

Surgery meeting with Tim Farron MP in Kendal on Friday 12 February 2016

CLIMATE RED LINES for TTIP and CETA

Henry Adams @henryadams henryadams@dragonfly1.plus.com www.bit.ly/STOP-TTIP-South-Lakes

Agenda summary *with amendments for increased clarity*

1. To push for **Climate red lines for TTIP and CETA** - the main thrust of meeting.
2. **ICS-ISDS**: Why ICS is a re-badged version of an isds and has been rightly rejected by a *significant part of the law profession (the German Magistrates Association)*. **ACTION**: Please ask Catherine Bearder/ALDE to provide evidence justifying a separate special court system for the privilege of foreign companies and TNC's.
3. **CETA** is to be provisionally implemented before ratification by state parliaments, and still contains a version of ISDS which Catherine Bearder wants removed. **ACTION**: Please demand that **CETA** is not provisionally implemented prior to ratification by member-state parliaments, as this is an unacceptable and un-necessary democratic deficit, and that its ISDS is removed.

Recommended action statements have the word **action** in red to enable you to get to these quickly.

1. Push for **Climate red lines** for TTIP and CETA

Why? We need to deny fossil fuel interests the extra powers they will get from TTIP and CETA to restrict our democratic space to regulate fossil fuels, and to reverse the current status quo for TTIP and CETA, which reinforce the subjugation of climate to trade (& investment protection), and irreversibly liberalize fossil fuels. TTIP and CETA head in the opposite direction to meeting the COP21 targets for a warming of below 1.5 and 2 degrees, and we have only a few years of window left to have any chance of meeting these vital targets¹. There is a chasm between climate reality and pro-TTIP ideology currently held by the LibDems and ALDE by default.

The www.bit.ly/CLIMATEredlinesTTIPCETA pdf document is brief and simple for public distribution. This needs to be translated into action statements that can be taken up by politicians: ([red line actions](#) below)

Below I provide minimum actions to help Tim Farron and the LibDems formulate climate red lines for TTIP and CETA: i.e. some of the main climate conditions that have to be met by any trade and investment agreement before LibDem MPs and MEPs can consider voting for such an agreement.

Legal primacy of climate v trade

Red line action: Insist that the TTIP and CETA text includes a legally robust statement that makes it clear that climate has legal primacy over trade. This could also be stated: that the ability of Parliaments, governments and the EU to act on climate change by democratic processes should have legal primacy over free trade principles.

¹ [show www.bit.ly/carboncountdown chart to emphasize closing window for 1.5 and 2 degrees of warming]

This should apply to all parts of the agreement including for example any chapter on investment protection and any chapter on energy. It should also be strongly stated in the proposed Sustainable Development chapter.

As shown in my 2-page '[Climate red lines](#)' pdf linked to above, and a copy of [the leaked instructions to EU's COP21 negotiators](#) which I gave you at the surgery meeting, the current status is for trade to trump climate, and this is on course to be reinforced by TTIP. Other REFS: '[Trade trumps climate](#)' (CEO), and [Sam Lowe for FoE](#).

Strike-out liberalization of trade in fossil fuels

In the proposed Energy Chapter, the **EU negotiators are pushing for "a legally binding commitment in the TTIP guaranteeing the free export of crude oil and gas resources"**.

Red line action: Insist that this proposal should be struck out, and instead:

- The chapter is re-named 'Climate and energy chapter' or at the least 'Energy and climate chapter'.
- It includes the legal primacy statement.
- It makes clear that governments or the EU should be free to restrict trade in fossil fuels, for example, especially those of higher carbon intensities (e.g. from tar sands & shale). It should thus for example make it easy for the EU's Fuel Quality Directive to have a differential effect on more carbon intense transport fuels (a proposal which was removed by the EU following intense pro-fossil-fuel lobbying).

REFERENCES: I've explained this issue many times e.g. by email to Catherine Bearder MEP and yourself in June 2015: www.bit.ly/climatebeforefossilfuels but her replies avoided this issue: www.bit.ly/TTIPclimateBearder

Regulatory Cooperation body / Council (RCC)

Example of threat: Tim are you relaxed about **Chevron** being a "stakeholder" for US interests on the regulatory cooperation body, and having an early say on climate regulatory proposals? The rendering ineffective of the climate legislation in EU's Fuel Quality Directive during the years of TTIP and CETA negotiations is an example of what would be made easier for fossil fuel companies via the regulatory cooperation body.

NB: "**Chevron is an official advisor to the U.S. trade representative...**" [writes Pia Eberhardt of Corporate Europe Observatory](#). The [Carbon Majors study](#) calculated that Chevron is responsible for **3.52%** of the total carbon emissions over the last couple of centuries, [has used ISDS to sue Ecuador, and is pushing for a strongly pro-corporate ISDS in TTIP \(p.7 & p.6 respectively of FoE factsheet\)](#). It was Occidental that used ISDS to sue Ecuador a crippling \$1.7 billion. Recently Chevron contributed paid huge amounts [to defeat Californian climate legislation](#). Happy with the existing lobbying power of BigOil? TTIP and CETA will increase it.

Red line action: Insist that there is no place for fossil fuel companies or their investors as stakeholders in relation to the proposed Regulatory Cooperation body. Ask Catherine Bearder MEP and ALDE what they have done to ensure this so far.

REFERENCES: [by Glyn Moody](#), by CEO [re climate in dec2015](#) (pdf), CEO [18jan16](#), my [collation of references on RCC](#).

The proposed Investment Chapter – the ICS - ISDS

Red line action: Insist that there should be no special separate corporate court systems for the privilege of foreign investors or TNC's should be removed.

Instead the chapter should instruct investors to respect the domestic national court systems in the countries where they operate.

Again, the chapter should make clear to investors that climate and environmental concerns, health and safety, and other vital citizens' rights should take precedence over profit and investment rights. If companies regard any

domestic courts as being a risk, they should incorporate that risk within their decision to invest right from the start.

In contrast to the strong investor protection being pushed for TTIP's Investment Chapter, a leaked version of the proposed Sustainable Development Chapter for TTIP shows inadequate environmental protection: The Guardian's Arthur Neslen writes (23oct15): "environmental safeguards are 'virtually non-existent' in trade deal negotiating text for sustainable development, lawyers say" in 'TTIP: EU negotiators appear to break environmental pledge in leaked draft' <http://www.theguardian.com/business/2015/oct/23/ttip-eu-negotiators-appear-to-break-environmental-pledge-in-leaked-draft>

These findings, together with critiques of the ICS-ISDS, give me no confidence in the assurances given by Catherine Bearder with regards our environmental concerns. If she favours a separate court system, why does she show no sign of having requested for it to be multi-directional, so that companies can be sued if they break environmental safeguards, and for the latter to be legally robust, not toothless?

The above 4 red lines do not tackle all the climate-threats within TTIP and CETA.

Global Justice Now listed another big climate threat in their four page briefing: [Five reasons TTIP and CETA are terrible for the climate](#) (December 2015), that of '**Encouraging high-carbon agriculture**' which I also give below:

Others include:

--- TTIP encourages high-carbon agriculture (section 4 in the above GJN briefing)

By favouring big agribiz TNC's and US industrial scale livestock farming over smaller farms and organic farms more prevalent in the UK and EU such as in Cumbria, TTIP promotes more carbon intensive forms of farming. To try and prevent this it is essential that regulatory standards are not lowered.

--- Must account for the higher emissions of longer supply chains

By promoting longer distance international trade, and at the same time doing nothing (or the reverse) to putting in place fair carbon costs for such distances (aviation and shipping have both dodged carbon taxes [Air France sponsored COP21 for a reason]), TTIP and CETA unfairly increase the tilt of the playing field in favour of long-distance trade e.g. by TNC's instead of shorter distance trade e.g. for local produce. Furthermore this unfair tilt is not just true of avoidance of carbon costs but also of corporate taxes: c.3% for TNC's as cf. c.20% for domestic smaller companies who don't focus on exports to the US but trade more locally. TTIP and CETA are likely to give extra power to TNC's to make sure tax is kept deregulated². This tax unfairness promotes higher carbon longer distance trade. As Green economist Molly Scott Cato states: "The acknowledgement of the ecological limit to economic activity [growth] means rethinking the wastefulness of the global economy, and encouraging the health of local economies, in particular reducing the energy inefficiency [carbon costs] of lengthy global supply chains". [My added text in square parentheses]

TTIP and CETA are not just intrinsically bad for climate, but also by ignoring the ecological limits to growth, they ignore 2 of the most vital factors for long-term sustainable continued human and wildlife existence. They are thus unfit for the 21st century.

² **How TTIP threatens UK's ability to enforce fair taxes on corporations** - Global Justice Now 15feb16
<http://www.globaljustice.org.uk/news/2016/feb/15/how-ttip-threatens-uks-ability-enforce-fair-taxes-corporations> Links to new 12pp GJN report by Claire Provost (pdf)

LibDem conference

Though Catherine Bearder informs me that "trade" is not part of the LDconf agenda, I replied to her that it is primarily a climate issue - from a climate viewpoint - and hope that climate is in the agenda, and that fossil fuel trade and investment is not being excluded from discussion (like it was at COP21)

Tim Farron / LIBDEMS either under-estimate or turn a blind-eye to the power of fossil fuel and other corporate influence on TTIP, CETA, TPP. COP21 shows huge fossil fuel influence – LibDems should acknowledge this.

4. ICS-ISDS

Catherine Bearder echoes ALDE claim that ICS replaces ISDS, but ICS is a version of ISDS, because though it has some improvements, it nonetheless [retains the same major unacceptable flaws](#) rejected by many thousands of people. Furthermore, Cecilia Malmstrom admits the differences are small, and is thus not wanting CETA renegotiated to replace its ISDS but to modify it.

I have repeatedly summarized [the flaws in the EP's "ISDS-lite"](#) and Malmstrom's ICS (they are similar), in emails and other documents (scroll down for appendix on ICS-ISDS: copy of part of my email to Catherine Bearder). This recent assessment by Pia Eberhardt of CEO is the latest big critique: **The zombie ISDS** <http://corporateurope.org/international-trade/2016/02/zombie-isds> (17feb16).

Recent news: Germany's biggest association of judges "rejects the proposal of the European Commission to establish an investment court" saying "neither is there a legal basis nor the necessity" for such a court."

REFS:

Top German Judges Tear To Shreds EU's Proposed TAFTA-TTIP Investment Court System – Glyn Moody in Techdirt, 9feb16 <https://www.techdirt.com/articles/20160204/09411333520/top-german-judges-tear-to-shreds-eus-proposed-tafta-ttip-investment-court-system.shtml>

On ICS-ISDS: 3feb16 **If you're worried about our sovereignty, read the German judges' damning indictment of TTIP** – Nick Dearden, Global Justice Now <http://www.globaljustice.org.uk/blog/2016/feb/3/if-youre-worried-about-our-sovereignty-read-german-judges-damning-indictment-ttip> "They've [issued a damning indictment](#) on the proposal for an 'international investment court'" ... "Their statement [Germany's biggest association of judges] "rejects the proposal of the European Commission to establish an investment court" saying "neither is there a legal basis nor the necessity" for such a court."

German judges slap TTIP down - Germany - DW.COM - 04.02.2016

<http://www.dw.com/en/german-judges-slap-ttip-down/a-19027665>

ACTION proposed for Tim: Ask ALDE and Catherine Bearder for a convincing evidence-backed case justifying a necessity for a separate special court system for the privilege of foreign companies and TNC's. This would need to provide evidence of where domestic courts have come up with unbalanced judgements.

3. CETA:

CETA is to be provisionally implemented before ratification by state parliaments, and still contains version of ISDS which Catherine Bearder wants removed. A major democratic deficit.

CETA is currently still in “legal scrubbing stage”, next stage translation into member state languages.

- Will be provisionally implemented, including its ISDS, after both 1. voting by Council of Ministers and 2. YES/NO vote by EP – no process for amendments, but NB before ratification by member state Parliaments (if at all). **This is an unacceptable democratic deficit.** As to scrutiny: LibDems have only 1 MEP. UK GP 3 MEPs.

ACTION proposed: Please write to EU’s Trade Minister Cecilia Malmstrom demanding that **CETA** is not provisionally implemented prior to ratification by member-state parliaments, as this is an unacceptable and unnecessary democratic deficit. Also that its ISDS is removed pre-implementation.

LibDem MPs and MEP should say to Malmstrom that they will vote against CETA if it contains an ISDS.

The ISDS is still in CETA: still there and thus dangerous. NB: Malmstrom states only small differences separate it from the ICS proposed for TTIP! and one of her proposals is to amend it after implementation to move it towards ICS (too risky).

ACTION: NB: Catherine Bearder says she is against ISDS – yet it is still in CETA. Q: Will she vote for CETA if ISDS still in it? (and if climate red lines remaining in crossed status – thus bad for climate)

Appendix for ICS-ISDS:

Copy of part of email to Catherine Bearder on the ICS-ISDS:

ISDS-ICS Firstly I must correct a misleading impression you portray in how you make a distinction between the new ICS and the existing ISDS.

Although the proposed ICS – Investment Court System – has a number of “improvements” on the existing forms of ISDS, nonetheless it retains a number of the intrinsic central flaws of existing ISDS, such that *in effect*, although the new proposal has been re-badged with a new name – ICS, it is actually a type of investor [to] state dispute settlement proposal, or ISDS in effect, or “ISDS-lite” – as the similar EP’s proposal has been rightly nick-named, so as prevent any misleading impressions the re-badged new version might [intentionally?] create.

Here are just a few of these intrinsic core flaws that the ICS and previous versions of ISDS share in common (there are numerous documents online that add to these):

1. Both provide court systems *separate* from longer-standing domestic national court systems for the unique privilege of foreign companies and TNC’s, and are thus intrinsically both discriminatory and distanced from democracy. **Furthermore you have provided no convincing evidence-based justification for why such a system is needed and would be good for all of us rather than those privileged sectors** (Tim Farron has raised this point in discussion with me but it has not been adequately addressed by ALDE). In contrast there is ample and increasing evidence for the abuse of such separate systems.
2. They work in one direction only, investor to state, without allowing state to investor cases or public citizens to investor or NGO’s e.g Client Earth to investor. This is intrinsically imbalanced and prone to innate bias in a number of ways.
3. They give legal primacy to trade principles, money and profit-foregone as values, down-grading more important human values such as our health, safety and wellbeing, environment, climate and biodiversity. For example they give legal primacy to trade over climate – an existing and dangerous ordering that will be reinforced by TTIP and CETA.

And there are more such flaws in common, brought out by legal assessments by for example

Gus Van Harten

of Osgoode Hall Law School, York University (not UK York) and the German Association of Judges, and many other critical assessments.

Furthermore, Cecilia Malmstrom insists that the differences between the existing ISDS in CETA, and the ICS proposed for TTIP, are not so great that CETA needs to be opened up for renegotiation!

I quote from the Council of Canadians:

“The Council of Canadians has rejected this because ICS and ISDS are not substantially different. Council of Canadians chairperson Maude Barlow says, "The proposed investment court system still gives a special status to foreign corporations by allowing them to challenge the laws that apply to everyone else through a special system outside established court systems."”

“Meanwhile, the European commissioner for trade Cecilia Malmström has tried to downplay the issue by asserting it could be settled without reopening CETA. According to her [media release](#), “[Malmström] stressed that the CETA provisions on investment were already state of the art and that the EU was aiming for some fine tuning to make it equivalent to the new EU approach as laid out in the Investment Court System proposal.””

Lastly – legal analysis of ICS shows that it does not give the adequate protection that you portray.

Please provide to Tim Farron and us - convincing evidence-based justification for why such a separate legal system is needed and would be good for all of us rather than those privileged sectors. Give examples of cases where existing domestic courts have failed to provide an adequate balanced judgement.

Surgery meeting with Tim Farron MP in Kendal on Friday 20th November 2015 0

Henry Adams @henryadams henryadams@dragonfly1.plus.com www.bit.ly/STOP-TTIP-South-Lakes

The brief time available meant only a few items on my agenda could be discussed.

Points I made:

(In italics are associated points I would have liked to have made but prevented by time constraint)

1. Update on the TPP - especially re climate

Text of the **Trans Pacific Partnership** (TPP) was published on 5th November after being kept secret from the public and parliamentarians during the negotiations (though I understand US corporate “stakeholders” had involvement). It is highly relevant to us with regards TTIP because **it gives us a good indication of what the US trade negotiators are aiming for with TTIP**. I will thus present some key facts:

1. **The words ‘climate change’ do not appear once in the entire document. Ditto the word ‘climate’.** The word ‘emissions’ has a few occurrences, but within text that appears to be legally toothless.
2. The text is considered by environmental NGO’s to be a gift to the fossil fuel industry and other extractive or environmentally damaging industries. E.g. 350.org – [‘TPP Text Confirms A Handout to the Fossil Fuel Industry’](#), Sierra Club: [‘TPP Text is “Concrete Evidence” of Toxic Deal’](#), and as regards impacts on people: “TPP would offshore more American jobs, lower our wages, flood us with unsafe imported food and expose our laws to attack in foreign tribunals” – Lori Wallach of Public Citizen’s Global Trade Watch, [quoted by BBC](#).
3. Even a leading ISDS arbitration lawyer states [“If the trade minister is saying, ‘We’re not at risk for regulating environmental matters’, then the trade minister is wrong.”](#) [referring to Australia – one of the TPP partners].
4. An example of text in its ISDS makes clear the power it gives to TNC’s over and above governments, parliaments and democracy: The text gives a TNC the power to sue a government for compensation if its “investment backed expectations” are not realized due to unexpected new regulations. Here such loss of future profits are absurdly regarded as “indirect expropriation” (see next page for screen-grab). Such power doesn’t even to be carried out to be an effective “chill” on new regulations. Imagine the effect on new climate legislation with this power to an oil company or “fracker”: the regulation would be chilled at birth; no hoped for chilling effect for the planet.

2. ISDS / ICS in TTIP

Our big diff with ALDE/Bearder
I gave him the T&E text

“Lipstick on a pig” Footnote: reminds us also of cosmetic differences between US and EU – imagine “mutual recognition” for cosmetics!

Tim expressed concern with the cost of ISDS cases, such as to the taxpayer (for example the nation paying its costs even if doesn’t lose the case), and whether the ICS would reduce costs. I mentioned that I had heard an idea for a time-limit to prevent mounting legal costs to the taxpayer, *but didn’t have time to explain the extra running costs to all taxpayers of the ICS courts – even if not used, and taxpayer funding for SME challenges!*

Tim appears not to be certain that there is a definite necessity for a separate court system.

3. ISDS in CETA

A full ISDS

I said to Tim – if there is one Q I would like you to raise – see Will ALDE state it will vote against CETA if full ISDS is still in it? Is ALDE pushing for renegotiation of CETA to remove the full ISDS or replace it with the ICS or “ISDS-lite”

Exit ICSID @no2isa · Nov 11

#ISDS Chilleffect 2.0

Under #TPP parliaments must consider if new laws could have been expected by foreign investors

(a) The determination of whether an action or series of actions by a Party, in a specific fact situation, constitutes an indirect expropriation, requires a case-by-case, fact-based inquiry that considers, among other factors:

(ii) the extent to which the government action interferes with distinct, reasonable investment-backed expectations;³⁶ and

³⁶ For greater certainty, whether an investor's investment-backed expectations are reasonable depends, to the extent relevant, on factors such as whether the government provided the investor with binding written assurances and the nature and extent of governmental regulation or the potential for government regulation in the relevant sector.

8

Exit ICSID @no2isa · Nov 11

Be warned

#ISDS chapter in #TPP would require compensation if government actions undermines investors "expectations"

(a) The determination of whether an action or series of actions by a Party, in a specific fact situation, constitutes an indirect expropriation, requires a case-by-case, fact-based inquiry that considers, among other factors:

(ii) the extent to which the government action interferes with distinct, reasonable investment-backed expectations;³⁶ and