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## RUSH TO THE SHIPPING PEAK

Trans-Pacific peak season may be weeks away, but rates and demand already are turning upward

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# COLLECTING DAMAGES FOR PIRACY LOSSES

**PIRATE ATTACKS AGAINST** commercial vessels are increasing in international and territorial waters. The International Maritime Bureau reports 406 attacks during 2009, a 38.5 increase over 2008 and the third successive year of double-digit percentage increases. Somali pirates are responsible for the bulk of these attacks, but attacks also increased off the coasts of Nigeria, Singapore, Bangladesh and several South American nations.

Losses are staggering. According to the IMB, pirates boarded 153 vessels in 2009, seajacking 49, and shipowners paid \$90 million to ransom ships, cargoes and crews.

Ransoms, however, account for just a portion of the damages. Hundreds of millions of dollars of property has been pirated, and some owners and operators may never recover the losses. Delivery delays or damage to or theft of cargoes cause losses for cargo owners. Shipowners and operators suffer increased operating costs whether their ships pass through high-risk areas or divert around them.

The international community has focused efforts on deterring pirates. Despite these efforts, the Somali pirates' success in extracting ransoms may be the reason attacks elsewhere are increasing. Clearly, something more than physical deterrence is necessary. The recent reports of pirate attacks by Mexican drug cartel members on Falcon Lake, which straddles the U.S.-Mexico border, demonstrate that physical deterrence alone is not enough.

The U.S. can take the lead in establishing effective disincentives for foreign states that aid and abet piracy. Injured parties may be able to look to U.S. courts for a forum to hold foreign states responsible for their losses.

Jus cogens, a principle of international law, binds states to respect and enforce certain global norms regardless of whether that state has consented to be so bound. Piracy has

been considered a violation of the law of nations for centuries, and the prohibition of piracy is a generally accepted jus cogens norm.

Liability for aiding and abetting piracy has been established in American jurisprudence since pre-colonial times. Liability is routinely ascribed to individuals, but there is no principled reason why states profiting from pirates' criminal acts should not face civil liability for aiding and abetting piracy and sea robbery.

States profiting from pirates' criminal acts are the most egregious abettors. Kenya is a prime example. Recent reports indicate Somali pirates work within Kenya's lax, corrupt legal system to launder ransom money. Somali pirate warlords and their financiers use much of this money to buy real estate in Kenya.

The Kenyan government assesses a 30 percent withholding tax on the gross rental income received from real properties, plus an approximate 1 percent tax on the value of the property and, in Nairobi (where much of the pirates' money is invested), an 8 percent land value tax.

Kenya clearly and significantly profits from piracy and armed robbery at sea and should be held liable to the private parties its aiding and abetting have harmed.

It's been said that no good thing comes easy, and that's certainly true of the search for an effective means to hold state sponsors of piracy responsible for losses caused by pirates.

The chief obstacle preventing a judgment against an aiding and abetting state is that no court, with the possible exception of the abetting states' own courts, has clear jurisdiction to hear such cases. Private parties aren't allowed to institute proceedings in the International Court of Justice, and the federal Foreign Sovereign Immunities Act deprives U.S. courts of jurisdiction over foreign states unless

one of the FSIA exceptions applies. The FSIA exceptions are so restrictive courts rarely find jurisdiction to hear claims against foreign states.

One exception, however narrow, provides promise. The expropriation exception allows a private party to sue a foreign state in U.S. courts in cases in which property is taken in violation of international law, and that property (or property for which it is exchanged) is either (1) present in the United States in connection with a commercial activity carried on in the United States by the foreign state, or (2) not present in the United States but owned or operated by a foreign state's agency or instrumentality that is engaged in a commercial activity in the United States.

Without doubt, property taken by pirates on the high seas is property taken in violation of international law, and it is possible to prove that agencies or instrumentalities of foreign states engaging in commercial activity in the U.S. may own property exchanged for property taken by pirates.

Those suffering property losses within a foreign state's territorial waters could not avail themselves of the expropriation exception because attacks within territorial waters are not "piracy" as defined by the 1982 U.N. Convention on the Law of the Sea. Nevertheless, the exception may provide a means to recover losses occurring in international waters. Perhaps more important, lawsuits against foreign states to recover for such losses finally may provide an incentive for aiding and abetting nations to deter future attacks.

Losses to pirates are better avoided, of course, but we need not assume such losses are permanent after all. **joc**

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