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PROPOSAL

From:	Secretary-General of the European Commission, signed by Ms Martine DEPREZ, Director
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To:	Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of the European Union
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Delegations will find attached document COM(2022) 38 final.

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Proposal for a

COUNCIL DECISION

**on the position to be taken on behalf of the European Union in the International Centre
for Settlement of Investment Disputes (ICSID)**

EXPLANATORY MEMORANDUM

1. SUBJECT MATTER OF THE PROPOSAL

This proposal concerns the decision establishing the position to be taken on behalf of the European Union within the Administrative Council of the International Centre for Settlement of Investment Disputes (ICSID) in connection with the envisaged adoption of the amended ICSID rules.¹ The adoption will produce legal effects on the European Union's treaty practice in the field of investment dispute settlement.

2. CONTEXT OF THE PROPOSAL

2.1. The Particular Interest of the European Union in ICSID

Currently 155 States are contracting states of ICSID, among which 26 are Member States of the Union. The European Union is not a member of ICSID itself. However, the European Union has incorporated the ICSID Arbitration Rules and Additional Facility Arbitration Rules in all of its trade and investment agreements that include rules on investment protection.² Pursuant to such agreements, the ICSID rules can apply in investment disputes initiated by EU investors against third countries, by non-EU investors against EU Member States or, following the proposed amendments, in disputes brought against the Union under the ICSID Additional Facility Arbitration Rules. Thus, the Union has a particular interest in the reform of ICSID rules.

2.2. ICSID

ICSID is an institution that is part of the World Bank Group. It is an independent and depoliticised dispute-settlement institution. The objectives of ICSID are:

- (a) providing a dispute settlement mechanism for investor-State disputes by conciliation, arbitration or fact-finding,
- (b) administering these disputes, and
- (c) promoting international investment by providing confidence in the dispute resolution process.

The ICSID dispute settlement mechanism is available to investor-State disputes and to State-State disputes under investment treaties and trade agreements, under domestic investment laws and pursuant to investment contracts concluded between States and foreign investors. ICSID also acts as an administrative registry.

¹ I.e., the ICSID Administrative and Financial Regulations, Institution Rules, Arbitration Rules, Conciliation Rules, Additional Facility Rules, Additional Facility Administrative and Financial Regulations, Additional Facility Arbitration Rules, Additional Facility Conciliation Rules, Fact-Finding Rules, Fact-Finding Administrative and Financial Regulations, Mediation Rules, Mediation Administrative and Financial Regulations.

² See Article 8.23(2) of the EU-Canada Comprehensive Economic and Trade Agreement (CETA), Article 3.33(2) of the EU-Vietnam Investment Protection Agreement and Article 3.6(1) of the EU-Singapore Investment Protection Agreement. Article 26 of the Energy Charter Treaty, to which the Union is a party, also allows for the application of the ICSID Rules.

2.3. The envisaged acts of ICSID

The Secretariat of ICSID initiated a consultation process on the reform of the Centre's Rules in 2018. Throughout the years 2018-2021, intensive discussions took place between the Secretariat and ICSID member states based on five successive drafts of revised rules. The European Union, represented by the European Commission, has actively participated in the consultation process, coordinated the positions of the EU Member States and repeatedly submitted written comments on the draft texts on behalf of the EU and its Member States. As a result of this process, the following amendments and new texts, producing legal effect on the European Union's treaty practice, will be put to a vote of the Administrative Council by written procedure scheduled to close on 21 March 2022:

2.3.1. Amendments to the ICSID Convention Proceedings

The amendments include amendments to the ICSID Administrative and Financial Regulations, the ICSID Institution Rules, the ICSID Arbitration Rules and the ICSID Conciliation Rules.

Among the main substantive changes are a new requirement to include a description of the ownership and control of the investment within the request for arbitration or conciliation, an obligation to disclose third-party funding, enhanced rules regarding the disqualification of arbitrators, the costs of the proceedings, early dismissals of unfounded claims, bifurcation of proceedings, as well as revised timelines. A new provision addresses explicitly requests for security for costs. The transparency of proceedings has been enhanced as far as possible without requiring an amendment of the ICSID Convention. A new set of rules for expedited arbitration proceedings are also proposed.

2.3.2. Amendments to the Additional Facility Proceedings

The amendments include changes to the ICSID Additional Facility Rules, the ICSID Additional Facility Administrative and Financial Regulations, the ICSID Additional Facility Arbitration Rules and the ICSID Additional Facility Conciliation Rules.

The possible scope of application of the Additional Facility Rules is extended to investment disputes in which neither the respondent nor the State of the claimant are ICSID Contracting Parties, as well as to disputes involving Regional Economic Integration Organisations. In addition, most of the changes made to the ICSID Arbitration and Conciliation Rules are also reflected in the revised ICSID Additional Facility Rules, with slightly more ambitious provisions on transparency.

2.3.3. Amendments to the ICSID Fact-Finding Proceedings

Changes concern the ICSID Fact-Finding Rules, as well as the ICSID Fact-Finding Administrative and Financial Regulations. A set of updated stand-alone fact-finding rules are proposed through which disputing parties can jointly request a fact-finding Committee to conduct a specific fact-finding proceeding.

2.3.4. Proposal of new ICSID Mediation Rules

A new set of ICSID Mediation Rules and relevant Administrative and Financial Regulations are proposed in reply to requests by States and investors to provide greater capacity for mediation. The mediation rules have a broad scope of application and can, upon consent,

apply to any mediation proceedings relating to an investment that involve a State or a Regional Economic Integration Organization

3. POSITION TO BE TAKEN ON THE UNION'S BEHALF

The amendments the Administrative Council of ICSID will be called to vote upon address some of the identified shortcomings of the current system of investor-state dispute settlement. It must be noted that in parallel to the ICSID reform process, the European Union and its Member States are pursuing the creation of a permanent multilateral investment court that would replace the current system of investment arbitration by a permanent mechanism. Work on the creation of a multilateral investment court is currently taking place within the United Nations Commission on International Trade Law (UNCITRAL) and is expected to be concluded in 2026. In view of the European Union, only a permanent investment court will address sufficiently and comprehensively all the problems resulting from the current system of *ad hoc* investment arbitration. However, until the establishment of a multilateral court, the current system of investment arbitration will continue to apply and any improvements to its rules should be welcomed. The Council should therefore support the proposed amendments to the ICSID Rules.

4. LEGAL BASIS

4.1. Procedural legal basis

4.1.1. Principles

Article 218(9) of the Treaty on the Functioning of the European Union (TFEU) provides as follows: *‘The Council, on a proposal from the Commission or the High Representative of the Union for Foreign Affairs and Security Policy, shall adopt a decision suspending application of an agreement and establishing the positions to be adopted on the Union’s behalf in a body set up by an agreement, when that body is called upon to adopt acts having legal effects, with the exception of acts supplementing or amending the institutional framework of the agreement.’*

First, Article 218(9) TFEU requires a body set up by an international agreement that has the power to establish rules or adopt decisions in the context of that agreement. The wording *‘in a body set up by an agreement’* indicates that the *‘provision concerns the positions to be adopted on behalf of the European Union in the context of its participation, through its institutions or, as the case may be, through its Member States acting jointly in its interests, in the adoption of such acts within the international body concerned’*.³

Article 218(9) TFEU applies regardless of whether the European Union is a member of the body or a party to the agreement.⁴ The Court of Justice has stated that *‘[w]here an area of law falls within a competence of the European Union [...] the fact that the European Union did not take part in the international agreement in question does not prevent it from exercising that competence by establishing, through its institutions, a position to be adopted on its behalf’*

³ Judgment of the Court of Justice of 6 October 2015, Council v Commission, C-73/14, ECLI:EU:C:2015:663, paragraph 63.

⁴ Judgment of the Court of Justice of 7 October 2014, Germany v Council, C-399/12, ECLI:EU:C:2014:2258, paragraph 64.

*in the body set up by that agreement, in particular through the Member States which are party to that agreement acting jointly in its interest.*⁵

4.1.2. Application to the present case

The envisaged acts amending the ICSID rules fulfil these principles.

First, the ICSID Administrative Council, the body voting on the amendments, is a body set up by an agreement, in line with Article 218(9) TFEU. The current Article 7 of the ICSID Convention and Regulation 7 of the ICISD Administrative & Financial Regulations express the Administrative Council's role in, *inter alia*, amending the ICSID rules. The Administrative Council has the power to establish rules or adopt decisions in the context of the ICSID agreements. The Administrative Council is not acting independently of the parties but through its Contracting States (see Article 4(1) ICSID Convention).

Second, the envisaged acts are '*acts having legal effects*', in accordance with Article 218(9) TFEU. The ICSID dispute settlement mechanism is applicable in the European Union's and its Member States' international investment protection agreements.⁶ In particular, after adoption of the amendments, the ICSID Additional Facility Rules will potentially become applicable in disputes initiated against the European Union in which measures adopted by the Union are the subject of the dispute and in which the Union would act as the respondent. Thus, the amendments of the ICSID Rules have legal effects on the functioning and application of international agreements concluded by the Union and on the conduct of legal proceedings to which the Union would be a party.

In summary, the Commission requests the Council to adopt the Union's position with regard to the envisaged acts so that the Member States which are Contracting Parties to the ICSID Convention, acting jointly in the interest of the Union, may express the Union's position within the Administrative Council of ICSID. The procedural legal basis for the proposed decision is Article 218(9) TFEU.

4.2. Substantive legal basis

4.2.1. Principles

Primarily, the substantive legal basis for a decision under Article 218(9) TFEU depends on the objective and content of the envisaged act in respect of which a position is taken on the European Union's behalf. '*It is settled case-law that the choice of the legal basis for a Community measure must rest on objective factors amenable to judicial review, which include in particular the aim and the content of the measure*'⁷.

⁵ Judgment of the Court of Justice of 7 October 2014, Germany v Council, C-399/12, ECLI:EU:C:2014:2258, paragraph 52.

⁶ See Article 8.23(2) of the EU-Canada Comprehensive Economic and Trade Agreement (CETA), Article 3.33(2) of the EU-Vietnam Investment Protection Agreement and Article 3.6(1) of the EU-Singapore Investment Protection Agreement. Article 26 of the Energy Charter Treaty, to which the Union is a party, also allows for the application of the ICSID Rules.

⁷ Judgement of the Court of Justice of 12 December 2002, Commission v Council, Case C-281/01, ECLI:EU:C:2002:761, paragraph 33.

4.2.2. *Application to the present case*

The main objective of the envisaged acts relates to updating and amending the existing ICSID rules, i.e. the reform of investment dispute-settlement rules used by the European Union and its Member States in several EU agreements.

Pursuant to Article 207 TFEU, foreign direct investment is part of the European Union's common commercial policy. The EU's and EU Member State's international agreements that refer to the ICSID rules provide protection for foreign direct investment and have been adopted (or authorised in the case of EU Member States' investment agreements⁸) on the basis of Article 207 TFEU. According to the Court of Justice of the European Union, foreign direct investment falls within the exclusive competences of the Union, while foreign non-direct investment and investment dispute settlement falls within a competence which is shared between the Union and its Member States⁹.

The substantive legal basis for the proposed decision should therefore be the first subparagraph of Article 207(4) TFEU.

4.3. **Conclusion**

In conclusion, the legal basis of the proposed decision should be the first subparagraph of Article 207(4) TFEU in conjunction with 218(9) TFEU.

5. **PUBLICATION OF THE ENVISAGED ACT**

In view of the public interest in the reform of investor-state dispute settlement and in line with the Union's commitment to transparency, it is appropriate to publish the Council Decision after the completion of the voting procedure within the Administrative Council of ICSID on 21 March 2022.

⁸ See Regulation (EU) No 1219/2012 of the European Parliament and of the Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries.

⁹ Opinion 2/15 of the Court of Justice of 16 May 2017, ECLI:EU:C:2017:376, paragraph 293.

Proposal for a

COUNCIL DECISION

on the position to be taken on behalf of the European Union in the International Centre for Settlement of Investment Disputes (ICSID)

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular the first subparagraph of Article 207(4) in conjunction with Article 218(9) thereof,

Having regard to the proposal from the European Commission,

Whereas:

- (1) The Administrative Council of ICSID will vote on amendments of the ICSID rules, which will have legal effects for the purposes of Article 218(9) TFEU by written procedure scheduled to be concluded on 21 March 2022.
- (2) The European Union is not a member of ICSID. However, the Union has constantly incorporated by reference the ICSID rules into its trade and investment agreements that provide for investment protection and investment dispute settlement.
- (3) In Opinion 2/15 of the Court of Justice of 16 May 2017¹⁰, the Court clarified that foreign direct investment falls within the exclusive competences of the Union while competence over foreign non-direct investment and investment dispute is shared between the Union and its Member States.
- (4) Through the reform of the ICSID rules, the ICSID Additional Facility Rules will potentially become applicable to disputes initiated against Regional Economic Integration Organisations such as the European Union. The Union also uses the ICSID rules in its treaties and these can be used by Union investors in cases brought against third countries, by non-Union investors against Member States of the Union or the Union itself when the relevant requirements of the ICSID Convention are met.¹¹ Thus, the amendments of the ICSID rules will have legal effects on the functioning and application of international agreements concluded by the Union and on the conduct of legal proceedings to which the Union may be a party. The Union therefore has a particular interest in the reform of ICSID rules.
- (5) Twenty-six Member States of the Union are members of ICSID. Those Member States have the possibility to participate in the Administrative Council and vote on the amended rules in the context of the written procedure.

¹⁰ Opinion 2/15 of the Court of Justice of 16 May 2017, ECLI:EU:C:2017:376.

¹¹ This is currently not possible as regards the Union given Regional Economic Integration Organisations cannot be members of ICSID, absent an amendment to the ICSID Convention.

- (6) Therefore, the Council should adopt the Union's position with regard to the envisaged amendments of the ICSID rules so as to allow the Member States which are Contracting Parties to the ICSID Convention, acting jointly in the interest of the Union, to express the Union's position within the Administrative Council of ICSID.
- (7) In the context of ICSID Convention Proceedings, the amendments update and develop the ICSID Administrative and Financial Regulations, the ICSID Institution Rules, the ICSID Arbitration Rules and the ICSID Conciliation Rules. The amendments will *inter alia* lead to enhanced transparency of the proceedings, clarify provisions on early dismissal of unfounded claims and security for costs, and implement disclosure obligations for third-party funding.
- (8) In the context of ICSID Additional Facility Proceedings, the proposed amendments update and develop the ICSID Additional Facility Administrative and Financial Regulations, the ICSID Additional Facility Arbitration Rules and the ICSID Additional Facility Conciliation Rules. Most of the amendment to the ICSID Convention proceedings will also be mirrored in the ICSID Additional Facility Rules. In addition, the scope of the Additional Facility Proceedings will be extended to also include *inter alia* disputes involving Regional Economic Integration Organisations.
- (9) In the context of ICSID Fact-Finding Proceedings, the proposed amendments update and develop stand-alone ICSID Fact-Finding Rules and ICSID Fact-Finding Administrative and Financial Regulations.
- (10) In the context of ICSID Mediation, the reform proposal establishes a new set of ICSID Mediation Rules and ICSID Mediation Administrative and Financial Regulations.
- (11) The Commission, together with the governments of the Member States that are Contracting Parties to the ICSID Convention, has taken a leading role in the negotiation of the updated rules based on agreed Union positions. The amendments address current concerns expressed with regard to the existing Investor-State Dispute Settlement system and substantially improve the ICSID Rules and Regulations.
- (12) The position to be adopted on behalf of the Union pursuant to this Decision is without prejudice to the Union and its Member States' main objective to pursue the creation of a permanent multilateral investment court that would replace the current system of investment arbitration by a permanent mechanism,

HAS ADOPTED THIS DECISION:

Article 1

Acting jointly in the interest of the Union, the Member States that are Contracting Parties to the ICSID Convention shall express their acceptance of the amendments of the ICSID rules during the written voting procedures initiated by the Chairman of the Administrative Council of ICSID on 20 January 2022.

Article 2

This Decision shall be published in the *Official Journal of the European Union* after the completion of the voting procedure within the Administrative Council of ICSID.

Article 3

This Decision is addressed to the Member States that are Contracting Parties to the ICSID Convention.

Done at Brussels,

*For the Council
The President*