

Why Corruption Goes Uncovered in Arbitration

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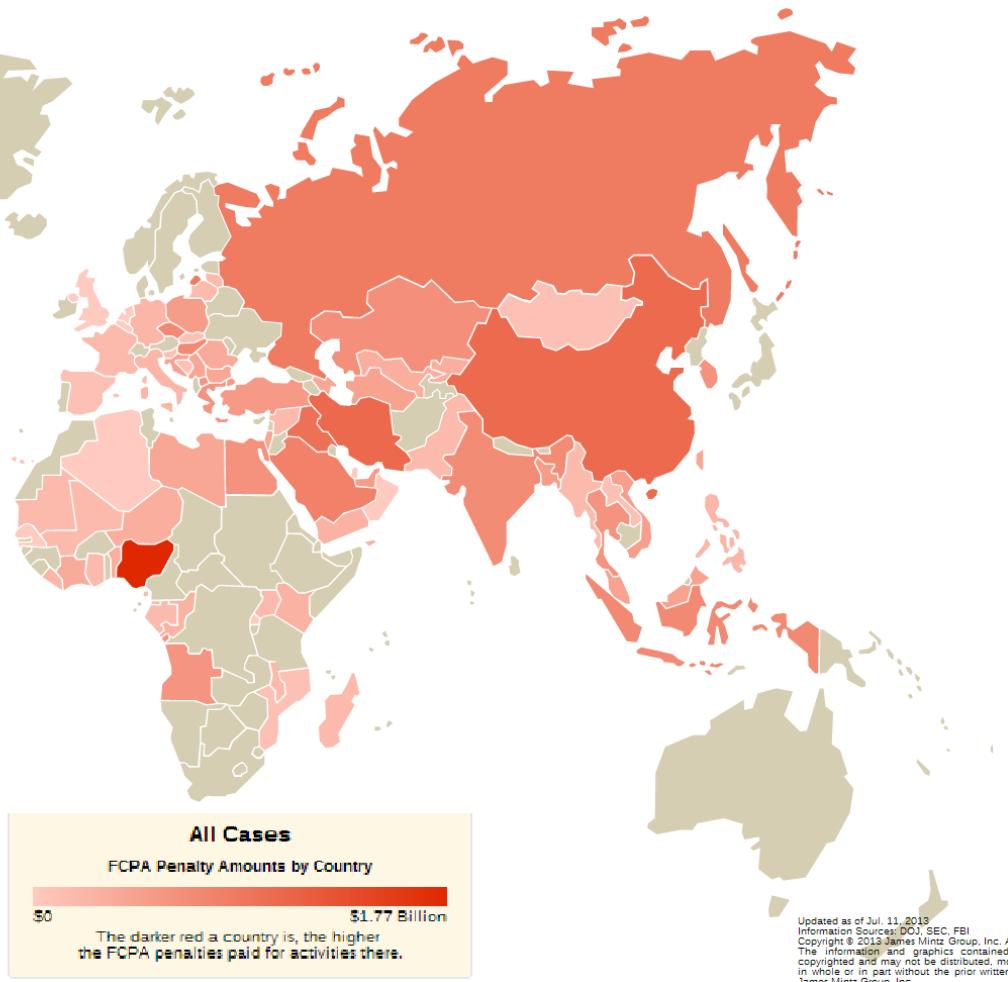
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WHERE THE BRIBES ARE

Penalties in U.S. Government FCPA Cases Since 1977

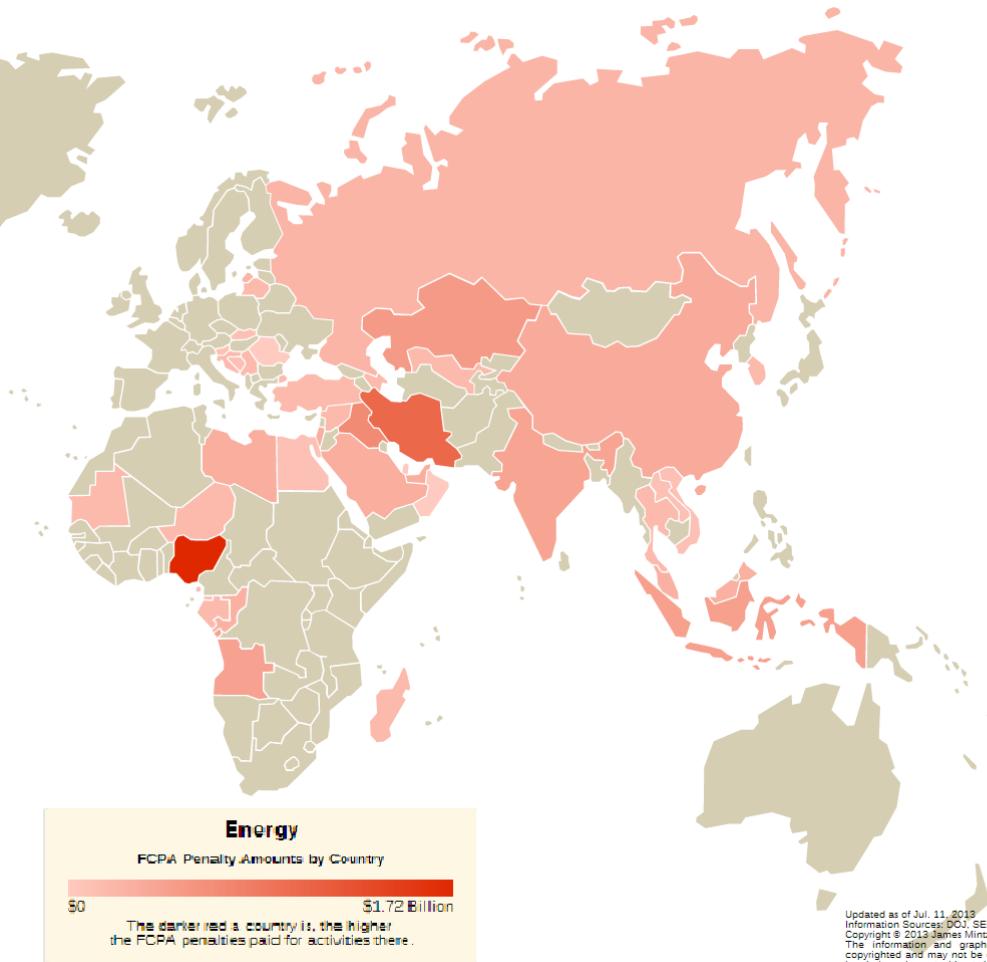
SECTORS	
•	All Sectors \$4.84 billion
•	Energy \$2.12 billion
•	Manufacturing \$225.80 million
•	Defense & Aero \$457.09 million
•	Consulting, Misc. \$882.74 million
•	Health & Pharma \$291.26 million
•	Telecomm. \$313.30 million
•	Agriculture \$50.83 million
•	Infrastructure \$148.16 million



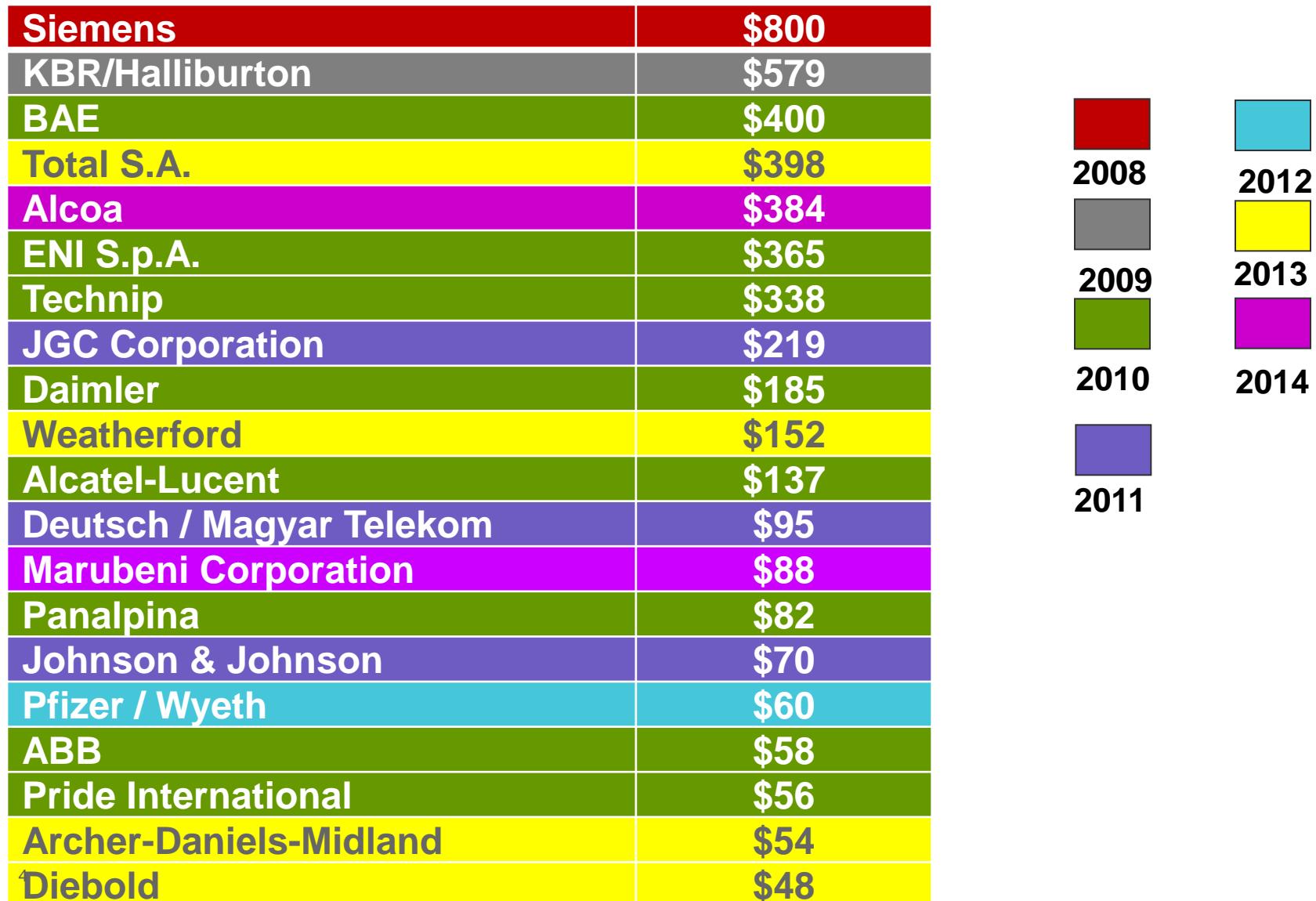
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20 Largest Cases (in millions of US\$)



Why corruption goes uncovered in arbitration?

Because arbitrators

- Do not consider they have an obligation to investigate corruption issues *ex officio*
- Lack investigative apparatus due to the private nature of arbitration (no real enforcement powers)
- Place the burden of proof on the party alleging corruption
- Often impose a higher standard of proof

Why corruption goes uncovered in arbitration?

Because the parties

Prefer not to allege corruption in arbitral proceedings due to:

- Risk of dismissal of their substantive claims if the tribunal finds the contract null and void as being obtained by corruption;
- Risk of dismissal of allegations of corruption for lack of evidence (as a rule, no documentary evidence exists, witnesses refuse to testify);
- Risk of forfeiting the right to allege the same with national courts at the enforcement stage.

Why corruption goes uncovered in arbitration?

Because the state courts

- Have a limited mandate for reviewing arbitral awards;
- Do not want to reconsider the issues related to the merits of the award.

Raising corruption issues *sua sponte*?

An arbitral award overlooking corruption in fact sanctions it

- it is counter to national and international public policy
- it results in the invalidity of the award
- it means arbitrators lend credibility to an illegal conduct
- it means arbitrators are aiding and abetting a crime by facilitating the payment of bribes

Red flags prompting arbitrators to investigate corruption

Checklist 1: Circumstances triggering further investigation by the arbitral tribunal *sua sponte*

- The main contract is related to a country rated high for corruption
- The principal in the main contract is a state, an entity under state control or a publicly listed company
- The main contract relates to a sector prone to corruption, e.g. defence, public health, construction
- There is a contract with an intermediary, e.g. for agency, consultancy or facilitation services, joint activity (agency contract)
- The subject matter of the agency contract is not tangible
- The agent's fees are established as a % of the value of the main contract to be awarded and the amounts are unreasonably high in comparison to the work to be done by the agent
- The agent's fees are payable only after the main contract has been awarded or after the payments under the main contract have been made
- If the main contract is not awarded, the fees are not payable and any costs incurred are not reimbursable

Red flags shifting burden of proof from a party alleging corruption

Checklist 2: Non-exhaustive list of circumstantial evidence of contracts involving corruption

- The agent was recommended by officers of a party to the main contract
- There is no substantial time gap between the execution of the agency contract and the date when the main contract was awarded to the principal
- The agent does not have an office at the place designated for the performance of obligations under the agency contract
- The agent does not maintain a real office
- The agent does not have sufficient personnel capable of carrying out work corresponding to the stated value of the service to be provided
- There are no substantial records confirming performance under the agency contract, e.g. time sheets of employees, minutes of meetings, reports about work performed, exchanges of correspondence

Red flags shifting burden of proof from a party alleging corruption, *cont.*

Checklist 2: Non-exhaustive list of circumstantial evidence of contracts involving corruption, *cont.*

- The real beneficiaries of the agent are unknown or its shareholders (beneficiaries) are people capable of influencing the execution or performance of the main contract
- The nature of such influence is unclear
- The agent is registered in a tax-free territory
- The agent has only nominal directors (usually residents of tax-free territories or lawyers)
- The agent's fees are payable into an account in a country other than where the agent is incorporated
- The agent has no prior history of activity
- The agent has no website

Evidence to prove legitimacy of contract

Checklist 3: Non-exhaustive list of circumstantial evidence of contracts involving corruption

- Existence of personnel qualified to do the work described in the agency contract
- Records showing that such personnel is already engaged in the performance of work, e.g. employee time sheets, payslips
- Documents describing the work performed, when and by whom.
- Information about previous projects implemented by the agent
- Information on the extent to which the agent's fees are consistent with market rates
- External opinion of auditors commissioned to check cash flows confirming that the fees paid to the agent were spent lawfully

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