

13315/18 (conclusion)
COM(18)693
+ ADD 1 (COM(2018) 693 final)
+ ADD 2 (COM(2018)693 final)
&
13314/18 (signature)
COM(18)694
+ ADD 1 (COM(2018)694 final)
+ ADD 2 (COM(2018)694 final)

EXPLANATORY MEMORANDUM FOR EUROPEAN UNION LEGISLATION AND DOCUMENTS

Proposal for a Council Decision on the signing, on behalf of the European Union, of the Investment Protection Agreement between the European Union and its Member States, of the one part, and the Socialist Republic of Viet Nam, of the other part

Proposal for a Council Decision on the conclusion, on behalf of the European Union, of the Investment Protection Agreement between the European Union and its Member States, of the one part, and the Socialist Republic of Viet Nam, of the other part

The following annexes are attached to the proposals

Annex to the Proposal for a COUNCIL DECISION on the [signing/conclusion], on behalf of the European Union, of the Investment Protection Agreement between the European Union and its Member States, of the one part, and the Socialist Republic of Viet Nam, of the other part

Annex 2 to the Proposal for a COUNCIL DECISION on the [signing/conclusion], on behalf of the European Union, of the Investment Protection Agreement between the European Union and its Member States, of the one part, and the Socialist Republic of Viet Nam, of the other part

Submitted by Department for International Trade on 5 November 2018

SUBJECT MATTER

1. This Explanatory Memorandum (EM) concerns the proposals for Council Decisions on the signature and conclusion of the EU-Vietnam Investment Protection Agreement (EUVIPA). These Council Decisions respectively constitute the legal instruments authorising the Signing and Conclusion of the agreement on behalf of the European Union (EU). The EUVIPA is a mixed agreement, to which both the EU and its Member States are parties.

2. The European Commission has not, at this time, made a proposal to provisionally apply the agreement (that is, to provisionally apply the agreement or elements thereof pending the completion of ratification procedures by all parties). To provisionally apply the Commission would need to put forward a further proposal for a Council Decision to provisionally apply the agreement, as required by article 218(5) TFEU. That Decision could potentially be adopted by the Council under qualified majority voting (QMV), although we anticipate the Commission would want consensus for provisional application and Member States are not expected to seek provisional application. Although some investment provisions in CETA have been provisionally applied, these are only those that are within EU exclusive competence and, inter alia, ICS provisions have been excluded.
3. Prior to its entry into force the agreement must be ratified by all EU Member States, through their own domestic procedures, and by Vietnam. The current proposals do not concern the agreement's provisional application nor its entry into force; neither do they prejudge the outcome of Member States' own ratification procedures. The above proposals concern the signing of the agreement by the EU and also present a draft Decision for conclusion by the EU. The Decision on conclusion by the EU will not be adopted until after the European Parliament has given its consent. As with other "mixed agreements", the Agreement will not come into force until the European Union has concluded the Agreement and, additionally, all Member States have ratified the Agreement in accordance with their own domestic processes.
4. Negotiations on an EU-Vietnam Free Trade Agreement (EVFTA) began in 2012. On 15th October 2013 the negotiation mandate was extended to cover investment protection. However, subsequent to confirmation by the Court of Justice of the European Union (CJEU), in its Opinion 2/15, that investor-to-state dispute settlement and non-direct foreign investment are areas of shared competence, the investment protection and dispute provisions were split from the FTA into the separate EUVIPA. To note, a separate EM on the EVFTA is being submitted alongside this EM.
5. The EUVFTA and EUVIPA were preceded by the EU-Vietnam Political Cooperation Agreement (EVPCA), which entered into force in October 2016.
6. The EUVIPA covers protection of direct and indirect foreign investments and establishes a standing tribunal/body and appeal system to adjudicate Investor-State disputes ("Investor-Court System" ("ICS")). It provides that upon its entry into force existing bilateral investment treaties (BITs) between Vietnam and individual EU Member States shall be terminated, or, upon its provisional application, suspended. Contained in Annex 2 to both of the above proposals is a list of those BITs impacted by provisional application or entry into force of this agreement: this includes the UK-Vietnam BIT.

SCRUTINY HISTORY

7. The Council Decisions for the Conclusion and for the Signing of the EUVIPA are new proposals being put forward by the European Commission and there is no related scrutiny history.

MINISTERIAL RESPONSIBILITY

8. The Secretary of State for International Trade has primary responsibility for trade and investment policy. Other Secretaries of State with an interest in this area include the Chancellor, the Secretaries of State for Foreign Affairs and for Business, Energy and Industrial Strategy.

INTEREST OF THE DEVOLVED ADMINISTRATIONS

9. The UK's trade policy is a reserved matter under the UK's devolution settlements, though Devolved Administrations maintain an interest.

LEGAL AND PROCEDURAL ISSUES

Legal basis

10. The substantive legal basis for these Decisions is Article 207 of the Treaty of the Functioning of the EU (TFEU), which covers foreign direct investment only. The procedural legal bases are those to conclude an international agreement, being: Article 218(6) TFEU for the Council Decision on the Conclusion of the agreement, and Article 218(5) TFEU for the Council Decision on the Signing of the agreement.
11. In relation to investment protection, the EU has partly exclusive and partly shared competence, as confirmed by the CJEU in its Opinion 2/15. In that Opinion, the CJEU confirmed that competence is shared in respect of indirect foreign investment; and investor-state dispute settlement (ISDS), in this case ICS for both direct and indirect foreign investment.

European Parliament Procedure

12. The role of the European Parliament is set out in articles 218(6) and 218(10) TFEU. In this case, the consent of the Parliament is required under article 218(6).

Voting procedure

13. Whilst only Qualified Majority Voting (QMV) is mandated by the EU Treaties in this instance, we expect that Council will act via the process of Common Accord whereby agreement is required by all Member States in order for signature and conclusion of the EUVIPA to be approved.

Impact on United Kingdom Law

14. The Council Decisions on the Conclusion and Signing of the agreement have no impact on UK law.

Application to Gibraltar

15. The issue of application to Gibraltar does not arise in relation to these Council Decisions. The Council Decisions referenced address the Conclusion and Signing of the agreement, not its provisional application.

Fundamental rights analysis

16. These proposals have no consequences for the protection of fundamental rights.

APPLICATION TO THE EUROPEAN ECONOMIC AREA

17. The Council Decisions referenced address the Conclusion and Signing of the agreement by EU Member States; not its provisional application, entry into force, or adoption by the EEA.

SUBSIDIARITY

18. In relation to investment protection, the EU has partly exclusive and partly shared competence, as confirmed by the CJEU in its Opinion 2/15 (regarding the EU-Singapore Free Trade Agreement). In that Opinion, the CJEU confirmed that competence is shared in respect of indirect investment and in respect of investor-to-State dispute settlement for both direct and indirect investment, where the Member States act as defendants.
19. The Government has conducted competence assessments of the EVFTA and EVIPA and is satisfied that they have been presented to Council in line with the CJEU Opinion 2/15 of May 2017.

POLICY IMPLICATIONS (including Exit implications where appropriate)

20. On 23 June 2016, the EU referendum took place and the people of the United Kingdom voted to leave the European Union. Until exit negotiations are concluded, the UK remains a full member of the EU and all the rights and obligations of EU membership remain in force. During this period the Government will also continue to negotiate, implement and apply EU legislation. The outcome of these negotiations will determine what arrangements apply in relation to EU legislation in future once the UK has left the EU.
21. Given the requirement that individual Member States ratify the agreement, it is unlikely that the agreement will enter into force before the UK leaves the EU. Ratification by the UK will be subject to the procedure in section 20 of the Constitutional Reform and Governance Act 2010. In the event all of the agreement is provisionally applied prior to EU-exit, the UK's existing BIT with Vietnam would be suspended.

22. The BIT will, therefore, remain in force at this time. Agreeing to the signature and future conclusion of the EUVIPA at this time does not bring the EUVIPA into force.

CONSULTATION

23. The European Commission conducted consultations on the EUVFTA prior to beginning negotiations, and since their conclusion, the details of which are given in the proposals. Over the course of negotiations, Member States have been briefed as appropriate on developments in Council. The UK has also consulted other government departments and the devolved administrations in the preparation of this Explanatory Memorandum.

IMPACT ASSESSMENT

24. The EU has conducted an impact assessment, details of which are given in the proposals for Council Decisions on Conclusion and Signature of the EUVIPA.

FINANCIAL IMPLICATIONS

25. There are no immediate financial implications resulting from these proposals for Council Decisions on the Conclusion and Signing of the EUVIPA.

TIMETABLE

26. Whilst the Commission has not set out a timetable, we anticipate that Council could be asked to vote on signature and conclusion of the EVFTA and EVIPA before the UK has exited the EU in March 2019.

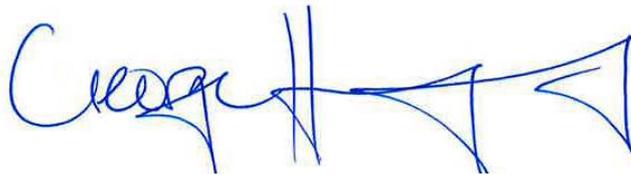
27. It remains unlikely that the European Parliament (EP) will be asked to approve the agreements before EP elections in April 2019, most likely pushing EP approval back to late 2019. Vietnam would need to ratify the Agreement before it could enter into force.

28. All EU Member States also need to ratify the agreement before it can enter into force. This will likely take a number of years and as such we do not expect the Agreement to come into force before the end of the Implementation Period. The European Commission has not, at this time, made a proposal to provisionally apply the agreement.

OTHER OBSERVATIONS

29. For reference the two Annexes provided alongside the proposed Council Decisions on signature and conclusion of the EU-Vietnam IPA are as follows. The same two annexes are provided in association to both proposals on signature and conclusion

- a. Annex 1 – Investment Protection Agreement between the European Union and the Republic of Vietnam (final text)
- b. Annex 2 – Annexes to the agreement



**GEORGE HOLLINGBERY MP
MINISTER OF STATE FOR TRADE POLICY
DEPARTMENT FOR INTERNATIONAL TRADE**