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ETUCE

European Trade Union Committee for Education EI European Region

Statement on Investment Protection in EU Investment Agreements

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EUROPEAN REGION- ETUCE

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The European Trade Union Committee for Education (ETUCE)* is deeply concerned about new rules for investment protection being proposed by the European Commission for future EU investment agreements. ETUCE is particularly worried about the aim of including the investor-state dispute settlement (ISDS) mechanism into EU free trade agreements.

The recent regulation No 912/2014 of 23 July 2014 setting out rules on managing financial responsibility relating to ISDS in EU investment agreements states in paragraph 4 that the right to regulate must be respected and safeguarded in EU agreements, and that foreign investors must be given the same level of protection, but not a higher level of protection.

ETUCE believes that the flawed ISDS mechanism is contradictory to and limiting on the right to regulate. As well, investor-state rules do not ensure an equal level of protection for foreign and domestic investors.

The practice of ISDS demonstrates that the right to regulate is often undermined as investors can challenge regulations, which they feel violate their rights to access a market or affects their future profits. Due to the cost of defending an ISDS case, as well as potential punitive awards imposed by ISDS tribunals, governments will in practice face real regulatory constraints and a narrowing of policy space. In recent years the numbers of ISDS cases have increased significantly. Consequently, the intention to substantially increase the coverage of ISDS will likely bring severe consequences and the increase of cases may be expected to be further intensified.

While ISDS has consequences in all areas of democratic decision-making, ETUCE has specific concerns in respect to the education sector. The education sector is a highly regulated sector based on democratic decision-making. Depending upon the coverage of education services in future trade deals, private education investors could use ISDS to challenge quality and accreditation standards if they felt these standards were “disguised barriers to trade” or “more trade burdensome than necessary”. These standards are crucial to ensure the quality of education and therefore ISDS poses very significant risks to the education sector and democratic decision-making in general.

Regarding, the requirement to ensure an equal level of protection for foreign and domestic investors, the fundamental problem is that the ISDS mechanism by definition gives a special status to foreign investors by granting exclusive rights to foreign investors to by-pass domestic courts. Consequently, the ISDS arrangement potentially discriminates against domestic investors, as well as citizens whose rights may be affected but have no standing before ISDS panels.

In addition, foreign investors are granted extensive rights without any requirements to take on responsibility for their activity in return. Essentially, the ISDS mechanism results in privatising the gains and socialising the losses. Under ISDS foreign investors are given exclusive rights to challenge democratic laws and regulations with potentially very substantial awards in their favour, at the same time governments and citizens must ultimately pay the cost of defending itself and the potential monetary awards that ISDS arbitration generate.

Alternatives already exist to the flawed ISDS mechanisms that can be integrated in EU Investment Agreements. Such an alternative is the state-to-state dispute settlement mechanisms, which guarantee the critical role of governments in determining and protecting the public interest. Consequently, the number of frivolous cases is limited in the state-to-state mechanism, as the state of the investor must bring the case rather than the investor itself.

**The European Trade Union Committee for Education (ETUCE) represents 129 Teacher Unions and 11 million teachers in 45 countries of Europe. ETUCE is a Social Partner in education at the EU level and a European Trade Union Federation within ETUC, the European Trade Union Confederation. ETUCE is the European Region of Education International, the global federation of teacher unions.*