



Asamblea General

Distr.
GENERAL

A/HRC/12/26/Add.2
3 de septiembre de 2009

ESPAÑOL
Original: INGLÉS

CONSEJO DE DERECHOS HUMANOS
12º período de sesiones
Tema 3 de la agenda

**PROMOCIÓN Y PROTECCIÓN DE TODOS LOS DERECHOS HUMANOS,
CIVILES, POLÍTICOS, ECONÓMICOS, SOCIALES Y CULTURALES,
INCLUIDO EL DERECHO AL DESARROLLO**

**Informe del Relator Especial sobre los efectos nocivos para el goce de los
derechos humanos del traslado y vertimiento ilícitos de productos y
desechos tóxicos y peligrosos, Okechukwu Ibeanu ***

Adición

MISIÓN A CÔTE D'IVOIRE Y LOS PAÍSES BAJOS
(4 a 8 de agosto de 2008 y 26 a 28 de noviembre de 2008)**

* Documento presentado con retraso.

** El resumen del presente informe se distribuye en todos los idiomas oficiales. El informe propiamente dicho, que figura en el anexo del resumen, se distribuye únicamente en el idioma en que se presentó y en francés.

Resumen

En el presente informe se exponen las conclusiones y recomendaciones del Relator Especial sobre los efectos nocivos para el goce de los derechos humanos del traslado y vertimiento ilícitos de productos y desechos tóxicos y peligrosos a raíz de sus visitas a Côte d'Ivoire, del 4 al 8 de agosto de 2008, y a los Países Bajos, del 26 al 28 de noviembre de 2008.

Ambas visitas se realizaron en el marco de las actividades del Relator Especial para examinar los efectos para el goce de los derechos humanos del traslado y vertimiento de productos y desechos tóxicos y peligrosos del buque *Probo Koala* en Abidján el 19 de agosto de 2006 y en días próximos a esa fecha. El *Probo Koala* había sido fletado por la empresa de comercio de productos básicos Trafigura y había atracado en Amsterdam antes de iniciar su viaje a Côte d'Ivoire, donde vertió desechos en distintos lugares del distrito de Abidján.

En el caso de los Países Bajos, la visita se centró en los acontecimientos que rodearon al intento de descarga de los desechos del *Probo Koala* en el puerto de Amsterdam, la recarga de los desechos y la posterior salida del buque. El Relator Especial también evaluó las medidas adoptadas por las autoridades de los Países Bajos tras el vertimiento en Côte d'Ivoire.

El Relator Especial llega a la conclusión de que se han reforzado las medidas para evitar que se vuelvan a producir incidentes similares en los Países Bajos. Alienta a las autoridades públicas a que efectúen inspecciones rigurosas y, de ser necesario, procedan a la detención de los buques en casos como el del *Probo Koala*. Los Países Bajos deberían seguir prestando apoyo al Gobierno de Côte d'Ivoire para que pueda vigilar y combatir eficazmente los efectos a largo plazo del incidente en la salud humana y el medio ambiente.

En la visita a Côte d'Ivoire se examinaron los procedimientos seguidos antes de la descarga y el vertimiento de los desechos del *Probo Koala* y durante esas operaciones y se evaluaron las medidas correctivas adoptadas por el Gobierno tras el incidente. El Relator Especial señaló la necesidad urgente de abordar las cuestiones pendientes, en particular en lo que respecta a la descontaminación, la atención de la salud y las indemnizaciones. Alienta a las autoridades de Côte d'Ivoire a que sigan adoptando medidas para proteger el derecho a la vida, el derecho al disfrute del más alto nivel posible de salud física y mental y el derecho a un medio ambiente sano de todas las víctimas afectadas y sus familias.

El examen del Relator Especial sobre el papel de Trafigura en el vertimiento de los desechos del *Probo Koala* se centró en la obligación de la empresa de respetar los derechos humanos. A este respecto, recomienda que Trafigura siga financiando y apoyando las labores de reparación pendientes en Côte d'Ivoire. En sus operaciones generales, Trafigura también debería asegurar la divulgación de información oportuna y fiable sobre sus actividades y sobre la naturaleza y la composición de los desechos que estas generan. Asimismo, Trafigura debería proporcionar sin demora información adecuada sobre los efectos potenciales de sus actividades en el medio ambiente, la salud y la seguridad y ocuparse sistemáticamente de que los desechos sean sometidos a un tratamiento ambientalmente racional, en particular procediendo a una evaluación rigurosa de las instalaciones portuarias de recepción y conciliando los intereses comerciales con las exigencias de derechos humanos y ambientales.

Anexo

**REPORT OF 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,
OKECHUKWU IBEANU**

**MISSION TO CÔTE D'IVOIRE (4 TO 8 AUGUST 2008) AND
THE NETHERLANDS (26 TO 28 NOVEMBER 2008)**

CONTENTS

	<i>Paragraphs</i>	<i>Page</i>
I. INTRODUCTION	1 - 8	4
II. PURPOSE OF THE VISITS AND FRAMEWORK FOR ANALYSIS	9 - 18	5
III. SUMMARY OF EVENTS PRIOR AND UP TO THE DUMPING OF WASTE IN ABIDJAN	19 - 28	7
IV. IMPACT ON THE ENJOYMENT OF HUMAN RIGHTS	29 - 38	8
V. RESPONSES BY THE NETHERLANDS, CÔTE D'IVOIRE AND TRAFIGURA	39 - 84	10
A. The Netherlands	40 - 55	11
B. Côte d'Ivoire	56 - 67	13
C. Trafigura	68 - 84	15
VI. RECOMMENDATIONS	85 - 88	19

I. INTRODUCTION

1. 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 conducted a country visit to Côte d'Ivoire, from 4 to 8 August 2008, and to the Netherlands, from 26 to 28 November 2008.
2. The two country visits were undertaken as part of the Special Rapporteur's efforts to examine the effects on the enjoyment of human rights of the movement and dumping of toxic and dangerous products and wastes from the vessel *Probo Koala*, in Abidjan, on and around 19 August 2006. The *Probo Koala* had been chartered by commodity trading company Trafigura and had docked in, inter alia, Amsterdam, prior to its journey to Côte d'Ivoire. The findings of both visits are therefore presented in one comprehensive report.
3. During his visit to Côte d'Ivoire, the Special Rapporteur met with representatives of the Ministry of Foreign Affairs, the Ministry of the Environment, Water and Forests, the Ministry of Justice and Human Rights, the Ministry of Animal Husbandry and Fisheries, the Ministry of Town and Urban Sanitation, the Ministry of Health and Public Hygiene, the Prime Minister's Office, the Parliamentary Committee on the Environment, the Governor of the District of Abidjan, the Executive Bureau of the National Human Rights Commission of Côte d'Ivoire, the Public Prosecutor, the Côte d'Ivoire Anti-Pollution Centre, the President of the International Commission of Enquiry on Toxic Waste in the District of Abidjan, the President of the National Commission of Enquiry on Toxic Waste in the District of Abidjan, the National Office of Civil Protection, the Chamber of Commerce and Industry, the Autonomous Port of Abidjan, the United Nations Operation in Côte d'Ivoire (UNOCI), the International Committee of the Red Cross, the chief of the village in Akouédo, civil society and victims. The Special Rapporteur also had the opportunity to visit some of the sites where waste from the *Probo Koala* was discharged in the districts of Abobo, Akouédo, Route d'Alepe and Vridi.
4. During his visit to the Netherlands, the Special Rapporteur met with representatives of the Ministry of Foreign Affairs, the Ministry of Transport and its inspectorate, the Ministry of Housing, Spatial Planning and Environment and its inspectorate, the Amsterdam City Council, the Mayor of Amsterdam, the Port of Amsterdam, Amsterdam Port Services, Saybolt International, as well as parliamentarians of the Standing Committee on the Environment, the Public Prosecutor, academics, lawyers and members of civil society. In addition, the Special Rapporteur met with the director of Trafigura and his lawyer, as well as with an external adviser appointed by Trafigura to conduct an independent inquiry into the *Probo Koala* incident. Prior to the visit to the Netherlands, the Special Rapporteur had already met with Trafigura representatives in Geneva on 10 September 2008.
5. Both missions were carried out at the invitation of the respective Governments. The Special Rapporteur wishes to thank both the Government of Côte d'Ivoire and the Government of the Netherlands for their invitations and for their cooperation during the visits.
6. In relation to the visit to Côte d'Ivoire, the Special Rapporteur would like to thank the Ministry of Environment, Water and Forestry for having taken the lead in the organization of the mission to Côte d'Ivoire. He would also like to express his appreciation to UNOCI and its Human Rights Division for their tireless efforts and support throughout his visit. In addition, the Special Rapporteur would like to express his sincere gratitude to civil society representatives,

including victims and associations representing their interests, who took the time to meet and speak with him during and in relation to his visit to Côte d'Ivoire.

7. With regard to the visit to the Netherlands, the Special Rapporteur thanks the Ministry of Foreign Affairs for its leading role in the organization of the visit. He also gives special thanks to the Standing Committee on the Environment, for its commitment and cooperation during his visit.

8. The present report provides an account of the Special Rapporteur's findings and recommendations deriving from the two visits. Following an overview of the specific objectives of the visits and relevant international standards used by the Special Rapporteur as a framework for analysis, the Special Rapporteur briefly describes the sequence of events leading up to the dumping of wastes from the vessel *Probo Koala* in Abidjan, its impact on the enjoyment of human rights and the response by relevant duty-bearers and other stakeholders. He concludes the report with a set of recommendations for action still to be taken so that the rights of victims and their families can be realized.

II. PURPOSE OF THE VISITS AND FRAMEWORK FOR ANALYSIS

9. The specific purpose of the two country visits was essentially threefold:

(a) To examine the adverse effects on the full enjoyment of human rights resulting from the movement and dumping of the waste from the *Probo Koala*;

(b) To assess the response by relevant duty-bearers and other stakeholders on the basis of their obligations and responsibilities under international human rights and environmental law;

(c) To identify lessons learned and to recommend additional measures in order to ensure the full realization of the victims' right to an effective remedy and reparation.

10. While the Special Rapporteur acknowledges the involvement of a range of States and third parties in the movement and dumping of the waste from the *Probo Koala*, he limits the report to an assessment of actions taken by the Government of the Netherlands, the Government of Côte d'Ivoire and Trafigura. These limitations are imposed by practical and financial constraints on the ability of the Special Rapporteur to make country visits, but also reflect his evaluation of the central role played by these stakeholders in the incident.

11. The Special Rapporteur wishes to stress that the purpose of the visits was not to make inferences on the question of alleged liability of relevant stakeholders under criminal and civil law. He is aware that Trafigura is currently contesting the consequences of the dumping in legal proceedings in several countries, including the Netherlands and the United Kingdom of Great Britain and Northern Ireland. The Special Rapporteur also notes that the question of liability falls outside the scope of his mandate. Instead, the report focuses on the rights of victims of the incident.

12. In order to assess the level of realization of their rights, the Special Rapporteur refers in particular to the following international human rights standards:

(a) The right to life, as enshrined in, inter alia, article 3 of the Universal Declaration of Human Rights and article 6 of the International Covenant on Civil and Political Rights;

(b) The right to the enjoyment of the highest attainable standard of physical and mental health, as set out in, inter alia, article 25 (a) of the Universal Declaration of Human Rights and article 12 of the International Covenant on Economic, Social and Cultural Rights.

13. Relevant principles that the Special Rapporteur also considers of great importance to ensuring a human rights-based approach to the management of toxic and dangerous products and wastes in general, and which he has taken into account in his analysis, are accountability, transparency, access to information and participation. These principles are grounded in the right to an effective remedy, the right to freedom of expression and the right to take part in the conduct of public affairs, as enshrined respectively in article 2, paragraphs 3, 19 and 25 of the International Covenant on Civil and Political Rights.

14. The Special Rapporteur has also taken into account relevant international environmental standards, because they govern, inter alia, the transportation of hazardous wastes and the prevention of marine pollution. In this regard, reference is made to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal of 1989, which establishes a prior informed consent procedure for such movements to take place and requires that all practicable steps are taken to ensure that hazardous or other wastes are managed in such a manner as to protect human health and the environment against the adverse effects that may result from such wastes. Reference is also made to the International Convention for the Prevention of Pollution from Ships of 1973, as modified by the Protocol of 1978 relating thereto (MARPOL Convention).

15. Both Côte d'Ivoire and the Netherlands are parties to the main international human rights treaties of relevance to the mandate of the Special Rapporteur, as well as to the above-mentioned international conventions on hazardous wastes and the prevention of pollution from ships. They are therefore duty-bound to implement and comply with their provisions.

16. With regard to the human rights responsibilities of transnational corporations and other business enterprises, such as Trafigura, these can be derived from an evolving body of norms both within and outside the international human rights system. They include the “protect, respect and remedy” framework developed by the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises.¹ The framework emphasizes the State duty to protect against human rights abuses by third parties, including business, through appropriate policies, regulation and adjudication; the corporate responsibility to respect human rights, which in essence means to act with due diligence to avoid infringing on the rights of others; and greater access to effective remedy, judicial and non-judicial (A/HRC/11/13).

17. A relevant source of reference outside the framework of international human rights mechanisms are the Guidelines for Multinational Enterprises of the Organization for Economic Cooperation and Development (OECD). The Guidelines are recommendations jointly addressed

¹ A/HRC/8/5.

by Governments to multinational enterprises, which are called on to “respect the human rights of those affected by their activities consistent with the host government’s international obligations and commitments”.

18. The Special Rapporteur believes that these principles and standards of good practice, and the “protect, respect and remedy” framework developed by the Special Representative of the Secretary-General, provide an authoritative measure for assessing the human rights responsibilities of Trafigura and fulfilment of the duty to protect by both Côte d’Ivoire and the Netherlands in relation to the movement and dumping of waste from the *Probo Koala* in Côte d’Ivoire. Furthermore, the Special Rapporteur notes that Trafigura is bound by the domestic legislation of the country in which it operates, and that such legislation may include rules and regulations implementing the provisions of the Basel Convention.

III. SUMMARY OF EVENTS PRIOR AND UP TO THE DUMPING OF WASTE IN ABIDJAN

19. The account of events described below and leading up to the dumping of waste in Abidjan in August 2006 is by no means exhaustive. It merely serves as a basis for analysis of the effects of the incident on the enjoyment of human rights and related responses by relevant duty-bearers and other stakeholders in line with their international human rights obligations and responsibilities.

20. As noted above, the waste discharged in Abidjan originated from the vessel *Probo Koala*. This type of ship generally transports ores, hydrocarbons or any type of bulk cargo. It has two slop tanks designed for the storage of cargo residues, tank purging water and hydrocarbon mixtures. Apart from hydrocarbons, the *Probo Koala* was also authorized to transport liquid sodium hydroxide (caustic soda), which could be used for removing mercaptans² from blend stocks and gasolines and for the cleaning and breakdown of fuel residue.

21. The *Probo Koala*, which sails under a Panamanian flag, was chartered by Trafigura in October 2004. Trafigura is one of the world’s largest commodity trading enterprises in the energy sector. Its operations include every aspect of the sourcing and trading of crude oil, petroleum products, renewable energies, metals, metal ores and concentrates for industrial consumers. Trafigura employs 1,900 staff in 42 countries and had a turnover of 73 billion United States dollars in 2008.

22. According to information received from Trafigura, gasoline blend stocks were transferred to the *Probo Koala* in the Mediterranean between April and June 2006. The blend stocks were treated with caustic soda in order to reduce the level of mercaptans, which prevent the blending of oil products into a tradable commodity. Trafigura reports that, after this “onboard” caustic washing, the *Probo Koala*’s slop tanks contained a mixture of water, blend stock and caustic soda.

23. On 30 June 2006, on its way to the port of Paldiski in Estonia to unload part of its gasoline cargo, the *Probo Koala* docked at the port of Amsterdam to refuel and to discharge the content

² Sulphur-containing organic compounds.

of its slop tanks. On the night of 2 July 2006, a vessel operated by Amsterdam Port Services, a specialized waste de-slopping company with expertise in the unloading and handling of a wide range of vessel-specific waste, including MARPOL slops, collected the first part of the waste from the *Probo Koala*'s slop tanks.

24. Strong odours emanating from the waste prompted Amsterdam Port Services to take a sample, which revealed a significantly higher chemical oxygen demand than it was permitted and able to process on its premises, in addition to a high quantity of mercaptans, which was causing the foul stench. Given that treatment would be more complex and costly and that it could only be done in Rotterdam, Amsterdam Port Services gave Trafigura a revised cost estimate accounting for the higher level of toxicity revealed by sample analysis (from €20 per m³ to €900 per m³). Trafigura rejected the quote and requested to reload the waste.

25. On 5 July 2006, Amsterdam Port Services proceeded to re-embark the waste, after which the *Probo Koala* set sail for Paldiski, where, between 9 and 13 July, it reportedly unloaded 3,300 tons of gasoline and loaded approximately 26,000 metric tons of unleaded gasoline, bound for Lomé and Lagos, Nigeria.

26. On 19 August 2006, the *Probo Koala* berthed in Abidjan. Through its subsidiary, Puma Energy Côte d'Ivoire, and with the assistance of its shipping agent in Abidjan, WAIBS, Trafigura had arranged unloading and treatment of its slop waste with a newly created company, Tommy Ltd. The company had made an offer of \$30 per m³ for waste falling under the MARPOL Convention and \$35 per m³ for chemical slops, after which Trafigura instructed WAIBS to make arrangements for the discharge of the waste and to coordinate the operation with Tommy Ltd.

27. Tommy Ltd. rented 12 trucks, which dumped the waste at various sites in the district of Abidjan between the evening of 19 August and the morning of 20 August 2006. A report by the United Nations Disaster Assessment and Coordination team,³ deployed upon request by the United Nations Humanitarian Coordinator in Abidjan, indicates that, on the night of 14 September, further dumping of the same hazardous waste may have taken place.

28. According to the Ivorian Ministry of Health and Public Hygiene, there were 18 dumping points in 8 sites. Additional sites have also been reported. None of the dumping sites had proper facilities for the treatment of chemical waste. Suffocating odours originated from the dumping sites.

IV. IMPACT ON THE ENJOYMENT OF HUMAN RIGHTS

29. Residents in areas close to the dumping sites were directly exposed to the waste through skin contact and the breathing in of volatile substances. In addition, secondary exposure reportedly occurred through contact with surface water, groundwater and eventually through the consumption of food grown on or extracted from contaminated land and water.

³ United Nations Disaster Assessment and Coordination, "Cote d'Ivoire: urban hazardous waste dumping", 11-19 September 2006.

30. On 20 August 2006, 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. Some residents were allegedly forced to flee their homes and many businesses forewent commercial earnings for a significant period of time following the contamination. Widespread public demonstrations were held in the district of Abidjan. During the Special Rapporteur's visit to Côte d'Ivoire, non-governmental organizations informed him that the demonstrations were often dispersed violently.

31. According to official estimates, 15 people died, 69 were hospitalized and there were more than 108,000 medical consultations resulting from the incident.⁴ During the Special Rapporteur's visit, non-governmental organizations informed him that the figures may well be higher, taking into account additional deaths and long-term health consequences that had been reported. An assessment by the Ministry of Health and Public Hygiene concluded that there were 63,296 probable and 34,408 confirmed cases of exposure to the waste from the *Probo Koala*. In this regard, the impact of the dumping of the waste from the *Probo Koala* on the enjoyment of human rights mainly concerns the right to life and the right to the enjoyment of the highest attainable standard of physical and mental health.

32. The Special Rapporteur considers that loss of life as a result of the movement and dumping of toxic waste constitutes a violation of the right to life. In interpreting the right to life under the International Covenant on Civil and Political Rights, the Human Rights Committee stressed that the expression "inherent right to life" could not properly be understood in a restrictive manner, and that the protection of that right requires States to take positive measures.⁵ In combination with the general legal obligation arising from article 2 of the Covenant, which requires States to take legislative, judicial, administrative, educative and other appropriate measures in order to fulfil their legal obligations under the Covenant,⁶ the Special Rapporteur argues that the right to life imposes on States a duty to take all appropriate measures to ensure the safe and sound management of toxic and dangerous products and wastes throughout their life cycle. Furthermore, failure by States parties to take appropriate measures to prevent, investigate, punish and redress the loss of life caused by toxic and dangerous products and wastes is a violation of the right to life.

33. In the view of the Special Rapporteur, similar State obligations would also arise in relation to the negative effects on human health of the movement and dumping of toxic and dangerous products and wastes. In this respect, the Committee on Economic, Social and Cultural Rights emphasized that the improvement of all aspects of environmental and industrial hygiene, as a component of the right to health, comprised the prevention and reduction of a population's

⁴ Report of the International Commission of Inquiry on the discharge of toxic wastes in the district of Abidjan, 19 February 2007.

⁵ General comment No. 6 on the right to life (1982), para. 5.

⁶ General comment No. 31 on the nature of the general legal obligations imposed on States parties to the Covenant (2004), para. 7.

exposure to harmful substances, such as radiation and harmful chemicals or other detrimental environmental conditions that have a direct or indirect impact on human health.⁷

34. The Special Rapporteur acknowledges that the existence of a causal link between the alleged violations of the rights to life and health, on the one hand, and the waste offloaded and dumped from the *Probo Koala*, on the other, has not yet been fully established. In this regard, he once again stresses that he does not in any way intend to prejudge future determinations by courts seized of this matter. While not being in a position to make conclusive inferences on the exact composition and toxic nature of the waste in question, the Special Rapporteur would nevertheless like to make the observations below.

35. Firstly, the Special Rapporteur has taken note of information received from Trafigura stating that the characteristics of the waste from the *Probo Koala* could have resulted in a highly unpleasant smell, but could not have led to the widespread injuries, illnesses and deaths alleged.

36. Secondly, the Special Rapporteur is aware that the analysis of samples taken in Amsterdam, when the *Probo Koala* docked there, and in Abidjan in the aftermath of the incident showed that the waste dumped from the *Probo Koala* was petrochemical. According to the United Nations Disaster Assessment and Coordination team that visited Côte d'Ivoire shortly after the incident, this kind of waste "can be harmful to humans and the environment if serious exposure takes place".³

37. Thirdly, the Special Rapporteur observes that a mission to Côte d'Ivoire, mandated by the Basel Convention secretariat in response to a request for technical assistance from Côte d'Ivoire, concluded that, "based on available information, the *Probo Koala* wastes exhibit the hazard characteristics of the Basel Convention".⁸

38. On the basis of the above considerations and taking into account the immediate impact on public health and the proximity of some of the dumping sites to areas where affected populations reside, the Special Rapporteur considers that there seems to be strong prima facie evidence that the reported deaths and adverse health consequences are related to the dumping of the waste from the *Probo Koala*. Hence, there are sufficient grounds for considering the actions of relevant stakeholders prior to, during and after the dumping from a human rights perspective, in addition to the consideration of relevant standards in relation to the movement of hazardous wastes and marine pollution.

V. RESPONSES BY THE NETHERLANDS, CÔTE D'IVOIRE AND TRAFIGURA

39. Given the alleged adverse effects on the enjoyment of human rights resulting from the dumping of waste from the *Probo Koala*, the Special Rapporteur considered the actions taken by the Netherlands, Côte d'Ivoire and Trafigura prior to, during and after the dumping in order to assess the fulfilment of relevant duties and responsibilities under international human rights law, as described above.

⁷ General comment No. 14 on the right to the highest attainable standard of health (2000), para. 15.

⁸ UNEP/CHW/OEWG/6/2, annex, para. 3 (c).

A. The Netherlands

40. The Rapporteur focused on two aspects: (a) procedures followed during the aborted discharge of the waste and the subsequent permission for the ship to sail to Estonia; and (b) actions taken by the Government after the dumping in Côte d'Ivoire, in particular in terms of determining the facts and taking of measures to ensure prevention of any such incidents in the future.

41. With regard to the first aspect, the Special Rapporteur notes that national and European legislation is in place to implement the provisions of both the Basel Convention and the MARPOL Convention. The national laws concerned are the Environmental Management Act and the Prevention of Pollution from Ships Act. The Environmental Management Act falls within the remit of the Ministry of Housing, Spatial Planning and the Environment and its inspectorate. The Prevention of Pollution from Ships Act comes under the competency of the Ministry of Transport, Public Works and Water Management and its inspectorate.

42. Relevant legislation at the level of the European Union includes Council Regulation (EEC) No. 259/93, as subsequently amended, on the supervision and control of shipments of waste within, into and out of the European Community, which transposes the Basel Convention obligations into European Union legislation. The Special Rapporteur notes that regulations are binding in their entirety and directly applicable in all States members of the Union without the need to be transposed into national law.

43. The circumstances surrounding the discharge of waste from the *Probo Koala* were unusual. Firstly, as mentioned in the summary of events, uncertainty arose over the exact composition and toxic nature of the waste after part of the waste had been offloaded from the vessel in Amsterdam. Secondly, an extensive discussion ensued among relevant authorities on the question of whether Amsterdam Port Services was technically the holder of the waste and therefore required to dispose of it in an environmentally sound manner. The situation was further compounded by the absence of an agreement between Trafigura and Amsterdam Port Services on the higher cost for treatment of the waste following the analysis of a waste sample and the subsequent request made by Trafigura to reload the waste, a situation that may have created doubts as to the applicable legal framework.

44. Under such circumstances, inspection of the vessel and a sample analysis to determine the origin and exact composition of the waste would have been necessary to identify the applicable legal framework. Although the Special Rapporteur did receive information on hydrogen sulphide readings, which indicated that there was no danger to human health, in addition to a sample taken by the Netherlands Forensic Institute, an inspection of the vessel by national police and measurements by a surveying company, it is his understanding that relevant inspectorates did not carry out any further inspections and that the possibility of detaining the *Probo Koala* was not fully considered.

45. The Environmental Management Act and Council Regulation (EEC) No. 259/93 did nevertheless offer possible grounds to prevent the return of the waste already offloaded and the departure of the ship. In particular, the Environmental Management Act prohibits the discarding of industrial or hazardous waste by transferring it to another person not been authorized to receive it in accordance with section 10.37, paragraph 2, of the Act. This clearly hinges on the

question of whether Amsterdam Port Services had accepted the offloaded part of the waste and whether reloading it would constitute a transboundary movement under Council Regulation (EEC) No. 259/93. In addition, the Regulation only allows the movement of hazardous waste to another State member of the European Union if consent is given, while exportation to countries that are not members of OECD is prohibited.⁹

46. The Prevention of Pollution from Ships Act requires the captain of a ship to deliver the residues of certain categories of noxious substances specified in annex II to the MARPOL Convention to a port reception facility.

47. Although the Special Rapporteur accepts the complexity of the legal framework and the uncertainty regarding its proper application in the case in question, he regrets that none of these provisions were ultimately invoked to prevent the reloading of the waste and the departure of the *Probo Koala*, particularly considering that the captain was alleged to have made conflicting claims about the nature of the waste.

48. With regard to the remedial action taken by the Government after the dumping had taken place in Côte d'Ivoire, the Special Rapporteur has taken note of several fact-finding initiatives undertaken at the levels of local and central government. They include: (a) an inquiry conducted by the Hulshof Commission, set up by the Municipality of Amsterdam (see paragraph 73 below); (b) a factual account and summary of relevant legislation prepared by the Inspectorate of the Ministry of Housing, Spatial Planning and the Environment; and (c) an advisory opinion issued by the Dutch parliamentary counsel.

49. The Special Rapporteur welcomes the initiatives taken by the Government to set up an inter-ministerial working group to coordinate follow-up to the *Probo Koala* case. According to information received by the Special Rapporteur, such initiatives include the preparation of a protocol on "unusual situations", which would clarify responsibilities and decision-making processes, and a study on better harmonization of different legal frameworks involved. The Special Rapporteur also appreciates the efforts made to improve cooperation and coordination between different inspectorates in this context.

50. As financial considerations appear to have played a key role in the decision to reload the waste back on to the *Probo Koala*, the Special Rapporteur encourages the Netherlands to consider creating a fund or another financing mechanism in the implementation of its follow-up initiatives. Such a funding tool would ensure the proper discharge and treatment of toxic and hazardous waste in the Netherlands in situations where disagreements over payment arise, where the carrier of the waste is unwilling to pay for environmentally sound disposal of such waste and where inaction could determine a serious risk of serious or irreversible damage to human health and the environment. Upon judicial determination of liability, the carrier of the waste would be required to reimburse the costs incurred.

⁹ Council decision 97/640/EC concerned the approval, on behalf of the Community, of the amendment to the Basel Convention, as laid down in decision III/1 of the Conference of the Parties. By that amendment, all exports of hazardous waste destined for disposal from countries listed in annex VII (Parties and other States which are members of OECD, the European Community and Liechtenstein) to the Convention to countries not listed therein were prohibited, with effect from 1 January 1998.

51. The Special Rapporteur is nevertheless satisfied that improved measures have been taken to prevent the recurrence of such incidents. In this regard, he was informed that a similar incident occurred in 2007 with another vessel allegedly chartered by Trafigura. In that case, the inspectorate of the Ministry of Housing, Spatial Planning and the Environment took samples and the waste was processed in a plant for toxic waste after the results of an analysis of the samples taken by the inspectorate had become available and permission was given by the local authorities to process the waste. Significantly, the waste collector and Trafigura agreed on the processing of the waste.

52. The Special Rapporteur also notes the investigation conducted by the Public Prosecutor, which has resulted in judicial proceedings against Trafigura, the captain of the *Probo Koala*, Amsterdam Port Services and the municipality of Amsterdam. These proceedings are currently ongoing.

53. At the international level, the Special Rapporteur is aware of the support provided by the Netherlands for the deployment of the United Nations Disaster Assessment and Coordination team in the aftermath of the dumping in Côte d'Ivoire in 2006. The Netherlands has contributed financially to a project implemented by the United Nations Environment Programme (UNEP) with counterparts from the Côte d'Ivoire Ministry of Environment, Water and Forests. The project focuses on the preparation of a hazardous waste management plan for the district of Abidjan and capacity-building of the waste management regime in the port of Abidjan, including the transfer of technology to strengthen the technical capacity of the Ivorian Anti-Pollution Centre.

54. The Basel Convention Regional Centre for French-speaking countries in Africa, based in Senegal, is also implementing a regional component of the UNEP project with the aim of building institutional capacity in Côte d'Ivoire and other countries. This includes technical assistance to develop norms and regulations to eliminate loopholes at the national level, with the overall objective of enhancing capacity to monitor and control the transboundary movement of hazardous waste and chemicals.

55. Further assistance by the Government of the Netherlands, in particular in the form of technical expertise, to help the Government of Côte d'Ivoire deal with outstanding health-care, decontamination and other issues would be useful and necessary.

B. Côte d'Ivoire

56. The Special Rapporteur's visit to Côte d'Ivoire included a review of procedures followed prior to and during the dumping of the waste from the *Probo Koala*, and an assessment of the remedial action taken by the Government after the incident. The latter included issues such as decontamination, access to health care, compensation, and access to justice, which the Special Rapporteur considers essential for the realization of the right to an effective remedy and reparation for victims of the dumping.

57. Articles 19 and 28 of the Constitution of Côte d'Ivoire guarantee the right to a healthy environment. The import of wastes and hazardous wastes into Côte d'Ivoire is prohibited by law No. 88-651 of 7 July 1988 and framework law No. 96-766 of 3 October 1996. Under these laws,

the unauthorized importation of hazardous wastes and noxious substances is a criminal offence.¹⁰

58. Despite the above-mentioned legal safeguards, the dumping of the waste from the *Probo Koala* revealed a weakness of and disregard for administrative procedures to prevent unauthorized importation of hazardous waste. With regard to the discharge of waste in the port of Abidjan, noted flaws include the granting of a licence to Tommy Ltd. to operate in the port without rigorous assessment and scrutiny of its application. With regard to the inspection of ships, the authorities did not verify the nature of the waste and its potential impact on human health and the environment prior to the discharge of the waste. In this regard, the Rapporteur notes that the Ivorian Anti-Pollution Centre does not have a permanent presence in the port of Abidjan and is not in a position to conduct systematic inspection of ships docking in the port.

59. With regard to remedial action after the dumping, a crisis committee was set up led by the Ministry of Environment, Water and Forests, and an official announcement was made to the public about the exact coordinates of the polluted sites, the need to stay away from these sites and the availability of health centres for health checks. The Minister for Environment, Water and Forests also contacted the Basel Convention secretariat, an inter-ministerial committee on toxic wastes was created and a national toxic waste abatement plan was launched to address urgent health, environmental and economic issues. The crisis, and the enormous social unrest that it caused, led to the resignation of the Government on 6 September 2006.

60. With regard to health care, the Special Rapporteur has taken note of information received from the Government that free medical treatment was provided in approximately 50 access points, including public and private health institutions, and in mobile units. During his visit, the Special Rapporteur was informed that the access points often lacked proper equipment and medication to treat patients. In addition, many people, especially those living near the dumping sites, still experience health problems. Adverse effects on childbirth and child health, including miscarriages and stillbirth, have also been reported. The monitoring of the long-term effects on human health and care for the most vulnerable therefore remains necessary.

61. With regard to decontamination, clean-up operations were assigned by the Government to Séché, a French group that intervened through Tredi International, its subsidiary. Tredi extracted 9,300 tons of contaminated soils and liquids from the district of Abidjan, which were shipped to France and incinerated at a special factory owned by Trédi.¹⁰ The Special Rapporteur was told that eight sites had been decontaminated in this manner. Full decontamination has, however, not yet taken place.

62. The Government has called on victims to register on an official list to receive compensation. Disputes have however arisen about the accuracy of the list, which was based on information provided by State hospitals. Many people were, however, not registered, as they had sought medical care in clinics that were not certified by the State or through traditional healers. In addition, some victims could not register because they did not have official identity cards.

¹⁰ See Rapport de la commission internationale d'enquête sur les déchets toxique déversés dans le district d'Abidjan.

63. During his visit, the Special Rapporteur was informed that some victims had been compensated. Others have not received any or only limited compensation. Affected businesses, in particular in the Vridi industrial area, also claimed to have received inadequate compensation. The slow pace of the process, a lack of transparency and limited recognition of victims and acknowledgement of their suffering are of particular concern in this context.

64. In February 2007, the President of Côte d'Ivoire signed an out of court settlement with Trafigura. On the basis of the settlement, Trafigura paid \$198 million to cover damages suffered by the State, reimbursement for decontamination costs and compensation for victims. The State agreed to indemnify directly any individual claiming to have suffered harm. Victims' associations appear not to have been consulted before the agreement was signed. This is a matter of serious concern, particularly since the settlement required the State to waive all current or future action for liability and damages. The Special Rapporteur also received complaints about inequitable distribution and an overall lack of clarity in the subsequent use made of the settlement payment.

65. With regard to access to justice, the Public Prosecutor conducted an investigation into the incident, which led to the prosecution of several individuals. However, in March 2008, the Court of Appeal ruled that there was insufficient evidence to pursue criminal charges against Trafigura. In October 2008, the owner of Tommy Ltd. and a representative from the shipping agent WAIBS received prison sentences of 20 and 5 years respectively for their role in the incident; seven other individuals were acquitted. Personal injury group litigation is still ongoing before the High Court of Justice in the United Kingdom. In this class action, over 20,000 victims allege they were injured by exposure to the waste from the *Probo Koala* as a result of actions by Trafigura.

66. In relation to the verification of facts and the disclosure of the truth about the incident, the Special Rapporteur has taken note of the reports issued by both the national and international commissions of inquiry on the toxic waste in the district of Abidjan, and encourages the Government to follow up on their recommendations. The Special Rapporteur notes that these reports have not been widely disseminated.

67. Some measures have been taken with a view to preventing the dumping of waste in the future. In particular, the Special Rapporteur welcomes the initiative to prepare a hazardous waste management plan for the district of Abidjan in the context of the above-mentioned project (see paragraph 50 above) carried out with the assistance of UNEP. Further capacity-building of relevant institutions in this area is necessary. At the same time, effective prevention can only be realized if these initiatives are accompanied by institutional reform and a strengthening of independent supervisory powers in the area of waste management.

C. Trafigura

68. The Special Rapporteur's review of the role of Trafigura in the dumping of the waste from the *Probo Koala* was focused on the company's responsibility to respect human rights.

69. The OECD Guidelines for Multinational Enterprises (see paragraph 17 above) emphasize that companies are expected to comply with national laws and to respect the principles of relevant international instruments. The policy framework for business and human rights developed by the Special Representative of the Secretary-General on the issue of human rights

and transnational corporations and other business corporations provides that, in addition to compliance with national laws, the baseline responsibility of companies is to respect human rights.¹¹ This responsibility exists independently of States' duties¹² and even where national law is absent.¹³

70. The exercise of this responsibility requires due diligence, a process whereby companies not only ensure compliance with national laws, but also become aware of, prevent and address adverse effects on human rights. The scope of due diligence is determined by the country context in which business activities take place; the impact that business activities may have on human rights within that context; and the extent to which relationships associated with these activities might contribute to abuse.¹⁴

71. The Special Rapporteur considers that the due diligence test in the *Probo Koala* case rests on the questions of whether Trafigura took all the necessary precautions to prevent any possible adverse impact on human rights of the discharge of its waste, and of whether it could have reasonably known that its actions or omissions would contribute to a human rights violation. In the view of the Special Rapporteur, these precautions needed to be particularly stringent in the case of Côte d'Ivoire, given the prevailing climate of insecurity and weak rule of law in the country as a result of the crisis, which started in 2002. Several political agreements aimed at resolving this crisis have been signed and implemented, the most recent of which being the Ouagadougou Political Agreement of 4 March 2007.

72. Within this framework, the Special Rapporteur has identified the following specific elements of due diligence in relation to the dumping of the waste from the *Probo Koala* in Abidjan:

(a) Full disclosure of and clarity on the composition of the *Probo Koala's* slop tanks and destination for disposal prior to the unloading of the waste;

(b) Evaluation of port reception capacities and waste disposal facilities in terms of environmentally sound waste treatment prior to the unloading of the waste;

(c) Remedial action after the dumping of the waste.

73. With regard to the first element, the Special Rapporteur has taken note of alleged inconsistencies in the way the *Probo Koala* and its shipping agent communicated the content and nature of the slops to port authorities in Amsterdam. According to the report of the Hulshof Commission (see paragraph 48 above) received by the Special Rapporteur, the content of the *Probo Koala's* slop tanks was variously described as a "mixture of tank washing, petrol and

¹¹ In its resolution 8/7, the Council welcomed the policy framework and emphasized that transnational corporations have a responsibility to respect human rights.

¹² A/HRC/8/5, para. 55.

¹³ *Ibid.*, para. 23.

¹⁴ *Ibid.*, para. 25.

caustic soda”, “oily tank washings and cargo residues”, “watery cleaning liquids” and “waste from steam degreasing”. The Special Rapporteur also notes that, at a later stage, after having left Amsterdam and upon berthing in Abidjan, Trafigura characterized the waste as “chemical waste water” as opposed to “MARPOL waste water”.

74. In addition, the high chemical oxygen demand was apparently not known when the *Probo Koala* docked in Amsterdam and was only detected on the basis of the sample taken by APS. Similarly, there was reportedly a lack of clarity around the destination for the discharge of the waste from the *Probo Koala* after its stop in Amsterdam. In this regard, the terms “next convenient opportunity” and “to sea for orders” were used, while initially “Paldiski, Estonia” had been indicated. While the Special Rapporteur acknowledges that this may not be uncommon in such transactions, the discretion with which different descriptions were used appears to be broad and not conducive to transparent decision-making on the treatment of potentially toxic waste.

75. With regard to the assessment of appropriate port reception facilities, the analysis carried out after the vessel berthed in Amsterdam revealed that the waste could not be treated there and that only the port of Rotterdam had adequate treatment facilities. Under these circumstances, the Special Rapporteur considers that the onus would be on Trafigura to show in what way the port of Abidjan would be equally or better equipped to process the waste.

76. In this respect, the Special Rapporteur is aware of Trafigura’s assertion that the port of Abidjan is widely regarded as an appropriate location to discharge slops falling under the MARPOL Convention. According to information received from Trafigura, approximately 30,000 tons of hydrocarbon residues and waste waters were discharged from ships in Abidjan between 1 January and 6 September 2006.

77. The Special Rapporteur observes that Trafigura’s claims on this issue are not supported by the findings of the above-mentioned technical assistance mission to Côte d’Ivoire mandated by the Basel Convention secretariat, which found that “the Abidjan port is not equipped with the necessary facilities for the offloading and treatment of wastes covered by the MARPOL Convention. The mission was unable to confirm whether the port was in fact authorized to receive such wastes”.¹⁵

78. At the time of the events, the port of Abidjan reportedly had only one experienced de-slopping service provider, the company Ivoirienne des techniques des énergies (ITE). While it is not unusual for a commodity trader such as Trafigura to work with several companies for the discharge and treatment of its waste, the exercise of due diligence would seem to suggest that ITE was the only viable option in this particular case.

79. With regard to the decision to contract Tommy Ltd. to discharge the waste, the Special Rapporteur acknowledges information received from Trafigura that its subsidiary, Puma Energy, contacted the shipping agent WAIBS, which in turn identified Tommy Ltd. as being able to deal with the slops. Reportedly, the port of Abidjan confirmed that Tommy Ltd. was registered and copies of relevant licenses and authorizations had been provided to Puma Energy. Furthermore,

¹⁵ UNEP/CHW/OEWG/6/2, annex, para. 3 (f).

WAIBS and Tommy Ltd. were informed of the composition of the waste, including its chemical oxygen demand. Tommy Ltd. stated that it would assume full responsibility for the operation.¹⁰

80. In the view of the Special Rapporteur, these elements do not amount to a full evaluation of reception capacities in the port of Abidjan aimed at ensuring environmentally sound waste treatment. In this regard, further information at the Special Rapporteur's disposal suggests that Tommy Ltd. was only created shortly prior to the arrival of the *Probo Koala* and had neither previous experience with waste treatment nor adequate facilities, equipment and expertise to treat waste. It is of concern to the Special Rapporteur that these shortcomings do not appear to have been taken into consideration by Trafigura.

81. At the very least, due diligence should have triggered additional inquiries into Tommy Ltd.'s capacity to treat waste in an environmentally sound manner, particularly in the light of the fact that Tommy Ltd. informed Trafigura that it would discharge the waste from the *Probo Koala* "in a place out of the city, called Akouédo, which is properly equipped to receive any type of chemical product".¹⁰ The Special Rapporteur had the opportunity during his visit to Abidjan to visit Akouédo. It is a municipal waste dump existing alongside poor communities living on subsistence farming and in extremely precarious conditions. Nearby residents live on recycling garbage for personal use or reselling. Akouédo was not in any way equipped to treat the waste from the *Probo Koala*.

82. With regard to the third element of due diligence, the Special Rapporteur notes that Trafigura sent two senior executives, in addition to a team of medical experts, a geologist and a refining engineer to Abidjan in the immediate aftermath of the incident to conduct an impact assessment and to assist with the handling of the crisis. Trafigura also declared that it would fully cooperate with the Government of Côte d'Ivoire and the United Nations Disaster Assessment and Coordination team investigating the incident.

83. In November 2006, Trafigura commissioned an independent inquiry into the events, which led to an interim report, but was not concluded in order not to prejudice the outcome of legal proceedings in the United Kingdom.¹⁶ In the context of the above-mentioned settlement agreement, an environmental audit was also carried out. In April 2008, Trafigura agreed to pay an additional €7.6 million for remedial work and other health-care, education and environmental projects.

84. While the Special Rapporteur generally welcomes the efforts made by Trafigura to provide redress, he encourages it to continue to fund and support outstanding remedial work. In addition, the Special Rapporteur is greatly concerned by reports that the company has filed or threatened to file libel lawsuits against various civil society and media institutions that have reported on the *Probo Koala* incident in a critical manner. Such lawsuits may have the effect of stifling independent reporting and public criticism. In this regard, the Special Rapporteur considers that Trafigura, as a public figure in this case, should show restraint.

¹⁶ See also www.probokoalainquiry.com.

VI. RECOMMENDATIONS

85. The Special Rapporteur recommends that the Government of the Netherlands and relevant State actors:

(a) Harmonize and strengthen existing legislation on the prevention of marine pollution and environmental management in order to ensure more rigorous inspection and, where necessary, the detention of ships for a reasonable period of time, in particular in cases of inconsistent or incorrect declarations regarding cargo and waste on board;

(b) Consider the creation of a financial mechanism that would ensure the proper discharge and treatment of toxic and hazardous waste in the Netherlands; such a mechanism would need to be developed in accordance with the “polluter pays” principle and presuppose reimbursement by the carrier of the waste upon a judicial determination of liability;

(c) Continue to provide support to the Government of Côte d’Ivoire to enable the latter to effectively monitor and address possible long-term human health and environmental effects of the incident.

86. The Special Rapporteur recommends that the Government of Côte d’Ivoire and relevant State actors:

(a) Engage in a broad consultative process, including relevant civil society actors, and specifically seek the views of victims, families of victims and victims’ associations on outstanding issues and measures required to address possible long-term human health and environmental effects of the incident;

(b) Allocate sufficient resources and seek financial and technical assistance to ensure full decontamination of all remaining dumping sites as soon as possible;

(c) Take further action to protect the right to life, the right to the enjoyment of the highest attainable standard of physical and mental health, including the right to a healthy environment of all affected victims and their families, by, inter alia, conducting a health survey in affected areas and a mapping of outstanding health issues and providing adequate medical assistance to victims, including treatment of new and long-term manifestations of illnesses as a result of the dumping;

(d) Take additional measures to intensify the dispensation of compensation to all victims and to complete this process as a matter of urgency in a clear and transparent manner;

(e) Implement structural reforms to improve waste treatment capacities in the port of Abidjan and strengthen monitoring and supervision by relevant environmental agencies in order to ensure that waste is treated in an environmentally sound manner;

(f) Ensure full access to information for those affected on measures taken to address possible long-term adverse effects on health and the environment of the incident.

87. **The Special Rapporteur recommends that Trafigura:**

(a) In relation to the *Probo Koala* incident, continue to provide financial assistance to the Government of Côte d'Ivoire in order to address outstanding issues related to decontamination, health care and compensation, and support structural reforms to strengthen capacities to manage hazardous waste in an environmentally sound manner;

(b) In its overall operations, ensure that reliable information is disclosed in a timely manner regarding its activities and the nature and composition of the waste that these activities generate;

(c) Provide adequate information in a timely manner on the potential environmental, health and safety impact of its activities, and systematically ensure that waste is treated in an environmentally sound manner, including by rigorously assessing appropriate port reception facilities and balancing commercial interests with human rights and environmental requirements;

(d) Develop a corporate accountability and human rights policy and management framework, including annual reporting on social, environmental and economic effects. 88.

The Special Rapporteur recommends that the international community, including United Nations entities, and donors:

(a) Continue to provide support to the Government of Côte d'Ivoire and relevant State actors in addressing possible long-term human health and environmental effects of the incident, with a particular focus on decontamination, health care and compensation, and promoting the rights of victims;

(b) Continue to assist the Government of Côte d'Ivoire and other States, as appropriate, both in terms of financial and technical assistance, to strengthen capacities to monitor and control both transboundary and domestic movement of toxic and dangerous products and wastes.

Filename: 0915280
Directory: C:\DOCUME~1\Thodiyil\LOCALS~1\Temp\notes39E

DCF

Template: \\fsclu\redirected\$\Thodiyil\Application
Data\Microsoft\Templates\Normal.dot

Title: A/HRC/12/26/Add.2 - 09-15280

Subject: FINAL

Author: Ricardo Sáenz

Keywords:

Comments:

Creation Date: 9/24/2009 10:57:00 AM

Change Number: 2

Last Saved On: 9/24/2009 10:57:00 AM

Last Saved By: Maruchi Zeballos

Total Editing Time: 1 Minute

Last Printed On: 9/24/2009 2:09:00 PM

As of Last Complete Printing

Number of Pages: 20

Number of Words: 9'055 (approx.)

Number of Characters: 48'627 (approx.)