

The Bangladesh Accord Arbitrations: Arbitrating Business and Human Rights Disputes

Judith Levine & Ashwita Ambast*

1. Introduction

Pursuant to Pillar 3 of the United Nations Guiding Principles on Business and Human Rights, states and businesses must provide effective access to judicial and non-judicial remedies for victims of business and human rights abuses. The absence of effective recourse for victims of business and human rights abuses has been described as a ‘governance gap’.¹ Several stakeholders and commentators, including the Working Group on International Arbitration of Business and Human Rights (the ‘Working Group’), have proposed the use of international arbitration for the resolution of disputes involving business and human rights.² Arguably, international arbitration offers a neutral forum, freedom for parties to select their own decision-makers with relevant expertise, and flexibility for parties and tribunals to tailor the procedure to suit the needs of the particular dispute.³ Importantly, in contrast with non-binding methods of dispute

* Judith Levine is an independent international arbitrator based in Sydney, and former Senior Legal Counsel at the Permanent Court of Arbitration in The Hague. Ashwita Ambast is Legal Counsel at the Permanent Court of Arbitration and Co-Registrar of the Mauritius International Arbitration Centre. An earlier version of this case note article was presented in the ‘Development Finance in Emerging Markets: Challenges, Innovations and Results’ Conference of the QMUL – UNIDROIT Institute of Transnational Commercial Law in partnership with the Oxford Commercial Law Centre (13-15 April 2018; Oxford, Blavatnik School of Government). The views in this case note are personal to the authors.

¹ Claes Cronstedt & Robert C Thompson, ‘A Proposal for an International Arbitration Tribunal on Business and Human Rights’ (2016) 57 *Harvard International Law Journal* 66 <http://www.harvardilj.org/2016/07/a-proposal-for-an-international-arbitration-tribunal-on-business-and-human-rights/#_ftn5> accessed 28 August 2018.

² Claes Cronstedt, Jan Eijsbouts, Adrienne Margolis, Steven Ratner, Martijn Scheltema and Robert C Thompson, ‘International Arbitration of Business and Human Rights Disputes, Questions and Answers’ (17 August 2017) <<http://www.l4bb.org/news/Q&A.pdf>> accessed 8 May 2020, 1-2.

³ Catherine Dunmore, ‘International Arbitration of Business and Human Rights Disputes: Part 2 – Advantages and Challenges’ (*Doing Business Right Blog*, 13 December 2017) <<http://www.asser.nl/DoingBusinessRight/Blog/post/international-arbitration-of-business-and-human-rights-disputes-part-2-advantages-and-challenges-by-catherine-dunmore>> accessed 8 May 2020; Cronstedt (n 2) 4; Claes Cronstedt, Jan Eijsbouts, Adrienne Margolis, Steven Ratner, Martijn Scheltema,

resolution, arbitration results in a binding award that in many cases may be enforced by domestic courts pursuant to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards,⁴ other conventions,⁵ or national law.⁶

On 24 April 2013, Rana Plaza, a garments factory in Dhaka, collapsed. Over 1,100 people were killed and over 3,000 were injured.⁷ The incident led to immediate negotiations amongst stakeholders in the ready-made garment ('RMG') industry, including worker unions, NGOs, fashion brands, the international labor organization ('ILO') and the government of Bangladesh, to put in place a system for monitoring, reporting and remedying future safety issues. This led to the signing of the Accord on Fire and Building Safety in Bangladesh, an 'independent, legally binding agreement between global brands and retailers and trade unions' on 15 May 2013 (the 'Accord').⁸ The Accord, which since attracted signatures of domestic and global trade unions and

Robert C Thompson, 'International Arbitration of Business and Human Rights: A Step Forward' (*Kluwer Arbitration Blog*, 16 November 2017)

<<http://arbitrationblog.kluwerarbitration.com/2017/11/16/international-arbitration-business-human-rights-step-forward/>> accessed 29 August 2018.

⁴ Convention on the Recognition and Enforcement of Foreign Arbitral Awards 330 UNTS 38; 21 UST 2517; 7 ILM 1046 (1968). Further information about the convention is available at <<http://www.newyorkconvention.org/>> accessed 21 November 2018. Commentary on this convention and its application by national courts is available at: 'UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards' (September 2016) http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/2016_Guide_on_the_Convention.pdf accessed 21 November 2018; H Kronke et al. (eds), *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (Kluwer 2010); GA Bermann (ed) *Recognition and Enforcement of Foreign Arbitral Awards: The Interpretation and Application of the New York Convention by National Courts* (Springer 2017).

⁵ For example, the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, March 18 1965, 4 ILM 524.

⁶ Dunmore (n 3).

⁷ Ashley Westerman, '4 Years After Rana Plaza Tragedy, What's Changed For Bangladeshi Garment Workers?' (*NPR*, 30 May 2017) <<https://www.npr.org/sections/parallels/2017/04/30/525858799/4-years-after-rana-plaza-tragedy-whats-changed-for-bangladeshi-garment-workers?t=1535463700982>> accessed 28 August 2018; Michael Safi, Dominic Rushe, 'Rana Plaza, five years on: safety of workers hangs in balance in Bangladesh', (*The Guardian*, 24 April 2018) <<https://www.theguardian.com/global-development/2018/apr/24/bangladeshi-police-target-garment-workers-union-rana-plaza-five-years-on>> accessed 28 August 2018.

⁸ 'Accord on Fire and Building Safety in Bangladesh' (13 May 2013) <<https://bangladesh.wpengine.com/wp-content/uploads/2018/08/2013-Accord.pdf>> accessed 8 May 2020; 'About the Accord on Fire and Building Safety in Bangladesh' <<http://bangladeshaccord.org/about/>> accessed December 2018; Steven Greenhouse, 'Major Retailers Join Bangladesh Safety Plan', (*The New York Times*, 13 May 2013) <https://www.nytimes.com/2013/05/14/business/global/hm-agrees-to-bangladesh-safety-plan.html?_r=0> accessed 28 August 2018.

over 200 fashion companies from over 20 countries, aims to make the RMG industry in Bangladesh safe and sustainable and helps close the ‘governance gap’.

This article is a study of the first publicly known arbitrations that were brought pursuant to that Accord (the ‘Accord Arbitrations’) and which were administered by the Permanent Court of Arbitration (‘PCA’) and concluded in amicable settlements in July 2018. Specifically, it examines how the Parties and the Tribunal tackled the following three procedural hurdles during the arbitration proceedings: the silence of the arbitration clause on certain key issues, the degree of transparency and confidentiality applicable to the arbitrations, and the establishment of an efficient procedure to address mass claims.⁹ The approach taken to these issues provides important lessons for future business and human rights arbitrations.

2. The Accord and the Arbitrations¹⁰

Signatories to the Accord commit to the ‘goal of a safe and sustainable’ RMG industry in Bangladesh, ‘in which no worker needs to fear fires, building collapses, or other accidents that could be prevented with reasonable health and safety measures.’¹¹ To this end, the Accord requires global brands that have signed the Accord to designate all suppliers producing products for them in Bangladesh as being of a specific ‘tier’, and to require each tier of supplier factories to accept a certain degree of inspection and any

⁹ There is an abundance of existing literature on these three procedural points. On the subject of defective or incomplete arbitration clauses, see for example Clive M. Schmitthoff, ‘Defective Arbitration Clauses’ [1975] *Journal of Business Law* 9; G Born, *International Commercial Arbitration* (Kluwer, 2014) 770 onwards; Blackaby, Partasides, Redfern, et al. *Redfern and Hunter on International Arbitration* (6th edn, OUP 2015) 135. On balancing transparency and confidentiality in international commercial arbitration, see for example, A Malatesta, R Sali (eds), *The Rise of Transparency in International Arbitration* (JurisNet 2013); CA Rogers, ‘Transparency in International Commercial Arbitration’ (2006) 54(5) *University of Kansas Law Review* 1301. On the topic of efficiency in international arbitration more generally, see J Waincymer, ‘Promoting Fairness and Efficiency of Procedures in International Commercial Arbitration - Identifying Uniform Model Norms’ (2010) 3(1) *Contemporary Asia Arbitration Journal* 25; J Risse, ‘Ten Drastic Proposals for Saving Time and Costs in Arbitral Proceedings’, (2013) 29(3) *Arbitration International* 453; C Florescu, ‘The Arbitration Agreement and Arbitrability, Towards Achieving Efficiency in International Arbitration’ in Klausegger, Klein, Kremslehner (eds), *Austrian Yearbook on International Arbitration* (2015). We do not seek to critically engage with the literature concerning these issues, but to outline important lessons that may be drawn from the first publicly known arbitrations brought pursuant to the Accord.

¹⁰ For a discussion, see Procedural Order No. 2 (4 September 2017) <<https://pcacases.com/web/sendAttach/2234>> accessed 8 May 2020 [4-16].

¹¹ Accord (n 8) preamble.

attendant remediation measures. Signatory brands must require Tier I factories (which represent not less than 30 per cent of each signatory brand's annual production in Bangladesh by volume), to accept '[s]afety inspections, remediation and fire safety training'.¹² Tier II factories (major or long-term suppliers to each signatory brand, which together with the Tier I factories shall represent not less than 65 per cent of each signatory company's production in Bangladesh by volume) must be required by the signatory brands to accept '[i]nspection and remediation'.¹³ Tier III factories (facilities with occasional orders, one-time orders, or orders from which factories represent less than 10 per cent of the signatory company's production) must be required by the signatory brands to accept '[I]imited initial inspections to identify high risks'.¹⁴ The types of structural risks that have been identified in the inspection reports include: critically high stress on the columns of the factory building, the lack of bracing on the roofs of factories, cracking in the structures supporting the floor, and corrosion in columns supporting the factory.¹⁵

Under the Accord a steering committee, appointed by the signatory brands and the unions and chaired by a representative of the ILO (the 'Steering Committee'), shall select a Safety Inspector. The role of the Safety Inspector is to direct '[t]horough and credible safety inspections' by skilled personnel of the designated Tier I, II, and III factories.¹⁶ Further, the Safety Inspector is responsible for ensuring that each factory designated under the Accord has undergone an initial inspection within the first two years of the term of the Accord.¹⁷ The Safety Inspector also contributes to capacity building within the Ministry of Labour and Employment of Bangladesh regarding inspections and to the national action plan on fire safety.¹⁸

¹² Accord (n 8) 'Scope'.

¹³ Accord (n 8) 'Scope'.

¹⁴ Accord (n 8) 'Scope'.

¹⁵ See Richard Hill and John Collins, 'Structural Inspection Report' (29 June 2014) <<http://bangladeshaccord.org/wp-content/uploads/Structural-Report-Four-Wings-Tunic-Fashion.pdf>> accessed 31 October 2018; Adrian Ryan and Brian Twohig, 'Client Summary Report' (24 March 2014) <http://bangladeshaccord.org/wp-content/uploads/190312_Mens-Apparel-Day-Apparels-Day-Fashion.pdf> accessed 31 October 2018.

¹⁶ Accord (n 8) Articles 4, 9.

¹⁷ Accord (n 8) Article 9.

¹⁸ Accord (n 8) Article 9.

Article 12 of the Accord directs signatory brands to require their designated factories to implement corrective measures identified by the Safety Inspector that are required to ‘bring a factory into compliance with building, fire and electrical safety standards’.¹⁹ Pursuant to Article 22 of the Accord, signatory brands are under an obligation to ensure that the commercial terms they negotiate with their suppliers are financially feasible for the factories to maintain safe workplaces and comply with upgrade and remediation requirements instituted by the Safety Inspector.²⁰ The Steering Committee also appoints a Training Coordinator, who ‘shall establish an extensive fire and building safety training program’ to be delivered by skilled personnel.²¹

The Steering Committee makes available to the public the list of supplier factories in Bangladesh, inspection reports developed by the Safety Inspector for all factories and reports of factories that are not acting expeditiously to implement recommendations, and periodic reports that present industry data, review of findings, recommendations and report progress on remediation.²²

Under Article 5 of the Accord, the Steering Committee is empowered to decide any dispute between the Parties to the Accord. The Steering Committee’s decision may be appealed to an arbitral tribunal.²³ The Steering Committee elaborated on the procedure for dispute resolution in its governance regulation of 24 September 2013 (‘Governance Regulation’)²⁴ and its decision of 10 April 2014 on a dispute resolution process (the ‘Dispute Resolution Process’).²⁵

On 8 July 2016 and 11 October 2016, IndustriALL Global Union and UNI Global Union (the ‘Claimants’), two non-governmental labour union federations based in Switzerland, submitted notices of arbitration against two global fashion brands (the

¹⁹ Accord (n 8) Article 12.

²⁰ Accord (n 8) Article 22.

²¹ Accord (n 8) Article 16.

²² Accord (n 8) Article 19.

²³ Accord (n 8) Article 5.

²⁴ ‘Accord Regulations (adopted 24th September 2013) – Amended at SC meeting 10th July 2014’ <<http://bangladeshaccord.org/2014/07/accord-regulations-adopted-24th-september-2013-amended-sc-meeting-10th-july-2014/>> accessed 30 August 2018.

²⁵ ‘Dispute Resolution Process as agreed by the Steering Committee on 10th April 2014’ <<http://bangladeshaccord.org/2014/04/dispute-resolution-process-agreed-steering-committee-10th-april-2014/>> accessed 30 August 2018.

‘Respondents’, and with the Claimants, the ‘Parties’). The Claimants alleged that the Respondent fashion brands had failed to require their supplier factories in Bangladesh to remediate the factory facilities within the deadlines set out in the corrective actions plans under Article 12 of the Accord. The Claimants further alleged that the Respondents had failed to negotiate commercial terms with the supplier factories to make it feasible for the supplier factories to cover the factory remediation costs, as required under Article 22 of the Accord.²⁶

In December 2016, the Parties agreed that the two arbitrations, while remaining formally distinct, would be heard by the same three-member tribunal (the ‘Tribunal’).²⁷ They jointly approached the PCA to serve as registry and for its Secretary-General to finalise composition of the Tribunal. The Parties participated in arbitration proceedings before the Tribunal for several months, during the course of which the Tribunal, *inter alia*, determined that it had jurisdiction over the disputes and issued orders on document production and the structure of proceedings.²⁸

On 18 January 2018 and 26 June 2018, the parties to PCA Case No. 2016-36 and 2016-37, respectively, informed the Tribunal and the PCA that they had agreed to suspend the arbitration as they had entered into settlement agreements in each of the arbitrations.²⁹ On 17 July 2018, the preconditions to settlement having been met, the two

²⁶ PCA Case No. 2016-36: IndustriALL Global Union and UNI Global Union (Claimants) v. Respondent (Global fashion brand); PCA Case No. 2016-37: IndustriALL Global Union and UNI Global Union (Claimants) v. Respondent (Global fashion brand). See Bangladesh Accord Arbitrations, Case Number 2016-36; 2016-37 <<https://www.pcacases.com/web/view/152>> (accessed 8 May 2020); Permanent Court of Arbitration, Press Release: The Tribunal Issues Decision on Admissibility of Claims and Confidentiality, 16 October 2017 <<https://www.pcacases.com/web/sendAttach/2238>> accessed 29 August 2018; Procedural Order No. 2 (n 10) [19].

²⁷ Terms of Appointment in PCA Case No. 2016-36 (17 March 2017) <<https://pcacases.com/web/sendAttach/2236>> accessed 8 May 2020 [2.5]; Terms of Appointment in PCA Case No. 2016-37 (17 March 2017) <<https://pcacases.com/web/sendAttach/2237>> accessed 8 May 2020 [2.5]; Procedural Order No. 1 (19 April 2019) <<https://pcacases.com/web/sendAttach/2235>> accessed 8 May 2020 [1.1].

²⁸ Procedural Order No. 2 (n 10) [104A].

²⁹ Termination Order in PCA Case No. 2016-36 (n 27) [32]; Termination Order in PCA Case No. 2016-37 (n 27) [32]; ‘Settlement reached with global fashion brand in Bangladesh Accord arbitration’ (15 December 2017) <<http://www.industriall-union.org/settlement-reached-with-global-fashion-brand-in-bangladesh-accord-arbitration#.WjPEYxxuB94.twitter>> accessed 29 August 2018.

Accord Arbitrations were terminated by orders of the Tribunal in terms agreed by the Parties.³⁰

3. The Arbitration Agreement

The Accord Arbitrations were brought pursuant to Article 5 of the Accord, which states in the relevant part that:

‘Upon request of either party, the decision of the [Steering Committee] 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).’

Article 5 poses certain procedural obstacles. For example, Article 5 is silent on the method of appointment of arbitrators. The Parties in the Accord Arbitrations, having nominated one arbitrator each to the three-member tribunal, were unable to agree on the appointment of a presiding arbitrator. In case of a deadlock, the presiding arbitrator may be appointed by an appointing authority. However, Article 5 does not name such an appointing authority. When parties have failed to elect an appointing authority in their arbitration agreement, a default appointing authority or institution that may designate an appointing authority, may be found in the applicable procedural rules. Article 5 states that the arbitration shall be governed by the UNCITRAL Model Law on International

³⁰ PCA Case No. 2016-36, Termination Order, Redacted Version for Publication (17 July 2018) <<https://www.pccases.com/web/sendAttach/2438>> accessed 29 August 2018; PCA Case No. 2016-37, Termination Order, Redacted Version for Publication (17 July 2018) <<https://www.pccases.com/web/sendAttach/2439>> accessed 29 August 2018.

Commercial Arbitration 1985 (with amendments as adopted in 2006).³¹ However, the UNCITRAL Model Law is not helpful in prescribing an appointing authority as it was not designed to function by itself as a set of arbitration rules.³² Rather, the objective of the UNCITRAL Model Law is to assist states in ‘reforming and modernizing their laws in arbitral procedure’.³³

The Claimants had pointed to guidance regarding applicable procedural rules from outside the Article 5 arbitration agreement. The Governance Regulation states:

‘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.’ (emphasis added by the authors)

Further, the Dispute Resolution Process states:

‘9. If a Party is unsatisfied with the decision of the Steering Committee [...] 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)*. [...]’ (emphasis added by the authors)

³¹ Accord (n 8) Article 5.

³² The Model Law leaves the choice of an appointing authority for states to decide when they adapt the Model Law to their own needs as domestic legislation. See Roger Alford, ‘Arbitrating Bangladesh Labor Rights (Part II)’ (*Kluwer Arbitration Blog* 15 May 2015) <http://arbitrationblog.kluwerarbitration.com/2013/05/15/arbitrating-bangladesh-labor-rights-part-ii/?_ga=2.96463198.356402140.1534773086-714281129.1519339922> accessed 29 August 2018.

³³ UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006 <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html> accessed 29 August 2018.

However, it is not evident that a tribunal can rely on the Governance Regulations and/or the Dispute Resolution Process to fill the gaps in the Article 5 arbitration agreement. Indeed, the Respondents argued that the Tribunal should not rely on the Governance Regulations or the Dispute Resolution Process because they are ‘different from (and incompatible with) the process described in Article 5 of the Accord’. The Respondents argued that the Governance Regulations and Dispute Resolution Process cannot be seen as an independent arbitration agreement that modifies the effect of Article 5 of the Accord.³⁴

The procedural hurdle imposed by the absence of an appointing authority and the gaps in the procedural rules prescribed by the arbitration agreement was resolved by the Parties to the Accord Arbitrations stipulating that the 2010 UNCITRAL Arbitration Rules (rather than the UNCITRAL Model Law) applied to the arbitrations.³⁵ The Parties then jointly requested the PCA Secretary-General to act as appointing authority in accordance with an agreed list procedure.³⁶ In these circumstances, any difficulties raised by the drafting of the arbitration clause in the 2013 Accord were side-stepped by party agreement.

Article 5 is also silent on other key issues, including the seat of the arbitration, the law applicable to the interpretation of the Accord, and the administering arbitral institution.³⁷ These gaps were also resolved, to a certain extent, by the Parties’ agreement. The Parties in their initial correspondence and at the initial procedural conference in London held in March 2017, agreed that the seat of the arbitration would be The Hague.³⁸ The Parties further agreed that the dispute would be administered the PCA.³⁹ The Parties were unable to agree on the law applicable to the dispute, with the

³⁴ Procedural Order No. 2 (n 10) [39].

³⁵ Interestingly, since this time, the Drafting Team has noted that the UNCITRAL Rules ‘would be an apt model from which to work [...]’, see ‘Business and Human Rights Arbitration Project Report’ (2018) <<https://www.cilc.nl/cms/wp-content/uploads/2018/03/BHR-Arbitration-Report-Drafting-Team-Meeting-25-26-January-2018.pdf>> accessed 29 August 2018; Procedural Order No. 2 (n 2) [23] [27] [28].

³⁶ Termination Order in PCA Case No. 2016-36 (n 30) [9]; Termination Order in PCA Case No. 2016-37 (n 30) [9].

³⁷ The Governance Regulation states that ‘These regulations and any dispute arising out of or in connection with such regulations shall be governed and construed in accordance with Dutch law’.

³⁸ Procedural Order No. 2 (n 10) [28].

³⁹ Terms of Appointment in PCA Case No. 2016-36 (n 27) [8.1]; Terms of Appointment in PCA Case No.

Respondents submitting that the Accord is governed by Bangladeshi law and the Claimants submitting it is governed by Dutch law.⁴⁰ The Accord Arbitrations were terminated before the Tribunal was required to decide this issue.

It follows from the above discussion that parties to commercial contracts and agreements with a business and human rights element should ensure that the following matters are specified in the arbitration clause at the time that the contract is concluded: (i) the law applicable to the dispute; (ii) the seat of the arbitration; (iii) a trusted appointing authority;⁴¹ and (iv) administrative support from experienced arbitral institutions. The Parties to the Accord Arbitrations resolved several of these points by agreement, absolving the Tribunal or the Secretary-General of the PCA in his capacity of appointing authority, of the need to determine questions of validity and effectiveness of the arbitration clause. However, in other cases, leaving parties to decide on the parameters of the arbitration in a contentious environment, after the dispute has arisen, may pose obstacles leading to significant delays in the arbitration proceedings.

Several of the gaps in Article 5 of the Accord have been expressly addressed in the 2018 version of the Accord, whose dispute resolution clause provides in the relevant part that:

‘Upon request of either party, the decision of the [Steering Committee] 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

2016-37 (n 27) [8.1]; Procedural Order No. 1 (n 27) [1.1]; Procedural Order No. 2 (n 10) [29]; <<https://pcacases.com/web/sendAttach/2238>> accessed 29 August 2018.

⁴⁰ Procedural Order No. 2 (n 10) [38] [65]. The Tribunal noted that for purposes of the preliminary issues then before it, the outcome would be the same whether Bangladeshi or Dutch law were applied (Procedural Order No. 2 (n 10) [65] [91].

⁴¹ The satisfactory resolution of business and human rights disputes depends on the tribunal being comprised of competent arbitrators with sufficient experience in the areas of law raised by the dispute, for example commercial law, human rights law, and international law. There have been discussions about the establishment of a panel of arbitrators who have expertise in business and human rights, from which parties may make a selection. See Cronstedt et.al (n 3).

allocation of costs relating to any arbitration and the process for selection of the Arbitrator, shall be governed by *the UNCITRAL Arbitration Rules (as in its last revision)* unless otherwise agreed by the parties. The arbitration shall be seated in *The Hague* and *administered by the Permanent Court of Arbitration.*⁴² (emphasis added)

This new dispute resolution clause thus refers to the 2010 UNCITRAL Arbitration Rules, specifies a seat of arbitration, and states that the arbitration shall be administered by the PCA.⁴³ The 2018 Accord also specifies that the ‘Accord shall be governed by the law of the Netherlands.’⁴⁴

Parties to contracts that allow for the arbitration of business and human rights disputes may also consider incorporating mechanisms to manage the costs of the arbitration, in the arbitration clause or in the terms of appointment. For example, the Parties to the Accord Arbitrations, in the Terms of Appointment, agreed to the use of a tribunal secretary to perform tasks on behalf of the tribunal, ‘the primary purpose of which shall be to reduce the overall costs that would otherwise be incurred by the Tribunal itself carrying out such tasks’ and also agreed to discounted hourly rates for the Tribunal members and the PCA.⁴⁵

4. Transparency and confidentiality

Article 28(3) of the 2010 UNCITRAL Arbitration Rules states that unless the parties agree otherwise, a hearing shall not be public. Article 34(5) of the 2010 UNCITRAL Arbitration Rules states that an award may only be made public with the consent of the Parties.⁴⁶ The 2010 UNCITRAL Arbitration Rules do not provide any

⁴² The 2018 version of the Accord can be accessed here: <<http://bangladeshaccord.org/wp-content/uploads/2018-Accord-full-text.pdf>> accessed 30 August 2018. Under this accord, the signatories agree to ‘continue a fire and building safety program in Bangladesh until midnight of May 31, 2021’.

⁴³ The PCA has extensive experience in the administration of disputes involving at least one State, State-controlled entity, or intergovernmental organization. During 2017, the PCA administered 160 cases. <<https://pca-cpa.org/wp-content/uploads/sites/175/2018/03/Online-PCA-Annual-Report-2017-07.03.2018.pdf>> accessed 30 August 2018.

⁴⁴ 2018 Accord (n 42) Article 24.

⁴⁵ Terms of Appointment in PCA Case No. 2016-36 (n 27) [8.1.4]; Terms of Appointment in PCA Case No. 2016-37 (n 27) [8.1.4].

⁴⁶ See Procedural Order No. 1, (n 27) Section 15.

further guidance on the level of confidentiality or transparency to be accorded to arbitrations.

In the absence of specific directions in the 2010 UNCITRAL Arbitration Rules, the Parties took different views, given the background to and purpose of the Accord, on what information about the arbitrations could be made publicly available.⁴⁷

The Claimants argued in favour of a ‘full transparency’ approach, entailing publication on the PCA’s website of the existence of the disputes, the names of the parties to the arbitration, the names of the counsel representing the Parties, the names of the members of the Tribunal, documents related to the case (including pleadings, procedural orders, and transcripts), and all interim, partial, or final awards, subject only to necessary safeguards for the protection of confidential business information.⁴⁸ The Claimants highlighted the public interest involved in this arbitration, particularly to the multitude of Accord stakeholders.⁴⁹ Relying on the Governance Regulations and the minutes of the Steering Committee, the Claimants argued that the quasi-public nature of the Accord envisaged making compliance related matters (barring confidential workers’ complaints and business information) accessible to all interested stakeholders.⁵⁰ As a compromise, the Claimants suggested that basic information about the arbitrations be published on the

⁴⁷ Procedural Order No. 2 (n 10) [3].

⁴⁸ Procedural Order No. 2 (n 10) [82].

⁴⁹ Procedural Order No. 2 (n 10) [83]. Whether a dispute engages the public interest has affected the applicable confidentiality regime. It is worth noting that the rules of procedure in inter-state proceedings (which usually involve issues affecting the public interest) allow for a degree of transparency in the proceedings. See eg Section VI, Rules of Procedure, The Enrica Lexie Incident (*Italy v. India*) PCA Case No. 2015-28; Article 15, Rules of Procedure, Bay of Bengal Maritime Boundary Arbitration between Bangladesh and India (*Bangladesh v. India*) PCA Case No. 2010-16; Article 16, Rules of Procedure, The South China Sea Arbitration (*The Republic of Philippines v. The People’s Republic of China*) PCA Case No. 2013-19. See also, discussion on transparency in Judith Levine and Nicola Peart, ‘Procedural issues and innovations in environment-related investor-state disputes’ in Kate Miles (ed), *Research Handbook on Environment and Investment Law* (Edward Elgar, 2018); Business and Human Rights Arbitration Project Report (2018) <<https://www.cilc.nl/cms/wp-content/uploads/2018/03/BHR-Arbitration-Report-Drafting-Team-Meeting-25-26-January-2018.pdf>> accessed 29 August 2018. Additionally, the call for greater transparency in investor-state arbitration by states in multilateral discussions is in part based on providing ‘a meaningful opportunity for public participation in the proceedings possibly enhancing the public understanding of the process’ <<http://undocs.org/A/CN.9/WG.III/WP.142>> accessed 31 October 2018. See also UNCTAD, Transparency in IIS: A Sequel, UNCTAD Series on Issues in International Investment Agreements (2012) 37 (where it is proposed that the commercial arbitration model of full confidentiality is not applicable to investment arbitration given the ‘public-private’ dimensions of investment arbitration). <https://unctad.org/en/PublicationsLibrary/unctaddiacia2011d6_en.pdf> accessed 31 October 2018.

⁵⁰ Procedural Order No. 2 (n 10) [83].

PCA's website, while documents related to the case such as pleadings, transcripts, and procedural orders, be made available only to the Steering Committee, non-disputing Accord witnesses and signatories, and unions.⁵¹

By contrast, the Respondents argued in favour of a 'full confidentiality' approach, preserving the confidentiality of the existence of the arbitration, all submissions, hearings, orders, and awards.⁵² The Respondents argued that confidentiality was 'standard practice in international commercial arbitration' and was also to be implied as a duty under Bangladeshi and Dutch law.⁵³ They refused the publication of any information that might disclose the names of the Respondents, factories, or individuals involved in the arbitrations.⁵⁴ The Respondents noted that the Accord itself only publishes information about the remediation of supplier factories and states that the information linking companies to factories must remain confidential.⁵⁵ The Respondents further argued that making the identities of the Respondents known would be inconsistent with the Governance Regulations and the November 2013 public disclosure guidelines of the Steering Committee, which only provide information to workers about the safety of workplaces but keep the performance of specific companies confidential.⁵⁶ The Respondents pointed to the irreparable reputational damage that the 'mere disclosure of the existence of the arbitrations' might bring to the Respondents (who at all times 'strongly denied the allegations that [they] had failed to meet [their] obligations under the Accord')⁵⁷ and contended that no prejudice would be suffered by the Claimants or by other Accord stakeholders by maintaining the confidentiality of the arbitrations.⁵⁸ The Respondents were agreeable to the publication of a redacted award upon the conclusion of the Accord Arbitrations, which would provide the public access to the legal interpretation of the Accord.⁵⁹

⁵¹ Procedural Order No. 2 (n 10) [88].

⁵² Procedural Order No. 2 (n 10) [72].

⁵³ Procedural Order No. 2 (n 10) [77].

⁵⁴ Procedural Order No. 2 (n 10) [81].

⁵⁵ Accord (n 8) Articles 11, 19.

⁵⁶ Procedural Order No. 2 (n 10) [75].

⁵⁷ See for example, reference to pleadings at Procedural Order No. 2 (n 10) [22].

⁵⁸ Procedural Order No. 2 (n 10) [76].

⁵⁹ Procedural Order No. 2 (n 10) [79].

The Tribunal noted that the drafting history of the 2010 UNCITRAL Arbitration Rules, as well as sources in Dutch and Bangladeshi law, suggest that confidentiality must be assessed on a case-by-case basis.⁶⁰ The Tribunal determined that no general trend or practice regarding confidentiality in commercial or investor-state arbitrations could substitute the Tribunal's own assessment of 'the correct balance to be struck in light of the parties, their dispute, and the underlying arbitration agreement'.⁶¹ Recognising the unique nature of the dispute that could not be characterised as a purely public law dispute, a traditional commercial arbitration or a typical labour dispute, and in light of the 'genuine public interest in the Accord',⁶² the Tribunal held that it was '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 [...] which point to an obligation to protect certain information about the participating brand companies'.⁶³ The Tribunal considered that the Accord and the Governance Regulations provided for the publication of information about supplier factories and Steering Committee meeting minutes, but kept confidential the identity of the brands.⁶⁴ Accordingly, the Tribunal held that '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

⁶⁰ Procedural Order No. 2 (n 10) [90] [91]. The Tribunal refers to David D Caron and Lee M Caplan, *The UNCITRAL Arbitration Rules: A Commentary* (2nd ed, 2013) 39, footnote 131 citing UNCITRAL 40th Session, UN Doc A/Cn.9/614 (wherein it is indicated at [85] that the Working Group noted that 'the scope of confidentiality needed could depend on the subject matter of the dispute and the applicable regulatory regimes' and at [86] that '[t]he opinion that a general confidentiality provision should not be included was expressed by many delegations. It was also suggested that the matter should be left to be addressed on a case-by-case basis by the arbitrators and the parties.'). The Tribunal also refers to Thomas H Webster, *Handbook of UNCITRAL Arbitration* 264 (2010).

⁶¹ Procedural Order No. 2 (n 10) [92].

⁶² Procedural Order No. 2 (n 10) [93-94]. The Tribunal noted 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); (d) the number of workers in the [RMG] industry protected by the Accord (over 2 million); (e) the involvement of international organizations in the negotiation and governance of the Accord (including the ILO); (f) the involvement of States and State entities in the negotiation and oversight of the Accord (including the government of Bangladesh); (g) the involvement of Bangladeshi and international non-governmental organizations as witnesses to the Accord and in an advisory capacity; and (h) the public nature of the Accord itself and many associated documents, as well as detailed information about factory remediation under the Accord' (Procedural Order No. 2 (n 10) [93]).

⁶³ Procedural Order No. 2 (n 10) [94].

⁶⁴ Procedural Order No. 2 (n 10) [95-96].

confidential the identity of the Parties'.⁶⁵ The Tribunal proposed to the Parties a model Protocol on Confidentiality and Transparency, which envisaged the publication of the Tribunal's orders, decisions, and awards, but with redactions for any information that might disclose the identity of the Respondents.⁶⁶ The Tribunal further proposed a model confidentiality undertaking for third parties, a model website entry about the arbitrations for the PCA's website, and a model PCA press release (which would be issued as required, with the agreement of the Parties, to record important case developments).⁶⁷

The Parties then agreed on a Protocol on Confidentiality and Transparency (the 'Protocol'), which was adopted by the Tribunal in a subsequent procedural order.⁶⁸ The Protocol (subject to certain exceptions) prohibits the disclosure and publication of 'confidential material' which broadly includes correspondence between the Parties and with the Tribunal regarding the arbitrations; documents filed in the arbitrations; awards, decisions and orders of the Tribunal; and minutes, records, and transcripts or hearings and other case meetings.⁶⁹ The Protocol established an agreed process for the redaction of awards, decisions, and orders prior to publication on the PCA's website.⁷⁰ Pursuant to this procedure, the PCA's website now hosts basic information about the Accord Arbitrations, as well as redacted versions of the Terms of Appointment, procedural orders, and termination orders.⁷¹

In the absence of a clear agreement between the parties relating to public disclosure, the approach of the Accord Tribunal supports the view that a transparency regime for business and human rights arbitrations must achieve an appropriate balance between protecting the interests of the brands and disclosing information that is in the interest of third-party stakeholders. It has been argued that transparency should be the default rule in business and human rights disputes, but that 'an arbitral tribunal should be entrusted with the discretionary power to make determinations concerning transparency'

⁶⁵ Procedural Order No. 2 (n 10) [97].

⁶⁶ Procedural Order No. 2 (n 10) [99].

⁶⁷ Procedural Order No. 2 (n 10) [98-102].

⁶⁸ Procedural Order No. 4 (9 October 2017) <<https://pcacases.com/web/sendAttach/2310>> accessed 8 May 2020.

⁶⁹ Protocol (n 68), Part A.1 and A.3.

⁷⁰ Protocol (n 68), Part A.5.

⁷¹ Permanent Court of Arbitration, Bangladesh Accord Arbitrations, Case Number 2016-36; 2016-37 <<https://www.pcacases.com/web/view/152>> accessed 19 August 2018.

as this is essential in order to ensure that the confidentiality of information about the businesses and victims is protected to the extent necessary in the circumstances of a particular case.⁷²

The Accord Arbitrations provide a model for the development of a transparency regime tailored to the needs of the dispute in question and which functioned on the basis of party consent. The Protocol in the Accord Arbitrations might serve as a model for future cases. The Accord Arbitrations also demonstrate the use of the resources of an arbitral institution such as the PCA to facilitate the implementation of the transparency regime agreed to by the parties, through the publication of information about the case and press releases under supervision of the tribunal.

5. Arbitrating Mass Claims

Given the broad scope of the potential human impact of corporate practices, tribunals preoccupied with business and human rights disputes are likely to be confronted with the question of how best to arbitrate mass claims.⁷³ The Tribunal in the Accord Arbitrations was no exception. The dispute underlying the Accord Arbitrations involved alleged non-compliance with the Accord standards in a number of factories. Accordingly, in their Notices of Arbitration, the Claimants requested the Tribunal to order, *inter alia*, the payment of hazardous duty pay to factory workers and the placement of remediation costs in respect of hundreds of factories in escrow.⁷⁴

International courts and tribunals faced with mass claims, such as the United National Compensation Commission and the Commission for Real Property Claims of Displaced Persons and Refugees in Bosnia and Herzegovina, have adopted different

⁷² Business and Human Rights Arbitration Project Report (2018) <<https://www.cilc.nl/cms/wp-content/uploads/2018/03/BHR-Arbitration.-Report-Drafting-Team-Meeting-25-26-January-2018.pdf>> accessed 29 August 2018. One author has proposed the use of the UNCITRAL's Rules on Transparency in business and human rights arbitrations; Dunmore (n 3).

⁷³ The Drafting Team has noted that more consideration must be given to mass claims procedures. Business and Human Rights Arbitration Project Report, Drafting Team Meeting 25 and 26 January 2018, The Hague, The Netherlands <<https://www.cilc.nl/cms/wp-content/uploads/2018/03/BHR-Arbitration.-Report-Drafting-Team-Meeting-25-26-January-2018.pdf>> accessed 29 August 2018.

⁷⁴ Procedural Order No. 2 (n 10) [21].

methodologies to expeditiously process multiple claims, including using technology to match and group multiple individual claims that are tied to decisions on the same facts or by standardizing verification and valuation methods to address any gaps in documentary evidence that can be applied to evidence in multiple cases.⁷⁵ The experience of prior courts and tribunals reveals that any methodologies and techniques applied must be tailored to the specific demands of the dispute.

The Parties avoided a major concern related to mass claims—the coordination of decision making across disputes under the same instrument⁷⁶—by agreeing that the same tribunal would hear both Accord arbitrations. This ensured that similarly situated aggrieved workers and factories would be subject to consistent outcomes and interpretations of the relevant instrument. However, the Tribunal still faced the question of how most efficiently to organise the arbitration, from the determination of the jurisdiction of the Tribunal and the liability of the Respondents (if any) to the distribution of hazard pay to workers and/or remediation sums for factories (if applicable).

Simultaneously with resolving preliminary issues of admissibility, the Tribunal sought to define the scope of ‘the next phase of the arbitration, in which the Tribunal [would] determine liability, along with specified issues of remedies.’⁷⁷ The Parties agreed that the post-admissibility phase, described in the arbitrations as the ‘Liability-Plus Phase’, should encompass a decision on the liability of the Respondents for any breaches of Articles 12 and 22 of the Accord, and a determination by the Tribunal of the available heads of damages that could be claimed by the Claimants in the event of a finding of liability.⁷⁸ However, the Parties did not agree on the extent to which the Liability-Plus Phase should cover the methodology for calculating damages for the individual factories and the extent to which the Tribunal should be involved in applying the methodology for calculating damages to individual factories.⁷⁹

⁷⁵ Howard M Holtzmann, Edda Kristjánsdóttir, *International Mass Claims Processes: Legal and Practical Perspectives* (OUP 2007) 4-246; See also Permanent Court of Arbitration (ed), *Redressing Injustices Through Mass Claims Processes: Innovative Responses to Unique Challenges* (OUP 2006).

⁷⁶ *ibid* Holtzmann, Kristjánsdóttir 254.

⁷⁷ Procedural Order No. 3 (19 September 2017) <<https://pcacases.com/web/sendAttach/2309>> accessed 8 May 2020 [1].

⁷⁸ Procedural Order No. 3 (n 77) [19-20].

⁷⁹ Procedural Order No. 3 (n 77) [21].

The Claimants maintained that the Tribunal should stop short of adjudicating the ‘mini-disputes’ involving each factory but should in the Liability-Plus Phase (i) adjudicate the Respondents’ liability for breach of the Accord; (ii) assuming a finding of liability, determine the available heads of damages; and (iii) determine ‘global amount[s] to be paid into escrow’ (managed by a neutral third party) for remediation costs for corrective actions for factories and hazardous duty pay, should these be found to be heads of recoverable damage.⁸⁰ The Claimants proposed a further ‘Claims Phase’ in which individual factories or workers that were entitled to make claims could draw on the funds in the escrow amount ‘to remediate uncorrected issues’ or hazardous pay, respectively.⁸¹

The Respondents argued that the Liability-Plus Phase should be limited to a finding of liability. The Respondents considered the Claimants’ proposal to be inefficient because (i) it would have required the Parties to make quantum submissions before the determination of heads of damages by the Tribunal and (ii) the operative facts on quantum would change in the course of the proceedings.⁸²

The Tribunal ordered the Parties in the Liability-Plus Phase to make submissions on the methodology by which the Tribunal would determine compensation for breaches, but not on an amount of damages to be placed in escrow.⁸³ The Tribunal invited specific comments from the Respondents on the question of whether it would be appropriate for the Tribunal to determine a global amount to be paid into escrow using the formula propose by the Claimants or using any other formula.⁸⁴ While noting that entering the quantum phase of the arbitration ‘risks doing work that will not be necessary in the event that the Tribunal holds that [the Respondents] are not liable’,⁸⁵ the Tribunal found that its approach would ‘best balance competing considerations of efficiency’ to consider certain specific questions of remedies at the liability phase.⁸⁶ However, due to the

⁸⁰ Procedural Order No. 3 (n 77) [10-11].

⁸¹ Procedural Order No. 3 (n 77) [12].

⁸² Procedural Order No. 3 (n 77) [15-17].

⁸³ Procedural Order No. 3 (n 77) [25].

⁸⁴ Procedural Order No. 3 (n 77) [23].

⁸⁵ Procedural Order No. 3 (n 77) [24].

⁸⁶ Procedural Order No. 3 (n 77) [24].

Parties' amicable settlement, the cases were terminated before these guidelines could be put into practice.

6. Concluding remarks

This article has explained the manner in which the Tribunal in the Accord Arbitrations approached difficult procedural questions arising from gaps in the arbitration agreement, transparency and confidentiality, and the mass claims aspect of the disputes. For each point, the Tribunal reviewed the positions of the Parties, considered the unique circumstances of the Accord and the dispute before it, and drew upon the resources of the PCA.

The Claimants' representatives have hailed the Arbitrations as a success, noting that the 'settlement shows that the Bangladesh Accord works. It is proof that legally-binding mechanisms can hold multinational companies to account'⁸⁷ and that the settlements 'prove the validity of the arbitration process. It is a turning point for business and human rights'.⁸⁸ While the Confidentiality Protocol prevents the Respondents'

⁸⁷ Valter Sanches, IndustriALL General Secretary <<http://www.industrialunion.org/global-unions-reach-us23-million-bangladesh-accord-settlement-with-multinational-brand>> accessed 30 August 2018; Graham Dunning QC, 'The Bangladesh Accord—A Model for Environmental Dispute Resolution?' in *The Small States Conference on Environmental Dispute Resolution* [forthcoming].

⁸⁸ Christy Hoffman, General Secretary of UNI Global Union, as quoted in Dominic Rushe, 'Unions reach \$2.3m settlement on Bangladesh textile factory safety' (*The Guardian*, 22 January 2018) <<https://www.theguardian.com/business/2018/jan/22/bangladesh-textile-factory-safety-unions-settlement>> accessed 30 August 2018; Marney Cheek, counsel for the Claimants said that '[t]he Bangladesh Accord arbitrations and the settlements ... achieved show that arbitration in the business and human rights context is a real and effective means to resolve disputes arising out of transnational business activity' 'Covington Helps Secure Historic Settlement in Arbitration Under the Accord on Fire and Building Safety in Bangladesh' (Covington, January 22 2019) <<https://www.cov.com/en/news-and-insights/news/2018/01/covington-helps-secure-historic-settlement-in-arbitration-under-the-accord-on-fire-and-building-safety-in-bangladesh>> accessed 30 August 2018; Jenny Holdcraft, Assistant General Secretary of IndustriALL Global Union said that '[p]rior to the Accord a settlement of this size and scope on supply chain worker safety was unthinkable... The Accord has the power to fundamentally change the way garments and textiles are produced' and Christy Hoffman, General Secretary of UNI Global Union, said that '[t]hese cases prove the Accord's power to hold companies accountable and make work safer across the supply chain [...] [b]ecause of the legally-binding nature of the Accord, tens-of-thousands of potentially deadly hazards have been fixed and more than one million workers have been trained. That is why we will continue to rigorously enforce the Accord and continue to look at innovative, effective ways to resolve disputes with brands.' 'Bangladesh Accord arbitration cases - resulting in millions-of-dollars in settlements - officially closed' (IndustriALL 18 July 2018) <<http://www.industrialunion.org/bangladesh-accord-arbitration-cases-resulting-in-millions-of-dollars-in-settlements-officially>> accessed 30 August 2018.

representatives from making public statements, it is worth noting that the 2018 Accord has already in its first months been signed by over 180 brands, showing that the Accord Arbitrations have certainly not deterred industry from embracing this enforceable mechanism.⁸⁹ Finally, as an indication that this type of dispute settlement mechanism might be embraced in the future in other industries, it is observed that the 2018 version of the Accord references not only the RMG industry but ‘other related industries’ and notes that upon agreement by the Steering Committee, ‘the work of the Accord could possibly be expanded to other related industries beyond RMG on a voluntary basis.’⁹⁰

Business and human rights disputes are a sui generis category of disputes, with procedural considerations that are distinct from investor-state arbitration and from commercial arbitration. Whilst the gaps in procedural rules governing these arbitrations might be filled by party consent and soft law,⁹¹ there are currently proposals for the development of a set of tailored procedural rules that might govern disputes involving business and human rights.⁹² At the time of the writing of this article, a drafting team (headed by Judge Bruno Simma) is preparing the Hague Business and Human Rights Rules.⁹³ The Working Group will certainly grapple with striking the appropriate balance between generating rules that are helpful in the conduct of business and human rights disputes and preserving procedural flexibility to accommodate the ‘evolving nature of the corporate world’.⁹⁴

⁸⁹ See <<http://www.industriall-union.org/signatories-to-the-2018-accord>> accessed 30 August 2018.

⁹⁰ 2018 Accord (n 42) Preamble, footnote 1. For increasing attention to business and human rights issues in the construction industry in the context of mega sporting events, see discussion in Judith Levine & Kashpee Wahid, ‘Business and Human Rights: A ‘New Frontier’ for International Arbitration?’ (2017) ACICA Review 35.

⁹¹ Cronstedt and Thompson (n 1).

⁹² Cronstedt et al, (n 2) 7; Cronstedt et al (n 3).

⁹³ Dunmore (n 3); ‘Business and Human Rights International Arbitration Project launched’ (The Hague Institute for Global Justice, 7 November 2017) <<http://www.l4bb.org/news/ProjectPressRelease1711.pdf>> accessed 29 August 2018.

⁹⁴ Angel Gabriel Cabrera Silva, ‘Legal Innovations for Corporate Accountability under International Law: A Critique’ (2016) 57 Harvard International Law Journal <<http://www.harvardilj.org/2016/07/legal-innovations-for-corporate-accountability-under-international-law-a-critique/>> accessed 29 August 2018.