

Extra caution needed for Plomin C coal power plant project due to heightened corruption risks

Introduction

On 2 September 2014, it was announced by Croatian electricity company HEP that a preferred bidder had been chosen for the controversial Plomin C 500 MW coal power plant project in Croatia. The preferred consortium consists of Japan's Marubeni and France's Alstom¹. In second place was a consortium consisting of Daewoo from South Korea and Abeinsa from Spain, and in third place Italy's Edison, owned by EDF.

The selection of Marubeni has already raised concerns in the Croatian media due to the company's recent conviction for bribery in the Indonesian Tarahan power plant project in Sumatra, Indonesia (see below). Interestingly, the Tarahan project corruption case involved both Alstom and Marubeni acting together. As a result of this case, Marubeni has been barred from financing by the Japan Bank for International Co-operation for nine months. until December 25, 2014.²

Alstom's record is even more unenviable – so much so that in 2010 the Ethics Council of the Norwegian Pension Fund Global recommended excluding the company from the pension fund's investment portfolio³. In 2011 the Norwegian Ministry of Finance decided to put Alstom S.A. on its observation list for four years due to the risk of gross corruption in the company's operations,⁴ and asked the Ethics Council to provide annual reports on the company's progress.⁵ In 2015 General Electric will take over Alstom's power division. It will be interesting to see whether it is able to make an impact on Alstom's track record.

In this paper we give an overview of selected cases in which Marubeni and Alstom have been either found guilty, have been charged, or are under investigation. This is not meant to be a complete picture, as it is often difficult to establish when investigations have been opened or closed. Several additional investigations have been mentioned in the media, often involving several countries, but without any details about the precise projects involved, so they are not covered below.

In summary, the choice of Marubeni and Alstom as preferred bidder for the Plomin C project should represent a signal to potential financiers of the project to perform their due diligence with extreme care. It is also a signal to the Croatian public and authorities to pay particular attention to any deals made in relation to this project.

Marubeni Corporation

Tarahan project, Indonesia: On 15 May this year, Marubeni Corporation was sentenced by the District of Connecticut in the US and fined USD 88 million for its participation in a scheme to pay bribes including to a high-ranking member of the Indonesian Parliament and high-ranking members of Perusahaan Listrik Negara (PLN), the state-owned electricity company in Indonesia. According to the US Department of Justice, the bribes were aimed at ensuring assistance in securing a USD 118 million contract, known as the Tarahan project, for Marubeni and Alstom to provide power-related services.

Marubeni and Alstom hired two consultants, whose primary function was to pay the bribes to Indonesian officials. The first consultant received hundreds of thousands of dollars in his US bank account, then allegedly

¹ Its Alstom Power division is based in Switzerland

² JICA notice, Measures against Fraud, March 26 2014, http://www.jica.go.jp/english/notice/140326 01.html

³ The Government Pension Fund – Global, Recommendation to the Norway Ministry of Finance, December 2010, http://www.regieringen.no/pages/2588965/alstom_e_2010.pdf

⁴ Ministry of Finance: Government Pension Fund Global: Company placed on observation list, 06.12.2011, http://www.regjeringen.no/en/archive/Stoltenbergs-2nd-Government/Ministry-of-Finance/Nyheter-og-pressemeldinger/nyheter/2011/government-pension-fund-global-company-p.html?id=665635

⁵ Reports for 2012 and 2013 can be found here: http://www.regjeringen.no/en/dep/fin/Selected-topics/the-government-pension-fund/responsible-investments/companies-excluded-from-the-investment-u/observation-of-companies.html?id=601811

transferred the bribe money to a bank account in Indonesia for the benefit of the official. In Autumn 2003, Marubeni and its co-conspirators felt that the this consultant was not effectively bribing key officials at PLN and decided to reduce the consultant's commission from three percent of the total contract value to one percent and pay the remaining two percent to a second consultant who could bribe PLN officials more effectively.

Marubeni pleaded guilty on March 19, 2014, to one count of conspiracy to violate the anti-bribery provisions of the Foreign Corrupt Practices Act (FCPA) and seven counts of violating the Act. The company signed a plea agreement in which it admitted its criminal conduct, agreed to enhance its global anti-corruption programme and to co-operate with the department's ongoing investigation, and agreed to pay an USD 88 million fine. The plea agreement cites Marubeni's lack of co-operation with the department's investigation, its lack of an effective compliance and ethics programme at the time of the offence, its failure to properly remediate and the lack of its voluntary disclosure of the conduct as some of the factors considered.⁶

Bonny Island Project, Nigeria

On 17 January 2012 it was announced that Marubeni Corporation had agreed to pay a USD 54.6 million criminal penalty under the US Foreign Corrupt Practices Act (FCPA) for its participation in a decade-long scheme to bribe Nigerian government officials to obtain engineering, procurement and construction contracts.

The U.S. Justice Department's Criminal Division charged Marubeni with one count of conspiracy and one count of aiding and abetting violations of the FCPA. The company had been hired as an agent – along with Jeffrey Tesler, a U.K. solicitor - by the four-company TSKJ joint venture to help it obtain and retain contracts to build liquefied natural gas (LNG) facilities on Bonny Island, Nigeria, by bribing Nigerian government officials, among other means.

TSKJ was comprised of Technip S.A., Snamprogetti Netherlands B.V., Kellogg Brown & Root Inc. (KBR) and JGC Corporation. Between 1995 and 2004, TSKJ was awarded four EPC contracts, valued at more than USD 6 billion, by Nigeria LNG Ltd. to build the LNG facilities on Bonny Island.

TSKJ paid approximately USD 51 million to Marubeni during the course of the bribery scheme and intended for these payments to be used, in part, for bribes to Nigerian government officials.

Under the terms of a two-year deferred prosecution agreement, Marubeni agreed to retain a corporate compliance consultant to review its compliance program and to cooperate with the U.S. Justice Department in ongoing investigations. If Marubeni abides by the terms of the agreement, the department will dismiss the criminal information when the term of the agreement expires.⁷

Alstom

1. Cases in which Alstom has been found guilty or pleaded guilty

Tarahan project, Indonesia: As well as Marubeni being fined as outlined above, Alstom executives have also been charged in connection to the case. Frederic Pierucci, a current executive at Alstom, pleaded guilty on July 29, 2013, to one count of conspiring to violate the FCPA and one count of violating the FCPA. David Rothschild, a former vice president of regional sales, pleaded guilty on November 2, 2012 to one count of conspiracy to violate the FCPA. Lawrence Hoskins, a former senior vice president for the Asia region for Alstom, and William Pomponi, a former vice president of regional sales, were charged in a second superseding indictment on July 30, 2013.8 Pomponi pleaded guilty on 17 July 2014, while Hoskins' trial is scheduled for June 2, 2015.9

Zambia Power Rehabilitation Project, Zambia: On 22 February, 2012 the World Bank Group announced the debarment of Alstom Hydro France and Alstom Network Schweiz AG (Switzerland) in addition to their affiliates

⁶ US Justice Department press release: Marubeni Corporation Sentenced for Foreign Bribery Violations, 15 May 2014 http://www.fbi.gov/washingtondc/press-releases/2014/marubeni-corporation-sentenced-for-foreign-bribery-violations

⁷ US Justice Department press release: Marubeni Corporation Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay a \$54.6 Million Criminal Penalty, 17 January 2012

⁸ US Justice Department press release: Marubeni Corporation Sentenced for Foreign Bribery Violations, 15 May 2014 http://www.fbi.gov/washingtondc/press-releases/2014/marubeni-corporation-sentenced-for-foreign-bribery-violations

⁹ US Justice Department press release: Former Executive of French Power Company Subsidiary Pleads Guilty in Connection with

for a period of three years. This followed Alstom's acknowledgment of misconduct after it made an improper payment of EUR 110 000 to an entity controlled by a former senior government official for consultancy services in relation to the World Bank-financed Zambia Power Rehabilitation Project in 2002 ¹⁰. The debarment is part of a Negotiated Resolution Agreement between Alstom and the World Bank which also includes a restitution payment by the two companies totalling approximately USD 9.5 million.

As a result of the World Bank's debarment, other international financial institutions which have signed the 2010 Agreement for Mutual Enforcement of Debarment Decisions, including the EBRD, have also debarred the companies.

Plavinas hydropower plant, Latvia, Rades power station, Tunisia and Perles power station, Malaysia On 22 November 2011 the Swiss Office of the Attorney General announced that it had issued a summary punishment order against Alstom Network Schweiz AG (formerly Alstom Prom AG) and fined the company CHF 2.5 million and imposed a compensatory claim of CHF 36.4 million.

Alstom Network Schweiz AG was convicted under Article 102 of the Swiss criminal code due to its failure to sufficient precautions to prevent bribery of foreign public officials in the Plavinas hydropower plant project in Latvia, the Rades power station project in Tunisia and the Perles power station in Malaysia. ¹¹ Consultants engaged by Alstom on the basis of consultancy agreements in the three countries had forwarded a considerable part of their success fees to foreign decision-makers and thereby had influenced them in favour of Alstom.

Originally Alstom's former Compliance Manager was accused of qualified money laundering, bribery of foreign public officials and disloyal management. In July 2009, the proceedings were extended to include Alstom Network Schweiz AG and Alstom SA, France. In these investigations the Office of the Attorney General established that the group had a reasonable Compliance Policy but that it had not enforced it sufficiently to prevent acts of bribery. Alstom SA as the parent group was not convicted but had to pay part of the court costs plus CHF 1 million in reparations to be used by the International Red Cross in Latvia, Tunisia and Malaysia. ¹²

Sulcis power plant, Sardinia, Italy

On 28 March 2008, a settlement was reached at the Tribunale Ordinario in Milan between the Italian authorities and Alstom, in which the court found that in 2001 four Alstom executives had bribed two public officials at the partly state-owned Italian company Enel in order to secure a contract for the Sulcis power plant on Sardinia.

The employees were given suspended prison sentences of 9 to 11 months, and Alstom Power Inc. and Alstom Prom Ltd. - wholly-owned subsidiaries of Alstom - were each fined EUR 240,000 for the administrative offence of not having implemented adequate management and organizational models to prevent the use of bribery and had to reimburse the Italian state for the amount of the bribes: EUR 597,220.

An audit revealed that Alstom and Siemens had transferred some USD 6 million to foreign bank accounts belonging to two Enel employees in order to win sub-contractor agreements with Enel. Alstom employees used a fictitious consultancy agreement to conceal the bribes, which amounted to two per cent of the total contract sum. The fictitious consultancy agreement was entered into by Alstom's then European Director for International Operations and an intermediary in Dubai. Following this, the Chairman of Alstom Power Inc., who also held the position as Country President in the USA, made an agreement with Enel's managing director

Foreign Bribery Scheme, 17 July 2014, http://www.fbi.gov/washingtondc/press-releases/2014/former-executive-of-french-power-company-subsidiary-pleads-guilty-in-connection-with-foreign-bribery-scheme

¹⁰ World Bank press release: Enforcing Accountability: World Bank Debars Alstom Hydro France, Alstom Network Schweiz AG, and their Affiliates, 22 February 2012,

http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,contentMDK:23123315~pagePK:64257043~piPK:437376~theSitePK:4607.00.html

¹¹ For more details about the cases, see the Summary Punishment Order of 22.11.2011 from Federal Attorney Stefan Lenz: http://www.scribd.com/doc/73503009/Summary-Punishment-Order

¹² Swiss Federal Administration press release: Criminal proceedings against Alstom entities are brought to a close, 22.11.2011, http://www.bundesanwaltschaft.ch/suchen/index.html? lang=en&keywords=Alstom&search_mode=AND&from_day=&from_month=&from_year=&to_day=&to_month=&to_year=&colum n=&dokumenttyp=&site_mode=extern&Submit=search#volltextsuche

about the awarding of the contract, as well as the size of the bribe. The then Corporate Compliance manager at Alstom signed the fictitious consultancy agreement. During the trial the intermediary from Dubai confessed that his accounts in Switzerland were used by Alstom to conceal the bribes. He was fined 116,000 EUR. ¹³

Gas insulated switchgear cartel, European Union

Corruption usually conjures up images of brown envelopes and outright bribes, but it can also take many other shapes. In this case, in 2007 the European Commission fined eleven groups of companies a total of EUR 750 712 500 for participating in a cartel for gas insulated switchgear¹⁴ projects, in violation of Article 81 of EC Treaty, which bans restrictive business practices. The companies were ABB, Alstom, Areva, Fuji Electric, Hitachi Japan AE Power Systems, Mitsubishi Electric Corporation, Schneider, Siemens, Toshiba and VA Tech. Between 1988 and 2004, the companies rigged bids for procurement contracts, fixed prices, allocated projects to each other, shared markets and exchanged commercially important and confidential information ¹⁵. In 2011 Alstom's fine was somewhat reduced from EUR 65 million to EUR 58.5 million. ¹⁶

2. Cases where charges have been brought against Alstom or its staff

Dehli Metro, India, Warsaw trams, Poland and Tunis trams, Tunisia

In July 2014 the UK Serious Fraud Office (SFO) announced that it had brought charges against a UK subsidiary of Alstom, Alstom Network UK¹⁷, after nearly five years of investigation. Alstom was charged with six offences of corruption and conspiracy, involving paying around USD 8.5 million in bribes between 2000 and 2006 to win transport contracts in India, Poland and Tunisia.

The SFO alleges that Alstom bribed officials or agents of the Delhi Metro Rail Corporation by paying nearly Rs20m to a company called Indo European Ventures in 2001, and another EUR 3 million to another, Global King Technology, in 2002.

In Warsaw, the SFO alleges that Alstom paid EUR 824,000 to officials in 2001 in exchange for providing 62 trams to Tramwaje Warszawskie, by disguising the bribes as payments that formed part of consultancy agreements with the companies Sagax Engineering and Kavan.

Prosecutors allege a similar conspiracy in Tunisia, where Alstom paid EUR 2.4m to government officials to secure a contract to provide 30 trams and infrastructure work in Tunis by paying an entity called Construction et Gestion NEVCO.¹⁸

3. Ongoing corruption investigations involving Alstom

Sostani unit 6. Slovenia

In February 2012 the Slovene Commission for the Prevention of Corruption issued a report outlining its concerns regarding the procurement procedures for the Sostanj lignite power station unit 6, which was to receive financing from both the European Bank for Reconstruction and Development and the European Investment Bank. Among other things, it found that one of the members of the technical commission for the tender process in which Alstom won the tender had business links to Alstom which may have enabled Alstom to have access to privileged information. ¹⁹ In June 2012 the European Anti-Fraud Office, OLAF, opened an

¹³ The Government Pension Fund – Global, Recommendation to the Norway Ministry of Finance, December 2010, http://www.regjeringen.no/pages/2588965/alstom_e_2010.pdf; Claudio Gatti: Alstom at Center of Web of Bribery Inquiries, New York Times, 29 March 2010, http://www.nytimes.com/2010/03/30/business/global/30alstom.html?pagewanted=all&_r=0

¹⁴ Gas insulated switchgear (GIS) is heavy electrical equipment used to control energy flows in electricity grids, and is the major component of turnkey power substations.

¹⁵ European Commission press release: Competition: Commission fines members of gas insulated switchgear cartel over 750 million euros, 24 January 2007, http://europa.eu/rapid/press-release IP-07-80 en.htm

¹⁶ However, some of this is also to be paid jointly with Areva due to the transfer of a subsidiary of Alstom during the period of the offence. General Court of the European Union: The General Court reduces the fines of certain members of the gas insulated switchgear cartel, 3 March 2011, http://europa.eu/rapid/press-release_CJE-11-15_en.pdf

¹⁷ Serious Fraud Office press release: Criminal charges against Alstom in the UK, 24 July 2014, http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2014/criminal-charges-against-alstom-in-the-uk.aspx

¹⁸ Caroline Binham: Alstom accused of bribing officials to win contracts, Financial Times, September 5, 2014 http://www.ft.com/cms/s/0/e0e6dbe0-351a-11e4-a2c2-00144feabdc0.html?siteedition=intl#axzz3EdlNrDQB

¹⁹ Slovene Commission for the Prevention of Corruption: Intermediate findings and position of the Commission for the Prevention of

investigation into the case²⁰. OLAF passed its findings to the Slovene national authorities, whose investigations are ongoing.

Brazil metro projects

In March 2014 it was reported that Brazil's antitrust agency CADE had begun investigating several major international companies for allegedly fixing prices in 15 contracts to build and maintain trains and metro lines in five Brazilian cities between 1998 and 2013. CADE's statement that said 118 officials from 18 companies, including Alstom SA, Germany's Siemens AG, Canada's Bombardier Inc, Japan's Mitsui & Co Ltd and Spain's CAF SA, were under investigation. CADE stated that the members of the cartel apparently divided up the tenders between themselves and pretended there was competition, but had agreed previously on the prices of their bids. Alstom said it would provide clarifications to the Brazilian authorities as soon as it had access to the legal documents.

CADE said the cartel allegedly began in 1998 during bidding for Sao Paulo's Lilas metro line and price-fixing continued with the city's CPTM metropolitan railway projects, a subway in Brazil's capital Brasilia in 2005, and contracts for subway cars for Porto Alegre, Belo Horizonte and Rio de Janeiro in 2012.²¹

TermoRio power plant, Rio de Janeiro, Brazil

In 2008 it was reported that businessman Luiz Geraldo Tourinho Costa had alleged that in 2002, Alstom in 2002 used an account he had in Uruguay to deposit money from an Alstom subsidiary in Switzerland. The money - one payment of USD 550,000 dollars, and another of USD 342,000 dollars - was paid to Petrobras, Brazil's state-run oil company which has a 50-percent stake in the TermoRio power plant to which Alstom supplied turbines in a deal worth USD 550 million dollars at the time, the businessman was reported to have said²². In 2014, Brazilian news portal Estadao published documents allegedly proving this. Neither Petrobras nor Alstom was willing to comment on the grounds that investigations were still ongoing.²³

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Corruption, February 2012, unofficial translation by Focus Association for Sustainable Development, http://bankwatch.org/sites/default/files/StateCommissionReport-corruption-TES6-23Feb2012.pdf

²⁰ Letter from OLAF, 13 June 2012, http://bankwatch.org/sites/default/files/Slovenia%20Investigation.pdf

²¹ Roberta Vilas Boas: Brazil investigates price-fixing by alleged train cartel, 21 March 2014, http://www.reuters.com/article/2014/03/21/brazil-cartel-idUSL2N0MI12E20140321

²² Finanznachrichten/Thomson Financial: Businessman alleges Alstom paid bribes for Brazil project, 29 May 2008, http://www.finanznachrichten.de/nachrichten-2008-05/10935430-businessman-alleges-alstom-paid-bribes-for-brazil-project-report-020.htm

²³ Mateus Couthino: Documentos sugerem propina da Alstom na Petrobrás, 2 April 2014, http://politica.estadao.com.br/blogs/fausto-macedo/extrato-sugere-propina-da-alstom-na-petrobras/