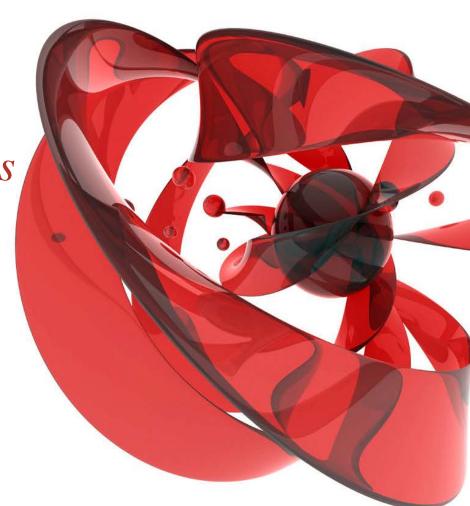
ALLEN & OVERY

Corruption:

Justifications and excuses

Kiev Arbitration Days
5 November 2015



Starting point: there are unlikely to be any justifications or excuses

- "An investment will not be protected if it has been created in violation of national or international principles of good faith; by way of corruption, fraud, or deceitful conduct; or if its creation itself constitutes a misuse of the system of international investment protection under the ICSID Convention. It will also not be protected if it is made in violation of the host State's law"

Hamester v. Ghana, ICSID ARB/07/24, Award, 18 June 2010

Failed justifications

- Payment is "a gift of protocol" (WDF v Kenya)
- Bribery is the only way to do business (WDF v Kenya)

Other possible justifications or responses

- State should be estopped from relying on corruption defence if it condones (expressly or tacitly) the corrupt behaviour
 - Relevance of State's investigation into allegations of official corruption
- Payment was made under duress
 - But even a payment under duress is likely to be treated as corrupt
- Payment was lawful under the applicable law
 - E.g. facilitation payments are lawful under some national laws
 - But transnational public policy against corruption may take precedence
- Any corruption related to the conduct of the investment rather than its making
 - But corruption likely still to make claim inadmissible or provide defence on the merits

Key battleground: proof of corruption

- Once corruption is proven, it is very hard to justify
- This makes proof of corruption a key battleground
- Difficulties of proof have led to controversies over:
 - Burden of proof
 - Standard of proof

Fallback options for the allegedly corrupt party

- Counterclaim for restitution?
 - A corrupt payment is a bilateral transaction
 - Arguably its recipient has been unjustly enriched and should be liable to repay it
- Each party should bear its own costs
 - Recipient with unclean hands should not recover its costs

Thank you



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