Council of the
European Union

Brussels, 4 March 2022
(OR. en)

6125/22

Interinstitutional File:
2022/0025 (NLE)

FDI 3

LEGISLATIVE ACTS AND OTHER INSTRUMENTS

Subject:	COUNCIL DECISION on the position to be adopted on behalf of the European Union within the Administrative Council of the International Centre for Settlement of Investment Disputes (ICSID)

COUNCIL DECISION (EU) 2022/...

of ...

on the position to be adopted on behalf of the European Union within the Administrative Council of 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 Article 207(4), first subparagraph, in conjunction with Article 218(9) thereof,

Having regard to the proposal from the European Commission,

Whereas:

(1) The Administrative Council of the International Centre for Settlement of Investment Disputes (ICSID) will vote by written procedure on a package of proposed amendments to the ICSID rules. The written procedure was initiated on 20 January 2022 and is scheduled to be concluded on 21 March 2022.

(2) The Union is not a member of ICSID. However, the Union has 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 2017[1], the Court clarified that foreign direct investment falls within the exclusive competences of the Union and that investment dispute settlement mechanisms cannot be established without the Member States' consent.

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

(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 Union. The Union also uses the ICSID rules in its investment treaties, and those rules can be used by Union investors in cases brought against third countries, by non-Union investors against Member States of the Union or by non-Union investors against the Union itself when the relevant requirements of the ICSID Convention are met. Thus, the amendments to 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 the ICSID rules.

(5) 26 Member States of the Union are members of ICSID. Those Member States are able to participate in the Administrative Council and vote on the amended rules in the context of the written procedure.

(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 amendments 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 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 amendments address current concerns expressed with regard to the existing investor-State dispute-settlement system and substantially improve the ICSID rules.

(12) The position to be adopted on behalf of the Union pursuant to this Decision is without prejudice to the main objective of the Union and its Member States in this area, namely to pursue the creation of a permanent multilateral investment court that would replace the current system of investment arbitration with 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 proposed amendments to the ICSID rules during the written voting procedure initiated by the Chairman of the Administrative Council of ICSID on 20 January 2022 and scheduled to be concluded on 21 March 2022 by approving the four draft Resolutions to:

– amend the Regulations and Rules for ICSID Convention proceedings (AC(C)/RES/1/2022);

– amend the Regulations and Rules for ICSID Additional Facility proceedings (AC(C)/RES/2/2022);

– adopt Regulations and Rules for ICSID mediation proceedings (AC(C)/RES/3/2022); and

– adopt Regulations and Rules for ICSID fact-finding proceedings (AC(C)/RES/4/2022).

Article 2

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

Done at …,

For the Council
The President