



BBC High Court defence against Trafigura libel suit

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Description

By Julian Assange (julian@wikileaks.org)

This document was submitted to the UK's High Court by the British Broadcasting Corporation (BBC) in September 2009, as a Defence against a libel claim brought against them by the oil company Trafigura. A May 2009 BBC Newsnight feature suggested that 16 deaths and many other injuries were caused by the dumping in the Ivory Coast of a large quantity of toxic waste originating with Trafigura. A September 2009 UN report into the matter stated that 108,000 people were driven to seek medical attention. This Defence, which has never been previously published online, outlines in detail the evidence which the BBC believed justified its coverage. In December 2009 the BBC settled out of court amid reports that fighting the case could have cost as much as 3 million pounds. The BBC removed its original Newsnight footage and associated articles from its on-line archives. The detailed claims contained in this document were never aired publicly, and never had a chance to be tested in court. Commenting on the BBC's climbdown, John Kampfner, CEO of Index on Censorship said: "Sadly, the BBC has once again buckled in the face of authority or wealthy corporate interests. It has cut a secret deal. This is a black day for British journalism and once more strengthens our resolve to reform our unjust libel laws." Jonathan Heewood, Director of English PEN, said: "Forced to choose between a responsible broadcaster and an oil company which shipped hundreds of tons of toxic waste to a developing country, English libel law has once again allowed the wrong side to claim victory. The law is an ass and needs urgent reform." Now that this document is in the public domain, the global public will be able to make their own judgement about the strength of the BBC's case.

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IN THE HIGH COURT OF JUSTICE

Claim No. HQ 09X02050

QUEENS BENCH DIVISION

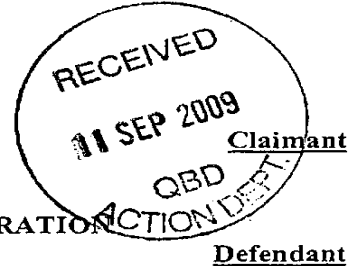
Claim Form issued 15 May 2009

BETWEEN:

TRAFIGURA LIMITED

and

BRITISH BROADCASTING CORPORATION



Defendant

DEFENCE

All paragraph references are to the paragraphs in the Particulars of Claim unless otherwise stated.

The headings below are for ease of reference only

1. Paragraph 1 is admitted save that no admissions are made as to the nature of the Claimant's principal activity (which is not within the Defendant's knowledge). References in this Defence to Trafigura are to the Claimant and, where appropriate, the Trafigura Group or other companies within the Trafigura Group.
2. Save that no admissions are made as to the extent to which, if at all, the programme and website entry complained of referred to or were understood to refer to the Claimant (as distinct from the Trafigura company or companies responsible for the shipment and discharge of oil and related waste products), paragraphs 2, 3 and 4 are admitted. The remainder of this Defence is pleaded without prejudice to this non admission. Insofar as may be necessary, the Defendant will rely upon the whole of the section of Newsnight featuring Trafigura for the proper context of the words complained of.

3. Subject to paragraph 2 above, it is admitted that the programme is defamatory of Trafigura and averred that the Claimant's meaning strikingly omits reference to many of the specific criticisms in the programme, which relate to the Claimant's culpability for the dumping of highly toxic waste with an obvious potential to cause serious harm to public health. It is denied that the programme meant or was understood to mean that the dumping caused "*numerous*" miscarriages or "*very severe illness with long term chronic effects in tens of thousands of people*". It is admitted that the programme alleged that Trafigura was culpably responsible for causing or permitting the unlawful dumping of highly toxic waste with an obvious potential to cause serious harm to public health as in fact it did. It is further admitted that the actual consequences alleged in the programme included miscarriages and injury to health of tens of thousands of people including sixteen deaths. It is averred that in the present context the notion of a "*significant number of deaths*" lacks ethical meaning. Any death is "significant" and scandalous if caused by the illegal dumping of waste (as indeed is any substantial injury to public health).

4. If and insofar as the programme bore the following defamatory meanings it was true in substance and in fact.

PARTICULARS OF MEANING

- A. Trafigura was culpably responsible for causing or permitting the illegal dumping of waste from the *Probo Koala* in Abidjan, Cote D'Ivoire, in that:
 - (1) Trafigura created the waste by applying an unsophisticated cleaning process to a cargo of coker naptha at sea;

- (2) Trafigura knew the waste was highly toxic, potentially lethal and posed a serious risk to public health and to the environment (unless properly processed and disposed of) or was wholly reckless as to its nature in these respects;
- (3) Trafigura entrusted disposal to a local company in Abidjan, which it knew lacked the facilities and experience to process and dispose of the material properly (or as to whose facilities and experience it was wholly reckless);
- (4) Trafigura could have had the waste properly processed and disposed of in Europe, but chose not to do so for reasons of profit;
- (5) The disposal of the waste by the local company was unlawful as Trafigura must have known it would be or was highly likely to be.

B. Trafigura by its acts and omissions (as outlined above) was culpably responsible for the foreseeable consequences of the illegal dumping which included injury to the health of many thousands of local inhabitants and the death of some local inhabitants and miscarriages for which Trafigura paid the Ivorian government very substantial compensation.

C. Trafigura has publicly responded to the scandal with denials, which lack credibility and candour.

PARTICULARS OF JUSTIFICATION

Glossary

4.1 The Defendant uses the following abbreviations and definitions in this Defence:

4.1.1	APS	Amsterdam Port Authority, Holland
4.1.2	BASEL	The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal 1989
4.1.3	BMA	Bulk Maritime Associates, Trafigura's shipping agents in Amsterdam
4.1.4	CIAPOL	Centre Ivoirien Anti-Pollution
4.1.5	COD	Chemical Oxygen Demand
4.1.6	DMB	The Amsterdam City Council Environment and Building Service, Holland
4.1.7	Libel action	Action brought by Trafigura for damages for libel against Leigh Day & Co, solicitors acting on behalf of the Claimants in the PI litigation
4.1.8	MARPOL	International Convention for the Prevention of Pollution from Ships 1973 as modified by the Protocol of 1978.
4.1.9	NFI	Nederlands Forensisch Instituut, Holland
4.1.10	OCHA	United Nations Office for the Coordination of Humanitarian Affairs
4.1.11	PI litigation	Action brought against Trafigura for damages for personal injury under a Group Litigation Order dated 16 February 2007
4.1.12	PMI	A division of Petróleos Mexicanos (PEMEX), a state-owned Mexican oil company which sold coker naptha to Trafigura
4.1.13	Probo Koala	An Oil-Bulk-Ore Carrier time chartered by Trafigura
4.1.14	Puma	Puma Energy Cote D'Ivoire, a wholly owned subsidiary of Trafigura in Abidjan, Ivory Coast
4.1.15	TBBV	Trafigura Beheer BV
4.1.16	Tommy	Compagnie Tommy Sarl

- 4.1.17 TREDI French firm specialising in the removal of toxic waste contracted by the Ivorian Government to perform the clean-up operations which commenced on 17 September 2006 at the Akouedo site
- 4.1.18 TRAPSA Compagnie des Transport par Pipelines a travers le Sahara, La Skhirra, Tunisia
- 4.1.19 UNDAC United Nations Disaster Assessment and Co-ordination
- 4.1.20 WAIBS Trafigura's appointed shipping agents in Abidjan for the Probo Koala
- 4.1.21 WHO World Health Organisation

Quotes in italics are from Trafigura's internal emails save where otherwise indicated.

The Probo Koala and coker naptha waste

4.2 From December 2005 to April 2006, Trafigura purchased substantial quantities of coker naptha from a Mexican company called PMI out of Brownsville, Texas at a very low cost. Three separate cargoes (of some 28,000 metric tonnes each) of the purchased coker naptha were then loaded onto three separate vessels at Brownsville between March and June 2006. By mid-June 2006 these cargoes had all been transferred to one vessel, the *Probo Koala*.

4.2.1 Coker naptha is a hydrocarbon fraction which has been subject to a process known as coking whereby heavy residues of previously refined crude oil are cracked by extreme heat without a catalyst. Coker naptha contains significant toxic material.

- 4.2.2 The toxic material comprises among other things sulphur in various forms, including alkyl mercaptans and hydrogen sulphide, and phenols in quantities which render the coker naptha unsuitable for use prior to treatment. The mercaptans are sulphur compounds which also render the coker naptha highly malodorous. Once treated coker naptha can be used as a gasoline blending product or as reformer feed.
- 4.2.3 Coker naptha rarely comes onto the market as its further refinement usually takes place as part of the integrated refinery process.
- 4.2.4 Insofar as the particulars below refer to Trafigura's knowledge of scientific matters, the Defendant will rely on Trafigura's exceptional experience in the supply and off-take of crude oil, petroleum and petroleum related products. The key aspects of the science referred to below are basic in that industry and would be freely available, if not already known, to the Master of a vessel such as the *Probo Koala*, chartered by Trafigura or otherwise under its control and any agents used by Trafigura and to its own senior management. The key aspects of the science would also be known to Trafigura's Ship Manager(s) onshore. In relation to the coker naptha in issue in this case, Trafigura's management at the highest level took a close interest in its refinement (including waste) and commercial exploitation.
- 4.2.5 Scientific matters are summarised in these particulars. They will be further detailed in expert evidence insofar as it may be necessary and proportionate to do so.

- 4.3 The coker naptha which Trafigura purchased from PMI had extremely high levels of sulphur, including in the form of mercaptans and hydrogen sulphides, which can be released as highly toxic gases (especially hydrogen sulphide) through dilution or acidification or contact with other chemicals. Trafigura's knowledge that the coker naptha contained toxic material is evident from its description as "*PMI crap*", "*PMI shit*" and "*More High Sulfur from PMI*" in internal emails. Further, by email dated 28th April 2007 from Christian Bastanzo of Trafigura to Arizago Ivan of PMI, Trafigura "*officially place[d] PMI on notice for all costs, damages and losses [Trafigura] may incur as a result of the huge discrepancy between Mercaptans*", the stated difference in mercaptans being between 1577ppm (as stated in the contract between Trafigura and PMI) and 2014ppm (as found in the coker naptha loaded onto the *MT Moselle* on April 25th 2006). Trafigura purchased large quantities of PMI's coker naptha because it was "*bloody cheap*" and it saw a business opportunity to "*make serious dollars*", being as much as \$7 million per cargo.
- 4.4 The coker naptha could have been safely processed (ie. without leaving a residue of toxic waste) under normal refinery conditions, as Trafigura must have known:
- 4.4.1 By hydro-desulfurization or hydro-treatment in a refinery; or
- 4.4.2 By Merox washing the coker naptha in a Merox Unit in a refinery. The toxic waste products resulting from that process can then be transformed into stable, relatively harmless disulphates through the additional step of oxidation. The caustic soda used can then itself be recycled.
- 4.5 On 28th December 2005 Claude Dauphin, the then Chief Executive of Trafigura issued a directive to the effect that Trafigura should "*be*

creative” in relation to the coker naptha in order to minimise costs and maximise profits.

- 4.6 In the event, Trafigura did not adopt either of the options set out in 4.4 above, but opted for an unsophisticated method to replicate the chemical reactions used in the Merox process by applying aqueous caustic soda and a catalyst to the coker naptha, a procedure sometimes known as “caustic washing”. This rarely used process could not of itself address the problem of the resulting toxic waste. Trafigura’s first attempt at caustic washing some of the coker naptha took place on-shore at Tankmed’s facility in La Skhirra, a port in Tunisia on or about 13th March 2006. Tankmed at La Skhirra was one of very few on-shore facilities which allowed caustic washing, although no such caustic washing had taken place at La Skhirra since 1996 (and the facility did not have the capacity to dispose of toxic waste).
- 4.7 Trafigura knew that on-shore caustic washing was at the time in effect widely banned outside refineries including by the USA, Singapore and all European countries because their local environmental agencies did not allow the transport for disposal of the resulting toxic waste. Indeed, the Odfjell terminal in Rotterdam informed Trafigura that “*they no longer allow this operation [caustic washing] due to toxicity and European environmental laws etc*”.
- 4.8 On or about 13th March 2006, following caustic washing of 40,000 cubic metres of the PMI coker naptha at Tankmed’s facility at La Skhirra, serious noxious odour problems caused distress to the local workers and population. Some were reportedly hospitalised with breathing problems as a result of their exposure to the fumes. Other workers reportedly complained of eye irritation, vomiting and faintness, resulting in an investigation by TRAPSA on or about 24th March 2006.

- 4.9 On 24th March 2006, in response, Trafigura sent one of its consultants “to perform a PR Exercise to reassure guys about Odour” including misleadingly ‘blagging’ that the odours were due to olefins in the coker naphtha. In late March 2006 the port authorities at La Skhirra forbade Tankmed from proceeding with any further caustic washing operations on behalf of Trafigura.
- 4.10 Trafigura then decided to conduct the caustic washing operations aboard the *Probo Koala* off the coast of Gibraltar. Trafigura’s off-shore caustic washing process (which created the problem of the resulting waste) comprised two stages: (1) the reaction between the caustic soda and the alkyl mercaptans (stage one); and (2) the oxidation of the product of stage one with the assistance of a catalyst - cobalt phthalocyanine sulphonate with the product name ARI-100 EXL (stage two). The process reduced the mercaptan sulphur content in the coker naphtha by approximately 47%.
- 4.11 The resulting waste comprised a predominantly aqueous phase and an oil based phase. Both contained dissolved materials. The waste would have contained the following highly toxic/hazardous constituents (leaving aside the coker naphtha, the unspent sodium hydroxide and the unspent catalyst):
- 4.11.1 Sodium alkanethiolates (RSNa) and possibly other mercaptan derivatives/salts. These can be soluble in water, corrosive and toxic by both inhalation and ingestion. Contact with skin can also lead to permanent damage. Highly odorous and associated with the smell of garlic, they are a product of stage one of the process as outlined above.
- 4.11.2 Sodium hydrosulphide (NaHS), which is also toxic by both inhalation and ingestion, and damaging to skin on contact. By

reaction with water or acid or heating, it may lead to the production of hydrogen sulphide gas, which is highly toxic, dangerous and potentially lethal. It is also a product of stage one of the process.

- 4.11.3 Sodium sulphide (Na_2S), which is toxic, harmful by ingestion and inhalation, and can lead to the creation of hydrogen sulphide gas (on reaction with acid, for example).
- 4.11.4 Dialkyl disulphides (RSSR), which include dimethyl disulphide which is highly toxic and dangerous to humans and also has a characteristic garlic smell.
- 4.11.5 Ethyl and methyl mercaptans, which are present in coker naphtha (see above) and which are liable to cause respiratory problems, headaches and nausea.
- 4.11.6 Hydrogen sulphide (H_2S), a gas (see above).
- 4.11.7 Phenols (which consist of a hydroxyl group ($-\text{OH}$) bonded directly to an aromatic hydrocarbon group), and are hazardous to humans via ingestion, inhalation and skin contact. The simplest member of the group is phenol itself ($\text{C}_6\text{H}_5\text{OH}$), repeated or prolonged skin contact with which may cause dermatitis, and, at high concentrations, chemical burns. The vapour is corrosive to the eyes, the skin and the respiratory tract and the inhalation of phenol vapour may cause lung oedema. The substance may also cause harmful effects on the central nervous system, heart and kidneys, resulting in convulsions, coma, cardiac disorders or respiratory failure. In extreme cases, exposure may result in death and the effects may be delayed. Long-term or repeated exposure to phenol

may have harmful effects on the liver and kidneys and phenol is a suspected carcinogen.

Sulphides are volatile in the presence of water and H₂S is one of the breakdown compounds. Sulfides and other vapours from gaseous and volatile material in the waste would have been released from the surface of the waste during and following disposal. If the surface area of the waste was increased (as, for example, by spreading) the rate of release would have increased. If in contact with acids, the generation of hydrogen sulphide would be substantially increased.

- 4.12 On or about 15th April 2006, Captain Theologus Gampierakis, on behalf of TBBV, sent the Master of the *Probo Koala* an email stating that the “caustic soda washing was successful” and that prior to berthing at La Skhirra, “Pls ensure that any remainings 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 to anyone at LaSkira and merely declare it as tank washings”. Trafigura knew that normal ship’s slops or tank washings mainly consist of oily water, generated after a ships’ oil tanks have been washed with seawater between loads. This was in effect a request to the Master to conceal from the harbour authorities the toxic nature of the waste.

Amsterdam

- 4.13 On 20th June 2006, Naeem Ahmed, a senior manager at Trafigura (rather than, as would be usual with conventional slops disposal, the Master acting on his own initiative) approached APS, an experienced and reputable waste facility at Amsterdam port, to remove and safely dispose of between 200-250 cubic metres (of the total of some 554 cubic metres) of the waste on board the *Probo Koala*, falsely and/or misleadingly

describing the waste in an email to APS, as “*Gasoline Slops (Majority is Water, Gasoline, Caustic Soda)*”. “Slops” indicate, and were intended to indicate that the waste was the result of the routine washing of the ship’s tanks. It is clear from their subsequent actions that APS did not appreciate at this stage that the waste was toxic as described above or that it posed any special difficulties.

- 4.14 Following receipt of the email, APS provided two alternative quotes on 20th June 2006, both based upon a COD level of less than 2000mg/l. This COD level clearly indicated that APS thought it was dealing with low-risk material as unequivocally did the proposed price of only 6,675 euros.
- 4.15 The false and/or misleading description of the *Probo Koala*’s waste was re-confirmed in the formal notice of hazardous waste dated 30th June 2006. The notice required completion prior to the ship’s arrival and was filled in by BMA, Trafigura’s shipping agent in Amsterdam. The purpose of the visit to Amsterdam was said to be bunkering (ie. re-fuelling) and de-slopping, the waste being described as a mixture of washing water/petrol and caustic soda. As to the effect of this statement, paragraph 4.13 is repeated. The slops were further falsely described as Annex 1 UN1023 and water (so indicating gasoline and water). The seriousness of these mis-statements is evidenced by the fact that Trafigura is currently facing criminal prosecution in Holland on various charges arising from the misrepresentation of the waste. The Defendant will rely on the various Dutch legal provisions and European Community regulations referred to in the charges.
- 4.16 Following the arrival of the *Probo Koala* in Amsterdam on 2nd July 2006, APS removed 261.612 cubic metres of its waste (via a specialist barge) to its premises in the Petroleumhaven area of the Port of Amsterdam for analysis and processing. Shortly thereafter, complaints were received of

foul smells coming from APS's premises. In consequence, the environmental inspector from DMB, the Amsterdam City Council Environment and Building Service, asked APS to close its plant down at 1pm on 3rd July 2006. By about 2.20 pm, the Fire Brigade at Petroleumhaven attributed the cause of the stench to a high level of mercaptans.

- 4.17 As stated above, in reliance on the false and/or misleading description of the waste referred to above, the COD had been assumed by APS to be less than 2000 mg/l. On 26th June 2006, Trafigura indicated its willingness "*to proceed with this offer*" (which included the cost of analysis, environmental administration, customs and destruction) despite APS's evident misunderstanding of the nature of the waste. After analysis APS (predictably) dramatically increased the price to 1000 euros per cubic metre on 3rd July 2006.
- 4.18 At 20.17 on 3rd July 2006 Trafigura emailed BMA refusing to pay the higher cost for the disposal of the waste, and asking for the waste (still being described merely as "*slop washings*") to be taken back on board the *Probo Koala* for disposal elsewhere "*at next convenient opportunity*".
- 4.19 Samples were taken from various tanks of the *Probo Koala* on 3rd July 2006 and tested by the NFI. A sample from the slop tanks was found to contain, amongst other things, the following:
- 4.19.1 10% of sodium hydroxide amounting to 37.9 tons of the weight in the waste;
- 4.19.2 3.34% mercaptan sulphur amounting to 12.7 tons of the weight in the waste;

- 4.19.3 4.80% of phenols, including cresols, amounting to 18.2 tons of the weight in the waste;
- 4.19.4 0.50% of hydrogen sulphide amounting to 1.9 tons of the weight in the waste. According to the Dutch police investigative team, who had no reason to distort information received, the hydrogen sulphide meters of employees were "hit hard" on 3rd July 2006.
- 4.20 At 22.11 on 3rd July 2006, two hours after Trafigura's email pleaded at 4.18 above, an anonymous fax was received by the Port of Amsterdam which stated that: *"these slops are heavily polluted. APS is now going to return these "slops" to the vessel minus 20 cubic metres so that the vessel receives a receipt for this. The shipping company thinks that processing is much too expensive. There is another consignment of 250 cubic metres on board, so that there will in due course be a total consignment of 480 cubic metres of heavily polluted slops on board...I am sending this anonymously, as I am afraid for myself if it becomes known that I have reported this. However I feel it is my duty to inform you..."*
- 4.21 On the morning of 4th July 2006 the Master of the Probo Koala informed Dutch police officers that the waste consisted of washing water from cleaning the tanks between loading operations with water and caustic soda. For the reasons pleaded above this was manifestly untrue.
- 4.22 At 22.48 on 4th July 2006 APS were finally given permission to re-load the waste back on board the *Probo Koala*, which was duly done, and the embargo upon the departure of the *Probo Koala* was lifted on the morning of 5th July 2006.
- 4.23 Accordingly by at least 2nd July 2006, Trafigura were well aware that the *Probo Koala's* waste had been assessed by APS as being well outside the

parameters of regular ship's slops and as consisting of toxic materials the safe disposal of which required expensive processing, proper facilities and expertise.

Nigeria

4.24 After a stop at Paldiski in Estonia to discharge and load gasoline, the *Probo Koala* sailed to Lagos, Nigeria, arriving on 30th July 2006, where it discharged its gasoline cargo on 9th August 2006 and remained until 17th August 2006.

4.25 Whilst in Lagos, Trafigura contacted two local companies in relation to the waste on board the *Probo Koala*. Internal e-mail traffic expressed concern at the unsafe de-slopping facilities initially provided, when a barge was brought alongside the *Probo Koala* for discharge of the waste into an open tank. The Master of the *Probo Koala* (rightly) refused to discharge the waste into an open tank. The episode again indicates Trafigura's failure to make clear the nature of the waste they were carrying as "slops".

4.26 Trafigura was also concerned about the onward sale of the waste in the local Nigerian market because, as stated in an email dated 10th August at 2.01pm, it "*has potential implications on us*", meaning that the toxic waste might be traced back to Trafigura, as evidenced by:

4.26.1 an email dated 10th August 2006 at 2.39pm which stated "*In this instance due to the nature of the slop onboard I would prefer the slop to be discharged in a different port other than Lagos if possible*".

- 4.26.2 An email dated 15th August 2006 at 4.57pm which stated *“see if they can arrange for a barge to pick up the slops, preferably offshore Lome or as far as possible offshore Nigeria and within international waters”*
- 4.26.3 An email dated 15th August 2006 at 6.50pm which stated *“they will only be able to arrange for a barge to de-slop in Nigerian waters...He will also ensure that we get proper paperwork for receipt of slops”*
- 4.26.4 An email dated 16th August 2006 at 10.01am which stated *“Understand and share your concerns about doing this in Nigerian waters. If we can not manage to convince Daddo to do it outside Nigeria then please make sure that Daddo understand that we do not want any issues and proper clearances should be obtain [sic] in order to avoid any implications for the Trafigura or the vessel”*
- 4.26.5 An email dated 16th August 2006 at 10.18am which stated *“Dude, pls call CD [Claude Dauphin]. I spoke to him yesterday and he said NO to any such operation in Nigeria. We go to Lome, charter a barge and bring it back to Nigeria for Daddo under a different name”*
- 4.27 The above e-mail traffic reveals a cynical concern that the adverse consequences of discharging the waste in Nigeria might be traced back to Trafigura, rather than a sufficient and proper concern that those adverse consequences be avoided.

Abidjan

- 4.28 After leaving Nigeria on 17th August 2006, Trafigura, through its wholly owned subsidiary Puma Energy CI, arranged for the *Probo Koala* to discharge its waste in the port of Abidjan, Ivory Coast. At all material times, Trafigura, through Puma, were informed of local conditions, waste facilities and their geographical location.
- 4.29 There was no reason for the *Probo Koala* to travel to Abidjan other than to dispose of its waste.
- 4.30 Contrary to the averments in its Press Release dated 16th August 2008, its Defence in the Personal Injury litigation and its Reply in the Libel action, Abidjan is not a port which provides, or was at the material time able to provide, Trafigura with sophisticated, or indeed any, facilities for the proper processing and disposal of the toxic waste on the *Probo Koala*. As later stated in a United Nations Environmental report dated 16th April 2007 entitled "*Report of the mission undertaken in the Cote D'Ivoire following the incident of the Probo Koala, in the context of decision V/32*":
- "Abidjan port is not equipped with the necessary facilities for the offloading and treatment of the wastes covered by the Marpol Convention...*
- Cote D'Ivoire is lagging severely behind in the implementation of a national plan for the environmentally sound management of hazardous and other waste covered by the Basel convention"*
- 4.31 At 14.46 on 17th August 2006, Jorge Luis Marrero, head of contracts and logistics for Trafigura's petroleum activity (and who, according to Claude Dauphin, was authorised to deal with the arrival and stop-over of the *Probo Koala*), e-mailed Captain Kablan N'Zi ("Captain Kablan"), Deputy Director of Puma, informing him that Trafigura wanted to discharge about 528 cubic metres of "*Chemical slops*", stating (amongst other things) that:

4.31.1 The “slops” were a *“mix of Gasoline, with caustic Soda and a high concentration of Mercaptan Sulphur”*;

4.31.2 *“Due to the high concentration of Mercaptan Sulphur the mix is very smelly and have [sic] to be removed from the vessel and disposed properly to avoid environmental concerns or problems with authorities”*

4.31.3 *“COD...measured approximately 21,000mg/l”*

4.31.4 *“Total organic Chlorine (TOCI) - measures >5pct...The reaction of chlorine chemicals with lignins in pulp bleaching produces organic chlorine compounds of varying sizes, TOCI compounds”*

4.31.5 *“Due to the COD being larger than 2000mg/l, these are not to be considered as “Marpol slops” but “Chemical slops”.*

4.32 The Defendant will compare and contrast these descriptions with those used earlier as pleaded above. The Defendant will also rely on the very different terms of the description of the waste in an email sent on 18th August 2006 by Paul Short of Trafigura to WAIBS headed *“Probo Koala – Slops discharge in Abidjan”* appointing WAIBS as its local shipping agent for the handling of the waste, which contains no reference at all to mercaptans or sulphur, described the waste as slops or *“eaux sales”* and refers to chloride compounds as the most toxic.

4.33 However these descriptions were also false and/or misleading in omitting any mention of the following important and relevant facts, all of which were known to Trafigura (and from the terms of the email dated 17th August 2006 it is to be inferred to Mr Marrero), at the material time:

- 4.33.1 that the waste on board the *Probo Koala* was not 'slops' at all (in the generally understood meaning of the word) but the by-product of having treated coker naphtha by caustic washing on board ship;
- 4.33.2 that, as a result of the caustic washing, the waste on board the *Probo Koala* included a significant volume of additional toxic material as pleaded above, which represented a real and substantial danger to public health if not properly treated and disposed of;
- 4.33.3 that the waste on board included hydrogen sulphide;
- 4.33.4 accordingly, that the waste on board the *Probo Koala* fell within the Basel Convention which prohibits the transfer of toxic waste materials from OECD countries to non-OECD countries;
- 4.33.5 the difficulties encountered by Trafigura in disposing of the waste in Amsterdam (as set out above), not least the concerns raised by APS and the involvement of the Dutch environmental authorities, the police and the fire department.

Tommy

- 4.34 Following receipt of the email from Mr Marrero (which was received in the Ivory Coast at 13.46 due to the hour change), at 14.00 Captain Kablan telephoned Essoin Kouau of Waibs to request the telephone number of ITE (which was the only waste disposal business of note in the Ivory Coast, and a company with whom Trafigura had worked in the past). As the ITE office was closed until 14.30, Captain Kablan was given Tommy's telephone number instead.

- 4.35 Tommy was a very newly incorporated company.
- 4.35.1 Following an application dated 7th June 2006 for a licence to empty, maintain and bunker ships in the Port of Abidjan, Tommy had been granted a licence on 12th July 2006.
- 4.35.2 On 20th July 2006, the Master's Office of the Autonomous Port of Abidjan authorised Tommy, subject to certain other requirements, to "*recover used oil and hydrocarbon residues in a sealed tank to avoid spillages and accidental discharges*". This was intended to cover normal ships' slops and used engine oil, not the toxic residue following on board caustic washing.
- 4.36 Tommy claimed (as was evidently the case) no experience of, or specialist expertise in, or suitable equipment for, the management of chemical waste, which Mr Marrero had informed Captain Kablan was on board the *Probo Koala*.
- 4.37 In the afternoon of 18th August 2006, Mr Kouau of Waibs introduced Salomon Ugborugbo of Tommy to Captain Kablan, at Captain Kablan's request. At the meeting, Captain Kablan asked Mr Ugborugbo to provide a quote for the disposal of the waste on board the *Probo Koala*.
- 4.38 By handwritten letter addressed to Mr Marrero (and given to Captain Kablan) dated 18th August 2006 headed "*Discharging of Slops*" Tommy stated:

"Due to the high Concentration of Mercaptan Sulphur and the high smell of this product, we've being advise [sic] by a Chemist after reading your E-mail to discharge your chemical slops in a place out of the City

properly prepared to receive any type of chemical product, called "AKWEDO".

To avoid any environmental casualty [sic] for Puma Energy, Ship and you, Compagnie Tommy shall take all responsibilities and assure you a good job. Proper documentation would been [sic] given to vessel after Operation.

MARPOL Slops: 30 US dollars per 1m3

Chemical Slops: 35 US Dollars per 1m3

4.39 It is clear from the terms of the handwritten note referred to at para. 4.38 above that:

4.39.1 this was not, on any view, a communication from a competent professional company, let alone a company with the specialist skills, experience and equipment to deal with waste which Trafigura knew, certainly by this time, to be toxic chemical waste;

4.39.2 Tommy's headed notepaper itself stated that the company had only been granted a licence about one month earlier on 12th July 2006;

4.39.3 Tommy had explicitly informed Trafigura that it intended to "discharge" the chemical waste rather than process it (which would have been the only appropriate way to dispose of the waste);

4.39.4 Tommy intended to "discharge" the waste in "AKWEDO", a highly populated residential district of Abidjan whose waste site had no suitable facilities for storing, let alone processing such waste;

4.39.5 the price quoted by Tommy (which amounted to \$18,480 for chemical waste) was wholly uncommercial and unrealistic for any proper treatment/disposal of the waste;

4.39.6 Tommy indicated no intention of analysing the slops and did not seek any detailed analysis of the slops before their disposal.

4.40 On 18th August 2006, in the email set out above, Paul Short on behalf of Trafigura confirmed the appointment of Tommy. The Defendant will rely on and refer to the Unloading Attests, as signed and stamped by the Chief Officer of the *Probo Koala*, which do not reflect the chemical or toxic nature of the waste.

4.41 On 24th August 2006 (as evidenced by an email timed at 4:08 pm) Naeem Ahmed of Trafigura was asked by the Dutch Water Police for documentation showing the slops had been discharged as "*Chemical Waste Slops*" with supporting documentation including the invoice. By this time (see below) the slops had already been discharged and dumped by Tommy (or their agents) in open air sites as detailed below. The e-mail observed "*bear it in mind that it would have cost us approximately \$250k to discharge 200 cbms in Amsterdam...*" and concluded: "*Please call me when you have some minutes as I would like to clarify something about this invoicing...*" At 10:12 on 25th August 2008 Marrero of Trafigura stated "*please note that we require an invoice from the slop removal company as follows...*" In a striking departure from the agreed figures given in Tommy's 18th August 2006 letter set out above, the requested further invoice from Tommy specified that 168,048 CBM [cubic metres] chemical slops comprising mercaptan sulphur solids/caustic waste were disposed of at a cost of 500US\$/CBM and 470 CBM Marpol slops comprising water washing/gasoline slops were disposed of at a cost of 50 US\$/CBM. The total proposed new figure was US\$102,037.

4.42 On or about 25th August 2006, Tommy provided a yet different set of figures for the disposal of the waste, namely:

“58 CBN [sic] Chemical Slops: USD 1000/CBM = 58,000

(Mercaptan Sulphur Solid/Caustic waste)

470 CBM MARPOL Slops: USD 60/CBM = 28,200

(water washing/Gasoline slops)”

which it was said amounted to a total of USD 86,200 *“If contacted”*.

The form of the invoice followed that proposed by Marrero.

4.43 In the light of the above, it is averred that when it was decided to entrust Tommy with the disposal of the waste from the *Probo Koala*, Trafigura:

4.43.1 knew that Tommy was not an appropriately qualified and suitably equipped or experienced company to carry out the work or was wholly reckless as to whether it was or not; and

4.43.2 knew that the *“discharge”* of the waste proposed by Tommy and the manner in which it was to be done created a real risk of injury and even death to those exposed to the discharged waste or was wholly reckless as to whether it did or not;

4.43.3 knew that the price originally charged by Tommy (and agreed to by Trafigura) was wholly unrealistic if Tommy had been competent and concerned to treat and dispose of the waste responsibly;

4.43.4 knew that the price originally charged by Tommy would have alerted the Dutch authorities;

4.43.5 did not give Tommy (or the local shipping agent) a full and responsible description of the waste for fear that would have prevented its discharge.

The dumping of the waste from the Probo Koala

- 4.44 The *Probo Koala* arrived at the port of Abidjan at approximately 10.00 on 19th August 2006 and moored at the Petroci quay where it unloaded its waste into a series of fuel tankers hired by Tommy, from 13.30 on 19th August 2006 to 19.00 on the 20th August 2006.
- 4.45 Tommy did not process or treat the waste from the *Probo Koala*. From about 06.00 on 20th August 2006, some 13 trucks hired by Tommy dumped the *Probo Koala* waste in at least 16 open-site locations around Abidjan, all of which were situated in, or close to residential areas.
- 4.46 Following complaints to the Ivory Coast Minister of the Environment on the morning of 21st August 2006 by residents of Akouedo, Vridi and Plateau Dokui, CIAPOL agents took samples of waste material dumped on the wharf beside the *Probo Koala* (having been refused access to any waste on board by the ship's crew). The analysis of this material by the SIR Laboratory recorded a very high content of hydrogen sulphide (6129 mg/kg) and sulphur mercaptans (1287 mg/kg), its report concluding that: "*this product is similar to a petroleum product having a density of 750.6kg/m³, very close to gas, with a very high content of sulphur hydrogen, toxic substance that can at this amount lead to immediate death in case of inhalation*".

Legislative control on shipping and disposal of toxic waste

- 4.47 The waste produced by the on board caustic washing fell within Regulation 3(1)(A) of Marpol Annex II (as interpreted with the guidance from Appendix 1 of Annex 2). Regulation 5 of Marpol Annex II required the disposal of the waste to a reception facility.
- 4.48 The waste further fell within the Basle Convention under Annex 1 (eg Y8 and/or Y11), having the properties listed in Annex III Code H6.1 and/or H11 and/or Annex VIII Code A3010.
- 4.49 In 1994 the Ivory Coast was party to the Basle Convention. No notice of the importation of the waste was given by Trafigura to the Ivory Coast as required by Article 6 of the Convention, so rendering it illegal under Article 6.
- 4.50 In 1994 the Ivory Coast ratified the Bamako Convention. No notice of the importation of the waste was given by Trafigura to the Ivory Coast as required by Article 9 of the Convention, so rendering it illegal under Article 9.
- 4.51 Ivory Coast Law 88-651 of 7th July 1988 prohibits the importation, deposit or storage of industrial toxic waste.
- 4.52 The Defendant repeats its reliance on the Dutch and European Community law provisions and regulations referred to in the Dutch charges against Trafigura.
- 4.53 Trafigura caused or materially contributed to the unlawful dumping by Tommy by reason of its acts and omissions pleaded above and did so in the knowledge that the waste was toxic and a real and serious risk to public health or did so wholly recklessly.

The consequences of the dumping

- 4.54 In 2006 the population of Abidjan was officially estimated at about 3.848 million. Prior to the dumping of the Probo Koala waste as described above, the health of the population of Abidjan was unremarkable, notwithstanding the presence of landfill/waste disposal sites close to urban areas. As Trafigura must have known, the Ivory Coast is a third world country, which lacks the sophisticated medical and environmental infrastructure of more advanced countries.
- 4.55 As part of its emergency plan in response to the dumping, the Ivorian government commissioned an Epidemiology Report (“the Report”) into the consequences of the dumping of the *Probo Koala* waste from the epidemiological survey team at the Institut National d’Hygiene Publique (INHP) working in close association with the Heads and doctors of treatment centres that had been set up by the Ministere de la Sante et de L’Hygiene Publique (MSHP). The Report is detailed and clearly based on data from primary sources and is on matters of high public interest. The Report contains extensive detail as to hospitalisation, registered patient numbers and the like.
- 4.56 On the morning after the dumping there was an intensely unpleasant smell (of the kind to be expected from sulphur-related pollution and gases) which spread several kilometres from the dump sites. Thereafter the smell persisted until at least October 2006 and intensified after periods of rain. On and after 22nd August 2006 the three Centres Hospitale-Universitaires (CHU) of Abidjan were confronted by large numbers of people seeking treatment for pollution related illness. Between 21st August and 4th September 2006 of the order of 200 patients per day were registered. The crisis was so serious that a medical response system was set up within the district of Abidjan with 33 free treatment centres in addition to the three existing CHUs. Doctors awaiting their first posting were recruited to reinforce the teams at the treatment centre. On 25th August 2006 the

Ivorian Government informed the Basel Secretariat of a pollution problem and requested assistance. After 4th September 2006 the number of registered patients increased rapidly. The peak was reached on 15th September 2006 with 1,681 registered patients. By 11th September 2006 the crisis was a matter of such serious international concern that OCHA, UNDAC, WHO and the Basel Secretariat were all present in Abidjan.

- 4.57 On or about 18th September 2006 the World Health Organisation announced:

WHO is in regular contact with hospitals and health centres to evaluate the burden being placed upon the health care system by this emergency. In Cocody, on 11th of September alone, over 1000 people attended the teaching hospital for assessment and treatment. At Yopougon teaching hospital 600 people are attending daily, and at the Akouedo Health Centre, an average of 300 people are consulting daily, including many children and young infants. This is double the usual workload and almost all of the personnel of the hospitals and clinics have been diverted to receive these patients, such that regular consultations have all-but-ceased.

The overwhelming numbers of people seeking medical attention because of this chemical waste are severely disrupting medical services and have resulted in shortages of medicines. This has put a double burden on the already weak health system of Cote d'Ivoire. This crisis has shown that the country does not have the capacity to deal with such an emergency.

While over 15,000 people have sought medical care, and 6 deaths have been reported, WHO is not yet able to provide an accurate assessment of the number of people who have been made ill by exposure to the waste. One of WHO's priorities will be to put in place an epidemiological surveillance system to track any uncommon health events. The level of

public anxiety continues to be high, and this also needs to be urgently addressed..."

- 4.58 According to the Report, the majority of the patients seeking medical advice were suffering from general or neurological symptoms (73.4%), ENT or pulmonary symptoms (68.1%), digestive symptoms (55.1%) and cutaneous and ocular symptoms (29% and 18% respectively). All these symptoms were consistent with exposure by inhalation, ingestion or direct contact with the waste or its by products. There were commonly problems with coughing, breathing, headaches, sore throats and gastric difficulties.
- 4.59 Further, patients were classified as suspected (25,563), likely (24,825) or confirmed (43,492) victims of contamination by toxic waste. According to the Report at least 82 patients affected by the pollution were admitted to hospital and ten deaths were recorded as attributed to the pollution. The fact that "*some deaths*" were recorded was also contained in the Compromise Agreement referred to at 4.61 below, to which Trafigura were a party.
- 4.60 The dumping of the waste also caused severe environmental damage, which is self evident from the nature of the waste and which it would be disproportionate to particularise. Tredi, a French firm, was contracted by the Ivorian government to conduct clean-up operations. The operation lasted many months.
- 4.61 In February 2007 Trafigura entered into a Compromise Agreement with the Government of the Ivory Coast ("the Agreement") whereby it paid the Government one billion CFA (equivalent to about £100,000,000). The Agreement expressly stated that this sum was to be used to '*compensate victims*' (£73,000,000), to reimburse the Government for '*de-pollution costs...relating to the treatment of waste discharged from the Probo*

Koala' (approximately £22,000,000) and to build a plant to treat waste in Abidjan (approximately £5,000,000). Although the Agreement was "without prejudice to liability", it is to be inferred that Trafigura, which has (see below) gone to extreme lengths to limit any reputational damage to the Group, would not have paid out such an enormous sum without requiring that proper systems were in place to filter out fraudulent or speculative claims. In all the circumstances, Trafigura must privately have recognised that it was substantially to blame for the disaster.

4.62 Following the dumping of waste from the *Probo Koala*, the Senior Examining Magistrate of the 4th Chamber of the District Council of Abidjan ordered an investigation of its consequences by the Laboratoire de Toxicologie et Hygiene Agro-Industrielle, Abidjan. As part of its investigation, numerous solid and liquid samples including from the brain, the lungs, the heart, the liver, the kidneys, the subcutaneous fat, the psoas muscle, the transudate, the peripheral blood, the cardiac blood, the urine, the gastric content and the bile ("the samples") were taken by forensic scientists from the bodies of 12 deceased people, namely:

- (i) YOUNGUE, Bi Zrousan Romaric
- (ii) YAPO, Ange Tchetché
- (iii) DIOHORE, Iridje Arlette
- (iv) EDOUKOU, Esperance
- (v) KOUASSI, Kouassi Martial
- (vi) NGORAN, Ettian Firmin
- (vii) AGOLE, Oneville Johane
- (viii) ZEI, Edmond
- (ix) DEMBA, Traore
- (x) TANOHO, Yao Bernard
- (xi) KAKOU, Jean Jaques
- (xii) GNEBA, Camille

4.63 On or before 27 March 2007, the said samples were chemically analysed, focusing attention on body organs that were likely to retain and concentrate hydrogen sulphide, namely the lungs and the brain. Upon analysis, the following results were found:

(i)	YOUNGUE, Bi Zrousan Romaric	5.43 H ₂ S in ug/g of brain
(ii)	YAPO, Ange Tchetché	2.65 H ₂ S in ug/g of brain
(iii)	DIOHORE, Iridje Arlette	18.28 H ₂ S in ug/g of lungs; 6.54 H ₂ S in ug/g of brain
(iv)	EDOUKOU, Esperance	10.93 H ₂ S in ug/g of brain
(v)	KOUASSI, Kouassi Martial	4.83 H ₂ S in ug/g of brain
(vi)	NGORAN, Ettian Firmin	8.02 H ₂ S in ug/g of brain
(vii)	AGOLE, Oneville Johane	16.87 H ₂ S in ug/g of lungs;
(viii)	ZEI, Edmond	2.13 H ₂ S in ug/g of brain
(ix)	DEMBA, Traore	35.34 H ₂ S in ug/g of lungs; 6.85 H ₂ S in ug/g of brain
(x)	TANOH, Yao Bernard	11.58 H ₂ S in ug/g of brain
(xi)	KAKOU, Jean Jaques	17.28 H ₂ S in ug/g of lungs 6.12 H ₂ S in ug/g of brain
(xii)	GNEBA, Camille	3.97 H ₂ S in ug/g of brain 2.4 H ₂ S in ug/g of brain [2 results]

All of the above concentrations of H₂S are significantly above the reported fatal poisoning rates of 0.8 and 0.92ug/g in the blood of humans and were sufficient to cause death by H₂S poisoning. There is no alternative credible source for the Hydrogen Sulphide other than the *Probo Koala* waste.

4.64 In addition, samples taken from the waste sites where material from the *Probo Koala* had been dumped were also analysed and found to contain approximately 8mg/l of H₂S.

- 4.65 Substantial compensation payments were made by the Ivorian Government to the families of the above 12 deceased, as well as to four named others, (Kouassi Yao Ferdinand, Sondo Alimata, Djiguemde Harouna and Colonel Agnimel Memel Jean-Baptiste) from the Compensation Fund set up pursuant to the Agreement referred to at 4.61 above. The Ivorian Government would not have agreed to compensation payments being made to the families of these deceased people unless reasonably satisfied that their deaths had been caused by the toxic waste.
- 4.66 On 15th September 2006, having previously had no complications at all in her pregnancy, Fidele Posson (the wife of Jean-Francois Koudio), aged 18, suffered a miscarriage when her child was still-born at eight months. At the time of the dumping, Ms Posson was living in the Akuedo village extension, approximately 100 metres from where the waste was dumped and was severely affected by inhaling the toxic fumes as a result of which she attended at the CHU Cocody hospital on 1st September 2006. Both Ms Posson's medical report and the "Proces verbal de constatation de deces" indicate that her still-birth/miscarriage was as a result of her inhaling toxic fumes prior to 15th September 2006.
- 4.67 Further, on or about 27th August 2006 Ahou Emie Martine Diby, aged 30, suffered a miscarriage when she was nearly six months pregnant, having previously suffered no complications at all in her pregnancy (and having given birth to other healthy children). At the time of the dumping, Ms. Diby was living at Plateau Dokui and was severely affected by inhaling toxic fumes as a result of which she attended at the Centre Medicale de la Grace on 25th August 2006 where she was referred for a pre-natal scan. On 27th August 2006 the scan confirmed that the baby was dead. Ms Diby's previous examination on 11th August 2006 (eight days before the dumping) confirmed that her pregnancy was continuing as normal. It is strongly to be inferred that the reason for the miscarriage was as a result of Ms. Diby inhaling toxic fumes prior to 27th August 2006.

4.68 If and insofar as it may be necessary on the issue of causation, the Defendant will rely on the fact that:

4.68.1 In the voluminous subsequent investigative materials, there is no suggestion that the drivers of the trucks were given any instructions by Tommy or Trafigura not to mix the two phases when dumping or to avoid existing landfill or waste disposal sites (where acid was likely to be present).

4.68.2 It is to be inferred that the drivers would have dumped the waste in a manner which mixed the two phases and in a manner which spread the material over wide surface area.

4.68.3 By their nature existing landfill and waste disposal sites (where much of the *Probo Koala* waste was dumped) are highly likely to contain acidic materials.

4.68.4 Rotting vegetation is also highly likely in existing landfill and waste disposal sites and is acidic in nature.

4.68.5 Humidity in the Ivory Coast in August-September was high (eg 95% on 19th and 21st August 2006). There was rainfall in early September 2006.

4.68.6 A substantial volume of the waste was dumped at existing open landfill/waste disposal sites (eg. Akouedo and Plateau Dokui). Those sites are close to residential areas and commonly visited by children and people searching for anything of value.

4.68.7 The correlation between the reported symptoms and the potential toxic effects of the waste's constituents as pleaded above.

4.69 On 23rd October 2008, Salomon Ugborugbo of Tommy was sentenced to 20 years imprisonment following criminal prosecutions in the Ivory Coast for his part in the dumping of the waste from the *Probo Koala*. As pleaded above, Trafigura never should have permitted Tommy to deal with the waste.

Subsequent public statements by Trafigura which it knew were false or as to which it was reckless

4.70 The Defendant will rely on and refer to press releases issued by Trafigura between September 2006 and August 2007 as supposedly truthful accounts. In particular those press releases contain information to the following exonerating effect, which Trafigura either know is, and knew was, false or as to whose truth it is and was wholly reckless:

4.70.1 There was every reason to suppose that the washings “*have little or no toxicity*” (24/9/06);

4.70.2 Trafigura did not discharge the slops in Amsterdam because the waste disposal company “*wanted to renegotiate its original contract*” and it was “*therefore forced to discharge the slops elsewhere*” (an account which entirely omits the incident in Amsterdam and, other than a passing reference to APS analysing a sample, the true reason for the submission of a new quotation by APS) (19/9/06).

4.70.3 The “*slops discharged were not toxic waste*”, being “*a mix of gasoline blend stock, spent caustic soda and water, as used routinely to clean gasoline cargoes*” (4/10/06)

- 4.70.4 It can be confidently stated that there was “*little if any hydrogen sulphide*” in the waste (24/9/06); the slops “*did not contain hydrogen sulphide*” (4/10/06; 25/10/06; 26/10/06)
- 4.70.5 Trafigura has not acted improperly in any way (24/9/06) and the Probo Koala “*followed all correct procedures when it offloaded slops at Abidjan*” (6/10/06);
- 4.70.6 “*The slops are a mixture of gasoline residues, spent caustic soda and water. There are facilities for the disposal of slops at most refinery ports..*” and “*the waste...only includes oil and oil products*” (18/10/06; 26/10/06; 13/11/06);
- 4.70.7 The caustic washing was a “*normal gasoline blendstock operation*” as carried out off Gibraltar and a “*normal ships procedure*” (18/10/06);
- 4.70.8 Tommy was contracted “*for the safe disposal of the slops*”, implying that it was fit and equipped for such an operation; and Trafigura “*checked the credentials provided*” (16/8/07);
- 4.70.9 The sole reason that the slops were not offloaded in Nigeria was concerns as to the suitability of the two companies who applied for the task (itself false and falsely implying that Tommy was fit for the task or reasonably so regarded by Trafigura) (25/10/06; 13/11/06);
- 4.70.10 Trafigura intended to discharge the waste “*at a suitable port*” (13/11/06);

4.70.11 *"It is falsely alleged that the Probo Koala's slops made people ill when this liquid was dumped at several sites around Abidjan in August 2006.."* (16/8/07)

4.70.12 *"The discharge of slops from cargo vessels is a routine procedure...Abidjan's port deals with over 30,000 tonnes of slops every year"*, falsely implying these were standard slops and their discharge a standard procedure (16/8/07);

4.70.13 The injury to health in Ivory Coast was in effect all *"caused by others"* and Trafigura *"is in no way responsible for the sickness suffered by the people of Abidjan"* (16/8/07);

4.70.14 The payment to the Ivory Coast government was *"made in the same spirit as Trafigura's funding for the victims of Hurricane Katrina in New Orleans"* (16/8/07).

In support of the case that the above statements were false and Trafigura knew they were false or were reckless as to their truth, the Defendants will rely on the particulars pleaded above.

4.71 Further, the Defendant will rely on similar statements to those set out at 4.70 above, submitted by Trafigura to the BBC, and statements published by The Guardian newspaper on 14th May 2009 and The Times newspaper on 4th September 2009.

4.72 On 3rd December 2008, in Response 1 of its "Responses to Amended Requests for Clarification of the Defence Pursuant to Part 18 of the CPR", Trafigura finally accepted (having previously only admitted that the "Likely" chemical composition of the waste was much lower in relation to the phenols and 'inorganic sulphur') that the figures set out at 4.19 above

represented the “*composition of the slops as they were offloaded in Abidjan*” (as set out at the “*corrected*” Amended Schedule 13 of the Defence in the PI litigation) attached to the responses dated 3rd December 2008. However, Trafigura chose in Amended Schedule 13 misleadingly to describe the findings relating to Hydrogen Sulphide as “Inorganic Sulphur (Sulphide and Bi-Sulphide as S)”. The findings contained the correct description ‘Hydrogen Sulphide’ at Table 4.2 of the original NFI report from which these figures were taken. It is to be inferred that the change was to draw attention away from Hydrogen Sulphide, a highly and notoriously toxic and dangerous substance, which caused or substantially contributed to the deaths referred to above and the tragedy generally.

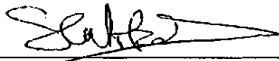
- 4.73 The Claimant is part of a very substantial corporate group with access to the highest quality of legal advice. It is to be inferred that it is well aware of the pre-action protocol for defamation and the importance of compliance with it under the Civil Procedure Rules. The Claimant wholly and deliberately failed to comply with the protocol. It is the Defendant’s case that the Claimant’s failure to specify “*the factual inaccuracies*” in the programme” and to “*give a sufficient explanation as to why the words were inaccurate*” (Protocol, paragraph 3.2) reflects the fact that the Claimant fully appreciates that it cannot credibly claim innocence of blame for the disaster, although that remains its public position.
5. If necessary, the Defendant will rely upon Section 5 of the Defamation Act 1952.
 6. Paragraphs 6 and 7 are admitted. The Defendant will rely upon the whole of the Article for its proper context.
 7. As to Paragraph 8, no admissions are made as to what the Article meant or was understood to mean.

8. Further or alternatively, the Article was in substance true in the meanings set out under Paragraph 4(a) and (b) above. The Defendant repeats the Particulars given under Paragraph 4 above.
9. Paragraph 9 is denied.
10. It is denied that the Claimant is entitled to damages and an injunction whether as alleged at Paragraph 10 or at all. As to damages the Defendant will, if necessary, rely on each and every of the above particulars as are proved at trial in diminution of damages. As to the matters relied upon in support of the claim at Paragraph 10:
 - 10.1 It is admitted that a trial of the PI litigation is due to take place at the High Court in October 2009. It is denied that the Defendant's publications prejudged the result of that trial whether as alleged at Paragraph 10.1 or at all.
 - 10.2 It is admitted that the Defendant incorporated the Claimant's denials of the allegations concerning the toxicity of the waste made through its public statements and officers (including its co-founder and director Eric de Turkheim) into the programme. Save as aforesaid Paragraph 10.2 is denied.
11. For all the reasons set out at Paragraphs 4 and 8 above, it is denied that the Claimant is entitled to the injunction claimed in Paragraph 11 or at all. This

denial is without prejudice to such further arguments as to the availability of an injunction as may be available.

ANDREW CALDECOTT QC
JANE PHILLIPS

I believe that the facts stated in this Defence are true.



Stephen Mitchell
Head of Multimedia Programmes

11 September 2009

Served on 11 September 2009 by Solicitors for the Defendant
BBC Litigation Department, Room 2251 White City, 201 Wood Lane, London W12 7TS

Claim No. HQ 09X02050

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

B E T W E E N:

TRAFIGURA LIMITED

Claimant

- and -

BRITISH BROADCASTING
CORPORATION

Defendant

DEFENCE

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