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Vorlesung	Ort: Odense Institution: University of Southern Denmark LV-Nummer: 80110001 Link:	Prof. Dr. Steffen Hindelang
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Current Developments and Challenges in Public International Law

Session on International Investment law

Investing abroad - Challenges and opportunities for providing legal advice to Danish businesses in times of Brexit and mounting international protectionism

Denmark's economic and social well-being depends strongly on open borders for trade and investment. What concerns investment, Denmark's businesses hold direct investments abroad worth kr. 1,241.3 billion (€ 166.8 billion). In 2016 alone, the return on these investments amounted to kr. 71.3 billion (€ 9.5 billion).[\[1\]](#)

Investing abroad does not only subject Danish businesses to foreign laws and regulations and may lead to complex multi-jurisdictional legal issues, but also increases the so-called "political risk" of an investment. Especially long-term investments are extremely vulnerable to sudden policy changes in foreign markets. For example, referenda such as the one on Brexit may lead to a complete redesign of a nation's legal trade and investment relations with other countries. The same holds true if, after general elections, a government switches from a previously liberal towards a protectionist trade and investment policy. The latter can be witnessed in the USA. In both scenarios, a sizeable number of Danish investments are affected: The UK is the second, the USA the third largest recipient of Danish direct investments amounting to kr. 153 billion (€ 20.6 billion) and kr. 126 billion (€ 16.9 billion) respectively.

Governments may enact discriminatory measures which impact foreign businesses more severely than domestic ones. Cases may relate to discriminatory taxation or

more cumbersome administrative procedures. Governments may also decide to dishonour previously agreed subsidy schemes. Recently, this has been seen especially in the renewable energy sector; an economic sector of significance to Danish investments abroad. In extreme cases, foreign governments may even expropriate property owned by foreigners all together without providing adequate compensation.

Which legal instruments do Danish businesses have at hand in such situations? They could rely on legal remedies (which may or may not) be available in their host State jurisdiction. They can, however, also take recourse to means available in public international law, i.e. international investment law (IIL).

IIL can be defined as the body of rules and standards in public international law which aims at protecting investments abroad. Today, there are over 3000 bilateral and regional investment (protection) treaties creating, along with the customary international law on aliens, a dense and yet highly complex regulatory network. Denmark itself has signed or ratified 59 so-called bilateral investment treaties (BITs). Danish businesses, furthermore, benefit from investment-related rules contained in so-called comprehensive free trade agreements (FTAs) negotiated by the European Union with third countries.

The vast majority of bilateral and regional investment treaties provide for investor-state dispute settlement (ISDS); a peculiarity in public international law. An investor can initiate international arbitral proceedings against a sovereign host state challenging its measures on the grounds that they were incompatible with the substantive standards in the investment agreement. These measures accrue regularly from the exercise of public authority of the host state and can be executive, legislative or judicial in nature.

[\[1\]](#) In comparison, foreign investors owned assets worth kr. 685 billion (€ 92 billion) in Denmark by the end of 2016. All numbers from Danmarks Nationalbank, 2017.