TRADE AND INVESTMENT POST BREXIT

IMPACT OF BREXIT ON EXISTING AND PENDING INVESTMENT AGREEMENTS

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STATUS OF EU TRADE AND INVESTMENT AGREEMENTS

• A large number of trade and investment treaties with third countries involve the EU, at various stages of negotiation, signature and ratification

• Two broad categories of EU treaties:
  – Exclusive competence
  – Mixed agreements
WHAT WILL HAPPEN TO EU EXCLUSIVE COMPETENCE AGREEMENTS?

• EU as an entity is a party to the agreement

• **Individual Member States are not parties to the agreement**

• Simple notification on the part of the EU of the UK’s exit likely to be sufficient
WHAT WILL HAPPEN TO SHARED COMPETENCE / MIXED AGREEMENTS (1) ?

• EU and individual Member States parties to the agreement

• More complex question

• UK will remain party in name, but depending on its terms some or all of the agreement may no longer be applicable in the UK:
  - Delineation of competence between EU and Member States
  - Territorial provisions linked to territory of the EU
WHAT WILL HAPPEN TO SHARED COMPETENCE / MIXED AGREEMENTS? (2)

• A number of potential options may be pursued by the UK:

- Formal declaration of intention to assume all obligations under the agreement in its own right

- Amendment to territorial scope of the agreement

- Negotiation of new agreements with relevant third countries
IMPACT ON EXISTING INVESTMENT AGREEMENTS

- Limited impact on existing investment agreements:

  - **Energy Charter Treaty** is a mixed agreement, and remains in force for the UK

  - **Existing FTAs** (eg South Korea, Peru) did not generally terminate existing BITs. UK has BITs with South Korea and Peru
WHAT IS THE IMPACT FOR PENDING INVESTMENT AGREEMENTS?

• Number of agreements negotiated, but not yet in force / ratified

• **Key issue = effect on existing UK BITs** with relevant third countries

• EU / Singapore FTA:

  “Upon the entry into force of this Agreement … the agreements between Member States of the European Union and Singapore listed in Annex 9-D … shall cease to have effect and shall be replaced and superseded by this Agreement” (Art 9.10(1))

• **Intended to terminate existing BITs.** UK unlikely to want to do so
WHAT IS THE IMPACT FOR PENDING INVESTMENT AGREEMENTS?

• Possible solution: temporary suspension of BITs

• Complex considerations to be negotiated:
  – **Sunset provisions**
  – **Timing**: if breach before BREXIT, but claim brought after BREXIT, which treaty applicable?
  – **Procedure**: should EU still determine appropriate Respondent?
  – Differing **levels of protection**

• Simpler solution: **UK BIT remains in force for set period of time**