

MODEL ARBITRATION CLAUSES

FOR THE RESOLUTION OF DISPUTES UNDER
ENFORCEABLE BRAND AGREEMENTS

Clean
Clothes
Campaign

The logo for the Clean Clothes Campaign, featuring the text "Clean Clothes Campaign" in a bold, sans-serif font. A small red scissors icon is positioned at the bottom right of the text.

GLOBAL
LABOR
JUSTICE

The logo for Global Labor Justice, featuring the text "GLOBAL LABOR JUSTICE" in a bold, sans-serif font. The letters "G", "L", and "J" are highlighted in yellow.

W R C
WORKER RIGHTS
CONSORTIUM

The logo for the Worker Rights Consortium (WRC), featuring the letters "W R C" in blue boxes above the text "WORKER RIGHTS CONSORTIUM".

Executive Summary

The 2013 Rana Plaza factory collapse disaster in Bangladesh, as well as numerous other industrial tragedies and labor rights abuses have exposed the need for brand and supplier accountability for ensuring labor rights including freedom of association and collective bargaining. Trade unions and labor rights NGOs have worked with global brands to establish meaningful corporate accountability for workers' rights in brands' international supply chains. One increasingly important mechanism through which trade unions, labor rights NGOs, and global corporations have sought to establish such accountability has been the negotiation of legally binding, enforceable agreements between brands, trade unions, and labor rights NGOs that cover labor rights in the operations of brands' third-party suppliers.

Building from different forms of collective bargaining and community-labor partnerships, these agreements, which are often referred to by their proponents as “enforceable brand agreements” or “EBAs” are an avenue to raise the bar for protection of labor rights in supply chains. They replace brands' voluntary corporate social responsibility (“CSR”) programs, whose private factory audits have consistently failed to end abuses in supply chains,¹ with legally enforceable obligations and may include requiring and ensuring that suppliers cooperate with independent factory monitoring and respect workers' rights. EBAs recognize the crucial role of worker representatives and advocates – trade unions and labor rights NGOs—as equal and active counterparts to brands in establishing mechanisms for protecting the rights and welfare of workers in brands' supply chains. This enforceable and co-governed approach to addressing labor abuses in supply chains is sometimes framed as “Worker-driven Social Responsibility” (“WSR”) – in contrast to brand's own voluntary, and largely unilateral, CSR programs.²

¹ Such voluntary brand programs typically rely on private auditing and for-profit social certification of factories, which have frequently failed to prevent labor abuses. Clean Clothes Campaign, “Fig Leaf for Fashion. How social auditing protects brands and fails workers” (Sep. 2019) <https://cleanclothes.org/file-repository/figleaf-for-fashion.pdf/view>.

² Worker-driven Social Responsibility Network, “What Is WSR?” <https://wsr-network.org/what-is-wsr/>.

Recent examples of supply chain labor rights initiatives established through EBAs include:

- The Bangladesh Accord on Fire and Building Safety, signed by Global Union Federations, Bangladeshi unions, labor rights NGOs and more than 200 brands, whose independent factory inspections have identified over 144,000 fire, electrical, and structural hazards across 1,600 garment factories in that country, more than 90% of which have now been remediated; and which has trained over 1.7 million workers on workplace safety, and resolved 359 safety and rights complaints.
- Oversight agreements between trade unions and employers in supply chain systems, such as those between the Farm Labor Organizing Committee and the North Carolina Growers Association, and the CGT union in Honduras with Fruit of the Loom corporation, both providing binding arbitration for disputes arising under their supply chain agreements.
- The Fair Food Program, established by the Coalition of Immokalee Workers, which has secured commitments from 14 major food retailers to purchase produce exclusively from growers that implement a human rights-based code of conduct covering 35,000 farmworkers in the southeastern United States; and successfully combated widespread gender-based violence, sexual harassment, and forced labor on produce farms.
- Agreements on combating gender-based violence and harassment that have been negotiated by brands, labor unions, labor rights NGOs, women's rights organizations, and apparel suppliers in Lesotho (2019), to establish a comprehensive training program and complaint mechanism to prevent and address gender-based violence and harassment that covers 10,000 workers across five factories.

Drawing from lessons learned in the implementation of these and other similar agreements and addressing, in particular, the challenge of resolving disputes among parties concerning their interpretation and application, the **Model Arbitration Clauses** that follow in this document propose

a dispute resolution mechanism for EBAs that aims to be fair, affordable, enforceable, efficient and transparent.

Designed for direct incorporation into enforceable brand agreements, the Model Arbitration Clauses and accompanying Commentary that follow advances a streamlined arbitration system that protects impartiality and due process while avoiding excessive litigiousness, promoting transparency, alleviating burdensome costs, and providing final and binding enforcement. The Clauses draw from leading international arbitration rules and existing supply-chain agreements negotiated by trade unions, labor rights NGOs and brands, and cover a range of considerations, including:

- Choice of law
- Choice of arbitrators
- Seat of arbitration and location of hearings
- Procedures and timelines governing arbitration proceedings
- Potential remedies
- Awards and their enforcement
- Allocation of costs and fees
- Transparency and exceptions to transparency

The Clauses are informed by the experiences of lawyers and other advocates representing trade unions and labor rights NGOs at the cutting-edge of developing and implementing enforceable supply chain agreements.

The proposed **Enforceable Brand Agreement Model Arbitration Clauses** that follow are presented as the first iteration of a living document, with the potential to grow, evolve, and reflect new lessons from enforceable supply-chain agreements. To this end, the document, together with a comments section, will be hosted by the [International Lawyers Assisting Workers \(ILAW\) Network](#), that has recently been established by the AFL-CIO Solidarity Center, which aims to bring together legal practitioners and scholars who advocate for and pursue research on rights and interests of workers and their organizations.

Table of Contents

EXECUTIVE SUMMARY	2
ACKNOWLEDGEMENTS:	7
INTRODUCTION: ENFORCEABLE BRAND AGREEMENTS AND MODEL ARBITRATION CLAUSES	9
MODEL ARBITRATION CLAUSES FOR THE RESOLUTION OF DISPUTES UNDER ENFORCEABLE BRAND AGREEMENTS	15
ARTICLE 1: GENERAL TERMS	15
ARTICLE 2: SECRETARIAT, NOTICE OF ARBITRATION AND RESPONSE	20
ARTICLE 3: ARBITRATOR ROSTER, SELECTION, QUALIFICATIONS AND DISCLOSURE	23
ARTICLE 4: CASE MANAGEMENT	27
ARTICLE 5: APPLICABLE LAW	27
ARTICLE 6: SEAT OF ARBITRATION; PLACE OF ARBITRAL HEARING; LANGUAGE OF ARBITRATION	29
ARTICLE 7: TRANSPARENCY	32
ARTICLE 8: HEARINGS, DISCOVERY, EVIDENCE	34
ARTICLE 9: EXPERTS; SITE VISITS	37
ARTICLE 10: PARTICIPATION OF AMICI AND OTHER NON-DISPUTING PARTIES	38
ARTICLE 11: PROVISIONAL, CONSERVATORY AND INTERIM MEASURES	40
ARTICLE 12: MULTI-PARTY CLAIMS AND JOINDER	41
ARTICLE 13: AWARDS AND REMEDIES; WRITTEN OPINION; FINAL AND BINDING EFFECT; INTERPRETATION OR CORRECTION OF AWARD; ADDITIONAL AWARD	42
ARTICLE 14: ARBITRATOR FEES; APPORTIONMENT OF COSTS & FEES	44
ARTICLE 15: OPTIONAL MEDIATION OR FACILITATED SETTLEMENT CLAUSE	45
ANNEX 1: TIMETABLE AND DEADLINES	47
ANNEX 2: ARBITRATOR CODE OF CONDUCT	49

Acknowledgements:

The following persons served as the drafting group for these Model Arbitration Clauses for Enforceable Brand Agreements:

Katerina Yiannibas, Columbia Law School & University of Deusto

Lance Compa, Cornell ILR School

Judy Gearhart, International Labor Rights Forum

Eric Gottwald, International Labor Rights Forum (now at AFL-CIO)

Esmeralda Lopez, International Labor Rights Forum

Scott Nova, Worker Rights Consortium

Ben Hensler, Worker Rights Consortium

Jennifer Rosenbaum, Global Labor Justice

Shikha Silliman Bhattacharjee, Global Labor Justice

Ben Vanpeperstraete, (formerly at) Clean Clothes Campaign

Ineke Zeldenrust, Clean Clothes Campaign

Valuable written comments on earlier drafts were provided by:

James Brudney, Fordham Law School

Sean Hansen, Peggy Browning Fellow, Northeastern Law School

Jon Hiatt, former AFL-CIO General Counsel, now with Solidarity Center/International Lawyers Assisting Workers (ILAW)

Christy Hoffman, UNI Global Union

Wilma Liebman, former Chair, National Labor Relations Board

Sandra Polaski, former deputy director, International Labor Organization

Jeff Vogt, Solidarity Center/International Lawyers Assisting Workers (ILAW)

Valuable comments in a November 5, 2019 meeting on this arbitration project held at the International Lawyers Assisting Workers (ILAW) founding conference in Mexico City were provided by several of the above-mentioned contributors, and by:

Cecelia Chang (Open Society Foundation (“OSF”))

Ben Davis (United Steelworkers)

Michael Felson (U.S. Department of Labor (ret.))

Elizabeth Frantz (OSF)

Carlos Lopez (International Commission of Jurists)

Conchita Lozano-Batista (Weinberg Roger and Rosenfeld)

Komala Ramachandra (Human Rights Watch)

Robin Runge (Solidarity Center)

Charity Ryerson (Corporate Accountability Lab)

Bobbie Santa Maria (Business and Human Rights Resource Center)

Ruwan Subasinghe (International Transport Workers Federation)

Dave Welsh (Solidarity Center, Indonesia)

January 2020

Introduction: Enforceable Brand Agreements and Model Arbitration Clauses

The Model Arbitration Clauses in this document are offered as a template for dispute resolution mechanisms in enforceable brand agreements covering labor rights and labor standards in supply-chain facilities and operations. These model clauses take into account various arbitration rules, including the UNCITRAL Arbitration Rules and The Hague Rules on Business and Human Rights Arbitration.³ While these Model Arbitration Clauses are presented as a single template, practitioners may choose to extract or modify some of the clauses to align with their interests.

These clauses also draw from arbitration clauses in existing supply-chain agreements negotiated by labor rights advocates and brands covering garment factory workers in Bangladesh and Honduras, farm workers in Ohio, North Carolina, and Florida; dairy workers in New York and Vermont; school bus drivers around the United States; garment workers in supplier factories for brands based in the Netherlands, and others. These agreements include:

- The Bangladesh Accord on Fire and Building Safety between the UNI and IndustriALL global unions, Bangladeshi unions, and over 200 brands supplied by factories in Bangladesh;
- The “Washington Agreement” between the Honduran CGT labor federation and Fruit of the Loom, Inc. covering its factories in Honduras;
- Collective bargaining agreements between the Farm Labor Organizing Committee (FLOC) and brands and growers associations in Ohio and North Carolina;

³ The preparatory process also included reviews of UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (2014); International Chamber of Commerce (ICC) Arbitration Rules (as revised 1 March 2017); Permanent Court of Arbitration (PCA) Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment (2001); Court of Arbitration for Sport (CAS) Code of Sports-related Arbitration (in force as of 1 January 2019); American Arbitration Association (AAA) Employment Arbitration Rules (as amended 1 November 2009).

- The Fair Food Program of the Coalition of Immokalee Workers (CIW) with food retailers and farmers in Florida and other Atlantic coast states;
- The Milk With Dignity program of Migrant Justice with dairy product retailers and dairy farmers in Vermont and New York;
- The national collective bargaining agreement between the Teamsters Union and First Student, Inc., covering school bus drivers and maintenance employees in the U.S. operations of the UK-based First Group;
- The Agreement on Sustainable Garment and Textile negotiated by industry organizations, trade unions, civil society organizations and the Dutch government, under the guidance of the Social and Economic Council of the Netherlands (SER);
- The Agreement on the Prevention and Elimination of Gender-based Violence and Harassment negotiated by trade unions and NGOs in Lesotho with the Nien Hsing Textile Co., Ltd.

The Model Arbitration Clauses in this document draw from all of the above-noted sources to create an arbitration template in which workers' organizations and their allies can best defend and advance their interests in the supply-chain context. The goal is to design a streamlined arbitration system that moves quickly, avoids excessive litigiousness, promotes more transparency, does not impose burdensome costs on parties and their representatives, and provides final and binding enforcement while ensuring impartiality and due process guarantees for all parties to the agreement.

The terms "labor stakeholder" and "brand" are used in the singular in this document for descriptive simplicity. Enforceable brand agreements would more likely take shape between multiple labor stakeholders, including trade unions and worker-advocacy NGOs, and multiple companies in supply-chain relationships (here called "brands" whether or not they are recognized consumer brand-name producers or retailers). Enforceable brand agreements could also entail a single labor stakeholder and multiple brands, or multiple labor stakeholders and a single brand. Enforceable

brand agreements are not to be confused with employer-worker contracts. The main constant contemplated in this template is the supply-chain relationship, and a contractual commitment by brands to ensure compliance with labor rights and labor standards by their suppliers.

It is also important to remember the distinction between this set of Model Arbitration Clauses and an enforceable brand agreement. This is not a model enforceable brand agreement. It is up to the parties to negotiate the terms of their enforceable brand agreement. These are model arbitration clauses that could be incorporated into an enforceable brand agreement, either in whole or as modified by parties to an enforceable brand agreement for the means of resolving disputes concerning the interpretation and application of that agreement.

While such agreements typically involve international supply-chain relationships, these clauses could be adapted to a strictly domestic framework. In that case, some of these modalities might not apply. Negotiators in a domestic setting can make the needed adjustments while preserving this model.

The Bangladesh Accord on Fire and Building Safety is a quintessential enforceable brand agreement. After the 2013 Rana Plaza apparel factory collapse that killed more than 1100 workers, global unions, Bangladesh trade unions, and U.S. and European NGOs negotiated the Accord with several brands. Many more companies, estimated over 200, joined the Accord and accepted its terms. They include an independent inspection program; public disclosure of inspection reports and remedial steps; brand guarantees of financial support and continued sourcing to sustain employment in affected factories; health and safety training program for workers; the right to refuse unsafe work; and a complaint mechanism for workplace hazards.

The Bangladesh Accord contains a binding arbitration clause, too. This key provision is what made the agreement enforceable, in contrast to most other multi-employer and multi-stakeholder initiatives with monitoring and auditing steps that have in most cases proven to be inadequate, since they do not provide binding enforcement.

Two arbitrations that took place under the Accord in 2016-18 (consolidated in a single proceeding) are a prominent backdrop to this initiative. Those cases were settled before an arbitral award was issued on the merits, so the Accord's arbitration system was not fully tested.

But the delays, costs, procedural complexities, litigiousness, opacity and other problems with the Accord arbitration motivated workers' rights advocates to seek a more suitable enforcement mechanism for enforceable brand agreements. These Model Arbitration Clauses are the result.

Labor stakeholders and brand representatives can incorporate this model language into their agreements. Alternatively, they can use this language as a starting point for negotiating an arbitration clause tailored to the specific features of their relationship. Such features include economic sector, product line, pricing structures, locations of brand headquarters and supply-chain workplaces, composition of the parties on each side of the negotiating table, and other considerations.

This set of Model Arbitration Clauses assume the following template, though it is understood that variants can take shape within the overall template:

- A company or multiple companies based in one or more "home countries" (*companies are here called "brands" for short; they are presumably multinational firms whose "home country" is the location of corporate headquarters*);
- Who contract with "suppliers" for products or services based in one or more "host countries" (*in some instances the home-country brand might be the parent company of a host-country subsidiary that acts as a supplier*);
- Where brands are not the direct employers of workers at the supplier worksite; the supplier is their direct employer (*additional layers of sub- and sub-sub-contracting could also be implicated in supply-chain relationships*);
- But brands negotiate an agreement with labor stakeholders, usually global unions, national unions and/or worker-advocacy NGOs (*labor stakeholders could also include regional and local trade unions that represent workers at the suppliers' worksites, or local NGOs that act on behalf of workers when no authentic union representation is currently in effect*);
- In which brands agree to require their suppliers through their commercial arrangements to comply with labor rights and labor standards set out in the agreement (*suppliers*

themselves are not parties to an enforceable brand agreements – they have a commercial relationship with brands requiring compliance with terms and conditions of the agreement, which is negotiated by brands and labor stakeholders; however, labor stakeholders and suppliers may also negotiate supplemental agreements to ensure compliance with the enforceable brand agreement).

In addition to commitments on labor rights and labor standards, other commitments in enforceable brand agreements should include (but are not limited to):

- funding, participating in, and/or cooperating with independent oversight and implementation bodies, and requiring suppliers to do so;
- financial support to suppliers to facilitate compliance;
- penalties for suppliers for noncompliance;
- income maintenance or increase for workers affected by suppliers' measures to come into compliance;
- compensation to workers affected by suppliers' non-compliance;
- participation in and support for initiatives to strengthen national law mechanisms; and
- funding for a reserve to cover some portion of the costs of arbitration or other methods of facilitated settlement of disputes between parties that are not resolved through the agreement's oversight or implementation bodies.

These model arbitration clauses also assume that labor stakeholders and brands will include in their agreements a robust system for addressing and resolving disputes *before* reaching an arbitration stage. Parties can create informal steps for identifying and solving problems early on. They can agree on a more formal, jointly-administered dispute resolution process. They can make a plan for conciliation or mediation using independent outsiders who specialize in these methods.

Each of the enforceable brand agreements cited above, beginning with the Bangladesh Accord, has included collaborative mechanisms to resolve disputes before reaching the arbitration stage. They first insist on informal ground-level dialogue to address problems before they grow larger. If continued treatment is needed, they provide for investigations, reports, consultations, conciliation, mediation and other steps to settle their differences without having to turn to arbitration.

The specific steps and timelines for in-house dispute resolution differ among these enforceable brand agreements. But they have one important feature in common: each agreement creates a joint body with a mandate to take up and resolve disputes and other functions as might be set out in the agreement, called variously a Steering Committee, Oversight Committee, Commission, Standards Council, Secretariat and other names signifying a designated group of top-level representatives of parties to the agreement, sometimes with participation of one or more neutral participants, to address and solve disputes without having to take the ultimate step to arbitration. The importance and effectiveness of such measures are reflected in the fact that under each of the agreements, most in force for many years now, only one or two disputes have ever gone to arbitration.

This is the preferred outcome. These model arbitration clauses are offered in the hope that they never will have to be used because the parties themselves are able to engage in good-faith dealings to settle disputes. But sometimes well-intentioned, good faith efforts cannot bridge the gap between parties, and they turn to arbitration to reach a resolution. These model clauses offer an efficient, cost-conscious arbitration mechanism that respects the rights and interests of parties to an enforceable brand agreement.

One final note: these clauses are meant to be streamlined. They cannot cover every possible eventuality or issue that might arise in an arbitration proceeding. Considering the scope of potential disputes that may be arbitrated under these clauses, parties may exercise their discretion to modify or opt out of certain provisions that do not respond to their needs in the dispute at issue. Parties can refer to the UNCITRAL or The Hague Rules on Business and Human Rights for more details covering other potential developments in a proceeding to help them fill in any gaps.

Model Arbitration Clauses

for the Resolution of Disputes under Enforceable Brand Agreements

Article 1: General Terms

1. In the event of any dispute, controversy or claim arising out of or relating to this enforceable brand agreement, or the breach, termination or invalidity thereof, the parties shall first refer the dispute to a non-adversarial method of resolving conflicts specified in the enforceable brand agreement, such as fact-finding, consultation, dialogue, conciliation, mediation, or facilitation. If the dispute has not been settled within such reasonable period as the parties may agree, such dispute shall be settled under arbitration. The terms of this agreement shall govern the arbitration except where any of these terms is in conflict with a provision of the law applicable to the arbitration from which the parties cannot derogate, that provision shall prevail.

2. A party's choice to invoke arbitration does not constitute a waiver of a party's right to pursue remedies, judicial or non-judicial, that are not explicitly waived in the enforceable brand agreement. Moreover, agreement by a party to arbitration under these clauses constitutes a waiver of any right of immunity from jurisdiction in respect of the proceedings relating to the dispute in question to which such party might otherwise be entitled. A waiver of immunity relating to the execution of an arbitral award must be explicitly expressed.

3. This arbitration agreement should not be read to suggest that States are relieved of their obligations under national and international law to protect workers' rights and labor standards. Any arbitration-based dispute settlement system is a complement to state-based labor law enforcement, not a substitute. However, the availability of state-based labor law enforcement shall not block or delay arbitration of any dispute arising under or related to this agreement.

4. The purpose of the enforceable brand agreement, including this arbitration clause, is to ensure timely and meaningful compliance with labor rights and labor standards set forth in the agreement for workers in supply-chain facilities and operations. It is not a collective bargaining agreement (CBA) between workers' representatives and the supply-chain operations managers and owners who directly employ them, and it does not supplant national law. However, where the

enforceable brand agreement requires supply-chain employers to 1) adhere to a valid, freely negotiated CBA, and 2) to comply with national law (except where national law provides less protection for workers than protections contained in the enforceable brand agreement), disputes over the application of the enforceable brand agreement, the CBA, or national law may be subject to arbitration under these clauses. In case of any difference in timing, coverage or protection between the enforceable brand agreement and the CBA or national law, the terms and conditions most favorable to workers shall prevail. An arbitrator acting under this agreement may not prioritize commercial goals over the promotion of labor rights and standards.

5. The parties agree that any dispute that is submitted to arbitration shall be considered to have arisen out of a commercial relationship or transaction for the purposes of Article I of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

6. Settlement may be agreed at any time, including after arbitration proceedings have been commenced. A disputing party shall give timely consideration to a proposal by the other disputing party for use of non-adversarial, collaborative methods. However, unwillingness to engage in a given method of non-adversarial conflict resolution, unless required under the enforceable brand agreement, shall not be grounds for suspending arbitration proceedings.

Commentary:

Paragraph 1 is based on the UNCITRAL Model Arbitration clause as well as the ICC Model Mediation Clauses. Practitioners should exercise great care if they choose to modify this clause so as not to invalidate the arbitration agreement or an eventual award. Any changes to this clause should closely follow model arbitration clauses from leading arbitral institutions. This clause also empowers the parties to fashion an arbitration mechanism that serves their interests within the parameters of what the law allows. As noted earlier, parties may wish to refer to UNCITRAL or Hague model rules to address other matters not explicitly covered in the enforceable brand agreement.

Paragraph 2 clarifies that by invoking this arbitration mechanism, parties do not waive any right to remedy without explicitly doing so within the context of the enforceable brand agreement. Other remedies available to the parties could include filing a lawsuit or other judicial complaint, seeking

a court injunction, or making any other claim in national or international courts or in non-judicial venues under mechanisms such as:

- ILO conventions and decisions by ILO supervisory bodies;
- OECD Guidelines for Multinational Enterprises;
- World Bank Environmental and Social Standards;
- Labor provisions under the Generalized System of Preferences or other trade laws of various countries;
- Labor chapters of trade agreements between and among various countries;
- Labor standards in the UN Guiding Principles on Business and Human Rights and in the UN Global Compact;
- International framework agreements between global unions and multinational firms.

This paragraph recognizes that the parties may agree to limit recourse to judicial or non-judicial forums and to define conditions under which arbitration is a preferred or exclusive procedure. But the choice is up to them, and absent any agreement limiting it; all parties have the right to pursue remedies in other forums. This places a further burden on the parties to make the issue of waiver explicit and within the context of the enforceable brand agreement so as to further address inequality of financial and staff resources between labor stakeholders and brands (also sometimes called “equality of arms”) issues as pertaining to waiver.

Paragraph 3 guards against national governments using enforceable brand agreements and these arbitration rules as a rationale or excuse for failing to effectively enforce national labor laws and international human rights and labor standards. Labor stakeholders and responsible brands must maintain demands to strengthen effective enforcement by national labor law authorities. However, it also guards against parties using the formal availability of labor law enforcement by

states, which may, in practice, be neither timely nor impartial, as a justification for non-enforcement of an enforceable brand agreement or as reason to block or delay arbitration proceedings.

Paragraph 4 declares the purpose of an enforceable brand agreement is to secure timely and meaningful compliance by suppliers with workers' rights and labor standards in their workplaces as spelled out in the enforceable brand agreement.

Defining enforceable brand agreements as rights-purposive is important to avoid a problem that arose in the only arbitration ever to take place under the labor chapter of a free trade agreement. In the arbitration case between the United States and Guatemala, a 3-person panel ruled that labor rights goals in the U.S.-Central America-Dominican Republic trade agreement (CAFTA) have to be balanced against the trade agreement's commercial goals of preventing unfair competition – and that these commercial purposes had priority over labor rights.

The panel found massive violations of workers' rights in Guatemalan export sectors, and corresponding failure of the Guatemalan government to enforce labor laws. But the panel said there was no evidence that the violations affected trade, because the United States could not show that Guatemalan exporters used the cost savings from workplace rights violations to cut prices of their exports to gain competitive advantage. It made no difference that the companies could have applied violations-based cost savings to their profits instead of cutting prices. The panel concluded that since the violations were not shown to result in price differentials, they did not affect trade, and therefore did not run counter to CAFTA's commercial purpose.

Paragraph 4 forecloses such a result in an arbitration under these clauses. It clarifies that enforceable brand agreements are rights-promoting and rights-purposive, and an arbitrator shall not prioritize commercial goals over the promotion of labor rights and standards.

Paragraph 4 also makes clear that enforceable brand agreements are not based on the direct employment relationship between supply-chain employers and their employees. Direct employment relations are governed by any applicable collective bargaining agreement and by applicable labor and employment law of the host country. Where there is a valid, freely-negotiated CBA, the enforceable brand agreement normally requires supply-chain employers to adhere to the

CBA (although exceptions may arise in the case of more narrowly targeted enforceable brand agreements, such as those covering fire and building safety, gender-based violence, or other defined topics). Likewise, the enforceable brand agreement normally requires compliance with national law, as long as national law does not undercut the protections of the agreement.

In these cases, the enforceable brand agreement co-exists with the CBA and with national law. There may be situations in which workers or their representatives would want to pursue arbitration under the enforceable brand agreement rather than under the CBA or national law (due to lack of resources, lack of confidence in the arbitration procedure under the CBA, lack of confidence in enforcement capacity of national labor authorities, an opportunity for more international scrutiny and support, etc.). In case of different levels of protection, an arbitrator must apply the one most favorable to workers.

Some countries prohibit arbitration of collective or individual employment disputes, requiring that they be decided in specialized labor courts. Paragraphs 3-4 emphasize that enforceable brand agreements do not substitute for national law or for CBAs. Thus, these arbitration rules do not supplant dispute resolution mechanisms under CBAs or national law. Therefore, these clauses should allow for enforcement of an award, if necessary, in countries that require labor and employment disputes in a direct employment relationship to be resolved by courts. This is important if use is to be made of the New York Convention to secure enforcement of an arbitration award under Paragraph 5.

At the opposite extreme, some countries (most notably the United States) allow most employers to force employees to submit to mandatory arbitration in individual employment disputes, often prohibiting employees from acting as a class. Insisting that enforceable brand agreements and these clauses do not govern direct employment relationships ensures that brands cannot challenge arbitrability under these clauses because employees did not submit to mandatory arbitration constraints.

Paragraph 5 makes available to the parties recourse to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the 'New York Convention'). Some states that have made the commercial reservation to the New York Convention require a pre-existing commercial relationship between parties if the Convention is to apply. The existence of the enforceable brand

agreement and its commercial aspects satisfy this requirement, in that enforceable brand agreements may affect commercial arrangements between brands and suppliers (for example, requiring brands to pay suppliers a price enabling them to comply with the rights and standards in the agreement, or requiring brands to cancel contracts with suppliers who fail to comply with labor rights and labor standards specified in the agreement). Agreements may require certain expenditures by parties (for example, the Bangladesh Accord provided for brands' financial support for independent building and fire safety inspections). Such commercial aspects should not affect prioritizing of labor rights and standards in any arbitration proceeding or post-arbitration litigation under these model arbitration clauses.

Paragraph 6 offers support for non-adversarial means of resolving disputes before turning to arbitration. It is assumed that the enforceable brand agreement spells out such pre-arbitration stage and mechanisms, and that the agreement will contain reasonable time limits on such non-adversarial methods so that the internal-pre-arbitration steps do not block or delay arbitration. These clauses leave to the parties how they want to structure and time limit pre-arbitration stages, rather than try to prescribe a one-size-fits-all clause for all agreements.

Article 2: Secretariat, notice of arbitration and response

1. The parties shall agree on a Secretariat to serve as the administrative body for an arbitration arising out of or relating to this enforceable brand agreement. The Secretariat will manage the arbitrator selection process, facilitate communication among the parties and the arbitrator, maintain records, publish arbitration-related documents in keeping with transparency and confidentiality rules, receive and disburse payments from the parties for joint arbitration expenses, and other tasks required to facilitate the arbitration. The Secretariat shall make all documents available in a timely manner to the parties, and where relevant to the public, in the form and in the language in which it receives them.

2. Parties initiating arbitration ("claimants") shall send a notice of arbitration to a responsible representative of the other party or parties ("respondents") and to the parties' chosen Secretariat by any means of communication that provides or allows for a record of its transmission and receipt. The notice shall identify provisions in the enforceable brand agreement that the claimant

argues have been breached, state the relief or remedy claimants seek, and propose a definition of the question or questions for the arbitrator to decide. Such identification and statement can be a brief recapitulation of the claimant's position in earlier exchanges about the dispute during stages prior to arbitration.

3. Within fifteen days of receipt of the notice, respondents shall file an answer, which can likewise be a brief recapitulation of the respondent's position in earlier exchanges prior to arbitration. This period may be extended to thirty days if the respondent challenges the sufficiency of the notice, arbitrability of the dispute, or the claimant's proposed question for the arbitrator. In this case, the answer shall set forth grounds for such challenge, with supporting arguments in a brief not to exceed 10 pages in length (double-spaced, 12-point font).

4. The arbitrator shall rule on any challenge by respondents to the sufficiency of the notice of arbitration, or any challenge to arbitrability of the dispute, or any disagreement about the question for the arbitrator to decide. Respondents must include any such challenge in their reply to the notice of arbitration, or the challenge is waived. The arbitrator shall generally make such rulings within ten days of receipt of respondents' reply, however, to preserve arbitral due process, the arbitrator may extend this period up to thirty days. Such ruling shall allow leave to a party adversely affected to amend the notice or the response in keeping with the ruling. Subject to the arbitrator's approval, parties may seek to amend or amplify their claims or responses, or the proposed question for the arbitrator to decide, in light of developments as the arbitration proceeds.

Commentary:

Paragraph 1 requires the parties to select in their enforceable brand agreement an entity to administrate the arbitration proceedings – receiving correspondence, gathering and maintaining documents, receiving deposits and making payments, overseeing arbitrator selection, releasing public information, and other technical tasks. The parties would contract with such an institution in advance of any arbitration so that it would be “at the ready” when arbitration is invoked.

In making their selection, the parties can take into account their locations and resources, location of the administering entity, cost factors and other variables. Note that the parties would make this

choice in their initial agreement, in advance of any arbitration, not *ad hoc* when an arbitration arises.

For example, parties could designate the Permanent Court of Arbitration (PCA) to perform these functions. This was the choice of parties to the Bangladesh Accord for the arbitrations that took place under that agreement. Alternatively, parties could designate one of the following groups to perform these functions: the American Arbitration Association, the National Arbitration Forum, the Association for Conflict Resolution, the International Institute for Conflict Prevention and Resolution, the London Court of International Arbitration, the JAMS ADR Group, the WIPO Arbitration and Mediation Center, the Singapore International Arbitration Centre, the Hong Kong International Arbitration Centre or another organization equipped to administer arbitration proceedings.

Parties could enlist a university-based dispute resolution center to administer proceedings, using graduate students overseen by experienced professors to carry out related tasks. The Scheinman Institute for Conflict Resolution at Cornell University is a prime example. Several universities in Europe with strong international labor law programs could also assume this role. The point is to let the parties make this choice rather than have these clauses make the choice for them.

Paragraph 2 sets forth a simple step of notice to the other party and to the administrative entity that parties have chosen as their secretariat to initiate the arbitration process. The notice should be minimal in length (one of the goals of these arbitration rules is to limit the amount of paper that lawyers fling at each other). It is presupposed that the parties have already fully aired their positions and exchanged information and arguments in stages prior to invoking arbitration. The “responsible representative” language allows some leeway for who might receive the notice. To dispel any ambiguity, parties can specify in the arbitration clause of their agreement who would be the responsible parties to receive the notice.

Paragraph 3 creates a tight but practical deadline for a response to the notice of arbitration. Again, the parties should be fully apprised of their respective positions based on exchanges in stages leading up to the arbitration. A respondent should likewise be fully prepared to challenge the sufficiency of the notice, arbitrability of the dispute, or the proposed question for the

arbitrator, knowing well in advance that the case was heading toward arbitration if not settled earlier. Respondents should have their challenge to sufficiency, arbitrability or the proposed question, and supporting brief, ready for submission within the ten-day response deadline.

Paragraph 4 ensures that the arbitrator has power to rule quickly and definitively on any objection to the sufficiency of claimant's notice of arbitration or to the arbitrability of the dispute. The arbitration should not get bogged down by lawyers jousting over preliminary motions, as is typical of most litigation and much commercial arbitration. This paragraph also lets parties amend their claim or response based on new information or evidence or events that come to light while the arbitration is underway, with the arbitrator maintaining control over any such amending.

Article 3: Arbitrator roster, selection, qualifications and disclosure

1. Not later than 90 days after the signing of their enforceable brand agreement, parties shall agree on a standing roster of no less than ten potential arbitrators with specific expertise in international human rights, labor rights, and labor standards. Parties may also take into account expertise in sub-specialties such as occupational safety & health, employment discrimination, freedom of association, collective bargaining systems, gender justice, labor standards enforcement, migrant labor, prevailing labor and commercial practices of the relevant industry, familiarity with labor laws of the host country, labor contract interpretation, and others that parties consider relevant. Parties shall make every effort to establish a roster reflecting balance among gender, ethnicity, country or region of origin, language, and other diversity considerations among candidates with the requisite expertise.

2. Arbitrators serving on the roster shall have no personal or financial interest in the results of the proceeding in which they are appointed and shall have no relation to the underlying dispute or to the parties or their counsel that may create an appearance of bias. Arbitrators shall disclose any potential conflicts or history of relationships with the labor stakeholders and brands signatory to the agreement. If chosen to join the roster, arbitrators on the roster must update their disclosure statement annually. Parties shall review the composition of the roster annually and make any adjustments as they agree. Arbitrators shall comply with the annexed Code of Conduct.

3. No later than the day following receipt of the notice of arbitration, the Secretariat shall ask all members of the roster for the soonest dates they are available to serve. Roster members shall state their dates of availability within three business days after receiving the request from the secretariat. The Secretariat shall then forward their responses to the parties, who should make best efforts to agree within ten days (running concurrently with the notice and response periods) on their choice of arbitrator.

4. When parties fail to agree on the choice of an arbitrator, each party shall submit to the Secretariat by the end of the next business day a list in order of preference of at least five acceptable names of available arbitrators on the roster. The Secretariat will immediately announce the first name matched by both parties to handle the arbitration, who shall serve as the arbitrator in the case.

5. If there is no match among proposed names, each party, within five days, shall name one person from the roster who is unavailable, or among the latest available, to join an *ad hoc* appointing authority. These two are empowered to appoint the arbitrator for the dispute if they agree on the choice. If they do not agree, they will choose, within five days, a third person from the roster who is also unavailable or among the latest available. Those three, within five days, would appoint an arbitrator from the roster, either by consensus or by majority vote, taking into account availability to handle the arbitration in a timely manner. These three would exercise the appointing authority on a *pro bono* basis.

6. The dispute shall be heard and decided by one arbitrator. Where the parties have agreed in their enforceable brand agreement, or by agreement after one party initiates arbitration, three arbitrators may be appointed. In the event that three arbitrators are to be appointed, each party shall appoint one arbitrator from the roster and these party-appointed arbitrators shall then appoint the presiding arbitrator from the roster. In the absence of party agreement, the presiding arbitrator shall be chosen by lot from among the three roster members who indicated the soonest availability for the arbitration.

Commentary:

Paragraph 1 envisions creation of a standing roster from which an impartial arbitrator can be quickly selected (or, by mutual agreement only, a 3-person tribunal also quickly selected). Parties would agree on a roster in their original enforceable brand agreement, or within ninety days of concluding their agreement, to be in place and ready to go when needed.

The requirement for expertise in international human rights or labor rights law and standards, and optionally one or more sub-specialties tailored to parties' needs, ensures that arbitrators will understand the issues and the labor rights and standards-promoting purpose of the enforceable brand agreement. This is another way to avoid the outcome of the U.S.-Guatemala arbitration, where two of the three panelists were trade law experts with no prior labor experience. They prioritized commercial aspects of CAFTA and looked to WTO rulings for guidance, ignoring decisions by the ILO Committee on Freedom of Association, the Committee of Experts, international human rights tribunals, and other relevant bodies.

Potential sources of roster candidates are: 1) professional arbitrators and mediators with the requisite international knowledge and experience; 2) retired ILO officials (or retired from other international organizations or from national governments); 3) respected university or research center-based scholars; 4) respected former trade union or management figures who have won the confidence of the other side over a long period of proven good-faith dealings.

Selection to an enforceable brand agreement arbitrator roster would be an honor. Labor stakeholders and brands should invite potential candidates to apply for the roster with a carefully crafted notice of desired experience and qualifications.

Paragraph 2 ensures that roster members will not have any conflict of interest. Roster candidates will have to disclose any actual, potential, or perceived conflicts of interest before joining the roster (see Annex 2 for more details). This paragraph also envisions an annual review of the roster by the parties, who can agree to any changes.

Paragraph 3 ensures that the parties will have a wide enough choice of arbitrators who would be available to serve on a timely basis. This paragraph also sets a rapid timeline for appointing an arbitrator by direct agreement of the parties.

Paragraph 4 provides a mechanism for rapid choice of an arbitrator when the parties cannot initially agree, using a matching list method administered by the secretariat. It seeks to encourage an overlap of acceptable names so that further steps are not needed. If parties are communicating internationally, parties may modify the next-business day period to two business days.

Paragraph 5 provides for recourse when the matching list method fails to identify an arbitrator acceptable to both parties. Recourse is to an appointing authority drawn from the roster in a typical appointment system: each party picks one; these two can agree on the choice; if they do not agree they will choose a third appointing authority member; those three then name the arbitrator. Roster members who are not among those available to serve can play this role. The hope is that this step will not be needed in most cases, when the parties agree or their 5-name lists produce a match.

Paragraph 6 allows for parties to agree to use a 3-person arbitral tribunal rather than a single arbitrator in complex cases where the experience and expertise of three arbitrators complement each other. Using a 3-person tribunal requires agreement of both parties, who would then proceed in typical fashion for the establishment of a 3-person arbitral tribunal: each party picks one arbitrator; those two choose the third, or the third is chosen by lot if they cannot agree.

It should go without saying that the parties may agree on a different method of creating a roster and appointing of the arbitrators from the roster. The procedure outlined here is recommended for its simplicity and speed.

Article 4: Case management

1. Within 10 days after the arbitrator is appointed, the arbitrator and the parties shall hold a scheduling and case management meeting to review and agree on procedures, schedules, and deadlines in accordance with the annexed Timetable and Deadlines.

2. Extensions of time related to scheduling and deadlines under these clauses are permitted by mutual agreement of the parties. Absent agreement, the arbitrator shall rule on requests for extension, with the burden on the requesting party to demonstrate a compelling need based on unforeseen or uncontrollable circumstances, undue hardship or unfair disadvantage.

Commentary:

Paragraph 1 requires the arbitrator and the parties to move quickly to plan the course of the arbitration adhering to the timetable contained in the Annex to these clauses.

Paragraph 2 requires the parties to adhere to the schedule and deadlines unless they both agree on time extension. If there is no agreement, the arbitrator will decide, but holding the requesting party to a high bar for granting the request. Convenience alone is not compelling.

Article 5: Applicable law

1. The arbitrator shall apply the terms of the enforceable brand agreement to resolve the dispute. If the terms of the agreement provide the entire basis for an award, the arbitrator shall not go beyond the terms of the agreement.

2. If the terms of the agreement do not provide the entire basis for an award, the arbitrator shall first apply generally recognized international human rights and labor law, rules of law, or standards contained in these sources that the arbitrator determines to be relevant:

- a) international norms in UN human rights covenants, ILO conventions, OECD Guidelines, UN Guiding Principles, regional human rights and social charters, and other relevant instruments;

- b) decisions of ILO supervisory bodies (CFA, CEACR, Commissions of Inquiry);
- c) decisions by international tribunals such as ECHR, ECJ, ECSR, IACHR, ACJHR and others;
- d) consensus in decisions by national high courts;
- e) customary international labor law; or
- f) respected international labor law and labor relations scholarship.

3. After application of international human rights and labor law norms and jurisprudence, the arbitrator may apply any other relevant sources of law, rules or standards.

Commentary:

Paragraph 1 states that if the parties' agreement provides sufficient foundation for the arbitrator to decide the case, the arbitrator need not look beyond the four corners of the agreement. It is expected that international labor and human rights norms or standards will be deemed relevant in the agreement—either by general references or by specific inclusion of instruments or decisions in the field.

Paragraph 2 makes clear that if the arbitrator looks beyond the language of the agreement, international human rights and labor rights law and standards are the overarching legal principles to apply in the case. The use of “law, rules of law or standards” intends to provide the arbitrator with the broadest possible flexibility in choosing the normative sources from which the applicable law is drawn. This is a departure from typical choice of law rules, which could require applying national law of the host country where the supplier is located, or of the home country where the brand is based, or of the place of arbitration.

Applying the national law of the supplier's location is problematic when such national law fails to comport with international standards. The same can be true of the brand's home country,

especially the United States, where many features of labor and employment law are incompatible with international norms. The place of arbitration is driven by convenience of the parties and should not be a factor in deciding what law to apply. In contrast, international human rights and labor law, rules of law and standards are more universal in scope and application.

On point d) on the sources of law, there can be outlier court decisions. "Consensus" here means by a substantial majority of national courts.

Point e) reflects labor rights advocates' position that freedom of association, the right to organize and bargain collectively (including the right to strike), the elimination of child labor, forced labor, and discrimination in the workplace, workplace health and safety and other basic labor rights are recognized under customary international law. See, for example, Jeffrey Vogt et. al., *The Right to Strike in International Law* (Hart Publishing 2020).

Point f) on the work of international labor scholars recalls an observation by U.S. Supreme Court more than a century ago, when the court cited among sources it considers in applying international law: "[T]he works of jurists and commentators who by years of labor, research, and experience have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is." See *The Paquete Habana*, 175 U.S. 677 (1900).

Paragraph 3 gives leeway to the arbitrator to take into account other relevant sources of law, rules or standards.

Article 6: Seat of arbitration; place of arbitral hearing; language of arbitration

1. Parties shall designate in the enforceable brand agreement the seat of arbitration, which shall be the locus of litigation, if it becomes necessary, to compel arbitration or vacate an award.
2. The party initiating arbitration shall propose the location for a hearing in the case, which may or may not be at the seat of arbitration. The presumption is that the hearing should be held in the

place where the alleged harm took place. Taking into account cost, convenience, and due process concerns, the arbitrator shall decide whether to hold hearings for the presentation of evidence through documents and witnesses, or for oral argument based solely on document submissions. The proposal for location of a hearing can be included in the notice of arbitration, or can be made at the outset of scheduling and case management meetings among the parties and the arbitrator. The arbitrator shall resolve any dispute as to the location of a hearing, taking into account the interests of the parties with due regard to cost, convenience, and due process. In making this decision, the arbitrator should give greater weight to positions of the party seeking the lower-cost solution.

3. The parties may designate any language(s) to be used in the arbitration proceedings. Alternatively, parties may defer choice of language to the initiation of arbitration, in which case each party shall state its preferred choice. Any dispute as to choice of language will be resolved by the arbitrator, taking into account cost factors for translation and interpretation and added complexity of using multiple languages. However, the arbitrator will give due consideration to workers being able to testify in their own language.

Commentary:

Paragraph 1 clarifies issues that come into play in choosing a seat of arbitration. Parties could agree on the seat *ad hoc*, based on the details of the arbitration that has been invoked. Or they could agree on the seat in advance, in their enforceable brand agreement, so it does not become an issue for the arbitration.

The seat of arbitration is important if one party refuses to arbitrate, and the other party files a lawsuit to compel arbitration. The lawsuit would have to be filed before a court in the seat of arbitration. The law of the seat of the arbitration also determines the scope of arbitrability. There is no autonomous definition of arbitrability under international law. States define arbitrability differently and the concept can be taken to include whether a subject matter is capable to be resolved by arbitration or whether a person is capable to be party to an arbitration. Some States find that employment and/or labor-related disputes, individual and/or collective, are not subject to arbitration. For more on arbitrability, see the International Bar Association (IBA) Subcommittee on

Recognition and Enforcement of Arbitral Awards, 'Report on the concept of 'Arbitrability ' under the New York Convention' (September 2016)

(<http://www.ibanet.org/Document/Default.aspx?DocumentUid=C551D35B-8CFD-4255-98D9-BBEB94974A7B>).

The seat is also important at the other end of the process, if a party refuses to accept the arbitrator's award and the other party files a lawsuit to vacate the award or to compel enforcement of the award.

The parties should agree on a seat in a strong rule-of-law country where such suits can advance and be handled effectively. The World Justice Project ("WJP") Rule of Law Index (see <https://worldjusticeproject.org/>) is a widely respected and accepted ranking system of national judiciaries; the top 25 countries provide ample options for choosing a seat of arbitration.

Parties should keep in mind that some countries, even in the top 25 WJP rankings, prohibit arbitration of labor and employment disputes, requiring them to be decided by courts. A strong argument can be made that such prohibitions only apply to disputes arising in the direct employer-employee relationship or collective bargaining relationship, not to a dispute giving rise to arbitration under enforceable brand agreements. Nonetheless, parties may wish to avoid having to test the argument in courts of countries with such prohibitions.

Choice of the seat of arbitration would likely depend on the location of headquarters (global or regional) of the parties to the agreement. It could be in a major city in any of the top 25 rule-of-law countries in the WJP Index. In determining the seat of arbitration, parties may also want to consider whether the state has ratified the New York Convention and whether the state has made a commercial reservation to the convention (see <http://www.newyorkconvention.org/countries>). It is presumed that parties will exercise due diligence in reviewing and analyzing the legal implications of a potential seat of arbitration.

Paragraph 2 addresses the place of arbitration where any hearing would take place. This should be agreed by the parties and the arbitrator and need not be the seat of arbitration. It leaves to the arbitrator a final decision as to place, taking into account the interests of the parties. Special

attention should be given to minimizing costs to stakeholders of bringing workers to testify at a hearing.

Paragraph 3 recognizes that evidence and testimony may require translation or interpretation, but that such services are expensive and time-consuming. The parties and the arbitrator should make every effort to conduct proceedings in one language, presumably the language of the enforceable brand agreement. However, this should not weigh against workers' ability to give evidence in their own language where such testimony is needed.

Article 7: Transparency

1. Parties to an enforceable brand agreement shall seek to agree on matters of transparency, or exceptions to transparency, and present their agreement to the arbitrator.

2. In the absence of party agreement, parties shall give notice of any request for exceptions to transparency during the course of scheduling and case management meetings with the arbitrator. The arbitrator shall resolve any dispute between the parties over transparency before the start of any hearing, if a hearing takes place; or if no hearing takes place, before the start of the period for parties to prepare final briefs in the case. If unforeseen issues of transparency or exceptions to transparency arise during the course of proceedings, any dispute shall be put to the arbitrator orally or with a summary one-page written argument by each party, and the arbitrator shall decide the matter on the following day.

3. Subject to exceptions to transparency for confidential or protected information, the following documents shall be made available to the public: the notice of arbitration and the response to the notice of arbitration containing the statement of claim and the statement of defense; a table listing all exhibits to the aforesaid documents and to expert reports and witness statements, if such table was produced in the proceedings; the orders, decisions and awards of the arbitrator.

4. There is a presumption of transparency in the proceedings. The burden of proof to establish an exception to transparency is on the party seeking it. The presumption in favor of transparency and the burden are reversed where a party is seeking to protect the identity (or identifying

information) of employees of the supply chain employer who have security concerns should their identity be revealed. Such security concerns include both physical security and concerns about possible retaliation or reprisals in or out of the workplace. The party seeking confidentiality on trade secrets or employee security may make its argument to the arbitrator *ex parte*, and the arbitrator may deny confidentiality only when the risk of disclosure of trade secrets or potential adverse consequences for employees is negligible.

5. Hearings for the presentation of evidence or for oral argument shall be public, unless the parties agree that a hearing be closed to the public. If one party wants an open hearing and the other party wants a closed hearing, the arbitrator shall decide the matter. Where there is a need to protect confidential or restricted information, the arbitrator shall make the appropriate arrangements to hold in private that part of the hearing requiring such protection.

6. Upon party agreement, audio recording or transcripts of hearing proceedings may be taken, with each party bearing related costs equally. If one party does not want a recording or transcript and the other party wants it, the party wanting it shall make arrangements and bear the costs, and the audio recording or transcript shall be provided to the other party and to the arbitrator. If both parties do not want a recording or transcript, the parties and the arbitrator will rely on their own notes for purposes of briefing and writing a decision.

Commentary:

Paragraph 1 lets the parties agree on the extent to which information related to the arbitration is made transparent, and the arbitrator and the Secretariat should respect their agreement.

However, since parties may not agree on everything related to transparency or exceptions to transparency, the arbitrator must be empowered to resolve any disputes. The parties should state their positions and make their arguments to the arbitrator early in the process.

Paragraph 2 constrains the arbitrator and the parties to resolve issue of transparency early in the process so they do not later become sources of conflict or delay.

Paragraph 3 contains a non-exhaustive list of the kind of information that should be disclosed.

Paragraph 4 declares a general presumption in favor of transparency and places the burden of overcoming the presumption on the party seeking an exception to transparency. At the same time, it creates a special rule in cases involving the security of individual employee victims if their names are revealed. It reverses the presumption and the burden of overcoming it, and sets a high bar for convincing the arbitrator to allow disclosure of workers' identity.

Paragraph 5 provides for opening to the public hearings in the case, except when confidentiality is required. The arbitrator shall make logistical arrangements to facilitate the public access to hearings by the means as it deems most appropriate. However, the arbitrator may decide, after consultation with the parties to hold all or part of the hearings in private where this becomes necessary for logistical reasons, such as when the circumstances render any original arrangement for public access to a hearing infeasible.

Paragraph 6 provides for creation of audio recordings or transcripts of hearing proceedings. Where parties agree, recordings or transcripts can be made and the parties must share the cost equally. If one party insists on a recording or transcript, that party must make arrangements and bear the cost, understanding that the recording or transcript must be furnished to the other party and to the arbitrator. If both parties agree not to have a transcript, everyone must rely on careful notes.

Article 8: Hearings, discovery, evidence

1. Parties may agree to waive a hearing in the case and have the arbitrator issue an award based on documentary submissions, including any record created in stages prior to arbitration. However, any offers of settlement made in such prior stages shall not be admitted into evidence, and the arbitrator shall not take them into account in reaching a decision in the case. The parties may agree to limit the length and scope of written submissions and written and oral witness evidence (both fact witnesses and experts).

2. If both parties agree or if one party requests it, a hearing shall be held for the presentation of evidence by witnesses, including expert witnesses, or for oral argument only based on documentary evidence provided to each other and to the arbitrator. The arbitrator and the parties shall plan the hearing during their scheduling and case management discussions in the 10-day

period following selection of the arbitrator. The arbitrator shall decide the duration of the hearing, taking into account the position and arguments of the parties. The arbitrator shall make every effort to hold the hearing in a single day, but no hearing shall last more than 3 days unless both parties agree. More than one hearing day shall follow in successive days.

3. The arbitrator shall rule on the admissibility of evidence, both documentary and in witness testimony. The arbitrator shall liberally admit evidence introduced by a party, deciding what weight to assign to evidence admitted over objection. The arbitrator shall exclude evidence that is duplicative, repetitive, or cumulative.

4. The arbitrator may compel discovery with respect to documentary evidence sought by a party, whether the parties have waived a hearing or if a hearing is to take place, and with respect to witness testimony if a hearing is to take place. The party seeking such production shall demonstrate that such documents are likely to exist and to be relevant. Parties shall disclose in advance whom they intend to call as witnesses at the hearing, and make a proffer of proof as to what the witness will testify about. There shall be no deposition of any witnesses in advance of the hearing. Each party shall pay any costs associated with its witnesses appearing and testifying at the hearing.

5. Upon the request of a party, the arbitrator may reduce the number of witnesses called, or compel a party to produce a witness not on its list, taking into account due process concerns, time and cost expenditure. If a party fails to comply with the arbitrator's order to produce documentary evidence or to produce a witness, the arbitrator shall apply maximum adverse inference against the party refusing to comply, and favorable inference for the party that requested the order, with respect to the subject matter of the request.

6. Parties may agree to remote witness testimony. In the absence of party agreement, the arbitrator shall decide based on a party's argument for in-person testimony. Remote testimony is to be preferred absent a compelling argument for in-person testimony. Each party shall bear any costs related to remote testimony by its witnesses.

Commentary:

Paragraph 1 lets the parties forego a hearing to save time, cost, and complication if the issues for the arbitrator to decide are sufficiently clear and facts are not in dispute. In many cases, parties' exchanges and information gathered in stages prior to arbitration will enable the arbitrator to decide the matter without need for a hearing. Parties should strive to achieve this outcome with good-faith efforts to provide information to each and stipulate the facts so that they can present a complete record to the arbitrator. However, parties shall not provide to the arbitrator any offer of settlement at a prior stage either by itself or by the other party. This enables the parties to make every effort to settle their dispute without fear that an offer will come back later to haunt them in the arbitration.

Paragraph 2 provides that a hearing shall take place if both parties request it, or just one of them requests it. This protects the due process interests of the party who wants a hearing when the other party does not. Paragraph 2 also provides for a quick decision on whether a hearing will take place and puts limits on the duration of a hearing.

Paragraph 3 puts the arbitrator in control of the admissibility of evidence, allowing for a relatively lenient standard often characterized as "for what it is worth," to minimize lawyers' fighting over objections and keep the hearing moving.

Paragraph 4 provides for discovery orders on documentary evidence and witnesses. It requires parties to supply a list of witnesses they intend to call at the hearing, if a hearing is to take place, and a general description of what their testimony will entail. Paragraph 4 also precludes any depositions in advance of the hearing. This is a key factor in reducing costs and delays. It also provides that each party shall bear all costs associated with witnesses they produce at the hearing, whether voluntarily or pursuant to compulsory process.

Paragraph 5 provides that the arbitrator can reduce the number of witnesses to be called, and reiterates the arbitrator's authority to compel the appearance of witnesses based on parties' arguments and due process concerns. Finally, paragraph 5 directs the arbitrator to apply an adverse inference against a party that refuses to comply with a discovery order and in favor of the

requesting party, rather than force the other party to file suit to compel compliance and thus adding lengthy delays to the proceedings.

Paragraph 6 provides for the use of remote testimony at hearings to save unnecessary travel costs for witnesses. The parties can agree to have witnesses testify remotely to save time and cost. The arbitrator is empowered to decide any dispute related to remote versus in-person testimony, but should favor remote testimony to save time and cost.

Article 9: Experts; site visits

1. Upon party agreement and with approval of the arbitrator, the parties may jointly engage one expert witness answerable to the arbitrator to address relevant issues in the case. The parties and the arbitrator shall agree on terms of reference for such a jointly engaged expert, including fees and other expenses. The parties shall bear equally the fees and other costs for such jointly agreed expert.

2. Whether or not a jointly engaged expert is used, each party may engage expert witnesses on its own behalf. Either party can challenge the expert status of the other party's choice, but the burden is on the challenging party to demonstrate that the other party's proposed expert is manifestly unqualified; otherwise, the arbitrator shall accommodate the choice. The arbitrator may limit the number of expert witnesses based on arguments of the parties regarding expertise, relevance, duplication, repetition, cost and other concerns, with due process considerations paramount in deciding whether to exclude a proposed expert.

3. The parties may request that their own or the other's expert witnesses testify in person. The arbitrator may consider the parties' arguments and grant their request. However, the arbitrator is empowered to order that expert witnesses provide their evidence in writing without having to appear at the hearing, as long as the decision is the same for both parties.

4. Upon parties' agreement, the arbitrator may make an on-site inspection in connection with the arbitration. If there is no agreement, one party can request a site visit, and the parties can make arguments for or against it. There shall be a presumption against the need for a site visit, but the party requesting it can overcome the presumption by a compelling argument as to why it is

necessary. The arbitrator shall decide the matter, taking into account due-process arguments of the parties in light of added cost and delays. If the arbitrator decides that a site visit is needed, each party shall pay its own costs for the site visit, and share the cost of the arbitrator's daily fee and travel expenses.

Commentary:

Paragraph 1 contemplates the possibility of an agreement by the parties on a jointly chosen expert to serve the arbitrator, upon the arbitrator's approval.

Paragraph 2 provides for each party the right to call upon expert witnesses on its behalf. It seeks generally to accommodate their choice, allowing exclusion only upon convincing the arbitrator that the proposed expert is manifestly unqualified. In deciding the number of experts allowed to submit evidence, the arbitrator must keep in mind the emphasis in these clauses on streamlining proceedings and keeping down costs. The arbitrator is empowered to balance these interests in deciding whether to have experts testify at the hearing, whether in-person or remotely.

Paragraph 3 allows the arbitrator to have experts offer only written evidence even if a hearing takes place, which parties can address in their briefs rather than through cross-examination.

Paragraph 4 recognizes that site visits may be advisable in some cases, and parties can agree to have a site visit, but they should be carefully circumscribed if parties do not agree. If one party wants a site visit and the other does not, a presumption shall run against having a site visit. But the party seeking it can overcome the presumption with a convincing argument.

Article 10: Participation of *amici* and other non-disputing parties

1. Parties may propose participation of amici and other non-disputing parties for written submissions only. After consultation with the disputing parties, the arbitrator may allow a person that is not a disputing party to file a written submission regarding a matter within the scope of the dispute. If both parties propose such participation, the arbitrator shall allow it or not in equal measure.

2. A third person wishing to make a submission shall apply to the arbitrator, and shall, in a concise written statement, which is in a language of the arbitration and complies with any page limits set by the arbitrator:

- a) Describe the third person, including, where relevant, its membership and legal status (e.g., trade association or other non-governmental organization), its general objectives, the nature of its activities and any parent organization (including any organization that directly or indirectly controls the third person);
- b) Disclose any connection, direct or indirect, which the third person has with any disputing party;
- c) Provide information on any government, person or organization that has provided to the third person (i) any financial or other assistance in preparing the submission; or (ii) substantial assistance in either of the two years preceding the application by the third person (e.g. funding around 20 per cent of its overall operations annually);
- d) Describe the nature of the interest that the third person has in the arbitration; and
- e) Identify the specific issues of fact or law in the arbitration that the third person wishes to address in its written submission.

Commentary:

If the arbitrator grants a party's request to allow a right to amicus or non-disputing party participation, it is important that any interests of such applicants be disclosed. Parties may also consider to agree to a standing right of a defined number of amici to participate, or set page limits in the interest of time and efficiency, or to preclude such participation altogether.

Article 11: Provisional, conservatory and interim measures

1. The arbitrator may, at the request of a party, take any provisional, conservatory, or interim measures the arbitrator deems necessary, including any measure to maintain or restore the status quo, prevent irreparable or serious harm or prejudice, preserve evidence, preserve assets to satisfy a future award, and other criteria normally applied to the issuance of an injunction by a court, falling within the subject-matter of the dispute.

2. The arbitrator shall be empowered to issue interim orders not to dismiss or otherwise discriminate or retaliate against workers, or immediately to reinstate or make whole workers who were dismissed or discriminated or retaliated against, related to their exercise of rights protected by the enforceable brand agreement or their testimony or other involvement in arbitration proceedings. The same protection shall extend to co-workers, family members or other persons in a relationship with affected workers.

Commentary:

Paragraph 1 ensures that for all the reasons that courts are empowered to issue injunctions to protect parties' interests while a case proceeds through necessarily time-consuming stages, the arbitrator in a labor stakeholder-brand dispute must be able to issue orders preventing or compelling certain conduct by a party that could not be remedied later as part of an award.

Paragraph 2 focuses specific attention on the critically important need for the arbitrator to nip in the bud efforts by supply-chain employers to interfere with workers exercising their labor rights by ordering immediate reinstatement or other remedy to restore the status quo ante, or to prevent or remedy any other form of discrimination or retaliation against affected employees, co-workers, family members or other possible targets. Since brands themselves do not directly employ workers, they will have to include provisions in their supplier contracts obligating local managers to obey such an order by the arbitrator, with penalties if they fail to comply.

Article 12: Multi-party claims and joinder

1. Insofar as possible, claims with significant common legal and factual issues shall be heard together. The arbitrator may adopt special procedures appropriate to the number, amount and subject matter of the particular claims under consideration. There shall be no bar or limit to collective claims affecting multiple workers in the arbitration proceeding.

2. Within 30 days after respondent's reply to the notice of arbitration, either party may ask the arbitrator to join any other party to the agreement to the arbitration when the underlying issues are the same as those raised in the notice of arbitration, without excessively complicating or delaying the arbitration process.

The arbitrator is empowered to decide on such joinder taking into account arguments of the parties, timeliness of the request, fairness to the party sought to be joined, delays in the arbitration process, and other considerations.

Commentary:

Paragraph 1 addresses the question of "class action"-type cases under this arbitration mechanism. Normally, consent to class arbitration will not be inferred and must be explicit; this matter should be addressed in the agreement so as to avoid any due process deficiencies. However, to the extent that enforceable brand agreements are intended to protect labor rights and standards of groups of workers employed by suppliers, those workers are by definition a class whose interests are the subject of the arbitration. A "class action" normally needs special certification to proceed. Under a enforceable brand agreement meant to protect all employees of supply chain employers, class status is the default posture for arbitrations unless the case involves a subset of workers; for example, a case involving anti-union dismissals of individual workers or violence against individual workers, which would require personalized remedies.

Paragraph 2 aims to avoid unnecessary duplication or repetition of arbitrations. So for example, the arbitrator might join a brand that was not named in the initial notice of arbitration but whose alleged breach of the agreement fits the factual pattern at issue in the arbitration. However, the

30-day limit (after respondent's reply) guards against upsetting the proceedings after they are well underway.

Article 13: Awards and remedies; written opinion; final and binding effect; interpretation or correction of award; additional award

1. All awards shall be made in writing and shall be final and binding on the parties. Copies of the award signed by the arbitrators shall be communicated to the parties by email. The parties shall carry out all awards without delay.

2. The arbitrator may order any remedy available in law or equity compelling the brand or brands to secure compliance by suppliers with labor rights and labor standards mandated in the enforceable brand agreement. The award may order monetary compensation and non-monetary relief, including restitution, rehabilitation, satisfaction, specific performance, liquidated damages, mandatory training, and the provision of guarantees of non-repetition. Without being punitive, an award may also contain recommendations for other measures that may assist in resolving the underlying dispute and preventing future disputes or the repetition of harm. The arbitrator may also act *ex aequo et bono* using equitable criteria.

3. Upon party agreement, each party may submit to the arbitrator its last best offer for resolving the dispute, and ask the arbitrator to choose one of these final offers as the basis for the award, without substantive change. Otherwise, the arbitrator's decision and remedial order shall be based on language of the enforceable brand agreement and where relevant, application of relevant international human rights and labor rights law and standards.

4. The arbitrator shall state in writing the reasons upon which the award is based. The publication of the terms and reasoning of the award cannot be waived.

5. The award may contain an order of non-repetition tantamount to a permanent injunction, and maintain the arbitrator's jurisdiction to hear claims of violation of the award.

6. If, before the award is made, the parties agree on a settlement of the dispute, the arbitrator shall either issue an order for the termination of the arbitral proceedings or, if requested by the parties and accepted by the arbitrator, record the settlement in the form of an arbitral award on agreed terms. The arbitrator is not obliged to give reasons for such an award, but must be satisfied that such an award is compatible with international labor and human rights norms.

Commentary:

Paragraphs 1-2 are meant to give binding force to the arbitrator's decision and to give the arbitrator wide discretion in fashioning a remedy. An award may order monetary compensation and other forms of relief listed in Paragraph 2. An award may order a brand to cancel its supply contract with a supplier who refuses to cooperate in implementing the award, or to impose financial penalties pursuant to the brand-supplier contract. An award may also contain recommendations for other measures that may assist in resolving the underlying dispute and preventing future disputes or the repetition of harm, but distinct from the terms of an award, such recommendations shall be binding only if agreed by the parties.

Potential remedies also include, but are not limited to: reinstatement, back pay, severance pay, payment into retirement or welfare funds, financial support for safety and health improvements, training and financial support for workers affected by brands' failure to compel compliance by suppliers with conditions of the enforceable brand agreement (this last could cover lost wages to workers partially or totally unemployed by such failure as well as reasonable lump-sum payments to workers partially or totally disabled by such failure), order to recognize a trade union and bargain in good faith, and other guarantees to the right to freedom of association.

Requiring brands to cut off or impose financial penalties on suppliers who fail to do what is necessary to implement the award is a key part of a binding enforcement system. Commercial contracts between brands and suppliers should contain a clause obligating the supplier to do what is necessary to come into compliance with the award, however, the absence of such clauses in these contracts shall not limit the discretion of the arbitrator to require such actions.

Paragraph 3 allows the parties to opt for a "final offer" arbitration in which each would make its best offer for a resolution of the case, and ask the arbitrator to choose one of their offers which

the arbitrator deems most suitable. Such a method might be preferable if the facts and circumstances of the case lend themselves to it. Since this could only be done by agreement of the parties, neither is disadvantaged. If one party wants the arbitrator to decide the case not using a final-offer method, it will be so decided based on the arbitrator's judgment as to language of the agreement, application of relevant law, and equitable considerations.

Paragraph 4 ensures a written award so that all parties will be advised of the analysis and reasoning of the arbitrator in making the award. This allows them to seek any interpretation or clarification that might be needed.

Paragraph 6 contemplates the possibility of settlement of the dispute before the arbitrator renders an award (as in the Bangladesh Accord arbitration case). This relieves the arbitrator of the obligation to make a written award. However, the parties may request the arbitrator to transform their settlement into the award in writing, which may be useful if judicial enforcement is later sought.

Article 14: Arbitrator fees; apportionment of costs & fees

1. The parties shall agree on the daily or part-daily fee to be paid to the arbitrator. Parties may further define parameters regarding arbitrator's expenses for airfare, lodging, and meals. By seeking and accepting a place on the roster, arbitrators shall accept the fee structure under this clause.
2. Parties shall make every effort to include in enforceable brand agreements the establishment of a reserve fund to cover anticipated arbitrator's fees and expenses and other common costs of the arbitration, such as administrative payments to the secretariat, sufficient to underwrite at least one arbitration.
3. If no reserve fund exists, the parties shall bear equally the costs of the arbitrator's fee and expenses and other common costs. However, on equitable grounds, taking into account the relative financial resources of the parties, the nature of the dispute, the facts and circumstances of the case and other relevant considerations, the arbitrator may allocate common costs to the

parties in differing amounts. Such allocation shall only apply to common costs; each party shall bear its own legal costs, travel expenses, and other expenditures over which it has control.

Commentary:

Paragraph 1 allows the parties to agree on a standard daily fee structure for arbitrators. For guidance, one default benchmark could be the daily fee paid to experienced labor arbitrators in the U.S. labor arbitration system, generally \$2500-\$3000 per day. This will ensure equal treatment of roster members while paying an adequate, but not onerous, daily fee (not the typical fee for commercial arbitration between two deep-pocketed corporations). This should be sufficient to attract world-class arbitrators interested in dispensing justice, not making money, while being fairly compensated for their efforts.

Paragraph 2 encourages creation of a reserve fund sufficient to cover the anticipated common costs of at least one arbitration. It leaves to the parties how much each of them pays into the reserve fund. Presumably the funding would come mainly or totally from the brands, who have the resources for this.

Paragraph 3 sets a default of equal sharing between the parties of all common costs associated with the arbitration. At the same time, it leaves room for the arbitrator to allocate costs between the parties based on equitable considerations. The allocation would apply to common costs only, not to all costs – it is not a full-blown “loser pays” formula. Common costs may include but are not limited to the fee of the arbitrator, travel and expenses incurred by the arbitrator, and where relevant, the fee of the jointly-agreed expert, travel and expenses incurred by the jointly-agreed expert, the administrative fee or expenses of the secretariat.

Article 15: Optional mediation or facilitated settlement clause

1. At any time during the course of the arbitral proceedings, parties may agree in writing to resort to mediation or other facilitation methods to resolve their dispute. Upon the joint request of the parties, the arbitrator shall stay the arbitral proceedings for a period of time agreed by the parties.

2. All offers, admissions, or other statements by the parties, or recommendations by the mediator or other facilitator, made during the course of the settlement proceedings shall be inadmissible as evidence in the arbitral proceedings, unless otherwise agreed by the parties.

3. No mediator or other facilitator may subsequently participate in the same arbitral proceedings in any capacity, including as arbitrator, expert, counsel, adviser or otherwise.

4. If the collaborative settlement proceedings are terminated without a settlement of the dispute, the arbitrator, at the request of any party, shall resume the arbitral proceedings.

Commentary:

Mediation or other forms of facilitated settlement should be encouraged. Article 15 gives parties an opportunity of turning to mediation or other facilitation methods at any stage of an arbitration proceeding, including after the arbitration has commenced

Anything that parties say or offer in mediation cannot be admitted into evidence in the arbitration should the mediation fail to produce a settlement. This provides an inducement for the parties to make their best efforts to settle the dispute.

Annex 1: Timetable and deadlines

The following timetable and deadlines shall apply for each step of proceedings under this arbitration clause. "Days" means business days, exclusive of Saturday, Sunday, or major national holidays in the relevant countries.

Starting with the date of receipt of the notice of arbitration:

- 15 days for respondent's reply (30 days if respondent submits an accompanying brief);
- 10 days (concurrent with the 5/10 days for the reply) to choose the arbitrator;
- 10 days from receipt of respondent's reply for the arbitrator to rule on any challenge or disagreement (the arbitrator may extend this to 30 days for complex issues);
- Within 10 days after the arbitrator is selected, hold the planning/case management scheduling meeting among the parties and the arbitrator (this can be done remotely);
- Within 30 days after the first planning meeting (there may be follow-up meetings), the parties submit their documentary evidence and briefs, and also any requests for discovery orders or interim orders; unless otherwise agreed, the notice of arbitration is made publicly available;
- Within 10 days, the arbitrator rules on discovery orders and interim orders;
- Within 30 days, the hearing takes place;
- Within 10 days after the hearing, the parties submit post-hearing briefs;
- Within 30 days of receipt of post-hearing briefs, the arbitrator makes the decision/award;

- Within 5 days after the award, parties have an opportunity to request an interpretation or clarification from the arbitrator based on good-faith concerns about ambiguity, uncertainty etc.; such request shall explain the basis of their concerns;
- Within 5 days after such a request, the other party can submit a reply brief asserting its position in the matter;
- Within 10 days of such a request (or reply brief), the arbitrator issues the interpretation or clarification.

The minimum amount of time expended in this scenario is 165 business days (approximately 200 calendar days); the maximum is 190 business days (approximately 250 calendar days). The arbitrator may, at any time, after inviting the parties to express their views, modify any period of time prescribed or agreed by the parties.

For the purpose of calculating a period of time, such period shall begin to run on the day following the day when the relevant communication is received.

Commentary:

This timetable is included as a separate Annex to show the timetable and deadlines in one place rather than intersperse them throughout these clauses. The goal is a rapid resolution of the case, which is vitally important where workers' rights and labor standards are at stake.

This is an ambitious timetable, but it is expected that the parties would be fully prepared to move quickly in line with it. The issues should have been fully aired in stages prior to arbitration, and relevant actors (union, NGO and brands' staff who were handling the matter at earlier stages; lawyers, witnesses, experts, the pre-selected secretariat etc.) should be poised to move when a claimant initiates the arbitration.

Annex 2: Arbitrator Code of Conduct

Definitions

- a) "Affiliate" encompasses all companies in a group of companies, including the parent company.
- b) "Close family member" refers to a spouse, sibling, child, parent or life partner, in addition to any other family member with whom a close relationship exists.
- c) "Model clauses" refers to these Model Arbitration Clauses for Enforceable Brand Agreements.

1. General Duties

At all times, arbitrators shall:

- a) Be, and reasonably appear to be, independent and impartial;
- b) Avoid impropriety as well as any reasonable perception of impropriety;
- c) Avoid direct and indirect conflicts of interests;
- d) Respect the confidentiality of the arbitral proceedings;
- e) Observe high standards of conduct that preserve in all respects the integrity of the arbitral proceedings; and
- f) Act diligently, fairly and in a timely manner.

2. Duty of Disclosure

1. Prior to appointment to the standing roster under these Model Clauses, a person approached in connection with her, his or their possible appointment to the roster (the "candidate") shall disclose any interest, relationship or matter that could reasonably be considered as affecting her, his or their independence or impartiality, or that might otherwise give rise to a reasonable perception of impropriety. An arbitrator, from the time of appointment to the roster and throughout any arbitral proceedings shall without delay disclose any such circumstances to the parties (and the other arbitrators in case of a 3-person panel) unless they have already been informed of these

circumstances. To this end, a candidate or arbitrator shall make all reasonable efforts to become aware of such interests, relationships and matters. The disclosure obligations of candidates and arbitrators shall conform to international best practices.

2. Candidates shall disclose at least the following interests, relationships and matters:

a) Any financial interest of the candidate or arbitrator:

i. in the proceeding or in its outcome; and

ii. in any other administrative, judicial or arbitral proceeding that involves any of the same issues that may be decided in the arbitral proceedings under these Model Clauses;

b) Any financial interest of the candidate's or arbitrator's employer, partner, business associate or close family member:

i. in the proceeding or in its outcome; and

ii. in any other administrative, judicial or arbitral proceeding that involves any of the same issues that may be decided in the arbitral proceedings under these Model Clauses;

c) Any past or existing⁴ financial, business, professional, close family or close personal relationship with the parties or their affiliates or representatives, or any such relationship involving a candidate's or arbitrator's employer, partner, business associate or close family member;

d) Public advocacy or legal or other representation concerning issues closely related to the dispute in the proceeding or involving the same matters;

⁴ For the purposes of this Code of Conduct, "existing" relationships include reasonably expected future relationships.

e) All past and pending arbitral appointments made by any of the parties or their affiliates or close family members;

f) All pending appointments made by any of the parties' representatives and law firms involved in the dispute, as well as any such appointments made in the previous five years;

g) All pending work as a party representative, expert or in any other role in any matter for or adverse to any of the parties involved in the arbitration, including the parties' representatives, law firms, expert companies and financial institutions, as well as any such work performed in the previous five years; and

h) The nature and content of any pre-appointment contact between a party or its representatives and a candidate.

3. The disclosure obligations set out in paragraphs 1 and 2 above shall not be construed in such a way that the burden of detailed disclosure makes it impractical for qualified individuals to serve as arbitrators. Candidates and arbitrators are not required to disclose interests, relationships or matters whose bearing on their role in the arbitral proceedings would be trivial.

3. Independence and Impartiality of Arbitrators

1. An arbitrator shall not, directly or indirectly, incur any obligation or accept any benefit that would in any way interfere, or reasonably appear to interfere, with the proper performance of her, his or their duties.

2. An arbitrator shall not use her, his or their position on the arbitral tribunal to advance any personal or private interests and shall avoid actions that may create the impression that others are in a special position to influence her or him in respect of the arbitration.

3. An arbitrator shall not allow financial, business, professional, family or social relationships or responsibilities to influence her, his or their conduct or judgment in respect of the arbitration.

4. An arbitrator shall avoid entering into any relationship or acquiring any financial interest that is likely to affect her, his or their independence and impartiality or give rise to a reasonable appearance thereof, or that might otherwise give rise to a reasonable appearance of impropriety.

4. Duties of Arbitrators, Candidates and Former Arbitrators

1. An arbitrator shall not delegate the duty to decide the dispute to any other person. An arbitrator shall ensure that her, his or their assistants and staff, as well as any tribunal secretaries, comply with the provisions of this code.

2. For the duration of the arbitral proceedings under these Model Clauses, an arbitrator shall not act as party representative, party-appointed expert or witness in any other administrative, judicial or arbitral proceeding that involves any of the same issues that may be decided in the arbitral proceedings under these Model Clauses.

3. Under no circumstance shall a candidate or arbitrator discuss with any party any jurisdictional, substantive or procedural issue relevant to the dispute except in the presence of all other parties.

4. All former arbitrators shall avoid actions that may create the reasonable appearance that they lacked independence or impartiality in carrying out their duties or derived advantage from the decisions of the arbitration panel.

5. Confidentiality

1. No arbitrator or former arbitrator shall at any time disclose or use any non-public information concerning a proceeding or acquired during a proceeding except for the purposes of that proceeding, except with the consent of all parties or where and to the extent disclosure is required by legal duty, to protect or pursue a legal right or in relation to legal proceedings before a court or other competent authority. Any arbitrator or former arbitrator shall not, in any case, disclose or use any such information to gain personal advantage or advantage for others or to adversely affect the interest of others.

2. An arbitrator or former arbitrator shall not at any time disclose the deliberations of the arbitral tribunal or any member's view.

6. International Best Practices

For matters governed by but not expressly settled in this Code of Conduct, the Code of Conduct shall be interpreted and applied in light of international best practices.