In the past decade large, mostly American, companies have claimed rights under ISDS

More than 1m people in Europe have signed petitions against the Transatlantic Trade and Investment Partnership. In Britain, a YouGov poll showed that those who thought the plan would be bad for Britain outnumbered those who thought it would be beneficial by three to one. YouGov did not go on to ask: “Do you have the faintest idea what the previous question was about?” (To be fair, one-third of those questioned had the sense to say they did not know.)

TTIP, currently being negotiated between America and the EU, is an ambitious attempt to create a north Atlantic free trade area. With no tariffs and harmonised regulation, businesses could compete (and products could move freely) from California to Croatia. My instinct is to approve. But the protesters might have a point.

Serious bargaining incorporates an element of bluff, and too much transparency can prove an obstacle to necessary compromises. Some degree of privacy is indispensable. But Brussels and Washington, where most of the negotiations are being conducted, are the lobbying capitals of the world — places where large corporations spend lavishly in the finest
restaurants. In the absence of a more open process it is very difficult to refute the general allegation that the TTIP agenda is driven by big business interests; or specific claims that Europe might — for example — find itself moving towards a US-style patent system, which is increasingly a licence to litigate rather than a spur to innovation.

The problem is aggravated by Europe’s “democratic deficit”, which undermines confidence that agreements will be the product of the legitimate legislative scrutiny of the kind that happens in at least some national parliaments. The European Commission, recognising that reticence is a problem, has recently published draft texts of its position in a number of contentious areas.

But the principal focus of popular concern is the potential inclusion in the deal of provisions for what is drily called “investor-state dispute settlement”. From the 1980s, this process became a standard element of trade deals between the US and less developed countries, and was adopted in other bilateral agreements between developed and emerging economies. ISDS requires that, when investors claim their property has been expropriated by signatory states, the dispute must be adjudicated in an international forum. Poor countries often lacked independent judicial systems and were in urgent need of investment from abroad. This submission to international arbitration was a way to protect local populations as well as foreign investors from short-sighted policies and corrupt leaders.

Similar provisions soon found their way into agreements between developed nations. ISDS was incorporated into the North Atlantic Free Trade Agreement, although it is hard to argue that the Canadian legal system is inadequate for the protection of foreign investors. In the past decade some large — predominantly American — companies have aggressively claimed rights under ISDS. Tobacco company Philip Morris, for example, has used bilateral investment agreements between Hong Kong and Australia to claim that restrictions on tobacco promotion represent deprival of its property.

Protesters say that ISDS might be used to attack Britain’s National Health Service, and indeed a case on public provision of healthcare was brought against Canada in 2008. Even if that and similar claims lack merit, the mere threat of litigation can have a chilling effect on policy — the Australian litigation has led New Zealand to defer anti-tobacco measures. It would be much easier to sell TTIP to a sceptical European public if ISDS were no longer part of it.

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* Ditching investor-state dispute settlement may come at quite a cost / From John Danilovich

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