



Complaint against TÜV Rheinland and TÜV India on possible Violations of the OECD Guidelines for Multinational Companies

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Introduction

The organizations European Center for Constitutional und Human Rights (ECCHR), medico international, FEMNET, the Bangladeshi trade unions Garment Workers Unity Forum (GWUF) and the Comrade Rubel Memorial Center as well as five individuals of the Rana Plaza survivors’ group file this OECD complaint against the companies TÜV Rheinland AG and TÜV Rheinland India Pvt. Ltd. in the context of massive labor rights violations at the Phantom Apparel Ltd. factory as well as the collapse of the Rana Plaza factory building in Dhaka, Bangladesh on 24 April 2013, in which at least 1,138 people died and 2,500 people were injured.

Phantom Apparel Ltd. was one of the garment factories in the Rana Plaza building complex and was the subject of a social audit in June 2012 which was conducted by TÜV Rheinland India Pvt. Ltd., a 100 percent subsidiary of TÜV Rheinland AG.

TÜV India violated the OECD Guidelines by not assessing carefully in its audit whether human rights violations such as child labor, discrimination against women, trade union rights and forced overtime occurred. Another violation occurred through giving a false statement regarding the quality of the building structure saying the building was of “good construction quality”. The company did furthermore not meet the OECD Guidelines by not indicating the

risks concerning building safety, although they were obvious in the opinion of the complainants and by not properly assessing the legal approvals concerning the building.

TÜV Rheinland did not meet the OECD Guidelines as it failed to take appropriate measures to ensure that their subsidiary meets the relevant standards when conducting audits and because it did not react appropriately to the obviously false statement in the audit report.

The deficient audit report may have prevented relevant actors such as retailers and factory owners from taking appropriate measures with regards to the indicated labor rights violations and building safety and thus may have contributed to human rights violations.

The organizations filing this complaint therefore ask the German NCP to ascertain whether the defendant has breached the following sections in the OECD Guidelines:

- Chapter II. A. 10
- Chapter II. A. 11
- Chapter II. A. 12
- Chapter IV. 2
- Chapter IV. 3
- Chapter IV. 5
- Chapter V 1c

The Complainants

The European Center for Constitutional and Human Rights e.V. (ECCHR) is an independent, non-profit legal organization dedicated to protecting civil and human rights by legal means. ECCHR also works to ensure that transnational companies are held to account when their operations lead to or are complicit in gross human rights violations.

FEMNET e.V. is a non-profit organization, which stands up for the economic, cultural and social rights of women. The organization specifically supports women in the garment industry in Asia – women who are fighting for their rights.

medico international is an aid and human rights organization that fights for social change. In solidarity with socially excluded and marginalized people in the global South, medico works to promote living conditions fit for human beings, which maximize health and social justice.

Garment Workers Unity Forum is a union founded by Ms. Moshrefa Mishu in the 1990s with a major focus on women's rights and with 80,000 members all over Bangladesh.

Comrade Rubel Memorial Center was founded in honor of a worker “Rubel” who died in the Aswat factory fire in 2012 after having helped many people escape from the factory.

Ms. Raima Jahan is the daughter of the deceased victim Israfil Biswas who was a staff level employee, the store manager of Ether Tex Ltd.

Mr. Mahmudul Hasan Hridoy joined the New Wave Styles Ltd. 13 days before the collapse. He was under the rubble for 20 hours before he was rescued.

Ms. Rikta Khatun Joshna worked as sewing operator with Phantom Apparel Ltd. Her spine was severely injured. At the time of the collapse, she was only 14 years old.

Ms. Morjina Begum's daughter Rashida was working with New Wave Bottoms Ltd. as sewing operator at the time of the collapse. Her body was never rescued.

Ms. Jesmin Akhter was an operator working for Phantom Tac Ltd. She worked there for nearly three years. She injured her back and can't work sitting for long hours.¹

The Defendants

The defendants are TÜV Rheinland AG and TÜV Rheinland India Pvt. Ltd (hereinafter TÜV Rheinland and TÜV India). TÜV Rheinland is the operational holding company of the TÜV Rheinland group. It is a global provider of technical, safety, and certification services. It was originally founded in 1872 and has its headquarters in Cologne, Germany. The company group is present in 65 countries worldwide² and employs around 17,000 people in all major industrial sectors. In 2015, TÜV Rheinland revenues totaled 1.8 billion Euros.³

TÜV India is a 100 percent owned subsidiary of TÜV Rheinland.⁴ It started its operations in India in 1996 with local headquarters at Bangalore. TÜV India provides testing, inspection and certification services.⁵ It is a part of the TÜV Rheinland India, Middle East & Africa Group.⁶

¹ For further information on the complainants, see annex 1.

² TÜV Rheinland, About Us, Philosophy and Brand, available at: http://www.tuv.com/en/corporate/about_us_1/philosophy_brand/philosophy_brand.html (last accessed 29 February 2016).

³ TÜV Rheinland, Financial Report 2015, available at: https://www.tuv.com/media/01_presse_2/german_publications/unternehmensbericht/TUEV_Rheinland_Unternehmensbericht_2015.pdf (last accessed 27 April 2016).

⁴ TÜV Rheinland, TÜV Rheinland India, From the Managing Director's Desk, available at: http://www.tuv.com/en/india/about_us_in/tuv_rheinland_india/managing_director_message/managing_director_message.html; Cairn Centre of Excellence (CCoE), About US, Cairn India, available at: <http://tr-ccoe.com/about.php#Tuv> (last accessed 29 February 2016).

⁵ TÜV Rheinland, TÜV Rheinland India, From the Managing Director's Desk, available at: http://www.tuv.com/en/india/about_us_in/tuv_rheinland_india/managing_director_message/managing_director_message.html (last accessed 29 February 2016).

⁶ TÜV Rheinland, About Us, regions and Countries, available at: http://www.tuv.com/en/india/about_us_in/group_2/regions_and_countries_4/regions_and_countries.html (last accessed 29 February 2016).

Jurisdiction of the German National Contact Point

The German NCP has jurisdiction over both TÜV Rheinland and TÜV India. Neither Bangladesh nor India, where TÜV India is registered, are signatories to the OECD Guidelines and therefore the specific instance should be filed with the National Contact Point in the parent company's home country.

Complainant's Previous Attempts to Make Contact

On 6 July 2015, ECCHR along with Activist Anthropologist Bangladesh,⁷ FEMNET, Clean Clothes Campaign and medico international submitted a complaint against TÜV Rheinland through the Business Social Compliance Initiative (BSCI)'s complaint mechanism to request BSCI to investigate the shortcomings of the audit report and further exclude TÜV Rheinland from the BSCI auditing.⁸ At the time of the submission, the complainants sent a copy of the complaint to TÜV Rheinland in order to keep the company informed about the procedure and expecting TÜV Rheinland to respond to the alleged issues. TÜV Rheinland did not reply to the complainants directly but its response was published on the website of the Business & Human Rights Resource Center: "Immediately after the tragic accident on 24 April 2013, we have publicly acknowledged that we have carried out a social audit by the BSCI standard in the companies mentioned. The result of this audit was a report, which names deficiencies and calls for improvements. We have not examined the stability of the building, because such an investigation of building security and static is not the subject of inspections by the BSCI standard."⁹

In October 2015, complainants informed TÜV Rheinland by email that they were going to make public the BSCI complaint on the complainants' websites, inviting TÜV Rheinland to send their comments.

Independent of the BSCI complaint, TÜV Rheinland published a statement on their website responding to a screening of the ARD TV-magazine "Monitor" of 4 June 2013.¹⁰ It states among other things: "Auditors of TÜV Rheinland have audited two factories in the Rana Plaza building under the BSCI respectively the SEDEX standard in recent years. Both standards do not include the inspection of possible structural defects of a building, but on social and ethical criteria of work organization."

⁷ The Activist Anthropologist Bangladesh is working directly with the survivors and family members of deceased and missing workers of the Tazreen Fashion factory where a fire killed at least 117 people in 2012 and the factories at the Rana Plaza building. They support legal intervention and seek justice and accountability.

⁸ BSCI Complaint, "Complaint regarding Social Audit Report BSCI 7-01/09 of Phantom Apparel Ltd.," annex 2.

⁹ Business & Human Rights Resource Center, Home, Bangladesh: NGOs raise concerns about flaws in TÜV Rheinland's Rana Plaza social audit report, available at: <http://business-humanrights.org/en/bangladesh-ngos-raise-concerns-about-flaws-in-tpercentC3percentBCv-rheinlands-rana-plaza-social-audit-report#c126118> (last accessed 29 February 2016).

¹⁰ TÜV Rheinland, TÜV Rheinland responds to ARD-magazine Monitor, 5 June 2013 (translation in the text by the author), annex 3.

Structure of the Complaint

In what follows, the complainants first describe the circumstances surrounding the collapse of Rana Plaza summarized on the basis of reports of the Bangladeshi government and NGOs as well as newspapers articles. In section II, the complainants describe the human rights of workers that have been violated through the working conditions at Phantom Apparel regarding the time before the collapse and through the collapse itself. Section III gives an overview of the most important failures of the audit report in question. Section IV and V conclude that TÜV India and TÜV Rheinland did not comply with several provisions of the OECD Guidelines and in section VI the complainants set out their requests to the NCP and the defendants.

I. The Rana Plaza Collapse

The Rana Plaza building, an eight-storey building with original permission for six stories and a ninth floor under construction, was located in the Savar district of Dhaka, Bangladesh, and hosted five garment factories: New Wave Bottoms Ltd., Phantom Apparels Ltd., Ether Tex Ltd., Phantom Tec Ltd. and New Wave Style Ltd.

On 23 April 2013, cracks in the walls of the Rana Plaza Building emerged. Workers were sent home, while Mr. Sohel Rana, owner of the building, requested an inspection from a local engineer. Despite the warning of the engineer, Mr. Rana pronounced publicly that the building had been verified and found to be safe.¹¹ The next day, the day of the collapse, workers were asked to return to their workplaces. Many workers refused, as they feared the risk of an unstable building. However, the managers of the factory Phantom Apparel Ltd. (hereinafter: Phantom Apparel) threatened the workers with dismissal.¹² As it was the end of the month, the workers could not take the risk of losing a whole month's salary.¹³

Contrary to the situation in the garment factories, employees of the Bangladeshi BRAC Bank in an office on the second floor of the building were not sent back to work. After being informed of the cracks in the walls, the BRAC management promptly suspended the activities of the branch.¹⁴ The owner of Phantom Apparel did not use the interval on the 23 April to communicate with buyers in order to extend deadlines and release the factory from the pressure to continue the production. Instead, some former workers of Phantom Apparel claim that they were even physically assaulted and made to enter the building. When less than an hour later the electricity went out and the generators were turned on, the building started to

¹¹ J. Burke, The Guardian, "Majority of Bangladesh garment factories 'vulnerable to collapse'", 3 June 2013, available at: <http://www.theguardian.com/world/2013/jun/03/bangladesh-garment-factories-vulnerable-collapse> (last accessed 29 February 2016); J. Motlagh, VQR, "The Ghosts of Rana Plaza", available at: <http://www.vqronline.org/reporting-articles/2014/04/ghosts-rana-plaza> (last accessed 29 February 2016).

¹² Human Rights Watch, "Whoever Raises their Head Suffers the Most: Workers' Rights in Bangladesh's Garment Factories", April 2015, p. 3, available at: <https://www.hrw.org/report/2015/04/22/whoever-raises-their-head-suffers-most/workers-rights-bangladeshs-garment> (last accessed 1 March 2016).

¹³ Interview with a sewing operator of Phantom Apparel of 17 February 2015, series of interviews conducted by the Activist Anthropologist, interview 3, annex 4.

¹⁴ W.B. Habib, M.F. Rahman, The Daily Star, "Murder, not accident", 24 April 2014, available at: <http://www.thedailystar.net/flashback-19971> (last accessed 29 February 2016).

collapse.¹⁵ The collapse killed 1,138 persons and injured 2,500. Most of the injured were women, some of them pregnant.¹⁶

Phantom Apparel was subject of a social audit conducted by TÜV India in June 2012, less than a year before the collapse of Rana Plaza.

Reasons for the Collapse

The Rana Plaza building was built in violation of its original design and the applicable construction laws.¹⁷ On 10 April 2006, the owner of Rana Plaza, Mr. Sohel Rana, had obtained a permit to construct a six-storey building for commercial purposes from Savar Municipality. The construction started in 2007. On 25 March 2008, on the basis of another application, Savar Municipality granted a permit to construct four additional floors and the building was approved as an industrial structure. The permit was provided in violation of relevant building regulations as the National Building Code and the Detailed Area Plan.¹⁸ First, the Municipality failed to observe that the building project did not comply with the “Detailed Area Plan,” which lays out zonings for residential, commercial, and industrial use. Second, before giving its approval, the Municipality should have ensured that the building complies with architectural and structural standards of the Bangladesh National Building Code and the Dhaka Metropolitan Building Construction Rules.¹⁹ Third, the municipality only approved the layout, but not the infrastructural integrity.²⁰ No permission was obtained from

¹⁵ Interview with a Rana Plaza survivor of 24 April 2013, series of interviews conducted by the Activist Anthropologist, interview 1, annex 4; M. Strasser, Newsweek, “A Year after Bangladesh’s Deadly Factory Collapse, Western Companies Slow to Compensate Victims”, 24 April 2014, available <http://www.newsweek.com/year-after-bangladeshs-deadly-factory-collapse-western-companies-slow-248506> (last accessed 29 February 2016).

¹⁶ Center for Policy Dialogue, Second Independent Monitoring Report, February 2014, p.12, available at <http://cpd.org.bd/wp-content/uploads/2014/01/KG-Moazzem-Final-Second-26-January.pdf> (last accessed 29 February 2016).

¹⁷ Mr. Sohel Rana has been accused of violating sub-sections 3a, 3b, and 3c of the Building Construction Act 1952, FIR and Ejahar, Savar Police Station Case No. 53(4)13; D.M. Sabet, A. Tazreen, “Building construction laws and their enforcement: Looking beyond Rana Plaza”, University of Liberal Arts Bangladesh, Center for Enterprise and Society, Current Events Analysis Series, (2013), available at: http://www.ulab.edu.bd/CES/documents/Building_Code_Analysis-hi.pdf (last accessed 27 April 2016); Interview by ECCHR with the architect of the design of the building, Dhaka, 22 May 2014, on file with ECCHR; report submitted to C Q K Mustaq Ahmed, Senior Secretary, Ministry of Home Affairs on 22 May 2013, in: “Bangladesh factory collapse blamed on swampy ground and heavy machinery”, *The Guardian*, 23.05.2013, available at: <http://www.theguardian.com/world/2013/may/23/bangladesh-factory-collapse-rana-plaza> (last accessed 29 February 2016).

¹⁸ D.M. Sabet, A. Tazreen (see supra note 17); S.Z. Al-Mahmood, C. Passariello, *The Wall Street Journal*, “Bangladesh Victims Demand Payback”, 24 October 2013, available at: <http://www.wsj.com/articles/SB10001424052702304069604579153553776683312> (last accessed 1 March 2016).

¹⁹ D.M. Sabet, A. Tazreen (see supra note 17); Since the collapse, Bangladesh Police has arrested the Mayor of Savar Municipality, Mr. Refayet Ullah, who is accused of negligence in monitoring the construction process of Rana Plaza and approving a faulty building design. S.Z. Al-Mahmood, C. Passariello, *The Wall Street Journal*, “Bangladesh Victims Demand Payback”, 24 October 2013, see supra note 18). The Mayor was listed in the charge sheet of the Bangladesh Anti-Corruption Agency for violation of the National Building Code, Ruma, P, Reuters, “Bangladesh charges 18 over garment factory collapse”, 16. July 2014, available at: <http://www.reuters.com/article/2014/07/16/us-bangladesh-ranaplaza-idUSKBN0FL1C020140716> (last accessed 1 March 2016).

²⁰ K.R. Chowdhury, “Tammoy housing violated building rule for Rana Plaza”, *Dhaka Tribune*, 30 May 2013, available at: <http://www.dhakatribune.com/law-amp-rights/2013/may/30/tammoy-housing-violated-building-rule->

City Development Authority (RAJUK), the Bangladeshi government agency in charge of construction safety.²¹

Until 2012, the building was built up to the 8th floor. In order to raise another floor, cement, bricks and other materials were stored on the top floor in the year 2013.²² In addition, according to the report of the investigation committee commissioned by the Bangladeshi Ministry of Home Affairs, the use of heavy garment factory machinery at the upper floors of the building was not foreseen in its structural design and thus the weight and vibration of this machinery contributed to the collapse.²³ These factors in the opinion of the complainants were obvious to everyone visiting the building and could have been observed without a building engineers' expertise; see below, paragraph III 2 f).

Furthermore, the Rana Plaza building was initially designed for commercial purposes and not for industrial use.²⁴ Other factors responsible for the collapse were the marshland on which the building was constructed, the inferior combination of cement and sand, the thin subfloors and the undersized columns.²⁵

II. Violations of Human Rights of Workers at Phantom Apparel

Various human rights of workers in the Rana Plaza building were violated before the factory collapse and through the collapse itself.

1. Child Labor

Among the deaths at Rana Plaza, at least 39 workers were between 13 and 17 years of age.²⁶ Former workers of Phantom Apparel confirm that there were child workers among the employees also at Phantom Apparel. According to a sewing operator of the factory, a 12 year

rana-plaza (last accessed 1 March 2016); Odhikar "Broken dreams: A Report on the Rana Plaza Collapse", 19 June 2013, p.3-4, available at: http://1dgy051vgyxh41o8cj16kk7s19f2.wpengine.netdna-cdn.com/wp-content/uploads/2013/06/Fact-finding_RMG_Rana-Plaza_Eng.pdf (last accessed 1 March 2016).

²¹ S.Z. Al Mahmood, J. Burke, S. Neville, The Guardian, "Bangladesh Building collapse: anger amid desperate search for survivors", 26 April 2013, available at: <http://www.theguardian.com/world/2013/apr/25/bangladesh-building-collapse-anger-search> (last accessed 1 March 2016); Odhikar, "Broken dreams: A Report on the Rana Plaza Collapse", 19 June 2013, p.3, available at: http://1dgy051vgyxh41o8cj16kk7s19f2.wpengine.netdna-cdn.com/wp-content/uploads/2013/06/Fact-finding_RMG_Rana-Plaza_Eng.pdf (last accessed 1 March 2016).

²² Odhikar, "Broken dreams: A Report on the Rana Plaza Collapse", 19 June 2013, p.5, (see supra note 21).

²³ Interview with Saydia Gulrukh, Activist Anthropologist, Bangladesh, available at: <https://vimeo.com/162587530> (password: corppaccountability); report submitted to C Q K Mustaq Ahmed, Senior Secretary, Ministry of Home Affairs on 22 May 2013 (see supra note 17).

²⁴ Interview with the architect of the design of the building, 22 May 2014, Dhaka, on file with ECCHR.

²⁵ Report submitted to C Q K Mustaq Ahmed, Senior Secretary, Ministry of Home Affairs on 22 May 2013 (see supra note 17).

²⁶ Bangladesh Garments Workers Solidarity, a Compilation of Rana Plaza Workers Carnage, "24th April: Outcries of A Thousand Souls" (2014), p.176; N. Dean, M. Rashid, The Telegraph, "Bangladesh's Rana Plaza tragedy lives on for the child workers who survived", 24 April 2014, available at: <http://www.telegraph.co.uk/news/worldnews/asia/bangladesh/10783733/Bangladeshs-Rana-Plaza-tragedy-lives-on-for-thechild-workers-who-survived.html> (last accessed 29 February 2016).

old boy was killed right before her eyes. She also reported that children often worked as helpers in the factory.²⁷

The following human rights have been violated by the employment of children in the factory:

- Article 26. 1 of the Universal Declaration of Human Rights (the right to education)
- Article 2 c of the ILO Declaration on Fundamental Principles and Rights at Work (the right to protection from child labor)
- Article 2.1 of the ILO Convention No. 5 on the Minimum Age (Industry)
- Article 3 of the ILO Convention No. 182 on the Worst Forms of Child Labour (the right to protection from harmful work)
- Article 32 of the UN Convention on the Rights of the Child
- ILO Convention No. 138 on the Minimum Age Convention, not ratified by Bangladesh²⁸

2. Freedom of Association

None of the five factories operating in Rana Plaza had a trade union.²⁹ This also applies to Phantom Apparel³⁰ with the consequence that workers were powerless to resist their managers who ordered and threatened them to enter the doomed building a day after large cracks had appeared. The “Participation Committees” mentioned in the TÜV India audit report are not comparable to trade unions. Their members are often nominated by the factory management and not elected by the workers.³¹

The freedom of assembly, being at the core of the ILO’s values, is guaranteed by the following standards:

- Article 11 of the European Convention on Human Rights
- Articles 20 and 23 of the Universal Declaration of Human Rights

²⁷ Interview with a sewing operator of Phantom Apparel of 17 February 2015, series of interviews conducted by the Activist Anthropologist, interview 3, annex 4.

²⁸ Although this convention was not ratified by Bangladesh, it must serve as a benchmark for German companies. This applies also to other ILO conventions listed in the following as well as to e.g. the European Convention on Human Rights.

²⁹ Human Rights Watch, “Whoever Raises their Head Suffers the Most: Workers’ Rights in Bangladesh’s Garment Factories” Workers’ Rights in Bangladesh’s Garment Factories, April 2015, p. 7, 8 (see supra note 12).

³⁰ Interview with a child sewing operator of Phantom Apparel of 22 January 2016 conducted by ECCHR in Dhaka, Savar, annex 5; interview with Saydia Gulrukh, Activist Anthropologist, Bangladesh, available at: <https://vimeo.com/162587530> (password: corpaccountability).

³¹ Gisela Burckhardt, Todschick. Edle Labels, billige Mode – unmenschlich produziert, 2014, p. 123, annex 6.

- ILO Constitution in connection with Article 1 of the ILO Declaration of Philadelphia
- Article 2b) of the ILO Declaration on Fundamental Principles and Rights at Work
- ILO Convention No. 87 on Freedom of Association and Protection of the Right to Organise
- ILO Convention No. 98 on the Right to Organise and Collective Bargaining
- ILO Convention No. 135 on Workers' Representatives, not ratified by Bangladesh.

3. Discrimination of Women

At Phantom Apparel, female workers were discriminated and harassed. The management treated women much harsher than men and continuously threatened women for the case that they would not fulfill their quota.³²

The following international human rights instruments specifically address women's rights:

- Convention on the Elimination of All Forms of Discrimination Against Women
- Preamble, Articles 1 and 3 of the Universal Declaration of Human Rights
- Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence ("Istanbul Convention")
- Article 14 of the European Convention on Human Rights
- Articles 2, 3 and 26 of the International Covenant on Civil and Political Rights
- Articles 2, 3 and 7(i) of the International Covenant on Economic, Social and Cultural Rights

4. Forced Overtime/Disciplinary Measures

Forced overtime was common at Phantom Apparel.³³ One child worker reports that she often had to work compulsory overtime, e.g. from 8 a.m. to 3 a.m. when she was scheduled for the night shift. Work then did not stop at the foreseen time and she was not allowed to go home.³⁴

³² Interview with a child sewing operator, annex 5.

³³ Interview with Saydia Gulrukh, Activist Anthropologists Bangladesh; <https://vimeo.com/162587530> (password: corpaccountability).

³⁴ Interview with a child sewing operator, annex 5.

Also intimidating disciplinary measures were common in this sector³⁵ including at Phantom Apparel, where disciplinary measures took place at least on the day of the collapse. Former workers report that they were forced back into the Rana Plaza building on 24 April 2013.³⁶ A sewing operator of Phantom Apparel reports how the manager of the factory threatened them to withhold the whole month's salary if they didn't go back to work.³⁷

The combination of overtime and disciplinary measures as occurred in the Rana Plaza building and most likely at the Phantom apparel factory constitutes forced labor. Forced or compulsory labor is any work or service that is exacted from any person under the menace or threat of a penalty, and which the person has not entered into on his or her own free will.³⁸

Compulsory overtime in itself can constitute forced labor. This is not the case as long as it is within the limits permitted by national legislation or collective agreements. Above those limits however, it is appropriate to examine the circumstances in which a link arises between an obligation to perform overtime work and the protection against forced labor.³⁹

Although workers may in theory be able to refuse to work beyond normal working hours, their vulnerability means that in practice they may have no choice and are obliged to do so in order to earn the minimum wage or keep their jobs, or both. In cases in which work or service is imposed by exploiting the worker's vulnerability, under the threat of a penalty, dismissal or payment of wages below the minimum level, such exploitation ceases to be merely a matter of poor conditions of employment; it becomes one of imposing work under the threat of a penalty which calls for protection of the workers.⁴⁰

The preconditions outlined are met in the present case: it is not in doubt that overtime was imposed by exploiting the worker's vulnerability.

³⁵ Research Initiative for Social Equity, Society, "Recent and Typical Worker Harassment – Collected Cases," *RISE Society Website*, 5 April 2014, available at <http://risebd.com/2014/04/05/recent-and-typical-worker-harassment-collected-cases/> (last accessed 23 March 2016).

³⁶ Interview on file with the Activist Anthropologist, 24 April, 2013 at Enam Medical College and Hospital, Savar, Dhaka; recorded interview by Activist Anthropologist with survivors, 16 October 2013, Palpara, Savar, Dhaka.

³⁷ Interview with a sewing operator of Phantom Apparel of 17 February 2015, series of interviews conducted by the Activist Anthropologist, interview 3, annex 4.

³⁸ Art. 2 of the ILO Forced Labour Convention, 1930 (No. 29). Two elements characterize forced or compulsory labor: Firstly, the threat of penalty while the penalty may consist in the refusal to pay wages. And secondly, the work or service must be undertaken involuntarily. Deciding whether work is performed voluntarily often involves looking at external and indirect pressures, such as the withholding of part of a worker's salary as part repayment of a loan, or the absence of wages or remuneration, or the seizure of the worker's identity documents. The principle that all work relationships should be founded on the mutual consent of the contracting parties implies that both may leave the work relationship at any moment, subject to giving reasonable notice in accordance with national law or a collective agreement. If the worker cannot withdraw his/her consent, without fear of suffering a penalty, the work may be considered to be forced labor, starting from the moment he or she has been denied the right to stop working, ILO Helpdesk, *website*, available at: http://www.ilo.org/empent/areas/business-helpdesk/faqs/WCMS_DOC_ENT_HLP_FL_FAQ_EN/lang--en/index.htm#Q1 (last accessed 23 march 2016).

³⁹ Report by the ILO Committee of Experts on the Application of Conventions and Recommendations of the national legislation and practice on forced labour, 15 February 2007, paragraph 132, available at: http://www.ilo.org/ilc/WCMS_089199/lang--en/index.htm (last accessed 18 April 2016).

⁴⁰ ILO Q6A on Business and Forced Labour, available at: http://www.ilo.org/empent/areas/business-helpdesk/faqs/WCMS_DOC_ENT_HLP_FL_FAQ_EN/lang--en/index.htm#Q9 (last accessed 18 April 2016).

The prohibition of forced labor is included in the following standards:

- Article 23. 1 of the Universal Declaration of Human Rights
- Article 6 and 7 of the International Covenant on Economic, Social and Cultural Rights
- ILO Convention No. 29 on Forced or Compulsory Labour
- ILO Convention No. 105 on the Abolition of Forced Labour

5. Deaths and Injuries through the Collapse

The collapse of the building and the resulting death of 1,138 persons and physical and psychological injury of 2,500 people has violated the following human rights:

- Article 3 of the Universal Declaration of Human Rights
- Article 6. 1 of the International Covenant on Civil and Political Rights (the right to life)
- Article 12.1 of the International Covenant on Economic, Social and Cultural Rights (the right to health)
- Article 23 of the Universal Declaration of Human Rights
- Art. 7 of the International Covenant on Economic, Social and Cultural Rights (the right to decent work)
- Article 16 of the ILO Convention No. 155 on Occupational Safety and Health Convention (the right to a safe workplace), not ratified by Bangladesh.

III. The BSCI Social Audit Report by TÜV India

The audit report in question of 16, 17 and 18 June 2012 is enclosed as Annex 7.⁴¹ It fails to indicate the shortcomings regarding the above-identified human rights violations such as Child labor, discrimination against women, trade unions' rights and forced overtime and classifies the respective criteria as "good". In addition the report includes false statements on building construction quality and building approval, fails to indicate security risks which, in the opinion of the complainants, were obvious. The auditor does not meet the minimum professional standards for auditors.

⁴¹ The audit report is published in: Gisela Burckhardt, Todschick, p. 123, annex 6.

TÜV Rheinland India inspected the production facilities of the Bangladeshi factory Phantom Apparel in Rana Plaza less than a year before the catastrophe. According to BSCI representatives, Phantom Apparel itself had commissioned TÜV Rheinland to carry out the audit.⁴²

The audit was based on the BSCI as well as the SEDEX standards. BSCI was launched in 2003 as an initiative of the Foreign Trade Association (FTA) in its own words “in response to the increasing business demand for transparent and improved working conditions in the global supply chain.”⁴³ The BSCI Code of Conduct containing standards for labor protection is endorsed by each BSCI participant.⁴⁴

SEDEX (Supplier Ethical Data Exchange) is a non-profit membership organization claiming to be “dedicated to driving improvements in ethical and responsible business practices in global supply chains.”⁴⁵ The SEDEX Associated Auditing Group (AAG) publishes a “Best Practices Guidance” manual for the performance of social audits, which describes in detail how audits should be prepared, executed and reviewed.⁴⁶ TÜV Rheinland is a member of the SEDEX (AAG).⁴⁷

Both standards cover “workplace health and safety” without mentioning explicitly fire and building safety.

1. Content of the Audit Report

The audit at Phantom Apparel was conducted by a single person and involved three days of onsite and half a day of offsite work. The audit was based on the BSCI Audit Questionnaire, which consists of three parts: A. Master Data; B. BSCI Mandatory Social Requirements; C. Best Practice for Industry (voluntary implementation but auditing is mandatory). Regarding part B, the auditor has to classify the requirements as either “good” (no deviation from requirements) or as “improvements needed” (deviation from requirements).

In the case of Phantom Apparel, the audit of part B concluded with the total result “improvements needed”. This resulted from the overall view of a total of 12 criteria.

⁴² In a meeting at ECCHR on 19 November 2015, two BSCI representatives stated that Phantom Apparel had requested the BSCI audit.

⁴³ BSCI, Achievement Study 10 Years of the BSCI, available at: http://www.ftaintl.org/sites/default/files/bsciachievementstudy_master_final.pdf (last accessed 1 March 2016).

⁴⁴ BSCI, “BSCI Approach”, BSCI Website, available at: <http://www.bsci-intl.org/content/bsci-code-conduct> (last accessed 1 March 2016).

⁴⁵ SEDEX, “About SEDEX”, SEDEX Website, available at: <http://www.sedexglobal.com/about-sedex/> (last accessed 1 March 2016).

⁴⁶ SEDEX, “SEDEX Members Ethical Trade Audit SMETA 2012 Best Practices Guidance,” 2012, available at: http://www.sedexglobal.com/wp-content/uploads/2012/07/SMETA-Best-Practice-Guidance-4-Pillar-4_0-L.pdf (last accessed 1 March 2016).

⁴⁷ SEDEX, “Associate Auditor Groups”, SEDEX Website, available at: <http://www.sedexglobal.com/ethical-audits/aag/> (last accessed 1 March 2016).

a. Aspects Classified as “Good”

In six aspects the report noted no objections:

B.3 Working time

“The normal working hours are 8 hours per day and 6 days per week, i.e 48 hours regular working per week. There is case of reported overtime maximum of two hour. checked last three months salary and Overtime records on random sampling basis. It was also cross verified during workers interview and found consistency between records produced Vs workers statement. The manual In & out-time recorded by the time keeper and cross checked, signed by the employees.”

B. 5 Child labor/Young Employees

“There was no child labour or young labor identified during document review, plant tour and worker interviews” (Section B 5.0 Child labour/ young employees).

On the “Child Labour Record Sheet” it says

“No child labour was found during audit.”

B. 6 Forced labor /Prisoner Labor / Disciplinary Measures

“It was verified through worker interviews that there was no prison labour or forced labour. During plant tour, it was observed that workers were working without pressure. There is no reported cases of Disciplinary measures.”

B.7 Freedom of Association

“There is a workers Participatory committee. Some of workers in the committee are as follows 1. Mr. Sadam Mia - worker – Sewing 2. Mrs. Sumi Begum - worker – Finishing”

B. 8. Discrimination

“During worker interviews, it was found that there was no un-equal, abuse, un-usual disciplinary practices, and there were no preference on the religion, origin, political affiliation or age.”

b. Statements about the Building

In the remarks in the section of part B, the audit report stated that

“The building and machine layout is process based, good construction quality, duly approved” (Item B 9.0 Working Condition).

The audit report also stated that

“the company has obtained legal approvals from competent authority as required by law” (Item B 2.0, Documentation).

The audit of part C resulted in the assessment that the factory was not yet ready for a SA8000 certification.⁴⁸ The auditor specifically added in the remarks section that *“They have a long way to go for SA-8000 requirements.”*

The audit report contains a mandatory Corrective Action Plan. Between September and December 2012, the auditor approved the implementation of the Corrective Action Plan.

2. Failures of TÜV India’s Audit Report

As the social audit at Phantom Apparel was conducted by TÜV Rheinland under the auspices of BSCI, the standards established by BSCI and TÜV Rheinland are to be considered the minimum relevant regulatory standards.⁴⁹ The complainants would favor significantly higher standards for credible and effective audits as well as a fundamental change to the auditing approach. The standards described here are only identified for the purpose of assessing whether the auditors at least adhered to these minimum standards. Those are:

- the BSCI Standard including the BSCI Code of Conduct,⁵⁰ the BSCI Management Manual,⁵¹ the FTA Framework Contract;⁵²
- the SEDEX Standard including the SEDEX AAG “Best Practices Guidance” manual for the performance of social audits, which describes in detail how audits should be prepared, executed and reviewed;⁵³

⁴⁸ The “SA8000 Standard” is one of the widely recognized professional standards. It is based on the UN Declaration of Human Rights, conventions of the International Labour Organization, United Nations and national laws; it also spans industry and corporate codes to create a common language to measure social performance.

⁴⁹ TÜV Rheinland has confirmed that the audit of Phantom Apparel was based on both the BSCI and the SEDEX standards, compare annex 3.

⁵⁰ BSCI Code of Conduct (see supra note 44).

⁵¹ BSCI, “Management Manual,” January 2009, available at http://www.google.de/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CCYQFjAA&url=http%3A%2F%2Fwww.boco-scm.com%2Fde-DE%2Fdownload%2Ffile%2Ffid%2F9439&ei=bp9sVIPPBYKHO_vagXA&usg=AFQjCNGe9aqtLatb1j6j3wpsLU1xW0rRg&bvm=bv.80120444,d.ZWU (last accessed 1 March 2016).

⁵² The Framework Contract between the Foreign Trade Association (FTA) and CISE (Centro per l’innovazione e lo Sviluppo Economico), signed 14 June 2013, available at: http://www.fc.camcom.it/download/CISE_Relazione_Allegato_2.pdf?chk=1j7z4d93pn&DWN=11806 (last accessed 2 March 2016). This contract was signed after the Rana Plaza collapse. For the purposes of this complaint, it is assumed that the contents of the earlier Framework Contracts were similar. The BSCI rules that only auditing companies that have signed the Framework Contract with FTA are entitled to conduct BSCI Audits.

⁵³ SEDEX, “SEDEX Members Ethical Trade Audit SMETA 2012 Best Practices Guidance,” 2012, available at http://www.sedexglobal.com/wp-content/uploads/2012/07/SMETA-Best-Practice-Guidance-4-Pillar-4_0-L.pdf (last accessed 1 March 2016).

BSCI specifically requires from auditors “competence and experience concerning the country in question.”⁵⁴ This also means that auditors have to be well-prepared, know the relevant laws and understand the local context.⁵⁵ BSCI focuses on so-called “risk-countries.”⁵⁶ It is therefore inherent in social audits that they take place in a context where the government does not always fulfill its regulating role. According to the UN Global Compact, when government regulation is weak, businesses have an enhanced duty to respect human rights, as the risks of infringing human rights may be greater because of the context.⁵⁷ It is expected of social auditors to be aware of this context of weak governmental regulation while assessing compliance with local and national legislation. Social auditors are not meant as replacements for inspections done by governments. Auditors are, however, required to verify whether governments are actually doing the necessary inspections in addition to their own inspection.

Both frameworks call also for a professional skepticism with auditors: The BSCI Framework Contract calls upon auditors to use their “best effort” to ensure that their data are “accurate”.⁵⁸ Similarly, the SMEDEX Best Practices Guidance emphasizes the necessity of “verifiable” evidence as the basis for judgment and the importance of determining the “authenticity” of information.⁵⁹

In this context, the complainers want to refer the expert opinion of a professional social auditor working in the Bangladeshi textile industry, enclosed here as annex 8. According to him, auditors often have very little training and are not trained adequately to professionally audit factories.

The audit report contains the following shortcomings with respect to the above mentioned standards:

⁵⁴ FTA Framework Contract, Section 2 §3 (see supra note 52).

⁵⁵ E.g. “Prior to conducting an audit, auditors should: Understand the local context in practice, site / sector / regional issues. Be aware of, and up to date with, appropriate local and national laws”, Sedex Best Practices Guidance, Appendix 1, under 2. Freedom of Association (see supra note 53).

⁵⁶ BSCI Risk Countries list as of 1 January 2011. A newer document is available since January 2014. The new classification is based on governance factors of the World Bank. Here, the document is used that was applicable at the time of the 2012 audit at Phantom Apparel. The old classification based on the Human Development Index of the United Nations and the Corruption Perceptions Index of Transparency International in addition to the field experience of sourcing companies.

⁵⁷ UN Global Compact Principle 1, see commentary on “determining the scope of responsibility”: “Pay particular attention to the context in countries where laws are widely known to fall short of international standards and where enforcement may be inadequate,” available at: <https://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/principle1.html> (last accessed 10 April 2016).

⁵⁸ FTA Framework Contract (see supra note 52).

⁵⁹ SEDEX, “Best Practices Guidance”, Appendix 1, under 4. Child Labour and Young Workers, section 4.9, p. 57, (see supra note 53).

a. Child Labor not Identified

The audit report failed to identify child labor at the factory.⁶⁰ It states on two occasions that child labor was not identified during the audit which stands in clear contrast to numerous reports and witness statements, see above, paragraph II 1).

In order to determine whether children worked in the factory, the auditor checked the staff documents, made a factory tour and conducted interviews with workers. These measures were not sufficient and the auditor should have known this particularly against the background of the well known problems of Bangladesh's textile industry.

When examining whether child labor took place, the auditor should have taken into account industry- and country-specific risks. He also should have applied a professional degree of skepticism and should have carried out in-depth verification of information and should have gone beyond a simple checklist survey to detect the alleged existence of child labor. He furthermore should have shown awareness of the vulnerable position of the employees.

The industry- and country-specific risks include the notoriety of child labor in Bangladesh with 7.4 million children between 5 and 17 years working in the country.⁶¹ Child labor is common in the garment industry, now and at the time of the collapse, with cases of children working more than 11 hours per day and child workers being overburdened with work and hardly having any time for recreation.⁶²

It is a well-known practice that factory owners know in advance about visits and children are given leave or are hidden in the factory. This was the case also at Rana Plaza. This was confirmed by former workers in three of the five factories housed in the building.⁶³ Children were either sent home before audit tours or, if they didn't look too much like children, were not identified as children by the auditors.⁶⁴

To verify the working hours of child workers, the auditor should have checked the salary sheets and the production output registry but especially he should have visited the factory without prior notice and should have interviewed workers and trade unionists outside the factory site. Furthermore, he should have conducted the plant tour with more scrutiny in order to identify child workers. Instead, the auditor failed to go beyond the checklist approach and thus failed to adhere to the minimum standard of care for auditors.

⁶⁰ BSCI defines child labor as work of children under the age of 15, as long as there is no local law stipulating a higher age which is not the case for Bangladesh.

⁶¹ UNICEF, "Fact sheet, Child Labour in Bangladesh", updated June 2010, available at: http://www.unicef.org/bangladesh/Child_labour.pdf (last accessed 10 April 2016).

⁶² ICF International, "Child Labor in the Informal Garment Production in Bangladesh", August 2012, p.13, available at: <https://www.dol.gov/ilab/reports/pdf/2013GarmentBangladesh.pdf> (last accessed 1 March 2016). The Guardian, "Bangladesh garment factories still exploiting child labour for UK products", 6 February 2014, available at: <http://www.theguardian.com/world/2014/feb/06/bangladesh-garment-factories-child-labour-uk> (last accessed 1 March 2016).

⁶³ Human Rights Watch, "Whoever Raises their Head Suffers the Most: Workers' Rights in Bangladesh's Garment Factories" (see supra not 12).

⁶⁴ Interview with a sewing operator of Phantom Apparel of 17 February 2015, series of interviews conducted by the Activist Anthropologist, interview 3, annex 4.

b. Harassment of Trade Unions not Identified

The audit report failed to identify that trade unions were not present at Phantom Apparel.⁶⁵ It merely refers to the existence of Participatory Committees. However, it is well known in the industry that the members of such committees are often appointed by the factory management and not freely elected⁶⁶ and that trade unions in Bangladesh are widely harassed. Before the Rana Plaza collapse, the Bangladeshi ministry of labor had refused to register all but a handful of unions and even after the catastrophe, while attention has been paid to post-Rana Plaza improvements, government responses indicate that less than 10 percent of garment factories in Bangladesh have unions⁶⁷ and workers involved in setting up unions are intimidated and mistreated and even receive death threats.⁶⁸ Against this background of country-and industry-specific risks, the auditor should not have been content with the information on the Participatory Committee. He should have contacted local union representatives in order to find out whether the workers' rights to form unions at Phantom Apparel had been respected in the past.

c. Discrimination against Women

The audit report also failed to identify that women were subjected to discrimination at the factory, see paragraph II 3. According to the audit report, the auditor based his assessment solely on worker interviews. Given the widespread harassment of female workers in the textile industry in Bangladesh, this is not a credible audit result.⁶⁹ Discrimination of women is a daily occurrence in Bangladesh's garment sector, where most garment workers are women, while supervisors and managers are mostly men.⁷⁰ In nearly every factory, women are being insulted and humiliated on account of their sex.⁷¹ Accordingly, the auditor should have undertaken additional measures in order to assess the situation. These could have been to interview local unionists, as there were no unions at Phantom Apparel itself. He also could have conducted offsite interviews to get better information. The auditor however failed to be sensitive to the vulnerability of the workers and thus failed to fulfill the obligations of BSCI auditors.

⁶⁵ The BSCI Code of Conduct principle 1 rules that the enterprise "respects the right of workers to form unions or other kinds of worker's associations and to engage in collective bargaining."

⁶⁶ Gisela Burkhardt, Todschick, p. 123, annex 6.

⁶⁷ Human Rights Watch, "Whoever Raises their Head Suffers the Most: Workers' Rights in Bangladesh's Garment Factories" (see supra note 12).

⁶⁸ Human Rights Watch, Bangladesh: Protect Garment Workers' Rights - Factory Owners Use Beatings, Threats to Kill, to Stop Labor Organizers, 2014, available at: <https://www.hrw.org/news/2014/02/06/bangladesh-protect-garment-workers-rights> (last accessed 19 April 2016).

⁶⁹ Research Initiative for Social Equity, Society, "Recent and Typical Worker Harassment – Collected Cases," *RISE Society Website*, 5 April 2014, available at <http://risebd.com/2014/04/05/recent-and-typical-worker-harassment-collected-cases/> (last accessed 10 April 2016).

⁷⁰ Human Rights Watch, "Whoever Raises their Head Suffers the Most: Workers' Rights in Bangladesh's Garment Factories", p. 24-28 (see supra note 12); Research Initiative for Social Equity Society (RISE), *Recent and Typical Worker Harassment – Collected Cases*, available at: <http://risebd.com/2014/04/05/recent-and-typical-worker-harassment-collected-cases/> (last accessed 23 March 2016).

⁷¹ Gisela Burkhardt, Todschick, p. 123, annex 6.

d. (Forced) Overtime/Forced Labor

The audit report also failed to identify that workers were forced to work overtime at Phantom Apparel; see paragraph II 4.⁷² Again, according to the outlined standards for auditors, the auditor would have had to conduct more careful in-depth investigations as it is well known that forced overtime is common in Bangladesh's garment industry. In many cases, workers are given unattainable production targets and are forced to work late at night or on holidays, and later denied the overtime pay they should have received.⁷³

In particular, the auditor should not have been confident that the workers who are known to be often intimidated by their employers dare to report the true state of affairs. Also he should have known that the employers instruct the workers to make it appear not to be working under pressure, especially when an audit is announced in advance. The only possibility to get reliable information on forced overtime and disciplinary measures would be through cooperation with the local unions. He might also have obtained information about overtime through careful reading of the salary slips.

e. Negligent False Statement on Construction Quality

In expressing that *"the building and machine layout is process based, good construction quality, duly approved"* (Item B 9.0 Working Condition), the auditor made a negligent false statement, going beyond the scope of his competence.

It is evident that negligent false statements are in violation of any auditing standards. Furthermore, the fact that the auditor gave a statement on construction quality without being educated as an engineer is in clear violation of the BSCI Framework Contract requiring sector-specific professional experience and competence.⁷⁴ The requirement to have competent auditors is not met if auditors give statements beyond their scope of competence. The statement in question should not have been included in the report.

f. Failure to Indicate Obvious Flaws in Building Safety

The report failed to challenge flaws in construction and building safety, which were obvious in the view of the complainants such as the extra construction of floors, the reverting to industrial use and the heavy machinery on the top floors.

⁷² The BSCI Code of Conduct rules that the enterprise "does not engage in any form of forced servitude, trafficked or non-voluntary labour" and that it "observes the law regarding hours of work."

⁷³ Human Rights Watch, "Whoever Raises their Head Suffers the Most: Workers' Rights in Bangladesh's Garment Factories", p. 28 (see supra note 12).

⁷⁴ Framework Contract between the Foreign Trade Association (FTA) and CISE (see supra note 52). In addition, the widely accepted industry guide of the GCSP "Reference Tool for Auditing Competence" expressively cautions that "auditors should not assess conditions beyond the substantive areas where they have competence." GCSP, "Reference Tool for Auditing Competence", §1, available at: <http://www.gscpnet.com/working-plan/step-3-auditing-competence.html> (last accessed 1 March 2016).

Although both auditing standards here at issue primarily relate to social and ethical criteria of working conditions and not to the examination of possible structural defects of a building, structural questions also play a role in the standards and could not be completely excluded:

The SEDEX requirements stipulate that the so-called “perimeter survey” should include the “physical construction and layout of the employment site e.g. building structure”.⁷⁵ SEDEX auditors are also called upon to make appropriate checks that machines are operated in a safe manner, which should have drawn attention to the generators and the impact of the generators on the building safety.⁷⁶

The BSCI Framework Contract requires auditors to possess “competence regarding industrial safety.”⁷⁷

Accordingly, the defendants cannot argue that the building security is entirely beyond the scope of the audit.

The crucial point however is that a careful and responsible auditor always has to communicate obvious risks, even if they formally do not fall within the scope of the audit. This arises for example from the SEDEX standard, according to which the inspection tour of the auditor should cover the workstations but also the building construction and its maintenance.⁷⁸ This inclusion would not make sense if the auditor would not be requested to look for obvious risks in this context. This is also admitted by TÜV Rheinland in its reply to the ARD magazine “Monitor”: “Structural engineering controls, controls of the structure of the building, fire protection systems and building and electrical engineering and are not part of audits under the BSCI standard. In case of obvious defects, however, the auditors of course immediately inform factory owners and clients.”⁷⁹

In the view of the complainants, the defects such as the extra construction of floors, the reversal to industrial use and the heavy machinery on the top floors were obvious in this sense: A reasonably careful auditor should, in any case, have realized them. This applies in particular because auditors were urged to always consider industry- and country-specific risks in their assessments: the BSCI Code of Conduct explicitly calls upon factories and auditors to bear “in mind the prevailing knowledge of the industry and of any specific hazards.”⁸⁰ Also

⁷⁵ SEDEX, “Best Practices Guidance”, Section 7.2 (emphasis added by author) (see supra note 53).

⁷⁶ SEDEX, “Best Practices Guidance”, Appendix A1 3.8. (see supra note 53).

⁷⁷ FTA Framework Contract, Section 3, Paragraph 2, emphasis added by author (see supra note 52).

⁷⁸ According to the SEDEX requirements, during the site tour, “[t]he auditor should walk around all areas of the employment site in order to [...] Evaluate Health & Safety” which should include an inspection of the workstations, “building construction, maintenance and certificates” (emphasis added). SEDEX, “Best Practices Guidance”, Section 7.2, emphasis added by author (see supra note 53). The SEDEX clause on health and safety is highly similar to the BSCI formulation: “A safe and hygienic working environment shall be provided, bearing in mind the prevailing knowledge of the industry and of any specific hazards. Adequate steps shall be taken to prevent accidents and injury to health arising out of, associated with, or occurring in the course of work, by minimising, so far as is reasonably practicable, the causes of hazards inherent in the working environment” (emphasis added by author).

⁷⁹ TÜV Rheinland reply to the ARD magazine “Monitor”, annex 3.

⁸⁰ BSCI Code of Conduct (see supra note 44).

according to the SEDEX standard, auditing companies should take into account the specific circumstances of the country in question.⁸¹

The stability of buildings undoubtedly belongs to the specific risks of the Bangladeshi textile industry.⁸² The 2013 Rana Plaza collapse was not the first garment factory accident in Bangladesh: In 2004, the six storey building Shankhari Bazar collapsed.⁸³ In 2005, the Spectrum Sweater factory collapsed, killing 64 workers, after five floors had been added to a four storey building, and after having been repeatedly audited. In 2006, a five storey building with the factory Phoenix Garments collapsed, killing 21 people. In 2010, a five storey building in Begun Bari collapsed, again after additional floors had been added illegally.⁸⁴

Against this background, a professional auditor should have been attentive to these aspects and should have realized and indicated the risks in the report.

g. Insufficient Legal Documentation not Identified

The auditor did not comply with the BSCI standard, because he failed to identify that legal approval for the building was not sufficient. The BSCI standard requests that auditors should verify whether there are regular inspections of buildings and detect possible hazard sources.⁸⁵ Similarly, the SEDEX standard requests that building licenses and construction approval are checked from appropriate authorities.⁸⁶ Similar to the BSCI requirement, the SEDEX standard specifies that during the site tour, auditors are required to check structural safety certificates.⁸⁷

However, the audit report does not indicate that the building permit was provided in violation of relevant building regulations such as the “Detailed Area Plan,” the Bangladesh National Building Code and the Dhaka Metropolitan Building Construction Rules but even states that “*the company has obtained legal approvals from competent authority as required by law*” (Item B 2.0, Documentation).

⁸¹ E.g.: “Prior to conducting an audit, auditors should: Understand the local context in practice, site / sector / regional issues. Be aware of, and up to date with, appropriate local and national laws”, SEDEX Best Practices Guidance, Appendix 1, under 2. Freedom of Association (see supra note 53).

⁸² The reason for this is inferior building materials but also the fact that due to lack of space in the large cities, factories are housed in multi-storey buildings and these even often are extended illegally to additional floors. Heavy power generators often are located in the upper floors and water tanks are installed on the roofs, New York Times, “Battling for a Safer Bangladesh”, 21 April 2014, available at: http://www.nytimes.com/2014/04/22/business/international/battling-for-a-safer-bangladesh.html?_r=1 (last accessed 1 March 2016).

⁸³ D.M. Sabet, A. Tazreen, (see supra note 17); S. A. Shafi, Keynote Paper, Round Table Discussion on Implementation of National Building Code, 30 June 2010, National Press Club, available at http://www.google.de/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&ved=0CDgQFjAB&url=http%3A%2F%2Fwww.blast.org.bd%2Fcontent%2Fkey-note%2Fnational-building-code-29June.pdf&ei=YnbrVP1GxPZS-c6AuA0&usg=AFQjCNH7nkmEGFVS_Ernix3aO4qt3_HbHw&sig2=20vTrjRLsJKnbG9uqHKgkg&bvm=bv.86475890,d.d24&cad=rja (last accessed 1 March 2016).

⁸⁴ D.M. Sabet, A. Tazreen, (see supra note 17).

⁸⁵ BSCI Management Manual, Section 2.2.1, B.1 Management Practice, Risk Analysis (see supra note 51).

⁸⁶ SEDEX, “Best Practices Guidance”, Appendix 1, under 3. Health and Safety, section 3.3. (see supra note 53).

⁸⁷ SEDEX, “Best Practices Guidance”, Health and Safety, section 3.8. (see supra note 53).

The auditor should and could have realized the insufficient documentation, if he had taken into account the sector- and country-specific risks. BSCI operates in “high risk” countries, which signals a lack of regulatory quality and a high risk of corruption.⁸⁸ Government regulation of the construction branch in Bangladesh is notoriously weak due to corruption, a limited availability of inspectors, and lack of resources. This should have been known to the auditor. There is little or no competence needed to detect the deficiencies and they can be identified just through observations. The auditor failed to perform the audit with the necessary skepticism and the need for thorough verification of documentation.

3. Conclusion

TÜV India did not meet the BSCI and SEDEX standards when assessing the working conditions at Phantom Apparel and accordingly has not adhered to the minimum professional standards for auditors.

If TÜV India had made a conscientious examination of all the circumstances and had submitted an audit report which expressly referred to the existing deficiencies, then the factory owner but also the retailers that sourced textiles from the factory would have been alerted at an early stage and would have been able to react earlier with respect to the human rights violations such as child labor, discrimination against women, harassment of trade unions and forced overhours and could have made a more informed decision on the discovery of the cracks in the building. For a more detailed outline of the possible causal link compare paragraph IV 1b).

Thus, through the deficient report, TÜV India has potentially contributed to the violation of the human rights chapter of the OECD Guidelines as will be shown in the following paragraph.

IV. Violations of OECD Guidelines for Multinational Enterprises / TÜV India

As shown in the overview on the responsibility of local actors in annex 9, major responsibility for the Rana Plaza collapse lies with the government of Bangladesh and the factory- and building owners. However, auditing companies that create confidence on the side of the buying companies also bear responsibility under the OECD Guidelines regarding the soundness of their reports.

TÜV India has acted in violation of the OECD Guidelines as it did not assess carefully whether the human rights of workers were guaranteed as foreseen by the BSCI and SEDEX standards. Furthermore, they may have contributed to the deaths and injuries resulting from

⁸⁸ Bangladesh ranks 139 on the Corruption Perceptions Index 2015 of Transparency International, “Corruption Measurement Tools”, *Transparency International Website*, available at: http://www.transparency.org/country#BGD_DataResearch_SurveysIndices (last accessed 7 March 2016).

the Rana Plaza collapse through deficient auditing of the Phantom apparel factory (Chapters IV 2 and II A.11) or at least they were directly linked to these human rights violations (Chapters IV 3 and II A. 12).

1. Failure to Avoid Contributing to Human Rights Violations (Chapter IV 2, II A. 11)

TÜV India might have contributed to human rights violations and thus violated Chapter II Paragraph A. 11 and IV Paragraph 2 of the OECD Guidelines through having generated the deficient audit report, specifically by not properly assessing in their Phantom Apparel audit whether

- children were working at the factory,
- the right of workers to form unions was respected,
- workers were subject to forced overtime, and whether
- women were subject to discrimination.

TÜV India might have violated the OECD Guidelines also

- through giving a false statement regarding the quality of the building structure
- by not indicating obvious flaws concerning building safety which could be determined without engineering expertise in building structure, and
- by not properly assessing the legal approval situation of the building.

According to Chapter II Paragraph A. 11 and IV 2 of the OECD Guidelines, enterprises are requested to avoid causing or contributing to adverse human rights impacts and address such impacts when they occur. As the relevant standard for human rights, Chapter IV indicates the framework of internationally recognized human rights, the international human rights obligations of the countries in which they operate as well as relevant domestic laws and regulations. As outlined above, numerous human rights violations have occurred at the Phantom apparel factory before and through the building collapse.

a. Contribution to the Adverse Impact / Causal Link

It is possible that TÜV India contributed with the deficient audit report to the human rights violations such as child labor, discrimination against women, harassment of trade union, forced overtime but also to the loss of life by the factory collapse. A company contributes to adverse impact where its actions or omissions cause, facilitate or incentivize another entity to cause an adverse impact.⁸⁹

The complainants have indications that the deficient audit report might have facilitated the factory and building owners' decision not to evacuate the building in time. A strong audit report with a conscientious examination of all the circumstances in June 2012 and expressly referring to the existing deficiencies should have made it very difficult for the owners not to

⁸⁹ OECD Guidelines, Chapter II, Commentary 14.

take measures regarding structural issues in advance, e.g. remove heavy power generators from the upper floors and not to evacuate the building when the cracks emerged. However, the complainants cannot determine definitively whether the factory and building owners in fact would have undertaken these measures.

The following measures could and should have been undertaken with a strong audit report:

On the one hand, with a strong audit report, the owners should have been alerted at an early stage and should have made a more informed decision about the reaction to the discovery of the cracks in the building.

Secondly, the buyer companies should have been alerted through to the report. They could thus have conducted further investigation into the building and requested their suppliers to take appropriate action e.g. regarding power generators. They also could have communicated that, in the case of obvious building defects, their orders will be immediately suspended with the consequence that the factory owner would have had to send the workers home. This has been done in the case of the closure of the BRAC branch. This could have prevented the workers from being driven back into the factories.

In fact, many retailers rely on the content of BSCI reports. The BSCI feeds them into a database that retailers have access to. The BSCI even encourages its members to rely upon these reports for their supplier decisions.⁹⁰ That BSCI participants rely on the data provided in the database was confirmed by the German retailer ADLER, which is not involved in the present case, in the following statement in which they explain their decision to accept products from a factory in Rana Plaza: “Metro and ADLER only accepted the ready products as an exception, because the factory could present the BSCI certificate.”⁹¹

Retailers could also have caused production to be halted. As buyers, at least through cooperation with other clients of Phantom Apparel, they have a high level of influence on the factories. They can use this position to ensure the safety of workers in case of emergency if they are alerted to a serious safety issue in a timely manner. The OECD Guidelines require that companies act in cooperation with other companies in order to increase their influence.⁹²

Thus, there is a high possibility in that there was a causal link between the deficient audit report and the factory collapse.

The same applies for the causal link with the violation of labor standards such as child labor, discrimination against women, trade union rights and forced overtime. If the violations had been identified and named in the audit report, the factory owner would have been under

⁹⁰ BSCI, “Participants”, BSCI Website, available at <http://www.bsci-intl.org/join-us/entreprise/regular-member> (last accessed 10 April 2015, not accessible anymore).

⁹¹ E-Mail by ADLER to a consumer from April 2014, in: Gisela Burckhardt, Todschick. Edle Labels, billige Mode – unmenschlich produziert, p. 126, annex 6. In contrast to systems like SA 8000, the BSCI audits are not part of a certification scheme. Instead, the BSCI approach is so-called “development-oriented.” In its email, ADLER mistakenly assumes that BSCI audits lead to a certificate.

⁹² OECD Guidelines, Chapter II Paragraph 23.

pressure to change the situation, either directly through the report or the corrective measures or through the brands exerting pressure on the factory owner.

b. Effective Countermeasures and Leverage

If a company has contributed to an adverse impact, it should take the necessary steps to cease or prevent its contribution and use its leverage to mitigate any remaining impact to the greatest extent possible.⁹³ TÜV India has failed to do so.

aa. Leverage

The defendants would have had the opportunity to exercise influence over various actors in the industry in order to avoid the labor rights violations as well as the deaths and injuries caused by the factory collapse and similar accidents in the future.

Leverage is considered to exist where the enterprise has the ability to effect change in the wrongful practices of the entity that causes the harm.⁹⁴ The leverage of the company arises from its sheer size and from the global operational influence of the TÜV Rheinland group. The company also has a worldwide reputation that is close to unrivalled. The name “TÜV” has for decades stood for safety and reliability and the TÜV-certified logo is a well-liked and much used label. TÜV also has leverage with buyers and brands in Germany and elsewhere. TÜV India could have even increased this leverage through cooperation with other companies and institutions. The OECD Guidelines urge companies to join forces in special cases: Where suppliers have multiple customers and are potentially exposed to conflicting requirements imposed by different buyers, enterprises are encouraged, with due regard to anti-competitive concerns, to participate in industry-wide collaborative efforts with other enterprises with which they share common suppliers to coordinate supply chain policies and risk management strategies, including through information-sharing.⁹⁵

bb. Countermeasures

Specifically, TÜV India has had the opportunity to call for concrete measures on the part of the factory owner, thus improving the working conditions and safety at work. As the commissioned audit company which aims to increase safety in factories, they had the power and obligation to list and particularly highlight the shortcomings and the appropriate steps in the Corrective Action Plan and arrange re-audits to request improvements from the factory.

Together with BSCI and SEDEX, both audit-sharing platforms, and the retailers that were buying from Rana Plaza factories, the defendants could have pressured the building and factory owners to improve working conditions such as child labor, discrimination of women, harassment of trade unions and forced overtime and eliminate the obvious structural deficiencies and to have the building safety checked by a competent authority. The factory

⁹³ OECD Guidelines, Commentary on Chapter IV, Paragraph 42.

⁹⁴ OECD Guidelines, Commentary on Chapter II, Paragraph 19.

⁹⁵ OECD Guidelines, Commentary on Chapter II, Paragraph 23.

owners rely on good cooperation with BSCI and thus could not have ignored their requests. If TÜV India had confronted BSCI and the retailers with the evident risks, they would have been obliged to put pressure on the factory owners. Although some of the retailers involved may have only placed small orders, the factory owner was dependent on the entire group of clients.

With regard to building safety, TÜV Rheinland would also have had the opportunity to call on the BSCI to change its approach with regard to audits in the sense that key issues such as building security are included in the scope of the audit, that certification companies have to be liable for their reports and that workers and trade unions are involved on a regular basis in the preparation of reports. Here, too, TÜV Rheinland, which in itself is already an extremely large, prestigious and thus important company within BSCI, could have joined forces with other certification companies.

Accordingly, the defendants have not undertaken the appropriate measures to cease/prevent their contribution to adverse impacts.

To the knowledge of the complainants, the defendants have not undertaken any measures to mitigate the ongoing effects as far as possible after the factory collapse e.g. they have failed to participate in the Rana Plaza Alliance compensation fund or to help the victims and relatives of the disaster in other ways.

In sum, TÜV India might have contributed to the human rights violations such as child labor, discrimination against women, trade union rights and forced overtime. and to the loss of lives in the context of the Rana Plaza collapse without having taken the appropriate countermeasures. Through this, it failed to respect Chapter IV Paragraph 2, Commentary 42 of the OECD Guidelines.

2. Failure to Secure the Elimination of Child Labor (Chapter V 1 c, II A. 11)

TÜV India acted in violation of Chapter V 1 c) of the OECD Guidelines as they did not assess carefully whether children were working at the factory and through this contributed to the failure to secure the elimination of child labor by the Phantom Apparel owner. Chapter V 1 c) requests companies to “contribute to the effective abolition of child labour, and take immediate and effective measures to secure the prohibition and elimination of the worst forms of child labour as a matter of urgency.”

As outlined above, the obligations under Chapter V are not limited to actual employment relationships. All enterprises are expected to act in accordance with the risk-based due diligence and supply chain recommendations in Paragraph A.10 to A.13 of Chapter II.

a. Worst Forms of Child Labor

The risk of the existence of worst forms of child labor were present at Phantom Apparel with the consequence that TÜV India should have taken appropriate measures to address these impacts according to Chapter II Paragraph A. 11 of the OECD Guidelines.

Relevant Age

The audit report was conducted on the basis of the BSCI Code of Conduct. The BSCI defines child labor as work of children under the age of 15, as long as there is no local law stipulating a higher age. There is no such local law for Bangladesh.⁹⁶ While reports confirm that 39 children (between 13 and 17) were among the victims of the Rana Plaza collapse and while former workers confirm that children were also among the employees at Phantom Apparel, the audit report states on two occasions that child labor was not identified during the audit. Accordingly, auditors either have given false information or have not checked thoroughly enough whether children were working in the factory.

Worst Forms of Child Labor

Child work in the textile industry can be considered as worst forms of child labor in the sense of ILO Convention 182 on the prohibition and the elimination of the worst forms of child labour. Article 3 paragraph d) of the convention defines the worst forms of child labor as work which is likely to harm the health, safety or morals of children.

This is the case for example if children have to sit bent over in one position especially when done for long periods of time, for example when sewing footballs or clothes. Children are also exposed to hazardous work when the workplace is unsanitary, poorly lit and poorly ventilated. This is also true when clean drinking water, health services and schools are unavailable, especially in the more remote areas. In these conditions, children are more at risk of catching illnesses and disease.⁹⁷

A lot of these risks were present at Phantom Apparel factory. The work in the factory included long hours sitting and bending over sewing machines. It was probable that children's workplaces were not sufficiently ventilated as a high number of sewing machines in a room will go hand in hand with dust from textiles.

Accordingly, the risk of the existence of worst forms of child labor as named in Chapter V 1 c) of the OECD Guidelines was evident, especially against the background of the notoriety of child labor in Bangladesh.

⁹⁶ BSCI Management Manual, p. 36 (see supra note 51).

⁹⁷ ILO, Convention No. 182, available at: <http://www.ilo.org/ipec/Campaignandadvocacy/Youthinaction/C182-Youth-orientated/worstforms/lang--en/index.htm> (last accessed 1 March 2016).

b. Contribution to Adverse Impact regarding Child Labor

Through this, TÜV India might have contributed to persisting existence of child labor at Phantom Apparel, see above, paragraph V 1 c).

c. Effective Countermeasures

Effective measures to secure the elimination of the worst forms of child labor – as required by the OECD Guidelines – would in the situation of TÜB India have as an initial step required a proper assessment whether children were working under these conditions for Phantom Apparel.

For this, the auditor should have met the above outlined BSCI and SEDEX standards and taken into account industry- and country-specific risks. He also should have applied a professional degree of skepticism and carry out in-depth verification of information and should have gone beyond a simple checklist survey to detect the existence of child labor. He furthermore should have shown awareness of the vulnerable position of the employees.

The industry- and country-specific risks include the notoriety of child labor in Bangladesh, with 7.4 million children between 5 and 17 working in the country,⁹⁸ but also the well-known practice that factory owners know in advance about visits and children are given leave or are hidden in the factory. In fact, children were sent home for audits at Rana Plaza and Phantom Apparel. This was confirmed by former workers in three of the five factories housed in the building⁹⁹ among them also employers of Phantom Apparel.¹⁰⁰

To verify the working hours of child workers, the auditors should have checked the salary sheets and the production output registry. They furthermore should have visited the factory without prior notice and should have interviewed workers and trade unionists outside the factory site. Instead, the auditor apparently failed to go beyond the checklist approach.

In light of the above, TÜV India has violated Chapters V 1 c), II A. 11 of the OECD Guidelines.

3. Alternatively: Direct Link to Human Rights Violations (Chapter IV 3, II A. 12)

If the NCP is of the opinion that TÜV India did not contribute to the human rights violations at the Rana Plaza building as well as to the failure to secure the elimination of child labor, then they were in any case directly linked to it in the sense of Chapter II A.12 and Chapter IV Paragraph 3 of the OECD Guidelines.

⁹⁸ UNICEF, “Fact sheet, Child Labour in Bangladesh”, updated June 2010, available at: http://www.unicef.org/bangladesh/Child_labour.pdf (last accessed 10 April 2016).

⁹⁹ Human Rights Watch, “Whoever Raises their Head Suffers the Most: Workers’ Rights in Bangladesh’s Garment Factories”, (see supra note 12).

¹⁰⁰ ECCHR Interview with a child sewing operator at Phantom Apparel Ltd., 22. January 2016, annex 5.

According to these provisions, companies must seek to prevent or mitigate an adverse impact where they have not contributed to that impact, when the impact is nevertheless directly linked to their operations, products or services by a business relationship.

a. Direct Link between TÜV India and the Adverse Impact

The term “directly linked through a business relationship” does not require any form of causality. The resulting responsibilities, furthermore, are independent of the amount of leverage of a company. The amount of leverage does not affect this responsibility itself, but it does influence the nature and extent of the due diligence. The term also is not limited to first tier business relationships.¹⁰¹

b. Appropriate Actions

The OECD Guidelines foresee that enterprises whose operations, products or services are linked by a business relationship to an adverse impact should “seek to prevent or mitigate an adverse impact.”¹⁰² Among the factors that will enter into the determination of the appropriate action in such situations are the enterprise’s leverage over the entity concerned, how crucial the relationship is to the enterprise, the severity of the impact, and whether terminating the relationship with the entity itself would have adverse human rights impacts.¹⁰³

If the business enterprise has leverage to mitigate the adverse impact, it should exercise it. The stronger the leverage is, the more essential it is to use it efficiently. As outlined above, the defendants have an influential position towards the various relevant actors. Nevertheless, they have not taken any measures to fulfill their responsibilities.

TÜV India accordingly was directly linked to the failure to ensure occupational health and safety by the factory owner without having taken the appropriate countermeasures. It has thus failed to respect the provisions of Chapter IV, Paragraph 3 of the OECD Guidelines.

V. Violations of OECD Guidelines by TÜV Rheinland

Alongside TÜV India, the parent company TÜV Rheinland has itself violated the OECD Guidelines. It failed to conduct human rights due diligence (paragraph 1) and failed to ensure that its subsidiary TÜV India meets the relevant standards when conducting audits (paragraph 2).

¹⁰¹ Working Party on Responsible Business Conduct Note of the Chair of the Negotiations on the Revision of the Guidelines in 2011, Regarding the Terminology on "Directly Linked" 20 March 2014, annex 10.

¹⁰² OECD Guidelines, Chapters II A. 12 and IV 3.

¹⁰³ OECD Guidelines, Commentary on Chapter IV, Paragraph 43.

1. Failure to Conduct Due Diligence (Chapter II A. 10 and Chapter IV 5)

The complainants consider that the defendant failed to conduct ongoing due diligence with regard to the violation of workers' rights and thus violated Chapter II Paragraph A. 10 and Chapter IV, Paragraph 5.

Under Chapter II, Paragraph A. 10 of the OECD Guidelines, enterprises should carry out risk-based due diligence, to identify, prevent and mitigate actual and potential adverse impacts and account for how these impacts are addressed.

Given the serious risks to a large number of people, TÜV Rheinland should have carried out comprehensive due diligence. The nature and extent of due diligence appropriate to a particular situation, such as the specific steps to be taken, will be affected by factors such as the size of the enterprise, context of its operations, the specific recommendations in the OECD Guidelines, and the severity of its adverse impacts.¹⁰⁴

The severity of a potential adverse human rights impact is the most important factor in determining the scale and complexity of the processes the enterprise needs to have in place in order to know and show that it is respecting human rights. The severity of impacts will be judged by their scale, scope and irremediable character. This means that the gravity of the impact (its scale) and the number of individuals that are or will be affected (its scope) will both be relevant.¹⁰⁵

In the present case, the potential adverse impacts included massive labor rights violations as well as all sorts of factory accidents and the risk of a building collapse meaning impacts of particular severity, as they affect thousands of people's lives and physical integrity. In cases of death and where victims suffer permanent damage, impacts are also irremediable. The risks of serious labor violations and of building collapses was also well known and well documented, see above.

Accordingly, TÜV Rheinland should have taken concrete precautionary measures to avoid such catastrophes. The company should have explicitly asked its auditors to include obvious building safety deficiencies in their reports and to notify the competent authorities and to have in each of their reports indicated that a special audit of the building security is required by a qualified structural engineer. For further measures see above, paragraph IV 1 b).

TÜV Rheinland has failed to identify, prevent and mitigate actual and potential adverse impacts.

¹⁰⁴ OECD Guidelines, Commentary on Chapter II, Paragraph 15, Chapter IV, Paragraph 5.

¹⁰⁵ Office of UN High Commissioner for *Human Rights*, The Corporate Responsibility to Respect Human Rights, An Interpretive Guide, 2012, available at: http://www.ohchr.org/Documents/Publications/HR.PUB.12.2_En.pdf (last accessed 17 March 2016).

2. Failure to Avoid Contributing to Adverse Impacts (Chapter IV 2 and II A. 11)

As outlined above, TÜV India has violated Chapters II, Paragraph A. 11 and IV, Paragraph 2 of the OECD Guidelines through their deficient audit report. TÜV Rheinland itself has contributed to these violations as it failed to take appropriate measures to ensure that their subsidiary meets the relevant standards when conducting audits.

The complainants believe that the parent company TÜV Rheinland had a high degree of influence and control over its subsidiary TÜV India and in particular had the opportunity to ensure that the subsidiaries abroad meet their responsibility by carrying out audits carefully and in accordance with the relevant standards. The parent company had the power to directly influence standards of practice at TÜV India.

Accordingly, the parent company shares responsibility when audits do not meet these standards and therefore could be responsible under the OECD Guidelines. The influence of the parent company TÜV Rheinland resulted first from the close personal ties with TÜV India and secondly from the system of global corporate management controlled by TÜV Rheinland; see annex 11, paragraph 2.

The provisions of the OECD Guidelines can be violated through omissions. The commentary on Chapter IV of the OECD Guidelines, Paragraph 42 outlines: “Activities’ can include both actions and omissions.”

The OECD Guidelines foresee in Chapter I Principle 4 that the different entities of a corporate group are expected to co-operate and to assist one another to facilitate observance of the OECD Guidelines. They also call on the board of the respective parent entity to ensure the strategic guidance of the enterprise, the effective monitoring of management and to take into account the interests of stakeholders. In undertaking these responsibilities, the board needs to ensure appropriate control systems, in particular, risk management, operational control, and compliance with the law and relevant standards.¹⁰⁶

To fulfill these standards of monitoring and control, TÜV Rheinland should have had knowledge about the (negligent) way that reports are conducted. Consequently, it would have been able to undertake the following measures:

- With respect to child labor, discrimination against women, forced overtime and trade union rights, TÜV Rheinland should have ensured that its auditors conduct unannounced factory visits, conduct a comprehensive review of company documentation and have offsite interviews with workers and trade unionists.
- With a functioning internal review system, TÜV Rheinland should have been informed about the false statement in the audit. It must have been obvious for every person reviewing the report that a social auditor cannot give a statement on

¹⁰⁶ OECD Guidelines Chapter II, 6 and Commentary 8.

construction quality. Consequently, TÜV Rheinland should have counterchecked the report and should have urged the auditor to correct the report and should have checked whether the respective auditor has the necessary competence to conduct audits.

- With respect to the non-identification of the obvious risks, TÜV Rheinland should have trained its auditors on country and industry specific risks and should have made sure that auditors generally include obvious risks in their report, e.g. through an extra section in the audit report form.

As outlined in annex 11, TÜV Rheinland did have the possibility to engage with TÜV India regarding the appropriate conduct of social audits in the textile industry.

Accordingly, TÜV has violated the above indicated provisions of the OECD Guidelines through omission.

VI. The Complainant's Expectations

If the indications of TÜV's violations of the OECD Guidelines are confirmed, the complainants have the following expectations:

1. Expectations toward the Company

- **TÜV Rheinland provides damages**

The complainants suggest that TÜV Rheinland provides the amount of 250,000 Euro for psychological treatment of victims of the Rana Plaza collapse. After the disaster, the Rana Plaza Arrangement was set up, which included a trust fund collecting contributions primarily from the 29 global brands that had recent or current orders with at least one of the five garment factories in the Rana Plaza building. After more than two years the target of 30 million US Dollars was reached. To the knowledge of the complainants, TÜV Rheinland has not contributed to the fund. In 2015, the last contributions were disbursed to those affected. However, certain additional costs could not be covered. This includes expenditures for psychological treatment of trauma caused by the disaster. There is currently a great need for such therapies.

- **TÜV Rheinland engages within BSCI, the government of Bangladesh and the Bangladesh Garment Manufacturers and Exporters Association (BGMEA) to strengthen national legislation on auditing liability in Bangladesh.**

- **TÜV Rheinland Changes the Structure of its Factory Controls**

The defendants are required to conduct a careful and comprehensive examination of the audited factories which goes beyond going through a standardized check list. The following issues have to be implemented:

- fire and structural checks by competent engineers as far as this is not covered by the Accord on Fire and Building Safety in Bangladesh;
- interviews with workers need to be done off-site and for a longer duration;
- the interviewed workers need to be selected by a trade union, not by the factory owner; if there is no factory union, a local union needs to be asked to select the workers;
- women-specific issues must be assessed by female auditors.

The following steps should be assessed / included in every audit:

- conversations with trade unions;
- participation of neutral persons such as academics;
- sensitizing of factory owners;

The following questions should be included in the checklist:

- number of grievances reported by workers;
- situation of social security of workers;
- existence of women-led trade unions;
-

Furthermore, the defendants should implement an effective system of quality management including internal sanctions for assessments that are negligently conducted.

- **TÜV Rheinland engages towards an industry-wide structural change of factory controls**

TÜV Rheinland engages within BSCI and towards other companies in the industry for the implementation of the following points:

- implementation of the measures listed above;
- standardized contractual arrangements that in the case of factory accidents, where risks are not noted in audit reports, workers are entitled to claim damages against the certification company;
- make reports (in the national language) publically available and transparent;
- conduct trainings to improve women's situation;
- change payment structure/avoid corrupting incentives;
- include subcontracting factories in the scope of the control;

- **Miscellaneous**

- TÜV Rheinland gives access to the contract with the BSCI member upon which the Social Audit at Phantom Apparel was based.

2. Expectations toward the National Contact Point

The complainants respectfully request the NCP to review this case according to procedural regulations laid out in the OECD Guidelines and to take the appropriate steps.

Furthermore,

- the NCP is requested to invite TÜV Rheinland for mediation, and
- the NCP is requested to provide a fair, transparent and foreseeable procedure and facilitate mediation in an atmosphere which enables confidential and open dialogue in order to agree on a joint statement.

In case mediation fails,

- the NCP is requested to indicate, whether the company has breached the OECD Guidelines and give recommendations to improve implementation,
- the NCP is requested to do follow-up monitoring concerning the compliance with the given recommendations at appropriate time intervals,
- the NCP is requested to inform other government agencies in Germany and Bangladesh of its statement if potentially relevant to a specific agency's program.

VII. Annexes

- The Complainants from the Rana Plaza Survivors' Group, **Annex 1**
- BSCI Complaint, "Complaint regarding Social Audit Report BSCI 7-01/09 of Phantom Apparel Ltd.", **Annex 2**
- TÜV Rheinland, TÜV Rheinland antwortet ARD-Magazin Monitor, 05.06.2013, **Annex 3**
- Series of interviews conducted by the Activist Anthropologist, **Annex 4**
- ECCHR Interview with a child sewing operator at Phantom Apparel Ltd., 22 January 2016, **Annex 5**
- Gisela Burckhardt, Todschick. Edle Labels, billige Mode – unmenschlich produziert, 2014, **Annex 6.**
- BSCI Phantom Apparel Ltd Social Audit Report, number BL-18/12, **Annex 7**
- Expert Opinion Mr. Abul Quasem, Social Auditor, **Annex 8**
- The role of local actors, **Annex 9**
- Working Party on Responsible Business Conduct Note Of The Chair Of The Negotiations On The Revision Of The Guidelines In 2011, Regarding The Terminology On "Directly Linked" 20 March 2014, **Annex 10**
- Overview: TÜV Rheinland /Corporate Structure, **Annex 11**
- Ministry of Corporate Affairs (MCA), Government of India, *MCA website*, screenshot, **Annex 12**