

*Special Concerns in Africa
Deals - M&A AB&C due
diligence*

*Canada- South Africa
Chamber of Business*

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Agenda

- Why is this important in Africa Deals?
- Regulatory/ Enforcement Expectations
- What is the Corruption Perception climate in area?
- Special areas of concern to S.A. deals
- Certain questions typically used to address these issues
- Closing/Q&A



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PRESS RELEASE



SEC Charges Hitachi With FCPA Violations

FOR IMMEDIATE RELEASE 2015-212

Washington D.C., Sept. 28, 2015 — The Securities and Exchange Commission today charged Tokyo-based conglomerate Hitachi, Ltd. with violating the Foreign Corrupt Practices Act (FCPA) when it inaccurately recorded improper payments to South Africa’s ruling political party in connection with contracts to build two multi-billion dollar power plants.

Hitachi has agreed to pay \$19 million to settle the SEC charges.

The SEC alleges that Hitachi sold a 25-percent stake in a South African subsidiary to a company serving as a front for the African National Congress (ANC). This arrangement gave the front company and the ANC the ability to share in the profits from any power station contracts that Hitachi secured. Hitachi was ultimately awarded two contracts to build power stations in South Africa and paid the ANC’s front company approximately \$5 million in “dividends” based on profits derived from the contracts. Through a separate, undisclosed arrangement, Hitachi paid the front company an additional \$1 million in “success fees” that were inaccurately booked as consulting fees without appropriate documentation.

“Hitachi’s lax internal control environment enabled its subsidiary to pay millions of dollars to a politically-connected front company for the ANC to win contracts with the South African government,” said Andrew J. Ceresney, Director of the SEC’s Enforcement Division. “Hitachi then unlawfully mischaracterized those payments in its books and records as consulting fees and other legitimate payments.”

Related Materials

- [SEC complaint](#)
- [Other FCPA cases](#)

Why is AB&C DD Incredibly Important in Africa based Transactions

BEYOND HITACHI Headlines of this week

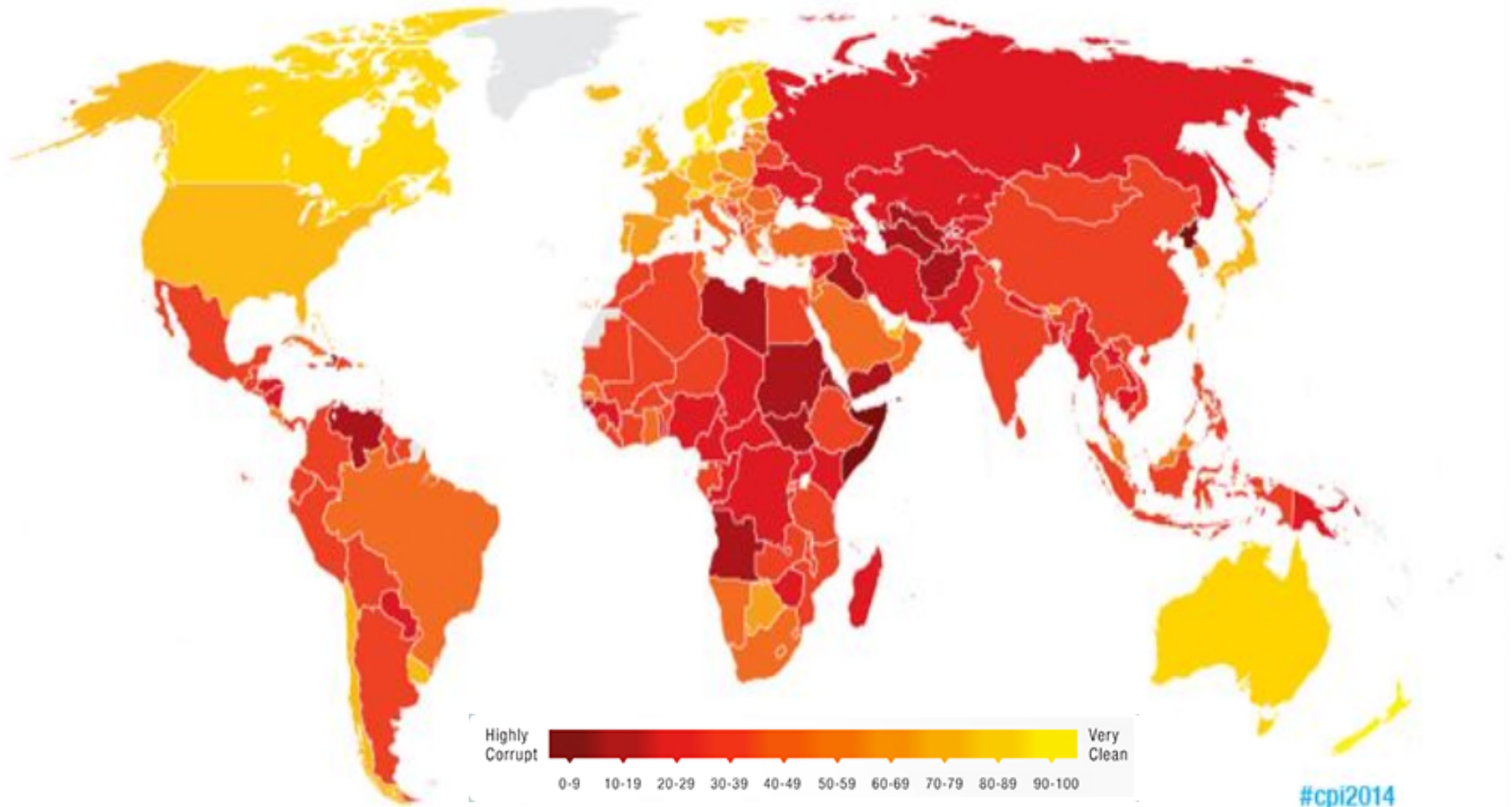
AB&C “issues” can and have:

- A) Killed deals outright or
- B) Make a deal’s value far lower or even drop it dramatically
- C) Expectation in Africa deals that “there will be problems - only hope we can find them”
 1. Buyers these days want to AND expect to “inherit” clean companies from an AB&C perspective. NO ONE wants to successor liability.
 2. Regulatory expectations are such that avoiding this type of due diligence is not a workable option (pre or post deal)

Excerpt From CFPOA Resolution in NIKO Resources Ltd.
(From Probation Order)

“... To the extent that the use of agents and business partners is permitted at all by the company, it will institute appropriate due diligence and compliance requirements pertaining to the retention and oversight of all agents and business partners, including: i) Properly documenting risk-based due diligence pertaining to the retention and appropriate and regular oversight of agents and business partners; ...”

WHERE is your Africa Target doing its business ? What are its High Risk countries/ locations?



Source: Corruption Perceptions Index 2014 < <http://www.transparency.org/cpi2014/results>>

#cpi2014
www.transparency.org/cpi

How bad are the Corruption issues in/near South Africa

South Africa
67

Angola
161

Zimbabwe
156

Swaziland
69

Mozambique
119

Key Africa Corruption cases M&A DD Cases

- Hitachi settlement - \$19 million USD
 - Allegations re: ANC indirect bribes through third parties
 - Coordination with ADB (African Development Bank)
- Bay Street Miner - with operations in Africa – raided by RCMP - investigation ongoing
- Montreal Based Company alleged to have made payments re: Government Train Contract
- Net1UEPS action - resolved without charge (declination) but expensive investigation nonetheless
- BAE arms allegations investigated by SFO

Typical Trouble spots looked at in Africa Deals (acquirer hot buttons re AB&C)

- Where else is Target doing business (jurisdictions)? Where are the “sell to” locations (overlap with Sanctions - sales to improper countries/ individuals)?
- Percentage of interaction with Chinese Third parties
- CSR programs - the What and How of your programs (tribal especially)
- BEE efforts - again- what is being done?
- Interactions with political parties/ political donations/ relationships with surrogates
- How much effective IDD is being performed on third parties?
- Cash controls in countries with cash driven economies
- Does Target really have compliance program? - Has anything been put into place?

Some Typical Tasks to Address these Concerns

- A. Corporate intelligence need strong but public internet info typically light – (how to solve?)
- Reputational due diligence of key entities AND individuals (maybe level 3 is needed)
 - Black List/PEP and other relevant checks to be performed (OFAC/InterPOL/Others)
- B. Strong look at key contracts/deals driving Deal Value. How did they get these deals? How much value is represented by these government related deals (see example)? Are any assets to be obtained already “tainted” or “poisoned”?
- C. Assess strength & extent of the existing AB&C program- IF ANY. Do they have a program? – If so, does it have real teeth or is it just a paper tiger?

Some Typical Tasks Undertaken (cont.)

- D. Depending on size of Deal and value, strongly recommend “on the ground” transaction testing in these quite high risk jurisdictions to see what is really going on “in country”.
- E. Approach may need to be different in auction/more competitive situations (i.e. when up front AB&C Due Diligence cannot be done – then backside post acquisition work needed even more.

Thank you
Any questions

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