

*International investment law is rushing to stake out the high ground of democratic theory. It has been claimed that the interests of foreign investors ordinarily will not be represented within a host state's political processes and so investors deserve heightened protection from policy decisions that adversely affect investment interests. I argue in the present article that this smuggling of democratic theory and constitutional postulates into international investment law is inapt and, as an empirical matter, inaccurate. By looking to the US origins of political process doctrine, I argue that its invocation by international investment tribunals is inapposite given the doctrine's concern with relegating ordinary economic regulation to relaxed scrutiny. Nor is reference to the European experience all that helpful – representation reinforcement review has not been a hallmark of European jurisprudence. I claim that this worry over democratic processes masks an attempt at legitimating controversial review by investment tribunals of high public-policy matters. Moreover, as empirical studies suggest, this solicitude offered to investors by political process review is mostly unwarranted as foreign corporate actors can and do shape host domestic policy.*

**Keywords:** investment law/democracy/political-process theory/  
representation-reinforcement review/comparative law/business political  
activity

## I Introduction

Perhaps the gloomiest political theorist in the United States, Sheldon Wolin has described the appearance of democracy in the contemporary world as 'occasional and fugitive.'<sup>1</sup> The privatization of public authority and the reduction of citizenship to consumer citizenship and of democracy to shareholder democracy are just some of the features that have contributed to the debasement of democratic practice. These features of

\* Faculty of Law, University of Toronto

† I am grateful to Andrew Newcombe, Jonathan Bonnitcha, Gus Van Harten, and two anonymous reviewers for comments; to Tom Allen and Emma Aisbett for advice; and to Kyle Gooch, Chava Schwebel, and the staff at the Wolff International Law Library at Georgetown University Law Center, led by Marylin Raisch, for research assistance. I also am thankful for questions and comments from audiences at the Alternative Approaches graduate seminar and the faculty workshop, both at the Faculty of Law, University of Toronto. Many thanks, finally, to Ladan Mehranvar for sharing her research on the Cytrar dispute with me.

1 Sheldon S. Wolin, 'Fugitive Democracy' (1994) 1 Constellations 11 at 19.

contemporary democracy work to suppress new forms that mediate the emergence of commonality. The potential for ordinary people to become ‘political beings through the self-discovery of common concerns,’ Wolin writes, is sublimated in contemporary democratic practice.<sup>2</sup>

The regime to protect and promote foreign investment, I have argued elsewhere,<sup>3</sup> has contributed to this malaise. The rules and institutions that comprise the regime establish thresholds of tolerable democratic behaviour by, among other things, purporting to place limits on the redistributive capacity of states.<sup>4</sup> Looming large over the ‘field of social vision,’ they occupy the space of political possibility in much the same way as ‘an army does a territory.’<sup>5</sup> If it is correct to claim that ‘[e]conomic equality is, in substantial part, a *political* phenomenon,’<sup>6</sup> then democracy’s shrinking space signals a chastened ability to disturb wealth distribution beyond a prevailing *status quo*.<sup>7</sup>

If the investment-rules regime has been described as contributing to ‘good governance’ practices, such as the promotion of transparency and respect for due process,<sup>8</sup> investment treaties and international investment tribunals charged with interpreting these treaties have not had a lot to say about the operation of democratic processes.<sup>9</sup> When a tribunal did have something to say about political speech, it was not favourably

2 Ibid. at 11; see also Sheldon S. Wolin, *Democracy Inc.: Managed Democracy and the Specter of Inverted Totalitarianism* (Princeton, NJ: Princeton University Press, 2008) at 260 [Wolin, *Democracy Inc.*].

3 David Schneiderman, *Constitutionalizing Economic Globalization: Investment Rules and Democracy’s Promise* (Cambridge: Cambridge University Press, 2008) [Schneiderman, *Economic Globalization*].

4 David Schneiderman, ‘Transnational Legality and the Immobilization of Local Agency’ (2006) 2 *Ann. Rev. Law & Soc. Sc.* 387 at 399 [Schneiderman, ‘Transnational Legality’].

5 Philip Corrigan and Derek Sayer, *The Great Arch: English State Formation as Cultural Revolution* (Oxford: Basil Blackwell, 1985) at 199.

6 Larry M. Bartels, *Unequal Democracy: The Political Economy of the Gilded Age* (Princeton, NJ: Princeton University Press, 2008) at 3.

7 More precisely, in the context of the current global financial crisis, the ability to disturb wealth distribution can go no further than to return to the *status quo ante*; see discussion in David Schneiderman, ‘Movement, Countermovement, Transnational Legality’ (Paper prepared for the Annual Law and Society Association Meeting, Chicago, 27 June 2010) [unpublished].

8 Andrew Newcombe, ‘Sustainable Development and Investment Treaty Law’ (2007) 8 *J. World Tr. & Inv.* 357 at 403 [Newcombe].

9 Others have made claims that the GATT–World Trade Organization (WTO) agreements reinforce the operation of domestic political processes; see Daniel A. Farber & Robert E. Hudec, ‘Free Trade and the Regulatory State: A GATT’s-Eye View of the Dormant Commerce Clause’ (1994) 47 *Vand. L. Rev.* 1401 at 1405 and John P. McGinnis & Mark L. Movsesian, ‘The World Trade Constitution’ (2000) 114 *Harv. L. Rev.* 511 at 515; as does international law more generally; see Anupam Chander, ‘Globalization and Distrust’ (2005) 114 *Yale L.J.* 1193 at 1234.

inclined towards its exercise by political actors, in circumstances exceeding the bounds of ‘normal information,’ going ‘well beyond the ambit of normal contractual behaviour.’<sup>10</sup> It is significant, then, that the tribunal in *Técnicas Medioambientales Tecmed SA v. Mexico*<sup>11</sup> conscripted democratic theory into its ruling, arguing that the interests of foreign investors will not ordinarily be represented within a host state’s political processes. I argue, in this article, that resort to democratic theory in *Tecmed* both is inapt and, as an empirical matter, inaccurate. This nod in the direction of democracy, moreover, elides the role of investment rules in suppressing democratic alternatives. As I have argued elsewhere, the operative rules and structure reveal a great deal of ambivalence, if not outright disdain, for the results of democratic processes beyond those considered normal.<sup>12</sup> Democratic processes are considered, for the most part, untrustworthy stewards of change.

The investment-rules regime, represented by a worldwide web of some 2,700 bilateral and regional investment treaties,<sup>13</sup> is designed to shield investors from substantial diminution of their investment interests. Investors are entitled to trigger dispute settlement mechanisms and seek damages for breach of investment treaties before international investment tribunals. These tribunals – made up of an elite corps of trade and investment lawyers and arbitrators<sup>14</sup> – are expected to interpret the treaties in accordance with the embedded preferences of international investment law.<sup>15</sup> Tribunal members overwhelmingly are concerned, therefore, with measuring the effects of state regulation on investors. They usually are much less concerned with the public-interest justifications offered by states in defence of measures that impair investment interests. This mode of interpretation has been labelled, in the context of expropriation claims, ‘sole-effects’ doctrine: determinations as to whether there has been a violation of investment disciplines are made solely with reference to the effects of measures

10 *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania* (24 July 2008) ICSID Case No. ARB/05/22 at paras. 696, 503, 627. This aspect of the dispute concerned negative public statements made by a Tanzanian minister that contributed, in the tribunal’s view, to the finding of an expropriation and denial of fair and equitable treatment. These actions elevated the state’s behaviour from a mere contractual breach to a breach of the 1966 U.K.-Tanzania investment treaty. Significantly, the claimant was awarded no damages.

11 (2003), 10 ICSID Rep. 130, (International Centre for Settlement of Investment Disputes) at para. 122 [*Tecmed*].

12 Schneiderman, ‘Transnational Legality,’ supra note 4.

13 UNCTAD, *World Investment Report: Transnational Corporations, Agricultural Production and Development* (New York: UN, 2009) at 32 [UNCTAD, 2009].

14 Jan Paulsson, ‘Ethics, Elitism, Eligibility’ (1997) 14 J. Int. Arb. 13 at 19.

15 Martti Koskenniemi, ‘The Fate of Public International Law: Between Technique and Politics’ (2007) 70 Mod. L.R. 1 at 9.

on investors.<sup>16</sup> Sole-effects doctrine is contrasted with an approach that considers public-interest objectives under the rubric of ‘proportionality analysis.’ This is an idea familiar to many constitutional systems in the world,<sup>17</sup> where rights may justifiably be limited if the means used are proportionate to the ends sought. Sole-effects doctrine better captures the dominant trends in international investment law. A handful of tribunals, however, have moved to proportionality as a supplementary means of analysis. This move has likely been precipitated by legitimacy concerns, which continue to dog the investment tribunal process.<sup>18</sup>

International investment arbitration has risen to some prominence, despite being structured on a private-law model of commercial arbitration intended to resolve disputes *in camera* and in an *ad hoc* fashion, with little or no publicity or national judicial oversight.<sup>19</sup> The system has attracted the ire not only of transnational movement critics<sup>20</sup> but even of the United States Congress. Congress authorized trade promotion authority in 2002 only on the basis that US negotiators grant to foreign investors no greater rights than those available to US citizens, fearing that investment rules were superseding the high protections afforded to property owners under the Fifth and Fourteenth Amendments to the US constitution.<sup>21</sup> Legitimacy troubles have been augmented by some

16 Rudolf Dolzer, ‘Indirect Expropriations: New Developments?’ (2002) 11 N.Y.U. Env. L.J. 64 at 79. No matter how worthwhile the purpose pursued by states, if an investor has been substantially harmed by a treaty breach, full compensation must be paid; see *Compañía del Desarrollo de Santa Elena S.A. v. Costa Rica* (2000) 39 I.L.M. 317 (International Centre for Settlement of Investment Disputes) [*Compañía del Desarrollo*].

17 Beatty claims that proportionality analysis is a ‘universal criterion of constitutionality,’ ‘an essential, unavoidable part of every constitutional text’; David Beatty, *The Ultimate Rule of Law* (Oxford: Oxford University Press, 2004) at 162.

18 See discussion in David Schneiderman, ‘Legitimacy and Reflexivity in International Investment Arbitration’ (Paper prepared for the Workshop on Socio-Legal Perspectives on the Adjudication of International Economic Disputes, Onati Institute for the Sociology of Law, 15–6 July 2010) [unpublished] [Schneiderman, ‘Legitimacy’].

19 David Schneiderman, ‘Constitution or Model Treaty? Struggling over the Interpretive Authority of NAFTA’ in Sujit Choudhry, ed., *The Migration of Constitutional Ideas* (Cambridge: Cambridge University Press, 2006) 294; see also Gus Van Harten, *Investment Treaty Arbitration and Public Law* (Oxford: Oxford University Press, 2007) [Van Harten].

20 Sarah Anderson & Sara Grusky, *Challenging Corporate Investor Rule: How the World Bank’s Investment Court, Free Trade Agreements, and Bilateral Investment Treaties Have Unleashed a New Era of Corporate Power and What to Do about It* (Washington, DC: Food & Water Watch; Institute for Policy Studies, 2007).

21 This effort, as Been and Beauvais show, is futile to the extent that the definition of investment covers a much wider range of interests than does the US constitution; Vicki Been & Joel C. Beauvais, ‘The Global Fifth Amendment? NAFTA’s Investment Protections and the Misguided Quest for an International “Regulatory Takings” Doctrine’ (2003) 78 N.Y.U.L.R. 30; see also Schneiderman, *Economic Globalization*, supra note 3 at 73–4.

states' withdrawing from the regime. Effective November 2007, Bolivia withdrew from the International Centre for the Settlement of Investment Disputes (ICSID) convention governing investment disputes.<sup>22</sup> Ecuador similarly withdrew from the ICSID convention in 2008<sup>23</sup> and gave notice to denounce at least nine bilateral investment treaties (BITS) that it considered oppressive in their terms, with little return, so to speak, in attracting new inward investment.<sup>24</sup> Despite the vaunted flexibility of international investment agreements,<sup>25</sup> some states are beginning to check out as a consequence of the regime's embedded preferences.

The *Tecmed* decision,<sup>26</sup> discussed next, captures these preferences well. This is a case where an investor sued successfully for damages by reason of Mexico's failure to renew an annual licence to run a hazardous waste facility site only a couple of years after the site was purchased by the investor. Finding that there had been an expropriation requiring the provision of compensation, the *Tecmed* tribunal turned to a seemingly *obiter* discussion of proportionality,<sup>27</sup> asking whether the measures adapted were 'reasonable with respect to their goals.' It was in the context of this discussion that the tribunal observed that the investor's foreign subsidiary could not have participated in the political processes that gave rise to the decision not to renew.<sup>28</sup> This factor, among others, helped to defeat claims about the legitimacy of Mexico's decision, underscoring the decision's expropriatory nature.

22 International Centre for Settlement of Investment Disputes, News Release, 'Bolivia Submits Notice under Article 71 of the ICSID Convention' (16 May 2007), online: ICSID <<http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=NewsReleases&pageName=Announcement3>>.

23 International Centre for Settlement of Investment Disputes, News Release, 'Ecuador Submits a Notice under Article 71 of the ICSID Convention' (9 July 2009), online: ICSID <<http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=Announcements&pageName=Announcement20>>.

24 UNCTAD, 2009, *supra* note 13 at 32.

25 UNCTAD, *Reserving Flexibility in IIAs: The Use of Reservations* (New York: UN, 2006); see also David Schneiderman, 'Promoting Equality, Black Economic Empowerment, and the Future of Investment Rules' (2009) 25 S.A.J.H.R. 246.

26 *Tecmed*, *supra* note 11.

27 Coe, Jr. and Rubins describe this turn to proportionality as unprecedented in international investment law; Jack Coe, Jr. & Noah Rubins, 'Regulatory Expropriation and the *Tecmed* Case: Context and Contributions' in Todd Weiler, ed., *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law* (London: Cameron May, 2005) at 265 [Coe, Jr. & Rubins].

28 *Tecmed*, *supra* note 11.

The tribunal's reasoning invokes principles familiar to students of US constitutional law. That doctrine makes no appearance in the decision, however. Instead, the arbitrators looked to a decision of the European Court of Human Rights (ECHR) in *James*.<sup>29</sup> The ECHR surmised, in the context of a taking of property at less than market value, that non-nationals are more vulnerable to the whims of legislative majorities than are nationals. Foreigners will not have had a hand in the election of the parliamentarians who authored the legislation nor will they have been consulted about its adoption, the ECHR observed.<sup>30</sup>

This resort by an investment tribunal to the 'high ground of democratic theory' is significant.<sup>31</sup> The tribunal invoked reasons that, as in national constitutional settings, tend to legitimate the power to negative governmental decision making. Symbolically, this suggests that investment tribunals stand in a situation similar to that of national high courts. Substantively, it underscores the degree to which the investment-rules regime mimics the constitutional constraints of particularistic national legal systems.<sup>32</sup>

In this article, I inquire into the incorporation of democratic theory and constitutional postulates into international investment law. By looking to the US origins of political-process doctrine (or representation-reinforcement review), I argue that its invocation by the *Tecmed* tribunal is inapposite given the doctrine's concern with relegating ordinary economic regulation to relaxed scrutiny. Nor is reference to the European experience all that helpful – representation-reinforcement review has not been a hallmark of European jurisprudence, nor has the ECHR been all that interested in deprivations of foreign wealth.<sup>33</sup> We might, instead, understand this worry over democratic processes as an attempt to legitimate controversial review by investment tribunals of high public-policy matters.<sup>34</sup> Moreover, this solicitude offered to investors by political-process review mostly is unwarranted. The corporate political activity and business risk literature suggests that foreign corporate actors can and do shape host domestic policy. Indeed, not only is

29 *James and Others v. The United Kingdom* (1986), 8 E.H.R.R. 123 at para. 63 [*James*].

30 *Ibid.* at 24.

31 Bruce Ackerman, 'Beyond *Carolene Products*' (1985) 98 Harv. L. Rev. 713 at 715 [Ackerman].

32 Schneiderman, *Economic Globalization*, supra note 3.

33 Ursula Kriebaum, 'Nationality and the Protection of Property under the European Convention on Human Rights' in Isabelle Buffard, James Crawford, Alain Pellet, & Stephan Wittich, eds., *International Law between Universalism and Fragmentation* (Leiden, The Netherlands: Martinus Nijhoff, 2008) 649 [Kriebaum]; Ursula Kriebaum, 'Is the European Court of Human Rights an Alternative to Investor-State Arbitration?' in P.M. Dupuy, F. Franconi, & E.U. Petersmann, eds., *Human Rights in International Investment Law and Arbitration* (Oxford: Oxford University Press, 2009) 219.

34 On the public law nature of international investment law, see Van Harten, supra note 19.

corporate political power present and pervasive in most every part of the world,<sup>35</sup> corporate power distorts political processes in ways that undermine democracy's rationales.<sup>36</sup>

I move, first, to a fuller discussion of the *Tecmed* tribunal decision and its resort to political-process doctrine (Part II) and then to the place of European law in the tribunal's formulation (Part III). I turn next to a discussion of customary international law (Part IV) and then to political-process doctrine as understood in US constitutional law (Parts V and VI). The empirical evidence shores up the article (Part VII), revealing the degree to which business political activity can be expected to play a role within the processes of operative democracies all over the world.

I must confess that there is some superficial appeal to *Tecmed*'s embrace of political-process formulations. In a highly integrated world, it is enticing to think that democratic processes could be improved so that the interests of those affected by decision making within national borders are taken into account.<sup>37</sup> It is especially appealing for those who are rendered vulnerable by national and transnational processes of economic integration.<sup>38</sup> I argue, here, that this is a harder case to make in the instance of foreign investors, who can in no way be considered equivalent to vulnerable persons unaccounted for in contemporary democratic processes.

## II *The Tecmed Dispute*

The *Tecmed* dispute arose under a Spain–Mexico BIT and concerned a failure to renew a permit to operate the Cytrar hazardous waste-facility site situated thirteen kilometres from Hermosillo, the capital of the state of Sonora. The Madrid-based company Técnicas Medioambientales S.A. (Tecmed) had purchased the Cytrar site at auction in the expectation that it would continue to operate the facility under its newly formed Mexican subsidiary.<sup>39</sup> The facility operated for almost two years (from 1996 to 1998) mostly without incident. Civil society opposition

35 Leslie Sklair, *Globalization: Capitalism and Its Alternatives* (Oxford: Oxford University Press, 2002) at 72–81.

36 Wolin, *Democracy Inc.*, supra note 2.

37 Seyla Benhabib, *The Rights of Others: Aliens, Residents, and Citizens* (Cambridge: Cambridge University Press, 2004); Linda Bosniak, *The Citizen and the Alien: Dilemmas of Contemporary Membership* (Princeton, NJ: Princeton University Press, 2006); Nancy Fraser, *Scales of Justice: Reimagining Political Space in a Globalizing World* (New York: Columbia University Press, 2009); Dora Kostakopoulou, *The Future Governance of Citizenship* (Cambridge: Cambridge University Press, 2008).

38 Yasemin Nuhoğlu Soysal, *Limits of Citizenship: Migrants and Postnational Membership in Europe* (Chicago: Chicago University Press, 1994).

39 *Tecmed*, supra note 11 at para. 88.



began to mobilize against Cytrar, however, once reports began circulating that a truck driver had developed a burn on his leg after coming into contact with soil contaminated with toxic waste destined for the site. Subsequent observation at the site revealed an open toxic dump with waste lying exposed and uncontained.<sup>40</sup> It was also revealed that Cytrar had accepted landfill and contaminated soil from the Alco Pacifico plant near Tijuana. Alco Pacifico was a US-owned facility that had previously been shut down by federal authorities for violating Mexican federal environmental law.<sup>41</sup> Subsequent investigation by the Federal Environmental Protection Attorney's Office (PROFEPA), prompted by the community's outrage, revealed that trucks carried hazardous waste from Alco Pacifico in exposed, open sacks.<sup>42</sup> Other PROFEPA investigations found 'irregularities' in the disposal of Alco Pacifica waste that resulted in fines and in findings that 'there [we]re circumstances that pose[d] or m[ight] pose a risk to the environment or to health' in the disposal of waste from another company. This led to the imposition of further urgent-measures fines for exceeding landfill limits, though these, PROFEPA claimed, did not have a 'significant effect on public health.'<sup>43</sup> It turned out, as well, that Cytrar had been authorized to transport and store Alco Pacifico waste pursuant to an agreement with Mexican federal authority.<sup>44</sup>

Hermosillo-based activists first obtained a court ruling to prohibit the importation of waste from outside of the state of Sonora. As the order was ignored and not enforced, a coalition of civil society forces took direct action and blocked the entrance to the Cytrar site for 37 days in January and February 1998. The numbers blockading the site rose to approximately 300 persons, until they were forcibly dislocated by over one-hundred police officers.<sup>45</sup> This precipitated the filing of human rights commission complaints and a further blockade, thwarted by the police, in April 1998.<sup>46</sup> Setting up their headquarters in the main square in Hermosillo, over the course of 192 days, activists secured the signatures of over thirty thousand to a petition opposing the operation of the site. Hundreds also attended rallies and marches.<sup>47</sup>

40 Anna Ochoa O'Leary, 'Women and Environmental Protest in a Northern Mexican City' (Spring 2002) 6:1 *Ariz. Rep.* 1 at 4.

41 Richard Boren, 'Hermosillo Residents Take a Stand' (May 2008) 6:4 *Borderlines* 11 [Boren, 'Hermosillo Residents']; Richard Boren, 'Border Forum: Insights and Perspectives' (July 2008) 6:5 *Borderlines* 16 [Boren, 'Border Forum'].

42 *Ibid.*; *Tecmed*, supra note 11 at para. 107.

43 *Ibid.* at para. 100.

44 *Ibid.* at para. 107.

45 Boren, 'Hermosillo Residents,' supra note 41.

46 Boren, 'Border Forum,' supra note 41.

47 *Ibid.*; see also *Tecmed*, supra note 11 at para. 108.



Civil society opposition was fuelled by a Mexican federal law requiring that hazardous waste dumps be located at least twenty-five kilometres from any municipality. The Cytrar site, about thirteen kilometres (eight miles) from Hermosillo, appeared to be in violation of federal law. The law was enacted, however, after Tecmed purchased the site and obtained its licence. The law was in force when the application for annual renewal came before Mexican federal authorities. This was not, however, the purported ground for refusal of renewal of the permit; rather, the Mexican federal authorities relied on a variety of other transgressions, including exceeding landfill limits and unauthorized storage of liquid and biological infectious waste.<sup>48</sup>

The investment tribunal acknowledged that opposition to the landfill was ‘widespread and aggressive.’<sup>49</sup> Yet, the tribunal continued, ‘[H]owever intense, aggressive and sustained,’ it was not ‘in any way massive or went any further than the positions assumed by some individuals or the members of some groups that were opposed to the landfill.’<sup>50</sup> ‘[O]nly two hundred to four hundred people,’ the tribunal observed, ‘out of a population of almost one million, participated in demonstrations.’<sup>51</sup> In which case, the intensity of local opposition to the site could be disregarded by the tribunal – it simply provided no excuse for the government’s actions. Even if Cytrar had been guilty of a number of environmental transgressions in transporting waste from the site in Baja, these transgressions ‘never compromised the ecological balance,’ the tribunal concluded, and were not the real reason for the failure to renew.<sup>52</sup> Rather, there were ‘socio-political’ reasons, having to do with the proximity of the site to the local municipality.<sup>53</sup> By separating out public-health concerns from socio-political motivations, the tribunal could shield itself from accusations that it had thwarted legitimate environmental or public-health regulation. It is important to emphasize, here, that the tribunal did not find that there was a discriminatory intent behind the Mexican federal government’s decision.<sup>54</sup> The decision was not intended to target foreign-owned wealth and so should not have

48 *Tecmed*, supra note 11 at para. 99; Marco A. Orellana, ‘Science, Risk and Uncertainty: Public Health Measures and Investment Disciplines’ in Philippe Kahn & Thomas W. Wälde, eds., *New Aspects of International Investment Law* (Leiden, The Netherlands: Martinus Nijhoff, 2007) 671 at 775.

49 *Tecmed*, supra note 11 at para. 108.

50 *Ibid.* at para. 144.

51 *Ibid.*

52 *Ibid.* at para. 148.

53 The tribunal reports, *ibid.*, that the company was even prepared to relocate to another part of the state in order to placate community objections, an offer that apparently was never taken up by Sonora or federal officials.

54 *Ibid.*

given rise to any concerns that the measures were intended to penalize non-nationals.<sup>55</sup> One is left wondering, however, what otherwise would have precipitated vociferous local opposition to the site, which could only be viewed, then, as arbitrary and irrational.

The investor principally claimed that this was a compensable event tantamount to expropriation and that there was a denial of fair and equitable treatment. For our purposes, we need only focus on the first claim (though the second claim also was successful<sup>56</sup>). Regulatory takings fall within the terms of the treaty as a sub-set of indirect *de facto* expropriations. These will be measures which are ‘irreversible and permanent, and if the asset or rights subject to such measures have been affected in such a way that “... any form of exploitation thereof ...” has disappeared; i.e. the economic value of the use, enjoyment or disposition of the assets or rights affected by the administrative action or decision have been neutralized or destroyed,’ then there will have been a taking requiring the payment of compensation.<sup>57</sup> Even where measures are ‘beneficial to society as a whole – such as environmental protection,’ the obligation to pay compensation remains.<sup>58</sup> The ‘government’s intention,’ the tribunal wrote, ‘is less important than the effects of the measure’ on the investor.<sup>59</sup> In this instance, the government’s actions ‘fully and irrevocably destroyed’ the investment and so amounted to an expropriation.<sup>60</sup> Here seemed to be yet another instance in which the sole-effects doctrine was the overriding consideration.<sup>61</sup>

The tribunal was not content with examining only the effects of a measure on an investor or investment. Seemingly, in *obiter*, the tribunal sought to determine whether such a measure was proportional in its effects in light of the government’s objective. This should have had the effect of mitigating an emphasis solely on the impact of a measure on an investor. Yet even here, the tribunal admitted, ‘the significance of such [an] impact has a key role’ in determining whether there

55 See discussion in Thomas M. Franck, *Fairness in International Law and Institutions*. (Oxford: Clarendon Press, 1995) at 470 [Franck].

56 The tribunal also found that there was a denial of fair and equitable treatment due to the ‘lack of transparency’ and ‘ambiguity and uncertainty’ about the future of the investment. This was conduct that upset the investor’s legitimate expectations and so amounted to another ground for compensation: *Tecmed*, supra note 11 at paras. 164, 172.

57 Ibid. at para. 116.

58 Ibid. quoting *Compañía del Desarrollo*, supra note 16 at paras. 72, 76.

59 Ibid.

60 Ibid. at para. 117.

61 See Schneiderman, *Economic Globalization*, supra note 3 at c. 3; August Reinisch, ‘Expropriation’ in Peter Muchlinksi, Frederico Ortino, & Christopher Schreuer, eds., *The Oxford Handbook of International Investment Law* (New York: Oxford University Press, 2008) at 446 [Muchlinksi, Ortino, & Schreuer].

has been proportionality.<sup>62</sup> Though investor impact may have a role to play in proportionality analysis, here, sole-effects doctrine does double duty.

The question, as framed by the tribunal, was ‘whether such measures are reasonable with respect to their goals, the deprivation of economic rights and the legitimate expectations of who suffered such deprivation [*sic*].’<sup>63</sup> Though having already found the measure to be a taking, the analysis began with the ‘due deference’ that is owed to the state when it takes measures in the public interest. Among the factors to be considered in assessing proportionality, the tribunal added, was the ‘size of the ownership deprivation’ and whether compensation was offered.<sup>64</sup> Also weighing into the tribunal’s proportionality analysis was ‘that the foreign investor has a reduced or nil participation in the taking of the decisions that affect it, partly because investors are not entitle[d] to exercise political rights reserved to the nationals of the state, such as voting for the authorities that will issue the decisions that affect such investors.’<sup>65</sup> Here, the tribunal drew not on US constitutional law but on a ruling of the ECHR.<sup>66</sup> The tribunal noted that the Strasbourg Court also considered the extent to which foreign investors are disenfranchised from participating in decisions that give rise to such measures by public authority, because investors are not entitled to exercise political rights available to ‘nationals of the State.’<sup>67</sup> It turns out that this is not a nuanced representation of what the ECHR decided in *James*.<sup>68</sup>

### III *The European Model*

*James* concerned leasehold-reform legislation in the United Kingdom requiring the Duke of Westminster, the owner of some 2 000 homes in the districts of Belgravia and Mayfair in central London, to sell his leased property at significantly reduced rates to lessees. The forced sale resulted in massive windfalls for some tenants. In dispute was the amount of compensation owed to James, which was substantially less than full value. The Court, applying its ‘margin of appreciation’ doctrine, required the state only to show some ‘reasonable relationship of proportionality’ between means (compensation provided) and ends

62 *Tecmed*, supra note 11 at para. 122.

63 *Ibid*.

64 *Ibid*.

65 *Ibid*.

66 *James*, supra note 29.

67 *Tecmed*, supra note 11 at para. 122.

68 *James*, supra note 29; Coe, Jr., & Rubins, and also Hirsch similarly fail to catch the nuances in the ECHR jurisprudence; Coe, Jr. & Rubins, supra note 27 at 625; Moshe Hirsch, ‘Interactions between Investment and Non-Investment Obligations’ in Muchlinksi, Ortino, & Schreuer, supra note 61 (2008) 154 at 172.

(the promotion of social justice).<sup>69</sup> It was appropriate, the Court observed, that nationals bear this kind of burden, in contrast to non-nationals, who will have ‘played no part in the election or designation of its authors nor have been consulted on its adoption.’<sup>70</sup> For this reason, the ‘general principles of international law’ mentioned in article 1 of Protocol No. 1 of the European Convention on Human Rights,<sup>71</sup> which might have required compliance with a strict standard of prompt, adequate, and effective compensation,<sup>72</sup> did not apply to the taking of property owned by nationals of the state doing the taking;<sup>73</sup> in which case, the state legitimately could provide compensation at rates less than the strict standard. The Court used similar reasoning in *Lithgow*, decided later that same year.<sup>74</sup> This second case concerned the nationalization, with compensation at less than full value, of the British aircraft and ship-building industry. On these two occasions where the Court embraced the political-process rationale, it did not do so to strike at discriminatory economic legislation; rather, it did so to shield national state measures from any greater scrutiny than was required under its margin of appreciation doctrine. This is consistent with the Court’s overall stance as regards economic matters, in which ‘acceptance of the member States’ entitlement to regulate their respective economies is embedded in the Convention’s structure.’<sup>75</sup>

Might the same hold true in the case of alien-owned property? It is important to underscore that the ECHR, in these cases, invoked

69 *James*, supra note 29 at paras. 46, 50; Tom Allen, *Property and the Human Rights Act 1998* (Oxford: Hart, 2005) at 133 [Allen].

70 The ECHR opinion states, ‘Especially as regards a taking of property effected in the context of a social reform, there may well be good grounds for drawing a distinction between nationals and non-nationals as far as compensation is concerned. To begin with, non-nationals are more vulnerable to domestic legislation: unlike nationals, they will generally have played no part in the election or designation of its authors nor have been consulted on its adoption. Secondly, although a taking of property must always be effected in the public interest, different considerations may apply to nationals and non-nationals and there may well be legitimate reason for requiring nationals to bear a greater burden in the public interest than non-nationals’; *James*, supra note 29 at para. 63.

71 *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 U.N.T.S. 221 Eur. T.S. 5 as am. by Protocol to the *Convention for the Protection of Human Rights and Fundamental Freedoms*, 20 March 1952, 213 U.N.T.S. 262 Eur. T.S. 9.

72 The Court preferred not to rule on whether this was an element of the general principles of international law.

73 Franck, supra note 55 at 456.

74 *Lithgow and Others v. The United Kingdom* (1986), 8 E.H.R.R. 329 at para. 116.

75 Marius Emberland, *The Human Rights of Companies: Exploring the Structure of ECHR Protection* (Oxford: Oxford University Press, 2006) at 192; Florian Becker, ‘Market Regulation and the Right to Property’ (2007) 26 Y.B.Eur.L. 255 at 282.

understandings of the way political processes operate in the context of deciding whether to apply ‘general principles of international law.’<sup>76</sup> Otherwise, the ECHR has not seen fit to strictly scrutinize takings of alien property. In *Beyeler*,<sup>77</sup> for instance, the Court seemed uninterested in the fact that the claimant was a non-national contesting Italian law. The law vested a historic work of art by Van Gogh in the state by reason of the Swiss owner’s failing adequately to declare his interest in the painting. Rather than preferring a strict test of compensation under the expropriation provisions of Protocol No. 1 to the Convention, the ECHR applied a loose balancing test.<sup>78</sup> In almost every other case, the ECHR has shown little or no heightened interest in interferences with foreign-owned wealth.<sup>79</sup> Consequently, it has never applied the strict criteria that may be mandated by ‘general principles of international law’ under article 1, Protocol No. 1.<sup>80</sup> It fairly can be said that democratic theory, in general, and political-process doctrine, in particular, have not played a very significant role in European human rights jurisprudence.<sup>81</sup> This is not to say that such concerns have not animated intellectual contributions to understanding the European project,<sup>82</sup> only that these concerns have not taken hold in the European judicial model.<sup>83</sup>

76 Allen indicates that the *travaux préparatoires* for the text of Protocol No. 1 indicate that it was intended to ‘continue the position which already obtained at international law’; Allen, *supra* note 69 at 28.

77 *Beyeler v. Italy* (2000), 33 E.H.R.R. 52.

78 Rudolf Beate, ‘*Beyeler v. Italy*’ (2000) 94 A.J.I.L. 736 at 739. Representation-reinforcement functions generally have not been served by European courts outside of the European Court of Justice doctrine of ‘institutional balance’; see Carol Harlow & Richard Rawlings, ‘Promoting Accountability in Multilevel Governance: A Network Approach’ (2007) 13 Eur.L.J. 542 at 547; Koen Lenaerts & Amaryllis Verhoeven, ‘Institutional Balance as a Guarantee for Democracy in EU Governance’ in Christian Joerges & Renaud Dehousse, eds., *Good Governance in Europe’s Integrated Market* (Oxford University Press, 2002) 35 at 37. The doctrine purports to ensure that each institution within the European Community, in the exercise of its authority, respects the competences granted to other institutions; *ibid.* at 44. Harlow likens it to the doctrine of the separation of powers; Carol Harlow, *Accountability in the European Union* (New York: Oxford University Press, 2002) at 44. But see Christian Joerges, ‘European Law as Conflict of Laws’ in Christian Joerges & Jürgen Neyer, ‘“Deliberative Supranationalism” Revisited’ (2006) 20 EUI Law Working Paper 15 at 22 [Joerges].

79 Most recently, see *Anheuser-Busch Inc. v. Portugal* (2007) 45 E.H.R.R. 36 [*Anheuser-Busch*].

80 Kriebaum, *supra* note 33 at 657. The dissenting judges in *Anheuser-Busch*, *supra* note 79, however, did so.

81 I am grateful to Tom Allen for assistance on this point.

82 Joerges, *supra* note 78 at 22.

83 Alexander Somek, ‘The Argument from Transnational Effects 1: Representing Outsiders through Freedom of Movement’ (2010) 16 Eur.L.J. 315 at 344.

## IV Customary International Law

Before turning to US constitutional law on the subject, there is a further candidate to consider as a source for *Tecmed's* formulation of political-process doctrine; namely, customary international law. The political-process rationale appears in early-twentieth-century articulations of the international minimum-standard-of-treatment rule. One reason that non-nationals – alien investors, to be exact – are entitled to better treatment than that dictated by the crudest standard applied to nationals, Edwin Borchard wrote in 1916, is because nationals are ‘presumed to have a political remedy, whereas the alien’s inability to exercise political rights deprives him of one of the principal safeguards of the rights of the citizen.’<sup>84</sup> In support of this proposition, Borchard refers repeatedly to a brief by Columbia law professor John Bassett Moore, in the *Constancia Sugar Refining Case* before the Spanish Treaty Claims Commission.<sup>85</sup> Borchard appears to have been mistaken as the argument makes no appearance in Moore’s brief.<sup>86</sup> Indeed, Borchard would have had little basis to cite Moore in support of the general proposition entitling aliens to rights greater than those available to nationals. This is because Moore describes the principle of an international minimum standard of treatment, in correspondence with Borchard, as an ‘exorbitant claim’ – it ‘invest[s] with the character of a rule of law what should be regarded as

84 Edwin Borchard, *The Diplomatic Protection of Citizens Abroad or the Law of International Claims* (New York: Banks Law, 1915) at 43, 106 [Borchard, *Diplomatic Protection*]; Edwin Borchard, ‘The “Minimum Standard” of the Treatment of Aliens’ (1939) 33 *Am. Soc’y Int’l L. Proc.* 51 at 57; Edwin Borchard, ‘The “Minimum Standard” of the Treatment of Aliens’ (1940) 38 *Mich. L. Rev.* 445 at 453. The claim was repeated by T.R. Armstrong of Standard Oil in response to the expropriation of foreign-owned oil properties in Mexico; see Wendell C. Gordon, *The Expropriation of Foreign-Owned Property in Mexico* (Westport, CT: Greenwood Press, 1976) at 167.

85 For references to Moore, see all three texts *ibid.* In Borchard, *Diplomatic Protection*, *ibid.* at 623, Borchard also makes reference to Sylvestre Pinheiro-Ferreira’s comments on G.F. de Martens in P. Pradier-Fodéré, *Traité de Droit International Public Européen et Américain: Suivant les progrès de la science et de la pratique contemporaines*, tome I (Paris: Pedone-Lauriel, 1885) at para. 405, n. 3. Pinheiro-Ferreira’s comments do not appear to rest on arguments about voice and representation but, instead, are premised on aliens’ ability to seek the authority of their home state in a case of host-state wrongdoing. Moreover, he appears somewhat ambivalent about the controversy. He notes that foreigners would not have granted their ‘consent’ to an injustice, such as being ‘stripped’ of property – they are ‘not placed on the same line’ as nationals; yet he acknowledges that foreigners must respect local law even if ‘hard, and onerous, unfair even.’ It is noteworthy that the Pinheiro-Ferreira reference does not appear again in Borchard’s later work, though the Moore reference does repeatedly. I am grateful to Chava Schwebel for translation assistance.

86 Nor does it seem to appear anywhere else (although Moore’s work has been searched extensively). This is curious, as Borchard was employed at this very time in the Library of Congress’s law library at the United States Supreme Court.

an exception based upon no definite principle.<sup>87</sup> Borchard continued to misrepresent Moore's views by citing him in support of a general proposition that Moore thought confusing and extravagant. Borchard, we might surmise, preferred to anchor support for this doctrinal innovation in Moore's reputation rather than in US constitutional law.<sup>88</sup>

Whatever the genealogy of Borchard's or the *Tecmed* tribunal's formulations, they are undeniably related to constitutional principles foundational to US constitutional law. I have in mind the decision of the US Supreme Court in *Carolene Products*<sup>89</sup> and its reformulation by John Hart Ely in *Democracy and Distrust*<sup>90</sup> (although the idea is traceable to earlier periods of constitutional history). Footnote 4 of *Carolene Products* has been described as a 'great and modern charter for ordering the relations between judges and other agencies of government'<sup>91</sup> – its reasoning 'more ensconced in [US] constitutional imagination than any other line of reasoning not directly traceable to the text.'<sup>92</sup> I turn next to a discussion of *Carolene Products*, not to rehash debates about its utility as a response to problems associated with purported counter-majoritarian difficulties, but to highlight features of its context and rationale suggesting that it provides an awkward basis for responding to legitimacy concerns raised by international investment law.

#### V *Carolene Products*

The brief ruling in *Carolene Products* reads mostly as an addendum to the constitutional revolution of 1937.<sup>93</sup> If constitutional presumptions

87 Letter from John Bassett Moore to Edwin Borchard (26 April 1915), Washington, Library of Congress (John Bassett Moore Papers, Box 29, file 'General Correspondence 1915').

88 Borchard was likely channelling the idea of representation-reinforcement review traceable to Justice Marshall's famous opinion in *McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316 (1819) [*McCulloch*], discussed in text accompanying notes 120–5 *infra*. Extrapolating principles of international law from an author's own national experience is a contemporary phenomenon as well, what Santos associates with the process he calls globalized localism; Bonaventura de Sousa Santos, *Toward a New Legal Common Sense: Law, Globalization, and Emancipation*, 2d ed. London: Butterworths; Lexis Nexis, 2002) at 179. See, e.g., Franck, *supra* note 55 at 454–6, who writes about the linkages between property and human rights in the context of bilateral investment treaties with reference to US constitutional law.

89 *United States v. Carolene Products Co.*, 304 U.S. 144 (1938) [*Carolene Products*].

90 John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge, MA: Harvard University Press, 1980) [Ely].

91 Owen Fiss, 'The Supreme Court 1978 Term – Foreword: The Forms of Justice' (1979) 93 Harv. L. Rev. 1 at 6.

92 Lea Brilmayer, 'Carolene, Conflicts, and the Fate of the Insider–Outsider' (1986) 134 U. Penn. L. Rev. 1291 at 1291.

93 Associated, of course, with the demise of the *Lochner* era's doctrine of substantive due process in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) [*West Coast Hotel*]; see J.M. Balkin, 'The Footnote' (1989) 83 N.W.U.L.Rev. 275 at 294.



had favoured freedom of liberty and of contract in contrast, for instance, to measures intended to improve the working conditions of labourers,<sup>94</sup> the new presumption post-1937 favoured legislative measures adopted to prevent the ‘exploitation of a class of workers who [we]re . . . relatively defenceless against the denial of a living wage.’<sup>95</sup>

In ten short pages of the Supreme Court Reports, Justice Stone for the Court upheld the congressional Filled Milk Act of 1923 as a valid enactment under the commerce clause, equal protection clause, and takings clause of the US Constitution. The *Carolene* company fell under the auspices of the federal law by importing ‘Milnut’ into southern Illinois, a cheap milk substitute that removed the milk’s butter fat and replaced it with less costly coconut oil. This was an ‘adulterated’ food product listed under the Act that was ‘injurious to the public health.’<sup>96</sup> That the congressional enactment was upheld is remarkable, considering that, only two years earlier, its constitutionality would have been in some doubt.<sup>97</sup> The Court’s reversal, of course, is exemplified by *Carolene Products*’s reasons: its structural and theoretical bases suggested in footnote 4.<sup>98</sup> As to the reasons, Justice Stone sustained the measure on the basis of a presumption of constitutionality and on the ‘affirmative evidence’ available.<sup>99</sup> The bill ‘was adopted by Congress after committee hearings, in the course of which eminent scientists and health experts testified.’<sup>100</sup> ‘Even in the absence of such aids,’ Stone continued, ‘the existence of facts supporting the legislative judgment is to be presumed, for regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.’<sup>101</sup> *Carolene Products* represents, then, the effective withdrawal of run-of-the-mill economic regulation from judicial scrutiny, so long as a rational basis, which is to be presumed, exists for the legislative measure.

94 *Lochner v. New York*, 198 U.S. 45 (1905).

95 *West Coast Hotel*, supra note 93 at 399.

96 *Carolene Products*, supra note 89 at 146.

97 Louis Lusky notes that the district court, in an unreported ruling, had sustained a demurrer to the indictment on the grounds that the statute was unconstitutional; Louis Lusky, ‘Footnote Redux: A *Carolene Products* Reminiscence’ (1982) 82 *Colum. L. Rev.* 1093 at 1094 [Lusky].

98 *Carolene Products*, supra note 89 at 152–3, n. 4.

99 *Carolene Products*, supra note 89 at 148.

100 *Ibid.* Miller finds this all too much. The ‘statute upheld in the case was an utterly unprincipled example of special interest legislation’ and Justice Stone’s justifications ‘patently bogus’; Geoffrey P. Miller, ‘The True Story of *Carolene Products*’ (1987) *Sup. Ct. Rev.* 397 at 396, 399.

101 *Carolene Products*, supra note 89 at 152.

There will be exceptions to the presumption of constitutionality, and these are described in footnote 4. First, at the insistence of Chief Justice Hughes,<sup>102</sup> Justice Stone's opinion admitted that there might 'be a narrower scope for the operation of the presumption in cases when legislation appears on its face to be within a specific prohibition of the Constitution,' such as the first ten amendments.<sup>103</sup> Nor was it deemed necessary to consider whether legislation 'which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation' – such as measures restricting the right to vote or choking off political opposition – also would be immune to the presumption and would call for more 'exacting judicial scrutiny' under the Fourteenth Amendment. Lastly, the Court needn't inquire into whether statutes directed at religious, national, or racial minorities – what is described as 'prejudice against discrete and insular minorities' – call for a 'correspondingly more searching judicial inquiry.'<sup>104</sup>

The second and third paragraphs of footnote 4 represent, then, a tentatively stated theory justifying the rigour with which the court would review legislative initiatives blocking access to the political process or evincing prejudice directed at vulnerable minorities. In his elegantly framed argument in *Democracy and Distrust*, John Hart Ely develops Justice Stone's footnote into a full-blown theoretical justification for Warren-Court-era case law.<sup>105</sup> According to Ely, the US constitution is concerned almost exclusively with political process in the broad sense – 'with clearing the channels of political change, on the one hand, and with correcting certain kinds of discrimination against minorities, on the other.'<sup>106</sup> Substantive questions, Ely maintains, were left 'almost entirely to the political process' and so are not an appropriate subject for judicial review.

Reviving the discredited idea of 'virtual representation,'<sup>107</sup> Ely argues that the interests of those without political power – political outsiders – should, in some instances, be tied constitutionally to those with power.<sup>108</sup> Treatment of non-residents under the dormant commerce clause (discussed next), Ely suggests, is a paradigmatic instance of the 'literally

102 Lusk, *supra* note 97 at 1097.

103 *Carolene Products*, *supra* note 89 at 152, n. 4.

104 *Ibid.* at 153, n. 4.

105 Ely, *supra* note 90.

106 *Ibid.* at 74, 103. For Klarman, this conjoining of an 'access prong of political process with a prejudice cohort' is unsustainable; Michael J. Klarman, 'The Puzzling Resistance to Political Process Theory' (1991) 77 *Va. L. Rev.* 747 at 788 [Klarman]. Klarman argues that Ely's political process theory is defensible on the basis only of the access front 'shorn of its prejudice prong'; *ibid.* at 788.

107 Discredited in the lead up to the American revolution, as it represented the imperial response to claims about taxation without representation; see Ely, *supra* note 90 at 82.

108 *Ibid.* at 83.

voteless' being entitled to virtual representation. Even the 'technically represented' might find themselves 'functionally powerless' and so in need of virtual representation.<sup>109</sup> The question for Ely was whether it was 'appropriate constitutionally to bind the interests of the majority to those of some minority with which no felt community of interests has naturally developed.'<sup>110</sup>

As Laurence Tribe notes, in an early review, determining those groups whose stereotyping is worthy of constitutional protection is, itself, a substantive question of constitutional law. These are, at bottom, 'judgements about the propriety of the options left to individuals or the burdens imposed on them.'<sup>111</sup> By this reason alone (in addition to other elements in the text of the constitution), there can be no escape from substance.<sup>112</sup> Ely reasons through some of these questions in his book. He admits that distinctions on the basis of alienage (or citizenship) are 'a relatively easy case.'<sup>113</sup> Discrimination on the grounds of gender, other than for pre-1937 legislation, by contrast is not seen as warranting strict scrutiny so long as women constitute more than fifty per cent of the voting population.<sup>114</sup> Corporate actors would not qualify under Ely's formulation. Corporate actors do not have a vote either inside or outside of states or in Congress.<sup>115</sup> Their interests, Ely observes, 'generally have to be protected by persons whose interests are tied up with theirs – officers, employees, stockholders.'<sup>116</sup> Consumers and allied producers can also represent

109 Ibid. at 84, 98.

110 Ibid.

111 Laurence H. Tribe, *American Constitutional Law*, 3d ed., vol. 1 (New York: Foundation Press, 2000) at 1075 [Tribe].

112 Klarman, *supra* note 106 at 785, writes that 'Ely's critics have been devastatingly successful in demonstrating that Ely's "procedural" theory of prejudice is riven with substantive judgments.'

113 Ely, *supra* note 90 at 161. There have been numerous instances in US history, however, where discrimination against foreign business actors has occurred at the federal and state levels and has even been upheld by courts; see discussion in Mira Wilkins, *The History of Foreign Investment in the United States to 1914* (Cambridge, MA: Harvard University Press, 1989) at 580–1; see also Detlev F. Vagts, 'The Corporate Alien: Definitional Questions in Federal Restraints on Foreign Enterprise' (1961) 74 *Harv. L. Rev.* 1489 at 1494–5. There are, in addition, national security exceptions, which are found in most BITs and are monitored in the United States by the Committee on Foreign Investment in the United States; see Economist Intelligence Unit, *World Investment Prospects to 2011: Foreign Direct Investment and the Challenge of Political Risk* (London: Economist Intelligence Unit, 2007) at 74–5, online: Economist Intelligence Unit <[http://a330.g.akamai.net/7/330/25828/20070829195216/graphics.eiu.com/upload/WIP\\_2007\\_WEB.pdf](http://a330.g.akamai.net/7/330/25828/20070829195216/graphics.eiu.com/upload/WIP_2007_WEB.pdf)>.

114 Ely, *supra* note 90 at 167–9.

115 Dissenting opinion in *Citizens United v. Federal Election Commission*, 558 U.S. 50 (2010), *per* Stevens J.

116 Ely, *supra* note 90 at 85.

foreign corporate interests,<sup>117</sup> sometimes effectively reducing the ‘deficit in participatory lawmaking.’<sup>118</sup> If consumer interests are considered too diffuse to countervail well-organized peak organizations,<sup>119</sup> then others – such as businesses with common interests, suppliers, and state agencies promoting inward investment – can speak presumably on behalf of investors. All of these constituencies – the corporation’s principal stakeholders – are target audiences for corporate advocacy campaigns. Indeed, studies indicate that ‘corporate constituency building,’ where corporate stakeholders are ‘organized and mobilized to express their support of, or opposition to specific public policy proposals,’ has become a ‘prevalent political influence tactic.’<sup>120</sup> There is the further possibility that foreign subsidiaries themselves will participate, directly or indirectly, in host-state deliberations that affect future profitability. The empirical evidence, discussed next, points precisely in this direction. A major problem with the *Tecmed* ruling, then, is the naïve way in which the tribunal invokes political-process doctrine without any inquiry into how investors may be implicated in local or national political decision making.

The more obvious difficulty is that the *Tecmed* tribunal invokes the political-process rationale for purposes that are at odds with the doctrine’s rationale in the post-1937 universe. If its impetus was to shield regulation of markets from judicial review and to reserve strict scrutiny for measures that negatively affect discrete and insular groups, then the tribunal’s approach appears to be the mirror opposite of this post-1937 rationale; unless, that is, transnational business organizations can be likened to groups discriminated against on the grounds of religion, nationality, or race. Writing in the context of 1938, Justice Stone had in mind, according to Cover, minorities that were ‘isolated in the social structure,’ occupying positions ‘relatively resistant to change’ and ‘vulnerable to attack by others.’<sup>121</sup> Rather than bearing any resemblance to the concerns motivating Justice Stone, the *Tecmed* formulation looks more like a version of what Upendra Baxi calls ‘trade-related market-friendly human rights.’<sup>122</sup> For

117 Russell Korobkin, ‘The Local Politics of Acid Rain: Public versus Private Decisionmaking and the Dormant Commerce Clause in a New Era of Environmental Law’ (1995) 75 Boston U.L. Rev. 751 at 751–2 [Korobkin].

118 Peter M. Gerhart & Michael S. Baron, ‘Understanding National Treatment: The Participatory Vision of the WTO’ (2004) 14 Ind. Int’l. & Comp. L. Rev. 505 at 519–20.

119 Mark V. Tushnet, ‘Rethinking the Dormant Commerce Clause’ (1979) Wis. L. Rev. 125 at 133 [Tushnet]; Mancur Olson, Jr., *The Logic of Collective Action: Public Goods and the Theory of Groups* (Cambridge, MA: Harvard University Press, 1965).

120 Michael D. Lord, ‘Corporate Political Strategy and Legislative Decision Making: The Impact of Corporate Legislative Influence Activities’ (2000) 39 Bus. Soc. 76 at 79, 89.

121 Robert M. Cover, ‘The Origins of Judicial Activism in the Protection of Minorities’ (1982) 91 Yale L.J. 1287 at 1299.

122 Upendra Baxi, *The Future of Human Rights*, 2d ed. (New Delhi: Oxford, 2006) at 234.

these reasons, it might be more fruitful to look to pre–New Deal rationales for strict scrutiny of economic subjects, such as those in support of what is known as the dormant commerce clause.<sup>123</sup> This doctrine, whose origins are usually traceable back to the decisions of Chief Justice Marshall and which may have influenced Borchard, may better explain the appearance of this rationale in contemporary international investment law.

#### VI *The Dormant Commerce Clause*

It might be thought that the category of invidious discrimination against ‘discrete and insular minorities’ would be limited to those classes (religion, nationality, race) mentioned by Chief Justice Stone. The opposite is suggested, however, by the invocation, in support of the third, tentatively stated proposition in *Carolene Products*’ footnote 4,<sup>124</sup> to Chief Justice John Marshall’s ruling in *McCulloch v. Maryland*.<sup>125</sup> According to Marshall’s structural analysis in *McCulloch*, the state of Maryland was not constitutionally entitled to tax out-of-state banks (the second instalment of the Bank of the United States was the principal target of the state law),<sup>126</sup> in part, because Maryland purported to tax ‘institutions created, not by their own constituents, but by people over whom they have no control’<sup>127</sup> Maryland had the power to tax institutions attached to constituents within the state, not institutions attached to constituents whom the state did not represent. Only in Congress, the Chief Justice proclaimed, ‘are all represented,’<sup>128</sup> in which case, only Congress could be entrusted with power of taxation over all. Here is one of the foundations for dormant-commerce-clause jurisprudence.

Pondering the pertinence of political-process theory in *McCulloch*, Ely notes that there is little reason to think that the bank was ‘more impoverished than any other organization,’ in which case, ‘the Bank was not voteless, at least not in any sense that other corporations were not.’<sup>129</sup> It is likely, Ely surmises, that the bank would not have received this ‘special solicitude’ from the Marshall Court had the bank not been a creature

123 The dormant-commerce-clause doctrine reads into the affirmative grant of power to Congress ‘to regulate commerce . . . among the several states’ a licence for judicial nullification in the case of laws that discriminate against interstate commerce or laws that unduly burden interstate commerce; Tribe, *supra* note 111 at 1031.

124 *Carolene Products*, *supra* note 89, at 152–3, n. 4.

125 *McCulloch*, *supra* note 88.

126 Charles Warren, *The Supreme Court in United States History*, vol. 1 (Boston, MA: Little, Brown, 1922) at 504–7.

127 *McCulloch*, *supra* note 88 at 435.

128 *Ibid.* at 431.

129 Ely, *supra* note 90 at 86.

of Congress, in which case, there were structural reasons and not procedural ones that motivated the Marshall Court. The case does stand for the proposition, however, that ‘in some situations, judicial intervention becomes appropriate when the existing processes of representation seem inadequately fitted to the representation of minority interests, even minority interests that are not voteless.’<sup>130</sup>

Stone referred in footnote 4, in addition to *McCulloch*, to his contemporaneous opinion in *South Carolina v. Branwell Bros.*<sup>131</sup> There, a South Carolina ban on semi-trailer trucks on state highways was upheld by the Supreme Court as ‘reasonably adapted to the end sought’; namely, the objectives of safety and the reduction of maintenance costs.<sup>132</sup> In *Carolene Products*, Stone refers specifically to footnote 2 of this decision, when he writes (again, in a tentative way) that, underlying the doctrine that no state can burden interstate commerce so as to confer an advantage on those within that state, is

the thought, often expressed in judicial opinion [probably referring here to Chief Justice Marshall in *McCulloch*], that when regulation is of such a character that its burden falls principally upon those without the state, legislative action is not likely to be subjected to those political restraints which are normally exerted on legislation where it affects adversely some interests within the state.<sup>133</sup>

So, here is clear evidence linking political-process theory to early dormant-commerce-clause doctrine.

Political-process theory, however, often makes an appearance in dormant-commerce-clause literature and doctrine as a proxy for an argument from efficiency.<sup>134</sup> Mark Tushnet, for instance, purports to explain the result in these cases as resting upon political justifications having to do with free trade and efficiency.<sup>135</sup> In fact, ‘once efficiency considerations

130 Ibid. at 87.

131 *Carolene Products*, supra note 89 at 153, n. 4 cont’d., commenting on *South Carolina Highway Department v. Barnwell Brothers*, 303 U.S. 177 (1937).

132 Ibid. at 190, 196. Stone could not find such a reasonable relation in *Southern Pacific Co. v. Arizona*, 325 U.S. 761 (1945) at 776 concerning an Arizona law limiting train lengths, in which the safety advantages were ‘so slight ... as not to outweigh the national interest in keeping interstate commerce free from interferences which seriously impede it ...’.

133 *Carolene Products*, supra note 89 at 185, n. 2.

134 This is not surprising if one considers that dormant-commerce-clause theorizing bears a family resemblance to political process rationales for just compensation under the US takings rule. Fischel, for instance, describes the constitutional requirement as serving political process functions by protecting outsiders from political failure in which their interests are likely to be poorly represented; see William A. Fischel, *Regulatory Takings: Law, Economics, and Politics* (Cambridge, MA: Harvard University Press, 1995) at 133.

135 Tushnet, supra note 119.

are held to have constitutional status,' Tushnet writes, 'it makes little sense to confine them to dormant commerce clause' cases, and so he mischievously makes an argument for the revival of *Lochner*-era doctrine of substantive due process.<sup>136</sup> If efficiency concerns explain much of what goes on under the guise of analysis of the dormant commerce clause, the cases applying the non-discrimination principle under the rubric of the dormant commerce clause, writes Lisa Heinzerling, 'aim toward the preservation and enlargement of the commercial market, undisturbed by regulation interfering with common law rights' reminiscent of the *Lochner* era.<sup>137</sup> An efficiency rationale, however, ill suits the *Tecmed* tribunal's resort to political-process theory. The tribunal made no claim, explicit or implicit, that efficiency concerns were driving its analysis in the context of its discussion of proportionality. There is a sense, however, that the *Tecmed* tribunal was giving voice to a pre-1937 view of acquired economic rights that complements well modern efficiency rationales.

Allied to the political-process rationale is the notion that the dormant commerce clause serves the cause of national unity: the idea that economic actors operating in the United States may proceed on the basis that there is one national economy and that 'the peoples of the several states must sink or swim together.'<sup>138</sup> As Donald Regan strikingly puts it, 'Protectionist legislation is the economic equivalent of war. It is hostile in its essence.'<sup>139</sup> Although it is impermissible for states to discriminate or unduly burden commerce, it is permissible for Congress to do so as supervising national authority representing all.<sup>140</sup> This appeal to structure and doctrine seems, again, ill fitted to the *Tecmed* setting, where there was no governing democratic community – no political union analogous to the US federal government – capable of attaining some of the objectives forbidden to states by the dormant commerce clause.<sup>141</sup>

136 *Ibid.* at 142.

137 Lisa Heinzerling, 'The Commercial Constitution' (1995) *Sup. Ct. Rev.* 217 at 272.

138 *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935) at 523.

139 Donald H. Regan, 'The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause' 1986 *84 Mich. L. Rev.* 1091 at 1113.

140 Gillian E. Metzger, 'Congress, Article IV, and Interstate Relations' (2007) 120 *Harv. L. Rev.* 1468 at 1484.

141 As Howse points out in the context of the 1994 Uruguay-Round GATT/WTO, '[T]here is no real democratic escape' from the results of the world trading system; Robert Howse, 'Managing the Interface between International Trade Law and the Regulatory State: What Lessons Should (and Should Not) Be Drawn from the Jurisprudence of the United States Dormant Commerce Clause' in Thomas Cottier & Petros C. Mavroidis, eds., *Regulatory Barriers and the Principle of Non-Discrimination in World Trade Law* (Ann Arbor: University of Michigan Press, 2000) 140 at 143.



The discussion so far has presupposed that voteless foreign investors have no voice in jurisdictions that are hosts to their investments. Such an emphasis on political processes in which voters get to register their preferences is a common feature of international law, writes Susan Marks.<sup>142</sup> Elections are more susceptible to easy monitoring by international observers and this has contributed to international law's penchant for 'low-intensity democracy.'<sup>143</sup> This is in contrast to other, more robust, forms of democratic participation in which voting is considered part of a much larger set of ongoing political practices.<sup>144</sup> Rather than emphasizing the episodic democracy associated with representative democracy,<sup>145</sup> Pierre Rosanvallon maintains that citizens in contemporary democracies exercise counter-democratic functions that serve to make politicians more accountable.<sup>146</sup> Citizens are pluralistic political actors, according to this account, serving as watchdogs, negating political decisions, and judging political behaviour. The empirical data, to which I turn to next, confirm that political participation can take many different forms.<sup>147</sup> The data also serve to disturb the foundations of the *Tecmed* tribunal's emphasis on the primacy of the ballot box.

#### VII *Corporate Political Activity*

In his penetrating critique of *Carolene Products*, Bruce Ackerman upsets a number of assumptions associated with political-process theory. His objective is to reconstruct US constitutional doctrine by merging it with a 'well-developed body of pluralist political science.'<sup>148</sup> He pointedly remarks that Justice Stone got it wrong: the judiciary should be moved to protect 'anonymous and diffuse' groups, rather than those who are discrete and insular, for it is 'these groups that both political science and American history indicate are systematically disadvantaged in pluralist

142 Susan Marks. *The Riddle of All Constitutions: International Law, Democracy and the Critique of Ideology* (Oxford: Oxford University Press, 2000).

143 *Ibid.* at 53ff.

144 *Ibid.* at 58–9, 62.

145 As Schumpeter bluntly puts it, 'And we define: the democratic method is that institutional arrangement for arriving at political decisions in which individuals acquire the power to decide by means of a competitive struggle for the people's vote'; Joseph A. Schumpeter, *Capitalism, Socialism, and Democracy*, 3d ed. (New York: Harper & Brothers, 1950) at 269.

146 Pierre Rosanvallon, *Counter-Democracy: Politics in an Age of Distrust*, trans. by Arthur Goldhammer (Cambridge: Cambridge University Press, 2008) at 16–7.

147 See Samuel P. Huntington & Joan M. Nelson, *No Easy Choice: Political Participation in Developing Countries* (Cambridge, MA: Harvard University Press, 1976) at 12.

148 Ackerman, *supra* note 31 at 729.

democracy.<sup>149</sup> Rather than racial or religious minorities, Ackerman writes, ‘victims of sexual discrimination or poverty’ are the groups having the ‘greatest claim upon *Carolene’s* concern with the fairness of the pluralist process.<sup>150</sup> Reversing the order of priority established by *Lochner*, Ackerman suggests that it is those without property rights who lack ‘ample opportunity to safeguard their own interests through the political process.’<sup>151</sup>

By engaging with a well-developed body of empirical literature, my aim here is to unsettle understandings about those interests entitled to similar solicitude. The object is to document how corporate influence may be brought to bear on legislators and regulators. This data should generate some anxiety. As the pattern of experience in the United States and other mature democracies establishes, the pathologies associated with the influence of money on politics significantly disturb the possibilities for democratic practice and reform.<sup>152</sup> Wolin, for instance, likens unaccountable influence peddling in the United States (unaccountable, that is, except to shareholders) to a form of corruption that, when it becomes normal, ‘is so widely pervasive as to be functional to the operation of a system and, at the same time, so deeply embedded as to incapacitate the system from reforming itself.’<sup>153</sup> Robert Reich describes corporate lobbying as having engulfed citizen politics, even destroying the possibility of politics.<sup>154</sup> Surveying the damage wrought by the near collapse of the financial system, Simon Johnson and James Kwak liken the political influence of Wall Street banks to that of a ‘new American oligarchy’ – ‘a group that uses economic power to gain political power, and then uses that political power for its own benefit.’<sup>155</sup> The data drawn on here, though hardly as egregious as those that resulted in the global financial crisis, can be read as justifying the regulation, even proscription in some cases, of corporate political behaviour as suggested by the 1975 U.N.

149 Ibid. at 724.

150 Ibid. at 718. Korobkin, *supra* note 117 at 752, would include here the diffuse and small group of ‘local consumers’ who may be opposed to those local producers who favour discriminatory treatment against foreign producers.

151 Ackerman, *supra* note 31 at 724.

152 Jürgen Habermas, ‘Conceptions of Modernity: A Look Back at Two Traditions’ in Jürgen Habermas, *The Postnational Constellation: Political Essays*, edited and translated by Max Pensky (Cambridge, MA: MIT Press, 2001) 130 at 153.

153 Sheldon Wolin, *Politics and Vision: Continuity and Innovation in Western Thought*, expanded ed. (Princeton, NJ: Princeton University Press, 2004) at 600; Wolin, *Democracy Inc.*, *supra* note 2 at 287.

154 Robert B. Reich, *Supercapitalism: The Transformation of Business, Democracy, and Everyday Life* (New York: Alfred A. Knopf, 2007) at 163–4.

155 Simon Johnson and James Kwak, *13 Bankers: The Wall Street Takeover and the Next Financial Meltdown* (New York: Pantheon Books, 2010).

Charter of Economic Rights and Duties of States.<sup>156</sup> For the purposes, however, of this argument – to disturb the unsubstantiated claim in *Tecmed* that foreign investors are unrepresented in political processes – it is sufficient to show (if evidence is at all needed) that corporate political activity and influence are alive and well in the contemporary world.

This is an era in which states compete aggressively for scarce foreign capital.<sup>157</sup> Desirous of signalling to investors that they will be accorded the highest priority by the policy-making apparatus of the state, state actors have adopted a variety of signalling devices; for instance, abandoning foreign-investment screening mechanisms and regulatory measures or executing concession contracts with guaranteed rates of return. If conditions for wealthy corporate actors are favourable in the pre-establishment phase, investments are most vulnerable to political risk after their establishment,<sup>158</sup> as the theory of the obsolescing bargain suggests in the field of natural resources.<sup>159</sup> Indeed, foreign investors can be subject to discriminatory, even retaliatory, treatment by reason of national origin. Amy Chua, for instance, has documented how cycles of re-nationalization often are driven by ethnically charged targeting of foreign economic actors within.<sup>160</sup>

State actors, in turn, are dependant upon the success of private market.<sup>161</sup> The generation of private wealth through markets helps to generate resources for the state both to tax and to borrow resources which partly determine political success. These are some of the ‘structural mechanisms’ that help to explain the continuing influence of capital on state managers despite the ‘relative autonomy’ of states.<sup>162</sup>

156 U.N.G.A. Res. 3281 (XXIX), Art. 2 (2) (b): ‘Transnational corporations shall not intervene in the internal affairs of a host state.’

157 Zachary Elkins, Andrew T. Guzman, & Beth A. Simmons, ‘Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960–2000’ (1996) 60 *Int.Org.* 811; John Stopford & Susan Strange, *Rival States, Rival Firms: Competition for World Market Shares* (Cambridge: Cambridge University Press, 1991) [Stopford & Strange].

158 Nathan Fagre & Louis T. Wells, Jr., ‘Bargaining Power of Multinationals and Host Governments’ (1982) 13 *J. Int. Bus. Stud.* 9.

159 Almost ‘from the moment that the signatures have dried on the document, powerful forces go to work that quickly render the agreements obsolete in the eyes of the government’; Raymond Vernon, *Sovereignty at Bay: The Multinational Spread of US Enterprises* (New York: Basic Books, 1971) at 47.

160 Amy Chua, ‘The Privatization–Nationalization Cycle: The Link between Markets and Ethnicity in Developing Countries’ (1995) 95 *Colum. L. Rev.* 223 at 226.

161 Strom C. Thacker, *Big Business, the State, and Free Trade: Constructing Coalitions in Mexico* (Cambridge: Cambridge University Press, 2000) at 74–5.

162 Fred Block, ‘Beyond Relative Autonomy: State Managers as Historical Subjects’ in Fred Block, *Revising State Theory: Essays in Politics and Postindustrialism* (Philadelphia, PA: Temple University Press, 1987) 81.

Even in the age of corrupt lobbyists like Jack Abramoff, there is more than a simple one-to-one correspondence between the desires of capital and the actions of politicians.<sup>163</sup> It is precisely in that space – between the exercise of the franchise and the vote on the legislative floor – that representative democracy offers opportunities for the well-organized interests of the voteless to make their voices heard.<sup>164</sup> For these reasons, it is said that ‘the best-represented interests on Capitol Hill and in state capitals are surely the interests of corporations and businesses that are not even eligible to vote.’<sup>165</sup>

The empirical evidence within the United States, unsurprisingly, indicates that corporate actors will endeavour to effect political change.<sup>166</sup> Adopting the premise of profit maximization as an explanation for corporate political activity,<sup>167</sup> studies reveal that corporations making their home within the United States use political activity to modify costly regulations or to secure government contracts.<sup>168</sup> Businesses are likely to use a variety of means to achieve these political ends, including contributing to political action committees (PACS), lobbying, corporate constituency building, and charitable giving. Foreign firms operating within the United States, however, are less likely to

163 Bob Jessop, *State Theory: Putting the Capitalist State in Its Place* (Cambridge, UK: Polity 1990) at 99.

164 Charles Lindblom, *Politics and Markets* (New York: Basic Books, 1977); David Vogel, *Fluctuating Fortunes: The Political Power of Business in America* (New York: Basic Books, 1989). Vogel argues that business influence fluctuates according to the fortunes of the US economy – when the economy is doing well, business influence declines, and when the economy declines, business does well; *ibid.* at 8.

165 James Gardner, ‘Liberty, Community, and the Constitutional Structure of Political Influence: A Reconsideration of the Right to Vote’ (1997) 145 U. Pa. L. Rev. 951 at 951.

166 Hillman suggests that corporate political strategies are determined, in part, by the degree to which the country’s political system is corporatist (as in some European states) or pluralist (as in the United States). The more corporatist, the more likely a firm will use a ‘relational approach,’ building constituencies within the country; see Amy J. Hillman, ‘Determinants of Political Strategies in US Multinationals’ (2003) 42 Bus. Soc. 455 at 458. The more pluralist a state, the more likely a firm will employ a ‘transactional approach,’ using information strategies (providing information directly to political decision makers) through lobbying, testifying, etc.; *ibid.* at 474.

167 Kevin B. Grier, Michael C. Munger, & Brian E. Roberts, ‘The Determinates of Industry Political Activity, 1978–1986’ (1994) 88 Am. Pol. Sci. Rev. 911.

168 Wendy L. Hansen & Neil J. Mitchell, ‘Disaggregating and Explaining Corporate Political Activity: Domestic and Foreign Corporations in National Politics’ (2000) 94 Am. Pol. Sci. Rev. 891 at 892. Firm size and number of defence contracts are ‘powerful predictors’ of PAC activity; see Wendy L. Hansen & Neil J. Mitchell, ‘Globalization or National Capitalism: Large Firms, National Strategies, and Political Activities’ (2001) 3 Bus. Pol. 1 at 13, online: Berkeley Electronic Press <<http://www.bepress.com/bap/vol3/iss1/art1>> [Hansen & Mitchell, ‘Globalization’].

engage in visible political activity, have fewer PACS,<sup>169</sup> and also give less to charity.<sup>170</sup> Although they are likely to lobby less than home firms do, lobbying is more common among foreign firms than are other political activities because lobbying has low visibility.<sup>171</sup> Foreign firms, in other words, do not want to appear to be participating or interfering in democratic processes within host states.<sup>172</sup> This is even the case for Canadian-owned foreign firms, those that might be considered the 'least foreign' of foreign firms.<sup>173</sup>

Foreign corporate actors will, for the most part, follow host-state political practice and so seek to influence political decision making via back-door channels. The corruption conviction against Representative Bob Ney (related to influence peddling by lobbyist Jack Abramoff) exposed the outer limits of this sort of activity. Ney admitted to accepting thousands of dollars worth of gambling chips in exchange for assisting the owner of a Cyprus-based aviation company in obtaining a visa and for easing American restrictions on the sale of airplanes and airplane parts from Iran.<sup>174</sup> We can assume that, even without pay-offs in poker chips, in operative (even dysfunctional) representative democracies, foreign-based corporate actors will get their voices heard.

Other factors, coming out of the political-risk literature,<sup>175</sup> help to explain business success and failure in shaping host domestic policy. There are factors, many of them internal to foreign subsidiaries, that help to mitigate investor vulnerability to political risk. Data drawn from a study by Thomas Poynter of the experience of managers of foreign multinationals in Tanzania, Zambia, Indonesia, and Kenya in the 1970s suggest that the more complex the managerial and operational tasks undertaken by the foreign firm (making it more difficult for host states to take over via nationalization or indigenization), the larger the volume of sales to associated firms, the more intense the volume of exports, the greater the proportion of foreigners in managerial and technical positions (they are

169 PAC activity is permissible for US-based affiliates of foreign firms, so long as committees are run by US citizens and financed by US citizens or resident aliens; Hansen & Mitchell, 'Globalization,' *ibid.* at 9.

170 *Ibid.* at 895.

171 *Ibid.* at 898.

172 Wendy L. Hansen, Neil J. Mitchell, & Jeffrey M. Drope, 'Collective Action, Pluralism, and the Legitimacy Tariff: Corporate Activity or Inactivity in Politics' (2004) 57 *Pol. Res. Q.* 421 at 422 [Hansen *et al.*].

173 Hansen & Mitchell, 'Globalization,' *supra* note 168 at 14, 17.

174 Philip Shenon, 'Lawmaker Admits He Took Illegal Gifts' *The New York Times* (16 September 2006), online: [http://query.nytimes.com/gst/fullpage.html?res=9D07EFDD1331F935A2575AC0A9609C8B63&sec=&spon=&page\\_wanted=all](http://query.nytimes.com/gst/fullpage.html?res=9D07EFDD1331F935A2575AC0A9609C8B63&sec=&spon=&page_wanted=all).

175 'Political risk' refers to changes in government legislation or policy that have a negative impact on firm operations or profits.

less easy to replace), then the greater the foreign-firm bargaining power vis-à-vis the host government.<sup>176</sup> Poynter adds that, according to his data set, the more 'politically aggressive firms' experienced significantly less governmental intervention in their operations. The more frequent the contacts between the subsidiary and government, in other words, the less likely government would be to intervene negatively in the firm's operations.<sup>177</sup> Also determinative of firm bargaining power is the intensity of competition faced by a foreign subsidiary<sup>178</sup> and the number of 'firm-specific resources that are hard to copy.'<sup>179</sup> Bargaining power will likely erode over time to the extent that firm-specific resources can be 'easily imitated' or there are 'strategically equivalent substitutes.'<sup>180</sup>

How well does this experience translate to emerging or new democracies in the contemporary global South? Extrapolating from the work of Hansen *et al.*,<sup>181</sup> it is reasonable to assume that foreign corporate actors also will engage in political activity within these states. Premised upon the standard model of corporate profit maximization, the incentives to participate will be the same for both domestic and foreign corporations.<sup>182</sup> Foreign firms also can be expected to adopt political practices viewed as legitimate within the host-country political context. Japanese and British firms, according to a small sample of 1988 US data, were likely to spread political contributions to incumbents in both parties in much less partisan ways than they might have done at home.<sup>183</sup> The point is that 'corporate political strategies converge' around practices common within the host-state context – that foreign entities do not 'carry their home practices abroad.'<sup>184</sup> Despite the rhetoric about obsolescing bargains, the data reveal that foreign investors have a wide variety of mechanisms

176 Thomas A. Poynter, 'Government Intervention in Less Developed Countries: The Experience of Multinational Companies' (1982) 13 *J. Int. Bus. Stud.* 9 at 21 [Poynter].

177 *Ibid.* at 19, 20.

178 Chan W. Kim, 'The Effects of Competition and Corporate Political Responsiveness on Multinational Bargaining Power' (1988) 9 *Strat. Manag. J.* 289.

179 An 'MNC's bargaining power will likely erode to the extent that the initial bargaining power was a function of resources that can be easily imitated and for which strategically equivalent substitutes are available within the host country. In contrast, to the extent that an MNC's resource is valuable, rare, difficult to imitate, lacks close substitutes, it can provide a sustainable bargaining power position'; Chul W. Moon & Augustine A. Lado, 'MNC-Host Government Bargaining Power Relationship: A Critique and Extension within the Resource-Based View' (2000) 26 *J. Manag.* 85 at 22.

180 *Ibid.* at 111; Louis T. Wells & Rafiq Ahmed, *Making Foreign Investment Safe: Property Rights and National Sovereignty* (New York: Oxford University Press, 2007) at 68.

181 Hansen *et al.*, *supra* note 172.

182 Hansen & Mitchell, 'Globalization,' *supra* note 168 at 6.

183 *Ibid.* at 15. As Stopford and Strange, *supra* note 157 at 224–5, suggest, firms will not want to tie their future to any 'single elite group.' This is because 'the dynamics of change' can result in changes of policy direction to which managers should be attuned.

184 Hansen & Mitchell, 'Globalization,' *supra* note 168 at 17.

available to ameliorate political risk and engage in extensive lobbying, either alone or in coalitions. Resisting the notion that investors have only one shot at bargaining with host states, in a study testing investor influence in twenty-five transition states, Edmund Malesky found that ‘coalitions of investors do indeed lobby for political change and often have significant impact on the economic trajectory of their host countries.’<sup>185</sup> Relying on survey data of some 4 000 firms operating abroad in 48 countries in 1999–2000, Rodolphe Desbordes and Julien Vauday conclude that foreign and domestic firms share the same degree of political influence and that, given concessions that may have been obtained upon entry, advantages enjoyed by foreign firms over domestic ones do not obsolesce over time.<sup>186</sup> They conclude that ‘the bargaining power of foreign firms is generally high enough to outweigh any political liability of foreignness.’<sup>187</sup> We can provisionally conclude, then, that foreign corporate actors within host states with operative representative democracies would not be voiceless and even would be ‘represented’ in ways similar to those of nationally based corporate actors. They might elect, however, to pursue less visible forms of political action for fear of being seen as illegitimately influencing national or local politics.

It also could be that resort to extra-national legal fora has the effect of draining host states of efforts to make their political- and legal-decision-making apparatus more responsive to what might be called fairness claims by foreign investors.<sup>188</sup> Instead of a reliance on transnational legal resources, an emphasis on host-state reforms could generate greater interest in ordinary reforms that benefit citizens and investors alike. Ronald Daniels hypothesizes that generating legal enclaves for foreign investors ‘siphons off the investor voice from the enterprise of creating good and generalized rule of law institutions’ in the host country.<sup>189</sup> In his study using governance indicators

185 Edmund J. Malesky, ‘Rethinking the Obsolescing Bargain: Do Foreign Investors Really Surrender Their Influence over Economic Reform in Transition States?’ (Paper prepared for Presentation at the Annual Conference of the International Studies Association, San Diego, 24 March 2005, Draft 1) at 26, online: <[http://nathanjensen.wustl.edu/me/files/WP2\\_06.pdf](http://nathanjensen.wustl.edu/me/files/WP2_06.pdf)> .

186 Rodolphe Desbordes and Julien Vauday, ‘The Political Influence of Foreign Firms in Developing Countries’ (2007) 19 *Econ.Pol.* 421 at 447–8.

187 *Ibid.* at 424.

188 Franck, *supra* note 55 at 7–9.

189 Ronald J. Daniels, ‘Defecting on Development: Bilateral Investment Treaties and the Subversion of the Rule of Law in the Developing World’ (Paper prepared for Faculty Workshop, Faculty of Law, University of Toronto, 29 November 2004, Draft, 23 March 2004) at 4, online: <<http://www.unisi.it/lawandeconomics/stile2004/daniels.pdf>> [Daniels]. Newcombe, *supra* note 8 at 394, argues that the ‘difficulty’ with Daniels’ approach is that ‘many . . . investors have made significant efforts to resolve disputes in local fora’ and that, while there have been a significant number of treaty disputes filed, ‘the number does not itself suggest that foreign investors are abandoning domestic legal



reported by the World Bank, Tom Ginsburg produces suggestive evidence that BIT adoption leads to subsequent declines in rule-of-law variables.<sup>190</sup> He hypothesizes that, without the incentive effects of adjudicating investor-state disputes, which could improve local judicial decision-making quality, international alternatives ‘may perpetuate poor domestic institutions by allowing powerful actors to exit.’<sup>191</sup> Investors not only become uninterested in host-state legal developments; they demand contractual concessions from host states that are likely ‘to limit the state’s capacity to respond to legitimate public policy concerns through the creation of credible, transparent and participatory regulatory institutions.’<sup>192</sup> This sort of behaviour, Albert Hirschman observes, damages ‘the capacity of a state to achieve meaningful consensus about needed reforms.’<sup>193</sup> So as to illustrate the point, Daniels points to public-infrastructure concession contracts that have given rise to vociferous opposition by local national publics and to subsequent investor–state disputes. Contracts typically are non-transparent commitments for a lengthy term of years, lack public legitimacy, and freeze regulatory regimes, possibly at the expense of socially desirable regulatory changes.<sup>194</sup>

These hypotheses complement well some of the findings in the empirical literature. Recall that Poynter’s study found that more ‘politically aggressive firms’ experienced significantly less governmental intervention.<sup>195</sup> Frequent contact enhanced a foreign firm’s bargaining

institutions and law reform for an IIA [international investment agreement] enclave.’ The problem with Newcombe’s rejoinder is, first, that Daniels derives his hypothesis from rational actor modelling, following Hirschman’s classic on the use of exit over voice, and so makes no such empirical claim; see Albert O. Hirschman, *Exit, Voice, Loyalty: Responses to the Decline in Firms, Organizations, and States* (Cambridge, MA: Harvard University Press, 1970). Second, Newcombe cites only four investment-tribunal decisions in support of the point that investors do not ‘simply rely on their IIA rights as trump cards’; *ibid.* This hardly amounts to decisive proof. What is called for here is more research.

190 Tom Ginsburg, ‘International Substitutes for Domestic Institutions: Bilateral Investment Treaties and Governance’ (2005) 25 *Int’l Rev.L.&Econ.* 107 at 120–1.

191 *Ibid.* at 121.

192 Daniels, *supra* note 189 at 31.

193 Albert O. Hirschman, *Essays in Trespassing: Economics to Politics and Beyond* (Cambridge: Cambridge University Press, 1981) at 278. It ‘damages the capability of capitalism to reform itself’; *ibid.* at 257.

194 Daniels, *supra* note 189 at 34. Tobin and Rose-Ackerman similarly suggest that a world replete with BITs ‘reduces the interest of MNCs in property rights reform and enforcement in developing countries’; Jennifer Tobin & Susan Rose-Ackerman, ‘Foreign Direct Investment and the Business Environment in Developing Countries: The Impact of Bilateral Investment Treaties’ (Center for Law, Economic and Public Policy research paper, Yale Law School, No. 293, 2 May 2005) at 10, online: Social Science Research Network <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=557121](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=557121)>. When foreign investors ‘bypass local law and lower their risk through BITs, developing country governments may have lost a major incentive to strengthen their domestic property rights regimes’; *ibid.* at 34.

195 Poynter, *supra* note 176 at 19, 20.

power by keeping the host government apprised of the parent firm's contribution to the subsidiary (as in the case of technology transfers) and future plans for growth. Initiating contacts with government enabled firms to identify the sponsors of interventionist measures and to ascertain the extent to which government intended to redirect policy.<sup>196</sup> This is the sort of political behaviour, Poynter adds, 'familiar to domestic and state enterprises in most LDCs and, of course, present in the majority of developed countries as well.'<sup>197</sup> It may be the case, as the empirical research suggests, that foreign firms will want to adopt a less visible role in states than do home-based firms. Nevertheless, as these studies also suggest, there is still much that foreign firms do to alleviate what might be considered adverse political decision making. Yadong Luo, for instance, maintains that a more cooperative orientation toward the host state reduces political risk.<sup>198</sup> Data from a 1998 survey of senior managers of 131 foreign firms operating in China reveal that, in situations where firms contribute distinctive resources, maintain strong personal relations with government officials, develop credibility and trustworthiness, and accommodate the social needs of the host country, MNC–host government relations are improved. This logic of political accommodation is premised on the idea that the 'bargaining position of firms can be best safeguarded if their business interests accommodate rather than neglect or dominate public interests in host nations.' 'From the host government viewpoint,' Luo writes, 'an MNC's political accommodation shows its commitment to the host society. High accommodation mitigates the liability of foreignness as perceived by officials and amplifies the firm's credibility and legitimacy as perceived by the public.'<sup>199</sup> In short, corporate political actors who are attentive to local needs are more likely to thrive economically (admittedly, without guaranteed high rates of return) while simultaneously promoting the interests of local political

196 Ibid. at 20.

197 Ibid. at 21.

198 Yadong Luo, 'Toward a Competitive View of MNC–Host Government Relations: Building Blocks and Performance Implications' (2001) 32 J. Int. Bus. Stud. 401.

199 Ibid. at 406. Much of this bears a family resemblance to the idea of corporate social responsibility – obligations that transnational corporate actors are said to owe to people and the environment in which they operate; see Peter Muchlinski, *Multinational Enterprises and the Law*, 2d ed. (Oxford: Oxford University Press, 2007) at 100–4 [Muchlinski, *Multinational*]. For our purposes, it matters not what form codes of conduct take or whether these obligations have the capacity to be internalized within corporate culture. The empirical literature examined here instructs that it is in a foreign subsidiary's interests to operate in ways that are attentive to local needs and conditions, even without a vote in a legislative assembly.

communities.<sup>200</sup> This is not to say that we should expect transnational business operatives to gain a ‘corporate conscience’<sup>201</sup> or become ‘agents of justice.’<sup>202</sup> Rather, it is to underscore that transnational business enterprises are deploying these resources in myriad jurisdictions around the world and so are not in need of international investment law’s helping hand.

### VIII Conclusion

It turns out that the *Tecmed* tribunal’s recourse to the high ground of democratic theory was ill founded, at least in the case of foreign investors. Whatever the precise origins of political-process doctrine, we should understand this scramble to higher ground as an attempt to resolve some of the nagging legitimacy concerns that have arisen in regard to international investment law more generally.<sup>203</sup> It also serves to elide the nexus between robust democratic practice and the suppression of alternatives promoted by the investment-rules regime.

Treating foreign corporate actors as if they were enfranchised citizens turns out, then, to be the wrong analogy. As the empirical studies reveal, foreign corporate actors should, instead, be likened to host-state corporate actors in operative democracies who, *ipso facto*, do not have the right to vote but who nevertheless participate, and do influence, political processes. The question that remains is whether the political-process concerns of international investment tribunals can be redirected to those more worthy of their solicitude – to the propertyless rather than the propertied. Then, it could be said that the regime was serving the cause of democracy.

200 Good corporate ‘citizenship,’ argue Stopford & Strange, *supra* note 157 at 225, requires ‘more than building up contacts in the local society; it means taking actions that help fuel [local] development.’ Much of this, admittedly, bears a family resemblance to the idea of corporate social-responsibility – obligations which transnational corporate actors are said to owe to people and the environment in which they operate. See discussion in Muchlinski, *Multinational*, *supra* note 199 at 100–4.

201 Philip Selznick, *The Moral Commonwealth: Social Theory and the Promise of Community* (Berkeley: University of California Press, 1992) at 351–2.

202 Onora O’Neill, ‘Agents of Justice’ in Andrew Kuper, ed., *Global Responsibilities: Who Must Deliver on Human Rights?* (New York: Routledge, 2005) 37 at 49–50. Indeed, we might worry that the ‘new ethicalism,’ such as the tactics associated with corporate social responsibility, re-inscribe market logic in the public sphere by framing it as moral. See Ngai-Ling Sum, ‘Articulation of “New Constitutionalism” with “New Ethicalism”’: Wal-Martization and CSR-ization in Developing Countries’ in Peter Utting, ed., *Corporate Social Responsibility and Regulatory Governance: Towards Inclusive Development?* (London: Palgrave Macmillan, 2010); and Shamir Ronen, ‘The Age of Responsibilization: On Market-Embedded Morality’ (2008) 37 *Econ. Soc.* 1.

203 Schneiderman, ‘Legitimacy,’ *supra* note 18.