# TTIP, CETA, ISDS: assessment by Dr Henry Adams of letter by Minister Ken Clarke to Tim Farron MP

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My website on TTIP, CETA, ISDS: www.bit.ly/FTAthreats

A critical assessment by Dr Henry Adams, a constituent of Tim Farron MP, of the appended 10june14 letter by The Rt Hon Kenneth Clarke QC MP, Minister Without Portfolio, The Cabinet Office, in response to Tim's letter to the Secretary of State Vince Cable (Dept: BIS) addressing some of the many serious concerns of his constituents, including myself, about the likely dangerous impacts of the trade and investment agreements under negotiation between the EU and the US and Canada (TTIP and CETA).

*Notes to aid readers: A references will be added when I have time, in addition to the hyperlinks, and the wording will be improved for the final. I have numbered the paragraphs of Ken Clarke's letter and associated 18feb14 article in the Wall Street Journal (WSJ) to aid reference (here coded as KC1… & WSJ1…). Also appended is the BIS FAQ leaflet on the ISDS – Investor-to-State Dispute Settlement mechanism. However I recommend it would be easier for the reader to look at Ken Clarke's letter and enclosures side-by-side to my response, by clicking www.bit.ly/TTIPKenClarke. I have also numbered my paragraphs to help reference – but please note also the version date of the present document, as the addition of any more paragraphs into future versions will alter the numbering.*

## CONTENTS



## Introduction

KC1

1. Thank you Ken for taking the time to address a number of our many concerns. Unfortunately, and not meaning to be disrespectful, I am not "reassured" by the points you make, and will explain why below.
2. Moreover, your letter re-affirms and adds strength to my assessment that the TTIP is a corporate power grab damaging to our democratic ability to protect us and our environment, that has *already* damaged our ability to act against climate change, that benefits the few (benefactors of corporate profits), to the loss of the rest of us.
3. Multinational corporations, aka transnational corporations, already have *financial* power over many nations. The TTIP will also give them *legal* power over nations. Do we want to be controlled by an

oligarchy of supranational corporations? (As well as having an oligopoly outcompeting SMEs?)

4. Background explanation of my viewpoint (my own background is scientific – starting in ecological research. Ecology involves trying to understand complex systems from evidence – very useful in the present study.)

5. A dangerous error of giving big trans-national corporations more power in controlling our futures, such as within TTIP, CETA and TPP, is shown well in the film 'The Corporation' (which examines the psychopathic psychology inherent in a corporation, bearing in mind that 'a corporation' has been given the legal equivalence of 'a person' by the US Supreme Court, giving sense to such a psycho-analysis). More simply it also means that money is given primacy as a yardstick of value above all other things of much more vital value to our long-term existence on this earth. I'll explain further:
6. The prime aim of a company or corporation is to maximize profits and returns to shareholders. Companies even have a legal duty to do that, in more general terms (the wording is not as explicit as I've stated here). This aim allows the minimizing of costs by externalizing them so they are born by others (e.g. negative externalities such as carbon emissions, pollution costs, labour costs [e.g. via tax credits], habitat destruction costs [e.g. re extractive industries] and other consequential costs). (These costs are neglected by the models from whose results the pro-TTIP economic hype has been cherry-picked.)
7. Regulations are thus essential to limit such shifting and ignoring of costs, and are becoming increasingly important this century due to climate change and resource depletion. Bloomberg New Energy Finance write that "governments … cannot rely on economics and market forces alone - some form of policy intervention will be required." But TTIP heads in the opposite direction of addressing these major 21st century core-requirements, by instead focusing on further liberalization of corporations from constraints and regulations, by reframing the latter as "barriers" to free trade and free markets, restricting priority-framing to monetary values, such as focusing priorities on the "need" for "economic growth", before the latter has been de-coupled from carbon emissions (also resource depletion and degradation issues etc), and also its absurd inclusion of transactions (e.g. in goods or services) irrespective of whether good or bad for us and our environment, and likewise also for our *economic* health (evidence: the 2007/8 crisis) (REFs: 'Rethinking Economic Growth' & Growth and environmental destruction inherent to money creation by banks - Positive Money).
8. TTIP is based on a neoliberal ideology that has been shown to be totally unfit for the global needs of the 21st century (including the financial system – which is a failure [e.g. austerity – used despite no empirical justification in economics]), and tries to legally "lock-in" the flaws of this ideology. It's "cart before horse": the trade and investment requirements for a sustainable world need to be agreed on *first*, and with public and civil society groups and NGOs being central to that process. The agreement itself should be based on what *we* want, not what big corporations want. So TTIP must be halted so its central aims can be detoxified and replaced:
9. An alternative trade model is required. It exists, but is less appealing to corporate short-term interests that focus on money and profits and disregard negative consequences. Removing trade-tariffs is but a tiny part of the TTIP aim, and can be achieved without TTIP as it is now.

KC2

**TRANSPARENCY & CORPORATE INFLUENCE**

10. You state: "It is important to realise that until we know what an agreement will contain, its impact cannot be precisely predicted." This reveals 2 important points:
(i) If you do not know what the agreement will contain – how can you be so confident that it will be benign to our concerns, especially as powerful big US (and European) corporate interests have had influence on proceedings from an early stage – including those working in opposition to our interests (as I will show)?
(ii) The public and NGOs, MPs and MEPs, and even official parts of the EU organisation and member-state governments, have *not* had adequate access to the preparations and negotiations for the CETA and TTIP,

whereas excessive corporate lobbying influence has been allowed at an early stage, and the FTA/BIT model on which TTIP and CETA are based is itself intrinsically pro-corporate, being a development on from the now 20 year old North American FTA (NAFTA) – designed to benefit profits for US multinational companies.

11. Here is some of my evidence:
    Corporate Europe Observatory found out that "more than 93% of the Commission's meetings with stakeholders during the preparations of the negotiations [for the EU-US FTA: TTIP] were with big business". In the US: an impressive Washington Post infographic shows how 'Industry voices dominate the trade advisory system', and "Private industry and trade groups represent the lion's share of committee members - 480, or 85% of the total.", and "most committees are devoted primarily or exclusively to business interests and related trade associations." Chevron, mis-user of the ISDS against Ecuador, is an official advisor to the US on TTIP.
12. Are you happy that we and democratic involvement (MPs, MEPs, NGOs, …), wait with faith in "reassurances" while a select few EU Commission technocrats almost secretly sort out an "agreement" with corporate, but not democratic, involvement? That would be like "blind leading the blind" with faithful trust.
13. So why the lack of transparency? US Senator Elizabeth Warren is quoted as saying: "I actually have had supporters of the deal say to me 'They have to be secret, because if the American people knew what was actually in them, they would be opposed." This echoes some of the history of NAFTA.
14. HoC here debate secrecy v transparency of TTIP negotiations: 'European Scrutiny Committee: Oral evidence: Transatlantic Trade and Investment Partnership, HC 292 Wednesday 11 June 2014, Ordered by the House of Commons to be published on Wednesday 11 June 2014.' E.g. Glyn Moody point out that UK MPs have no access to TTIP documents, e.g. see Q6. So how can UK Coalition Party MPs parrot TTIP hype so uncritically? Back-scratching tribalism? "allegiance"? career motives? oiling revolving doors? share dividends?
15. My/our assessment of the TTIP differs from claims of speculative future benefits in being evidence-based: examining for example (i) evidence from existing similar FTAs/BITs and ISDS cases, (ii) what US and corporate demands are for TTIP, (iii) how the latter have already resulted in our fears being realized, with the effectiveness of vital climate regulations already traded away as if mere bargaining chips. Thus I can show how one of your reassurances (KC1 "… weaken environmental regulation …") is already negated. Surely an evidence-based assessment is preferable to one of faith in "reassurances"?

**WINNERS & LOSERS, ECONOMIC BENEFITS & JOBS**

16. **Joseph Stiglitz, Nobel prize-winning economist**, said with regards 'Free Trade Agreements' such as TTIP/TAFTA: "Corporations everywhere may well agree that getting rid of regulations would be good for corporate profits. Trade negotiators might be persuaded that these trade agreements would be good for trade and corporate profits. But there would be some big losers - namely, the rest of us." (copied from www.citizen.org/TAFTA).
    **The predicted economic and jobs benefits have been shown to be overblown, and are speculative, whereas *existing* data from NAFTA show otherwise.**
17. The **predicted economic benefits** of the TTIP that the EU Commission and the coalition parties state mainly come from a commissioned report by CEPR (London) based on modelling of scenarios. These predictions have been shown by a number of academics to be very overblown. For example, the critical assessment by Gabriel Siles-Brügge and Ferdi De Ville in the LSE blog with the descriptive title: 'The potential benefits of a US-EU free trade deal for both sides may be much smaller than we have been led to believe'.
18. Note that most of the predicted economic gains are from an over-high and unrealistic expectation for the removal of '***non***-tariff barriers' (NTBs, aka NTMs – non-tariff measures), and would mean, in an "ambitious agreement", an unacceptable extent of de-regulation, hitting the very issues that we have concerns about, regulations designed to protect us and our environment! Also, a full opening up of public services procurement to irreversible privatization. To quote from page vii of the CEPR report: "Reducing

non-tariff barriers will be a key part of transatlantic liberalisation. As much as 80% of the total potential gains come from cutting costs imposed by bureaucracy and regulations, as well as from liberalising trade in services and public procurement."

19. Thus Ken – your last 2 sentences in KC2 when taken together don't give an impression consistent with the CEPR report, as you focus first on tariffs (which are already very small anyway, @c.3%, and could be removed using an alternative people-friendly trade agreement model), then secondarily on "unnecessary barriers to trade" (which understates the extent of deregulation I refer to; see refs to check).
20. Ken you also write: "Independent analysis " by which I guess you may mean the modelling scenarios within the *EU Commission-commissioned* CEPR report? Why no reference??? Then you continue " shows that an ambitious agreement could give an annual boost to the British economy of as much as £10 billion each year." If this is from the CEPR report you may be passing on misleadingly portrayed figures, because Glyn Moody points out that a footnote on p.3 states: "Note: estimates to be interpreted as changes to a projected 2027 global economy", so your figure may not be a per year figure pre-2027. The lack of a reference for your key figure does not contribute to "reassurance". Also: "could give…" implies the maximum possible pertaining to an ideal and optimistic set of conditions (and in 13 years time?).
21. Also I find the expression of economic benefit by the CEPR report as *per family* absurd (and glad you don't re-state that): the main benefits will be to shareholders in the multinational corporations, and in companies gaining from privatization of public services (especially the NHS), as it is they that will stand to gain the most.
22. The US Center for Economic and Policy Research (cepr) strongly criticizes the hollow claims that trade pacts are good for job creation and economic growth: 'Why Is It So Acceptable to Lie to Promote Trade Deals' (30may14), and comments on the report by the Centre for Economic Policy Research, London (also CEPR - but no connection).
23. This is also worth a read: Glyn Moody writes: 'Why TAFTA TTIP Isn't Worth It Economically, And How We Can Do Much Better' (26jun14, Techdirt). He summarizes studies that critically examine the pro-TTIP CEPR & Ecorys reports and finds that (i) the CEPR figures are misleadingly presented, and can result in cumulative figures being mistaken to be per annum figures [this needs closer examination which I haven't done; "the jury's out"], (ii) when %GDP pa growth values are correspondingly corrected they are tiny (much more under 1% pa), (iii) the models ignore the negative overall effects to the economy of where it is pro-corporate in TTIP to *increase* regulations, e.g. in IPR eg for pharma products, resulting in price increases, (iv) they make it easy for pro-TTIP readers to focus on the maximum gain figures not the more realistic likelihoods, (v) models look at the corporate gains that TTIP aims to favour, which are largest with the removal of NTBs, but omit accounting for the corresponding losses from removal of NTBs, associated with the removal of regulations that protect our interests – especially in the "ambitious" scenarios (read 'most potentially risky and damaging' scenarios of maximum deregulation).
24. Also see: 'ASSESS_TTIP: Assessing the Claimed Benefits of the Transatlantic Trade and Investment Partnership (TTIP) Final Report' (pdf) for OFSE (Austrian Foundation for Development Research). This report (which Glyn Moody refers to above) was commissioned and financed by the Confederal Group of the European United Left/Nordic Green Left (GUE/NGL) political group in the European Parliament (though disclaims from necessarily representing any official view of the GUE/NGL group). It covers aspects omitted by the official EU Commission commissioned reports, and its conclusions include e.g. "The social costs of regulatory change might be substantial", "Other potential adverse effects of TTIP are downplayed", etc, etc. Please read its summary at least.
25. My overview summary here is that the speculative financial or monetary gains from added trade and investment (especially as they are largely to corporate profits and shareholder dividends rather than to all of
us), are not the most important topics of the TTIP and CETA. This is because they are trivial compared with the corresponding major threats they impose on our ability to tackle by democratic means the key issues of global importance in the 21st century, such as tackling climate change, ocean acidification, biodiversity loss, over-consumption and over-exploitation of finite natural resources, food distribution, income inequality etc. Trade agreements need to focus on sustainable distribution of essential resources for all our long-term
benefit, not on increasing growth in GDP by increasing profits and dividends to the few, by liberalizing

corporations from regulations so they can further externalize their costs onto everyone else. The whole subject needs reframing away from the money-greed motive. Have you considered the Alternative Trade Mandate?

26. **Jobs?** The essence of FTAs/BITs is to liberalize the jobs market to allow jobs to go more easily to where-ever / who-ever pays the lowest to its employees with the least employment protection rights, and can lead to job-losses. This has happened with existing FTAs:
27. The now 20 year old NAFTA resulted in job-losses from USA and other ills:
    'NAFTA at 20 **One Million U.S. Jobs Lost**, Higher Income Inequality' Lori Wallach, 6jan14 HuffPost.
    CTC Citizens Trade Campaign's overview of NAFTA: "U.S. workers have lost 3 million actual and potential jobs".
    http://www.citizenstrade.org/ctc/trade-policies/existing-trade-agreements/north-american-free-trade-agreement-nafta/
    Wikipedia on NAFTA North American Free Trade Agreement and its effect on US jobs: "the AFL-CIO blames the agreement [NAFTA] for sending 700,000 American manufacturing jobs to Mexico over that time." This links to an FT article: 'Contentious NAFTA pact continues to generate a sparky debate' James Politi, 2dec13
    The Economic Policy Institute's economist Robert E. Scott, in his article titled 'NAFTA-related job losses have piled up since 1993' (10&16dec03) states: "Since the North American Free Trade Agreement (NAFTA) was signed in 1993, the rise in the U.S. trade deficit with Canada and Mexico through 2002 caused the displacement of production that supported 879,280 U.S. jobs. ..."
28. Even the EU Commission's Impact Assessment Report admit that TTIP is likely to bring "prolonged and substantial" dislocation to European workers: "… there will be sectors that will be shedding workers and that the reemployment of these workers in the expanding sectors is not automatic.." This is consistent with jobs going to where pay and conditions are least – the NAFTA flaw and globalization flaw, of a race to the bottom.

29. **Returning to "winners and losers": look at who is supporting TTIP, and the far greater numbers against it:**
    The supporters are the relatively few who stand to gain financially (such as shareholders in multinational corporations [and the Party who most of these are likely to vote for], or private health companies), especially those with corporate connections, or their tribal followers (those poorly-informed MPs who are following the party line or coalition line uncritically).
    Against: *hundreds* of NGOs, civil society organizations, all the major unions, people against NHS privatization, with more specific examples: Trade Justice Movement, World Development Movement for Global Justice, War on Want, Friends of the Earth Europe, Corporate Europe Observatory, Public Citizen's Global Trade Watch, Sierra Club, and many, many, others. Also the only large Party without corporate connections or funding (the Green Party).
    In summary – it is those FOR going with the flow of corporate money and power, versus those who rate human values other than greed for more money as being more important for our long-term future, and who
    give priority to our health and safety, our climate and environment, democracy, and reducing the rising inequalities.
    Politicians have to choose. To sit on the fence is *in effect*, equivalent to agreeing with the TTIP.
30. NB: Compare and weigh up the small speculative and dubious "benefits" of the TTIP and CETA, usually focused on money gains, and to a lesser extent on the even more dubious jobs gains, with on the other hand the huge spectrum of important negative impacts and threats that the TTIP and CETA would bring, which are listed well here: '30 Reasons why Greens oppose TTIP' and in more detail but less concisely here on my website: http://www.dragonfly1.plus.com/FTA_threats.html#negatives. Wouldn't it be better to choose an alternative model for trade agreements than TTIP and CETA? Such as the Alternative Trade Mandate?

KC3 **"REGULATORY HARMONIZATION" (deregulation)**

31. Your first sentence is impossible in reality, as the first part of the sentence means levelling *down* of regulations – and that will lower levels of protection, so invalidating the second part of your sentence. You express a wonderful ideal – but hardly realistic. You then refer to the benefit of just testing a product once – but don't state the reality that the US trade representative, and the US corporate stakeholders he is working for, is pushing for the usually higher EU standards to be reduced to US standards, and for the EU's vital '**Precautionary Principle**' and democratic say on products, to be replaced with [corporate-]"science-based" decisions on products with respect to health and safety and environment (I add [corporate-] as my own scientific background rejects the US acceptance of what a US company calls science-based [corporate science restricts the spectrum of impacts investigated, cherry-picks its results, …]).
32. The HLWG (the High Level Working Group on Jobs and Growth commissioned by the EU/US for the development of TTIP) and the CEPR report, show clearly that the drive of the TTIP is to reduce regulatory costs (to companies). Dr Brian Woodward points out, on assessing these reports, that "This will have a negative impact on health and safety issues, environmental protection, and workers rights. For example in the case of genetically modified crops the proposal is to limit regulation only to those issues that affect human and animal health. There are no proposals to look at the effects of GM crops on biodiversity and the environment. Also, their impact on small farmers in developing countries, who produce most of the world's food, is not to be considered."
33. This levelling down of regulations for '**regulatory harmonization**' is likely to mean for example, GM products being forced on us, with disregard to democracy. The US is strongly insistant on this. And that's just one example of many, such as hormone-injected cattle, chlorine-washed poultry, use of non-therapeutic antibiotics, toxic chemicals, endocrine disruptors etc.
34. I must add here a major concern that the TTIP would stifle and straightjacket the creation of new regulations in the future not just by the ISDS "chilling effect" but also by the creation of a **Regulatory Cooperation Council** that 'would allow early intervention by US and EU regulators in each other's rule making processes', and in which US corporate stakeholders will have an early say in proposed EU regulations. The US and its corporate stakeholders are pressing hard for this. With Chevron as an official US advisor – the threat to new EU climate regulations is obvious. The strength of this threat is already evidenced by the truncation of the EU's **Fuel Quality Directive** post 2020 under pressure from the US, following much pressure from Canada and tar sands oil interests. I have written this up here: www.bit.ly/FTAclimatefracking, and summarize it c.para.65.
35. You then refer to benefits to SMEs, and then on to consumers. But consumers do not want reduced safety standards in the products they buy – especially food products, even if that means lower prices. (And let's not forget the higher prices we may get from pharma products, as IPRights is one of the few areas where BigBiz wants *increased* regulatory control in TTIP – to protect its own interests, with little concern in protecting our interests).
36. **Financial deregulation** (cause of 1987/8 crisis to be ignored). While on SMEs, as an aside here: you do not mention that TTIP is unlikely to do anything to help level the playing field between SMEs and the multinationals with respect to **corporation tax**. That doesn't surprise me either – as the one sector the US has stronger regulatory control than the UK and EU is in the finance sector with Obama's **Dodd-Frank Act**, and the UK government wants to retain the lower regulations that advantage 'The City'. But with continued low financial regulations, there seems little prospect for the TTIP removing the up-to around 20% corporation tax advantage multinationals have over SMEs in trade, whereby they can misuse transfer-pricing and other tricks via tax havens to put SME competitors out of business and increase oligopoly. We need stronger financial sector regulation to protect smaller businesses against this unfair un-level playing field and to allow them to compete with the "big guys". But we are getting the opposite:
37. Furthermore, the Corporate Europe Observatory on 1st July this year writes: "**Leaked document shows EU is going for a trade deal that will weaken financial regulation**". < This is essential reading, as it reveals a serious threat to our future ability to tackle banks and financial stability. It ignores the cause of the 1987/8 crisis.

38. TTIP free-market? Market failure more like! (And TTIP is not the only threat to the D-F Act's regulations: TISA is too – and that is even more secret than TTIP, CETA, TPP. Have you heard of it? The big transnational corporations will not just have heard of it...).

**The ISDS – the Investor-to-State Dispute Settlement mechanism**

39. The ISDS gives multi-national corporations the power to sue nations if their future profits can be reduced by any changes in policy, regulations or legislation, including those designed to protect us and our environment. Also, it enables foreign multinationals to bypass our courts and laws in the process, by providing a behind-closed-doors tribunal system (such as the World Bank's ICSID in the US) comprising 3 unaccountable private arbitrators with a financially-incentivized pro-corporate bias, who can make decisions free from public scrutiny and appeal, and with a primacy of protecting profits and the "principle" of free market above protecting people and the environment or climate.
40. The ISDS is thus a significant threat to our vital long-term future needs, and also to our democracy and sovereignty, and consequently our ability to tackle the major issues facing us such as climate change. KC4
41. You state that "The government does not propose to comment on these cases". The government is thus ignoring the huge body of inconvenient evidence on the ISDS and its failures. How can that inspire "reassurance"? It does just the opposite.
42. Here are some of the many **examples of corporate misuse of the ISDS mechanism**:
    Using ISDS, a fracking company is suing Canada following Quebec's moratorium on fracking due to its pollution-risk (this could happen in the UK), Canadian gold mining companies are suing El Salvador and Costa Rica for stopping them mining to protect rivers from pollution, a UK mining company Churchill is suing Indonesia for stopping it mining following damage to a rainforest conservation area home to orangutans, tobacco company Philip Morris is
    suing Uruguay and Australia for demanding health warnings on cigarette-packages, and Occidental Petroleum, despite numerous abuses of human rights, social and environmental laws in Ecuador, has successfully sued the country the equivalent of 15 years worth of social welfare payments for stopping its contract there for breach of its terms. These examples are a few of the hundreds of ISDS cases outstanding.
43. Thus there is ample evidence from existing free trade and investment treaties of the misuse of the ISDS to put profit before our vital needs. This excellent 5 minute video also provides examples of such evidence and clearly explains how the ISDS works: https://vimeo.com/88146142.
44. Your next sentences in KC4 have no credibility because they ignore the evidence. You state: "ISDS tribunals cannot overturn laws made by democratically elected governments". Depending on how you define "overturn", there is good evidence that they have done just that: e.g. I quote Public Citizen quoted by Glyn Moody: "In one of the Chevron v. Ecuador cases, a three-person tribunal last year ordered Ecuador's government to interfere in the operations of its independent court system on behalf of Chevron by suspending enforcement of a historic $18 billion judgment against the oil corporation for mass contamination of the Amazonian rain forest. …" Do read the rest of that quote HERE which is shocking and shows interference in a sovereign constitution and independent judiciary that would be totally unacceptable by the UK public if in the UK, and I hope you will correct your assertion, and all others that are not borne out by the evidence.
45. Furthermore on that, although the EU Commission says it is ensuring an ISDS tribunal cannot order an existing regulation or law to be removed, nonetheless there is much evidence from existing ISDS cases that a foreign corporation can extract millions or even billions of money from a nation based on estimates of future profits-foregone as a result of those regulations or laws, even if they remain in place. It is totally unacceptable that a company should be financially compensated for the impact on it of a democratically created law, regulation or policy. A fault here in the ISDS is the misuse of the word '**expropriation**" WSJ6, which under corporate pressure has been extended in its application from expropriation of physical property (and/or existing capital) to estimates of reductions of future profits (and without internalizing of

negative externalities such as social carbon cost). I debate this and EU Commission's "reforming" of the ISDS with LibDem's Sarah Ludford MEP here: www.bit.ly/FTAhumanrightsLudford.

46. In your next sentence "acted unfairly" can mean anything depending on (i) how it is defined in the ISDS text (including how strict that definition is), and (ii) the mindset of those who interpret that "fairness", and if those people are corporate lawyers or arbitrators – as is so in an ISDS tribunal such as ICSID – then that term is most unlikely to be interpreted in a way that satisfies our concerns, and will probably ignore externalities and non-financial consequential aspects such as carbon emissions, pollution and human rights impacts. I am assuming you are referring to what is termed '**fair and equitable treatment**' in ISDS-speak, which together with the
terms 'expropriation' and 'discriminatory' are terms under which foreign companies can sue nation-states using ISDS. Again – I refer you to my discussion with Sarah Ludford.
47. You then use the word "**discriminatory**". I am well familiar with the weasely abuse of that word in relation to trade having studied its misuse by the tar sands industry and the Harper government (assisted by the UK government) in its intense lobbying directed at the EU's climate legislation in the Fuel Quality Directive. Tar sands fuel products have significantly higher production emissions than conventional oil products. Putting this reality into a trade-related law is considered to be 'discriminatory', and given primacy over the need to restrain the tar sands industry for vital climate reasons: The tar sands industry is a total contradiction to the necessity to keep 75 to 80% of our existing fossil fuel reserves in the ground if we are to retain a liveable
climate (with temp rise below 2 degrees above pre-industrial levels). Despite this, the TTIP negotiations have already rendered this legislation ineffective. This case study shows that the word "discriminatory" when applied to trade has been given primacy over tackling climate change, an unacceptable state that has already increased due to the TTIP. TTIP threatens to 'lock-in' the straight-jacketing of climate regulations affecting trade.

### KC5 EU Commission's "public consultation" on its "reforms" to the ISDS

**The ISDS consultation**

48. The EU Commission decided to hold a "public consultation" on the ISDS for TTIP (note it ignores the ISDS in
CETA, hoping we won't notice), because it was pressured to do so (your use of the word "right": right to who?).
49. The ISDS consultation (i) ignores the ISDS in CETA, (ii) is only 3 months long, which is in reality zero months to the public, because (iii) the public have not been informed about it because (iv) there has been inadequate coverage of TTIP, CETA and the ISDS on the TV news media such as BBC (in keeping with the suspicious desire to keep the public, and even MPs, properly informed), and (iv) the 3 months are over in a few days time! Some "public consultation"!
50. The consultation tries to restrict the responder from being able to answer the central issue – of whether or not the ISDS is necessary or not. To be public-user-friendly it needs to ask that basic simple question and address our core issues with the ISDS (which I will summarize further on).
51. Also, "appropriate balance" – that is in the eyes of a UK government working on behalf of UK investors abroad (i.e. in the US); but why do you not trust existing US federal and state legal protection procedures for UK companies, to an extent that you are prepared to trade off some of "Government's ability to legislate in the public interest" to strike "an appropriate balance between" the two. Your sentence appears to imply there is some trade-off to strike the appropriate balance, which is not reassuring!

**The EU Commission's ISDS "reforms"**

52. The ISDS Commission's reforms of the ISDS in summary try to patch up a number of issues but don't tackle the unacceptable core issues – which I will summarize further below. So it's like an ISDS with sticking plasters, and given a whitewash for "reassurance". (As I wrote to Sarah Ludford referring to human rights context).
53. Recent articles by **Corporate Europe Observatory (CEO)** explain more fully what I'm getting at. Their titles are appropriately descriptive:
27mar14 'Campaigners slam Commission's mock consultation on investor rights in EU-US trade deal'.

16apr14 'Commission's weak reforms of EU-US trade deal could unleash a corporate litigation boom' press release for this briefing:
16apr14 'Still not loving ISDS: 10 reasons to oppose investors' super-rights in EU trade deals'.
Note: "Second, it is a very one-sided process. Only companies can sue governments. Abusive corporations cannot be sued, for example, when they violate **human rights**." [my embolding]
Annex 1: Reality check of the Commission's plans for 'reform' of "substantive" investor rights
Annex 2: Reality check of the Commission's plans for 'reform' of "investor-state dispute settlement"

**Why the ISDS must be removed**

54. Here are some of the many totally unacceptable core issues ***intrinsic*** to the ISDS which necessitate its removal from the TTIP ***and*** CETA: ("intrinsic" means that no "patching up" will resolve its inherent flaws)
55. In summary the ISDS mechanism comprises behind-closed-doors arbitration by a tribunal of corporate/commercial lawyers distant in all ways from any negatively-affected public, and without democratic involvement nor recourse to appeal. The EU Commission's reform pushes for transparency, but because they are far from transparent about the TTIP negotiations, and existing tribunal setups for ISDS such as ICSID are not transparent, it's not easy to have faith here. More specifically:
56. (i) What is totally unacceptable and intrinsic to the ISDS is that it allows foreign companies, or foreign subsidiaries of non-foreign-based multinationals, **to bypass normal courts and legal processes that everyone else including non-foreign companies have to use;** instead providing them a parallel corporate-friendly system designed for their own benefit with arbitration by a tribunal of corporate/commercial lawyers who have a vested pro-corporate bias, and "have no accountability to any democratic system".
57. (ii) Also unacceptable is that the tribunal decisions can legally over-ride national legislation. By this I don't mean that the tribunal can "overturn" by forcing removal of such national legislation, but that decisions can order nations to pay compensation for the impact regulations have on future company profits – which could be huge:
58. (iii) Again totally unacceptable is that these tribunals can impose such huge multi-million (or even billion) dollar fines and costs on nations, excluding consideration of the costs of the companies activities on the nation or world if allowed to continue, such as by internalizing any negative externalities into the calculation of profits foregone (such as Social Carbon Costs). Also nations have to pay millions of dollars in legal costs, that are non-refundable even if they win.
59. (iv) Also unacceptable is the way the threat of such huge costs to the nation can effectively prevent (or "chill")
any potential new legislation being created to protect people and environment, for fear of the immense costs of it being challenged. There is already evidence that this happens, though bear in mind that such chilling is inherently not easy to measure.
60. (v) Note that the tribunal cases act in one way: Investor-to-State. It does not allow states to pursue foreign corporate investors for reparation or fines for damages done to the environment or to people as a result of their activities (such as mining or oil pollution). In fact it can and is used for the opposite of this: for e.g. oil companies to fine nations for trying to force the "polluter pays principle" for the clean-up of their corporate mess (e.g. Occidental oil co. - Ecuador case). What's more:
61. (vi) this 1-way direction, together with a number of other factors, such as the focus on the primacy of profits and free-trade and downplay of people/environment values, the way arbitrators earn their high pay, their private not public-service employment etc, results in both a financial incentive and a biased mindset for the arbitrators to have intrinsic pro-corporate bias - with unaccountability and impunity. Such extreme power for 3 private people to make decisions that can over-ride national law and sovereign constitutions.
62. Thus though the European Commission claim they have made the ISDS for the TTIP benign in relation to our concerns, it is hardly surprising that CEO and other NGOs disagree, and a German government minister too:
63. A number of countries are reacting against the ISDS having faced their "chilling effect" or being sued. For example, Germany's Secretary of State in the Federal Ministry of Economics Brigitte Zypries states in Die Zeit: "We are currently in the consultation process and **are committed to ensuring that the arbitration tribunals are not included in the agreement**" [my bolding] (REF). This doesn't surprise me, as Germany is

being sued by Vattenfall for loss of future profits as a result of Germany's changes in energy policy. Furthermore:

WSJ12

64. You assert that EU firms, especially SMEs, will need the safety net of – presumably you mean the ISDS – to protect their investments in the US such as in the public-procurement market. Do you have any evidence for this? I quote again from Germany's SoS Zypries: "**The German federal government's view is that the U.S. offers investors from the EU sufficient legal protection in its national courts**" (Ibid.). And surely we do not want the risk of this backfiring on the UK: the ISDS being used against UK local or national governments, even as a threat?
65. A world map shows the distribution of ISDS cases held in the World Bank's ICSID – though strangely I can't find the Quebec fracking case there yet: Thank you Brian Woodward for that link.

**The impact of the TTIP, CETA and ISDS on our ability to tackle climate change by democratic means such as policy, regulations, and legislation.**

66. SUMMARY RECAP: Corporate straightjacketing of new regulations by 2 main ways ("double lock" metaphor): (i) increased corporate influence at an early stage via e.g. a Regulatory Co-operation Council (e.g. Chevron re climate legislation) [c.para.33] and (ii) the threat of ISDS both by "chilling" and potential threats to sue for compensation.

KC8

67. I have written much on this subject on my website here: www.bit.ly/FTAclimatefracking, in which is collated much evidence to show that not only will TTIP, CETA and ISDS hinder our ability to tackle climate change by democratic processes, but also that important EU climate legislation has *already* been suppressed in effectiveness by the TTIP negotiations, before the TTIP has been agreed to. This totally demolishes Ken Clarke's statement: "Nor is it the case that a successful trade agreement will hold back action on climate change."

I introduced this evidence example above in c. para.33 re 'Regulatory Co-operation Council' – which shows one of the 2 'straight-jacketing' locks that oil interests can use to stifle new regulations such as those to tackle climate change. The other 'lock' to stifle new regulations is the ISDS threat. Here is a summary from my website of the example evidence:

**Evidence that TTIP negotiations seriously weakened EU climate legislation in the Fuel Quality Directive.**

68. The transport sector is set to be the EU's biggest $CO_2$ emitter from 2020, and quoting EurActiv: "Around a quarter of Europe's greenhouse gas emissions come from transport – the only sector in which CO2 output is increasing – and that figure could rise to 40% of the total by 2020, according to the European Commission" [EurActiv ref].
69. The climate change section of EU's Fuel Quality Directive (FQD) aims to reduce the carbon intensity of transport fuels (mostly diesel) by 6% by 2020 (and presumably by more from 2020). It aims to do this by encouraging the oil industry to reduce the life-cycle carbon emissions of fuels by reducing import of known

higher emissions fuels, such as from tar sands. But Canada's Conservative Harper government, aided by the UK government and Big Oil, has lobbied EU intensively to water down the FQD (so making it climate-ineffective) by claiming that the FQD is "**discriminatory**" – thus misusing "free-trade" terminology.
70. Last year the US added to this pressure on the EU at the same time as negotiations on TTIP: Quoting EurActiv: "Last July [2013], the **US trade representative Michael Froman** told a Congressional House Ways and Means Committee hearing that the FQD guidance on tar sands was "discriminatory, environmentally unjustified and

could constitute a barrier to US-EU trade." "We continue to press the Commission to take the views of stakeholders, including US refiners under consideration as they finalise these amendments," he said."
71. The EU Commission then buckled under this added pressure from the US trade representative, with Barroso agreeing to terminate the FQD post-2020.

72. Earlier this month (June 2014), following yet more pressure from Canada's Harper government, the EU Commission caved in to the tar sands industry's desire for the FQD not to discriminate against tar sands products in comparison to conventional oil products with regards its [much higher] carbon emissions, thus making the FQD ineffective (until a c.2016 review) in discouraging import of tar sands products to the EU. At around the same time, the first big shipment of tar sands crude arrived at Spain (Repsol refinery).
73. What this means is that:
    (i) TTIP (and CETA) have already had a major impact in making ineffective an important piece of EU climate legislation, thus demolishing Ken Clarke's "reassurances".
    (ii) The EU Commission cannot be relied upon not to cave in further to the demands of Canada (re CETA), the US (re TTIP), and corporate pressure, especially from Big Oil, in the TTIP, CETA, and ISDS. Little wonder they want to keep the text under wraps from scrutiny.
    (iii) the free-trade meaning of the term "**discriminatory**", as used in the ISDS as one of several EU-Commission-accepted reasons for corporations to sue nation-states, has been given primacy over our vital need to tackle climate change. This has serious implications for the ISDS: it is likely to continue to give legal primacy to free-trade corporate rights over climate change. The ISDS must be removed.
    (iv)
74. *RECENT EVIDENCE*: 8 July 2014: 'Leaked trade document exposes dangerous EU energy proposal' Friends of the Earth Europe. Please read this concise assessment.

KC8, KC9, KC10 **US LNG and reducing carbon emissions**

75. Firstly Ken as a scientist I need to correct your basic misunderstanding of what nations need to do to prevent global temperature rise exceeding 2 degrees C above pre-industrial levels, which is an internationally agreed limit (signed up to by the UK) at the COP summit in Copenhagen 2009, and is the agreed limit humans can live in without unacceptably extreme life-supporting problems (in fact it is now considered that 1.5 degrees is a safer limit to keep below). We are now at +0.75 to +0.8 degrees rise, and heading towards an at least 4 degrees rise, and more like 6 degrees. I will now try to show why your proposals as regards TTIP-approved fuel inputs to the EU such as US LNG are inadequate, as is the UK and EU's TTIP policy.
76. Secondly it is now generally accepted that to have any reasonable hope of staying below the 2 degrees rise we can only allow **565 gigatonnes** more carbon (usually expressed as $CO_2$ equivalents) into the atmosphere by mid-century. That is our **global carbon budget**.
77. Thirdly, the highly respected Carbon Tracker Initiative calculated that the amount of carbon in global proven reserves of coal, oil and gas, including both nationally-owned and company assets, amounts to **2,795 gigatonnes**, 5 times higher than what we can burn.
    **Thus 80% of *existing* reserves of coal, oil and gas must stay in the ground for us to have any good chance of having a planet we can all acceptably live on**. The TTIP ignores this.
78. Despite these widely accepted arguments the UK government has not addressed them or their implications, instead turning a blind eye and pushing in the opposite direction (e.g. Transport Minister recently in HoL summarizing Infrastructure Bill, to: "put the principle of maximising economic recovery of petroleum in the UK into statute"(links to Hansard) [why into statute?]). What they should be doing, is working out with our
    scientists what fuel sources we can import, produce and burn, and which we must not import but leave in the ground. TTIP must have this at its core – because it affects what fossil fuel sources can and cannot be invested in, and can and cannot be imported. However, negotiations demonstrate that the reaction of the US trade representative and Big Oil (on whose behalf he works) to the implied '**stranded assets**' of '**the carbon bubble**', appears to be to use TTIP to enable increase of the carbon bubble and to lock-in resistance to reducing it. TTIP is thus a climate disaster.
79. Because coal is the worst of the major fossil fuel categories for carbon emissions, that has top priority to remain in the ground. So too, tar sands bitumen and similar high-life-cycle-emissions oil sources must remain in the ground (but this is not accepted by key players in the UK government and the TTIP, who both support the tar sands industry as I've shown above).
80. Also – it means we should not start up new infrastructure to exploit new fossil fuel sources that are *in addition* to the existing proven reserves, and this includes fracking for shale gas, CBM, UCG etc. A major

flaw in your arguments Ken in KC7,8,9 is that you primarily look to fossil fuel solutions to a problem that needs focus on radical emissions reductions and clean green renewables. You and the UK government fail to understand that gas is still a major carbon emitter: it emits about half of the carbon-equivalents as coal per usable energy released – which is still a lot, and then *only if the strictest of regulations are adhered to from source to burning, so as to avoid methane emissions*. And the UK government is trying to dodge the latter with fracking of UK shale gas. **Professor Kevin Anderson** of the Tyndall Centre for Climate Change Research, Manchester University, backs up my point about gas as a significant carbon emitter when he here says that gas is still a high carbon energy source [when compared with the clean green alternatives]: 'House of Lords shale gas report chooses eloquence over analysis when addressing issues of climate change' (May 2014): like the HoL report, Ken are you [I quote Kevin] "rearranging deckchairs on the Titanic rather than grasping the wheel and urgently steering a different course"?

81. Ken you state in KC8 that "It is true that access to US liquefied natural gas exports is one of the EU's priorities in the negotiations. I must emphasise that this would not undermine or be consistent with our low carbon objectives" I have to correct your second sentence: I'll do that by showing that in the 1st of these sentences you reveal that this **priority of the EU is for the TTIP to facilitate import into the EU of a type of gas that has life-cycle emissions per unit energy released that is of similar magnitude of coal**, not the circa half that of coal which is gas at its best! Thus your second sentence will be shown to be incorrect:
82. **US LNG has an extra *double*-dose of associated emissions, on top of natural gas at its best**. These are from: (i) extra fugitive emissions of methane due in part to inadequate US regulations, and (ii) liquefying any source of methane gas is energy intensive (and thus carbon-intensive within the LNG scenario). I'll now give evidence for (i):
83. US fracked gas has a variable and as yet not fully quantified extra amount of associated fugitive emissions, occurring during (a) the drilling stage, (b) the exploratory and especially (c) the production phase, for example the open-pits for the (gassy) produced water [likely to be closed containers in the UK], venting from tanks etc (d) the ending of production phase (if the 'green' method is avoided), and (e) the abandoned well phase. NB: There is increasing evidence that the fugitive methane emissions in the US can be large enough when added to the burning of the gas to be of comparable magnitude to burning coal. Here below are some of the references. I have more on my website here: http://www.dragonfly1.plus.com/**FRACKING.html#CARBONemissions**:
84. DRILLING PHASE: 'Toward a better understanding and quantification of methane emissions from shale gas development' (pdf via Paul Mobbs) Caulton et al. (numerous authors) PNAS publ. April 2014: "... Large emissions averaging 34g CH4/s per well were observed from seven well pads determined to be in the drilling phase, 2 to 3 orders of magnitude greater than US Environmental Protection Agency estimates for this operational phase. ..." Here is an article referring to this paper: 'Problem wells' source of greenhouse gas at unexpected stage of natural gas production - 14apr14 – ScienceDaily.
85. EXPLORATORY & PRODUCTION PHASES: numerous articles and research reports. See my website link above.
86. ABANDONED WELL PHASE: **Mary Kang, Princeton University** study: 'Thousands of fracking wells in Pennsylvania 'may be leaking methane'' 20jun14 Environment theguardian.com.
'**Fracking safety: report warns of 'significant unknowns'** - Sparse public data on [UK] onshore oil and gas drilling makes full extent of failures in hydrocarbon wells unknown, experts say' 25mar14 Damian Carrington, theguardian.com: "The research confirms that well failure in hydrocarbon wells is an issue and
that publicly available data in Europe on this seems to be sparse," said **Professor Richard Davies of Durham University**, and who led the team of academics who undertook the work. "In the UK,...". Also provides useful data from other countries, e.g. in one dataset from Marcellus shale, Pennsylvania: 6.3% of wells were reported for internal or external well barrier failures (=506 wells out of 8,030).
87. So here we have another example of TTIP already being a vehicle for increasing fossil fuel emissions. KC8
88. Ken's last sentence of KC8 reveals his, EU's and UK's over-riding emphasis on the two other requirements of the 'energy supply trilemma': security/reliability and price-to-consumer, over carbon emissions. This emphasis is itself flawed as Ken's fossil-fuel-based "solution" will ultimately be worse for all 3 aspects of

the trilemma, because fossil fuel reliance, including on gas, reduces security/reliability and price to the consumer
in the long term, because fossil fuels – in this case gas is/are getting increasingly expensive to produce (as we run out of conventional sources), whereas clean green renewables are getting increasingly cheaper, and once
installed, a clean-green renewable device e.g. a solar panel, has low running costs (unlike fossil fuels including gas).
KC10

89. This flaw is increased in KC10 – in which Ken looks at nuclear and gas, almost dismissing energy efficiency and renewables. Ken – recent studies show you are wrong to say that meeting emissions reduction targets "will not be possible by relying on improved energy efficiency and renewables alone." It is possible scientifically and engineering wise. You are only correct insofar as it would be unlikely to be possible with your government at the helm, with its sticky web of connections with the fossil fuel industry and its financiers (who are also embedded within government as well as all the conflicts of interest, vested interests and keeping the revolving doors well-oiled, keeping Tory Party donors happy and appeased etc, etc, etc), and Osborne's protection of the Carbon Capital. The problem is largely political, added to which is voter ignorance due in part to the BBC's "false balance" bias on climate change (again under political leaning from those above).
90. Furthermore, your arguments for reducing the use of coal (which I agree is a good aim, though your method is wrong), are hollowed out by the fact that Osborne and the here-aptly-named coalition government has shown little intention to do just that (see Appendix below for my evidence supporting this statement: linked to in my appended tweets).
91. In summary for this section: I have shown that if it is true as you state "that access to US liquefied natural gas exports is one of the EU's priorities in the negotiations" then it would undermine objectives compliant with us heading towards a below +2 degrees trajectory, and that if you insist that "I must emphasise that this would not undermine or be consistent with our low carbon objectives", then your/ UK government's objectives, as well as the TTIP, also fail to comply with the 2 degrees internationally agreed limit.

**Other unwanted impacts of the TTIP**

92. In this long document I have only covered a fraction of the huge spectrum of negative impacts that the TTIP will have or make more likely. My website on "Free Trade Agreements" and Bilateral Investment Treaties tries to cover more of these in its section 'DANGERS' / 'Some of the many bad aspects…'. A short url for this website is www.bit.ly/FTAthreats. Also HERE is an excellent concise and readable list, and HERE is WDM's TTIP briefing. These are several of a great many relevant references on the internet listing and describing the bad aspects of the TTIP. In total they make the speculative financial gains shrink in comparison, especially as they are mainly to the already-wealthy, and the associated "trickle down" (more like drip-down) is merely an excuse for policies and agreements that increase inequality.

**Being against TTIP does not mean being against trade and enterprise**

93. In the TTIP the EU and the UK government are abdicating on their duty to provide a level playing field for all businesses for the 21st century. TTIP favours an increasing trend towards an oligopoly for the big trans-national corporations. It does nothing to properly address the corporation tax advantage for the big multinationals with subsidiaries in tax havens. Just the opposite – by pushing towards deregulation of the financial sector.
94. Also TTIP is inadequate with regard to the benefits to business from including adequate climate policy. In the appendix below is a short extract from 'World Bank: Climate policies could lift global GDP by trillions every year' 24june14 EurActiv.

95. **In summary Ken – I'm *not* reassured, just the opposite, and if Tim Farron reads all this – I expect neither will he be, nor most members of the public.**

96. **Appendix**

(recent tweets)
**Henry Adams** @henryadamsUK · UK #coal consumption rose by 22% over last 4yrs
http://www.bloomberg.com/news/2014-06-19/rising-german-coal-use-imperils-european-emissions-deal.html?utm_source=Energydesk+Daily+Email&utm_campaign=f301fbd466-Energydesk_Dispatch5_9_2013&utm_medium=email&utm_term=0_ad1a620334-f301fbd466-50269929
… & UK high st banks hav invested atleast £12B in coal since2005 @wdmuk

**Henry Adams** @henryadamsUK · Comment: The UK risks looking foolish if it doesn't address its coal problem | Jimmy Aldridge, 23jun14, Greenpeace UK
http://www.greenpeace.org.uk/newsdesk/energy/analysis/comment-uk-risks-looking-foolish-if-it-doesn%E2%80%99t-address-its-coal-problem …

(The Coalition government has been trying its best to extend the use of our old dirty coal-fired power stations, even using the Green Investment Bank's money to do so – to give it a "greenwash". So I have no trust nor put any credibility whatsoever in your (Ken) or the government's underlying motives here regarding coal.)

Because Ministers in the UK government have vested interests in the fossil fuel industry and pumping up the carbon bubble I doubt if they will have any incentive to follow this up:
World Bank Climate policies could lift global GDP by trillions every year 24june14 EurActiv
"Global economic output could rise by as much as an additional $2.6 trillion (€1.9tn) a year, or 2.2%, by 2030 if government policies improve energy efficiency, waste management and public transport, according to a
World Bank report released on Tuesday (24 June).
The report, produced with philanthropic group ClimateWorks Foundation, analysed the benefits of ambitious policies to cut emissions from transport, industrial and building sectors as well as from waste and cooking fuels in Brazil, China, India, Mexico, the United States and the European Union.
It found a shift to low-carbon transport and improved energy efficiency in factories, buildings and appliances could increase global growth in gross domestic product (GDP) by an extra $1.8 trillion (€1.3tn), or 1.5%, a year by 2030.
If financing and technology investment increased, global GDP could grow by an additional $2.6 trillion (€1.9tn), or 2.2%, a year by 2030, the World Bank said."

**Scans of Ken Clarke's letter and enclosures are appended:**

*(There may be an intervening blank page (yet another bug in the latest version of MS Word)*

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Tim Farron MP
House of Commons
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10 June 2014

Dear Tim,

1 Thank you for your letter of 23 May on behalf of your constituents, about negotiations over a trade and investment partnership between the EU and the US. Let me reassure them from the outset that there is nothing proposed in this trade agreement that will weaken environmental regulation, lead to the privatisation of the NHS or have any of the other undesirable and unlikely consequences that some campaigners are claiming. It is simply not the case that this would give corporations the power to prevent states from regulating in the public interest.

2 The European Union and the United States are the world's largest free trade zones. A trade and investment deal between them is a once-in-a-generation opportunity to create the largest free trade area the world has ever known. It would bring huge economic benefits to both sides of the Atlantic, increasing trade and investment, creating thousands of jobs, reducing prices and increasing choice for consumers. It is important to realise that until we know what an agreement will contain, its impact cannot be precisely predicted. Importantly, studies show that an ambitious agreement would deliver significant long-term economic benefits, although, unsurprisingly, the actual impact varies from study to study reflecting their differing assumptions, data sets and scenarios. Independent analysis shows that an ambitious agreement could give an annual boost to the British economy of as much as £10 billion each year. That is why we are pushing for a broad agreement that eliminates the vast majority of tariffs on trade between the two markets and reduces other unnecessary barriers to trade.

3 The purpose of negotiations is to reduce the barriers and costs created by regulatory differences between the EU and the US without lowering levels of protection. This will mean avoiding the unnecessary duplication of regulatory processes on both sides of the Atlantic when the tests are the same, so that products manufactured in the US and sold in the EU will only have to be tested once. It will also mean that different regulations in the EU and the US which achieve the same outcome will be mutually recognised. This will be of particular benefit to small and medium sized businesses which do not have the same resources as larger companies to be able to deal with the complex differences in regulations designed to protect consumers, workers and the environment on either side of the Atlantic. Reducing the cost to such small and medium sized businesses of meeting the necessary regulatory standards will also deliver benefits to consumers as businesses can pass on their savings to their customers in the form of lower prices and a greater range of goods and services.

4 Your letter refers to Investor-State Dispute Settlement (ISDS). The Government does not propose to comment on these cases. Let me clarify that ISDS tribunals cannot overturn laws made by democratically elected governments. They provide a mechanism for investors to raise a complaint and seek compensation if they consider a host nation has failed to meet an investment treaty obligation and

acted unfairly. Only if they can prove that their investments have been damaged by discriminatory or unfair treatment by the host nation will they be awarded compensation.

5 The European Commission's decision to hold a public consultation on its position on ISDS provisions in the proposed EU – US agreement reflects their commitment to getting this issue right. The aim of the consultation is to build a transparent and efficient investor state resolution system and make clear that ISDS will only apply to breaches of investment protection provisions and to no other part of the trade and investment deal. The Government supports the consultation, since it will help to ensure that the Commission strikes an appropriate balance between protection for UK investors abroad and the Government's ability to legislate in the public interest. We have made our position on this clear to the Commission.

6 I enclose a copy of an article I wrote in the Wall Street Journal recently, addressing people's concerns about the inclusion of investor protection in the proposed EU–US deal. I also enclose a leaflet on investor protection prepared by the Department for Innovation, Business and Skills. These may be of interest to your constituents.

7 Let me now address the specific bullet points in your letter. I must emphasise from the outset that it is simply not the case that a successful agreement would restrict governments' local renewable energy programmes, or limit the ability of governments to set the terms of their energy policies. The proportion of renewables in governments' energy mix, as well as overall energy policy, will continue to be decided by individual governments, subject to their obligations under existing EU and wider international agreements, including on reducing carbon emissions.

8 Nor is it the case that a successful trade agreement will hold back action on climate change. It is true that access to US liquefied natural gas exports is one of the EU's priorities in the negotiations. I must emphasise that this would not undermine or be inconsistent with our low carbon objectives. Both the EU and the US already have obligations to reduce their carbon emissions, to which they are both legally committed under the UN Framework Convention on Climate Change. The EU's objective is to diversify its sources of gas in order to loosen its dependence on Russian gas, improving its energy security and boosting its competitiveness by exerting downwards pressure on global gas prices.

9 I should also make clear that restricting the export and import of shale gas would not help to tackle climate change. Given that gas is the cleanest of available fossil fuels, US exports of liquefied natural gas to Europe would also make an important contribution to reducing the amount of coal used in power generation. Since burning LNG emits less carbon dioxide than coal, this would help to reduce carbon emissions across the EU. This would mirror what has already happened in the US, where the use of gas in electricity generations has had a dramatic effect on carbon emissions. The potential to use liquefied natural gas in the transport sector – for trains, heavy trucks and even shipping – could also reduce the consumption of oil and related carbon emissions.

10 I should also make clear that the EU aims to reduce its carbon emissions still further by agreeing an ambitious 2030 climate and energy framework. But this will not be possible by relying on improved energy efficiency and renewables alone. For our challenging climate targets to be met, we will also need significant amounts of nuclear and gas in our energy mix, reducing our dependence on carbon intensive coal.

11 Your letter refers to a leaked document. As you will know, the Government does not comment on leaked documents. However, your constituents will be interested to know that sustainable development will be an important consideration in the negotiation. The EU Commission has put together a number of papers on this, though these have not been leaked to the public.

12 For all of these reasons, we hope that the negotiations will reaffirm both sides' commitment to the UN Framework Convention on Climate Change process, building on existing cooperation under the EU/US Energy Council to promote efforts to build a low carbon economy. In particular, we hope that the negotiation of a successful EU – US agreement will promote shared low carbon objectives by encouraging trade, investment and innovation in green technology and energy-efficient good and services. A successful deal would remove tariffs on green goods, reduce regulatory barriers to trade and investment in green technology and open up procurement markets for environmental goods and services in those US states not currently part of the World Trade Organisation's Government Procurement Initiative. It should be noted that the joint statement of the last EU/US Energy Council in Brussels on 2nd April underlined both sides' commitment to the transition to a low carbon economy, to the UN Framework Convention on Climate Change process and to the phasing out of inefficient fossil-fuel subsidies.

13 Thank you, again, for passing on your constituents' concerns. I hope that this response reassures you that the ongoing negotiations on the Transatlantic Trade and Investment Partnership will ensure that a deal benefits the British economy, British workers and British consumers, without lowering environmental standards or undermining our ability to regulate in the public interest.

**KENNETH CLARKE**

# Press On to a Trans-Atlantic Trade Pact

*A misguided campaign threatens to derail a deal that would benefit consumers and businesses.*

By Kenneth Clarke, *Wall Street Journal*, 18th February 2014

1 At the G-8 conference last summer on the banks of Lough Erne, British Prime Minister David Cameron heralded the opening of negotiations on a trade deal between the European Union and the United States as a once-in-a-generation prize.

2 Standing shoulder to shoulder with U.S. President Barack Obama and European Commission President José Manuel Barroso, Mr. Cameron highlighted the tremendous potential of the EU-U.S. Transatlantic Trade and Investment Partnership to boost our collective economies by up to £180 billion ($301 billion) annually; to remove the tariff barriers on companies upon whose success governments' tax revenues depend; and to deliver lower prices to consumers.

3 It would be a tragedy if we were to sacrifice these benefits because of the well-intentioned but misguided campaign against clauses designed to prevent nationalist discrimination from cutting off international investment and trade.

4 The opposition to the EU-U.S. deal is based on misplaced concern over its provision for so-called "investor-state dispute settlement," which gives legal protection to international investors and companies operating beyond their national borders. As EU Trade Commissioner Karel De Gucht pointed out recently, the provision's critics seem to have got hold of the wrong end of the stick.

5 There is nothing new or sinister about such clauses. Investment protection is not about setting standards for consumer or environmental protection, nor is it about whether the U.K. National Health Service should remain publicly funded. Trade negotiations are not forums for raising or lowering standards or changing the social compact on either side of the Atlantic.

6 Investment protection is not the root of some corporate conspiracy. It plays a vital role in safeguarding the gains of international investments and the trade that depends on them, benefiting producers and consumers alike. By curbing the protectionist instincts of those politicians who would seek political advantage at foreign companies' expense, investment-protection clauses are designed to stop national and state governments from expropriating or abusing the investments of competitive firms—including British ones—entering their markets.

7 There is nothing new about this. Investment protection of this sort is a longstanding policy of the U.K. and the rest of the European Union. Investment protection clauses are reflected in more than 1,400 bilateral investment treaties that have been concluded by EU member states. They have been included in every British investment deal, without doing the slightest damage to consumer protection or undermining our sovereignty or our legal system.

8 Despite the ubiquity of such clauses, no successful investment protection case has ever been brought against the British government by a foreign company. Yet bilateral investment agreements are not always honored by the countries that sign up to them. And when the terms are breached, it is companies—small and medium firms, as well as big businesses—that are the losers. In cases like these, access to proper legal redress is vital.

9 But investment protection is not simply a rod for business to beat up government, as some pressure groups have recently claimed. The arbitration system is independent and cases are decided on their merits. Investors do not win them all.

10 According to a study by the United Nations Conference on Trade and Development, only 31% of concluded investment-protection cases have been resolved in favor of the investor. Moreover, the European Commission—which is beginning a three-month public consultation on its approach to investment protection in the treaty with the U.S.—has made clear that any agreement will include safeguards to ensure that the arbitration process is transparent and that businesses cannot thwart governments' legitimate public-policy objectives.

11 Investment protection has long been indispensable if bilateral treaties are to do their job and secure the confidence necessary to increase international investment. Just as American companies might not be confident about every EU member state complying with the terms of a trade and investment treaty, so European companies might be justifiably nervous about relying on every U.S. state not to try to cheat.

12 If the EU-U.S. treaty is successful in opening up the U.S. public-procurement market to EU firms, then EU countries need to make sure their companies' investments are adequately protected from U.S. pork-barrel politics. This is especially the case for small- and medium-sized companies, which lack the legal resources of larger firms when negotiating contracts, and which look to governments to make it safe for them to invest.

13 The negotiations for a historic trade deal between the world's two largest economies just go to show what open trading nations like the U.K. can achieve as leading members of the European Union. With a seat at the table, Britain has the clout to overcome pressure from Washington on a range of trade issues. If the negotiations for a treaty are successful, they will take us closer than ever before to joining up the modern world. If Britain were ever to leave the European Union, we would reduce our ability to influence big events and to protect our national interests in the modern world.

*Mr. Clarke, a former finance minister and barrister, is a Conservative member of the British Parliament, cabinet minister and trade envoy.*

# ISDS in numbers:

**0** No ISDS challenge has ever succeeded against the UK. Despite the large number of treaties in force with ISDS clauses, there have been only two ISDS challenges brought against us.

**30** UK investors have brought at least 30 ISDS claims against other countries to protect their investments.

**94** Since 1975 the UK has negotiated 94 Bilateral Investment Treaties (BITs) almost all of which include ISDS provisions. Most of these treaties involve countries that are or have been net recipients of UK investment rather than net investors in the UK.

**3400** There are around 3400 BITs in force worldwide.

# How transparent are proceedings under ISDS?

There are different ISDS arbitral mechanisms and rules specified in different treaties, the most common of which are set by bodies of the World Bank and the United Nations. In the past many treaties have not included instructions on transparency meaning provisions are decided on a case-by-case basis.

Recently the United Nations body (UNCITRAL) agreed a new set of rules on transparency that ensure there is public access to hearings and that key documents are made publicly available, with the only exception being for confidential information.

It will soon be possible to apply these rules to existing treaties and the EU has stated its intention to include the UNCITRAL transparency rules in all future treaties.


Cross-Government work on TTIP is led by the Department for Business, Innovation and Skills (BIS). To find out more, work with us or get involved in any other way, contact us on:

TTIP.team@bis.gsi.gov.uk

Department for Business Innovation & Skills


# Investor-State Dispute Settlement: FAQ

Part of a series of leaflets on the Transatlantic Trade and Investment Partnership (TTIP)

## What is ISDS?

ISDS gives international investors the right to bring a damages claim against the government of the 'host' state where the investment is located. Claims are heard by independent international tribunals. They must be based on an alleged breach by the host state of an investment protection commitment agreed in a treaty between the host state and the investor's home state. Such treaty commitments usually include not discriminating against foreign investors, protecting investments from expropriation by the host state, guaranteeing certain minimum standards of treatment and allowing free transfer of capital. The tribunal may award damages to the investor if the host state has breached a commitment. ISDS thus provides additional protection for investors, over and above any protection provided by the host state's domestic laws and courts.

## Is it a threat to UK sovereignty?

No. On the right terms, ISDS does not prevent the government from changing its policies or regulating in the public interest, provided that is done in a fair and non-discriminatory way. Nor does ISDS allow tribunals to overturn a host state's laws. Tribunals can order a host state to pay compensation, but only if it has breached its treaty obligations.

> Investment Protection plays a vital role in safeguarding the gains of international investments and the trade that depends on them, benefiting producers and consumers alike. It has been included in every British investment deal, without doing the slightest damage to consumer protection or undermining our sovereignty or our legal system.
>
> Rt Hon Kenneth Clarke QC MP, 2014

## What's the Government's position on ISDS in current FTA negotiations?

The UK Government will consider ISDS provisions in FTAs on a case-by-case basis and bearing in mind the terms of the wider agreement. The UK Government is aware of the risks of agreeing ISDS provisions on the wrong terms, particularly in agreements with countries which are a major source of investment into the UK. The UK will not support ISDS provisions in EU Treaties that restrict the Government's capacity to govern fairly and in the public interest in any policy area, including public health, labour standards or the environment. Safeguards protecting these policy areas are regularly incorporated into FTAs and BITs.

## What about in TTIP?

The UK Government welcomes the European Commission's forthcoming public consultation on the merits of ISDS in the Transatlantic Trade and Investment Partnership (TTIP). The US has supported ISDS clauses in other trade agreements including the Trans-Pacific Partnership, and already has BITs with nine EU Member States, but not the UK. At this early stage in negotiations it is not possible to provide more specific detail. If ISDS were to be included then we would press for provisions that strike the right balance between investment protection and the rights of government to regulate.

## Why's it needed?

Investments overseas by UK companies benefit both the company and the UK economy. Investing in a foreign country carries legal and political risk, particularly if the investor's legal rights in relation to actions by the host state are unclear or hard to enforce in local courts.

Where investment protection is provided in a treaty a mechanism is needed to resolve disputes between the investor and host state. ISDS gives UK investors access to independent tribunals and to possible compensation when they are treated unfairly by host states. It also deters the host state from acting unfairly in the first place.

## How is ISDS different to other dispute settlement mechanisms in FTAs?

ISDS claims are brought directly by investors and can result in damages awards that are enforceable internationally against the host state's foreign assets. ISDS does not extend to the other non-investment provisions of an FTA such as tariff rates.

These provisions are usually enforceable by state-to-state claims. State-to-state claims do not provide a right to damages. Instead, they can lead to authorised trade sanctions if a state fails to comply with the ruling in a dispute, similar to claims made through the World Trade Organisation under the WTO treaties.