INTERIM REPORT

THE PROBO KOALA INQUIRY
conducted by Lord Fraser of Carmyllie QC
When I was appointed in November 2006 to conduct an independent inquiry on behalf of Trafigura Limited, the terms of reference as adjusted with Graham Sharp required me to consider:

1. The voyage history of the chartered vessel Probo Koala during June to August 2006 and the subsequent events in the Ivory Coast following discharge at the port of Abidjan.

2. Organisation and operating procedures of the Company and comparison with other oil trading companies.

3. Port facilities and practice (including end disposal) relating to collection, transport and safe disposal of waste products associated with maritime and oil trading companies.

4. Existing legislation and International Conventions.

It was anticipated that I would consult with Intertanko, International Maritime Organisation, European Commission and other non-Government organisations.

It was recognised that the independent inquiry would wish to take evidence in the Ivory Coast or from there.

In accepting the invitation to conduct the inquiry, I noted the transparency and the independence which the terms of reference allowed me and particularly noted the company’s intention to make my findings public. Without that last undertaking I would not have accepted the invitation.

My attempts to fulfil my commitment have been, to say the least, frustrated by a number of factors beyond my control.

I did not and could not observe the terms subsequent to my
appointment, not least the agreement to report by the spring of 2007, as those who were lucklessly incarcerated in Abidjan were not released until February 2007 against the expectation that in the autumn of 2006 their release was imminent.

Without underestimating the extent of their deprivation of liberty in that ghastly gaol the matter that most influenced me was the raising of legal proceedings by Leigh Day in London on behalf of those claimed to have been affected by the actings of Trafigura in Cote d'Ivoire.

Those who are familiar with my work after appointment by the then First Minister of Scotland and the Presiding Officer of the Scottish Parliament into the cost over-run of the Scottish Parliament Building will know that I favour economy, fluency and delivery on time and within cost.

To Trafigura I admit that I have not achieved this notwithstanding Trafigura’s proper public desire for an early report but as I say, for reasons beyond my control. I believe that my integrity is un tarnished. If I am wrong in that, I acknowledge the right and indeed the responsibility of Trafigura to sack me.

That would, in my view, be wrong. Trafigura’s excellent Counsel, Edwin Glasgow QC and Leigh Day’s equally excellent Counsel, Lord Brennan QC have both in meetings accepted this fierce independence which I believe to be my hallmark. If that assertion is challenged I will abide by the conclusion.

If the greatest living judge in England, Lord Woolf, could accept instruction from BAE to examine their ethical conduct, I would consider myself under no constraint not to examine Trafigura. At this stage I would regard their willingness to pick up the tab only as admirable. Indeed, Trafigura have offered complete openness and given me their full co-operation.

As stated earlier, I am, however, a frustrated bunny. Shell and BP could not have been more helpful although their original instinct was that in some way I was a commercial spy. That fear dispelled the co-operation was then 100%.

The meeting with the International Maritime Organisation was less than satisfactory. Quite correctly the IMO saw its function as that of a secretariat for its member states. I cannot quarrel with that assessment.
of their legal status but within the IMO are lawyers of astonishing quality and I cannot believe that they have no opinions on the Marpol or Basel Conventions even if their views were to be unattributable.

I have had a large number of meetings in London and have made visits to the Netherlands and, contrary to Foreign and Commonwealth Office advice, I have visited Cote d’Ivoire. That was scary but revelatory.

I remain frustrated. I am still not being told the full story. It is murky and its ramifications I am increasingly convinced extend beyond Cote d’Ivoire.

I have been ably assisted by Archie Mackay of media2k and Larry George of Grundberg Mocatta Rakison LLP. Their assistance continues and I hope will continue in the future.

While I am in receipt of a large amount of documentation relating to the voyage of the Probo Koala during the period covered by my terms of reference, some or indeed perhaps all of this may be classed as evidence for the legal actions currently proceeding in London. Nothing I hold, however, is not known or could not be known to the parties. I intend to attend the proceedings in London not as a spy but as a very interested observer. I have no desire to visit Belmarsh or any other of Her Majesty’s prisons by falling foul of the laws of contempt.

Nor have I any desire to attempt to influence other potentially criminal action which I am led to believe may be raised elsewhere and it has been a further frustration that decisions relating to such action have extended from imminent to several months and back to imminent again. At time of writing no final decision had been taken.

I have examined the operating procedures of Trafigura and compared them with others to which I have been able to obtain public access or restricted access on a confidential basis. Once again I find myself frustrated that at this time I am unable to go into detailed comparison as, I am advised, they may form part of ‘live’ court proceedings.

I have had a large number of private meetings in the House of Lords and other locations to discuss various aspects of events covered by my remit and I have gathered a great deal of written information. I
mentioned earlier the reluctance of the officials of IMO whom I met to express opinions. But outwith that meeting I have accessed detailed information available on their website which has assisted me. The Marpol Convention is one of the many points for debate in the current legal action and so again I must express my frustration at being unable to offer any detailed comment on this issue at this time beyond the one referred to later.

In the early days after my appointment I set out some objectives and put forward suggestions of how they may be achieved.

Clearly I wished to visit the Cote d’Ivoire at an early stage but was not prepared to make the trip while Claude Dauphin, who had gone to Abidjan in response to the incident, and others were incarcerated as this could have been counter-productive. At the time of my appointment their release seemed imminent and while a number of false dawns for their liberation followed and frustrated me, their plight cannot be underestimated. During the interim, I did make contact with FCO in neighbouring Ghana and was strongly advised not to consider visiting but instead to go to Ghana and invite others to journey across the border. An alternative plan was to invite prospective witnesses to London. As you will see later, I did not follow this advice as I felt it was vital to my report to visit Abidjan.

I also wanted to visit Le Havre and Salaise-sur-Sanne to examine the materials removed from Abidjan and see for myself the process they were undertaking or continue to undertake. I am also extremely keen to have independent analysis of some of the samples removed from Cote d’Ivoire. For reasons not explained or understood these visits have not yet taken place and should I continue to receive what I see as a lack of co-operation in this matter I will not hesitate to name and shame when I am eventually able to publish my report.

In addition to Abidjan, I have also made visits to the ports of Amsterdam and Rotterdam. Given the continuing uncertainty over proceedings in the Netherlands these were more for information than fact gathering but were nevertheless extremely worthwhile.

I see no reason why I cannot give an outline of these visits at this point although clearly for the reasons stated earlier reaching full conclusions is not appropriate at this point.
ABIDJAN

I was disturbed that within the United Kingdom Abidjan was only portrayed as a lovely beach with rotting boats. In fact, outside Durban it is the biggest port in Africa and it does not take an experienced nautical eye to see its potential. There is a relatively narrow channel from the Atlantic into a deep-water lagoon capable of accepting the largest of ocean going vessels.

I travelled by boat around that lagoon. It is not an unsophisticated backwater but a major port. In contemporary terms environmental concerns do not seem to predominate but as a water lung for the city it is to be envied.

Abidjan is the biggest trading port in West Africa and up to 60 vessels can be berthed there are any one time. Its reception facilities are capable of handling container ships, chemical carriers, LPG carriers and bitumen carriers and large tankers. It is a matter of public record that major oil companies such as Total and Shell use the port in addition to a large number of oil trading companies for loading and discharging oil related products and to de-slop their vessels on a regular basis.

I visited the Petroci and SIAP jetties which operate on a 24/7 basis and are capable of handling fuel oil, gasoline, gas oil, jet oil, LPG, chemicals and bitumen.

Both within the city and beyond I visited nine sites where products apparently from the Probo Koala were dumped. It would be premature to reach any final conclusions. There appeared, however, to be no rational pattern. Some of the dumpsites visited allowed a flow almost directly into the lagoon. Others discharged into watercourses and some into ditches with no obvious destination.

In other words, it appeared the only pattern was one of ‘fly dumping’. Whether Trafigura needs to take responsibility and a legal liability for this is for others to determine at this stage but with this irregularity of pattern, I cannot instantly conclude a liability.
Maca, for example, where the only evidence of anything untoward is a warning sign in the middle of some heavy vegetation, is right beside a road.

Koumassi is off a main road at the start of some trading areas and housing.

There was evidence of work having been carried out at some of the sites. Indeed at Alepe (pictured top left) I was able not only to see work in progress but also examine materials – soil mainly – removed and stored in large containers on a specially constructed platform.

Deokui was another site where there appeared to be a discharge from a relatively busy road into a channel that led to a watercourse. There was a similar situation at the Obobo or Coco Service site (pictured left), where the road is above a little burn and there was also clear evidence of some type of clean up operation at this site.

During my visit to Abidjan, as a matter of courtesy, I paid my respects to the Batonnier, the equivalent to the head of a Bar Association in the UK. That visit recommended by Edwin Glasgow QC was a great success and so far as I was concerned, we had a most interesting discussion on the clash of civil and common law systems.

I also visited Akouedo and had a meeting with le Chef of the village, who was most hospitable. At this time I have refrained from including his opinions and observations and other information about the village, its history and the health of the people living there before and since August 2006.

The rubbish tip that sits next to the village is an awful place and the sight of mothers carrying their babes in their arms while scavenging for bits of plastic and metal is a memory difficult to forget. The sight of someone washing in a puddle as piles of garbage were being unloaded was equally distasteful. I will need some convincing as some romantics would have it that Africa is leading the way in recycling. What I observed was desperate people doing anything to scratch a living.
And yet in other parts of the village there were signs of commerce and happy smiles on young children playing outside their homes. There were also signs nearby of new buildings under construction and the hope of new prosperity.

I was struck by the large number of people in Abidjan. There seemed to be large crowds everywhere we passed and there is certainly a widespread social divide with shelter stretching from little more than a tent to some impressive looking properties. The National Geographic website states the population of the capital city to be 3.5 million. I have no way of measuring that but just an impression that I thought it was higher. Estimates varied wildly with a figure of over 5 million put to me. The significance of this is that it would seem that there is no prospect of any actuarial calculation of deaths or disease or illness that is possible. That makes it all the more important to see after Court proceedings the results of the post-mortems, autopsies and credible medical reports. It is disturbing although probably pertinent to note the same website states the life expectancy is just 43 years.

I have had a suggestion of a Truth and Reconciliation Commission to be established in Cote d’Ivoire to deal with all matters relating to the Probo Koala’s visit and subsequent events. As time has gone on I have doubts whether this will happen but should it happen I am sure that Trafigura would wish to authorise me to set out everything I know and for them to provide full cooperation.

Some of the information gathered and indeed some of my observations while in Cote d’Ivoire could be germane to the legal proceedings in London but in pursuit of an even-handedness between plaintiffs and defendant at this stage it would not be appropriate to offer any comment.
AMSTERDAM AND ROTTERDAM

Having no desire to disrupt or indeed interfere with what I now see as long-running and complicated legal issues in the Netherlands, I restricted my visit to Amsterdam to one of familiarisation. The port of Amsterdam is extremely large and linked to newer ports in the region known as the North Sea Canal area.

It is my understanding that it provides a full range of “appropriate” port facilities and services to maritime companies. At this stage I make no comment upon Marpol beyond saying that is appears to me that what is or is not “appropriate” contains an unacceptable degree of subjectivity entrusted to the receiving nation.

I was able to take a boat trip to view all of the areas relevant to my remit. It is here the story begins but I can offer no further comment at this time.

I wished to see at first hand a de-slopping operation and felt it inappropriate to attempt this in Amsterdam given on-going events and therefore it was arranged for me to visit Rotterdam.

The port is, of course, Europe’s largest logistic and industrial hub and has links with over 1000 ports worldwide.

The largest ocean-going vessels have unrestricted access around the clock and it has been one of the world’s major centres for oil and chemicals for many years. It is massive and for, example, ICE FUTURES EUROPE requires in its rules physical delivery of gasoil in ARA (Amsterdam, Rotterdam and Antwerp.)
Many of the leading oil and chemical companies in the world have bases in Rotterdam and the port features four oil refineries and more than 40 chemical and petrochemical companies. There are more than a dozen major tank storage and distribution companies and all are linked through a network of pipelines. It is clearly a world-class facility.

I gathered some valuable general information of the slops process and the processing facilities from my visit to Rotterdam and had useful discussions with a ship’s agent on the various roles of a vessel, its agent, receiver of slops and processor of slops, the testing procedures and the methods used to transfer slops or other items from ships to shore treatment facilities. It did strike me that in both ports environmental issues are given the greatest respect and are well-supported with regulatory restrictions.
IN SUMMARY

- Task requested not yet delivered but overtaken by other legal events.
- Civil proceedings in the United Kingdom frustrate early conclusion.
- Unwilling to compromise potential foreign criminal proceedings.
- Continuing lack of analysis of content and volume.
- Does this go beyond Trafigura?
NEXT STEPS

1 VISIT AND MEETINGS WITH:

a INTERTANKO

b (i) UK DEPARTMENT OF TRANSPORT
(ii) UK DEPARTMENT OF ENVIRONMENT, FOOD AND RURAL AFFAIRS

c EUROPEAN COMMISSION IN BRUSSELS

d (i) MARPOL EXECUTIVE
(ii) BASEL EXECUTIVE

e (i) EXXON
(ii) TOTAL
(iii) NATIONAL OIL COMPANIES ENGAGED IN TRANSPORTATION OF OIL

f FRENCH AUTHORITIES

g DUTCH NATIONAL and AMSTERDAM PORT AUTHORITIES

2 FURTHER VISIT(S) TO COTE D’IVOIRE

3 EVIDENCE TAKING IN UNITED KINGDOM BUT ONLY AFTER PROCEEDINGS CONCLUDED.
CONCLUSION

As I have repeatedly indicated in this Interim Report I cannot and will not challenge the authority of the Courts in this country or elsewhere in civil or criminal proceedings. That is what the rule of law is about and if I have inadvertently trespassed I would unreservedly apologise.

I reserve to myself, however, the right to comment freely when these legal proceedings have been concluded. If told by the Courts to desist, I shall do so but in the meantime I shall be asking all the pertinent questions as I see them and coming to my own private conclusions.

In due time meeting Trafigura’s repeated desire that my findings be made public causes me no problem and I have no hesitation in stating that this will happen.

In the meantime if any person, party or government thinks I am heading off the rails, I would welcome that contact. Any opinion or evidence will be treated with the confidentiality it deserves.

Lord Fraser of Carmyllie PC QC
House of Lords

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