreement substantially exceeded those in the previous contract. At the same time, Nike insisted that Mexmode managers recommit themselves to adherence to the Nike code and to intensified monitoring through Nike's compliance system.

The WRC intervention and continued scrutiny appeared to achieve a combination of long-term 'accountability from below' (through a democratic union), 'accountability from above' (through more rigorous Nike and Reebok compliance systems), and 'lateral accountability' (through the local advocacy of Professor Huberto Juarez's team)—the three-fold system of long-term accountability and remediation that the WRC team had proposed in its two reports.

As noted above, the mass media play a constitutive role in the success or failure of private monitoring, since the media may (a) legitimate the work of particular

monitoring organisations and (b) act as a transmission belt carrying factory information from transparent monitors such as the WRC to consumers, the ultimate ‘sanctioning’ actors. It was a significant development, then, when elite media in the United States recognised the success of the WRC model. In a long feature story, the *New York Times* concluded: ‘The cross-border campaign [by the Worker Rights Consortium and the United Students Against Sweatshops] prompted Nike to press managers at [Kukdong] to reinstate the ousted workers, to create a formal grievance process, to address complaints of harassment by its managers and to improve cafeteria conditions’, in addition to replacing the CROC with an independent union.<sup>26</sup> The editorial page of the *Washington Post* cited the WRC’s intervention at Kukdong as a model for transnational enforcement of labour rights.<sup>27</sup>

These and other major media reports made university administrators much readier to put pressure on Nike and other brands—and made it more difficult for the brands to dismiss the WRC as a ‘radical’ outlier on the spectrum of compliance organisations.

## PT Dada—Organisational Intervention and Interaction

The PT Dada factory, a South Korean-owned factory, is located in Purwakarta (two-hours outside Jakarta) and employs between 3000 and 5000 workers, predominantly young women. In 2001, the facility produced for major manufacturers such as The Gap, Adidas, and Disney. Two other manufacturers—Top of the World and American Needle—produced baseball caps and stuffed toys under license for more than twenty-five universities affiliated with the WRC.

In July, 2001, the entire PT Dada workforce walked out in protest over an array of grievances about non-compliance with labour rights and standards, including safety and health problems;<sup>28</sup> forced homework, often without pay; denial of full annual leave; corporal punishment against workers who took sick leave; and other forms of physical and verbal abuse. After the July strike, three different unions sought to organise the newly active workforce. Factory managers strongly supported one of the three unions and made public a collective bargaining agreement of which the workforce had no prior knowledge. Managers also launched a campaign of reprisals against workers who supported the protest, especially those who became leaders of the two independent unions.<sup>29</sup>

<sup>26</sup> G Thompson, ‘Mexican Labour Protest Gets Results’, *The New York Times* (October 8, 2002) at A3.

<sup>27</sup> ‘Editorial: How to Battle Sweatshops’, *The Washington Post* (February 2, 2001) at A22.

<sup>28</sup> The safety and health complaints included inadequate ventilation and drinking water, unsafe machine guarding, roofing, and cable lifts, failure to provide personal protective equipment, and denial of the right to wear shoes during work.

<sup>29</sup> Managers interrogated many workers about their union allegiance, demanded they renounce their membership in two unions disfavoured by management, and threatened to fire those who refused to join the management-favoured union. Over a two-week period, one young woman was sequestered



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Prior to the WRC's on-site assessment of PT Dada, in February, 2002, the WRC undertook a preliminary investigation lasting several months.<sup>30</sup>

### Evolving Forms of Participatory Monitoring and Remediation.

The composition of the WRC's PT Dada assessment team reflects the organisation's decision, after the Kukdong Assessment, to ensure that local workers, NGOs, and experts were represented at least equally with their 'Northern' counterparts. The six-member team was composed of: a senior WRC staff person; a professor of comparative and international labour law from the United States (this author); a resident expert in Indonesian occupational health and safety; a Staff Attorney of the Legal Aid Foundation (Labour Division) of Indonesia; a former garment-industry worker and Indonesian labour-rights specialist affiliated with the Sedane Institute for Labour Information (an Indonesian NGO); and a South Korean labour-rights specialist affiliated with the Asian Monitoring Resource Center.

The team spent six days on-site (February 17th through 22nd), conducting interviews, gathering documents, and inspecting the factory. In light of numerous allegations of intimidation of workers by local police, paramilitaries, and *preman* (thugs), the team interviewed workers in confidential locations away from the factory, including small cafes, courtyards, and private offices. The team interviewed production and supervisory workers, including supporters of each of the three unions that sought the allegiance of PT Dada workers after the mass walkout of July 2001.<sup>31</sup> The WRC team ultimately relied on over 150 worker interviews. The team also interviewed five PT Dada managers, including the President of Dada (Korea), the vendor; fifteen union officials; officials of the Purwakarta Ministry of

by security guards in 'solitary confinement' in a factory storage space, and was subsequently discharged. Managers filed a criminal complaint against a worker on the ground that her grievance letter alleging labour rights violations constituted defamation; local police officers thereafter began menacing interrogations and surveillance. Workers and union officers alleged that they were subject to similar intimidation by local thugs-for-hire (known as *perman* in Indonesian). Two workers who took education leave to attend union training were discharged.

<sup>30</sup> An independent researcher conducted interviews with workers at PT Dada and another facility from January through May 2001 and forwarded transcripts of those interviews to the WRC. Students from the United States conducted further interviews under the auspices of the Collegiate Apparel Research Initiative (CARI) and these too were made available to the WRC. After review of those interviews, the WRC retained a consultant, a United States researcher fluent in Bahasa Indonesian and well-versed in Indonesian culture and political economy. She conducted further preliminary interviews with workers, union officials, and advocates in the region.

In December, 2001, the WRC Executive Director sent a letter to PT Dada management seeking its view of grievances raised by PT Dada workers. After PT Dada responded, the Executive Director made the requisite findings to launch a formal WRC Assessment: First, he found that the preliminary investigation yielded evidence of probable cause to believe that PT Dada was non-compliant with workers rights in several areas, including occupational safety and health, wage and hours, physical abuse, and freedom of association. Second, he found that the PT Dada workforce overwhelmingly desired that the WRC undertake the Assessment.

<sup>31</sup> Workers were interviewed in groups of 2 to 6, for periods of time ranging from one to four hours. As in the Kukdong Assessment, interviews combined structured and unstructured methodologies.

Manpower, Police Department, and People's Parliament; four members of Adidas' Department of Social and Environmental Affairs, including the two ground-level auditors responsible for the factory inspections of PT Dada; and several local and international human-rights groups.

The team drafted and published a Preliminary Report in March, 2002. The Report found that there was a risk of particularly severe irreparable harm in five areas, including impairment of freedom of association by intimidation of union supporters by means of interrogations, threats of violence, abusive filing of criminal charges, solitary confinement, and various acts of favouritism and support toward the union dominated by supervisory personnel.<sup>32</sup>

As recounted above, during the Kukdong investigation the WRC proposed the formation of a cooperative remediation program among the WRC, the FLA, ILRF, Nike, Reebok, and local groups. That proposal was taken up by the local groups but not by the others. In the PT Dada case, the WRC instead proposed the formation of a local 'accountability team' comprised of representatives of Indonesian non-governmental organisations with expertise in labour rights, and urged the factory to grant the accountability team reasonable access to the factory, especially for the purpose of ensuring that factory managers and the company-favoured union did not have unfair and intimidating access to the workforce throughout the workday.

The WRC proposed and implemented the more narrowly drawn accountability team for several reasons. First, of course, the Kukdong case showed the difficulties of achieving cooperation among managerialist monitoring teams and organisations, with their own interests, methodologies, personnel, and philosophical commitments. Second and conversely, the Kukdong case had shown that much constructive improvement could be achieved through informal, rather than formal, interaction among the WRC and the compliance personnel of the brands and other monitoring groups.

Third, the experience of the Kukdong assessment had shown that local actors—with knowledge of local production systems, labour relations, legal practices, and political constellations—are more effective than external auditors affiliated with supply chains or transnational NGOs.

Fourth, the concept of the accountability team was adapted to the particular remedial requirements at PT Dada. In particular, the three unions at PT Dada were in the initial phase of efforts to establish a coordinated strategy, and perhaps a unified structure, to bargain a new collective agreement with PT Dada. Since the collective bargaining process was both the appropriate and legally mandated

<sup>32</sup> The other four areas requiring immediate remediation were: (1) abusive physical punishment and humiliation of workers who exercised their sick-leave entitlements; (2) danger of severe heat stress due to inadequate ventilation; (3) structural hazards, including dangers of roofing cave-ins and sub-standard cable lifts; and (4) factory requirements that workers take work home at night, often for sub-standard or no pay. In addition to these highest-priority items, the Preliminary Report identified many other areas of non-compliance in the areas of health and safety, wages and hours, discrimination, and freedom of association.

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forum to address many of the WRC's remedial recommendations, the WRC did not wish to establish a 'parallel' process beyond the accountability team's authority to ensure that the factory met minimum statutory standards and treated each of the three unions fairly in unionisation and collective bargaining.

Fifth, the WRC's experience suggested that a structure like the accountability team could ensure flexible and effective remediation when implemented alongside other channels of continuing communication between the WRC team and local actors. At the end of the five days of on-site assessment, the WRC team set up two such channels. A 'rapid response' channel was designed to transmit information about events in the factory as quickly as possible to members of the team, once they returned to their respective offices in Indonesia, South Korea, and the United States. That is, it seemed vital for the team to have continuous and rapid updates on fast-changing developments that might require immediate recommendations for new or revised remedial steps—in the event, for example, that new disputes or crises broke out between management and union supporters. A second channel was designed to allow the team members to communicate rapidly with 'elder strategists'—politically independent Indonesian advocates who had played prominent roles in the pre- and post-Suharto democracy movements and who could provide broader strategic evaluation of the complex events unfolding in Purwakarta.

#### Private Monitoring of Fluid Public Rights of Association.

The PT Dada case presented the WRC team with a particularly difficult problem of freedom of association. In the Kukdong case, the WRC had already faced a contest between a company-favoured union and an independent union movement. The PT Dada case was more complex, however, for at least three reasons. First, there were three unions vying for collective bargaining rights at PT Dada; and it appeared that no single union could claim an overwhelming majority. One was the SPSI, affiliated with a union that had had close relations with the former Suharto regime. The second was affiliated with SBSI and its sectoral union in the textile sector known as Garteks. The third union, SPBDI, was affiliated with a small independent organisation.

Second, the union favoured and supported by the company—the SPSI—was not as deeply integrated with managerial authority as was the company-dominated union at Kukdong.<sup>33</sup> There remained the possibility that that union might evolve into a bargaining representative with greater genuine autonomy, especially in light of competition for worker allegiance from the two other independent unions.

<sup>33</sup> It is true that, after the July 2001 strike, PT Dada managers played the lead role in 'reviving' the SPSI and bringing forward a collective agreement about which the workforce remained unaware. The national SPSI, however, had a significant reform wing; the leaders of the factory-level SPSI were among the leaders of the July strike; and the fluidity of events at PT Dada made it unclear whether the factory-level SPSI would develop in the reformist direction.

Third, the new, post-Suharto Indonesian Trade Union Law no 21 of 2000 provided rights of worker association in sweeping, abstract terms, but did not specify the rights and obligations of managers, unions, and workers in a context of multiple unions. Indonesia had also recently ratified ILO conventions on collective bargaining and freedom of association. PT Dada managers themselves offered three competing interpretations of managers' rights and obligations, during in-depth interviews by the WRC team. One manager asserted that PT Dada was obligated to bargain with the company-supported union with which a majority of workers had affiliated (notwithstanding the substantial evidence that those workers had affiliated under duress) and could not legally bargain with the other two unions. A second manager asserted that PT Dada was obligated to bargain with the company-supported union and could, but was not required by law, to bargain separately with the others. A third manager asserted that PT Dada was obligated either to bargain or consult with all three unions.

The WRC therefore faced the *reality* of labour-union 'pluralism' in the factory and the *formality* of a labour code that authorised but had not yet institutionalised concrete measures for implementing union pluralism. The situation at PT Dada was a closely watched case throughout Indonesia, precisely because it might become a model for institutions of pluralist bargaining under the new Indonesian law.

In his interview with the WRC team, the head of the regional Ministry of Manpower (the one-man equivalent of a combined Labour Ministry and Labour Board) expressed an opinion that Trade Union Law no 21 had priority over any ILO interpretations of conventions ratified by the Indonesian government. He interpreted the associational rights in Law no 21 to be sufficiently broad to allow managers and unions to choose among several options: exclusive negotiations with the majority union; negotiation with the majority union and consultation with minority unions; separate negotiations with each of the majority and minority unions; or unified bargaining with all unions. He made clear, however, that there was no precedent under the new domestic labour code for the situation prevailing at PT Dada and that his own expressed views on the matter were not legally binding.

This left the WRC team with the problem of interpreting a domestic code that had not yet been authoritatively interpreted by sovereign bodies—apart from the question whether the WRC or university codes might yield conflicting mandates on the question of pluralist bargaining. The view of the Indonesian 'elder strategists' was that the PT Dada rank-and-file workforce might well have strongly unified interests, even though the workforce had splintered into three different organisations following the July 2001 walkout. They convincingly based this view on the nature of the walkout itself. All workers had spontaneously walked out behind a single set of grievances; and they had elected a unified team of negotiators (to resolve the immediate strike) that included individuals who only later were recruited by the three separate organisations (to renegotiate the regular collective agreement). The elder strategists believed that the PT Dada workers, if

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given the opportunity, would likely choose a single, unified bargaining structure that included representatives of all three organisations.

The WRC team ultimately decided that it was not the WRC's task to craft a highly specific interpretation of the Indonesian labour code's mandate of pluralist bargaining. In the team's view, it was up to the PT Dada workers themselves to decide whether they wished to bargain through three separate unions or instead to engage in single-channel collective bargaining through a coordinated or unified bargaining structure. The team did conclude, however, that a robust conception of free association required the PT Dada management to not 'freeze out' any significant minority representative. That is, PT Dada should in fact bargain or consult with all three unions, whether separately or together as the workers might choose.<sup>34</sup>

By the spring of 2003, the three unions at PT Dada had in fact created a coordinated bargaining committee and were making substantial gains in collective bargaining, as described further in the next section.

### Remediation—Promoting Private and Public Capacity.

Adidas noted that '[f]rom the outset [of the WRC Assessment] it was agreed that there was a need for constructive dialogue between the WRC, factory management, and adidas-Soloman'.<sup>35</sup> After the WRC team's on-site mission, the WRC also worked closely with American Needle and Top of the World to ensure that they pressured, encouraged, and assisted PT Dada managers to implement the recommendations for remediation.

At a three hour meeting during the WRC team's on-site investigation, the Adidas compliance team made available its Action Plans for PT Dada and subsequently forwarded updated reports to the WRC team. The WRC team made findings of serious non-compliance that the Adidas monitors had simply missed: (1) mandatory homework, often underpaid or nonpaid (a violation of Adidas' Code sufficient to require Adidas to end its relationship with PT Dada if not immediately redressed), (2) solitary confinement of union supporters; (3) abusive criminal-law charges and surveillance by rogue police officers against union leaders; and (4) several other impairments of freedom of association, including physical threats and other intimidation in support of the management-favoured union.

In April, 2002, the WRC's accountability team was created. At a three-way meeting among the WRC, PT Dada, and Adidas, it was agreed that the accountability team would have access to the factory every two weeks for one full day. The

<sup>34</sup> The impending collective bargaining inflected the WRC's recommendations for remediation outside the area of freedom of association as well. In areas ranging from grievance procedures to worker training, the WRC team thought it was neither legitimate nor effective for the WRC to try to anticipate or displace workers' own preferences, expressed through their chosen bargaining representatives. In these subject areas, therefore, the Report urged that PT Dada remedy the problems in such manner as the collective bargaining process might determine.

<sup>35</sup> Adidas-Soloman, 'Annual Report' (2002).

accountability team consisted of three Indonesians—a human rights lawyer, a worker/researcher affiliated with a labour-education NGO, and a professor of industrial relations. The accountability team conducted ongoing worker interviews, visited the factory on a regular basis, and reported to the WRC's Washington office. The WRC discussed the accountability team's findings in four-corner deliberations among WRC staff, the licensees producing collegiate merchandise, PT Dada's Seoul headquarters, and PT Dada managers in Indonesia. These deliberations were occasions for collaborative problem-solving to implement and further specify the WRC's recommended remedies.

On September 29, 2002, the WRC published a Second Report, describing substantial progress on compliance with freedom of association (as well as other crucial workplace conditions<sup>36</sup>). PT Dada reinstated a leader of one of the two rank-and-file unions, who had been held in solitary confinement and subsequently discharged. The company also withdrew criminal complaints against other union leaders, who were able to return to work without sanction. These reinstatements were facilitated by the regional Ministry of Manpower.

All three unions were given equal access to office facilities and to workers to communicate about union activities. PT Dada managers made factory-wide announcements and postings stating their commitment to respect the workers' freedom of association, and communicated to all supervisors that intimidation or favouritism on behalf of any union was unacceptable. Managers and representatives of all three unions participated in an ILO training on collective bargaining, supported by both the WRC and Adidas. Workers confirmed that the shop floor atmosphere had changed considerably.

As predicted by the 'elder strategists', workers at PT Dada began to hold unified rank and file meetings among themselves and thereby strengthened bonds that stretched across the three union organisations. The leaders of the three unions also engaged in intensified, albeit difficult, efforts to form a coordinated negotiating position and, in early 2003, created a unified bargaining committee. PT Dada managers agreed to negotiate with whomever the unions chose to serve on a negotiating committee. In late March, the negotiations committee and the PT Dada management completed a first phase of negotiations that achieved substantial improvements in the company's policy on annual leave and monthly leaves.<sup>37</sup>

Through its remedial activities, the WRC catalysed private and public actors to strengthen their capacities for long-term monitoring. In the face of in-depth,

<sup>36</sup> According to workers interviewed by the WRC accountability team, PT Dada had ceased punishing workers for taking sick leave and had ceased the practice of requiring homework. On the question of heat stress, PT Dada had installed air-conditioning in the factory clinic where workers took respite from excessive heat; had begun to provide filtered and cooled drinking water rather than heated water; and had installed fans and rearranged production layout to move hot production processes closer to doors and windows. On the question of structural hazards, PT Dada had replaced the factory's asbestos roof, and was in the process of replacing the unsafe cable lift.

<sup>37</sup> As of this writing, the workers' negotiating representatives are completing surveys of local wages and benefits and 'minimum living expenses' in preparation for the second phase of negotiations which will address monetary issues.

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transparent reporting by the WRC and the latent threat of damage to brand reputation, the manufacturers sourcing from PT Dada felt little choice but to support aggressive remediation at the factory. The WRC's fact-finding placed pressure even on brands that sourced non-university merchandise at PT Dada.

Because the WRC had quickly established a reputation as the most competent, transparent monitor of labour rights, the brands believed it in their interest to ensure that the public understood that their compliance staff was cooperating with the WRC. Although the WRC found that Adidas' internal monitors had failed to identify several blatant violations of worker rights, Adidas capitalised on the WRC's subsequent praise for Adidas' participation in remediation efforts. In its 2002 Annual Report, Adidas highlighted that the WRC Remediation Report had acknowledged 'the very significant changes that have taken place at PT Dada and adidas-Soloman's "heavy efforts on issue-by-issue remediation work."' Adidas' managers, like Disney's, had considered taking the path of least resistance—namely, exit from the factory altogether—but chose instead to follow the universities' urgings to increase its purchase orders.<sup>38</sup>

The WRC's intervention also appears to have incrementally strengthened the authority of the Purwakarta Ministry of Manpower, Parliamentarians, and Development Officers—newly elected or appointed in the post-Suharto period—relative to the brands, the factory, and local rogue police and paramilitaries (holdovers from the Suharto regime). In meetings between the Purwakarta officials and the WRC team, the former indicated that, in the face of local police corruption and paramilitary thugs working for managers, they were unable to remedy the abusive firings that the team had uncovered in its fact-finding.<sup>39</sup> Local workers confirmed that PT Dada and other export factories in Purwakarta had simply stymied the Minister of Manpower's efforts to engage managers and aggrieved workers in mediation clearly mandated by law. Immediately after meeting with the WRC team, PT Dada agreed to mediation by the Ministry, which resulted in the factory's agreement to reinstate discharged union activists.

A similar pattern emerged in the remediation of abusive criminal charges filed by the factory. Factory managers had filed charges of criminal defamation against a worker on the ground that she had handed the managers a letter stating simply that 'PT Dada has violated worker rights'. After the filing of charges, two police officers began menacing surveillance of the worker. She and other witnesses—

<sup>38</sup> The WRC also agreed to appear alongside Adidas in an ILO video on successful factory monitoring—a media project that further raised Adidas' stake in continuing improvement of labour conditions at the factory. Although, as explained above, the WRC's policy is not to formally certify factories or brands, Adidas sought to give the appearance that the WRC had de facto affirmed its labour policies, at least in one factory.

<sup>39</sup> In a lengthy meeting between the WRC team and the newly installed officials, the latter expressed concern that the WRC would call for a boycott of PT Dada and damage local economic development. The team gave reassurances that the WRC would work actively to maintain and increase investment by the brands. The team also assured the officials that the WRC did not wish to intrude on their sovereign authority but instead stood ready to use whatever transnational power might aid the Ministry, the Parliament, and the Development Office in their public functions.

including a second group of Purwakarta police officers—identified the surveillants as police who free-lanced as violent enforcers for factories and others in the Purwakarta region.<sup>40</sup>

In the WRC team's interview with the Minister of Manpower, he stated that abusive criminal investigations against union activists were a significant problem in Indonesia. He concluded that the surveillance against the PT Dada worker constituted a violation of the worker's right of association, but said he lacked the power to intervene against the unjustified police investigation. However, after the WRC team's on-site investigation—during the worker-manager mediation made possible by the WRC's scrutiny—the Minister in fact won PT Dada's agreement to withdraw the criminal charges. The WRC investigation had made it politically feasible for him to challenge the rogue police.

The Purwakarta Minister of Manpower and his staff—in sharp contrast to the Puebla Conciliation and Arbitration Board in the Kukdong case—were impressive in their knowledge of domestic and international labour law and in their desire to implement the law. The Puebla CAB was captured by the state ruling party and its corrupt union affiliate. In contrast, the post-Suharto Minister and his Parliamentary supporters were sufficiently independent of the local police, paramilitary, and corporate elite to serve as a change agent within the political space opened by the WRC investigation. In Puebla, the WRC had to place sufficient pressure on Nike to ensure that local political elites acquiesced in the ouster of the CROC. In Purwakarta, the WRC's exposure of non-compliance was sufficient to tip the balance of political forces in favour of public authorities committed to democracy and the rule of law, without requiring direct political intermediation by the brand.<sup>41</sup>

## Conclusion

One of the chief criticisms of private monitoring is that it may displace collective bargaining and public authorities as vehicles for vindicating worker rights. The cases presented in this Chapter suggest that, at least in some circumstances, private

<sup>40</sup> The team scheduled an interview with the second group of police officers. They arrived in the company of the two officers who had been following the worker. Visibly agitated, they announced that they were no longer willing to speak with the team. The team took the opportunity to question the two officers who had been following the worker. In the tense interview that ensued, they denied engaging in any improper surveillance; stated that they had merely interviewed PT Dada managers to confirm that the allegedly defamatory letter had caused injury; stated that they had made no inquiry into whether PT Dada had in fact violated worker rights (a point confirmed by the PT Dada managers' testimony to the team); and yet conceded that under Indonesian law the truth of a statement was a defence to a charge of defamation. The interview ended when the police officers threatened the WRC team with physical violence and expulsion from Indonesia.

<sup>41</sup> Throughout these interactions, the inclusion of local, independent actors on the WRC team was crucial to the team's capacity to understand and navigate the local political constellation.



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monitoring may open 'social and political space' that enables rather than displaces workers' exercise of rights of association. The cases also indicate that in order to play that role effectively, private monitors may be drawn into evaluation of local political structures and may countermand local political elites that support corrupt unions or labour-repressive managers. Private monitors may incrementally strengthen the capacity of those local actors, including democratic public agencies, that seek to enforce the rule of law. In playing this role, however, private monitors' legitimacy and accountability may be stretched to the limit.

In these cases, a private monitor acted as a lever to open space for legitimate collective actors in two major ways: First, the ultimate purchasers or licensors—United States universities—used their latent economic power, by communicating their concern about repression of labour rights to licensees that produced in the factories in question. Second, media reports of the monitor's findings heightened the urgency of corrective action by the licensees and vendors and, concurrently, shined an international spotlight that protected workers against immediate reprisal for their union activities and impelled local public agencies to enforce labour rights.

The monitoring instrument created by universities was relatively *effective* for several reasons. First, the WRC teams are supervised by a governance structure that is neither funded nor controlled by corporations or labour unions. The teams therefore do not face the conflicts of interest that are built into management compliance systems and consortia in which corporations have controlling blocs. Those conflicts disable managerialist monitors from conducting robust investigation of rights of association and other complex labour rights, and from engaging in sustained, transparent remediation in the absence of strong external incentives to do so. Ensuring that several hundred strikers return to a factory from their home villages, after they have been assaulted by riot police, managers, and corrupt union officials, cannot be accomplished by a corporate compliance officer sending a confidential letter of recommendation to factory managers. Nor can it be accomplished by a confidential audit that occurs weeks or months after the event. It requires immediate, continuous, and transparent on-site monitoring and sustained remediation; and it likely requires continuous pressure from monitoring organisations, unions, brands, consumers, or public bodies empowered to allocate incentives—in addition, of course, to the primary effort of the workers themselves.

For observers outside of the United States, it may seem curious that any participation in labour-rights reporting by the predominant organisations representing workers' rights (labour unions) is thought to illegitimate those reports. But in the United States, labour unions are widely viewed as 'special interest groups' and carry negative connotations for much of the mass media and the public. The WRC's organisational independence from both for-profit corporations and labour unions is therefore a foundation of the credibility and perceived objectivity of its reporting. This is especially true when the WRC is investigating factories where workers are currently involved in unionisation efforts, as in the two cases presented in this chapter.

Second, the monitoring organisation created by the universities is itself subject to second-order ‘monitoring’ and sustained pressure by USAS—a highly motivated and well-organised group of activists committed to ensuring that the universities implement the recommendations of WRC assessment teams. By contrast, managerial monitors face only the diffuse and erratic check of unorganised consumers.

Third, because the WRC is lodged in the university communities, it is able to draw on the expertise and resources of its faculties. Managerial monitors conduct audits through personnel who are generally not professionally trained in compliance with labour rights and standards. While the frontline auditors of corporate brands, for-profit auditing firms, and NGOs may in some instances have professional training in occupational hygiene and safety, they generally have no professional education whatsoever in the complex jurisprudence of freedom of association, collective bargaining, and employment discrimination. The WRC, by contrast, has ready access to the *pro bono* services of professors of labour law, comparative labour law, international labour law, and occupational safety.

This point should not be taken as a fetishisation of professionalism. The question, rather, is one of minimal competence to inquire into complex, multi-dimensional norm-systems and, in the process, to help build the capacity of local actors to engage effectively with discourses about such systems. In the Kukdong case, for-profit auditors overlooked one of the most basic and pervasive problems of free association—namely, the entrenchment of a company-dominated union by subtle and not-so-subtle interactions among factory managers, union officials, and local labour administrators. In that case as well, Nike’s auditor made gross errors of Mexican law that might have undermined remediation altogether if not corrected by the specialists on the WRC team. In the PT Dada case, inexperienced Adidas auditors were unable to effectively address a complex problem of labour-union pluralism.

Fourth, the WRC investigations are resource-intensive, compared to managerialist monitoring. The WRC devotes ten or twenty times the person-days to on-site interviews, compared to corporate audits. The WRC develops high-trust relationships with workers in their home villages and neighbourhoods, compared to the brief worker interviews conducted on factory property by managerialist auditors. The WRC gives continuous, detailed attention to remediation by factory managers, unlike the spot checks used by managerialist monitors. After deliberation within WRC teams, the labour-law specialists on the team write highly detailed reports in the style of objective judicial opinions. University administrators are willing to act on the basis of such reports, drafted by members of the universities’ own law faculties, and cannot easily dismiss student groups that launch activist campaigns in support of the reports’ recommendation for remediation. At the same time, elite newspapers and broadcasters treat the university reports as especially credible.

Fifth, by virtue of the comprehensive participation of local actors in WRC assessments, the teams are able to extend their remediation efforts into rural villages and urban neighbourhoods—as required by labour markets that span fac-

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tories, villages, and urban informal sectors. Local actors also enable the teams to understand and negotiate the complex political environment that influences the success or failure of remediation. The WRC would not have achieved remediation in the Kukdong case without the assistance of village networks that reached hundreds of wrongfully discharged workers, and without local advocates' understanding of political clientelism in Puebla. In the PT Dada case, the team could not have successfully extracted vital information from the violent factions within the Purwakarta police department, without the detailed knowledge of local team members.

In addition to their relative effectiveness, the WRC assessments aspire to be relatively democratic, in three senses. First, the assessment teams include local representatives of workers, rights-advocates, and experts. The local team members participate as equals with WRC staff and university specialists in the team's deliberations over findings of fact, interpretation and application of labour rights to specific contexts, findings of legal compliance or non-compliance, and recommendations for remediation and organisational restructuring. The WRC personnel enter the local situation with explicit attention to power disparities among themselves and local participants, and attempt to construct processes that equalise those relationships. The WRC views each investigation as an experiment that yields 'learning' about best practices in symmetricising power.

Second, the monitoring teams conduct structured and unstructured interviews with workers, managers, public officials, and other interested local actors in social settings that evoke high trust. The teams are conceived as the point of encounter between 'central' norms—whether international, domestic, or private codes—and the 'local' normative worlds of the factory and its community. In the interview process, local workforces, managers, and communities contribute to the specification of relatively abstract, 'universal' labour rights. As a consequence, the specifications of rights that emerge from deliberations both within the team and between the team and local workers and managers are likelier to be autonomously shaped and well-suited to local production systems and local preferences. This is illustrated by the WRC's response to complex problems of labour pluralism in the PT Dada case.

Third, the monitoring process is designed to concurrently investigate immediate grievances and to build the capacity of a broad spectrum of local actors—private and public—to conduct long-term monitoring and remediation, as the presence of the WRC team diminishes. This long-term role is played in the Kukdong case by the independent Mexmode union, the Huarez research team, and Nike's strengthened managerial compliance effort. In the PT Dada case, the invigorated regional Ministry of Manpower, the WRC accountability team, the 'elder strategists', and the unified collective bargaining committee play this role.

There is warranted concern among labour unionists about whether any private monitor—no matter how participatory its methodology—can legitimately decide the question whether particular labour unions and particular collective-bargaining relationships are validly established. That question will arise with great frequency

whenever workers are attempting to unionise in low-wage countries, in light of the common practice by companies and governments of attempting to create or support protection unions.

In the cases reported here, the WRC recognised the sensitivity of the question of union legitimacy and tried to act accordingly. The different conclusions reached by the WRC in the two cases are instructive. In the Kukdong case, based on the overwhelming evidence that the incumbent union was a corrupt, violent, and unauthorised organisation, the WRC concluded that it was not the legitimate representative of the factory workforce. In the end, the factory terminated its relationship with that union, and the workforce resoundingly gave its support to a new, democratically constituted union. In the PT Dada case, one of the three unions at the factory was supported by managers, but the WRC concluded that that union had sufficient potential to evolve into a more independent bargaining representative to preclude any judgment about its legitimacy by a private monitor—especially in the new Indonesian legal environment that validated pluralist bargaining between management and multiple unions. The WRC therefore deferred to processes of union competition. Even in that case, of course, the WRC recommended that general principles of free association—including guarantees that all workers could communicate freely about union affairs and affiliate with the union of their choice without coercion—be honoured.

Both the relative effectiveness and relatively democratic nature of the private-monitoring interventions in these cases depended in large part on the resource-intensive methodology of the WRC. Whether this methodology can promise improved compliance not just in individual factories but across entire brands, export sectors, or country-wide labour markets depends on either of two developments: the provision of enormously increased resources to monitors, or the implementation of higher-powered incentives sufficient to cause brands, vendors, and local labour boards and inspectorates to implement aggressive remediation in anticipation of monitoring.

Just as pressing as the challenge of ‘scaling up’ the participatory, resource-intensive model is the question whether its democratic foundations can be deepened. The model’s three participatory aspirations, of course, will be unevenly achieved in practice. Beyond that, the model persistently requires the private monitor to influence local political structures, both to succeed pragmatically in improving workplace conditions and to implement the participatory process itself. In each of the cases, the WRC team ran up against local political hierarchies that were coupled with labour-repressive managerial corps. In the Kukdong case, the WRC teams placed sufficient pressure on multinational brands to, in turn, actively challenge authoritarian political structures. In the PT Dada case, the WRC team enabled certain local authorities legitimated by democracy or the rule of law to out-manoeuvre or countermand authoritarian, corrupt, or incompetent public actors that were allies of factory managers.

Such political intervention calls for strengthening the legitimacy and accountability of monitoring teams presently constructed by well-intentioned representa-

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tives of collective consumers such as US universities. Many aspects of monitoring—the selection of team members; the choice of fact-finding methods; the deliberative processes for interpreting domestic and international codes; the design of remedial programs, including the new structures of accountability to be embedded in factory organisations—raise familiar questions of democratic governance, the rule of law, and administrative effectiveness. And the monitoring teams' interventions into local political and economic life raise even more pressing questions of accountability. The point may seem obvious to many readers; but it is suppressed in the daily practice of private monitoring, a field that continues to grow exponentially and haphazardly. If a political opportunity arises to integrate participatory modes of monitoring into higher-level democratic bodies, at the national or regional levels, the opportunity should be seized.

