

**CRISIS MANAGEMENT
AND FIRST AID: WHEN
GOVERNMENT
CONTRACTORS ARE
THE HEADLINERS**

WELCOME

OOPS 2014

**GOING GLOBAL:
Grabbing Opportunity
While Mitigating Risks**

Alan Gourley

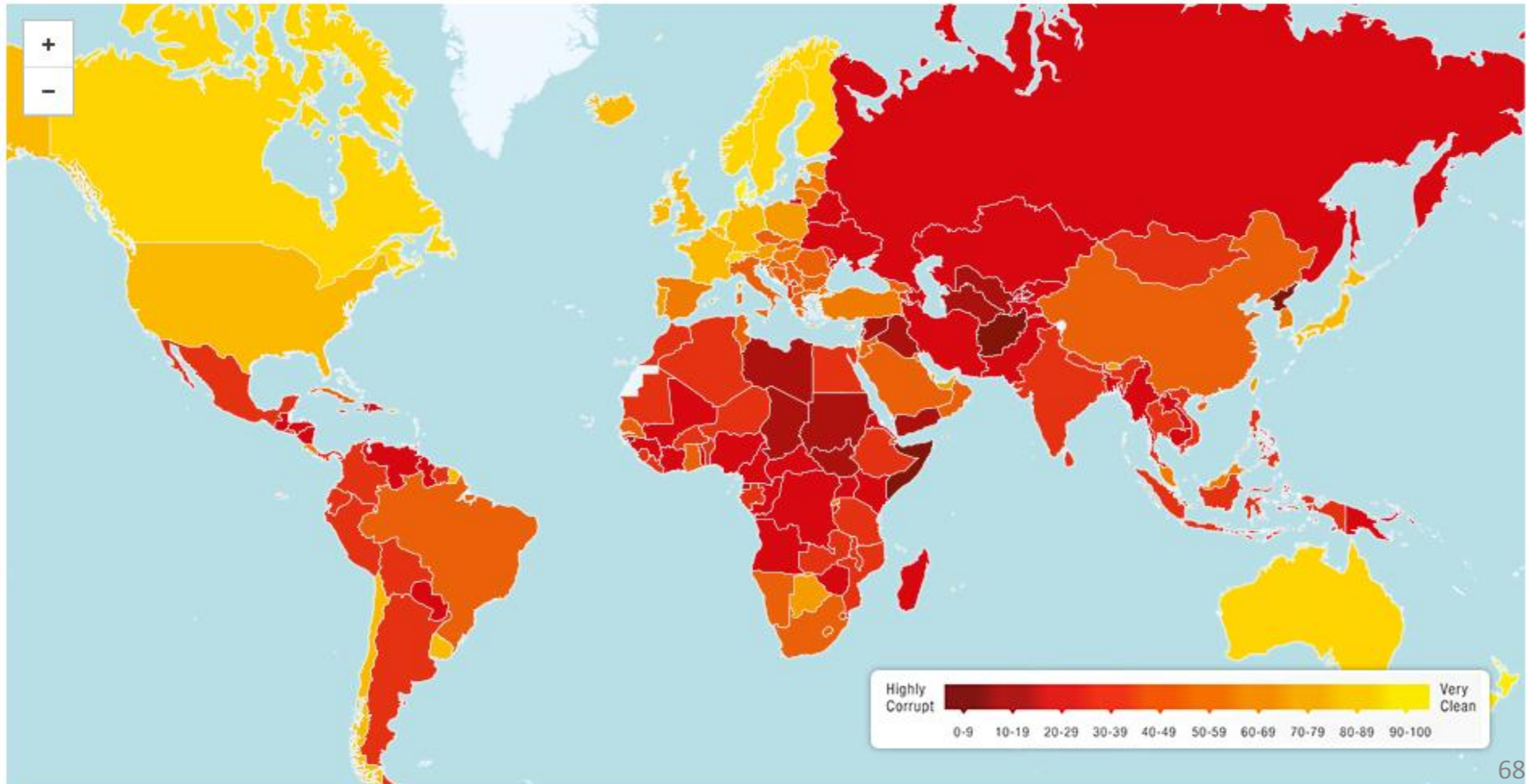
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OOPS ²⁰¹⁴

It's A Dangerous World – TI's 2013 CPI



Scale: 0 (highly corrupt) to 100 (very clean)

- 1. Sanctions & Export Controls in Transition**
- 2. Anti-Corruption Developments**
- 3. De-Mystifying International Arbitration**

Sanctions & Export Controls in Transition

Sanctions & Export Controls in Transition

Russia/Ukraine Sanctions

- Asset freezes on individuals and 18 entities
- Denial & revocation of export licenses
- Potential legislation could expand sanctions

Iran Sanctions

- Joint Plan of Action period ending July 20, 2014

Sanctions & Export Controls in Transition

Russia/Ukraine Sanctions: Addressing Risk

- Due diligence
 - Sanctions are fluid
 - Get help identifying “shadow” SDN entities
- Extricating company from blocked contracts
- Contract language for protection

Sanctions & Export Controls in Transition

Export Control Reform Updates

- Final rules effective:
 - Cat. VIII, XIX (Oct. 15, 2013)
 - Cat. VI, VII, XIII, and XX (Jan. 6, 2014)
 - Cat. IV, V, IX, X, and XVI (July 1, 2014)
- Remaining Categories in progress
- New brokering rule (effective Oct. 25, 2013)

Sanctions & Export Controls in Transition

Export Control Reform: Addressing Risk

- Reclassification of products
 - contractual requirements to notify customers
- Transitioning export authorizations
 - Licenses and license exceptions
 - Update TAAs and MLAs as needed
- Review ITAR registrations
 - Revised broker registration requirements

Anti-Corruption Developments

Enforcement Trends: Penalties

- **Fewer enforcement actions in 2013 (9), but increased penalties (\$720,668,902)**
- **2014: Already trending ahead of 2013 (\$611m)**
 - **Alcoa: \$384m**
 - **HP: \$108m**
 - **Marubeni: \$88m**

Risk Factors: Payment Mechanisms

- Third party intermediaries (shipping, insurance, freight forwarding, distributorship agreements) using False POs/Invoices
- Sham JV partnerships
- “Volume discounts” and additional margin used to create slush funds

Identifying Risks

- **“Obtain or Retain Business”**
 - VAT Refunds
 - Import Permits
- **“Anything of Value”**
 - Tuition payments, preferential recruiting treatment, electronic equipment, bags of cash
- **Travel & Entertainment**
 - Trips to FIFA World Cup soccer tournament in Hanover, Germany
 - Honeymoon trip of daughter of a foreign official
 - Religious pilgrimage trip for employee of a SOE and family
 - Side Trips to Las Vegas on SFO conference trip; Aruba on NY site visit

Mitigating Risk in Retaining Intermediaries

Do

- Obtain No Bribes/Payments Certification
- Tailor Level of Due Diligence to Location & Activity
- Ask Questions & Document Responses
- Always Create Accurate Records

Don't

- Rely Solely on Compliance with Laws (or even FCPA)
- Rely on “Cookie-Cutter” Questionnaires
- Accept Vague Descriptions or Assurances
- Ignore “Red Flags”

De-Mystifying International Arbitration

De-Mystifying International Arbitration

8 Reasons Why International Arbitration Might Be For You

1. Neutrality
2. Party Autonomy
3. Discovery
4. Expertise of Decision Makers
5. Confidentiality
6. Enforceability
7. Finality
8. Cost



81

De-Mystifying International Arbitration

Arbitration Clause - Step 1

➤ **Institution**

➤ **Rules**



VIAC

VIENNA INTERNATIONAL ARBITRAL CENTRE
INTERNATIONAL ARBITRAL CENTRE
OF THE AUSTRIAN FEDERAL ECONOMIC CHAMBER



ARBITRATION INSTITUTE
OF THE STOCKHOLM CHAMBER OF COMMERCE

De-Mystifying International Arbitration

Arbitration Clause - Step 2

➤ *e.g.*, ICDR model clause:

"All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules."

➤ *e.g.*, ICC model clause:

"Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be determined by arbitration administered by the International Centre for Dispute Resolution in accordance with its International Arbitration Rules."

De-Mystifying International Arbitration

Arbitration Clause - Step 3

- Escalation Clause [a/k/a “tiered” or “multi-step” or “step-up”]
- Arbitrators
 - Number: 1 or 3
 - Nationality
 - Expertise / Experience
 - Selection Method
- Language
- Place of Hearing
- Discovery / Disclosure



De-Mystifying International Arbitration

Do

- Designate institution
- Select rules of designated institution
- Use model clause
- Add specifics

Don't

- Mix & match rules and institutions
- Draft free-style
- Copy clause from other contract
- Translate clause from other contract
- Combine parts from different clauses

Questions?

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