



**MAX PLANCK INSTITUTE**  
FOR COMPARATIVE PUBLIC LAW  
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# ***A Strategy for Defeating Objections to Jurisdiction Based on Investment- Establishment Illegality***

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# THE PROBLEM

- Example
  - Apartment-Complex Case
- Specification of the Problem
  - Meritorious claim destroyed by corruption
- The Challenge



## A SOLUTION

### *Use Doctrine of Duress to Nullify States' Jurisdictional Objection*

- Premises to Prove:
  - P1: duress app. to arbitration agreements
  - P2: temporal applicability of duress
  - P3: use of duress to nullify jurisdic. object.
  - P4: part. in corruption = product of duress



## PREMISE 2: TEMPORAL APPLICABILITY (1)

- Question:

*Does duress apply to corrupt dealing between investor and state?*

- Problem

- Corrupt dealing before the formation of the arbitration agreement

- Option 1:

- Duress applies pre-formation of arb. ag.



## PREMISE 2: TEMPORAL APPLICABILITY (2)

- Option 2:
  - Arb. agreement has already formed at time of corruption

*Premise 1: investor-state arbitration agreements are unilateral contracts*

*Premise 2: unilateral contracts form when promisee (investor) starts performing*

*Premise 3: investor starts performing when its makes its investment*



## PREMISE 3: POTENTIAL OF DURESS

- Question:

*Can duress be used to nullify states' jurisdictional objections?*

- Problem
  - Traditional Use 1: avoid contract
  - Traditional Use 2: avoid change to contract
- Answer: emphasis flexibility of duress



## PREMISE 4: SUBSTANCE OF DURESS

- Question:

*Could investors' participation in corruption amount to product of duress?*

- Element 1: illegitimate threat
- Element 2: threat causes investor to act
- Element 3: no reasonable alternative



## SOME LIMITATIONS

- Participation in systemic corruption
- Application of English law
- Sanctioning of investors' participation in systemic corruption