

# The International Transport Workers' Federation Flag of Convenience Shipping Campaign: 1983-1995

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## I. INTRODUCTION

In the introduction of the earlier study of this subject, it was stated:

The International Transport Workers' Federation (ITF) is unique among the International Trade Union Secretariats (ITs)<sup>1</sup> in several ways. Unlike the other ITs, the ITF directly represents employees, sometimes with their consent, and often without authorization; it signs agreements with individual companies; it has even negotiated an agreement with its counterpart, the International Shipping Federation [ISF]; by virtue of the strategic location of many of its affiliates, it has been able to exert enormous economic power through boycotts in order to gain its objectives; and as a result of this power, it has accumulated considerable financial reserves.<sup>2</sup>

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1. ITs are organizations which affiliate unions in particular industries from around the world. A general description of ITs and the international labor movement is found in HERBERT R. NORTHRUP and R.L. ROWAN, *MULTINATIONAL COLLECTIVE BARGAINING ATTEMPTS*, at 11 (1979). The principal change in the organization of the international labor organizations since 1979 has been the virtual end of the World Federation of Trade Unions and its affiliated ITs. These were the communist organizations which were dominated by the Soviet Union, and adhered to the Soviet foreign policy line.

2. HERBERT R. NORTHRUP and R.L. ROWAN, *THE INTERNATIONAL TRANSPORT WORKERS' FEDERATION AND FLAG OF CONVENIENCE SHIPPING*, at 1 (1983)

Since the publication of that book, the ITF has been involved in significant litigation, especially in Europe and the United States, its finances have substantially increased, and it has most recently begun to alter some of its policies. It continues, however, to attempt to strengthen its campaign against Flag of Convenience ("FOC") shipping, that is, ships which bear the flags of countries other than those of the beneficial owners.

The ITF affiliates national unions in all branches of transportation. In December 1993, it had 398 affiliated unions in 105 countries who had 4.3 million members.<sup>3</sup> Of these, only 680,000, or 16 percent, were members of seamen's unions.<sup>4</sup> Yet the ITF's principal power and the bulk of its considerable wealth are derived from the maritime industry.

This article updates the earlier book by examining ITF policies and practices in the maritime industry since 1983. Special attention is given to ITF finances which are derived from the FOC campaign, to the "double bookkeeping" controversies and litigation in the United States, and to litigation resulting from ITF-associated boycotts, or threats thereof, in Europe. A review and update of the continuing ITF-FOC campaign provides the setting for these recent developments.<sup>5</sup>

## II. A SUMMARY OF THE ITF'S FOC CAMPAIGN

The ITF-FOC campaign is handled today very much as described in the *ITF-FOC Book*,<sup>6</sup> but there are some new developments. Basically, it is an attempt to overcome by direct action the market effect of lower costs, and thereby to prevent the loss of registries and jobs by developed countries and their seamen to Third World countries and their seamen.

### A. DEVELOPMENT AND RATIONALE OF FOC CAMPAIGN

Registering ships in countries other than those of the beneficial owners has been traced back to the 1920s and was growing more common prior to World War II. It has expanded greatly since World War II, and as shown in Figure 1, is still an expanding phenomenon. In December 1994, FOC ships, which are overwhelmingly staffed by crews from Third World countries, comprised 43 percent of the world gross registered tonnage ("GRT"). For 1994, the ITF general secretary<sup>7</sup> stated that FOC ships

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[hereinafter *ITF-FOC Book*]. The agreement with the ISF was in effect 1973-78, and pertained to the employment of Indian subcontinent seamen on British-flag ships. *Id.* at 97.

3. International Transport Worker's Federation, REPORT ON ACTIVITIES, 1990-1993 (1994), at 15 [hereinafter *ITF Report 1990-1993*].

4. *Id.* at 77.

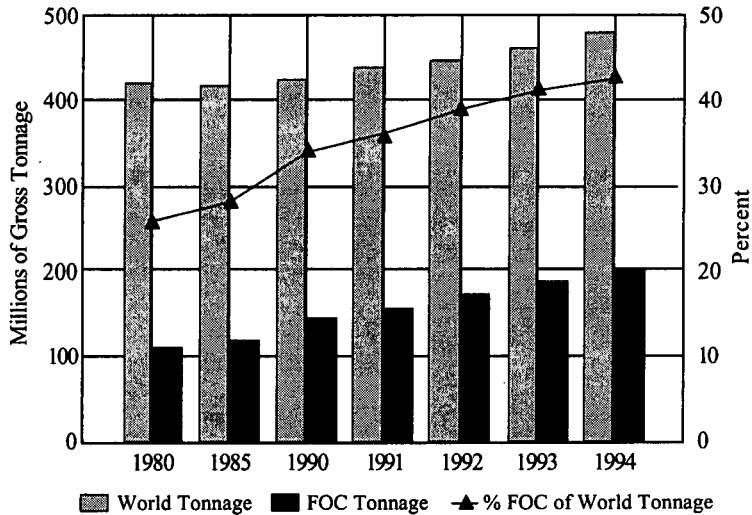
5. See *ITF-FOC Book*, *supra* note 2, at Chapter II, (detailing the ITF's history, organization, structure, and government).

6. *Id.* at Chapters III and IV.

7. The general secretary is the chief administrative officer of the ITF, as in all ITFs. The

were in the majority.<sup>8</sup> The leading countries in which the beneficial owners who utilize FOC shipping are headquartered are Greece, the United States, and Japan.<sup>9</sup>

FIGURE 1. GROWTH OF FOC SHIPPING



Note: 1994 is an estimate. The countries for which data are not available represent less than 1 percent of FOC tonnage.

Sources: Lloyd's Register, World Fleet Statistics, various years; ITF, Report on Activities, 1990-91-92-93 (1994, Table 1).

FOC shipping was once dominated by the flags of Panama, Liberia, and Honduras. Today, Honduras is no longer a major factor, but Panama and Liberia are not only the largest FOC ship registries, but as shown in Table 1, the largest registries in the world, accounting for more than one-fourth of the world's gross tonnage. Many other countries in Asia, the South Pacific, as well as Bermuda and other developing nations now invite ship registry as a source of government revenue and employment of their citizens.

The listing of FOC countries is subject to varying definitions and in-

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president, vice-presidents, and executive boards are chosen from the officers of affiliated national unions, and serve on a part-time basis. The general secretary in the ITF, and in many other ITFs that can afford more than a one-person permanent officer, is assisted by several assistant general secretaries. This form of union governance is based upon the typical European national union model. See, *ITF-FOC Book*, *supra* note 2, at 6.

8. David Cockroft, Address to the 1994 North American Maritime Ministry Conference, *The ITF and the Maritime Ministry* at 4 (1994) (on file with the ITF) [hereinafter *Maritime Ministry Address*]. For our definition, we used that of the ITF in 1993. It is not clear why Cockroft's data show a larger percentage than that of the *World Fleet Statistics*, 6 LLOYD'S REGISTER (1994).

9. *Id.*

TABLE 1  
FLEET REGISTRATION AND GROSS TONNAGE IN 1994  
(TWENTY LARGEST FLEET REGISTERS)

	<i>Ships</i>	<i>Gross Tonnage</i>	<i>%G.T.</i>		<i>Ships</i>	<i>Gross Tonnage</i>	<i>%G.T.</i>
Panama	5,799	64,170,219	13.5	United States	5,270	13,655,438	2.9
Liberia	1,621	57,647,708	12.1	Singapore	1,239	11,894,846	2.5
Greece	1,923	30,161,758	6.3	Philippines	1,518	9,413,228	2.0
Cyprus	1,619	23,292,956	4.9	Hong Kong	358	7,703,410	1.6
Bahamas	1,159	22,915,349	4.8	South Korea	2,121	7,004,199	1.5
Japan	9,706	22,101,606	4.6	Italy	1,434	6,818,178	1.4
Norway (NIS)	749	19,976,489	4.2	India	881	6,485,374	1.4
Russia	5,285	16,503,871	3.5	Taiwan	642	5,996,103	1.3
China	2,701	15,826,688	3.3	Germany	1,200	5,696,088	1.2
Malta	1,086	15,455,370	3.2	Turkey	1,000	5,452,798	1.1

Source: Lloyd's Register, World Fleet Statistics, 1994.

terpretations. For example, a shipowner in a developed country may agree to a bareboat charter<sup>10</sup> to a Philippine organization, which then transfers the ship to the Philippine flag and employs a Philippine crew under Philippine conditions. The ITF may claim that this is an FOC ship. Philippine authorities, however, strongly disagree, noting that the Philippines is far in the lead as the world's largest supplier of seamen, that this country encourages the training and employment of its citizens on all ships, including FOC-registered ones, as a means of expanding employment and accumulating foreign currency,<sup>11</sup> but that the bareboat chartered ship is a Philippine one operated completely by a Philippine organization.

To stem the loss of employment and share of the shipping market, some European countries have established "international" or "second" registers. These registers employ seamen at reduced rates, often utilizing Third World personnel for ordinary seamen and national personnel for officers. The most successful second register is that of Norway, in 1994 as

10. Under a bareboat charter the shipowner, for an agreed consideration, turns over all operations of the ship including crewing to a second party. This type of charter may, or may not, involve a flag transfer.

11. The Philippines has about 350,000 seamen who have been accredited to work on ships. Often, many are unemployed, but as in most Third World countries, competition for the jobs is great because the wages are among the highest in the land for blue collar work. The laws of this country provide that 80 percent of the seaman's base rate (the statutory allotment) is sent monthly in U.S. dollars to the agent, who then monthly remits that amount in pesos to the bank account of the seaman. Otherwise, the allotment could not be used by the family for support during the often ten months in which the seaman is gone. The exchange also provides the Philippines with badly needed U.S. dollars (hard currency). Dr. Northrup's interview with Cresencio M. Siddayao, Dept. Administrator, Philippines Dept. of Labor & Employment (on file with author).

shown in Table 1, the seventh largest in the world. As discussed in section II.G, below, the ITF has designated some second registers as FOCs, but not the two most successful ones.

Also discussed in section II.G, below, is the status of dependency registers such as Kerguelan for France, and the Isle of Man and Hong Kong for the United Kingdom. The last named, as set forth in Table 1, is the fourteenth largest register, and has existed for many years.

The driving forces generating the expansion of the FOC fleet are two major costs: taxes and labor. The former are much lower in FOC-flag registries; the latter are significantly so, particularly when costs of manning requirements, work rules, and fringe benefits are added to wage costs. FOC shipping thus involves the transfer not only of the registries but also of the jobs in developed countries to underdeveloped ones. Since the ITF, like most ITFs, was founded by European socialist-oriented unions, and has been dominated by them since its inception, it is not surprising that the organization's FOC campaign quickly evolved into one to "regain" the lost jobs — i.e., transfer them back from Third World seamen to those in developed nations. As the ITF's general secretary stated in a 1994 address, this remains the official goal of the campaign:

The ITF is, and has always been an organization led by its members. The majority of those members come from the traditional maritime countries [32 percent from Western Europe in December 1993]<sup>12</sup> - the shipowning countries, and the Flag of Convenience Campaign . . . has been and still is led primarily by the desire of those unions to defend and maintain their jobs.<sup>13</sup>

Policies for the FOC campaign are established by the ITF's Fair Practice Committee ("FPC") which was originally manned almost exclusively by delegates from unions in developed countries. After several incidents came close to causing a rupture with unions in Asia, particularly India and Singapore, the FPC was enlarged to include representation from these and other countries.<sup>14</sup>

#### B. THE FOC CAMPAIGN IN PRACTICE

The FOC campaign follows a standard procedure in most ports, as diagrammed in Figure 2.

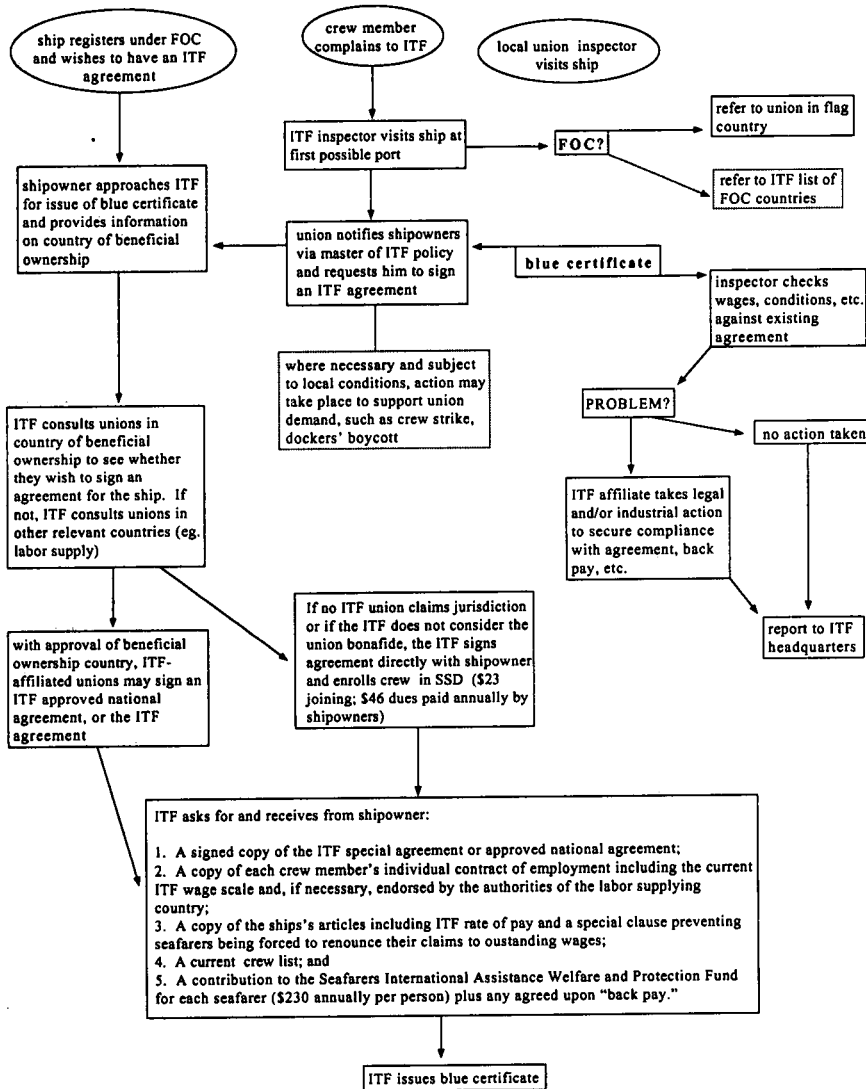
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12. *ITF Report, 1990-93*, *supra* note 3, at 35.

13. *Maritime Ministry Address*, *supra* note 8, at 2.

14. *See, ITF-FOC Book*, *supra* note 2, at 96.

FIGURE 2. A SUMMARY OF THE ITF-FOC CAMPAIGN



After determining that a given ship may be an FOC-flag one, ITF inspectors, who are members of ITF-affiliated unions and have been trained and are compensated by the ITF to perform this function,<sup>15</sup> board a ship in port and request to see the wage and manning schedule and the ITF's "blue certificate," which is given to ships that are in compliance with ITF standards. It states: "It is hereby certified that the [name of ship] is covered by agreements acceptable to the International Transport Workers' Federation. This certificate is valid to [date]," provided it is signed by an ITF official "for [the] general secretary."

If no blue certificate is produced, if the wage schedule is otherwise unsatisfactory to the inspector, and if the shipowner declines to sign an agreement which is dictated by the ITF, an attempt is made to have longshoremen, other dock workers, or tugboat operators boycott handling the ship, or otherwise to prevent it from leaving port. The terms of the ITF-dictated agreement include wage rates unilaterally established by the ITF as equal to wages on the European average standard, described in section II.C, below. Additionally, the ITF demands "back pay," which is sometimes negotiable, but which is unilaterally determined by the ITF representative as the amount "owed" to the crew based upon voyage or voyages present and past; and dues to the ITF welfare fund of US\$230 per crew member per year, plus back dues charged. With a ship complement of twenty-two, the dues, exclusive of back pay, amount to US\$5,060 per year. This is often dwarfed by back pay which can mean a wage increase exceeding US\$500 per crew member per month for a crew of twenty-two. On a nine-month voyage, this amounts to approximately US\$100,000.

If the shipowner agrees to these demands and signs the ITF-dictated agreement, the blue certificate is provided by the ITF. The owner then avoids the high costs of having the ship literally held captive in a port, and thereby being unable to deliver or to take on cargo as required by shippers, or to meet cargo commitments in other ports.

In 1994, the ITF reported that as of December 1993, 2,358 FOC ships were under "acceptable" agreements, and that during this year, "around 355 were boycotted or faced with the immediate threat of boycott action." During 1993, the ITF collected US\$8,940,213.68 from 315 ships in "arrearages of wages and other cash benefits obtained for and paid to crew members" as a result of the FOC campaign.<sup>16</sup> Table 2 shows for four years the number of ships under "acceptable" contracts, the "arrearages of

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15. See, e.g., *FOC Inspectors Hold Worldwide Seminar*, ITF NEWS, Sept. 1990, at 8. This is one of many articles on inspector training found in the ITF NEWS over the years. Additionally, the ITF's general secretary has announced an expansion of the number and duties of inspectors. See *ITF Report 1990-1993*, *supra* note 3, at 94.

16. *ITF Report 1990-1993*, *supra* note 3, at 95.



wages and other cash benefits obtained for and paid to crew members," and the number of ships involved in these collections. These substantial collections and ships involved followed a period in the late 1980s during which "the number of ships covered by ITF acceptable collective agreements fell significantly . . ." from a high of 2,200 ships in 1982 to 1,565 in 1989.<sup>17</sup>

TABLE 2  
SHIPS COVERED BY ITF "ACCEPTABLE" AGREEMENTS, "ARREARS"  
WAGES AND WELFARE FUNDS COLLECTED, AND NO. OF  
BOYCOTTED SHIPS  
1990-1993

Year	<i>Ships with ITF Agreements</i>	<i>"Arrears" Pay Funds Collected</i>	<i>No. Boycotted Ships Involved</i>
1990	1,533	US\$13,202,971.77	263
1991	2,078	6,444,666.68	222
1992	2,862	13,413,482.52	363
1993	2,358	8,940,213.68	315

Source: ITF, Report on Activities, 1990-1991-1992-1993 (1994), at 95.

In order to engineer these boycotts, the ITF requires the cooperation of local or national maritime, tugboat, or longshore and other dock workers' unions, national laws which permit boycotts of this nature, and a crew of inspectors. The countries where historically and currently boycotts have enjoyed the most freedom from legal restraints are Australia, Finland, and Sweden,<sup>18</sup> to a somewhat lesser extent, Norway, and more recently, British Columbia, Canada.<sup>19</sup> Even in countries in which such boycotts can be enjoined by the courts, however, delays can be very expensive while a shipowner seeks legal redress. As a result, some shipowners find that it is less expensive to agree to the ITF terms than to seek court action. Charterers and terminal operators increasingly require that

17. *Id.* at 93; and ITF REPORT ON ACTIVITIES, 1986-89, at 88 [hereinafter *ITF Report 1986-89*]. A thorough examination of ITF fund collections and finances is found in Part III, *infra*.

18. See, *ITF-FOC Book*, *supra* note 2, at 56-70, and 89-94.

19. See, *ITF Report, 1990-93*, *supra* note 3, at 96. The International Longshoremen's and Warehousemen's Union ("ILWU"), the dominant longshore union on the U.S. and Canada West Coast and Hawaii, affiliated with the AFL-CIO in 1993 after long years of being independent and supporting the communist international organizations. Since then, it has also affiliated with the ITF and supported ITF activities, including boycotts which are legal in British Columbia. U.S. West Coast maritime attorneys have advised the authors that no such boycotts have occurred or been threatened in U. S. ports there, undoubtedly because of much more stringent anti-boycott legislation in U.S. than in British Columbia. Some reports to Dr. Northrup question this, claiming that such stoppages have occurred, but are not contested by shipowners who wish "to avoid further trouble".

ships obtain blue certificates in order to avoid any threat of boycotts. In some cases, companies which actively resist ITF demands permit their chartering departments to insist that independent operators obtain blue certificates. These facts are important sources of the ITF's wealth, analyzed in section III, below.

### C. THE ITF AGREEMENT AND BLUE CERTIFICATE ISSUANCE

The ITF agreement requires wages at the level unilaterally established by it as equal to wages on the European average standard; since 1994 that has been US\$856 per month for an able-bodied ("AB") seaman. To this, overtime, fringe benefits, and other costs are added, bringing the actual "consolidated earnings" to US\$1,804 per month.<sup>20</sup> Moreover, the ITF standard agreement also includes manning requirements and wage rates and conditions for all other classifications, which further increase costs.<sup>21</sup>

As a compromise with its affiliated seamen's unions from Third World countries, particularly those in Asia which had threatened to leave the ITF over its unique attempts to establish unilaterally a common international wage,<sup>22</sup> the concept of "total crew costs" ("TCC") was developed. This concept provides for a minimum total cost for AB seamen, now set at US\$1,100 per month, which is, of course, considerably less than the standard ITF rate, and which the ITF has vowed to raise as soon as possible to the standard rate. Not surprisingly, the ITF general secretary reported that "[a]lthough the number of ships covered by ITF Standard Agreements has fallen significantly, there has been a marked increase in the number of Total Crew Cost . . . agreements signed."<sup>23</sup>

The widespread use of TCC agreements would on its face seem to mean that the attempt of the ITF to establish an uniform worldwide wage has in practice been abandoned to a major extent. Yet, this may well not be correct. According to the secretary of the ISF:

Initially, ITF accepted that virtually any cost to employers could be added to the list [that went into deriving the cost of a TCC wage], as well major items such as basic wage, overtime, leave, etc., but over the years they have gradually and successfully restricted the elements they will accept. The situation now is that there are so many ITF restrictions — that TCC contracts are

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20. This "benchmark" rate was frozen at \$821 per month from 1983 until it was raised in 1993, effective Jan. 1, 1994. See, *ITF Increases Wages for Flag of Convenience Crews*, ITF NEWS, May-June 1993, at 1.

21. ITF Standard Collective Agreement (Jan. 1994) (on file with ITF). This document, which is published by the ITF, contains all conditions for agreements for shipowners in considerable detail.

22. See *ITF-FOC Book*, *supra* note 2, at 96-105 (describing the tension between Asian seafarers' and ITF-affiliated unions).

23. *ITF Report 1990-93*, *supra* note 3, at 77.

becoming very standard, for example, each rank/rating, category must receive a precise ratio of wages related to the ABs rate; e.g., Master must be 3.061 and trainees 0.75 the wage costs multiplied by the manning of the ship must amount to 61% of the costs under the Standard Agreement and social costs must be less than 10% of the total, etc. Far from abandoning attempts to enforce a worldwide uniform wage, ITF are closer to achieving it than before.<sup>24</sup>

The ISF secretary has also found that the ITF is now making efforts to standardize TCC contracts so that one document will be applicable to all nationalities. They "have produced such a document and have persuaded a number of employers to adopt it," including the German Shipowners' Association for GIS, that country's second register,<sup>25</sup> as discussed in section II,G below.

This drive by the ITF to standardize and upgrade TCC agreements has produced a shipowner reaction. In 1993 an organization of maritime employers was reorganized under the name of the International Maritime Employers' Committee ("IMEC") to oppose the ITF policy of "picking off" individual employers by establishing negotiating committees covering employers in particular countries. This was done for the Philippines and India in 1994, and more recently has been attempted in Poland. The claim is that through this mechanism a better deal for shipowners and charterers was effectuated in the former two countries.<sup>26</sup>

To obtain a blue certificate when TCC is utilized by the ship, the ITF also requires a collective bargaining agreement from the crews' home country where the affiliated union has recommended the issuance of the certificate subject to the approval of the ITF national headquarters, and the incorporation of regulations specified above. Since the ITF's 1983 (Madrid) congress, approval of the ITF-affiliated unions which represent seamen in the country of the ship's beneficial ownership is also necessary unless this right is not asserted within four weeks of a blue certificate request.<sup>27</sup> This last requirement, originally known as the "Madrid Policy," and modified by the "Geneva Policy" at the 1994 convention, resulted from numerous charges that blue certificates were provided despite substandard conditions, particularly by the Korean Seamen's Union ("KSU"), which as of March 1983 had issued 712 blue certificates, an "astounding 41 percent of the total" then extant.<sup>28</sup>

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24. Letter from Dearsley, Secretary, International Shipping Federation, to Dr. Northrup (Sept. 7, 1995) (on file with author) [hereinafter *Dearsley, Sept. 7, 1995*].

25. Letter from David Dearsley, Secretary, International Shipping Federation, to Dr. Northrup (Nov. 20, 1995) [hereinafter *Dearsley Nov. 20, 1995*].

26. *Id.*

27. See, ITF Guidelines for Affiliates Signing TCCs (Jan. 1994), for detailed requirements for approval of TCC agreements.

28. See, *ITF-FOC Book, supra* note 2, at 132.

For a considerable time, the Madrid Policy does not appear to have been widely enforced despite a 1990 declaration by the Fair Practices Committee that “[t]he ITF and its affiliates must continue to adhere to it.”<sup>29</sup> In the United States, the National Maritime Union (“NMU”) attempted to assume this role by establishing a satellite, the International Maritime Union, to carry out this function, but the ITF refused to sanction it, probably because it gave no role to the larger Seafarers International Union (“SIU”).

After the 1994 Geneva Policy was agreed upon, however, the NMU and the SIU formed a joint organization, the Union of International Seamen (“UIS”), which has an address in Panama and a legal residence in the Caiman islands and, therefore, is presumably outside the jurisdiction of U.S. labor legislation. By thus establishing headquarters abroad presumably to escape domestic labor legislation, which is what the SIU and the NMU repeatedly have charged beneficial shipowners do, the UIS became what might be termed a “Flag of Convenience Union (FOCU).”

The UIS has asserted jurisdiction over whether a TCC agreement covering a ship, whose beneficial owners are American, and who also operates U.S. flag ships with NMU or SIU members, may be approved by the ITF. Correspondence provided to the authors indicated that this organization demands approximately \$6,500 per ship for such approval. This apparently is over and above the \$5,060 payable directly to the ITF. There is no indication that either the seamen or the shipowners receive any service for this charge other than assurance of obtaining a blue certificate.<sup>30</sup>

Similar policies are practiced elsewhere. Court records in the double bookkeeping cases discussed in section IV, below, indicate that the Japanese unions played a similar role in the contracts with Filipino crewmen and the Greek unions with Maldives Islands crews. Others such as the Dutch, the Norwegians, as well as the Japanese, use the beneficial ownership power apparently to maintain a presence at the bargaining table and to attract welfare or other funds that have declined with declining memberships.<sup>31</sup>

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29. *ITF Report, 1990-93*, *supra* note 3, at 149.

30. The correspondence, dated in the summer of 1994, is from Robert Parise, UIS President, whose residence is in Florida, and is apparently directed to a shipowner whose name is blacked out, with copies to the then general secretary of the National Union of Seafarers of India, an official of a Philippine ship officers' union, and a gentleman in Manila. It includes a contract which states the payments required for a blue certificate. These payments are set at US\$16 per year per man charged to the company, and an additional \$.70 per man per day for UIS membership fees. The agreement also “permits” the Filipino union to represent the crew, who are apparently from that country.

31. *Dearsley*, Sept. 7, 1995, *supra* note 24.

According to the ITF general secretary:

the Geneva Policy . . . [provides that] unions in beneficial ownership countries have the negotiating rights on their ships. They have the right (implicit rather than explicit) to levy union dues or other charges in respect of the seafarers on board those vessels, both national or non-national. There is currently no ITF policy governing such arrangements, which are quite common in other countries too. Our main concern in such a situation is that the seafarers concerned receive proper trade union services and this is also something which is currently under active review. As an aside I must add, however, that the sums of money referred to are a tiny fraction of the saving achieved by shipowners in substituting foreign for US seafarers and no-one would be happier than the US unions if US owners were to hire their own countrymen.<sup>32</sup>

The difficulty with this explanation is, first, that the ITF has no authority to grant "negotiating rights" to any union, or to grant a union the "right . . . to levy union dues or other charges in respect to seafarers." Rather, such matters are a function of national law and policy. Second, at least in the United States, the collectors of the monies, who have located themselves in foreign territory presumably to avoid U.S. law and policy, can apparently present no evidence that the monies paid provide anything to the seamen, but rather merely levy a tax against the shipowner.

It would appear, therefore, that the Geneva Policy is a method of attempting to shore up the depleting resources of developed country maritime unions, all of which are suffering financially from declining memberships. Unfortunately, the policy also appears open at least to financial mismanagement. Given the large amounts of monies involved in ITF boycott activities, as discussed below in section III, it is perhaps not surprising that questionable activity relating to the ITF-FOC campaign has been widely rumored in the past, as well as having been found in cases involving Australian, British, and Swedish unions, and more recently, the Russian unions.<sup>33</sup> Meanwhile, the ISF secretary has "written formally [to the UIS] to enquire by what right they are making their demands."<sup>34</sup>

#### D. SUBSTANDARD AND "BEST IN THE WORLD" FOC SHIPOWNERS

There is no doubt that some FOC ships, and some national flag ships as well, are substandard in terms of safety, working conditions, and wages.<sup>35</sup> For seafarers on such ships, the ITF has played an important

32. Letter from David Cockroft, ITF general secretary, to Dr. Northrup (April 5, 1995).

33. See, *ITF-FOC Book*, *supra* note 2, at 93 (Australia), 104 (Britain), and 105 (Sweden). Corruption in Russia is, of course, both widespread and widely publicized. There have been repeated reports of this among shipowners to whom we have talked.

34. *Dearsley*, *Sept. 7, 1995*, *supra* note 24.

35. A virtual catalogue of such ships is found in PAUL K. CHAPMAN, *TROUBLE ON BOARD*

and humanitarian role. It has called the attention of the world to their conditions, demanded that their standards be improved before they can leave port, literally provided rescue, relief, and sustenance to those thus disadvantaged, and successfully pleaded their case before national and international governmental bodies.

There is also no doubt that, contrary to some ITF claims and literature, FOC ships cannot be characterized as providing either all bad or all good wages and conditions. Thus, a former general secretary of the ITF stated:

Among extremes associated with Flags of Convenience, making generalization hazardous, is that some owners are among the best employers in the world, e.g., the U.S. oil companies, while others are certainly the worst.<sup>36</sup>

The ITF's official booklet in regard to the FOC campaign likewise distinguishes the "good" from the "bad" with the former including only those who sign an ITF agreement:

Not all shipowners operating FOC vessels are as bad as the worst contingent who scrimp on wages and safety measures, save on food and clothing for crew, and budget by not manning their ships properly.

The ITF has a good relationship with many companies . . . who take their responsibilities seriously. These are shipowners who have seen the sense of signing an ITF Agreement, and who have then strictly complied with it. In our experience, their ships are relatively safe, and on-board conditions are generally good . . .<sup>37</sup>

The Liberian FOC fleet in large part is comprised of U.S. oil and bulk-carrier ships. In his book, a catalogue of alleged abuses involving FOC ships, Chapman states:

There is at least one well-organized and effective international ship registry, that of Liberia. Liberia has demonstrated that an international registry can function efficiently and humanely. In recent years, whenever the Center for Seafarers' Rights [a division of the Seaman's Church Institute] has contacted the Liberian ship registry on behalf of an individual seafarer or an entire crew, the international registry office, located in Reston, Virginia, has investigated the complaint . . . [and sought to ameliorate the situation.] If the Center for Seafarers' Rights . . . complained directly to the shipowner, the response might not have been so decisive. But the Liberian registry could bring the weight of its authority to bear on the problem and there was a positive outcome.<sup>38</sup>

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(1992). Mr. Chapman was formerly an official of the Seamen's Church Institute, New York City, and played an active role in the double bookkeeping cases described in Part IV, *infra*.

36. Charles H. Blyth, Address to Company of Master Marines, (London, Dec. 3, 1975). The late Mr. Blyth served as ITF general secretary, 1968-77.

37. *Flags of Convenience — The ITF's Campaign*, at 39 (on file with ITF and author).

38. *Chapman, supra* note 35, at 134.

Despite these statements, FOC ships owned by U.S. oil companies and other Liberian-registered ships have been boycotted on numerous occasions regardless of the ship's condition, safety record, or the terms of employment merely because they did not carry a blue certificate.<sup>39</sup> Moreover, in an address to the 1994 ISF Manpower Conference, the newly elected ITF general secretary has apparently hardened ITF policy:

The ITF is growing stronger while many of its affiliates are growing weaker . . . . Indeed, like the growth in the number of ITF approved collective agreements, it is in many ways a sign of failure. A failure to achieve the central political objective of the Flag of Convenience campaign — drive ships back to their genuine national flag and to the regulations laws and conditions of the shipowners' country. A failure so far to defeat the Flag of Convenience system.

Yet this remains our central political aim and we have no intention of abandoning it. We shall continue to concentrate our attack not [on] the individual shipowner who is obliged to make use of the flag of convenience because his competitors are doing so too, but on the system itself. Although we are aware that safety records vary from flag to flag, there really is no "good" FOC. In the end, any open register which really took its responsibilities seriously and acted as a flag state should act would lose its market to other, less scrupulous, countries. It is the FOC system itself which has caused such a marked deterioration in safety standards and the growth of the short term quick buck mentality . . . .

We have no desire to interfere with the collective bargaining arrangements applying to genuine national flag vessels. Subject to the standards laid down by the ILO, [International Labor Organization], national owners and national unions can exercise all the flexibility they like on national flag ships. When, however, a vessel moves to an FOC, then it becomes a matter for the ITF as a whole, acting collectively on behalf of all our affiliates. When we intervene to secure ITF standards on such a vessel, our ultimate objective is not just to sign an agreement, still less is it to secure a financial contribution to ITF funds. Our ultimate goal is to discourage the owner from re-flagging the vessel.<sup>40</sup>

When asked to comment about the apparent contradiction between the booklet and the speech, the general secretary wrote:

The FOC brochure states the basic principle of ITF policy, which is that the FOC system is bad and that all FOCs are therefore bad things. This is true in the end simply because no FOC can exercise real control over "its" ships

39. See, *ITF-FOC Book*, *supra* note 2, at Chapter III. Such boycotts continue from time to time where national law does not outlaw them. See, e.g., the case of the *Phillips Arkansas*, a Liberian flag ship, noted in FREDERICK W. WENTKER, JR., *Double Bookkeeping and ITF Activities - Double Wage Penalty Claims in the US*, 21 INT'L BUS. LAW. (1993), at 426.

40. David Cockroft, Address to the ISF Manpower Conference, *Taking the Moral High Ground: Priorities in Labour Standards - The ITF View* (London 1994), at 7 [hereinafter *ISF Address*].

. . . . This doesn't mean, however, that statistically there are not registers which have a higher ratio of well managed ships than others. It is no secret that the Liberian registry is at the top end of the scale . . . because it has always been the flag of preference for US tanker operators . . . rather than any intrinsically "better" behaviour on the part of the Liberian registry.<sup>41</sup>

The fact remains that all FOC ships by far are not substandard. The ITF's failure to recognize this in practice is the result of its focus on raising the costs of all FOC-flag ships so that vessels flying developed country flags can better compete rather than necessarily on removing dangerous or substandard shipping from the world fleet.

#### E. ITF WORLDWIDE WAGE MINIMA V. ILO MINIMA

Although the ITF general secretary refers to "the standards laid down by the ILO," there is a major difference between the wage standards promoted by the ITF, and those recommended by the ILO. The ILO recommendations are established by its Joint Maritime Commission ("JMC"), a bipartite committee established under ILO governing policies. The JMC has a government-appointed chairperson but is composed solely of representatives of employers and workers from major ship-owning and labor supplying countries in the maritime industry. The ITF secretariat has regularly served as secretary of the workers group and vice-chairman of the Commission; the ISF provides the same service for the employers' group.

The ILO Commission has recommended increases in the AB seamen's rate three times during the 1990s, the last effective January 1, 1995, at US\$385 per month.<sup>42</sup> This was a joint recommendation of employer and worker representatives in which the ITF participated. Yet the ITF has set a worldwide standard wage of more than twice the ILO standard.

The ILO wage is established as a reasonable minimum that some underdeveloped countries, in many of which seafarers' jobs are among the highest paid, can meet without destabilizing national wage levels. Others, however, such as India, find this rate burdensome, and have objected to each increase in the ILO rate.

The ITF standard rate, on the other hand, appears dedicated to reducing, and eventually eliminating, the cost advantages of utilizing FOC flags and crews, thereby assisting in its objective of "regaining" the jobs for the seamen from developed world countries. Indeed, the ITF has made it plain that "one of the main objectives of the . . . [FOC] campaign

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41. *Cockroft*, *supra* note 32.

42. Joint Shipowner/Seafarer Resolution. Resolution Concerning the ILO Minimum for Able Seamen (Geneva, Dec. 1994), at 1 (on file with ITF).



had been to defeat the free play of market forces which sought to supply crews at the lowest rates the market would bear."<sup>43</sup> Actually, of course, the ITF has been compelled by economic forces and the needs of the Third World seamen and countries to settle in most cases for the lower TCC rates, and thus to put off any potential to "regain" the lost jobs by use of a much higher standard rate. The increasingly regular reinterpretation of the TCC rates, which have moved them closer to the standard rate, is, however, designed to nullify the TCC rate advantage, and therefore, to make it more difficult for Third World countries to compete.

The ITF has actually recognized the ILO minima by stating that wage rates and working conditions set for "bona fide national flag vessels must not fall below the ILO recommended minimum wages for an AB (recommendation 109) as interpreted by the ITF and other conditions laid down as recommended in the relevant ILO instruments." The ISF, however, disagrees with a number of the ITF's interpretations of the ILO standard, which again all have the effect of raising the costs.<sup>44</sup>

#### F. ITF POLICY AND NATIONAL COUNTRY FLAG SHIPPING

Prior to the fall of communism, the ITF did not challenge the flag ships of the Soviet Union and its satellites on the grounds that they were not FOC shipping. Yet it was generally conceded that such countries' shipping had inferior conditions and lower wages than did most FOC ships. Now that communism has been discarded, some newly formed unions in these countries have affiliated with the ITF. In June 1994, they comprised 16 percent of the ITF affiliated membership.<sup>45</sup>

The ITF is concerned that these countries will become very low wage FOC havens. Already some seamen therefrom have been recruited by FOC flags, and some Russian ships have been flagged out to lower wage paying ex-communist country registries,<sup>46</sup> and others have been flagged out for quite different reasons. According to the ISF secretary:

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43. Statement of Harold Lewis, General Secretary, ITF, 1977-93, in Proceedings of the 36th ITF Congress, Florence, August 2-9, 1990, at 8.

44. ITF Policy on Minimum Conditions of Service and Negotiating Rights on Merchant Ships. (Geneva Policy, 1994). The disagreements between the ITF and the ISF interpretations of the ILO wage resolution concern the definition of the standard number of days per week and per month. This affects the overtime calculation, and the number of leave days in a month. See, Letter from David Dearsley, ISF secretary, to A. Selander, assistant secretary, ITF, (Mar. 15, 1995).

45. *ITF Report, 1990-93*, *supra* note 3, at 38.

46. It has been reported, e.g., that Russian crewmen have been utilized on Greek-owned Adriatic tankers, and that Russian ships have been flagged out to the Ukraine. See, *ITF Seeks Talks with Adriatic Tankers*; and *Russian Crews Fight Use of Ukrainians*, *TRADE WINDS*, Dec. 30, 1994, at 5. See also, *Russian Crews for Export*, *ITF NEWS*, July 1989, at 9; and Craig Mellow, *Russia: Making Cash from Chaos*, 131 *FORTUNE*, Apr. 17, 1995, at 148, 150 (which notes that one Russian entrepreneur founded an agency "to provide Russian sailors for Greek ships," and an-

Many ships owned in former communist countries have been flagged-out to open registers [FOCs] but the reasons and the consequences are complicated. The need to attract foreign currency for fleet renewal and the demands by Western banks for the assets to be registered in countries with known and safe laws dealing with mortgages, etc., is probably the major reason. But the consequences have been bizarre as in many cases Russian crews who are members of Russian ITF affiliated unions, employed by Russian companies on Russian-owned ships flying, say, the Maltese flag, have to be paid ITF rates of pay. This puts them in the mega-star pay bracket by Russian standards and has resulted in many companies having to employ armed guards to protect crews from the local mafia on their return home!<sup>47</sup>

The 1995 increase in the ITF standard and TCC wage minima has apparently upset Asian countries who fear that this might reduce employment for their seamen because of the new competition from ex-communist countries.<sup>48</sup> This has added to the long series of disagreements between Asian ITF affiliates and the ITF secretariat.<sup>49</sup>

The underlying causes of this problem have been the ITF's unilateral willingness to declare a national union illegitimate, to boycott the ship, and to enroll the seamen involved who were not members of a union that was legitimate in the ITF's opinion into its Special Seafarers' Department ("SSD"). This then requires shipowners desiring a blue certificate to pay to the ITF entrance (initiation) fees of US\$23 and annual dues of US\$46 per seafarer in addition to the other charges noted in Figure 2 and related text, above, and to forward these monies to the ITF secretariat.<sup>50</sup> No other ITS has such provisions for individual memberships. In the United States, of course, this procedure without a recognized showing of assent by the bargaining unit employees would raise questions of legality pursuant to National Labor Relations Act ("NLRA"), as amended.<sup>51</sup>

As workers in Third World countries have organized their own unions, such ITF action has diminished. In 1988, the SSD was consolidated with the Seafarers' Department as its membership declined, falling from its 1988 membership peak of 9,834 to 6,344 the following year.<sup>52</sup>

According to the ITF general secretary, the SSD has been so overwhelmed by a heavy workload since the fall of communism and the large number of calls for its assistance that it does not have accurate current

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other has taken over a fleet of ships from the government and will use Russian sailors on Russian ships).

47. *Dearsley*, Sept. 7, 1995, *supra* note 24.

48. A meeting of the ITF's Asian/Pacific Seafarers, as described in the ITF NEWS, Mar. 1990, at 7, gives hints of this. Conversations with shipping officials have confirmed this situation, and the ITF general secretary refers to it in his *Maritime Ministry Address*, *supra* note 8, at 3.

49. See, *ITF-FOC Book*, *supra* note 2, at 41, 54, 96, and 140.

50. *ITF Standard Collective Agreement*, *supra* note 21, at 11.

51. Pub. L. No. 74-108, 49 Stat. 449 (codified as amended at 29 U.S.C. §§ 141-197 (1982)).

52. *ITF Report, 1986-89*, *supra* note 17, at 86 and 139.

SSD membership data. He also states that in areas, such as China, where free unionism does not exist, and in other countries where either a union's constitution or national legislation proscribe admittance of non-domiciled seamen, SSD membership is required, but that generally, ITF's "policy is that whenever possible seafarers should belong to an appropriate ITF affiliated union."<sup>53</sup> Nevertheless, he has noted that the ITF will continue to make judgments about whether it will act on its own initiative despite the existence of national unions if it sees the need:

Let me make it quite clear . . . the ITF and its affiliates are prepared to take action against any sub-standard ship whatever its flag if its physical condition or operational standards put seafarers' lives at risk. . . .<sup>54</sup>

#### G. DEPENDENCY AND INTERNATIONAL, OR "SECOND" REGISTERS

For many years, dependency territory registers, such as Hong Kong for Great Britain, and more recently, also Isle of Man, and for France, Kerguelen, have existed, utilizing Third World crews and often officers from the ruling country, or for Britain, or another Commonwealth nation.

Job losses by the developed country ship registers have during the last decade induced a number of European countries led by Norway to establish international, or "second registers" which permit much lower than union or country scale wages and the use of non-domiciled seamen, but usually provide benefits, such as medical protection and pension credits, as well as good and safe working conditions.<sup>55</sup> Such registers are designed to prevent re-flagging to FOC registers by reducing costs to levels that are reasonably competitive to the FOC level.

The rise of the second registers has been contentious within the ITF. The ITF leadership and some national unions are opposed to second registers, and national legislation that permits their operation. Thus, the German unions recently requested that the ITF designate GIS, the German second register, as an FOC flag, and forced the German owners to accept the ITF TCC contract for GIS which establishes higher than competitive rates and is designed not only to protect jobs and wage rates for the German officers on board, but also to comply with the ITF standard TCC contract applicable to all nationalities.<sup>56</sup>

As a result of national government policy, ITF affiliates, with those in Norway and Denmark being the most successful, have negotiated agreements covering second registry ships. As Table 1 showed, Norway's

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53. Cockroft, *supra* note 32.

54. *ISF Address*, *supra* note 40, at 8.

55. Telephone interview, cruise ship company official which flags some of its ships with NIS, the Norwegian second register.

56. *Dearsley*, Nov. 20, 1995, *supra* note 25.

second register was the seventh largest in the world in 1994: Denmark's was No. 24. Unlike the situation in Germany, the Norwegian and Danish unions have opposed pressure from the ITF and some of its affiliates to designate their second registers as FOC flags. They point out that their countries have adopted laws governing these registers, and that their existence, and in Norway, legislation, gives them some control of the terms and conditions of employment, which is far superior for them than to have the shipowners in their countries "flag out" to one or more of the existing FOC registers.

The record demonstrates the wisdom of the policies of the Norwegian and Danish unions. In 1980, the Norwegian regular register embraced 22 million gross tons of shipping. By 1987 when NIS was instituted, the regular register was down to 5.4 gross tons. In 1994, the regular register stood at 2.4 gross tons while NIS was up to 19.9. In 1985 the Norwegian fleet was manned almost exclusively by Norwegians; in 1994, 26,800 seafarers were employed, of whom only 6,800 were natives. It would also appear that some former Norwegian registers which flagged out have returned under NIS.

In Denmark, the data show that DIS has stabilized the national fleet. The regular register declined from 5.4 gross tons in 1980 to 0.5 in 1994 while DIS grew from 4.0 in 1989, its first year, to 5.1 in 1994.<sup>57</sup>

Other second or international registers have been created or utilized by owners. Luxembourg has become the (perhaps temporary) home for the Belgium owned fleet and as a flag state Belgium has ceased to exist. . . . Others, however, have had less success, for example the Canary Islands register and Madeira have been reformed for Spanish, Portuguese and other owners albeit so far with little impact.<sup>58</sup>

The ITF has adopted policies which demand the right for unions in the second register country to bargain for non-domiciled seamen wages and conditions on these registers.<sup>59</sup> The wishes of the non-domiciled seamen are apparently not consulted. Where such bargaining occurs, the ITF policies apply "considerations" involving ship safety, union negotiating rights, maintenance of social security, and tax relief to seafarers and shipowners. It further provides that no ITF affiliates "shall sign agreements for second register vessels which fall below the ITF benchmark and the ITF standards, as amended from time to time." If a union affiliate in a second register country so requests, or if it decides where "circumstances so dictate," the FPC "reserves the right to declare any second

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57. *Id.*

58. *Id.*

59. See, ITF FAIR PRACTICES COMMITTEE, *Resolution on Second Registers*, (London, June 14-16, 1995), for the official ITF policy on such registers.

register an FOC,"<sup>60</sup> as it has done in regard to the German one.<sup>61</sup> Thus far, however, the ITF has had very limited success in controlling second register employment policies in no small part because of the fundamental disagreements among affiliates as indicated by the German case on the one hand, and those of Norway and Denmark on the other. The Norwegian and Danish unions attempt to escape ITF censure by negotiating for the Third World crews and meeting somewhat closely ITF standards. They also are probably themselves mollified by some funding for these efforts.

These second registers, plus the almost extinction of the once dominant United States fleet,<sup>62</sup> demonstrate the difficulties of developed countries attempting to compete in the maritime industry without various subsidies or restrictive legislation. The future for any ITF-led "regaining" of this work appears dim indeed.

### III. THE FINANCES OF THE ITF

There is no other ITS for which an analysis of its finances is more instructive in understanding its operating principles and priorities than the ITF. Unlike other union federations, the ITF does not receive the bulk of its income from member affiliates' dues, but rather from employers in the shipping industry. Moreover, as already noted, only 16 percent of the workers represented by ITF affiliates are employees of the shipping industry. Yet the preponderance of the ITF's financial resources derive from its Seafarers Department and the "taxes" imposed on shipowners as part of the FOC campaign. The sizable revenues flowing from this campaign combined with the inability (or unwillingness) of the ITF to disburse its resources among its affiliated national unions has made the ITF by far the wealthiest international trade secretariat.<sup>63</sup> By 1994, the ITF had accumulated assets exceeding the equivalent of \$100 million with negligible debt. A conservative investment portfolio would yield at least \$5 million annually in interest income alone.

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60. *Id.*

61. *ITF Rates Increased*, ITF NEWS, Aug./Sept. 1995, at 10.

62. The last two major U.S. flag carriers, Sealand and American President, are seeking FOC status for at least some of their vessels, leaving the coastwise territory only for the U.S. flag, and this because the eighteenth century Jones Act permits only U.S. flag ships to handle U.S. port-to-port traffic. Other countries have similar legislation.

63. Most international trade secretariats have a difficult time balancing their operating budgets which are dependent largely on affiliated union dues. Except for the International Metal Workers Federation ("IMF"), whose affiliates include some of the largest unions in the free world, the typical ITS has little accumulated financial resources.

## A. FINANCIAL STRUCTURE

Prior to 1984, the ITF included in its *Report on Activities* detailed data concerning its finances. The data for those years have been published previously.<sup>64</sup> Beginning in 1984, financial data were omitted from these reports and other published ITF documents, but the ITF, as a union federation, has been required to report such information to the British Government on Form AR21, "Annual Return for a Trade Union," pursuant to the Trade Union and Labour Relations Act 1974. As of January 1996, the latest ITF Form AR21 report available from the British Government relates to 1994-95.

In 1981, the ITF established the Seafarers' Trust ("Trust"), a registered trust, in order to avoid paying corporation taxes on the Welfare Fund's investment income, and to distribute grants to seafarer affiliates and other friendly organizations. The Trust receives the Welfare Fund's investment income by covenant to charity as well as other donations therefrom. It is required to submit financial reports to the United Kingdom Charity Commission. The data presented are taken from the Welfare Fund and Trust reports to these British government agencies, plus two annual reports issued by the Trust in 1994 and 1995.

Although the ITF receives substantial income, its financial structure is relatively easy to comprehend. For accounting purposes, revenues and expenditures are recorded in two principal funds: the General Fund and the ITF Seafarers' International Assistance, Welfare, and Protection Fund ("Welfare Fund"), which was established to allocate grants and assistance to seamen.<sup>65</sup>

The General Fund, which ostensibly supports the main operating costs of the ITF regardless of the industry involved, is financed primarily by revenue from affiliate dues. It is tasked with funding administration, i.e., salaries, rent, office equipment and supplies, travel, conferences, general overhead, and grants and donations, and regional education programs not specifically pertaining to the FOC program or other seafarer matters.

Since the late 1970s, however, the General Fund has provided a decreasing proportion of the ITF's total funding. Instead, the Welfare Fund, the overwhelming source of revenue for which is derived from the FOC campaign to compel contributions from shipowners, has been the dominant financial vehicle for the ITF. This is not altogether surprising. Given that the Welfare Fund is supposed to support only those activities relating to seafarers, the sharply rising expenditures on the FOC campaign in recent years naturally caused the Welfare Fund's share of the

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64. See, *ITF-FOC Book*, *supra* note 2, at 135.

65. See Table 3.

ITF's spending to climb. Nevertheless, the Welfare Fund has been burdened with an increasing share of non-FOC campaign expenses; in 1984 the Welfare Fund was charged with 30 percent of non-FOC expenditures but by 1991-92 this had reached 54 percent. Subsequently, it has fallen to 48 percent in 1993-94 and 47 percent in 1994-95.<sup>66</sup>

Moreover, this does not tell the whole story. The Welfare Fund built and owned one of the two buildings formerly occupied by the ITF's staff, and no doubt also financed the new building and its refurbishing into which the ITF moved in October 1995 to consolidate the location of its London personnel.<sup>67</sup> Numerous expenses and overhead can be charged to the Welfare Fund as if they pertained only to seafarers, but actually cover other activities as well. There is no question that the Welfare Fund has greatly enhanced the ability of the ITF to operate on a much greater scale than was possible before the inauguration of the FOC campaign.

Table 3 summarizes the most important aspects of the ITF's finances by consolidating the two Funds and the Seafarers' Trust through 1994-95, and by listing only those revenue and expense items which are of material importance. Over the past decade, the ITF's total income did not grow appreciably — even though that of the General Fund more than doubled — while its expenses tripled from £3 million to nearly £9.5 million. Fastest growing among expenditures were those relating to the FOC campaign and to general administration, the most significant of the latter being staff salaries.

Figure 3 points out the critical role of the Welfare Fund in financing the ITF's expansive spending during the 1980s. Without the Welfare Fund and the Seafarers' Trust, which receives its income from the Welfare Fund, the ITF would be a very modest organization, financially; this is shown by the fact that the General Fund's income did not account for more than 19 percent of the ITF's total income in any of the years from 1984 through 1994-95. Thus, the maritime activities of the ITF, and in particular those relating to the FOC campaign, provide the brunt of the ITF's financing for all its activities regardless of the industry involved.

The Welfare Fund has been so lucrative that the ITF's vastly increased expenditures have not resulted in a reduction in the ITF's total asset base. From 1984 to 1994-95, the ITF's assets rose from £37 million to £75 million (the latter amount being equivalent to more than US\$100 million). In fact, greatly increased revenues flowing into the Welfare

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66. Some portion of non-FOC campaign expenditures are of course related to the ITF's maritime activities, but it is not possible to determine the breakdown. There is no doubt, however, that income from the FOC campaign contributes substantially to funding ITF expenditures unrelated to seafarers.

67. See, ITF NEWS, November 1995 at 2, for a picture of the new ITF headquarters and its address.

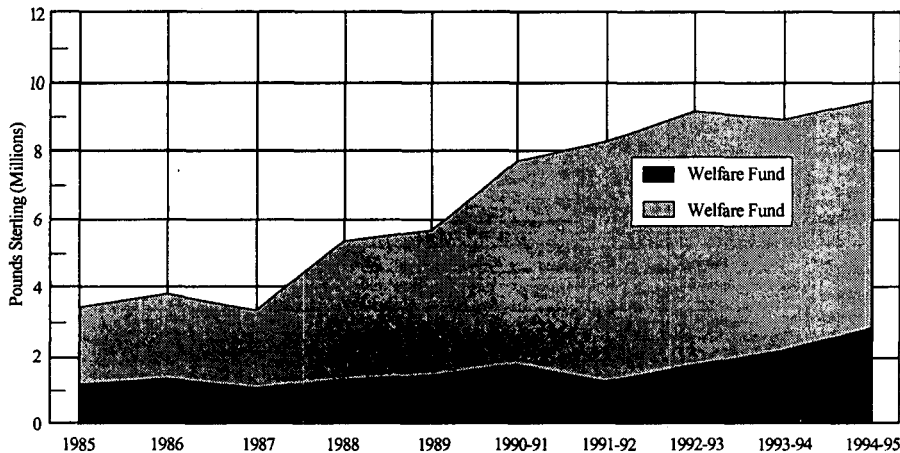
TABLE 3  
TEN YEAR FINANCIAL SUMMARY OF THE ITF  
(POUNDS STERLING)

	1985	1986	1987	1988	1989	1990-91	1991-92	1992-93	1993-94	1994-95
<b>INCOME</b>										
General Fund	11,896,930	13,935,480	11,439,814	12,463,554	13,087,879	14,908,503	14,346,306	16,651,988	13,028,184	16,641,148
Subscriptions	1,200,964	1,328,801	1,231,298	1,422,981	1,463,128	2,206,663	1,852,081	2,370,817	2,534,025	2,877,870
Welfare Fund	899,672	1,004,593	1,058,668	1,164,482	1,229,220	2,032,725	1,593,203	1,872,203	2,166,263	2,382,231
Shipowners' Contrib.	10,695,966	12,606,679	10,208,516	11,040,573	11,624,751	12,701,840	12,494,225	14,281,171	10,494,159	13,762,278
Investment Income	7,619,630	6,017,460	5,470,948	5,669,961	5,876,553	7,413,136	7,167,506	8,273,128	8,118,128	10,544,313
	2,113,863	1,959,278	1,871,093	2,168,255	2,721,095	3,255,699	3,046,518	1,964,200	1,263,390	1,330,129
<b>EXPENSES</b>										
Administrative	3,414,839	3,837,110	3,328,973	5,389,343	5,735,142	7,819,613	8,327,061	9,218,456	8,979,058	9,579,568
FOC Campaign	1,087,329	1,658,165	1,587,507	1,874,904	2,255,650	2,969,659	2,508,440	3,045,514	3,544,595	4,855,940
Legal	1,771,298	1,662,765	1,165,701	2,851,831	2,950,597	4,373,595	5,488,125	5,730,271	4,752,568	4,723,628
Inspectors Fees	601,554	929,056	524,804	836,316	1,288,883	1,733,579	1,787,510	1,708,514	1,221,375	1,180,582
Travel	748,586	511,030	431,618	1,649,047	1,391,838	2,255,796	3,310,456	3,720,415	3,080,797	3,050,236
Other	378,517	222,679	209,279	366,468	269,876	384,220	390,159	321,342	450,396	492,810
	556,212	521,180	575,765	662,608	528,895	476,359	330,496	422,671	681,895	0
<b>ASSETS</b>										
General Fund	43,125,459	51,427,479	55,538,272	55,449,624	58,252,804	63,297,813	67,053,094	74,287,679	73,020,978	74,671,489
Welfare Fund	233,313	207,124	235,822	295,627	281,791	367,000	915,553	1,491,086	1,800,906	1,791,921
Seafarers' Trust	27,658,382	34,822,209	34,097,257	27,953,379	28,844,642	28,127,707	27,604,082	30,810,335	32,031,072	36,191,568
	15,233,761	16,398,145	21,205,193	27,200,618	29,126,371	34,803,106	38,533,459	41,986,258	39,189,000	36,688,000
<b>DEBITS</b>										
Backpay to be Distributed	1,833,111	1,094,402	1,511,293	1,816,135	2,225,605	2,023,889	2,851,986	3,755,011	3,148,371	3,282,208
Interest Due on Backpay	1,009,000	1,186,500	1,338,500	1,510,500	1,797,500	2,148,501	1,500,000	1,700,000	1,700,000	1,700,000
Total Assets in U.S. Dollars	\$53,360,024	\$75,406,861	\$90,748,810	\$98,777,960	\$95,517,123	\$112,967,607	\$118,643,745	\$131,154,897	\$109,677,509	\$114,366,853

Notes: (1) administrative expenses are those not relating to the ITF's ongoing Flag of Convenience campaign; (2) exchange rates are average for year. Source: ITF, Annual Return for a Trade Union, Form AR 21, 1985 - 1994-95; Report to the U.K. Charity Commission, 1985 - 1992-93; Annual Report of the Seafarers' Trust, 1993-94 and 1994-95.



FIGURE 3. THE FINANCIAL IMPORTANCE OF THE WELFARE FUND  
(TOTAL ITF EXPENDITURES AS CHARGED TO EACH FUND)



Source: ITF, Annual Return for a Trade Union, U.K., Form AR 21, 1985- 1994-95.

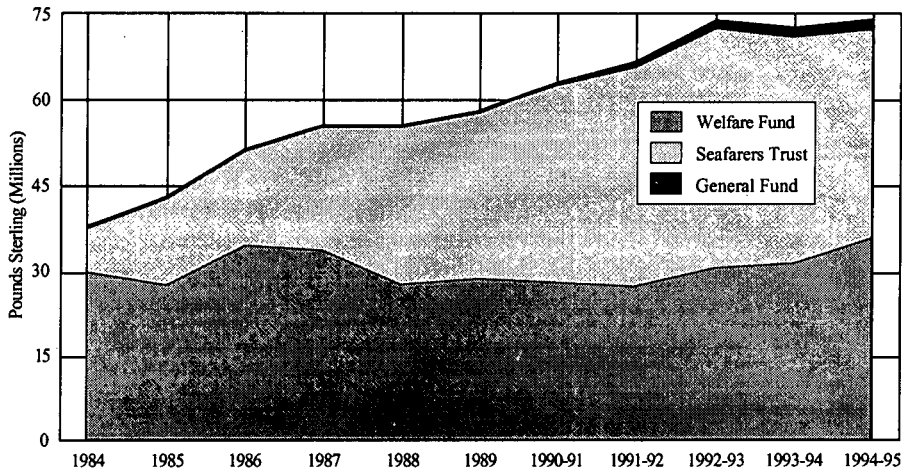
Fund resulted in the decision to establish the Seafarers' Trust in 1981. The evolution of the ITF's assets and financial power, which are unmatched by any other ITS, is shown in Figure 4. The General Fund represents a very small percentage of the ITF's assets, whereas the Seafarers' Trust has grown considerably since the mid-1980s and now accounts for 50 percent.

#### B. THE WELFARE FUND

In 1965, the Welfare Fund was established as a distinct financial entity with the purpose of providing assistance and welfare disbursements to seamen. A small percentage of its revenue accrues from subscription payments made by members of the ITF's Seafarers' Department and by those seaman who are covered by ITF agreements but who do not belong to any union or to a union affiliated with the ITF.

The data in Table 3 also shows that the Welfare Fund benefits from interest collected on back pay won for seamen on FOC ships — US\$5 million in fiscal 1994-95 remained undistributed. These funds are distributed to seamen, but it often requires time to find them or obtain their addresses because of the mobility in the industry and the problems of locating personnel in Third World countries where the infrastructure is

FIGURE 4. THE ITF'S FINANCIAL POWER  
(TOTAL ASSETS)



Sources: ITF, Annual Return for a Trade Union, U.K., Form AR 21, 1984-1994-95; Seafarers' Trust, Report to the U.K. Charity Commission, 1984-1992-93; Annual Report of the Seafarers' Trust, 1993-94 and 1994-95.

weak. Some are never found despite energetic efforts by the ITF administrators to locate them. The ITF benefits by being able to use the "float" which, as Table 3 shows, has been a sizable amount each year.

Because the Welfare Fund's revenues underwrite much of the ITF's total expenditures on all of its programs and as such have permitted the ITF to operate on a much greater scale than was possible before the inauguration of the FOC campaign, it logically follows that shipowners in effect provide the resources that allow the ITF to pursue its objectives, including the extraction of further contributions. For example, from 1984 through 1989, and again in 1994-95, shipowners' welfare contributions exceeded by a good measure the entire expense budget of the ITF covering all transport sectors under the ITF's umbrella. As already noted, revenue figures alone do not tell the whole story of the critical nature of the Welfare Fund as a financing vehicle. Besides financing ITF's headquarters, for which the ITF pays rent, the Welfare Fund undoubtedly provides other financing, such as for ITF's sophisticated office equipment.

Spending by the Welfare Fund over the past decade has been dominated by expenditures for administration of the FOC campaign, outlays to the Seafarers' Trust through the Covenant to Charity and other donations, and to a much lesser extent by welfare grants to seaman — supposedly the Fund's principal mission. In 1989, for instance, the Welfare Fund

allocated welfare grants and assistance to seaman totalling less than 1 percent of that year's income; this rose to nearly 5.5 percent in 1994-95, still quite small.

Although the Welfare Fund has in recent years significantly increased its spending on welfare grants and donations to the Seafarers' Trust, the Welfare Fund still accrued surpluses and possesses huge financial reserves. At the end of fiscal year 1994-95, the Welfare Fund's assets were £36 million, which generated investment income that exceeded the General Fund's income from affiliate subscriptions or dues in 1990-91, 1991-92, and 1992-93.

The sharp increase in administrative expenses starting in the late 1980s is related to the escalating costs of the FOC campaign. In particular, legal charges have exploded as a result of court challenges to the ITF's attempt to force payments from shipowners. In 1984, legal and professional fees totaled £727,039, but by 1989 they amounted to £1.3 million, and in 1992-93 to £1.7 million, and stood at £1.2 million in 1994-95. Rising even faster than legal costs have been expenditures on inspectors' fees, which have jumped from £592,329 in 1984 to over £3 million in 1994-95, a result in part of a substantial expansion of the number of inspectors employed in recent years. One factor driving this increase, in addition to the hope that it will result in greater shipowner acceptance of blue certificates, may be increased reliance on such fees and on shipowners' welfare contributions for financial support by unions in western countries as their memberships continue to decline. Lending credence to this view is the fact that the level of "contributions" made by shipowners has changed relatively little over the past decade — from £7.4 million in 1984 to £10.5 million in 1994-95, — implying that either the contributions have become far more difficult to collect, thus requiring a greater number of more highly trained inspectors, or that reimbursements for inspections are being utilized to offset in part declining memberships in developed country maritime unions as the proportion of the world fleet that are FOC ships or second registers continues to increase.

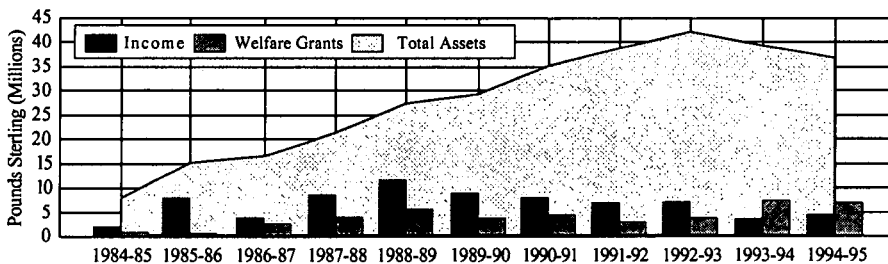
The expansion of payments by the ITF to affiliates from the Welfare Fund seems certain to enhance the power of the ITF vis-a-vis its affiliates. If an affiliate desires to be a beneficiary of such funding, it surely enhances its standing by supporting the policies of the current administration. This is not unusual in the intra-politics of organizations. Given the declining nature of national maritime unions in developed countries and the financial power of the ITF, such a development in the hands of a strong general secretary is even more likely.

C. THE SEAFARERS' TRUST

The Seafarers' Trust has operated for most of its existence as a mechanism to minimize taxes on the FOC campaign's revenue and to issue grants. ITF personnel comprise the Trust's board of trustees and officials. Following an initial input of £4 million in 1981, the Trust has been "donated," under a Deed of Covenant, the investment income realized by the assets of the Welfare Fund since 1983. The Welfare Fund has also periodically made donations to the Trust, in addition to those associated with the Covenant, as a means of sheltering even more FOC revenue from taxation.

Figure 5 tracks the evolution of the Trust's assets since 1984. The Covenant donations have accounted for the majority of the Trust's income, although in the late 1980s the non-Covenant donations were likewise very large. Over this ten-year period, the Trust received in excess of £61 million in income. Tax-reducing donations from the Welfare Fund were in excess of £45 million. As shown in the financial summary of the ITF provided in Table 3, above, the total assets of the Trust rose from £7.7 million in 1984 to almost £37 million (or nearly \$56 million) in 1994.

FIGURE 5. SEAFARERS' TRUST  
(WELFARE GRANTS RELATIVE TO INCOME)



Sources: Seafarers' Trust, Annual Report to the U.K. Charity Commission, 1984-85 - 1992-93; Annual Report of the Seafarers' Trust, 1993-94 and 1994-95.

Given that the Trust is a registered charity, one would expect that its expenditure accounts would reflect this fact by showing significant outlays on charitable activities. According to the Trust's first annual report, issued for 1993-94:

The Trust's principal objects are providing, or assisting in providing, for the

social welfare of seafarers of all nations and assisting them and their dependents in conditions of sickness, hardship and distress.<sup>68</sup>

What is most notable about the Trust is the apparent lack of accord between its stated objectives — i.e., those for which it has been granted beneficial tax status — and those it has pursued for most of its existence, particularly the lack of significant charitable outlays until recently, relative to its income and total assets.

As shown in Figure 5, except for its two latest fiscal years, the amount of welfare grants dispersed annually fell considerably short of the Trust's income and, to a far greater extent, its total assets. In only six years of the Trust's entire existence have welfare grants risen above 50 percent of its income and in only two years have welfare grant expenditures been sufficient to reduce the Trust's assets. Consequently, the Trust accumulated an ever-growing trove of riches; a cynic would believe this to be the reason that the ITF never issued an annual report for the Trust prior to 1993-94, when it could show substantial outlays on welfare grants. As of 1994-95, the total income received by the Trust since its creation in 1981 had reached £82.7 million; expenditures on welfare grants amounted to £44.7 million at the end of its fiscal year 1994-95, and combined with administrative expenses, totaled £46.1 million. The Trust's assets at the end of fiscal 1994-95, therefore, measured £36.6 million, which for the first time fell below the entirety of welfare grants issued by the Trust since its founding.

In terms of geographic distribution, the nature of the Trust's welfare grants is as noteworthy as their relative magnitude. The great bulk of the welfare grants have historically been issued for union-sponsored activities in developed countries. For example, only 9 percent of the funds transferred to the Trust in 1981 were expended. Twenty-eight of the thirty-two grants made by May 7, 1982, were to union projects in developed countries.<sup>69</sup> Twelve years later in fiscal year 1992-93, about 80 percent of welfare grants were destined for countries belonging to the Organization for Economic Cooperation and Development ("OECD"),<sup>70</sup> and in other years the distribution was doubtless also heavily skewed toward wealthy western nations, Australia and Japan.

One possible explanation, as stated in the ITF's first ever annual report of the Trust is "a lack of knowledge on the part of some agencies [in Third World countries] of the Trust's existence and also the degree to

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68. See, ITF SEAFARERS' TRUST, 1993-94 Financial Report, at number 2.

69. See, *ITF-FOC Book*, *supra* note 2, at 140-41.

70. THE ITF SEAFARERS' TRUST, *supra* note 67, at 8. OECD is the international organization of the wealthier developed countries.

which they were prepared to seek alternative sources of finance."<sup>71</sup> Perhaps at least equally significant, however, is the fact that all of the Trust's trustees have been, and continue to be, members of the ITF executive board or of its staff, all are citizens of developed countries, and it is administered by an organization located in Europe and dominated by European unions. The apportionment of the Trust's grants has predictably elicited complaints from developing country organizations,<sup>72</sup> and has led the Trust to commence a new strategy for allocating a higher percentage of grants to them.

The new Trust policy for targeting grants is based upon a formula that considers the number of seafarers originating in and working in a region and the amount of trade conducting in a region by seaborne means.<sup>73</sup> This reallocation of Trust grants has resulted in a decline of disbursements to developed countries from approximately 80 percent of the total in 1993-93 to about 64 percent in 1994-95.<sup>74</sup>

A substantial part of the increases in funding for Third World countries was provided to the "Asian Tigers" — Hong Kong, South Korea, Singapore, and Taiwan — none of which can realistically be considered as underdeveloped, but are Asian. These countries combined received less than 10 percent of the 1994-95 Trust grants as compared with 3 percent the previous year. This may reflect a temporary situation, or a healthy degree of prudence by the ITF in recognition that many developing countries cannot productively absorb large inflows of funds or equipment.

On a regional basis, grants for European groups were reduced from 69 to 30, and from £3.5 million to £2.2 million between 1993-94 and 1994-95. On the other hand, those in the Asia-Pacific region declined slightly in numbers, but increased somewhat in amounts from £2.1 million to £2.3 million. Of this total, Australia received £530,044 in 1994-95, about one-half of its 1993-94 total, but still 23.2 percent of the regional total as compared with the 1993-94 ratio of 52.4 percent. On the other hand, Japan received £534,827 in 1994-95, 23.4 percent of the regional total, as compared with £160,210, 7.7 percent of the regional total, in 1993-94. Other major grants in 1994-95 went to Taiwan (£470,150, 20.5 percent of the total regional grants), Thailand with the largest Third World country grant (£400,000, 17.5 percent of the regional total), and Samoa (£114,403, 5 percent of the regional total). There were no other six-figure grants.

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71. *Id.* at 9.

72. The ITF estimates that at least 60 percent of seafarers are now from Asian countries, and when adding in those from other developing areas, the total number of seafarers from non-western countries probably surpasses 80 percent.

73. ITF SEAFARERS' TRUST, ANNUAL REPORT, 1994-95, at 9.

74. All data relating to this issue are from the 1993-94 and 1994-95 ITF SEAFARERS' TRUST ANNUAL REPORTS.

Thus, the increase in distribution of Trust grants for the Asia-Pacific region saw only two underdeveloped countries, Thailand and Samoa, gain major grants while Australia and Japan, two OECD countries, received 46.6 percent of the grant money, and another 20.5 percent went to Taiwan, a fast-rising "tiger". It is unfair to base criticisms on one or two years of an attempt to reorient the Trust grant policy, but it is fair to note that there must be considerable more change if the grants are to make a substantial contribution to the countries which supply the largest number of the world's seafarers.

#### D. THE ITF'S NEW PROACTIVE USE OF THE TRUST

Soon after assuming the post of ITF general secretary in 1993, David Cockroft was quoted publicly that the Trust was poorly administered:

Administration has been almost non-existent . . . Trust meetings have tended to take place three times a year at lunchtime in between other meetings. This has got to become more systematic and we have already had a full-day meeting . . . to look at it and there are more to come.<sup>75</sup>

True to his word, Cockroft has appointed an administrator for the fund, issued its first two annual reports, and as already discussed, considerably increased its donations, and moved to alter the concentration of grants to developed countries particularly by increasing those to welfare projects in Asia from which the majority of present day seamen are recruited.

The new Trust administration has also declared that "[d]eveloping a proactive approach to the future activities of the Trust is one of our main priorities."<sup>76</sup> Being more "proactive" includes instigating grants on its own motion instead of just waiting for affiliated unions to propose them, and altering the geographic grant distribution by permitting grants in underdeveloped areas where the ITF has no affiliates. It is also clearly in line with what appears to be Cockroft's determination to utilize grants to increase the ITF's visibility, to enhance its public image, and to further its FOC campaign.

Thus, the ITF scored a public relations coup by donating \$1 million to endow a chair at the World Maritime University, located in Malo, Sweden, and agreeing "to provide initial funding for the establishment of an independent international institution dedicated to research into the whole range of seafarers' occupational safety and health problems," located in Wales.<sup>77</sup> The Trust has also agreed to provide a grant of £270,000 per year for three years to the International Committee on Seafarers'

75. *ITF Admits Controversial Fund is Badly Administered*, TRADEWINDS, Aug. 6, 1993, at 9.

76. ITF SEAFARERS' TRUST, ANNUAL REPORT, *supra* note 67, at 13.

77. ISF Address, *supra*, note 35, at 6.

Welfare ("ICSW") in order to establish a full-time secretariat, located in London.<sup>78</sup> Since these organizations are all headquartered in Europe, they will not alter the past geographical distribution of grants, but there has also been a grant of £500,000 to a Thailand project.

Interestingly, in view of the new emphasis on health and safety is the fact that in the past only 0.6 percent of the Trust grants were related to health and medical matters, which is a smaller share than that given for sports and entertainment. Moreover, it remains to be seen whether these new organizational grants will duplicate activities of the ILO, and whether the result will be to emphasize items under the health and safety banner which will support ITF policies on hours, crew manning, time off, and other collective bargaining issues.

The Cockcroft administration does not plan to alter the concentration of recipient organizations which have received Trust grants in the past. The majority of the nearly 700 grants since 1981 have gone to "established seafarers' welfare bodies such as those sponsored by various churches."<sup>79</sup> There is good reason for this besides the fact that numerous churches do provide missions, rest areas, and other welfare services to seamen in ports throughout the world. In recent years, for example, one such church body, the Seamen's Church Institute, New York, dedicated itself, in the words of its then director, to "the problems of exploitation of seamen aboard ship."<sup>80</sup> In this work, it has cooperated and assisted the ITF, as discussed in Part IV, *infra*. Cockcroft has noted in regard to church representatives:

We [the ITF and the church] provide complementary and not competing service to seafarers. Not only can you deal with the many complex problems which are beyond our competence, but you can also . . . "boldly go" where ITF inspectors would normally get thrown off the ship.<sup>81</sup>

It would appear, therefore, that proactive changes in the Trust will alter some patterns of grant donations but maintain others. The key variable determining grant action will henceforth undoubtedly be the effect on ITF policies, practices, and aspirations, particularly in regard to the FOC campaign.

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78. ICSW is a coordinating body involving ISF, ITF and various organizations providing port welfare, such as religious-sponsored missions. Ake Selander, for many years an ITF assistant general secretary with responsibility for the FOC campaign, is scheduled to become the secretariat for ICSW on his retirement from ITF early in 1966.

79. ITF SEAFARERS' TRUST, ANNUAL REPORT, *supra* note 67, at Foreword.

80. Richard F. Shepard, *Ahoy, Mates, the Institute Back at the Seaport*, N.Y. TIMES, May 6, 1991, at B3.

81. *Maritime Ministry Address*, *supra* note 8, at 3.



## IV. DOUBLE BOOKKEEPING AND LITIGATION IN THE UNITED STATES

To avoid ITF boycotts, to step aside from controversy, and to adhere to requirements of charterers who insist that ships avoid boycotts, ship-owners predominately from the Far East for many years signed ITF-approved agreements, paid into the ITF Welfare Fund, but also signed separate agreements with their national unions where they exist, or otherwise paid wages at a much lower rate than either the ITF standard or approved TCC scales dictated by the ITF. This was historically relatively easy to do prior to the recently enforced Madrid and Geneva policies because ITF's affiliated unions approved the issuance by the ITF in London of blue certificates to vessels which had signed the ITF agreements.

It is preposterous to believe that the Far Eastern unions or seamen were unaware of the double bookkeeping involved. In interviews with shipowner and ship operator personnel, maritime union officials, and government officials in Japan, Thailand, Singapore, and Hong Kong in 1983, double bookkeeping was talked about freely as clearly prevalent in all countries visited except Singapore, and parties interviewed declared that it was common in the Philippines, Taiwan, and South Korea as well. They all regarded it as necessary to operate, particularly in the Australian trade.<sup>82</sup> Additionally, in Third World countries except Singapore, the wages actually paid seamen at the country rate are among the highest that could be earned as blue collar workers.<sup>83</sup>

Double bookkeeping by Western standards is clearly unacceptable; certainly these authors do not support its use. The Asian view, however, looked at it differently. Those who have utilized double bookkeeping point to the circumstances created by the ITF attempt — the only effort of its kind — to establish a worldwide wage standard despite the vast differences in living conditions, living costs, and job opportunities in various areas of the world, and particularly the differences in these standards between developed and Third World countries. They combined these considerations with the view that double bookkeeping is a practical solution to a practical problem of being able to operate ships and to avoid

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82. *ITF-FOC Book*, *supra* note 2, at 106 (summarizing these interviews, together with other information concerning double bookkeeping).

83. This has been attested to one of the authors by American companies who utilize particularly Filipino seamen, as well as by authorities in the Philippines, both in person in 1983, and by telephone and fax ten years later. The large number of applicants attempting to enroll in training schools in the Philippines, and the resultant oversupply of applicants and trained seafarers there attest to this situation. Wage data for such countries are found in the *YEARBOOK OF LABOUR STATISTICS* published by the ILO, but even though these data are the most reliable available for underdeveloped countries, they lack rigor and are usually quite out of date. Wentker, *supra* note 39, at n. 4: "Currently [1993] a Filipino AB earns about US \$700 a month base, overtime and vacation. The average wage for a labourer in the Philippines is about US \$100-125 per month".

controversies that probably could not be won. From their point of view, therefore, double bookkeeping became an understandable and reasonable solution to a problem.

It was usually not meant to cheat seamen, whose union officials, and probably most of the seamen themselves, must always have been aware of the double bookkeeping. In the Philippines, for example, manning agents licensed by the government, who are by law the only source of seafarer hiring, recruited seamen with the understanding that double bookkeeping was involved. It was explained to seamen that double bookkeeping was a method to maintain their jobs in economies in which jobs are very scarce. Some Filipino seamen prior to a voyage received a bonus and bonuses each month while on voyage for participating in the ruse. Moreover, they surely knew that if they complained about double bookkeeping, they could find it difficult in the future to gain these coveted jobs for which the supply generally exceeded the demand.

The seamen were paid the country or market wage throughout their terms of employment and signed receipts for those wages. Seamen also signed receipts for payment on the basis of the ITF wage schedule. The ITF wage schedule was often written into the ship's articles and two sets of books were kept: one reflecting the actual wage schedule, the other the ITF one.

The ITF had, of course, been aware of double bookkeeping for many years, but found it very difficult to obtain evidence or otherwise to curtail its practice. As its *Report on Activities* stated to the 1986 congress:

Manning agents circulate owners with details of their own special "guarantees" regarding the evasion of ITF standards once the ITF Blue Certificate has been obtained, thereby cheating both the crews and the charterers who insist on f-o-c ships being in possession of the Blue Certificate as a way of ensuring employment standards that are acceptable to ITF affiliates. The increasing sophistication of the "double accounts," coupled with what can only be described as terrorization of crews, presents ITF inspectors with tremendous problems in carrying out routine checks on compliance with ITF agreements.<sup>84</sup>

All this was altered insofar as trade through United States ports is concerned when the ITF teamed up with a resourceful attorney and the Seamen's Church Institute. As some Chinese shipowners predicted would happen a decade earlier, the seamen who blew the whistle were largely Filipino.<sup>85</sup>

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84. See, *ITF Report*, *supra* note 3, at 117.

85. See, *ITF-FOC Book*, *supra* note 2, at 106.

## A. UNITED STATES LAW AND DOUBLE BOOKKEEPING

The attempts of the ITF and its affiliates to boycott FOC ships in United States ports were, after what appeared to be a successful start, drastically curtailed by a series of U.S. Supreme Court rulings during the 1960s and early 1970s. Directing its "attention . . . to the well-established rule of international law that the law of the flag ordinarily governs the internal affairs of a ship," and absent a clear affirmative direction from Congress otherwise, the Court ruled that there was no basis for the exercise of National Labor Relations Board jurisdiction over FOC ships.<sup>86</sup> It then ruled that since picketing of foreign flag ships by American seamen was not an act protected by U.S. labor legislation, state courts could enjoin such action.<sup>87</sup> ITF actions against FOC ships in American ports were thereafter largely halted until the double bookkeeping controversy erupted in late 1989.

United States law, however, has provided special protection to aspects of seafarers' wages and working conditions almost from the inception of the Republic. The Seamen's Wage Act<sup>88</sup> dates from 1790; it was amended in 1872, 1898, and 1915. Key sections of this legislation are as follows:<sup>89</sup>

(a) A seamen's entitlement to wages and provisions begins when the seaman begins work or when specified in the agreement required by § 10302 of this title (46 U.S.C. § 10302) for the seaman to begin work or be present on board, whichever is earlier.

(e) After the beginning of the voyage, a seaman is entitled to receive from the master, on demand, one-half of the balance of wages earned and unpaid at each port at which the vessel loads or delivers cargo during the voyage. A demand may not be made before the expiration of 5 days from the beginning of the voyage, not more than once in 5 days, and not more than once in the same port on the same entry. If a master does not comply with this subsection, the seaman is released from the agreement and is entitled to payment of all wages earned. Notwithstanding a release signed by the seaman under § 10312 of this title, a court having jurisdiction may set aside for good cause

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86. *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963). This case and related ones are fully discussed in the *ITF-FOC Book*, *supra* note 2, at 50.

87. *Windward Shipping (London) Ltd. v. Am. Radio Ass'n*, 415 U.S. 104 (1974).

88. 46 U.S.C. § 10313 (1988). We are indebted to Frederick W. Wentker, Jr., Lillick & Charles, San Francisco; Craig C. Murphy and Robert I. Sanders, Wood, Tatum, Wonacott, & Landis, Portland, OR, for assistance in analyzing this legislation and the related court decisions; to Richard J. Dodson, Dodson & Vidrine, Baton Rouge, LA, and to Charles F. Lozes and David B. Lawton, Terriberry, Carroll & Yancey, New Orleans, LA, for providing further information about the cases; and to the late Paul N. Wonacott and Kathleen A. McKeon, also of the Wood, Tatum firm for use of their summary of the statute.

89. Other sections of the Act that have been brought up in the course of the litigation include §§ 10314 and 10315, which prohibit or limit advances and allotments of wages. 46 U.S.C. §§ 10314, 10315 (1988).

shown, a release and take action that justice requires. This subsection does not apply to a fishing or whaling vessel or a yacht.

(f) At the end of a voyage, the master shall pay each seaman within 24 hours after the cargo has been discharged or within 4 days after the seaman is discharged, whichever is earlier. When a seaman is discharged and final payment of wages is delayed for the period permitted by this subsection, the seaman is entitled at the time of discharge to one-third of the wages due the seaman.

(g) When payment is not made as provided under subsection (f) . . . without sufficient cause, the master or owner shall pay to the seaman 2 days' wages for each day payment is delayed.

(i) This section applies to a seaman on a foreign vessel when in a harbor of the United States. The courts are available to the seaman for the enforcement of this section.

The double bookkeeping cases involved whether this law could be interpreted in an expansive manner, and whether damages for fraud, emotional distress, and other alleged injuries could be obtained where double bookkeeping was found. Initially, all these questions were won by the plaintiffs, with resultant large damage awards. Despite an initial victory on the west coast, however, the results there were quite modest in terms of financial awards. Nevertheless, settlements and litigation have probably ended double bookkeeping on ships that enter American ports.

## B. THE EARLY CASES

According to Richard J. Dodson, the attorney who handled these cases for the plaintiff seamen,<sup>90</sup> about ten cases against double bookkeeping were brought. The earliest involved a 1988 case brought against a Hong Kong ship, the *M/V Palvia*, registered in Liberia, arrested in New Orleans, and placed under a large pre-trial bond by the Parish of St. James Louisiana District Court. Settlement was achieved for \$451,080, and then \$263,494 more when the company did not abide by a seamen's protective order in the settlement agreement.<sup>91</sup>

The 1989 case that first brought the perils of double bookkeeping in American ports to the maritime world's attention involved the *M/V Fareast Trader* in the port of Galveston, Texas. Like most of the cases, this was brought to Dodson's attention by John Sansone, a member of the International Longshoremen's Association ("ILA"), then an ITF inspector in the Gulf of Mexico area, who in turn was alerted by a port religious

90. Interview with Mr. Richard J. Dodson, in Baton Rouge, LA, (March 22, 1995).

91. *Tomas C. Urdas v. Pauley Inc. and Eckoxa Co., Ltd.*, 23rd Judicial District Court, Parish of St. James, State of Louisiana (1988). The second case was adjudicated in Hong Kong; *See also*, Dodson interview, *supra* note 89; and *Multi Million Dollar Damages for Crew Cheated of ITF Wages*, ITF NEWS, Sept. 1990, at 7.

group.<sup>92</sup>

The shipowners, headquartered in Hong Kong with a Filipino crew, compounded their problems by dispatching agents who threatened the crew. Dodson had provided the crew with tape recorders, his usual practice, and this became part of the evidence. The background of double bookkeeping and ITF policies was apparently also unknown to the defense. The shipowners settled on a very lavish interpretation of the Wage Act, plus damages, for a total of \$1,174,000.<sup>93</sup>

The ITF was ecstatic with this result. Since its loss of the secondary boycott cases in the courts in the 1960s and 1970s, it had been seeking a legal approach to attack FOC shipping in United States ports. Because the United States has the second largest beneficial ownership of FOC registry ships, the successful attack on double bookkeeping in the *Fareast Trader* case appeared to be an answer. The ITF NEWS announced:

Historic Victory for FOC Campaign . . . . The ITF's campaign against flag of convenience shipping has received a major boost with a record-breaking US court settlement of \$1,174,000 for 24 crew members from the Panamanian flag *Fareast Trader* . . . it also represents a significant breakthrough in the use of US law . . . . An entirely new legal front in the FOC campaign has now been successfully established. . . .<sup>94</sup>

A second large award was made in the Japanese-owned, Panama flag ship, *Pioneer Leader*, case in Jacksonville, Florida. The shipowner settled for \$1,030,000 on wage claims of only \$188,000. In all such cases, the ability of Dodson to obtain a huge protective order, such as \$7,100,000 in the *Pioneer Leader* case, almost insured the result. Shipowners' inability to raise bond money for such amounts literally forced them to settle on Dodson's terms.<sup>95</sup>

### C. THE WASHINGTON-OREGON TRILOGY

Four key cases were brought on double bookkeeping charges in west coast cases involving Japanese-owned ships; three with Filipino crews and one with a Korean crew reached the courts in the same general period, 1989-90. The first to be decided, and one of a trilogy that the Court of

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92. Sansone is now coordinator of ITF North America inspectors, headquartered in the AFL-CIO building in Washington, D.C. Dodson received nearly all his double bookkeeping cases (and many others) via either Sansone or directly from a religious group.

93. *Angad v. M/V Fareast Trader*, in rem, *Fareast Trader Navigation, S.A. Wah Tung Shipping Agency Co., Ltd., Receipt, Release, and Settlement Agreement*, S.D. Texas, Galveston Div., C.A. No. 6-89-221 (Aug. 24, 1989); See also, Dodson interview, *supra* note 89.

94. *Historic Victory for FOC Campaign*, ITF NEWS, September 1989, at 1; See also, *Double-Bookkeeping*, ITF NEWS, May-June, 1990, at 15.

95. *Penalty Award for Pioneer Leader Crew in USA*, ITF NEWS, Jan. 1990, at 13; *Double-Bookkeeping*, ITF NEWS, May-June, 1990, at 15; and Dodson interview, *supra* note 89.

Appeals, Ninth Circuit, combined into one decision, involved the *Pine Forest*, a Vanuatu flag ship, arrested in Tacoma, Washington. The owners tendered \$267,586 as back wages under the ITF standard agreement to thirteen crew members who left the ship there, hoping to settle the case. The seafarers nevertheless sued.

The result was Dodson's greatest, but a short-lived victory. The U.S. District court, Western District, Washington, awarded the seafarers \$32,657,536, plus attorneys' fees. This included the whole panoply of the Dodson charges: statutory penalties, loss of future income, emotional stress, and punitive damages, not only for those that left the ship in Seattle, but for eight discharged overseas as well.

When defendants sought to appeal and wished to stay execution, the Court set supersedeas bond at \$59,000,000. The defendant appealed to the Ninth Circuit, which reversed as to the bond because the lower court erred when it failed to allow for payment of back wages which would stop the running of penalties, and remanded the case to the District court "for the limited purpose of setting a new bond."<sup>96</sup> The case was then appealed to the Ninth Circuit on its merits.

The second case involved the *Southern Aster*. All the seamen in this case were discharged overseas. The U.S. District Court, District of Oregon, dismissed the statutory claims on the grounds that seafarers discharged in foreign ports from foreign-owned and -flagged ships were not covered by the statute, and dismissed their tort claims on grounds of *forum non conveniens*. As a condition of the dismissal, the shipowners agreed to submit to the jurisdiction of a Korean court.<sup>97</sup>

Rounding out this trilogy was the case involving the *M/V Fir Grove*, a sister ship to the *Pine Forest*, but arrested in Oregon, not Washington and, therefore, heard by the same court as was the *Southern Aster*, with results quite different from that reached by the Washington court. The shipowners paid back wages according to the ITF standard agreement, and the ship was released upon payment of a bond. Subsequently the seamen were discharged in Oregon.

In a series of decisions, the court granted summary judgment against plaintiffs' fraud claims,<sup>98</sup> applied conflict of law analysis to find Philippine law should apply to pendent tort claims,<sup>99</sup> and denied plaintiffs' demand for a jury trial.<sup>100</sup> In its final decision, this court held that the ITF standard wage rates were the shipowners' obligation because they were exe-

96. Nelson R. Raby v. M/V Pine Forest, 1990 A.M.C. 2441 (W.D. Wash. 1990); *rev'd*, 918 F.2d 80 (9th Cir. 1990); *cert. denied*, 111 S.Ct. 2015 (1991).

97. L. Hyeon Su v. M/V Southern Aster, 1990 A.M.C. 1217 (D. Ore. 1990).

98. Jose v. M/V Fir Grove, 765 F. Supp. 1015 (D. Ore. 1990).

99. *Id.* at 1024.

100. *Id.*, 765 F. Supp. 1037 (D. Ore. 1991).

cuted in the shipping articles, rather than the lower wages promised before the voyage. In arriving at its decision, the court ruled that worthless sea water carried as ballast was not "cargo" within the meaning of the Act, and that "end of voyage" as used in the Act was not each trip or port stop, but rather the voyage was completed when the seamen were discharged even though they had not completed their contractual obligations.

As in *Southern Aster*, this court concluded that foreign seamen discharged in a foreign port are not covered by the Act. It, therefore, denied the attempt of former seamen of the *Fir Grove* in this category to intervene in the case. It rejected the expansive reading of the Act that because the withholding of wages was part of an ongoing scheme during the entire course of the voyage, conduct integral to that scheme occurred in the United States, thus satisfying the Act's jurisdictional requirement.

This Court also rejected the seamen's attempt to invoke penalties for the Act's half-wages-upon-demand penalty clause because the seamen did not notify the ship's masters of their claims. Signing wage receipts as part of the double bookkeeping arrangements was not found to be a substitute for notification. The claims of substantial tort damages under various theories, fraud claims, and misrepresentations of wage schedules, and emotional distress were all dismissed as unproved. Blacklisting charges because the cause of discharge was written in the seamen's books were likewise denied. The Court did, however, award attorneys' fees for seamen discharged in the United States.<sup>101</sup>

On appeal, the consolidated opinion of the Ninth Circuit in these three cases was well-grounded in the origin of the disputes. After pointing out that each case required the resolution of whether the Wage Act's projections extend to foreign crews discharged from foreign ships in foreign ports, the Court stated:

Although Congress likely could have extended the Wage Act this far, we conclude that it did not. The structure, history and more important, the plain language of the Act all point to this result. Congress must speak clearly to overcome the strong presumption against extraterritorial application of United States law, and this it has not done.<sup>102</sup>

Then, after stating that the dispute over whether ITF or lower wages should apply, the court noted that it understood the underlying issue of the double bookkeeping disputes:

Underlying the men's claims is an ongoing dispute between shipowners and the International Transport Workers' Federation, an umbrella labor organi-

101. *Jose v. M/V Fir Grove*, 801 F. Supp. 358 (D. Ore. 1992).

102. *Su v. M/V Southern Aster*; *Jose v. M/V Fir Grove*; and *Raby v. Pine Forest*, 978 F.2d 462, (9th Cir. 1992); *cert. denied*, 113 S. Ct. 2331 (1993).

zation of affiliated seafarers' unions. The unions seek to maintain worldwide wage rates that far exceed what seafarers from underdeveloped countries demand.<sup>103</sup>

After summarizing the history and issues involved in the three cases, the Ninth Circuit affirmed the dismissal of the *Southern Aster* case and the key points of *Fir Grove*, and reversed those of *Pine Forest*; the U.S. Supreme Court denied certiorari.

The Washington-Oregon trilogy would appear to have ended controversies about the meaning of the Wage Act and related claims. The Ninth Circuit's opinion determined that seafarers had the burden of proving that they were underpaid, but that the wage rates set forth in the shipping articles were the rates that must be paid; that the foreign seamen discharged in any American port were covered by the Act, but those discharged in foreign ports were not; that ballast is not cargo, and that a voyage was not just the leg of one trip, but rather included all trips until the seafarers were discharged; that the half wage provision requires an effective demand by seafarers to the ship's master of their claims; and that none of the evidence adduced supported awards for substantial tort damages, fraud, emotional distress, or blacklisting. Nevertheless, a key case in San Francisco that had been pending was also appealed to the Ninth Circuit.

#### D. THE SAN FRANCISCO CASE

This case, involving the *M/S Kiso*, a general cargo vessel owned by a Liberian company which was controlled by a Japanese company utilizing a Filipino crew, was being litigated even before *Fir Grove*, and was the first litigation to place the double bookkeeping matter in the context of the ITF campaign against FOC shipping. In summary judgment, the District Court, Northern District of California, ruled against making the case a class action suit covering all victims of double bookkeeping or all seamen who served on the *M/S Kiso* or other vessels owned by the same company; then ruled that the ITF agreement contained in the ship's articles defined the employment relationship; that "end of voyage" is established at the final port of destination and was not determined by the discharge of cargo at intermediate points; that seamen discharged in foreign ports are not covered by the Act; and that claims for wages required a full hearing.<sup>104</sup>

The plaintiffs then claimed that certain fringe benefits were not paid. These claims were dismissed.<sup>105</sup> Following trial, the District Court ruled

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103. *Id.*

104. *Mateo v. M/S Kiso*, 805 F. Supp. 761 (N.D. Cal. 1991).

105. *Mateo v. M/S Kiso*, 1993 A.M.C. 2278 (N.D. Cal. 1993).



against the seafarers on the remaining *in rem* claims for unpaid wages and statutory penalty wages. The trial court agreed that wages due were in fact paid, including vacation pay, in a timely manner, or if not timely, were paid appropriately because any delays were attributable to the seamen's failure to request payment.<sup>106</sup> On appeal, the Ninth Circuit affirmed these decisions.<sup>107</sup>

#### E. THE MALDIVES CASES

These cases involving Cyprus-flag ships, manned largely by Maldivian seamen and Greek officers, and owned by Forum Maritime, a Greek company, were brought in local courts in Louisiana by Dodson in the fall of 1992, on behalf of some Maldivian seamen. These cases may not have been strictly double bookkeeping ones although there were similar claims at least initially.

The Maldivian plaintiffs were FOC seamen who claimed that they were not receiving the pay they were entitled to under their contracts because of double bookkeeping. There were also allegations of blacklisting of the seamen and anti-union activities by the authorities in the Maldives. . . .

Testimony . . . indicated Forum paid the money claimed, in part directly to the seamen, and in part through a crewing agency which then made the payments in the Maldives. This procedure was allegedly in conformance with the law of the Maldives. The crew allege[d] that not all the money reached the intended final payees and there were several months of delays in some instances . . . .

[Later] . . . seamen filed . . . suit in state court for alleged torts only, seeking damages for blacklisting, distress allegedly caused by coercion and intimidation, [but] . . . not specifically . . . wage claims. Forum . . . removed the cases to federal court under the Foreign Sovereign Immunities Act.<sup>108</sup>

Dodson brought five cases in state court, and was able to arrest the ships and have bonds set at very high amounts for allegations involving relatively small claims — \$3 and \$4 million in two cases involving claims in thousands, or even hundreds. When the cases were remanded to federal court, these bonds were reduced to \$300,000 or less.<sup>109</sup> With pressure thus materially reduced for the defendants, the five cases were

106. *Mateo v. M/S Kiso*, 1993 U.S.D. Lexis 3004 (N.D. Cal., Mar. 1, 1993).

107. *Mateo v. M/S Kiso*, 41 F.3d 1283 (9th Cir. 1994). The seamen chose not to seek further review by the United States Supreme Court.

108. Wentker, *supra* note 39, at 431.

109. In response to an "invitation to assign reasons" from the Court of Appeals, Fifth Circuit, to which Dodson had appealed after the district court had materially reduced the amount of bonds, U.S. District Court Judge Peter Beer wrote:

I firmly believe that this U.S. District Court and others similarly situated are being subjected to an unwitting participation in attempts to manipulate exorbitant settlements of questionable wage claims by the serious and often incredibly expensive method of questioning a voyage and holding a vessel in arrest through the use of exorbi-

settled for payments of \$5,000 or less for approximately a dozen seamen, plus \$293,000 attorney's expenses for Dodson, which included maintaining ten Maldivian seamen in motels for over one year. These ships with Maldivian seamen have returned to the Port of New Orleans on voyages since then without interference.<sup>110</sup>

#### F. DOUBLE BOOKKEEPING — CONCLUDING COMMENT

The double bookkeeping cases were largely a blip, if a significant one, in the ITF's attempt to enhance its power in American ports. Thanks largely to Dodson, with assistance from the ITF and the port church groups, it is most unlikely that shipowners or charterers will permit such practices to be utilized for ships which enter American ports. The cases discussed herein, however, have not provided a method whereby the ITF can circumvent the United States laws governing boycotts, and thereby attack FOC shipping. Moreover, except for calling attention to the methods and prevalence of double bookkeeping, these cases do not affect double bookkeeping in ports of other countries. It may well be that in ports outside of North America and probably certain European countries, double bookkeeping is as prevalent as it undoubtedly was before Dodson commenced his successful campaign to eliminate it in the United States.

#### V. DEVELOPMENTS IN EUROPEAN LITIGATION

As the ITF boycott campaign grew in strength, it was inevitable that in Europe with its many countries there would be not merely isolated legal proceedings, but continuous chains and groups of proceedings in different jurisdictions to clarify the boundaries between the conflicting interests which the law seeks to protect. On the one hand, there is the right of unions and workers to secure satisfactory working conditions, but on the other hand there is the right of shipowners to trade their vessels internationally without being detained by extra-legal action in countries which have no connection with the owner, the crew or the union. To the ITF, the countries where boycotts were permitted were oases of justice in a hostile exploitive world, and to the shipowner they were areas of un-

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tant and exaggerated claims of a nature in all respects identical to those which are put forward here.

There is, in my opinion, no reasonably demonstrated basis for these exorbitant claims. Indeed, the amount of the bond I set is more than responsive to that of the claim that common sense dictates is viable.

Hussain Shakit v. Forum Trader, *per curiam*, (C.A. 92-3713, Sec. N, D.E.D. La., Nov. 20, 1992).

110. This summary of the Maldivian cases has been materially assisted by interviews with Attorney Dodson, Mar. 22, 1995, and with Charles F. Lozes and David B. Lawton, attorneys for Forum Maritime and the Maldivian Islands government, New Orleans, Mar. 23, 1995.

warranted intervention and lawlessness which vessels entered at their peril.

A shipowner confronted for the first time with a boycott could reasonably expect a demand by the ITF for the vessel to change its flag from a flag of convenience back to its national flag. This is after all the declared policy of the ITF. However, there are no reported cases of any such demand ever having been made, although there have been situations where owners have changed the flag and sometimes the crew, and the ITF intervention has ceased. The question of whether such a demand would be lawful seems never to have been asked, let alone answered, but if it were, the answer might be that even the jurisdictions most favorable to the ITF, which would be prepared to tolerate a boycott to obtain ITF wages, would not tolerate a boycott to force a change of flag. While this may well be the answer, it is surprising that the point has never been tested, bearing in mind the comments concerning British labor law of Lord Diplock in the *Nawala* case.<sup>111</sup>

If a demand on an employer by the union is about terms and conditions of employment, the fact that it appears to the court to be unreasonable because compliance with it is so difficult as to be commercially impractical, or will bankrupt the employer or drive him out of business, does not prevent its being a dispute connected with terms and conditions of employment . . . . Even if the predominant object were to bring down the fabric of the present economic system by raising wages to unrealistic levels, or to drive Asian seamen from the seas except when they serve in ships beneficially owned by nationals of their own countries, this would not, in my view, make it any less a dispute connected with terms and conditions of employment and thus a trade dispute, if the actual demand that is resisted by the employer is as to the terms and conditions on which his workers are to be employed.<sup>112</sup>

It would seem that at least a respectable argument could have been made by the ITF that the flag of the vessel was one of the terms and conditions of employment, which it required to be changed, and thus the ITF would have been entitled to the protection given to trade unions acting in a trade dispute in the United Kingdom. Such an argument, however, which would have given the highest credibility to the ITF in its

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111. *NWL Ltd. v. Woods, NWL Ltd. v. Nelson and others*, 1 W.L.R. 1294 (1980). This case in 1979 concerned a threatened boycott at an English port of a Hong Kong flag vessel with Chinese crew and suspected beneficial ownership not in Hong Kong. The crew was entirely satisfied with its terms and conditions and actually opposed the intervention of the ITF. The question in issue was whether in such a situation the unilateral action of the ITF justified the plea of trade union immunity. Lord Diplock made it clear that the law was widely framed, and that any demand about terms and conditions of employment, however unreasonable, would attract immunity. See, *ITF-FOC Book*, *supra* note 2, at 69, 85.

112. *Id.* at 8.

campaign, has never been mounted in any boycott proceedings in Europe or elsewhere.

Given that the ITF's declared policy is to oppose all FOC vessels and yet not to insist on the return to national flag under threat of boycott, the only other way to enforce the policy is to make the rates of pay so punitive that the shipowner will sooner or later return to the national flag or be defeated in a competitive market by owners remaining with their national flags.

It was inevitable that shipowners faced with very substantial demands which would undermine their competitiveness would turn to their lawyers to see what redress was available. In common with most other situations where legal redress is sought, the choice was between stopping the hostile activity by injunction or treating it as duress and seeking to recover damages and/or restitution afterwards. The legal developments in Europe during the past twenty years have centered on these two major remedies.

#### A. THE ISSUES TO BE ADDRESSED

Before it could be stated with any certainty whether ITF or crew action in any jurisdiction was permitted, a number of major issues had to be resolved, all of which were unlikely to be encompassed in any one case:

Is the law equally effective to prevent a strike or boycott in advance as it is to enable recovery in restitution or damages afterwards?

Does the concept of economic duress exist in a trade dispute context?

Can a union effect a lawful boycott on its own without the authority of the crew?

Can there be a lawful boycott, which is secondary industrial action in support of a primary dispute, where the crew members are not themselves on strike?

Can the ITF or its local affiliate make lawful demands against a vessel where there is a valid foreign collective bargaining agreement with a bona fide foreign trade union?

Is it lawful for the ITF to demand payment to its own Welfare Fund as one of the terms for permitting the release of a vessel from boycott?

If a vessel is subject to boycott, should the legality of the boycott be decided by the law of that jurisdiction or by some other system of law, i.e., the law of the flag or the country where the crew was recruited?

Does a different system of law apply to a claim in restitution than to a claim in tort?

All the above issues had to be decided by test cases in different jurisdictions. Most of these points have now been resolved, with the result that shipowners, crew, and the ITF know where they stand on the legality of any primary or secondary action in any particular jurisdiction. There

remains, however, a diminishing group of cases on more exotic and rarefied legal points, and also a number of developing cases in jurisdictions in which the law has been changed by statute where there is a need for further litigation to identify its new meaning. This has in particular occurred in the United Kingdom under the conservative Thatcher government between 1979 and 1990, which ended by making all secondary boycotts unlawful, and in Sweden by the *Lex Britannia* enacted by a socialist government which restored the ITF's liberty to boycott even vessels covered by bona fide foreign collective bargaining agreements.

Although labor law can be substantially different in different jurisdictions because it is often more closely related to politics than commerce, there were nevertheless definite trends in the litigation between shipowners and the ITF in different jurisdictions. The Scandinavian countries mainly held out with a slant towards labor, but the balance tipped away from the ITF in the remainder of Europe. In particular, there was a trend toward decisions which outlawed ITF intervention where a secondary boycott was mounted although in fact no primary dispute between the shipowner and the crew existed. A number of other European countries still permit secondary boycotts in some circumstances where there is a clearly identified primary dispute.

#### B. INJUNCTION OR RESTITUTION?

Twenty years ago, the first reaction of an attorney consulted by a shipowner asking whether an injunction could be obtained to forbid a boycott would be to consider the matter according to his own local domestic law. The port was after all within his own country's jurisdiction. The shipowner invariably felt dissatisfaction and stated that on board a ship the law of the flag should prevail, an argument which had appealed to the U.S. Supreme Court in its early rulings in the 1960s and early 1970s.<sup>113</sup> From the point of view of United Kingdom law, and indeed civil law on the continent of Europe, this was not an argument which at that time appeared likely to prevail over the effect of the local domestic law as applied in its own jurisdiction, albeit against a visiting foreign vessel.

As shipowners found themselves advised by their lawyers that there was no redress to prevent a boycott because such boycott was permitted by the local law, the question was asked whether there was an alternative remedy of claiming damages and/or restitution for what had been paid, after the duress of the boycott had been lifted and the vessel had sailed from the port. This alternative remedy had the added advantage of not delaying the ship while the issue was being tested in Court.

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113. See, *ITF-FOC Book*, *supra* note 2, at 50.

1. *Universe Sentinel*

The first case to test whether a restitutionary claim could succeed against the ITF was the English case of the *Universe Sentinel*.<sup>114</sup>

At the time of the proceedings in the early 1980s in this case, the United Kingdom law of economic duress was in its infancy. However, this case, which reached the House of Lords (the U.K. Supreme Court), drew on dicta in earlier decisions and held that economic duress could indeed be relied on to avoid contracts entered into in a situation where resistance to the demands would have caused harsh economic loss. As a result, restitution of sums paid under duress could succeed. The judgment related only to the payment to the Welfare Fund because the ship-owners conceded that in the light of the *Nawala* case, in which judgment was handed down during the currency of the *Universe Sentinel* proceedings, they could not claim back in restitution that which the ITF could not have been prevented from demanding under threat of boycott in the first place. The issue was whether the demand was connected with terms and conditions of employment. By three judges to two it was held that the Welfare Fund payment was not so connected and was therefore refundable.

Later in the 1980s the same issue was tried in the Norwegian Appeal Court in the case of the *Dorthe Oldendorff*<sup>115</sup> with precisely the same result. Three judges held that the Welfare Fund was not adequately connected with terms and conditions of employment, and the minority of two judges stated the contrary.

The proper or applicable law of the agreement entered into as a result of the boycott of the *Universe Sentinel* at Milford Haven, Wales, was never considered and was not in issue, but possibly from the success of this case the point began to germinate throughout the 1980s, leading to the important decisions of the *Saudi Independence*<sup>116</sup> in the Netherlands,

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114. *Universe Tankships Inc., of Monrovia v. Int'l Transport Workers Federation*, and others. App. Cas. 366 (H.L. 1983). The *Universe Sentinel* flew the Liberian flag, but was beneficially owned in the United States and had a mixed crew, including Indonesians. The vessel was detained by ITF boycott at the Welsh port of Milford Haven, with the ITF demanding full ITF worldwide conditions. The detention of the vessel would have had serious economic consequences involving more than one ship, due to the conditions in a fleet mortgage. The owners felt that they had no choice but to pay, but were determined to claim the money back again. Therefore as soon as the vessel sailed after signing up on ITF terms and making the necessary payments, notice of avoidance of the agreements was given and a Writ issued for restitution of all the money paid including back pay.

115. *Eidsivating* [Norway] Court of Appeals, May 19 1989.

116. *Hoge Raad* 16 December 1983, *Nederlandse Jurisprudentie* 1985, nummer 311; *Schip & Schade* 1984, nummer 25.

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followed by the *Evia Luck*<sup>117</sup> in the United Kingdom, and the *Nervion*<sup>118</sup> and the *JSS Britannia*<sup>119</sup> in Sweden.

## 2. *Saudi Independence*

The case of the *Saudi Independence*, which went to the Dutch Supreme Court, was the first case in Europe to grapple with the conflict between domestic law pertaining to the legality of strikes and the chosen foreign law in a contract of employment. The *Saudi Independence* sailed under the flag of Saudi Arabia, and employed a Filipino crew under Filipino employment contracts, which were stated to be subject to the law of the Philippines. The crew had a number of grievances and sought the assistance of the ITF while the vessel was at a Dutch port. The ITF advised the crew to strike. The owners commenced proceedings against both the ITF and the crew, seeking an injunction restraining the strike.

The court accepted the argument that the question of whether the crew was permitted to strike should be decided in accordance with the law of the employment contracts. It was held that under Filipino law the strike was unlawful and therefore the injunction was granted. The decision was upheld both in the Dutch Court of Appeal and the Dutch Supreme Court.

The ITF argued that irrespective of whether the action of the crew should be decided in accordance with Filipino law, the legality of the action taken by the ITF should be decided under Dutch law where the act of promoting the strike occurred. The Dutch Supreme court, however, confirmed the Appeal Court decision, that even if Dutch law should apply to the ITF's conduct, such conduct would be unlawful under Dutch law because it was inducing a strike which was unlawful under the applicable foreign law, that of the Philippines.

## 3. *Evia Luck*

In the mid-1980s after the United Kingdom legislation to limit secondary industrial action, shipowners believed that they were more likely to be successful in litigation in the United Kingdom and conversely the ITF believed that it would be more successful in Scandinavia. In the result, for unexpected reasons, both were proved wrong.

The *Evia Luck* was subject to boycott in Sweden and the boycott was lifted in exchange for the owners signing up on ITF terms subject to pay-

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117. *Dimskal Shipping Co., SA v. Int'l Transport Workers Federation*, 2 App. Cas. 152 (H.L. 1992).

118. *Nervion* (HD 1987:152) Swedish Supreme Court, 1987 No. 152; NJA [Sweden] 1987 at 885.

119. *JSS Britannia* (AD 120/89), Swedish Labour Court, No. 120, 1988.

ing back to the ITF's account in London and signing agreements which were stated to be subject to English law. The owners then took the novel step of suing the ITF in London (where its headquarters is located) rather than in Sweden where the boycott had occurred. The ITF responded, seeking a stay on grounds of *forum non conveniens*. Judge Hirst in the Commercial Court in London, however, ruled in February 1986, that the ITF's application failed and that the case could continue in London.

The action proceeded as a claim for damages and restitution in the Commercial Court in London. The damages claim was ultimately abandoned, but the restitution claim was pursued to the House of Lords. The issue was straightforward. Both parties agreed that the claim was subject to the English law of restitution. The ITF, however, argued that the legitimacy of the duress applied should be tested in accordance with the domestic law of the place where the boycott happened, i.e., Sweden. The owners argued that given that the parties had made the agreements entered into under threat of boycott subject to English law, it should apply to all aspects of the claim, including the test of the legitimacy of the boycott.

At first instance the owners failed as the respected Commercial Judge Phillips, stated that he considered the owners' case to be "ludicrous." However, in the Court of Appeal, two judges out of three considered that the ITF, having chosen English law, could not complain at English law being applied to the whole situation, including the test of the legitimacy of duress. The ITF then appealed further to the House of Lords, where it again lost with four judges finding for the owners and one for the ITF.

The owners abandoned their claim for damages in tort under the English double actionability rule in *Boys v. Chaplin*,<sup>120</sup> which says that to succeed in an English Court for a notionally tortious act committed abroad, it is necessary to show not only that the act in question is tortious under English law, but that the claim could also be actionable in the foreign country where the act was committed. During the proceedings it became quite clear that under Swedish domestic law, the boycott was lawful. Faced with this the owners abandoned their claim for damages.

Another interesting point which emerged was that although the claim would have failed under Swedish domestic law, had the case been brought in a Swedish Court, the Swedish Court would probably have applied English law as the applicable law and owners would therefore have won. This had become apparent from the Swedish case of the *Nervion*, which had by then been heard at first instance. Thus, although owners eventually won in the United Kingdom, it appears that they would have

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120. *Chaplin v. Boys*, App. Cas 356 (H.L. 1971).



won in any event in Sweden, to which country the ITF had unsuccessfully tried to have the case remitted! It is well established under English law that when considering foreign law, only the foreign domestic law is applied and not its private international law rules. Therefore, it was of no concern to the English Court that the claims would in fact have succeeded in Sweden under its private international law rules even though it would have failed under Swedish domestic law.

#### 4. *Nervion*

In the early 1980s, shipowners feared to go to the Northern Scandinavian countries, Norway, Sweden, and Finland. The law appeared to be very heavily weighted in favor of unions and employees against employers. However, the labor movement received a sudden and unexpected shock by the decision in the *Nervion*.

The *Nervion* had been subject to boycott in a Swedish port and had been signed up on ITF terms. Owners did not, however, pay the crew in accordance with the ITF employment contracts and the crew, supported by the ITF, decided to pursue a claim for ITF wages. This it did not by industrial action, but by the simple expedient of making a maritime claim against the ship for outstanding wages. In order to obtain security for its claim by arresting the vessel, the crew had to sue in the Commercial Court rather than the Labor Court.

For the first time, the Swedish Commercial Court grappled with the question of what law should be applied to test the validity of contracts entered into as a result of industrial action. In the absence of any express stipulation, it ruled in favor of the law of the flag, which was Panama. In accordance with Panamanian law, such contracts were voidable by reason of duress, even though this would not have been the case under Swedish domestic law.

Owners, therefore, won their claim in restitution, and this was subsequently affirmed by the Swedish Supreme Court. It is interesting to contemplate what might have been the outcome had the case gone first to the Labor Court from which there is no appeal to the Swedish Supreme Court.

The cases of the *Evia Luck*, where the chosen system of law was followed, and the *Nervion*, where no system of law was chosen, left open the question of what should happen where the ITF insisted under threat of boycott on choosing a system of law favorable only to the ITF but not to the shipowner. Could such a "choice" of law be disregarded in favor of the system of law with which the contract would otherwise have been most closely connected? This interesting question started to be litigated in the unreported case of the *Annabella Two* in the Commercial Court in

London, but it was never taken to a conclusion, possibly because it would no longer have been a useful test case. This was because during the proceedings the English common law rules on the choice of "proper" law were superseded by the "applicable" law under the Rome Convention,<sup>121</sup> as enacted in the United Kingdom by the Contracts (Applicable Law) Act 1990.

Article 8 of the Rome Convention says that the material validity of a contract should be decided in accordance with the law which would apply if the contract were valid. This does not leave scope to argue that such law should be ignored, although under Article 8, Rule 2, it could be argued that the question of consent should be decided in accordance with the law of the plaintiff's residence. Also, there is a provision under Article 16 that the Convention does not apply if it would be contrary to the public policy of the forum. These points remain to be argued in some future case in the United Kingdom or any other country which has adopted the Rome Convention.

Not surprisingly, after the *Evia Luck* and the *Nervion* decisions, the ITF inserted a specific Swedish choice of law clause into agreements entered into under boycott in Sweden. This tactic was unsuccessful in the Swedish Court in the case of *Phillips Arkansas*<sup>122</sup> where the ship was subject to boycott at a Swedish port and the court affirmed that the agreements were effectively avoided under Liberian law, being the law of the flag. To date, however, the effectiveness of the choice of Swedish law has not been challenged in the United Kingdom courts, beyond the tentative proceedings in the *Annabella Two* case. Such proceedings in the English courts would have particular significance because there is always jurisdiction over the ITF in English courts as its headquarters is in London.

The ITF might have thought that it would have no further difficulties under Swedish law. This was not to be. It suffered an even greater shock from the *JSS Britannia* case.

##### 5. *JSS Britannia*

The *JSS Britannia*, which was registered in Cyprus, called at Gothenburg and was subject to boycott by the Swedish Seafarers Union and the ITF, which unions requested an ITF agreement. The owners stood their ground, arguing that there was already a valid collective bargaining agreement ("CBA") with the crew's trade union in the Philippines. The court held that industrial action by a union against an employer who al-

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121. The Rome Convention is the name given to the agreement by European Community members as to the law applicable to contractual obligations open for signature in Rome, June 19, 1980, which harmonized the private international law rules for member countries of the European Community, now the European Union.

122. *Phillips Arkansas* (AD 10/92). Swedish Labour Court, No. 10, 1992.

ready had a subsisting CBA with a bona fide foreign union was unlawful. An injunction was therefore granted to restrain the boycott, and the vessel sailed without further intervention.

Shipowners' joy at the success of the *JSS Britannia* case was short lived. The then Labor government of Sweden, as one of its last acts in office before losing power to a conservative Government, amended Swedish labor law in such a way that although intervention with a Swedish CBA would remain unlawful, it would be permitted where the CBA was with a foreign trade union. This amendment to the Swedish Co-determination Act is now colloquially known as the "Lex Britannia." Although the incoming Conservative government had said that it would reverse Lex Britannia, it never did so before being replaced again by a Labor government. Thus, Lex Britannia remains the law, the effect of which was made clear in the *Estoril* case.<sup>123</sup>

#### 6. *Estoril*

The Lex Britannia came into force on July 1, 1991, and in January 1993 the French-owned Kerguelen flag *Estoril* was subject to boycott at the Swedish port of Wallhamn. The Portuguese crew had a valid CBA under a union which was federated to the ITF. Nevertheless, the ITF caused the vessel to be subject to boycott in support of a demand for ITF wages. The matter was heard by the Swedish Labor Court which held that in view of the Lex Britannia the union intervention was not unlawful and that a request for an injunction should therefore be refused.

#### C. EUROPEAN LAW AND LEX BRITANNIA

At the time of the hearing of the *Estoril*, Sweden had not yet become a member of the European Union, and so the question was never put to the test as to whether the Lex Britannia is contrary to the terms of the Treaty of Rome<sup>124</sup> and European Maritime Law.

Since the entry of Sweden to the European Union on January 1, 1995, however, numerous academic and practicing lawyers in Sweden and elsewhere have voiced the opinion that Lex Britannia is contrary to various provisions of Community law, in particular Article 6 on discrimination on grounds of nationality, Article 59 on the provision of services, and Article 65 which indicates that as long as restrictions exist, it must be done without distinction on grounds of nationality, echoing the funda-

123. *Estoril* (AD Interim Decision 28/93), Swedish Labor Court No. 28, 1993.

124. The Treaty of Rome is the name given to the treaty made in 1957 between the founding members of what became the European Union, and subsequent amendments and accessions thereto. It is essentially the constitution of the European Union, and is loosely referred to as meaning the entire body of European Law.

mental prohibition of discrimination based on nationality contained in Article 6. There is also possible violation of Article 61 of the Treaty in relation to the provision of maritime transport between member states. It thus would appear to be only a matter of time before the validity of *Lex Britannia* is challenged either in the Swedish Courts or in the European Court.

## VI. CONCLUSION

In the balance of the world, ITF activities continue. Australia remains a key sector of ITF strength.<sup>125</sup> Antitrust legislation, which once served as redress for shipowners, has been amended by the Labor government there, and new labor legislation does not appear to block ITF boycott pressures. The Waterside (longshore) Workers' union, a strong ITF supporter, and the long-time communist-led Seamen's Union have merged, adding to the ITF's control. Petroleum companies, which once defied the ITF in Australian ports, now either contract out their voyages to independent charterers holding a blue certificate, or send in their own tankers flying flags from a country flag ship which has the certificate. Whether some Asian or other flagged ships still engage in double book-keeping to escape the ITF pressure in Australian ports, as they certainly did in the 1980s, is not known.

Japan has seen its once strong Seamen's union, for many years the only Japanese union that engaged in nationwide collective bargaining, decline in numbers and strength precipitously as Japan has become the third largest country of beneficial owners of FOC ships. As do the log carriers in the United States trade, many if not most of these ships continue to use Japanese officers with their Philippine or other Third World crews.<sup>126</sup> There have been a few boycotts and resulting litigation in this country of peaceful labor relations, but generally the traditional quiet atmosphere prevails.

The uneasy relationship between the Asian underdeveloped countries and the ITF has been relatively calm in recent years, but tensions could rise in the future.<sup>127</sup> Under David Cockroft's leadership, the ITF has been attempting to expand its Asian presence and to improve its relationships there. The Trust Fund is, as noted in this study, slated for a key role in this. On the other hand, the Asian countries have already been concerned about the 1995 increases in the ITF's unilaterally determined

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125. See, *ITF-FOC Book*, *supra* note 2, at 89; and Wentker, *supra* note 39, at 428 (for update). See also, Clifford B. Donn and G. Phelan, *Australian Maritime Unions and Flag of Convenience Vessels*, 31 J. INDUS. REL. 329 (1991).

126. See, *ITF-FOC Book*, *supra* note 2, at 94; and Wentker, *supra* note 39, at 429, for background and update.

127. See *ITF-FOC Book*, *supra* note 2 at 96; and Wentker, *supra* note 39, at 428.

standard and TCC wage rates in part because of Eastern European country competition. This unease will surely be aggravated because the ITF's Fair Practice Committee at its June 1995 meeting announced that these rates will be raised 9 percent beginning January 1, 1998. The new rates will be set at \$934 per month for the standard rate and \$1,200 for the TCC one.<sup>128</sup>

The ITF campaign against FOC shipping has ebbed and flowed in its intensity over the years. Now under Cockcroft, the campaign is being increased. A new blacklist which will target whole fleets and their owners, managers, and related manning agents is being effectuated. Apparently, the object is to induce boycotts against any ship with particular owners or managers regardless of conditions on the particular ship if the ITF finds conditions on the shipowners' fleet is general objectionable.<sup>129</sup> How this will play out remains to be seen other than it appears certain to invite considerable litigation, most of which has not been going well for the ITF in recent years both in the United States and in Europe. The real question is whether the new blacklist policy will be used against operators of genuinely poor condition "rust buckets," or whether it will be a further attack on FOC shipping regardless of shipboard conditions.

The ITF has the advantage of fighting a campaign as a single body, with a single policy, and with almost unlimited funds to carry it out. Owners, on the other hand, are not united. Although there have been a few isolated occasions of cooperation by owners in providing funds for key litigations, such occasions have been rare. Shipowning organizations have always shown interest at the prospect of cases being successfully fought by FOC owners against the ITF, but when it comes to assisting in the funding of such cases, their interest has waned. Whether the incipient IMEC can alter this short-term outlook, remains to be seen. It is, however, a step toward improved defense for the shipowners.

The major cases to be determined in Europe relate to the conflict between Swedish law and the provisions of the Rome Convention on Applicable Law within the European Community, and the extent to which claims for restitution can be successful where the chosen system of law allegedly put there under duress can be attacked. Being headquartered in London, the ITF is always subject to the jurisdiction of English courts unless or until it removes its headquarters to another country. In restitution cases, the question of validity under the Rome Convention must also be considered in any new case.

In the United States, the law is quite clear. The boycott question was

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128. *ITF Rates Increased*, ITF NEWS (Aug./Sept. 1995), at 10.

129. *Id.* See also, James Brewer, *ITF Warns It May Widen Blacklisting*, LLOYD'S LIST, Jan. 3, 1995, at 4 (copy of ITF's blacklist statement on file with authors).

well settled in the 1960s and 1970s. The much more recent double bookkeeping cases have determined the reach of the statutes pertaining to this issue. A shipowner that in the future engages in double bookkeeping in United States ports is clearly and deservedly subject to substantial penalties.

As the ITF works hard to tighten its restrictions against FOC shipping, it increases its power vis-a-vis its affiliated unions in the developed world. These unions continue to weaken because of loss of membership and income. The ITF can do little, if anything, about the membership of affiliates in the developed world because there seems no hope that FOC shipping will be driven from the seas. The ITF's failure to recognize second registers as a superior answer to flagging out for declining developed country registers seems guaranteed to enhance the number and percentage of FOC shipping in the world fleet regardless of what anti-FOC policies the ITF adopts.

The ITF can, and does, aid developed country seamen union finances. To do this, the ITF uses patronage e.g., the appointment of union officials as port inspectors; it promulgates rules that such unions, as well as the ITF, can "tax" FOC shipowners by what may well be questionable methods, such as now being done by the American unions; and it provides grants from the Trust or the Welfare Fund. The net effect is a further increased dependency on the part of the affiliates, and an increase in power to the growing ITF bureaucracy and its general secretary.

An interesting paradox inherent in the ITF campaign against FOC shipping was called to attention in the 1983 ITF-FOC BOOK:

Finally, the ITF is an organization that has vowed to eliminate all FOC ships from commerce. It has failed to do so, but has grown wealthy in the process. It now faces an interesting dilemma. In the unlikely event that it would succeed in its avowed purpose, the ITF would eliminate the source of its wealth.<sup>130</sup>

To put the matter another way, the ITF needs to continue to lose its war against ITF shipping in order to maintain its income and its power. Moreover, maritime unions in many countries are increasingly dependent upon the ITF's power and wealth, and probably could not survive without assistance through this income stream.

The expansion of FOC shipping since 1983 has, therefore, resulted in enhanced wealth for the ITF. The Cockcroft administration is utilizing this wealth to expand the ITF's bureaucracy and activities to further an enlarged effort against FOC shipping. If history is any guide, FOC shipping will continue to increase its market share because developed country

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130. See, *ITF-FOC Book*, *supra* note 2, at 151.

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seamen and their unions have priced themselves out of most markets. Meanwhile, most shipowners are unlikely to join forces against the ITF tactics, but instead will acquire blue certificates as a cheaper alternative, (which it usually is in the short run). Consequently, the ITF will grow ever more wealthy as it continues its efforts against FOC shipping's ever-increasing market share.

