TTIP, CETA, ISDS: A summary briefing for Tim Farron MP for his planned meeting with Government Special Adviser(s), written by Dr Henry Adams and outlining major concerns by the SLACCtt and SL-WDM regarding these proposed agreements for trade, foreign investment, and many other aims

TTIP – Transatlantic Trade and Investment Partnership EU-US
CETA – Comprehensive Economic and Trade Agreement EU-Canada
ISDS – Investor-to-State Dispute Settlement mechanism
SLACCtt – South Lakes Action on Climate Change Towards Transition
SL-WDM – World Development Movement (for Global Justice), South Lakes group

Wednesday 9 July 2014, 9.15am – 3rd draft (most additions since 1st draft are shown in Ariel purple)

AIMS – summary: 2 main aims right now:

1. We want the ISDS mechanism removed from both TTIP and CETA because:

1. There is much evidence from existing FTAs/BITs that it is harmful.
2. Its harmful aspects are ***intrinsic***, and thus the EU Commission "reforms" fail to resolve its main problems. Removal is the only option (an option favoured by a German Government Minister).
   Danger is intrinsic because the bypassing of national court and legal systems with a parallel legal system for foreign or multinational companies/corporations is an intrinsic part of ISDS. I show why that's dangerous in listed points below.
3. It is unnecessary anyhow (and we agree with the German Minister on this too).

2. We want the TTIP and CETA halted because they are heading in the wrong direction:

NB: I strongly recommend the meeting focuses on the effect of TTIP on our democratic ability to tackle climate change, as an important example of this.

1. TTIP and CETA favour the few at a loss to the rest of us. Nobel prize-winning economist Joseph Stiglitz sums up the core problem well: "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."
2. The core aims and direction of travel are incompatible with resolving the issues of greatest global importance in the 21st century, such as climate change, resource depletion, ocean acidification, high extinction rates and biodiversity loss etc, all of which it will make harder for us to tackle, due to:
3. They increase the legal power of multinational companies and give primacy to "free trade" and profits over and above democracy and regulations designed to protect us and our environment, the latter being re-framed as "barriers to trade and investment" from which industry must be "liberalized" by minimizing regulatory costs. (We pay the costs as negative externalities). TTIP drives levelling down of existing regulation and the stifling of new regulation by legally formalizing increased corporate influence at an early stage, so that corporate interest is put before public interest. This stifling is one lock of a 'double-lock' ('straight-jacketing' regulation. The recent cutting-short and dilution of EU's climate legislation shows the stifling lock in action already.
4. Alternative trade models exist that can achieve useful gains for SMEs such as the removal of unnecessary tariffs and subsidies (re the latter: e.g. huge US subsidies to the fossil fuel industry especially oil, and to maize [GM] etc.), yet be compliant with sustainable development. TTIP is not "the only game in town". There is the Alternative Trade Mandate for example, signed up to by a significant number of MEPs.

NB: We have so many major concerns with the TTIP, CETA, ISDS, that a concise summary cannot possibly be adequately comprehensive. I will therefore focus in more detail on 2 major dangers: first on the worst part of the TTIP and CETA: the ISDS, and secondly on the straight-jacketing of climate action by the 'double-lock', in the hope of us making progress on these two first, and simply outline the other problems – enough to show that TTIP and CETA must be halted, and either I'll tackle those in future – or hopefully other people will focus on

those (e.g. TTIP legalizing an irreversible privatization ratchet on NHS / public service procurement, GM being forced on us etc.).

More specifically:

1. Why the ISDS must be removed:

1. There is much evidence from existing FTAs/BITs that it is harmful. But Ken Clarke refused to address these in his letter. Quoted from my rebuttal to Ken:

> 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 or plain-looks 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.
>
> 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.

2. The bad aspects of the ISDS cannot be resolved by the EU Commission "reforming" it because these bad aspects are ***intrinsic*** to the ISDS (thus no "patching up" will resolve its inherent flaws). This is because the ISDS gives corporations a parallel legal system designed for their benefit, bypassing our courts and legal processes and our democratic processes. This is totally unacceptable and I hope you agree. The following list shows in detail why the parallel system is unacceptable: (*You could tick or cross those you find acceptable or not, and ask the SpAd whether he/she/government finds these acceptable or not*)

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:

(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".

(ii) Also unacceptable is that the tribunal decisions can legally over-ride national legislation. By this I don't mean that the tribunal can (after EU reforms) "overturn" national laws 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:

(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.

(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.

(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:

(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.

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:
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. A number of countries are reacting against the ISDS having faced their "chilling effect" or being sued.

2. We want the TTIP and CETA halted because they are heading in the wrong direction:

Please focus on impact on climate change:

The TTIP legally locks in place a legal primacy for the trade and investment in fossil fuels to be more important than being able to tackle climate change. Climate change regulations affecting trade or investment are seen as barriers to trade and investment.

Please question the SpAd as to whether he/she/government reckon this is OK.

There is even a push for TTIP to ***increase*** transatlantic trade in fossil fuels, and thus increase their extraction, as revealed in FoE Europe's concise web-page article on 8 July 14, from which I quote: "The leaked position paper reveals that the proposed trade deal - the Transatlantic Trade and Investment Partnership, or TTIP - could change U.S. energy policy to allow for ***increased*** exports of oil and gas and keep the EU dependent on high levels of fossil fuel imports." [my bolding]. Ref: 8 July 2014: 'Leaked trade document exposes dangerous EU energy proposal' Friends of the Earth Europe.

That is from the EU to US. The US are also pushing for EU to accept tar sands products, and **for US oil companies to have an early say in any new future climate regulations** (ie. to ensure they are diluted, delayed or "killed at birth").

The TTIP straight-jackets our ability to tackle climate change by democratic processes such as by regulatory means in 2 main ways:

(i) The chilling effect of the ISDS on new regulations
(ii) Putting in place a legal system via which the US on behalf of oil and gas corporations, can influence future new EU regulations, and with Big Oil influence at an early stage. A stifling effect. This is totally unacceptable.

Furthermore, I've shown with evidence that Government (e.g. Ken Clarke) is ignoring the evidence that TTIP (and CETA) negotiations have ***already*** greatly damaged our ability to tackle climate change by democratic processes.
I have thoroughly collated evidence for this on my website here, and summarize it in my rebuttal to Ken Clarke: (shortened url: www.bit.ly/FTAhenryKC). I show that the TTIP (and CETA) negotiations have already resulted in the EU Commission agreeing to cut short and dilute one of the most important pieces of EU climate legislation – the Fuel Quality Directive, which aims to reduce imports into the EU of the most highly emitting transport fuel feed-stocks, in an attempt to reduce the carbon intensity of transport fuel in the EU by a modest 6% by 2020. And transport is one of EU's biggest sectors for carbon emissions, and increasing towards being its largest.
The reason given by the oil interests, echoed by UK DfT, is that the FQD, if it separates oil feedstocks into just a few categories of differing average life-cycle carbon emissions, will be **discriminatory** against tar sands sources, and because Canada's tar sands are the main current tar sands being exploited, then that's discriminating against Canada and oil companies trading their tar sands products. Note: the term 'discriminatory' is part of both the ISDS and FTAs / BITs as having primacy as a complaint: Here it is having primacy over tackling climate change by regulations that affect trade and investment. Being 'discriminatory' is considered more of a "sin" than ecoside, or killing people with cancer-producing pollution, or of trying to rapidly expand one of the world's worst carbon-emitting projects by 3 times. What's more – the coalition government agree that avoiding being 'discriminatory' has primacy over urgent tackling of climate change via this means [refs: replies by DfT ministers to my letters to them re the FQD (via yourself Tim), and my rebuttal to a former DfT Minister. Tim – a reminder: Norman Baker agreed that the FQD proposal was 'discriminatory' and that it should not be implemented until all oil sources had been individually assessed. My/our response: this would take years before it could be implemented, risking a win to the tar sands industry, and there was no reason why the FQD proposal could not become that sophisticated when the data became available. Events have proved me right and Norman wrong.] *Ask the SpAds whether they agree with this ranking of primacy.*

On second thoughts: the following evidence may be too much to tackle in the time available in the meeting:

Also I show in my rebuttal to Ken Clarke that the EU is using the TTIP to gain import into the EU from the US of gas with higher life-cycle carbon emissions than gas "at its best" (the latter is circa half the carbon intensity of coal). I quote:
'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:
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 then provide evidence, and I show that this priority of the EU for the TTIP goes against the international agreement to keep the global temperature rise below 2 degrees C.

To conclude 2. Why the TTIP and CETA should be stopped

It is unacceptable for oil interests to be given the power by TTIP to have a bigger say, and an earlier say (such as via a Regulatory Co-operation Council), as to what climate regulations the EU might want to put in place.

Similarly, it is unacceptable for corporations to have more say than democracy, and at an earlier stage than democracy, on other types of new or existing regulations. We do not want forced on us, by increased corporate power in TTIP, the following for example:
- tar sands products and other higher carbon intensity fossil fuels
- fracking
- GM seeds and foods, bee-killing pesticides
- hormone injected beef/pork/…, chlorine-washed chicken
- irreversible privatization of public services such as NHS
- etc, etc (it's a long list)

Finally:

1. Please inform them that many of my/our points of concern are more fully explained in my rebuttal of Ken Clarke's letter to you, and do insist they read that and respond specifically to any points they disagree with. The link is: www.bit.ly/FTAhenryKC

2. Also, South Lakes branch of WDM for Global Justice has produced an excellent summary of the group's strong concerns with TTIP (lead author: Dr Brian Woodward, Kendal). I have a copy as a pdf on my webspace here.

3. Director of WDM for Global Justice, Nick Dearden, is happy to meet you on TTIP.
   His email url: nick.dearden@wdm.org.uk
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