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Sir William Cash MP
Chair of the European Scrutiny Committee
European Scrutiny Committee
House of Commons
London
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Our ref:

25th February 2019

Dear Bill,

13312/18 and 13313/18 Proposals for Council Decisions on the signing and conclusion, on behalf of the EU, of the Free Trade Agreement between the EU and Vietnam

13314/18 and 13315/18 Proposals for Council Decisions on the signing and conclusion, on behalf of the EU, of the Investment Protection Agreement between the EU and its Member States, of the one part, and Vietnam, of the other part

Thank you for your Committee's report and consideration of the Explanatory Memorandums concerning Vietnam dated 5 November 2018 as discussed in your committee meeting held on 19 December 2018.

I welcome the opportunity to address the further questions detailed in the report in the accompanying "**Annex A**" to this letter.

I am copying this letter to the Chair of the House of Lords European Union Select Committee and the Chairs of the Exiting the EU, Foreign Affairs and the International Trade Committees, the clerks of each of the these Committees, Les Saunders (DExEU Parliamentary Team) and Edwina Osborne (DIT EU Scrutiny, EU Trade Team).

Yours sincerely,

GEORGE HOLLINGBERY MP

Minister of State for Trade Policy
Department for International Trade

Annex A – Commons ESC Questions on the EU-Vietnam Free Trade and Investment Protection Agreements

The Committee's conclusions and questions to the Minister

5.11 While the Minister reiterates the Government's well-rehearsed position on the importance of continuity of trade and investment relations with all third countries, including Vietnam, post-exit, it remains unclear whether these intentions can feasibly be implemented given continued uncertainty over possible Brexit outcomes and the pressing timescales involved.

Delivering the deal negotiated with the EU remains the Government's top priority. The approach described in the Withdrawal Agreement provides a clear mechanism to achieve continuity of our existing free trade agreements from exit day and throughout the Implementation Period (IP). Whilst the EU-Vietnam FTA has not yet been signed, it is likely to enter into force at some point during the implementation period and the Vietnamese Ministry of Industry and Trade has confirmed they would apply the EU-Vietnam FTA to the UK during any implementation period. On 10 October 2018, The Foreign Secretary, Jeremy Hunt agreed a joint statement with the Vietnamese Deputy Prime Minister, Pham Binh Minh in which the UK and Vietnam publicly reiterated their support for transitioning the prospective EU Vietnam Free Trade Agreement during the IP. A link to this statement can be found here: <https://www.gov.uk/government/news/uk-vietnam-joint-statement-london-10-october-2018> This was reconfirmed during a recent visit of the Vietnamese Vice Minister and Chief Negotiator from the Ministry of Industry and Trade.

Nevertheless, we continue to do the responsible thing and prepare for all eventualities, including 'no deal'. In this scenario, we are seeking to roll over free trade agreements once we have left the EU or as soon as possible thereafter. In the case of the prospective EU-Vietnam FTA, which is not likely to come into force until several months after 29 March, we would aim for the replicated bilateral agreement to enter into force at the same time as the EU-Vietnam FTA, or soon after, in order to avoid a gap in the application of the agreement. The Vietnamese Government have been supportive of this approach – the Vietnamese Vice Minister from the Ministry of Industry and Trade reconfirmed this during his visit to London on 14-15 January 2019. Discussions with Vietnamese officials about transitioning the prospective EU Vietnam FTA into a UK-Vietnam bilateral deal are progressing well.

5.12 In light of the draft Withdrawal Agreement of 14 November 2018, and noting that the Government is still preparing its own analysis of the EU-Vietnam FTA, which it will "make available to Parliament as soon as possible", we ask the Minister to provide detailed information on the implications for the UK of the proposed EU-Vietnam FTA and IPA for all currently foreseeable Brexit scenarios, and not to limit his analysis (as has been the practice to date in Explanatory Memoranda) to the scheduled transition/implementation period.

DIT has commissioned external analysis to understand the economic impacts of the EU-Vietnam FTA on the UK at a macroeconomic and sectoral level. This analysis examines the impact of the EU-Vietnam FTA on the UK economy compared to the agreement not being in place. This does not incorporate analysis on how the impact of the EUVFTA changes under different UK-EU trading relationships as this is out of scope of the proposed Council Decision, which is to sign and conclude an EU-only FTA and a separate 'mixed' IPA.

The impact assessment has been submitted to the Regulatory Policy Committee (RPC) for independent scrutiny and we will make this available as soon as the RPC provide their final rating.

The impact assessment does not assess the impact of the EUVIPA. As noted below, the EU-Vietnam IPA is not in force and is unlikely to come into force before the UK leaves the EU or the proposed Implementation Period. It will require ratification by all EU Member States which usually takes a number of years. As such we do not presently expect, both before the UK leaves the EU and during the proposed Implementation Period, there to be any tangible impact on investors or the UK and Vietnam as a result of the EUVIPA. The UK Vietnam Bilateral Investment Treaty (BIT) remains fully in force.

Continuity of UK-Vietnam trade relations after UK exit, in light of the proposed EU-Vietnam FTA

5.13 The FTA is likely to impact the continuity of UK trade and investment relations with Vietnam after UK exit on 29 March 2019, forming a point of reference (in the event of no-deal) or the basis of a future UK-Vietnam trade agreement (in the event of a negotiated withdrawal with a transition/implementation period and backstop¹).

No deal:

5.14 We ask the Minister to share the Government's intended approach to future trade relations with Vietnam in the event of a no-deal (non-negotiated exit from the EU with no

¹ See House of Commons Library note ['The backstop explained'](#).

Withdrawal Agreement). Would the EU-Vietnam FTA form a reference/baseline for a negotiated UK-Vietnam FTA, and is its negotiation and conclusion a priority for the UK post-exit?

As part of the Government's priority to ensure continuity of all existing EU FTA agreements, the UK is seeking to replicate the effects of the EU-Vietnam FTA in a bilateral deal following the UK's exit from the EU. Our aim would be the same in both a Deal and No Deal scenario. One area of practical difference would be that - in a No Deal scenario - the bilateral deal should enter into force at the same time as the EU-Vietnam FTA or soon after, whereas, in a Deal scenario, the bilateral deal would apply at the end of the IP, as the UK would continue to be covered by the EU-Vietnam FTA until this time. The Vietnamese Vice Minister from the Vietnamese Ministry of Industry and Trade agreed to this approach during his visit to London on 14-15 January 2019.

Negotiated withdrawal—during the transition/implementation period, including a possible extension by a further two years:

5.15 If the EU-Vietnam FTA enters into force during the transition/implementation period, the UK will be bound by the FTA obligations, but it is not certain that it will secure the benefits. Notwithstanding the provision in the draft Withdrawal Agreement that the UK is to be treated as a Member State for the purposes of international agreements during the transition/implementation period, we ask the Minister to set out:

- **whether the Government considers EU notification to Vietnam is wholly sufficient to guarantee that UK businesses and consumers secure the benefit of the EU bilateral agreement during the transition/implementation period;**

As with any FTA that the EU enters into, all Member States benefit from the FTA to the extent that their exporters and importers are willing to avail themselves of them. The benefits apply just as much as the obligations.

The Withdrawal Agreement text states that during IP, the UK is to be treated as a Member State for the purposes of international agreements, and this includes trade agreements. This means that the UK will be bound by the FTA obligations and will also secure the benefits. The EU will notify other parties of

this approach. The Government considers that this provides certainty and confidence that there will be no disruption to existing relationships underpinned by international agreements as we move into the IP.

As noted above, the Vietnamese Ministry of Industry and Trade has confirmed they would apply the EU-Vietnam FTA to the UK during any transition/implementation period.

- **whether Vietnam has confirmed that it would be prepared to apply the EU-Vietnam FTA to the UK (once it has entered into force) during any transition/implementation period, or whether it would seek any concessions in doing so; and**

The Vietnamese Ministry of Industry and Trade has confirmed they would apply the EU-Vietnam FTA to the UK during the IP, as set out above.

- **what practical effect there would be if the UK met all EU obligations under the FTA without being able to benefit from it.**

We are confident that the approach described in the Withdrawal Agreement will allow for continuity of the EU-Vietnam FTA during the IP as set out above. As noted above this means that the UK will benefit from the FTA as well as having to meet its obligations.

Negotiated withdrawal—the backstop applies at the end of the scheduled or extended implementation/transition period unless/until the EU and UK conclude a future relationship agreement that prevents a hard border between Ireland and Northern Ireland:

5.16 We ask the Minister to explain how the backstop arrangements would impact the UK's obligations and benefits under the EU-Vietnam FTA (and the extent to which they would differ for Northern Ireland and Great Britain).

If the backstop were to come into effect, those elements of new trade agreements that affect the functioning of the backstop would need to be aligned with the EU until we moved to the future partnership. We continue to work with partner countries to ensure continuity of existing free trade agreements across all scenarios to reflect the Withdrawal Agreement, including a protocol on Northern Ireland.

But in any case, the backstop is an insurance policy which we expect need never be used. We fully expect the alternative arrangements to be ready by the end of 2020, with both sides legally obliged to use their best endeavours to avoid the need for the backstop to ever be used. If it ever is used, it is explicitly temporary. This is clear from the legal text, which highlights that the Article 50 agreement

cannot form the basis for a permanent relationship and the backstop will be superseded by the future relationship.

5.17 In respect of negotiating a future UK (specific)—Vietnam trade agreement, we ask the Minister to explain:

- **whether Vietnam has indicated that it would be willing to accept continuity of effect of the FTA beyond the transition/implementation period or backstop; or**

Vietnam has agreed to replicate the effects of the EU-Vietnam FTA once it ceases to apply to the UK. DIT officials are currently in discussion with Vietnamese officials to achieve this.

- **whether the UK will be seeking to negotiate a more ambitious FTA with Vietnam bilaterally during any implementation/withdrawal period or backstop and if so: a) what concessions Vietnam might seek; b) what further access to the Vietnamese market the UK is likely to seek; and c) whether the EU-Vietnam agreement contains any "most favoured nation" provisions² which would inhibit Vietnam giving the UK more favourable terms than the EU;**

The UK may consider negotiating a more ambitious FTA with Vietnam in the future but this would only be likely to occur after conclusion of the future UK-EU relationship, although it is worth noting that the provisions in the EU-Vietnam FTA are already deep and comprehensive.

- **whether the Government intends to run negotiations for a future UK-Vietnam FTA in parallel to, or after conclusion of, the negotiation of the future UK-EU relationship, and if the former, what consideration it has given to running negotiations in parallel; and**

As noted above, the UK does not intend to run negotiations on a more ambitious UK-Vietnam FTA in parallel to negotiations for the future UK-EU relationship. Our priority is to replicate the EU-Vietnam agreement, whose provisions are deep and comprehensive.

The UK may consider negotiating a more ambitious FTA with Vietnam in the future but only after conclusion of the future UK-EU relationship.

- **how the backstop will impact the UK's ability to negotiate a future trade deal with Vietnam, by reference to its content/coverage (for example, would a new trade deal**

² A most favoured nation provision requires a party to the agreement (in this case either EU or Vietnam) to give to the other party any more favourable terms it accords to another state in any other agreement it enters into, as would happen if Vietnam gave the UK more favourable terms than in its agreement with the EU.

with Vietnam be applied to Great Britain only during the backstop or to the UK as a whole after the backstop) and given uncertainty over its end date

In the backstop, if it were ever to come into effect, the UK would be able to negotiate, sign, ratify and implement its own trade agreements, but those elements that affect the functioning of the backstop would need to be aligned with the EU until we moved to the future partnership. The government has been clear that in any scenario we will preserve the integrity of the Union and the UK's internal market. Any future FTAs the UK negotiate will include Northern Ireland. However, the UK has no intention of entering the backstop.

The UK's approach to investment protection and dispute resolution with Vietnam after exit in light of the proposed EU-Vietnam IPA

5.18 We note the Minister's assessment that the IPA is "unlikely" to enter into force "before the UK leaves the EU" and that "[a]greeing to the signature and future conclusion of the [EU-Vietnam IPA] at this time does not bring the [EU-Vietnam IPA] into force". We ask the Minister to confirm that the UK intends to vote in favour of the Council Decisions on signature and conclusion of the IPA and to set out its reasons for doing so. This should include the Government's position on the contents of the proposed IPA, in particular on the proposed ICS.

The UK intends to vote in favour of the Council Decisions on the signature and conclusion of the EU-Vietnam IPA (EUVIPA) and will continue to support the EU's ambitious trade agenda and remain a constructive partner as a Member State of the EU.

As has been previously noted, the EUVIPA is unlikely to enter into force before the UK leaves the EU, or indeed before the end of the proposed IP. Unlike the EU-Vietnam FTA, the EUVIPA is a mixed competence agreement. In order to enter into force the EUVIPA will have to be concluded by the European Parliament and ratified individually by all EU Member States and Vietnam. This process is likely to take a number of years, judging by previous examples of EU trade agreements which have required ratification by Member States in addition to EU conclusion and third-country ratification; the EU-Korea FTA took nearly five years to complete this process.

As you note in paragraph 5.7 of your report, the UK is committed to providing continuity for investors. To which end it should be noted, that the existing UK-Vietnam Bilateral Investment Treaty remains in place and fully in force whilst the EUVIPA conclusion and ratification process is taking place. The EUVIPA contains many of the same provisions as the UK-Vietnam BIT, while using more detailed treaty language. Though already recognised in customary

international law, the EUVIPA also re-affirms the right to regulate. The EUVIPA includes the EU's preferred approach to investor-state dispute settlement, the Investment Court System (ICS), however it is important to note that the system is not yet operational, for which reason it would be premature to comment further. The practical details, including how judges will be appointed, have not all been agreed; the ICS has yet to be made functional under CETA and, as you are also aware, the compatibility of the ICS with the EU treaties is currently before the Court of Justice of the European Union CJEU (Opinion 1/17). While the Advocate General has now delivered his opinion on 29 January 2019, this is not binding on the CJEU and we await the final opinion of the Court.

5.19 The Committee considers that the proposed IPA is likely to impact future UK investment relations with Vietnam after UK exit, particularly if the UK is in an extended transition period or backstop arrangement with the EU. Yet the Minister's Explanatory Memorandum is silent on these points. In September 2018, the Minister stated that the Government was "considering a wide range of options in the design of future bilateral trade and investment agreements".³ With just three months until UK exit, the Committee requires urgent clarification from the Minister on its intended approach to investment protection and dispute resolution agreements after 29 March 2019 and asks him to:

- **share his analysis on the implications of entry into force of the proposed IPA during any transition/implementation period or backstop, including in relation to 'sunset clauses';⁴**

It is unlikely that the EUVIPA will enter into force either before the UK leaves the EU, or before the end of the proposed IP. In the unlikely event it does, Article 129 of the Withdrawal Agreement, and the notification proposed in the footnote to that article, will serve as the basis for the continued application of the EU's International Agreements to the UK during the IP.

The EUVIPA and the UK-Vietnam BIT include a sunset clause of 15 years and 20 years, respectively, to provide investors with a predictable legal framework in the event that the agreement is unilaterally terminated. The EUVIPA provides that upon its entry into force, existing investment agreements between Vietnam and individual EU Member States shall be terminated. The footnote to Art.4.20(4) clarifies that in such a circumstance the 'sunset clauses' shall too cease to have effect. As explained above it is unlikely that the EUVIPA will come into force before the end of the IP, but if it does we would seek to work closely with our Vietnamese

³ See, for example, [debate in European Committee B on the EU-Singapore free trade agreement and investment protection agreement of 10 September 2018](#).

⁴ Most BITs contain a "sunset clause", providing for their provisions to continue in effect for a specified period following termination. Sunset clauses mean that a state will remain bound by its treaty obligations for a period of time notwithstanding a decision to terminate.

partners to ensure continuity and certainty for our investors based on the legal framework as applicable.

Based on Articles 129 and 126 of the Withdrawal Agreement, if the IPA enters into force during the backstop the UK will not be bound by it as Article 129 only applies during the IP.

- **clarify the Government's ambitions for supporting an investment dispute resolution process that is capable of delivering fair dispute outcomes in a transparent manner, to ethical standards, and in a cost-effective manner.⁵ In particular, will the Government seek to: keep or update the UK's current BIT with Vietnam after 29 March 2019; replicate the proposed IPA in its future agreement with Vietnam (and therefore replace the current UK-Vietnam BIT); and/or use the Commission's proposed multilateral investment court (MIC) (intended to replace bilateral ICS included in EU level agreements with the EU's FTA partner) as a forum for investor-state dispute settlement in its future trade agreements?**

The Government is currently reviewing its trade and investment policy and, as you note, we are considering a range of options for our future bilateral trade and investment arrangements. As the Government develops the UK's independent trade and investment policy, we are considering our approach to investment protection, including investor-state dispute settlement, for which the ICS is just one model. We support objectives of ensuring fair outcomes of claims, high ethical standards for arbitrators and increased transparency of investor-state dispute settlement hearings. These objectives can be achieved in many different ways.

As regards the EU's proposals for a Multilateral Investment Court (MIC), this work is at an early stage and being explored within the context of wider discussions on possible reform of ISDS within UNCITRAL's (United Nations Commission on International Trade Law) Working Group III. The UK was re-elected to UNCITRAL on 17 December 2018. We will want to examine the detail carefully, as it develops, to ensure that any new mechanism is cost effective, improves on existing investment dispute settlement procedures and better achieves our objectives as compared to alternative reform proposals.

- **(and) explain whether future investment relations will be covered under one 'umbrella' trade and investment agreement or split along the lines of the EU-Vietnam FTA and IPA.**

⁵ [Explanatory Memorandum dated 5 October 2017.](#)

The EU amended the architecture of its FTAs by removing investment protection and investor-state dispute settlement provisions and adding them to a separate investment protection agreement because the Court of Justice of the European Union (CJEU), in its Opinion 2/15, confirmed that ISDS and non-direct foreign investment are areas of shared competence. Accordingly the decision to split the agreements was for practical reasons bearing in mind the different ratification procedures necessary and the UK will not need to follow a similar approach when negotiating trade and investment agreements independently. The Government is currently reviewing its trade and investment policy and is considering a range of options for our future bilateral trade and investment arrangements. Our future approach to investment with Vietnam will be a matter for discussion in the context of our future bilateral relationship.

Transparency and scrutiny of trade negotiations

5.20 We consider that transparency in, and effective public and parliamentary scrutiny of, trade negotiations, both while the UK is a member of the EU and after UK withdrawal are fundamental to ensuring the democratic accountability of trade deals that the UK intends to become party to.

5.21 We ask the Minister to update us on what steps the Government intends to take to ensure transparency in, and effective scrutiny of a) the EU—Vietnam FTA and IPA during any implementation/transition period or backstop, and b) the negotiation and conclusion of a future UK-Vietnam trade and investment deal.

The Government supports a strong scrutiny process, both currently and into the future.

During the IP, the UK has agreed with the EU that common rules will remain in place. The Government recognises and supports the need for continued parliamentary scrutiny during this time and the Government is committed to continuing to support and facilitate a strong scrutiny process, including in relation to scrutiny of the EU-Vietnam FTA and IPA.

Whilst the degree of scrutiny that Parliament wishes to give to ongoing EU business in the IP will of course remain a matter for both Houses to determine, the Government would be happy to take forward discussions with the committees as to how the Government may best be able to facilitate scrutiny in that period.

In relation to scrutiny of any future UK-Vietnam trade and investment deals, the Government is committed to ensuring that we have a transparent and inclusive future trade policy. We have already made clear that all parts of civic and business society should have the opportunity to engage and contribute to the debate on future trade agreements. The Government is also clearly committed to

providing Parliament with the ability to inform and scrutinise new trade agreements, including through updates on the progress of negotiations to both Houses. At the end of a negotiation the Constitutional Reform and Governance Act 2010 will continue to apply, meaning that we will lay any treaty we wish to ratify before Parliament along with an explanatory memorandum. Consistent with current practice, Parliament will have the opportunity to scrutinise any legislation that is required to implement an FTA.