

Case Studies of Corporate Environmental Prosecution - Obstacles and Solutions



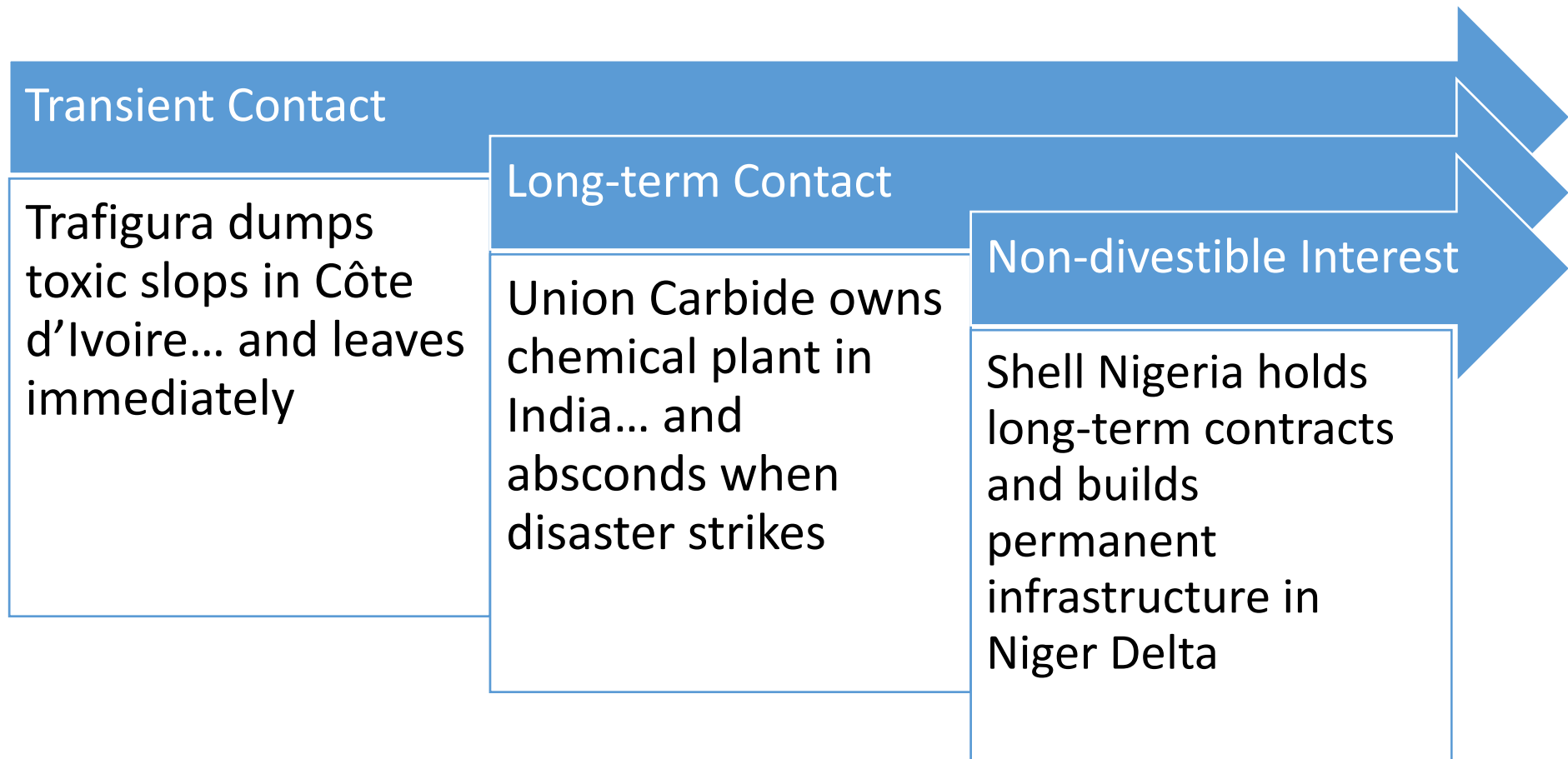
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IAP Regional Conference – March 2014

Livingstone, Zambia

A Spectrum of Corporate Involvement



Union Carbide and the Bhopal Gas Disaster

- 1970 – UCC opens pesticide factory at Bhopal, India
- 1973 – UCC's engineering department warns that effluent disposal system risks polluting ground water
- Dec. 2, 1984 – Methyl isocyanate leaks in the middle of the night, killing up to 10,000 in days and 15,000 more in the following years
- 1989 – 1997 – Numerous reports find dangerous contaminants in the land and water surrounding the plant
- 1998 – UCC's Indian subsidiary surrenders its lease to the site without completing clean-up
- 2004 – Indian Supreme Court concludes that the groundwater is contaminated and dangerous to human health



India Attempts to Hold UCC Responsible

- **1987 – Criminal charges filed for “culpable homicide not amounting to murder”; U.S. court sends civil suit back to India on FNC**
- **1987 – 1989 – UCC challenges jurisdiction despite FNC condition**
- **1989 – India settles and absolves UCC of future criminal liability**
- **1991 – Supreme Court sets aside criminal immunity decision, but UCC refuses to appear in Indian courts**
- **1994 – UCC sells UCIL**
- **2001 – UCC bought by Dow Chemicals**
- **2013 – Indian court orders Dow to explain why its operations in India should not be seized to answer for UCC’s failure to appear**

Discussion - Obstacles to Prosecution

- UCC used corporate form as a shield – lack of “enterprise liability.”
- U.S. Government was uncooperative in attempts to reach individuals.
- Because of UCC’s long-term investment in India, prosecutors did have some leverage. But once the Indian Supreme Court lifted the attachment of UCC’s shares in UCIL and UCC was able to abscond.
- The merger with Dow imposes yet another layer of corporate form.

Discussion – Opportunities and Workarounds

For a company with long-term interests in the country:

- Freezing Orders – increase your leverage and prevent absconding. Remember that a subsidiary *is* an asset.
- Get creative about extradition. It may not be possible to extradite a corporation, but corporate executives may be subject to extradition. And there may be ways around the political process for extradition.
- Use the corporate form against them. UCC may no longer have operations in India, but Dow does, and Indian prosecutors are getting creative.

Trafigura and Toxic Waste Dumping in Côte d'Ivoire

- Late 2005 – Trafigura refines coker naphtha on the *Probo Koala* at sea, producing toxic slops
- July 2, 2006 – Trafigura tries to unload waste in Amsterdam but decides not to because of high toxic waste unloading fee
- August 19, 2006 – Trafigura contracts with Compagnie Tommy in Abidjan, and the waste is buried in 18 locations around the city
- August 20, 2006 – Abidjan awakes to a medical emergency, as thousands of people experience rashes and breathing problems
- February 13, 2007, Côte d'Ivoire authorities settle with Trafigura and agree to forego prosecutions.

Possible legal violations

- Unpermitted export of hazardous wastes (Netherlands)
- Violation of Basel Convention on Transport of Hazardous Wastes
- Illegal transport of wastes to Africa (EU)
- Poisoning (Ivoirian criminal law)
- Breach of Ivoirian environmental laws prohibiting importation and deposit of hazardous or toxic materials)

Justice Frustrated

- **National Commission of Inquiry clearly indicated Trafigura's responsibility**
- **Police arrest and charge Trafigura executives (as well as executives of Compagnie Tommy)**
- **No recognition of corporate criminality under Ivoirian law**
- **February 13, 2007 – government announces settlement with Trafigura (parent and local subsidiary), foregoing criminal action**
- **The next day, the Trafigura executives are released on bail and flee the country**
- **2010 & 2011 – Dutch courts find Trafigura and executives guilty of illegal exportation of waste. No one is ever prosecuted for the dumping.**

Obstacles to Justice

- Political pressure – there is evidence that the Prosecutor and courts were pressured to grant bail and allow the executives to abscond in order to seal the settlement
- Once the executives were gone, the parent company was no longer present in Côte d'Ivoire
- Lack of corporate criminality allowed Ivoirian court to dismiss prosecutions against parent company and subsidiary executives

Shell Oil and the Bodo Oil Spill in Nigeria

A young child with a purple headwrap is in a small wooden boat on a river. The water is heavily contaminated with a thick, dark, viscous substance, likely oil, which is being scooped up by the child. The background shows a hazy, overcast sky and distant trees.

- **August 2008** – Major fault in the Trans-Niger pipeline causes massive oil spill in Ogoniland, which flows for ten weeks
- **December 2008** – Another ten-week spill occurs. Shell accepts that both spills were caused by equipment failure
- **In 2011**, Shell still had not cleaned up the thousands of barrels of oil spilled into the creeks.
- **Contamination** destroys vegetation, poisons water, kills fish, and makes traditionally livelihoods impossible
- **2011** – communities file suit in the UK, and Shell swiftly accepts responsibility.

Legal obligations under Nigerian law

- Environmental Guidelines require companies to negotiate with communities directly over compensation, which does not extend to health impacts or damage to public resources
- Clean-up must begin within 24 hours, and milestones must be met within one to two months. Company is responsible for clean-up regardless of cause of spill, but can be compensated if not at fault
- Companies must inspect pipelines monthly and take practical precautions
- Joint Investigation Team composed of company, regulator, and community representatives must determine cause and submit report

Weaknesses and Obstacles to Accountability

- Conflicts of interest – Department of Petroleum Resources seeks both to increase profitability and production and to oversee environmental impacts
- Federal oil spill agency has no independent capacity to investigate spills and relies on companies both for access and technical expertise
- Fines are extremely low – for failure to clean up a spill, approximately \$1,000.
- Joint Investigative Teams in practice are dominated by the company, and communities and regulators have little technical capacity

Opportunities for Improvement

- Duty to compensation should be clarified and should not be subject to negotiation
- Build community capacity and authority to monitor and inspect in order to increase government reach
- Shift legal burden of proof
- Use affordable, crowd-sourced mobile technology to identify patterns of non-compliance
- Update statutory fines
- Public interest civil suits (Ministerio Público model)

Thank You!

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