

WRITTEN TESTIMONY OF

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Chairman Menendez, Ranking Member Corker and members of the Committee, thank you for inviting me to testify at today's hearing to discuss "Labor Issues in Bangladesh." My name is Johan Lubbe and I am a shareholder with the law firm of Littler Mendelson, P.C. Littler is the world's largest labor and employment law firm exclusively devoted to representing management. I am here today in my capacity as a lawyer who practices international labor and employment law and my experience advising the U.S. retail and apparel industry specifically the associations representing the industry. These associations include the American Apparel and Footwear Association, the National Retail Federation, the Retail Industry Leaders Association, the U.S. Association of Importers of Textiles and Apparel. My testimony today will focus on some of the key issues facing companies, who are doing business in Bangladesh, as well as solutions that have been offered to address the issue of worker safety.

The North American retail and apparel community has been stunned and saddened at the heartbreaking loss of life from the recent tragedies at ready-made garment factories in Bangladesh. These tragic incidents only underscore the need for the international community to come together to build upon the ongoing work in Bangladesh by individual companies and other stakeholders to find practical, immediate and long-term solutions to ensure the safety of the workers in the garment production facilities in Bangladesh.

It must be noted that the problems within Bangladesh are extremely complex. As such, there is no simple "one-size-fits-all" solution that will resolve the current systemic issues. Any solution requires that all stakeholders work together to develop a system wide solution that will not only provide a long-term and sustainable solution to ensure worker safety in the Bangladesh garment industry, but will also maintain the viability of the country as a key manufacturer and supplier to markets around the world. As solutions are developed, it is important to allow for flexibility that will enable brands, retailers, manufacturers and other stakeholders to respond swiftly and effectively to an ever-changing environment within Bangladesh. This flexibility will allow companies who operate different supply chains with different factories to make sure they are responding in an appropriate manner to the issues before them.

Many efforts have been announced by multiple parties including governments, industry and others to address the key issues within Bangladesh. It is important that everyone recognize the

shared responsibility that is required for addressing the worker and factory safety issues. This responsibility lies with all stakeholders including the Bangladesh government, the U.S. and other foreign governments, factory owners, employer's organizations, workers, the buyers in North America and Europe, members of civil society, and organized labor. The efforts should all build off of each other to achieve the ultimate goal of protecting those who work in the Bangladesh garment factories.

Bangladesh Role in the Global Marketplace

As committee members are aware, Bangladesh has very quickly become a major player in the ready-made garment industry. As has been proven through the years, apparel and garment production are critical first steps for lesser developed countries to raise their standard of living. The garment industry accounts for 80% of Bangladesh's exports. In 2011, exports from Bangladesh totaled \$23 billion. Garment exports comprised nearly \$20 billion of this total. The industry directly employs 4.5 million workers, by far the largest employment sector in Bangladesh. It is significant to note that women make up close to 90% of the ready-made garment workforce, allowing for many to become the primary breadwinners for their families.

The bulk of Bangladeshi manufactured garments are sold in the European and North American markets. The European market accounts for 60% of Bangladeshi exports, about 30% of the exports come to the US, and the remaining 10% is split between Canada and a few other countries. Part of the reason why the European market share is so large is that apparel products qualify for duty free status under Europe's General Scheme of Preferences (GSP) program. Unlike the European GSP program, the U.S. does not provide for duty preferences under its own Generalized System of Preferences program. Both Europe and the U.S. are now considering removing benefits for Bangladesh under their respective programs. The potential impact of revisiting the GSP programs is not yet clear. It could lead to companies deciding to stop sourcing in Bangladesh.

In Bangladesh the majority of the ready-garment industry is located in Dhaka and the surrounding areas. The second largest concentration centers around Chittagong, which is the country's major port while the rest of the industry are part of Export Processing Zones. Bangladesh itself is a very unique country for the building of factories. Since the country is

mostly swamp land, there is not a lot of available stable land which can be used for industrial development purposes. While there is some more usable land further outside of Dhaka and Chittagong, the access to key infrastructure such as electricity and water is very sporadic and unreliable. Companies who decide to build outside Dhaka and Chittagong face significantly higher operating costs, as they need to typically build their own power and water facilities. This is a key reason as to why most manufacturing facilities are built in Dhaka and Chittagong.

Unfortunately the lack of usable land results in many buildings being constructed as multi-purpose facilities. In addition, a number of these buildings are built upon fill. If the fill is not done correctly or up to code, it makes the building inherently unstable. One of the biggest issues facing the industry is the enforcement of current building codes in Bangladesh. The country has a set of codes and certificate requirements which have not been enforced as they should be. The Rana Plaza building collapse only reinforces the need for the enforcement of current codes and an examination of whether the codes need to be updated. As has been reported, Rana Plaza was only authorized to be a five story building, yet an additional three floors were added to the building. In addition, the building was only zoned as a residential/commercial building. It was not meant to be used as an industrial complex and certainly not one to house large machines. These non-compliance issues all contributed to the horrific collapse of a building that was improperly constructed and used for the wrong purposes.

The industry has grown exponentially over the years. While this is positive for the overall Bangladesh economy, it also highlighted the unfortunate fact that the country was not equipped for this quick expansion, especially with the inability of the government to build industrial parks and Export Processing Zones to keep up with the growing demand.

Concerns in Bangladesh

The recent tragic events in Bangladesh have highlighted the continuing concerns about worker safety at ready-made garment factories in the region. In addition to these issues, there are other concerns for companies who continue to do business in the country. First and foremost is the Bangladeshi government itself. There are many reports about rampant corruption within the government which need to be addressed. There are some who are concerned about the number of Bangladeshi politicians who are actually factory owners and whether that will slow down or

prevent the necessary reforms to address worker and factory safety. The government has signaled a move to make the necessary changes with the recent announcements to convene a panel to consider an increase to the country's minimum wage and allowing unions to form in factories without the approval of factory owners. In addition, the government has promised to submit to the Bangladeshi Parliament a legislative reform package in June 2013 that will include amendments to Bangladesh's 2006 labor law allowing union representation and the right for collective bargaining for all workers in the country as well as other changes. Any solution would require the Bangladeshi government to act quickly and swiftly to allow these important changes to occur.

Second, the deficient infrastructure in Bangladesh is another concern. Not only with the structural integrity of current buildings, but issues with the electricity grid and water availability. Key to this is the need to quickly ensure through factory inspections and assessments that not only are buildings structurally sound and meet the appropriate codes, but that the electrical wiring and systems are also up to the appropriate codes and standards.

In addition to these issues, there are also issues of reliability of the overall industry as we see incidences of labor unrest increase and other issues with factory owners shutting down factories for periods of time. This uncertainty can have a significant negative impact on a company's supply chain. All of these factors are elements that retailers, brands and manufacturers are taking into consideration as they evaluate their current business relationships in Bangladesh.

Need for Shared Responsibility

As noted earlier, there is a strong need for shared responsibility to address the current issues and challenges in Bangladesh. This includes the Bangladeshi government; other governments including those of the U.S. and EU; the retailers, brands and manufacturers who contract in Bangladesh; the factory owners including the Bangladesh Garment Manufacturers & Exporters Association (BGMEA) and the Bangladesh Knitwear Manufacturers & Exporters Association (BKMEA); the factory workers; civil society; labor unions; and other international institutions.

The responsibility is shared and not that of the retailers only. Further, each stakeholder should have an area of responsibility and should not be required to usurp the role of other

stakeholders. This demarcation of responsibilities in socially responsible supply chain management is recognized and highlighted in a March 2011 United Nations (UN) report titled “*Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework*”. The UN Human Rights Council endorsed this report by UN Special Representative John Ruggie in June 2011. In the report, Professor Ruggie states: “The Framework rests on three pillars. The first is the State duty to protect against human rights abuses by third parties, including business enterprises, through appropriate policies, regulation, and adjudication. The second is the corporate responsibility to respect human rights, which means that business enterprises should act with due diligence to avoid infringing on the rights of others and to address adverse impacts with which they are involved. The third is the need for greater access by victims to effective remedy, both judicial and non-judicial. Each pillar is an essential component in an inter-related and dynamic system of preventative and remedial measures: the State duty to protect because it lies at the very core of the international human rights regime; the corporate responsibility to respect because it is the basic expectation society has of business in relation to human rights; and access to remedy because even the most concerted efforts cannot prevent all abuse.”¹

Professor Ruggie further elaborates in the report on one of the Foundational Principles “States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication.”² It, therefore, is the primary function of the Bangladeshi government to promulgate building and fire safety regulations that comply with international standards and also enforce such regulations through regular and effective government inspections and assessments.

In addition, the U.S. and other governments have the ability to provide assistance, through training, grants and other avenues to improve the infrastructure as well as worker and building safety. The Department of Labor is currently working on a grant to provide funds in Bangladesh for training and fire safety. Other international institutions could also provide funding to help

¹ Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework* , page 4, March 2011.

² Report pages 6-9.

with the training and infrastructure development and corrections to help improve the situation in Bangladesh. This could include grants or funds from USAID, the World Bank and others.

International organizations, such as the International Labor Organization (ILO), are also a critical stakeholder that needs to be engaged in the process. Specifically programs such as Better Work, which is a joint initiative through the ILO and the World Bank's International Finance Corporation, are essential to help improve worker safety in Bangladesh. The ILO has provided Bangladesh with a set of requirements which must be met before Better Work can begin in the country. It is imperative these conditions be met as soon as possible so that Better Work can begin. According to a representative with Better Work, several amendments included in the labor reform package which soon will be submitted to Parliament include amendments which specifically address some of the Better Work requirements. In addition, Better Work has reported that Bangladesh allowed for the registration of 23 garment factory unions to date in 2013. In both 2012 and 2011, only one union was allowed to register each year.

Retailers, brands and manufacturers all realize they have a role to play in worker and building safety within Bangladesh as well as other countries where they source from. This starts with the assessments and inspections to ensure that factories can not only manufacture the orders that they are given to the specifics in the contract, but that they also meet all of the local health, labor and safety regulations. These companies have instituted corporate social responsibility programs which include strict codes of conduct that vendors must adhere to. Failure to adhere to the code of conduct or specific contract requirements could lead to the termination of a contract with the vendor losing business.

Civil society also plays an important role in helping to develop a long-term sustainable solution. These organizations are typically on the ground in the country and can provide valuable expertise when working in a coordinate effort.

Current Initiatives to Address Worker and Factory Safety

A number of different initiatives have been announced to address worker and factory safety in Bangladesh. Efforts in the U.S. retail industry began well before the Tazreen Design Ltd. Factory fire in November 2012 to address fire safety issues. Those efforts have become

even more intense as retailers, brands and manufacturers continue to work in conjunction with their industry associations to finalize a plan to address fire and worker safety at factories in Bangladesh. In addition, two other competing initiatives were launched. One by the German international development agency Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ), called the “Fire Safety Alliance on Bangladesh,” and the other by IndustriALL Global Union (which represents apparel union affiliates worldwide), Bangladeshi unions and some NGOs called the “Fire and Building Safety MOU” (the MOU had actually been developed in 2010).

With the objective of combining efforts, the U.S. industry began to work with GIZ on their effort. There were also several retailers and brands who continued to work with IndustriALL on their MOU. At the end of April 2013, after the Rana Plaza building collapse, GIZ hosted a meeting with retailers and brands—U.S. and European, IndustriALL and other campaigning NGOs to finalize an Action Plan for fire and building safety in Bangladesh. At this meeting, IndustriALL and the campaigning NGOs proposed their own set of Principles. A good faith effort was made to attempt to merge the GIZ Action Plan with the IndustriALL Principles by a deadline of May 15, but this did not succeed. IndustriALL unilaterally announced May 12 that it would rename its MOU the “Accord on Fire and Building Safety in Bangladesh” and provided companies two days to sign onto the “Accord” before they released it. The Accord requires a five-year commitment from participating retailers to conduct independent safety inspections of factories, and pay up to \$500,000 per year toward operational costs. As noted, many European retailers and brands signed onto the Accord before it was released, while only three U.S. retailers have signed on.

As an industry, U.S. retailers work with their vendors throughout their supply chains seeking to establish safe working conditions. While U.S. retailers share IndustriALL's goal to improve worker safety in Bangladesh and to make tangible progress on the ground, U.S. retailers cannot in good conscience sign the Accord because the current language presents potentially unlimited legal liability given its vague and ambiguous terms. There are also concerns that the Accord

removes the responsibility of the Bangladeshi government for inherent government functions, such as building inspections.

Many companies believe that the IndustriALL Accord should not be viewed as the sole response and solution to the situation in Bangladesh. In the meantime, these retailers, brands and manufacturers have come together in an alliance to develop a single, unified action plan that will achieve immediate, sustainable, effective and long-lasting change for the garment industry and its workers in Bangladesh. The alliance also includes representatives from the Retail Council of Canada, the Canadian Apparel Federation and their members. The action plan builds upon the extensive work already being conducted by many of these retailers on the ground today. These actions include a focus on 1) worker training and empowerment; 2) standards for fire and building safety assessments; 3) sharing of factory inspection and training information; 4) governance; and 5) funding. This work is now occurring with the help of the Bipartisan Policy Center (BPC), under the guidance of former U.S. Senate Majority Leader George Mitchell and former U.S. Senator Olympia Snowe³. They have announced a plan will be finalized and released by July 2013.

In addition, some companies have announced their own efforts in Bangladesh which will be wrapped into this unified effort. For example, since last October, Gap Inc. has been on the ground in Bangladesh with the Gap Inc. Fire and Building Safety Plan. The Gap Inc. plan includes the appointment of a Chief Fire Safety Inspector and dedicated fire safety team, access up to \$20 million in accelerated capital for vendors to make fire safety improvements and \$2 million in financial assistance for Bangladeshi workers displaced due to fire safety remediation improvements. Gap Inc. hired Randy Tucker, P.E, a fire safety professional with more than four decades of experience in the developing world. Mr. Tucker and his team have been on the ground every month since the launch of the program to conduct inspections across the company's 73 approved third-party garment manufacturing factories in Bangladesh. As a result, twenty percent of the factories have been inspected, and many of them have already begun to make the recommended improvements.

³ "U.S. Retailers Announce New Factory Safety Plan," *The New York Times*, May 30, 2013.

It has also been reported that Wal-Mart would begin conducting detailed safety inspections at every one of the 279 factories it uses in Bangladesh. The company said it would complete all reviews within six months and will publicly release the names and inspection information on all of the factories. It also started posting on its website the list of failed factories in Bangladesh that are no longer allowed to produce for Wal-Mart. The company is also increasing the pace and frequency of follow up inspections in all Bangladesh factories, with visits taking place every two months to ensure both compliance and progress. Finally, Wal-Mart announced that it would hire Bureau Veritas to provide fire safety training to every worker in all 279 Bangladeshi factories, and contribute \$600,000 to Labor Voices to communicate with workers about concerns inside the factories. Labor Voices provides a channel for garment workers to raise their concerns through real-time, anonymized worker feedback.

Some of these action steps by the retail industry actually go beyond what has been proposed in the Accord to date.

Legal Issues for Consideration

Again, while retailers, brands and manufacturers share the goals of improving industrial health and safety of Bangladeshi factory workers, the legal issues raised by these companies regarding the Accord are significant and need full consideration. Finding a workable and sustainable program to improve the health and safety of Bangladeshi garment workers is complex, requires careful consideration and a system wide solution. An attempt at a “quick fix” may satisfy the immediate desire to be seen to be doing something, but might not render the long term sustainable solutions needed to permanently fix the problems/challenges to ensure worker safety.

There are numerous concerns about the Accord. Overall, the Accord creates legal enforceable obligations, but what is enforceable is vague and uncertain. The obligations are described in broad vague terms and it is left to arbitration to resolve disputes. In principle, arbitration as a dispute resolution mechanism is acceptable, but not basically to rewrite or define terms of the Accord that have not been agreed upon.

Second, the Accord shifts some of the basic government regulatory functions, such as

inspections, onto the retailers. While the US retailers are prepared to contribute in a variety of ways to improving worker and building safety standards in Bangladesh, the primary regulatory and enforcement function of such standards remains under the auspices of the Bangladeshi government. The Accord creates a free-standing Safety Inspector with broad powers to gain access to factories and order remedial action. At the same time, after the high level mission by the ILO of early May 2013, the Bangladeshi government committed to recruit and train by the end of October 2013 an additional 200 inspectors for its Department of the Chief Inspectorate of Factories. Creating a parallel free-standing safety inspectorate means establishing a duplicate enforcement bureaucracy and the Bangladeshi government potentially abdicating its primary function of enforcing building regulations and workplace health and safety codes. Privatizing an inherently government function, such as building inspections, as the Accord envisages, is therefore not the right approach to building the capacity, know-how and trained inspectors required by the Bangladeshi government to fulfill its role in ensuring safe workplaces for Bangladeshi workers. While industry and other stakeholders are part of this solution, the focus should be placed on providing the government the ability to carry out its core responsibility to protect its citizens, not supplanting that government function.

Third, there are also concerns that the Accord unduly shifts the responsibility on signatory retailers to essentially establish an independent employment relationship with the employees of their suppliers. In the section dealing with “Remediation”, signatory retailers will not only be responsible for factory owners maintaining the employment relationship and paying wages during a factory closing for structural improvements/renovations, but also finding the employees alternative jobs if they are terminated. These broad obligations imposed on the signatory retailers have potential expanded legal and financial obligations for the signatory retailers. Since the demise of the Alien Torts Act to impute liability on U.S. corporations for the ills of foreign actors, various attempts have been made to impose liability on U.S corporations under a variety of contracts. These potential and unforeseen legal and financial obligations that a vaguely drafted Accord might hold for signatory retailers are of real concern.

Lastly, the Accord effectively allows for a third party arbitrator to determine the price of garments produced in a facility, if the factory claims the price paid by retailers should be higher to fund the health and safety upgrades that factories make to comply with corrective actions by

the Safety Inspector. The Accord requires signatory retailers to “negotiate commercial terms” with the factories “which [would] 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.” A dispute about the adequacy of the commercial terms, including the purchase price of the garments, would be subject to arbitration under the Accord.

Conclusion

Collaboration is an essential component of efforts to improve worker and factory safety in Bangladesh. The joint efforts of all stakeholders are essential to identify viable solutions and implement a successful and sustainable plan of corrective action that addresses the system wide challenges in Bangladesh. A solution must address eradicating corruption, improving the quality of building construction, the location of factories, the issuing of building use permits, the enforcement of building and safety codes, the ability of garment workers to raise concerns free of retaliation, etc. While many would prefer a single coordinated effort, there should be flexibility to allow companies the ability to quickly deal with issues within their own supply chains.

The U.S. retail industry shares the common objective of preventing future workplace injuries and deaths of Bangladeshi garment workers. The industry is prepared and working swiftly towards making a substantial contribution to achieving results on the short-term and the long-term. Thank you for the opportunity to testify at this important hearing today.