Developments

Review Essay – What Makes the International Investment Rules Regime Undemocratic?

By Joel Colón-Ríos & Martín Hevia[*]

[David Schneiderman, *Constitutionalizing Economic Globalization: Investment Rules and Democracy's Promise* (Cambridge: Cambridge University Press, 2008, 340pp.]

A. Introduction

In an era in which democracy seems to have been relegated to a secondary place by processes associated with economic and political globalization, David Schneiderman's *Constitutionalizing Economic Globalization: Investment Rules and Democracy's Promise* is an unusual book.[1] Globalization, we have been told, comes accompanied by "a sense of newness, heterogeneity, and fluidity," but Scheiderman's reminds us that all this emphasis on mobility and constant transformations "draws attention away from a transnational regime concerned with fixity and security."[2] This fixity not only compromises democracy's tendency towards openness and change, but restricts the state's economic functions and limits its redistributive capacity; in short, it reproduces an ideology according to which democracy is not to be trusted in economic matters.[3] In this context, Schneiderman's proposal to "institutionalize a limited set of constitutional rules that do not impede the possibility of living up to democracy's promise, that of innovation through self-government for the purposes of collective betterment," appears like a truly democratic call of arms.

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[1] DAVID SCHNEIDERMAN, CONSTITUTIONALIZING ECONOMIC GLOBALIZATION: INVESTMENT RULES AND DEMOCRACY'S PROMISE (2008).

[2] *Id*. at 1–2.

[3] *Id*. at 2.

https://doi.org/10.1017/S2071832200001644 Published online by Cambridge University Press

In *Constitutionalizing Economic Globalization*,[4] Schneiderman mounts an attack on "new constitutionalism."[5] New constitutionalism has been described as "the *political/juridical form* specific to neoliberal processes of accumulation and to market civilization."[6] It is a pre-commitment strategy that prevents future governments from taking measures contrary to the political project of neoliberalism by "removing key aspects of economic life from the influence of domestic politics within nation states." New constitutionalism manifests itself through a web of international treaties that provide stringent legal protection to foreign investment (such as the investment chapter of the North American Free Trade Agreement (NAFTA) and the international regime of Bilateral Investment Treaties (BITs)). These agreements usually contain a series of legally-enforceable mechanisms that limit the power of government and legislatures to intervene in the market, binding them to a version of economic liberalism and narrowing in important ways their field of political possibilities.[7] New constitutionalism involves a set of rules that act as a "disciplining check on democratic deliberation."[8]

In this review, we would like to focus in what we think is Schneiderman's main claim through *Constitutionalizing Economic Globalization* and his principal criticism of new

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[4] Schneiderman began to develop some of the arguments presented in CONSTITUTIONALIZING ECONOMIC GLOBALIZATION in a series of articles that include: David Schneiderman, *Banging Constitutional Bibles: Observing Constitutional Culture in Transition*, 55 U. TORONTO L. J. 833 (2005); David Schneiderman, *Canadian Constitutionalism, the Rule of Law, and Economic Globalization*, *in* PARTICIPATORY JUSTICE IN A GLOBAL ECONOMY: THE NEW RULE OF LAW (Patricia Hughes & Patrich A. Molinary eds., 2003); David Schneiderman, *Constitutional Approaches to Privatization: An Inquiry into the Magnitude of Neo-Liberal Constitutionalism*, 63 LAW AND CONTEMP. PROBS. 83 (2001); David Schneiderman, *Investment Rules and the Rule of Law*, 8 CONSTELLATIONS 521 (2001); David Schneiderman, *Investment Rules and the New Constitutionalism* 25 LAW & SOC. INQUIRY 757, 757 (2000); David Schneiderman, *The Constitutional Strictures of the Multilateral Agreement on Investment*, 9 THE GOOD SOCIETY 90 (1999); David Schneiderman, *NAFTA's Takings Rule: American Constitutionalism Comes to Canada*, 46 U TORONTO L. J. 499 (1996).

[5] There is a large body of literature that, from different perspectives and emphasis, points to the similarities between transnational trade regimes and constitutionalism. See for example DEBORAH CASS, THE CONSTITUTIONALIZATION OF THE WORLD TRADE ORGANIZATION (2005); STEPHEN GILL, POWER AND RESISTANCE IN THE NEW WORLD ORDER (2003). STEPHEN CLARKSON, UNCLE SAM AND US: GLOBALIZATION, NEOCONSERVATISM, AND THE CANADIAN STATE (2002); Alec Stone, *What is a Supra National Constitution? An Essay in International Relations Theory*, 55 REV. OF POL. 441 (1994); ERNST-ULRICH PETERSMANN, CONSTITUTIONAL FUNCTIONS AND CONSTITUTIONAL PROBLEMS IN INTERNATIONAL ECONOMIC LAW (1991).

[6] Stephen Gill, *Constitutionalizing Inequality and the Clash of Globalizations,* 4 INT'L STUD. REV. 47, 48 (2002).

[7] Schneideman, *Investment Rules and the Rule of Law*, *supra* note 4, at 522.

[8] Schneiderman, *NAFTA's Taking Rule, supra* note 4, at 501; Schneiderman, *Investment Rules and the Rule of Law, supra* note 4, at 522. These rules, according to Schneiderman, operate both externally to the state (as independent legal regimes that limit the scope of state action) and internally (through reforms in national constitutions and the exercise of judicial review). Schneiderman, *Investment Rules and the Rule of Law, supra* note 4, at 523.

constitutionalism: that nobody asks the people whether they think it is worth it for their country to become a party to this web of international trade treaties. Schneiderman argues that this results in limiting their representative's decision making power and their capacity to regulate the economy. For him, this is a big cost in terms of collective self-government. We agre. To a certain extent,[9] a community's own mode of laying out its existence is the best, not because it is the best in itself, but because that mode is its own.[10] However, we want to suggest that Schneiderman picks the wrong target: the real problem for collective self-government is not "new constitutionalism," but the inherent aristocratic nature of representative democracy. New constitutionalism is just another undemocratic product of an anti-majoritarian scheme.

Moreover, we think that Schneiderman's focus on the fact that investment and trade treaties impose limits on the scope of a state's legislative jurisdiction tends to obscure the deficiencies of representative democracy. These kinds of limits, after all, are not exclusive of this type of agreement, but of international treaties in general and are usually thought as a legitimate exercise of state power. This is why we think that the strongest parts of Schneiderman's analysis are those instances in which he directly attacks the investment rules regime in substantive terms (the injustices and bad results its produces, etc.), rather than his emphasis on the limits the regime imposes on democratic and majoritarian processes. Schneiderman may or may not be right about his attacks on neoliberalism; in any case, that is where the action lies. Even when they constitute a central part of investment treaties (and in that respect one might even characterize them as substantive), voluntarily imposed constraints on the decision making power of a country´s democratic institutions through international treaties are not necessarily problematic from a democratic perspective.

B. Constitutionalizing Economic Globalization

Schneiderman begins by outlining the basic contours of new constitutionalism. He explains that the project of new constitutionalism is to restructure and to institutionalize international political forms that emphasize market credibility and efficiency. The main idea behind this project is to insulate key aspects of the economy from the influence of the mass of citizens by imposing constraints on the conduct of fiscal, monetary, trade and investment policies. For Schneiderman, the ultimate aim of the investment rule regime is to install a transnational market place.[11] Key to the regime is the imposition of "discipline" on state institutions in order to prevent national interference with property rights and to

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[9] That is, to the extent that certain basic human rights are respected.

[10] *See, e.g.*, Joel Colón-Rìos & Martín Hevia, *The (Un)rule of Law in Puerto Rico—A Republican Approach*, *in* RULE OF LAW: TRANSFORMATIVE APPROACHES (K. Padmaja ed., 2008).

[11] SCHNEIDERMAN, *supra* note 1, at 8–9.

https://doi.org/10.1017/S2071832200001644 Published online by Cambridge University Press

provide entry and exit options for holders of mobile capital with regard to particular jurisdictions. To achieve these aims, it is necessary to limit the processes of democratic decision making within nation states. Through constitution-like edicts, the investment rules regime confers corporate capital privileged rights of citizenship and representation while the role of majoritarian politics is reduced.[12]

Put slightly different, "the people" are deprived of the possibility of influencing important decisions regarding economic policy. Only a few, that is, those who negotiate these agreements, have a say on whether different countries are to be part of "a web of interlocking and legally binding agreements intended to provide the most stringent legal protection for foreign investment abroad."[13] Against these anti-democratic developments, Schneiderman proposes a 'democratizing constitutionalism' that is more consistent with a democratic society and that becomes "a means for incorporating political protest and keeping open a range of achievable political goals."[14] According to this view, democracy need not conform to "any precise model beyond guaranteeing basic legal minima for democratic will formation."[15] In a democracy, everything should be open to change (as long as the very rights and institutions that make it possible are maintained), and that includes the power of regulating the economy in order to protect or achieve what are considered superior social objectives.

After outlining the main characteristics of the investment rules regime in Chapter 1, Schneiderman moves to identify in detail its constitution-like features, which create the institutional forms that are necessary in order to prevent determinate political outcomes. In our view, Schneiderman is successful in pointing to the similarities between the investment rules regime and a constitutional order. For example, akin to a constitution that operates under a certain conception of constitutionalism, he argues that investment rules seek to resolve a tension between majoritarian politics and minority interests, but by way of rendering foreign investors as vulnerable minority groups.[16] Moreover, like traditional liberal constitutions, investment agreements aspire to be binding across generations (thus, they are difficult to change), often have binding enforcement mechanisms (which usually take the form of judicial review), and are characterized by vague and abstract rights language (such as fair and equal treatment, reasonableness,

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[12] *Id.* at 38.

[13] *Id.* at 206.

[14] *Id.* at 14.

[15] *Id.* at 14.

[16] *Id.* at 38.

https://doi.org/10.1017/S2071832200001644 Published online by Cambridge University Press

arbitrariness, and due process).[17] Consistent with these constitution-like features, international investment agreements also entitle investors to sue states for damages when their 'rights' are violated.

In Chapter 2, Schneiderman examines a specific aspect of the investment rules regime by skillfully showing how the expropriation provisions of investments agreements appear to have been heavily influenced by the U.S. constitutional doctrine of the taking of private property. Following Boaventura de Sousa Santos' conception of "globalized localism,"[18] Schneiderman shows that these expropriation rules, as many other institutions associated with economic globalization, are examples of local provisions that have gone global.[19] In Chapter 3, Schneiderman considers the aforementioned takings rule in light of the jurisprudence of NAFTA and other investment tribunals. By providing an overview of key cases, he shows that, while many tribunals have decided in favor of an expansive view of the takings rule, few have in fact found there to be compensable takings. Instead, Schneiderman explains that claimants appear to have been more successful when invoking the standard of fair and equitable treatment, which he maintains has begun to play a similar disciplinary function as the takings rule.[20]

In Chapter 4, 5, and 6, Schneiderman considers the ways in which the investment rules regime impacts domestic constitutional and statutory arrangements by providing examples of how "transnational legal disciplines are capable of having numerous domestic legal effects on state projects."[21] These chapters are in our opinion an invaluable contribution, since they detail 'real life' cases of the limiting effects international investment treaties can have on states' capabilities of regulating the economy and of adopting different kinds of redistributive measures.

Accordingly, Chapter 4 includes an analysis of the experience of Canada in 1994 when Parliament proposed the 'plain packaging' of cigarettes as a public health measure, a proposal that was eventually dropped, at least in part as a result of the possibility of an adverse ruling under NAFTA's takings rule.[22] In turn, Chapter 5 considers the degree in which South Africa's engagement with investment rules can affect its ability to promote

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[17] *Id.* at 39.

[18] BOAVENTURA DE SOUSA SANTOS, TOWARD A NEW COMMON LEGAL SENSE: LAW, GLOBALIZATION, AND EMANCIPATION (2002).

[19] SCHNEIDERMAN, *supra* note 1, at 47.

[20] *Id.* at 71.

[21] *Id.* at 114.

[22] *Id*, at 128.

equality and the lessening of the economic implications of apartheid, as its constitution mandates.[23] This part of the book concludes in Chapter 6, which examines, in light of new constitutionalism, the fate of constitutional orders that commit governments to nationalization or management of key economic sectors—as is the case with several Latin American constitutions. Schneiderman focuses on the Colombian Constitution of 1991, which had to be amended in order to adjust its property clause (which authorized the legislative expropriation of property without compensation for 'reasons of equity') to the disciplines of new constitutionalism.[24]

The last three chapters of the book address different possibilities of disrupting the logic of the investment rules regime. After arguing that new constitutionalism comes accompanied by a view of citizenship constructed around the values of the market (citizens as "market" or "economic" citizens), Chapter 7 presents different conceptions of citizenship (consumer citizenship, subnational citizenship, and computer-mediated citizenship) that might facilitate possible—although limited—sites of resistance. Chapter 8 considers in detail the 'rule of law' project advanced by the investment regime rules for the protection and promotion of foreign investment. This project is intended to "slow down and paralyze certain political processes" with the objective of guaranteeing economic liberty, equal treatment or 'non-discrimination,' fair and equitable treatment, as well as the prohibition of expropriation or measures 'tantamount' to expropriation.[25] In that chapter, Schneiderman establishes interesting similarities between this project and the functions the rule of law played in the hands of judges during Weimar Germany.

Schneiderman concludes his book by examining the ways in which legislative reform was used in the United States during the commonwealth period (1800-1860) to actively promote national development by granting—privileges and concessions (always subject to modification and repeal by the state) to corporations whose interests coincided with those of the public.[26] Here, "the law performed an enabling function, generating a framework for action and the release of political energies."[27] For Schneiderman, this framework approximates the model of democratic constitutionalism that he defends in the first chapter. Finally, the author identifies a set of alternative measures to the investment rules regime: anti-discrimination laws and insurance. Thus, for instance, in countries with functioning human rights oversight bodies, discriminatory activities against economic

[23] *Id.* at 157.

[24] *Id.* at 168.

[25] *Id.* at 206.

[26] *Id.* at 227.

[27] *Id.* at 228.

https://doi.org/10.1017/S2071832200001644 Published online by Cambridge University Press

actors based solely on their foreign status would be prohibited.[28] On the other hand, either public or private foreign investment insurance programs could provide security to foreign investors from the losses sustained as a result of measures that amount to expropriation under international law.[29]

C. The Aristocratic Nature of Representative Democracy

From their inception, modern republics established the absolute separation between representatives and ordinary citizens through the institutions of representative government. The old principle of *isegoria*, according to which the citizens of Athens had a right to issue proposals to the Assembly, was replaced by the right of universal suffrage. Such a right can be seen as the right to consent to the power of those who are in office, rather than to become the author of the laws to which one is subject. According to this account of democracy, the people participate *only* through the voice of their representatives. But those representatives are not bound at all by "the will" of their constituencies; they can exercise their independent judgment once they enter office: in traditional representative democracies, there's no way in which voters can annul the decisions of their representatives.[30]

Let us stay back in time for a while. Recall the founding fathers of the American Constitution and *The Federalist Papers*. James Madison argued that one of the reasons why the new constitution should establish a representative government was the existence of *factions*—groups of citizens that acted motivated by a common passion or by an interest that was contrary to the interests of other groups of citizens. Madison feared what is known as "the tyranny of the majority," and as an answer to that fear, the founding fathers developed the idea of "representative democracy."[31] In such system, the danger of the tyranny of the majority is driven away by some institutional devices, namely, the representative form of government and the separation between elected officials and ordinary citizens, the separation of powers among different departments of government and the principle of checks and balances that follows from it.[32]

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[28] *Id.* at 232.

[29] *Id.* at 233.

[30] Unless they have a case that would allow them to go before the courts to issue a complaint, or if the constitution allows for the popular initiative for the abrogation of ordinary laws. *See*, *e.g.*, URU. CONST. art. 79.

[31] Claude Ake, *Dangerous Liaisons: The Interface of Globalization and Democracy*, *in* DEMOCRACY'S VICTORY AND CRISIS 283 (Alex Hadenius ed., 1997).

[32] Madison also had in mind the indirect election for the positions of the President, Vice President, and Senators, but that only applies to those countries that followed the US constitutional tradition.

The main point of this system for what concerns us here is one that, perhaps, is less obvious. Such a feature is what Bernard Manin called "the aristocratic face of election" as a way of selecting authorities: the election has a democratic feature—the equal right to vote of all citizens—but, at the same time, it has a non-egalitarian and aristocratic aspect.[33] Despite the right to universal suffrage, the election privileges notable citizens. Of course, that privilege depends on the subjective preferences of voters, who do not treat candidates equally: candidates are not chosen on the basis of a universal or previously determined criterion—for instance, an exam.[34] Besides, in the competition to attract votes, candidates put forward political campaigns that aim at promoting their ideas and qualities among all the citizenry. However, not all the citizens are able to afford the cost of those campaigns.[35] Nevertheless, it's true that elections are held very often, which gives place to the possibility that voters change their subjective preferences. That fact allows for the possibility that the positions may be occupied by different candidates. However, that does not make modern republics less aristocratic; even if nobody has legal obstacles to run for office, not all the citizens have the same opportunities of getting into public positions. The elective system and the institutional arrangements of representative democracies have little to do with collective self-government; important decisions about substantive issues rest in the hands of a few.

Schneiderman's main contention is that new constitutionalism mandates the entrenchment, *beyond the reach of majoritarian control*, of rules for the free movement of transnational capital, a regime to which citizens are subject but in whose creation they did not play a role. Now, isn't this an old familiar problem? That is, Canada and many other countries are bound by these trade agreements, and as a result, the power of elected officials to make decisions of a certain kind is diminished, and arguably citizens are unable to benefit from the advantages of regulatory and redistributive measures. But even if these countries weren't bound by these agreements, the problem would still be there because what really matters is that in both situations the people were not supposed to be *necessarily* consulted about the decisions that affect and regulate their lives (much less to participate in their creation). As we suggested, representative democracy was never thought to be a process of *collective* discussion on the basis of which the public life of a community could be organized.

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[33] BERNARD MANIN, THE PRINCIPLES OF REPRESENTATIVE GOVERNMENT, 132–60 (1997).

[34] *Id.*

[35] This problem may be ameliorated by the state intervention in the funding of political campaigns in order to make the competition more democratic.

https://doi.org/10.1017/S2071832200001644 Published online by Cambridge University Press

D. Democratic Politics and International Treaties

Schneiderman's argument about the democratic deficit of the regimes created by investment treaties is also vulnerable to a further and different critique. An objection to investment treaties that rests on the fact that they limit the scope of the decision making power of governments and their peoples is actually an objection to international treaties *in general*. That is, all international treaties, by definition, place limits on the kind of policies that a state can adopt. Take, as an example, human rights treaties.[36] Human rights treaties seek to establish limits on the kind of laws that can be adopted by a legislature (regardless of how democratic and participatory the process that led to their adoption) if they violate what are considered to be the fundamental rights of individuals. Just as most people, Schneiderman does not seem to object to human rights treaties, and in fact, in Chapter 9 of the book, he presents the UN Human Rights Committee, which operates under the International Covenant on Civil and Political Rights, as an appropriate means for assessing the discriminatory nature of state practices that deny property rights.[37]

Consider, for example, the controversy about the death penalty and human rights in Argentina. The existence or non-existence of the death penalty is arguably outside those basic legal minima that are necessary for democratic will formation, yet most people committed to human rights consider the death penalty unacceptable from a substantive perspective.[38] Not surprisingly, several human rights treaties seek to limit the imposition of the death penalty or prohibit its re-establishment in countries that have previously abolished it. One of these treaties is the Pacto de San José, adopted in 1969 and subsequently ratified by many members of the Organization of American States, including Argentina.[39] Under this treaty, the Argentine State is unable to adopt laws that make certain crimes punishable by death, even when, every now and then (usually after a heinous crime is widely publicized by the media), there seems to be clear popular expressions in favor of re-establishing the death penalty in the country. Just as trade agreements, this human right treaty is clearly counter-majoritarian: it would prevent a simple majority of the people's representatives from re-establishing the death penalty even if, upon democratic deliberation, they decide that to be the right policy. Even if Schneiderman opposed human rights treaties as a matter of democratic principle, he would still probably agree that the repudiation of an investment treaty that reproduces the

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[36] The European Union provides an additional example of the way countries, through international treaties, limit the scope of their legislative power and submit to the decisions of external institutions.

[37] SCHNEIDERMAN, *supra* note 1, at 232.

[38] *Id.* at 14.

[39] Organization of American States, American Convention on Human Rights art. 4, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

features of the investment rules regime is more urgent than the repudiation of the Pacto the San José. But what this shows is that his objection to investment treaties has a substantive dimension that is obscured by his focus on the fact that these treaties impose limits on majoritarian decision-making.

Schneiderman's objection to investment treaties would be stronger if it were to take a decidedly substantive form: that the *kind* of limits that these treaties impose on democratic politics—limits that have to do with the state's capacity to regulate the economy—are unacceptable because, for instance, they lead to economic injustices, because they protect the interests of the powerful over those of ordinary people, in short, because they provide a juridical skeleton that facilitates the implementation of the political project of neo-liberalism.[40] It is not enough to point to the juridical limits that investment treaties impose on democratic politics.[41] The problem is the *content* of those limitations and the fact that they inhibit the ability of governments to intervene in the market, but not the idea of *a* limitation on the scope of the state's power. Instead of basing his critique to investment treaties on the way they affect democratic decision-making, Schneiderman could base it on the economic injustices these treaties can cause. This does not mean that democracy is irrelevant to his objection, but that it comes to play after one has convinced other citizens that investment treaties (unlike their human rights counterparts) are substantively undesirable.

This is particularly important when some countries have begun to make investment treaties (and international treaties in general) the possible object of popular consultation.[42] In those cases, the democratic objection to these treaties would be weaker,

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[40] SCHNEIDERMAN, *supra* note 1, at 2. Moreover, as Sornarajah has argued, it may also be that these treaties are based on the "initial lie that [their] aim was to protect reciprocal flows of foreign investment but in effect protecting only the one-way flow that takes place from the developed state to the developing state." M. Sornarajah, *Power and Justice: Third World Resistance in International Law*, 10 SING. Y.B. INT'L L. 19, 31 (2006).

[41] Of course, the procedure/substance dichotomy is fragile as its best: if we favor certain procedures above others is because there is something substantive (e.g. that every participant is treated like an equal member of the community) that we value about them. But our point here is simply that the fact that an international investment or trade treaty imposes limits on the decision making power of democratic institutions is not enough to maintain that they are inconsistent with democracy (if that were the case, we would be forced to abandon, in the name of democracy, the institution of international treaties altogether).

[42] The new constitutions of Ecuador and Bolivia contain provisions that allow people to require the government (through the collection of signatures) to call a referendum before an international treaty comes into effect. For example, Article 258 of the Bolivian constitution states that "Any international treaty must be approved through a popular referendum when requested by five percent of the citizens registered to vote, or thirty five percent of the representatives of the Plurinational Legislative Assembly. These initiatives can also be used to petition to the Executive Organ the subscription of a treaty." (Cualquier tratado internacional requerirá de aprobación mediante referendo popular cuando así lo solicite el cinco por ciento de los ciudadanos registrados en el padrón electoral, o el treinta y cinco por ciento de los representantes de la Asamblea Legislativa Plurinacional. Estas iniciativas podrán utilizarse también para solicitar al Órgano Ejecutivo la suscripción de un tratado"). BOL. CONST. art. 258. The constitution of Ecuador, in addition to a similar provision (Article 420), states in Article 422 that "The

since the 'people themselves' might consent to limit the scope of their representatives' decision-making power in order to give way to what is usually presented to them as the possibility of economic prosperity. In October 2007, for example, the Costa Rican electorate ratified, after what appeared to be a period of intense public debate, a free trade agreement with the United States, the first time in history in which such a treaty is subject to a referendum.[43] If Schneiderman is right about the undesirability of investment treaties, then the Costa Rican electorate was wrong. However, in order to show that they were wrong, it would not suffice to say that they were wrong because they limited their own power to do certain things (as this is what international treaties and, in fact, constitutions do); it would be necessary to argue that they were wrong because they didn´t realize that those *particular* limits were not beneficial from an economical and political perspective.

The democratic objection to investment treaties should not be based—at least not exclusively based—on democratic *theory*, but on arguments that seek to distinguish between desirable and undesirable exercises of democratic power. This should not be too difficult since, as Schneiderman shows in Chapters 4–6, the investment rules regime has the potential of negatively affecting the lives and the quality of life of millions of human beings. The shift of emphasis from procedure to substance is not only necessary to accommodate the defense of human rights treaties as consistent with a commitment to democracy. In light of the actual possibility of democratic politics playing an increasing role in the adoption of investment treaties, this move becomes urgent: the objection would become moot once political leaders are able to legitimize these treaties through democratic (and even highly participatory) methods.

E. Final Thoughts

In considering the value of Schneiderman's contributions, our critiques should not be understood as objections to his overall project. On the contrary, they are examples of the kind of questions that his diagnosis of the status of democracy under new constitutionalism makes urgent. Perhaps today, when a transnational regime in which the

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adoption of international treaties or international instruments in which the Ecuadorian state cedes its sovereign jurisdiction to international arbitration tribunals, in contratual or commercial issues between the State and natural or juridical persons is prohibited..." ("No se podrá celebrar tratados o instrumentos internacionales en los que el Estado ecuatoriano ceda jurisdicción soberana a instancias de arbitraje internacional, en controversias contractuales o de índole comercial, entre el Estado y personas naturales o jurídicas privadas..."). ECUADOR CONST. art. 420, 422.

[43] The agreement was approved by a 51% to 48 % margin. The treaty, the Dominican Republic-Central American Free Trade Agreement (DR-CAFTA), also includes Guatemala, Nicaragua, Honduras, El Salvador and the Dominican Republic. The Dominican Republic-Central America-United States Free Trade Agreement, Aug. 5, 2004, Pub. L. No. 109-53, 119 Stat. 462, *available at* http://www.ustr.gov/Trade_Agreements/Bilateral/CAFTA/CAFTA-DR_Final_Texts/Section_Index.html.

possibilities of democratic politics are limited in important and arguably undesirable ways is in place, it is time to begin to see that our traditional conception of democracy has always been a limited one.

Although we have always agreed that democracy means "rule by the people," our disagreements regarding the best interpretation of that ideal have prevented us from taking it seriously and attempting to institutionalize its most basic implication: that to say that the people rule themselves is to say that they are a 'self-governing' people; a group of human beings that come together as *political equals* and give themselves the laws that will regulate their conduct and the institutions under which they live. The basic implication of the ideal of the "rule by the people" is surely diminished in important ways by investment treaties adopted without any form of popular consultation. That implication is not taken seriously in our tradition of representative democracy either, where fundamental political decisions rest in the hands of a few.

Schneiderman's book is an important reminder that the very structure of democratic institutions and decision-making methods are still (and perhaps should always remain) a work-in-progress. This is true now more than ever because transforming a regime that seems to affect different groups in different ways, requires giving more political power to those who are more likely to be in the losing end of the equation. And if we take Schneiderman's analysis as an indication, this losing end takes the form of popular majorities. We have no doubt that Schneiderman has been more than able in accomplishing his stated objective of exploring the implications of the institutional fabric of the investment rules regime for democratic self-government.[44] His book is important not only for constitutionalists, international lawyers and political scientists, but for anyone interested in the fate of democracy in the 21st century.

[44] SCHNEIDERMAN, *supra* note 1, at 2.

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