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SAFETY AND ENVIRONMENT PROTECTION

Discussion Paper on Possible Actions to Combat Substandard Shipping by Involving Players Other than the Shipowner in the Shipping Market

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Summary

Safety and environment protection has been on the agenda of the Maritime Transport Committee for a number of years. The conclusion has been reached time and time again that while there is no single solution to prevent the operation of substandard vessels, there is certainly a sufficient number of international rules and regulations available to combat the phenomenon.

The real problem lies with ensuring adherence to these rules and regulations. It is true that flag states (and Classification Societies acting on their behalf), insurers, charterers and other interested parties have stepped up efforts to ensure shipowner compliance with national and international maritime rules. At the same time shipowners have themselves made very serious efforts to improve the safety and quality of their shipping. In addition, the International Maritime Organisation (IMO) has strengthened the obligations incumbent upon flag states, while Port State inspections have improved through regional agreements in Europe, Asia and the Americas. Nevertheless, despite these efforts, the problem of substandard shipping is still present.

Consensus seems to exist that further efforts must be made to achieve long-lasting improvements in vessel operating standards by combating non-observance of rules and standards. However, opinions differ as to how this could be best achieved.

This paper first discusses a number of related issues to be borne in mind when considering the need to involve industry players other than shipowners in the fight against substandard practices. Briefly, the paper examines:

- i) whether more regulation is likely to lead irresponsible operators to improve their standards;
- ii) the recognition that a gap exists between the perceptions held by OECD governments and some industry players of the commercial risks of substandard operations, and how to motivate sections of the industry into acknowledging that transparency of information can never be a substitute for a bias in favour of quality tonnage; and
- iii) acknowledgement that substandard shipping cannot be dealt with simply through an all-encompassing review of legal liability.

The remainder of the paper addresses the potential roles of parties other than the shipowner in combating substandard shipping. It particularly focuses on financial institutions, insurance interests, Classification Societies and users of shipping services. It makes a number of suggestions on initiatives for further examination as to how these players might make a greater contribution to reinforce the importance of quality shipping, and thus drive substandard ships further toward the margins of the industry.

The observations and initiatives suggested for further discussion are based on a range of informal contacts undertaken by a consultant to the OECD Secretariat, and the Secretariat itself, with the above-mentioned players in the shipping market. In revising this document the Secretariat has taken into account the views of the Maritime Transport Committee, and its Working Party, following their meetings held on 23-24 April 1998.

The Maritime Transport Committee agreed that this document be released publicly in order to stimulate further discussion on this very important issue, and for use as a resource document at an industry roundtable to be organised by the OECD Secretariat in September 1998.

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SAFETY AND ENVIRONMENT PROTECTION

Discussion Paper on Possible Actions to Combat Substandard Shipping by Involving Players Other than the Shipowner in the Shipping Market

I. Introduction

The role of flag and port states, and of shipowners, have been extensively addressed at the IMO and in the national legislation of many countries. It is clearly accepted by the international maritime community, and by this paper, that the primary duty to ensure compliance with international rules and standards, as regards maritime safety and protection of the environment, lies with the flag state. The crucial roles played by Port State Control, and the many international regulations which deal with ship safety and the protection of the environment, are also recognised. The purpose of this paper is to address the role that other, less visible (but nevertheless still important) players in the shipping market could play in the continuing campaign against substandard shipping.

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The competitive advantages enjoyed by substandard shipping, as described in the OECD report entitled "*Competitive Advantages Obtained by some Shipowners as a Result of Non-observance of International Rules and Standards*", have not had an equal impact on all sectors of the international shipping industry. Until now, it appears that, while certain parts of the general cargo, dry bulk and tanker trades have tried to take advantage of these lower costs, this has not been the case in the container sector, where shipowners would lose business if their operations were perceived by their customers to be below standard.

Quality ship operators take their responsibilities seriously, and participants in the shipping market do not generally appear to believe that the market "as a whole" is being disturbed by the activities of operators who ignore their international obligations. This is notwithstanding Port State Control returns showing significant levels of default across most sectors of the industry.

The shipping industry points out that while there already exist a large number of international conventions dealing with maritime safety, two additional, very important reforms are in the process of being introduced with the objective of enhancing quality across the industry--the 1995 amendments to the STCW Convention (International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, 1978) which came into effect in February 1997, and the phased introduction of the compulsory ISM Code (International Safety Management Code) certification, beginning in July 1998. These are expected to greatly strengthen the armoury against substandard vessels, although it might be possible to argue that these changes will only serve to widen the gap between the costs incurred by the responsible and the irresponsible shipowner, and so increase the competitive advantage which the latter already possesses. This would be particularly true if the enforcement of these measures were to prove ineffective.

Opinions remain divided on the prospective fate of ships that fail to meet required standards, but it seems to be generally accepted that, with the ISM Code in place, the Port State Control mechanism is likely to be extensively used (for example, through larger memberships in regional MOUs, higher

inspection rates, harmonized inspection and detention criteria, blacklisting of ships, the checking of ISM and STCW certification and hull inspection). This would have important repercussions for non-complying owners, as the economic effects are likely to be much more far-reaching than those resulting from the, at present, relatively infrequent detentions. In brief, the common view seems to be that the ISM Code will make a positive difference, provided that it is properly applied.

Despite the acknowledgement that responsible shipowners operating through quality registers are serious about ships safety, and that the new IMO regulations will facilitate the ability of flag and port states to act against substandard shipping, the fact remains that such vessels still exist, and additional efforts need to be made to combat them.

This paper addresses the role that can be played by parties in the market, other than the shipowner. A key element to be recognised at an early stage is that, while none of these other players could be considered as having sufficient individual influence to prevent the operation of substandard ships, each in their own way could help to make the operating environment that much more difficult for unscrupulous operators, and thus marginalise them in the international shipping market.

However, before undertaking this examination of the various industry players, it might be helpful to briefly discuss a limited number of closely related issues.

II. Combating Substandard Shipping by Involving all Players in the Shipping Market -- Related Issues

Shipping: governmental regulations -- a guarantee for safety?

The first reaction when serious incidents occur (be they in maritime, aviation, road transport, or indeed almost any other industry sector) is to call for greater regulation and government control, as if this offers an instant solution. However, as can be observed in the maritime and aviation sectors, long-standing efforts by the international community to address the issue of safety through regulation have not provided all the solutions. This is despite strict and comprehensive technical safety standards, complex webs of national and international regulators (e.g. the Paris and Tokyo MOUs in shipping), and continuing public pressure to minimise these safety risks to the greatest extent possible.

This is also true in the case of non-transport industries, for example, health and safety experts can provide a long list of products, from children's toys to motor components, that enter the world market at low prices and that, by the standards of advanced countries, and in some cases international standards, have been inadequately designed or manufactured. Nevertheless, knowingly or unknowingly, trade in these articles continues to be facilitated by import agents, banks and insurance companies (and reputable shipping lines) despite attempts by regulatory authorities to prohibit their sale.

In the aviation industry, neither the existence of strict licensing systems in a tightly regulated industry, nor of a powerful aircraft manufacturing industry whose interests coincide with safety in the air, have succeeded in preventing substandard operators. The airline industry continues to sustain a number of fatal accidents every year, while entire aircraft registers have been deemed unsafe by the Federal Aviation Administration in the United States, and their aircraft prohibited from using US airports.

Therefore, some care is needed to avoid a simplistic conclusion that, with greater regulatory involvement by governments, bad operators could somehow be squeezed out of the market-place. Unfortunately, there is no evidence that government regulation, regardless of how strictly it is enforced,

can succeed on its own. Hence, while acknowledging the existence of a number of very important international conventions dealing with maritime safety, this paper does not try to address the issue in a broad and systematic manner, but rather it takes a tangential approach by proposing to widen the focus to other industry players, where these can play a role in reducing the opportunities available for substandard shipping to operate.

The perception of risks/motivation in favour of quality

Furthermore, within the industry there appears to be a view that full transparency of information about the condition of ships and the way they are run, is all that is necessary to drive any substandard vessel out of the industry. The thinking is that such vessels would be driven out by a combination of punitive conditions attached to loans, high insurance premiums and shippers' doubts about the ability of the owner to complete the voyages satisfactorily. However, the continuing existence of such vessels seems to indicate that the effectiveness of mere transparency is at best limited.

This is probably due to wide differences in the perception of risk among the various industry players on the one hand, and the regulators and the public on the other. In other words, ship users may not appreciate the magnitude of the risk, or they may judge that the potential savings make the risk worth taking.

If these instances were isolated, then the effects could be contained. However, a sufficiently large number of such instances would not only encourage other substandard operators, but could also further depress freight rates to the disadvantage of quality operators. The problem here is that increasingly the spot market in the dry bulk and crude oil trades could (and to some degree already may) be set by the marginal ship, i.e. the low-standard ship acceptable for one voyage only by charterers and shippers whose sole interest is the lowest possible price.

In contrast, governments of traditional maritime countries, due partly to the high political and media profile of large-scale accidents, try to anticipate as many eventualities as possible, and set high standards which in those countries are strictly enforced. Therefore, the yardstick of a fully compliant ship, (according to most OECD Member governments) exceeds by a wide margin what the markets find acceptable to ensure reasonable service. This divergence further reinforces the view that left on their own, only the most well-run ships, operated by the most responsible owners, will voluntarily meet the strict safety standards demanded by the public. The remainder, to a greater or lesser degree, will require the efforts of government and other players in the shipping industry to adequately meet those standards.

The conclusion to be drawn on this issue is that if sections of the shipping industry are to be freshly motivated towards meeting quality standards, much more than pure transparency of information will be needed. It will also be salutary for governments to acknowledge openly this "perception gap", so as to avoid being drawn into facile conclusions about the potential scope for the industry to organise itself to achieve public policy objectives.

The issue of legal liability

While not directly related to the issue of substandard ships, shipowners have frequently expressed concerns that the burdens of legal liability are weighted against them. One response to this concern could be to re-open the whole question of shipowner liability, as expressed in the various Conventions and Rules -- Hague, Visby, Hamburg, Civil Liability Convention for Oil Pollution, Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and

Noxious Substances by Sea (HNS) and the 1976 Convention on Limitation of Liability for Maritime Claims.

There are two broad objections to this response. One has to do with proportionality. While some concern has been expressed, there is no evidence to suggest that the problem of divergent liability regimes is serious enough to require an overhaul of liability rules affecting the totality of shipping. The other objection concerns the likely outcome of a major review of liability. As the negotiations over the HNS Convention showed, there are very strongly held views in this area, stemming from considerations remote from the issue of basic standards among shipowners, which could influence the debate in a way not necessarily helpful to the cause of reducing the competitive advantages enjoyed by substandard shipping. Therefore, this paper seeks to focus on specific measures regarding the responsibilities of all the different players involved in the maritime transport business, without seeking to adjust the basic regime of legal liability.

The General Average

The General Average permits shipowner to claim, from cargo owners, a contribution to meet the cost of action undertaken, in extreme circumstances, to protect cargo and preserve a ship. The possible role of this legal remedy to either assist, or hinder, the fight against substandard shipping is problematic.

First, the General Average is not an "industry player" in the sense of the other institutions examined in this document, but a long-standing principle of international law which is now underpinned by the York-Antwerp Rules of 1994. Therefore, there is no "body" of persons or institutions which can be collectively identified under this heading.

Second, while in some circumstances the General Average may provide some kind of windfall for the owners of uninsured, substandard vessels, such shipowners would nevertheless face substantial risks because the General Average is an uncertain legal process and not a reliable source of cover or compensation. For these reasons the General Average issue is not examined further.

III. Suggested Initiatives for Further Discussion

The concept of a single scheme for "integrating" economic and safety policy is probably unlikely to be achieved, particularly if it were to entail any fundamental change in principles of liability. However, there are a variety of initiatives which could be investigated by industry groups, and which could make a useful contribution to reinforcing quality and driving substandard ships further towards the margins of the industry. These suggested initiatives do not require a new layer of regulation, nor would they overturn the long-standing principles of liability. On the contrary, they are pragmatic actions which could well be financially beneficial to the industry players by providing them with information which will enable them to better assess, and perhaps avoid, excessive risks in their dealings with substandard operators.

The initiatives enumerated below (and discussed in more detail under the individual sub-headings for each industry player) are suggested for further consideration by the parties involved:

- develop closer links between governments and ship financiers, to stimulate more informed decision making and to provide guidance to lenders through the direct supply of information by Classification Societies to banks;
- discuss the possibility of establishing a Quality Ship Index;

- consider how to foster the cohesive influence of the International Group of P&I Clubs in promoting regulatory processes such as the drive towards ISM Code certification and the provision of evidence of financial security in relation to third-party claims;
- address the need for a codification of the liability of Classification Societies;
- explicitly recognise the benefits of inspection systems devised by groups of shippers, encourage the adoption of voluntary codes of best practice, promote industry-led inspection schemes in the bulk industry, make maximum use of the information available from them in the operation of the Port State Control system, and use influence with the Classification Societies to secure a greater exchange of data between them and the shippers' organisations;
- discuss with organisations representing shipbrokers the scope for their access to better sources of vessel information, in return for the enhancement of appropriate elements of their Code of Practice;
- review the relationship between various government organisations with a view to improving the co-ordination of safety and economic policy;
- examine in close co-operation with all those involved in maritime transport operations the possibility of setting up an integrated database drawing on information from a variety of sources (see above) such as, *inter alia*, Port State Control administrations, shippers, insurance companies, charterers, Classification Societies and flag states; and
- encourage the parties which come into direct contact with ships (such as port authorities, terminal operators and cargo handling services) to put in place effective communication lines with local Port State authorities in order to advise them when a substandard, or potentially substandard, vessel is in port.

The thrust of these initiatives recognises that the main chance of success in combating substandard ships lies with the various industry players co-operating with each other to increasingly marginalise these vessels within the industry. The effectiveness of this co-operation would be greatly enhanced if it were undertaken in concert with the rigorous enforcement of existing international regulations (such as the ISM Code). Therefore, this paper does not recommend any new regulations, nor do the suggested initiatives intrinsically change the existing activities or responsibilities of the industry players identified.

However, if future action were to swing towards some kind of additional formal regulation which would have the effect of changing today's general practice of assigning primary responsibility to the shipowner towards a formal system of multiparty responsibility, then a number of other issues not specifically covered in this paper would also have to be investigated.

In particular, there would be some very complex legal and insurance issues in respect of whether any new multiparty system would:

- create uncertainties about the allocation of responsibility to the various parties;
- afford parties an opportunity to protect themselves against new legal risks/obligations; and

- create circumstances where additional legal and/or insured difficulties would arise, together with greater legal costs.

IV. The Industry Players

The following addresses the role of the individual players participating in maritime transport operations. It does not touch upon the role of ship owners/ship managers for reasons explained above. It considers how these players could contribute to the objective of raising standards in shipping, and in particular eliminating those ships that clearly fall short of prescribed international standards. It also only looks at cargo shipping since it is now generally accepted that in the much smaller (and more politically sensitive) international seapassenger transport sector, standards are already sufficiently closely supervised to eliminate any need for a fresh approach from the standpoint of the other players in the industry.

Financial institutions

A fully responsible lending policy could prevent the creation of companies that operate at the bottom end of the "safety scale". Very few shipping companies start operations without having to borrow money, and the negotiations over the terms of a loan could offer a unique opportunity for lenders to influence the way in which a ship is operated. Loan contracts containing clauses requiring ship purchasers to meet certain quality requirements, such as international safety standards, certainly provide a potential avenue for addressing the problem. However, persuading financiers to adopt such clauses requires strong factual evidence of losses suffered by financiers through substandard operations, e.g. through loss of uninsured vessels, etc. Therefore, this opportunity is only exploited fully by a small number of well-established lenders -- probably even a minority -- of the commercial banks who have been active in shipping finance through good times and bad, and who most often are only servicing the top segments of the market.

Competition between lenders for ship financing is fierce. This is the result of a number of factors:

- i) the capital ratio of most banks has risen dramatically;
- ii) demand for loans has grown less quickly than banks' capacity (although since the Asian financial crisis this may no longer be the case); and
- iii) the cost of capital has continued to fall.

Besides high levels of liquidity, one can also perhaps attribute part of the growth to the attractive state aid provided by certain countries, particularly in terms of taxation, which have been seen by financiers as well as investors as offering a simple and straightforward avenue to quick returns, as well as appearing to provide some form of government-backed security.

Coinciding with the increased availability of funds for lending, the number of lending institutions entering the ship finance market has grown substantially. Although this has been a feature of the industry in the past, the scale of the recent explosion -- by a factor of four or five over the last seven years, according to most estimates -- is without precedent.

Information on the procedures followed by new, and certain traditional lenders, is not readily available, but it is evident that many do not see it as their business to acquaint themselves with the day-to-day circumstances of the shipowner and his vessel(s). There seem to be various reasons:

- i) lack of the expertise required to understand the information if they had it, as most banks have little in-house technical knowledge;
- ii) an unwillingness to dilute the profitability of the deal by hiring consultants to advise them;
- iii) a fear of being held liable if they interfere too far with the management of the enterprise; and
- iv) lack of continuity among banking personnel, contributing to a culture in which a premium is placed on the quick deal.

Over the last four years this last factor has become particularly prominent in certain financial centres where the bonus system is highly developed, although well-publicised cases of imprudent dealing (albeit outside the area of ship finance) have cast doubt on the effectiveness of mechanisms used by banks to supervise lending procedures. Also, the recent problems faced by banks through poorly scrutinised loans, especially in East Asia, may considerably tighten up bank procedures.

Financial institutions tend to be particularly in accessible to governments except where propriety is in question or, in some circumstances, at the level of Central Banks. There are of course arrangements made under the Basle Concordat of the Bank for International Settlement which set some kind of minimum standards for the supervision of international banking groups and their cross-border establishments, but it would be unrealistic to expect details of ship lending practice to be covered at this level. However, one possible beneficial side-effect of the recent measures taken by the Bank of International Settlement requiring banks to focus more on cash-flow-based lending, may be that something of a brake will be applied to the easy flow of speculative finance.

In summary, there seem to be a general agreement that better information would enable lenders to make better judgements on their lending risks. However, in order to be able to access this information (for example from Classification Societies or Port State Controls), lending institutions should ensure that they have the prior written agreement of the prospective owner to ensure that they have immediate and unconditional access to such information. Such freedom should also include the right to inspect a vessel at any time.

Proposal

i) Considerations should be given to a co-ordinated approach by OECD governments, to their principal shipping lenders, to stimulate more informed decision-making. Such an approach should have two objectives:

- **to inform lenders of developments in the field of shipping safety and environmental regulation, for their own benefit, and to make clear the commercial and environmental dangers attached to the provision of finance for substandard vessels;**
- **to encourage the preparation of guidance to those engaged in ship financing, and to supplement existing general policies drawn up by individual lenders.**

Governments of non-Member countries should be encouraged to act similarly where appropriate.

ii) Lenders should be encouraged to insist as a condition of the loan--as some do at present--that they have automatic and unconditional access to all relevant information (e.g. from the Classification Society and cargo interests).

Note: Some banks already go further and require their own survey. Utilising information available to the Classification Society and cargo interests would at least alert the bank to any problems to do with inadequate maintenance, which is an area where lenders frequently seem to be uninformed. The Classification Societies, as represented by IACS, as well as cargo interests representatives would probably support such a move.

iii) Lenders should also aim to retain and exercise the right to monitor whether the vessel is crewed and maintained in accordance with international rules and standards, and the right to inspect the ship and its records at any time, including free access to Class, insurance and P&I records. Furthermore they should aim to require regular presentation of material from borrowers which proves that the vessel is operating in accordance with international rules and standards (e.g. drydocking reports, insurance certificates, etc.).

Note: At present lenders are not allowed access to the relevant files without permission of the owner. In principle lenders may often already have the right to inspect their security for the mortgage during the repayment period and the costs for such inspections can even be charged to the owner of the vessel. However, as long as the mortgagee is not in default under the repayment terms of the loan, there is little or no incentive for most lenders to inspect the vessel. Such inspections are normally only carried out in cases where the loan is in default.

Marine underwriters

Logic would dictate that the key to compensating the good owner for the extra costs that he bears in insuring a safe operation lies with the underwriting community, that is hull and machinery underwriters and cargo insurers. Insurers have traditionally exhibited a deep interest in the compliance by owners with standards of construction and maintenance, and public pressure has encouraged some of them to take a more active interest in the quality of the ships they insure. Because of this it might be expected that by today there would be a well-developed mechanism in place reflecting the level of risk associated with the ship and the cargo, clearly distinguishing the bad risk from the good, and setting premiums accordingly.

However, like banking, the marine underwriting market is currently suffering from considerable excess capacity. This, coupled with the creation of new entities in the Far East (in particular), has brought about fierce competition for business. In this context, it might be useful to note the recent response of underwriters to the decision by the International Association of Classification Societies (IACS) in May 1997 to suspend the Polish Register of Shipping (PRS) over doubtful practices associated with the transfer of a large number of aged bulkers from other class societies (the PRS was re-instated as an Associate of the IACS in June 1998). On the other hand, while many responsible insurers have sought additional surveys of PRS vessels, there has not been a similar uniform response from marine underwriters.

Hull and machinery insurance

In the past, a degree of discipline was maintained in the hull and machinery insurance market (insurance of the hull and machinery of a vessel including any accident arising from impact, collision, etc., while berthing or during navigation) through the operation of "Joint Understandings". However, in the European Union these proved incompatible with the competition provisions of the Treaty of Rome. Given the existing competitive pressure, there is little likelihood of any action by insurers, nor is there any real possibility of governments influencing them. The only possible way to provoke some world-wide cohesive action by underwriters seems to be to improve the availability of information concerning ownership/vessel record. A "shipowner/vessel performance" record would allow insurers to assess the level of risk posed by a particular vessel and to set the premium accordingly.

The Classification Societies report that close co-operation already exists between the IACS and marine underwriters through local markets in London, Norway and the United States, as well as through the International Union of Marine Insurers. Such co-operation may well serve as the basis of a more comprehensive exchange of information, for example through a "Quality Ship Index".

Cargo insurance

Of all the players in the shipping industry, the cargo insurers are perhaps the most elusive. The reason is, of course, that much cargo insurance is conducted through the open cover system which covers, subject to a limit to the amount at risk in any one vessel and often also subject to a limit to the amount at risk in any one location, all shipments forwarded by the assured during the currency of the open cover. Such cover is not specific to a vessel or shipping company. Furthermore cargo insurers deal with the cargo owner and not with the shipping company. Hence, it is not easy to engage the interest of these parties in the condition of particular ships. If anything is to be achieved here, it will probably be as part of the knock-on effect of greater transparency achieved for the purposes of the hull and machinery insurers. However, consideration might be given to some "insurance practices" (for example, over-insurance of the value of the cargo) which, in certain cases, almost encourage the use of substandard vessels carrying cargoes at low freight rates.

When the ISM Code is in force, there may also be scope to investigate the inclusion, in standard contracts for the carriage of cargo, of a clause making it a requirement that the cargo be carried on vessels which are ISM compliant.

General issues related to insurance

There is a general presumption in the foregoing section on insurance that denying insurance cover to substandard ships is a positive means of discouraging their operation by owners and their use by shippers.

However, it is possible to put the alternative view, that the denial of insurance cover will not in fact prevent the operation of such ships, and that this could actually create severe problems for shippers who ship cargo in the belief that insurance cover exists, and other third-party victims (e.g. those who might suffer from environmental damage). This scenario could also occur if insurance premiums, based on individually assessed risks, were so high as to encourage unscrupulous shipowners to take the risk of uninsured operation.

The problem of uninsurable, and uninsured, activities could be quite serious if it became widespread enough to undermine the operations of reputable shipowners. There is no clear-cut answer to this proposition. However, the weight of logic would seem to indicate that while there may be some occasions when innocent shippers and other victims may suffer through uninsured loss, the marginalisation of such shipowners should deliver far greater benefits overall. Of course, the removal of insurance cover, supported by other regulatory action such as the rigorous application of flag and Port State Controls, would produce a much more robust result.

Proposal

Consideration should be given to the feasibility and desirability of elaborating a form of "Quality Ship Index" by the various sectors of the shipping industry to guide insurers and others in their decision making.

Note: Governments should recognise the limits of their ability to influence insurers, but where initiatives are contemplated to improve the availability of information, they should be encouraged. For example a form of "Quality Ship Index" would need the co-operation of many parties, and governments could play a useful role in co-ordinating these efforts.

Considerations should also be given, when the ISM Code is in place, for standard clauses in contracts of carriage making it a requirement that cargo be carried in ISM-compliant vessels.

Protection and Indemnity Clubs

Probably the most important contribution to raising standards through the mechanism of insurance can be made by the P&I Clubs. These Clubs are mutual insurance organisations which cover the third-party liability of shipowners. Shipowners who are members of each Club are both the insurers and the insured. It is therefore in the interests of all members to ensure the quality of membership, and this is done by adopting stringent standards and the carrying out of surveys, etc. Thus these mutual organisations represent the principle of "industry self-motivated for quality" in action. In order to reduce volatility, the P&I Clubs in the International Group pool risks above \$5 million, and the mutuality of risk at this level also tends to improve standards. For instance, unlike hull and machinery insurers, the P&I Clubs in the International Group have been able to agree that compliance with the ISM Code be made a condition of cover.

However, as with the Classification Societies, the problem is less one of how to reinforce the workings of the established bodies than how to deal with those who, either voluntarily or because they are found not to meet the required standard, operate outside their ambit. In the P&I case, about 90 percent of the mutual insurance market for vessels above 2000gt is in the hands of the 15 Clubs of the International Group. There is disagreement about the number of ships without any cover, mutual or otherwise, but it is probably well below 5 percent (the question of the minority of uninsured owners is now being addressed at the IMO). It is hoped that, if possession of a Certificate of Entry to the P&I Clubs, or other form of acceptable insurance, is made one of the requirements of the Paris (and other) Memorandum of Understanding on Port State Control, the number of vessel trading uninsured will fall further.

The International Group is under investigation by the European Commission under competition articles of the Treaty of Rome. It has been suggested by the P&I Clubs that, without the Pool, it is unlikely that all Clubs would continue to make compliance with the ISM Code a condition of cover. Without commenting on the merits of the investigation, governments should nevertheless consider

examining their policies in the area of competition law in order to ensure that these do not unnecessarily prevent or hinder measures which would otherwise encourage ships safety and environmental protection.

Proposal

Considerations should be given to the possibility of enhancing the role of the P&I Clubs, by making entry into a Club an alternative requirement to the possession of any third-party cover. As an example, the International Group of Clubs might consider whether to allow new entries of ships which lack whatever ISM Code certificate is requested by their flag state administration and to exclude from membership any vessel not making the necessary progress towards securing the ISM Code Certificate .

Note: Although admittedly this might have the immediate effect of enlarging the population of ships which do not belong to a Club, it could, if done without delay, create the incentive that currently appears to be lacking to a large body of shipownersto get on with the ISM process.

Governments should examine their competition law policies to ensure that these do not unnecessarily hinder or prevent measures which encourage ships safety.

Classification Societies

Classification Societies today have a pivotal role in raising standards throughout the shipping industry. This capability has developed through the strengthening of the controlling function exercised by the International Association of Classification Societies (IACS) and the acceptance by the Societies of the lead role in handling ISM Code certification. Also important has been the IMO's limited progress in ensuring proper performance by flag states in carrying out their functions.

The implementation of IMO Assembly Resolutions A 739(18) and A 789(19) regarding Recognised Organisations, together with EC Council Directive 94/57, has been useful in regulating the Classification Societies' segment of the maritime industry. However, some flag state administrations use the services of Classification Societies which do not comply with these requirements, and delegate authority for statutory matters to them. The extent to which these activities have a significant impact on maritime safety remain to be seen.

Furthermore, the IACS Quality System Certification Scheme has strengthened through its six year existence and, together with IMO's involvement and oversight of the programme, keeps IACS Members' standards up to scratch. The 1997 action with regard to one of the IACS' Members shows that the IACS Council is determined to maintain high standards and to avoid any negative impacts on the credibility and integrity of classification. To a certain extent, competition between Societies will inevitably lead to less rigorous enforcement of standards, but this is probably the price that has to be paid for the dynamism and capacity for innovation that competition engenders.

Suggestions are made from time to time about altering the whole basis on which the Societies operate, so that, for instance, banks and/or insurance companies might assume the responsibility for employing them, at least once a vessel has been delivered. It has also been suggested that Classification Societies should be encouraged to introduce into their steering committees members from, for instance, insurance companies, P&I Clubs and financial institutions. It is beyond the scope of this note to examine such proposals in depth, but given the evident reluctance shown by some of the actors concerned, this would appear to be a change that would take a very long time to gain acceptance.

A good many of the benefits envisaged as a result of such a move could probably be obtained more easily through a process of wider and more immediate circulation of information derived from the Societies' inspections. However, at present it is very difficult to see any practical alternative to the current system although there is certainly a great need for transparency of information. In this respect, the IACS has pointed out that it is already providing substantial information to Port State Control, and that it is committed to co-operating with authorities by mandatory Procedural Requirements, which are auditable under the IACS "Quality System Certification Scheme".

Also, in an increasingly litigious world, and with the scope of the Societies' responsibilities growing by the month, an issue which governments need to follow closely is that of the *liability* of Societies. So far, courts have decided in Societies' favour but further challenges seem certain. The Comité Maritime International (CMI) has been considering where the Societies' liability begins and ends, and how any liability could be limited. There is a danger that, if attention is not paid to this topic, court proceedings in some jurisdiction or another might force the Societies as a whole to reconsider whether they can afford to play as prominent a role in the supervision of shipping standards as is now envisaged for them.

The Comité Maritime International has been working on this for several years through a Working Group which is seeking to draw up common Principles of Conduct and Model Contractual Clauses. So far, agreement has effectively been reached on "Principles of Conduct for Classification Societies", which set out standards against which the conduct of a Society in a given case should be measured. These principles cover all activities of the Society (such as classification work for shipowners and statutory work for governments) and apply to all Societies. The "Model Contractual Clauses", for inclusion in Societies' contracts with governments and shipowners, define and clarify, subject to applicable national law, the circumstances under which the civil liabilities of the Societies and their employees and agents should be regulated and limited. IACS members have recognised the benefits that such agreements would bring.

As regards the limits of liability, the Working Group has not yet been able to reach an agreement on this matter. Based on examples of current practices, the Working Group has proposed a clause which bases limitation of liability upon either a multiple of the fee charged, or a stated amount, whichever is greater, but does not cap the limitation amount by a stated figure. It is hoped that discussions on this issue will continue, resulting in a mutually acceptable agreement on a liability level for Classification Societies. Such a compromise could then be submitted for final agreement to a meeting of the CMI Assembly. Such an agreement could well avoid the necessity of governments taking direct action, or going through the route of revising the 1976 IMOLimitation of Liability Convention which would, in any case, be difficult as this convention has just been revised. In addition, such a review would take a rather long time to complete, and may not have the support of the IACS.

Proposal

Policy makers in OECD Member countries should update themselves on the CMI's work and bring suitable influence to bear on the parties to try to ensure a satisfactory outcome. Furthermore, they should consider whether it will be sufficient for the question of the Societies' liability to remain the subject of a recommendation from the CMI, or whether, in order to give the Societies the necessary confidence (as well as imposing greater restraints on those Societies which may themselves fail to attain the requisite standard), the new arrangements should be incorporated in a Convention -- possibly by way of a future revision of the 1976 Limitation of Liability Convention.

Cargogenerators

The question of whether shippers should be held responsible for their choice of vessels, and penalised in some way for the use of substandard ships, is now receiving some attention. Despite this there is a widespread view that the easier approach would be to strengthen Port State Control, rather than transfer responsibility to the shipper. However, it is also significant that not all countries have signed up to the MOU on Port State Control.

By contrast, there is considerable support for voluntary schemes whereby shippers co-operate in efforts to guarantee the quality of the ships they use. Two such schemes have been in operation for some time on a global scale, both associated with the carriage of environmentally sensitive cargoes.

The OCIMF (Oil Companies International Marine Forum) system for pooling inspection information known as SIRE (Ship Inspection Report Programme) has been running since November 1993, and now covers 41 companies which have an interest in shipping, terminal transfer and storage of crude oil and its products (including gas and petrochemicals). These cover about 70 percent of all international oil movements. Its goals are to:

- expand the availability of tanker inspection information;
- enhance tanker safety;
- reduce the incidence of pollution;
- reduce duplication of effort by inspecting organisations; and
- reduce the burden of multiple inspections on board ships.

There are currently about 11 000 reports on the database, available not only to OCIMF members but also to charterers, other organisations and governments having a direct and common interest with the OCIMF in tanker safety. Until early 1997, each company operated its own system of inspections but uniform criteria are now being introduced.

The chemical industry scheme (run by the Chemical Industries Institute -- CDI) is less than three years old. The principles of CDI state that vessels are inspected by independent, accredited inspectors on the basis of a single inspection programme. Reports are kept on an electronic database for easy access to all members and costs are shared between CDI members. CDI does not approve or reject vessels, this judgement is left to the individual member companies. Already, 600 ships out of a global fleet of around 1800 have joined the system.

In addition, the European Shippers' Council (ESC) has recently adopted a Voluntary Code of Conduct to promote maritime safety and eradicate or minimise the use of substandard shipping in the dry bulk sector. The Code provides for members of the ESC a voluntary vetting system/code of best practice that will guarantee the minimum level of standard relating to the quality of vessels. The Code, once in effect, stipulates that shippers and/or charterers will request from owners/managers/operators written information, and a warranty, that vessels meet minimum requirements in respect of class, P&I and insurance coverage, manning, the possession of appropriate certificates and recent detentions from Port State Controls. In case such information is not provided or vessels do not comply with minimum standards, members will consider such vessels as "substandard" and will not contract such vessels.

Two questions arise in this context: i) what can governments do to reinforce these industry schemes? and ii) can this be replicated for the dry bulk sector outside Europe?

The operators of both SIRE and CDI have sought to have the results of their inspections taken up and used by Port State Control authorities. Although some differences exist between the criteria adopted by the commercial organisations and the regulatory authorities, there can be little doubt that a vessel found unsuitable by shippers for the carriage of environmentally sensitive cargoes would at the very least be of "interest" to government inspectors, and that their inspection would be assisted by having access to the industry report. Such access could be improved if the reports were to be made available without charge.

As for extension to other commodities, a degree of realism is appropriate. There are certain types of dry cargo for which the conditions of carriage are extremely important. Foodstuffs such as grain for human consumption require strict observance of rules (such as quarantine requirements) governing loading and discharge and the condition of storage spaces, and major shippers conduct their own inspections of vessels to ensure quality in these areas. The same applies, for example, to some minor bulk commodities, such as alumina, but for the great majority of dry bulk shipments -- ore, coal, phosphate rock, fertiliser, etc. -- the shipper's major concern is that his cargo arrives at its destination in reasonable time, at a price allowing him to increase or at least maintain his market share in the long run. These are low-value products, with little perceived environmental risk, and some shippers do not see any advantage in incurring additional costs by subscribing to an industry-sponsored inspections system.

However, the adoption of the Code of Conduct by members of the European Shippers' Council will add impetus to similar schemes being adopted by other shippers' organisations, especially those representing the dry bulk sector of the market. Governments should consider how they can foster such schemes, and how to facilitate their operation to improve their effectiveness.

In the liner shipping market, the situation is entirely different. The conference and consortia system does not give any possibility to cargo generators, forwarders, non-vessel owning common carriers, etc., to monitor the quality of vessels carrying their cargoes. However, it has to be noted that in this sector ship quality has not generally been a problem.

Proposal

Governments and industry should consider how regulatory authorities could best make use of industry-led inspections systems and examine how to foster such schemes in the dry bulk industry. They should, in particular, explore how data from such schemes might be used to complement and enhance the information available from their own sources. There is a special need to draw on industry data to support Port State Control, but governments should also take the lead in trying to secure a greater exchange of data between the industry bodies and the Classification Societies.

Shipbrokers

To a substantial degree, the world's maritime cargo movements involve the intervention of a third party, in the form of a broker. Most bulk movements are effected through the services of a shipbroker, and it is relevant to ask whether this player should not assume a measure of responsibility for screening out substandard vessels. Where a shipper belongs to an organisation such as SIRE or CDI, this kind of screening will frequently already have taken place. However, in other cases, the shipper may well have nobody of knowledge upon which to draw in assessing the quality of the ship offered. Although the broker, with his close daily contact with the shipping industry, will be in a much better position to make

this judgement, the less respectable broker could argue that he only needs to meet the shipper's requirements, and if a ship of a particular quality is not specified his sole duty will be to find the cheapest ship which will complete the voyage satisfactorily.

The problem with this approach is not simply that a ship due to be scrapped at the end of a spot charter voyage is as acceptable as a quality-tonnage ship, but that a signal is sent to those ordering the next generation of bulk ships. The likelihood is that the proportion of low-specification newbuildings will increase and even less quality tonnage will come onto the market.

With bulkers, the experience in Australia has shown that the possibility of a ship being detained by Port State inspectors before the voyage begins, combined with a responsible approach by charterers, has acted as a deterrent to substandard vessels operating on the Australian bulk trades. Clearly, the Australian attitude has fed back into the broker/charterer information base, thus providing a clear demonstration that, together, shippers and brokers can exercise a major beneficial influence on the quality of shipping.

Proposal

Codes of practice exist within the shipbroking profession and there may be scope for these to be developed so as to strengthen the hand of those brokers who wish to promote better ships but who cannot afford to get out of line with their competitors. Governments of countries with established shipbroking interests should open a dialogue along these lines with brokers, but they will need to be ready to respond to demands for greater transparency of information on the results of inspections, not only by governments themselves but also by the Classification Societies, where these have had flag state inspection functions delegated to them.

Other industry players: ports, terminal operators, pilots and cargo handling services

It has to be noted that such players may well be too remote to directly influence substandard ship operations. For example, in respect of port authorities most countries are parties to international conventions and bilateral or multilateral agreements which prevent the denial of access to ports to any vessels, even if these are substandard. Terminal operators and cargo handling services appear to be even further removed.

However, it could be feasible for these players, which after all come in direct contact with the vessels themselves each and every time they enter port, to improve communications with Port State authorities so as to advise them of the presence in port of substandard, or potentially substandard, ships. Normal Port State inspection procedures could then follow.

Also, in order to reduce the possibility of pollution, port authorities should ensure that there are adequate waste removal facilities in their ports and their uses should be encouraged and facilitated.

Proposal

Parties which come into direct contact with ships while in port (such as port authorities, terminal operators, pilots and cargo handling services) should investigate putting in place effective communication lines with local Port State authorities, in order to advise them of when a substandard, or potentially substandard vessel, is in port.

V. Comments from Industry

Important notice

The comments provided by industry to an earlier draft of this paper have been included in this document in an unedited format in an effort to make available as much information as possible on the viewsheldbyindustryonthisimportantissue.

However,readersshouldnotethattheindustrycommentsrefertoanearlierdraft,andnottothis version of the paper. Therefore, paragraph numbers, where quoted, may not necessarily match those in thispaper,andfrequently,issuesorpointsraisedbyindustrymaynowbecovered.

Industrycommentshavebeenreproducedintheiroriginallanguageonly.

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COMMENTS FROM INDUSTRY / COMMENTAIRES DE LA BRANCHE D'ACTIVITE

ASSOCIATION DES UTILISATEURS DE TRANSPORT DE FRET (A.U.T.F.)

“En octobre 1997, le Groupe de travail général du Comité des transports maritimes de l'OCDE a préparé un projet de rapport présentant des *“Mesures envisageables pour lutter contre la navigation sous-normes en impliquant les acteurs du marché en question autres que les armateurs”*.”

Ce projet a été soumis à l'AUTF, afin que soient recueillis le point de vue et les commentaires des chargeurs français, dont l'implication dans la recherche de moyens susceptibles d'améliorer la sécurité maritime est bien connue.”

L'AUTF rappelle que, sous son ancienne appellation de CNUT (Conseil National des Utilisateurs de Transport), elle avait, en avril 1993, donné sa position sur les responsabilités respectives des pouvoirs publics et des chargeurs en matière de sécurité du transport maritime, et émis un certain nombre de recommandations à l'usage des adhérents. Elle soulignait que les chargeurs sont les premiers intéressés à la sécurité des navires qui conditionne la qualité du service rendu aux clients destinataires, comme la sécurité des approvisionnements qu'eux-mêmes reçoivent.

Elle rappelait toutefois, qu'il appartient aux pouvoirs publics, dans l'exercice de leurs attributions en matière de police, couvrant tous les domaines, y compris celui du transport, de fixer les règles relatives à la sécurité maritime, et d'en assurer l'application en se dotant des moyens nécessaires pour les faire respecter par tous les intéressés.

Et concluait que si la plupart des réglementations nationales et internationales n'étaient pas respectées, c'était faute d'un contrôle satisfaisant de leur application.

L'AUTF ne peut qu'approuver l'introduction du document de travail de l'OCDE dans laquelle il est indiqué que le nombre de règles et réglementations internationales destinées à empêcher que des navires sous-normes continuent à sillonner les mers est suffisant, et que le véritable problème consiste à garantir le respect de ces règles et réglementations.

Elle regrette que, dans la suite du texte, ne figurent pas dans les recommandations aux Etats Membres tout encouragement à renforcer les moyens de police mis en oeuvre pour lutter contre la navigation sous-normes.

Mais si l'AUTF ne peut en aucune façon approuver ce document sous sa forme actuelle, c'est surtout parce que les armateurs sont exclus de la liste des acteurs du marché, comme l'indique son titre même.

1. *Critique des arguments de l'OCDE en faveur d'une non-implication des armateurs dans le processus de lutte contre la navigation sous-normes*

Il ressort des arguments exposés par l'OCDE que l'idée à développer est non pas de renforcer les contrôles pour pénaliser les armateurs qui exploitent des navires sous-normes, mais d'encourager les armateurs à suivre les règles et réglementations internationales en vigueur.

- Cette analyse est insuffisante à plusieurs égards.

En effet, si les risques relatifs à la sécurité et à l'environnement sont pris en compte, les risques commerciaux liés à l'utilisation de navires sous-normes ne sont même pas mentionnés (comme par exemple l'arrêt d'un site de production faute de combustible).

L'OCDE se contente ensuite de constater l'absence de définition du navire sous-normes, sans pour autant proposer une, ni même suggérer que ce soit fait.

L'OCDE enfin, ne tire pas de conclusions déterminantes de l'étude des relations existantes entre les différents acteurs du marché qu'elle a définis: le paragraphe 5 de ce document n'expose en effet que l'intention de l'OCDE de "se pencher sur les relations entre les différents acteurs du marché", ce qui pourrait contribuer à définir "des mesures à même d'encourager l'utilisation de navires de plus grande qualité".

- De plus, la justification de la mise à l'écart de cette étude des armateurs est fondée sur un argumentaire peu cohérent.

Il est prématuré de considérer que les nouvelles réglementations ISM et STCW vont bouleverser instantanément la situation actuelle et conduire à un renouveau immédiat: il est, en effet, encore difficile de se faire une juste idée de l'efficacité de la mise en oeuvre de ces nouvelles conventions, et du délai qui sera nécessaire pour qu'elles produisent un effet significatif.

Il est inexact d'affirmer que "le système des transports maritimes des principaux vrac secs et de pétrole brut est tout orienté vers l'acceptation des normes de qualité les plus basses possibles". Dans ces secteurs, en effet, les industriels ont la volonté de maintenir un certain niveau de qualité, même si leurs efforts sont parfois compromis, voire annihilés, par un certain nombre de traders, qui travaillent avec des armateurs irrespectueux des réglementations internationales. Seuls en effet les chargeurs disposant d'une assise suffisante peuvent se passer d'un recours à des traders, ou refuser une cargaison transportée par un navire dont ils craignent qu'il soit inférieur aux normes.

Enfin, le pré-rapport de l'OCDE révèle que "les accidents les plus graves survenus ces dernières années ont impliqué des navires exploités de manière satisfaisante par des armateurs conscients de leurs responsabilités", mais 75 à 80 pour cent des accidents résultent d'une erreur humaine, plutôt que d'une défaillance technique. Il est donc quatre fois plus urgent d'améliorer le management armatorial et la qualité des équipages que la technologie des navires.¹

Ainsi, l'AUTF considère que le fournisseur du service maritime ne peut être exonéré de sa responsabilité première qui est de fournir un navire en bon état de navigabilité, armé par un équipage

1. cf JMM6.02.98,264.

compétent, entraîné et dirigé au niveau du siège de l'armement par une équipe de direction soucieuse de la sécurité d'un navire et de l'équipage, ainsi que des marchandises dont elle a la garde.

L'AUTF considère également que le renforcement des pouvoirs de police est essentiel pour que soient appliquées les conventions et réglementations sur la sécurité maritime, tout en observant qu'une politique contribuant à la sécurité du transport maritime ne peut être mise en oeuvre pleinement sans une implication forte des armateurs.

D'un simple point de vue logique, comme au plan de l'équité, il serait paradoxal qu'un armement qui ne respecte pas les règles au regard de la sécurité et de l'environnement ne soit pas mis en cause, alors qu'il est le mieux placé pour savoir que ses navires et leur mode d'exploitation constituent un danger.

2. *La nécessité d'une mise en place d'un partenariat armateurs-affréteurs*

1. Des Codes professionnels de bonnes conduites initiés par les affréteurs...

La mondialisation conduit à une véritable guerre économique, de laquelle ne sortent gagnantes que les entreprises capables de conquérir et fidéliser une clientèle multinationale. Ces entreprises se sont donc engagées dans une politique de qualité totale sur l'ensemble de la chaîne du service client.

Or, la qualité du transport, et plus généralement de la logistique, est devenue un élément déterminant du service rendu à la clientèle. Cette qualité implique la sécurité de l'acheminement.

Pour pallier les insuffisances des contrôles destinés à garantir le respect des réglementations internationales en faveur de la sécurité maritime, les affréteurs n'avaient d'autres solutions que d'élaborer leurs propres procédures de bonne conduite ou de bonnes pratiques, pour contrôler la qualité des navires auxquels ils confient leurs produits.

Ce sont les industries pétrolières par le biais de l'OCIMF et de son programme SIRE, et les industries chimiques avec le CDI, qui les premières ont mis en place ces pratiques.

Ce mouvement s'étend maintenant aux autres industries, qui malgré la moindre sensibilité de leurs activités aux conséquences d'un manquement aux règles de sécurité, sont tout à fait conscientes de l'importance de la qualité pour une meilleure compétitivité. Ainsi, avec le soutien des pouvoirs publics nationaux et européens, les chargeurs français, dans le cadre de l'AUTF, comme au niveau européen par l'intermédiaire de l'European Shippers' Council (ESC), travaillent à l'élaboration d'un code de "bonnes pratiques"/ou "bonne conduite", destiné à aider le chargeur et/ou affréteur à identifier un navire sous-normes, et comportant un engagement de ne pas affréter les navires ne respectant pas les réglementations internationales.

Ce Code est très proche des pratiques développées par les programmes SIRE et CDI, tout en étant adapté à la grande diversité des produits du secteur du vrac sec.

En effet, le problème tient surtout à la grande diversité et du nombre important des navires présents sur le marché du vrac sec, et à la réelle difficulté à obtenir, au moment de l'affrètement, des informations à jour et exactes relatives à la qualité et à la conformité du navire aux réglementations internationales.

Ce problème relatif au manque d'informations disponibles a déjà été évoqué par l'AUTF, qui a maintes fois réclamé que les informations relatives aux navires détenus par les Etats de ports soient mises, en temps réel, à la disposition des chargeurs.

Le Code de bonne conduite des chargeurs regroupe l'ensemble des informations dont un chargeur a besoin avant de fixer ou affréter un navire, c'est-à-dire des informations relatives à:

- l'Etat du pavillon;
- la certification du navire, et la Société de classification;
- le P&I Club et l'assureur coque et machine;
- des informations quant à son éventuelle détention par les Etats du port dans le cadre du Mémorandum de Paris, les motifs de son arrestation et les mesures correctives mises en oeuvre;
- l'équipage et la nationalité des officiers comme des marins.

Le but à terme de ces bonnes pratiques est, bien évidemment, l'éradication définitive de l'affrètement des navires sous-normes. Le complet succès de cette entreprise dépend d'une solidarité qui va bien au-delà de la mise en place de bonnes pratiques par les affréteurs ; il dépend aussi de la prise de conscience complète par les armateurs que leurs intérêts doivent les conduire à engager une politique de partenariat avec les affréteurs, en matière de sécurité maritime.

2. ...relayés par les armateurs

Rien en effet, n'a réussi à pleinement sans eux.

Ces sont les armateurs qui seuls maîtrisent à la fois le choix de l'Etat du pavillon et de la Société de classification, de la mise en oeuvre d'une politique de sécurité conforme aux réglementations internationales, de l'équipage et de sa formation, de la politique d'entretien de leurs navires, du respect des procédures de sécurité, et en fin de l'assurance d'un navire et de sa cargaison.

Beaucoup d'armateurs ont d'ores et déjà compris qu'ils avaient avantage à mener une véritable politique de sécurité allant au-delà du simple respect des réglementations internationales. Ils l'ont fait probablement parce qu'ils en tiraient des avantages en terme d'exploitation de leurs navires, en prenant de l'avance sur les réglementations futures, en élargissant la gamme des produits susceptibles d'être transportés par eux, en améliorant la conservation de leurs navires.

3. Les autres acteurs

Les autres acteurs mentionnés dans le chapitre 3 du pré-rapport de l'OCDE ne font pas l'objet de commentaires de notre part.

Leur action pour assurer la sécurité est importante, même si elle n'est pas aussi grande que celle des armateurs et des chargeurs.

L'AUTF ne peut qu'approuver l'analyse faite par l'OCDE de la situation du marché à travers des acteurs que sont les organismes financiers, les Sociétés de classification, les courtiers, les assureurs, les P&I Club et les pouvoirs publics.

Eneffet,cetteanalysemetenévidencetroispointsfondamentaux:

- lemanquedecommunicationdesdonnéesexistantesetladifficultéd'accèsauxinformations;
- lemanquedetransparencedumarché;et
- l'absencederesponsabilitéjuridiquebiendéfiniedecesacteurs.

Conclusion

L'AUTF ne peut cautionner ce pré-rapport de l'OCDE qui a fait une erreur de perspective majeure en excluant les armateurs "des acteurs du marché susceptibles de lutter contre la navigation sous-normes". Cette exclusion est défendue par des développements peu convaincants, alors que les armateurs ont une responsabilité de premier rang, liée à leur nature même de propriétaire/opérateur de navires ; les affréteurs n'ont, à l'évidence, qu'une responsabilité de deuxième rang, en raison du manque, de la limitation et/ou de l'imprécision des informations qu'ils ont à leur disposition.

Loin d'encourager une démobilisation des pouvoirs publics, l'AUTF insiste pour un renforcement des moyens de contrôle par tous les Etats, pour veiller à ce que les réglementations existantes en matière de sécurité maritimes soient respectées partout.

Pour contribuer à l'efficacité de ces contrôles, l'AUTF assure la promotion professionnelle d'un Code de "bonnes pratiques" auprès de ses membres qui sont tous incités à pratiquer une politique de qualité dans le transport de leurs produits, élément important du service rendu à leurs clients. Sans négliger le nécessaire renforcement du rôle des autres acteurs du monde maritime, l'AUTF considère qu'il faut tirer avantage de la communauté d'intérêts existant entre les armateurs soucieux de sécurité et les affréteurs soucieux de qualité.

L'AUTF préconise la réalisation de cette communauté d'intérêts dans un véritable partenariat au service de la sécurité maritime. Si les affréteurs ont temporairement pris l'initiative en assurant la promotion entre affréteurs des branches professionnelles de codes de "bonnes pratiques", ils espèrent que de semblables initiatives seront relayées par les organisations armatoriales les plus dynamiques et qu'une collaboration efficace réunira très rapidement armateurs et affréteurs.

AUSTRALIAN INDUSTRY

Australian Shipowners' Association

The Australian Shipowners' Association raised some concern that if governments were to tighten requirements of banks, class societies, marine insurance underwriters, etc. who are incorporated in OECD countries, this would result in dubious operators moving elsewhere, therefore increasing reliance on Port State Control authorities. The Australian Shipowners Association was also concerned that greater government involvement would lead to more ship inspections, which would cause increased delay. They suggested that there could be rationalisation and co-ordination between existing inspection regimes.

More detailed comments against the following proposals included:

Proposal: Consideration should be given to a co-ordinated approach by OECD governments, through their Central Banks -- to their principal shipping lenders to stimulate more informed decision making. This is not where the main problems lie. Dubious owners will go to non-Member countries if OECD banks get tough.

Proposal: Considerations should be given to the feasibility and desirability of elaborating a form of "Quality Ship Index" by the various sectors of the shipping industry to guide insurers and others in their decision making. Too complex a subject for "an index". Port State Control records are perhaps the nearest thing to a ship's track record and practice. The ISM Code will also create a benchmark.

Proposal: Considerations should be given to the possibility of enhancing the role of the P&I Clubs, by making entry into a Club an alternative requirement to the possession of any third-party cover. As an example, the International Group of Clubs might consider whether to allow new entries of ships which lack whatever ISM Code certificate is requested by their flag state administration and to exclude from membership any vessel not making the necessary progress towards securing the ISM Code Certificate. This will encourage the development of "clubs" outside the ambit of responsible governmentsto cater for those not qualifying for ISM Code certificates.

Proposals: Policy makers in OECD Member countries should update themselves on the CMI's work and bring suitable influence to bear on the parties to try to ensure a satisfactory outcome. Exploratory only.

Para 36

But this is by an industry with a small number of players who themselves own and charter ships.

Para 37

A specialised sector of shipping.

Para 40

Large mining companies take more responsibility--particularly in Australia.

Insurance Council of Australia (ICA)

The ICA supported the proposals and was willing to co-operate and undertake more co-ordinated efforts to reduce the incidence of substandard shipping. ICA noted that compliance with existing regulations is a major impediment to improving safety. It supported more effective policing of existing regulations and recognised the success of Port State Control programmes in combating substandard shipping. The ICA reported that Australian shippers demand high standards in their choice of shipping.

The ICA stated that even in the most competitive markets, lower standard vessels attract higher premium rates. However, this is a disincentive only where insurance is sought by the owners and many substandard vessels are trading without insurance of hull or liabilities. The ICA concluded that insurance measures on their own would not be successful in reducing the incidence of substandard shipping.

Proposals relating to the development of an integrated database would probably be supported by insurers but the ICA was concerned that requirements to maintain commercial confidentiality would have to be examined.

The National Bulk Commodities Group (NBCG)

The NBCG placed a strong emphasis on the need for a consistent international approach to Port State Control and argued that mechanisms which sought to broaden responsibility beyond shipowners would not be successful. They argued that the imposition of additional regulatory burdens would cause further problems for those who used quality shipping by providing another set of regulatory costs which they would pay and others avoid. This would widen the competitive gap between quality and substandard shipping.

The NBCG objected to a number of specific references in the paper dealing with the bulk shipping sector including:

Para 9

The last sentence needs to be amended to read "Unfortunately some Parties engaged in dry bulk trades..."

Para 11

The last sentence is not correct with an increasing number of quality shippers actually moving to more long-term contracts and away from the spot market.

Para 40

Arrival of cargo at its destination in reasonable time, etc. is the shipper's major concern -- not his only concern.

It also needs to be noted that quarantine inspections for certain dry bulk shipments can lead to higher standards of inspection than those in the liners shipping market.

Para 42

The role of the broker has been confused with that of the charterer. The ship broker acts for the vendor in the sale of a vessel rather than in the chartering of a vessel for a particular voyage. The proposal on page 15 is therefore incorrect since it deals with brokers as if they were charterers. The reference at the end of the first sentence should read "...out of line with their owners." (not competitors).

Para 43

The assertion that an increasing proportion of new buildings will be of low quality conflicts with the increasing standards demanded by the IMO and national customs/quarantine services.

Trade and Business Committee of the National Council of Lawyers (NCL)

The NCL's view was that the ship finance and marine insurance (hull or cargo) businesses were too fragmented to be responsive to the imposition of new regulation. The results of proposed new approaches to regulate lending for substandard shipping were considered by NCL to be unpredictable.

The NCL considered that new regulations would compare poorly with established and successful Port State Control arrangements. The NCL supported strengthening and expanding Port State Control programmes internationally with the possibility of concentrating on strategically chosen trade centres.

Shipping lenders will continue to act in their perceived best commercial interest and would be unlikely to respond to "information and encouragement" from a central bank or industry regulator.

Shipper taking a greater responsibility for the standard of shipping employed (particularly in the dry bulk sector), with the adoption of ship selection procedures similar to those used in the tanker market would reduce the incidence of substandard shipping.

BIAC MEMBERS

The BIAC Committee has not yet collectively addressed the issues raised in the paper, however, three BIAC members have responded on an individual basis:

BIAC Member 1

The objective of the OECD Secretariat paper (MTC paper, hereinafter) is to achieve the exclusion of substandard ships through the co-operation of players other than shipowners in the maritime chain. While this spirit itself seemingly leaves little room for objection, it should be fully recognised that, by now, the governments and the world shipping industry have been taking initiatives in the move to eliminate substandard ships, with IMO as the universal forum for that objective.

The enforcement of the ISM Code and 95 STCW Convention will culminate the past efforts of all the parties concerned in the shipping industry and maritime administration. It should be understood that people in shipping society generally think that the matter of the highest priority at present is the steady implementation of these treaties by flag states and countries supplying seamen, and the irresponsible attitude of some flag states, if any, should be penalised by the strict enforcement of Port State Control. It is not a part of the common sense in the society that any new structure needs to be constructed outside IMO, with OECD as its score.

On the other hand, the "*Recommended initiatives*" of the MTC paper, together with the paper's basic idea of "*a major overhaul of the way in which the industry operates*", do not appear to be appropriate as government policy measures in a free market economy.

The OECD MTC is urged to pay due attention to the following various issues:

- i) The subject addressed here is the elimination of substandard ships and not the overall standards of the shipping industry. There is no question in the maritime industry that the shipping industry as a whole is substandard. The coming enforcement of the ISM Code and the 95 STCW Convention itself be seen as proof of the industry's sound standards and ability to drive substandard ships out of the industry, in co-operation with the governments of nations through the UN organisation, IMO.
- ii) Port State Control, which has been introduced on a world scale for several years now, is becoming established as an effective counter-measure against the abuse of sovereign right by some flag states. And the ISM Code and the 95 STCW Convention will prove powerful reinforcement to the effective operation of the measure. It is appropriate to say that the

countermeasure to the abuse of sovereign rights should be the use of the sovereign right of the nations, i.e. Port State Control. The private sector will be unable to accept its private business sector's free competitive activities being subjected to the governments' convenience as a means to counter their irresponsible attitude of other governments.

- iii) On top of the foreseen complication of the governmental regulation, the "Recommended initiatives" in the MTC paper involve a very fundamental problem. Various players cited in "Recommended initiatives" are interested parties in the commercial transaction chain. If those players, other than shipowners, are allowed to have their say in governmental intervention in the name of ship safety, such an action will create for those players the possibility of wilful commercial utilisation. A ship might be detained due to a cargo owner's meddling.

The sharing of responsibility between industry players has been established worldwide as a result of many years' experiences. At this time, insufficient justification exists for governments to adopt a policy which will upset those commercial systems. Ship safety should continue to be borne by shipowners.

To sum up, let me reiterate that OECD governments are urged to ensure the strict implementation of the ISM Code and the 95 STCW Convention by flag states. There will thus be very little justification for governments to increase their intervention in commercial shipping transactions.

Ship safety is a serious subject which should be dealt with in a steady, practical manner, leaving aside such an ambitious approach as *"a major overhaul of the way in which the industry operates"*.

Likewise, although the title of the MTC paper indicates "substandard shipping" as the target, shipping actors might misunderstand the term. It is substandard "ships" that should be targeted.

While shipowners are required, and will continue their efforts, to obtain the understanding of other players in the importance of the elimination of substandard ships, the shipping industry will find it difficult to concur with the idea that governments use their administrative powers, under the name of combating substandard shipping, to introduce new regulations which might result in a system whereby governments and other players might be able to classify shipping companies.

BIAC Member 2

From a shipper's point of view the basic question of combating substandard shipping can only be dealt with by governments on a global level by setting up agreed standards and implementing necessary control mechanisms which shippers can rely on when they accept offers from shipowners. To a large degree this will only be possible within the framework of the IMO.

With the International Convention on Standards of Training, Certification and Watch Keeping for Seafarers 1978 (STCW Convention) which only came into effect in February 1997, and the phased introduction of the compulsory certification beginning in 1998 of the International Safety Management Code (ISM Code), it seems premature to try to reach conclusions on any further steps at this moment, specifically on an OECD level. Reasonable time to monitor the effects of the STCW Convention and the ISM Code should therefore be given.

As pointed out in the document other initiatives are already in place. There is considerable support for the voluntary schemes whereby shippers co-operate in efforts to guarantee the quality of ships

they use. The Oil Companies International Forum (OCIMF) system for pooling inspection information, the Ship Inspection Report Program (SIRE) and the chemical industry schemes are mentioned.

Within the European Shippers' Council (ESC) a best practice initiative has now been developed and a voluntary code of best practice has been established. This code, designed to assist shippers and/or charterers in the bulk sector in determining the suitability of vessels for the carriage of their cargo, will probably be approved by the ESC Chairmen's Committee next month.

In light of the general wish of self-regulation the function of such voluntary schemes should not be hampered by any new international obligations, specifically as the effect of the STCW Convention and the ISM Code combined with Port State Control has not yet been shown.

BIAC Member 3

The title of the OECD note *Possible actions to combat substandard shipping by involving players other than the shipowner in the shipping market* seems to follow the thrust of the OECD report entitled "Competitive advantages obtained by some shipowners as a result of non-observance of international rules and standards" [OCDE/GD(96)4].

The stated objective is to combat substandard shipping which may possess competitive advantages over shipping complying with international standards. However, it seems that the real objective is to create incentives for the use of higher quality tonnage, i.e. above the required standards with corresponding sound crewing and management. In other words, the issue is not how to ensure compliance with international standards, but how to create a mechanism whereby market players will be induced to promote the use of higher quality shipping and thereby reverse the "competitive advantage" of substandard shipping in favour of higher quality shipping.

While it remains to be seen how the various market/industry players will react on the specific proposals related to them, for the shipping industry the picture is abundantly clear. The shipping industry is over-regulated.

It is first and foremost for the shipping industry itself to ensure that it operates safe and environmentally friendly ships. The ISM Code, with its aim of ensuring a safety culture within companies, will achieve this goal, an objective seen against a growing recognition that high standards of operation are very much in the long-term interest of shipowners.

Before considering the proposed actions, the following questions need to be addressed:

- Are the parties responsible for the implementation of established standards really ineffective and is further action under consideration likely to be inadequate or not?
- Is there any real need for other players to be involved as suggested?
- How uniform, global and objective can their involvement be?

Regarding the involvement of other players, the following general observations on the recommended initiatives are made:

- It would be unwise to encourage central banks to intervene on the conditions of loans related to safety and crewing aspects. In any event, lender banks already monitor compliance of borrowers with safety and manning requirements.
- The arguments for the involvement of insurers are weak and self-defeating with reference to "excess capacity" and pessimistic prediction for the expected result.
- The "Quality Ship Index" is not a novel idea. However, it would seem not to be particularly attractive to underwriters who are professionals in assessing risks and determining corresponding levels of premia.
- While the desire for the limitation of civil liability of Classification Societies is understandable, it may undermine their credibility and be perceived as an effort to exonerate lax performance. In any case, the liability arrangements can be incorporated in the agreement between the Administration and the authorised Classification Society. Therefore there is no need for a new Convention, nor is it appropriate for that purpose to revise the 1976 LLMC.
- Industry-led inspections are useful and should be encouraged. SIRE and CDI could be replicated in the dry bulk sector if the intention and the end result would be to reduce the burden of multiple inspections on board ships. However, the general tendency does not leave much room for such an eventuality and, hence, the exercise may not be warranted.
- The notion of open discussion between governments and brokers for the promotion of quality ships is unrealistic. Brokers are fully aware of the needs of the market and the available capacity. It is in the best interest of brokers to recommend to charterers high quality expensive ships, as their fees are based on a percentage of the freight. However what is probably impossible for brokers, is to convince potential charterers operating in a highly competitive market to charter ships above the prevailing market prices.

Council of European and Japanese National Shipowners' Associations (CENSA)

CENSA considers that the second draft of the OECD report on which formal comment has been invited clearly requires the lead to be taken by "other players" particularly since each of its proposed recommendations concerns them and not shipowners. Equally it is clear that until a detailed response to each of the recommended initiatives has been made by the respective player, any comments by shipowners on the recommendations can only be general.

We believe in general that the report and its initiatives have to be set against certain parameters when it is considered by governments, i.e.:

- Discussions within the OECD must not lose sight of the OECD's remit which is in the area of economic activity.
- The markets for ship finance; marine insurance; P&I cover; reinsurance; liner shipping; tanker shipping; bulk cargo shipping, etc., are all cyclical and seldom coincident. The attitudes of each respective industry player could well reflect whether its particular market is soft or close to balance at the time of comment. The state of each market therefore needs to be taken into account when industry responses are reviewed.

- Most of the "other players" are in a contractual relationship with shipowners, therefore the report's reference to "*a fresh approach to the organisation of the shipping industry*" must focus on changing the mindset of those players rather than overturning the balance of responsibility and liability inherent in the current structure.

We therefore consider that the report and its recommendations should be considered against the general parameters outlined above.

Discussion by OECD governments of the report and its recommended initiatives is undoubtedly a useful first step in deciding whether any specific lines of action, as distinct from those taken in the IMO context, can be identified which would help to create incentives to use quality tonnage. We would therefore welcome the opportunity to comment, possibly within the context of an open roundtable, after the General Working Party of the MTC has completed its first consideration of the issues and the responses by other industry players.

EUROPEAN SHIPPERS' COUNCIL (ESC)

General comments/observations

The quality and reliability of shipping, and transport services more generally, are viewed by the industry to be an increasingly important factor in the overall competitiveness of the European industry in the global market. As a result of this, industry attaches considerable importance to improved performance in its supply chains as a means of securing efficiencies and enhanced competitiveness.

In recent years, EU and OECD governments have recognised the requirement for a properly functioning transport market in order to meet industry's needs. Considerable steps have been taken to deregulate or liberalise transport markets to drive through much needed improvements in performance. There is now broad recognition that the market is the most appropriate instrument for encouraging market improvements and that governmental intervention should be kept to a bare minimum. The ESC is therefore unconvinced and remains concerned with the notion that increasing industry costs or re-arranging the "organisation of the shipping industry" will lead to higher quality standards or eliminate "substandard" shipping.

There is a close correlation between quality, efficiency and competitiveness. The most efficient shipping and transport companies are regularly associated with employing good business practices and achieving high quality standards. This in turn results in higher levels of performance and lower costs. It does not therefore necessarily follow, as implied by OECD, that low freight rates or the price applicable in the market are a major contributor or cause of poor quality or "substandard" shipping.

Improving safety and protecting the environment

It is the fundamental responsibility of flag state administrations to formulate and enforce international legislation governing maritime safety and the responsibility of those who operate and manage ships to meet their statutory obligations. Because of the global nature of the industry the establishment of appropriate safety standards is best developed by flag state administrations through the IMO, although other international fora such as the OECD can play a useful role in reinforcing IMO and governmental objectives. The first priority in combating "substandard" shipping is the proper implementation and enforcement of existing international maritime safety and environmental legislation. This requires a

strengthening of Port State Control and the effective implementation of the international convention on standards of training, certification and watch keeping for seafarers (STCW) and the ISM safety management code, which is to be phased in during the course of 1998. It would, in ESC's view, clearly be inappropriate at this juncture to introduce any further regulatory measures, particularly if such legislation is not effectively enforced.

Action to combat substandard shipping--other players

The OECD report correctly highlights the serious deficiencies in the accuracy and availability of information provided to shippers on the condition of ships via Port State Control. Notwithstanding this, the ESC reiterates the fact that the responsibility for adherence to mandatory maritime safety requirements lies with the shipowner. The ESC is therefore both surprised and disappointed that the focus of the OECD paper in combating "substandard" shipping is solely aimed at "players other than shipowners". The OECD must recognise that shipowners can also play a significant contribution towards combating "substandard" shipping by improving the quality, accuracy and availability of information about the condition of vessels without resorting to unnecessary additional regulatory burdens.

Self-regulation/Best practice

The ESC believes self-regulation and the promotion of best practice will achieve more effective and tangible results in promoting maritime safety and environmental protection than alternative measures such as imposing sanctions or other punitive measures on both shippers and shipowners. This is more broadly recognised by governments, and in this respect the European Commission has recently supported self-regulatory initiatives rather than additional mandatory legislative measures. As the OECD report acknowledges, cargo industry interests have already taken significant steps through the SIRE and CDI initiatives to promote quality shipping, efficiency and the enhancement of maritime safety. Similar steps have been taken by shippers in the dry bulk sector through the development of best practices and the use of questionnaires in effort to improve the quality of information on the condition of vessels.

The ESC has now finalised a best practice voluntary code of conduct which we believe will contribute significantly to the elimination or use of "substandard" ships. The initiative has received the endorsement of the European Commission and a number of EU Member States. The code will be formally adopted by the ESC Chairmen's Committee on the 18 March 1998, and will be launched in conjunction with EU Transport Commissioner Neil Kinnock and the UK presidency of the EU at the Quality Shipping Conference on 4 June.

When the ESC voluntary code of conduct has been approved we would be happy to discuss this with the OECD and how the OECD can help to promote the ESC initiative. In the meantime, I would welcome the opportunity of discussing the OECD paper and our response in more detail.

INTERNATIONAL ASSOCIATION OF CLASSIFICATION SOCIETIES LTD (IACS)

It is noted that three keys to this paper are:

- i. there is no single solution;
- ii. there are sufficient rules without making any more;
- iii. the problem is ensuring adherence.

We would concur with these points. However, we would add that a great deal has already been done.

It is also noted that three questions are posed in the document:

1. Is more regulation likely to lead to improved standards?
2. How to deal with the gap between OECD governments and some industry players on the assessment of commercial risk?
3. How to motivate sections of the industry into acknowledging that transparency of information can never be a substitute for a bias in favour of quality tonnage?

The paper addresses these issues quite carefully and we would like to add further comment on a more detailed basis.

I. Introduction

We think that it should be stated that substandard shipping does not apply across the whole industry. For example, LNG, chemical tankers and container ships generally, and responsible owners in all sectors, operate and maintain their ships in good condition and the "broad brush" of criticism should not be applied as a generalism to the whole industry. Obviously, there are also regional variations.

The IACS believes that the ISM Code and STCW will make a difference -- provided they are properly applied. IACS Members have a heavy responsibility in terms of certification as the delegated agents of flag administrations but an essential element of this implementation is full support, backing and instructions from the flag administration together with close co-operation with Port State Control.

II. ...Involving all players...

It is agreed that quality does not always pay -- particularly in dry bulk trades, log carriage and some minor peripheral trades -- basically low-value items using cascaded multi-owned ships primarily influenced by an oversupply of tonnage. Transparency of information will help, but if the interests of shipowners and cargo interests coincide in a low cost, low quality operation, then substandard ships will continue to operate.

On the subject of liability, the current status with regard to shipowners' obligations is supported and there does not seem to be a good case for any increase in such legal liability. There is a need for better links with ship financiers who, by and large, do not seem exhaustively interested in the quality of the ships upon which they lend. Comment on the need for a codification of liability for Classification Societies is covered later in these notes.

III. The industry players

Financial institutions

The proposal is made that lenders should be encouraged to insist on all relevant information from Classification Societies.....being made available automatically as a condition of the loan. IACS Members are certainly willing to provide such information to the lenders who need to obtain written approval prior to agreeing to finance a prospective owner that they do have such immediate and unconditional rights. All too often, banks fail to do this and when they wish to obtain such information the privilege of the contract between the owner and the Classification Society enables an owner to avoid relevant information being divulged.

Similarly, banks and financiers should certainly make a condition of their loan the ability to obtain free access to records and inspect the ship at any time.

Marine underwriters

A close level of co-operation already exists between IACS and marine underwriters both through local markets in London, Norway and the United States but also through the International Union of Marine Insurers. There is a good flow of information within this group.

It is understood that work is already under development with regard to a "Quality Ship Index" within the London market but one of the key input elements -- basic data from the Paris MOU Port State Control detention database -- is not available.

Protection and Indemnity Clubs

Similarly, a good level of co-operation and exchange of information exists between the International Group members and IACS. It is understood that the International Group members are about to announce that they will make the holding of ISM Code Certification a condition of cover.

Classification Societies

The discussions on liability between IACS and the Comité Maritime International through a Joint Working Group have been in progress for some five years. During this time much progress has been made and agreement has effectively been reached on "Principles of Conduct" and "Model Contractual Clauses". The question of liability remains subject to negotiation but active moves are being made to bring this matter to a satisfactory conclusion.

IACS Members are well aware of the benefits that such an agreement will bring.

With regard to the possibility of new arrangements being incorporated into a Convention, IACS believes that this would be a very long-winded process and does not support such a development.

Cargogenerators

Emphasis is placed on the need to draw on industry data to support Port State Control. IACS is already providing substantial information to Port State Control and is committed to co-operate with authorities by mandatory Procedural Requirements which are auditable under the IACS Quality System Certification Scheme.

Interconnection amongst the varying and growing number of databases available in the shipping industry is a topic which should be pursued.

IACS has welcomed the opportunity to study and comment on the OECD paper and would be happy to continue this dialogue.

INTERNATIONAL TRANSPORT WORKERS' FEDERATION (ITF)

I. Introduction

The ITF cannot agree with the sweeping suggestion contained in paragraph 2 as we are firmly of the view that the market as *a whole* is being disturbed by the operators who ignore their international obligations and by the system which enables them to prosper. The unfair competition and the competitive distortion which is prevalent in the present system of international shipping is something we have long campaigned against.

The introduction makes reference to the revised STCW Convention and to the ISM Code in the context of Port State Control, as if this was the only control mechanism. In doing so it clearly fails to take into account the obligations of the flag state which are expressly set out in international law. The United Nations Convention on the Law of the Sea (UNCLOS) (1982) builds on customary international law, especially the 1958 declaratory Convention on the Law of the Sea and has now been widely ratified, by over 122 states. Moreover, UNCLOS is an "umbrella convention" which is built on by the specialised agencies of the United Nations, for example the IMO and ILO. This is acknowledged by both the IMO and the ILO and is one of the themes which run through a recently issued IMO Study on the *Implications of the Entry into Force of the United Nations Convention on the Law of the Sea for the International Maritime Organisation* (in document LEG/MISC/2). Since its entry into force on 16 November 1994, the provisions contained in UNCLOS have become of pre-eminent importance, as can be seen from some of the recent deliberations within the IMO. Furthermore, as the international community has called for a co-ordinated and integrated approach to oceans and the law of the sea issues, it is surprising that the OECD document does not contain a single reference to UNCLOS.

Moreover, the OECD document seems to only address the issue of substandard shipping at a vessel or, at best, at a company level and therefore does not deal with the issue in a structural or a systematic manner. It is commonly agreed and expressly stated within international law that the flag state is primarily responsible for ensuring compliance with international minimum standards. Indeed, Article 94 of UNCLOS establishes the fundamental principles and thereby makes clear that having a shipping register is not an unfettered right of a sovereign state but one which is qualified as a result of the obligations imposed on the state, especially with regard to ensuring compliance with international minimum safety, pollution prevention and social standards. Similarly, Article 217 of UNCLOS sets out the obligation on flag states to effectively enforce international rules, standards and regulations, irrespective of where a violation occurs. These requirements were, *inter alia*, incorporated into the

recently adopted IMO Assembly Resolution *Guidelines to Assist Flag States in the Implementation of IMO Instruments* (A. 847(20)).

As we have said in previous submissions to the OECD MTC, to date the debate and the proposed solutions have focused on the substandard operator and, to be frank, they have not ameliorated the situation and are unlikely to do so in the future. What is necessary is to concentrate on the system which allows the substandard operator to prosper and to continue trading, that is, the system which allows owner/operators to shop around and choose the most "suitable" register. Moreover, despite the growing rhetorical commitments of some of the flag of convenience registers to improve compliance with international minimum standards, the question is does the system itself permit it? Recent reports have indicated that a number of such registers, which generally have an abysmal record, are to take steps to make it easier to remove vessels from their register. That is, they will not stop such vessels trading but merely export the problem elsewhere. Given the ease of registration within such registers, which frequently permit "provisional certificates" to be issued by a Consul and do not require a flag state survey to be carried out for six months, such measures are hardly going to solve the problem.

The ITF is greatly concerned by the omission of any reference to the role of the flag state as the primary duty to ensure effective compliance lies with the flag state. This important fact has been reflected in the work of the IMO's Sub-Committee on Flag State Implementation and in the recent report of the United Nations' Secretary-General on Oceans and the Law of the Sea (paragraphs 145-149 of document A/52/487). Moreover, the ITF is of the view that the failure to reflect on the role of the flag state and the fact that governments and international bodies, including the OECD, have accepted the growth, proliferation and institutionalisation of a system which negates the requirements expressly provided for in international law will ensure that any initiative based on the contents of the OECD document will not succeed in addressing, nor in ameliorating, the problem.

The OECD document, in paragraph 3, notes that a number of important reforms are in the process of being introduced which aim to enhance quality within the shipping industry and questions whether the present time is an appropriate one for trying to decide on a major overhaul of the way the industry operates. The ITF is firmly of the view that not only would such an initiative be timely, but that something should have been done many years ago. However, based on the above section, we would argue that such an initiative needs to fundamentally address all aspects of the shipping industry and how it is organised in a systematic manner. This would include the establishment of mechanisms to eliminate the flag of convenience system which is an institutional system which effectively negates the provisions expressly provided for in international law. Such an initiative should seek to involve all the players in the shipping market and make them financially liable for the consequences of their actions.

In paragraph 6 the document refers to reservations about the need for a comprehensive review of how the markets function and the effects on ship quality and how to create incentives for the use of higher-quality tonnage. The ITF is greatly concerned that implicit within such an analysis is an acceptance of non-compliance with international minimum rules and standards and of a system which effectively negates the express requirements of international law. The ITF is of the view that the current system in which unfair competition is the norm, amounts to market failure. As such, it is necessary to, as a prerequisite, eliminate the unfair competition and competitive distortion which is caused by the flag of convenience system and their inability to meet international minimum standards and to comply with international law.

II. Combating Substandard Shipping by Involving All Players in the Shipping Market -- Related Issues

The ITF supports the analysis set out in paragraph 10 and concurs with the view that full transparency relating to the conditions of ships and the way they are run would not amount to a panacea. However, it is undoubtedly the case that the culture of secrecy which permeates the shipping industry facilitates the operation of both substandard shipping and the flags of convenience which enable such operators to prosper.

Similarly, the ITF concurs with the position set out in paragraph 11, as freight rates have been depressed through the operation of substandard ships. It is the unfair competition and the competitive distortion caused by the existence of the flag of convenience system which has caused the crisis within the shipping industry which is manifested by the projected shortage of suitably skilled and qualified seafarers, the ageing of the world fleet, the large number of lives lost at sea, the lack of flag state implementation and the spiralling increase in the number of Port State Control detentions.

Recommended initiatives

The ITF is also greatly concerned by the actions of the financial institutions as the effects of their decisions, based on short-term commercial considerations, have considerable latent consequences. Financial institutions are increasingly determining which flag a vessel should fly. This can mean, when they require that the vessel be registered in a flag of convenience register as a condition of a loan or mortgage, that the owner is then able to unilaterally determine the degree to which the vessel will comply with international minimum requirements. Such actions by financial institutions should be considered not only as grossly irresponsible, but as constituting a violation of international law, given that Article 91 of UNCLOS provides for a "genuine link" between the ship and the flag state. Although, the "genuine link" is not expressly defined in UNCLOS, other Articles, especially Articles 94 and 217, implicitly point to the requirement for an "economic link". That is, there should exist within the flag state a substantial entity which can be made responsible for the actions of the ship and to which penalties of adequate severity can be levied so as to discourage violations of applicable international minimum rules and standards, wherever they occur.

The MTC may be interested to note that Section 7.8 of the FAO Code of Conduct for Responsible Fisheries, under the heading "Financial Institutions", states:

"Without prejudice to relevant international agreements, states should encourage banks and financial institutions not to require, as a condition of a loan or mortgage, fishing vessels or fishing support vessels to be flagged in a jurisdiction other than that of the State of beneficial ownership where such a requirement would have the effect of increasing the likelihood of non-compliance with international conservation and management measures."

The suggestion that one measure could include drawing up guidance to lenders by Central Banks could be a useful initiative, provided that it sought to ensure compliance with international law and prevent financial institutions requiring vessels to be flagged out. However, the ITF is of the view that such a measure would need to be buttressed by some form of sanction and oversight regime, otherwise short-term commercial considerations could ensure that the document of guidance was largely ignored.

The role of the P&I Clubs is problematic as their rules are still geared to the industry as it existed in the 19th century and, as such, there is a total lack of transparency in their operations. The ITF strongly

supports moves which would require the mandatory provision of third-party insurance and has argued for such within the IMO Legal Committee (see LEG 75/4/4 submitted by the ICFTU). However, both the shipowners and the P&I Clubs, along with a number of OECD governments, are hostile to such a requirement as can be seen from the deliberations within the IMO Legal Committee. If such a provision were to be effective it would have to address the issue of accessibility. That is, there would need to be a direct right of action against the insurer, and the P&I Clubs could no longer hide behind the "pay to be paid rule". The current regime fails seafarers and their next of kin when they seek to secure their entitlements, especially in cases of loss of life and personal injury and, when a vessel has been lost, the system of one-ship registered companies means that there is in practice no entity, with assets, which can be sued. A compulsory insurance regime would also have to address the issue of deductibles and make the type and extent of cover more transparent than is the case today. Moreover, there would need to be a mechanism which would inform all relevant parties when cover was removed and which would not permit the P&I Club to retroactively remove their exposure to liabilities which had previously accrued.

The role of Classification Societies also needs to be comprehensively examined. Despite the change in their role in recent years as they have taken on considerable responsibilities as recognised organisations which survey vessels and issue certificates on behalf of states, their structures have not really changed. There are considerable problems with the standards of Classification Societies, even among those who are members of IACS. Moreover, there is little or no oversight of their operations and a considerable lack of transparency. It is also common knowledge that the so-called "unified requirements" can be negotiated downwards. These defects should be remedied.

The ITF is also concerned by the fact that the Classification Societies seem to be able to escape from being financially liable for their failures, even when it is clear that they were grossly negligent.

The ITF has strongly supported all moves to greater transparency within the shipping industry. To this end we strongly supported the establishment of an International Ship Information Data Base (ISID) when it was discussed within the IMO. However, it should be noted that at the first meeting the industry stated that they would not co-operate and would not make the information in their possession available. This was often derived from ship surveys and may have indicated that the vessel was unseaworthy and therefore constituted a danger to the safety of life at sea and the protection of the marine environment. It should also be noted that the governments also took a narrow view on who should be able to access such information and agreed that it should be restricted to governments, at least in the first instance. The current position is that the ISID has stalled due to budgetary constraints within the IMO.

Despite the apparent failure of the ISID, the ITF strongly supports the establishment of an international database, which should be available to all parties which have an interest in shipping, including trade unions, environmental groups and consumer organisations. However, the ITF is of the view that there would need to be a mechanism to compel those sections of the industry which are likely to refuse to provide the information and data they hold to do so. They should not be able to hide behind rationalisations such as commercial confidentiality or legal considerations. The need for such information is clearly demonstrated by the current system which allows P&I Clubs and Classification Societies to expel ships without communicating that information to anyone, including the crew. Similarly, the confidentiality and restrictions on access to industry surveys and databases not only retards any move towards greater transparency but can actually put lives at risk. After all, it should be common ground between the OECD MTC members and the ITF that it is clearly unacceptable that those who hold information demonstrating that a ship is unseaworthy and thereby constitutes a serious risk to the safety of life at sea and to the protection of the marine environment should be able to suppress such information and be under no obligation to communicate it as widely as possible. Current practice clearly demonstrates that a moral obligation is not sufficient to ensure that such information is made available to all concerned.

III. The Industry Players

The ITF is concerned by the curious remark in paragraph 18 that international passenger transport by sea is sufficiently supervised to eliminate the need for a fresh approach. Aside from the well-published ferry disasters, there have in recent years been a considerable number of incidents on cruise ships which give rise to considerable concern, especially given the large number of lives which are potentially involved. Indeed, concern on the liability issues with regard to passengers has caused the IMO Legal Committee to bring about a fundamental revision of the Athens Convention.

Proposal on financial institutions

The ITF, which has itself in recent times begun a dialogue with certain financial institutions, sees considerable merit in seeking to stimulate more informed and, thereby, more responsible decision making by financial institutions and agrees that it could, in the first instance, be through dialogue at the level of central banks. However, such a dialogue should also address the need to ensure compliance with international minimum requirements and eliminate the present state of affairs which, in reality, amounts to circumventing the requirements established by international law.

However, the ITF is of the view that it would be advantageous if the financial institutions themselves secured a comprehensive survey of the vessel. Although this could cause a further proliferation of surveys, it is essential given that many current surveys, including those undertaken by IACS Classification Societies, have demonstrably failed to identify, and thereby ensure, that serious structural problems are remedied,

The ITF strongly supports any moves which would result in financial institutions being held accountable for their decisions and believes that they too should have a role in ensuring that the vessel is crewed and maintained in conformity with international minimum rules and standards. Therefore, we would agree that the lenders should have and effectively exercise the right to inspect all records, including call, insurance and P&I records.

P&I Clubs

The ITF, based on experience, has considerable doubts about the possibility of enhancing the role of P&I Clubs. As indicated above, P&I Clubs have demonstrated a negative attitude to proposals to reform the insurance system. These proposals would make the system more transparent and more equitable. The ITF also has experience of situations where P&I Clubs and their agents deprive and even cheat seafarers and their next of kin and deny them their legal entitlements, even those established by their contracts of employment.

Classification Societies

The ITF remains gravely concerned about the performance of Classification Societies and is not convinced of their determination to maintain high standards. While some progress has undoubtedly been made, the dual role of Classification Societies as agents of the shipowner on the one hand and as recognised organisations performing statutory duties for administrations, on the other, gives rise for concern. Indeed a debate within the IMO Sub-Committee on Flag State Implementation led to an admission by IACS that the Societies issued provisional or conditional certificates which were not in line with international minimum rules and standards.

The ITF is also concerned that the current “oversight programme” leaves a lot to be desired and that there is a fundamental problem when “the game keeper is also the poacher”. That is, in addition to introducing greater transparency by making documents and survey reports readily available to all interested parties there needs to be a more independent and inclusive oversight regime.

As the document points out, the role of Classification Societies is growing rapidly and so far the courts have protected them from being legally liable for the acts and omissions of their employees. This is a curious state of affairs. Classification Societies perform a crucial role in maritime safety and the protection of the marine environment where they are allowed to largely regulate themselves, to retain confidentiality on the overwhelming bulk of the information and data they possess and to be given legal immunity. This is hardly a system which encourages them to rigorously enforce internationally agreed minimum rules and standards and, indeed, it is often said that in practice the IACS “unified standards” form the basis for negotiation between the shipowner and the Society.

Cargo generators

The ITF strongly supports the proposition that shippers should be held publicly responsible for their choice of vessels and penalised for the use of substandard ships. The suggestion that it would be easier to strengthen Port State Control may well be true, but it is facile in the extreme and flies in the face of the conclusions of the OECD report entitled, “ *Competitive Advantages Obtained by Some Shipowners as a Result of Non-Observance of International Rules and Standards* ”. Moreover, as noted in paragraph 11 of the document, it is the substandard operator and the shipper who is prepared to tolerate the operation of shipping in breach of international minimum rules and standards that sets the marginal rate. Which amounts to depressing the freight rates below the level required for the market to operate without unfair competition and competitive distortion.

While the ITF would agree that there should be a greater exchange of data between the industry bodies and Classification Societies, there is also a need to ensure that such information is made available to other interested parties, especially seafarers and their representative organisations.

Government authorities

While the ITF is generally sympathetic to the suggestion that a more integrated and holistic approach needs to be taken to formulating governmental policies, we find it rather curious that this co-ordinated action be limited to maritime safety and environmental protection with commercial and economic aspects. As the international community has commonly agreed that the human element is responsible for 80 percent of maritime casualties and it is this aspect which needs to be further addressed, the exclusion of social and labour issues is unacceptable. It should be noted that Article 94 of UNCLOS requires every state to effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag; these include the manning of ships, labour conditions and the training of the crew. The ITF is concerned that this restrictive integration of formulating government policies does not lead to commercial considerations retarding the adoption of meaningful international rules and standards, which is already too prevalent today.

The ITF is also of the view that it is essential to include labour and training aspects as there is currently a global shortage of suitably qualified seafarers, while the age profile of the OECD seafarers indicates that if urgent remedial action is not taken there is a real possibility of many OECD countries losing their maritime expertise.

ITF comment

While the OECD document contains many worthwhile suggestions, it is clear that the strategic aims and objectives of the original proposals submitted by the Netherlands have been lost. The Netherlands was aiming to secure the sound economic developments of the shipping industry and examined the system in which modern shipping operates. However, the OECD Secretariat's document contains a number of ad hoc suggestions, many of which are not new and which would, at best, only slightly improve the current situation.

The ITF is struck by the timidity of the Secretariat document and the lack of any clear direction or radical suggestions which could result in a fundamental improvement to the current malaise which besets world shipping. Nor would the document address the problems faced by shipping within OECD countries.

The document has singularly failed to address the central problem of the lack of flag state enforcement and would appear to give implicit support to the current system which effectively amounts to a negation of international law. It has failed to address the problem of flag states which lack either the will or the ability to enforce their international obligations and the competitive distortion this has caused. As such, it at best seeks to treat some of the symptoms without addressing the causes.

The Netherlands noted that the shipowner is the only market player to be penalised and at the same time not provided with the necessary tools by the other market players, in the form of adequate freight rates. As the Netherlands remarked, such a situation cannot foster a sound shipping economy and will not stabilise world shipping.

The ITF is obliged to note that the Secretariat document contains many references to greater transparency and to others which would amount to some structures becoming more participative. Perhaps, the OECD MTC should also give some consideration to how these principles can also be reflected in its own methods of work. On this point the ITF has been informed that TUAC directly participates in the work of the following OECD bodies: the Steel Committee, the ICCP and its working parties, and the Joint Meeting of the Chemicals Group and Management Committee of the Special Programme on the Control of Chemicals. Given this precedent, the ITF and TUAC are open to discussing with MTC and/or the relevant OECD Secretariat staff new ways in which to make our input to the MTC more participative.

ITF suggestion

The OECD Secretariat document notes, in paragraph 8, the situation in the civil aviation industry where the United States evaluates entire aircraft registers and, if they are deemed unsafe, their aircraft are prohibited from using US airports. As the concept of "Port State denial" is becoming established within the maritime industry as a mechanism to ensure compliance with the ISM Code it may be possible to seek to utilise such a mechanism in the future, to cure the malaise within the shipping industry.

INTERNATIONAL UNION OF MARINE INSURANCE (IUMI)***Summary***

No comments.

Introduction

Section 3

Market in insurance still very competitive and over capacity. Will they be able to take a firm line in compliance with ISM code from 1 August 1998? Doubtful.

Section 4

PSC in Europe and Paris MOU, etc., together with US Coastguards are in strongest position to ensure firm policing of ISM compliance. This should benefit prudent owners. As always, flag states are the weak line.

Section 19 - Financial Institutions

Greater discussion with marine insurers who may well hold good (or bad) information on prospective clients.

Section 24 - Marine Underwriters

Responsible underwriters have reacted to Polish register situation. Many insurers are seeking either special additional surveys in PRS registered vessels or another society class, and PRS have been eliminated from cargo class clause.

Section 25 - H&M Insurance

Agreed over-capacity but will ISM and STCW have a beneficial effect? Yes, but it will take time. August 1998 may be a landmark?

Section 26

Cargo risk assessment, in line with the proposal on "Quality Ship Index", is being actively examined in London market.

Section 27 - P&I Clubs

A number have already come out with conditions in line with the Proposal. As far as a certificate as an alternative to full third-party cover is issue of direct action a major issue.

Section 31 - Classification Societies

Many major members of IACS have marine insurers and ship owners on their boards.

Section 32 - Classification Societies

Liability of Classification Societies, CMI, etc. currently being deliberated will these lead to a greater caution by Classification Societies? While some agree it will make them *more* responsible, I feel there is a downside and it will create a greater reluctance to give "an opinion".

Section 34-Cargo generators

Strongly support this section 34-37 and proposal. Understand inter cargo looking at possible equivalent of SIRE for bulk carriers, but this will be very difficult and I rather doubt that it will be achievable.

JAPANESE SHIPPERS' COUNCIL (JSC)

JSC basically acknowledges the current needs for discussing issues of safety and environment protection at the OECD/MTC.

In this respect, the discussion paper on what other industry groups (other than shipowners) can contribute to maritime safety should be scrutinised from a practical viewpoint.

JSC supports the long tradition in the history of maritime liability that maritime safety and compliance with the various international conventions has rightly been the sole responsibility of those who manage and operate vessels.

However, JSC receives the impression from the draft paper that the OECD is suggesting that maritime safety could be improved by imposing financial sanctions on shippers who knowingly or unknowingly use substandard ships.

In this connection, JSC shares the concern expressed by the European Shippers' Council (ESC) which comments that the recent HNS Convention is the first breach of the historic principle of placing liability on those parties directly responsible for the operation and condition of ships. The HNS Convention makes cargo receivers of hazardous and noxious substances liable for spills or pollution caused by accidents or incidents at sea over which they have no control.

The draft paper makes reference in this connection to the widespread feeling amongst those engaged that the easier approach is to strengthen Port State Control rather than to transfer responsibility to the shippers. JSC would like to stress that Port State Control is not an effective measure from a practical viewpoint because the information provided is very often useless in assisting or judging shippers to pinpoint substandard ships.

As a matter of practice, difficulty lies in obtaining up-to-date and accurate information on whether ships meet international safety requirements at the time of charter.

JSC supports in this connection voluntary schemes or self-regulations now being contemplated by European shippers' bodies such as "Best Practice Voluntary Code of Conduct" formulated by the European Shippers' Council. JSC concurs that this kind of self-regulation should be an alternative to any further regulatory steps including the imposition of additional burdens, responsibilities or sanctions on shippers.

THE NAUTICAL INSTITUTE

The paper accurately identifies the interest groups and is well researched with respect to recent developments.

From the perspective of The Nautical Institute there are some observations to be made. The root tension in the paper concerns the desire for OECD countries to ensure that their ships, or ships visiting their ports, comply with legislation derived from international conventions, whereas commercial decision makers are willing to undertake deals without verifying compliance, confident in the knowledge that in the event of loss or damage there is a recognised process for settling the claims with minimum risk.

The shipmaster has the unenviable task of resolving this inherent conflict whilst having the absolute responsibility for the safety of the ship, personnel and cargo. So you can understand how much we appreciate the OECD initiative and why we wish to support and help promulgate the results.

The Nautical Institute recognises that ownership and finance can be arranged under any jurisdiction and supports the proposal for greater transparency so that good bankers can discriminate concerning investment risk.

We believe that targeting P&I Clubs and Classification Societies is the most effective way forward. OECD governments should make third-party insurance compulsory in OECD waters. In return for this valuable commercial safeguard, P&I Clubs must be made to disclose their insurance agreements to independent inspectors from OECD governments.

With respect to Classification Societies we support all your proposals: in particular widening the representation on the IACS governing council. We would like to see shipmaster representation at this level, either directly or through The Nautical Institute.

For some time we have been concerned with the problems of responsibility, particularly Classification Society surveyors who appear to put the interest of their Society before the safety of the ship they are surveying.

In this respect we would suggest an international licensing body for classification surveyors, perhaps run by The World Maritime University, IMO or The Institute of Marine Engineers.

Such an authority could independently of the Classification Society remove the licence of a surveyor who fails to carry out his duties in a professional manner. This concept is well established in terms of quality management and could be used to advantage.

Such an approach would make it less easy for substandard Classification Societies to operate.

Action by The Nautical Institute

We see our role in helping to promulgate the results of this excellent survey so as to give strength of purpose to those who want to raise standards in shipping.

In this respect we would like to seek permission to publish the report when it is completed as a Nautical Briefing. These occasional high-level papers are published and circulated to all our members and contacts world-wide, including most maritime colleges and committees.