

DIRECTORATE FOR SCIENCE, TECHNOLOGY AND INDUSTRY

**MARITIME SECURITY - OWNERSHIP AND CONTROL OF SHIPS:
OPTIONS TO IMPROVE TRANSPARENCY**

DISCUSSION PAPER

15 December 2003

This discussion paper represents the results of research and analysis undertaken by the OECD Maritime Transport Committee Secretariat, and does not necessarily reflect the views of either the Organisation or its member governments.

The secretariat is releasing this discussion paper to seek comments from interested parties. Any person or organisation wishing to comment on the discussion paper is invited to submit those comments electronically, by cob Friday 27 February 2004 to:

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Alternatively, comments can be faxed to Ms Haie-Fayle on +33 1 44 30 62 57.

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EXECUTIVE SUMMARY

Executive summary

This report considers possible measures to increase transparency of beneficial ownership from three different perspectives:

- Approaches to increase transparency in corporate vehicles that operate from jurisdictions that promote or permit anonymity.
- Approaches to increase transparency of ownership in shipping registers.
- Self-protection measures by governments.

The report provides a wide palette of possible measures that could increase transparency. It also acknowledges that most of these will require the co-operation of administrations that at present consider it appropriate and commercially beneficial for them to offer corporate vehicles and mechanisms that provide anonymity, as well as the shipping registers that facilitate such anonymity.

A substantial change of culture amongst these jurisdictions, and the clients they serve, will be needed if the issue of anonymity is to be successfully addressed in a global context.

Adopting an approach that provides confidentiality (as opposed to anonymity) may offer the possibility of a way forward acceptable to jurisdictions, shipping registers and beneficial owners alike. This would mean that beneficial ownership details would be available to the appropriate authorities when necessary, but that commercial confidentiality would also be preserved.

Finally, the report notes that if these measures are not taken up by those jurisdictions that provide anonymity, then governments facing security risks may at certain times need to take self-protection measures. These could be draconian and intrusive, and to some degree measures of last resort, but the reality remains that they could be seriously considered if security threats (or, worse still, actual terrorist action) forced the hands of those governments.

Consultation

The Maritime Transport Committee (MTC) considered a first draft of this report at its meeting in November 2003. At that meeting it decided that the report should be declassified and issued as a discussion paper in order to elicit views from as many interested parties as possible. Following this period for comments, the MTC Secretariat will revise the report and re-submit it to the Committee for its further consideration and possible future action.

At this stage this discussion paper represents the results of research and analysis undertaken by the MTC Secretariat, and does not necessarily reflect the views of either the Organisation or its member governments.

Any person or organisation wishing to comment on the discussion paper is invited to submit those comments electronically, by cob Friday 27 February 2004 to: linda.haie-fayle@oecd.org

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SECTION I: BACKGROUND

1. The Maritime Transport Committee considered the first report, Maritime Security: Ownership and Control of Ships at its meeting in January 2003. As well as endorsing the report and declassifying it for public release, the Committee also authorised the undertaking of the second phase of the study, which would look at actions that could be undertaken to increase transparency in the ownership and control of ships.

2. By way of introduction, the first report found that there are many mechanisms available to shipowners who wish to hide their identities, and that these are freely available in many shipping registers. The report also noted that the problem was not restricted to the actions of flag states, but that the problem was far more general, as those shipowners also have access to many jurisdictions, and especially established offshore centres, that openly offer corporate services that enable beneficial owners (whether involving ships or other commercial enterprises) to effectively hide their identities within those corporate structures.

3. Next, many flag states not only accept such corporations as owners of ships but actually promote anonymity as positive advantages of their flags, and this could facilitate the misuse of those registers by terrorists. It is presumed that those flags promote these services because they consider this gives them a commercial advantage over other flags.

4. The first report also noted that while open registers are more vulnerable to possible misuse by terrorists, because their *raison d'être* is to provide their services to virtually anyone, from any nationality, they are not alone in this vulnerability, as it is also possible for sophisticated and well-funded terrorists to use the traditional registers for such purposes. The higher risk involved in working through the more tightly controlled traditional registers may well be compensated by the more effective cover that would be offered by working through respected and well known flags.

Terminology

As with all papers that deal with technical matters, this one also uses a variety of terms that are specific to its area of relevance. The following terms may provide greater clarity in reading the report.

<i>Beneficial owner</i>	The natural person(s) who ultimately owns or controls a corporation (or in our particular area of interest a vessel) and/or the person on whose behalf a transaction is being conducted. It also covers those persons who exercise ultimate effective control over a legal person or arrangement.
<i>Corporate mechanisms</i>	These mechanisms are used in conjunction with corporate vehicles to shape their nature and operation. These mechanisms can include corporate (or bearer) shares, nominee shareholders, and nominee and “corporate” directors.
<i>Corporate vehicles</i>	These are legal entities through which a wide variety of commercial activities are conducted and assets are held. They include corporations, trusts, foundations and partnerships with limited liability features.
<i>Flag states</i>	These are sovereign states that operate shipping registers. In accordance with the UN Convention on the Law of the Sea, ships on those registers will take on the nationality of the flag state, and its laws will apply to those ships.
<i>Offshore centres</i>	Jurisdictions that offer comprehensive corporate and financial services, and which are characterised by a high level of non-resident activity.
<i>Open registers</i>	This is an informal term applied to shipping registers where the nationality of the owner is not a factor in the registration of a ship.
<i>Traditional registers</i>	This is also an informal term applied to those shipping registers that require the majority owner of a ship on that register to be a national of the flag state.

SECTION II: THE STARTING POINT FOR THE SECOND-PHASE REPORT

5. The first report on the ownership and control of ships found that those who (for whatever reason) sought to hide their identity, relied on three principal mechanisms:

- i. Internationally available corporate mechanisms that permit the creation of complex webs of companies whose beneficial owners are hidden from view.
- ii. Open shipping registers where in many cases reduced transparency is facilitated, and where the nationality of beneficial owners is not an issue.
- iii. Traditional shipping registers where nationality are in place, but which may lack the legal power, resources or expertise to track through international corporate arrangements to uncover the ultimate identity of the beneficial owner or owners.

6. The earlier report outlined in detail the relative ease with which beneficial owners could hide their identities as they went about their business of operating ships. The sheer number of jurisdictions that are willing to create corporate entities that hide ownership, and shipping registers that will register ships belonging to such obscure corporate vehicles, means that truly effective countermeasures would require the co-operation of dozens of states, some of which depend heavily on providing such services to attract corporate business and ship registrations.

7. This report will therefore firstly look at measures that could be put in place by jurisdictions that offer such corporate services to address those mechanisms that can facilitate anonymity. The report then turns to a range of measures that could be adopted by both open and traditional registers to address the specific issue of anonymous shipowners.

8. Finally, this report will examine some measures that could be put in place by governments, if other measures fail and where they may be under a heightened security risk involving shipping, and where this threat is increased by a continuing and severe lack of transparency in the shipping sector.

SECTION III: RELATED WORK IN THE OECD AND OTHER INTERNATIONAL ORGANISATIONS

9. The first phase report listed a number of corporate mechanisms, freely available in a number of countries and jurisdictions, that enable beneficial owners of corporations and other entities (including entities that own ships) to effectively hide their identities.

10. These mechanisms are intended to “facilitate” doing business internationally, and were not specifically created for the purpose of hiding the true ownership of vessels, but nevertheless can be used by shipowners for that purpose.

11. Because these mechanisms are not unique to the shipping industry, but are also available to other sectors such as banking and finance, and can be used for illicit activities such as money laundering, they have come under increasing scrutiny from a number of international organisations such as the Financial Action Task Force (FATF)¹ the United Nations² and the OECD.

12. As a result, a variety of international initiatives highlighting the need to comply with international regulatory and anti-money laundering standards are now underway. The common theme in all of these initiatives is the need for greater transparency, including transparency of ownership of corporate vehicles and information sharing. The most important initiatives are described in detail in Annex 1.

13. Clearly, there is a considerable convergence of interest between the Maritime Transport Committee and other international efforts to improve transparency and international co-operation, as all are concerned with the role played by international corporate vehicles and corporate mechanisms in facilitating the ability of those who wish to operate outside the law, both domestic and international.

14. The Committee supports the work under way in other agencies, including other parts of the OECD, directed at improving the availability of ownership information in the case of corporate mechanisms. If the measures promoted by all of these agencies were to be substantially implemented, and were to apply equally to ship-owning corporations, they would represent a substantial enhancement of the transparency of ownership and control of ships, and go a long way towards addressing the concerns of lack of transparency identified in the first report.

1 The Financial Action Task Force is a separate international body whose secretariat is located in the OECD.

2 See, for example, “Financial Havens, Banking Secrecy and Money Laundering”, a 1998 report prepared on behalf of the United Nations under the auspices of the Global Programme against Money Laundering, Office for Drug Control and Crime Prevention.

SECTION IV: APPROACHES TO IMPROVE TRANSPARENCY IN INTERNATIONAL CORPORATE VEHICLES

15. International corporate vehicles, and the corporate mechanisms that shape their functioning, are available in many jurisdictions (both on-shore and off-shore) and are not directly linked to the operation of shipping registers, except insofar as such corporate vehicles may be the owners of ships on those registers.

16. This section deals only with the issue of increasing transparency in those corporate vehicles and mechanisms. Actions that may be taken by shipping registers are dealt with in the next section.

17. As was described in the first report on ownership and control, various types of strategies involving corporate vehicles, and numerous types of corporate mechanisms, can be used to create opaque ownership arrangements for a single legal entity, or an entire web of them, tied together by complex and difficult-to-pierce arrangements.

18. These services are available from a large number of jurisdictions that are widely spread across the globe, and this makes it extremely difficult to deal with them. Nevertheless, any reduction in the ability of beneficial owners to totally hide their identities would be helpful in enhancing maritime security, and a number of measures are examined here that may help in achieving that objective. The Maritime Transport Committee recognises the extensive work already undertaken by a variety of other international agencies (see Section III and Annex 1 of this report), and while the options below (synthesised from work already done by those agencies) are noted for information, it is not proposed that the Committee undertake any direct action on these matters.

General Approaches

19. The OECD work on corporate governance has suggested that creating greater transparency in corporate vehicles could take three options, which are not mutually exclusive, and could be used in various combinations³:

➤ ***Up-front disclosure to the authorities***

This requires the disclosure of the beneficial ownership and control of corporate vehicles to the authorities charged with the responsibility for the establishment or incorporation stage, and imposes an obligation to update such information on a timely basis when changes occur. The obligation to report to the authorities may be placed on the corporate entity, the ultimate beneficial owner, or the corporate service provider involved in the establishment of the corporate entity.

3 This material is in part drawn from the OECD Steering Group on Corporate Governance, the FATF and the Forum on Harmful Tax Practices.

➤ ***An obligation by corporate service providers to maintain beneficial ownership and control information***

Intermediaries involved in the establishment and management of corporate vehicles, such as company formation agents, trust companies, registered agents, lawyers, notaries, trustees and companies supplying nominee shareholders, directors and officers (“corporate service providers”), would be required to obtain, verify and retain records on the beneficial ownership and control of those entities that they establish and administer, or for which they provide fiduciary services.

➤ ***Primary reliance on an investigative system***

Under such a system, the authorities would seek to obtain (through compulsory powers, court issued subpoenas or other measures) beneficial ownership and control information when illicit activity is suspected, when such information is required by authorities to fulfil certain functions (in our area of interest-security), or when such information is requested by other authorities, domestically or internationally, for security or other law enforcement purposes.

20. Each of these processes has its own strengths and weaknesses. While an up-front disclosure system would be suitable to jurisdictions with a high proportion of non-resident ownership and control of corporate entities, the second may better suit jurisdictions with a substantial pool of experienced service providers. The third would best suit jurisdictions with a strong legal system and with adequate resources to support an investigative system. In some instances, elements of two or more of these principles may offer the best solution.

21. All of the principles also imply that the jurisdictions are able to apply a proper oversight on the integrity of their systems, and that sufficient resources are made available to enable them to carry out their obligations.

Specific options

22. While the application of the above principles would provide greater transparency, they are nevertheless general in nature, and the options that follow are intended to provide guidance on some specific actions in support of the general principles outlined above.

Registration of corporate vehicles

- Jurisdictions should ensure that information on beneficial ownership of all corporate vehicles registered in their territory is available to the authorities in that jurisdiction. This requirement should extend to lawyers, notaries and other independent legal professionals and accountants when they prepare for, or carry out, transactions for clients that involve the creation, operation and management of companies, trusts and other legal persons and arrangements, and the buying and selling of business entities.

Corporate (or bearer) shares

- Options might include their abolition or the introduction of measures to ensure 1) their immobilisation (e.g., by requiring deposit of bearer shares with the authorities/licensed corporate service providers or by dematerialising shares) or 2) that their owners are known to the company or the authorities (e.g., mandatory reporting of identity of bearer share-holders as a condition to exercise voting rights or to receive dividends or upon attaining certain levels of control).

Nominee shareholders and directors

- Only licensed corporate service providers should be permitted to serve as nominees or fiduciaries, and they should have access to the identities of beneficial owners. This would protect the legitimate privacy interests of beneficial owners, while providing increased assurance that authorities would be able to discover the identity of beneficial owners in appropriate circumstances.

Trust laws

- Jurisdictions should avoid arrangements that allow trusts to be misused for illicit purposes, and that permit the trustee to change or name new beneficiaries in a non-transparent manner.
- Authorities should insure that they are in possession of adequate, accurate and timely information on trusts, including the settlor, trustees and beneficiaries that can be obtained in timely fashion by competent authorities.
- Jurisdictions should either abolish, or at least severely restrict, the availability of flee clauses that allow a trust, and information about a trust, to be moved to a different jurisdiction on receipt of service of process or inquiry by the authorities.

23. As noted earlier, the purpose of these options is not to make ownership and control information generally available to the public at large, but to make such information available to appropriate government authorities investigating a corporate entity for security reasons.

SECTION V: APPROACHES TO IMPROVE TRANSPARENCY IN SHIPPING REGISTERS

Introduction

24. In order to operate internationally vessels must be registered in a recognized ship register. The registration process therefore provides an important opportunity to identify the beneficial owners of entities or persons seeking to register ships, and thus to combat the use of ships for illicit purposes or for acts of terrorism.

25. The first-phase report indicated that there is an absence of any clear international standards or rules regarding the eligibility of particular classes of persons to register vessels. Furthermore, there are usually no requirements for registries to identify the beneficial owners of vessels entered on their registers. Even where registration is confined to nationals, there is usually nothing to prevent resident companies owned by non-residents of the country concerned from registering a vessel.

26. This situation is of concern given the potential risks associated with the shipping sector. The general practice in other sectors susceptible to abuse for illicit purposes, such as financial services, is that corporate entities are not licensed to operate until the appropriate regulator is satisfied that the beneficial owners are known, and that they are fit and proper persons to carry out the licensed activities.

27. Although this level of regulation has been traditionally confined to financial service institutions such as banks and insurance companies, it is increasingly being applied to a wide range of businesses or professionals that act as service providers in the creation of companies, trusts and other legal entities. These entities and service providers are in turn required to demonstrate that they are engaged in effective due diligence, including having in place proper procedures for customer identification.

28. There is accordingly considerable precedent for regulatory authorities in sensitive sectors insisting on transparency of ownership before licensing service providers in these sectors, as well as there being considerable experience in identifying ultimate beneficial owners in an international context. These broad principles have been applied in this section of the paper dealing with options aimed at shipping registers, and it is noted that if the customer “due diligence” principles established by the FATF were equally applied by shipping registers, then this would substantially reduce or eliminate the problem of anonymity.

29. It is also noted that while responsible registers, be they traditional or open, may share a common objective of ensuring that potential terrorists and criminals do not find it easy to operate in their jurisdictions, the fact remains that these types of registers are inherently different, and may need responses that are tailored to their particular characteristics, rather than attempting a “one size fits all” approach. Therefore, the suggestions that follow have been grouped under different headings, to identify those that may best suit a particular type of register, as well as those that would apply equally to both traditional and open registers.

Measures applicable to all registers

➤ ***Do not promote impenetrable anonymity as a selling point for your register***

Many registers use anonymity as a selling point, and promote this as an advantage over other registers. The implication that this carries (even if not intended) is that the identity of the beneficial owners will be protected in all circumstances. Such a privilege should not be available to those who could use this advantage to perpetrate terrorist acts, or to engage in criminal activities. Confidentiality, in the terms described earlier, would seem to be adequate for legitimate seekers of protection of their identities.

➤ ***Ship registers should be able to demonstrate that they have in place proper procedures for the identification of persons seeking to register ships***

Such identification procedures should identify the ultimate beneficial owner and/or controller of companies, partnerships and other legal entities, as well as the trustee, settlers and beneficiaries of trusts. This would ensure that shipping registers can exercise full legal jurisdiction over their vessels at all times. A system, whether intended or not, that allows anonymity to the extent that even the Flag State jurisdiction does not have access to the beneficial owners under any circumstance, should not be considered as adequate.

➤ ***Avoid registering ships whose beneficial ownership cannot be adequately identified***

Where owners go to extensive lengths using corporate mechanisms to hide their identities, then flags should not register those vessels.

➤ ***Train personnel in procedures to identify beneficial owners, and provide them with adequate resources***

When corporate vehicles are listed as owners of vessels, genuine efforts should be made to trace through their ownership arrangements, to establish whether they are open (i.e. lead to the beneficial owners) or closed (i.e. lead to a complex web of corporate structures and arrangements intended to hide their true identity).

It is likely that in many cases the corporate webs involved in the ownership of ships will quickly lead investigators outside the jurisdiction of the flag state, and into other jurisdictions scattered around the world. In those circumstances it would generally be well beyond the means available to Shipping Registration Offices to be able to pursue those investigations for any period of time without access to the resources necessary to undertake intense, rigorous (and well funded) searches.

➤ ***Information should be made available to competent authorities when appropriate***

There should be proper provision for holding, sharing and making access available to information. In particular there should be no barriers to the flow of information to competent authorities such as security and law enforcement agencies.

Measures that may particularly apply to traditional registers

30. It was noted in the earlier OECD report that while the use of traditional registers was more difficult (because of their more closed nature, and the need to meet nationality requirements), if terrorists were able to circumvent those provisions, then their vessels could attain a degree of protection that could make taking the risks worthwhile.

31. It is therefore suggested that traditional registers should remain vigilant to the possibility of such misuse. The following measures may be helpful in that task.

➤ ***Ensure that nationality requirements are closely monitored***

If nationality requirements are in place then these should be closely monitored to ensure that they are adhered to, and that details of majority beneficial ownership are known by the authorities.

➤ ***Pay particular attention to ship registrations that are registered by corporate vehicles, and undertake checks to ensure that locally incorporated entities are not subsidiaries of foreign corporations with obscure ownership details***

Most (if not all) traditional registers permit ships to be owned and registered by corporate entities. Locally incorporated (but ultimately foreign-owned) entities may meet those local nationality requirements. In these instances, ship registers should check their history thoroughly to ensure that they are not subsidiaries of foreign corporations (perhaps several layers removed) where beneficial ownership details may be hidden. If such ships are found, registration should be denied.

➤ ***Ensure that external dependencies cannot be used to circumvent nationality requirements***

The first report on ownership and control suggested that in some circumstances it might be possible for the external dependencies of some countries to be used by shipowners as a means of moving from one jurisdiction to another in an effort to cover their tracks. This could be done, for example when corporate vehicles from one dependency are automatically accepted by another dependency in the same family. There may be instances where this could even apply to the home country.

Those administrative and legal arrangements between the countries concerned and their dependencies are complex, but that very complexity could provide a vehicle for sophisticated and well-funded terrorists to hide behind those legal, administrative, traditional (and often quite delicate) arrangements.

Therefore, traditional flag states that have external dependencies should critically look at their administrative and legal arrangements to ensure that such practices are not facilitated, and that terrorists could not use a combination of corporate structures and facilitated arrangements between administrations to gain legitimacy. Those countries might also consider discussing with their dependencies how to prevent the possible misuse of otherwise appropriate arrangements.

Measures that may particularly apply to open registers

32. Open registers are by their very nature largely composed of ships belonging to non-nationals, and as a consequence are more exposed to possible misuse by potential terrorists and criminals. In particular, their administratively simpler and frequently less-intrusive registration procedures, while perhaps giving the register a commercial advantage over other registers, may also make them attractive to those seeking to hide their activities.

33. In itself, the desire of open registers to make themselves commercially competitive is understandable. Open registers are now part of the maritime landscape, and there is no suggestion here that this situation should be changed. However, such open and competitive philosophies by those registers should not involve ineffective administrations, nor the lowering of standards of safety, security and responsibility.

34. Open registers will therefore have to exercise particular care and scrutiny to ensure that their flags are not misused in this way. Some specific measures that may assist open registers to address these potential problems are provided below.

- ***Scrutinise carefully ship-owning arrangements that involve foreign corporate vehicles, especially those from jurisdictions that promote anonymity***

Some corporate vehicles are established for the sole purpose of carrying on business outside the jurisdiction of incorporation, and can frequently be used as means of preventing transparency of ownership. Such corporate vehicles should be scrutinised carefully to ensure that beneficial ownership details are available. While to some degree this advice applies to all registers, it is particularly applicable to open registers, where a majority, if not all of their ships will be foreign-owned.

- ***Do not permit the use of bearer shares in the ownership of ships, and eliminate, and strictly oversee the use of nominee Directors, office holders and shareholders***

These corporate mechanisms, and especially bearer shares, are primary vehicles for the creation of corporate webs that hide beneficial owners from all scrutiny. Such mechanisms should not be accepted without due care by flag states that wish to effectively regulate ships that carry their flags.

- ***Require a substantive local presence by the shipowner in your jurisdiction***

While it is not necessary for shipowners to meet nationality or residency requirements, flag states should nevertheless ensure that there is a sufficiently substantial link between the shipping register and the shipowner to ensure that the flag state can effectively discharge all its legal obligations with respect to the ships flying its flag. A “brass plaque” presence, or a corporate presence based on nominee directors, nominee shareholders and/or bearer share ownership should not be accepted as a sufficiently robust presence.

Instead, flag state administrations should require a genuine presence by the shipowner, through a person located person in the jurisdiction that, in the absence of the beneficial shipowner himself, would be fully responsible for all matters that involve legal responsibility, liability and security.

SECTION VI: SELF-PROTECTION MEASURES FOR GOVERNMENTS

35. The rather extensive list of measures provided above is aimed at jurisdictions that provide anonymity, and at shipping registers whose registration procedures enable and facilitate the anonymity of shipowners.

36. If a sufficient number of those jurisdictions and shipping registers were to implement these measures, then this would certainly make it more difficult for terrorists and criminals to hide. This in turn would give the intelligence, security and law enforcement authorities of all countries greater opportunities to thwart possible terrorist attacks, or at least to track down and apprehend perpetrators if they were successful in implementing their plans.

37. However, what would happen if, despite efforts to achieve greater transparency, many of those administrations chose to maintain the provision of anonymity? In particular, what if a sufficient number of flag states continued to promote, or at least accept, anonymity because they considered that to do otherwise would render their registers uncompetitive, and lead to the loss of shipowners to other flags?

38. In these instances, it would be left to governments to respond to threats, on their own, or in concert with like-minded partners. The concerns over security, ever present since 9/11, would grow considerably if the threat of terrorist action involving shipping increased for any reason, or if a terrorist incident actually took place.

39. By their very nature, and the circumstances in which they might be invoked, these measures are comparatively intrusive and disruptive, and would clearly only be considered by governments when the threat of possible terrorist action became very serious indeed.

➤ ***Co-ordinated action against jurisdictions that provide corporate mechanisms that facilitate anonymity***

Those administrations for whom transparency is important might be able to band together to encourage, or otherwise pressure administrations of jurisdictions that offer corporate services that facilitate anonymity to abandon or modify those corporate services. This is clearly a top down approach, as it would involve lifting the corporate veil on all international corporate entities, not just those involved in the ownership of ships.

Such actions by the international community are already under way, and have achieved a measure of success. For example, the Financial Action Task Force (FATF), referred to in some detail earlier in this paper, has (amongst other things) received commitments from a number of administrations to address the problems of anonymity (see Annex 1).

This kind of action may provide a reduction in the availability of corporate mechanisms that provide anonymity.

➤ ***Encourage flag states to address transparency of ownership***

If there is insufficient response from the individual flag states themselves, then those that promote and provide transparency could work together to encourage the more reluctant flag states to join them in providing for such transparency.

This could be done by engaging those flag states that promote anonymity in discussions aimed at demonstrating the alternatives available to those registers to improve transparency without necessarily risking their standing amongst responsible shipowners. There are encouraging signs amongst flag states of the recognition that continuing to avoid the issue of beneficial ownership is not necessarily conducive to the operation of an effective shipping register. This may offer fertile ground to gather together like-minded flag states, both traditional and open, to further promote the concepts of effective flag state control, and greater openness in beneficial ownership.

➤ ***Target ships where beneficial ownership is obscure***

If certain Flag States continue to promote and provide for total anonymity of beneficial owners, then other governments may need to move to protect themselves against the possibility of threats involving those ships. One way of doing this would be to submit ships whose beneficial ownership is obscure to intensive investigations by appropriate authorities.

While anonymous ownership is not of itself evidence of terrorist involvement, it would nevertheless provide a trigger to treat such vessels with caution. This is a proactive and cautious approach that would undoubtedly also snare innocent vessels and shipowners with innocuous reasons for wishing to be anonymous. However, where there are serious threats of possible terrorist action, such responses should not be discounted.

➤ ***Target ships from flag states that promote/permit anonymity***

If the threat escalates even further, and the opportunity of inspecting individual ships disappears, governments may then take an even broader approach by targeting entire Flags, when these are known to permit or promote virtually absolute anonymity. This would mean that all ships from those suspect flags would be targeted for much closer scrutiny before being permitted to proceed to the ports of the inspecting country. Again, this net would probably also capture ships whose ownership details may be relatively transparent, but which would be targeted by virtue of their association with a seriously suspect flag.

➤ ***Restrict access to ports only to flags and ships where ownership and control is known***

As an ultimate measure, in cases of extreme threat, or perhaps following a terrorist attack, governments could move to restrict access to their ports only to vessels from flags where it is known that ownership and control of their ships is transparent, and ships whose ownership is known. This would be virtually a measure of last resort when all other measures are exhausted. It would provide governments with a breathing space and/or window of secure opportunity to either address the threat, or if an incident has occurred to minimise the likelihood of a follow-up attack.

In both of the last two measures, prior assessment of which flag states are open with respect to ownership and control details, and which are not, would enable the measures to be rapidly implemented in the event of a threat that was sufficiently serious to prompt the affected government(s) to take such relatively drastic protective action.

CONCLUSIONS

40. If effectively implemented the measures contained in this report would go a long way towards eliminating anonymity, but the reality is there may be resistance to their adoption by some jurisdictions and ship registers

41. This report suggests that promoting the provision of confidentiality (as opposed to anonymity) may offer a workable compromise that could perhaps be acceptable to jurisdictions and beneficial owners.

42. Other international agencies have already made considerable progress with respect to measures addressing *corporate vehicles and mechanisms* that facilitate anonymity. These developments are welcome, and no doubt the effectiveness of their implementation will be carefully monitored.

43. This paper has postulated that *all shipping registers*, be they traditional or open, are vulnerable to potential misuse by terrorist or criminal interests. While traditional registers are probably more difficult to penetrate, they are not risk free, and vigilance should be exercised in this respect.

44. By their very nature, open registers are inherently more vulnerable to be misused by terrorists, especially those registers that promote the fact that they are committed, in most instances, to protect the identity of beneficial owners. This is not intended to castigate open registers, but simply to alert them to their greater vulnerability, and to urge them to greater vigilance to try to avoid being misused in this way.

45. There is some evidence that even open registers themselves are starting to think along these lines, for example a view was recently expressed by the International Registries Inc (which administers the Marshall Islands register) when a spokesman was reported as noting that “flag states should be the front-runners in ensuring greater transparency in the shipping industry”.⁴ This report would wholeheartedly endorse that view, and would commend all of the measures listed in the section on shipping registers to both traditional and open registers as a means of achieving that objective.

46. Finally, *governments* at some point in time may have to think of what approaches they could take for self protection, if other responses have not provided a satisfactory level of protection. Some such measures are outlined in this paper. Some are relatively intrusive and disruptive, and there is no easy way of specifying when (if ever) they may be justified. This would be a decision that only governments could make on behalf of their citizens when confronted with serious circumstances.

4 A speech given by Mr. Clay Maitland, managing partner of International Registries Inc, as reported in the *Lloyd's List* of 2 October 2003.

ANNEX 1

RELATED WORK UNDERTAKEN IN OTHER FORA

To our knowledge, those corporate mechanisms that can be used to provide anonymity to beneficial owners have been investigated by the:

- Financial Action Task Force on Money Laundering (FATF, an independent international body whose Secretariat is located at the OECD).
- OECD Steering Group on Corporate Governance (the authors of the report “Behind the Corporate Veil: Using Corporate Entities for Illicit Purposes”).
- OECD Forum on Harmful Tax Practices .

Each of these activities has their own areas of concern and objectives. Many of them (such as the debate on tax practices) are of no concern to this report, which is focused solely on the implications for maritime security of the lack of transparency in the ownership and control of ships.

The principal convergence of interest between the Maritime Transport Committee and these other areas of investigation is that all are concerned with the role played by international corporate entities and mechanisms in facilitating anonymity.

A second important area of convergence is in the work being undertaken by the FATF on Terrorist Financing, as it was shown in the first-phase report (*Ownership and Control of Ships*), that it is possible that shipping could also be used by terrorists to finance their activities, as well as using ships directly used for terrorist activities.

Each of the groups mentioned above have investigated and reported on corporate entities and mechanisms, and have made recommendations on how to possibly deal with the problems that arise from the misuse of those entities or mechanisms.

Financial Action Task Force

Much of the work on the use of entities for illicit purposes is now being taken forward by the FATF. The FATF is the standard-setter in the international effort to combat money laundering. It first produced a set of Forty Recommendations to combat money laundering in 1990. These were updated in 1996, by which time they had been endorsed by more than 130 countries. They were updated again in 2003 to reflect changing money laundering practices. The Recommendations set minimum standards for countries to implement according to their particular circumstances and constitutional frameworks. More recently, the FATF has also been leading international efforts to combat terrorist financing. In October 2001, it took the step of creating the Eight Special Recommendations on Terrorist Financing. These Recommendations contain a set of measures aimed at combating the funding of terrorist acts and terrorist organisations and are complementary to the Forty Recommendations.

The revised Forty Recommendations agreed by the FATF in June 2003 contain a standard on access to beneficial ownership and control information. They call on countries to ensure that there is adequate, accurate and timely information on the beneficial ownership and control of legal persons that can be obtained or accessed in a timely fashion by competent authorities. Countries are also called on to take appropriate measures to ensure that bearer shares cannot be misused for money laundering purposes and to be able to demonstrate the adequacy of those measures. As regards express trusts, information on the settlor trustee and beneficiaries should be accessible to competent authorities in a timely fashion.⁵

The new Recommendations also specifically require banks and other financial institutions to identify their customers and to verify their identity, and to apply similar requirements to beneficial owners. This requirement means that they are under an obligation to identify the natural persons that are the ultimate owners or controllers of a company, trust etc. Moreover, the Recommendations now apply similar requirements to a number of non-financial businesses and professions, such as lawyers, accountants, and trust and company service providers. In many countries, these types of firms create, manage and administer companies, foundations, trusts and other types of legal persons or arrangements, and would thus be in a position to provide national competent authorities with the information they might require on beneficial ownership and control.

All FATF members have committed to immediately start work on implementing the revised Recommendations where their domestic rules do not already meet them. In addition, there will be a process of self and mutual assessments conducted by the FATF and FATF-style regional bodies. Assessments conducted by the International Monetary Fund and the World Bank as part of their Financial Sector Assessment Programme and their Offshore Financial Centre assessment programme, have also been an important mechanism for helping to ensure that the FATF Recommendations are being implemented in all countries. The Fund and Bank will consider the continuation of these programmes, using the revised Recommendations, in early 2004. The evaluation and assessment programmes of the FATF, FATF-style regional bodies, and of the IMF and World Bank cover a significant majority of countries and territories around the world.

Since 1999, the FATF has also engaged in a major initiative to identify non-cooperative countries and territories (NCCTs) in the fight against money laundering. The NCCT process has sought out critical weaknesses in anti-money laundering systems which serve as obstacles to international co-operation. The goal of the process is to reduce the vulnerability of the financial system to money laundering by ensuring that all financial centres adopt and implement measures for the prevention, detection and punishment of money laundering, according to internationally-recognised standards. Part of this process has meant that countries reviewed under the NCCT process must show that they have adequate systems to identify the beneficial owners and controllers of legal persons and arrangements.

OECD Steering Group on Corporate Governance

The OECD has been one of the leading organisations on policy development in relation to transparency of ownership of corporate vehicles. In 2001, its Steering Group on Corporate Governance released a report “Behind the Corporate Veil: Using Corporate Entities for Illicit Purposes”. Based on this Report, a Template “Options for Obtaining Beneficial Ownership and Control Information” was developed

5 Recommendations 33 and 34 of the new FATF Forty Recommendations The full list of recommendations can be found at:
http://www.oecd.org/document/25/0,2340,en_2649_37453_2789401_1_1_1_37453,00.html.

The eight Supplementary Recommendations can be found at:
http://www.fatf-gafi.org/SRecsTF_en.htm#To%20download.

and adopted in 2002, providing a practical tool for assessing current systems for obtaining information on beneficial ownership and control, and focusing on the menu of options identified in the Report. Both the Report and the Template called on governments to ensure that they can obtain and share information on the ownership and control of corporate vehicles to combat their misuse for illicit purposes.

In this regard, the report and the template proposed that countries should adhere to three fundamental objectives. These fundamental objectives also provide a means for measuring the operational effectiveness of the options to be used in a jurisdiction:

- Beneficial ownership and control information must be maintained or be obtainable by competent authorities.
- There must be proper oversight and high integrity of any system for maintaining or obtaining beneficial ownership and control information.
- Non-public information on beneficial ownership and control should be able to be shared with other regulators/supervisors and law enforcement authorities, both domestically and internationally, for the purpose of investigating illicit activities and fulfilling regulatory/supervisory functions, respecting each jurisdiction’s own fundamental legal principles.

The report suggested that the misuse of corporate vehicles could be countered by countries maintaining and sharing ownership information. It proposed three mechanisms or options by which such information could be obtained. The Template intended to assist in the process of identifying how jurisdictions relate to these three possible options. It describes issues that will indicate whether a particular option may be suitable or appropriate for the jurisdiction and addresses characteristics of the system. These three options are:

- **Upfront disclosure of ownership information to the authorities:** requires the disclosure of the beneficial ownership and control of corporate entities at the establishment or incorporation stage and imposes obligation to update such information on a timely basis when changes occur. The obligation may be placed on the corporate entity, the ultimate beneficial owner, or the corporate service provider involved in the establishment or management of the corporate entity.
- **Imposing an obligation on service providers to maintain ownership and control information:** requires intermediaries involved in the establishment and management of corporate entities, such as company formation agents, trust companies, registered agents, lawyers, notaries, trustees, and company supplying nominee shareholders, directors and officers (“corporate service providers”), to obtain, verify, and retain records on the beneficial ownership and control of the corporate entities that they establish, administer or for which they provide fiduciary services.
- **Primary reliance on an investigative mechanism:** the authorities seek to obtain (through compulsory powers, court-issued subpoenas, and other measures) beneficial ownership and control information when illicit activity is suspected, when such information is required by authorities to fulfil their regulatory/supervisory functions, or when such information is requested by other authorities domestically and internationally for regulatory/supervisory or law enforcement purposes.

These options are three broad categories that are, to a large extent, complementary. They could be tailored and/or combined to fit local conditions, legal systems and practices, provided there is full adherence to the fundamental objectives. They should not be construed as exhaustive or exclusive, and need to be viewed in the context of complementary available measures for combating and preventing the use of corporate entities for illicit purposes.

Regardless of the options adopted, there must be proper oversight and high integrity of any system for maintaining and obtaining beneficial ownership and control information. Each jurisdiction must ensure that there are credible sanctions that are sufficiently robust to deter misuses and to punish non-compliance and that these sanctions are vigorously enforced.

OECD Forum on Harmful Tax Practices

The OECD's Committee on Fiscal Affairs (CFA) also undertakes extensive work on taxation; including on the topic of harmful tax practices. This work is being taken forward by the Forum on Harmful Tax Practices, a subsidiary body of the CFA. In 1998, the Forum issued a report *Tax Competition – An Emerging Global Issue*. This was followed by further reports in 2000 and 2001. A key objective of the Forum's work on harmful tax practices is to improve transparency and exchange of information for tax purposes within OECD Member countries and in non-OECD countries.

Transparency in this context requires that ownership, bank and accounting information should be available to appropriate governmental authorities so that it can be retrieved in response to a request for information. As regards ownership information the standard that has been established is that authorities should have the power to obtain and provide information, regarding the ownership of companies, partnerships and foundations. In the case of trusts, information on settlors, trustees and beneficiaries should be available.

The standard is set out in the Model Agreement on Exchange of Information in Tax Matters [www.oecd.org/taxation/]. Importantly, this agreement was developed by a group consisting of representatives from OECD Member countries as well as delegates from non-OECD countries that had made commitments to transparency and exchange of information.

The standards set out in the Model Agreement on Exchange of Information are common standards intended to apply to OECD and non-OECD economies alike. In the course of its work on harmful tax practices, the OECD has worked closely with many non-member economies. Of particular importance, however, is its work with its participating partners. These are countries and jurisdictions that have made commitments to transparency and exchange of information for tax purposes.

To date, 33 countries and jurisdictions have made such commitments, many of which operate shipping registers. What this means in practice is that these jurisdictions have agreed to introduce, on a phased basis, the regulatory and administrative measures necessary to implement the agreed standards of transparency and exchange of information, including transparency of ownership. These countries and jurisdictions are identified in the list below.⁶

The OECD has also identified six un-cooperative tax havens, two of which, Liberia and the Marshall Islands, have significant shipping registers. These six jurisdictions have for the time being decided not to make a commitment to transparency and exchange of information.

⁶ The letters of commitment provided by these jurisdictions can be viewed at:
http://www.oecd.org/document/19/0,2340,en_2649_33745_1903251_1_1_1_37427,00.html.

COMMITMENTS BY JURISDICTIONS

The following countries or jurisdictions have made commitments to transparency and exchange of information for tax purposes:

• Anguilla	• Antigua and Barbuda
• Aruba	• Bahamas
• Bahrain	• Belize
• Bermuda	• British Virgin Islands
• Cayman Islands	• Cook Islands
• Cyprus	• Dominica
• Gibraltar	• Grenada
• Guernsey	• Isle of Man
• Jersey	• Malta
• Montserrat	• Mauritius
• Netherlands Antilles	• Niue
• Panama	• Samoa
• San Marino	• St. Christopher (St. Kitts) and Nevis
• Saint Lucia	• Seychelles
• St. Vincent and the Grenadines	• Turks & Caicos
• US Virgin Islands	• Vanuatu
	• Nauru