LJN: BN 2149, Amsterdam Court, 13/846003-06 (PROMISE)

Date of decision:	23.7.2010
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Area of law:	Criminal
Type of proceedings:	First Instance, Bench
Subject:	Trafigura Beheer BV is sentenced to a fine of 1 million euros for exporting waste to Ivory Coast (an ACP state) and for delivering goods harmful to the health in Amsterdam, with concealment of the noxious character.

Decision

AMSTERDAM COURT

Public Prosecutor's Office no.: 13/846003-06 (Promise)

Date of decision: 23 July 2010

Objection (lawyers instructed)

DECISION

of Amsterdam Court, Economic Crimes Bench, in the criminal case against

TRAFIGURA BEHEER BV,

registered at Gustav Mahlerplein 102, 1082 MA, Amsterdam,

1. The examination in court

1.1 The court deliberated as a result of the examination at the hearings on 26 June 2008, 2 July 2008, 2 and 10 April 2009, 28 October 2009, 6 November 2009, 10 and 16 March 2010 (directional hearings) and the hearings on 1, 2, 10, 15, 16, 21, 24 and 28 June 2010 and 1, 2 and 9 July 2010 (discussion of content).

1.2.1 At the hearing on 26 June 2008 Protein Kissee s.a., Abidjan, Ivory Coast, joined the case as damaged party with reference to the losses it suffered of € 5,504,421.00 as a result of the offences with which Trafigura is charged.

1.2.2 At the same hearing the court considered that it could be determined without further investigation whether Protein Kissee s.a. had incurred a direct loss as a result of Trafigura's action (Code of Criminal Procedure Section 333) and decided that its claim was evidently not admissible.

1.3 The Public Prosecutions Department was represented by Messrs L.W. Boogert, H.P. Dankmeijer, M.J. Dontje, R.S. Mackor and C.A. Zijlstra.

1.4 Trafigura instructed its lawyers Messrs M. Wladimiroff, A. Verbruggen and R. de Bree, lawyers in The Hague, to defend it at the hearing.

1.5 For each charge the Public Prosecutions Department produced a summary of evidence. In its turn the defence produced a summary of the facts.

1.6 The court took note of the claim by the Public Prosecutions Department and the evidence produced by the defence.

2. Charge

After amendment of the charge on 26 June 2008 and 1 June 2010, Trafigura was charged with having:

1. In or about the period from 5 July to 20 August 2006 in and/or from the Netherlands and/or in Ivory Coast, together and in association with another or others, at least alone, whether or not intentionally, transported wastes contrary to the prohibition under Article 18, para. 1, of the EEC Regulation on the carriage of wastes, at least it, the suspect, and/or its accomplices, exported wastes (produced by treating fuel with sodium hydroxide (caustic soda)) on board the ship Probo Koala to an ACP state, namely Ivory Coast;

2. on or about 2 July 2006 in Amsterdam, together and in association with another or others, at least alone, offloaded goods, namely wastes produced by the treatment of fuel with sodium hydroxide (caustic soda), as tank washings to Amsterdam Port Services BV, knowing that these goods were harmful to life and/or health, since these wastes were a complex mixture of water with an extreme acidity and an oily liquid (both contaminated with sulphides and/or mercaptides and/or phenolates or thiophenolates, among other things), and concealed their harmful character (caustic and/or corrosive and/or extremely acidic) when offloading them;

3. on or about 30 June 2006 in Amsterdam, in any event in the Netherlands, together and in association with another or others, at least alone, forged a document, namely a "Notification of ships' waste and (remainders of) noxious substances (Wvvs [Act on pollution by ships] Section 12a)", being a document intended to serve as proof of some fact – and/or falsified it with the intention of using this document, or causing it to be used by others, as genuine and unforged, at least it, the suspect, and/or its accomplices, falsely and/or contrary to the truth, reported wastes and/or caused them to be reported as coming from the cargo area of the Probo Koala:

"Annex I Oily tank washings including cargo residue", consisting of "UN no. 1203" (UN no. standing for petrol and/or engine fuel) and "WATER",

(Whereas the wastes had not been produced by cleaning cargo tanks and/or did not consist only of petrol and water).

3. List of abbreviations

The abbreviations used in this judgment have the following meanings:

ACP:	The countries of the Continent of Africa to the south of the Sahara, the Caribbean and the Pacific Ocean (see fourth ACP-EEC Convention, with Protocols and Annexes; Lomé, 15 December 1989, Gaz. 1991, 35, p. 7)
APS:	Amsterdam Port Services BV
AV AO/IC:	Administrative Organization and Internal Control for Acceptance and Processing
B&W:	City Council
BMA:	Bulk Marine Agencies
CZV (COD):	Chemical Oxygen Demand
COD:	Chemical Oxygen Demand: see CZV (COD)
DAF:	Dissolved Air Flotation Facility
DMB:	Environment and Building Supervision Service of the Municipality of Amsterdam
ECHR:	European Court of Human Rights
EU:	European Union
EVOA:	Council Regulation (EEC) No. 259/93 of 1 February 1993 on the supervision and control of the carriage of wastes in, to and from the European Community
EVOA (New):	European Parliament and Council Regulation (EC) No. 1013/2006 of 14 June 2006 on the carriage of wastes
EVRM:	Convention for the protection of human rights and fundamental freedoms
H2S:	Hydrogen sulphide
HOI:	Port Reception Facility
HOV:	Port Reception Facility
HR:	Supreme Court

IBC:	Intermediate Bulk Container
IMT:	Interregional Environmental Team
KLPD:	National Police Service
LAP:	National Waste Management Plan
MARPOL:	International Convention to prevent pollution from ships, 1973, as amended by Protocol of 1978
MSDS:	Material Safety Datasheet
NFI:	Dutch Forensic Institute
OM:	Public Prosecutions Department
ppm:	Parts per million
PSC:	Port State Control
Trafigura:	Trafigura Beheer BV
Sr:	Criminal Code
Sv:	Code of Criminal Procedure
V&W:	Ministry of Transport and Public Works
VROM:	Ministry of Housing, Spatial Development and the Environment
WED:	Act on economic offences
Wm:	Environmental Management Act
Wvo:	Act on surface water pollution
Wvvs:	Act to prevent pollution from ships

4. Preliminary questions

The court found that the summons was valid, that it had jurisdiction, that the prosecution by the OM was admissible and that there was no reason to suspend the prosecution.

5. Facts and circumstances

5.1 The motor tanker Probo Koala is a ship launched in 1989 and built to carry solid and liquid substances and is also equipped to carry oil products of various compositions. ii. In 2006 the ship belonged to Prime Marine Management in Athens (Greece) and sailed on charter for Trafigura. Falcon Navigation, registered in Athens (Greece) was responsible for the day-to-day management of the ship and crew and received orders from those in authority at Trafigura Ltd. in London and Trafigura Beheer BV. iii. From 3 April 2006 to 3 October 2006 [name 6] was the master of the Probo Koala. He had been hired through a recruitment agency for seamen. iv.

5.2 Trafigura is one of the largest independent oil traders in the world with a trading volume of approximately 2 million barrels of crude oil and oil products per day. In addition, Trafigura is a world player in the extraction and trading of raw materials such as ores and minerals. Trafigura also operates a number of storage facilities for oil products. v. From September 2005 Trafigura has been buying crude naphtha in Brownsville (US) from PMI Trading in Mexico. vi. This naphtha, which was contaminated with a high content of sulphur compounds (mercaptans), could be made suitable as a blendstock petrol by treating it with caustic soda. At the end of December 2005 this naphtha became available on the market in large quantities. vii. Trafigura then looked for suitable locations to wash the naphtha with caustic soda. [name 7], employed as a petrol blender at Trafigura, played a role in that search. He was working on behalf of Trafigura Ltd. in London. The emails sent by him were always signed by him as follows: "Best regards, [name 7], Trafigura Ltd., for and on behalf of Trafigura Beheer BV". viii. At any rate, his investigations showed that the washing could take place in La Skhirra (Tunisia) at a refinery there belonging to Tankmed. The investigation by [name 7] showed, among other things: "Caustic washes are banned by most countries due to the hazardous nature of the waste (mercaptans, phenols, smell) and suppliers of caustic are unwilling to dispose of the waste since there are not many facilities remaining in the market." ix.

5.3 In the period between January and March 2006 two washing operations were carried out at this refinery in which naphtha coming from Brownsville carried to Tunisia by ships chartered by Trafigura (M/T Zadar and M/T Bow Prosper) was washed. x. [name 7] was the one who gave instructions to the refinery for these washing operations. xi. Tankmed reported to [name 7] that an odour nuisance had occurred at the second washing operation and that an investigation had been launched by the authorities. Tankmed was subsequently no

longer prepared to carry out the washing operation and the cargo that the Probo Koala carried to the refinery in early April 2006 was therefore not discharged there. xii

5.4 In the meantime Trafigura was still looking for an opportunity to wash the cargos by other methods. The idea came up to carry out these washing operations on board a ship that had the necessary tank and pumping systems. xiii. The Probo Koala met these requirements. This process (the "Merox" process) had not been carried out on a ship before. In this process, which was used at refineries and on oilfields, the mercaptans are washed out of the naphtha phase or out of the petrol phase with caustic soda. The mercaptans are not so much oxidized as removed. xiv. Trafigura decided on a strategic position in the Mediterranean Sea not far from Gibraltar. On the one hand, it was closer to Europe and the Baltic States where many of the cargoes came from and, on the other hand, close to West Africa, for which market the cargos mixed with the blendstock were ultimately intended.

5.5 The first washing on board the Probo Koala took place off Malta in April 2006. In an email of 7 September 2006 [name 7] reported on the washing operations that had taken place on board the Probo Koala. With regard to the process followed, he described it as follows:
"(...) We performed a full STS operation to the MT Probo Koala, (...) thereafter we added 50,000 litres (50 m^3) of caustic soda (MSDS attached) proportionately across all cargo tanks of MT Probo Koala (using an injection pump/hoses to the upper level of the coker naphtha from the top of the tank), thereafter circulated for 24 hours (by transferring individual tank quantities to an empty tank to achieve the maximum inter-surface contact between naphtha and caustic soda) and allowed the naphtha and caustic to separate/settle and thereafter drained the "used" caustic to the slop tanks. In order to ensure that all of the caustic was stripped from the treated coker naphtha, we stripped more than the quantity of caustic added originally to each cargo tank, to make best efforts that all caustic was stripped thus to ensure this may also strip some of the treated naphtha or any free water to the slop tanks [sic]. Thereafter (...) treated naphtha on board was used as a blendstock to make finished gasoline". x A number of emails show how the orders were worded that [name 6] received when the washing of cargos taken on board was concerned. xvi.

5.6 The quantity of caustic soda that had to be added to each cargo was determined at 50 m^3. xvii. This was bought from WRT registered in Amsterdam. xviii. In total 200 tonnes of caustic soda were taken on board the Probo Koala from each resupply ship at various positions. xix. In the period between April and the end of July 2006 at any rate 150 tonnes of caustic soda were used for the washings. On 26 June 2006 [name 6] received instructions to sail to Amsterdam. xx. On the way to Amsterdam the washing of a cargo of naphtha continued on board the Probo Koala on 27 June 2006, using 23 m^3 caustic soda. xxi.

5.7 The cargos coming from Brownsville were always transferred to the Probo Koala by a ship-to-ship (STS) manoeuvre, after which the washing operation began. In the washings that took place from 12 April 2006 xxii. Approximately 544 m^3 slops in total were produced on board the Probo Koala. xxiii. These slops consisted of a complex mixture of water with an extreme acidity and an oily liquid, both contaminated with very specific components, including phenols, disulphides and mercaptans. The water layer of the slops comes under European Waste Code 050111* (waste from fuel treated with alkali) and the oily layer comes under European Waste Code 130703* (other fuels including mixtures). xxiv.

5.8 From the moment that Trafigura decided to have the washing operation carried out on board, it looked for businesses that could process the slops. The company on Malta (Malta Shipyards) was not prepared to accept the slops "due to the chemical content". xxv. Nor could the slops produced on board be offloaded in Augusta (Italy). There was no possibility in Gibraltar either because the flashpoint of the slops was too low. xxvi.

5.9 At the end of July 2006 [name 6] received instructions from Trafigura (via Falcon Navigation) to sail to Paldiski (Estonia) to discharge a petrol cargo and to take on board petrol for the Nigerian market. Because Amsterdam was on the way to this port, Trafigura decided to enter the Port of Amsterdam to bunker, to change crew and to discharge the slops in the tanks. xxvi. For this purpose contact was made with APS as an HOV of the Municipality of Amsterdam. [name 5] was the director of that company.

5.10 In June 2006 [name 7] got in touch with APS regarding the possible discharge of slops there. xxviii. As a result of previous telephone conversations with[name 9] and [name 8] of APS, [name 7] sent an email to APS on 20 June 2006 with the following content:

"Dear Mr [name 8],
Following our telcon and to reiterate we would like to dispose between 200-250 cbms OS Gasoline Slops (majority is water, gasoline, caustic soda) [sic].
This is currently stored in the slop tanks of our vessel, MT Probo Koala, which we would sail to the Port of Amsterdam and discharge.
Please confirm price and location/procedure of this operation.
(...)." xxix.

5.11 Replying to the enquiry on the same day [name 9] of APS emailed two offers to [name 7]: one on the basis of direct discharge to shore and one on the basis of discharge to a barge. Both offers said:
"With reference to your request, concerning the slop disposal of ABM vessel, you herewith receive our offer as follows [sic]:
(...)
Product: Gasoline/caustic soda washings;
Sediment < 1%; TOCl < 1000 ppm; COD < 2000 mg/l;
Quantity: Max. 250 cbm
(...)." xxx.

5.12 By email of 26 June 2006 [name 7] told APS that the offer had been accepted. xxxi. Ultimately it was decided to discharge the slops to a barge, as advised by Falcon Navigation. xxxii.

5.13 On 28 June 2006 Falcon Navigation appointed BMA of Rotterdam as the ship's agent for the operation in Amsterdam. It was told that the Probo Koala would call at Amsterdam to bunker fuel, discharge slops and offload 50 empty caustic soda IBCs. xxxiii. At BMA's request xxxiv. APS issued a quotation on 30 June 2006 for the offloading of the 50 IBCs. xxxv. Ultimately this offer was not used.

5.14 On 30 June 2006 BMA faxed a "Notification of ships' waste and (remainders of) noxious substances" to the Port Authorities. This form said "1203 WATER" in the "Name of substance or UN number" space and "554 m^3" in the "Amount of waste to be delivered" space. Both entries are given after the box "Annex I Oily tank washings including cargo residue (specify name of substance or mixture)" in the "Type of waste" space. xxxvi. The entry was filled in by [name 6] who sent the form by email to BMA. xxxvii. BMA signed the form "As agents only". xxxviii.

5.15 The Probo Koala arrived in Amsterdam in the afternoon of 2 July 2006. It moored at Buoy 4 in the Afrikahaven. xxxix. At 19.30 hrs the barge Main VII, a collection vessel belonging to APS, went alongside to take on board the slops. At 20.00 hrs the transfer started. At 22.00 hrs about 250 m^3 slops had been transferred to the Main VII, into starboard tanks 1 and 3 and port tanks 1 and 3. xl. The Probo Koala wanted to discharge more slops but the Main VII was full at the time since its other tanks contained cargos taken on board previously. It was arranged that the Main VII would first go and offload and would then come back to collect the rest of the slops from the Probo Koala. xli.

5.16 At 23.30 hrs the Main VII returned to the site of APS. xlii. [name 10], operator at APS, took samples of the content of the tanks of the Main VII soon after. xliii. These samples were immediately partly analysed by [name]. An indicative measurement showed that the COD content of the slops from the Probo Koala was probably much too high for APS to be able to process these wastes. In addition, they smelled strongly. xliv. [name] therefore did not give permission to discharge the slops from the Probo Koala to the APS plant. xlv. He got in touch with BMA to say that the cost of processing would be significantly higher, about € 1,000 per tonne. xlvi. The same night [name 8] also sent an email with his findings to his colleagues [name 11] and [name 9]. xlvii. He left a note in the APS lab for the analyst who completed the COD measurement started by [name 8]. xlviii. The tanks of the Main VII containing the Probo Koala slops were locked with a chain. xlix.

5.17 The next morning, 3 July 2006, there was contact between APS and BMA and between BMA and [name 7]/Falcon Navigation about the processing price for the Probo Koala slops. l. [name 7] and APS could not agree on the price. li.

Ultimately BMA was told:

"(...) We have instructed the slop barge to redeliver the slop washings back to the vessel due to the high cost of delivery and processing at Amsterdam. Washings are to be kept on board and shall be disposed off at the next convenient opportunity [sic]." lii.

5.18 In the course of the same morning the police and fire brigade came to the APS site as a result of reports of odour said to be coming from APS. At the request of [name 5] also [name 12], DMB inspector, came to the site. In his turn [name 14] he notified the IMT. liii. Contact was also attempted with Amsterdam Port Authority. liv. Members of the KLPD visited the Probo Koala, where they spoke to [name 6]. lv.

5.19 [name 5] wanted to have the slops pumped back to the Probo Koala. lvi. [name 8] requested an exemption from the Port Authority for the ship-to-ship transfer of 225 m^3 washings. lvii. The Port Authority then contacted the KLPD and PSC. They saw no reason why the exemption should be refused. lviii. The exemption for the ship-to-ship transfer was issued the same day on condition that a vapour return pipe was used. The exemption was faxed to APS and BMA at 20.28 hrs. lix.

5.20. On [the morning] of 3 July 2006 members of the IMT took samples of the contents of tanks 1 and 3 starboard and 1 and 3 port on the Main VIII, the tanks containing the Probo Koala slops. lx. That evening [name 12] was again present at the APS site. He told [name 5] that the slops could not be redelivered to the Probo Koala. lxi.

5.21 At 22.11 hrs that evening Amsterdam Port Authority received a fax from an anonymous sender with the following text:
"I want to report the following to you: The ship Probo Koala discharged 250 m^3 slops to APS. However, these slops are heavily contaminated. APS is now going to redeliver these slops to the ship minus 20 m^3 so that the ship receives a receipt for them. The owner considers that processing is much too expensive. There is still a batch of 250 m^3 on board so that there is still a total batch of 480 m^3 of very heavily contaminated slops on board. I am now afraid that the ship, with the receipt for 20 m^3 in its hands, will declare at the next port that the slops were discharged in Amsterdam and that the 480 m^3 will "disappear" on the voyage. I urgently ask you to inform the shipping inspectors at the next port of this and to check whether the slops are still on board (...).

I am sending you this message anonymously since I am afraid for my job if it is known that I have reported this. But I think it is my duty to report this to you (...)". lxii.

5.22 The next day, 4 July 2006, members of the IMT took samples from the slop tanks of the Probo Koala. On this occasion they also spoke to [name 6]. lxiii. Together with the samples previously taken at APS, these samples were sent for analysis to the NFI. lxiv.

5.23 In the early afternoon APS sent a fax to DMB in which it complained about the prohibition issued by DMB to redeliver the slops. In the fax APS insisted on a quick solution, failing which claims could follow. lxv. At DMB the lawyers were put to work on the question of whether APS had accepted the slops in accordance with its licence. DMB also tried to get in touch with the VROM Inspectorate and PSC. None of the bodies consulted saw any reason to prevent APS from redelivering the substances or any possibility of forcing the Probo Koala to discharge its slops. The DMB lawyers came to the conclusion that APS had not accepted the slops. lxvi.

5.24 later that afternoon DMB sent another fax to APS saying that its view that the slops had not been accepted was not shared for the time being. Among other things, this fax said:
"(...) It is expected that the analysis results of the samples taken by the Judicial Authorities and analysed at the Forensic Laboratory in Rijswijk will be known tomorrow afternoon. In anticipation of this result, under the terms of the Environmental Management Act Section 10.37, you must not discharge these slops from the facility except to a recognized processor (...)." lxvii.

5.25 APS had the bunkers of the Probo Koala seized. lxviii.

5.26 In the evening of 4 July 2006, at the request of [name 5], the Environmental Supervision Sector Head, [name 40] and the Licences Head [name 3], of DMB, came to the APS site for a discussion with [name 5] and [name 11]. lxix. After the discussion [name 40] and [name 3] were convinced that APS had not accepted the

slops. Their conclusion therefore was that APS was free to redeliver the slops. [name 40] confirmed this orally to [name 5] but stipulated that an independent third party should measure the redelivery to see that all the slops that had been discharged were redelivered and that APS had to pay € 125,000 if it was found nevertheless that slops had been left at APS. lxx. These agreements were first specified in a draft letter but not confirmed officially to APS until the letter of 12 July 2006. The "fine" of € 125,000 was not mentioned in this final letter. This letter said, among other things:
"(...) This has resulted in the overall conclusion that it is not likely that the disputed batch of slops was accepted. My employees have told you that the prohibition on redelivery had been lifted on condition that (...)." lxxi.

5.27 Immediately after the oral message from [name 40] APS hired Saybolt to measure the tanks of the Main VII containing the Probo Koala slops. This measurement was carried out in the night of 4 to 5 July 2006. lxxii. Early in the morning of 5 July the seizure of the bunkers of the Probo Koala was lifted. Because of problems with the connection of the vapour return pipe redelivery of the slops from the Main VII to the Probo Koala only started at the end of the morning. At 11.40 hrs the redelivery operation was finished. lxxiii. The file does not show that the Probo Koala or its users came under the exemptions listed in the Environmental Management Act Section 10.37 para. 2.

5.28 During the morning the IMT and the OM learned that the slops had been redelivered when two IMT agents returned empty handed at about 10.00 hrs from their job of measuring the tanks of the Main VII because the ship was no longer at the APS quay. lxxiv.

5.29 During the afternoon of 5 July 2006 the Probo Koala, with the slops back on board, left the Port of Amsterdam for Paldiski (Estonia). lxxv. At the request of PSC the Port Authorities in Estonia checked whether the Probo Koala still had the slops on board. It seemed that they were. lxxvi.

5.30 From Estonia the Probo Koala sailed to Lomé (Togo) where it arrived on 30 July 2006. On 4 August 2006 it arrived in Lagos (Nigeria). There two unsuccessful attempts were made to offload the slops. lxxvii, In the afternoon of 17 August 2006 the Probo Koala set sail for Abidjan (Ivory Coast), lxxvii. Where it arrived on 19 August 2006. lxxix. The slops were discharged there into tanker trucks. They then left their loads at various sites in and around Abidjan.

6. Introductory remarks

6.1 On behalf of Trafigura the defence first made a number of comments of a general nature. In essence they come down to the fact that the events in Abidjan (Ivory Coast) played such a role in the criminal case now pending against it that it has resulted in a witch hunt against Trafigura in which no distinctions have been made.

6.2 The defence claims that it was not responsible for the dumping of the slops in Abidjan, that if this had not happened there would be no criminal case against Trafigura, that the nature of the slops and the possible consequences of the dumping were too complicated for a correct or careful report and – lastly – that environmental activists, journalists and politicians wanted to make headlines at the expense of Trafigura.

6.3 In the opinion of the defence, the OM contributed to the negative picture by its actions and statements in the course of the criminal trial. This did not result in a charge to which the court should respond. However, the content of the remarks did demand a response from the court.

6.4 In the court's opinion the defence is perfectly right when it claims that the events after the discharge of the slops in Ivory Coast cannot be held against it in the case now being conducted in the Netherlands. In its annual report for 2009 Trafigura said the following: "Dutch legal proceedings are ongoing but this case is only concerned with the events that occurred when the Probo Koala arrived in Amsterdam and is highly technical in nature, focusing primarily on which regulation is applicable to the discharging and reloading part of the slops (eg MARPOL, BASLE and/or Dutch legislation)."

6.5 The charges against Trafigura do indeed focus on the events involving the Probo Koala in Amsterdam in July 2006 and on the transport of the cargo of slops to Abidjan. However that does not mean to say that the

dumping of the slops in Abidjan by or on behalf of Compagnie [name 44] can be ignored entirely. It has been established that the entire contents of the slop tanks of the Probo Koala were dumped at various locations in and around Abidjan, thereby causing a huge odour nuisance and serious contamination of the environment. As a consequence – as the defence says – there has indeed been worldwide media attention on these events with an accusing finger pointing at Trafigura, especially because there was talk of deaths and injuries as a result of the dumping of toxic waste.

6.6 As the court believes as a result of the documents and the examination in court, this has resulted in the Netherlands in incorrect and simplistic reports. However, in the opinion of the court, it goes too far to expand such reports into a charge against the OM and even – albeit veiled – against the court.

6.7 After all, the starting point in the series of events is that Trafigura itself decided to throw in its lot with a company whose existence it had learned of through its own subsidiary Puma Energy in Ivory Coast, which was prepared to accept the slops for USD 35 per tonne, fully knowing from Trafigura that they were chemical slops with an extreme acidity and a very high COD content, while APS would have charged at least € 750 per tonne to process exactly the same slops after taking and analysing samples.

6.8 Trafigura also knew that it did not tell the media the whole truth about the nature of the slops and the method by which they were produced. This is shown in the press releases from Trafigura in September 2006. In 2007 it was still making do with a description of the slops as "comprising a mixture of gasoline, water and caustic soda". In its contacts with the media in 2006/2007 Trafigura adopted a defensive attitude when talking about the nature of the slops when there was still more information to be given about the exact composition and the possible consequences of them for humans and the environment. For instance, in a press release on 6 September 2006 Trafigura said: "Trafigura can confirm that the waste (slops) is a mixture of gasoline, water and caustic soda". lxxx. In a "press statement" of 24 September 2006 Trafigura said, among other things: "It maintains that the composition of the "chemical slops"; gasoline, spent caustic and water is a normal bi-product from the cleaning of gasoline blendstock cargo [sic] the slops are entirely in line with industry practice and international regulations". lxxxi.

6.9 On 24 September 2006, for instance, [name 45], director of Trafigura, still reacted to a draft press release with the statement "I would not mention the acid at all". lxxxii.

6.10 Trafigura is at liberty to adopt an unfortunate attitude but it is not fitting to point an accusing finger at the outside world without replying to the question of whether Trafigura itself could perhaps take some blame for the situation it ended up in in July/August 2006.
Trafigura shows thereby that it has no confidence in the role of the media and the honesty of journalists, although it makes an exception for the journalist [name 46]. He is the only one who understands it and who – as the court must assume, with the help of information from Trafigura – again published an article during this case and after hearing Trafigura's argument in which the relative innocence of the slops is described.

6.11 The court acknowledges the claim of the defence that Trafigura made financial efforts by paying USD 150 million to the Ivorian State and GBP 30 million to Ivoirians who claim they had experienced health complaints as a result of the dumping of the slops. The payments have nothing to do with Trafigura's alleged behaviour in the Netherlands. In themselves, the payments seem to be a reasonable reaction to the problems in Ivory Coast but we must not lose sight of the fact that the commercial considerations played a part since their annual reports show that Ivory Coast, in particular the Port of Abidjan, is important to Trafigura as a storage site and tank park for its activities in West Africa.

6.12 With the defence, the court regrets that Dutch Members of Parliament did indeed show a tendency to express themselves without reservation about certain events and without having formed an opinion beforehand on the basis of the facts. The court agrees with what Trafigura said on this subject in paragraphs 82 to 93 of its statement of pleadings. However, no single connection can be found in the file for the view that the OM was under political pressure to see Trafigura as a suspect.

7. Acquittal for charge 3

7.1 The defence asked for acquittal on charge 3. This position is based on the consideration that the evidence – given the summary of evidence by the OM – rests "solely or to a decisive degree" on the statement of the suspect [name 6] whereas the defence had no opportunity to question [name 6] in the preliminary investigation nor at the hearing, which is contrary to the right to examine under the EVRM Section 6. The statement by [name 6] cannot therefore be used in evidence, according to the defence.

7.2 The court rejects the defence's claim that the state (which means the OM and the court) did not make sufficient efforts to ensure that the defence was able to exercise its right to examine.

7.3 The examination in court did not show that the OM did not make sufficient efforts. The court believes that at the directional hearing in June 2008 the request to examine [name 6] was allowed and that the Examining Magistrate tried repeatedly to have [name 6] interviewed in the presence of the defence. Even in about May 2009, when the court decided on June 2010 as the date for the hearing of the case, it was not possible to examine [name 6] in the presence of the Examining Magistrate and the defence. Lastly, [name 6] did not want to appear in court in his own case.

7.4 All the above means that – in the words of the ECHR (26 March 1996, Doorson para. 72, LJN AD 2516, and 20 December 2001 PS v. Germany para. 23, LJN AE 7401) – the defence must be offered compensation: "Any difficulties caused to the defence by a limitation on the rights must be sufficiently counterbalanced by the procedures followed by the Judicial Authorities." Where a statement prejudicial to a suspect is concerned, the possibility of testing this statement is crucial. In the opinion of the court, it has no possibility here of offering a different possibility of testing.

7.5 However, in the opinion of the Supreme Court (see eg NJ 2003, 672) a statement by a person, who – despite a request to that effect – cannot be examined by the defence, can still be used in evidence provided the involvement of the suspect in the action with which he is being charged finds sufficient support in other evidence and that supporting evidence relates to the parts of this statement disputed by the defence. In this case it is certain that the defence has brought arguments to dispute the correctness of the statement of [name 6].

7.6 Assuming that the statement by [name 6] can be used in evidence, despite the objections of the defence, then this is the only evidence that suggests the indirect involvement of Trafigura in the incorrect completion of the "notification". There is no supporting evidence for their involvement. For this reason alone Trafigura must be acquitted on charge 3.

8. Evaluation of the evidence

8.1 The view of the Public Prosecutions Department

8.1.1 The OM is of the opinion that charges 1, 2 and 3 can be declared proven.

8.1.2 With regard to charge 1, the OM – in brief – claim the following. The slops came under the prohibition contained in the EVOA on exporting wastes to ACP states. The claim that the slops were ship's wastes and therefore came under the MARPOL Convention – and therefore under an exemption in the EVOA – does not hold water, in the OM's opinion; the slops were not produced by the normal operation of a ship. If it were true that the slops did come under the exemption in the EVOA, it must then be said that they were imported on being discharged to APS and thereby became EVOA wastes. After being redelivered to the Probo Koala they were then mixed with the slops that had stayed on board, so that after redelivery the entire batch of slops on board was covered by the EVOA. Export of these slops to an ECP state like Ivory Coast was therefore prohibited.

8.1.3 The OM believes that the export was only completed when the wastes were taken to shore for processing in the country of destination, so in this case Ivory Coast. The fact that the ship called at ports in other countries on the way from Amsterdam to Ivory Coast does not alter this fact; indirect export is still export.

8.1.4 The breach of the export ban can be ascribed to Trafigura since the behaviour that resulted in the breach was carried out on the instructions of its employees. Trafigura was aware of the European rules on waste and of possible breaches of these rules. This means that malice aforethought is a fact. Finally, Trafigura committed the breach together with others.

8.1.5 Regarding charge 2, the OM said the following. Trafigura offered the slops as petrol washings or tank washings, even though they were not since they were wastes that remained after a fuel treatment process. Trafigura concealed the true harmful nature of the slops from APS. Tank washings are merchandise; they are intended for recycling and therefore are covered by the term "goods" in the Sr Section 174.

8.1.6 Trafigura also knew that the slops were hazardous, as is shown by the email correspondence between its employees, including [name 7]. In addition, various attempts to discharge the waste in the Mediterranean region failed because of the chemical composition.

8.2 The view of the defence

8.2.1 The defence takes the view that Trafigura should be acquitted on every charge.

8.2.2 Regarding charge 1, the defence said that the EVOA was not applicable to this case. All the wastes produced on board a ship are governed by MARPOL and come under the exemption rule of the EVOA. The phrase "produced in the normal operation of a ship" does not mean anything, at least nothing that is relevant to this case. The exemption rule of the EVOA only takes effect if the material comes on shore and its nature is changed by mixing or contamination. There was no question of this in the case of the pumping operation between the Probo Koala and the Main VII and vice versa. So the slops came under MARPOL and continued to do so. The EVOA and MARPOL regimes are mutually exclusive.

8.2.3 Alternatively, Trafigura must also be acquitted because the export with which it is charged did not take place from the Netherlands and/or because this export did not end in Ivory Coast.

8.2.4 More alternatively, Trafigura must be exempt from prosecution because it misunderstood the law. It assumed that the slops did not come under the EVOA. That this assumption was shown to be incorrect later cannot be held against Trafigura.

8.2.5 Most alternatively the defence asks the court to suspend the case and put interlocutory questions to the Court of Justice in Luxembourg.

8.2.6 Regarding charge 2 the defence said the following, in brief. First, the slops cannot be regarded as "goods" within the meaning of the Sr Section 174 because there is no useful purpose or economic value. Second, there is no evidence that the slops could have a harmful effect on health if used reasonably. Third, Trafigura, in the person of [name 7], gave APS full information about the nature of the slops; they were not offered as tank washings. If APS assumed, despite the information given by Trafigura, that they were tank washings, Trafigura cannot be held responsible since the assumption by APS is completely irrational; the phrase "caustic soda" is unusual for tank washings and should have rung a bell, certainly when used in combination with the request for a quotation for the offloading of 50 empty caustic soda IBCs.

8.3 The court's decision

8.3.1 The causal facts and circumstances

For the causal facts and circumstances the court refers to the content of file 5.

8.3.2 Regarding charge 1 (EVOA)

8.3.2.1 After leaving Amsterdam with all its slops back on board, the Probo Koala sailed to Paldiski in Estonia and from there via Togo and Nigeria finally to Ivory Coast. There the slops were offloaded to a local waste processing company [name 44] who loaded them into tanker trucks which then dumped them here and there in Abidjan in the open air. So eventually the slops ended up in Ivory Coast in Africa.

8.3.2.2 The charge against Trafigura is that it thereby breached the prohibition included in the EVOA on exporting waste from the European Union to an ACP state. Ivory Coast is an ACP state. lxxxiii.

8.3.2.3 There is no dispute that the material in the slop tanks of the Probo Koala should be regarded as wastes within the meaning of the EVOA.
Section 1 of the EVOA defines its own area of application. Insofar as is relevant to this case, that section says:

1. This regulation applies to the carriage of wastes in, to and from the Community.
2. This regulation does not cover:
   a) the discharge to shore of wastes produced by the normal operation of ships and offshore platforms, including waste water and residues where such wastes are subject to a specific, binding international instrument;
   (...)

8.3.2.4 The "specific, binding and international instrument" referred to in Section 2a of the EVOA is the MARPOL Convention, as is shown by the fact that it is referred to in so many words in Section 1.3a of the EVOA (New).

8.3.2.5 In dispute is whether the slops come under the scope of the EVOA since Section 2a quoted above means that it is not applicable to the discharge to the shore of waste produced by the normal operation of ships, to which MARPOL is applicable (in brief: ship's wastes). Trafigura takes the view that the slops are ship's wastes and that they therefore do not come under the ban on export to ACP states.

8.3.2.6 It can be established that the wastes were produced on board a ship, the Probo Koala. By itself, this does not mean that they are ship's wastes that come under the exemption in the EVOA since it still has to be determined whether the waste has come from "the normal operation of a ship". The court does not follow Trafigura's view that no importance should be ascribed to the word "normal" simply because words do not even end up in texts such as this (an EEC Regulation). In the interpretation of the EVOA provision, the point of departure is also that the EVOA is intended to prevent waste from western countries being dumped in developing countries (such as the ACP states). Developing countries often lack the expensive facilities that are needed to process waste by a method that is safe and responsible for humans and the environment. In addition to that, even if these facilities are present, their proper use cannot always be guaranteed because of political instability and corruption.

8.3.2.7 Against the background of this idea of protection, it is obvious that EVOA be given a broad area of application. This means that exceptions to the principal rule (no export to ACP states) must be interpreted narrowly. The exception for discharging "ship's wastes" to the shore is, in the court's opinion, only justified in that light if they are wastes that are unavoidably produced on board a ship. A ship is primarily intended as a means of transporting people and/or goods over water from A to B. The waste necessarily produced in such movements must be regarded as coming from the normal operation of a ship, for instance sanitary waste and food residues produced by the crew or passengers, used oil from the engine room and bilge water. Washing water produced by washing cargo tanks has to be regarded as waste coming from the normal operations during a sea voyage. If a ship carries goods that have to be protected during the voyage against deterioration, the waste produced thereby can also be regarded as ship's waste. And if a ship is required by law to have a doctor on board, the waste produced by the doctor also comes from the normal operation of a ship (incidentally, the defence sees this differently). Furthermore, the taking on board and processing of things that are harvested at sea, such as fish, also belongs to the normal operation of a ship. The use of a ship for this purpose is unavoidable. Waste produced thereby therefore also qualifies as waste produced by the normal operation of a ship.

8.3.2.8 In the eyes of the court the slops from the Probo Koala are a completely different matter. They were produced by washing petrol with caustic soda on board the ship. The Probo Koala was not being used as a means of transport for petrol – this was brought to it by other ships and taken away again after processing – but as a floating factory. The washing of petrol is an industrial process that until then was always done in facilities suitable for that purpose on shore and is therefore not inherent in a ship. On the contrary, none of the products needed – petrol, caustic soda, catalyst, scavengers – are found at sea and the use of a ship for

this purpose is therefore not necessary. It appears that the washing process was carried out in this case on board a ship because it was not welcome on shore. For instance, [name 21] wrote on 18 April 2006 to his colleagues at Trafigura in an email on the subject "PMI shit": "We are coming up with some problems regarding the treating/disposing of the PMI naphtha out of Brownsville. We are now limited to caustic washing on a ship". lxxxiv. On 27 December 2005 [name 7] sent his colleagues an email saying: "We have already spoken to all the main storage companies, US/Singapore and European terminals no longer allow the use of caustic soda washes since local environmental agencies do not allow disposal of the toxic caustic after treatment". lxxxv. And they were not welcome in La Skhirra (Tunisia) either after the odour incident. lxxxvi. But the reason also comes down to the fact that an industrial process had been relocated from land to sea. The ship was not used for its function as a ship but as a floating factory carrying out a process for which presence at sea was totally unnecessary since all the materials needed for it had to be brought from the shore.

8.3.2.9 These considerations unavoidably lead the court to the conclusion that the Probo Koala slops cannot be regarded as being produced by the normal operation of a ship. This means that the exemption in Section 2a of the EVOA is not applicable and that therefore the export of these slops from the EU to an ACP state is prohibited.

8.3.2.10 Trafigura has claimed that there is no question of the export of the slops from the Netherlands to Ivory Coast, as in the charge. When the Probo Koala left Amsterdam carrying the slops, there was not as yet any plan to take the waste to Ivory Coast and although export from the Netherlands can already be proven, it is not export to Ivory Coast since the export already ended at the moment that the Probo Koala entered the territorial waters of an ACP state for the first time, namely the waters of Mauritius or, on closer inspection, Togo.

8.3.2.11 The limited interpretation of the EVOA expressed by the defence that there can no longer be a question of export of wastes to an ACP state as soon as these wastes cross the border of an ACP state does not ensue from the wording of the EVOA. Nor is it consistent with the purpose of the EVOA because that system of supervision and control over the transport of wastes was introduced to maintain, protect and improve the quality of the environment, not only in the Member State itself, but also in third countries. Lastly the limited interpretation is not consistent either with the system of other regulations, agreements and treaties that are also intended to protect the environment in those states. lxxxvii.

8.3.2.12 That the idea that the export of the wastes within the meaning of the EVOA can already be complete before the wastes are discharged to shore in the country of destination cannot be correct also follows from the fact that Section 2a of the EVOA only exempts discharges to the shore from the terms of the EVOA. If the action of export had already been completed at the moment when a ship coming from an EU Member State carrying waste enters the territorial waters of any ACP state, the export ban in the EVOA would always be broken and the exemption would not have any meaning since it is not possible to discharge something to shore without first entering the territorial waters.

8.3.2.13 Nor can it be accepted that there had been no question of export of slops from the Netherlands to Ivory Coast because it had not been decided when the ship left the Netherlands where the slops would eventually be discharged. In the court's opinion the act of export is regarded as one unit in which the actual course of events determines the answer to the question of where the export began, where it continued and where it ended. In the case of the Probo Koala this gives us the following picture: the Probo Koala left the Port of Amsterdam carrying its waste and, via Estonia, Togo and Nigeria, eventually reached Ivory Coast where the waste was finally discharged. In legal terms this means that the export began in the Netherlands and ended in Ivory Coast.

8.3.2.14 The court will pass over the most alternative request of the defence to put interlocutory questions to the Court of Justice in Luxembourg. The court is not required to put questions and considers itself able to reach a decision on the interpretation of the EVOA, as it has done above.

8.3.2.15 The conclusion of the above deliberations is that the claims by Trafigura have failed to have the desired effect. In the period mentioned in the charge Trafigura was guilty of exporting waste from the Netherlands to Ivory Coast. By doing so it breached the prohibition under the EVOA Section 18. It did so deliberately. In this case we can even say with malicious intent because the email sent by [name 7] on 28

December 2005 to his colleagues and bosses shows knowledge of bans on exporting waste: "(...) Under EU law you [are] no longer allowed to transport such waste across EU borders". lxxxviii.

8.3.3 Regarding charge 2 (Sr Section 174)

Goods or not goods?

8.3.3.1 According to legal history and case law "goods" are merchandise; moveable goods intended for use. xxxix. To decide whether the slops from the Probo Koala should be regarded as such, it is not particularly important what the composition of these slops was but it is important in the first place how the slops were offered to APS since the rationale of the Sr Section 174 is the protection against the selling or delivery of factually noxious goods under another name.

8.3.3.2 According to Trafigura and [name 7], in his first telephone conversation with [name 9]/[name 8] of APS [name 7] said that the slops had come from a petrol washing on board the Probo Koala using caustic soda. [name 7] is also said to have said how much caustic soda was used in the process and therefore how much ended up in the slop tanks. The court finds that [name 7] only says in his statement that he told APS the exact composition and origin of the slops. [name 9] and [name 8] of APS definitely said that this was not so. [name 8] said that the inquiry was for petrol washings, tank washings of petrol: a product that came to APS every day and about which [name 8] did not have to ask any special characteristics. According to [name 8] APS would have started a completely different procedure if [name 7] had said how the slops had been produced. xc. [name 9] said that he asked [name 7] to confirm his inquiry by email and found that the content of the email was the same as the telephone inquiry. xci.

8.3.3.3 The court finds the statement of [name 7] that he informed APS fully about the nature and origin of the slops unbelievable. Besides the above statements of [name 9] and [name 8], the court bases this on the following facts.

Whereas [name 7] told Vest Tank in Norway later, on 22 September 2006, by email xci. in detail what the composition and origin of the slops was, in his email to APS he only said: "Gasoline slops (majority is water, gasoline, caustic soda)". xciii. The offer from APS of 20 June 2006 was based on "gasoline/caustic soda washings". The quoted price (€ 6,675) is the price for normal petrol washings, as [name 9] stated. xciv. [name 6] and the first officer of the Probo Koala referred to the slops in their interviews in Estonia in September 2006 as "tank washings", just as Trafigura did in statements to the press as late as September 2006. In addition to that, [name 6] was instructed previously, in April 2006, not to mention the presence of caustic soda in the slops in La Skhirra: "Pls. ensure ensure that any remaining of caustic soda in the tanks' interface are pumped into the slop tank to the best of your ability and kindly do not, repeat do not disclose the presence of the material [sic] to anyone at La Skhirra and merely declare it as tank washings". xcv.

8.3.3.4 The lack of credibility of [name 7's] statement is not made less because on 15 August 2006 he told reporting officer [name 47] of his own accord how the slops had been produced xcvi. Because the telephone conversation between the reporting officer and [name 7] took place long after the telephone conversation between the same reporting officer and [name 25] of Falcon Navigation xcvii., in which [name 25] said, after some questioning xcviii. that, contrary to what seemed to follow from the oil record book, no tank washings had taken place, but instead cargo washings. In that interview [name 25] referred the reporting officer for details to "[name 7]", for whom he also gave contact details. It is evident that [name 25] put [name 7] in the picture after his conversation with the reporting officer and that the announcement by [name 7] that petrol had been washed was therefore less spontaneous than it seemed.

8.3.3.5 The conclusion from the above is that the slops were not offered as "spent caustic" or something similar but as "gasoline slops, majority is water, gasoline, caustic soda". APS understood this to be petrol washings, a substance that it receives every day as an HOV. It also acted accordingly in view of its offer (price, COD content) and its belief that it would be able to process the substances in its facility. When he took the slops from the Probo Koala on board the skipper of the barge Main VII also acted as if he was taking on board petrol washings; for instance, a vapour return pipe was not used, as the skipper stated. xcix.

8.3.3.6 The claim that APS should reasonably not have regarded the substances as petrol washings does not hold water. In the first place it is not for Trafigura, which did not report the real composition or origin of the substances, to accuse its counterparty of taking over its description unquestioningly and not regarding it with suspicion. In the second place it should not be forgotten that washing petrol with caustic soda on board ship had never been done before. APS therefore did not need to be cautious. Against this background it did not have to be alarmed by the mention of caustic soda in the inquiry, not even in combination with the later request for a quotation for the removal of 50 empty IBCs that had contained caustic soda although, looked at retrospectively, it would have been better for everyone if APS had been alarmed.

8.3.3.7 The conclusion is that Trafigura offered APS the slops as petrol tank washings. This is a waste that APS normally treats and processes in its facility by separating the substances into an oil fraction, a water fraction and a sediment fraction. Under its licence APS can centrifuge the oil fraction but this process is not yet in operation and therefore the oily layers are delivered to third parties, according to [name 5]. c. APS receives money for the oil fraction, as is shown by the tapped call between [name 5] and [name 1] about prices for waste oil such as petrol mixtures. ci. So APS does not destroy petrol tank washings as if it were a waste storage place but, as far as possible, makes it suitable for recycling. Unlike the chemical wastes that were offered for destruction in the case that resulted in the Supreme Court's decision of 16 March 1993 cii., the Probo Koala slops had a useful purpose and also an economic value. Because of that the court has come to the conclusion that the slops can be regarded as "goods" within the meaning of the Sr Section 174.

Discharged?

8.3.3.8 Trafigura did not – the court believes rightly – dispute that the slops were discharged to APS when they were transferred to the Main VII.

Harmful to life and/or health?

8.3.3.9 The NFI report of 29 January 2007 said about the Probo Koala slops: "They are very complex mixtures of water and alkaline substances in which relatively large quantities of organic material has dissolved, including many sulphur compounds (principally mercaptans and disulphides) and phenols and alkylphenols". ciii.

In the letter of 28 January 2010 from the expert Bakker of the NFI to the OM he says:

"It has been established that the slops contain flammable, caustic/corrosive substances (naphtha and sodium hydroxide respectively) and noxious to very toxic substances, besides substances which can release harmful to highly toxic substances in certain circumstances (sulphides, mercaptides). In view of the fact, among others, that the slops contain flammable substances (naphtha), substances that can seriously damage the skin (including sodium hydroxide) and substances that break down into highly toxic mercaptans and hydrogen sulphide when the acidity is reduced, the conclusion is justified, in our opinion, that this is a very hazardous waste". civ.

8.3.3.10 In the opinion of the court the very fact that the slops contain substances which can cause burns on contact with the skin justifies the conclusion that the slops are harmful to health. The question now is whether the substances were harmful to life and/or health even in the use that should reasonably have been expected after being discharged by Trafigura. In any event, Trafigura should have taken into account the fact that APS employees would collect and handle the substances in the same way as they would do with normal petrol tank washings. That means that they would not take any special safety precautions in connection with the corrosive character of the slops. For this reason alone it can be said that the slops were harmful to health if used in the expected way. Whether that danger became a reality is not important.

8.3.3.11 Apart from that, when processed in the DAF (which would considerably reduce the pH value) the slops would give off mercaptans and hydrogen sulphide which would then end up in the atmosphere and therefore in the environment. The consequences that the discharge of substances could have on the environment are described in the NFI report of 29 January 2007: "At a pH of 7.8 the volatile mercaptans and hydrogen sulphide can be released as gas. There is then odour nuisance for a great distance and a risk of headaches and nausea on the APS site". cv. These risks did not become reality (at least except for the odour incident on 3 July 2006 which was very probably due to the Probo Koala slops), because APS noticed on analysing the slops that the

COD content was too high for it to be able to process the slops in its facility. It is unpleasant that Trafigura says that it knew that APS would not be able to process the slops in its facility and that the danger would therefore not arise since Trafigura claims at the same time that it did not know that APS separates oily wastes in its facility into an oil, water and sediment fraction. When it suits it, it knows the industrial process of APS well and, when it is not to its liking, pretends that it does not know them. However, on this point the court is of the opinion that Trafigura, as an oil trader operating worldwide, which is also involved in recycling, can be considered as a matter of course to know that – at any rate in the Western World – oily wastes are made suitable for recycling as much as possible and that destruction is only a last resort.

Knowingly?

8.3.3.12 That Trafigura and [name 7] knew of the harmful character of the wastes is already shown by the fact that they had monitored the petrol washings from start to finish. So they knew how much caustic soda was in the slops. They also knew that it is a corrosive substance; the supplier of the caustic soda, WRT, gave [name 7] information about caustic soda by email in the form of a Material Safety Data Sheet". cvi. In addition, [name 7] knew that the slops could not be processed in Malta "due to the chemical content". cvii. [name 6] also knew about the harmfulness of the slops: he also received the MSDS and he had his crew wear protective clothing while working.

Concealment?

8.3.3.13 It was already found above that Trafigura and [name 7] discharged the slops to APS in the guise of petrol tank washings. This also confirms that they concealed the true nature and therefore the harmful character of the slops on discharging them. [name 6] also made no mention of the harmfulness at the time of discharge although he knew about it.

Conclusion

8.3.3.14 The above considerations show that Trafigura and [name 6] were guilty of discharging goods harmful to health – as they knew – although they concealed the harmful character.

9. Evidence

The court bases its decision that Trafigura committed an offence on the facts and circumstances contained in the evidence referred to in the footnotes in paragraphs 5, 8.2.2 and 8.2.3.

10. Verdict

The legal evidence has convinced the court and it therefore considers it proven that Trafigura committed charges 1 and 2 in that it:

1) in the period from 5 July 2006 to 20 August 2006 it intentionally transported wastes from the Netherlands, acting contrary to the prohibition placed by Article 18, para. 1, of the EEC Regulation on the carriage of wastes since it, the suspect, exported wastes on the ship Probo Koala (produced by the treatment of fuel using sodium hydroxide (caustic soda)) to an ACP state, namely Ivory Coast;

2) on 2 July 2006 in Amsterdam, together and in association with another, discharged wastes produced by treating fuel using sodium hydroxide (caustic soda) to Amsterdam Port Services BV as tank washings, knowing that these goods were harmful to life and/or health since these wastes were a complex mixture of water with an extreme acidity level and an oily liquid (both contaminated with, among other things, sulphides and mercaptides), and concealed their harmful character (caustic and corrosive) when discharging them.

11. Punishability of the offences

The proven offences are punishable by law. There are no grounds for justification.

12. Punishability of the suspect

The defence has claimed that Trafigura is totally innocent since it assumed that the slops came under MARPOL, not the EVOA. This reliance on mitigating ignorance of the law is not acceptable since reliance on ignorance of the law can only benefit a suspect in particular circumstances and Trafigura has not shown such particular circumstances. In addition, there is unlikely to be any circumstance that would rule out Trafigura's conviction. Trafigura is therefore punishable.

13. Grounds of the punishment

13.1 The demand by the Public Prosecutions Department (OM)

13.1.1 The OM has demanded that Trafigura be fined € 2 million for the offences in charge 3 together.

13.1.2 The fine they ask for is close to the maximum penalty for these offences. The OM gave reasons for its demand as follows. Trafigura trampled underfoot the elementary rule that western waste should not be dumped in developing countries. It concealed the harmfulness of the waste from APS and it did not hesitate to falsify the "notification" prescribed by law. Trafigura did this with malice aforethought. It put its own commercial interests before the interests of health and the environment. In these circumstances the OM considers a substantial fine to be deserved.

13.2 The view of the defence

In its statement of pleadings the defence made a number of preliminary remarks of a general nature and took the view, both in its pleadings and in its statement of rejoinder that Trafigura should be acquitted on all the charges against it. A defence based on ability to pay was explicitly declined. If a punitive defence has to be read into the introductory comments, it will, if necessary, be discussed in paragraph 13.3 below.

13.3 The court's decision

13.3.1 The blames Trafigura for choosing not to justify its actions at a public hearing. In a case such as this a corporate entity can expect at least to appear at the main hearing to explain its point of view and to offer the court and the OM an opportunity to ask questions about the choices it made. It thus deprived itself of the possibility of mentioning points that perhaps could have been of importance. Legal representation by lawyers, however outstanding, is not enough in a case like this.

13.3.2 In determining the level of the punishment the court regards at charge 1 against Trafigura – in brief, the export of the slops to an ACP state – in particular as the most serious offence. Trafigura can rightly and reasonably be accused of doing precisely what the EVOA, the Fourth Lomé Convention and the Basle Convention want to prevent, namely the export of waste to the Third World and damage to the environment.

13.3.3 It exported the wastes, of which it said itself that they caused serious pollution of the environment in an ACP state, Ivory Coast, to a state without thoroughly investigating whether the Port of Abidjan had the right facilities to process wastes produced by a chemical process on board the Probo Koala in a responsible way.

13.3.4 In commercial life a company that intends to use a new process – as in this case a washing process on board a ship in which caustic soda and other substances are added to coker naphtha to reduce the sulphur content, increase the octane count and thus improve the quality of the product – can reasonably be expected to be aware of the risks that such a new production method may involve and therefore to ask itself the question beforehand what it will do with the wastes that can be produced by such a process.

13.3.5 From the examination in court it can definitely be assumed that Trafigura knew that in this process, that had been carried out on shore for a considerable time, wastes are produced that put a heavy demand on the treatment since Trafigura Houston – which played a role in the purchase of the coker naphtha in Mexico and its storage in Brownsville (Texas) – had contact with companies in the US and elsewhere who knew the characteristics of the wastes produced in the washing process (Merox).

13.3.6 In 2006 Trafigura was already one of the largest traders in oil in the world and was involved in a large number of actions relating to the recycling of oil products (including blends) for commercial activities. In addition, Trafigura already knew in April 2006 that the discharge of slops for processing was at the very least not simple. The co-suspect [name 7] also knew this as well as the various departments of Trafigura Ltd. in London.

13.3.7 After the wastes offloaded in July 2006 in Amsterdam had been redelivered to the slop tanks of the Probo Koala, Trafigura knew from its contacts with APS, Saybolt and its own agent and the multiplicity of contacts between 2 and 5 July 2006 between [name 6], Falcon Navigation and Trafigura Ltd. in London that they were dealing with a substance with a very high COD content and an extremely high acidity level.

13.3.8 The sole fact that Trafigura believed that it was dealing in Abidjan with, it believed, a recognized processor does not absolve it. Although the price offered of USD 35 per tonne was more or less the same as the original offered by APS, it was definitely not similar to the price of at least € 750 per tonne that APS demanded after it found out the composition of the slops by taking samples. Under these circumstances Trafigura – which in the meantime also knew the exact composition – should never have agreed to treatment at such a price.

13.3.9 All of this justifies the assumption that Trafigura chose this solution for commercial reasons. On the whole there is nothing against a company choosing to keep the cost of production as low as possible. But it is completely different where – as has been said – a process new even to Trafigura was concerned in which a number of uncertainties were hiding, which Trafigura also knew, as shown by the many emails in the file referring to the method of washing and the problems that could arise.

13.3.10 A business with a reputation like Trafigura's could have been expected to come to a different decision from the one it made, even if it would perhaps cost a lot of money. This justifies the judgment of the court that this offence must be punished with the maximum fine that the legislation imposes. The amounts that Trafigura has already paid in Ivory Coast are no reason to reduce the fine.

13.3.11 A substantial fine is also justified for charge 2. In the court's opinion Trafigura is mainly to blame for the fact that it did not provide total clarity about the nature of the slops and that it gave no full explanation about how the slops had been produced. On the other hand, the court has taken into consideration in the punishment that the slops were not put on the consumer market but were discharged to APS, a recognized waste processor, and that there were no great risks to health or the environment.

13.3.12 Another factor against Trafigura is that one of its subsidiaries in the US has fallen foul of the law and has had to pay a substantial settlement.

13.3.13 When it comes to its ability to pay, the fine imposed is of very minor importance to a company such as Trafigura. In 2009 the gross profit of the Trafigura Group was USD 1.8 billion with a net profit of USD 938 million, more than double the results for 2008.

13.3.14 In the opinion of the court, taking everything into consideration, the following fine is reasonable and necessary.

14. Applicable statutes

The punishment imposed is based on Sections 23, 51, 57 and 174 of the Criminal Code, Sections 1a, 2 and 6 of the Act on economic offences and Section 10.60 of the Environmental Management Act. These statutes are applicable as applying at the time of the conviction.

Based on the above, the court has come to the following decision.

15. Decision

Declares charge 3 not proven and acquits Trafigura Beheer BV.

Declares proven that Trafigura Beheer BV committed charges 1 and 2 as shown in paragraph 10 above.

Declares not proven more or other charges against Trafigura Beheer BV than those declared proven above and acquits Trafigura Beheer BV.

The verdict is:

Regarding verdict 1:

Breach of a regulation under the Environmental Protection Act Section 10.60, para. 2, intentionally committed by a corporate entity;

Regarding verdict 2:

Complicity in supplying goods, knowing that they were harmful to life and health and concealing their harmful character, committed by a corporate entity.

Declares the proven offence punishable.

Declares the suspect Trafigura Beheer BV punishable for this offence.

Sentences Trafigura Beheer BV to a fine of € 1 million (one million euros).

This decision was handed down by

mr F.G. Bauduin, Chairman,
mrs. G.H. Marcus and W.M. de Vries, Judges,
in the presence of mrs. M. Cordia and N.C. van Geel, Clerks of the Court,

and declared at the public hearing of this court on 23 July 2010.

i. Where evidence is referred to below, this evidence is trial documents contained in the file against the suspect [name 5], APS, Municipality of Amsterdam, [name 6], [name 7] and Trafigura. Where the following footnotes refer to the trial documents with paragraph number
"3", this is an official report of witness interview;
"4", this is an official report of suspect interview;
"5", this is an official report of investigation or findings;
"8", this is an official report of seizure;
"9", this is another document as referred to in the Sv Section 344, para. 5;
Unless expressly stated otherwise in the footnote.
The court has determined that the evidence used was drawn up in accordance with applicable legal rules. If the evidence consists of a statement made by a suspect or witness to an Examining Magistrate, this will be stated expressly. If [name 5], APS, Municipality of Amsterdam, [name 6], [name 7] and Trafigura are mentioned, this means the co-accused listed above with the same name.

ii. Probo Koala data, para. 9.01, page no. 1.
iii. Para. 4.2.1, page no. 289 to 291: interview [name 18].
iv. Para. 5.04, subpara. 5.4.9.1, page no. 49: Probo Koala crew list.
v. "Trafigura; about us", submitted by the defence in its pleadings.
vi. Para. 4.19, page no. 270: interview [name 19].
vii. Email from [name 20] to [name 21] and [name 22], dated 27 December 2005, Annex to Annex 1 to letter of 22 March 2010 from the Public Prosecutor, added to the file on 16 March 2010.
viii. See eg para. 9.27, folder 3, page no. 7136: email from [name 7] to [name 9] of 26 June 2006.
ix. Para. 5.102, page no. 46: email from [name 7] to [name 21] of 28 December 2005.
x. Para. 9.27, folder 1, page no. 6513, letter from Trafigura to Tankage Mediterranee of 17 March 2006.
xi. Para. 9.23, page no. 6339 to 6342: letter from Trafigura to Tankage Mediterranee of 23 February 2006.

xii. Para. 9.27, folder 2, page no. 6782: email from [name 23] to [name 7] of 17 April 2006, para. 8.05, folder 2, page no. 554: email from [name 19] to [name 24] of 20 April 2006 and para. 5.72, page no. 4163.
xiii. Para. 8.05, folder 2, page no. 511: email from [name 22] to Chartering Tankers of 2 April 2006 and p. 513: email from [name 19] to [name 7], [name 25], [name 18] of 31 March 2006 and para. 9.64, folder 4, page no. 1121: email from [name 26] to [name 27], [name 28], [name 29] of 30 March 2006.
xiv. Examining Magistrate's interview of [name 30] of 24 June 2009.
xv. Para. 9.27, folder 1, page no. 6519: email from [name 7] to [name 31] of 7 September 2006.
xvi. See for instance para. 9.27, folder 1, page no. 6477 to 6479: email from [name 23] to the Master of the Probo Koala c/o Athens Ops of 7 April 2006.
xvii. Para. 8.05, page no. 511.
xviii. Para. 5.20, page no. 880.
xix. Para. 5.88, page no. 324: file with letter of request to Malta and para. 5.70, page no. 4139 and 4141.
xx. Para. 9.32, folder 2, page no. 8934: email from [name 18] to Probo Koala of 26 June 2006.
xxi. Para. 9.32, folder 2, page no. 8937: email from [name 24] to Probo Koala of 27 June 2006.
xxii. Para. 5.88, page no. 327: file with letter of request to Malta and para. 5.90, page no. 67: explanation of the facts by Saybolt.
xxiii. Para. 5.18, page no. 819: "Vessel ullage report" of 2 July 2006 and para. 5.71, page no. 4158.
xxiv. Para. 9.25, page no. 6397-6475: NFI report of 29 January 2007, in particular pages 19/63 and 20/63 of that report.
xxv. Para. 5.90, page no. 82 and 83: email from [name 32] to [name 7] of 10 April 2006.
xxvi. Para. 5.90, page no. 79: email from [name 43] to [name 32] of 10 April 2006.
xxvii. Para. 9.32, folder 8, page no. 357: email from [name 33] to Probo Koala of 29 June 2006.
xxviii. Para. 4.06, page no. 120, interview of [name 7] with police on 18 December 2006.
xxix. Para. 9.09, page no. 112: email from [name 7] to [name 8].
xxx. Para. 9.09, page 105, 106 and 109: email with attachments.
xxxi. Para. 9.09, page 109: email [name 7] to [name 9].
xxxii. Para. 9.27, folder 3, page 7126: email from [name 24] to [name 7] "Better via STS".
xxxiii. Para. 3.18, page no. 423-426: email from [name 34] to BMA of 28 June 2006.
xxxiv. Para. 4.02, page no. 32: interview of [name 9].
xxxv. Para. 5.18, page no. 789: offer.
xxxvi. Para. 5.18, page no. 808: notification of ship's waste and (remainders of) noxious substances.
xxxvii. Para. 4.16, page no. 207: interview of [name 6]: "I received an email from this company attaching a form. I had to fill in that form and say which wastes the Probo Koala was going to discharge in Amsterdam. I then emailed this form with the accompanying email to that company."
xxxviii. Interview of [name 35] by the Examining Magistrate on 9 July 2009, p. 8.
xxxix. Para. 5.32, page no. 2704: route map of a vessel.
xl. Para. 5.12, page no. 535 and 554: tank plan dated 2 July 2006, annex to official report of findings.
xli. Para. 3.05, page no. 72: interview of [name 48].
xlii. Para. 9.06, page no. 96: APS job sheet of 2 July 2006.
xliii. Para. 3.07, page no. 109: interview of [name 10].
xliv. Interview of [name 8] by the Examining Magistrate on 18 August 2009, p. 12.
xlv. Para. 4.01, page no. 6 and 7: interview of [name 8].
xlvi. Para. 3.31, page no. 517: interview of [name 36].
xlvii. Para. 9.12, page no. 236: email from [name 8] to [name 11] of 3 July 2006.
xlviii. Interview of [name 37] by the Examining Magistrate on 14 May 2009, p. 4.
xlix. Para. 3.07 page no. 112: interview of [name 10].
l. Para. 3.11, page no. 210: interview of [name 11], para. 3.17, page no. 413: interview of [name 33] and para. 3.31, page no. 517: interview of [name 36].
li. Para. 3.11, page no. 211: interview of [name 11].
lii. Para. 518, page no. 836: email from [name 24] to BMA of 3 July 2006.
liii. Interview of [name 12] by the Examining Magistrate on 11 March 2009, p. 6.
liv. Para. 5.01, page no. 1, 3 and 5.
lv. Para. 5.07, page no. 210 to 212.
lvi. Statement by suspect [name 5] as made at the hearing on 3 June 2010 and added to all the files.
lvii. Para. 3.22, page no. 457 and 458: interview of [name 38] and interview of [name 38] (sic) by the Examining Magistrate on 26 March 2009, p. 4.
lviii. Interview of [name 38] by the Examining Magistrate on 26 March 2009, p. 4, 8 and 9.

lix. Para. 5.18, page no. 809: exemption.
lx. Para. 5.03, page no. 38 to 40.
lxi. Para. 3.10, page no. 134: interview of [name 12] and interview of [name 12] (sic) by the Examining Magistrate on 11 March 2009, p. 14.
lxii. Para. 5.06, page no. 209: anonymous fax.
lxiii. Para. 5.04, page no. 41 to 48.
lxiv. Para. 5.04, subpara. 5.4.9.1, page no. 181 to 188: request for investigation.
lxv. Para. 9.13, page no. 296 and 297: fax from APS to DMB of 4 July 2006.
lxvi. Para. 9.42, page no. 12161 to 12165 and para. 9.13 p. 294 (email from [name 39] to [name 40] of 4 July 2006, saying: "Conclusion: APS did not accept the batch").
lxvii. Para. 9.13, page no. 290: fax from DMB to APS of 4 July 2006.
lxviii. Para. 9.17, page no. 814 to 817: request to carry out a seizure.
lxix. Interview of [name 40] by the Examining Magistrate on 10 March 2009, p. 26 and further interview of suspect [name 5] by the Examining Magistrate on 8 December 2009, p. 2009.
lxx. Interview of [name 40] by the Examining Magistrate on 10 March 2009, p. 28.
lxxi. Para. 9.13, page no. 282 and 283: letter from DMB to APS of 12 July 2006.
lxxii. Para. 5.21, page no. 888: Saybolt list of special events, stating times.
lxxiii. Para. 5.18, page no. 820: statement of facts wet mode of the Probo Koala.
lxxiv. Para. 5.09, page no. 220.
lxxv. Para. 9.27, folder 3, page no. 7170: email from BMA to [name 7] of 5 July 2006 and para. 9.18, page no. 767: Probo Koala's logbook.
lxxvi. Interview of [name 41] by the Examining Magistrate on 24 September 2009, p. 4 and interview [name 42] by the Examining Magistrate on 24 June 2009, p. 4.
lxxvii. Para. 9.27, folder 3, page no. 7406: email from [name 43] to [name 24] and others of 10 August 2006 and para. 9.32, folder 1, page no. 8387: email from Probo Koala to [name 18] of 17 August 2006.
lxxviii. Para. 9.32, folder 1, page no. 8385: email from [name 18] to the Probo Koala of 17 August 2006.
lxxix. Para. 9.23, page no. 6148: notice of readiness.
lxxx. Para. 5.28, folder 8, page no. 2536: press statement, attached to an email of 6 September 2006.
lxxxi. Para. 5.28, folder 8, page no. 2225: email from [name 49] to [name 50] of 25 September 2006.
lxxxii. Para. 5.28, folder 7, page no. 1809: email from [name 49] to Cheops Marketing & PR of 24 September 2006.
lxxxiii. See Fourth ACP-EEC Convention, with Protocols and Annexes; Lomé, 15 December 1989, OJEC 1991, 35, p. 7.
lxxxiv. Para. 5.102, page no. 65: email from [name 21] to [name 20] of 18 April 2006.
lxxxv. Email no. 40 from [name 7] of 27 December 2005, added to the file on 16 March 2010 as Annex to the letter from Mr L. Zegveld to Mr L.W. Boogert of 2 November 2009.
lxxxvi. Para. 9.27, folder 2, page no. 6782: email from [name 23] to [name 7] of 10 April 2006, para. 8.05, folder 2, page no. 554: email from [name 19] to [name 24] of 20 April 2006, and para. 5.72, page no. 4163.
lxxxvii. Commercial Register 6 July 2010, LJN BK 9263.
lxxxviii. Para. 5.102, page no. P.46: email from [name 7] to [name 21] and [name 22] of 28 December 2005.
lxxxix. Commercial Register March 1993, LJN AD 1846.
xc. Para. 4.01, page no. 2 and 3: interview of [name 8] and first interview of witness [name 8] by the Examining Magistrate of 15 May 2009, p. 10.
xci. Interview of witness [name 9] by the Examining Magistrate of 7 July 2009, p. 5 and 7.
xcii. Para. 9.27, folder 5, page no. 7816: email from [name 7] to [name 52] of 22 September 2006.
xciii. Para. 9.27, folder 3, page no. 7093: email from [name 7] to APS of 20 June 2006.
xciv. Para. 9.27, folder 3, page no. 7111: email from APS to [name 7] of 20 June 2006 and interview of witness [name 9] by the Examining Magistrate on 7 July 2009, p. 12.
xcv. Para. 5.48, page no. 3054: email from [name 24] to [name 53], according to witness [name 24] at his interview by the Examining Magistrate on 15 October 2009 he was passing on an order from Trafigura.
xcvi. Para. 5.48, page no. 3013: official report of findings by [name 47] saying that name 7] spontaneously told the reporting officer in a telephone conversation on 15 August 2006 that the slops were the waste from petrol washings on board.
xcvii. Para. 5.48, page no. 3013: official report of findings by [name 47] saying that the reporting officer had been in touch on 21 July 2006 with [...] ([name 25]).
xcviii. Interview of witness [name 47] by the Examining Magistrate on 9 April 2009, p. 9.
xcix. Para. 3.05, page no. 72: interview of [name 48].

c. Para. 4.10, page no. 163: interview of [name 5].
ci. Para. 5.61, 9, 3, page no. 3459: tap report of 20 January 2006; [name 51] calls APS.
cii. Commercial Register 16 March 1993, NJ 1993, 718.
ciii. Para. 9.25, page no. 6435, expert report by L.J.C. Peschier (NFI) of 29 January 2007.
civ. Doc. 10 of the documents entered in the case by the Public Prosecutions Department on 22 March 2010 after decision of the court of 16 March 2010.
cv. Para. 9.25, page no. 6421 and 6430: expert report by F.J.M. Bakker (NFI) of 29 January 2007.
cvi.Para. 9.27, folder 1, page no. 6486 to 6489: email from WRT BV to [name 7] of 31 March 2006, with annex, and interview of witness [name 30] by the Examining Magistrate on 24 June 2009, p. 3.
cvii. Para. 9.27, folder 1, page no. 6662: email from [name 32] to [name 7] of 10 April 2006.

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