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**I Want to Go the Extra Mile . . .  
But if I Give an Inch?**

**Corporate Social Responsibility Put to the Test in Global  
Supply Chain**

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## I. Introduction

Corporate social responsibility (“CSR”) is an evolving concept that currently does not have a universally accepted definition. CSR can generally be described as the way firms integrate social, environmental and economic concerns into their values, culture, decision-making, strategy and operations in a transparent and accountable manner and thereby establish better practices within the firm, create wealth and improve society.<sup>1</sup> In a world of multinational investment and global supply chains, CSR must extend beyond the borders of a company’s home state. Rapid globalization has encouraged discussion of the role and development of global governance. The development of voluntary CSR practices has contributed to the discussion.

This paper discusses CSR practices in the apparel and food industries. Section II addresses the 2012 Tazreen factory fire and 2013 Rana Plaza collapse in Bangladesh, the legal rules and international guidelines before and after these two incidents, and individual corporate CSR actions that came after. Section III retraces the 2008 Chinese melamine-tainted milk scandal, the legal rules and international guidelines before and after the scandal, and the response of a New Zealand stakeholder in the in Chinese company at the heart of the scandal. Section IV discusses principals that manufacturers and retailers can draw from these incidents.

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<sup>1</sup> Paul Hohnen, *Corporate Social Responsibility An Implementation Guide for Business*, IISD, p. 4, available at: [http://www.iisd.org/pdf/2007/csr\\_guide.pdf](http://www.iisd.org/pdf/2007/csr_guide.pdf) (last visited: Dec. 12, 2008).

## II. Fashion & Apparel Industry

### 1. Bangladesh Factory Fire and Collapse

Bangladesh is the second largest exporter of ready-made garments (RMG) in the world. Garment exports were estimated to be \$21 Billion in 2013. This increased by 5% to US\$22.25 billion in 2014, and increased by more than 10% to \$28.09 Billion in 2015.<sup>2</sup> This dramatic growth has come with challenges. Many RMG factories started as local domestic tailoring outfits that expanded by subcontracting to big garment exporting companies of Bangladesh and gradually grew to become big independent garment factories themselves. During this time of growth, it was common practice that no industrial building structure or policies were followed.<sup>3</sup>

Poor infrastructure and risk management issues can lead to fire injuries. According to the Bangladesh Fire Department, approximately 414 garment workers died in 213 factory fires from 2006 to 2009. In 2010, the death toll was approximately 79. Table 1, below, summarizes some major incidents since 2005.<sup>4</sup>

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<sup>2</sup> Better Work Bangladesh: Our programme, available at: <https://betterwork.org/where-we-work/bangladesh/bwb-our-programme/> (last visited: Jan. 10, 2018).

<sup>3</sup> A. K. M. Ayatullah Hosne Asif. An Overview of Sustainability on Apparel Manufacturing Industry in Bangladesh. *Science Journal of Energy Engineering*. Vol. 5, No. 1, 2017, pp. 7-8.

<sup>4</sup> *Id.*, p. 9.

**Table 1** Major factory incidents in the history of Bangladesh since 2005

Name of the Factory	Date of Incident	Number of Victims	Type of Hazard
Palmal Group	October 8, 2013	10 workers	Fire
Tung Hai	May 9, 2013	9 workers killed	Fire
Rana Plaza	April 24, 2013	1129 workers killed, 2515 injured	Building collapse
Smart Garments	February, 2013	9 workers killed	Fire
Tazreen factory	November 24, 2012	At least 112 workers killed, 200 injured	Fire
Eurotex	December 3, 2011	2 dead, 64 injured	Fire
Sportswear (Hameem Group)	December 14, 2010	29 dead, 11 injured	Fire
Garib and Garib	February 25, 2010	21 dead, 50 injured	Fire
Sayem Fashions	March 6, 2006	3 dead, 50 injured	Fire
Phoenix Building	February 25, 2006	22 dead, 50 injured	Building collapse

### **Tazreen Factory Fire**

On November 24, 2012, a fire broke out in the Tazreen Fashion factory in the Ashulia district of Dhaka. Of the 2000 workers, at least 117 were killed and over 200 were injured.<sup>5</sup> It was the deadliest factory fire in Bangladeshi history.<sup>6</sup>

Witnesses reported that many workers had been unable to escape through the narrow exits of the building.<sup>7</sup> The factory lacked adequate emergency exits that

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<sup>5</sup> Farid Ahmed, *At least 117 killed in fire at Bangladeshi clothing factory*, CNN, available at: [http://edition.cnn.com/2012/11/25/world/asia/bangladesh-factory-fire/?hpt=hp\\_t1](http://edition.cnn.com/2012/11/25/world/asia/bangladesh-factory-fire/?hpt=hp_t1) (last visited: Jan. 10, 2018).

<sup>6</sup> Anis Ahmed, Ruma Paul, *Bangladesh's worst-ever factory blaze kills over 100*, Reuters, available at: <https://www.reuters.com/article/us-bangladesh-fire/bangladeshs-worst-ever-factory-blaze-kills-over-100-idUSBRE8AN0CG20121125> (last visited: Jan. 10, 2018).

<sup>7</sup> *Id.*

would have made it possible to escape from the building.<sup>8</sup> The fire department refused to renew the building's fire safety certification in June 2012, and just 3 of the 8 floors of the factory were legal.<sup>9</sup> Thousands of Bangladeshi garment workers protested at the site of the fire, calling for better workplace safety,<sup>10</sup> during which 200 factories closed their doors.<sup>11</sup>

## **Rana Plaza Collapse**

On April 24, 2013, the eight-story Rana Plaza building outside Dhaka collapsed, killing more than 1,100 people. Thousands were injured. The building's owners had ignored warnings to avoid using the building after cracks appeared the day before. Garment workers were ordered to return the following day, and the building collapsed during morning rush-hour.<sup>12</sup>

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<sup>8</sup> ILRF, *ILRF Calls on Brands to Join Fire Safety Program Following Deadly Fire*, available at: <https://www.laborrights.org/releases/ilrf-calls-brands-join-fire-safety-program-following-deadly-fire> (last visited: 2018.11.28).

<sup>9</sup> The Daily Star, *Tazreen's fire certification expired on June 30*, available at: <http://www.thedailystar.net/news-detail-260363> (last visited: Jan. 10, 2018).

<sup>10</sup> Julfikar Ali Manik and Jim Yardley, *Garment Workers Stage Angry Protest After Bangladesh Fire*, available at: <http://www.nytimes.com/2012/11/27/world/asia/garment-workers-stage-protest-in-bangladesh-after-deadly-fire.html> (last visited: 2017.11.28).

<sup>11</sup> Thousands of textile workers gathered in Bangladesh in protest factory conditions following a massive fire that killed 112 people, available at: <http://theologian-flashiness.blogspot.tw/2012/11/thousands-protest-after-bangladesh-fire.html> (last visited: 2017.11.28).

<sup>12</sup> Nelson, Dean, *Bangladesh building collapse kills at least 82 in Dhaka*, The Daily Telegraph, available at: <http://www.telegraph.co.uk/news/worldnews/asia/bangladesh/10014778/Bangladesh-building-collapse-kills-at-least-82-in-Dhaka.html> (last visited: 2017.11.28).

At the time, the building housed five garment factories that manufactured goods for major retail companies in Europe and North America. It was the deadliest disaster in the garment industry. The causes included shoddy construction and the fact that the building had too many floors and too much heavy equipment for the structure to withstand.<sup>13</sup> The upper four floors had been built without a permit.<sup>14</sup>

### **The Conundrum of Subcontracting**

Subcontracting in the garment industry uses the capacity of smaller, cheaper firms to do simple tasks like labeling, button sewing, or basic stitching. Bigger firms use this system to increase the number and size of orders they book and improve profit margins. Bangladesh has more than 5,000 garment factories. They can be divided into three tiers based on their facilities, customers, and quality of employment. According to a working group on RMG Industry reforms, Tier 1 and Tier 2 garment manufacturers constitute only one-fifth of all Bangladeshi firms, but they account for more than 80 percent of production. They use larger and more efficient factories that are designed specifically for garment manufacturing, and generally employ up to 5,000 workers. Both Tier 1 and Tier 2

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<sup>13</sup> NPR, *4 Years After Rana Plaza Tragedy, What's Changed For Bangladeshi Garment Workers?*, available at :

<https://www.npr.org/sections/parallels/2017/04/30/525858799/4-years-after-rana-plaza-tragedy-whats-changed-for-bangladeshi-garment-workers> (last visited: 2017.11.28).

<sup>14</sup> Julfikar Ali Manik and Jim Yardley, *Building Collapse in Bangladesh Leaves Scores Dead*, New York Times, available at: <http://www.nytimes.com/2013/04/25/world/asia/bangladesh-building-collapse.html?hp> (last visited: 2017.11.28).

factories have systems in place in case of emergencies and generally comply with laws regarding working age and hours. The main distinction between Tier 1 and Tier 2 factories is that Tier 1 factories book their orders through international buying houses like Hong Kong-based Li & Fung or direct relationships with major brands to a much greater extent than the ones in Tier 2. Tier 2 factories may also sub-contract substantial assignments that Tier 1 factories are unable to complete on time or at cost.

Tier 3 factories make up the remaining 80 percent of garment factories. They usually operate as subcontractors to other local factories instead of international buyers or brands. Tier 3 factories have been described as modern day sweatshops. Both the Tazreen factory fire and the Rana Plaza collapse involved Tier 3 factories that were subcontracting to stitch garments for international buyers and major brands.<sup>15</sup>

Subcontracting allows Tier 1 and Tier 2 factories to avoid capital expenditures required to expand and mitigate the risk of excess capacity if demand wanes. One unintended consequence of subcontracting is that unsafe working conditions can become institutionalized by the practice of cost savings being passed upward by sub-contractors to direct-contractors. Although international buyers now formally prohibit a factory from sub-contracting, the practice is still widely

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<sup>15</sup> Edward Bearnot, Bangladesh: A Labor Paradox, World Policy Institute, available at: <http://www.worldpolicy.org/journal/fall2013/Bangladesh-Labor-Paradox> (last visited: Jan. 10, 2018).

known to continue. While officially refusing to allow factories to sub-contract may protect foreign buyers from legal liability in case of a disaster, this practice may also perpetuate unsafe and unsustainable practices when subcontractors continue to be used.<sup>16</sup>

## **2. Legal Rules/Guidelines Before Tazreen and Rana**

### **2.1 Host State: Bangladesh**

The Companies Act of 1994 and the Bangladesh Labour Act of 2006 do not have substantive provisions to enable the development of firms' self-regulated responsibility systems.<sup>17</sup> The Companies Act of 1994 does not provide the required focus on social responsibilities of firms or the liabilities of firm owners for this development. On the other hand, although the Bangladesh Labour Act of 2006 provides a long list of labour rights, the implementation strategies covered by it are not sufficient to develop a welfare-oriented workplace management system. Its provisions are descriptive, and the punishment measures detailed in it do not seem worthwhile.<sup>18</sup>

### **2.2. Home State: (United States as an example)**

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<sup>16</sup> *Id.*

<sup>17</sup> Rahim, M. M. (2013). Legal regulation of corporate social responsibility - A meta-regulation approach of law for raising CSR in a weak economy. Springer

<sup>18</sup> Rahim, M. M. (2012). Legal regulation of corporate social responsibility: Evidence from Bangladesh. *Common Law World Review*, 41(2), 97–133.

## **Occupational Safety and Health Act of 1970 (“OSH Act”)**

The OSH Act<sup>19</sup> is a US labor law governing the federal regulations regarding occupational health and safety in the United States. Under the OSH Act, employers must comply with specific standards promulgated by the Occupational Safety and Health Administration (“OSHA”), as set forth in Title 29 of the Code of Federal Regulations (“CFR”). Under the General Duty Clause of the OSH Act, employers shall furnish to each of his employees’ employment and a place of employment that are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees and shall comply with occupational safety and health standards promulgated under this Act.

Although the OSH Act and OSHA regulations provide a comprehensive framework for workplace safety in the United States, they do not apply to the acts of US enterprises overseas. Unlike the Foreign Corrupt Practices Act<sup>20</sup>, which governs the conduct of any entity that registers securities in the United States no matter where the conduct takes place, OSHA’s authority cannot reach beyond the US shores.

### **2.3 International Actions**

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<sup>19</sup> 3 U.S.C. § 425.

<sup>20</sup> 15 U.S.C. § 78dd-1.

## **(1) ILO: Guidelines on Occupational Safety and Health Management Systems (ILO-OSH 2001)**

The International Labour Office (“ILO”) Guidelines on Occupational Safety and Health Management Systems<sup>21</sup> (“ILO Guidelines”) provide guidance for action at the national and enterprise levels. According to the ILO Guidelines, occupational safety and health, including compliance with the OSH requirements pursuant to national laws and regulations, are the responsibility and duty of the employer. The employer should show strong leadership and commitment to OSH activities in the organization, and make appropriate arrangements for the establishment of an OSH management system. The system should contain the main elements of policy, organizing, planning and implementation, evaluation and action for improvement.

The OSH policy should include, as a minimum, the following key principles and objectives to which the organization is committed: (a) protecting the safety and health of all members of the organization by preventing work-related injuries, ill health, diseases and incidents; (b) complying with relevant OSH national laws and regulations, voluntary programs, collective agreements on OSH and other requirements to which the organization subscribes; (c) ensuring that workers and their representatives are consulted and encouraged to participate actively in all

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<sup>21</sup> INTERNATIONAL LABOUR OFFICE, GUIDELINES ON OCCUPATIONAL SAFETY AND HEALTH MANAGEMENT SYSTEMS (2001).

elements of the OSH management system; and (d) continually improving the performance of the OSH management system.

The employer and senior management should allocate responsibility, accountability and authority for the development, implementation and performance of the OSH management system and the achievement of the relevant OSH objectives.<sup>22</sup> Hazards and risks to workers' safety and health should be identified and assessed on an ongoing basis. Preventive and protective measures should be implemented.<sup>23</sup> Emergency prevention, preparedness and response arrangements should be established and maintained. These arrangements should identify the potential for accidents and emergency situations, and address the prevention of OSH risks associated with

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<sup>22</sup> Structures and processes should be established which: (a) ensure that OSH is a line-management responsibility which is known and accepted at all levels; (b) define and communicate to the members of the organization the responsibility, accountability and authority of persons who identify, evaluate or control OSH hazards and risks; (c) provide effective supervision, as necessary, to ensure the protection of workers' safety and health; (d) promote cooperation and communication among members of the organization, including workers and their representatives, to implement the elements of the organization's OSH management system; (e) fulfill the principles of OSH management systems contained in relevant national guidelines, tailor guidelines or voluntary programs, as appropriate, to which the organization subscribes; (f) establish and implement a clear OSH policy and measurable objectives; (g) establish effective arrangements to identify and eliminate or control work-related hazards and risks, and promote health at work; (h) establish prevention and health promotion programs; (i) ensure effective arrangements for the full participation of workers and their representatives in the fulfilment of the OSH policy; (j) provide appropriate resources to ensure that persons responsible for OSH, including the safety and health committee, can perform their functions properly; and (k) ensure effective arrangements for the full participation of workers and their representatives in safety and health committees, where they exist.

<sup>23</sup> Preventive and protective measures should be implemented in the following order of priority: (a) eliminate the hazard/risk; (b) control the hazard/risk at source, through the use of engineering controls or organizational measures; (c) minimize the hazard/risk by the design of safe work systems, which include administrative control measures; and (d) where residual hazards/risks cannot be controlled by collective measures, the employer should provide for appropriate personal protective equipment, including clothing, at no cost, and should implement measures to ensure its use and maintenance.

them. The arrangements should be made according to the size and nature of activity of the organization.<sup>24</sup>

## **(2) OECD: 2011 Guidelines for Multinational Enterprises**

The Organisation for Economic Co-operation and Development (“OECD”) Guidelines for Multinational Enterprises <sup>25</sup> (“OECD Guidelines”) are recommendations addressed by governments to multinational enterprises operating in or from adhering countries. The OECD Guidelines’ recommendations express the shared values of the governments of countries from which a large share of international direct investment originates and which are home to many of the largest multinational enterprises. The OECD Guidelines aim to ensure that the operations of these enterprises are in harmony with government policies, to strengthen the basis of mutual confidence between enterprises and the societies in which they operate, to help improve the foreign investment climate and to enhance the contribution to sustainable development made by multinational enterprises.

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<sup>24</sup> The arrangements should: (a) ensure that the necessary information, internal communication and coordination are provided to protect all people in the event of an emergency at the worksite; (b) provide information to, and communication with, the relevant competent authorities, and the neighborhood and emergency response services; (c) address first-aid and medical assistance, firefighting and evacuation of all people at the worksite; and (d) provide relevant information and training to all members of the organization, at all levels, including regular exercises in emergency prevention, preparedness and response procedures.

<sup>25</sup> OECD, OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES (2011).

According to Part V “Employment and Industrial Relations” of the OECD Guidelines<sup>26</sup>, within the framework of applicable law, regulations and prevailing labor relations and employment practices and applicable international labor standards, enterprises should take adequate steps to ensure occupational health and safety in their operations. In their operations, to the greatest extent practicable, enterprises should employ local workers and provide training with a view to improving skill levels, in co-operation with worker representatives and, where appropriate, relevant governmental authorities.<sup>27</sup>

### **(3) Fair Labor Association: FLA Workplace Code of Conduct; Principles of Fair Labor and Responsible Sourcing**

The Fair Labor Association (“FLA”) is a non-profit organization works to improve labor practices by offering tools and resources to companies, delivering training to factory workers and management, conducting due diligence through independent assessments, and advocating for greater accountability and transparency from companies, manufacturers, factories and others involved in global supply chains.<sup>28</sup>

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<sup>26</sup> Id., p. 35 – 41.

<sup>27</sup> Id.

<sup>28</sup> Fair Labor Association, available at: <http://www.fairlabor.org/> (last visited: Jan. 12, 2018).

Companies that join the FLA commit to ten Principles of Fair Labor and Responsible Sourcing (and/or Production) and agree to uphold the FLA Workplace Code of Conduct in their supply chain. The Code of Conduct is based on ILO standards, and seeks to protect the workers who manufacture clothing, footwear, agricultural products and other items enjoyed by consumers around the world.

Companies affiliated with the FLA are expected to comply with all relevant and applicable laws and regulations of the country in which workers are employed and to implement the Workplace Code in their applicable facilities. The FLA Workplace Code of Conduct includes the following standards: (1) employment relationship; (2) nondiscrimination; (3) prohibition of harassment/abuse; (4) prohibition of forced labor; (5) prohibition of child labor; (6) freedom of association and collective bargaining; (7) health, safety and environment; (8) hours of work; and (9) compensation. The FLA Code of Conduct requires employers to provide a safe and healthy workplace setting, and to adopt responsible measures to mitigate negative impacts that the workplace has on the environment.<sup>29</sup>

Additionally, FLA “Principles of Fair Labor and Responsible Sourcing” includes 7

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<sup>29</sup> Fair Labor Association, Code of Conduct, available at: <http://www.fairlabor.org/our-work/code-of-conduct> (last visited: 2017.12.04).

principles.<sup>30</sup> Principle 3 requires a company affiliated with the FLA to share its commitment to workplace standards with suppliers and workers in the supply chain. Principle 5 deals with workplace compliance monitoring, including collecting and managing information the company's suppliers and their compliance with workplace standards.<sup>31</sup>

### **3. Legal Rules/Guidelines After the Incidents**

#### **3.1 Host State: Bangladesh**

After the Tazreen Fashions fire, the Ministry of Labour and Employment of Bangladesh and the ILO met. On January 15, 2013, they issued a Joint Statement of Commitment to work together to develop a "National Tripartite Plan

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<sup>30</sup> Fair Labor Association, Principles of Fair Labor and Responsible Sourcing, available at: [http://www.fairlabor.org/sites/default/files/fla\\_principles\\_of\\_fair\\_labor\\_responsible\\_sourcing\\_5.pdf](http://www.fairlabor.org/sites/default/files/fla_principles_of_fair_labor_responsible_sourcing_5.pdf) (last visited: Jan. 12, 2018).

<sup>31</sup> Principles of Fair Labor and Responsible Sourcing

5. Company Affiliate conducts workplace standards compliance monitoring

5.1 Company Affiliate conducts pre-sourcing assessment of suppliers to review compliance with workplace standards.

5.2 Company Affiliate monitors an appropriate sampling of suppliers regularly to assess compliance with workplace standards.

5.3 Company Affiliate ensures that monitoring includes as appropriate, but not limited to, worker interviews, management interviews, documentation review, visual inspection, and occupational safety and health review.

5.4 Company Affiliate ensures that, where relevant, monitoring is consistent with applicable collective bargaining agreements.

6. Company Affiliate collects, manages and analyzes workplace standards compliance information

6.1 Company Affiliate maintains a complete and accurate list of all suppliers.

6.2 Company Affiliate collects and manages information on suppliers' compliance with workplace standards.

6.3 Company Affiliate analyzes noncompliance findings to identify trends, including persistent and/or egregious forms of noncompliance and reports to the FLA on such analysis.

of Action on Fire Safety” by the end of February 2013.<sup>32</sup> According to the “National Tripartite Plan of Action on Fire Safety”, Bangladesh committed to adopting a National Occupational Health and Safety Policy, and review all relevant laws, rules and regulations. As a result, the Bangladesh Labour Act was revised in June 2013. Major changes included the simplification of provisions relating to the registration of trade unions, the establishment of safety committees in every factory with over 50 workers, a prohibition from blocking exits, and mandatory fire drills every six months.<sup>33</sup> The law was also changed to

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<sup>32</sup> ILO, National Tripartite Plan of Action of Fire Safety for the Ready-Made Garment Sector in Bangladesh, available at: [http://www.ilo.org/dhaka/Informationresources/WCMS\\_209285/lang--en/index.htm](http://www.ilo.org/dhaka/Informationresources/WCMS_209285/lang--en/index.htm) (last visited: Jan. 12, 2018).

<sup>33</sup> Bangladesh Labour Act

**Sec. 62 Precaution as to fire**

(1) Every establishment shall be provided with such means of exit including at least one alternative staircase connecting with every floor at the time of fire and [requisite number of] fire fighting equipments **[in every floor]** as may be prescribed by rules.

(2) If it appears to an Inspector that no means of exit has been provided according to the rules mentioned in sub-section (1) **[or no requisite number of fire fighting equipments have been placed according to the license given by the Fire Service Department]**, he may, by serving an order in writing upon the employer, inform him of the measures which in his opinion are required to be taken within the time specified in that order.

(3) In every establishment the door affording exit from any room shall not be locked or fastened so that the person working in the room may easily and immediately open it from inside and all such doors, unless they are of the sliding type, shall be constructed to open outwards, or where the door is between two rooms, in the direction of the nearest exit from the building and no such door shall be locked or obstructed while work is being carried on in the room.

**(3a) In every establishment, while work is going on, no exit of a room shall be kept locked or fastened and no exit shall be hindered or no barrier shall be put on the way.**

**(3b) All doors shall be made in such a way that they may be opened at once from inside of a working room to outwards.**

**(3c) If there is any door between 2 (two) rooms, it shall be made in such a way that it may be opened near to the nearest exist of the building and no such door shall be kept locked or hindered while work is going on.**

(8) In factories and establishments wherein 50 (fifty) or more workers/ employees are employed, at least once in **every [6 (six) months]** a mock firefighting shall be arranged and a book of records in this regards shall be maintained in the prescribed manner by the employer.

**Sec. “78(a). Mandatory use of personal safety equipment.**

(1) In an applicable case, an employer shall not engage any workers in work without providing and ensuring use of personal safety equipment, and in doing so, a record book shall be maintained as designated by the owner.

(2) In spite of supply of personal safety equipment if those are not used by workers concerned, they are to be held liable thereof.

remove the requirement that government share the member lists of unions with employers, and to lower the required number of votes for a strike to two-thirds of members from three-quarters.<sup>34</sup>

Further reforms included the Implementation Rules for the Bangladesh Labour Act (2006) on September 15, 2015 that provided guidance on implementation of central elements of the Bangladesh Labour Act. Bangladesh also initiated a major reform of the Department of Inspections for Factories and Establishments (“DIFE”). These reforms included elevating the DIFE to a department, installing high-level leadership, and creating 392 new inspector positions. Budget allocations for DIFE also increased considerably, from \$900,000 in 2013-14 to \$4.1 million for the period 2015-2016. By August 2015, 200 new inspectors had been recruited, taking the total to 284, a significant increase compared to the 92 active inspectors on duty at the time of the Rana Plaza collapse.<sup>35</sup>

## **3.2 International Actions**

### **(1) Global Actions**

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(3) For ensuring professional health and safety for workers at workplace, each of workers shall have to be aware on the risk of the work through trainings.”

<sup>34</sup> Edward Bearnot, Bangladesh: A Labor Paradox, World Policy Institute, available at: <http://www.worldpolicy.org/journal/fall2013/Bangladesh-Labor-Paradox> (last visited: 2017.11.28).

<sup>35</sup> ILO, STRENGTHENING WORKPLACE SAFETY AND LABOUR RIGHTS IN THE BANGLADESH READY-MADE GARMENT SECTOR, p. 9 (Sept. 2016).

On October 22, 2013, the ILO launched its “Improving Working Conditions in the Ready Made Garment Sector Programme” with the support of Canada, the Netherlands, and United Kingdom. The first phase of the program focused on building and fire safety assessments, labor inspection reforms, awareness on occupational safety and health, and rehabilitation and skills training for Rana Plaza survivors. The second phase covers strategic areas including: ensuring factory safety through remediation, governance building to effectively regulate industrial safety and support labor inspection reform, and improving OSH in both policy and practice.<sup>36</sup>

The European Union, Bangladesh, and the United States launched a “Sustainability Compact for the RMG Industry” with support from the ILO in July 2013. In January 2016, Canada also became a Compact partner. The Compact sets out a series of commitments and deadlines for changes relating to safety, legislation, and working conditions as well as responsible business conduct.<sup>37</sup> The Compact is built on short-term and long-term commitments related to three inter-linked pillars: 1) respect for labor rights; 2) structural integrity of buildings and occupational safety and health; and 3) responsible business conduct.<sup>38</sup>

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<sup>36</sup> ILO, IMPROVING WORKING CONDITIONS IN THE READY-MADE GARMENT SECTOR (RMGP) PROGRAMME IN BANGLADESH, available at: [http://www.ilo.org/dhaka/Whatwedo/Projects/safer-garment-industry-in-bangladesh/WCMS\\_226530/lang--en/index.htm](http://www.ilo.org/dhaka/Whatwedo/Projects/safer-garment-industry-in-bangladesh/WCMS_226530/lang--en/index.htm) (last visited: Nov. 28, 2017).

<sup>37</sup> ILO, Strengthening workplace safety and labour rights in the Bangladesh Ready-Made Garment sector, p. 6 (Sept. 2016).

<sup>38</sup> ILO, Support the Implementation of the Sustainability Compact, available at: [http://www.ilo.org/dhaka/Whatwedo/Projects/WCMS\\_396191/lang--en/index.htm](http://www.ilo.org/dhaka/Whatwedo/Projects/WCMS_396191/lang--en/index.htm) (last visited: 2017.11.28).

## **(2) Accord on Fire and Building Safety in Bangladesh & Alliance for Bangladesh Worker Safety**

Other key initiatives include the Bangladesh Accord on Fire and Building Safety (the “Accord”), which brings together over 200 apparel brands, global and local trade unions, NGOs and workers’ rights groups in a legally-binding arrangement. Company signatories include H&M, Benetton, C&A, Tesco, Marks and Spencer, Bonmarché, El Corte Inglés, Mongo, Matalan, and Primark. Meanwhile, the Alliance for Bangladesh Worker Safety (the Alliance) comprises 29 mainly North American brands, including Walmart, Target, Costco, The GAP, The Children's Place, and Sears. Both the Accord and the Alliance have carried out comprehensive programs to improve the safety of the factories they source from as well as train workers in areas such as fire safety.

The Accord was signed on May 15, 2013. It has six key components:<sup>39</sup>

- (1) A five-year, legally binding agreement between brands and trade unions to ensure a safe working environment in the Bangladeshi RMG industry;
- (2) An independent inspection program supported by brands in which workers and trade unions are involved;
- (3) Public disclosure of all factories, inspection reports and corrective action plans;

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<sup>39</sup> Accord on Fire and Building Safety in Bangladesh, About the Accord, available at: <http://bangladeshaccord.org/about/> (last visited: 2017.11.28).

- (4) A commitment by signatory brands to ensure sufficient funds are available for remediation and to maintain sourcing relationships;
- (5) Democratically elected health and safety committees in all factories to identify and act on health and safety risks; and
- (6) Worker empowerment through an extensive training program, complaints mechanism and right to refuse unsafe work.

The Accord requires participating international firms to spend up to \$500,000 a year on investments in safety. Importantly, it also stipulates that the signatories can be found legally liable for damages if a disaster occurs in a firm from which they source.<sup>40</sup> Under Article 21 of the Accord, each signatory company shall require that its suppliers in Bangladesh participate fully in the inspection, remediation, health and safety and, where applicable, training activities. If a supplier fails to do so, the signatory will promptly implement a notice and warning process leading to termination of the business relationship if these efforts do not succeed. The Accord policy on fraud will be zero tolerance. A supplier will be terminated with immediate effect where fraudulent acts by that supplier are verified. A terminated RMG company group may requalify for placement of business by an Accord signatory company after a period of no less than 18 months from the date of termination. To requalify after such period, the RMG company group is required to demonstrate that all remediation from the Accord initial inspection has been satisfactorily completed and that an acceptable, time

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<sup>40</sup> Edward Bearnot, Bangladesh: A Labor Paradox, World Policy Institute, available at: <http://www.worldpolicy.org/journal/fall2013/Bangladesh-Labor-Paradox> (last visited: 2017.11.28).

bound corrective action plan is in place to correct any new findings identified after the initial inspection.<sup>41</sup>

Signatory companies to the Accord also commit to ensure funds are available for all necessary safety renovations and repairs.<sup>42</sup> In addition, the Accord protects workers' rights to refuse dangerous work, including the right to refuse to enter a dangerous building.<sup>43</sup> The Accord also provides dispute resolution procedures for parties.

On June 29, 2017, global unions and companies agreed to extend the Accord by an additional three years. At the end of that time, the work will be handed over to a national regulatory body, supported by the ILO, to be carried forward from that point. In December 2019, an assessment will be conducted by 2018 Accord SC of whether there is a national regulatory body ready to take over this role. If the SC determines that no such body is ready, this agreement shall be extended for

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<sup>41</sup> Accord on Fire and Building Safety in Bangladesh, Terminated Suppliers, available at: <http://bangladeshaccord.org/terminated-suppliers/> (last visited: 2017.11.28).

<sup>42</sup> Accord on Fire and Building Safety in Bangladesh, Art. 22

In order to induce Tier 1 and Tier 2 factories to comply with upgrade and remediation requirements of the program, participating brands and retailers will negotiate commercial terms with their suppliers which ensure that it is financially feasible for the factories to maintain safe workplaces and comply with upgrade and remediation requirements instituted by the Safety Inspector. Each signatory company may, at its option, use alternative means to ensure factories have the financial capacity to comply with remediation requirements, including but not limited to joint investments, providing loans, accessing donor or government support, through offering business incentives or through paying for renovations directly.

<sup>43</sup> Accord on Fire and Building Safety in Bangladesh, Art. 15

Signatory companies shall require their supplier factories to respect the right of a worker to refuse work that he or she has reasonable justification to believe is unsafe, without suffering discrimination or loss of pay, including the right to refuse to enter or to remain inside a building that he or she has reasonable justification to believe is unsafe for occupation.

a further 12 months.<sup>44</sup> As of October 26, 2017, 47 brands and retailers had signed the Accord, covering almost 1,200 of the current factories.<sup>45</sup>

The Alliance for Bangladesh Worker Safety (the “Alliance”) is a legally binding, five-year commitment. The Alliance was organized through the Bipartisan Policy Center with discussions convened and chaired by former United States Senate Majority Leader George Mitchell and former United States Senator Olympia Snowe. The collaborative process of establishing the Alliance involved apparel industry companies and stakeholders including: the U.S. and Bangladeshi governments, policymakers, NGOs, members of civil society, and organized labor.<sup>46</sup>

The vision of the Alliance is to substantially improve worker safety by upgrading factories, educating workers and management, empowering workers, and building institutions that can enforce and maintain safe working conditions throughout Bangladesh. The Alliance works to achieve its vision through initiatives in five strategic pillars: (1) standards and inspections (2) remediation of

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<sup>44</sup> 2018 Accord on Fire and Building Safety in Bangladesh: May 2018, available at: <http://bangladeshaccord.org/wp-content/uploads/2018-Accord-full-text.pdf> (last visited: 2017.12.19).

<sup>45</sup> Accord Continuation Beyond May 2018, available at: <http://bangladeshaccord.org/2017/10/accord-continuation-beyond-may-2018/> (last visited: 2017.12.19).

<sup>46</sup> The Alliance for Bangladesh Worker Safety, About the Alliance for Bangladesh Worker Safety, available at: <http://www.bangladeshworkersafety.org/who-we-are/about-the-alliance> (last visited: Jan. 12, 2018).

existing factories (3) worker empowerment (4) safety training of workers and management, and (5) sustainability.<sup>47</sup>

Member companies of the Alliance agree to “work with factories that ensure a safe working environment, with each Member committing not to source from any Factory that the Member has deemed to be unsafe”, and agree to “strive to end unauthorized subcontracting within their supply chains, and review their internal policies to ensure application of best practices for addressing unauthorized subcontracting.”<sup>48</sup> The Alliance has developed an internal escalation process to assist members in determining the safety of the factories from which they source. This escalation process begins with notification to factories that do not meet one or more program areas and allowing them time to comply. If factories do not properly engage throughout escalation or make enough progress, factories will eventually be removed from the Alliance. This process has led to 164 factories being removed from the Alliance compliant factory list because of their lack of progress in one or more Alliance programs. Factories that wish to reestablish participation in the Alliance must undergo a new inspection at their own cost.<sup>49</sup>

The Alliance provides for its members to create a fund to underwrite factory-based fire and building safety initiatives, support temporarily displaced workers

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<sup>47</sup> UN Global Compact, Alliance for Bangladesh Worker Safety, available at: <http://supply-chain.unglobalcompact.org/site/article/187> (last visited: 2017.11.28).

<sup>48</sup> Members Agreement, available at: <http://www.bangladeshworkersafety.org/files/Alliance-Member-Agreement-FINAL.pdf> (last visited: 2017.11.28).

<sup>49</sup> The Alliance for Bangladesh Worker Safety, Suspended Factories, available at: <http://www.bangladeshworkersafety.org/factory/suspended-factories> (last visited: 2017.11.28).

due to factory safety remediation activities, and to voluntarily provide affordable financing for building safety.

There are some tensions between the Accord and the Alliance. Accord members say they work closely with labor unions and have extensive input from workers, while the Alliance's members assert that the Accord has not provided wages to workers who were laid off when their factory was temporarily closed after inspectors found serious problems. The Alliance's inspections process has been criticized as not being independent, and many of the factories listed as "on track" on the Alliance website have been said to still face major safety hazards.<sup>50</sup> The Alliance has also been criticized for not including a right for workers to refuse dangerous work.<sup>51</sup> A study released by New York University's Stern School of Business has found that although the Accord and the Alliance have inspected 2,000 of Bangladesh's more than 5,000 apparel factories, the more than 3,000 others generally have worse conditions and that middlemen often secretly send them orders from Western brands. Thus, they are unlikely to result in a substantial change in sector-wide working conditions or labor relations.<sup>52</sup>

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<sup>50</sup> Clean Clothes Campaign, *Alliance for Bangladesh Worker Safety overstates progress while workers' lives remain at risk*, available at: <https://cleanclothes.org/news/2016/11/21/alliance-for-bangladesh-worker-safety-overstates-progress-while-workers-lives-remain-at-risk> (last visited: 2017.12.19).

<sup>51</sup> Comparison: The Accord on Fire and Building Safety in Bangladesh and the Gap/Walmart scheme, available at: <https://cleanclothes.org/resources/background/comparison-safety-accord-and-the-gap-walmart-scheme> (last visited: 2017.12.19).

<sup>52</sup> Edward Bearnot, *Bangladesh: A Labor Paradox*, World Policy Institute, available at: <http://www.worldpolicy.org/journal/fall2013/Bangladesh-Labor-Paradox> (last visited: 2017.11.28).

## Comparison

	<b>The Accord</b>	<b>The Alliance</b>
<b>Cost of safety repairs and renovations</b>	Each signatory company may use alternative means to ensure factories have the financial capacity to comply with remediation requirements, including but not limited to joint investments, providing loans, accessing donor or government support, through offering business incentives or through paying for renovations directly. (Article 22)	The Affordable Capital for Building Safety (“ACBS”) is designed to provide Factory owners within the respective supply chain of each donating Member with access to affordable loans to finance needed Factory repairs and/or improvements recommended by the Alliance and sanctioned by Alliance Member inspections and audits. (Article 2.3.1)
<b>The support of temporarily displaced workers due to Factory safety remediation activities</b>	Signatory companies shall make reasonable efforts to ensure that any workers whose employment is terminated as a result of any loss of orders at a factory are offered employment with safe suppliers, if necessary by actively working with other suppliers to provide hiring preferences to these workers. (Article 14)	A reserve of 10% of the Worker Safety Fund will be established for the support of temporarily displaced workers due to Factory safety remediation activities. (Article 2.2(c))
<b>Workers’ right to refuse dangerous work and enter a dangerous building</b>	Signatory companies shall require their supplier factories to respect the right of a worker to refuse work that he or she has reasonable justification to believe is unsafe, without suffering discrimination or loss of pay, including the right to refuse to enter or to remain inside a building that he or she has reasonable justification to believe is unsafe for occupation. (Article 15)	The Member Agreement of the Alliance makes no mention of the right of workers to refuse dangerous work, leaving factory managers free to bully workers into dangerous buildings.
<b>Enforcement</b>	The Accord is a binding, legally enforceable contract.	Unenforceable by workers. The sole rights to enforce any

	<b>The Accord</b>	<b>The Alliance</b>
	Worker representatives, who have a strong interest in enforcement, are signatories. Binding arbitration, backed up by the courts of the home country of the company in question, is used to resolve disputes and enforce company commitments. (Article 5)	alleged breach of such commitments by a Member are through the processes described in the Bylaws. No Member has any right of action or other claim against another Member arising out of this Agreement, or such Member's participation in the Alliance, all of which are hereby waived and released. <sup>53</sup> (Article 10.4)

### **(3) OECD Due Diligence Guidance for Responsible Supply Chains in the Garment and Footwear Sector (2017)**

The OECD Due Diligence Guidance for Responsible Supply Chains in the Garment and Footwear Sector<sup>54</sup> (“Guidance”) aims to help enterprises implement the due diligence recommendations contained in the OECD Guidelines for Multinational Enterprises along the garment and footwear supply chain in order to avoid and address the potential negative impacts of their activities and supply chains. It seeks to support the aims of the OECD Guidelines to ensure that the operations of enterprises in the garment and footwear sector are in harmony with government policies to strengthen the basis of mutual confidence between enterprises and the societies in which they operate.<sup>55</sup>

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<sup>53</sup> Comparison: The Accord on Fire and Building Safety in Bangladesh and the Gap/Walmart scheme, available at: <https://cleanclothes.org/resources/background/comparison-safety-accord-and-the-gap-walmart-scheme> (last visited: 2017.12.19).

<sup>54</sup> OECD, OECD DUE DILIGENCE GUIDANCE FOR RESPONSIBLE SUPPLY CHAINS IN THE GARMENT AND FOOTWEAR SECTOR (2017).

<sup>55</sup> Id.

#### **4. Individual Corporate Action (H&M as an example)**

H&M signed the Accord on Fire and Building Safety in 2013. H&M committed to ensuring that all of its supplier factories in Bangladesh undergo additional fire and building safety inspections by the end of 2014. All of its suppliers were requested to assess the electrical installations in their factories.<sup>56</sup>

In 2014, the H&M Conscious Foundation donated \$100,000 to the Rana Plaza Donors Trust Fund in order to support the victims of the Rana Plaza disaster and their families in Bangladesh. The Foundation made this donation based on humanitarian grounds, even though H&M never had any business relations with any factories in Rana Plaza.

As planned, all of H&M's supplier factories in Bangladesh had undergone additional safety inspections as per the Accord. These assess three different areas: fire risks, electrical installations, and structural conditions of the building. All of its supplier factories passed the fire and electrical assessments with no immediate risks, while all factories required some improvements mostly concerning fire exits.

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<sup>56</sup> H&M, H&M Conscious Actions Sustainability Report 2013, p. 30, available at: [http://sustainability.hm.com/content/dam/hm/about/documents/en/CSR/reports/Conscious%20Actions%20Sustainability%20Report%202013\\_en.pdf](http://sustainability.hm.com/content/dam/hm/about/documents/en/CSR/reports/Conscious%20Actions%20Sustainability%20Report%202013_en.pdf) (last visited: 2017.12.14).

In the structural assessments, the majority (56%) of the supplier factories were found to have no immediate risks. For about one third of the factories, partial risks were identified and addressed. The assessments and corrective actions have been verified by the Accord. H&M now focuses on securing continued remediation and making sure that any newly added factories will undergo the same initial inspections and, where required, remediation procedures.<sup>57</sup> However, it has been reported that H&M has not honored the commitments it made to ensure worker safety at its supplier facilities. Even those factories the retailer deems among its best performers have failed to meet mandated timeframes for repairs and renovations.<sup>58</sup>

### **III. Food Industry**

#### **1. Chinese Melamine-tainted Milk Incident**

The 2008 Chinese milk scandal was a food safety incident in The People's Republic of China. Manufacturers were adulterating milk, infant formula, and other food products with melamine to give them the appearance of higher protein

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<sup>57</sup> H&M, H&M Conscious Actions Sustainability Report 2014, pp. 35, 111, available at: [http://sustainability.hm.com/content/dam/hm/about/documents/en/CSR/reports/Conscious%20Actions%20Sustainability%20Report%202014\\_en.pdf](http://sustainability.hm.com/content/dam/hm/about/documents/en/CSR/reports/Conscious%20Actions%20Sustainability%20Report%202014_en.pdf) (last visited: Feb. 14, 2017).

<sup>58</sup> Tara Donaldson, *Labor Orgs Say H&M Behind on Safety Repairs in Bangladesh*, available at: <https://sourcingjournalonline.com/labor-orgs-say-hm-behind-on-safety-repairs-in-bangladesh/> (last visited: 2017.12.19).

content. Of an estimated 300,000 victims in China, six babies died from kidney stones and other kidney damage and an estimated 54,000 babies were hospitalized. The issue raised concerns about food safety and political corruption in China and damaged the reputation of exported China food. Dozens of countries imposed bans and additional examination on Chinese food products.<sup>59</sup>

The scandal broke out on July 16, 2008, after sixteen babies in Gansu Province were diagnosed with kidney stones. The babies were fed with infant formula produced by Shijiazhuang-based Sanlu Group. After the initial focus on Sanlu, government inspections revealed the problem existed to a lesser degree in products from 21 other companies, including an Arla Foods-Mengniu joint venture company known as Arla Mengniu, Yili, and Yashili.<sup>60</sup> Tian Wenhua, Chairwoman and general manager of Sanlu was charged under Articles 144 and 150 of the criminal code of PRC. The Intermediate People's Court in Shijiazhuang sentenced Tian Wenhua to life in prison on January 22, 2009.<sup>61</sup>

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<sup>59</sup> Tania Branigan, *Chinese figures show fivefold rise in babies sick from contaminated milk*, The Guardian, available at: <https://www.theguardian.com/world/2008/dec/02/china> (last visited: 2017.11.29).

<sup>60</sup> AQSIQ of PRC announces the list of tainted-milk products, available at: <http://news.cctv.com/china/20080916/107375.shtml> (last visited: 2017.11.29).

<sup>61</sup> Zhu Zhe, *Two Get Death in Tainted Milk Case*, CHINA DAILY, Jan. 23, 2009, available at: [http://www.chinadaily.com.cn/china/2009-01/23/content\\_7422983.htm](http://www.chinadaily.com.cn/china/2009-01/23/content_7422983.htm) (last visited: Jan. 12, 2018).

The New Zealand dairy cooperative Fonterra owned a 43% stake in Sanlu at the time.<sup>62</sup> Fonterra said it knew in August 2008 that the milk powder was tainted, but Chinese authorities held off on announcing a public recall. Fonterra's then chief executive Andrew Ferrier said that Sanlu's milk supply may have been sabotaged, and the company did not come forward with the information weeks earlier because it was waiting for the recall process to move through the Chinese system.<sup>63</sup> Fonterra notified the New Zealand government on September 5, 2008, and three days later, the Prime Minister of New Zealand had Beijing officials alerted directly.<sup>64</sup>

Fonterra's value of the company plunged as a result of the scandal. On September 24, 2008, Fonterra announced it had written down the carrying value of its investment by NZ\$139 million, reflecting the costs of product recall and the impairment of the 'Sanlu' brand because of the "criminal contamination of milk".<sup>65</sup>

The scandal affected other companies as well in September. Mengniu-Arla, a joint-venture between Danish/Swedish co-operative Arla Foods and Mengniu, halted production after three of 28 tests taken from Mengniu showed traces of

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<sup>62</sup> Kerri Ritchie, *Fonterra denies advocating melamine use in milk scandal*, ABC NEWS, available at: <http://www.abc.net.au/news/2009-01-28/fonterra-denies-advocating-melamine-use-in-milk/275912> (last visited: 2017.11.29).

<sup>63</sup> Austin Ramzy and Lin Yang, *Tainted-Baby-Milk Scandal in China*, available at: <http://content.time.com/time/world/article/0,8599,1841535,00.html> (last visited: 2017.11.29).

<sup>64</sup> *NZ PM Alerted China to Tainted Baby Milk*, THE SYDNEY MORNING HERALD, available at: <http://www.smh.com.au/world/nz-pm-alerted-china-to-tainted-baby-milk-20080914-4gfh.html> (last visited: Jan. 12, 2018).

<sup>65</sup> NBR, *Fonterra posts \$139 million impairment charge on San Lu stake*, available at: <https://www.nbr.co.nz/article/fonterra-posts-139-million-impairment-charge-san-lu-stake-35621> (last visited: 2017.11.29).

melamine and recalled the contaminated batches.<sup>66</sup> The British confectionery group Cadbury was forced to withdraw its 11 chocolate products in China on suspicion of melamine contamination and close down its three factories in China. The recall affected the China markets, as well as Taiwan, Hong Kong, Japan, Korea, and Australia.<sup>67</sup> Unilever recalled its Lipton milk tea powder after the company's internal checks found traces of melamine in the Chinese powdered milk used as an ingredient.<sup>68</sup> Nestlé's factory in Heilongjiang was also implicated: the Taiwanese Department of Health forced the delisting of six Neslac and KLIM products for containing minute traces of melamine, although the minister said they did not pose a significant health risk.<sup>69</sup>

## **2. Legal Rules/Guidelines Before the Scandal**

### **2.1 Host State: People's Republic of China**

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<sup>66</sup> Reuters, *Danish Arla says implicated in China milk scandal*, available at: <https://www.reuters.com/article/us-china-milk-arla/danish-arla-says-implicated-in-china-milk-scandal-idUSLG30575720080916> (last visited: 2017.11.30).

<sup>67</sup> Reuters, *Cadbury withdraws China chocolate on Melamine concern*, available at: <https://uk.reuters.com/article/uk-cadbury/cadbury-withdraws-china-chocolate-on-melamine-concern-idUKTRE48S2B520080929> (last visited: 2017.11.30).

<sup>68</sup> CBS News, *Lipton Milk Tea Powder Recalled in Asia*, available at: <https://www.cbsnews.com/news/lipton-milk-tea-powder-recalled-in-asia/> (last visited: 2017.11.30).

<sup>69</sup> Taiwan News, *Taiwan's DOH head: Nestle and Klim milk powder contain melamine*, available at: <https://www.taiwannews.com.tw/en/news/753763> (last visited: 2017.11.30).

Chinese law imposes serious legal penalties on both manufacturers that produce tainted foods and government officials who conceal information about poisonous food products.<sup>70</sup>

### **(1) The Criminal Law of the People's Republic of China (as amended in 2006)**

The Criminal Law has several provisions that impose severe criminal sanctions on producers and sellers that produce counterfeits or substandard products causing serious bodily injuries or death. For example, Article 140 prohibits the production of adulterated products as well as the sale of counterfeits as genuine products, substandard products as good products, or unqualified products as qualified ones. For producers who violate this law, with sale amounts exceeding 2 Million Yuan, it mandates sentences of fifteen years of fixed-term imprisonment or life imprisonment. In addition, it imposes fines of fifty percent to twice the sale amount or a confiscation of total illegal proceeds.

Similarly, Article 143 imposes criminal sanctions on producers and sellers of foods that do not conform to hygienic standards. For substandard products that cause food poisoning accidents or other severe food-borne diseases, the responsible parties face mandatory sentences ranging from several years of

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<sup>70</sup> Chenglin Liu, *Profits above the Law: China's Melamine Tainted Milk Incident*, 79 MISSISSIPPI LAW JOURNAL 371, (2009).

fixed-term imprisonment up to life imprisonment, depending on the severity of the circumstances. They may additionally face a fine of up to twice the sale amount.

Finally, Article 144 prescribes the most severe criminal punishment for producing adulterated foods. It applies to producers and sellers of foods mixed with poisonous or harmful non-food materials. Under this article, any offense to the act itself calls is punishable by up to five years of imprisonment. If the violation gives rise to serious harm to human health, the sentence must be no less than five years and no more than ten years. If the adulterated products cause serious bodily harm or death, the sentence can be the death penalty.

## **(2) The Product Quality Law of the People's Republic of China (Amended as of 2000)**

The Product Quality Law also includes provisions for criminal sanctions as well as administrative fines and victim compensation. Article 32 prohibits the production or sale of adulterated products, counterfeits, shoddy products, or substandard products. Article 33 mandates that sellers inspect products and verify product quality. Articles 49 and 50 require a stop of production and confiscation of illegal proceeds. In addition, fines ranging from fifty percent to three times the sale amount can be levied. In serious circumstances, a producer's business license can be revoked. For cases serious enough to constitute a crime, these articles require criminal investigation.

Article 44 provides holds a producer liable for medical care expenses and lost earnings due to absence from work when defective products cause bodily injury. Mandated compensation also includes living expenses for the injured party's dependents, if the defective product left the victim disabled, and funeral and living expenses of the decedent's surviving dependents, if the defective product causes death.

### **(3) Food Recall Administration Provisions of 2007**

The General Administration of Quality Supervision, Inspection and Quarantine (the "QSIQ") issued the Provisions on the Administration of Food Recall (the "Recall Provisions") on August 27, 2007. According to the Recall Provisions, a food producer must keep a complete record of its food production process. Once the food producer knows or has reason to know that its products may pose a health hazard to consumers, it must promptly assess food safety and submit a report to the local QSIQ. The food producer is required to report safety issues for its products to the local QSIQ, including consumer complaints. The food producer must cooperate with the local QSIQ's investigation and assessment. The food producer also has the option to perform a voluntarily recall by stopping production on the same day it reports the food contamination and by making a public announcement. For a voluntary recall, the producer must report a detailed

plan to the local QSIQ within three days. Alternatively, the State QSIQ will order a mandatory recall. Notably, the Recall Provisions set forth various sanctions for producers who refuse to issue a recall or conceal information about unsafe products.

In sum, China has sophisticated legal provisions that punish both food producers for making adulterated foods and government officials for concealing vital information that cause public health emergencies. The milk scandal demonstrated, however, that these laws were largely disregarded.<sup>71</sup>

## **2.2 Home State: New Zealand**

There are 4 main Acts which regulate the safety of food produced and sold in New Zealand or intended for export, including the 1981 Food Act and the 1999 Animal Products Act (“APA”). The purpose of the APA is to protect human and animal health and facilitate access to overseas markets. The risk management system under the APA potentially covers operations for all animal materials and products from production and harvesting to processing, transport, storage and export.

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<sup>71</sup> Id., pp. 388-393, 396.

The APA establishes a regulatory regime that requires all animal products traded and used to be 'fit for intended purpose'. Food businesses do this by meeting standards for animal products. The regime comprises the following types of controls:

- Standards – these are issued under the Act as Regulations or Notices;
- Risk Management Programs (“RMP”), which are implemented by businesses processing animal material to manage food safety hazards and ensure that resulting animal products meet relevant standards;
- Regulated Control Schemes (“RCS”) – these are imposed and managed by Ministry of Primary Industries (“MPI”) in circumstances where it is more efficient to control food-related risks, such as contaminants and residues, through a national program;
- Export controls, which are issued by MPI and include Overseas Market Access Requirements, General Requirements for Export and official assurances.<sup>72</sup>

The RMP is to be based on the principles of Hazard Analysis and Critical Control Point (“HACCP”). Section 13 of the APA requires the following businesses to operate under an RMP: a) primary processors of animal material; b) secondary processors of animal products intended for human or animal consumption, except to the extent that they are subject to the Food Act regime; c) retail butchers who are dual operator butchers; and d) other persons specified by Order in Council under section 15 of the APA as required to operate under an

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<sup>72</sup> Ministry of Primary Industries, New Zealand food legislation, available at: <http://www.foodsafety.govt.nz/policy-law/food-regulation/nz-food-legislation/> (last visited: 2017.12.01)

RMP. A secondary processor of animal products intended for export with an official assurance must have an RMP to comply with overseas market access or official assurance requirements.<sup>73</sup>

## **2.3 International Actions**

### **(1) Codex: General Principles of Food Hygiene**

The Codex Alimentarius Commission (“Codex”), jointly run by the United Nations Food and Agriculture Organization (“FAO”) and the World Health Organization (“WHO”), sets international food safety and quality standards to promote safer and more nutritious food for consumers worldwide. Codex standards serve in many cases as a basis for national legislation, and provide the food safety benchmarks for international food trade.<sup>74</sup>

The Codex General Principles of Food Hygiene identify the essential principles of food hygiene applicable throughout the food chain (including primary production through to the final consumer), to achieve the goal of ensuring that food is safe and suitable for human consumption; recommend a HACCP-based approach as a means to enhance food safety; indicate how to implement those principles; and

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<sup>73</sup> New Zealand Government, Guidance Document: An Overview of the Animal Products Act 1999, p. 5 (Jan. 18, 2017)

<sup>74</sup> FAO, UN strengthens regulations on melamine, seafood, melons, dried figs and labelling, available at: <http://www.fao.org/news/story/en/item/150771/icode/> (last visited: 2017.12.01).

provide a guidance for specific codes which may be needed for sectors of the food chain; processes; commodities; or to amplify the hygiene requirements specific to those areas.

Industry should apply the hygienic practices set out in the General Principles to provide food which is safe and suitable for consumption; ensure that consumers have clear and easily-understood information, by way of labelling and other appropriate means, to enable them to protect their food from contamination and growth/survival of foodborne pathogens by storing, handling and preparing it correctly; and maintain confidence in internationally traded food.

Section III of the General Principles covers primary production and associated procedures. Sections IV to X set down the general hygiene principles which apply throughout the food chain to the point of sale.<sup>75</sup>

## **(2) Hazard Analysis and Critical Control Point (HACCP) System**

HACCP is an internationally recognised system used to identify and manage significant food safety hazards, and ensure food safety for the business. HACCP can be used throughout all stages of the food chain, from primary production to

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<sup>75</sup> The Codex General Principles of Food Hygiene, CAC/RCP 1-1969, Rev. 4-2003.

final consumption, forming an important part of risk-based food safety programmes, such as Risk Management Programmes.<sup>76</sup>

The principles set forth in the HACCP, as defined by the Codex recommended international code of practice are: (1) Conduct a hazard analysis; (2) Determine the critical control points (CCPs); (3) Establish critical limits for each CCP; (4) Establish a system to monitor the control of the CCP; (5) Establish the corrective action when monitoring indicates that a particular CCP is not under control; (6) Establish verification procedures; and (7) Establish documentation concerning all procedures and records relevant to the HACCP principles and their application.<sup>77</sup>

### **3. Legal Rules/Guidelines After the Incidents**

#### **3.1 Host State: China**

The Chinese Government has responded to the melamine crisis with new, stronger regulations. In June 2009, China's new Food Safety Law came into effect. The new law filled gaps and assigned clear responsibility to each agency.

Every period of the food production process was covered under this law. A new

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<sup>76</sup> HAZARD ANALYSIS AND CRITICAL CONTROL POINT, available at: <https://www.mpi.govt.nz/food-safety/food-safety-codes-and-standards/hazard-analysis-and-critical-control-point/> (last visited: Dec. 12, 2017).

<sup>77</sup> FAO, HAZARD ANALYSIS AND CRITICAL CONTROL POINT (HACCP) SYSTEM AND GUIDELINES FOR ITS APPLICATION, Annex to CAC/RCP 1-1969, Rev. 3 (1997), available at: <http://www.fao.org/docrep/005/y1579e/y1579e03.htm> (last visited: Jan. 12, 2018).

Food Safety Commission was set up by the Chinese government in 2010 to supervise the entire food safety system and strategy.<sup>78</sup>

According to Article 42 of the Food Safety Law, food producers and traders shall establish a food safety traceability system to ensure traceability of food products. The state encourages food producers and operators to adopt information technology to collect and keep production and operation information and establish a food safety traceability system. This is intended to provide transparency and traceability to the entire food production chain. Article 63 provides that the State shall establish a food recall system.<sup>79</sup>

The Chinese government seems to have recognized the insufficiency of heavy reliance on top-down surveillance in China's supply chain management. It is necessary to encourage food producers to shoulder more responsibility. Therefore, as part of the reform, the Chinese government intends to shift the obligation onto producers so as to prompt a better CSR environment.<sup>80</sup>

### **3.2 Home State: New Zealand**

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<sup>78</sup> Jiani Yan, *Fonterra in the San Lu milk scandal – a Case Study of a New Zealand Company in a Product-harm Crisis*, p. 76 (2011).

<sup>79</sup> The Food Safety Law of PRC, available at: [http://big5.gov.cn/gate/big5/www.gov.cn/zhengce/2015-04/25/content\\_2853643.htm](http://big5.gov.cn/gate/big5/www.gov.cn/zhengce/2015-04/25/content_2853643.htm) (last visited: 2017.11.30).

<sup>80</sup> JIANI YAN, *FONTERRA IN THE SAN LU MILK SCANDAL – A CASE STUDY OF A NEW ZEALAND COMPANY IN A PRODUCT-HARM CRISIS*, 77 (Lincoln Univ. 2011).

## **(1) 2014 Food Act**

The Food Act 2014 supersedes the Food Act 1981 and makes some fundamental changes to New Zealand's domestic food regulatory regime. A central feature of the new Act is a sliding scale where businesses that are higher risk, from a food safety point of view, will operate under more stringent food safety requirements and checks than lower-risk food businesses. The new Act promotes food safety by focusing on the processes of food production, not the premises where food is made. The Act brings in new food safety measures:

- food control plans (FCPs) – written plans for managing food safety on a day-to-day basis. These are used by higher risk businesses; and
- national programmes – a set of food safety rules for medium and low risk businesses.

The new Act introduces other changes, including the way food recalls are managed, changes for food importers, and penalties. The Food Act 2014 gives the chief executive of MPI the power to direct a food recall if needed. Previously a recall under the Food Act 1981 could only be directed by the Minister for Food Safety. The new Act also includes a better food safety compliance system than the Food Act 1981. Minor and technical offenses will be dealt with faster and more effectively, and penalties for the worst offenses have been strengthened.<sup>81</sup>

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<sup>81</sup> Ministry of Primary Industries, Food Act 2014, available at: <https://www.mpi.govt.nz/food-safety/food-act-2014/overview/> (last visited: Jan. 12, 2018).

## **(2) 2017 Animal Products Notice**

New Zealand issued Animal Products Notice 2017 on April 21, 2017 (the “Notice”) pursuant to the APA to impose extra requirements for the manufacture of infant formula. Because infant formula can be the sole source of nutrition for a vulnerable population group, greater food safety monitoring and oversight is appropriate and generally expected. Infants and young children have special nutritional needs and a less developed immune system than healthy adults.

The Notice promotes consistency in the application of risk management measures applied to the production and processing of relevant products by imposing specific requirements relating to the premises and equipment used, the control of raw materials, the formulation of the products, product and environmental testing, tracing, and verification and evaluation of manufacturing processes.

Manufacturers of relevant product are responsible for ensuring they meet their obligations under this Notice. A person who fails to comply with the requirements of this Notice may be committing an offence under the APA.<sup>82</sup>

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<sup>82</sup> Animal Products Notice: Manufacture of dairy-based infant formula products and formulated supplementary foods for young children, April 21, 2017, available at:

### **3.3 International Actions**

#### **(1) Codex Maximum Level for Melamine**

In the wake of the 2008 melamine-tainted milk scandal, Codex adopted a maximum melamine level of 1 mg/kg for powdered infant formula in 2010.<sup>83</sup> Establishment of maximum levels will help governments differentiate between low levels of unavoidable melamine occurrence that do not cause health problems, and deliberate adulteration - thereby protecting public health without unnecessary impediments to international trade. While not legally binding, the new levels allow countries to refuse to allow the importation of products with excessive levels of melamine.<sup>84</sup> On July 4, 2012, Codex set a maximum limit of 0.15 mg/kg for melamine in liquid infant milk.<sup>85</sup>

#### **(2) OECD-FAO Guidance for Responsible Agricultural Supply Chains**

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<https://www.mpi.govt.nz/processing/dairy-products/specific-dairy-products/> (last visited: Dec. 1, 2017).

<sup>83</sup> Mark Astley, CODEX REGULATION BOLTS THE DOOR ON INFANT MILK MELAMINE CONTAMINATION, available at: <https://www.foodqualitynews.com/Article/2012/07/05/Codex-sets-maximum-limits-on-melamine-in-liquid-infant-milk> (last visited: Dec. 1, 2017).

<sup>84</sup> FAO, INTERNATIONAL EXPERTS LIMIT MELAMINE LEVELS IN FOOD, available at: <http://www.fao.org/news/story/en/item/43719/icode/> (last visited: Dec. 1, 2017).

<sup>85</sup> FAO, UN STRENGTHENS REGULATIONS ON MELAMINE, SEAFOOD, MELONS, DRIED FIGS AND LABELLING, available at: <http://www.fao.org/news/story/en/item/150771/icode/> (last visited: Dec. 1, 2017).

There are some major guidelines, including “2011 OECD Guidelines for Multinational Enterprises”, “Principles for Responsible Agricultural Investment that respect rights, livelihoods and resources (“PRAI”)(2010)”, “Principles for Responsible Investment in Agriculture and Food Systems of the Committee on World Food Security (“CFS-RAI”)(2014)”, and “OECD FAO Guidance for Responsible Agricultural Supply Chains (2016)”. The objectives of these guidelines are to help enterprises observe standards of responsible business conduct to ensure that their operations do not lead to adverse impacts and contribute to sustainable development.

OECD FAO Guidance for Responsible Agricultural Supply Chains comprises four sections:

- (1) a model enterprise policy outlining the standards that enterprises should observe to build responsible agricultural supply chains;
- (2) a framework for risk-based due diligence describing the five steps that enterprises should follow to identify, assess, mitigate and account for how they address the adverse impacts of their activities. The five-step framework to undertake risk-based due diligence includes: (i) establish strong enterprise management systems for responsible agricultural supply chains; (ii) identify, assess and prioritise risks in the supply chain; (iii) design and implement a strategy to respond to identified risks; (iv) verify supply chain due diligence; and (v) report on supply chain due diligence<sup>86</sup>;

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<sup>86</sup> *Id.*, p. 31.

(3) a description of the major risks faced by enterprises and the measures to mitigate these risks;

(4) a guidance for engaging with indigenous peoples.<sup>87</sup>

According to Model enterprise policy for responsible agricultural supply chains of the Guideline, enterprises should adopt appropriate practices to prevent threats to human life, health, and welfare in operations, as well as threats deriving from the consumption, use or disposal of goods and services, including by adhering to good practices in food safety. Besides, enterprises shall contribute to the protection of the health and safety of affected communities during the life-cycle of their operations.<sup>88</sup>

#### **4. Fonterra's Action**

Fonterra paid a heavy price for its involvement in the Sanlu milk scandal in China. Fonterra said that it must have complete control of the supply chain to operate in China, as it does elsewhere in the world, to ensure quality standards.<sup>89</sup>

Fonterra now has strong measures in place to help ensure it is not faced with such a crisis again, including:

(1) importing standard ingredients from New Zealand, such as cheese, milk powder and specialty ingredients; and

(2) developing farm hubs: Fonterra has two farming hubs in China, situated in

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<sup>87</sup> OECD/FAO (2016), *OECD-FAO Guidance for Responsible Agricultural Supply Chains*, OECD Publishing, Paris.

<sup>88</sup> *Id.*, p. 27.

<sup>89</sup> YAN, *supra* note 80 at 68-69.

Yutian County in Hebei province and Ying County in Shanxi province, while a third hub in Shandong province is in development as part of joint venture with Abbott.

In addition to these measures, Fonterra implements corporate social responsibility policies. In 2009, Fonterra established the Fonterra Rural Maternity and Infant Healthcare Community Programme in partnership with the Soong Ching Ling Foundation. This program delivers medical care and advice to pregnant women, mothers of infants, and children in rural communities across China. More than 10 million rural people have benefited so far. Fonterra also established the Fonterra Scholarship in 2010. Valued at RMB 3 Million, the scholarship has benefitted more than 800 Chinese students studying farming or food science in universities, helping to cultivate talent for the local food industry.<sup>90</sup>

#### **IV. Lessons Learned**

From the stories mentioned above, it can be observed that laws and regulatory measures tend to become more stringent after high profile crises. Host states will strike a balance between the right to regulate and the protection of investors, and no longer encourage investment by weakening or reducing the protections afforded in domestic laws. Host states will strengthen the inspections and take

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<sup>90</sup> FONTERRA, ABOUT FONTERRA CHINA, available at: <https://www.fonterra.com/cn/en/about-fonterra-china.html> (last visited: Dec. 7, 2017).

actions over poorly performed CSR actions, and continue to implement reforms that make themselves increasingly accountable. Home states and NGOs cooperate to assist home states to build the regulatory and management systems. In addition, they will carry out programs to empower labor, consumers, and local communities as well as other stakeholders. NGOs continuously monitor whether manufacturers obey all applicable laws and complete the remediation. Besides, in order to achieve the goal of transparency and traceability, NGOs oversight on whether global buyers disclose their supplier factories, require those suppliers to comply with international standards and to check that the rules are followed periodically. If manufacturers and global buyers fail to meet good business practices, NGOs, consumers, and local communities may boycott their products.

Thus, all businesses must comply with home and host states' laws and regulations. Additionally, enterprises must be aware of international standards. Although most international standards are generally broad in terms and non-binding, some investment treaties incorporate those standards, and indicate that investors shall meet such international standards. For example, the 2016 Morocco–Nigeria Bilateral Investment Treaty introduces a series of obligations upon investors. After establishment, investors must maintain an environmental management system and uphold human rights in accordance with core labor and environmental standards, and must meet or exceed national and internationally accepted standards of corporate governance. Investors are also expected to

operate through high levels of socially responsible practices and apply the ILO Tripartite Declaration on Multinational Investments and Social Policy<sup>91</sup>.

Theoretical and empirical research often points to a positive relation between CSR and company competitiveness. Key potential benefits for firms implementing CSR include: (1) better anticipation and management of an ever-expanding spectrum of risk; (2) improved reputation management; (3) enhanced ability to recruit, develop and retain staff; (4) improved innovation, competitiveness and market positioning; (5) enhanced operational efficiencies and cost savings; (6) improved ability to attract and build effective and efficient supply chain relationships; (7) more robust “social license” to operate in the community;<sup>92</sup> and (8) sustainable development.

## **1. For Manufacturers**

For manufacturers, CSR involves a wide range of stakeholders, including employees and shareholders, business partners and suppliers, customers, and public authorities as well as local communities. Stakeholder consultation is really about initiating and sustaining constructive external relationships over time.

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<sup>91</sup> Tarcisio Gazzini, *The 2016 Morocco–Nigeria BIT: An Important Contribution to the Reform of Investment Treaties*, INVESTMENT TREATY NEWS, Sept. 26, 2017, available at: [http://www.iisd.org/itn/2017/09/26/the-2016-morocco-nigeria-bit-an-important-contribution-to-the-reform-of-investment-treaties-tarcisio-gazzini/?utm\\_source=newsletter-itn&utm\\_medium=email&utm\\_campaign=itn-september-17](http://www.iisd.org/itn/2017/09/26/the-2016-morocco-nigeria-bit-an-important-contribution-to-the-reform-of-investment-treaties-tarcisio-gazzini/?utm_source=newsletter-itn&utm_medium=email&utm_campaign=itn-september-17) (last visited: Jan. 12, 2018).

<sup>92</sup> Hohnen, *supra* note 1, at 10-12.

Companies that start the process early and take a long-term, strategic view are, in essence, developing their local “social license to operate.”<sup>93</sup>

In the melamine-tainted milk case, Sanlu covered up the facts, and did not communicate with consumers in good faith. No immediate response triggered a serious food safety incident. Eventually, Sanlu went into bankruptcy. The Tazreen factory fire and Rana Plaza collapse mirrored the poor working conditions in the Bangladesh apparel industry, including low wages, unsafe factory buildings, chemical hazards, noise-induced hearing loss, and ergonomic hazards. There are a wide range of chemicals utilized in textile production for dyeing and printing, such as bleaching agents and azo dyes. Long term or excessive exposure can sensitize the worker’s immune system. Additionally, if the issue of wastewater is not properly treated, then the environment and human health would be negatively impacted. Local residents may protest against the chemical pollution, which causes interruption to business.

Thus, enterprises must hold good faith, effective, and meaningful consultations with communities through their own representative institutions before initiating any operations that may affect them and continue to hold consultations with them during and at the end of operations. Consultations with stakeholders can help enterprises to realistically assess the project viability and identify effective and

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<sup>93</sup> IFC, Stakeholder Consultation, available at: [https://www.ifc.org/wps/wcm/connect/5a4e740048855591b724f76a6515bb18/PartOne\\_StakeholderConsultation.pdf?MOD=AJPERES](https://www.ifc.org/wps/wcm/connect/5a4e740048855591b724f76a6515bb18/PartOne_StakeholderConsultation.pdf?MOD=AJPERES) (last visited: Dec. 10, 2017).

context-specific response measures. Inclusive and fully transparent consultations can lower transaction costs, reduce opposition and create trust among stakeholders.

## **2. For Retailers**

After the Tazreen factory fire and Rana Plaza collapse, human rights groups criticized that retailers fell short of pledges to overseas workers. Fonterra paid a heavy price for its involvement in the Sanlu milk scandal in China. Thus, in order to achieve good quality control and manage enterprises reputation, retailers should identify their upstream suppliers and sub-suppliers, and must build accountable, transparent, and ethically managed supply chains. Like-minded companies can form profitable long-term business relationships by improving standards, and thereby reducing risks.<sup>94</sup> Larger retailers can push their suppliers to implement a CSR approach, such as requiring suppliers to establish health and safety management system that adheres to the international standards.

Conducting risk-based due diligence on suppliers and their subcontractors can also help retailers build a reliable supply chain. For instance, Adidas established and disclosed its global supplier list. Adidas builds “Workplace Standards”, and uses the standards to select and retain business partners. Adidas maps its

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<sup>94</sup> Hohnen, *supra* note 1, at 11.

supply chain risk by taking into consideration the risk of source state and suppliers' compliance risk. Source state and factory profiles determine the subject of issues to be prioritized as well as the frequency of monitoring and remediation activities. In addition to Adidas's own monitoring activities, it values independent and unannounced assessments by independent third parties to demonstrate the credibility of and provide verified information to stakeholders. When Adidas finds that the factory management does not meet Workplace Standards, it issues warning letters. If suppliers do not make necessary corrections, then Adidas ends the relationship.<sup>95</sup> This is a good example for retailers to bear in mind.

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<sup>95</sup> Adidas, SUPPLY CHAIN APPROACH, available at: <https://www.adidas-group.com/en/sustainability/compliance/supply-chain-approach/> (last visited: Jan. 12, 2018).