BAN Intervention on Legal Analysis / Probo Koala Case

I think we can all remember hearing about the horror of August 19, 2006 when we learned that many tonnes of toxic chemical waste, created onboard the ship PROBO KOALA by the oil-trading company Trafigura, had found its way to the port and city of Abidjan in Cote d'Ivoire, West Africa. This week a new omnibus report “The Toxic Truth” on the entire incident and aftermath has been released by Greenpeace and Amnesty International in Dakar and Nairobi. BAN will post a link to that report on the OEWG website in the Other Documents area.

The PROBO KOALA dumping resulted in over 100,000 residents seeking medical assistance from health problems. And authorities reported that between 15-17 persons had died. It was a waste trade disaster of monumental proportions that we can recall fundamentally transformed the 8th Conference of the Parties held in Nairobi on 27 November 2006.

Dr. Achim Steiner, UN Under-Secretary and Executive Director of the UN Environment Programme (UNEP) has recently called the incident “a human tragedy that occurred in a fragile country that should never have happened and must never be repeated-- in Cote d’Ivoire or elsewhere.”

Indeed it is the job of the Parties to the Basel Convention to do everything in their power to prevent anything like this despicable act of deliberate discharge and dumping from ever happening again. And also to assist in ensuring that perpetrators of this type of activity are held fully accountable.

It is against this backdrop that we must consider the “Revised Legal Analysis” that has been prepared by the Secretariat to the Basel Convention (SBC).

But what we find to our surprise is that the legal analysis goes to great lengths to deny a very clear and literal interpretation of Basel and instead concludes that Basel does not apply until the wastes have been turned over to a land-based activity, even if the ships are generating the wastes in territorial waters. Such an interpretation is incorrect and makes it very easy for unscrupulous operators to act with impunity as long as they operate from a ship.

A new study by the Center for International Environmental Law (CIEL) reveals that the MARPOL Convention never meant to control a waste generated by an irresponsible company that decided to turn a ship into a floating factory.

In the case of the Probo Koala, Trafigura later asserted that the waste they created was MARPOL waste, deriving from the normal operations of a ship. The want to avoid responsibility for creating a deadly waste and blame receiving facilities in the Netherlands or Cote d’Ivoire for the problem they created.

But this is not correct. And according to the Basel Convention’s article 1 paragraph 4, if the wastes are not MARPOL wastes then the Basel Convention does apply.
So, the Revised Legal Analysis seems to not only be incorrect but is giving one of the worst perpetrators of criminal trafficking in the history of our Convention, a legal gift. We are helping them avoid prosecution. And at the same time, while the IMO is now prohibiting this type of factory activity in the SOLAS Convention, we will be arguing that Basel is impotent to act in future on such wastes that might be generated illegally.

The effect of the current legal analysis could mean that ship owners and operators would be immune from prosecution for what would normally be considered criminal trafficking -- and only port authorities or reception facilities – often the victims or pawns in these deadly schemes -- can be prosecuted instead.

We urge the Parties, to postpone the adoption of this legal analysis until COP11 and allow for further revisions based on new information and new analysis that has come to light. In this way we can be sure of having an analysis with long term implications that is legally correct and at the same time more closely fulfills the underlying moral and environmental purpose of our Convention.

Thank you.

http://www.greenpeace.org/international/the-toxic-truth

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