

# ALLEN & OVERY

*Corruption:  
Justifications and excuses*

Kiev Arbitration Days  
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## 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**



**James Freeman**

**Counsel**

**[james.freeman@allenovery.com](mailto:james.freeman@allenovery.com)**

**+44 (0) 20 3088 2496**