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PROPOSAL

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| From: | Secretary-General of the European Commission, signed by Mr Jordi AYET PUIGARNAU, Director |
| date of receipt: | 19 October 2018 |
| To: | Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of the European Union |
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Delegations will find attached document COM(2018) 691 final.

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Brussels, 17.10.2018
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2018/0356 (NLE)

Proposal for a

COUNCIL DECISION

on the conclusion of the Free Trade Agreement between the European Union and the Socialist Republic of Viet Nam

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

- **Reasons for and objectives of the proposal**

The dynamically growing Southeast Asian economies, with their over 600 million consumers and a rapidly rising middle class, are key markets for European Union exporters and investors. With a total €227.3 billion of trade in goods (2017) and €77 billion of trade in services (2016), the Association of Southeast Asian Nations (ASEAN) taken as a whole is the EU's third largest trading partner outside Europe, after the US and China. At the same time, a total €263 billion foreign direct investment stock (2016) in the ASEAN makes the EU the first foreign direct investor in the ASEAN, while the ASEAN as a whole is in its turn the second largest Asian foreign direct investor in the EU – with a total foreign direct investment stock of €116 billion (2016).

Vietnam has become the EU's second biggest trading partner in ASEAN after Singapore and ahead of Malaysia, with trade between the EU and Vietnam worth €47.6 billion in 2017. Vietnam is one of the fastest growing countries in ASEAN, with an average GDP growth rate of around 6% in the past decade that is forecasted to be maintained in the future. Vietnam is a vibrant economy of more than 90 million inhabitants, with the fastest growing middle class in ASEAN, and a young and dynamic workforce. With its high literacy rate and education levels, comparatively low wages, good connectivity and a central location within ASEAN, more and more foreign investors are choosing Vietnam as their hub to service the Mekong region and beyond.

On 23 April 2007, the Council authorised the Commission to enter into negotiations for a region-to-region Free Trade Agreement (FTA) with countries of the ASEAN. It being understood that the objective was to negotiate a region-to-region FTA, the authorisation provided however for the possibility of bilateral negotiations in the event that it was not possible to reach an agreement to negotiate jointly with a grouping of countries of the ASEAN. In light of difficulties encountered in the region-to-region negotiations, both sides acknowledged that an impasse had been reached and agreed to pause these.

On 22 December 2009, the Council agreed on the principle of launching bilateral negotiations with individual ASEAN countries based on the authorisation and negotiating directives of 2007, whilst preserving the strategic objective of a region-to-region agreement. The Council also authorised the Commission to launch bilateral negotiations first with Singapore, as a first step towards the objective of the timely launch of such negotiations with other relevant ASEAN countries. The EU has thereafter launched bilateral FTA negotiations with Malaysia (2010), Vietnam (2012), Thailand (2013), the Philippines (2015) and Indonesia (2016).

On 15 October 2013, based on a new EU competence under the Lisbon Treaty, the Council authorised the Commission to extend the on-going bilateral negotiations with ASEAN countries to cover also investment protection.

On the basis of the negotiating directives adopted by the Council in 2007, and supplemented in October 2013 to include investment protection, the Commission has negotiated with Vietnam an ambitious and comprehensive FTA and an Investment Protection Agreement (IPA), with a view to creating new opportunities and legal certainty for trade and investment

between both partners to develop. The legally reviewed texts of both agreements have been made public and can be found on the following link:

<http://ec.europa.eu/trade/policy/countries-and-regions/countries/vietnam/>

The Commission is putting forward the following proposals for Council decisions:

- Proposal for a Council Decision on the signing, on behalf of the European Union, of the Free Trade Agreement between the European Union and the Socialist Republic of Viet Nam;
- Proposal for a Council Decision on the conclusion of the Free Trade Agreement between the European Union and the Socialist Republic of Viet Nam;
- 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; and
- Proposal for a Council Decision on the conclusion 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.

Earlier, the Commission had put forward a proposal for a horizontal safeguard regulation that will be of application among other agreements to the FTA between the EU and Vietnam.

The attached proposal for a Council Decision constitutes the legal instrument for the conclusion of the Free Trade Agreement between the European Union and the Socialist Republic of Viet Nam.

- **Consistency with existing policy provisions in the policy area**

The negotiations of the FTA and the IPA were preceded by the negotiation, by the European External Action Service, of a Partnership and Cooperation Agreement (PCA) between the European Union and its Member States and the Socialist Republic of Viet Nam, which entered into force in October 2016. The PCA provides the legal framework to further develop the already longstanding and strong partnership between the EU and Vietnam, in a broad range of areas, including political dialogue, trade, energy, transport, human rights, education, science and technology, justice asylum and migration.

The EU and Vietnam's longstanding trade and economic relationship has until now developed in the absence of a specific legal framework. The FTA and IPA that have been negotiated will constitute specific agreements giving effect to the trade and investment provisions of the PCA and will be an integral part of the overall bilateral relations between the EU and Vietnam.

From the date of its entry into force, the EU-Vietnam IPA will replace and supersede the bilateral investment treaties between Vietnam and EU Member States that are listed in Annex 6 (List of Investment Agreements) to the IPA.

- **Consistency with other Union policies**

The EU-Vietnam FTA and IPA are fully consistent with Union policies and will not require the EU to amend its rules, regulations or standards in any regulated area. Furthermore, like all

other trade and investment agreements the Commission has negotiated, the EU-Vietnam FTA and IPA fully safeguard public services and ensure that governments' right to regulate in the public interest is fully preserved by the agreements and constitutes a basic underlying principle to them.

2. LEGAL BASIS, SUBSIDIARITY AND PROPORTIONALITY

- **Legal basis**

Following the Court of Justice of the EU Opinion 2/15, and in light of the subsequent wide-ranging discussions among EU institutions on the architecture of trade and investment agreements, the Commission presents the result of negotiations with Vietnam in the form of two self-standing agreements: an FTA and an IPA, as was the case for the result of negotiations between the EU and Singapore.

In view of Opinion 2/15, and considering that the content of the EU-Vietnam FTA is essentially the same contents as that of the EU-Singapore FTA, all the areas covered by the EU-Vietnam FTA would fall within the competence of the EU and, more particularly, within the scope of Articles 91, 100(2) and 207 TFEU. In the same vein, all substantive provisions on investment protection under the EU-Vietnam IPA, to the extent that these apply to foreign direct investment, would be covered under Article 207 TFEU.

As a result, the EU-Vietnam FTA is to be signed by the Union pursuant to a decision of the Council based on Article 218(5) TFEU and concluded by the Union pursuant to a decision of the Council based on Article 218(6) TFEU, following the European Parliament's consent.

In addition, Article 218(7) TFEU has been added as a legal basis as it is appropriate for the Council to authorise the Commission to approve the position of the Union on certain modifications to the FTA given that the FTA provides for expedited and/or simplified procedures to approve such modifications. Therefore, the Commission should be authorised to approve modifications or rectifications to be adopted by the Trade Committee pursuant to Articles 9.20 (Modification and Rectification to Coverage) and 9.23 (Committee on Investment, Trade in Services, Electronic Commerce and Government Procurement) as regards the list of entities in Sections A (Central Government Entities) to C (Other Covered Entities) of Annexes 9-A (Coverage of Government Procurement for the Union) and 9-B (Coverage of Government Procurement for Viet Nam).

The EU-Vietnam IPA is to be signed by the Union pursuant to a decision of the Council based on Article 218(5) TFEU and concluded by the Union pursuant to a decision of the Council based on Article 218(6) TFEU, following the European Parliament's consent and ratification by the Member States in accordance with their respective internal procedures.

- **Subsidiarity (for non-exclusive competence)**

As confirmed by Opinion 2/15 on the EU-Singapore FTA and in analogy thereto, the EU-Vietnam FTA as presented to Council does not cover any matters that fall outside of the EU's exclusive competence.

With regard to the IPA, the Court confirmed that, pursuant to Article 207 TFEU, the EU has exclusive competence with regard to all substantive provisions on investment protection, to the extent that these apply to foreign direct investment. The Court further confirmed the EUs

exclusive competence with regard to the state-to-state dispute settlement mechanism in relation to investment protection. Finally, the Court stated that the EU has shared competence with regard to non-direct investment and investor-to-state dispute settlement (replaced later on by the Investment Court System in the IPA), where the Member States act as defendants.¹

These elements cannot be separated in any coherent way from the substantive provisions or the state-to-state dispute settlement and hence should be included in EU-level agreements.

- **Proportionality**

This proposal is in line with the vision of Europe 2020 strategy and contributes to the Union's trade and development objectives.

- **Choice of the instrument**

This proposal is in accordance with Article 218 TFEU, which envisages the adoption by the Council of decisions on international agreements. There exists no other legal instrument that could be used in order to achieve the objective expressed in this proposal.

3. RESULTS OF EX-POST EVALUATIONS, STAKEHOLDER CONSULTATIONS AND IMPACT ASSESSMENTS

- **Ex-post evaluations/fitness checks of existing legislation**

After negotiations with Vietnam were completed, a team led by DG Trade's Chief Economist Unit's carried out a study of the economic benefits to be expected from the agreement.

The analysis predicts that the elimination of bilateral tariffs and export taxes together with the reduction of the NTBs that affect the cross-border exchanges of goods and services will boost bilateral trade considerably. EU exports to Vietnam are estimated to rise by more than €8 billion by 2035, while Vietnam's exports to the EU are expected to grow by €15 billion. This corresponds to an increase in relative terms of EU exports to Vietnam by almost 29% and of Vietnam exports to the EU by nearly 18%.

The economic modelling carried out further estimates that EU national income could grow by more than €1.9 billion by 2035 as a result of the FTA, while Vietnam's national income could increase by €6 billion over the same period. The sizeable difference in expected benefits is the result of the large difference in the relative importance of the EU and Vietnam as export destination to each another.

The results of the quantitative analysis presented above may be considered to underestimate the real economic impact of the agreement, as they do not take into account the foreseeable benefits linked to the strengthening of the protection and enforcement of intellectual property rights or the liberalisation of FDIs in the manufacturing sectors and of public procurement. Furthermore, synergies in global supply chains that may derive from the EU-Vietnam FTA, particularly in the broader context of an ongoing effort to further strengthen the EU's economic relationship with the ASEAN region, have not been possible to model but could be expected to be significant.

¹ See the clarification in the judgement of the Court of Justice of the European Union in Case C-600/14 Germany vs Council (Judgment of 5 December 2017) paragraph 69.

- **Stakeholder consultations**

Prior to the launch of bilateral negotiations with Vietnam, a Trade Sustainability Impact Assessment (TSIA) of the FTA between the EU and the ASEAN² was conducted by an external contractor to study the potential economic, social and environmental impact of a closer economic partnership between both regions.

In the framework of the preparation of the TSIA, the contractor consulted internal and external experts, organised public consultations in Brussels and in Bangkok, and held bilateral meetings and interviews with civil society in the EU and in ASEAN. Consultations in the framework of the TSIA provided a platform for the involvement of key stakeholders and the civil society in a dialogue on trade policy in relation to Southeast Asia.

Both, the TSIA report and the consultations held in the context of its preparation, provided the Commission with input that has been of great value in all bilateral trade and investment negotiations launched since with individual ASEAN countries.

In addition, in June 2012, the Commission conducted a public consultation on the future bilateral agreement with Vietnam that included a questionnaire prepared to obtain information from stakeholder that later helped the Commission in establishing priorities and taking decisions throughout the negotiating process. 62 replies were received, of which 43 from industry federations and associations, 16 from individual companies and three from Member States. Replies covered a wide range of sectors, including agri-food, ICT, textiles, services, pharmaceuticals, chemicals, metals, green energy, automotive, machinery and wood-paper. The written consultation was followed with meetings with a selected number of respondents to the questionnaire identified as representing the most sensitive sectors for the negotiations with Vietnam (textile, alcoholic beverages, pharmaceuticals, automotive and ICT).

A roundtable with stakeholders on human rights and sustainable development in the context of bilateral relations between the EU and Vietnam was held in May 2015³. The Commission then carried out a dedicated analysis⁴ addressing the possible impact of the FTA on human rights and sustainable development.

Prior and during negotiations, the EU Member States were regularly informed and consulted orally and in writing on the different aspects of the negotiation via the Council's Trade Policy Committee. The European Parliament was also regularly informed and consulted via its Committee on International Trade (INTA), and notably its EU-Vietnam FTA Monitoring Group. The texts progressively resulting from the negotiations were circulated throughout the process to both institutions.

- **Collection and use of expertise**

A Trade Sustainability Impact Assessment of the FTA between the EU and ASEAN was carried out by the external contractor "Ecorys".

- **Impact assessment**

The TSIA, conducted by an external contractor and finalised in 2009, concluded that an ambitious EU-ASEAN FTA would deliver important positive impacts (in terms of GDP,

² <http://trade.ec.europa.eu/doclib/html/145989.htm>

³ <http://trade.ec.europa.eu/doclib/events/index.cfm?id=1288>

⁴ http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc_154236.pdf

income, trade and employment) for both the EU and Vietnam. National income effects on the EU side were estimated at €13 billion and for Vietnam at €7.6 billion.

- **Regulatory fitness and simplification**

The EU-Vietnam FTA and IPA are not subject to REFIT procedures. They nevertheless contain a number of provisions that will simplify trade and investment procedures, reduce export and investment related costs and will therefore enable more small firms to do business in both markets. Among the expected benefits are: less burdensome technical rules, compliance requirements, customs procedures and rules of origin, the protection of intellectual property rights, or the reduction in cost of litigation under the Investment Court System for claimants that are SMEs.

- **Fundamental rights**

The proposal does not affect the protection of fundamental rights in the Union.

4. BUDGETARY IMPLICATIONS

The EU-Vietnam FTA will have a financial impact on the EU budget on the side of the revenues. It is estimated that foregone duties could reach an amount of €1.7 billion upon full implementation of the agreement. The estimate is based on average imports projected for 2035 in the absence of an agreement and represents the annual loss in revenues resulting from the elimination of EU tariffs on imports originating in Vietnam.

The EU-Vietnam IPA is expected to have a financial impact on the EU budget on the side of the expenditures. The agreement will be the EU's third (after the EU-Canada Comprehensive Economic and Trade Agreement, and the EU-Singapore) to incorporate the Investment Court System (ICS) for the resolution of disputes between investors and states. An amount of € 700,000 of additional yearly expenditure is foreseen from 2019 onwards (subject to the entry into force of the agreement) to finance the permanent structure comprising a First Instance and an Appeal Tribunal. At the same time, the agreement entails the use of administrative resources under budget line XX 01 01 01 (Expenditure related to officials and temporary staff working with the Institution), considering that it is estimated that one Administrator will be dedicated as full-time equivalent to the tasks inherent to this agreement. This is indicated in the Legislative Financial Statement and is subject to the conditions mentioned in it.

5. OTHER ELEMENTS

- **Implementation plans and monitoring, evaluation and reporting arrangements**

The EU-Vietnam FTA and IPA include institutional provisions that lay down an implementing bodies' structure to continuously monitor the implementation, operation and impact of the agreements. The agreements being an integral part of the overall bilateral relation between the EU and Vietnam as governed by the PCA, the mentioned structures will form part of a common institutional framework with the PCA.

The institutional chapter of the FTA establishes a Trade Committee that has as its main task to supervise and facilitate the implementation and application of the agreement. The Trade Committee is comprised of representatives of the EU and of Vietnam who will meet every

year or at the request of either side. The Trade Committee will be in charge of supervising the work of all specialised committees and working groups established under the agreement (Committee on Trade in Goods; Committee on Customs; Committee on Sanitary and Phytosanitary Measures; Committee on Investment, Trade in Services, Electronic Commerce and Government Procurement; Committee on Trade and Sustainable Development; Working Group on Intellectual Property Rights, including Geographical Indications; and Working Group on Motor Vehicles and Parts).

The Trade Committee has also the task to communicate with all interested parties, including private sector and civil society, in relation to the functioning and implementation of the agreement. In the agreement, both sides recognise the importance of transparency and openness and commit to consider the views of members of the public in order to draw on a broad range of perspectives in the implementation of the agreement.

The institutional chapter of the IPA establishes a Committee with the main task to supervise and facilitate the implementation and application of the agreement. Among other tasks, the Committee may, subject to the completion of each side's respective legal requirements and procedures, decide to appoint the Members of the ICS Tribunals, fix their monthly remuneration, and adopt binding interpretations of the agreement.

As emphasised in the "Trade for All" Communication, the Commission is dedicating increasing resources to the effective implementation and enforcement of trade and investment agreements. In 2017, the Commission published the first annual FTA Implementation Report. The main purpose of the report is to convey an objective picture on the implementation of EU FTAs, highlighting the progress made and the shortcomings that need to be addressed. The objective is for the report to serve as the basis for open debate and engagement with Member States, the European Parliament and the civil society at large on the functioning of the FTAs and their implementation. As an annual exercise, the publication of the report will allow regular monitoring of developments, registering also how identified priority issues have been addressed. The report will cover the EU-Vietnam FTA as of its entry into force.

- **Implementation in the EU**

Certain actions will need to be taken in order to ensure implementation of the Agreement. These will be put in place in time for the application of the Agreement. These are a Commission implementing regulation to be adopted pursuant to Article 58(1) of Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code opening the tariff rate quotas provided for by the Agreement.

- **Explanatory documents (for directives)**

Not applicable

- **Detailed explanation of the specific provisions of the proposal**

In negotiating the **EU-Vietnam FTA**, the Commission pursued two principal objectives: first, to provide the best possible terms of access for EU operators to Vietnam's market; and, second, to set a valuable second point of reference (after the agreements with Singapore) for the EU's other negotiations in the region.

Both of these objectives have been fully met: the agreement goes beyond existing WTO commitments in many areas, such as services, procurement, non-tariff barriers and the protection of intellectual property, including geographical indications (GI). In all of these

areas Vietnam also agreed to new commitments which go significantly beyond what Vietnam has so committed in other agreements, including in CPTPP.

In line with the objectives set by the negotiating directives, the Commission secured:

- (1) the comprehensive liberalisation of services and investment markets, including cross-cutting rules on licensing and for the mutual recognition of diplomas, and sector-specific rules designed to ensure a level playing field for EU businesses;
- (2) new tendering opportunities for EU bidders in Vietnam, who is not a member of the WTO Agreement on Government Procurement;
- (3) the removal of technical and regulatory trade barriers to trade in goods, such as duplicative testing, in particular by promoting the use of technical and regulatory standards familiar in the EU in the sectors of motor vehicles, pharmaceuticals and medical devices, as well as green technologies;
- (4) based on international standards, a more trade-facilitative regime for the approval of European food exports to Vietnam;
- (5) Vietnam's commitment to reduce or eliminate its tariffs on imports from the EU, and a cheaper access of European businesses and consumers to products originating in Vietnam;
- (6) a high level protection of intellectual property rights, including with regard to the enforcement of these rights, also at the border, and a TRIPs-plus level of protection of EU GIs;
- (7) a comprehensive chapter on trade and sustainable development, which aims at ensuring that trade supports labour rights, environmental protection and social development and promotes the sustainable management of forests and fisheries. It includes commitments on effective application of international standards and on efforts towards ratification of a number of international conventions. The chapter also sets out how social partners and civil society will be involved in its implementation and monitoring; and
- (8) a swift dispute resolution mechanisms through either panel arbitration or with the help of a mediator.

The **EU-Vietnam IPA** will ensure a high level of investment protection, while safeguarding the EU's and Vietnam's rights to regulate and pursue legitimate public policy objectives such as the protection of public health, safety and the environment.

The agreement contains all the innovations of the EU's new approach to investment protection and its enforcement mechanisms that are not present in the 21 existing bilateral investment treaties between Vietnam and EU Member States. It is a very important feature of the IPA that it replaces and hence improves the 21 existing bilateral investment treaties.

In line with the objectives set by the negotiating directives, the Commission ensured that EU investors and their investments in Vietnam will be granted fair and equitable treatment and not be discriminated against compared to Vietnamese investments that are in like situations. At the same time, the IPA protects EU investors and their investments in Vietnam from

expropriation, unless it is for public purposes, in accordance with due process, on a non-discriminatory basis and against payment of prompt, adequate, and effective compensation according to fair market value of the expropriated investment.

Also in line with the negotiating directives, the IPA negotiated by the Commission will offer investors the option of a modern and reformed investment dispute resolution mechanism. This system ensures that investment protection rules are adhered to and seeks to strike a balance between protecting investors in a transparent manner and safeguarding the right of a State to regulate in order to pursue public policy objectives. The agreement sets up a standing international and fully independent dispute resolution system, consisting of a permanent First Instance and an Appeal Tribunal that will conduct dispute settlement proceedings in a transparent and impartial manner.

The Commission is mindful of the balance to be struck between moving forward with the reformed EU investment policy and the sensitivities of EU Member States as regards the possible exercise of shared competence on these matters. The Commission has not, therefore made a proposal to provisionally apply the investment protection agreement. Nonetheless, should Member States wish to see a proposal for provisional application of the investment protection agreement, the Commission stands ready to make such a proposal.

Proposal for a

COUNCIL DECISION

on the conclusion of the Free Trade Agreement between the European Union and the Socialist Republic of Viet Nam

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 91(1), Article 100(2), and the first subparagraph of Article 207(4), in conjunction with Article 218(6)(a)(v) and Article 218(7) thereof,

Having regard to the proposal from the European Commission,

Having regard to the consent of the European Parliament,

Whereas:

- (1) In accordance with Council Decision No [XX]⁵, the Free Trade Agreement between the European Union and the Socialist Republic of Viet Nam (the 'Agreement') was signed on [XX XXX 2019], subject to its conclusion at a later date.
- (2) Pursuant to Article 218(7) of the Treaty on the Functioning of the European Union, it is appropriate to authorise the Commission to approve on the Union's behalf the position to be taken on certain modifications to the Agreement that are to be adopted by a simplified procedure pursuant to Article 9.20 of the Agreement or, as regards the list of entities in Sections A to C of Annexes 9-A and 9-B to the Agreement, pursuant to Article 9.23 of the Agreement in the Committee on Investment, Services, Electronic Commerce and Government Procurement.
- (3) The Agreement should be approved on behalf of the Union.
- (4) The Agreement, in accordance with its Article 17.20, does not, within the Union, confer rights or impose obligations on persons, other than those created between the Parties under public international law,

HAS ADOPTED THIS DECISION:

Article 1

The Free Trade Agreement between the European Union and the Socialist Republic of Viet Nam (the 'Agreement') is hereby approved on behalf of the Union.

⁵ [Reference to be inserted]

The text of the Agreement is attached to this Decision.

Article 2

For the purposes of Articles 9.20 and 9.23 of the Agreement, the modifications or rectifications as regards Sections A to D and F of Annexes 9-A and 9-B to the Agreement shall be approved by the Commission on behalf of the Union.

Article 3

The President of the Council shall designate the person empowered to proceed, on behalf of the Union, to the notification provided for in Article 17.16(2) of the Agreement, in order to express the consent of the Union to be bound by the Agreement⁶.

Article 4

This Decision shall enter into force on the day of its adoption.

Done at Brussels,

*For the Council
The President*

⁶ The date of entry into force of the Agreement will be published in the *Official Journal of the European Union* by the General Secretariat of the Council.