Basel Convention’s Flawed Legal Analysis Could Help Companies Like Trafigura Avoid Prosecution

"Revised Legal Analysis“ Needs Further Revision

-- Submitted by BAN on behalf of Greenpeace, Amnesty International, and BAN

We all can remember to well the horror of August 19, 2006 when we learned that many tonnes of a 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. The dumping resulted in over 100,000 residents seeking medical assistance from health problems, including nausea, headaches, vomiting, abdominal pains, and irritation to skin and eyes. Subsequently, authorities reported that between 15-17 persons had died.

It was a waste trade disaster of monumental proportions that fundamentally transformed the 8th Conference of the Parties held in Nairobi on 27 November 2006, as the Parties and assembled delegates listened in mute shock to the words of Ms. Safiatou Ba-N’daw, Deputy Director of the Office of the Prime Minister of Côte d’Ivoire as she recounted how the crisis struck her capitol of Abidjan.

Dr. Achim Steiner, UN Under-Secretary and Executive Director of the UN Environment Programme (UNEP) has 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 sacred trust of the Parties to the Basel Convention and the International Maritime Organization 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.

While the IMO has moved within its SOLAS Convention to ban similar industrial processes onboard ships, perhaps the only legally binding instrument of international law that should already be applied in such a case is the Basel Convention. Indeed if the Basel Convention did not apply to this type of waste trading and dumping, a loophole would be cemented in place for possible future disasters from illegal or extra-legal activities of this kind and as well as an inability to hold perpetrators accountable. It is against that backdrop that we must consider the “Revised Legal Analysis“ (OEWG8/Inf/18) has been prepared by the Secretariat to the Basel Convention (SBC).
This analysis surprisingly seems to go out of its way and bend over backwards to deny even instances of a very clear and literal interpretation of Basel and instead concludes that even while the wastes were in the control of the ship operators, they would not fall under the Basel Convention and would only fall under the Basel Convention after they had been handed off to others on land.

Yet a recent legal analysis by the Center for International Environmental Law (CIEL) indicates that this interpretation is incorrect in some instances and unnecessarily narrow in others.

Much hinges on the question of whether Basel applies to factory type waste generated onboard a ship operating factory type operations (e.g., desulfurization of fuel). When generated on land with similar technology there is no question that this type of waste is hazardous. So the question is not whether it is hazardous, or whether it is waste, but rather whether it falls under the exemption of Article 4, paragraph 1.

That paragraph excludes from the scope of the Convention: “wastes which derive from the normal operation of a ship, the discharge of which is covered by another international instrument.”

In its “Revised Legal Analysis” the SBC studied the travaux préparatoires and correctly concluded that Article 4.1 in fact refers to the IMO Marpol Convention. However what the SBC appears not to have done was to study the travaux préparatoires of Marpol. CIEL investigated these and learned that indeed Marpol never intended or even considered to include factory type waste generated onboard a ship. This is new information that must be considered in any legal analysis.

They never ever meant to control a waste generated by an irresponsible company that decided to turn a ship into a floating factory because they had run out of options for processing difficult material on land. Trafigura’s later asserted that the waste they created was MARPOL waste, deriving from the normal operation of a ship. But the Marpol travaux make it very clear that such wastes are not and were never meant to be covered under Marpol. Thus by default this type of waste, not being excluded by Article 4.1, will fall then under the Basel Convention control procedures by literal interpretation wherever a transboundary movement has occurred. Basel is also likely to apply also for many other obligations such as the obligation for Environmentally Sound Management, and waste minimization even without transboundary movement being involved.

In other words, when wastes of this kind (not derived from the normal operations of a ship) are generated while in port or in the territorial waters of a state (which was often the case in the Probo Koala case), then Basel most obviously and literally must apply.

But very surprisingly, the SBC in their final sentence reach a conclusion that denies this fact and which is legally untenable:

“With regards to the Basel Convention provisions regulating TBM, this legal analysis suggests that they do not apply to wastes generated on board ships, whether such wastes fall within or outside of the Article 1 paragraph 4 exclusion clause. However, if hazardous and other wastes generated on board ships have been offloaded from a ship and are subsequently the object of TBM, as defined by the Basel Convention, the control procedure of the Basel Convention applies to such TBM.”

The effect of this very dangerous erroneous conclusion could mean that shipowners 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.

According to CIEL, this is an incorrect legal analysis. Much is at stake in this analysis and these erroneous conclusions coming out of the Basel Convention are very worrying. The PROBO KOALA case was perhaps the most egregious case of waste trade in history. If the Basel Convention cannot find the courage to confront this type of trade, its lack of action would not only be an affront to international law, to Cote d’Ivoire, the African Continent, developing countries, but to the human and environmental rights we all are entitled to enjoy everywhere on earth.

We urge the Parties, to not adopt or accept this analysis even provisionally but to allow for far more time and consideration to be made in order to allow for more peer review by other legal experts in
order to conclude an analysis that is assured of being legally correct and at the same time more closely fulfills the underlying moral mission of the Basel Convention.

Note: For more information on the PROBO KOALA case please find link to a new omnibus report “The Toxic Truth” produced by Greenpeace and Amnesty International, to be released this week in Dakar and Nairobi.

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

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