

The strong case against separate corporate court systems (ICS/ISDS)

(with links to excellent recent reports)

www.bit.ly/ICSISDS

By Henry Adams – **Autumn 2016** – especially FAO Tim Farron MP and the LibDems

We can't let big US oil and fracking firms have an ICS/ISDS in CETA to undermine climate legislation.

[update:] We were very pleased to hear Tim Farron saying that companies should use national domestic courts if they wish to legally settle any disputes with governments over trade or investment issues. We hope other LibDems come to agree with Tim when they read the evidence below.

0. [important new update on 17oct16]:

Client Earth: **Law professors say ISDS is incompatible with EU law** “Over 100 EU law professors have [signed a letter saying investor provisions in trade agreements like TTIP and CETA undermine EU rule of law](#). ClientEarth lawyer Laurens Ankersmit, whose analysis shows that [Investor State Dispute Settlement \(ISDS\) is illegal under EU law](#), said: “EU law professors have now joined Civil society and judges associations across Europe to question the legality of investment arbitration in Europe. It is absolutely crucial that the European Court of Justice is asked to clarify this issue before a potentially unconstitutional deal is concluded.”...” <http://www.clientearth.org/101-law-professors-say-isds-is-incompatible-with-eu-law/> This refers to the statement also summarized and linked to here:

17oct16 **Legal Statement on Investment Protection in TTIP and CETA** - Stop TTIP <https://stop-ttip.org/blog/legal-statement-on-investment-protection-in-ttip-and-ceta/> - this summary links to the full pdf: **Legal Statement on investment protection and investor-state dispute settlement mechanisms in TTIP and CETA - October 2016** – with list of over 100 law Professor signatories - <https://stop-ttip.org/wp-content/uploads/2016/10/13.10.16-Legal-Statement-1.pdf>

1. Do you know a case where a foreign investor was treated unfairly by a European court, or a UK investor by a US court? In contrast **there's ample evidence of corporate abuse of the ISDS** (ref. in 2.). The LibDems and ALDE have *yet to* put forward (to my knowledge) a strong case with evidence, for any need for a separate corporate court system for the exclusive (and thus discriminatory) privilege of foreign companies and TNCs, such as evidence for national domestic courts being inadequate and unimprovable, to counter the accumulating evidence and strong arguments against such separate legal systems. Instead they appear to accept that the EU Commission's new version of isds (the ICS) adequately addresses concerns with the ISDS. However:

2. **ICS (Investor Court System)**: Numerous thorough assessments of the EU Commission's proposed ICS version of isds show that though it has several peripheral modifications to make it less unsafe, it retains the core dangers, and would increase their persistence by further institutionalization. And the modifications are weak – for example the addition of “right to regulate” is so weakly worded that corporate lawyers can question the extent of that right. ALDE appear to ignore these assessments. Example reference (I've already given you a paper copy):

ISDS – ICS: The zombie ISDS – “Rebranded as ICS, rights for corporations to sue states refuse to die” - Corporate Europe Observatory, February 2016. This is a thorough assessment of the ICS version of ISDS, also including a good chapter on the ISDS in general including example lawsuits: <http://corporateeurope.org/international-trade/2016/02/zombie-isds> 17feb16

3. Furthermore, CETA's ICS-compatible version of isds does not ensure that the modifications lined up for TTIP's ICS will actually happen, such as the addition of an appeals mechanism.

4. CETA's ICS/ISDS is dangerous to the EU not just because it can be used by Canada's extractive/mining industry – which is [notorious for its poor human rights and environmental record](#)

(and its abuse of the ISDS), but also because it [can be used by over 80% of US TNC's operating in the EU as they have offices in Canada](#). That includes the big fossil fuel companies such as Chevron – which want to use the ISDS to deter climate legislation. For further details see the excellent new report **'CETA: Trading away democracy'** – September 2016

<http://www.bothends.org/en/Publications/document/173/CETA-Trading-away-democracy>

This means that if CETA's ICS/ISDS is ratified and implemented, US and other TNC's wouldn't need TTIP's ICS to threaten "regulatory chill" or sue many millions for "indirect expropriation", "discrimination" or "fair and equitable treatment" – all loosely defined thus open to misuse. Also – even if we leave the EU – if CETA's ICS/ISDS is implemented before we've left – it will apply to the UK for 20 years.

5. Even the government-commissioned assessment by LSE came out against the ISDS, so it was effectively ignored by government as the Tory government insist on a strong ISDS (so does Chevron): I quote from its conclusion:

"In sum, an EU-US investment chapter is likely to provide the UK with few or no benefits. On the other hand, with more than a quarter of a trillion dollars in US FDI stock, the UK exposes itself to a significant measure of costs." Source:

April 2013 - LSE report commissioned by BIS: TO THE DEPARTMENT FOR BUSINESS INNOVATION AND SKILLS: COSTS AND BENEFITS OF AN EU-USA INVESTMENT PROTECTION TREATY

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/260380/bis-13-1284-costs-and-benefits-of-an-eu-usa-investment-protection-treaty.pdf

6. An excellent new report by the very knowledgeable Pia Eberhardt et al:

CETA: Trading away democracy - HOW CETA'S INVESTOR PROTECTION RULES COULD RESULT IN A BOOM OF INVESTOR CLAIMS AGAINST CANADA AND THE EU – September 2016 – A Joint Publication, September 2016 (20 pages). Written by Pia Eberhardt et al.

<http://www.bothends.org/en/Publications/document/173/CETA-Trading-away-democracy>

- highlights the ICS-ISDS in CETA. Excellent summary page of dangers e.g. Canadian mining companies in EU e.g. Gabriel Resources – Romania case. *Quotes:*

"Chevron argues that the mere existence of ISDS is important as it acts as a deterrent." - EU Commission official about a meeting with Chevron on ISDS, 29th April 2014

"It's a lobbying tool in the sense that you can go in and say, 'Ok, if you do this, we will be suing you for compensation.' [...] It does change behaviour in certain cases." - Peter Kirby, law firm Fasken Martineau, on investor-state arbitration

ICS: **"This doesn't change anything because the standards on the basis of which judgements are rendered remain the same."** - Nigel Blackaby, arbitration lawyer with Freshfields on the EU's ICS proposal."

Ask yourself: - Can the EU fight climate change if oil and gas giants can sue over higher standards?

- Should foreign companies have the right to sue the EU over laws protecting our health and the environment?

7. CETA's ICS/ISDS is just one of the ways it increases corporate power and constrains democracy. The following excellent and thorough recent report has a chapter for each topic at issue:

Making Sense of CETA - 2nd edition - An analysis of the final text of the Canada–European Union Comprehensive Economic and Trade Agreement – PowerShift (Berlin) & Canadian Centre for Policy

Alternatives https://power-shift.de/wordpress/wp-content/uploads/2016/09/Making-sense-of-CETA_22092016.pdf 82pp

Whereas this is a good summary: <https://corporateeurope.org/international-trade/2016/10/great-ceta-swindle>

8. **Collation of useful analyses of ICS/ISDS:** My online collation document (pdf) for references on

ICS/ICS since autumn 2015: <http://www.dragonfly1.plus.com/ISDS-ICS-refs-links.pdf>

and for **CETA references:** www.dragonfly1.plus.com/CETAreferences.pdf

9. Some of the correspondence and surgery meetings on TTIP, CETA, ISDS/ICS, between Henry Adams and Tim Farron MP are available online here: <http://www.dragonfly1.plus.com/STOP-TTIP-South-Lakes.html#TimFarron>