

**EXPLANATORY MEMORANDUM ON A PROPOSAL FOR A COUNCIL DECISION ON THE POSITION TO BE TAKEN ON BEHALF OF THE EUROPEAN UNION WITHIN THE PARTNERSHIP COUNCIL ESTABLISHED BY THE TRADE AND COOPERATION AGREEMENT BETWEEN THE EUROPEAN UNION AND THE EUROPEAN ATOMIC ENERGY COMMUNITY, OF THE ONE PART, AND THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND, OF THE OTHER PART, AS REGARDS THE ADOPTION OF A DECISION ESTABLISHING A LIST OF INDIVIDUALS WHO ARE WILLING AND ABLE TO SERVE AS MEMBERS OF AN ARBITRATION TRIBUNAL UNDER THE AGREEMENT**

COM(22)589 + Annex

Submitted by the Foreign, Commonwealth and Development Office, 1 December 2022

**SUBJECT MATTER**

1. The European Commission's proposal seeks a Decision from the Council of the EU ('Council') on the position to be adopted on behalf of the EU in the Trade and Cooperation Agreement (TCA) Partnership Council with regard to establishing a list of at least 15 persons who are willing and able to serve as members of an arbitration tribunal in accordance with Article 752 of the TCA.
2. Pursuant to Article 741 of the TCA, arbitrators are required to demonstrate expertise in law and international trade, including on specific matters covered within the TCA, and, in the case of a chairperson, also have experience in dispute settlement procedures. They cannot be affiliated with or take instruction from either the EU or UK and shall serve in their individual capacities and not take instructions from any organisation or government with regard to matters related to the dispute; their independence must be beyond doubt.
3. The function of the arbitration tribunal, in accordance with Article 742 of the TCA, is to make an objective assessment of the matter before it; setting out the findings of facts and law and the rationale behind the decision. They should also consult regularly with the UK and EU and provide adequate opportunities for a mutually agreed solution.
4. The UK and EU have each selected six individuals available to serve as members of an arbitration tribunal and a further four each who may serve as chairpersons. Both sides conducted independent selection processes, before nominating candidates for the other Party to consider. UK nominations were decided by Ministers after recommendations from a senior official selection panel that reviewed and sifted applicants who had applied through an Expression of Interest campaign run by the Government. Following brief negotiations, each side agreed to a final selection of 20 individuals listed in the **Annex**.

5. As set out in Article 752 of the TCA, the Partnership Council was meant to establish the list by 30 June 2021. However, when it became clear that neither side would be ready to agree the list by this date, both Parties committed to doing so as soon as practicable.
6. A joint decision establishing the list of arbitrators under the TCA will be considered and, if agreed, adopted by the Partnership Council via written procedure.

## **SCRUTINY HISTORY**

7. In response to a letter from the Chair of the European Scrutiny Committee, the then Minister for Europe and North America wrote to both scrutiny committees on 31 March 2022 to update them on the selection of arbitrators under the TCA.

## **MINISTERIAL RESPONSIBILITY**

8. The Secretary of State for Foreign, Commonwealth and Development Affairs has central responsibility for relations with the European Union and is the UK Co-Chair of the Partnership Council.

## **INTEREST OF THE DEVOLVED GOVERNMENTS**

9. The dispute settlement provisions under the TCA are reserved, but there could be disputes that impact the Devolved Governments (DGs) directly or indirectly. With regard to arbitrator selection specifically, there is no role for the DGs. We consulted them on the preparation of this explanatory memorandum and they provided no comments.

## **LEGAL AND PROCEDURAL ISSUES**

**(i) Legal Base:** The legal basis for establishing the list of arbitrators is provided by Article 752 of the TCA. The basis for the European Commission's proposal stems from Article 218(9) of the TFEU, which states that the Council shall adopt a decision to establish a position on behalf of the EU in a body established by an agreement – in this case the Partnership Council under the TCA.

**(ii) Voting Procedure:** A qualified majority is required for the adoption of the proposal.

**(iii) Timetable for adoption and implementation:** We expect the Council to formally adopt the Commission's proposal in early December. A joint decision to establish the list will then be taken by the Partnership Council via written procedure shortly thereafter. Reaffirmation and reference to this decision will then be noted at the Partnership Council meeting currently scheduled for early January.

## **POLICY IMPLICATIONS**

10. There are no substantial policy impacts arising from the forthcoming Council Decision. In a scenario where a dispute proceeds to arbitration before the list of arbitrators is established under the TCA, there is a default mechanism for appointing a tribunal set out in Article 740 of the Agreement.
11. The proposal relates to the dispute settlement procedure set out in Title I of Part Six of the Trade and Cooperation Agreement, the UK and the EU must seek to resolve any disputes arising from the agreement through cooperation and entering consultations in good faith, with the aim of reaching a mutually agreed solution.
12. If a resolution is not reached, the complaining Party may request the establishment of an arbitration tribunal, which shall be composed of three arbitrators, to provide a final and binding ruling on the issue. There are then a series of provisions for bringing the respondent Party, if found to be in breach, into compliance with their obligations under the TCA.

## **CONSULTATION**

13. No external consultation on this Commission proposal is required.

## **FINANCIAL IMPLICATIONS**

14. None.

## **MINISTERIAL NAME AND SIGNATURE**



Leo Docherty MP

Minister for Europe

Foreign, Commonwealth and Development Office

## **Annex: Proposed List of Arbitrators**

### Chairpersons

Leora Blumberg

Gavan Griffith

Campbell McLachlan

Christopher Thomas

Thomas Cottier

William J. Davey

Valerie Hughes

Penelope Jane Ridings

### EU

Laurence Boisson de Chazournes

Irina Buga

Michael Hahn

Crenguta Leaua

Helene Ruiz Fabri

Peter Leo Henri van den Bossche

### UK

Jean Kalicki

Lawrence Collins

Janet Whittaker

Surya Subedi

Lorand Bartels

David Unterhalter