

Foreword

The global economy is characterized not only by a steady increase of international trade, but also by growing flows and stocks of foreign direct investment (FDI). This development has manifested itself especially since the mid-1980s. The importance of FDI in providing foreign markets with goods and services has become comparable to trade. FDI also constitutes a crucial source of external finance for developing countries.

An important prerequisite for a high level of FDI is that investors view the political risk of the host country as manageable. Political risk may, for example, comprise the danger of expropriation of the investment without adequate compensation, or more subtle regulatory measures with comparable effects, which are often referred to as indirect expropriation. The most important legal instruments in international investment law that may mitigate this kind of risk are bilateral investment treaties (BITs). Since the first BIT, concluded between Germany and Pakistan in 1959, the number of such treaties has risen to the impressive number of more than 2700 in 2010. Despite the undeniable importance of FDI for the global economy and the growing prominence of BITs, the economic analysis has mainly focussed on international trade law and has thus far neglected the analysis of international investment law. This contribution by Jan Peter Sasse seeks, and succeeds, to fill that gap in the existing literature.

Jan Peter Sasse begins his research by providing a comprehensive analysis of the economic and legal tools available to international investors who wish to safeguard their assets abroad. In contrast to the domestic context, international law is generally characterized by the absence of a supranational authority that may enforce legal obligations through coercion. Consequently, investors have to rely on economic devices (the exchange of hostages, for example) or on legal protection through international law and the possibly unfavourable domestic legislation and judiciary of host-states. Especially in the light of the lack of a truly multinational treaty on the protection of FDI, bilateral investment treaties can be considered a cornerstone of international investment law. Consequently, a number of recent empirical studies find a positive relationship between the conclusion of BITs and the amount of FDI flows.

The economic analysis of the functioning of BITs must first of all illuminate the relationship between the investor and the host-state. This relationship may be characterized by problems of hold-up and asymmetric information. Based on the rational choice principle as advanced recently by scholars of international law and economics, Jan Peter Sasse shows to what extent the host-state can overcome the hold-

up problem through self-commitment. Furthermore, the author convincingly argues that signaling is only of limited value in counteracting the asymmetry of information between investors and host-states.

Apart from the relationship between investors and host-states, a thorough analysis of bilateral investment treaties has to take into account the strategic interaction among host-states that may consider BITs as an instrument in the competition for FDI. Jan Peter Sasse analyses this competition in great institutional detail with special attention devoted to the environmental conflicts that have emerged in the context of international arbitration. His results show that BITs, if drafted and interpreted with care, may help capture the beneficial effects of institutional competition and mitigate the potentially detrimental effects. The author then contributes to two ongoing discussions in the area of international investment law. Firstly, Jan Peter Sasse provides an empirical analysis of the impact of BITs on the institutional quality of developing countries. He finds that external effects of BITs on institutional quality cannot be verified. The study thus lends empirical support neither to the optimistic calls for BITs as serving as a positive example for developing countries, nor to the pessimistic accounts that regard BITs as detrimental to domestic institutional quality. Secondly, the author provides a systematic analysis of the issue of transparency vs. confidentiality in international arbitration. Jan Peter Sasse explains why more transparency may be harmful for the parties involved and that, as a consequence, a movement towards more transparency in international investment arbitration will be hard to achieve.

This publication in the field of international law and economics makes a valuable contribution to our understanding of the functioning of bilateral investment treaties. Jan Peter Sasse also provides an insightful and well-researched analysis of different aspects of the protection of FDI through BITs, including institutional competition, institutional quality, and transparency.

Prof. Dr. Thomas Eger