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A Model for Business and Human Rights through International Arbitration under the Bangladesh Accord: The 2017 Decision on Admissibility Objection in Industrial Global Union and Uni Global Union

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The first publicly available decision issued under the international arbitration process provided for under the Accord on Fire and Building Safety in Bangladesh ('Bangladesh Accord') (note that Roger Alford previously summarized the Bangladesh Accord's dispute resolution clause here) was issued through the 4 September 2017 Decision on Admissibility Objection in *Industrial Global Union and Uni Global Union* (Permanent Court of Arbitration Case No. 2016-36). This Decision rejected the respondents' (certain global fashion brands) objection to jurisdiction and admissibility, thus permitting the claims brought by both unions against the respondents to remediate their facilities to ensure fire and building safety as provided for in the Bangladesh Accord, and to provide hazard pay for workers.

For those looking at various alternatives and models of reform current investor-State dispute settlement mechanisms, this Decision lends unique insights into the possible antecedent functional role of an intermediate standing 'Steering Committee', a committee of seven members, composed of three representatives from trade union signatories, three representatives from company signatories, and a representative chosen by the International Labour Organization as "a neutral chair and independent advisory member" (Bangladesh Accord, Article 1, Governance). In *Industrial Global Union and Uni Global Union*, the Tribunal notably acknowledged the unique hybridity of public interests and private concerns in arbitrations under the Bangladesh Accord:

> "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 characterizations, 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 commenced; (c) the number of supplier factories affected by the Accord (over 1600); (d) the number of workers in the Ready-Made Garment 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 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. 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." (*Industrial Global Union and Uni Global Union* 2017 Decision, paras. 93-94).

The respondents in *Industrial Global Union and Uni Global Union* had argued, in gist, that the claims were inadmissible because the deadlocked Steering Committee (with the ILO representative repeatedly declining to cast a vote) did not produce a "majority decision", which, in their view, is the only Steering Committee decision that can be "appealed to a final and binding arbitration process" (Bangladesh Accord, Article 3, Dispute Resolution).
The arbitral tribunal rejected this interpretation through a textual and structural reading of the Bangladesh Accord, finding in the cases before it that the Steering Committee nevertheless went through the required "deliberative process(es) and arrived at a 'decision' for each charge within the meaning of Article 5 [of the Accord]". (Decision, para. 57.) The tribunal stressed:

> "…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 in 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." (*Industrial Global Union and Uni Global Union* 2017 Decision, para. 61. Emphasis added.)

The Tribunal further clarified that the role of the Steering Committee, while technical

in allowing interested stakeholders the first chance of examining the subject-matter of alleged violations of safety standards in the Accord, was ultimately preliminary and not at all intended to be fully exhaustive on fact-finding:

> "…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 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 the result followed from a majority vote against them or an equal vote…
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> …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." (*Industrial Global Union and Uni Global Union* 2017 Decision, paras. 60 and 63. Emphasis added.)

There is certainly some policy significance to considering a preliminary, stakeholder-driven, and non-legal procedure, such as that before a standing body (the Steering Committee) created under an agreement involving States, companies, and labor unions, recognizing the interfaces of public interests and private concerns before resort to arbitration. This model recalls early proposals by the United Nations Conference on Trade and Development to embed dispute prevention policies in investment contracts, well before the institution of formal investor-State arbitration procedures. It has the additional virtue of deliberately engaging specialized international organizations such as the International Labour Organization (ILO), especially for the technical determination of international labor safety standards and company accountability practices prescribed in the Bangladesh Accord. Moreover, by widening the scope of the Accord to State and non-State stakeholders as partners in ensuring consistent fire and building safety practices of supply chain operators such as those in garment manufacturing in Bangladesh, the Accord recognizes both the private and the public functions of international arbitration, in contrast to frequent criticisms of the current investor-State arbitration system, which to date, only marginally provides for inputs from non-disputing parties through amicus submissions, (and which are often all too dependent on obtaining the prior consent of

the parties to their amicus participation).

The *Industrial Industrial Global Union and Uni Global Union* 2017 Decision stands in contrast to the recent *Urbaser v. Argentina* arbitral award. *Urbaser* has been hailed in various quarters for having recognized international human rights norms as part of the fabric of international laws regulating the conduct of States and that "international law accepts corporate social responsibility as a standard of crucial importance for companies operating in the field of international commerce" (*Urbaser v. Argentina* award, para. 1195). However, the *Urbaser* award still fell short of crucially operationalizing international human rights law in the foreign investment contract, at least enough to allow human rights stakeholders to have a meaningful part in the investor-State dispute settlement process. Indeed, the *Urbaser* tribunal ultimately denied the counterclaim filed by Argentina that was anchored on alleging the investors' breach of the right to water, stressing that "the mere relevance of this human right [to water] under international law does not imply that [the investor and its shareholders] were holding corresponding obligations equally based on international law. No human rights obligation to provide access to water existed on the part of the claimants before they entered into the concession.." (*Urbaser v. Argentina* award, para. 1212). Bruno Simma and I proposed, several years ago, that there should be some space to involve international specialized organizations such as the Committee on Economic, Social, and Cultural Rights, in the technical fact-finding and determinations of human rights impacts arising from the conduct of investors and host States in foreign investment transactions. To date, investor-State arbitrations hardly refer to reports of such international specialized organizations, but routinely engage independent financial experts for damages valuations. It is certainly baffling that, to this day, investor-State arbitral tribunals do not seek assistance from specialized international organizations, at least to illuminate on issues of quantification of damages asserted by investors, especially where they may also have been corresponding human rights impacts to local populations of host States from the acts of investors.

While the *Urbaser* decision illustrates the practical limits of broadly recognizing human rights norms in investor-State arbitration and how to achieve the meaningful broader participation of all public and private stakeholders in the enforcement of all legal norms (public and private) governing foreign investment, it is at least promising that a new model may have feasibly arisen for the meaningful participation of specialized international organizations and non-State stakeholders under the Bangladesh Accord, as seen through the lens of the 2017 Decision on Admissibility Objection in *Industrial Union and Uni Global Union*. The future of investment treaty and investor-State dispute settlement reform may well be recognize the full universe of actors, stakeholders, and participants in foreign investment contracts.

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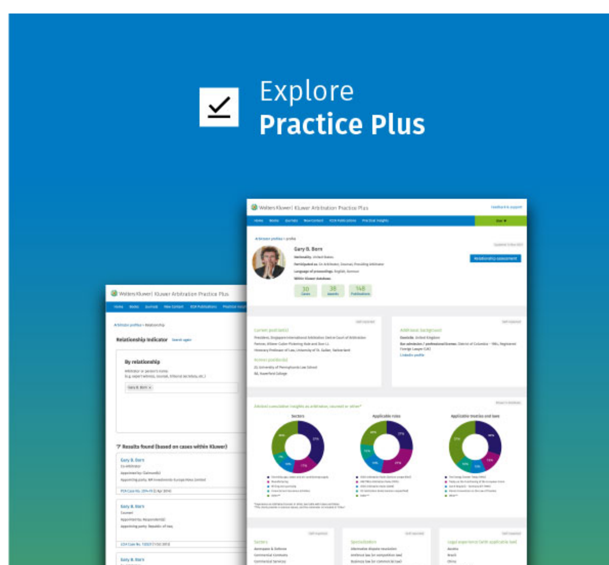

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