

The Trafigura Case

Waste Management

Keywords

- > Probo Koala incident
- > Trafigura case
- > Ship waste
- > Seas pollution

1. Factual background

In the *Probo Koala* incident, more recently also known as the Trafigura case, toxic and dangerous waste products belonging to Trafigura –one of the world's leading oil trading companies– were shipped from Amsterdam to Abidjan (Ivory Coast), where in August 2006 they were improperly disposed of at several sites around the city without any further treatment. A causal link between the exposure to the extremely toxic products dumped and the loss of human life in several cases and health injury in tens of thousands of cases seems obvious, but has never been established by a court.¹

Trafigura is a private company incorporated under the law of the Netherlands in 1993, which according to its corporate web page 'is the world's third largest independent oil trader and the second largest independent trader in the non-ferrous concentrates market'.² Based in Amsterdam, Trafigura Beheer BV is the mother company of a holding constituted by several subsidiaries operating across the globe. The media have linked Trafigura to corruption scandals such as the Oil for Food Programme in Iraq, as well as to incidents that have had serious consequences for human health and the environment. The most outstanding one certainly was the so called *Probo Koala* incident.

According to the facts established in the Report of the International Commission of Inquiry on the discharge of toxic wastes in the district of Abidjan, of 19 February 2007, between April and June 2006 Trafigura acquired gasoline blend stocks which were loaded on the *Probo*

Koala, a tanker sailing under the Panamanian flag that had been chartered by Trafigura in 2004.³ On its way from La Skhirra oil terminal (Tunisia) to its destination in Paldiski (Estonia), the load was treated with caustic soda, most probably in the period between May and June 2006, when the *Probo Koala* was anchored off



©Raigo Pajula/AFP – A picture of the ship that caused a stink

the coast of Gibraltar and Algeciras.⁴ This process of on-board 'caustic washing' may be used in order to obtain interim products in the refinement process of petroleum that allows the owner of the load to avoid paying a refinery for the process. However, the treatment with caustic soda generates highly hazardous substances, such as sodium hydroxide, sodium sulphide and phenols. For this reason, this type of 'washing' has been banned in most countries. However, it continues to be used onboard tankers at sea.⁵

After continuing on its way to Paldiski, on 30 June 2006, the *Probo Koala* docked at the port of Amsterdam to refuel and discharge its slop tanks. However, upon analysis of samples of the *Probo Koala* waste, the Amsterdam Port Services found that it would be more complex and costly to treat than expected because of the high level of toxicity, raising the cost estimate from €20 per m³ to € 900 per m³. Trafigura rejected the estimate and reloaded the waste onto the *Probo Koala*.⁶

In Paldiski (Estonia) in early July 2006, the *Probo Koala* unloaded the washed gasoline and loaded unleaded gasoline to be delivered in Lagos (Nigeria). Before its arrival in Lagos, it made a ship-to-ship (STS) transfer of part of its load off the coast of Lomé (Togo). Allegedly, the *Probo Koala* unloaded 36,000 m³ of gasoil in the port of Lagos, even though Nigerian authorities hold that the tanker did not have the authorization either to enter the port or to unload.⁷ Nigerian authorities interviewed by a delegation of the International Commission of Inquiry recognized that

¹ On the factual background of the case and its various legal ramifications, see A Hindman and R Lefeber, 'General Developments. International/Civil Liability and Compensation' (2010) 20 Ybk Intl Envtl L 239, 244-7.

² See <http://www.trafigura.com/about_us.aspx> (last accessed, 26 October 2011).

³ Rapport de la Commission International d'Enquête sur les déchets toxiques déversés dans le district d'Abidjan, 19 février 2007, retrieved from

<<http://www.courdescomptesci.com/attachments/File/RAPPORT%20DE%20LA%20CIEDT.pdf>> (accessed on 12 september 2011).

⁴ *ibid.*, 25-6.

⁵ K Jesse and J Verschuuren, 'Country Report: The Netherlands' IUCN Academy of Environmental Law e-Journal Issue 2011 (1) 155, 157.

⁶ UN Doc A/HRC/12/26/Add.2 (2 September 2009). See Annex, para. 23 and 24.

⁷ Rapport (n 2), 26.



<http://www.radical.es> – A representation of the *Probo Koala*'s route



Photograph: Issouf Sanogo/AFP/Getty Images – Abidjan, where toxic waste was dumped.

their general information services had informed them about the toxicity of the content of the slop tanks of the *Probo Koala*. However, as the captain himself had not reported any dangerous load, that information was not official, and Nigerian authorities did not consider to be obliged to inform Ivorian authorities about the vessel under article 4 of the Bamako Convention.⁸

After two weeks anchored in Nigerian territorial waters, the *Probo Koala* set off for Abidjan where, in the meantime, Trafigura had made arrangements through its local subsidiary to unload and treat its slop waste for \$30 per m³ for MARPOL wastes, and \$35 per m³ for chemical wastes.

The company hired for the treatment and disposal, Tommy Ltd., which had been incorporated ten days before the arrival of the *Probo Koala*, rented a number of trucks that dumped the waste without further treatment in eight sights around Abidjan on the evening of 19 August and early 20 August. It was this waste that caused the suffocating odours.⁹

According to a report by the Special Rapporteur of the Human Rights Council, in the immediate aftermath of the dumping many people from the surrounding districts had to flee their homes because of the contamination and 'thousands of individuals visited health-care centres complaining of nausea, headaches, vomiting, abdominal pains, skin reactions and a range of eye, ear, nose, throat, pulmonary and gastric problems'.¹⁰ Moreover, on the basis of official estimates, the rapporteur holds that at least 15 people died, 69 were hospitalized and more than 108,000 had to consult medical specialists. The rapporteur also highlights the assessment of the Ivorian Ministry of Health and Public Hygiene, according to which there were 63,296 probable cases and 34,408 confirmed cases of exposure to the waste from the *Probo Koala*.¹¹

2. International legal framework

Several international legal instruments may be applicable to the facts underlying the *Probo Koala* incident: namely, the 1973 International Convention for the Prevention of Pollution from Ships, as amended by the 1978 Protocol (MARPOL); the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal; and the 1991 Bamako Convention on the Ban on the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa. However, except for the Basel Convention, the facts that would determine the applicability of the MARPOL and Bamako Conventions are still rather confused

2.1. 1973/1978 MARPOL Convention

With respect to the application of the MARPOL Convention, the lack of reception facilities in the Port of Abidjan for wastes generated in ships, as required under Annexes I, II and IV of the Convention, obviously means that the Ivory Coast was in a situation of non-compliance.¹² However, as Gary Cox has pointed out,¹³ it is not quite clear whether the MARPOL Convention is applicable specifically to the *Probo Koala* incident, as it did not involve the discharge of harmful substances 'into the sea', thereby causing pollution of the marine environment.¹⁴

2.2. 1991 Bamako Convention

Further confusion exists with respect to the applicability of the Bamako Convention and the potential determination of a breach thereof by Nigeria, as it did not forward the information it had on the characteristics of the load of the *Probo Koala* to the Secretariat of the Convention, as required under its article 4.

As highlighted previously, the Nigerian authorities had been informed by their general information services of the

⁸ *ibid.*, 67-8.

⁹ *ibid.*, 28-9.

¹⁰ UN Doc A/HRC/12/26/Add.2, Annex, para. 30.

¹¹ *ibid.* para. 31.

¹² UNEP, IMO, Secretariat of the Basel Convention and Government of Ivory Coast, *Evaluation Report Assessment of the Port of Abidjan*, UNEP, 2009, 28-9.

¹³ G Cox, 'The Trafigura Case and the System of Prior Informed Consent under the Basel Convention—A Broken System?' (2010) 6 *Law, Environment and Development Journal* 263, 275.

¹⁴ Arts 1(1), 2(2), 2(3) and 2(6) MARPOL Convention



Source: www.independent.co.uk.

toxicity of the content of the *Probo Koala*'s slop tanks. However, since the dangerous load had not been officially reported by the vessel's captain, the Nigerian authorities did not consider that they were obliged under article 4 of the Bamako Convention to inform its Secretariat.¹⁵

2. 3. Basel Convention

Therefore, considering that the discharge of the substances from the *Probo Koala*'s slop tanks is not covered by the MARPOL Convention and cannot be qualified as '[deriving] from the normal operations of a ship',¹⁶ the facts underlying this incident clearly fall within the scope of the Basel Convention, which submits any transboundary movement of hazardous wastes to a prior informed consent procedure.

3. Action taken in the context of international institutions

3.1. Follow-up and action taken in the framework of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal

Interestingly, Ivory Coast did not trigger the Basel Convention NCP, but requested assistance from the Convention's Technical Cooperation Trust Fund, under which an ad-hoc technical commission was established in order to assist in assessing the damage to human health and the environment arising from the dumping. After its in-country visit, the commission found that it was 'unable, at this stage, to establish whether or not the discharging of waste from the *Probo Koala* constituted illegal transboundary movement of hazardous wastes as defined by the Basel Convention', but stated that:

"[w]ithout prejudging which international body is competent to rule on the case, serious lapses ha[d] occurred in the application

of the relevant regulations, whether under the Basel Convention, the MARPOL Convention or the Bamako Convention on the ban on the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa."¹⁷

During the eighth meeting of the Basel Convention's COP held while the commission was in Ivory Coast, the Parties did not refer the matter to the Compliance Committee either, but merely called for countries and stakeholders to provide technical and financial assistance to Ivory Coast to implement its emergency plan for the clean up and assessment of the damage on the ecosystems, its follow-up, and the investigation to establish responsibilities.¹⁸ Eventually, the Netherlands contributed €1 million to the fund established by the executive director of UNEP under decision VIII/1, without expressly recognising any sort of responsibility in the matter.¹⁹

3.2. Action taken by the UN Human Rights Council

Under its renewed mandate,²⁰ the Special Rapporteur on the adverse effects of the movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights carried out missions to Ivory Coast and the Netherlands in August and November 2008, respectively, in order to assess the implications of and response to the *Probo Koala* incident.²¹

Even though acknowledging that the causal link with the dumping of the *Probo Koala*'s slop wastes had not been fully established, and reaffirming his purpose not to interfere with pending judicial proceedings, the Special Rapporteur found that the *Probo Koala* incident had had – and was continuing to have – serious implications for the enjoyment of the right to life under the International Covenant on Civil and

¹⁵ See n 8.

¹⁶ Art 1(4) Basel Convention.

¹⁷ Report of the Basel Convention Secretariat's technical assistance mission to Côte d'Ivoire (20 November 2006–1 December 2006) in the context of decision V/32. UN Doc UNEP/CHW/OEWG/6/2 (2007), Annex, para. 3 (d) and (e).

¹⁸ COP decision VIII/1, para. 1. UN Doc UNEP/CHW.8/16 (2007).

¹⁹ UN Doc UNEP/SBC/BUREAU/8/1/7 (2007), para. 12.

²⁰ UN HRC Res. 9/1 (UN Doc A/HCR/9/28, 2 December 2008).

²¹ UN Doc A/HCR/12/26/Add.2.



www.unep.org – Technicians doing a water exam

Political Rights, and the right to health under the International Covenant on Social, Economic, and Cultural Rights.²² The Special Rapporteur's report concludes with a series of recommendations for further action addressed to the Netherlands, Ivory Coast and Trafigura. In particular, the Special Rapporteur recommends the Ivory Coast to reinforce its efforts to cope with the consequences of the *Probo Koala* incident. With respect to the Netherlands 'and other relevant state actors', he further recommends

“- to harmonize and strengthen existing legislation that implements international treaties governing the prevention of marine pollution and the transboundary movement of hazardous products, including the creation of financial mechanisms ensuring the proper discharge and treatment of such products; and

- to provide continuing financial support to the Ivory Coast to address the long-term consequences of the *Probo Koala* incident.”²³

Finally, the Special Rapporteur makes several recommendations to Trafigura, in order to provide continuing financial support to the Ivory Coast and to develop 'a corporate accountability and human rights policy and management framework' that should enable it to attain substantially higher standards of corporate social responsibility.²⁴

4. Development of the 'Trafigura Case' before national judiciaries

4.1. Ivory Coast

On 18 September 2006, Ivorian authorities arrested Claude Dauphin and Jean-Pierre Valentini, two leading executives of Trafigura who had travelled to Abidjan allegedly to investigate the matter. N'zi Kablan, executive of Puma Energy, Trafigura's local subsidiary, was also arrested. On

13 February 2007 all three executives were released as Trafigura and the Ivorian Government had reached a settlement according to which the company would pay €152 million for the construction of a waste treatment plant and the assistance in the recovery operations. In return, Ivory Coast dropped any present and future criminal or civil liability claims against Trafigura and released its imprisoned personnel. However, in the settlement Trafigura stressed that the payment did not imply the recognition of any sort of responsibility, nor liability in the matter.²⁵ Independently there from, the owner of the Ivorian company incorporated and contracted for the disposal of the *Probo Koala* Wastes –Tommy Ltd. – was sentenced to twenty years imprisonment, and his shipping agent to five years.²⁶

4.2. United Kingdom

In November 2006 about 30, 000 affected Ivorians brought a civil law suit to the High Court of Justice in London seeking compensation in excess of £100 million. Trafigura denied any sort of liability in the case, claiming it had no reasons to suspect that Tommy Ltd. would improperly dispose of the wastes.²⁷

In March 2009, the High Court of Justice granted the claimants a temporary injunction, prohibiting Trafigura from having 'any communications, by whatever means, with any claimant.'²⁸

This injunction was granted after the claimants' counsel presented evidence that the defendant's counsel had tried to influence individual claimants in order to change their statements. Eventually, in September 2009, shortly before the hearings before the Queen's Bench Division in the so-called Trafigura Personal Injury Group Litigation, both sides reached an agreement to settle the case with the payment of £28 million by Trafigura (approximately £1, 000 for each claimant), against the release of a joint statement, according to which exposure to the dumped wastes could

²² *ibid*, Annex, para. 29-38.

²³ *ibid*, Annex, para. 85.

²⁴ *ibid*, Annex, para. 87.

²⁵ Hindman and Lefebvre (n 1), 245-6.

²⁶ Jesse and Verschuuren (n 5), 157.

²⁷ See <business-

humanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases/TrafiguralawsuitsreCtedIvoire> (last accessed, 12 September 2011).

²⁸ See A Brown 'UK Oil Company Accused Of Trying To Buy Witnesses', Commercial Law International, 7 April 2009, in <<http://www.commerciallawinternational.com/?tag=toxic-spill>> (last accessed, 12 September 2011).



not have caused any serious injury or death. A few days before the extra-judicial settlement, a court in the Netherlands had ruled that the Dutch prosecutor had infringed the law in

giving Leigh Day & Co. – the solicitors of the Ivorian claimants in the *Trafigura Personal Injury Group Litigation* – access to a report by the Netherlands Forensics Institute on the nature of the slop wastes of the *Probo Koala*, as those claimants were not a party to the proceedings before the Dutch courts.²⁹ Therefore, Leigh Day & Co. was prevented from using the report in the case in the UK.

The following reproduces the text of the agreed final joint statement:

“The parties have since August 2006 expended considerable time and money investigating in detail the events in Abidjan in 2006. As part of that process, in excess of 20 independent experts in shipping, chemistry, modelling, toxicology, tropical medicine, veterinary science and psychiatry have been appointed to consider all the issues relating to those events.

• These independent experts are unable to identify a link between

exposure to the chemicals released from the slops and deaths, miscarriages, still births, birth defects, loss of visual acuity or other serious and chronic

injuries. Leigh Day and Co, in the light of the expert evidence, now acknowledge that the slops could at worst have caused a range of short term low level flu like symptoms and anxiety.

• From these investigations, it is also clear that there are many claims which have been made for symptoms, in some cases perhaps understandably, which are unconnected with any exposure to the slops.

• In the light of the expert evidence, Leigh Day & Co withdraws the comments made on its website on 8 November 2006 and subsequently, which alleged, among other things, that the slops had caused a number of deaths and miscarriages. Trafigura and Leigh Day & Co have accordingly resolved the libel proceedings brought by Trafigura.

• Leigh Day & Co deny that any of their clients have made any deliberately false claims. In the light of assurances given to their senior leading counsel and in view of his advice, Leigh Day

²⁹ [2009] Court of Gravenhage, Judgment of 4 September 2009, case number 341048 / KG ZA 09-830. See <zoeken.rechtspraak.nl/Default.aspx> (last accessed, 26 October 2011). According to an article published in the Dutch newspaper ‘de Volkskrant’ on 24 August 2009, the forensic report –the content of which was not put into question by Trafigura– established that the contents of the tanker had been 528,000 litres of extremely alkaline waste constituting 6.8% sulfur, for 3.5% alkyl-thiols and 0.5% hydrogen sulfide. See <<http://www.volkskrant.nl/vk/nl/2686/Binnenland/article/detail/352672/2009/08/24/Trafigura-OM-moet-rapport-geheimhouden.dhtml>> (last accessed, 26 October 2011).



withdraw any allegation that there of Trafigura or any of its legal advisors (including Macfarlanes) in investigating the claims.

- Leigh Day & Co acknowledge the substantial assistance that Trafigura provided to the Government and people of the Cote d'Ivoire, including the provision of medical supplies and payments for de-contamination of dumpsites and the establishment of a compensation fund.
- It remains Trafigura's position that it did not foresee, and could not have foreseen, the reprehensible acts of Compagnie Tommy in dumping the slops in and around Abidjan in August and September 2006, and that Compagnie Tommy acted entirely independently of, and without any authority from, Trafigura. Nevertheless, Trafigura regrets that this incident occurred and is pleased that the matter has now been resolved.³⁰

4.3. Further developments related to the extrajudicial settlement reached in the Trafigura Personal Injury Group Litigation

(1) Ivory Coast

After the extrajudicial settlement reached in the UK and Trafigura had transferred the agreed sum to a bank account established in Ivory Coast, a so far unknown organization – *Coordination nationale des victimes des déchets toxiques en Côte d'Ivoire* – led by Claude Gohourou claimed to be the legitimate representative of the plaintiffs and obtained an injunction from the Court of Appeal of Abidjan, freezing the settlement funds. On 22 January 2010 the Court of Appeal ruled in favour of *Coordination nationale des victimes des déchets toxiques en Côte d'Ivoire*. After the transferral of the settlement funds to this organization, in February an agreement was reached on their

distribution, which was made effective in March that year.³¹

(2) United Kingdom

In September 2009, shortly before the extrajudicial settlement was reached in the Trafigura Personal Injury Group Litigation, Trafigura obtained an injunction barring 'The Guardian' from publishing the so-called Minton Report, an internal e-mail dated from September 2006, containing the technical assessment of the *Probo Koala's* slop wastes that had been commissioned by Trafigura in the aftermath of the incident in Abidjan. In the conclusions of the Minton Report it is clearly stated with respect to the substances of the slop wastes that

"The compounds listed above are capable of causing severe human health effects through inhalation and ingestion. These include headaches, breathing difficulties, nausea, eye irritation, skin ulceration, unconsciousness and death. There would also be a strong and unpleasant odour over a large area. All of these effects were as reported in this incident."³²

The injunction was a so-called 'super-injunction', by which 'The Guardian' was not only barred from reporting on the content of the Minton Report, but also prevented from informing about its existence. As defined in a recent report, a super-injunction is 'a court order which requires that, when an injunction is in place, its very existence may not be disclosed or published.'³³

Eventually, the super-injunction was circumvented by the means of a question that the Labour MP Paul Farrelly submitted on 12 October 2009 for written answer to the then Secretary of State for Justice, Jack Straw, asking for his assessment

"... of the effectiveness of legislation to protect (a)

³⁰ Source: <trafigura.com/PDF/Trafigura%20and%20Leigh%20Day%20&%20Co%20agreed%20final%20Joint%20Statement.pdf> (last accessed, 12 September 2011).

³¹ See n 27.
³² Minton Report, 14 September 2006, para. 9.3, at <<http://image.guardian.co.uk/sys-files/Guardian/documents/2009/10/16/mintonreport.pdf>> (last accessed 12 September 2011).

³³ G Danby 'Privacy' Library Standard Note SN/HA/5978, 23 May 2011, 1.

³⁴ House of Commons, Questions for Oral or Written Answer beginning on Wednesday 14 October 2009, Part 1: Written Questions for Answer on Wednesday 14 October 2009. See <<http://www.publications.parliament.uk/pa/cm200809/cmordbk1/91014w01.htm>> (last accessed on 26 October 2011).

³⁵ The Guardian, 'Guardian gagged from reporting parliament', 12 October 2009, at <<http://www.guardian.co.uk/media/2009/oct/12/guardian-gagged-from-reporting-parliament>> (last accessed on 26 October 2011).

³⁶ The Guardian, 'Trafigura drops bid to gag Guardian over MP's question', 13 October 2009, at <<http://www.guardian.co.uk/media/2009/oct/13/trafigura-drops-gag-guardian-oil>> (last accessed on 26 October 2011).

³⁷ See <<http://news.bbc.co.uk/2/hi/programmes/newsnight/8417913.stm>>. Last access 26 October 2011. See also <<http://www.guardian.co.uk/media/2009/oct/17/bbc-trafigura/print>> (last access 26 October 2011).

³⁸ [2010] Court of District, Amsterdam, Judgment of 23 July 2010. Case number 13/846003-06. See

<<zoeken.rechtspraak.nl/detailpage.aspx?ijn=BN2149>> (last access 26 October 2011).

³⁹ [2010] Court of District, Amsterdam, Judgment of 23 July 2010. Case number 13/846004-08. See

<<zoeken.rechtspraak.nl/detailpage.aspx?ijn=bn2193>> (last access 26 October 2011).

⁴⁰ [2010] Court of District, Amsterdam, Judgment of 23 July 2010. Case number 13/846003-08. See

<<zoeken.rechtspraak.nl/detailpage.aspx?ijn=bn2068>> (last access 26 October 2011).

⁴¹ [2010] Court of District, Amsterdam, Judgment of 23 July 2010. Case number 13/994066-07. See

<<zoeken.rechtspraak.nl/detailpage.aspx?ijn=BN2185>> (last access 26 October 2011).

The case against the municipal port authority was declared inadmissible due to the immunity of governmental authorities under Dutch law: [2010] Court of District, Amsterdam, Judgment of 23 July 2010. Case number 13/846008-08. See <<zoeken.rechtspraak.nl/detailpage.aspx?ijn=BN2052>> (last access 26 October 2011).

⁴² [2011] Court of Appeals, Amsterdam, Judgments of 23 December 2011, Cases number 23-003334-10 and 23-003335-10. See

<<zoeken.rechtspraak.nl/ResultPage.aspx>> (last access 27 February 2012).

⁴³ [2010] Supreme Court, The Hague, Judgment of 6 July 2010. Case number 09/01546 B. See

<<zoeken.rechtspraak.nl/detailpage.aspx?ijn=bk9263>> (last access 26 October 2011).

⁴⁴ Jesse and Verschuuren (n 5), 158.

⁴⁵ [2012] Court of Appeal, Amsterdam, Judgment of 30 January 2012, Case number R.1115-10. See

<<zoeken.rechtspraak.nl/ResultPage.aspx>> (last access 27 February 2012). See also

<www.expatica.com/nl/news/dutch-news/trafigura-director-can-be-prosecuted-says-dutch-court_204823.html> (last access 24 February 2012).

whistleblowers and (b) press freedom following the injunctions obtained in the High Court by ... (ii) Trafigura and Carter-Ruck solicitors on 11 September 2009 on the publication of the Minton report on the alleged dumping of toxic waste in the Ivory Coast, commissioned by Trafigura."³⁴

Despite initial attempts by Trafigura's representatives (Carter-Ruck) to prevent The Guardian and other newspapers from reporting on this parliamentary question,³⁵ they dropped their claims in this respect, a fact which was celebrated as an important victory for the sake of freedom of information.³⁶

However, this was not the only occasion on which Trafigura interfered with the freedom of information. Earlier that year, in May 2009, Trafigura had also brought a libel action against the BBC in response to its reporting on the events of Abidjan in August 2006 in its programme *Newsnight*, emitted on 13 May, where it was said that the dumped slop wastes had caused deaths. Eventually, in December 2009, the BBC decided to settle the case for tactical reasons, as the extra-judicial settlement in the *Trafigura Personal Injury Group Litigation* – in which the claimants were publicly recognizing that the slop wastes could not have caused any serious injury nor death – left the broadcasting corporation exposed in the libel action.³⁷

4.4. The Netherlands

Nam The District Court of Amsterdam convicted Trafigura in July 2010, ordering the payment of €1 million, as it considered that the concealment of the hazardousness of the *Probo Koala* wastes from the port authorities in Amsterdam, and their subsequent exportation to an ACP country, violated article 18(1) of Council Regulation (EEC) 259/93, implementing the Basel Convention.³⁸ Moreover, the captain of the *Probo Koala* received a suspended

five-month prison sentence,³⁹ whereas the Trafigura officer in charge of the onboard 'caustic washing' and the discharge of the slops in Amsterdam received a suspended six-month prison sentence and a fine of €25,000.⁴⁰ On the other hand, even though he was found guilty of contravening Dutch environmental legislation, the director of the Amsterdam Port Services was acquitted from any criminal liability, as he rightfully trusted the municipal port authority that allowed him to reload the wastes on the *Probo Koala*.⁴¹ These judgments have recently been confirmed by the Court of Appeal of Amsterdam in December 2011.⁴²

Prior to the aforementioned judgments of the District Court of Amsterdam, the Supreme Court of the Netherlands overturned a ruling of 19 December 2008 of the Court of Appeal of Amsterdam, in which it decided not to prosecute the Chief-Executive Officer (CEO) of Trafigura Beheer, as it did not appreciate there to be a sufficient link between the CEO's personal actions and the dumping of the wastes in Ivory Coast. The Supreme Court held that this decision relied on too narrow an interpretation of the terms 'transboundary movement' and 'export' in Regulation (EEC) 259/93. According to the Supreme Court, these terms necessarily include all the activities of the exporter once the waste has entered the territorial waters of an ACP country, particularly those after it has reached its final destination.⁴³ Therefore, the case has been referred back to the Court of Amsterdam, where it is still pending final sentencing.⁴⁴ Accordingly, the Court of Appeal reviewed its original decision on 30 January 2012 and decided that Claude Dauphin can be prosecuted for the alleged illegal export of waste by Trafigura.⁴⁵

Overall, in view of the aforementioned decisions of the national judiciary, the Netherlands may be considered to have acquitted its obligation to 'take

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⁴⁶ Basel Convention, art 4(4). See Jesse and Verschuuren (n 5), 158.

⁴⁷ See [2011] Court of Appeal, The Hague, Decision of 12 April 2011. Case number K09/0334.

<zoeken.rechtspraak.nl/detailpage.aspx?ijn=BQ1012> and W.T. Douma. 'Trafigura not prosecuted for dumping of chemical waste in Ivory Coast', at <asser.nl/Default.aspx?site_id=7&level1=12218&level2=12255&level3=13072> (last accessed 27 June 2011).

appropriate legal, administrative and other measures to implement and enforce the provisions of this Convention, including measures to prevent and punish conduct in contravention'.⁴⁶ Yet, in April 2011 the Court of Appeal in The Hague rejected the suit of Greenpeace Netherlands seeking to oblige the Dutch public prosecutor to initiate criminal proceedings against Trafigura Beheer for homicide, bodily harm and environmental crimes committed in Ivory Coast in connection with the *Probo Koala* incident. Interestingly, the Court found that, as an environmental NGO according to its statutes, Greenpeace lacked the capacity to seek the prosecution of offences other than environmental crimes. Even with respect to the latter, the complexities of the inquiry that would have had to be carried out in cooperation with Ivory Coast, in combination with the compensation that Trafigura had already paid to local authorities in 2007 were found reasonable grounds not to prosecute.⁴⁷



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References

Cox, G., 'The Trafigura Case and the System of Prior Informed Consent under the Basel Convention - A Broken System?' (2010) 6 *Law, Environment and Development Journal* 263.

Hindman, A. and R. Lefeber, 'General Developments. International/Civil Liability and Compensation' (2010) 20 *Yearbook of International Environmental Law* 239.

Jesse, K. and J. Verschuuren, 'Country Report: The Netherlands' (2011)(1) *IUCN Academy of Environmental Law e-Journal* 155.

'Rapport de la Commission Internationale d'Enquête sur les déchets toxiques déversés dans le district d'Abidjan' (19 February 2007). Available at <<http://www.courdescomptesci.com/attachments/File/RAPPORT%20DE%20LA%20CIEDT.pdf>> accessed 12 September 2011

UNEP, IMO, Secretariat of the Basel Convention and Government of Ivory Coast, 'Evaluation Report. Assessment of the Port of Abidjan' *UNEP* (2009).