FOREWORD

Fostering national development is one of the twin goals of international investment law. Foreign capital, technology, and enterprise are, of course, indispensable for development, but meaningful and self-sustaining national development is neither achieved nor measured simply in terms of increases in physical infrastructure and GDP. A critical ingredient for self-sustained development in any state is good governance based on the rule of law as an integral part of its political ecology. Good governance is a critical component of economic opportunity, because those about to sink capital, technology, and enterprise in pursuit of profit must rely upon it in their business planning. For these reasons, bribery of officials and the consequent corruption of national legal systems is a significant issue for international investment law, that part of international law designed to facilitate foreign direct investment to accelerate the economic development of recipient states. The elimination of corruption is a central policy-goal that has been confirmed in lofty, if yet general terms, in major multilateral conventions as Dr Llamzon demonstrates in this brilliant book.

Everyone condemns bribery and corruption. No one argues that the practices are beneficial or even value neutral. The challenge in this area of law has never been securing an international consensus that money-honest government is good and that the corruption of public officials is bad. The problem has been devising a method to implement that consensus in the detailed investment transactions that take place in a world in which many states have weak or corrupt legal systems and even in states in which bribery of public officials is, for all intents and purposes, the coin of the realm.

Responsibility for implementing the international policy has fallen to investment tribunals operating under bilateral and multilateral investment treaties. Their very varied decisions (and non-decisions), brilliantly dissected here by Dr Llamzon, show just how difficult a task it is.

The challenge for investment tribunals faced with cases in which bribery or corruption has been alleged is usually presented as evidentiary: determining whether bribery occurred. Actually, the real task often begins with that factual determination, for at that point, far thornier questions come to the fore and even though they may not be expressed but merely hover in the background, they may influence decision. These types of questions cover a wide range for example, what was the purpose of the payment–whether to 'grease' a transaction that was otherwise lawful or to secure the waiver of an important law or regulation that should have been applied or to create an entirely fictional transaction whose only economic function is to mulct the State while the partners in corruption, investor and official, share the spoils? Was the bribe 'offensive' or 'defensive', i.e., was it paid to initiate the investment or was it paid once the investment had been sunk and if the latter, was it paid to protect the investment from what would have been an unlawful interference by the official soliciting the bribe? Was the bribe solicited by an official or eagerly pressed by the investor? What was the degree of volition or coercion of the briber? Was the official soliciting the bribe acting on his or her own behalf, or was it a case in which the official was 'robbing for the Crown', as an official in one instance explained apologetically to his victim, in Horacio Verbitzky's

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celebrated exposé?[1] Whether or not bribery occurred, was the investment otherwise *bona fide* and was it of real benefit to the host state? If so should that factor play a role in determining the lawfulness of the investment as well as in assessing the damages to which the investor might be entitled?

Although, *in limine*, one may ask whether these questions should even be posed. As a constitutive matter, should the international policy guiding investment tribunals be one of zero tolerance? If it is, the only question for the tribunal confronting allegations of bribery is whether it occurred. If it has, none of the other, post-factual questions would even be admissible. The apparent moral clarity and simple ability to implement such a constitutive principle generates its own problems: it punishes only one party while rewarding the other in a bilateral transaction in which both parties are *in pari delicto*; in so doing it may actually incentivize official demands for bribes.

Dr Llamzon tackles these difficult questions, in terms of international and national law, morality and professional ethics. His analysis of every published case involves a detailed treatment of the facts and arguments of the parties and not simply quotation of a sentence in the award. As a result of this painstaking methodology, he is able to reconstruct for his readers how the tribunals actually grappled with the issues. The end-product is a most accurate description of decision trends along with searching appraisals of them in terms of policies which can contribute to accomplishing the goals of international investment law and world public order. Dr Llamzon's cautious introduction of the law of State responsibility as a corrective for the asymmetric tendency in decision trends is brilliant. Overall, this book will prove indispensable to scholars, international legislators, international arbitrators, and counsel who argue before them.

It will continue to be indispensable, for the problems Dr Llamzon treats bode to stay with us. Even if all the governments of the world were suddenly to become effective constitutional democracies, corruption would not disappear. Recall Gibbon's observation of the later Roman Empire: 'Corruption, the most infallible symptom of constitutional liberty, was successfully practised: honours, gifts, and immunities were offered and accepted as the price of an episcopal vote"[2] Indeed, it is especially in effective constitutional democracies that corruption seems inescapable or, as Gibbon puts it, 'infailible' precisely because, in such social arrangements, each person is free to cultivate identities and to be subject to multiple loyalty systems. What we call'corruption' is the product of two competing loyalties, one of which must be betrayed, in a specific case, in order to serve the other and rare is the loyalty system that directs its subjects simply to yield to another. To be sure, Jesus of Nazareth, in one notable exception, enjoined his followers to 'render unto Caesar the things which are Caesar's and unto God the things that are God's'.[3] Alas, even this seemingly unequivocal conflicts rule can require case-by-case interpretation.

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[1] Horacio Verbitsky, Robo *para la corona: los frutos prohibidos del árbol de la corrupción*, Planeta, 1991.
[2] 3 Gibbon, Decline and Fall of the Roman Empire 385.
[3] Matthew 22: 20-22.

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