

Maritime Human Resources; Maritime Failure; Maritime Disaster

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Introduction

“Whilst there is a temptation to focus all reform attention on the flag states as the weakest link in the regulatory chain, it is unrealistic to hope that flag state supervision alone will be adequate to counteract the pervasive market forces that operate on shipowners.”

With this quote a number of the issues that are central to current maritime policy-making and the relationship to maritime enterprises are brought to the forefront. The relationship between disreputable flag states, globalisation and markets, and the role of shipowners is the focus of many of the problems facing the maritime sector and the stimulus for many policies. But beware – maritime policies will remain ineffective regardless of their laudable and appropriate aims if their derivation, reflection of stakeholders’ interests and the governance of how they come about and are delivered, is substantially lacking.

The purpose of this paper is quite simple – to outline the degree of maritime policy and governance failure across all policy-jurisdictions and its significance for maritime human resources. The devil is in the detail of course, for maritime policy and governance are ill-defined, misunderstood and commonly deliberately misrepresented. Our story is one with roots long ago and it is necessary to accommodate much of its history if we are to begin to understand the causes of the failures which we shall examine. Consequently the reader will need to be patient as there are no quick fixes in the policy arena, certainly none which have substance or durability, and there is a requirement of those taking part for endurance, grit and determination (as well as a little foresight and talent). However, our story will be lightened by tales of death and destruction, injury and corruption, disease and immorality, incarceration and violence. .

Failure

Much of the discussion on policy failure will concentrate upon the situation in the maritime sector in the European Union. This is partly because there are many examples of policy debate and governance dispute that have emerged at this level of

jurisdiction. However because of the globalised nature of shipping, all maritime policies tend to exhibit jurisdictional interlocking and as a result discussion crosses over to evidence of failure at international, national, regional and local levels as well. There are many examples of policy failure that we can take. Our choice is not wholly unlimited but its range and scope is almost breathtaking.

Liner Shipping Regulation

We can start some years back with a policy anomaly that illustrates the scale and longevity of the degeneration of maritime policy-making and governance across all levels of jurisdiction. The 1986 package of measures for the maritime sector agreed by the European Union included the infamous 4056/86 Regulation that provided exemption for liner conferences operating into or out of the European Union (then Community) from the Treaty of Rome rules on competition (Paixiao and Marlow, 2001). Liner conferences in their traditional form clearly breached the Treaty in many ways and other commercial and industrial sectors in the EU have always been prevented from collusion and cartel forming under any circumstances with severe fines applied to those stepping out of line. Not so liner shipping which was allowed to continue to enter into agreements on schedules, rates and the like – albeit with some restrictions and with a degree of enforced transparency. This anomaly emerged from a complex and heated political debate between the European Commission and the Council of Transport Ministers, with some intense pressure from leading (generally larger) liner shipping companies such as Maersk, P & O, Nedlloyd and Hapag Lloyd. Despite heavy criticism, the exemption continued to be applied from its inception in 1986 and was finally eliminated only in 2008 despite universal condemnation apart from the ship-owners that were the major beneficiaries from the protection offered.

Regulation 4056/86 was inconsistent, incoherent and irrational in the context of the Treaty of Rome, the principles of the EU and their rigid application to all other sectors. For 20 years simply its existence was a clear policy failure as it violated the most significant principle that drives the European Union in all that it does – that of free competition to achieve maximum economic benefits for all. It also represented an aberration of governance in its emergence from a political tiff between two authorities of the European Union, rather than as a rational consequence of structured and open debate of the issues. Its ineffectiveness was apparent from its failure in application. Examples abound but one that was especially notable featured fines imposed on operators in 1998 for collusion through the Trans-Atlantic Conference Agreement (TACA) which were substantial but subsequently quashed on appeal in 2003

From 2006 onwards there have been major steps taken to abandon 4056/86 so that by 2008, the Treaty of Rome would be fully applicable to the liner shipping industry and conferences will be illegal for all operations into and out of the EU. Whilst in itself this ends a major maritime policy anomaly, the process of removal has been fraught with argument and in particular accusations of vagueness by the European Commission with respect to what comes next and how much collusion between operators could continue to be acceptable (Tradewinds, 2007c). The European Liner Affairs Association (ELAA) Brussels based lobbying group, commented that the guidelines issued by the EC in September were too ‘vague and in some cases contradictory’ and ‘carriers will have to assess whether it is safe to gather and publish information’ (Tradewinds, 2007b). In addition there is continued distrust between the Council of Ministers and Commission with the former Council of Competition Ministers demanding the right to be consulted on each stage of the

phasing out which is conducted by the Commission (Lloyds List, 2006v). Even from the grave, 4056/86 will continue to haunt EU maritime policy-making.

Tramp Shipping

A related problem has featured only much more recently and concerns the position of tramp shipping in relation to EU competition policy. For many years tramp shipping was exempt from the competition rules but suddenly, in late 2006, the Directorate General for Competition announced that it would enforce rules on operators which if violated could result in fines of up to 10% of group turnover (Lloyds List, 2006x). The position has always been vague in that competition law did apply to tramp pools but was left in the hands of member states whilst the similar situation relating to liner conferences was a Commission responsibility. The sudden change of emphasis was unclear and unexpected. The Council of Ministers' Regulation shifting powers from member states to the Commission was agreed without notice to stakeholders who did expect change but not for some months. In addition to the unexpected timing, the impact of the new Regulation was unknown on the industry and its derivation, timing and impact had remained a close secret. Rather unconvincingly, the Commission was felt to prefer to test the effect of competition law in practice rather than spend time predicting and considering the effects before implementation.

European Register of Shipping

Meanwhile, the initial attempts at launching a European Register of Shipping (EUROS) under the 1989 package of maritime proposals presents us with another catalogue of disasters in policy terms. Wrapped up with a variety of add-ons to make it more tempting, EUROS offered privileged access to aid cargoes and a variety of potential tax concessions in exchange for flying a second (European) register which came with restrictions on manning (Smith, 1993). As an attempt to counter the growth of flags of convenience by offering a European registry with higher standards but with options to reduce the strict manning requirements of state flags, it failed miserably falling between the economic advantages of flags of convenience and the standards which were ensured (at some cost) by conventional registries.

In fact EUROS never really even began to get started. Fiercely resisted by ship-owners and labour unions who saw it as a threat to profits and jobs respectively, the European Commission failed to understand that policy proposals of this type needed the full support and agreement of those most affected from their initial conception. This was never even considered. The policy emerged from high level discussions and then was expected to filter down the jurisdictional hierarchy from supra-national through national member states to those at the operational level – the ship-owners and labour unions – who would enthusiastically take up the idea despite the failure to incorporate their needs and fears in the process. This pattern of governance failure has been repeated in recent years over the development of EU ports policy – more on which later. EUROS was eventually abandoned after many years of sitting on the agenda of high level groupings in the EU, a victim of a misconceived policy that had failed to incorporate the various stake-holders that had central interests in the issues it raised.

Interestingly, the whole issue of a European register has been raised again by the Commission in the debates on maritime policy through 2007 and into 2008, despite an intriguing combination of clear and widespread opposition and apathy. The public consultation process that led to the publication of the 2007 Blue Paper

contained a strong theme that hinted at the creation of a new European register of shipping linked to the concept of a European Maritime Space and (as we shall see later) the concept of maritime cabotage. All three concepts generated fierce opposition amongst the maritime community with almost no exception – and yet remained at the forefront of Commission proposals throughout 2006 and 2007.

The proposals had first emerged during February 2006 with suggestions that the Commission had plans for a European registry leaked into newspapers and led to a fierce denial of any such idea (Lloyds List, 2006a). Stemming from ideas of European Flag State control and a single line in notes accompanying the Erika 3 package of legislation referring to the ‘development of a European flag’, the Commission stated that they did ‘not foresee the adoption of a European flag state.’ However, the fact that the use of a single phrase in an obscure part of documentation can lead to extensive debate at the European Parliament and across the European media is indicative of a failure of trust across jurisdictions and between governance authorities.

Despite the Commission denials, the debate continued throughout 2006 with the Green Paper questioning whether ‘an optional EU register be made available?’ and Commission President Jose Barroso quoted as saying that ‘he would not hesitate to propose the EU flag.....if they (*sic*) were deemed necessary after the consultation phase.’ (Lloyds List, 2006k).

Clear indication of the intensity of debate over maritime policy throughout the Green paper consultation phase came from the appointment of Fotis Karamitsos as Director for Maritime Policy by the Commission, who stressed in September 2006 that the Commission had not made up its mind on a European flag (Lloyds List, 2006w). However, finally in October 2006 the plans for a European flag were put to rest when the Commission’s Deputy Director for Energy and Transport, Zoltan Kazatsay commented at the Maritime Industries Forum that the policy was ‘going to fail’. In response the secretary general of the European Community Shipowners Association compared the situation to that of EUROS in the early 1990s stating:

“Why did EUROS fail at that time? The simple reason is that it intruded into the competence of member states on the company taxation and the taxation of seafarers and social security.” (Lloyds List, 2006y).

Although the issue was raised again by European Commissioner Joe Borg in October 2006, it was only in the context of encouraging free and open discussion of all potential policies (Lloyds List, 2006aa). In that sense the renewed discussion of European flags was healthy in that it was not a policy pursued by the Commission in opposition to member states and stakeholders. However at the same time, the interest and resentment generated reflects an on-going distrust that exists between each group and a failure of communication itself implying difficulties within the maritime governance community.

Double Hulled Tankers

Maritime policy has continued to exhibit a catalogue of failures since then. One area of policy that has given trouble for many years has stemmed from environmental concerns about shipping and in particular something that has raised much public debate – the safety of oil tankers and the infrequent but disastrous effects of a number of incidents in EU waters in recent years. These have included the most infamous of all with the sinking of the *Prestige* and *Erika* and the catalogue of

political, policy and governance failures that followed which culminated in policy decisions in France and Spain at the national level concerning the compulsory introduction of double-hulled tankers in advance of similar legislative and policy proposals both at the international (IMO) and the supra-national (EU) level (De Vivero and Mateos, 2004).

Maritime policy-making exhibits a traditional hierarchical organisation of governance. A dominant principle of hierarchical policy-making is that policies emerge in broad, generic form from the higher levels, to cascade down the hierarchy to lower levels where they are applied to the sector with appropriate, locally relevant details adopted. The adoption of new rules concerning double-hulled tankers by individual nation-states in the wake of the *Prestige* was in clear conflict of hierarchical policy-making with agreement through jurisdictions and implementation at the lowest level possible, closest to the stakeholders who have most to gain and lose. Instead we have national member states taking the lead because of the delays in implementing policy at superior jurisdictions and consequently sending messages up the hierarchy to higher levels as well as down to those involved in the day-to-day operation of shipping. The failure of the key characteristics of the hierarchical model that underpins maritime sector governance generated loud objections to the unilateralism that followed. The issue that is important here is not the policy adopted – in fact those at the peak of the hierarchy had similar views towards tankers as those at the nation-state level – but that the model around which all policy is supposed to be derived and applied and which forms a fundamental framework for the maritime industry should be violated to such an extent – the consequence of which is the potential for confused and contradictory policies and significantly raised opportunities for policy abuse and manipulation by the shipping industry itself. A governance model based on hierarchy, but ignored at will by lower jurisdictions cannot do anything but generate random and widespread policy failure.

Tonnage Tax

One area that has been almost universally seen as a success for maritime policy in the EU has been the relentless growth of tonnage tax initiatives to the extent that very few EU member states now do not operate such a system (Brownrigg et al, 2001; Selkou and Roe, 2004). Of course it is not only EU member states that have introduced tonnage taxation and examples exist in India, Korea, South Africa, Norway and beyond. However, it is the success of these policies within the EU that is most dramatic and which has attracted substantial favourable comment since the relaxation of the EU Guidelines for State Aid to Shipping that took place from 1997. However in whose terms is the policy of tonnage tax a success and how much does it represent an anomaly or worse, an example of hypocrisy stimulated by the desire for financial success generated by those with most to gain?

Tonnage taxation varies member state by member state, but in all cases represents a mechanism that replaces some form of national corporation tax by a specific taxation that is aimed at the maritime sector. The characteristics of variation are considerable. There is the UK where only direct shipping activities can be included and if a company opts for tonnage taxation instead of corporation tax, then all such activities of the company must be included. This contrasts with the Irish version where any maritime related activity can be included. Taxation rates vary considerable as do requirements for membership of the national registry, links with training and lengths of commitment. However, and the key point to the ‘failure’ status of tonnage tax policy in the EU, all such taxation is a subsidy; a state-aid as defined

by the EU in its guidelines, under which tonnage taxation is permitted as an exception by the Commission to the rules of the Treaty of Rome.

Two major measures of policy success are those of consistency and equitable application. Tonnage tax offers neither. As a ship-owner, tonnage tax is a boon offering a range of subsidised taxation regimes across reputed flag states in the EU, which with the capital, legal and physical mobility of shipping, can be played off one against another to achieve the maximum benefit for shipping companies who threaten to move vessels between flags and capital regimes at will unless their taxation requirements are met. This is neither equitable nor consistent. It is a policy unavailable to any other commercial sector in the EU despite similar characteristics of financial, legal or even physical mobility (for example the airline industry, international road freight industry, international telecommunications, satellite television etc), whilst the benefits to be derived from tonnage taxation are hard to identify apart from to shareholders of the companies concerned and consequential spin-offs in related financial markets. In many cases a link to the respective EU flag or to stimulating interest in the maritime labour market is not even a requirement and any supposed benefits of safety and to the environment claimed by registries from established states remain unrealised. The inconsistencies in the tonnage tax policy were further emphasised in early 2007 by comments from the Managing Director of Carnival Cruising, David Dingle, who in commenting upon the development of a new maritime policy in one breath called upon the necessity to retain tonnage taxation in the EU whilst also demanding that the European Commission should not be protectionist (Lloyds List, 2007c). By definition, tonnage taxation is an EU protectionist measure, facilitating taxation privileges only for those allowed to receive them and particularly so if entry to the tonnage tax club is reserved for EU member state flags – as is the case for some member states.

Tonnage tax thus benefits very few, does so inequitably across the EU, fails to achieve broader benefits for public goods (safety, the environment, security), acts as an exception to the Treaty of Rome which guides the rest of activities within the EU, and can be justified only in terms of sustaining a maritime base within the EU – something that is questionable at best and at worst simply a privilege. In policy-making terms it has no place in the current hierarchical arrangement as it violates all other taxation standards at the supra-national level and has no basis at the international level in achieving international standards for safety, security and the environment. And as such it represents a glaring example of policy failure – not for the shipping companies who take advantage of it but for the shipping (and the wider) community as a whole.

Ports

A further failure is the EU Port Policy which quite publicly, has staggered forwards (and backwards) over the last five years, in protracted attempts (and failures) to introduce common competitive standards across ports in the EU (Farrell, 2001). Heavily promoted by the European Commission as a necessary move towards achieving a European market for port services, the ports policy looked to enforce a competitive regime in larger ports across the EU. This included a requirement to facilitate at least two providers of services (for example for stevedoring, ro-ro ramp provision, container terminal services and even pilotage) so that port users would have choice. The result would be increased competition, higher quality services and reduced costs – or so at least the Commission believed. Services included would cover both traditionally commercial but also those traditionally state run and

monopolistic in character – pilotage being the most characteristic of these. In addition the proposals included allowing vessels to use their own labour to load/unload ships to provide further competition in the market.

Largely supported by ship-owner representatives, the ports policy was promoted twice in an attempt to push it through the EU legislative process – but each time it failed due to severe objections from labour unions, port representatives, the various service providers in ports, and a host of other objectors. Few member states saw the need for a policy of this type – the UK for example could not see how it could be made to work in a country where all port facilities were privatised and some port service providers had contracted for long periods into a non-competitive situation. Others argued that competition existed between ports (sometimes between ports in different countries) and competition within them was wholly unnecessary.

Proponents of the EU ports policy geared up for a third attempt throughout 2006 and 2007 and in the process seemingly ignored the opposition that continued to exist at all levels (Lloyds List, 2006c, 2006f, 2006g) and exemplified by the views of ESPO (Lloyds List, 2007e). The 2006 Transport Commissioner failed to rule out further attempts at a common ports policy despite continued fierce opposition from almost everyone affected. The situation was further confused by his claim that policy ‘action’ was not synonymous with legislation leaving the future open to much debate and little certainty (Lloyds List, 2006g). Meanwhile the Green Paper on maritime policy issued in 2006 for the new maritime policy public consultation phase raised the issue again with suggestions that an EU ports policy was a necessity. This generated little enthusiasm. The policy appears to be unwanted and largely (if not entirely) unneeded by all levels of the policy-making hierarchy, by the industry, by its representatives and by the market in general. This is not to say that a ports policy is not needed but one that reflects the full range of stakeholders involved in the sector and also one that is not developed and dictated to the industry from on high.

Ports policy degenerated further throughout 2007 following continued and long-running clashes between the Commissioners for Transport and Competition and the Director for Maritime Affairs over their respective roles – each seeing themselves as central to policy-making in this area (Lloyds List, 2006m; 2006kk). The confusion was not helped when the Chairman of the European Commission Task Force John Richardson attempted to clarify part of the situation, claiming there had been a ‘semantic misunderstanding’ and that ‘Mr Barrot’s team would continue to handle ‘maritime’ issues whereas Mr Borg’s team would handle ‘marine’ issues’. The respective rights of each are not for us to debate – but what is central is the difficulty of generating and interpreting coherent policies in such a context where there is an open and fractious policy dispute between those individuals responsible for them. The end of 2007 saw the publication of the EU Commission Maritime Blue Book and a new EU Ports Policy consultation paper both of which contained proposals for policy strategy. The Commission indicated that it was looking for progress on ports policy but using the ‘soft law’ option – a vague concept that implies Commission ‘interpretations’ rather than legislation which could be used by the European Court of Justice when required (Lloyds List, 2007f). The response to such suggestions has not been popular with port stakeholders who view such measures as policy by ‘stealth’ whereby unpopular policies can be implemented without debate or formal agreement by those outside the Commission. Is it any wonder that the EU ports policy is inadequate?

The issue of jurisdictional hierarchy remains central to other policy failures in the EU maritime sector. In recent years a long-running dispute about maritime policy representation has been festering as the European Commission continues to attempt to gain a seat for itself (representing the EU 27 member states) at the International Maritime Organisation (IMO). Supported by perhaps one member state in this approach, the EU continues to suggest that for the member states to have a balanced and strong say in IMO policy-making – in response to pressure from the USA in particular – it is necessary that all 27 members speak with a coherent and single voice which only the EU as a single representative body can provide. The weight of the EU presence would match the 27 member states' votes at present but would overcome arguments and disagreements between them which fragment their views in opposition to other large states and voting blocs. Discussion on agreeing an EU maritime viewpoint would take place in Brussels rather than London so that agreed stands would be taken and adhered to.

Very few member states support the position of the European Commission and in fact the majority fiercely opposed it. At present the IMO is equally opposed as it sees its role as a collective of nation-state representatives despite the fact that the EU does have representation (in lieu of the member states) on other UN and international policy-making bodies – albeit not for shipping. In addition, industry representatives from the International Chamber of Shipping and the International Shipping Federation condemned any proposals to substitute the member states by an EU representative at the IMO particularly because it would dilute the technical debates to which member states actively contribute local knowledge (Lloyds List, 2006dd).

This policy dispute is at the heart of the problems that besiege maritime policy-making and reflect the difficulties inherent in the current hierarchical, state-centred approach. The EU sees a need that is unsupported by its member states who, in theory, should be taking the policy lead from the hierarchy above – in this case the EU Commission and other EU bodies. The Commission continues to press ahead with its ambitions at the IMO despite objections from those above (the IMO) and those below (the member states). The issue is not whether the policy would work if imposed – but whether the policy-making process at present can accommodate such demands, reflects the needs and desires of those it represents or whether it is outmoded, inappropriate and as such, a liability. Awareness of this dispute between the IMO and EU and an increasing trend by the EU and its member states towards unilateralism is clear from the increasing number of statements made by Efthimios Mitropoulos, the Secretary General of the IMO, through 2005, 2006 and 2007 which refer to these issues and which stress how the IMO sees itself as an international organisation increasingly forced to defend its mandate to set global standards of safety at sea, vessel-sourced pollution prevention and maritime security:

“There is also what I consider to be a misguided trend towards seeking political solutions to shipping-related matters without even bringing them to the international body that was specifically set up to deal with them.” (Lloyds List, 2005a).

Particular concern has been noted by the IMO over the EU in its consideration of safety issues, mirroring the US policy moves in 1990 which resulted in the US Oil Pollution Act, creating a unilateral safety regime for tankers without consultation with other states through the IMO. Further unilateralism can be anticipated especially with

regard to issues that strike a chord with the public, media and politicians – pollution is one clear issue but others include recent difficulties over ship recycling where member state governments and pressure groups are driving policies rather than them emerging from the hierarchical governance framework that has been created. In Denmark and the Netherlands exports of scrap vessels to India have been stopped and the UK now insists that all government owned ships must be scrapped in OECD, environmentally sound facilities. These are responses to what are considered the failed 2003 voluntary scrapping policies of the IMO and are aimed to bridge the gap that exists until further international law can be agreed.

Clearly the opinions of both national governments and pressure groups representing public views are important to the policy-making process, but to reiterate the problem once again – if a hierarchical policy-making framework exists, and there is the need to coordinate policy to make it work through an international industry, then unilateralism produces chaos and inefficiencies. The answer may well not lie in the structures which exist at present and perhaps other governance approaches may need to be adopted. It is clear that ‘the responsibility for resolving this complex web of environmental and human issues must, in the final analysis, be sorted by entities with an international brief like the IMO and the International Labour Organisation (ILO)’ (Tradewinds, 2006a) but the current governance framework clearly also does not work and the apparent slow speed of the IMO, justifiable or otherwise, is generating policy failure through a process of insidious unilateralism in the context of hierarchically structured maritime governance that abhors such moves.

Meanwhile considerable concern has been expressed about the deteriorating relationship between the IMO, the EU and member states who it is felt are being usurped against their own wishes and that of the international authority. For example Aart Korteland, Chairman of KNVR (Royal association of Dutch Shipowners):

“It becomes more and more clear that the Commission is trying to dictate a common policy to the member states.” (Lloyds List, 2005c).

Pressure has also been placed on the IMO to revise its policy-making procedures as member states view current geographical representation at the IMO Council (the main policy-making body) as unfair (Lloyds List, 2006dd). The countries that make up the council are felt by many new maritime powers to be unrepresentative – examples being that the USA is a member of the senior category of council member although its ship register is small, whilst Liberia, one of the world’s biggest, is not represented at all. The result is undemocratic policy-making, limited stakeholder involvement, unilateralism and policy failure.

These inadequacies of representation manifest themselves in IMO policies that are unwanted or treated with suspicion by members. Take the voluntary member state audit scheme – viewed by a number of major registries as ‘worthwhile and laudable’ but also as generating accelerated flag hopping and with the potential to be abused as a marketing ploy. It would be further disadvantaged by the fact that a number of organisations to which flag states would have the opportunity to delegate certification would not be subject to any IMO audit – but would be subject only to nation-state monitoring. This confused state of affairs would allow individual member states to operate IMO-certificated registries without recourse to the IMO itself, creating a governance nightmare (Lloyds List, 2006b; 2006t). The US Coastguard for example, recognised 155 certification organisations, all of which were outside the

ambit of the IMO. To quote the Director General of Belize Registry, Angelo Mouzourouopoulos:

“...the IMO’s approach would only encourage unilateral legislation at Brussels level and elsewhere...” (Lloyds List, 2006b).

UNCLOS

Further debate was generated following the EU Maritime Commissioner Joe Borg’s call for EU full membership of the UN Informal Consultative Process on Oceans and the Law of the Sea (ICP) in a speech in September 2005 (Lloyds List, 2005b). The EU had only observer status whilst each of the individual member states of the EU were full members. Borg went on to say:

“We have made it clear that we attach great importance to resolving the discrepancy that currently exists between the European Community’s observer status and *its competences – whether exclusive or mixed – with respect to many issues that are` being discussed in the ICP.*” (Italics MR) (Lloyds List, 2005b).

Now these comments by Borg go back to the heart of the EU governance and policy problems. The Commission sees an irrationality in policy competences and representation. Their view is that their role is to develop and impose maritime, legal policies but they are represented in fragmented form (it could be argued that they are not represented at all) and therefore their competencies are prejudiced. This is a governance issue which is made more severe by the fact that the member states who make up the European Union are in total disagreement with their own representatives from the Commission over who should take part in such fora (and the IMO representation issue is much the same). From this sorry mess is supposed to emerge clear, agreed and directed policy, implemented across jurisdictions that in fact, remain blurred by the debate and imposed on an industry that is subject to considerable complexity as a consequence of its globalised activity. What chance is there of this happening?

Borg went on emphasising the debate between the Commission, the International body (ICP) and the member states:

“As a contracting party in its own right of both UNCLOS... and of the UN Fish Stock Agreement, the European Community (*sic*) has accepted legal obligations with respect to oceans and the law of the sea that are particularly relevant to the ICP agenda. We hope that the UN will grant the EU the status that fully reflects its rights and obligations under the international law within the ICP.” (Lloyds List, 2005b).

This call for increased influence came as the Commission was developing its new maritime policy (more of which later) which was anticipated to call for more powers within Exclusive Economic Zones off EU coastal states, which are currently governed by UNCLOS. Fears were expressed that the Commission would be looking to regional measures rather than using international bodies to redesign UNCLOS particularly with regards to amending established intervention rights to provide enhanced environmental protection (Lloyds List, 2005b). Research conducted for the Commission suggested that a greater power of intervention by member states or the

Commission, than is allowed for under UNCLOS would be a logical way forward to protect Europe's coasts against marine accidents and vessel sourced pollution. Central to the concept (and central to objections to it from international policy-making bodies) was the idea of legalising intervention outside a member state's territorial waters but within their 200 nautical mile EEZ. This measure would be taken by the EU without recourse to the IMO or other international policy-making bodies, generating justifiable accusations of unilateralism.

The principle was further emphasised by Borg in July 2006, looking to enable European Union actions in waters beyond national jurisdiction (Lloyds List, 2006r). Resistance to the EU effectively extending jurisdiction over commercial shipping from the existing 12 mile limit to the 200 mile EEZ limit was expressed by the Secretary-General of the European Community Shipowners Association who also insisted that any changes to UNCLOS had to be made through the appropriate international body and not regionally. Further criticism came in December 2006 with the International Chamber of Shipping and the International Shipping Federation both suggesting that firm opposition would come from both the industry and many member state governments to the EU proposed changes to UNCLOS (Lloyds List, 2006nn).

Criminalisation of Seafarers

The European Commission has generated a barrage of criticism over its policy towards ship-related pollution where the approach adopted to deter such events is to criminalise the seafarers involved (Lloyds List, 2006h, 2006j, 2006l, 2006o, 2006ee). The Directive came in force in October 2005 (and implemented in the laws of the member states in March 2007) despite extensive lobbying from all sides of the shipping industry and from member state governments in Greece, Malta and Cyprus and also extensive, if subtle, criticism from the Secretary General of the IMO, Efthymios Mitropoulos during a 2005 meeting with the EU Commissioner for the Environment, questioning whether:

“...imposing criminal sanctions in such cases, was the appropriate response.” (IMO, 2005).

The pollution incident might well be accidental but this would not prevent seafarers involved being prosecuted if the pollution took place anywhere within EU waters. Putting the rights and wrongs of this to one side at least for the moment, support for this measure has been very limited from member states and also from the industry as a whole. Whilst it is of course the case that some legislation and policy has to be introduced by authorities from time to time that is wholly unpopular, in most cases there is normally at least an understanding that the policy is necessary. Not so with criminalisation which is widely seen as disproportionate and quite probably targeting the wrong people.

Resistance to the policy has continued thereafter with particular pressure from the International Chamber of Shipping and BIMCO. However in both cases the policy soup has been mired as they withdrew formal opposition, in the first case aiming to direct their efforts towards specific seafarers' rights and in the second as the ICS felt that their national membership made the situation over-complex and that their true role was one as a lobbying rather than a political organisation. However, the industry continued to press against the Directive through the London High Court where representatives from Intercargo, the Greek Shipping Cooperation Committee, Lloyds

Register and the International Salvage Union sought a judicial review to have the case referred to the European Court of Justice. The key to the case was a governance dispute centring on conflict between the Directive and treaty obligations under Marpol which had not been resolved.

Further criticism came in the form of accusations that the Directive was a unilateral measure designed to break away from international law. The whole debate was made even more unclear in that although it is an EU Directive, the international shipping industry was actually challenging the UK Department of Trade and Industry who had imposed the Directive in the UK. The heady mix of national, international, supranational and cross-national representation battling it out over a policy unwelcome by most of those for whom it was designed suggest policy, governance and jurisdictional chaos at its worst.

Places of Refuge

Meanwhile the European Commission is also finding difficulties in implementing its plans for places of refuge for vessels at times of poor weather or when technically troubled by accident or mechanical failure. Whilst the aim of the policy is reasonably well understood by all those involved including member states' governments, its implementation is proving extremely difficult suggesting a policy process that can deliver legislation but not necessarily enforce it – certainly within a reasonable timescale. Directive 2002/59/EC, which includes the requirements for member states to designate places of refuge, has proved to be extremely difficult for some member states to implement to the extent that the EU Commission had to resolve to a campaign to encourage implementation at member state level – something that actually is a legal requirement (EMSA, 2004).

Security

Security has been a rising star in policy terms for some years now with major concerns over shipping's role in the movement of both terrorist materials and terrorists and illegal immigrants. Two issues have emerged where confusion and deliberate moves to avoid the established policy-making framework have taken place. The first in 2005 was when the USA lobbied national governments in the EU rather than EU institutions in an attempt to reach agreement over two projects considered key to security strategy. Despite established policy routes through the EU before moving on to national government discussions, the USA government decided to deal directly with member states concerning the Container Security Initiative and the Galileo Satellite project thus resorting to bilateralism in the face of unwanted multi-lateral procedures. Commenting on such events, former US Ambassador to the EU, Rockwell Schnabel claimed that it was a tactic 'commonly employed' (Lloyds List, 2005d).

The EU spent much time in 2005-6 deriving its own 24 hour rule for container screening based on the USA approach (which we have just noted was developed avoiding discussion with the EU). This was adopted in 2006 and is to be employed from 2009. However, it has been heavily criticised by those most involved – the liner shipping sector and more specifically, the World Shipping Council (WSC) – as having no security value because of flaws in its drafting (Lloyds List, 2006u). The flaw in Commission Regulation 1250 is that it does not oblige non-vessel operating common carriers (NVOCC) or freight forwarders to file advance manifest declarations with European customs and in so doing goes against World Customs Organisation and US/Canadian guidelines. Claims by the WSC are that the

Commission received but ignored advice to this effect from ECSA, the European Shippers Council and interests representing freight forwarders, aviation and road transport.

Environmental Issues

Environmental policy-making both within the EU and elsewhere, has shown rather more coherence than other sectors although it is still easy to find examples of failure to collaborate, coordinate and cooperate between the various jurisdictions. Disagreements between the IMO and the USA over emissions regulations emerged in 2007 when the US California state decided to press ahead with ship emission laws that will override IMO regulations (Tradewinds, 2007a). Only a few weeks after this came news of problems with applying the new IMO ballast water treatment regulations for which in September 2007, there was no type of approved equipment available. Some new vessels would soon have to comply and yet had no way of doing this – clear example of governments and business failing to cooperate effectively (Tradewinds, 2007b). There were also claims that changes to Marpol Annex VI with regards to ship emissions, by the IMO was a short-term measure that failed to take the long-term into consideration and might lead to decreased pollution from ships but at the expense of increased pollution from refineries.

Meanwhile the IMO attempted to defend its position with Secretary General Mitropoulos suggesting that the IMO was pledged to speeding up work on emissions and would not be pressured by the EU to show more urgency. To achieve this, the IMO suggested the introduction of a Panel of Experts in Ship Pollution to examine the issue of airborne pollution holistically rather than pollutant by pollutant (Lloyds List, 2007f). However, as the policy model continues to disintegrate, the EU is now examining the possibility of including ship emissions (and especially CO²) into carbon trading schemes thus instituting a unilateral, regional policy (Tradewinds, 2007c).

Regional Policy

Further policy problems were emerging over jurisdictional disputes between the European Commission and the European Conference of Peripheral Maritime Regions (CRPM) which comprises 154 members stretching from the Baltic to the Black Sea. In October 2006, CRPM President Claudio Martini described it as:

“...contradictory that the Commission dedicates so much talent and energy to promoting on a global scale the Europe of the seas and oceans while at the same time forsaking one of the key (regional) policies in the area of maritime transport.” (Lloyds List 2006bb).

Logistics

The policy-making problems of the maritime sector are far-reaching and do not just focus on issues centring on flags, registries and nation-states that are founded in tradition. The more recent emergence of logistics as a central part of maritime activity has also been characterised by problems of governance and a continued failure of the EU policy-makers to understand and incorporate the sector stakeholder adequately.

For example, initiatives aimed at making freight transport in the EU more efficient and sustainable received a very mixed response from the logistics sector (Lloyds List, 2007g). The debate centred on a package of proposed measures adopted by

the Commission in October 2007 including logistics, priorities to rail freight and European ports, a European maritime transport area and the motorways of the sea. Whilst the Commission saw these proposals as linking logistics with the various transport modes, the comment from the industry was that they could not be taken seriously in particular because the EU had only very limited budgetary control related to the proposals and would rely on the compliance of member states. This would not be forthcoming. To quote Thomas Cullen from UK based Transport Intelligence, the Commission would be better off focusing on areas where it could facilitate the private sector:

“...rather than attempting to direct the industry from a centrally developed and ultimately flawed blueprint.” (I.E.Canada, 2007)

The EU Green and Blue papers

By early 2008 the generic EU maritime policy remained in tatters. The attempts to develop a new ‘holistic’ and coherent policy following extensive Green Paper consultation throughout 2007 and the subsequent Blue Paper in many ways shows up the failures in approach, in governance and in policy-making that undermine the EU’s increasingly frequent and desperate attempts to come to grips with the problems of the maritime sector. Both the Green and Blue Papers were full of good intentions and on the surface provided wide access to all interested parties to have their views put forward and considered, a process emphasised during the Green Paper’s launch in late 2006 (Lloyds List, 2006s; 2006ff; 2006hh; 2006ii; 2006jj). The Commission followed all good consultative practice. But what has it achieved? A reiteration of hopes and ideals that have to be put into place by a Commission that has a track record of policy failure. An inadequate inclusion of a selection of those stakeholders that have an interest in the maritime sector. Asking for their opinions and views is not the same as ensuring that all interested parties have adequate access to the policy-making process. It is not adequate ‘holistic’ governance to publish suggestions, ask for comments and hold meetings that tend to reinforce the established views of the limited range of interests that are geared up to maritime lobbying in the EU. Where is the networking, the inclusivity, the balancing of pressure groups, the public, labour interests, commercial sector, ship-owners and agents, ports, media, politicians and so on in the generation of ideas and the consideration of proposals? Instead we had the established and traditional hierarchical approach centred around state interests, failing to accommodate the public interest or to include the needs of all those involved in particular if those groups or individuals could not be easily incorporated into the existing governance structures. The Commission (with advice) proposes and suggests; there is a limited response back from the traditional and predictable lobbyists; the Commission decides and legislates. The industry in all its forms and interests rejects, resists, prevaricates. The same old policy failings.

These failings raised their head as the public consultation process continued. Just before the Commission issued the Green Paper, the UK government expressed concern at the leaked proposal that the EU might be looking to extend the power of the European Maritime Safety Agency (EMSA), with the aim of taking power away from national government agencies (Lloyds List, 2006e). This reflected similar moves by the Commission with regards to the IMO which had generated further resistance to the Green paper proposals from both a range of national governments and from the European Community Shipowners Association (ECSA) (Lloyds List, 2007a). This

had followed claims by the European Commission Maritime Policy Director, Fotis Karamitsos, that a campaign of misinformation was being waged by those generally opposed to the EU. He suggested that the Commission was looking for no more than 'observer status' at the IMO and were not looking to 'muzzle' member states at the UN forum (Lloyds List, 2006w).

Further dismay at the Green Paper and a general feeling by both member states and the shipping community that the Commission was attempting to extend its jurisdiction in maritime affairs and reduce that of the national representatives and industrial stakeholders was expressed in response to proposals for a 'European maritime space' including issues related to maritime cabotage (Lloyds List, 2006cc, 2007b). The Secretary-General of ECSA expressed concern that European maritime cabotage could be interpreted by the Commission as a method of extending European protectionism – restricting intra-European trade to only EU registered vessels rather than at present whereby the cabotage rules were aimed at opening up trades to vessels from all countries (Lloyds List, 2006aa). This stance against what had been interpreted as the Commission position was supported by BIMCO (Lloyds List, 2006hh) and further attacked by ECSA in early 2007 (Lloyds List, 2007b).

So Joe Borg's trumpeted new holistic maritime policy may well contain the right words and has included many of the traditional maritime interests, but will it change anything? Will it provide a flexible, responsive, meaningful, sensitive and representative set of policies that will be implemented by those with the responsibility to do so? Or will it simply lead to another EUROS, another Treaty of Rome anomaly, another neglected or rejected policy for ports, for maritime safety, or even further subsidies for the maritime sector under a supranational governance regime that claims to support policies of competitiveness, efficiency and a single market for all commercial and industrial sectors? Will shipping companies continue to be able to abuse registries and tax regimes, by trading off member state flags, one against another, using the unstoppable cloak of globalisation as a means of blackmailing the EU into retaining a tonnage tax regime that does nothing for global maritime safety, environment, security, social conditions or even efficiency?

WTO

It is not only the EU that exhibits maritime policy failure. At an international level, the continued delays and arguments that are taking place throughout the negotiations about world trade at the WTO are symptomatic of further policy failure and the pressing need to address governance in the maritime sector. Continued reports emerge of trade ministers unable to agree any principles of how to cut subsidies and tariffs for agricultural and industrial goods including the major international trading nations of the UK, the European Union as a whole, Japan, India and Australia. Failure to reach agreement on these fundamental principles would leave little time or chance for agreement on services such as shipping (Lloyds List, 2006p, 2006x). Despite recognition that gains from agreement on services at the WTO talks would generate benefits twice those of products, little has been achieved. Weak offers were put forward by Brazil, India and South Africa on shipping issues whilst the USA continued to refuse to even discuss shipping at all, suggesting a flaw in the governance framework within which international shipping policy is supposed to be developed.

Bulker and Tanker Construction

The role of the IMO in global maritime policy-making was again in question over new goal-based standards for shipbuilding which were resisted by almost all stakeholders. Emerging in detail during 2006, the Maritime Safety Committee of the IMO endorsed the view of its working group that over-arching goals should be drafted as amendments to the International Convention for the Safety of Life at Sea (SOLAS). The objective was to agree a set of standards that could be applied to all shipbuilding and based on goals that need to be achieved. However, although laudable, a major problem emerged as to who should hold verification authority. The work group agreed that this authority needed to be a group of experts under the auspices of the committee and that no further liability issues would arise for the IMO (Lloyds List, 2006d).

Further to these problems of verification of IMO goal-based standards, the Cyprus Shipping Council and the Union of Greek Shipowners expressed concerns about the new rules to be applied to the construction of tankers and bulk carriers by the International Association of Classification Societies (IACS) (Lloyds List, 2006i). Both the Cyprus and Greece organisation claimed that the new common structural rules were seriously flawed and that the International Chamber of Shipping (ICS) would represent the concerns of national shipping organisations in further discussions. Further to this development, it emerged that the concerns centred on the inadequacy of standards that had been proposed and the failure to achieve a trail of responsibility leading back to shipowners whose liability covered only the first year after delivery (Lloyds List, 2006n).

These episodes relating to vessel construction for both the IMO and IACS suggest serious governance flaws whereby the industry stakeholders feel that their concerns are inadequately represented resulting in policies that fail to address the problems that exist. In both cases the result can only be a failure in policy-making that consequently cannot achieve its prime aims.

Some Conclusions

The existing maritime policy-making framework is characterised by three features which make it anachronistic and in severe need of change – it is hierarchical, state centric and institutional bound. In an era of intensifying globalisation, these characteristics which were once appropriate and central to maritime governance, have become an irrelevance. The result is maritime policy failure and a maritime disaster for the human resource.

Failure is endemic in maritime policy-making – so common that its scale is almost overwhelming and it starts to become almost unbelievable in its scope and depth and its implications for shipping and ports enterprises. Despite this it is important to point out that there are policy successes that reflect how the existing jurisdictional hierarchy and structures can work together – examples of nation-states and the EU cooperating in attempting to streamline shipping's regulatory framework have been noted from Norway (Lloyds List, 2006z) and how China and the ILO (representing national and international jurisdictions respectively) have been happy to cooperate in developing a new Labour Convention (Lloyds List, 2006gg). However by comparison, the level of disappointment is remarkable. The EU is central to much of this failure but not because it is the sole or even main cause. It is simply part of a jurisdictional policy framework that no longer works. Because of its activity and

central position in that framework it features most commonly in stories of policy inadequacy – but other significant institutions – the IMO, industrial representatives (IACS, WSC, ICS, ECSA, ESPO etc), member state governments – have all played their part in contributing to this dismal scene.

Change will require considerable reflection and adaptation. It will necessitate the true involvement of a wider range of maritime stakeholders, appreciation of the role that shipping plays in sustaining and using the inadequate governance system that exists, the removal of institutional bound hierarchies, a move towards flows rather than spaces and territoriality, and perhaps most significantly, a reconsideration of the institutions that dominate maritime governance – the IMO, the OECD, the WTO, the EU, the ministries of nation-states.

Interestingly the EU has recognised the policy failures that have been increasingly occurring and turned to the issue of revised governance arrangements and procedures as a solution (Lloyds List, 2006ll; 2006mm; 2007d). The Blue Paper featured significant discussion of the concept of governance and EU Maritime Affairs Commissioner Borg emphasised the need to ensure that the processes of governance are correct so that the ‘mechanisms for cooperation, coordination and integration are clearly identified.’ (Lloyds List, 2007d). However although recognition of the problem is a stage forward, is this enough and can the generation of new policies which continue to fail in alarming numbers ever produce a satisfactory environment for the maritime sector? It is the contention here that new policies will never resolve the problems faced by the sector until the underlying framework which supports and directs policy generation and implementation is appropriate. This can only happen if all maritime stakeholders are substantively involved in the process of policy making and implementation, if the relationships between the maritime jurisdictions are appropriately organised and changed when necessary if the appropriate mechanisms to develop and implement maritime policies exist, and if the societal forces that drive the world economy are recognised for what they are and a governance framework designed to accommodate them.

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