IN THE MATTER OF ARBITRATIONS COMMENCED PURSUANT TO THE ACCORD ON FIRE AND BUILDING SAFETY IN BANGLADESH AND THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW ARBITRATION RULES 2010

PCA CASE NO. 2016-36

between:

INDUSTRIALL GLOBAL UNION AND UNI GLOBAL UNION
(the "Claimants")

- and -

[redacted]

AND

PCA CASE NO. 2016-37

between:

INDUSTRIALL GLOBAL UNION AND UNI GLOBAL UNION

- and -

[redacted]

PROCEDURAL ORDER NO. 2

(DECISION ON ADMISSIBILITY OBJECTION AND DIRECTIONS ON CONFIDENTIALITY AND TRANSPARENCY)

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4 September 2017

The Tribunal

Mr Donald Francis Donovan (President)
Mr Graham Dunning QC
Professor Hans Petter Graver

Registry

Permanent Court of Arbitration
Tribunal Secretary: Ms Judith Levine

Pursuant to Paragraph 2.5 of Procedural Order No. 1 of 19 April 2017, the Tribunal issues the following Procedural Order No. 2.

I. INTRODUCTION

1. This Order deals with preliminary issues arising in arbitrations brought by two global workers' unions against two fashion brands under the Accord on Fire and Building Safety in Bangladesh of 15 May 2013 ("**Accord**").

2. First, the Tribunal considers the Respondents' contention that the disputes are not admissible because mandatory pre-conditions to arbitration under Article 5 of the Accord have not been met (the "**Admissibility Objection**"). As the Parties were informed on 23 May 2017, and for the reasons expressed in Part IV.C below, the Tribunal rejects the Admissibility Objection and holds that the claims may proceed to the merits phase.

3. Second, the Tribunal addresses the Parties' competing views over what information may be publicly disclosed about these proceedings, bearing in mind the express limitations under the UNCITRAL Arbitration Rules 2010, relevant provisions of the Accord itself, and the Tribunal's general discretion as to the conduct of proceedings (the "**Transparency Issue**," together with the Admissibility Objection, the "**Preliminary Issues**"). For the reasons set out in Part V.C below, the Tribunal issues directions that seek to strike an appropriate balance between the interests of the Respondents in protecting their business information and reputations, and the transparency interests of the Claimants in making basic information about these arbitrations available to other stakeholders under the Accord and the wider public.

II. THE ACCORD

4. The Accord is a legally binding agreement among brands and trade unions designed to build a safe and healthy garment industry in Bangladesh. The five-year agreement was created in the immediate aftermath of the April 2013 Rana Plaza building collapse that led to the death of more than 1100 people and injured more than 2000.[1] Signatories to the Accord include over 200 global brands, retailers, and importers across 20 countries in Europe, North America, Asia, and Australia; eight Bangladeshi trade unions; two global trade unions; and four non-governmental organizations that witnessed the signing.

5. As set out in the Accord's preamble, signatories commit to the "goal of a safe and sustainable Bangladeshi Ready-Made Garment ("**RMG**") industry in which no worker needs to fear fires, building collapses, or other accidents that could be prevented with reasonable health and safety measures."[2]

6. The Accord establishes a system for independent safety inspections;[3] disclosure about factories, inspection reports, and corrective actions;[4] and commitment of funds for remediation.[5] It also includes safety training programs and complaints mechanisms for workers.[6] It "covers all

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1 Accord on Fire and Building Safety in Bangladesh, official website: www.bangladeshaccord.org; *See also*, Claimants' Notice of Arbitration, 8 July 2016 ("**Notice of Arbitration against** [redacted]"), para. 3; [redacted] Response to Claimants' Notice of Arbitration [redacted], 6 October 2016, para. 4.

2 Accord on Fire and Building Safety in Bangladesh, 13 May 2013 ("**Accord**"), Preamble, Exh. C-1.

3 Accord, Arts. 8-10.

4 Accord, Arts. 11-15.

5 Accord, Arts. 21-23; *See also*, para. 24.

6 Accord, Arts. 16-18.

suppliers producing products for [a] signatory company" and seeks to protect approximately 2 million Bangladeshi workers.[7]

7. The companies that sign the Accord are obliged to "participate fully in the inspection, remediation, health and safety, and where applicable, training activities as described in the Agreement."[8] Where suppliers fail to do so, then the signatory company is expected to implement a "notice and warning process."[9] The companies are also required to negotiate commercial terms with suppliers that "ensure that it is financially feasible for the factories to maintain safe workplaces and comply with upgrade and remediation requirements instituted by the Safety Inspector."[10]

8. The Accord is governed by a Steering Committee that has "equal representation by the trade union signatories and company signatories (a maximum of 3 seats each) and a representative from and chosen by the International Labour Organization ("**ILO**") as a neutral chair"[11] ("**Steering Committee**" or "**SC**"). It also envisages the appointment of an Advisory Board involving brands, retailers, suppliers, government institutions, trade unions, and NGOs, as well as the development of a programme by the Steering Committee in consultation with a "High-Level Tripartite Committee" established amongst the Ministry of Labour and Employment of Bangladesh, the ILO and a German sustainability company.[12]

9. Article 4 of the Accord sets out the basic function of the Steering Committee:

> The SC shall have responsibility for the selection, contracting, compensation and review of the performance of a Safety Inspector and a Training Coordinator; oversight and approval of the programme budget; oversight of financial reporting and hiring of auditors; and such other management duties as may be required. The SC will strive to reach decision by consensus, but, in the absence of consensus, decisions will be made by majority vote. In order to develop the activity of the SC, a Governance regulation will be developed.

10. Article 5 of the Accord deals with "Dispute Resolution":

> Dispute resolution. Any dispute between the parties to, and arising under, the terms of this Agreement shall first be presented to and decided by the SC, which shall decide the dispute by majority vote of the SC within a maximum of 21 days of a petition being filed by one of the parties. Upon request of either party, the decision of the SC may be appealed to a final and binding arbitration process. Any arbitration award shall be enforceable in a court of law of the domicile of the signatory against whom enforcement is sought and shall be subject to The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (The New York Convention), where applicable. The process for binding arbitration, including, but not limited to, the allocation of costs relating to any arbitration and the process for selection of the Arbitrator, shall be governed by the UNCITRAL Model Law on International Commercial Arbitration 1985 (with amendments as adopted in 2006).

11. Under the heading "transparency and reporting," Article 19 of the Accord provides that the Steering Committee "shall make publicly available and regularly update information on key aspects of the programme," including:

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7 Accord Public Disclosure Report, 1 July 2016, Exh. C-9.
8 Accord, Art. 21.
9 Accord, Art. 21.
10 Accord, Art. 22.
11 Accord, Art. 4.
12 Accord, Art. 7.

a. A single aggregated list of all suppliers in Bangladesh (including sub-contractors) used by the signatory companies, based on data which shall be provided to the SC and regularly updated by each of the signatory companies, and which shall indicate which factories on this list have been designated by that company as Tier 2 factories, however volume data and information linking specific companies to specific factories will be kept confidential.

b. Written Inspection Reports, which shall be developed by the Safety Inspector for all factories inspected under this programme, shall be disclosed to interested parties and the public as set forth in paragraph 11 of this Agreement.

Public statements by the Safety Inspector identifying any factory that is not acting expeditiously to implement remedial recommendations.

c. Quarterly Aggregate reports that summarize both aggregated industry compliance data as well as a detailed review of findings, remedial recommendations, and progress on remediation to date for all factories at which inspections have been completed.

12. Article 20 of the Accord provides that the signatories shall work together with other organizations, such as the ILO and the Bangladeshi Government, to ensure that suppliers that participate fully in the inspection and remediation activities of this Agreement "shall not be penalised as a result of the transparency provisions of this Agreement."

13. Funding for the Accord comes from the signatories, and the Steering Committee may also seek contributions from governments and other donors.[13] In October 2013, the Accord signatories set up the Stichting Bangladesh Accord Foundation, based in Amsterdam and with an office also in Bangladesh, to execute the fire and building safety program.[14]

14. As envisaged in Article 4 of the Accord, on 24 September 2013, the Steering Committee adopted a "governance regulation" which was amended on 10 July 2014 ("**Governance Regulations**").[15] Of potential relevance to this Decision:

> **CHAIR OF SC**
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> . . . The ILO will choose an ILO representative to serve as the neutral and independent Chair of the SC, with no voting power . . . .
>
> The Chair serves in a non-voting advisory capacity and is responsible for convening and chairing meetings of the SC and encouraging joint working between the Signatories . . . .
>
> The Chair shall publish a public report of each meeting of the SC which shall include key decisions and other information deemed appropriate and agreed by the SC . . .
>
> **DISPUTE RESOLUTION**
>
> The SC shall establish and maintain a complaints process to ensure that signatories to the Accord are meeting their commitments under the Accord through addressing alleged violations of their commitments under the Accord.
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> The principles in the complaints process shall include:
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> - Procedural fairness;
> - A Signatory can file a petition to the SC alleging a breach or breaches of the Accord by another Signatory.

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13 Accord, Arts. 24-25.
14 Articles of Association of the Stichting Bangladesh Accord Foundation, 21 October 2013, Exh. C-10.
15 Governance Regulations, adopted 24 September 2013, amended 10 July 2014, Exh. R-1.

- The SC shall consider the petition and issue its decision within a maximum of 21 days after the petition is filed.
- Upon request of either party to the dispute, the decision of the SC may be appealed to a final and binding arbitration process. The dispute may also be submitted to the arbitration process by either party in the event that the SC is unable to issue a decision supported by the majority.
- The process for binding arbitration, including but not limited to the costs relating to any arbitration and the process for selection of the Arbitrator, shall be governed by the UNCITRAL Arbitration Rules (as revised in 2010). The SC shall appoint by unanimous vote a panel of at least three arbitrators from which the parties to the dispute shall select (through a process of elimination) one arbitrator to consider an appeal.
- If the SC, after using best efforts to resolve, has a disagreement regarding interpretation of the Accord, any Member of the SC shall be able to refer the disagreement to an arbitrator.

CONFIDENTIALITY

Information that is not public knowledge such as certain financial data or trade secrets and that is viewed as property of the holder shall be treated as confidential insofar as this is not inconsistent with the Accord.

TRANSPARENCY AND REPORTING

There is a need for transparency and public communication in order to build trust and confidence among the workers and the wide community of those who are affected by the implementation of the commitments as set forth in the Accord.

This need for transparency needs to be balanced with the need of Company Signatories for confidentiality of certain information for legal and business reasons.

The SC shall take into account the above when establishing policies on confidentiality, reporting and public communications which are not otherwise specified in the Accord, the Articles of Association, or the Regulations.

CHOICE OF LAW

These regulations and any dispute arising out of or in connection with such regulations shall be governed and construed in accordance with Dutch law.

15. On 10 April 2014, the Steering Committee agreed on a Dispute Resolution Process ("**Dispute Resolution Process**"):

1) Any signatory may initiate a case using the Dispute Resolution Process by alleging that another signatory party has violated a provision of the Accord. For purposes of clarification, witness signatories may not initiate a case.

2) The Executive Directors ("ED") or Chief Safety Inspector ("CSI") may also bring matters of non-compliance to the attention of the Steering Committee for consideration.

3) If a signatory, the ED or the CSI believe that a provision of the Accord has been violated, any one of them may initiate discussions with the signatory involved in order to solve the matter. If the parties fail to resolve the situation within a period of 30 days, a signatory may file a charge with the Steering Committee and/or the ED or CSI will report back to the Steering Committee that it has been unable to resolve the matter. In the latter case, the Steering Committee itself may decide to file a charge. The Steering Committee's decision to file a charge is without prejudice to its final decision on the merits of the claim, which shall be

issued only after an investigation. At least 15 days before filing the charge, the complaining party shall give written notice to the signatory involved.

4) The charge should contain a clear statement of the facts. It should identify which provision of the Accord has been purportedly violated, and request a remedy. A copy of the charge should be sent to the involved signatory party.

5) The Steering Committee will assign a committee of at least two people, at least one from each caucus, to investigate the claim and issue a recommendation.

6) Within 21 days of the date the charge is filed, the Steering Committee shall issue its decision on the merits of the claim, taking into consideration the recommendation of the investigators.

7) The Steering Committee will communicate its decision to all involved parties.

8) If the Steering Committee finds that the charge has merit, it will convene a process with the parties to the dispute to determine whether the charged party is willing to remedy the violation within 30 days of the Steering Committee's decision.

9) If a party is unsatisfied with the decision of the Steering Committee or if a charged signatory does not remedy the violation in accordance with the Steering Committee's decision within the time allowed, or if the Steering Committee is unable to issue a decision supported by the majority, either party to the dispute, or the Steering Committee, may submit the matter to a final and binding arbitration process. In such an instance, the process for arbitration, including but not limited to the costs relating to any arbitration and the process for selection of the arbitrator, shall be governed by the UNCITRAL Arbitration Rules (as revised in 2010). Such request for arbitration must be filed no later than 60 days from the Steering Committee's decision. In cases where the Steering Committee has found merit in the claim, the Accord shall assume any arbitration costs which may attach to the complaining party under the UNCITRAL Arbitration Rules.

10) If the Steering Committee is unable to reach a decision supported by the majority regarding an interpretation of the Accord, the Steering Committee or either caucus of the SC shall be able to refer the disagreement to an arbitrator so long as the Steering Committee has made its best efforts to resolve the disagreement. In such case, the UNCITRAL Arbitration Rules will also apply.[16]

16. While it is common ground among the Parties to these arbitrations that the Accord legally binds them, the Parties have different views about the nature and validity of the above-referenced Governance Regulations and Dispute Resolution Process, as discussed further below in Section IV.

III. PROCEDURAL BACKGROUND TO THESE ARBITRATIONS

A. The Parties

17. The claimants in these arbitrations are IndustriALL Global Union ("**IndustriALL**") and UNI Global Union ("**UNI**," and collectively with IndustriALL, the "**Unions**" or "**Claimants**"). The Claimants are both non-governmental labor organizations based in Switzerland, and they signed the Accord on 15 May 2013. Both of the Claimants are represented in these arbitration proceedings by Marney Cheek, Clovis Trevino, and Erin Thomas, of Covington & Burling LLP.

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[16] Dispute Resolution Process as agreed by the Steering Committee on 10 April 2014 ("**Dispute Resolution Process**"), Exh. C-2.

18. The respondents in both of these cases are global fashion brands. The respondent in PCA Case No. 2016-36 is [redacted].[17] The respondent in PCA Case No. 2016-37 is [redacted].[18]

B. Claims against [redacted]

19. On [redacted], the Unions submitted to the Steering Committee a charge against [redacted], alleging that [redacted] had (i) failed to require suppliers to remediate facilities within the mandatory deadlines imposed by Corrective Action Plans ("**CAPs**") as required under Article 12 of the Accord; and (ii) failed to negotiate commercial terms to make it financially feasible for their suppliers to cover the costs of remediation, as required under Article 22 of the Accord.[19]

20. During a conference call on [redacted], the Steering Committee discussed the charge and the investigations it had undertaken. The Steering Committee concluded that it was "unable to reach a decision on the merits of the charge filed against [redacted]" and that it would "send a formal letter to all parties informing them of the outcome of the SC decision, noting that in this decision and according to the Dispute Resolution process the Trade Unions have the right to proceed to arbitration."[20] Accordingly, on [redacted], the Accord Secretariat sent a letter to [redacted] on behalf of the Steering Committee to inform [redacted] of "its decision regarding the recent charge." The letter stated:

> Following investigation of the charge by two Steering Committee members and their subsequent report back at a Steering Committee on [redacted], please see below for the statement agreed to by the Steering Committee.
>
> Under the rules of the Accord Dispute Resolution Process either party to the dispute, or the Steering Committee, may submit the matter to a final and binding arbitration process no later than 60 days from the Steering Committee's decision.[21]
>
> . . .
>
> **Accord Steering Committee decision, adopted [redacted]:**
>
> The SC does not agree on the merits of this case. However the SC re-iterates its clear view that the dispute resolution process is valid and binding on all Accord signatories.
>
> Without prejudice to either the labor or brand signatories' position as to whether there has been a violation in this case, the Steering Committee notes that a signatory brand is considered responsible for remediation under Article 12-15 of the Accord for any factory which is on the brand's list of active factories within 30 days of the factory's inspection whatever the quality of the relationship and whether there is an importer or agent

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17 Accord Secretariat Monthly Report Detail, Signatory Membership Status, June 2016, Exh. C-8; Notice of Arbitration against [redacted], para. 4.

18 Accord Monthly Report Detail.

19 Charge with Accord Steering Committee filed by IndustriAll Global Union and UNI Global Union against [redacted], Exh. C (2016-36)-53.

20 Steering Committee Conference Call Minutes, [redacted], Exh. C (2016-36)-54.

21 Letter from Accord Secretariat on behalf of Steering Committee to [redacted], Exh. C (2016- 36)-55.

> involved. In the case filed against [redacted] by the global union signatories, the SC agrees that [redacted] is responsible for all [redacted].
>
> Pursuant to these sections of the Accord, a signatory company has certain obligations, irrespective of tiering under the Accord. This includes communicating to the factory its responsibilities under the Accord:
>
> - To implement the corrective actions according to a schedule that is mandatory and time-bound.
> - To maintain workers' employment relationship and regular income during any period that a factory is closed for renovations for a period of no longer than six months. Failure to do so may trigger a notice and ultimately, termination of business.
> - To respect the right of a worker to refuse unsafe work, without suffering discrimination or loss of pay.

21. The Claimants commenced arbitration against [redacted] on 8 July 2016, pursuant to Article 5 of the Accord and Article 9 of the Dispute Resolution Process.[22] Their Notice of Arbitration includes requests for (i) a declaration stating that [redacted] is in violation of its obligations under the Accord; (ii) an award ordering [redacted] to place remediation costs in escrow; (iii) an award ordering [redacted] to pay hazardous duty pay to workers; (iv) an award granting costs for these proceedings; and (v) interest.[23] The Claimants appointed as arbitrator Professor Hans Petter Graver, a national of Norway.

22. [redacted] filed a Response to the Notice of Arbitration on 6 October 2016, in which it strongly denied the allegations that it had failed to meet its obligations under the Accord.[24] It also stated that "the claims should be rejected as they are not admissible," arguing:

> The provisions of the arbitration agreement set out in Article 5 of the Accord provide for the requirement, as a condition precedent to any claim being brought, for the SC to have made a decision on the issues in dispute. No such resolution has been made here, and the Claimants are not entitled to pursue any arbitration in those circumstances.[25]

23. In its Response, [redacted] also noted that Article 5 of the Accord "suffers from significant deficiencies that potentially render it unworkable as a valid mechanism to arbitrate".[26] Nevertheless, [redacted] recalled that it "firmly supports the objectives of the Accord to improve working conditions for garment workers in Bangladesh,"[27] and stated:

> Without prejudice to the Respondent's position on the enforceability of Article 5 in principle, the Respondent is nonetheless prepared to agree, for the purposes of the current dispute only, that the Claimants' claims be determined by an arbitral tribunal established under the UNCITRAL Arbitration Rules 2010.
>
> However, for the reasons given below, the Respondent maintains that the Claimants' claims have been brought prematurely, prior to the satisfaction of the contractual preconditions set out in Article 5. The claims are therefore inadmissible and should be dismissed.[28]

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22 Notice of Arbitration against [redacted].
23 Notice of Arbitration against [redacted], para. 55.
24 [redacted] Response, paras. 3, 10- 14.
25 Response, para. 10.
26 Response, para. 19.
27 Response, para. 21.
28 Response, para. 21; *See also* para. 59.

24. [redacted] appointed as arbitrator Mr Graham Dunning QC, a national of the United Kingdom.

C. Claims against [redacted]

25. Meanwhile, on [redacted], the Unions brought a charge to the Steering Committee, alleging that [redacted] was in breach of Articles 12 and 22 of the Accord.[29] The Steering Committee discussed the charge and the investigations into the charge at a meeting on [redacted] and again during a conference call on [redacted].[30] According to the minutes of the [redacted] call, the three brand representatives did "not find that the charge has merit" and the three union representatives did "find that the charge has merit." The minutes record that the Steering Committee "was therefore unable to reach a decision on the merits of the charge filed against [redacted]. The Chair noted that unions now have the right to take the charge further if they wish."[31] This outcome was conveyed to [redacted] on [redacted] by letter from the Accord Secretariat:

> On behalf of the Accord Steering Committee we are informing you of its decision regarding the charge brought by UNI Global Union and IndustriALL Global Union . . .
>
> Following investigation of the charge by two Steering Committee members and their subsequent report back at a Steering Committee meeting on [redacted], the Steering Committee was unable to reach a decision supported by the majority on the merits of the charge. Under the rules of the Accord Dispute Resolution Process either party to the dispute, or the Steering Committee, may submit the matter to a final and binding arbitration process no later than 60 days from the Steering Committee's decision. . . .[32]

26. The Claimants then commenced arbitration against [redacted] on 11 October 2016, pursuant to Article 5 of the Accord and Article 9 of the Dispute Resolution Process.[33] The Claimants again appointed Professor Graver, and seek similar relief from [redacted] as they do from [redacted].[34]

27. [redacted] filed a Response to the Notice of Arbitration on 10 November 2016, in which, like [redacted], it strongly denied the allegations that it had failed to meet its obligations under the Accord.[35] [redacted] raised the same admissibility objection as [redacted], and similarly stated that, despite the deficiencies in Article 5 of the Accord, [redacted] was "prepared to agree, for the purposes of the current dispute only, that the Claimants' claims be determined by an arbitral tribunal established under the UNCITRAL Arbitration Rules."[36] [redacted] also appointed Mr Dunning as arbitrator.

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29 Charge with Accord Steering Committee filed by IndustriAll Global Union and UNI Global Union against [redacted], Exh. C (2016-37)-85.

30 Steering Committee Quarterly Face to Face Meeting Minutes, [redacted], Exh. C-(2016-37)-86; Steering Committee Conference Call Minutes ("Conference Call Minutes"), [redacted], Exh. C-(2016-37)-15.

31 Conference Call Minutes, p. 4.

32 Letter from Accord Secretariat on behalf of Steering Committee to [redacted], Exh. C-(2016-37)-87.

33 Notice of Arbitration against [redacted].

34 Notice of Arbitration against [redacted], para. 61.

35 [redacted] Response to Claimants' Notice of Arbitration ("[redacted] **Response**"), 10 November 2016, paras. 3, 10-14.

36 [redacted] Response, para. 20; *See also* para. 61.

D. Constitution of the Tribunal and Coordination of Proceedings

28. The Parties jointly advised the Permanent Court of Arbitration ("**PCA**") on 5 December 2016 that they had agreed that the PCA Secretary-General would serve as appointing authority and the PCA would administer the arbitrations. The Parties conveyed their agreement that "the arbitrations shall be conducted under the UNCITRAL Arbitration Rules (as revised in 2010), and that the proceedings, while remaining formally distinct, will be heard by the same arbitral tribunal." The Parties also agreed on English as the language of the arbitration and The Hague as the seat. They requested the PCA Secretary-General to appoint the Presiding Arbitrator according to an agreed list procedure, which resulted in the selection of Mr Donald Francis Donovan, a national of the United States of America.

29. At a procedural meeting held in London on 23 March 2017, the Tribunal and the Parties signed the Terms of Appointment confirming the procedural framework of the proceedings, including the composition of the Tribunal, formalization of the PCA's role as registry, and the appointment of Ms Judith Levine as Tribunal Secretary. The Parties agreed that the two proceedings would be coordinated and that "the Terms of Appointment and any Award rendered in the respective cases will be formally separate but for reasons of procedural economy, other documents such as correspondence and procedural orders will not be issued separately." The Terms of Appointment each record that "the Parties agree, subject to the Respondent's admissibility objection, that the Tribunal has jurisdiction over this case."[37]

30. During the procedural meeting, the Parties and the Tribunal engaged in an initial discussion of the Preliminary Issues, but concluded that further briefing was required. On 19 April 2017, the Tribunal issued Procedural Order No. 1, which included a schedule for a briefing on the Preliminary Issues. The Order noted: "[t]o the extent applicable law is relevant to the Tribunal's decisions on these issues, the Parties agreed that they will plead the law and provide relevant authorities, but not submit expert opinions."[38]

31. In accordance with Procedural Order No. 1, the Parties filed a first round of written submissions on the Preliminary Issues on 24 April 2017, and a reply round on 15 May 2017.

32. On 23 May 2017, following an in-person Tribunal meeting, the Parties were informed that the Tribunal had found it had sufficient material before it to resolve the Preliminary Issues without the need for further input from the Parties. The Tribunal further informed the Parties that it had unanimously decided that the Claimants' claims are admissible and a reasoned decision would be forthcoming. In the meantime, the Parties were invited to discuss the precise scope of the merits phase to achieve an efficient proceeding on liability and key remedies issues. The Tribunal also advised that it would revert on confidentiality and transparency. Until then, the interim direction under Paragraph 15.3 of Procedural Order No. 1 would remain in effect, namely that "[p]ending an agreement or ruling on confidentiality, the Tribunal confirms its direction of 23 May 2017 that all details of the proceedings, including that they are pending, be kept confidential."

33. The Parties exchanged their respective proposals as to the scope of any "liability-plus" phase on 15 June 2017, which the Tribunal will address in a subsequent procedural order.

34. On 17 June 2017, in accordance with an agreed revised procedural timetable, the Claimants submitted their Statement of Claim, accompanied by evidence and expert reports.

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37 Terms of Appointment, 17 March 2017, para 2.3.
38 Procedural Order No. 1, 19 April 2017, para 2.1.

IV. ADMISSIBILITY OBJECTION

A. Summary of the Respondents' Position

35. The Respondents submit that the Claimants' claims should be dismissed in their entirety, as they are not admissible.[39] According to the Respondents, referral to arbitration under Article 5 of the Accord is subject to the satisfaction of the following three "clear and unambiguous" and "objectively ascertainable" contractual pre-conditions, which form a "commercially prudent escalation process:"

> (a) first, any dispute between the parties must be presented to the Steering Committee;
>
> (b) second, the Steering Committee must decide the dispute by majority vote within a maximum of 21 days; and
>
> (c) third, upon request of either party, the decision of the Steering Committee may be appealed to a final and binding arbitration process.[40]

36. The second and third of these pre-conditions were not met, according to the Respondents, because there was no "majority decision from the Steering Committee which [the Claimants] could seek to appeal."[41] They argue that the Steering Committee "did not reach a decision" as required by the second pre-condition, because there is no document demonstrating a "deliberate and methodological assessment of the merits of the claim," no "detailed analysis of the arguments made or evidence," and thus no "comprehensive record of the claims" presented to the Tribunal.[42] They add that the "requirement for a majority decision from the SC" is directly linked with the right to arbitration under Article 5, making it an "explicit stipulation" that must be fulfilled as a matter of law before proceeding to arbitration.[43]

37. The Respondents argue that the third pre-condition was not met because the current arbitration proceedings "cannot in any way be characterised as an appeal." In their view, Article 5 of the Accord "expresses a clear and unambiguous intention to limit the scope of the tribunal's role to that of an appellate body" and thus "the mere fact that no underlying (and appealable) decision was ever made is not sufficient to empower the tribunal to assume the role of a first-tier decision maker."[44] This interpretation of "appeal," they submit, is consistent with the context and nature of the Accord as a whole.[45] The Steering Committee is "undoubtedly best placed" to make findings into the "technical and factual issues" likely to arise under the terms of the Accord, with arbitration providing an appeal mechanism for mistakes, as "an additional layer of scrutiny if the Steering Committee's decision results in any kind of legal or financial consequences."[46] The Respondents also refer to the context of "consensus" in which the Accord was concluded to support their view that the signatories intended any disputes to be "rare and resolved internally and consensually." Thus, arbitration was "always intended to be an exceptional appellate

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39 *See generally*, [redacted] Response, paras. 32-35; [redacted] Response, paras 31-34; Respondents' Memorial on Preliminary Issues, 24 April 2017 ("Respondents' Memorial"), paras. 60-61, 65; Respondents' Reply to Claimants' Submission on Preliminary Issues ("Respondents' Reply"), 15 May 2017, para. 43.

40 Respondents' Memorial, paras. 10, 65.

41 Respondents' Memorial, para. 3; Respondents' Reply, para. 4.

42 Respondents' Memorial, paras. 20-21; Respondents' Reply, para. 4.

43 Respondents' Reply, paras. 16-17.

44 Respondents' Memorial, para. 22.

45 Respondents' Memorial, para. 17.

46 Respondents' Memorial, para. 17.

jurisdiction."[47] Further, these arbitrations cannot be considered as "appeals" because the relief sought now is not the same as that sought in the original charges.[48]

38. The Respondents observe that the contractual pre-conditions under Article 5 would be mandatory and enforceable as a matter of law, whether the governing law of the Accord (and/or the arbitration agreement) were Bangladeshi law, as the Respondents contend, or Dutch law, as the Claimants contend.[49]

39. The Respondents also argue that the Tribunal should not rely on the Governance Regulations or the Dispute Resolution Process, because those documents "are different from (and incompatible with) the process described in Article 5 of the Accord." Whether governed by Dutch or Bangladeshi law, the documents do not constitute a valid standalone arbitration agreement or a valid amendment to Article 5.[50] The Respondents object to the Claimants' characterization of these documents as mere "clarifications."[51] They submit that in purporting to create the Dispute Resolution Process, the Steering Committee acted *ultra vires* Article 4 of the Accord.[52]

40. According to the Respondents, the "most straightforward, logical and correct course of action is for this Tribunal to terminate these proceedings, leaving it open to the Claimants to pursue their complaints before the [Steering Committee] and obtain a reasoned decision from that body."[53] Knowing that a "majority decision is required" might also encourage the Claimants to submit "more valid claims . . . in any future disputes presented to the SC."[54]

B. Summary of the Claimants' Position

41. According to the Claimants, the Respondents' argument that the Steering Committee's failure to "decide the dispute by majority vote" constitutes a bar to arbitration fails for at least four reasons.

42. *First*, the Claimants submit that a majority decision is not a mandatory precondition to arbitration under Article 5 of the Accord.[55] They argue primarily from the text of Article 5, the second sentence of which, they point out, empowers "either party" to appeal a "decision of the SC" to arbitration, without setting any requirements as to the content or form of the "decision."[56]

43. While the Claimants argue that "the Tribunal need not go beyond the text of Article 5," they also point to the "underlying purpose" of the Steering Committee phase, to facilitate opportunities for settlement, not to impede or obstruct arbitration proceedings where the dispute remains unresolved.[57] They observe that "there is nothing that the Unions could have reasonably done prior to these arbitrations to achieve what the Respondents argue is required for their claims to be ripe for arbitration."[58] The Claimants submit that the Accord signatories could not have intended to deprive putative claimants of access to arbitration simply because the Steering Committee failed to act by majority.[59] That result becomes especially compelling in light of the

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47 Respondents' Reply, para. 12.
48 Respondents' Reply, paras. 25-26.
49 Respondents' Memorial, paras. 24-42; Respondents' Reply, para. 15.
50 Respondents' Memorial, paras. 43-57; Respondents' Reply, paras. 27-37.
51 Respondents' Reply, paras. 27-28.
52 Respondents' Memorial, paras. 58-64; Respondents' Reply, paras. 31-37.
53 Respondents' Memorial, para. 23.
54 Respondents' Reply, para. 40.
55 Claimants' Submission on Preliminary Issues ("**Claimant's Submission**"), paras. 6, 7-18.
56 Claimants' Submission, para. 8.
57 Claimants' Submission, para. 11.
58 Claimants' Submission, para. 11.
59 Claimants' Submission, paras. 13-14.

practice of the ILO chair not to vote. Since the unions and brands tended to vote in blocs, "[a]s a practical matter, the SC operates by consensus or it reaches a deadlock."[60] Hence, the Respondents' interpretation of Article 5 would "severely restrict the Unions' access to arbitration." Whatever the shortcomings in the drafting of Article 5, the Claimants argue, "by agreeing to arbitrate, the parties to the Accord must be presumed to have intended an effective remedy."[61]

44. *Second*, the Claimants observe that post-Accord instruments confirm their interpretation.[62] They submit that the Governance Regulations and the Dispute Resolution Process serve to clarify that the Accord signatories intended that "arbitration be available if a dispute cannot be satisfactorily resolved at the SC." The Claimants reject the Respondents' argument that the Dispute Resolution Process re-writes the terms of Article 5 of the Accord.[63] They also note that neither Respondent objected to the instruments until after the charge was brought more than two years later.[64]

45. *Third*, the Claimants refer to "authoritative statements" by the Steering Committee as "confirming the Unions' right to arbitrate the present disputes."[65] The Steering Committee characterized its own actions as "decisions" that they had reached no agreement on the merits of the charge. The Claimants submit that as the Accord's "executive, decision-making body," the Steering Committee's statements should carry interpretative weight, shedding light on the original understanding of Accord signatories.[66]

46. *Finally*, the Claimants submit that dismissal of the Unions' claims would serve no legitimate interest.[67] They point out that there is "no certainty or expectation that the SC will ever be able to decide on the merits of the charges, or that the institutional structure of the SC will change so as to allow for decision-making by majority." To gain access to arbitration under the Respondents' reading, the Unions would have to re-submit their charges to the SC, with no reasonable expectation of effective redress, unless one of the union representatives voted with the brands to create a "majority decision." The Claimants argue that such "redundancy and gamesmanship" do not serve the purposes of the Accord or the efficient administration of justice.

47. In their Reply submission, the Claimants rebut the Respondents' attempt to "impose a number of new unwritten preconditions to arbitration under the Accord." They reiterate that Article 5 does not limit the Parties' right to invoke arbitration only to the case of majority decisions and observe that Article 5 does not prescribe that a "decision" must be contained in a "document demonstrating a deliberate and methodological assessment of the merits."[68] Nor does Article 5 instruct either party to "re-submit" a decision to the Steering Committee if it is not issued by majority or falls short of the Respondents' supposed "form and content requirements." The Claimants disagree that the word "appeal" limits the Tribunal's competence to that of an "appellate body" that cannot engage in *de novo* review or review of a decision that is not "reasoned." To interpret "appeal" in the way the Respondents suggest would involve "reading into Article 5 limitations that simply do not exist."[69] The Claimants also observe that the Respondents' form and content requirements are difficult to reconcile with the 21-day limit for

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60 Claimants' Submission, paras. 16-17.
61 Claimants' Submission, para. 18.
62 Claimants' Submission, paras. 6, 19-25.
63 *See* Claimants' Reply Submission on Preliminary Issues ("**Claimant's Reply**"), paras. 23-27.
64 Claimants' Submission, para. 24.
65 Claimants' Submission, paras. 6, 26-30.
66 Claimants' Submission, paras. 28-30.
67 Claimants' Submission, paras. 6, 31-33.
68 Claimants' Reply, paras. 10-13.
69 Claimants' Reply, paras. 12-14.

SC decisions. In any event, the Claimants submit, the record shows that the SC did in fact thoroughly review, analyze, and deliberate on the Unions' claims before reaching a decision.[70]

C. Tribunal's Analysis

48. Analysis of the Respondents' Admissibility Objection must start with the text of Article 5 of the Accord, which provides in relevant part:

> Dispute resolution. Any dispute between the parties to, and arising under, the terms of this Agreement shall first be presented to and decided by the SC, which shall decide the dispute by majority vote of the SC within a maximum of 21 days of a petition being filed by one of the parties. Upon request of either party, the decision of the SC may be appealed to a final and binding arbitration process. . . .

49. The respective Parties agree that the Unions took the first step in the Article 5 procedure, "present[ing]" the dispute to the Steering Committee by filing a petition, when they submitted to the Steering Committee a charge against [redacted] on [redacted] and a charge against [redacted] on [redacted].[71]

50. The Parties disagree, however, about whether the outcome of the Steering Committee's decision-making process in respect of those charges constituted a "decision" for purposes of Article 5 so as to allow the Claimants to request that the disputes be referred to arbitration. The Parties each rely upon the text of Article 5, its context within the Accord, and the overall nature and purpose of the Accord, but they disagree about (i) any form and content requirements of a Steering Committee "decision;" (ii) the effect of the reference to "majority vote;" and (iii) the meaning of term "appeal."

51. *First*, as to the form and content of a decision, the Respondents argue that a "document demonstrating a deliberate and methodical assessment of the merits of the claims" containing a "detailed analysis of the arguments made or evidence submitted … or the positions expressed" is required, because without such a document, "there is no prior decision" for an arbitral tribunal to assess.[72] But the text of Article 5 does not prescribe any such requirements for the content of a decision or the methodology the Steering Committee must follow to reach one. The Tribunal has no warrant for reading into Article 5 specific requirements that the Accord signatories did not adopt.

52. Indeed, if anything, the requirement that the Steering Committee decide a dispute within 21 days of the filing of a petition strongly indicates that Article 5 does not contemplate an extensive written and evidentiary procedure. To the extent that there might be expectations as to the minimal process the Steering Committee must undertake, the record here reflects a thorough process by which it assessed these claims: it first established an investigation committee; the investigation committee met with and exchanged written communications with the respondent brands; the investigation committee reported back to the Steering Committee; and the Steering Committee then reviewed and assessed the respective positions of the Unions and respondent brands for each charge. Although the Steering Committee was unable to form a majority with respect to "the merits" of the charges, it did agree on certain aspects of each charge (for example, with respect to [redacted], that it was responsible for [redacted], and with respect to [redacted], that until early 2016 it lacked a systematic management system to deal with the

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70 Claimants' Reply, paras. 19-22.

71 Charge with Accord Steering Committee filed by IndustriALL Global Union and UNI Global Union against [redacted], [redacted], Exh. C-(2016-36)-53; Charge with Accord Steering Committee filed by IndustriALL Global Union and UNI Global Union against [redacted], dated [redacted], Exh. C-(2016-37)-85.

72 Respondents' Memorial, para. 20.

Accord and manage remediation). The Steering Committee then came to an overall conclusion that it reflected in writing.

53. Specifically as to the [redacted] charge, the record shows the Steering Committee appointed an "Investigation Committee" to assess the charge. The Investigation Committee met with [redacted] representatives and received extensive documentation from [redacted], which it was unable to review thoroughly within the 21-day period.[73] The Investigation Committee members agreed on some issues, including [redacted] responsibility for the acts of a former subsidiary, and reported back to the Steering Committee during a conference call on [redacted], when the charges were discussed amongst the Steering Committee as a whole, including the ILO Chair. The brand representative and the union representative on the Investigation Committee acknowledged their areas of agreement and likely disagreement. The ILO chair concluded that "the SC is unable to reach a decision on the merits of the charge filed against [redacted]," and all members of the Steering Committee agreed that the parties be formally informed "of the outcome of the SC decision, noting that in this decision and according to the Dispute Resolution process the Trade Unions have the right to proceed to arbitration. . . ."[74]

54. Accordingly, on [redacted], the Accord Secretariat formally informed [redacted] "on behalf of the Accord Steering Committee . . . of its decision regarding the recent charge." That letter noted that following an investigation, the Steering Committee had agreed to send to [redacted] a statement, which was entitled "Accord Steering Committee decision, adopted [redacted]." That statement noted that the "SC does not agree on the merits of this case" but that it had agreed on certain principles relating to responsibility of brands under the Accord.[75]

55. Specifically as to the [redacted] charge, the record shows that the Steering Committee again appointed an "Investigation Committee" to assess the charge. As in the [redacted] process, the Investigation Committee met with representatives of [redacted], which then provided a written response to the charges. [redacted] provided further information in response to the Investigation Committee's requests.[76] At a meeting on [redacted], the Steering Committee discussed the charges and agreed to provide [redacted] with an extension of time to provide further evidence. On [redacted], after further exchanges of information and meetings among [redacted] and the Investigation Committee, the Steering Committee discussed the charge again.[77] The Investigation Committee there reported that while it agreed that [redacted] did not have a "systematic or holistic management system in place to deal with the Accord and manage remediation until early 2016," the brand representative and union representative on the Investigation Committee were unable to agree on a joint recommendation to the Steering Committee.[78]

56. Following a discussion among all voting and non-voting members of the Steering Committee, the three brand representatives recorded that they "do not find that the charge has merit," while the three union representatives recorded that they "find that the charge has merit." The minutes of the teleconference note that the "SC was therefore unable to reach a decision on the merits of the charge filed against [redacted]. By letter dated [redacted], on behalf of the Steering Committee, the Accord Secretariat advised [redacted] "of its decision regarding the charge brought by [the Unions]."[79] The letter reported that "following investigation of the charge by two

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73 Steering Committee Conference Call Minutes, [redacted], p. 2, Exh. C-(2016-36)-54.
74 Steering Committee Conference Call Minutes, [redacted], p. 3, Exh. C-(2016-36)-54.
75 Letter from Accord Secretariat on behalf of Steering Committee to [redacted], [redacted], p. 2, Exh. C-(2016-36)-55.
76 Steering Committee Quarterly Face-to-Face Meeting Minutes, [redacted], p. 12, Exh. C-(2016-37)-86.
77 Steering Committee Conference Call Minutes, dated [redacted], Exh. C-(2016-37)-15.
78 Steering Committee Conference Call Minutes, dated [redacted], Exh. C-(2016-37)-15.
79 Letter from Accord Secretariat on behalf of Steering Committee to [redacted], [redacted], p. 1, Exh. C-(2016-37)-87.

Steering Committee members and their subsequent report back at a Steering Committee meeting on [redacted], the Steering Committee was unable to reach a decision supported by the majority on the merits of the charge."[80]

57. On this record, the Tribunal concludes that the Steering Committee went through a deliberative process and arrived at a "decision" for each charge within the meaning of Article 5.

58. *Second*, the Respondents argue that to be eligible to "be appealed to a final and binding arbitration process," the decision must be made by a majority. They rely on the provision of Article 5 that the Steering Committee "shall decide the dispute by a majority vote." They reason that the only category of decision that may be referred to arbitration is one taken by a "majority vote."

59. As a matter of the plain language of Article 5, there is no reason to interpret the prescription in the first sentence of Article 5 that the Steering Committee take decisions by majority vote to require a reading of the second sentence that would disallow any other kind of decision from being brought to arbitration. Specifically, there is no reason to exclude from the second sentence a disposition of the petition that does not, for whatever reason, attract a majority. As the Steering Committee itself confirmed here by describing its disposition in each of the cases before us as a "decision," each of the petitions was considered and resolved, and it would be strained to characterize either of those resolutions as other than a "decision."

60. That result is confirmed by consideration of the context in which the relevant provisions of Article 5 appear. By providing for initial consideration of a petition by industry representatives on an Accord-established body (the Steering Committee), by a process that would generally be expected to take a limited amount of time (21 days) the Accord provided for a serious examination of a petition in the first instance by actors with knowledge of, and a stake in the success of, the Accord, but one that fell short of a full-blown arbitral proceeding. If that limited process did not result in a disposition, either by amicable agreement or by acceptance by the unsuccessful party of the rejection or acceptance of the petition, that party had a right to pursue arbitration, with all the rights and procedures that a right to arbitration would carry. The purpose of the initial procedure before the Steering Committee is neither achieved nor compromised in any way by the circumstance whether the Steering Committee vote is in favor of the petitioner or respondent or, as here, an equal vote. Here, the Claimants did not secure from the Steering Committee the relief they sought, and it matters not that that result followed from a majority vote against them or an equal vote.

61. That result is further, and definitively, confirmed by the pointless consequences that would follow from the rule urged by the Respondents. At this point, there is nothing further that the Claimants could do to pursue their petition except to refile it with the Steering Committee. But that body has already given it the consideration contemplated by Article 5. Hence, the only way to release the petition from Steering Committee limbo would be for one of the union or brand representatives – presumably here, one of the union representatives – to "cross the floor" and vote to reject it, which would then produce the majority vote that the Respondents contend is the condition to invoking arbitration. The Accord signatories could not have intended to promote that kind of gamesmanship as the only way to access arbitration in the event of an evenly divided Steering Committee. Equally, they could not have intended to deny a claimant access to arbitration in the event of a tie but make it available if the claimant lost by a majority or unanimous vote.

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[80] Letter from Accord Secretariat on behalf of Steering Committee to [redacted], [redacted], p. 1, Exh. C-(2016-37)-87.

62. *Finally*, the Respondents argue that the use of the word "appealed" in Article 5 expresses a "clear and unambiguous intention to limit the scope of the tribunal's role to that of an appellate body" whose task is simply to provide an "additional layer of scrutiny" in the event the Steering Committee "might make mistakes" resulting in "legal or financial consequences," rather than perform a "*de novo* appraisal."[81] As with their interpretation of the term "decision," the text of Article 5 provides the Respondents no support for that reading of the term "appeal." As a general matter, the term "appeal" means simply some form of review of an initial determination; without more, it connotes simply an application by one party to a higher decision-making body for a review or reversal of a decision of a lower decision-making body.

63. The term "appeal" does not, standing on its own, carry any accepted "limit[s]" to the scope of the appellate body's review; some appellate bodies have full powers of *de novo* review, while the authority of others may be circumscribed. Here, considering the non-legal, industry-based character of the first level of decision-making, there is every reason to believe that the Accord signatories considered that the "arbitration" to which that initial decision could be "appealed" would involve the full fact-finding and law-deciding authority of standard arbitral processes.

64. The Tribunal therefore concludes that each of the Claimants have demonstrated that they presented their disputes to the Steering Committee, and that the Steering Committee reached decisions about those disputes from which the Claimants requested to bring an appeal to a final and binding arbitration process. Accordingly, the Claimants have fulfilled any preconditions to arbitration set out in Article 5 of the Accord.

65. In reaching this conclusion, the Tribunal has found it unnecessary to determine whether Dutch or Bangladeshi law might apply, as the Parties have identified no point of interpretation of Article 5 that would depend on that choice.

66. Given that on a plain reading of Article 5 in its context the Claimants have a right to proceed to arbitration, the Tribunal also considers it unnecessary to rely on the Steering Committee's Governance Regulations or the Dispute Resolution Process as independent grounds for finding the claims admissible and hence to consider the Steering Committee's authority either to interpret or supersede Article 5 for purposes of dispute resolution. It may be, as the Parties have suggested, that the equal votes in these two cases was the consequence of the unforeseen unwillingness of the ILO chair to vote in this kind of case,[82] a circumstance now addressed by the Governance Regulations, as amended in July 2014, and the Dispute Resolution Process, issued in April 2014. Be that as it may, for the reasons set forth, the Tribunal has no difficulty holding that Article 5 in its original form dictates the result we reach here. We note, however, that that result comports with the Steering Committee's unanimous conclusion in these two cases that the Claimants had the right to commence arbitration, and with the Steering Committee's more general view with respect to how disputes should proceed under the Accord.

67. Finally, given the Respondents' respective stipulations that they are "prepared to agree, for the purposes of the current dispute only, that the Claimants' claims be determined by an arbitral tribunal established under the UNCITRAL Arbitration Rules 2010,"[83] the Tribunal has no need to consider the sufficiency of Article 5, standing alone, to found its jurisdiction.

68. Respondents' Objection to Admissibility is dismissed.

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81 Respondents' Memorial, paras. 17, 21.

82 Claimants' Submission, paras. 16-16, 20; Respondents' Reply, para. 23.

83 [redacted] Response, paras. 21, 59; [redacted] Response, paras. 30, 61.

V. CONFIDENTIALITY OR TRANSPARENCY OF PROCEEDINGS

69. The UNCITRAL Arbitration Rules 2010 are silent on matters of transparency and confidentiality, except for Article 28(3), concerning the privacy of hearings, and Article 34(5), governing the publication of awards:

> 28(3) Hearings shall be held in camera unless the parties agree otherwise.
>
> . . .
>
> 34(5) An award may be made public with the consent of all parties or where and to the extent disclosure is required of a party by legal duty, to protect or pursue a legal right or in relation to legal proceedings before a court or other competent authority.

70. The Parties agree that for other aspects of these proceedings, the Tribunal has general discretion to decide the appropriate extent of confidentiality and transparency, taking into account fairness and efficiency concerns.[84] The Parties also submit that, in exercising its discretion, the Tribunal should be guided by the Accord framework.[85] The Accord, itself a public document, contains provisions both promoting transparency and protecting confidentiality of signatory brands.

71. Generally, the Respondents urge an approach favoring confidentiality, while the Claimants favor more transparency.

A. Summary of the Respondents' Position

72. The Respondents ask the Tribunal to "issue an order preserving the confidentiality of the proceedings, including the existence of the arbitrations and all submissions, hearings, orders and awards thereunder."[86]

73. Whether the Tribunal chooses Bangladeshi or Dutch law as the law of the arbitration agreement, the Respondents submit "the result will be the same." While neither jurisdiction has legislation explicitly addressing confidentiality of arbitration, they contend that both "recognise confidentiality as a fundamental characteristic and advantage of arbitration."[87]

74. According to the Respondents, preserving confidentiality aligns with the terms of the Accord and the Parties' practice under it,[88] which both make clear that there is to be transparency as to inspections and remediation data for *factories*, while information about the *signatory companies*' activities are to be kept confidential.[89] The Respondents focus on Article 19, which sets forth the type of information about factories to be made "publicly available" but states that "volume data and information linking specific companies to specific factories will be kept confidential."[90] They

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84 Claimants' Submission, para. 63; Respondents' Memorial, para. 88. Article 17 of the 2010 UNCITRAL Rules provides: ". . . the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at an appropriate stage of the proceedings each party is given a reasonable opportunity of presenting its case. The arbitral tribunal, in exercising its discretion, shall conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties' dispute."

85 Claimants' Submission, para. 36; Respondents' Memorial, para. 73.

86 Respondents' Reply, para. 72.

87 Respondents' Memorial, paras. 70-71. *See also* para. 87 noting that both jurisdictions allow Tribunals to give effect to parties' agreements on confidentiality.

88 Respondents' Memorial, paras. 72-87.

89 Respondents' Memorial, paras. 72-87.

90 Respondents' Memorial, paras. 72-87; Respondents' Reply, paras. 45-48.

also point to Article 20, which recognizes that care should be taken to avoid harm, even to suppliers, as a result of transparency provisions.[91]

75. The Respondents also invoke the transparency and confidentiality provisions in the Governance Regulations and public disclosure guidelines issued by the Steering Committee in November 2013.[92] These documents are said to reflect the Steering Committee's assessment that the appropriate balance is achieved by providing workers with the factual data needed to understand the safety of workplaces but to keep confidential the performance of specific signatory companies. This balance is played out also in practice by the types of information published on the Accord website, and the fact that minutes of meetings discussing particular brands are kept confidential or anonymized.[93]

76. The Respondents then turn to the Tribunal's duty under Article 17 of the UNCITRAL Rules to ensure a "fair and efficient process for resolving the parties' dispute." First, they express the concern that mere disclosure of the existence of the arbitrations would draw media attention and risk irreparable reputational damage that would outstrip any actual damages that could be awarded.[94] This would be unfair, they argue, when there has been no finding of breach, the Respondents' remediation rates are improving, and years spent cultivating a brand committed to social responsibility would be destroyed.[95] Second, the Respondents say that no prejudice would be suffered by the Claimants in preserving confidentiality, or by the stakeholders of the Accord, who have never had access to information about performance of signatory brands. The Respondents also predict frequent disagreements over redactions that might add time and complexity. They query whether there are any benefits to disclosure beyond allowing the Claimants to exert public pressure on the Respondents, especially when the factory information is already public, and the Accord is due to expire in May 2018, after which the interpretative value of the awards may be moot.[96]

77. The Respondents argue that the Claimants' proposal to publish hearing transcripts and the Award directly contradicts the provisions of the UNCITRAL Rules mandating privacy of hearings and confidentiality of the Award absent consent, which the Respondents do not give. They also point to "standard practice in international commercial arbitration."[97] Had the parties wanted transparency provisions, they argue, "they could have drafted a different arbitration clause or chosen a state court system."[98]

78. Finally, the Respondents submit that the Tribunal should also recognize an implied duty of confidentiality arising from the Parties' agreement to arbitrate, which is supported by Bangladeshi law (via other common law decisions) and Dutch scholars on arbitration law.[99] The Respondents note that when the new Dutch Arbitration Act was enacted, although confidentiality was not expressly included in the Act, it was nevertheless regarded as a "solid feature and principle of unwritten Dutch arbitration law," with limited exceptions for "arbitrations with public law content like investment arbitrations." The Respondents distinguish the present

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91 Respondents' Memorial, para. 74.
92 Respondents' Memorial, paras. 78-81. *See* para. 14 above.
93 Respondents' Memorial, para. 84; Respondents' Reply, para. 47.
94 Respondents' Memorial, paras. 68, 89. *See also* Respondents' Reply, para. 60.
95 Respondents' Memorial, paras. 68, 89. *See also* Respondents' Reply, paras. 60-64.
96 Respondents' Reply, paras. 68-69.
97 Respondents' Memorial, para. 96; Respondents' Reply, paras. 49-52.
98 Respondents' Reply, para. 58.
99 Respondents' Memorial, paras. 97-110; Respondents' Reply, paras. 52-53.

arbitrations, which concern contractual disputes between private parties, from investment treaty arbitrations, which involve state entities, public resources, and government commitments.[100]

79. However, the Respondents offer a compromise in their cover letter to the 24 April 2017 submissions:

> Without prejudice to the Respondents' submissions on confidentiality contained within the joint Memorial, the Respondents would be willing to consent to a redacted version of the final Award being published, following the conclusion of the proceedings. This redacted version of the award should be strictly limited to those parts of the Award that discuss the terms of the Accord and the legal analysis of its provisions (and the consequences, if any, of any breaches which may be found). It should not contain the name of either of the Respondents, nor any of the factual and/or procedural sections whereby it may be possible to identify the Respondents, factories or individuals involved in the proceedings. The Parties would be required to cooperate in order to produce an agreed redacted version of the Award and would each be requested to approve the final version before publication.[101]

80. The Respondents reiterate this proposal in their Reply, describing it as a solution that "keeps stakeholders informed and promotes consistency while maintaining the balance struck in the Accord between transparency and confidentiality."[102]

B. Summary of the Claimants' Position

81. The Claimants seek a fully transparent approach, requesting that the Tribunal declare that the PCA shall publish on its website, and that the Parties may disclose "(i) the existence of the disputes; (ii) the names of the parties to the two arbitrations; (iii) the names of counsel representing the Parties; (iv) the names of the members of the Tribunal; (v) documents related to the case, such as pleadings, transcripts and procedural orders, subject only to necessary safeguards for the protection of confidential business information; (vi) all interim, partial, or final awards, subject only to necessary safeguards, for the protection of confidential business information." They also seek declarations that the PCA may issue periodic press releases about the arbitrations at the Tribunal's direction.[103]

82. According to the Claimants, these proceedings are not relevant only to the disputing parties. They point out that the signatories to the Accord include around 200 clothing brand companies, retailers, and importers, eight Bangladeshi trade unions, and four NGO witnesses. The Accord obligations at issue are relevant to sourcing relationships with over 1,600 non-signatory Bangladeshi suppliers, to the intended benefit of over 2 million garment factory workers in Bangladesh. Given the character of the Accord as a "quasi-public agreement" with "far reaching public interest implications," these multiple stakeholders and the public at large "have a strong interest in the transparency of these proceedings and their outcome."[104] The Claimants also point to the important role under the Accord of international organizations, including the ILO.[105]

83. According to the Claimants, the text, governance, and framework of the Accord all counsel dispute resolution transparency.[106] They point to Article 19 of the Accord on "Transparency and

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100 Respondents' Reply, paras. 55-57.
101 Respondents' Letter accompanying Respondents' Memorial, 24 April 2017; Respondents' Reply, para. 51.
102 Respondents' Reply, paras. 70-71.
103 Claimants' Reply, paras. 49(b), (d).
104 Claimants' Submission, paras. 37-40; Claimants' Reply, paras. 32-33.
105 Claimants' Submission, paras. 37-40.
106 Claimants' Submission, paras. 37-49.

Reporting" to show that a key tenet of the Accord is making compliance-related matters accessible to all interested stakeholders. There are two limited confidentiality exceptions: a confidential workers' complaint process under Article 18, and protection of "business confidential information" under Article 19. The Claimants do not regard the latter as requiring arbitrations to be conducted in secret, as it simply applies to "volume data."[107] Had the parties wished for arbitration proceedings to be confidential, they could have so stipulated. The Claimants propose that the Respondents' "specific confidentiality interests may be effectively protected through appropriate redactions if and when they arise."[108]

84. The Claimants also note that the Governance Regulations, as well as Steering Committee meeting minutes and public statements, all underscore the centrality of transparency to the Accord framework, subject only to limited exceptions.[109] They observe that as a practical matter, decisions by this Tribunal will make "important interpretative guidance available to the Unions, Accord signatories, and the SC with respect to the content and scope of Accord obligations."[110]

85. Referring to commentaries, the drafting history of the 2010 UNCITRAL Rules, and decisions of other arbitral tribunals, the Claimants contend that they are not bound by a general duty of confidentiality beyond the limited provisions on hearings and publication of the award.[111] They rebut the Respondents' contention that there is a generally prevailing view demanding confidentiality in arbitration. No such view is supported under Dutch law or Bangladeshi law, and other jurisdictions have expressly refused to recognize an implied duty of confidentiality.[112]

86. Consistent with the tenets of the Accord, its quasi-public nature, and the strong public interest in its enforcement, the Claimants argue that the Tribunal should exercise its discretion in line with the current trend toward greater transparency in international arbitration proceedings.[113] In the Claimants' view, the appropriate balance between the need for transparency and the Respondents' interest in protecting "certain information for "legal and business reasons" can be accomplished by implementing a "limited confidentiality protocol."[114]

87. In their Reply, the Claimants reject as unsupported the Respondents' suggestion that the desire for transparency "can only be seen as a cynical attempt by the Claimants to put pressure on the Respondents, through the means of adverse publicity, to cave in to their unwarranted demands."[115] They characterize the Respondents' proposal as a request that the Tribunal "pre-emptively suppress the Unions' right to reveal their case—not only to the public at large but also their affiliates and members—on the basis of speculative risk of reputational damage."[116] They submit that the interests of the two Respondents should not be put above all other interested parties given the quasi-public nature of the Accord.[117]

88. Finally, the Claimants offer an alternative compromise, proposing that basic information about the arbitrations, press releases, and redacted awards shall be published on the PCA website, while "documents related to the case, such as pleadings, transcripts and procedural orders" shall be

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107 Claimants' Submission, paras. 40-41; Claimants' Reply, paras. 33-38.
108 Claimants' Reply, para. 35.
109 Claimants' Submission, paras. 42-46.
110 Claimants' Submission, paras. 47-49.
111 Claimants' Submission, paras. 50-61; Claimants' Reply, paras. 41-43.
112 Claimants' Submission, paras. 58-61; Claimants' Reply, paras. 29-31.
113 Claimants' Submission, paras. 62-66; Claimants' Reply, para. 32.
114 Claimants' Reply, para. 40.
115 Claimants' Reply, para. 45.
116 Claimants' Reply, para. 47.
117 Claimants' Reply, para. 48.

made available only to the Steering Committee, non-disputing Accord witnesses and signatories, and the executive boards of the Unions.[118]

C. Tribunal's Analysis

89. As noted, the Parties have agreed to apply to these proceedings the 2010 UNCITRAL Rules, which contain two articles expressly addressing transparency and confidentiality. These are Article 28(3), which requires hearings to be held *in camera* unless the parties agree otherwise, and Article 34(5), which states that an award may be made public with the consent of all parties or where required of a party by legal duty.

90. For all other aspects of the proceedings, the Tribunal must decide the appropriate extent of confidentiality and transparency.[119] By their own terms, for example, neither Article 28(3) nor Article 34(5) makes confidential the existence of the arbitration, the identity of the parties, or the subject matter of the dispute. As the drafting history of the UNCITRAL Rules confirms, the "prevailing view" among the drafters was that, beyond the specific provisions in the Rules, "the issue of confidentiality was left to be addressed on a case-by-case basis by the tribunal and the parties."[120]

91. Before turning to the provisions of the Accord, the Tribunal considers the Parties' positions on applicable law. Both sides acknowledge that the Dutch and Bangladeshi legal systems contain no express requirements with respect to either confidentiality or transparency in international arbitrations.[121] No Party has identified any source of either Dutch or Bangladeshi law that compels a holding that an implied duty of confidentiality might apply here. On the other hand, they have pointed to commentaries of government officials, practitioners, and academics that confirm the view that under either system, it is for the parties and tribunals in particular cases to decide on the appropriate level of confidentiality or transparency, depending on such factors as the "public interest," the "public law component," and the "importance" of confidentiality to the parties to the proceeding.[122] Hence, whether issues of confidentiality are governed by the law of the arbitration agreement or the law of the arbitral procedure, and whether that be Dutch law, Bangladeshi law, or transnational principles, the Tribunal's latitude to determine the extent of confidentiality is constrained only by the UNCITRAL Rules that the Parties have agreed will govern this proceeding.

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118 Claimants' Reply, para. 49(c).

119 Claimants' Submission, para. 63; Respondents' Memorial, para. 88. Article 17 of the 2010 UNCITRAL Rules provides: ". . . the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at an appropriate stage of the proceedings each party is given a reasonable opportunity of presenting its case. The arbitral tribunal, in exercising its discretion, shall conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties' dispute."

120 *See* David D. Caron and Lee M. Caplan, *The UNCITRAL Arbitration Rules: A Commentary* (2d ed. 2013), Exh. CL-11, p. 39, n 131, citing UNCITRAL, 40th Session, UN Doc A/Cn.9/614, n 5 at 19, para. 86; Thomas H. Webster, *Handbook of UNCITRAL Arbitration* 264 (2010), Exh. CL-12.

121 Respondents' Memorial, paras. 70-71, para. 87; Claimants' Submission, paras. 58-61; Claimants' Reply, paras. 29-31.

122 Amendment of Book 3, Book 6, and Book 10 of the Civil Code and the Fourth Book of the Code of Civil Procedure relating to the Modernization of Arbitration, Memorandum of Answer (15 May 2015) (Neth.) Dutch original; English translation), Exh. C-31 [*see also* Exh. RL-036 for alternative translation]; H.J. Snijders, *Arbitrage, vertrouwelijkheid of openbaar, dan wel een mixtum daarvan ("Arbitration, confidentiality, transparency or a mixture of both")*, Tijdschrift voor Arbitrage, 2014, Exh. R-30; South Asian Association for Regional Cooperation Arbitration Council, *Bangladesh,* [chapter contributed by Dr Kamal Hossain & Associates], Exh. CL-28; Norton Rose Group, *Arbitration in Asia Pacific: Bangladesh* 2 January 2010, Exh. CL-29.

92. Likewise, in the context of international arbitration practice generally, while the Respondents point to sources suggesting a general expectation of confidentiality among commercial users of international arbitration,[123] and the Claimants observe a trend towards greater transparency, particularly in the context of investor-state arbitration,[124] no such practice or trend could substitute for the Tribunal's careful consideration of the correct balance to be struck in light of the parties, their dispute, and the underlying arbitration agreement. In the course of that consideration, the Parties agree that the Tribunal should take into account concerns of fairness and efficiency and draw guidance from the Accord framework.[125]

93. In the Tribunal's view, this case cannot be characterized either as a classic "public law" arbitration (involving a State as a party) or as a traditional commercial arbitration (involving private parties and interests), or even as a typical labor dispute. A number of features distinguish the Accord from such categorizations, including (a) the creation of the Accord in the wake of the Rana Plaza tragedy; (b) the number of signatories to the Accord (over 200 as at the date the arbitrations were commenced); (c) the number of supplier factories affected by the Accord (over 1600);[126] (d) the number of workers in the Ready-Made Garment industry protected by Accord (over 2 million);[127] (e) the involvement of international organizations in the negotiation and governance of the Accord (including the ILO);[128] (f) the involvement of States and State entities in the negotiation and oversight of the Accord (including the government of Bangladesh);[129] (g) the involvement of Bangladeshi and international non-governmental organizations as witnesses to the Accord and in an advisory capacity;[130] and (h) the public nature of the Accord itself and many associated documents, as well as detailed information about factory remediation under the Accord.[131]

94. These factors give rise to a genuine public interest in the Accord, including on the part of other stakeholders who would have a direct interest in its interpretation. In the Governance Regulations, the Steering Committee expressly recognized the need for "transparency and public communication in order to build trust and confidence among the workers and the wide community of those who are affected by the implementation of the commitments set forth in the Accord."[132] The Tribunal is therefore not inclined to impose a blanket confidentiality order of the nature sought by the Respondents. On the other hand, the Tribunal must take into account competing factors stemming from the language of the Accord and the practice under it, which point to an obligation to protect certain information about the participating brand companies.

95. As noted at paragraph 10, the Accord contains provisions both promoting transparency and protecting confidentiality of signatory brands. Under the heading "transparency and reporting," Article 19 requires the Steering Committee to "make publicly available and regularly update information on key aspects of the programme." While this requirement includes publishing compliance data, safety inspector reports for "all factories," and a list of "all suppliers in Bangladesh (including sub-contractors) used by the signatory companies," Article 19 also contains the express limitation that "volume data and information linking specific companies to specific factories will be kept confidential."

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123 Respondents' Memorial, paras. 95-102.
124 Claimants' Submission, paras. 63-64.
125 Claimants' Submission, para. 63; Respondents' Memorial, para. 88.
126 Notice of Arbitration against [redacted], para. 4.
127 Notice of Arbitration against [redacted], para 5.
128 Accord, Arts. 4, 7.
129 Accord, Arts. 6, 7, 20 (referring to Bangladeshi government), Art. 24 (referring to other governments as potential donors).
130 Accord, Arts. 7, 20.
131 *See generally* www.bangladeshaccord.org.
132 Governance Regulations, adopted 24 September 2013, amended 10 July 2014, Exh. R-1.

96. A similar approach is reflected in the Steering Committee's Governance Regulations, which note that the need for transparency needs to be "balanced with the need of Company Signatories for confidentiality of certain information for legal and business reasons."[133] In practice, this has meant that Accord institutions treat as confidential, or redact prior to publication, any document, such as meeting minutes, that reveal the identity of brands.[134] The Respondents state that the "business reasons" for maintaining confidentiality include concerns about "reputation damage," explaining that their brand association with social responsibility "could easily be destroyed, with very real financial consequences," if the arbitrations were to attract media attention to allegations that they deny and that neither the Steering Committee nor, at least as of now, the Tribunal have upheld.[135] Though the Tribunal finds no support for the charge that it is "the Claimants' goal" to cause such reputational harm, it recognizes as legitimate the Respondents' concern to protect reputational interests.[136]

97. In the Tribunal's view, it is appropriate to balance both sets of interests emphasized by the Parties by disclosing certain basic information about the existence and progress of the arbitration proceedings, while at the same time keeping confidential the identity of the Respondents. The Tribunal applauds the Parties' willingness to compromise to achieve that balance.[137] It further notes that both sides have referred to the possibility of developing a "limited confidentiality protocol,"[138] or a "comprehensive confidentiality order in keeping with standard international arbitration practice."[139]

98. Bearing in mind the Tribunal's discretion under Article 17 of the UNCITRAL Arbitration Rules 2010 to "conduct the arbitration in such manner as it considers appropriate" and its duty to "conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties' dispute," the Tribunal here sets down certain guidelines for confidentiality and transparency and invites the Parties to confer and propose an appropriate Protocol on Confidentiality and Transparency within those guidelines. To facilitate this process, the Tribunal annexes to this Procedural Order some draft texts that the Parties may wish to use as a starting point for their discussions.

99. **Annex I** to this Procedural Order is a model Protocol on Confidentiality and Transparency containing definitions of, and procedures for dealing with, confidential materials, information and hearings. The Tribunal expects that the Protocol would provide for publication of the Tribunal's orders, decisions, and awards, but with redactions for any information that might (directly or indirectly) disclose the Respondents' identities. As Respondents have proposed, the objective would be to make available those portions of any orders, decisions, and awards that reflect interpretation of the Accord or analysis of the legal obligations flowing from it, so as to provide guidance to other stakeholders. The model Protocol at Annex I therefore contains model provisions for the publication of information about the arbitrations and the Tribunal's orders, decisions, and awards, subject to a redaction process to be agreed. The Tribunal also expects that pleadings, witness statements, transcripts of hearings, or other documents created for the purpose of the hearing would be treated as confidential, but the Parties would be free to seek consent from the other side or make applications to the Tribunal for other directions consistent with the principles set down in this Order.

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133 Governance Regulations, adopted 24 September 2013, amended 10 July 2014, Exh. R-1.
134 *See, e.g.* the documents cited in Respondents' Memorial, paras. 83-85.
135 Respondents' Reply, paras. 63-65.
136 *Cf.* Respondents' Submission, para. 65.
137 Respondents' cover letter accompanying Respondents' Memorial, Respondents' Reply, para. 70; Claimants' Reply, para. 49(c).
138 Claimants' Reply, para. 40.
139 Respondents' Submission, para. 88.

100. **Annex II** to this Procedural Order is a model confidentiality undertaking for third parties, as described in the model Protocol.

101. **Annex III** to this Procedural Order is a model website entry about the proceedings for the PCA website. The Tribunal expects that the Protocol would authorize the Tribunal to direct the PCA, following consultation with the Parties, to publish certain basic information on its website, and to issue, periodically, press releases concerning the nature and progress of proceedings. The information would include a description of the Accord, the disputes, the names of the Claimants, the Claimants' representatives, the composition of the Tribunal and any documents that the Parties may agree to include for publication. The PCA website entry would not reveal the identity of the Respondents. Nor would it indicate any information from which the specific identities of the Respondents or their representatives could be inferred.

102. **Annex IV** to this Procedural Order is a model PCA Press Release about the proceedings. The Tribunal expects that the Protocol will provide for the Tribunal to direct the PCA to publish on its website a Press Release noting initial developments in the proceedings, as well as any important subsequent developments.

103. The Tribunal will retain full authority to determine all issues concerning confidentiality and transparency and the implementation of the Protocol, including the disclosure of any information about the arbitration, the content of the website or any press releases, and the publication of decisions and awards, as well as redactions thereto.

VI. DECISION

104. The Tribunal, having considered the Parties' respective positions, and for the reasons set out above, unanimously decides and orders:

A. JURISDICTION AND ADMISSIBILITY

1. The Tribunal confirms its jurisdiction over the Claimants' claims, recalling the Parties' agreement, in Paragraph the 2.3 of the Terms of Appointment that, "subject to the Respondents' admissibility objection, the Tribunal has jurisdiction" over these cases; and

2. The Tribunal rejects the Respondents' Admissibility Objection and holds admissible the Claimants' claims.

B. CONFIDENTIALITY AND TRANSPARENCY

3. The Tribunal directs the Parties to confer and develop a Protocol on Confidentiality and Transparency in line with the guidelines set out in this Procedural Order, and to report back to the Tribunal with a draft indicating areas of agreement and/or disagreement, by 19 September 2017. The Tribunal invites the Parties to use as a model **Annex I** to this Procedural Order.

4. The Tribunal will subsequently issue the Protocol on Confidentiality and Transparency in the form of a procedural order.

Place of Arbitration, The Hague

Dated, 4 September 2017

Donald Francis Donovan
Presiding Arbitrator

ANNEX I

MODEL PROTOCOL ON
CONFIDENTIALITY AND TRANSPARENCY

PCA Case No. 2016-36

INDUSTRIALL GLOBAL UNION AND UNI GLOBAL UNION
v. [redacted]

AND

PCA Case No. 2016-37

INDUSTRIALL GLOBAL UNION AND UNI GLOBAL UNION
v. [redacted]

A. CONFIDENTIAL MATERIALS, INFORMATION AND HEARINGS

1. "Confidential Materials" are all documents produced, filed or exchanged in the present arbitrations, including:

    a. all correspondence between or among the Parties, the Tribunal and/or any third parties in relation to the arbitrations;

    b. all documents filed in the arbitrations, including all pleadings, memorials, submissions, witness statements, annexures, and other evidence, and all documents produced (whether by a Party or a third party);

    c. all awards, decisions and orders and directions of the Tribunal that have not been subject to redaction pursuant to Section ## below.

    d. all minutes, records (including recordings), and transcripts of hearings, meetings and conferences; and,

    e. information contained in or derived from any such documents.

2. Documents and information shall not be considered Confidential Materials to the extent that they are in the public domain (including on the Accord website), other than as a result of a breach of this Procedural Order No. [X].

3. Neither Party shall disclose or publish any Confidential Materials unless provided for in the UNCITRAL Arbitration Rules 2010, authorized under this Procedural Order No. [X], or agreed between the Parties.

4. "Confidential Information" shall include (i) information that discloses (directly or indirectly) the identity of the Respondents or their representatives, or enables their specific identities or that of their representatives to be inferred; and (ii) any information not in the public domain that is designated as such by a Party for legal and business reasons (for example, if it connects the identity of a specific signatory brand to information about factories).

5. A Party may designate documents containing Confidential Information by marking them with the phrase "Contains Confidential Information." Any Confidential Information within the document shall be identified clearly. If the document as a

whole constitutes Confidential Information, it shall be sufficient to designate the document as such on its first page.

6. If a Party submits a document containing Confidential Information, the document shall be submitted in accordance with the timetable specified in applicable Procedural Orders of the Tribunal. A redacted version of the document shall be submitted 21 days thereafter, and shall be marked with the designation "Confidential Information Redacted."

7. Inadvertent failure to designate information pursuant to this Procedural Order No. [X] as Confidential Information shall not constitute a waiver of any claim for protection, so long as such claim is asserted within 10 days.

8. If a Party objects in writing to the other Party's designation of information as Confidential Information within 30 days after the submission of that information, or if a party wishes to designate as Confidential Information a part of a document submitted by the other Party, the parties shall seek to reach agreement. Failing such agreement within 21 days, the Parties shall submit the documents to the Tribunal to decide on the designation.

9. Confidential Materials and Confidential Information may be disclosed to non-parties if and when necessary for the purposes of the arbitration. Any third party to whom it is necessary to disclose Confidential Materials and Confidential Information shall be required, prior to such disclosure, to give written undertakings to keep Confidential Materials and Confidential Information confidential and to comply with this Procedural Order No. [X]. Such undertakings are to be in the form set out in **Annex II** to Procedural Order No. 2.

10. The requirement to give such undertakings does not apply to:

    a. the Tribunal and the clerks and arbitration secretaries to the members of the Tribunal, and the Registry;

    b. The Parties and their affiliates and respective directors;

    c. The officers and employees and legal representatives of the parties and of the persons and entities referred to in subsection (b);and

    d. Court reporters or interpreters retained by the Registry in connection with any hearing in the present arbitrations.

11. Notwithstanding the foregoing, a party may disclose Confidential Materials and Confidential Information to the extent necessary to:

    a. prosecute or defend the arbitration or proceedings related to it (including enforcement or annulment proceedings), or to pursue a legal right;

    b. respond to a compulsory order or request for information of a governmental or regulatory body;

    c. make disclosure required by law or by the rules of a securities exchange; or

    d. seek legal, accounting or other professional services, or satisfy information requests of potential acquirers, investors or lenders, provided that in case of any disclosure allowed under the foregoing circumstances (a) through (d) where possible the producing party takes reasonable

measures to ensure that the recipient preserves the confidentiality of the information provided,

provided that the entity making the disclosure informs the other Parties of the proposed disclosure 7 days in advance of the proposed disclosure.

12. The Tribunal may permit further disclosure of Confidential Materials and Confidential Information where there is a demonstrated need to disclose that outweighs any party's legitimate interest in preserving confidentiality.

13. All hearings, meetings and conferences shall be held *in camera*, and the transcripts shall be kept confidential.

B. PUBLICATION OF INFORMATION ABOUT THE ARBITRATIONS [AND TRIBUNAL'S AWARDS AND DECISIONS]

1. Upon direction of the Tribunal, the PCA shall publish on its website the information modelled on that set out in **Annex III** to Procedural Order No. 2, after providing an advance draft to the Parties.

2. Upon direction of the Tribunal, the PCA shall publish a Press Release, modelled on that set out in **Annex IV** to Procedural Order No. 2, after providing an advance draft to the Parties.

3. The Tribunal shall from time to time direct the PCA to issue other Press Releases reporting on the nature and progress of the arbitration proceedings, taking into account the principles set out in Procedural Order No. [X], and after providing advance drafts to the Parties.

4. The PCA shall publish the Tribunal's awards, decisions, and orders on its website, subject to prior redaction pursuant to Section B.5 below. In addition, neither Party shall be precluded from publishing any of the Tribunal's awards, decisions and orders in the redacted form approved for publication on the PCA website.

5. Each Party shall identify within 21 days after receipt of any award, decision, or order from the Tribunal all redactions that the Party proposes to be made. To the extent that the other Party disagrees with any of the proposed redactions, the following procedure shall apply:

    a. The Party opposing the redaction may, within 14 days after being notified of the other Party's proposal, submit a reasoned application to the Tribunal for an order that the publication of the document be permitted without the redaction.

    b. Within 14 days after the making of any such application, the Party seeking the redaction may respond to the application.

    c. The Tribunal will thereafter make an order in relation to the proposed redaction. Pending any such order, the disputed portion may not be published.

    The Tribunal will remain constituted for the purpose of making any order under this Section in relation to its final award or other final decision.

6. Following the publication of the Tribunal's awards, decisions, and orders by the PCA, such documents shall no longer be considered Confidential Materials.

C. TRIBUNAL'S AUTHORITY

7. In accordance with the UNCITRAL Rules and the provisions of Procedural Order No. 2, the Tribunal retains full authority to determine all issues concerning confidentiality and transparency and the implementation of this Procedural Order No. [X], including the disclosure of any information about the arbitration, the content of the website or any press releases, and the publication of decisions and awards, as well as redactions thereto.

ANNEX II

MODEL CONFIDENTIALITY UNDERTAKING

PCA Case No. 2016-36

INDUSTRIALL GLOBAL UNION AND UNI GLOBAL UNION
v. [redacted]

AND

PCA Case No. 2016-37

INDUSTRIALL GLOBAL UNION AND UNI GLOBAL UNION
v. [redacted]

CONFIDENTIALITY UNDERTAKING

I, [name], [title], [affiliation], hereby undertake as follows.

1. I have read a copy of Procedural Order No. 2 and Procedural Order No. [X] (containing a protocol on confidentiality and transparency) in the above-mentioned arbitrations.

2. I have been informed that [name of parties] proposes to disclose Confidential Materials or Confidential Information (as defined in Procedural Order No. [X]) to me.

3. I will abide by all of the terms of Procedural Order No. [X] in respect of any Confidential Materials and Confidential Information disclosed to me, including the obligation not to disclose any such Confidential Materials or Confidential Information other than to persons permitted by Procedural Order No. [X] to have access to such Materials and Information and will utilize any Confidential Materials or Confidential Information solely for the purpose for which it is provided to me.

_____
Signed

_____
Print Name

_____
Date

ANNEX III

PROPOSED LANGUAGE FOR PCA WEBSITE ENTRY [www.pcacases.com]

Case Name	Bangladesh Accord Arbitrations
Case Description	The Permanent Court of Arbitration (PCA) is currently administering two arbitrations arising under the Accord on Fire and Building Safety in Bangladesh of 13 May 2013 (Accord). The Accord is an agreement between global brands and trade unions created in the aftermath of the Rana Plaza building collapse, to establish a fire and building safety programme for workers in the textile industry in Bangladesh. IndustriALL Global Union and UNI Global Union (Claimants) commenced arbitrations under the Accord and the UNCITRAL Rules of Arbitration 2010 on a global fashion brand (Respondent in PCA Case No. 2016-36) on 8 July 2016, and against another global fashion brand (Respondent in PCA Case No. 2016-37) on 11 October 2016.
Names of Claimants	IndustriALL Global Union UNI Global Union
Names of Respondents	Respondent in PCA Case No. 2016-36 Respondent in PCA Case No. 2016-37
Case Number	2016-36 2016-37
Administering Institution	Permanent Court of Arbitration (PCA)
Case Status	Pending
Type of Case	Contract-based or other arbitration
Subject Matter or Economic Sector	Manufacturing
Rules used in Arbitral Proceedings	UNCITRAL Arbitration Rules 2010
Treaty or contract under which proceedings were commenced	The Accord on Fire and Building Safety in Bangladesh of 13 May 2013
Language of Proceedings	English
Seat of Arbitration (by Country)	The Netherlands
Arbitrators	Mr Donald F. Donovan (Presiding Arbitrator) Mr Graham Dunning QC Professor Hans Petter Graver
Representatives of the Claimants	Ms Marney L. Cheek Ms Clovis Trevino Ms Erin Thomas COVINGTON & BURLING LLP Mr Albert Marsman DE BRAUW BLACKSTONE WESTBROEK N.V.

Date of Commencement of Proceedings	8 July 2016; 11 October 2016
Additional Notes	Under the instructions of the Tribunal, the PCA will issue press releases from time to time containing information on the procedural steps taken by the Tribunal. The identity of the Respondents and their representatives will be kept confidential. Following consultation with the Parties, the Tribunal has issued as Procedural Order No. [X] containing a protocol on confidentiality and transparency, which allows for publication of orders, decisions, and awards after redaction of certain confidential information.
Attachments	[e.g. redacted orders and decisions]

ANNEX IV

PROPOSED LANGUAGE FOR PCA PRESS RELEASE

PERMANENT COURT OF ARBITRATION

Peace Palace, Carnegieplein 2,
2517 KJ The Hague, The Netherlands

Telephone : +31 70 302 4165
Facsimile : +31 70 302 4167
E-mail : bureau@pca-cpa.org
Website : www.pca-cpa.org

COUR PERMANENTE D'ARBITRAGE

Palais de la Paix, Carnegieplein 2,
2517 KJ La Haye, Pays-Bas

Téléphone : +31 70 302 4165
Télécopie : +31 70 302 4167
Courriel : bureau@pca-cpa.org
Site Internet : www.pca-cpa.org

PCA PRESS RELEASE

ARBITRATIONS UNDER THE ACCORD ON FIRE AND BUILDING SAFETY IN BANGLADESH BETWEEN INDUSTRIALL GLOBAL UNION AND UNI GLOBAL UNION (AS CLAIMANTS) AND TWO GLOBAL FASHION BRANDS (AS RESPONDENTS)

THE HAGUE, [DATE] 2017

The Tribunal Issues Decision on Admissibility of Claims and Confidentiality

The Permanent Court of Arbitration ("PCA") is administering two arbitration proceedings under the Accord on Fire and Building Safety in Bangladesh of 13 May 2013 ("Accord"). On 4 September 2017, the Tribunal constituted in the two arbitrations issued a second Procedural Order, finding the claims to be admissible and issuing directions to the parties on confidentiality and transparency.

Background

The Accord is an agreement between global brands and retailers and trade unions created in the aftermath of the Rana Plaza building collapse, to establish a fire and building safety programme for workers in the textile industry in Bangladesh. Article 5 of the Accord provides for arbitration of disputes.

The Claimants in the arbitrations are IndustriALL Global Union and UNI Global Union, two non-governmental labor organizations based in Switzerland that signed the Accord on 15 May 2013. They are represented in these arbitrations by Covington & Burling LLP. The two Respondents are global fashion brands that have signed the Accord. The Claimants commenced arbitration against the first Respondent on 8 July 2016, and the second Respondent on 11 October 2016.

The Parties agreed that the 2010 UNCITRAL Arbitration Rules shall apply to the two arbitrations, that the legal seat of the arbitrations shall be The Hague, that the Secretary-General of the PCA shall serve as appointing authority, and that the PCA shall serve as Registry.

The Tribunal, composed of Professor Hans Petter Graver, Mr Graham Dunning QC, and Mr Donald Francis Donovan (presiding), was formally constituted on 3 February 2017.

The Tribunal and Registry held a preliminary procedural meeting with the Parties in London in March 2017, during which they signed Terms of Appointment and discussed preliminary procedural issues. The

Tribunal issued its first Procedural Order on 19 April 2017. [Redacted versions of the Terms of Appointment and Procedural Order No. 1 are available on the PCA's website at <xxx>].

Decision on Preliminary Issues

On 4 September 2017, having considered submissions of the Parties, the Tribunal decided that the pre-conditions to arbitration under Article 5 of the Accord had been met. Accordingly, the claims were held to be admissible and within the Tribunal's jurisdiction. The arbitrations will now proceed to a merits phase, with hearings scheduled for the first half of 2018.

The Tribunal also issued directions on confidentiality and transparency. As the Parties have agreed to apply the 2010 UNCITRAL Rules to the present proceedings, hearings are to be held in private and any award of the Tribunal can only be made public with the consent of the Parties. The Tribunal has taken note of the interest in the Accord of the public and numerous signatories and other stakeholders (including companies, supplier factories, unions representing millions of workers, governments, international organizations, and non-governmental organizations). At the same time, the Tribunal has taken into account that the Accord itself acknowledges the need to protect the business information and reputational interests of the brand companies, as confirmed by provisions of the Accord and the practice under it of publicizing information about supplier factories while keeping confidential any information that links to particular brands. Accordingly, to strike a balance between the competing interests, the Tribunal has ordered that certain basic information about the case may be made public, and, pursuant to a Protocol, issued as Procedural Order No. [X], developed in consultation with the Parties, certain documents may be disclosed following a redaction process. The Tribunal has directed that the identity of the Respondents be kept confidential.

[A redacted version of the Tribunal's decision on preliminary issues is available at the PCA's website at <xxx>].

Further Information

Under the instructions of the Tribunal, the PCA will issue press releases from time to time containing information on the procedural steps taken by the Tribunal. Basic information about the proceedings is available on the PCA Case Repository http://www.pcacases.com. Information about the Accord, including as to factory remediation rates, is available at www.bangladeshaccord.org.

Contact: Permanent Court of Arbitration
E-mail: bureau@pca-cpa.org