

# Why Corruption Goes Uncovered in Arbitration

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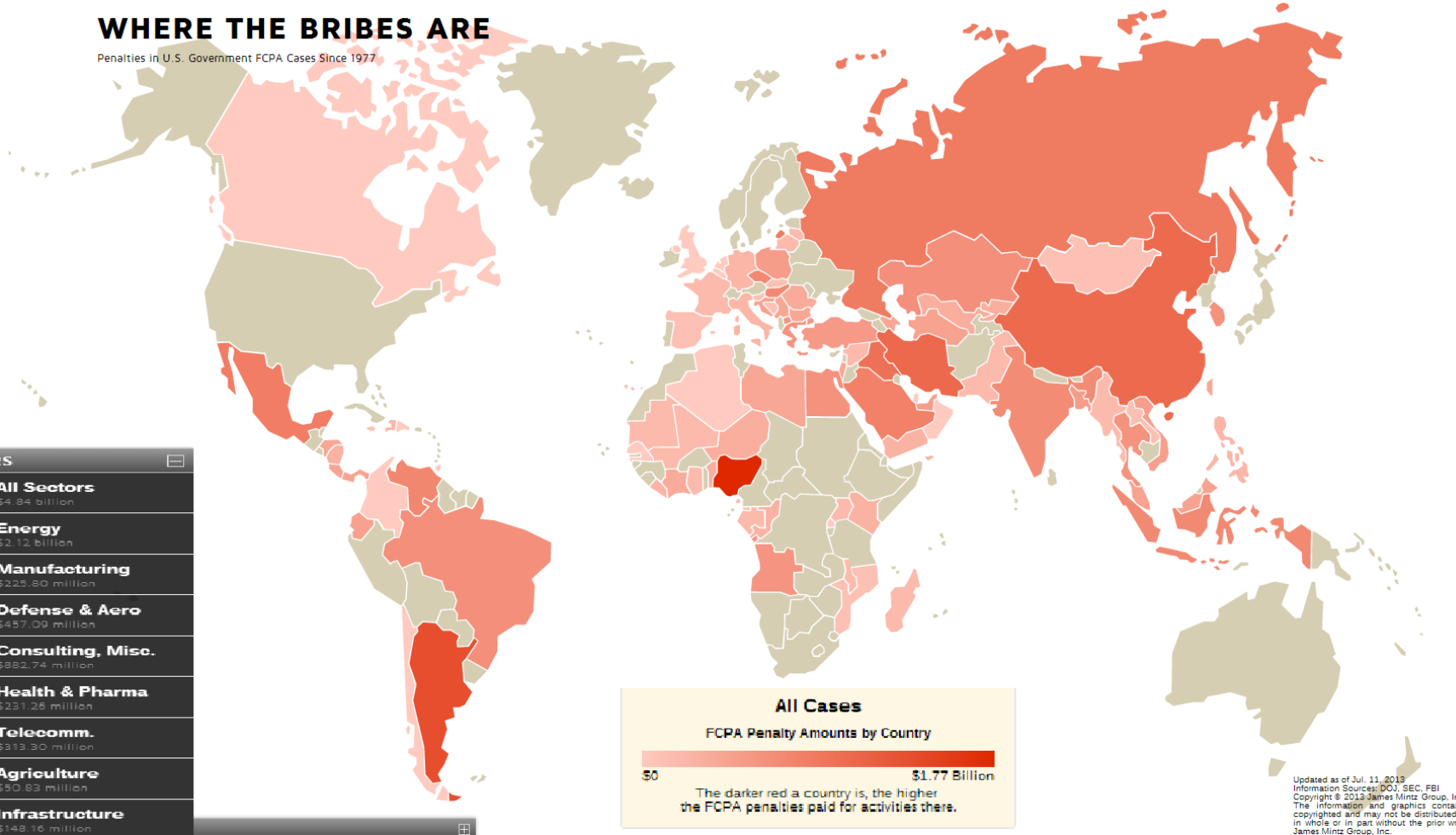
ICC International Court of Arbitration

**01 September 2014**



# WHERE THE BRIBES ARE

Penalties in U.S. Government FCPA Cases Since 1977



**SECTORS**

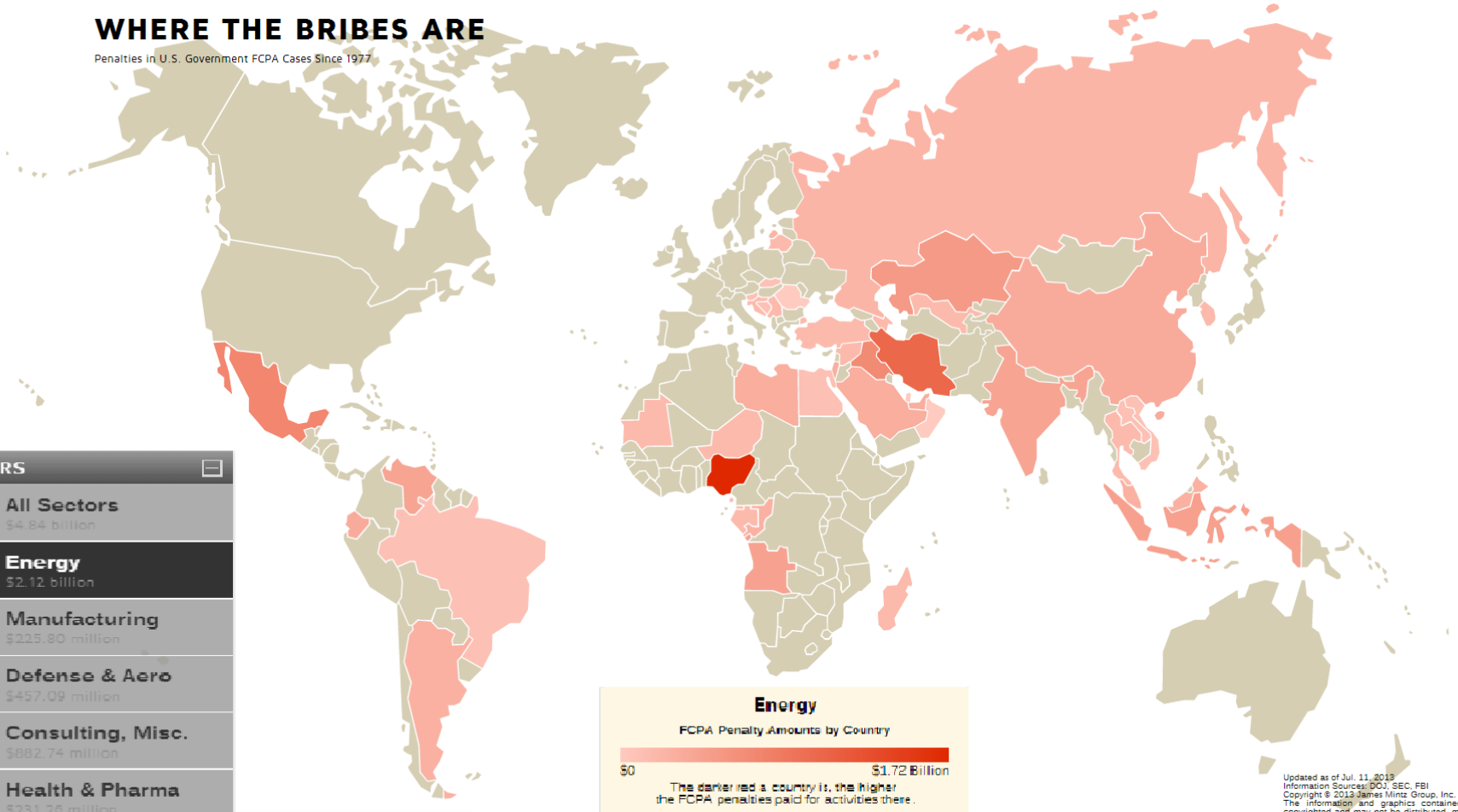
	<b>All Sectors</b>	\$4.84 billion
	<b>Energy</b>	\$2.12 billion
	<b>Manufacturing</b>	\$225.80 million
	<b>Defense &amp; Aero</b>	\$457.09 million
	<b>Consulting, Misc.</b>	\$892.74 million
	<b>Health &amp; Pharma</b>	\$231.26 million
	<b>Telecomm.</b>	\$313.30 million
	<b>Agriculture</b>	\$50.93 million
	<b>Infrastructure</b>	\$148.16 million



Updated as of Jul. 11, 2013  
 Information Sources: DOJ, SEC, FBI  
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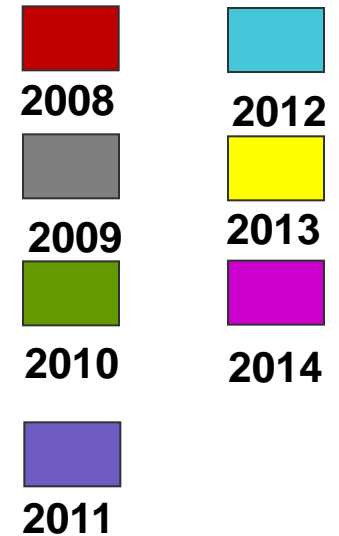
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## 20 Largest Cases (in millions of US\$)

<b>Siemens</b>	<b>\$800</b>
KBR/Halliburton	\$579
BAE	\$400
<b>Total S.A.</b>	<b>\$398</b>
<b>Alcoa</b>	<b>\$384</b>
ENI S.p.A.	\$365
Technip	\$338
JGC Corporation	\$219
Daimler	\$185
<b>Weatherford</b>	<b>\$152</b>
Alcatel-Lucent	\$137
Deutsch / Magyar Telekom	\$95
<b>Marubeni Corporation</b>	<b>\$88</b>
Panalpina	\$82
Johnson & Johnson	\$70
Pfizer / Wyeth	\$60
ABB	\$58
Pride International	\$56
<b>Archer-Daniels-Midland</b>	<b>\$54</b>
<b>Diebold</b>	<b>\$48</b>



# 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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