

Corrupt at Its Core: How Law Failed the Victims of Waste Dumping in Côte d’Ivoire

Rebecca Bratspies*

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* Professor, CUNY School of Law, Director Center for Urban Environmental Reform. Parts of this Article were originally written for the 6th Ingram Colloquium at the University of New South Wales, and benefitted immensely from discussions at that event. I owe a debt of gratitude to my colleagues Sarah Lamdan and Doug Cox, and to 3L Abigail Downs for their research support, to Erika George, Carmen Gonzalez, and Andrea McArdle for their valuable feedback, and to the students in my Environmental Justice class whose unanswered questions encouraged me to research this topic.

I. INTRODUCTION

On August 19, 2006, citizens of Côte d'Ivoire woke to suffocating odors. Overnight, five-hundred tons of hazardous waste had been illegally dumped across the country's largest city, Abidjan.¹ Thousands were sickened. The incident stands as one of the most flagrant environmental crimes in recent memory. Now, more than a decade later, it is past time to examine the tragedy as an act of environmental corruption and to use the incident to draw lessons about the failures of global environmental governance. The case is particularly instructive because the multi-national oil-trading company involved, Trafigura,² has recently been back in this news; this time because of South Korean allegations that the company was involved in oil shipments to North Korea in violation of United Nations ("UN") Sanctions.³

1. The Ivorian Ministry of Health and Public Hygiene concluded that wastes had been illegally dumped in at least eighteen spots, on eight different sites, though additional sites have been reported. See Okechukwu Ibeanu (Special Rapporteur), *Report of the Special Rapporteur on the Adverse Effects of the Movement and Dumping of Toxic and Dangerous Products and Wastes on the Enjoyment of Human Rights, Addendum: Mission to Côte d'Ivoire (4 to 8 August 2008) and the Netherlands (26 to 28 November 2008)* ¶28, U.N. Doc. A/HRC/12/26/Add.2 (Sept. 3, 2009) [hereinafter *Special Rapporteur*]. Right around this same time, Trafigura pled guilty to "two counts of entry of goods into the United States by means of false statements." Harvey Rice, *Firm Pleads Guilty in Oil-for-Food Case*, CHRON (May 26, 2006, 5:30 AM), <https://www.chron.com/business/energy/article/Firm-pleads-guilty-in-Oil-for-Food-case-1862731.php> [<https://perma.cc/NCN8-JS3G>]. These guilty pleas stemmed from Trafigura's involvement with the UN Oil-for-Food scandal. *Id.*

2. Trafigura is one of the world's largest traders of oil and petroleum products. See *What We Do*, TRAFIGURA, <https://trafigura.com/about-us/what-we-do/> [<https://perma.cc/489W-DR9U>] (last visited April 19, 2018). Trafigura's founders, Claude Dauphin and Eric de Turckheim, were protégés of Marc Rich, the controversial oil trader who wound up as number six on the FBI's Most Wanted List after he fled the United States rather than face charges of tax evasion and of violating trade sanctions against Iran. David Leigh, *Inside Trafigura: Accusations, Sour Deals, and Friends in High Places*, GUARDIAN (Sept. 16, 2009, 5:44 PM), <https://www.theguardian.com/world/2009/sep/16/inside-trafigura-pollution-conservatives> [<https://perma.cc/UE8V-FCKB>]; Eric Lichtblau and Davan Maharaj, *Clinton Pardon of Rich a Saga of Power, Money*, CHI. TRIBUNE (Feb. 18, 2001), <http://www.chicagotribune.com/ns-clinton-pardons-analysis-story.html> [<https://perma.cc/469G-25ET>]. On his last day in office, President Clinton pardoned Rich. See Peter Schweizer, *Bill Clinton's Pardon of Fugitive Marc Rich Continues to Pay Big*, N.Y. POST (Jan. 17, 2016, 6:00 AM), <https://nypost.com/2016/01/17/after-pardoning-criminal-marc-rich-clintons-made-millions-off-friends/> [<https://perma.cc/Z8PV-TUJZ>].

3. South Korean officials describe Trafigura as a "consignor" for the ship, the *Lighthouse Winnmore*, that was seized after secretly transferring 600 tons of oil to North Korea in defiance of UN Sanctions. Henry Sanderson & David Sheppard, *HK Company Latest to Deny Link to North Korea Oil Sale*, FIN. TIMES (Jan. 3, 2018), <https://www.ft.com/content/b2614a20-43f1->

With regard to the dumping in Côte d' Ivoire, Trafigura “strenuously maintains that it did nothing wrong and its staff acted in an appropriate manner throughout, using industry standard practices.”⁴ The company’s North Korea statement strikes a similar note, asserting that “Trafigura conducts its business so as to comply with all applicable sanctions and has had no involvement in the final destination of this cargo.”⁵ The last part of this denial is the most interesting, because the question of what constitutes “involvement in the final destination of cargo”⁶ was precisely the issue in question after the Abidjan dumping, only in that case the “cargo” was hazardous waste that had been unlawfully dumped across the city. Trafigura generated the waste in question and then contractually transferred that waste to another company for disposal in Côte d' Ivoire. The company maintains its innocence in part by pointing out to the contract requirement that the waste be disposed of in compliance with the law.⁷ In the newest allegations against the company, Trafigura is accused of illegally selling oil to North Korea. There is no question that Trafigura originally owned the cargo that was ultimately transferred to North Korea, but claims to have sold it to another company with a contract that prohibited further sale of the cargo in violation of sanctions.⁸

389e-a745-c2ee1dec08bd. Trafigura asserts that the ship “was ‘neither owned nor has it been chartered by Trafigura.’” *Id.*

4. TRAFIGURA, TRAFIGURA AND THE PROBO KOALA 5 (2016). The rest of the company’s statement goes on to state that “the Probo Koala incident has undoubtedly been a catalyst for substantive and ongoing reviews of the company’s operations.” *Id.* While the Abidjan dumping certainly catalyzed a massive public relations effort, there is little evidence that it produced changes in the company’s actual behavior in the marketplace.

5. See Henry Sanderson and David Sheppard, *Trafigura Denies Owning Tanker Accused of Sending Oil to North Korea*, FIN. TIMES (Jan. 2, 2018), <https://www.ft.com/content/f6ac6286-a8db-3fe6-95e9-b03156cc7632> (quoting company statement).

6. *Id.*

7. This protestation hearkens back to a similar position Trafigura took during the UN Oil-For-Food scandal. According the Volker Report, Trafigura paid bribes in order to unlawfully smuggle hundreds of thousands of gallons of oil out of Iraq. See Indep. Inquiry Comm. into U.N. Oil-for-Food Programme, Paul A. Volcker (Chairman) et al., *Manipulation of the Oil-for-Food Programme by the Iraqi Regime* 176–85 (Oct. 27, 2005) [hereinafter Volcker Report]. The company defended itself by pointing to its contracts, which it claimed showed that it was simply a buyer in the ordinary course of business. *Id.* at 201–05; see also Leigh, *supra* note 2. Roughly half of the smuggled oil was sold to Koch Petroleum. Volcker Report, *supra* note 7, 182–84.

8. See Kanga Kong & Dan Murtaugh, *Trifigura Denies Involvement in North Korea Oil Transfer*, BLOOMBERG (Jan. 2, 2018, 6:27 AM), <https://www.bloomberg.com/news/articles/2018-01-02/trafigura-denies-involvement-in-illicit-north-korea-oil-transfer> [<https://perma.cc/>

The details of the North Korea incident are still unfolding. But, regardless of whether the facts ultimately bear out South Korean allegations against Trafigura, the incident reinforces the same quandary that the Abidjan dumping revealed—law’s inability to reach multinational actors who intentionally structure their actions to avoid legal responsibility. This Article suggests that this inability is an intrinsic characteristic of our current global trade system—a feature, not a bug.

Trafigura’s relationship to the events in Abidjan provide a particularly useful case study for exploring this issue because the company describes itself as being “at the heart of the global economy.”⁹ Taking the company at its word, the Abidjan dumping highlights a troubling lack of accountability at the heart of the global economy. It reveals how the system of laws that make up international trade law permit Northern trading partners to profit enormously from unlawful conduct in Southern States, while deploying formal legal structures as a shield against any responsibility for that conduct.¹⁰ Indeed, the incident reveals an implicit form of corruption embedded in a global trading system structured to allow plausible denials of involvement in illegal or corrupt transactions.

This Article begins with an overview of how environmental corruption has typically been framed in scholarly discussions. Part III provides a description of the tragedy that occurred in Abidjan on August 19, 2006, situating the event in the context of the public and private environmental governance and management choices that led up to it. Part IV identifies the legal regimes that should have prevented this tragedy, and analyzes where those legal regimes fell short. This Part examines the ways that neoliberal principles¹¹

G76Q-LHLC]. Trafigura’s purchaser, Global Commodities Consultants, in turn claims to have sold the cargo to “another company, which it said it believed was based in Taiwan” with a contract that included a similar sanctions provision. Sanderson & Sheppard, *supra* note 3.

9. *About Us*, TRAFIGURA, <https://trafigura.com/about-us/> [https://perma.cc/QDU6-TQ3D] (last visited April 19, 2018).

10. For an exploration of this issue, see Ruth Gordon, *Unsustainable Development*, in *INTERNATIONAL ENVIRONMENTAL LAW AND THE GLOBAL SOUTH* 50, 60–73 (Shawkat Alam et al. eds., 2015).

11. For purposes of this Article, I am relying on Henry Giroux’s description of neoliberalism as “remov[ing] economics and markets from the discourse of social obligations and social costs.” Simon Dawes, *Interview with Henry A. Giroux: The Neoliberalisation of Higher Education*, SIMON DAWES (June 26, 2014), <https://smdawes.wordpress.com/2014/06/26/interview-with-henry-a-giroux-the-neoliberalisation-of-higher-education/> [https://perma

ratify the “impeccable” economic logic¹² that leads to the dumping of hazardous wastes in developing countries. While the Basel Ban¹³ and the Bamako Convention¹⁴ sought to make that “impeccable logic” flatly illegal,¹⁵ limitations at the heart of international law inhibit their effective implementation. This Part proposes that the contours of the global trading infrastructure in which such choices get made is itself corrupt—that drawing the boundaries of actors subject to environmental and human rights obligations to exclude transnational corporations (“TNCs”) is itself a kind of implicit corruption. Finally, this Article uses the robust literature on environmental corruption to demonstrate that this implicit form of corruption is built into the heart of the international commodities trade, and concludes by suggesting some ways forward.

.cc/MT5D-W4SS].

12. Memorandum from Lawrence H. Summers, Chief Economist, World Bank, to Distribution, World Bank (Dec. 12, 1991) (suggesting we should face up to the impeccable economic logic behind dumping a load of toxic waste in the lowest wage country), available at <http://www.whirledbank.org/ourwords/summers.html> [https://perma.cc/T94B-2B75]. Summers claimed that the memo was meant to be sarcastic, *Furor on Memo at World Bank*, N.Y. TIMES (Feb. 7, 1992), <https://nyti.ms/2pyo3K2> [https://perma.cc/FYG2-6A4K], and later that the memo was actually written by someone else. JMG, *Summers Receives Flack for His Tactless Pollution-Control Memo as VP of World Bank in 1991*, GRIST (Nov. 25, 2008), <https://grist.org/article/logical-but-totally-insane/> [https://perma.cc/ED2H-RQ5K] (naming Lant Pritchett as the actual author). Nevertheless, the impeccable logic expressed in this memo was on view in the events that occurred in Abidjan.

13. The Basel Ban is an amendment to the Basel Convention on the Control of Transboundary Movements of Hazardous Waste and their Disposal that prohibits all transboundary movement of hazardous wastes from Organization for Economic Cooperation and Development (“OECD”) countries to non-OECD countries. See Third Meeting of the Conference of the Parties to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, *Decision III/1: Amendment to the Basel Convention*, U.N. Doc. UNEP/CHW.3/35 (Nov. 28, 1995) [hereinafter Basel Ban].

14. Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa, Jan. 30, 1991, 2101 U.N.T.S. 177 [hereinafter Bamako Convention]. Article 4 of the Bamako Convention criminalizes the import of any hazardous wastes into Africa regardless of the reason for the import. *Id.* art. 4.

15. See generally Jim Puckett, *The Basel Ban: A Triumph Over Business-As-Usual*, BASEL ACTION NETWORK (Oct. 1, 1997), http://archive.ban.org/about_basel_ban/jims_article.html [https://perma.cc/7MVK-YCF7].

II. INTRODUCTION TO CORRUPTION

In 2015, the UN targeted reducing corruption as an essential component of achieving the Sustainable Development Goals,¹⁶ and “shift[ing] the world on to a sustainable and resilient path.”¹⁷ Indeed, Sustainable Development Goal 16, “peace, justice and strong institutions,” specifically includes “substantially reduc[ing] corruption” and “promot[ing] the rule of law” as targets.¹⁸ Thus, reduction of corruption is key to achieving sustainable development. While all kinds of corruption are problematic, environmental corruption poses unique challenges for sustainability.

Corruption is a broad, all-encompassing term. Many different acts fall under its umbrella—from bribery and cronyism in developing national policy, to embezzlement of funds intended for implementing environmental programs, to graft for issuing permits and licenses, to unlawful payments in exchange for favorable implementation of enforcement programs. All of these forms of corruption impose costs—leaving people worse off economically and environmentally, while hollowing out social and political institutions.¹⁹ Economically, corruption introduces distortions by altering the allocation of resources, lowering investment, reducing the productivity from public expenditures,²⁰ and slowing economic growth.²¹ Politically, corruption corrodes the legitimacy of the

16. G.A. Res. 70/1, *Transforming Our World: the 2030 Agenda for Sustainable Development* (Sept. 25, 2015).

17. *Id.* preamble.

18. *Goal 16: Promote Just, Peaceful, and Inclusive Societies*, UNITED NATIONS: SUSTAINABLE DEV. GOALS, <https://www.un.org/sustainabledevelopment/peace-justice/> [<https://perma.cc/9LA5-H7S9>] (last visited Mar. 29, 2018).

19. See generally ZUZANA DANČÍKOVÁ, TRANSPARENCY INT’L SLOVAK., *COSTS OF CORRUPTION* (2012).

20. The UN Development Program reports that corruption increases the cost of water infrastructure projects by as much as forty percent, adding up to twelve billion dollars a year to the cost of providing safe drinking water and sanitation in accordance with Sustainable Development Goal 6. See UNITED NATIONS DEV. PROGRAM, *FIGHTING CORRUPTION IN THE WATER SECTOR: METHODS TOOLS AND GOOD PRACTICES* 16–18 (Phil Matsheza et al. eds., 2011). The sector is vulnerable to collusion, kickbacks and bribery. As a result, less water infrastructure is built, and existing infrastructure is maintained less well, all at a higher cost.

Id.

21. See, e.g., Alexandra Leitão, *Corruption and the Environmental Kuznets Curve: Empirical Evidence for Sulfur*, 69 *ECOLOGICAL ECON.* 2191 (2010).

State,²² undermining democracy and the rule of law.²³ Socially, corruption leads to cynicism, frustration, and apathy among the citizens of a corrupt State.²⁴

Corruption unquestionably undermines environmental protection.²⁵ Among the environmental ills fostered by corruption are the diversion of funds allocated for environmental programs to private pockets; the facilitation of trafficking in wildlife and other natural resources; and the willingness to look the other way when pollution levels far exceed what might otherwise be allowed. For more than a decade, we have known that levels of corruption in a State are tightly tied to environmental outcomes: the higher the corruption level in a country, the lower its environmental sustainability.²⁶

Much of the scholarly attention to environmental corruption focuses on resource extraction. The problems in this context are significant.²⁷ The World Bank estimates that more than fifteen

22. Research from Sweden shows that perceptions of corruption, even in the absence of actual corruption, undermine State legitimacy. Jonas Linde & Gissur Ó. Erlingsson, *The Eroding Effect of Corruption on System Support in Sweden*, 26 GOVERNANCE 585 (2013).

23. See Natalie Delia Deckard & Zacharias Pieri, *The Implications of Endemic Corruption for State Legitimacy in Developing Nations: An Empirical Exploration of the Nigerian Case*, 30 INT'L J. POL. CULTURE & SOC'Y 369 (2017); *Corruption as an Indicator of a Failed State*, PARTNERSHIP FOR TRANSPARENCY (July 19, 2013), <https://ptfund.org/corruption-as-an-indicator-of-a-failed-state/> [https://perma.cc/KM2B-9FWM].

24. See Mary Noel Pepys, *Corruption within the Judiciary: Causes and Remedies*, in TRANSPARENCY INTERNATIONAL: GLOBAL CORRUPTION REPORT 2007, at 3, 12 (Diana Rodriguez & Linda Ehrichs eds., 2007) (noting that in former communist countries, nearly fifty percent of people described the legal-judicial system as corrupt). Marina Kurkchian documented how this belief that the system is corrupt drives a vicious cycle in which “the expectation of legal failure,” promotes bribery or the use of connections to circumvent the law, which in turn further underscores a negative view of law. Marina Kurkchian, *The Illegitimacy of Law in Post-Soviet Societies*, in LAW AND INFORMAL PRACTICES: THE POST-COMMUNIST EXPERIENCE 25, 27 (Denis J. Galligan & Marina Kurkchian eds., 2003).

25. See, e.g., Achim Steiner, Sec'y Gen. World Comm'n on Dams, Introductory Remarks for Workshop on Corruption and the Environment at the 9th International Anti-Corruption Conference (Oct. 13, 1999) (noting that by allowing access to resources either in contravention of existing rules or at a price below that which society has valued the resource, environmental corruption perverts a society's choices and values).

26. See, e.g., Richard Damania et al., *Trade Liberalization, Corruption, and Environmental Policy Formation: Theory and Evidence*, 46 J. ENVTL. ECON. & MGMT. 490 (2003); Per G. Fredriksson et al., *Corruption and Energy Efficiency in OECD Countries: Theory and Evidence*, 47 J. ENVTL. ECON. & MGMT. 207 (2004); Per G. Fredriksson et al., *Bureaucratic Corruption, Environmental Policy and Inbound US FDI: Theory and Evidence*, 87 J. PUB. ECON. 1407 (2003); Leitão, *supra* note 21.

27. MICHAEL RENNER, WORLDWATCH PAPER 162: THE ANATOMY OF RESOURCE WARS 17 (Thomas Prugh ed., 2002) (“Societies whose main income is derived from resource royalties

billion dollars' worth of resources are unlawfully extracted each year.²⁸ According to one report, up to eighty percent of the harvest from some Latin American tropical forests is illegal and/or undeclared.²⁹ Reports out of Russia indicate that the overwhelming majority of harvested timber is from illegal logging.³⁰ The situation in many other countries is comparable.³¹ Each year, millions of hectares of forest worth ten to fifteen billion dollars are lost to corrupt practices,³² and that figure does not even begin to capture the enormous social and environmental costs associated with these activities.³³

Other extractive resources are equally problematic. In Nigeria, for example, the National Oil Company was unable to account for nearly twenty billion dollars of the oil revenue generated from 2012 to 2013.³⁴ Indeed, virtually every stage of virtually every resource management program is vulnerable to corruption through bribery,

instead of value added seem prone to develop a culture of widespread corruption. Resource royalties enable political leaders to maintain their stranglehold on power by funding a system of patronage that rewards followers and punishes opponents. And because such regimes rely less on revenues derived from a broad-based system of taxation, they also have less need for popular legitimacy and feel less pressure to be accountable.”)

28. A widely quoted World Bank study estimates that one trillion dollars in bribes changes hands annually (for perspective, that was roughly three percent of global aggregate gross domestic product (“GDP”) in 2001). Daniel Kaufmann, *Myths and Realities of Governance and Corruption*, in WORLD ECONOMIC FORUM GLOBAL COMPETITIVENESS REPORT 2005–2006, at 81, 96–98 (2005). This estimate understates the monetary stake in corruption because it does not include embezzlement of public funds or theft of public assets. Overall, the cost of corruption is estimated to be five percent of GDP. ORGANISATION ECON. CO-OPERATION & DEV.: CLEANGOVBIZ, BACKGROUND BRIEF: THE RATIONALE FOR FIGHTING CORRUPTION 2 (2014). For perspective, Transparency International estimates that Indonesia’s former dictator Mohamed Suharto alone embezzled between \$15–35 billion. Robin Hodess, *Introduction*, in TRANSPARENCY INT’L, GLOBAL CORRUPTION REPORT 2004, at 11, 13 box 1.1 (Robin Hodess et al. eds., 2004).

29. See, e.g., Carl-Éric Guertin, Commc’ns & Responsible Trade Manager, Que. Wood Export Bureau, A Paper Presented as Basis of an Expert Presentation at the UNECE Timber Committee Market Discussion: Illegal Logging and Illegal Activities in the Forest Sector: Overview and Possible Issues for the UNECE Timber Committee and FAO European Forestry Commission (Oct. 7–8, 2003).

30. ENVTL. INVESTIGATION AGENCY, LIQUIDATING THE FORESTS: HARDWOOD FLOORING, ORGANIZED CRIME, AND THE WORLD’S LAST SIBERIAN TIGERS 31–32 (2013).

31. MARILYNE PEREIRA GONCALVES ET AL., THE WORLD BANK, JUSTICE FOR FORESTS 2 n.10 (2012).

32. *Id.* at 1.

33. *Id.* at 2.

34. Sarah Chayes, *A Hidden Cost of Corruption: Environmental Devastation*, WASH. POST (June 16, 2017), https://www.washingtonpost.com/outlook/a-hidden-cost-of-corruption-environmental-devastation/2017/06/16/03f93c1e-52b8-11e7-b064-828ba60fb98_story.html?utm_term=.d64c95ac8878 [https://perma.cc/8U8E-VPVJ].

favoritism, nepotism, and/or embezzlement. In scores of countries around the world, “senior officials, key business leaders and out-and-out criminals weave themselves into sophisticated networks” for the purpose of exploiting natural resources to maximize personal gains.³⁵ It is this behavior that inspires the term “kleptocracy.”³⁶ There is an entire body of literature documenting the so-called “resource curse”³⁷—the way that mineral resource abundance creates opportunities for corruption and violence.³⁸ The curse of natural resource “kleptocracy,” or as Sarah Chayes puts it, “[p]redatory extraction of natural resources” requires “lax enforcement of whatever regulations exist.”³⁹

Less attention has been paid to the role that corruption plays in distorting the handling of hazardous wastes. However, Interpol’s working group on pollution crimes has recently begun to focus on this topic.⁴⁰ Raids in 2017 discovered well over a million tons of illegal waste as part of a global network of the illegal waste trade.⁴¹ The working group identifies illegal shipment and disposal of waste as a threat to global security.⁴² Unfortunately, existing trade infrastructure too often creates “an open opportunity for illegal shipment of hazardous wastes.”⁴³ Inadequacies in domestic “legislation, waste management policy, awareness, and market capacity” in many developing countries allow this illegal trade to

35. *Id.*

36. STANISLAV ANDRESKI, *THE AFRICAN PREDICAMENT: A STUDY IN THE PATHOLOGY OF MODERNISATION* 108–09 (1968) (defining kleptocracy as a system in which “the functioning of the organs of authority is determined by the mechanisms of supply and demand rather than the laws and regulations”).

37. *See, e.g.*, *ESCAPING THE RESOURCE CURSE* (Macartan Humphreys et al. eds., 2007); MICHAEL ROSS, *THE OIL CURSE: HOW PETROLEUM WEALTH SHAPES THE DEVELOPMENT OF NATIONS* (2012).

38. RENNER, *supra* note 27.

39. Chayes, *supra* note 34.

40. *See* INTERPOL POLLUTION CRIMES WORKING GRP., *ASSESSING THE LINKS BETWEEN ORGANISED CRIME AND POLLUTION CRIMES* (2006).

41. *Hazardous Materials Seized in Largest Global Operation Against Illegal Waste*, INTERPOL (Aug. 8, 2017), <https://www.interpol.int/News-and-media/News/2017/N2017-100> [<https://perma.cc/25J4-53AQ>] (noting that criminal networks perceive waste crimes to be low risk/high reward).

42. *Id.*

43. O’LAOIRE RUSSEL ASSOCS., *EUROPEAN COMM’N DIRECTORATE-GENERAL TAXATION AND CUSTOMS UNION, STUDY ON THE ROLE OF CUSTOMS IN ENFORCEMENT OF EUROPEAN COMMUNITY LEGISLATION GOVERNING THE PROTECTION OF THE ENVIRONMENT AND ITS BEST PRACTICES 2* (2011) [hereinafter *BEST PRACTICES*].

flourish.⁴⁴ Yet, Interpol's focus is on the criminal enterprises that unlawfully transfer hazardous wastes, rather than on the corrosive impacts of environmental corruption in the developing countries where those wastes wind up.⁴⁵ Unfortunately, developing countries are particularly vulnerable to corruption with regard to polluting activities.⁴⁶ Lack of infrastructure and weak enforcement regimes make many developing countries attractive targets for unlawful hazardous waste disposal. The human impacts of these activities are compounded by poverty and poor access to health care.

This problem is not limited to developing countries. A significant percentage of the waste moving within the European Union ("EU") is illegal.⁴⁷ In 2009 for example, twenty percent of the road haulage in Germany involved waste transport, and roughly seven percent of that freight was illegal.⁴⁸ The figures for other EU countries are comparable.⁴⁹ Much of this waste was illegally destined for African and Asian countries in violation of the EU's Waste Shipment Regulation.⁵⁰ Corruption in the form of bribery can pervert even the most progressive environmental regulatory systems by undermining the legitimacy of inspections and permitting systems. This kind of corruption, which perverts the

44. *Id.* at 69 (discussing these inadequacies in Asian countries in particular).

45. *Environmental Crime*, INTERPOL, <https://www.interpol.int/Crime-areas/Environmental-crime/Environmental-crime> [https://perma.cc/F2XH-L4AU] (last visited May 9, 2018).

46. For a description of the problem, see Zada Lipman, *Trade in Hazardous Waste*, in INTERNATIONAL ENVIRONMENTAL LAW AND THE GLOBAL SOUTH, *supra* note 10, at 256, 256–60; *see generally*, DAVID NAGUIB PELLOW, RESISTING GLOBAL TOXICS: TRANSNATIONAL MOVEMENTS FOR ENVIRONMENTAL JUSTICE (2007) (documenting that residents of developing countries bear disproportionately high risk of being exposed to toxic wastes). In developed countries, exposure to toxic waste is an environmental justice issue, with poor and minority communities, the so-called 'South in the Global North,' experiencing greater risks than their compatriots. *See* Carmen G. Gonzalez & Sumudu Atapattu, *International Environmental Law, Environmental Justice, and the Global South*, 26 TRANSNAT'L L. & CONTEMP. PROBS. 229 (2017); *see also* Rebecca M. Bratspies, *The Climate for Human Rights*, 72 U. MIAMI L. REV. 308, 337–43 (2018) (describing the plight of Mossville, Louisiana and the toxic exposure case Mossville residents have brought before the Inter-American Commission on Human Rights); Carmen G. Gonzalez, *Environmental Justice, Human Rights, and the Global South*, 13 SANTA CLARA J. INT'L L. 151, 154–57 (2015).

47. EUROPEAN UNION NETWORK FOR THE IMPLEMENTATION & ENF'T OF ENVTL. LAW, IMPEL-TFS ENFORCEMENT ACTION III—FINAL REPORT I (2012–2013) (finding that well over twenty-five percent of waste shipments were unlawful).

48. EUROPEAN UNION NETWORK FOR THE IMPLEMENTATION & ENF'T OF ENVTL. LAW, IMPEL-TFS ENFORCEMENT ACTIONS II—ENFORCEMENT OF EU WASTE SHIPMENT REGULATION "LEARNING BY DOING" 40 (2009).

49. *Id.*

50. *Id.* at 42–45.

application of a regulatory system to a specific situation⁵¹ is often termed petty or bureaucratic corruption.⁵² Petty corruption can have serious ramifications—leaving exposure to hazardous and toxic wastes not only unchecked, but also obscured by layers of seemingly valid, yet practically meaningless, environmental oversight.⁵³

On a more basic level, corruption can completely distort the values expressed in law itself. This corruption, often called “grand corruption”⁵⁴ goes far beyond corrupting individual permitting or enforcement decisions. Instead, grand corruption involves using illicit means “to influence the formation of laws, regulations, decrees, and other government policies . . . to their own advantage by means of the illicit and non-transparent provision private benefits to public officials.”⁵⁵ The participants in grand corruption can be individuals, groups, or firms—from both the public and private sectors. This kind of corruption deprives the public of the honest services of government officials by facilitating the development of less protective legal standards and practices than would otherwise be adopted,⁵⁶ and/or by producing unfair allocations of environmental resources and burdens across a society.⁵⁷

The role of what we typically think of as corruption—illicit payments, quid pro quo exchanges, and cronyism—in this process

51. See John K. Wilson & Richard Damania, *Corruption, Political Competition and Environmental Policy*, 49 J. ENVTL. ECON. & MGMT. 516, 517 (2005) (explaining the difference between grand and petty corruption in terms of whether a payment seeks “to influence the setting of policy” or “to avoid the consequences of a given policy”).

52. See SUSAN ROSE-ACKERMAN & BONNIE J. PALFIKA, *CORRUPTION AND GOVERNMENT: CAUSES, CONSEQUENCES, AND REFORM* 51–53 (2d ed. 2016) (objecting to the term “petty corruption” on the ground that “the aggregate quantities involved and the costs to society may be very large”).

53. See, e.g., ENVTL. INVESTIGATION AGENCY, *THE LAUNDERING MACHINE: HOW FRAUD AND CORRUPTION IN PERU’S CONCESSION SYSTEM ARE DESTROYING THE FUTURE OF FORESTS* 4–5 (2012) (describing as cynical the “no questions asked” perspective by timber purchasers in the United States who do not hesitate to rely on environmental certifications they know to be meaningless).

54. SVETLANA WINBOURNE, *MGMT. SYS. INT’L., CORRUPTION AND THE ENVIRONMENT* 12 (2002).

55. WORLD BANK, *ANTICORRUPTION IN TRANSITION: A CONTRIBUTION TO THE POLICY DEBATE* 1 (2000).

56. Fredriksson et al., *Corruption and Energy Efficiency in OECD Countries: Theory and Evidence*, *supra* note 26.

57. See JESSICA DILLON ET AL., *TRANSPARENCY INT’L., CORRUPTION AND THE ENVIRONMENT* 13–17 (2006).

is obvious.⁵⁸ It is not unheard of for decision-makers to accept bribes to alter environmental decisions.⁵⁹ Even more common are lavishly funded lobbying campaigns, and campaign contributions from those seeking specific legal or administrative outcomes.⁶⁰ These payments are often intended to reduce support for protective legislation, or increase support for lax standards.⁶¹ Around the world there are examples of how conservation⁶² and development policies⁶³ further private interests of policymakers and their supporters, rather than the public interest of those they are appointed or elected to serve.⁶⁴ Sadly, there are many examples of policymakers “twist[ing] economic and foreign policy

58. One recent high-profile bribery scandal was J.P. Morgan’s “Sons and Daughters” program, which hired the children of high ranking Chinese officials in order to purchase access. Jessica Silver-Greenberg & Ben Protess, *JPMorgan Hiring Put China’s Elite on Easy Track*, N.Y. TIMES: DEALBOOK (Aug. 29, 2013, 10:00 PM), <https://dealbook.nytimes.com/2013/08/29/jpmorgan-hiring-put-chinas-elite-on-an-easy-track/> [<https://perma.cc/F9ZV-4ECB>]; Heather Timmons, *JPMorgan’s “Systematic Bribery” in China Was So Blatant the Bank Had an Internal Spreadsheet to Track It*, QUARTZ (Nov. 17, 2016), <https://qz.com/840705/jpmorgans-jp-m-systemic-bribery-in-china-was-so-blatant-the-bank-had-an-internal-spreadsheet-to-track-it-the-sec-says/> [<https://perma.cc/JC62-X8LE>].

59. See, e.g., Dan Barstow & Alejandra Xanic von Bertrab, *How Walmart Got Its Way in Mexico*, N.Y. TIMES (Dec. 17, 2012), <https://www.nytimes.com/2012/12/18/business/walmart-bribes-teotihuacan.html> [<https://perma.cc/DBQ8-KGHU>]; *Monsanto Fined \$1.5 Million for Bribery*, BBC NEWS (Jan. 7, 2005, 6:22 AM), <http://news.bbc.co.uk/2/hi/business/4153635.stm> [<https://perma.cc/TP89-3SYG>] (describing illegal payments from a Monsanto employee to an Indonesian official in a bid to avoid environmental scrutiny).

60. See, e.g., Matt Lee-Ashley & Jenny Rowland, *For Polluters, Congress Will Overturn an Environmental Rule for \$2.3 Million*, CTR. FOR AM. PROGRESS (Feb. 14, 2017, 12:01 AM), <https://www.americanprogress.org/issues/green/news/2017/02/14/415105/for-polluters-congress-will-overturn-an-environmental-rule-for-2-3-million/> [<https://perma.cc/BQ9V9DZ9>] (detailing campaign contributions made by those advocating for repeal of environmental rules, and the subsequent votes of those accepting the contributions).

61. See, e.g., Tiffany Stecker, *Dow’s Lobbying Spending Overshadows Competition*, BNA (Apr. 30, 2017), <https://www.bna.com/dows-lobbying-spending-n57982087339/> [<https://perma.cc/QQ4L-XFSP>] (describing Dow Chemical payments and its drive to ward off regulation).

62. See generally CLARK GIBSON, *POLITICIANS AND POACHERS: THE POLITICAL ECONOMY OF WILDLIFE POLICY IN AFRICA* (1999).

63. PATRICK STALGREN, *CORRUPTION IN THE WATER SECTOR: CAUSES, CONSEQUENCES AND POLITICAL REFORM*, SWEDISH WATER HOUSE POLICY BRIEF NO. 4, at 10–11 box 6 (2006) (detailing the many levels of corruption); Janelle Plummer & Piers Cross, *Tackling Corruption in the Water and Sanitation Sector in Africa: Starting the Dialogue*, in *THE MANY FACES OF CORRUPTION: TRACKING VULNERABILITIES AT THE SECTOR LEVEL* 221, 228–33 (J. Edgar Campos & Sanjay Pradhan eds., 2007) (describing how water projects are designed to benefit elites and politicians rather than citizens).

64. See generally IMF, *Corruption: Costs and Mitigating Strategies*, Staff Discussion Note (May 2016).

to serve their short-term ends⁶⁵ rather than the short or long-term interests of the broader society.

The overt corruption embodied by bribery, embezzlement, and impunity are widely recognized as dangerous.⁶⁶ The World Bank characterized corruption as “public enemy number one.”⁶⁷ Pope Francis called it a “scourge,”⁶⁸ and a “cancer.”⁶⁹ Indeed, the corruption-cancer metaphor is popular—former World Bank President James Wolfenson invoked it in 1995 stating “let’s not mince words: we need to deal with the cancer of corruption.”⁷⁰ More recently, David Cameron and Joe Biden have likened corruption to “cancer.”⁷¹ Around the world, leaders characterize corruption as a “threat to democracy” itself.⁷²

There are many anti-corruption programs, organizations, and institutions doing their best to reduce obvious and overt acts of corruption.⁷³ These programs work to build public awareness and

65. WORLD WILDLIFE FUND, SOCIOECONOMIC ROOT CAUSES OF BIODIVERSITY LOSS IN THE PHILIPPINES SUMMARY 15 (1998) (describing the conduct of sugar oligarchs in the Philippines).

66. For example, Nigerian President Buhari called the fight against corruption “a matter of . . . survival.” *Nigeria’s Buhari Presses for Military Aid, Pledges ‘Zero Tolerance’ for Corruption*, U.S. INST. PEACE (July 22, 2015), <https://www.usip.org/publications/2015/07/nigerias-buhari-presses-military-aid-pledges-zero-tolerance-corruption> [<https://perma.cc/6UBQQQR E>].

67. Press Release, World Bank, Corruption is “Public Enemy Number One” in Developing Countries, Says World Bank Group President Kim (Dec. 19, 2013), available at <http://www.worldbank.org/en/news/press-release/2013/12/19/corruption-developing-countries-world-bank-group-president-kim> [<https://perma.cc/XZJ2-UMJC>].

68. Caroline Stauffer, *Pope Francis in Peru Urges Society to Combat ‘Scourge’ of Corruption*, REUTERS (Jan. 19, 2018, 6:32 PM), <https://www.reuters.com/article/us-pope-peru-corruption/pope-francis-in-peru-urges-society-to-combat-scourge-of-corruptionidUSKBN1F82UM> [<https://perma.cc/B75N-JGJN>].

69. Pope Francis (@pontifex), TWITTER (Oct. 20, 2015, 1:20 AM), <https://twitter.com/pontifex/status/656384389094359040?lang=en> [<https://perma.cc/URA6-2SPR>].

70. James D. Wolfenson, President, World Bank, Annual Meetings Address (Oct. 1, 1996). Of course for Wolfenson, the World Bank and economic globalization was an antidote to corruption, rather than its implicit core.

71. Cynthia Kroet, *David Cameron: Corruption is ‘Cancer’*, POLITICO (May 12, 2016, 3:47 PM), <https://www.politico.eu/article/david-cameron-corruption-is-cancer/> [<https://perma.cc/SSX2-QXUV>]; Joe Biden, Vice President, Remarks by Vice President Joe Biden to Romanian Civil Society Groups and Students (May 21, 2014).

72. *Corruption Poses Unparalleled Threat, U.S. Official Says*, U.S. INST. PEACE (Dec. 17, 2015) (quoting United States Assistant Secretary of State William Brownfield), <https://www.usip.org/publications/2015/12/corruption-poses-unparalleled-threat-us-official-says> [<https://perma.cc/3F7L-23T9>].

73. Unfortunately, the Trump administration has taken significant steps to undermine anti-corruption efforts. Acting on the lobbying efforts of the American Petroleum Institute and then-Exxon CEO Rex Tillerson (and now former Secretary of State) the administration’s

to add transparency and accountability to government decision-making, particularly in developing countries.⁷⁴ They typically characterize the causes of specific instances of environmental corruption as internal to the country in question⁷⁵—whether it be insufficient legislation, lack of respect for the rule of law, weak democracy, overly wide discretion coupled with minimal accountability and transparency, poor enforcement, or low professionalism.⁷⁶ Thus, their activities typically focus on efforts to create legislation, to build rule of law cultures,⁷⁷ to promote

first act was to work with the Republican Congress to repeal a SEC regulation that would have required oil companies to disclose details of payments to international governments in connection with oil and gas production. Steven Mufson, *Trump Signs Law Rolling Back Disclosure Rule for Energy and Mining Companies*, WASH. POST (Feb. 14, 2017), https://www.washingtonpost.com/business/economy/trump-signs-law-rolling-back-disclosure-rule-for-energy-and-mining-companies/2017/02/14/ccd93e90-f2cd-11e6-b9c9e83fce42fb61_story.html?utm_term=.9192fe4c7d6f [<https://perma.cc/E7AK-QANU>]. The administration also apparently withdrew from the Extractive Industries Transparency Initiative (“EITI”), an international effort to fight corruption in oil, gas, and mineral extractive industries. Julia Simon, *U.S. Withdraws from Extractive Industries Anti-Corruption Effort*, REUTERS (Nov. 2, 2017, 12:19 PM), <https://www.reuters.com/article/us-usa-eiti/u-swithdraws-from-extractive-industries-anti-corruption-effort-idUSKBN1D2290> [<https://perma.cc/7YUT-YTD2>]; see also Letter from Gregor J. Gould, Dir. U.S. Dep’t of Interior to Fredrik Reinfeldt, Chair, Extractive Indus. Transparency Initiative Bd. (Nov. 2, 2017), available at https://eiti.org/sites/default/files/documents/signed_eiti_withdraw_11-17.pdf [<https://perma.cc/9GY8-437C>] (stating that the United States was withdrawing “effective immediately” because “domestic implementation of EITI does not fully account for the U.S. legal framework”).

74. For a useful, albeit slightly dated list of organizations, see LONDA ESADZE, POL’Y & LEGAL ADVICE CENTRE, ANTI-CORRUPTION ORGANISATIONS, INSTITUTIONS, NETWORKS AND INITIATIVES: AN ANNOTATED LIST (2013).

75. See, e.g., ROSE-ACKERMAN & PALFIKA, *supra* note 52, at 51 (characterizing corruption as “a symptom that something has gone wrong in the management of the state”). Their work offers a detailed overview of how corruption works *within* a State, but does not contemplate that the entire global system might be corrupt.

76. For the derivation of the majority of this list, see Daniel Treisman, *The Causes of Corruption: A Cross-National Study*, 76 J. PUB. ECON. 399 (2000), and Toke S. Aidt, *The Causes of Corruption*, CESIFO DICE REPORT, Summer 2011, at 15. Each of these factors has been identified in many different sources. See, e.g., ACP-EU Joint Parliamentary Assembly Working Document on the Respect for the Rule of Law and the Role of an Impartial and Independent Judiciary (Oct. 4, 2013), http://www.europarl.europa.eu/meetdocs/2009_2014/documents/acp/dt/932/932686/932686en.pdf [<https://perma.cc/NT5F-23J7>] (focusing on the rule of law); Abigail Barr et al., *Corruption in Public Service Delivery: An Experimental Analysis*, 72 J. ECON. BEHAVIOR & ORG. 225 (2009) (focusing on transparency and professionalism); Ivar Kolstad & Arne Wiig, *Does Democracy Reduce Corruption?* (Chr. Michelsen Inst., Working Paper No. 2011:4, 2011) (focusing on strength of democracy).

77. Recently, there has been additional attention to the relationship between corruption and violent extremism. See, e.g., LEANNA MCKAY, U.S. INST. OF PEACE, TOWARD A RULE OF LAW CULTURE: EXPLORING EFFECTIVE RESPONSES TO JUSTICE AND SECURITY CHALLENGES—PRACTICAL GUIDE (Adewale Ajadi & Vivienne O’Connor eds., 2015).

democratic accountability, to support watchdog groups, and to professionalize various governmental epistemic communities.⁷⁸

While these activities are all worthwhile, they leave the dynamics of the global market, which drives corruption, unaddressed.⁷⁹ Too many anti-corruption efforts start from the common, flawed assumption that the problem of corruption is largely a domestic problem within individual States or regions, rather than an aspect of a specific globalized legal and economic relationship *between* States, and between States and private actors—most notably TNCs. They also define corruption in terms that suggest that corruption is a developing country issue,⁸⁰ and that countries with the so-called “rule of law”⁸¹ do not suffer from corruption (or at least suffer from significantly less corruption).⁸² These ideological pre-commitments, which Foucault would call the “limits and forms of the sayable,”⁸³ too often shape the basic assumptions of anticorruption efforts in a fashion that limit the possibilities on their reform horizon.

This perspective leads to suggestions that membership in the World Trade Organization or in multilateral trade agreements can be an antidote to corruption, or a prize dangled in front of corrupt

78. For a typical treatment of these suggestions, see Robert Hunja, *Here Are 10 Ways to Fight Corruption*, WORLD BANK (Dec. 8, 2015), <https://blogs.worldbank.org/governance/here-are-10-ways-fight-corruption> [<https://perma.cc/SLW6-ARZM>].

79. For example, a mid-term analysis of the World Bank’s Forest Strategy concluded that World Bank Staff tended to treat environmental and social safeguards as “barriers” rather than as key ways to improve development outcomes. ARNOLDO CONTRERAS HERMOSILLA & MARKKU SIMULA, THE WORLD BANK, WORLD BANK FOREST STRATEGY: REVIEW OF IMPLEMENTATION 36 (2007).

80. See, e.g., Irene Villanueva Nemesio, Note, *Strengthening Environmental Rule of Law: Enforcement, Combatting Corruption, and Encouraging Citizens Suits*, 27 GEO. INT’L ENVTL. L. REV. 321, 322 (2015) (“In developing countries with weak or imbalanced cooperation among [government, private sector, and citizens], ‘environmental rule of law’ suffers.”).

81. Thomas Carothers, *The Rule of Law Revival*, FOREIGN AFF., March/April 1998, at 95, 96.

82. For example, Forbes Magazine, a self-proclaimed “capitalist tool” explicitly claimed that countries become less corrupt as they get richer. *Corruption*, FORBES (Michael Noer et al. eds., Jan. 22, 2009, 6:00 PM), https://www.forbes.com/2009/01/22/corruption-economics-bribes-biz-corruption09_cx_mn_avb_de_0122corrupt_land.html#47b415524c13; *Forbes: A ‘Capitalist Tool’ That’s Pinching Pennies*, N.Y. TIMES: DEALB%K (June, 15, 2009, 5:02 AM), <https://dealbook.nytimes.com/2009/06/15/forbes-a-capitalist-tool-thats-pinching-pennies/> [<https://perma.cc/7MYS-TV6D>].

83. Michel Foucault, *Politics and the Study of Discourse*, in THE FOUCAULT EFFECT: STUDIES IN GOVERNMENTALITY 53, 59 (Graham Burchell et al. eds., 1991) (emphasis omitted).

regimes to incentivize change.⁸⁴ While those memberships might conceivably serve as an antidote to certain kinds of corruption—the kleptocracy phenomenon comes to mind⁸⁵—participation in global trade can also be a spark for even more corrosive corruption. It is an open secret that “the world’s biggest trading partners are also the world’s biggest markets for illicit goods and services.”⁸⁶

Entry into the global economy may demand an implicit form of corruption in the form of laws structured to reduce the possibilities for environmental protection and jeopardize traditional land rights of indigenous groups.⁸⁷ Global markets greedy for cheap raw materials and cheap disposal of wastes can promote the emergence of rentiers rather than governing institutions, particularly in fragile States. Indeed, markets and the thirst for profits in “rule of law” States too often depend on, facilitate, or even demand that corruption exist elsewhere. For this reason, the behavior that is commonly labeled corruption is only the last link in a much wider system of exploitation.

Most literature on corruption is rooted in a particular vision of corruption, one that focuses largely on clearly illicit actions like bribes and embezzlement. To that end, it defines corruption as

84. The WTO itself claims that membership can “help reduce corruption.” 5 *The WTO Can . . . Encourage Good Governance*, WORLD TRADE ORG., https://www.wto.org/english/thewto_o_e/whatis_e/10thi_e/10thi05_e.htm [<https://perma.cc/N2EA-8V5Q>] (last visited Mar. 27, 2018). Numerous scholars echo this position. See, e.g., Todd L. Allee & Jamie E. Scalera, *The Divergent Effects of Joining International Organizations: Trade Gains and the Rigors of WTO Accession*, 66 INT’L ORG. 243, 273 (2012); Zdenek Drabek & Marc Bacchetta, *Tracing the Effects of WTO Accession on Policy-Making in Sovereign States: Preliminary Lessons from the Recent Experience of Transition Countries*, 27 WORLD ECON. 1083 (2004); Roberta Gatti, *Explaining Corruption: Are Open Countries Less Corrupt?*, 16 J. INT’L DEV. 851 (2004); Wayne Sandholtz & Mark M. Gray, *International Integration and National Corruption*, 57 INT’L ORG. 761, 766–67 (2003). But see Sanchari Choudhury & Daniel L. Millimet, *WTO Membership and Corruption* (Mar. 10, 2016) (unpublished manuscript), available at <https://faculty.smu.edu/millimet/pdf/WTOCorr.pdf> [<https://perma.cc/5YH7-YHJ4>] (making the claim that WTO membership increases corruption).

85. See, e.g., SARAH CHAYES, *THIEVES OF STATE: WHY CORRUPTION THREATENS GLOBAL SECURITY* 202 (2016) (identifying membership in trade organizations and deals as an incentive to reducing acute corruption). Yet, too often, “rule of law” States are willing to look the other way for even venally corrupt officials and regimes that have leverage in the form of desired natural resources or strategic geopolitical positions.

86. UNITED NATIONS OFFICE ON DRUGS & CRIME, *THE GLOBALIZATION OF CRIME: A TRANSNATIONAL ORGANIZED CRIME THREAT ASSESSMENT*, at ii (2010).

87. Rebecca M. Bratspies, *Assuming Away the Problem? The Vexing Relationship Between International Trade and Environmental Protection*, in *NON-STATE ACTORS, SOFT LAW AND PROTECTIVE REGIMES: FROM THE MARGINS* 227, 228–29 (Cecilia M. Baillet ed., 2012).

“the abuse of public office for private gain.”⁸⁸ Thus, we see a global corruption index in which two-thirds of the countries evaluated receive below a fifty on Transparency International’s zero to one hundred corruption score, with zero being highly corrupt and one hundred being very clean governance.⁸⁹ These kinds of corruption are unquestionably corrosive to the legitimacy of the State⁹⁰ and undermine sustainable development. Transparency International cautions that “rule of law” countries should not rest easy—they too are vulnerable to corruption, specifically “closed-door deals, conflicts of interest, illicit finance and patchy law enforcement that can distort public policy and exacerbate” domestic and external corruption.⁹¹

But this framing, which emphasizes the public officials engaging in corruption, misses far too much. It overlooks the role that a globalized economic system plays in driving corruption. In particular, this framing leaves out the immense complexity of the symbiotic relationship between “rule of law” countries and corruption countries, as well as between the corrupted public officials and their private sector corruptors. For example, the illegal timber trade nets South-East Asia \$3.5 billion a year.⁹² To couch this as a problem of corruption in South-East Asia obscures the participation in a corrupt system by other countries willing to “timber launder”⁹³ and by the TNCs that typically act as ultimate purchasers.⁹⁴

88. WINBOURNE, *supra* note 54, at 4 (emphasis omitted).

89. *Corruption Perception Index 2016*, TRANSPARENCY INT’L (Jan. 25, 2017), https://www.transparency.org/news/feature/corruption_perceptions_index_2016 [<https://perma.cc/W2G2-A9RS>].

90. For a good description of this phenomenon and the social corrosion it produces, see generally CHAYES, *supra* note 85.

91. *Corruption Perception Index 2016*, *supra* note 89.

92. *New UNODC Campaign Highlights Transnational Organized Crime as a US\$870 Billion a Year Business*, UNITED NATIONS OFF. ON DRUGS & CRIME (July 16, 2012), <https://www.unodc.org/unodc/en/frontpage/2012/July/new-unodc-campaign-highlights-transnational-organized-crime-as-an-us-870-billion-a-year-business.html> [<https://perma.cc/2F2P-7UYV>].

93. UNITED NATIONS OFF. ON DRUGS & CRIME, ENVIRONMENTAL CRIME—THE TRAFFICKING OF WILDLIFE AND TIMBER, available at https://www.unodc.org/documents/toc/factsheets/TOC12_fs_environment_EN_HIRES.pdf [<https://perma.cc/B28H-UKKX>] (last visited May 9, 2018). For a description of timber laundering in Peru, see ENVTL. INVESTIGATIONS AGENCY, *supra* note 53, at 8–13 (describing the process of laundering timber through false forest inventories, validated by corrupt forest officers).

94. For example, Lumber Liquidators paid \$13 million in criminal fines for illegally importing flooring that had been harvested illegally in Russia. Press Release, Dep’t of

France's Elf Aquitaine corruption scandal of the 1990s underscores this point. Elf Aquitaine had been a French State-owned oil company that was privatized in 1994.⁹⁵ Investigations revealed an Elf network of bribery, cronyism, and corruption of "staggering proportions" that reached the heights of French corporate and political life.⁹⁶ The company had paid millions of euros to buy influence and contacts across Africa,⁹⁷ Asia,⁹⁸ and Europe.⁹⁹ In Congo, Angola and Gabon, Elf's illicit payments fomented corruption, lining the pockets of a ruling elite while siphoning off the proceeds of oil resources before they ever reached the State treasuries.¹⁰⁰ Although more than thirty company officials went to jail, those convictions were generally perceived as merely the tip of the iceberg.¹⁰¹ The Elf saga underscores the importance of including the identity of the

Justice, Lumber Liquidators Inc. Sentenced for Illegal Import of Hardwood and Related Environmental Crimes (Feb. 1, 2016), available at <https://www.justice.gov/opa/pr/lumber-liquidators-inc-sentenced-illegal-importation-hardwood-and-related-environmental> [<https://perma.cc/QA4R-PQQ5>].

95. *Public Offering for Elf Aquitaine Opens*, UPI (Jan. 21, 1994), <https://www.upi.com/Archives/1994/01/21/Public-offering-of-Elf-Aquitaine-opens/4776759128400/> [<https://perma.cc/C359-6KVF>]; see also *France Nears the End of Elf Aquitaine Sale*, N.Y. TIMES (Nov. 14, 1996), <https://www.nytimes.com/1996/11/14/business/france-nears-the-end-of-elf-aquitaine-sale.html> [<https://perma.cc/K3WK-46X8>].

96. Jon Henley, *Elf Bribery Scandal Claims Dumas*, GUARDIAN (Mar. 1, 2000, 9:17 PM), <https://www.theguardian.com/world/2000/mar/02/eu.politics> [<https://perma.cc/YG2H-29PA>]. The highest profile perpetrator brought to trial was former French Foreign Minister Roland Dumas. His indictment on corruption charges forced Dumas to resign from his position as head of the Constitutional Council, France's highest court. James Coomeramy, *Dumas Resigns in Corruption Probe*, BBC NEWS (Mar. 1, 2000, 11:13 AM), <http://news.bbc.co.uk/2/hi/europe/662257.stm> [<https://perma.cc/6AGA-NEH9>]. Dumas was convicted in 2002, but his conviction was overturned on appeal. John Lichfield, *Court Overturns Dumas Conviction for Corruption*, INDEPENDENT (Jan. 30, 2003), <https://www.independent.co.uk/news/world/europe/court-overturns-dumas-conviction-for-corruption-131369.html> [<https://perma.cc/TZS4-HJG2>].

97. Cassie Knight, *Congo's Oil Quagmire*, GLOBALIST (Apr. 19, 2008), <https://www.theglobalist.com/congos-oil-quagmire/> [<https://perma.cc/42RK-X8HP>].

98. *French Judge Dismisses Lafayette Case*, TAIPEI TIMES (Oct. 3, 2008), <http://www.taipetitimes.com/News/taiwan/archives/2008/10/03/2003424891/1> [<https://perma.cc/Y47KMPZR>] (describing corruption in Taiwanese warship purchases).

99. *An Oily Scandal*, DW (Feb. 5, 2002), <http://www.dw.com/en/an-oily-scandal/a-435550-1> [<http://p.dw.com/p/1pJ0>].

100. Jon Henley, *France Pursues Bigger Picture in Elf Scandal*, GUARDIAN (June 1, 2002, 9:52 PM), <https://www.theguardian.com/world/2001/jun/02/jonhenley> [<https://perma.cc/S7NM-H83Z>]; Knight, *supra* note 97.

101. Henley, *supra* note 100; Knight, *supra* note 97. For a full description of the case written by the French Magistrate in charge of the investigation, see generally EVA JOLY, JUSTICE UNDER SIEGE: ONE WOMAN'S BATTLE AGAINST A EUROPEAN OIL COMPANY (2006).

corruptors, and the legal systems that enable their actions, into any story of developing country corruption. Any corruption narrative that focuses merely on the identity of the corrupted and the flaws in the legal system that enable *their* actions is inherently incomplete. Thus, a more accurate definition of corruption would cast the net more broadly to include “the abuse of [all] entrusted power for private gain.”¹⁰²

Maybe there is something about the very act of extracting resources to meet the needs of distant consumers who are completely unaccountable and uninterested in the local costs associated with that extraction that leads to the situation I am calling “implicit corruption.” By requiring, as a condition of entry, that social and economic power be transferred to private actors, global trade regimes and international law limit the possibilities for environmental protection and human rights accountability. Even grand corruption,¹⁰³ which examines collusion between businesses and politicians within a country—the kinds of corruption that undermine human rights, prevent sustainable development, and fuel social exclusion—does not define corruption broadly enough to capture the corrosive effects of this externally-imposed implicit corruption. Implicit corruption undermines democracy every bit as much as do bribes or embezzlement, and by allowing the collection of rents, implicit corruption reduces economic productivity, just as explicit corruption does. While this notion of grand corruption begins to capture enormous levels of corruption, even in the “rule of law” countries, where companies funnel massive amounts of money into lobbying intended to alter laws and regulations,¹⁰⁴ it still ignores the foundational role that

102. *What is Corruption?*, TRANSPARENCY INT’L, <https://www.transparency.org/what-is-corruption/> [<https://perma.cc/SDC4-UV7Q>] (last visited Apr. 19, 2018); see also *Corruption*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/corruption> [<https://perma.cc/L9RT-H9PM>] (last visited Apr. 19, 2018) (defining corruption as “dishonest or illegal behavior especially by powerful people.”).

103. Transparency International defines “grand corruption” as “[t]he abuse of high-level power that benefits the few at the expense of the many, and causes serious and widespread harm to individuals and society.” *Grand Corruption*, TRANSPARENCY INT’L, https://www.transparency.org/glossary/term/grand_corruption [<https://perma.cc/RD7Z-3F4P>] (last visited Apr. 19, 2018). Transparency International goes on to note that grand corruption “often goes unpunished.” *Id.*

104. In the United States, for example, a unanimous Supreme Court recently narrowed the definition of public corruption to exclude much of what the public would consider to be influence peddling. See *McDonnell v. United States*, 136 S. Ct. 2355 (2016) (finding that federal corruption prosecutions are limited to situations in which public officials take

international law plays in cementing that corruption into domestic regimes.

From its colonial roots to the present, globalized trade has focused on the needs and desires not of the inhabitants of developing countries, but of producers and consumers elsewhere.¹⁰⁵ During colonialism, resources flowed from the colonies to satisfy consumer desires in the colonizing countries, and advance the colonizers' financial interests.¹⁰⁶ Prevailing development strategies largely continue this pattern. Developing countries are encouraged to enter the global market by producing raw commodities intended for export.¹⁰⁷ The lending policies of multilateral and bilateral development institutions fostered and funded this trend,¹⁰⁸ creating not only opportunities for grand and petty corruption, but also leaving widespread environmental degradation in their wake.¹⁰⁹ Indeed, one European Union

"formal" and "concrete" government actions in response to gifts or payments and exempting from corruption actions like arranging meetings or urging underlings to consider a matter, even when those favors were preceded or followed by gifts or money). This followed the infamous 2010 *Citizens United* decision in which the Supreme Court concluded that "ingratiation and access" in exchange for campaign contributions was "not corruption," *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 360 (2010), and a decision in which the Supreme Court concluded that the crime of theft "of honest services" applied only to bribes and kickbacks. *Skilling v. United States*, 561 U.S. 358, 368 (2010).

105. For example, under British colonial rule, India experienced a series of devastating famines from around 1876 through 1902 in which tens of millions died. Yet, during that period, grain merchants exported record quantities of grain out of India. See, e.g., B.M. BHATIA, *FAMINES IN INDIA: A STUDY IN SOME ASPECTS OF THE ECONOMIC HISTORY OF INDIA, 1860-1945*, at 37-39, 137-38 (1963) (showing that grain exports more than doubled during the famine years, and tripled during the worst years). Ireland had a similar experience under British rule. See CECIL WOODHAM-SMITH, *THE GREAT HUNGER: IRELAND 1845-1849*, at 75-77 (1962).

106. Richard Drayton, *The Wealth of the West Was Built on Africa's Exploitation*, *GUARDIAN* (Aug. 19, 2005, 8:31 PM), <https://www.theguardian.com/politics/2005/aug/20/past.hearof-rica05> [<https://perma.cc/25SL-ASW4>] (making this point); see generally GUY STANDING, *THE CORRUPTION OF CAPITALISM: WHY RENTIERS THRIVE AND WORK DOES NOT PAY* (2017).

107. See Jasper Goss et al., *Agri-Food Restructuring and Third World Transnationals: Thailand, the CP Group and the Global Shrimp Industry*, 28 *WORLD DEV.* 513, 514-15 (2000); see also Bratspies, *supra* note 87.

108. The Asian Development Bank and the World Bank were the largest sources of loans and grants for development of shrimp farming in developing countries. Other development banks also participated significantly in funding shrimp farming projects in developing countries. PASCAL RAUX & DENIS BAILLY, *EUROPEAN COMM'N, LITERATURE REVIEW ON WORLD SHRIMP FARMING*, INCO-DEV Project No. ICR-2001-10042, at 4, 11-12 (2002); Solon Barraclough & Andrea Finger-Stich, *Some Ecological and Social Implications of Commercial Shrimp Farming in Asia* 18 (U.N. Research Inst. for Soc. Dev., Discussion Paper No. 74, 1996).

109. See Rimjhim M. Aggarwal, *Globalization, Local Ecosystems, and the Rural Poor*, 34 *WORLD DEV.* 1405 (2006); Arthur E. Neiland, et al., *Shrimp Aquaculture: Economic Perspectives*

assessment of this relationship concluded that the existing legal infrastructure presents “an open opportunity for illegal shipment of hazardous wastes.”¹¹⁰

This model of global trade also includes a deeper, more implicit form of corruption—it is frequently structured to deny developing countries access to the very desirable commodities they produce.¹¹¹ For example, West Africa produces some of the lowest-sulfur crude oil in the world¹¹²—oil that can be refined into relatively clean gasoline and diesel fuels.¹¹³ In fact, “[t]he region produces more than enough of this high-quality crude to satisfy [its] domestic demands.”¹¹⁴ Yet, because these countries lack domestic refining capacity, they depend on fuel oils imported from the European Union and the United States.¹¹⁵ These Northern traders have built a hugely profitable global industry devoted to creating low-quality, polluting fuels (so-called “African Quality” fuel)¹¹⁶ for import into these countries. The profits flow to traders based elsewhere, while West Africa reaps a harvest of pollution and illness. Examining this

for Policy Development, 25 MARINE POL’Y 265, 267 (2001) (noting that export industries can create a culture of “mining” rather than sustainably managing natural resources). There are also significant social justice concerns associated with this strategy as it entails the privatization and enclosure of areas that were traditionally common-property resources. *See generally* JAMES BOYLE, *THE PUBLIC DOMAIN: ENCLOSING THE COMMONS OF THE MIND* (2008).

110. BEST PRACTICES, *supra* note 43, at 2.

111. The famine-era exports from India were official policy of the British Viceroy which insisted on non-interference in grain export markets and simultaneously refused to provide relief to those unable to purchase food. *See supra* note 105 and accompanying text. Even at the time, it was clear that the devastating famines were not caused by food *production* shortages in India, but were instead a manifestation of the colonial political structure that prioritized meeting consumer demand in Europe. *See* BHATIA, *supra* note 105, at 8–10; I GOV’T OF INDIA, *REPORT ON THE FAMINE IN THE BOMBAY PRESIDENCY 1899–1902*, part I ¶ 4 (1903); JAMES RAMSAY MACDONALD, *THE AWAKENING OF INDIA* 161–64 (1910); LALA LAJPAT RAI, *ENGLAND’S DEBT TO INDIA: A HISTORICAL NARRATIVE OF BRITAIN’S FISCAL POLICY IN INDIA* 274–81 (1917).

112. MARC GUÉNIAT ET AL., *PUB. EYE, DIRTY DIESEL: HOW SWISS TRADERS FLOOD AFRICA WITH TOXIC FUELS* 11–13 (Edward Harris ed., 2016); *Today in Energy: Crude Oils Have Different Quality Characteristics*, U.S. ENERGY INFO. ADMIN. (July 16, 2012), <https://www.eia.gov/todayinenergy/detail.php?id=7110> [<https://perma.cc/4R6R-Z9ZZ>].

113. For an explanation of how different qualities of fuel are processed, and their according value, see Wendy Lyons Sunshine, *The Basics of Crude Oil Classifications*, BALANCE (July 9, 2017), <https://www.thebalance.com/the-basics-of-crude-oil-classification-1182570> [<https://perma.cc/RMC2-F96Y>].

114. GUÉNIAT ET AL., *supra* note 112, at 13.

115. *Id.*

116. *Id.*; Stephanie Hegardy, *The Dirty Secret of ‘African Quality’ Fuel*, BBC NEWS (Mar. 9, 2017) <http://www.bbc.com/news/av/world-africa-39220347/the-dirty-secret-of-african-quality-fuel> [<https://perma.cc/Z7DF-PRUS>].

portion of the oil trade through the 2006 Trafigura incident in Côte d'Ivoire highlights just how much the structure of this international trade is built on implicit corruption and depends on the existence of State-level corruption as a last link.

III. THE DUMPING IN CÔTE D'IVOIRE: A LESSON IN IMPLICIT CORRUPTION

Trafigura's version of the events in Abidjan is straightforward. On the webpage dedicated to explaining the incident, Trafigura reports:

In 2006 Trafigura chartered the Probo Koala, a tanker, for the transportation of oil products. The vessel needed to have some residual waste or 'slops' treated. These slops were discharged to a licensed contractor in Abidjan in the presence [sic] Ivorian officials, but the contractor then recklessly dumped them at 17 or 18 locations in the city, triggering the events known as 'the Probo Koala case.'¹¹⁷

This bare-bones statement leaves out many important facts.

The background of this environmental tragedy is the global trade in diesel fuel. "Trafigura is one of the world's largest independent traders in oil and petroleum products,"¹¹⁸ dominating the import and distribution of petroleum products across West Africa.¹¹⁹ A privately-held firm, Trafigura's network "extends to every corner of the globe."¹²⁰ The company's annual revenues dwarf the gross national product of many States.¹²¹ Trafigura operated largely out

117. *The Probo Koala Case in 12 Questions*, TRAFIGURA, <https://trafigura.com/resource-centre/probo-koala/> [<https://perma.cc/R35E-H7R7>] (last visited Apr. 20, 2018).

118. TRAFIGURA, 2018 CORPORATE BROCHURE 8 (2018).

119. GUÉNIAT ET AL., *supra* note 112, at 5.

120. *About Us*, *supra* note 9.

121. In 2017, Trafigura reported a profit of \$2.2 billion, on revenues of \$136.4 billion. TRAFIGURA, 2017 ANNUAL REPORT (2017). By way of comparison, 26 countries had GDPs that were less than Trafigura's profits, and only 57 countries had 2017 GDPs that exceeded Trafigura's 2017 revenues. *List of Countries by Projected GDP*, STATISTICS TIMES (Mar. 23, 2018), <http://statisticstimes.com/economy/countries-by-projected-gdp.php> [<https://perma.cc/8V8V-LK6N>]. In 2006, the year the dumping in Abidjan occurred, Trafigura's turnover was \$45 billion, roughly three times Côte d'Ivoire's GDP of approximately \$18 billion. See TRAFIGURA ANNUAL REPORT 2006, at 2 (2006); *GDP Grows 1.5% in Ivory Coast*, COUNTRYECONOMY, <https://countryeconomy.com/gdp/ivory-coast?year=2006> [<https://perma.cc/G5G6-C77V>] (last visited Apr. 20, 2018). Moreover, at the time of the dumping and its ensuing health crisis, Côte d'Ivoire was emerging from a serious, multi-year political and military crisis. *Ivory Coast*, GLOBAL POL'Y F., <https://www.globalpolicy.org/security-council/i>

of the limelight until the 2006 dumping of its hazardous waste in Côte d'Ivoire made the firm a household name.

Trafigura's business model involves using regulatory arbitrage to sell low-quality fuels (with high sulfur content) into African markets with weak environmental standards, producing "African Quality" fuels.¹²² To that end, Trafigura acquires waste oils¹²³ and, using a process criticized as predatory "blend-dumping,"¹²⁴ blends that cheap, dirty oil with higher quality blendstocks, thereby degrading the high quality stocks into dirty, low-quality fuels that just barely satisfy the weakest national standards for sulfur content.¹²⁵ This strategy involves scouring the world for the cheapest blendstocks. In 2005, Trafigura acquired a particularly inexpensive low-quality feed stock from Mexico called coker naphtha.¹²⁶ Trafigura believed

ndex-of-countries-on-the-security-council-agenda/ivory-coast.html [https://perma.cc/7GY74YB5] (last visited Apr. 20, 2018).

122. The shipboard mixing that gave rise to the wastes dumped in Abidjan is an example of this process.

123. A lengthy Trafigura e-mail chain offers a unique window into how insiders perceive this process: from the company's delight over acquiring an extremely cheap blendstock, to their annoyance that disposing of the associated toxic waste will cost money, to the degraded fuel's delivery in Lagos, Nigeria and the ultimate dumping of the toxic wastes in Abidjan. See David Leigh, *The Trafigura Files and How To Read Them*, GUARDIAN (Sept. 16, 2009, 10:08 AM), <https://www.theguardian.com/world/2009/sep/16/trafigura-e-mail-files-read> [https://perma.cc/7NKJ-XTS9]. Specific e-mails in this e-mail chain are cited frequently throughout this Article, and unless otherwise noted, the e-mails and letters analyzed in this Article all stem from this e-mail chain. See *Final Emails*, GUARDIAN (Sept. 16, 2009, 10:08 AM), http://image.guardian.co.uk/sys-files/Guardian/documents/2009/09/16/Final_e-mails.pdf [https://perma.cc/UHG3-NBK5].

124. GUÉNIAT ET AL., *supra* note 112, at 6.

125. The resulting fuels could never be legally sold in the EU or the US because they contain sulfur levels that vastly exceed EU and US regulatory limits. *Id.* Pollution from dirty fuels contribute to millions of premature deaths each year, see John Vidal, *Air Pollution Rising at an 'Alarming Rate' in World's Cities*, GUARDIAN (May 11, 2016, 11:01 PM), <https://www.theguardian.com/environment/2016/may/12/air-pollution-rising-at-an-alarming-rate-in-worlds-cities> [https://perma.cc/S9QL-L7HS], and tens of thousands in West Africa. SARAH CHAMBLISS ET AL., INT'L COUNCIL ON CLEAN TRANSP. 47 fig. 19 (2013).

126. Coker naphtha is notoriously difficult to process. See e.g., *Coker Naphtha Hydrotreating Technology*, HALDOR TOPSOE, <https://www.topsoe.com/products/coker-naphtha-hydrotreating-technology> [https://perma.cc/5KB9-BJZJ] (last visited Mar. 31, 2018) (characterizing coker naphtha as a "difficult feedstock" that "places extraordinary demands" on the treating process); Junaid Shah, *Naphtha Hydroprocessing 101*, REFINERLINK (Sept. 26, 2016), http://www.refinerlink.com/blog/Naphtha_Hydroprocessing_101 [https://perma.cc/9TDN-82YK] (describing coker naphtha as "degrad[ed] with a monumental increase in impurities such as sulfur, nitrogen, silicon, etc."). For details about the origins of the coker naphtha feedstock at the heart of this case, see Letter from James H. Rodio, Holland & Knight LLP, to John Gauthier, Special Agent, Criminal Investigation Division of the EPA

it could make what it termed “serious dollars”¹²⁷ by using an unusual process called “caustic washing” to de-sulfurize the naphtha sufficiently to produce “Africa-Quality” fuels.¹²⁸ Caustic washing is banned in most countries because it produces a highly-contaminated waste that very few facilities can safely handle.¹²⁹ Trafigura was aware of the disposal problem, noting in a 2005 internal memorandum that “[c]austic washes are banned in most countries due to the hazardous nature of the waste (mercaptans, phenols, smell)¹³⁰ and suppliers of caustic are unwilling to dispose

(Dec. 14, 2006); *Toxic Waste Dumping in Abidjan: Chapter 2: The Ivory Coast Dumping*, STATE CRIME, <http://www.statecrime.org/testimonyproject/ivorycoast#chapter2> [<https://perma.cc/62S6-J55F>] (last visited Mar. 31, 2018).

127. E-mail from James McNicol, Trader, Trafigura, to Leon Christophilopoulos, Head Gas Trader, Trafigura, Jorge Troop, Trader, Trafigura, Farzad Askari, Vice President, Trafigura, & Amjad Habbas, Dir., Trafigura (Dec. 27, 2005, 4:54 PM). Company executives estimated that each cargo of coker naphtha purchased for use in producing “African Quality” fuel would generate \$7 million in profit. See E-mail from James McNicol, Trader, Trafigura, to Naeem Ahmed, Chemist, Trafigura (Dec. 28, 2005, 9:30 AM).

128. See E-mail from James McNicol, to Leon Christophilopoulos, *supra* note 127; E-mail from James McNicol, Trader, Trafigura, to Leon Christophilopoulos, Head Gas Trader, Trafigura, Jorge Troop, Trader, Trafigura, Farzad Askari, Vice President, Trafigura, & Amjad Habbas, Dir., Trafigura (Dec. 27, 2005, 1:12 PM); E-mail from James McNicol, Trader, Trafigura, to Claude Dauphin, President, Trafigura (Dec. 27, 2005, 11:24 PM). The usual process by which the coker naphtha would have been processed is called mercaptan oxidation (known as the “Merox process”). Merox is performed in a specialized facility and includes a step to oxidize the waste from the process into a stable, less hazardous form. Caustic washing is cheaper, but generates a highly-contaminated waste product. AMNESTY INT’L, *TIMELINE: TOXIC WASTE DUMPING IN CÔTE D’IVOIRE* (2012). Caustic washing consists of adding caustic soda and a catalyst to the naphtha. Complaint Concerning Failure to Prosecute an Offence from Liesbeth Zegveld, Lawyer, Greenpeace, and Michiel Pestman, Lawyer, Greenpeace, to the European Court of Justice 4 n.13 (Sept. 16, 2009) [hereinafter Greenpeace Criminal Complaint]. This lowers the odorous mercaptan sulfur content of the fuel. Letter from John Minton, Minton, Treharne & Davis Ltd, to Mark Aspinall, Lawyer, Waterson Hicks, (Sept. 14, 2006) [hereinafter Minton Report], available at <https://file.wikileaks.org/file/waterson-toxicwaste-ivorycoast-%C3%A92009.pdf> [<https://perma.cc/GCC2-883Z>].

129. Complaint from J.P. van den Brink, Lawyer, Greenpeace, to the Dutch Advertising Code Foundation 6–7 (Jan. 6, 2010) [hereinafter Greenpeace Ad Complaint], available at <http://www.greenpeace.nl/Global/nederland/report/2010/5/coplaint-dutch-advertising-code.pdf> [<https://perma.cc/UGG4-MS55>].

130. A report commissioned by Trafigura confirmed that the wastes dumped around Abidjan likely contained “considerable quantit[ies]” of dangerous sulfide compounds that could cause harm either by contact or at a distance. Minton Report, *supra* note 128. Trafigura obtained a gag order preventing the British press from discussing this report, and attempted to use the gag order to prevent any news coverage of the fact that a gag order had been issued. David Leigh, *Guardian Gagged from Reporting Parliament*, *GUARDIAN* (Oct. 12, 2009, 3:51 AM), <https://www.theguardian.com/media/2009/oct/12/guardian-gagged-from-reporting-parliament> [<https://perma.cc/L83A-DCKS>].

of the waste since there are not many facilities remaining in the market. . . .”¹³¹ Trafigura was also aware that EU law prohibited the transport of caustic wastes across EU borders.¹³² The cost of disposing of this highly-contaminated waste ultimately became a key driver of the environmental contamination that ensued in Côte d’Ivoire.¹³³

Trafigura’s initial plan was apparently to conduct caustic washing in the Tunisian port of La Skhirra. However, after some of the facility’s workers were hospitalized with breathing difficulties in March 2006, Trafigura’s Tunisian operation shut down.¹³⁴ In writing an incident report, Trafigura initially noted that noxious odors were produced, likely by Di-enes which “are known for causing stability problems in oil.”¹³⁵ However, in response to internal objections, the “offending paragraph” was removed.¹³⁶

Internal emails make it clear that Trafigura had no intention of letting the bad experience in Tunisia stop their proposed processing and sale of this material. Indeed, they viewed the Tunisian incident as a “PR exercise” rather than a wake-up call.¹³⁷

131. See Greenpeace Ad Complaint, *supra* note 129, at 6–7 (quoting Trafigura Internal Memo (Dec. 28, 2005)).

132. *Id.*; see also E-mail from Naeem Ahmed, Chemist, Trafigura, to Leon Christophilopoulos, Head Gas Trader, Trafigura, & James McNicol, Trader, Trafigura (Dec. 28, 2005, 3:11 PM). Every year, authorities stop hundreds of illegal waste shipments destined for countries outside the EU. See EUROPEAN UNION NETWORK FOR THE IMPLEMENTATION & ENF’T OF ENVTL. LAW, *supra* note 48, at 35–39. A serious risk with such shipments is that the waste is dumped illegally or processed without protecting humans and the environment. A significant percentage of the waste moving within the EU is illegal. See *id.* The failure of Dutch authorities to stop this particular shipment will be discussed in notes 208–215 and 286–289 and the accompanying text.

133. In fining Trafigura €1 million for illegal export of the waste, a Dutch judge concluded that Trafigura had knowingly rejected safe disposal options in the Netherlands and instead chose to get rid of waste it knew to be hazardous cheaply in Abidjan “for commercial reasons.” Criminal Court Amsterdam 23 juli 2010 (Transfigura Beheer BV) (Neth.), BN 2149, 13/846003-06 ¶ 13.3.9 [hereinafter Criminal Court Amsterdam Decision], translated at TRAFIGURA, https://www.trafigura.com/media/3928/judgment_of_23_july_2010_english_rb_amsterdam_ecli_nl_rbams_2010_bn2149.pdf [<https://perma.cc/C66A-392L>].

134. Greenpeace Ad Complaint, *supra* note 129, at 7.

135. E-mail from David Foster, Consultant, White Consulting, to Naeem Ahmed, Chemist, Trafigura (Mar. 24, 2006, 11:46 AM).

136. E-mail from Naeem Ahmed, Chemist, Trafigura, to David Foster, Consultant, White Consulting (Mar. 24, 2006, 12:30 PM) (requesting that the paragraph be struck); E-mail from David Foster, Consultant, White Consulting, to Naeem Ahmed, Chemist, Trafigura (Mar. 24, 2006, 2:01 PM) (removing the paragraph).

137. E-mail from Naeem Ahmed, Chemist, Trafigura, to White Consultant Group (Mar. 22, 2006, 1:47 PM).

Trafigura instead floated the possibility of “tak[ing] on a vessel that is about to be scrapped for something like \$5k/day . . . and park[ing] [it] somewhere in [West Africa]”¹³⁸ adding the caveat “I don’t know how we would dispose of the slops and I don’t imply we would dump them, but for sure there must be some way to pay someone to take them.”¹³⁹ Another Trafigura actor poured cold water on the cost estimates for that scheme, adding “that implies you don’t want insurance . . . and do not care if she sinks.”¹⁴⁰ The traders went back and forth over the price for such a ship, emphasizing that they wanted “dogs[,] [a]nd cheap ones.”¹⁴¹ Trafigura then rented the Panamanian flagged ship the *Probo Koala*¹⁴² and moved its caustic washing operation to international waters near Malta.¹⁴³ The hazardous wastes, called slops, created by these caustic washing and blending operations, were stored on the *Probo Koala*.¹⁴⁴

In April of 2006 Trafigura approached facilities in multiple European ports¹⁴⁵ seeking to offload roughly 550 cubic meters of the caustic waste.¹⁴⁶ All rejected the waste as too caustic and

138. E-mail from Leon Christophilopoulos, Head Gas Trader, Trafigura, to Jose Larocca, Trader, Trafigura, & Archronida Gerakis, Co-Founder & Managing Dir., Falcon Navigation (Mar. 10, 2006, 11:05 PM).

139. *Id.* It is worth noting that after this incident, Jose Larocca was promoted to be Trafigura’s Head of Oil Trading. *Jose Larocca*, TRAFIGURA, <https://trafigura.com/about-us/leadership/board-member?Member=Jose+Larocca> [<https://perma.cc/ZF5K-GE25>] (last visited Apr. 20, 2018).

140. E-mail from Archronida Gerakis, Co-Founder & Managing Dir., Falcon Navigation, to Leon Christophilopoulos, Head Gas Trader, Trafigura, & Jose Larocca, Trader, Trafigura (Mar. 13, 2006, 9:15 AM).

141. E-mail from Leon Christophilopoulos, Head Gas Trader, Trafigura, to Archronida Gerakis, Co-Founder & Managing Dir., Falcon Navigation & Jose Larocca, Trafigura (Mar. 13, 2006, 2:31 PM).

142. The ship was a Korean built carrier owned by a Norwegian company but operated by a Greek company while sailing under a Panamanian flag. Jonathan Verschuuren & Steve Kuchta, *Victims of Environmental Pollution in the Slipstream of Globalization*, in *THE NEW FACES OF VICTIMHOOD: GLOBALIZATION, TRANSNATIONAL CRIMES AND VICTIM RIGHTS* 127, 129 (Rianne Letschert & Jan van Dijk eds., 2011).

143. *Trafigura Toxic Waste ‘Made in Malta’*, MALTA INDEP. (Nov. 22 2009), <http://www.independent.com.mt/articles/2009-11-22/news/trafigura-toxic-waste-made-in-malta-266666/> [<https://perma.cc/7H9U-AAQT>].

144. E-mail from Leon Christophilopoulos, Head Gas Trader, Trafigura, to Jorge Troop, Trader, Trafigura (Apr. 18, 2006, 12:36 PM).

145. AMNESTY INT’L, *supra* note 128.

146. Greenpeace Criminal Complaint, *supra* note 128, at 4 n.13.

requiring special handling.¹⁴⁷ Trafigura also attempted to dispose of the wastes in Tunisia. Internal Trafigura emails revealed that management instructed the *Probo Koala* captain as follows: “[please] ensure that any remain[s] 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 LaSkhira and merely declare it as tank washings.”¹⁴⁸ This too was unsuccessful, La Skhirra would not let the *Probo Koala* discharge the slops.¹⁴⁹ After this, Trafigura clearly viewed the disposal of this waste to be a matter of urgency, to “avoid choking on the stuff.”¹⁵⁰ Trafigura personnel referred internally to the waste as “PMI shit.”¹⁵¹

In early July 2006, the *Probo Koala* attempted to discharge the caustic wastes in Amsterdam. To that end, Trafigura entered into a contract with Amsterdam Port Services (“APS”) to dispose of the waste for €7 per cubic meter.¹⁵² In this contract, Trafigura characterized the waste as ordinary tank washings, rather than as hazardous waste.¹⁵³ On the forms required by Dutch authorities, Trafigura reportedly characterized the wastes as “washing water containing oil.”¹⁵⁴ However, alerted by strong odors,¹⁵⁵ APS sampled the waste and discovered it was far more hazardous than

147. Criminal Court Amsterdam Decision, *supra* note 133, ¶ 5.8 (identifying Gibraltar, Malta, and Italy).

148. E-mail from Probo Koala to Theologos Gampierkas, Probo Koala Captain (Apr. 15, 2006, 4:26 PM).

149. E-mail from Leon Christophilopoulos to Jorge Troop, *supra* note 144.

150. *Id.*

151. This was the title of a series of internal Trafigura e-mails from April 15th through 26th. Trafigura CEO Claude Dauphin participated in that e-mail thread. See *Final Emails*, *supra* note 123.

152. Criminal Court Amsterdam Decision, *supra* note 133, ¶¶ 8.3.3.3–8.3.3.7.

153. *Id.*

154. Greenpeace Criminal Complaint, *supra* note 128, at 6. In 2010, Trafigura was fined € million for exporting waste to the Ivory Coast in violation of European law and for delivering goods harmful to the health in Amsterdam, with concealment of the noxious character. Criminal Court Amsterdam Decision, *supra* note 133, ¶¶ 8.3.3.14, 15. The ship’s captain was convicted and given a five-month suspended prison sentence. Criminal Court Amsterdam 23 juli 2010 (Probo Koala Captain) (Neth.), BN 2193, 13/846004-08 ¶ 13 [hereinafter Captain Decision], translated at GOV’T NETH., <https://linkeddata.overheid.nl/front/portal/document-viewer?ext-id=ECLI:NL:RBAMS:2010:BN2193> [<https://perma.cc/4L2E-URSM>].

155. On July 3, odor complaints prompted the Dutch police, fire, and environmental health departments to investigate the APS facility. The odors apparently emanated from the Trafigura waste which was then at the APS facility. Greenpeace Criminal Complaint, *supra* note 128, at 5.

the ordinary tank washings contemplated in the contract.¹⁵⁶ APS informed Trafigura that the nearest facility able to safely process and dispose of its hazardous waste was in Rotterdam and that the cost of such disposal would be roughly €1000 (\$1,300) per cubic meter rather than the original €27(\$34) contract price.¹⁵⁷

This information could not have come as a surprise to Trafigura—its internal emails from six months earlier identified Rotterdam as the only facility capable of disposing of the waste safely, and correctly identified the likely cost.¹⁵⁸ Nevertheless, Trafigura refused to pay the higher price and instead demanded that the waste be reloaded on to the *Probo Koala*.¹⁵⁹ After much discussion, Dutch authorities used an extremely narrow definition of their jurisdiction to allow the waste to be returned to the ship.¹⁶⁰ Trafigura told the Dutch authorities that the waste would be “disposed off [sic] at the next convenient opportunity.”¹⁶¹ It was this waste that was ultimately dumped in Côte d’Ivoire. Subsequent Netherlands Forensic Institute testing concluded that given the

156. The deal between Trafigura and APS was for wastes with a chemical oxygen demand (“COD”) of less than 2000 mg/l. Fax from Bert Wolf, APS, to Naeem Ahmed, Chemist, Trafigura (June 20, 2006); E-mail from Anita Spijkers, Bulk Mar. Agencies, to Trafigura Beheer BV c/o Falcon Navigation (July 3, 2006, 9:16 AM). However, official testing revealed COD levels that exceeded the contractual specifications by several orders of magnitude (720,000 rather than under 2,000). J. VAN DER KAMP, MINISTRY OF JUSTICE: DUTCH FORENSIC INSTITUTE, EXPERT REPORT ON ODOR NUISANCE INCIDENT APS AMSTERDAM 13 (2007). Because APS was unable to process the highly contaminated waste itself, it requested processing quotes from two specialized processing plants. Greenpeace Criminal Complaint, *supra* note 146, at 5 n.14 (citing Daily Collection of Maritime Press Clippings 2006-176, A Digital Newspaper for the Shipping Industry).

157. E-mail from Anita Spijkers to Trafigura Beheer BV c/o Falcon Navigation, *supra* note 156.

158. E-mail from Naeem Ahmed to Leon Christophilopoulos & James McNicol, *supra* note 132.

159. It is fairly well-established that avoiding the costs associated with legal disposal is one of the main drivers of illegal waste disposal. Alessio D’Amato et al., *Illegal Waste Disposal, Territorial Enforcement and Policy: Evidence from Regional Data* 6 (Sustainability Envtl. Econ. & Dynamic Studies, Working Paper 03/2014, 2014).

160. Under pressure from Trafigura and APS, Dutch officials concluded that APS had not yet accepted the slops and thus returning the waste to the *Probo Koala* would not be “export” of a hazardous waste in violation of EU regulations. See Karin van Wingerde, *The Limits of Environmental Regulation in a Globalized Economy: Lessons from the Probo Koala Case*, in ROUTLEDGE HANDBOOK ON WHITE-COLLAR AND CORPORATE CRIME IN EUROPE 260, 263–64 (Judith van Erp et al. eds., 2015). Indeed, the Hulshof Committee concluded that the sense of urgency surrounding this questionable decision stemmed from financial considerations. *Id.*

161. E-mail from Theologos Gampierkas, Probo Koala Captain, to Bulk Mar. Agencies (July 3, 2006, 5:53 PM).

level of contamination in the waste, EU law prohibited its export to any African State.¹⁶²

By mid-August, the *Probo Koala* was in Lagos, Nigeria, delivering cargo and still trying to dispose of the waste. A Trafigura employee requested that the slops be transferred to a barge in international waters off the coast of Nigeria, for disposal in Nigeria.¹⁶³ On August 15, 2006, the Dutch police contacted Trafigura to follow up on the waste, cautioning that the waste should be disposed of as chemical waste, and asking to see discharge records.¹⁶⁴ Two days later, having made two unsuccessful attempts to dispose of the waste in Lagos,¹⁶⁵ the *Probo Koala* left for Abidjan, Côte d'Ivoire, a port that had not been part of the ship's planned voyage. The ship had no cargo to deliver in Abidjan, nor was it scheduled to pick up any cargo there. It appears that the sole purpose of the visit to Abidjan was to dispose of the troublesome toxic waste.

On August 19, 2006, the *Probo Koala* arrived in Abidjan.¹⁶⁶ Through Trafigura's subsidiary, Puma Energy Côte d'Ivoire,¹⁶⁷ and with the assistance of Trafigura's shipping agent in Abidjan,¹⁶⁸

162. Dutch Forensic Inst., Expert Report, Report for Public Prosecutions Dep't Related to Amsterdam Port Services 30 (Jan. 29, 2007) (categorizing the waste from the *Probo Koala* as listed hazardous under European Commission Regulations). For the EU law that prohibited the export of such categorized wastes, see Council Regulation 259/93, art. 14, Supervision and Control of Shipments of Waste within, into and out of the European Community, 1993 O.J. (L30) 1, 9, 10 (EC) [hereinafter European Transfer of Waste Shipping Regulation]. Such export is also contrary to the Basel Ban, which bans export of hazardous wastes from OECD countries to non-OECD countries, as well as the Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes Within Africa (which made such import a crime). See Basel Ban, *supra* note 13; Bamako Convention, *supra* note 14.

163. E-mail from Jorge Luis Marrero, Head of Contracts & Logistics for Petroleum Activities, Trafigura, to Stephen Mann, Comoditex (Aug. 15, 2006, 4:57 PM).

164. See AMNESTY INT'L & GREENPEACE, THE TOXIC TRUTH: ABOUT A COMPANY CALLED TRAFIGURA, A SHIP CALLED THE PROBO KOALA, AND THE DUMPING OF TOXIC WASTE IN CÔTE D'IVOIRE 11 (2012).

165. Criminal Court Amsterdam Decision, *supra* note 133, ¶ 5.30.

166. TRAFIGURA, THE PROBO KOALA JOURNEY, available at https://www.trafigura.com/images/probo-koala/Probo_Koala_Journey.pdf [<https://perma.cc/J4JT-57PY>] (last visited Apr. 20, 2018).

167. At the time, Puma Energy was a wholly-owned subsidiary of Trafigura. Greenpeace Criminal Complaint, *supra* note 146, at 2 n.7. Trafigura remains one of the main shareholders. *Ownership and Shareholders*, PUMA ENERGY, <https://www.pumaenergy.com/en/about-us/ownership-and-shareholders/> [<https://perma.cc/VQJ9-C8MP>] (last visited Apr. 20, 2018).

168. According to Lord Fraser of Carmyllie, whom Trafigura hired to investigate, Trafigura had been using the West African International Business Services for three years as

Trafigura arranged to transfer its waste to a newly created Abidjani company, Compagnie Tommy Ltd. Trafigura entered a one-page handwritten contract with Compagnie Tommy to dispose of the waste at a price of thirty-five dollars per cubic meter¹⁶⁹ for what Trafigura described as “chemical slops.”¹⁷⁰ In confirmation emails, Trafigura referred to the waste as “polluted water” rather than hazardous waste.¹⁷¹ It is worth noting that the figure Compagnie Tommy quoted is comparable to the price APS had offered Trafigura before discovering the hazardous nature of the waste.¹⁷² Compagnie Tommy loaded Trafigura’s waste into rented trucks, and brought it to the Akouédo dump.¹⁷³ However, the stench emanating from the waste caused enough concern that it prompted the municipal dump to close.¹⁷⁴ Compagnie Tommy then proceeded to dump the waste at approximately eighteen sites in the district of Abidjan between the evening of August 19th and the morning of August 20th, 2006.¹⁷⁵

Almost immediately, thousands of individuals began flooding in to “health-care centers complaining of nausea, headaches, vomiting, abdominal pains, skin reactions and a range of eye, ear,

its shipping agent at the Port of Abidjan. LORD FRASER OF CARMYLLIE, *THE PROBO KOALA INQUIRY: SECOND INTERIM REPORT* 6 (2010) [hereinafter FRASER, *SECOND INTERIM REPORT*].

169. Letter from Compagnie Tommy to, Jorge Luis Marrero, Head of Contracts & Logistics for Petroleum Activities, Trafigura (Aug. 18, 2006), available at https://www.trafigura.com/media/3907/correspondence_with_tommy_regarding_the_content_of_the_slops_fr.pdf [<https://perma.cc/PWV2-YNAV>]. In convicting Trafigura of maliciously violating the ban on export of waste from Europe to Africa, the presiding judge in the Court of Amsterdam emphasized the price discrepancy between the disposal price quoted in Europe and the price Trafigura paid in Abidjan, noting “Trafigura—which in the meantime also knew the exact composition [of the waste]—should never have agreed to treatment at such a price.” Criminal Court Amsterdam Decision, *supra* note 133, ¶ 13.3.8.

170. E-mail from Jorge Luis Marrero, Head of Contracts & Logistics for Petroleum Activities, Trafigura, to Kablan N’Zi, Joint Adm’r, Puma Energy (Aug. 17, 2006), available at <http://statecrime.org/testimonyproject/ivorycoast#chapter3> [<https://perma.cc/24B8-2TNL>] (last visited Apr. 22, 2018).

171. Greenpeace Criminal Complaint, *supra* note 128, at 9.

172. *Special Rapporteur*, *supra* note 1, ¶ 26.

173. *Id.* ¶ 27.

174. AMNESTY INT’L & GREENPEACE, *supra* note 164, at 9.

175. *Id.*; FRASER, *SECOND INTERIM REPORT*, *supra* note 168, at 7. Assessing this activity, the most Trafigura’s expert could conclude was that “[t]he evidence is so tainted that no one could reasonably conclude whether this was part of a pre-conceived plan or panic ‘fly tipping’ with the original purpose having been to sell on the slops as notorious ‘black fuel.’” FRASER, *SECOND INTERIM REPORT*, *supra* note 168, at 7.

nose, throat, pulmonary, and gastric problems.”¹⁷⁶ Official estimates put the death toll at 15, with 69 additional hospitalizations, and more than 108,000 medical consultations resulting from the incident.¹⁷⁷ The Côte d’Ivoire Ministry of Health and Public Hygiene concluded that there were 63,296 probable and 34,408 confirmed cases arising from exposure to the waste.¹⁷⁸

Within days, the dumping had become international news. The human health disaster it wrought brought teams from the UN Disaster Assessment and Coordination,¹⁷⁹ the World Health Organization,¹⁸⁰ the UN Office for the Coordination of Humanitarian Affairs¹⁸¹ and the Basel Secretariat¹⁸² to Abidjan. The incident brought down the Côte d’Ivoire government¹⁸³—which was a transitional government that had only been in office for nine months¹⁸⁴—and prompted the European Parliament to adopt a resolution supporting a move to “bring to justice those

176. *Special Rapporteur*, *supra* note 1, ¶ 30. Trafigura’s own experts confirmed that these are precisely the health effects one would expect from a release of the large quantities of hydrogen sulfide contained in the wastes generated from caustic washing. Minton Report, *supra* note 128, ¶ 5.3.

177. RAPPORT DE LA COMMISSION INTERNATIONALE D’ENQUETE SUR LES DECHETS TOXIQUES DEVERSES DANSE LE DISTRICT D’ABIDJAN [REPORT OF THE INTERNATIONAL COMMISSION OF INQUIRY ON THE DISCHARGE OF TOXIC WASTES IN THE DISTRICT OF ABIDJAN] 2 (2007) (author’s translation).

178. *Special Rapporteur*, *supra* note 1, ¶ 31.

179. UNITED NATIONS DISASTER ASSESSMENT & COORDINATION, COTE D’IVOIRE URBAN HAZARDOUS WASTE DUMPING (2006).

180. *Chemical Dump in Cote d’Ivoire*, WORLD HEALTH ORG. (Sept. 20, 2006), http://www.who.int/mediacentre/news/notes/2006/np26_update/en/ [<https://perma.cc/FD5S-UDRR>] (describing dispatch of a World Health Organization team to Abidjan).

181. *Cote d’Ivoire: UN Sends Team to Help Coordinate Response to Deadly Toxic Waste Crisis*, UN NEWS (Sept. 11, 2006), <https://news.un.org/en/story/2006/09/191602-cote-divoire-un-sends-team-help-coordinate-response-deadly-toxic-waste-crisis> [<https://perma.cc/AMV9-JX3Z>] (describing dispatch of a three-member Office for the Coordination of Humanitarian Affairs team to Abidjan).

182. UNITED NATIONS ENVT. PORGRAMME, IMPLEMENTATION OF DECISION VIII/1 ON COTE D’IVOIRE (describing dispatch of a technical assistance mission from November 20th through December 1st, 2006).

183. *New Government Formed in Ivory Coast After Toxic Waste Scandal*, N.Y. TIMES (Sept. 17, 2006), <https://www.nytimes.com/2006/09/17/world/africa/17ivory.html> [<https://perma.cc/24KG-3ZBY>]; *Poisonous Days: A Toxic-Waste Scandal Shows Up the Country’s Fragility*, ECONOMIST (Sept. 14, 2006), <https://www.economist.com/node/7923227/print> [<https://perma.cc/9YMS-MXDT>].

184. Joe Bavier, *Ivory Coast Government Disbanded Over Toxic Waste Scandal*, VOA (Oct. 31, 2009, 9:30 AM), <https://www.voanews.com/a/a-13-2006-09-07-voa29/325912.html> [<https://perma.cc/743C-AC29>].

responsible for this environmental crime and to ensure full remediation of the environmental contamination, as well as compensation for the victims.”¹⁸⁵

An often-undocumented portion of this saga is the toll that the illicit dumping took on the people of Abidjan. While the UN and the Ministry of Health were counting exposure cases, nobody was counting the days of schooling lost because schools in the affected area were closed, or the days of work lost because businesses were shut.¹⁸⁶ Nor was anyone calculating the revenue and food supplies lost because fishing and farming activities were halted, or the inconvenience from having the Akouédo municipal dump closed for months on end.¹⁸⁷ There has been very little transparency about the ongoing risks that exposure victims may face.¹⁸⁸ Years after the dumping, residents still complain about odors, and are still coping with “headaches, skin problems, and respiratory issues that they believe are linked to the incident.”¹⁸⁹ It was only in 2015 that the Côte d’Ivoire government announced that it had completed decontamination of all the dumpsites.¹⁹⁰ This was seven years after UN Special Rapporteur Okechukwu Ibeanu raised concerns about the slow pace of the clean-up, and the negative health impacts experienced by those living next to the unremediated sites.¹⁹¹ These concerns were compounded by

185. Eur. Parl. Resolution on the Export of Toxic Waste to Africa, ¶ L.1, 2006 O.J. (C 313E) 432, 433 [hereinafter Resolution on the Export of Toxic Waste to Africa].

186. Verschuuren & Kuchta, *supra* note 142, at 131.

187. *Id.*

188. See Press Release, United Nations Special Rapporteur, 10th Anniversary of the ‘Probo Koala Incident’ (Aug. 17, 2016), available at <http://www.srtoxics.org/2016/08/10th-anniversary-probo-koala-incident/> [https://perma.cc/8EC6-CQLB]. Contemporaneous health research showed that twenty-one percent of those exposed were still experiencing symptoms months after the dumping occurred. Issake Tiembre, *Toxic Waste Dumping in Abidjan: Health Concerns*, INT’L SOC’Y ENVTL. EPIDEMIOLOGY, <https://ehp.niehs.nih.gov/isee/s-2-13-05/> [https://perma.cc/8EC6-CQLB] (last visited Apr. 20, 2018).

189. Press Release, United Nations Special Rapporteur, *supra* note 188.

190. *Affaire déchets toxiques: Après la dépollution des sites, les victimes exigent la réparation des préjudices*, ABIDJAN (Nov. 10, 2015), <http://news.abidjan.net/h/573012.html> [https://perma.cc/65QK-LLNT] (author’s translation). In 2018, the UN issued its own report on the status of these sites. Although the UN concurred that the sites had been decontaminated, the report explicitly stated: “The findings, however, do not preclude that health impacts from their original exposure to the wastes in 2006 are still affecting communities.” UNITED NATIONS ENV’T. PROGRAMME, ENVIRONMENTAL AUDIT OF THE SITES AFFECTED BY THE DUMPING OF TOXIC WASTES FROM THE “PROBO KOALA” 8–9 (2018).

191. Laura McInnis, *Ivory Coast Sites Still a Threat: U.N. Expert*, REUTERS (Aug. 8, 2008, 12:23 PM), <https://www.reuters.com/article/us-ivorycoast-toxic-un/ivory-coast-toxic-sites-still-a-threat-u-n-expert-idUSL810490920080808> [https://perma.cc/DXA9-9W83].

Trafigura's unwillingness to share information about the nature of the waste. Indeed, in 2016, the tenth anniversary of the dumping, Special Rapporteur Ibeanu, joined by five other UN Human Rights Special Rapporteurs, was still calling on Trafigura to disclose information about the contents and nature of the waste that was dumped, and to provide an adequate remedy for the injured.¹⁹²

IV. HOW THE TRAFIGURA CASE HAS FIT INTO THE LAW

The dumping in Abidjan was unambiguously a criminal act. The Côte d'Ivoire Constitution guarantees the right to a healthy environment.¹⁹³ Domestic laws criminalize the unauthorized importation of hazardous wastes and noxious substances into Côte d'Ivoire.¹⁹⁴ Any violation of this law is punishable by a fifteen-to-twenty year prison sentence and a hefty fine.¹⁹⁵ Indeed, pursuant to that law, a Côte d'Ivoire court sentenced the head of Compagnie Tommy, Salomon Ugborugbo, to twenty years in jail for his role in the disaster.¹⁹⁶ Kouao Essoin, the West African International Business Service Abidjan shipping agent who brokered the deal between Trafigura and Compagnie Tommy, was found guilty of complicity in poisoning and received a five year sentence.¹⁹⁷

Despite the above-mentioned prosecutions, the dumping of the waste from the *Probo Koala* revealed the weakness of the legal safeguards intended to prevent unauthorized importation of hazardous waste into Côte d'Ivoire. Compagnie Tommy was issued a license to operate without rigorous scrutiny or an assessment of its capabilities.¹⁹⁸ Côte d'Ivoire authorities failed to verify the

192. *Ten Years on, the Survivors of Illegal Toxic Waste Dumping in Côte d'Ivoire Remain in the Dark*, UNITED NATIONS HUM. RTS. (Aug. 19, 2016), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20384> [<https://perma.cc/8D6H-YW3P>].

193. See CONSTITUTION OF CÔTE D'IVOIRE, Nov. 8, 2016, art. 27, *translated at* https://www.constituteproject.org/constitution/Cote_DIvoire_2016.pdf?lang=en [<https://perma.cc/7MN2-FVTA>].

194. See Act No. 88-651 of 7 July 1988 for the Protection of Public Health and the Environment Against the Effects of Nuclear and Toxic Industrial Waste and Harmful Substances (Côte d'Ivoire); Environmental Code, Act No. 96-766 of 3 October 1996, art. 99, 101 (Côte d'Ivoire).

195. Act No. 88-651, art. 2.

196. FRASER, SECOND INTERIM REPORT, *supra* note 168, at 2.

197. *Id.*

198. See *Corruption, Apathy Led to ICoast Toxic Waste Scandal: Report*, MARS DAILY (Nov. 24, 2006), http://www.marsdaily.com/reports/UN_Seeks_Help_To_Clean_Up_Deadly_Ivorian_

nature of the waste and its potential impact on human health and the environment prior to the discharge of the waste.¹⁹⁹ This was not surprising given that Côte d'Ivoire was just past the throes of a civil war that had placed 4,000 UN peacekeepers around the country.²⁰⁰ Multiple violent outbreaks in Abidjan and other cities around the country occurred throughout 2006.²⁰¹ The government was hard-pressed to manage anything, let alone monitor import of hazardous waste masquerading as ship waste. Indeed, Ivorian environmental authorities did not have a presence in the port of Abidjan and were in no position to conduct systematic inspection of ships docking in the port.²⁰²

Unlike the local actors who were given significant prison sentences, Trafigura and its managerial employees avoided criminal prosecution by striking a deal with the still-in-crisis Côte d'Ivoire government. In exchange for a payment of \$198 million, the government in Côte d'Ivoire agreed to release two Trafigura executives²⁰³ who had been imprisoned pending trial for violating

Toxic_Waste_Dumps_999.html; *Toxic Waste: Officials Blamed*, NEWS24 (Nov. 23, 2006, 8:12 PM), <https://www.news24.com/Africa/News/Toxic-waste-Officials-blamed-20061123> [<https://perma.cc/HZ29-YTEX>]; see also *Toxic Waste Dumping in Abidjan Chapter 2: The Ivory Coast Dumping*, *supra* note 126.

199. Lydia Polgreen, *Neglect and Fraud Blamed for Toxic Dumping in Ivory Coast*, N.Y. TIMES (Nov. 24, 2006), <https://www.nytimes.com/2006/11/24/world/africa/24ivory.html> [<https://perma.cc/HG96-HGKR>]; *Toxic Waste Dumping in Abidjan*, *supra* note 126.

200. See YEARBOOK OF THE UNITED NATIONS 2006, at 177–87 (Peter Jackson et al. eds., 2006) (detailing violence and deployment of UN peacekeepers).

201. See *id.* Côte d'Ivoire did manage to establish a temporary truce in order to send a national team to the 2006 World Cup, after qualifying for the first time. Matais Grez, *How Dider Drogba and His Ivory Coast Teammates Helped End a Civil War*, CNN (Nov. 13, 2017, 9:26 AM), <https://edition.cnn.com/2017/11/11/football/ivory-coast-dider-drogba-stops-civil-war-copa/index.html> [<https://perma.cc/94CY-37CP>]. Minutes after qualifying, Ivorian soccer legend Dider Drogba and his teammates fell to their knees in an emotional plea for peace. *Id.*; see also, Alex Hayes, *Dider Drogba Brings Peace to Ivory Coast*, TELEGRAPH (Aug. 8, 2007, 12:01 AM), <https://www.telegraph.co.uk/sport/football/international/2318500/Didier-Drogba-brings-peace-to-the-Ivory-Coast.html> [<https://perma.cc/Y373-533M>]. A peace treaty was finally signed in 2007, but elections were not held until 2010. The results of the 2010 election provoked a renewed political crisis requiring UN intervention. *Q&A: Ivory Coast Crisis*, BBC NEWS (Apr. 13, 2011), <http://www.bbc.com/news/world-africa-11916590> [<https://perma.cc/RN4W-3LVD>].

202. See generally *Toxic Waste Dumping in Abidjan, Chapter 5: Deviance and the Ivorian State*, STATE CRIME, <http://statecrime.org/testimonyproject/ivorycoast#chapter5> [<https://perma.cc/3URM-RLPH>] (last visited Apr. 20, 2018).

203. In September 2006, Trafigura Chairman Claude Dauphin, accompanied by Trafigura's West Africa Desk manager Jean-Pierre Valentini visited Côte d'Ivoire to investigate the clean-up. Both were promptly arrested and were held in a Côte d'Ivoire jail until February 2007. The two were released after striking a deal to pay monies to the

Côte d'Ivoire's poisoning laws, and to terminate all ongoing legal actions against Trafigura.²⁰⁴ The agreement also waived all current or future actions for liability and damages against Trafigura resulting from the dumping.²⁰⁵ Trafigura characterized this payment as recognizing that "it had an economic and humanitarian responsibility to the region but not a legal responsibility for the event itself."²⁰⁶ In 2008, Trafigura agreed to pay an additional €7.6 million to the Côte d'Ivoire government²⁰⁷ for remedial work to clean up the contaminated sites.²⁰⁸ It is not unheard of for low level employees to go to jail for environmental violations, while the executives who planned and profited from the activities remain free.²⁰⁹ Yet, the differing fates of the actors involved in this catastrophe ought to give pause to those interested in justice.

The fact that Côte d'Ivoire waived all claims against Trafigura does not mean that the company entirely escaped criminal liability. In June 2008, the Dutch Public Prosecutor brought charges against Trafigura Beheer BV (a London subsidiary of Trafigura) and a number of other parties for the Amsterdam-based events that led to the dumping.²¹⁰ On July, 23, 2010, the Dutch court handed down a guilty verdict against Trafigura Beheer BV, Naem Ahmed, a

government. See Peter Murphy, *Trafigura Execs Released After Ivory Coast Deal*, REUTERS (Feb. 14, 2007, 3:09 PM), <https://www.reuters.com/article/us-ivorycoast-toxic-release/trafigura-exec-released-after-ivory-coast-deal-idUSL1461558720070214> [<https://perma.cc/6LJ4-LA5Y>].

204. FRASER, SECOND INTERIM REPORT, *supra* note 168, at 8. One Ivorian involved in the United Kingdom tort litigation described this settlement in the following terms: "all those who have good sense should denounce [its] immorality." *Agouman v. Leigh Day*, [2016] EWHC (QB) 1324, ¶ 38 (Eng) (alteration in original).

205. *Toxic Waste Deal Won't Halt Case*, BBC NEWS (Feb. 15, 2007, 12:26 AM), <http://news.bbc.co.uk/2/hi/africa/6360659.stm> [<https://perma.cc/RT92-5XE6>].

206. FRASER, SECOND INTERIM REPORT, *supra* note 168, at 8.

207. The president at the time, Laurent Gbagbo, is currently facing charges at the International Criminal Court for crimes against humanity he allegedly masterminded after losing the 2010 presidential election. INT'L CRIMINAL COURT, CASE INFORMATION SHEET: THE PROSECUTOR V. LAURENT GBAGBO AND CHARLES BLÉ GOUDÉ, ICC-02/11-01/15 (2016). Gbagbo has been in the custody of the International Criminal Court since 2011. *Id.*

208. FRASER, SECOND INTERIM REPORT, *supra* note 168, at 9.

209. See, e.g., EUGENE F. BRIGHAM & JOEL F. HOUSTON, FUNDAMENTALS OF FINANCIAL MANAGEMENT 20–21 (14th ed. 2015) (describing this phenomenon in the business world generally).

210. Criminal Court Amsterdam Decision, *supra* note 133, ¶ 8.3.2.15; Captain Decision, *supra* note 154; Criminal Court Amsterdam 23 juli 2010 (Trafigura Employee, Naem Ahmed) (Neth.), BN 2068, 13/846003-08, translated at DE RECHTSPRAAK, <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBAMS:2010:BN2068> [<https://perma.cc/3BT8-JVCV>].

London-based executive of Trafigura Ltd., and Sergiy Chertov, the captain of the *Probo Koala*. Trafigura was convicted for failing to disclose the harmful character of the waste²¹¹ and for illegally exporting the waste to Côte d'Ivoire.²¹² For this criminal act, the court fined Trafigura €1 million (roughly \$1.2 million).²¹³ The captain was convicted of fraudulently misrepresenting the wastes to Dutch officials as nonhazardous.²¹⁴ Naeem Ahmed was convicted of concealing the dangerous nature of the waste and was fined €25,000 (roughly \$30,000).²¹⁵ The guilty verdicts were upheld by the Dutch Court of Appeal in December 2011.²¹⁶ In 2012, Trafigura paid an additional €7,000 (roughly \$79,000) fine to have charges against its chairman, Claude Daphin, dropped.²¹⁷

In 2009, Trafigura also paid roughly \$50 million in an out-of-court settlement to individuals in Côte d'Ivoire who said they had been injured when the waste was spread on dumps around

211. The specific charge was that Trafigura:

[O]ffloaded 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.

Criminal Court Amsterdam Decision, *supra* note 133, ¶ 2.2.

212. European Transfer of Waste Shipping Regulation, *supra* note 162. Art. 18 makes it a criminal offence to export hazardous waste from the European Union to the African, Caribbean and Pacific Group of States. *Id.* art. 18. Moreover, the Minton Report indicated that the land disposal of these wastes violated Council Directive 1999/31/EC of 26 April 1999, the landfill directive, which prohibited landfill disposal of liquid and corrosive waste. Minton Report, *supra* note 128, at ¶ 8.2.

213. Criminal Court Amsterdam Decision, *supra* note 133, ¶ 15. Both Trafigura and the Dutch prosecutor appealed this fine. The parties ultimately settled for more money—with Trafigura paying the €1 million fine, plus disgorging an additional €300,000—the amount Trafigura saved by not properly disposing of its waste. *Update 1—Trafigura Reaches Toxic Waste Settlement with Dutch*, REUTERS (Nov. 16, 2012, 5:26 PM), <https://www.reuters.com/article/trafigura-court/update-1-trafigura-reaches-toxic-waste-settlement-with-dutch-idUSL5E8MGDZC20121116> [<https://perma.cc/6R78-XV6P>].

214. The Captain, Sergiy Chertov, was sentenced to a five-year suspended jail term. *Trafigura Found Guilty of Exporting Toxic Waste*, BBC NEWS (July 23, 2010), <http://www.bbc.com/news/world-africa-10735255> [<https://perma.cc/FBX9-2KE5>].

215. *Id.* The employee, Naeem Ahmed, participated along with Chairman Claude Dauphin and other Trafigura employees in the company's internal e-mail exchanges concerning the caustic wastes. See *Final E-mails*, *supra* note 122.

216. AMNESTY INT'L & GREENPEACE, *supra* note 164, at 9–10.

217. Press Release, Trafigura, Trafigura's Punishment Final, Top Executive Settles (Nov. 16, 2012), available at https://www.trafigura.com/media/3916/dutch_authorities_statement_english.pdf [<https://perma.cc/6NH2-4WXJ>].

Abidjan.²¹⁸ Perhaps not surprisingly given the turbulent political context, this settlement was followed by accusations that the funds had been mismanaged or appropriated rather than passed on to the pollution victims and their families.²¹⁹

Roughly 30,000 victims of the dumping joined a class action suit brought in London by British law firm Leigh Day and Co. The case, *Motto and Ors v. Trafigura*, was the biggest such suit in United Kingdom legal history.²²⁰ After intensive negotiations, the parties reached a settlement agreement in September 2009, about a month before the trial was due to start. Trafigura agreed to pay victims £30 million (roughly \$48 million).²²¹ In return, the victims agreed to issue a joint statement which asserted that twenty independent experts appointed by both parties for the litigators were:

[U]nable to identify a link between exposure to the chemicals released from the slops and the deaths, miscarriages, still births, birth defects, loss of visual acuity or other serious or chronic injuries. [The Plaintiff's attorneys], in the light of the expert evidence, now acknowledge that the slops could at worst have caused a range of short term low level flu like symptoms and anxiety.²²²

None of the underlying “expert” reports were made public, and all are protected by the confidentiality of the settlement process. The settlement was structured as a single payment into a bank account in Côte d’Ivoire.²²³ Almost immediately, the funds were co-opted

218. *Trafigura Found Guilty of Exporting Toxic Waste*, *supra* note 214.

219. *Ivory Coast Probes Trafigura Waste Fund Theft*, BBC NEWS (June 21, 2010), <http://www.bbc.com/news/10366945> [<https://perma.cc/3QW2-ZTW4>].

220. Ian Dunt, *Laying Waste in the Ivory Coast*, POLITICS.CO.UK (Sept. 17, 2009, 12:00 AM), <http://politics.co.uk/comment-analysis/2009/09/17/feature-laying-waste-in-the-ivory-coast> [<https://perma.cc/5FRS-83DX>].

221. *Agouman v. Leigh Day*, [2016] EWHC (QB) 1324, ¶¶ 18–19 (Eng.); Guy Chazan, *Firm to Pay \$48.7 Million in Ivory Coast Pollution Case*, WALL STREET J. (Sept. 21, 2009, 12:01 AM), <https://www.wsj.com/articles/SB125344659517725659> [<https://perma.cc/9D7P-KZEJ>].

222. *Agreed Final Joint Statement*, TRAFIGURA, https://www.trafigura.com/media/3950/trafigura_and_leigh_day_co_agreed_final_joint_statement.pdf [<https://perma.cc/8JFH-BLTD>] (last visited Apr. 21, 2018).

223. See *Agouman v. Leigh Day*, ¶¶ 18–35; Xan Rice, *Fears Over £30m Payment to Toxic Waste Victims in Trafigura Case*, GUARDIAN (Jan. 22, 2010, 1:17 PM), <https://www.theguardian.com/world/2010/jan/22/trafigura-compensation-gouhourou> [<https://perma.cc/M3Y9-4W6S>].

by corrupt officials.²²⁴ Subsequently, many victims complained that they were not paid the promised settlement funds. Moreover, their law firm, Leigh Day, was found to have breached its duties to them by not preparing for and protecting the settlement funds against corruption in Côte d'Ivoire where the funds were vulnerable to dishonest claims, including claims enforced by a corrupt judiciary in the Ivory Coast.²²⁵

In 2015, the victims tried again. Stichting Victimes des Dechets Toxiques Cote d'Ivoire (Victims of Toxic Waste in Ivory Coast), a Dutch foundation representing more than 100,000 of the spill victims, filed a lawsuit demanding that Trafigura clean up the contamination, and seeking compensation of €2,500 (roughly \$2,800) per victim.²²⁶ Dutch courts had previously rejected a class action lawsuit brought by the victims on procedural grounds.²²⁷ In doing so, the court praised Trafigura for the “meticulous and extensive”²²⁸ case it made that the victim class was not properly represented in Dutch court. The care with which the company defended itself from liability to victims marks a stark contrast with the lack of care in handling disposal of the toxic waste in question. In September 2017, lawyers for the foundation refiled the lawsuit seeking to represent 107,000 plaintiffs.²²⁹

224. On January 13, 2015, an Ivorian court handed down a twenty year sentence to those responsible for the funds' misappropriation. Despite the fact that this sentence was confirmed on July 27, 2016, by the appellate court, none of those responsible have been arrested or imprisoned. See Press Release, United Nations Special Rapporteur, *supra* note 188.

225. *Agouman v. Leigh Day*, ¶¶ 105–113.

226. *100,000 Victims of Ivory Coast Toxic Spill Launch Dutch Suit*, DAILY MAIL (Feb. 20, 2015, 11:47 AM), <http://www.dailymail.co.uk/wires/afp/article-2961901/100-000-victims-Ivory-Coast-toxic-spill-launch-Dutch-suit.html> [<http://perma.cc/YTG3-C2BJ>].

227. See Private Law Court Amsterdam, 30 november 2016 (Stichting Union des Victimes de Déchets Toxiques D'Abidjan et Banlieues/Trafigura Beheer B.V.) (Neth.), C/13/581973/HA ZA 15-195 [hereinafter Private Law Court Amsterdam Decision], *translated at* TRAFIGURA, https://www.trafigura.com/media/4087/20161130_judgment_stichting_uvdt_ab_v_trafigura_ii_english.pdf [<https://perma.cc/ZA39-TANB>].

228. *Id.* ¶ 5.22.

229. *Ivory Coast Toxic Spill Victims Launch New Dutch Court Bid*, ENCA (Sep. 28, 2017, 6:50 AM), <http://www.enca.com/africa/ivory-coast-toxic-spill-victims-launch-new-dutch-court-bid> [<https://perma.cc/ZA39-TANB>] (reporting that Trafigura's lawyer acknowledges that the company “should never have disposed of its wastes in Abidjan and its surroundings” but nevertheless asserting that the “victims' suit cannot be heard as the foundation which represents them is not legitimate”).

A. What Does Human Rights Law Have to Say About This Incident?

Immediately after the dumping, the Human Rights Council requested that the Special Rapporteur on the Adverse Effects of the Illicit Movement and Dumping of Toxic and Dangerous Products and Wastes on the Enjoyment of Human Rights issue a report on the Trafigura incident.²³⁰ The Special Rapporteur's report identified Trafigura's human rights obligations with regard to the catastrophe the dumping created.²³¹ The Special Rapporteur highlighted the company's obligation to disclose information about the waste, and to fund remedial clean-up work in Côte d'Ivoire, as well as a more general obligation to ensure that its waste is treated in an environmentally sound manner, "including by rigorously assessing appropriate port reception facilities and balancing commercial interests with human rights and environmental requirements."²³²

The baseline responsibility of companies is to respect human rights.²³³ This responsibility existed in 2006, and was an obligation that applied to TNCs independent of States' duties,²³⁴ even in the absence of relevant State law.²³⁵ At a minimum, this duty requires due diligence on the part of a company, not only to comply with relevant municipal law, but also to become aware of, prevent, and address adverse human rights impacts that might flow from its conduct.²³⁶ To pose the question of whether Trafigura satisfied this duty is to answer it. Despite Trafigura's protestations that it followed commercially reasonable practices, it is clear that the company failed to take even obvious and minimally burdensome

230. *Special Rapporteur, supra* note 1. Indeed, the Council extended Professor Okechukwu Ibeanu's commission as Special Rapporteur for that purpose. *Id.*

231. *Id.* at 2.

232. *Id.*

233. The policy framework for business and human rights developed by the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business corporations emphasizes that "transnational corporations and other business enterprises have a responsibility to respect human rights." Human Rights Council Res. 8/7, Mandate of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, U.N. Doc A/HRC/RES/8/7 (June 18, 2008).

234. John Ruggie (Special Representative), *Report on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises: Advanced Edited Version*, ¶ 55, U.N. Doc. A/HRC/8/5 (Apr. 7, 2008).

235. *Id.* ¶ 23.

236. *Special Rapporteur, supra* note 1, ¶ 71.

precautions to prevent adverse impact on human rights from the discharge of its waste.

In the years since the Trafigura incident, international law has taken steps to further flesh out the responsibilities of TNCs like Trafigura. To that end, the UN adopted the “Protect, Respect and Remedy Framework” developed by the Special Representative of the Secretary-General on the issue of human rights, TNCs, and other business enterprises.²³⁷ Under this framework, States have the duty to protect against human rights abuses by third parties, including business, through appropriate policies, regulation, and adjudication. At the same time, all organs of society, including corporations, have a responsibility to respect human rights.²³⁸ All organs of society must act with due diligence to avoid infringing on the rights of others; and both States and third parties have an obligation to remedy any violations, including greater access to effective remedies, which may or may not involve access to the courts.²³⁹ The Guidelines for Multinational Enterprises of the OECD, provide some information about what the duty to respect human rights entails.²⁴⁰

B. What Was Trafigura’s Due Diligence Obligation?

In the decade since the Abidjan dumping, Trafigura has consistently maintained that it conducted itself within the law, and that it followed commercially reasonable practices. Trafigura’s argument that its decision to reject a safe disposal option in Rotterdam and instead transfer the waste to Compagnie Tommy hinges on the claim that the wastes involved were ordinary ship waste²⁴¹ governed by the MARPOL Convention,²⁴² rather than

237. John Ruggie, *supra* note 234.

238. For an exploration of this point, see Rebecca M. Bratspies, “*Organs of Society*”: A Plea for Human Rights Accountability for Transnational Enterprises and Other Business Entities, 13 MICH. ST. J. INT’L L. 9 (2005).

239. See generally Human Rights Council, Report of the Special Representative on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, U.N. Doc. A/HRC/11/13 (Apr. 22, 2009).

240. See ORGANISATION FOR ECON. CO-OPERATION & DEV., OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES (2008).

241. For example, in handing down its guilty verdict against Trafigura the Amsterdam court noted that the company “maintain[ed] that the composition of the ‘chemical slops’; gasoline, spent caustic and water is a normal biproduct from the cleaning of gasoline blendstock cargo [sic] the slops are entirely in line with industry practice and international

hazardous wastes that could not lawfully be exported from Europe to Africa.²⁴³ Yet in private communications before the dumping occurred, Trafigura explicitly notified its local subsidiary Puma that the wastes were not MARPOL wastes.²⁴⁴ Moreover, the Dutch Court concluded specifically that Trafigura knowingly and maliciously exported wastes to Côte d'Ivoire in contravention of EU law “without thoroughly investigating whether the Port of Abidjan had the right facilities to process [the] wastes.”²⁴⁵

The International Convention for the Prevention of Pollution from Ships of 1973, as modified by the Protocol of 1978 relating thereto (MARPOL Convention) applies to wastes generated at sea on board ships.²⁴⁶ The Convention requires that ship wastes be managed and disposed of in an environmentally sound manner to prevent pollution to the sea and harm to human health.²⁴⁷ It provides that slops and wastes generated at sea are brought ashore rather than being disposed of at sea,²⁴⁸ and that member States have an obligation both to provide adequate reception facilities and to ensure that materials discharged ashore are subsequently handled correctly.²⁴⁹ Trafigura's argument thus turned on the assertion that the wastes in question were “ship waste” because they were generated on a ship. Under that cramped reading of international law, it was Amsterdam and Abidjan, rather than

regulations,” and redacted press releases to remove mentions of the caustic nature of the waste. Criminal Court Amsterdam Decision, *supra* note 133, ¶ 6.8–9 (alterations in original).

242. International Convention for the Prevention of Pollution from Ships, November 2, 1973, 12 I.L.M. 1319, *amended by* Protocol of 1978 Relating to the International Convention for Prevention of Pollution from Ships, Feb. 17, 1978, 1340 U.N.T.S. 61 [hereinafter MARPOL Convention].

243. Indeed, the European Court of Auditors used this incident as “Example 1” to demonstrate the need for regulatory enforcement with regard to international waste shipments. See CONTACT COMMITTEE OF THE SUPREME AUDIT INSTS. OF THE EUROPEAN UNION, COORDINATED AUDIT ON THE ENFORCEMENT OF THE EUROPEAN WASTE SHIPPING REGULATION 11 (2013).

244. E-mail from Jorge Luis Marrero to Kablan N'Zi, *supra* note 170 (“Due to the COD being larger than 2000mg/l, these are not to be considered ‘MARPOL slops’ but ‘chemical slops.’”).

245. Criminal Court Amsterdam Decision, *supra* note 133, ¶ 13.3.3.

246. MARPOL Convention, *supra* note 242.

247. *Id.* arts. 1, 2.2.

248. For a good description of the scope of MARPOL requirements, see CE DELFT & CHEW, EUROPEAN MAR. SAFETY AGENCY, EMSA/OP/02/2016, THE MANAGEMENT OF SHIP-GENERATED WASTE ON-BOARD SHIPS 11–18 (2017).

249. MARPOL Convention, *supra* note 242, annex I, reg. 38. For details, see INT'L MAR. ORG., MEPC.1/CIRC.834, CONSOLIDATED GUIDANCE FOR PORT RECEPTION FACILITY PROVIDERS AND USERS (2014).

Trafigura, that acted improperly by failing to provide appropriate port facilities for disposing of the waste. Thus, Trafigura argued that the catastrophe flowed directly from a flaw in MARPOL—the “unacceptable degree of subjectivity entrusted to the receiving nation”²⁵⁰ over what constituted appropriate port facilities.

A Dutch court made short work of this claim, noting to Trafigura that the “slops cannot be regarded as being produced by the normal operation of a ship.”²⁵¹ Moreover, the Court concluded that Trafigura acted willfully and maliciously by allowing the disposal to proceed “fully knowing” that the wastes involved “were chemical slops with an extreme acidity and a very high COD content.”²⁵² The Court emphasized the price discrepancy between the Amsterdam quote based on the actual composition of the waste and the price Trafigura ultimately paid to get rid of its waste in Abidjan.²⁵³ Moreover, pursuant to Article 11(d) of the MARPOL convention,²⁵⁴ the International Maritime Organization lists waste receiving facilities in each country, and details the capacity of each facility.²⁵⁵ Côte d’Ivoire has no facilities on the list of ports with facilities to handle oily wastes²⁵⁶—indicating that there are no facilities in the country capable of handling MARPOL wastes, let alone hazardous wastes. As a sophisticated transnational actor “at the heart of the global economy,”²⁵⁷ Trafigura, one of the largest oil traders in the world, can surely be taxed with knowing these basic facts about the legal regimes governing its actions.²⁵⁸ Finally, as the Dutch Court noted, “Trafigura already knew in April 2006 that the discharge of slops for processing was[,] at the very least[,] not simple.”²⁵⁹

250. LORD FRASER OF CARMYLLIE, *THE PROBO KOALA INQUIRY: FIRST INTERIM REPORT* 8 (2008).

251. Criminal Court Amsterdam Decision, *supra* note 133, ¶ 8.3.2.9.

252. *Id.* ¶ 6.7.

253. *Id.* ¶ 13.3.8.

254. MARPOL Convention, *supra* note 242, art. 11(d).

255. *GISIS: Port Reception Facility Database*, INT’L MAR. ORG., <http://www.imo.org/en/OurWork/Environment/PortReceptionFacilities/Pages/Port-reception-facilities-database.aspx> [<https://perma.cc/EFX5-RV34>] (last visited May 9, 2018).

256. INT’L MARITIME ORG., MEPC.3/Circ4, *FACILITIES IN PORTS FOR THE RECEPTION OF OILY WASTES FROM SHIPS* (2003).

257. *About Us*, *supra* note 9.

258. See Criminal Court Amsterdam Decision, *supra* note 133, ¶ 13.3.6.

259. *Id.*

The facts surrounding its contract with Compagnie Tommy suggest that Trafigura acted with far less than full due diligence. Compagnie Tommy had been incorporated shortly prior to the arrival of the *Probo Koala*—during the “period between Trafigura’s decision not to pay for expensive waste disposal in Amsterdam and its ship’s arrival in Abidjan.”²⁶⁰ The brand new Abidjani company had no experience with waste treatment and “show[ed] all the signs of being [a] front company set up specifically to handle the Trafigura waste.”²⁶¹ While Compagnie Tommy had a newly acquired license to handle normal ships wastes, it had no license for handling hazardous chemical wastes.²⁶² The UN Special Rapporteur points out that Trafigura does not seem to have considered the lack of licensure or experience with hazardous wastes to be potential flaws in their business partner’s ability to execute the technically complex task of safely processing and disposing of the wastes.²⁶³

It is very difficult to see how Trafigura did not have, at a minimum, a duty to inquire as to the actual capacity of Compagnie Tommy, and the Port of Abidjan more generally, to appropriately and safely handle its wastes. This duty was all the more pressing because of the company’s prior experience in Amsterdam. Having been informed that the waste could not be safely treated in Amsterdam and that only the port of Rotterdam had adequate treatment facilities, the duty to respect and protect human rights, at a minimum, imposed a duty on Trafigura to assure itself that the port of Abidjan would be equipped to process its caustic waste. This it could not do. Indeed, the Secretariat of the Basel Convention reported that Abidjan was not even equipped “with the necessary facilities for the offloading and treatment of wastes covered by the MARPOL Convention.”²⁶⁴

Throughout the investigations that followed the dumping, Trafigura asserted that it had fully informed Compagnie Tommy of

260. *Ivory Coast Government Panel Releases Toxic Waste Findings*, VOA (Oct. 31, 2009, 2:03 PM), <https://www.voanews.com/a/a-13-2006-11-23-voa22/319097.html> [<https://perma.cc/369K-NVK3>] (citing the report).

261. *Id.*

262. Greenpeace Ad Complaint, *supra* note 129, ¶ 53.

263. *Special Rapporteur*, *supra* note 1, ¶ 80.

264. Working Grp. of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, Dumping of Toxic Wastes in Abidjan, Côte d’Ivoire, *Decision VIII/1 on Côte d’Ivoire*, U.N. Doc. UNEP/CHW/OEWG/6/2, annex ¶ 3(f) (July 2, 2007).

the nature of the wastes, and the need for the wastes to be handled correctly to avoid any environmental concerns.²⁶⁵ Yet, the one-page handwritten contract with Compagnie Tommy does not support that claim.²⁶⁶ While it did note that the waste had a smell associated with sulfur from high mercaptans, the contract contained no indication of the waste's extremely high COD. Moreover, the handwritten contract with Compagnie Tommy made no mention of treatment, and informed Trafigura that it would discharge the waste "in a place out of the city properly prepared to receive any type of chemical product, called [Akouédo]."²⁶⁷ It would have taken virtually no investigation to discover that Akouédo was in fact a municipal waste dump²⁶⁸ that was not in any way equipped to treat the caustic waste the *Probo Koala* was entrusting to Compagnie Tommy.²⁶⁹ Trafigura's behavior immediately after the dumping also undercuts its claim of due diligence. Three days after the dumping, Dutch authorities contacted Trafigura demanding a discharge report, including an invoice for the waste.²⁷⁰ According to Amnesty International and Greenpeace, Trafigura executives in London responded by asking Compagnie Tommy to modify its invoice for the disposal job to show a much higher price.²⁷¹

265. FRASER, SECOND INTERIM REPORT, *supra* note 168, at 6.

266. Letter from Compagnie Tommy to Jorge Luis Marrero, *supra* note 169.

267. *Id.*; *Special Rapporteur*, *supra* note 1, ¶ 81.

268. Worse, the Akouédo waste dump was located near numerous farms and was home to a cohort of extremely poor scavengers who eked out a precarious living recycling waste from the facility. *Ivory Coast Dump Dwellers Revolt Amid Toxic Waste Scandal*, VOA (Oct. 31, 2009, 11:03 AM), <https://www.voanews.com/a/a-13-2006-09-14-voa47/315996.html> [<https://perma.cc/4MML-DTJN>].

269. Akouédo is "an old fashioned dump site with no impermeable lining at the bottom, no draining and treatment of leachate, and no gas collection and recovery." *The Environment in Cote d'Ivoire: Post-Conflict Environmental Assessment*, UNITED NATIONS ENV'T PROGRAMME, <http://postconflict.unep.ch/en-cote-divoire-PCEA-photoessay-2015/> [<https://perma.cc/D26E-FRLE>] (last visited Apr. 20, 2018).

270. AMNESTY INT'L & GREENPEACE, *supra* note 164, at 88.

271. *See id.* at 88–89 (Reproducing in full a Trafigura internal e-mail from Jorge Marrero (August 23, 2006) requesting that Compagnie Tommy issue an invoice with a disposal price of \$500 per cubic meter, rather than the contractually agreed price of \$35. This e-mail emphasized that Compagnie Tommy and West African International Business Services should provide these new numbers if contacted by European customs agents about the disposal.). This e-mail hearkened back to an allegation made by the Volcker Report that Trafigura had used false invoicing to hide illicit payments that violated the terms of the UN Oil-for-Food Programme. Volcker Report, *supra* note 7, at 185. Trafigura denied this earlier allegation. *Id.* at 201–05.

Moreover, because the waste was hazardous, it was covered by the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal.²⁷² All of the relevant States, Switzerland (corporate home of Trafigura), the United Kingdom (main office of Trafigura), the Netherlands (site of unloading), Nigeria (last port of call before dumping), Panama (flag flown by *Probo Koala*), and Cote d'Ivoire (site of dumping), were parties to the Basel Convention.²⁷³ Thus, no matter how jurisdiction over this waste is assigned, it was subject to the restrictions of the Basel Convention. The Basel Convention creates a prior informed consent procedure for transboundary movement of hazardous wastes,²⁷⁴ and requires that “all practicable steps to ensure that hazardous wastes or other wastes are managed in a manner which will protect human health and the environment against the adverse effects which may result from such wastes.”²⁷⁵

The Basel Convention defines as unlawful:

[A]ny transboundary movement of hazardous or other wastes: (a) without notification pursuant to the provisions of this Convention to all States concerned; or (b) without the consent pursuant to the provisions of this Convention of a State concerned; or (c) with consent obtained from States concerned through falsification, misrepresentation or fraud; or (d) that does not conform in a material way with the documents; or (e) that results in deliberate disposal (e.g. dumping) of hazardous wastes or other wastes in contravention of this Convention and of general principles of international law.²⁷⁶

Despite this clear language in the Basel Convention, existing trade infrastructure presents “an open opportunity for illegal shipment of hazardous wastes.”²⁷⁷ Interpol noted that “[c]rime

272. Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, Mar. 22, 1989, 1673 U.N.T.S. 57 [hereinafter Basel Convention].

273. *Parties to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal*, BASEL CONVENTION, <http://www.basel.int/Countries/StatusofRatifications/PartiesSignatories/tabid/4499/Default.aspx> [https://perma.cc/3KGB-8BPZ] (last visited Mar. 21, 2018).

274. Basel Convention, *supra* note 272, art. 6.

275. *Id.* art. 2.8.

276. *Id.* art. 9.1. In general, wastes generated aboard a ship are not covered by the Basel Convention. But, only the exclusion for ship wastes is explicitly limited to those wastes “which derive from the normal operation of a ship.” *Id.* art. 1.4.

277. BEST PRACTICES, *supra* note 43, at 2.

involving the illegal transport and disposal of waste presents a global threat to environmental security.”²⁷⁸ These crimes are generally perceived to be low risk/high reward crimes by the perpetrators,²⁷⁹ even though they create extremely high risks for the environment and affected populations.²⁸⁰ A range of inadequacies in domestic legislation, waste management policy, awareness, and market capacity in many developing countries allow this illegal trade to flourish.²⁸¹ Indeed, one study estimated that illegal wastes amounted to between seventy percent and ninety-three percent of waste exports from the European Union to non-OECD countries.²⁸² Unfortunately, because responsible handling of hazardous wastes is so costly, the illegal trade in hazardous waste continues to thrive.²⁸³ The role of organized crime in illegal hazardous waste disposal has been well-documented.²⁸⁴ The role that “legitimate” TNCs play in this trade has been less carefully examined.

Part of the problem is that the Basel Convention restrictions apply to States, not directly to TNCs like Trafigura. They have no obligation to conform their actions to global treaties intended to protect human rights or the environment. At the same time, TNC’s home States generally do not bear responsibility for the

278. See, e.g., INTERPOL ENVTL. SEC. SUB-DIRECTORATE, ENVIRONMENTAL COMPLIANCE AND ENFORCEMENT COMMITTEE: MEETING AND EVENTS—FINAL REPORT 22 (2014).

279. *Hazardous Materials Seized in Largest Global Operation Against Illegal Waste*, INTERPOL (Aug. 8, 2017), <https://www.interpol.int/News-and-media/News/2017/N2017-100> [<https://perma.cc/ZNS9-YWKT>] (reporting that a thirty day worldwide sting operation discovered 1.5 million tons of illegal waste).

280. Interpol has a pollution crimes working group that documents the “clear and direct human impact” from these crimes. See INTERPOL ENVTL. SEC. SUB-DIRECTORATE, *supra* note 278, at 15.

281. See Mario Obradović et. al., *Dumping and Illegal Transport of Hazardous Waste, Danger of Modern Society*, 38 COLLEGIUM ANTROPOLOGICUM 793, 798–800 (2014). Indeed, more than twenty-five years ago, Agenda 21 identified lack of governance capacity as a sustainability priority for the international community. U.N. Sustainable Development, Agenda 21, Chapter 19, Environmentally Sound Management Of Toxic Chemicals, Including Prevention Of Illegal International Traffic In Toxic And Dangerous Products, <http://www.un-documents.net/a21-19.htm> [<https://perma.cc/F67U-NGJA>] (last visited Apr. 20, 2018). Unfortunately, many of those same challenges remain.

282. BEST PRACTICES, *supra* note 43, at 16.

283. Europol has cautioned about this temptation, noting that in addition to clearly criminal enterprises, otherwise lawful businesses also engage in illegal waste disposal. See EUROPOL, THREAT ASSESSMENT 2013: ENVIRONMENTAL CRIMES IN THE EU (2013).

284. See, e.g., INTERPOL ENVTL. SEC. SUB-DIRECTORATE, *supra* note 278; INTERPOL POLLUTION CRIMES WORKING GRP., *supra* note 40.

extra-territorial actions of its corporate citizens.²⁸⁵ As a result, TNCs operate largely with impunity in States with weak governments, or governments susceptible to corruption. These are not bugs, but features of the system of international law. At every step of the decision chain, international law constricts legal responsibility in a fashion that minimizes responsibility for corporate misconduct.

V. IMPLICIT CORRUPTION

The Trafigura dumping incident is ripe for an investigation of the role that corruption plays in creating environmental disasters. There are many points along the path at which a corruption analysis might be fruitful. The most obvious, and most well-studied, involve the last link—the actual dumping itself. Indeed, a Côte d’Ivoire panel created to investigate this incident highlighted the role that domestic corruption (including lax regulations and enforcement failures) played in allowing the illegal dumping to take place.²⁸⁶ There is no question that the incident revealed the weakness of the legal safeguards intended to prevent unauthorized importation of hazardous waste. Compagnie Tommy was issued a license to operate without rigorous scrutiny and assessment of its capabilities.²⁸⁷ Côte d’Ivoire regulators failed to verify the nature of the waste and its potential impact on human health and the environment prior to the discharge of the waste.²⁸⁸ A decade later, the authorities still have not assessed the long-term risks from exposure to the waste dumped from the *Probo Koala*, and have failed to monitor victims’ health.²⁸⁹ Indeed, many victims have not

285. HOME STATE RESPONSIBILITY FOR EXTRATERRITORIAL HUMAN RIGHTS VIOLATIONS COMMITTED BY NON-STATE ACTORS 12–22 (2010); Sara L. Seck, *Home State Responsibility and Local Communities: The Case of Global Mining*, 11 YALE HUM. RTS. & DEV. J. 177 (2008) (advocating for such responsibility).

286. RAPPORT DE LA COMMISSION NATIONALE D’ENQUÊTE SUR LES DECHETS TOXIQUES DANS LE DISTRICT D’ABIDJAN [THE COMMISSION OF ENQUIRY ON TOXIC WASTE IN THE DISTRICT OF ABIDJAN: FINAL REPORT] (2006) (author’s translation).

287. *Toxic Waste Dumping in Abidjan, Chapter 5: Deviance and the Ivorian State*, *supra* note 202.

288. The UN Special Rapporteur reported that Ivorian environmental authorities did not have a permanent presence in the port of Abidjan and were not in a position to conduct systematic inspection of ships docking in the port. *Special Rapporteur*, *supra* note 1, ¶ 58.

289. *Cote d’Ivoire 2017/2018*, AMNESTY INT’L, <https://www.amnesty.org/en/countries/afri-ca/cote-d-ivoire/report-cote-divoire/> [<https://perma.cc/2GBH-8B4X>] (last visited Apr. 20, 2018).

received any compensation payments.²⁹⁰ Each of these facts raises important questions about corruption. Indeed, this incident is used as a case study in the legal barriers preventing access to justice for victims of human rights violations alleged to be the responsibility of transnational corporations.²⁹¹

Similar corruption-oriented questions can be asked about the Dutch officials permitting the *Probo Koala* to reload its caustic wastes and depart Amsterdam without a plan for disposing of the wastes. This decision, which hinged on an overly-technical interpretation of what constituted an import of waste, violated both the letter and the spirit of the EU's hazardous waste regulation. The Special Rapporteur reports that relevant inspectorates did not carry out any further inspections and that the possibility of detaining the *Probo Koala* was not fully considered,²⁹² even though the Dutch Environmental Management Act and European Council Regulation (EEC) No. 259/93 offered possible grounds to prevent both the return of the waste already offloaded and the departure of the ship.²⁹³ In particular, the Environmental Management Act prohibits the discarding of industrial or hazardous waste by transferring it to another person not authorized to receive it.²⁹⁴ This clearly hinges on the question of whether Amsterdam Port Services had accepted the offloaded part of the waste and whether reloading it would constitute a transboundary movement under Council Regulation (EEC) No. 259/93. European Union regulations only permit the movement of hazardous waste to another State member of the European Union if consent is given,

290. See Neil Rose, *Leigh Day "Breached Duty" to Thousands of Trafigura Claimants Who Did Not Receive Share of £30m Settlement*, LEGALFUTURES (June 17, 2016), <https://www.legalfutures.co.uk/latest-news/leigh-day-breached-duty-thousands-trafigura-claimants-not-receive-share-30m-settlement> [https://perma.cc/U2NU-3K5N].

291. DANIEL BLACKBURN, INT'L CENTER FOR TRADE UNION RIGHTS, REMOVING BARRIERS TO JUSTICE: HOW A TREATY ON BUSINESS AND HUMAN RIGHTS COULD IMPROVE ACCESS TO REMEDY FOR VICTIMS 24–29 (2017).

292. *Special Rapporteur*, *supra* note 1, ¶ 44.

293. Indeed, according to the Special Rapporteur, a similar situation arose in 2007 with regard to another vessel allegedly chartered by Trafigura.

In that case, the inspectorate of the Ministry of Housing, Spatial Planning and the Environment took samples and the waste was processed in a plant for toxic waste after the results of an analysis of the samples taken by the inspectorate had become available and permission was given by the local authorities to process the waste. Significantly, the waste collector and Trafigura agreed on the processing of the waste.

Id. ¶ 51.

294. See Environmental Management Act, § 10.37 ¶¶ 1–2 (Neth.).

while exportation to countries that are not members of OECD is prohibited.²⁹⁵

Trafigura's ultimately unsuccessful efforts to interdict information concerning a report it had commissioned, the so-called Minton Report, highlights another pressing aspect of implicit corruption. The Minton Report was a scientific analysis of the process used onboard the *Probo Koala*, and the waste that was likely dumped in Abidjan.²⁹⁶ The report concluded that the waste in question had been toxic, and was likely to cause precisely the symptoms the Abidjani victims claimed to have experienced.²⁹⁷ Needless to say, this report was unfavorable to the company's litigation strategy in the class action settled by the Leigh Day law firm in 2009. This report, which directly contradicted the negotiated language of the settlement agreement as to the nature and effect of the waste, had apparently not been disclosed to plaintiff's attorneys during discovery.

Just as the case was settling, a copy of the Minton Report was leaked to *The Guardian* newspaper. Reporters for *The Guardian* approached Trafigura to establish the validity of the document.²⁹⁸ Trafigura's lawyers responded by obtaining a so-called "super-injunction" to prevent the newspaper from publishing the Report or its conclusions.²⁹⁹ The super-injunction went well beyond interdicting any discussion of the content of the report. It also enjoined the paper, under penalty of contempt, from alerting the public that an injunction had been issued and limited what they

295. Council Decision 97/640/EC concerned the approval, on behalf of the Community, of the amendment to the Basel Convention, as laid down in decision III/1 of the Conference of the Parties. Council Decision 97/640, 1997 O.J. (L 272) 45. By that amendment, all exports of hazardous waste destined for disposal from countries listed in annex VII (Parties and other States which are members of OECD, the European Community and Liechtenstein) to the Convention to countries not listed therein were prohibited, with effect from January 1, 1998. *Id.*; see also Basel Ban, *supra* note 13.

296. Minton Report, *supra* note 128.

297. The Minton Report concluded that the wastes involved were capable of causing severe human health effects, including the range of effects reported by victims (headaches, breathing difficulties, nausea, eye and skin irritation, unconsciousness and death). *Id.* ¶ 9.3. The report also concluded that the wastes were hazardous, and that land disposal of this waste would be forbidden in an EU member State. *Id.* ¶¶ 8–9.

298. David Leigh, *Revealed: Trafigura-Commissioned Report into Dumped Toxic Waste*, GUARDIAN (Oct. 16, 2009, 7:47 PM), <https://www.theguardian.com/world/2009/oct/17/trafigura-minton-report-revealed> [<https://perma.cc/G2FQ-CN2J>].

299. *Super Injunction*, GUARDIAN, annotated text available at <http://image.guardian.co.uk/sys-files/Guardian/documents/2009/10/20/SUPER-INJUNCTION.pdf> [<https://perma.cc/2GCT-3HLP>] (last visited Apr. 20, 2018).

could report.³⁰⁰ Coupled with the facts that the injunction had been filed anonymously, and the court documents were sealed, the super-injunction had the effect of preventing the public from learning that the company had even gone to court.³⁰¹

When a member of Parliament posed a question about the legality of such a super-injunction,³⁰² Trafigura's lawyers even tried to prevent reporting about the question.³⁰³ Instead, *The Guardian* ran a front page story announcing that it had been prevented from identifying the MP who asked the question, the question itself, to which minister the question had been directed, and even why it was prevented from reporting.³⁰⁴ Public outcry forced the company to back down and withdraw the injunction.³⁰⁵

300. Alan Rusbridger, *Trafigura: Anatomy of a Super-Injunction*, *GUARDIAN* (Oct. 20, 2009, 1:22 PM), <https://www.theguardian.com/media/2009/oct/20/trafigura-anatomy-super-injunction> [<https://perma.cc/43WF-SF8Q>].

301. *See id.*

302. David Leigh, *Trafigura Drops Bid to Gag Guardian Over MP's Question*, *GUARDIAN* (Oct. 13, 2009, 4:42 PM), <https://www.theguardian.com/media/2009/oct/13/trafigura-drops-gag-guardian-oil> [<https://perma.cc/2UZ6-NSAW>]. Labour Member of Parliament ("MP") Paul Farrelly, representing Newcastle-under-Lyme, had posed a question for Jack Straw, the Secretary of State for Justice. The question asked:

[W]hat assessment he has made of the effectiveness of legislation to protect (a) whistleblowers and (b) press freedom following the injunctions obtained in the High Court by (i) Barclays and Freshfields solicitors on 19 March 2009 on the publication of internal Barclays reports documenting alleged tax avoidance schemes and (ii) Trafigura and Carter-Ruck solicitors on 11 September 2009 on the publication of the Minton report on the alleged dumping of toxic waste in the Ivory Coast, commissioned by Trafigura.

David Leigh, *Gag on Guardian Reporting MP's Trafigura Question Lifted*, *GUARDIAN* (Oct. 13, 2009, 8:08 AM), <https://www.theguardian.com/media/2009/oct/13/guardian-gagged-parliamentary-question> [<https://perma.cc/D2AA-DTEG>].

303. Staff Reporter, *How the Trafigura Story Came to Be Told*, *GUARDIAN* (Oct. 16, 2009, 5:59 PM), <https://www.theguardian.com/world/2009/oct/16/trafigura-carter-ruck-the-guardian> [<https://perma.cc/SZ98-MQMK>].

304. David Leigh, *supra* note 130. The Guardian wrote:

Today's published Commons order papers contain a question to be answered by a minister later this week. The Guardian is prevented from identifying the MP who has asked the question, what the question is, which minister might answer it, or where the question is to be found.

The Guardian is also forbidden from telling its readers why the paper is prevented—for the first time in memory—from reporting parliament. Legal obstacles, which cannot be identified, involve proceedings, which cannot be mentioned, on behalf of a client who must remain secret.

Id.

305. *How the Trafigura Story Came to Be Told*, *supra* note 303. The nature of a super-injunction makes it difficult to know how many there have been. The authors claim that

The right of access to information is generally considered a key component of human rights, particularly in the environmental context.³⁰⁶ Thus, efforts to suppress information about the nature of the waste dumped in Abidjan have significant human rights ramifications. Indeed, Trafigura has been roundly criticized by a collection of UN Special Rapporteurs for its continued lack of transparency about the nature of the waste.³⁰⁷ One of the stranger outcomes to emerge from Trafigura's strategy of obfuscation has been that the Dutch editors of Wikipedia announced that they were forced to change the editing settings of the *Probo Koala* Wikipedia page to non-editable because someone from Trafigura kept editing the entry to say that Trafigura had done nothing wrong.³⁰⁸

VI. CONCLUSION

The Trafigura saga in Abidjan highlights the implicit corruption inherent in the international legal system that facilitates global trade divorced from human rights accountability. It reveals a pernicious economic logic which insists that "citizens of developing nations have a low opportunity cost in hazardous wastes."³⁰⁹ This

twelve such injunctions have been issued. Steven Swinford & Holly Watt, *Courts Issue 80 Gagging Orders in Six Years*, TELEGRAPH (May 13, 2011, 10:54 PM), <https://www.telegraph.co.uk/news/uknews/law-and-order/8512656/Courts-issue-80-gagging-orders-in-six-years.html> [<https://perma.cc/Q449-DLK3>].

306. See Rebecca Bratspies & Sarah Lamdan, *Human Rights and Environmental Information*, in ENCYCLOPEDIA OF HUMAN RIGHTS AND THE ENVIRONMENT (forthcoming 2018); Svitlana Kravchenko, *Is Access to Environmental Information a Fundamental Human Right?*, 11 OR. REV. INT'L L. 227 (2009).

307. Press Release, United Nations Special Rapporteur, *supra* note 188. The Special Rapporteurs issuing the statement include: Baskut Tuncat, Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes; Hilal Elver, Special Rapporteur on the right to food; Dainius Pūras, Special Rapporteur on the right to health; and Leo Heller, Special Rapporteur on the human right to safe drinking water and sanitation. They were joined in issuing this statement by human rights experts Mohammad Ayat, Independent Expert on the situation of human rights in Côte d'Ivoire and Pavel Sulyandziga, current Chairperson of the Working Group on human rights and transnational corporations and other business enterprises. *Id.*

308. Van Wingerde, *supra* note 160, at 270.

309. Johnson et al., *Potential Gains from Trade in Dirty Industries: Revisiting Lawrence Summers Memo*, 27 CATO J. 397, 401 (2007). That rationale asserts that "[o]ne might conclude that people in developing countries would rationally accept increased exposure to hazardous pollutants in exchange for opportunities to increase their productivity—and, hence, their incomes . . ." *Id.* Apparently when the economic logic is strong enough, "one" need not consult the people involved, or obey their laws that explicitly prohibit these activities.

sentiment rests on the premise that because poor people in developed countries do not enjoy an abundance of material goods and because they tend to die at a younger age, their loss from exposure to hazardous substances is of a lesser magnitude than the loss experienced in developed countries where people live longer and enjoy a higher standard of living. While the Abidjan catastrophe is particularly egregious, it was in many ways the logical outgrowth of the legal regime in which it occurred. International law narrows legal responsibility all along the decision chain in a fashion that is structured to avoid corporate responsibility for human rights violations.

There is an argument that the role of the Bretton Woods Institutions, the World Bank and the International Monetary Fund, promote this kind of implicit corruption. As developing nations sought aid packages or debt forgiveness, the Bretton Woods Institutions pursued policies that devolved economic control from governments to the private sector.³¹⁰ As part of the progressive development of human rights, the UN had already identified dumping of toxic wastes as a serious threat to multiple human rights, including the right to life, and the right to enjoyment of the highest attainable standard of physical and mental health,³¹¹ the right to clean water, the right to food, and the right to housing.³¹² Yet, by tying financing to economic privatization, these institutions transfer the levers of economic power from States, which have well-recognized human rights obligations under international law, to corporate actors who do not. As Nigerian scholar Clause Ake characterized this phenomenon, “the Bretton Woods institutions have unfortunately come to symbolize power without responsibility.”³¹³ Corporate actors are accountable, but to their shareholders rather than to the people affected by resource extraction or pollution disposal decisions. Under this responsibility scheme, a decision based on increasing or protecting profit

310. Chris Nwachukwu Okeke, *The Second Scramble for Africa's Oil and Mineral Resources: Blessing or Curse?*, 42 INT'L LAW. 193, 195–96 (2008).

311. Office of the High Commissioner for Human Rights Res. 1995/81, U.N. Doc. E/CN.4/1995/81 (Mar. 8, 1995).

312. Report of the Special Rapporteur on the Implications for Human Rights of the Environmentally Sound Management and Disposal of Hazardous Substances and Wastes, U.N. Doc. A/HRC/33/41 (Aug. 2, 2016) (detailing how toxic waste exposure implicates these rights in the context of the rights of children).

313. CLAUDE AKE, DEMOCRACY AND DEVELOPMENT IN AFRICA 122 (1996).

margins can be justified as a legitimate exercise of corporate power, where one based on preserving air quality for non-shareholders has no legal standing.

Once power has been transferred to private decision-makers, their lack of human rights obligations then becomes justification for the lack of accountability for exploitative choices. One underexplored consequence of the World Bank-mediated transfer of power from States to private actors is the wholesale elimination of human rights accountability from those development decisions. This creates the conditions in which implicit corruption festers. Corporate decision-makers have every incentive to undermine rigorous legal regimes of environmental protection, worker protection, and human rights.

TNCs skillfully exploit their ambiguous status to evade the control of States and to avoid any social duties that might flow from their activities. The abuse of flags of convenience to evade rigorous environmental and worker safety oversight is just one manifestation of this gap.³¹⁴ The high probability of bribery is another. Bribery is commonly perceived to be the norm rather than the exception in high polluting industries, particularly oil and gas.³¹⁵ Although trade and foreign investment is generally touted as an antidote for corruption, the evidence does not fully support this claim. Instead of necessarily being substitutes, it turns out that corruption and trade can be complements, with increased trade increasing corruption and degrading environmental protection.³¹⁶ The combination of foreign investment and corrupt locals can prove deadly—with foreign investment driving down environmental standards.³¹⁷

314. See Carlos Felipe Llinás Negret, *Pretending to Be Liberian and Panamanian; Flags of Convenience and the Weakening of the Nation State on the High Seas*, 47 J. MAR. L. & COMMERCE 1 (2016) (describing the role of flags of convenience in a global race to the bottom for environmental and worker safety standards); *Why So Many Shipowners Find Panama's Flag Convenient*, BBC NEWS (Aug. 5, 2014), <http://www.bbc.com/news/world-latin-america-28558480> [<https://perma.cc/KA7M-YWZE>].

315. See ERNST & YOUNG, *MANAGING BRIBERY AND CORRUPTION IN THE OIL AND GAS INDUSTRY* (2014); see also DEBORAH HARDOON & FINN HEINRICH, *TRANSPARENCY INT'L, BRIBE PAYERS INDEX 201*, at 14–19 (2011); Dave Forest, *Corruption Endemic in the Oil and Gas Industry*, OILPRICE.COM (June 29, 2016, 10:24 AM), <https://oilprice.com/Energy/General/Corruption-Endemic-In-The-Oil-And-Gas-Industry.html> [<https://perma.cc/7EU4-QYDD>].

316. Cole et al., *Endogenous Pollution Havens: Does FDI Influence Environmental Regulations?*, 108 SCANDANAVIAN J. ECON. 157, 159 n.5 (2006).

317. *Id.* at 160, 174.

It seems clear that in making choices about its waste disposal practices, Trafigura neither viewed itself as a human rights actor, nor took precautions to prevent adverse impact on human rights from the discharge of its waste. Indeed, as early as 2005, Trafigura had investigated disposal options and knew that, due to the hazardous nature of the waste,³¹⁸ European, United States, and Singaporean authorities prohibited disposal of caustic washes within their territories.³¹⁹ Trafigura also knew that the only safe, responsible waste disposal option available to it involved working with the Rotterdam facility, which the company rejected as too costly while in port in Amsterdam.³²⁰ These discussions included the very highest authorities in the company.³²¹ The allure of cheap feedstock that would “make serious dollars”³²² overrode concerns about the lack of a plan to deal with the toxic waste.³²³

Trafigura is not alone in making this profit versus risk calculus. Corporations large and small apply relentless internal pressure to meet financial goals, whether for net income, cash flow, return on investment, or stock price. There are ubiquitous temptations and pressures to cut corners, cheat, or commit fraud in pursuit of profit.³²⁴ Economic self-interest can easily turn into avarice. Unfortunately, global trade too often reinforces rather than

318. E-mail from Naem Ahmed to Leon Christophilopoulos & James McNicol, *supra* note 132.

319. E-mail from Naem Ahmed, Chemist, Trafigura, to James McNicol, Trader, Trafigura, Leon Christophilopoulos, Head Gas Trader, Trafigura, Jorge Troop, Trader, Trafigura, Farzad Askari, Vice President, Trafigura, & Amjad Habbas, Dir., Trafigura (Dec. 27, 2005, 7:29 PM).

320. *Id.*; *see also* E-mail from Naem Ahmed to Leon Christophilopoulos & James McNicol, *supra* note 132.

321. *See supra* note 151.

322. E-mail from James McNicol to Leon Christophilopoulos Jorge Troop, Farzad Askari, & Amjad Habbas, *supra* note 128; *see also* E-mail from Naem Ahmed, to James McNicol, Leon Christophilopoulos, Jorge Troop, Farzad Askari, & Amjad Habbas, *supra* note 319.

323. E-mail from Leon Christophilopoulos, Head Gas Trader, Trafigura, to Jorge Troop, Trader, Trafigura (Apr. 18, 2006, 12:36 PM). Titled “PMI Shit,” this e-mail emphasized the looming crisis of disposal, noting that Tunisia, “where we were washing/discharging will not let us discharge this material anymore, so the ship we’re using for washing is now converted to floating storage. We also still haven’t tackled how we will dispose of the [waste].” *Id.*

324. Ben W. Heineman Jr., *Only Government Intervention Can Stop Corrupt Capitalism*, ATLANTIC (Jul. 11, 2012), <https://www.theatlantic.com/politics/archive/2012/07/only-government-intervention-can-stop-corrupt-capitalism/259687/> [https://perma.cc/YLR3-25RD].

disrupts this pattern. The Trafigura incident is, in the words of the European Parliament, “just the tip of the iceberg.”³²⁵

The global trade in high-sulfur fuel highlights this painful reality. The trade, which involves degrading fuel to the point that it just barely exceeds pollution control standards, is corrupt at its core. Traders deliberately mix fuels to achieve a sulfur content as poor as can possibly scrape by in order to increase profit margins. These high sulfur fuels contribute to air pollution that is responsible for many thousands of avoidable illnesses and deaths across Africa.³²⁶ While the governments involved could potentially make the fuel sulfur standard more stringent, and the selling of the degraded fuel may be technically legal, that should not be the end to a corruption analysis. After all, corruption is about abuse of power for private gain. Whether law adequately prohibits conduct that is reckless and greedy does not change the scandalous nature of the activities involved. Deliberately creating and selling fuels that are more polluting than they would otherwise be—literally corrupting the fuels—is unquestionably an abuse of economic power for private gain, the very definition of corruption.

The abuse of power is only underscored by the fact that most of these traders are based in countries with much more rigorous standards—countries in which it would be unambiguously illegal to sell these “African Quality” fuels. Yet, international trade not only allows these corrupt practices, the very structure of a corruption analysis excludes questioning the terms of the trade itself. Indeed, Trafigura’s own assessment of its conduct before, during, and after the Abidjan dumping found “no glaring departure by Trafigura from procedures followed by other oil trading companies” and the investigator noted that he was “not aware of any substantial departure by Trafigura from what is good trading practice.”³²⁷ Rather than an exoneration of Trafigura, these statements stand as a searing indictment of business as usual in that industry.

In 2018, Trafigura is celebrating the 10th anniversary of the Trafigura Foundation,³²⁸ established in the wake of the Abidjan toxic waste scandal. This Foundation was a self-proclaimed

325. Resolution on the Export of Toxic Waste to Africa, *supra* note 185, ¶ K.

326. See GUÉNIAT ET AL., *supra* note 112.

327. FRASER, SECOND INTERIM REPORT, *supra* note 168, at 4.

328. TRAFIGURA FOUND., <https://www.trafigurafoundation.org/> [<https://perma.cc/QT63-FQHD>] (last visited May 9, 2018).

“response to the aspirations of Trafigura employees wishing to make a tangible and sustainable difference to communities around the world.”³²⁹ Its mission is to “improve socio-economic conditions of vulnerable communities around the world” and to “achiev[e] sustainable results with a real, lasting impact.”³³⁰ Yet, it is unclear what, if anything, Trafigura learned from this tragedy and whether the corporate culture has changed. Many of the figures that dominated internal discussions during the *Probo Koala*’s hunt for a cheap disposal site remain at the firm. Indeed, one of the key players on all the internal Trafigura emails associated with the Abidjan debacle now serves as Head of Oil Trading for the firm.³³¹ The Trafigura Foundation proclaims its support for the Sustainability Goals³³² at the same time that Trafigura remains one of the major players in the “African Quality” fuel trade. Similarly, in 2014, Trafigura joined the Extractive Industries Transparency Initiative,³³³ claiming that doing so reflected Trafigura’s “commitment to transparency and accountability as core components of responsible trade.”³³⁴ However, despite its membership in an organization that “underline[s] the importance

329. *Trafigura Foundation*, GOODOPEDIA, <http://www.goodopedia.com/cause/trafigura-foundation/> [https://perma.cc/VA6R-2X3B] (last updated 2013).

330. TRAFIGURA FOUND., *supra* note 328.

331. Jose Larocca, who was CC’d on many of the e-mails cited in this Article currently serves as head of oil trading. *See Jose Larocca*, *supra* note 139. Trafigura then-CEO, Claude Dauphin, who was also on the e-mails, continued to serve as CEO until 2014, and remained Trafigura’s Executive Chairman until his death in 2015. Sarah Kent, *Trafigura Founder Claude Dauphin Dies at Age 64*, WALL STREET J. (Sept. 30, 2015, 3:19 PM), <https://www.wsj.com/articles/trafigura-founder-claude-dauphin-dies-at-age-64-1443631769> [https://perma.cc/8JQZ-XYXH]. For perspective on the insignificance of the fines assessed against Trafigura for the Abidjan dumping, it is worth mentioning that Dauphin was France’s thirty-second richest person at his death, leaving behind a fortune worth \$1.4 billion. Dmitry Zhdannikov, *Trafigura Founder, Commodity Trade Giant Claude Dauphin Dies*, REUTERS (Sept. 30, 2015, 11:48 AM), <https://www.reuters.com/article/us-trafigura-dauphin/trafigura-founder-commodity-trade-giant-claude-dauphin-diesidUSKCN0RU22920150930?feedType=RSS&feedName=peopleNews> [https://perma.cc/YVD9-2AT9].

332. *Supporting the Sustainable Development Goals*, TRAFIGURA FOUND., <https://www.trafigurafoundation.org/about-us/highlights/supporting-the-sustainable-development-goals/> [https://perma.cc/Y32G-75PB] (last visited May 9, 2018).

333. While focusing mostly on State obligations to manage extraction of natural resources, the EITI principles also emphasize the transparency duties of corporate members like Trafigura. *See EXTRACTIVE INDUS. TRANSPARENCY INITIATIVE, THE EITI STANDARD 2016*, at 10 box 1 (2016).

334. *Trafigura Joins EITI Transparency Initiative*, TRAFIGURA (Nov. 18, 2014) (emphasis omitted), <https://www.trafigura.com/news/trafigura-joins-eiti-transparency-initiative/21144> [https://perma.cc/2GMN-4WNT].

of transparency by governments and companies in the extractive industries,”³³⁵ Trafigura still refuses to release details about composition of the wastes dumped around Abidjan. The lack of disclosure continues to hamper clean-up of the contaminated sites, and health monitoring of the Trafigura dumping victims. Whether any kind of foundation promoting philanthropic activities can be an answer to the implicit corruption inherent in that fuel trade remains to be seen.

It does not have to be this way—there are alternative conceptions of the relationship between trade and human rights. The UN Global Compact,³³⁶ for example, would underpin the global economy with universal values as defined by international instruments. The Global Compact approach embraces an alternative perspective which views the right to development as an inherent human right and the right to the environment as a collective human right.³³⁷ To that end, Principles 1 and 2 of the Global Compact would demand that businesses not only support and respect human rights, but ensure they are not complicit in human rights abuses.³³⁸ Under Principle 8, business entities would be obligated to promote greater environmental responsibility.³³⁹ Were the international community to embrace these principles outlined in the Global Compact, domestic law in TNC home countries might provide a remedy and a deterrent for the kind of conduct that so harmed the people of Abidjan.

335. EXTRACTIVE INDUS. TRANSPARENCY INITIATIVE, *supra* note 333, at 10 box 1 principle 5.

336. *The Ten Principles of the UN Global Compact*, UNITED NATIONS GLOBAL COMPACT, <https://www.unglobalcompact.org/what-is-gc/mission/principles> [<https://perma.cc/2UEW-4CNV>] (last visited Apr. 20, 2018).

337. *See id.*; *see also* Okeke, *supra* note 310, at 195–96.

338. *The Ten Principles of the UN Global Compact*, *supra* note 336, principles 1–2.

339. *Id.* principle 8.