

van Aaken, Anne; Desierto, Diane

**Research Report**

## The Hague Rules on Business and Human Rights Arbitration

Columbia FDI Perspectives, No. 304

**Provided in Cooperation with:**

Columbia Center on Sustainable Investment (CCSI) - A joint center of Columbia Law School and the Earth Institute, Columbia University

*Suggested Citation:* van Aaken, Anne; Desierto, Diane (2021) : The Hague Rules on Business and Human Rights Arbitration, Columbia FDI Perspectives, No. 304, Columbia University, Columbia Center on Sustainable Investment (CCSI), New York, NY

This Version is available at:

<https://hdl.handle.net/10419/254138>

**Standard-Nutzungsbedingungen:**

Die Dokumente auf EconStor dürfen zu eigenen wissenschaftlichen Zwecken und zum Privatgebrauch gespeichert und kopiert werden.

Sie dürfen die Dokumente nicht für öffentliche oder kommerzielle Zwecke vervielfältigen, öffentlich ausstellen, öffentlich zugänglich machen, vertreiben oder anderweitig nutzen.

Sofern die Verfasser die Dokumente unter Open-Content-Lizenzen (insbesondere CC-Lizenzen) zur Verfügung gestellt haben sollten, gelten abweichend von diesen Nutzungsbedingungen die in der dort genannten Lizenz gewährten Nutzungsrechte.

**Terms of use:**

*Documents in EconStor may be saved and copied for your personal and scholarly purposes.*

*You are not to copy documents for public or commercial purposes, to exhibit the documents publicly, to make them publicly available on the internet, or to distribute or otherwise use the documents in public.*

*If the documents have been made available under an Open Content Licence (especially Creative Commons Licences), you may exercise further usage rights as specified in the indicated licence.*



## **Columbia FDI Perspectives**

Perspectives on topical foreign direct investment issues

No. 304 May 3, 2021

Editor-in-Chief: Karl P. Sauvant ([Karl.Sauvant@law.columbia.edu](mailto:Karl.Sauvant@law.columbia.edu))

Managing Editor: Riccardo Loschi ([Riccardo.Loschi@columbia.edu](mailto:Riccardo.Loschi@columbia.edu))

### **The Hague Rules on Business and Human Rights Arbitration\***

by

Anne van Aaken and Diane Desierto\*\*

International “soft law,” including non-binding standards for businesses, has expanded in recent years, including through the OECD Guidelines for Multinational Enterprises, the Global Compact and the UN Guiding Principles on Business and Human Rights (“Guiding Principles”) in 2011. These substantive standards, however, largely omit procedural mechanisms or alternatives to the inadequacy or unavailability of litigation in national courts.

After consultation with numerous stakeholders, [the Hague Rules on Business and Human Rights Arbitration](#) (the “Hague Rules”) were launched on December 12, 2019. They establish a concrete framework for arbitrating business and human rights disputes, providing claimants with new, consensual, flexible, and multi-purpose remedial mechanisms to resolve those disputes. They are modeled on the [2013 UNCITRAL Arbitration Rules](#), with modifications to account for the specific context of business and human rights arbitration (based on Pillar III of the Guiding Principles, namely access to remedy for victims of business-related abuses), while also useful for business to fulfill its obligations under Pillar II, the responsibility to respect human rights. As with all arbitrations, consent to arbitrate is crucial to taking part in them. How widely the net is cast vis-à-vis potential victims’ ability to bring a claim depends on the scope of consent given by the respective business.

The Hague Rules provide flexibility and breadth to deal with various business and human rights disputes (e.g., business-to-business, victim-to-business, third-party beneficiaries), with *ex ante* or *ex post* consent after the dispute arises. Key differences from commercial disputes concern the public interest in the resolution of business and human rights disputes, which may require higher degrees of transparency (as default rules) and greater participation by third parties (amicus briefs are allowed, including for eligible countries with a sufficient nexus to a dispute); evidence taking and costs allocation mindful of power and resource imbalances among parties; witness protection measures and possibilities for joinder or multi-party claims; and specific expertise and qualifications for arbitrators (as well as a Code of Conduct as default rules). Applicable law, as stipulated by the parties, could range from domestic law (supply chain) contracts, human rights treaties and soft law standards. Tribunals have the additional mandate to ensure that their awards are human rights-compatible. As a shield against costly and meritless suits, the Hague Rules provide for an expedited procedure to dispose of claims manifestly without merit at a preliminary stage.

Because business and human rights arbitration depends on mutual consent of the parties to disputes, they were drafted with the considerations of all stakeholders in mind—those affected by human rights abuses, civil society, business, and countries. The Hague Rules are not meant to displace other procedures, including national courts, but they make it more likely that there would be no gap in access to remedies with respect to the human rights impacts of business operations.

The Hague Rules are a voluntary instrument—but they can be made effective in multiple ways:

- In the FDI context, it is possible to incorporate binding references in investment treaties or state contracts (complementary to required human rights assessments); this would be in countries’ interest to fulfil their human rights obligations under Pillar III.
- Development finance institutions and export credit agencies could make the consent to arbitrate under the Hague Rules a requirement for financing, e.g., under the “Recommendation of the Council on Common Approaches for Officially Supported Export Credits and Environmental and Social Due Diligence,” adopted by the OECD Council.
- Private banks can incorporate the duty to provide remedy in project-related corporate loans, including through consent to arbitrate under the Hague Rules with a defined group of potential beneficiaries of a project. Such a requirement of consent to arbitrate can also be added to private sector voluntary guidelines and initiatives, such as the Equator Principles.
- New regional arbitral institutions, centers, regional intergovernmental organizations, international and national bar associations, and national courts can offer or refer to the Hague Rules as an optional, alternative or preliminary mechanism for parties seeking to manage or resolve future business and human rights disputes, such as on climate change and labor and environmental issues.
- The Hague Rules can also be used between companies and their suppliers on non-compliance with business and human rights contractual provisions, including third-party beneficiaries (such as [Community Development Agreements](#) used in the extractives sector or those in cross-border infrastructure development projects). They are also attractive for multi-stakeholder arrangements (e.g., the [Voluntary Principles on Security and Human Rights](#)). Many more applications are possible, such as in national public procurement procedures and in template contracts for sectors and industries.

Most crucially, it is hoped that the business sector has every incentive to consent to arbitrations arising under the Hague Rules as part of the spectrum of available remedies to resolve or finally adjudicate business and human rights disputes in a binding manner, *in parallel* with the possible emergence of new business and human rights national legislation (e.g., in Germany, Switzerland), the [European Union plans](#) for a [legislative proposal](#) by 2021 on mandatory human rights due diligence for European companies and the UN Business and Human Rights Treaty.

---

**\* The *Columbia FDI Perspectives* are a forum for public debate. The views expressed by the author(s) do not reflect the opinions of CCSI or Columbia University or our partners and supporters. *Columbia FDI Perspectives* (ISSN 2158-3579) is a peer-reviewed series.**

**\*\*** Anne van Aaken ([anne.van.aaken@uni-hamburg.de](mailto:anne.van.aaken@uni-hamburg.de)) is Alexander von Humboldt Professor for Law and Economics, Legal Theory, Public International Law and European Law and Director, Institute of Law and Economics, University of Hamburg, Law School; Diane Desierto ([ddesierto@nd.edu](mailto:ddesierto@nd.edu)) is Professor of Law and Global Affairs, LLM Faculty Director at Notre Dame Law School and Keough School of Global Affairs, University of Notre Dame (USA); Professor of International Law at Philippines Judicial Academy. Both authors were members of the Drafting Team of the Hague Rules. The authors wish to thank Mark Feldman, Eva Hampl and Harm Schepel for their helpful peer reviews.

*The material in this Perspective may be reprinted if accompanied by the following acknowledgment: “Anne van Aaken and Diane Desierto, ‘The Hague Rules on Business and Human Rights Arbitration,’ Columbia FDI Perspectives No. 304, May 3, 2021. Reprinted with permission from the Columbia Center on Sustainable Investment ([www.ccsi.columbia.edu](http://www.ccsi.columbia.edu)).” A copy should kindly be sent to the Columbia Center on Sustainable Investment at [ccsi@law.columbia.edu](mailto:ccsi@law.columbia.edu).*

For further information, including information regarding submission to the *Perspectives*, please contact: Columbia Center on Sustainable Investment, Riccardo Loschi, [riccardo.loschi@columbia.edu](mailto:riccardo.loschi@columbia.edu).

The Columbia Center on Sustainable Investment (CCSI), a joint center of Columbia Law School and the Earth Institute at Columbia University, is a leading applied research center and forum dedicated to the study, practice and discussion of sustainable international investment. Our mission is to develop and disseminate practical approaches and solutions, as well as to analyze topical policy-oriented issues, in order to maximize the impact of international investment for sustainable development. The Center undertakes its mission through interdisciplinary research, advisory projects, multi-stakeholder dialogue, educational programs, and the development of resources and tools. For more information, visit us at <http://www.ccsi.columbia.edu>.

#### **Most recent *Columbia FDI Perspectives***

- No. 303, Gary Clyde Hufbauer, “Dangers lurking in the OECD tax proposals,” *Columbia FDI Perspectives*, April 19, 2021.
- No. 302, Pierce O’Reilly, “International tax reform and FDI,” *Columbia FDI Perspectives*, April 19, 2021
- No. 301, Manu Misra, “Investment facilitation and India: A closer look,” *Columbia FDI Perspectives*, April 5, 2021
- No. 300, Daniel Naujoks, “Engaging diaspora direct investors: The four elements of successful policy regimes,” *Columbia FDI Perspectives*, March 22, 2021
- No. 299, Axel Berger and Manjiao Chi, ‘The EU-China Comprehensive Agreement on Investment: Stuck half-way?’, *Columbia FDI Perspectives*, March 8, 2021

**All previous *FDI Perspectives* are available at <http://ccsi.columbia.edu/publications/columbia-fdi-perspectives/>.**