

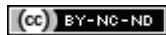
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NOTES

FROM BLACKBEARD TO JACK SPARROW—WHO ARE TODAY’S
PIRATES AND WHY DO WE CARE? THE EFFECT THE LEGAL
DEFINITION OF PIRACY HAS ON THE INTERNATIONAL SHIPPING
INDUSTRY AND MARITIME INSURANCE COVERAGE

Jamie Schumacher



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NOTES

FROM BLACKBEARD TO JACK SPARROW—WHO ARE TODAY’S PIRATES AND WHY DO WE CARE? THE EFFECT THE LEGAL DEFINITION OF PIRACY HAS ON THE INTERNATIONAL SHIPPING INDUSTRY AND MARITIME INSURANCE COVERAGE

*Jamie Schumacher**

ABSTRACT

Today’s pirates may seem more like terrorists, and their effect can be felt on a variety of sectors within society, most notably international commerce. The shipping industry deals with the threat of pirate attacks on a regular basis. In order to prevent a profit loss from those attacks, the industry has sought insurance coverage. The difficulty arises within these insurance policies as to the definition of “piracy,” and whether acts that more closely resemble terroristic activities as opposed to the traditional notion of piracy are covered. This Student Note evaluates the evolving definition of piracy, both within the United States’ court system and in international law. The lack of a consistent definition raises the argument that policy coverage varies too significantly to effectively protect the economic loss associated with a pirate attack. The Note concludes by noting that regardless of how piracy is defined, the threat of attacks still exists. Additionally, due to liability under the United Nations Convention for the International Sale of Goods (CISG), insurance coverage within the shipping industry will still be sought.

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I. INTRODUCTION

Whether it's Blackbeard, Calico Jack, or the always-lovable Jack Sparrow, pirates have received publicity for centuries. They have roved the high seas stealing golden treasures of old and precious cargo of new. Today these pirates come in a more modern form with AK-47s and Rocket Propelled Grenades in place of swords. Although only a few have come face to face with pirates recently, it is rumored they no longer dawn the peg-leg or the eye patch. Despite the more modernized appearance of today's pirates, they still affect our lives, especially the lives of sailors and those involved in the shipping industry. Pirates today are also influencing the world economy by rerouting shipping lanes and causing massive loss of both cargo and ships.

The difficulty today is in how to identify these pirates; they no longer identify themselves with the black skull flag on their masthead. Today's pirates sometimes seem more like terrorists, attributing their actions as politically motivated. With occurrences of terroristic attacks and pirate attacks bearing marked similarities, it becomes difficult to separate the two. Why should we need to? Many things in society revolve around how something is defined, and this is no exception. Courts have recently debated the question about whether one can be charged with the crime of piracy for committing an act that no longer fits the 1820's definition.¹ This difficulty expands into how the shipping industry deals with pirate versus terrorist attacks and how the world responds to these occurrences.

This note begins by looking at the evolving definition of piracy in Section II. In Section III it will take that definition and apply it to the increase in attacks facing the world today. Section IV will evaluate how the shipping industry classifies pirate attacks within the United Nations Convention for Contracts in the International Sale of Goods (CISG) and what that means for both buyers and sellers. Section V will discuss how the industry tries to deal with the increase in attacks through marine insurance. Finally, Section VI and VII will discuss how some piracy may seem to be having a positive impact, but how when the final numbers come in, piracy

¹ See, e.g., *United States v. Dire*, 680 F.3d 446, 456 (4th Cir. 2012), *cert. denied*, 133 S. Ct. 982 (2013).

clearly falls in the negative column. Piracy costs the world economy billions of dollars each year, and the little positive effect it is having for third-world countries and their pirates is actually detrimental in the long run.

II. EVOLVING DEFINITION

In the United States, piracy is defined as “whoever, on the high seas, commits the crime of piracy as defined by the law of nations, and is afterwards brought into or found in the United States, shall be imprisoned for life.”² Thus, piracy is defined by looking to the “law of nations.”³ The law of nations, as it is under treaties and current customary international law, breaks down the crime of piracy into five elements:

- (1) [A]ny illegal act of violence or detention, or any act of depredation;
- (2) committed for private ends; (3) on the high seas or a place outside the jurisdiction of any state; (4) by the crew of the passengers of a private ship . . . ;
- (5) and directed against another ship . . . , or against persons or property on board such ship⁴

The Supreme Court, in *United States v. Smith*, encountered a situation where a crew mutinied, confined their officer, and seized an armed vessel without any authorization or commission.⁵ They sailed out to sea and committed the acts of plundering and robbing a Spanish vessel.⁶ The Court noted that the definition of piracies “might have been left without inconvenience to the law of nations.”⁷ The Court concluded that whatever differences may exist as to the definition of piracy, it is true in all views that piracy includes robbery or forcible depredations upon the sea.⁸ The Court stated that they would not hesitate to declare the act of piracy, by the law of nations, as “robbery upon the sea.”⁹

² 18 U.S.C. § 1651 (2012).

³ *Dire*, 680 F.3d at 456.

⁴ *Id.* at 465.

⁵ *United States v. Smith*, 18 U.S. 153, 154 (1820).

⁶ *Id.*

⁷ *Id.* at 158.

⁸ *Id.* at 161.

⁹ *Id.* at 162.

In *United States v. Dire*, the defendants mistakenly attacked a Navy ship on the high seas, which had disguised itself as a merchant vessel.¹⁰ Crewmembers of the Navy ship could see that one of the defendants was armed with a loaded rocket-propelled grenade launcher and that two others were carrying AK-47 assault rifles.¹¹ A brief exchange of fire occurred with the defendants firing at the navy ship and the navy ship responding.¹² After the short exchange, defendants fled, but were captured by the crew.¹³ The court decided that the phrase “as defined by” incorporates evolving concepts and therefore the definition of piracy changes with advancements in the law of nations. Where the current definition, based on customary law as reflected in the United Nations Convention on the Law of the Sea (UNCLOS), includes any act of illegal violence, the defendants’ actions constituted piracy.¹⁴

In *United States v. Hasan*, an opinion on a motion made by one of the *Dire* defendants to dismiss his piracy count, the federal district court concluded that piracy included acts of violence committed on the high seas for private ends.¹⁵ The *Hasan* court defined piracy within § 1651 as consisting of any of the following acts and their elements:

(A) (1) any illegal act of violence or detention, or any act of depredation; (2) committed for private ends; (3) on the high seas or a place outside the jurisdiction of any state; (4) by the crew or the passengers of a private ship . . . ; (5) and directed against another ship . . . , or against persons or property on board such ship . . . ; or

(B) (1) any act of voluntary participation in the operation of a ship . . . (2) with knowledge of the facts making it a pirate ship; or

(C) (1) any act of inciting or of intentionally facilitating (2) an act described in subparagraph (A) or (B).¹⁶

Although not as developed as in *Smith*, the *Dire* and *Hasan* courts relied heavily on international laws and treaties to determine whether or not

¹⁰ *Dire*, 680 F.3d at 449.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* at 469.

¹⁵ 747 F. Supp. 2d 599, 640–42 (E.D. Va. 2010), *aff’d sub nom.* *United States v. Dire*, 680 F.3d 446 (4th Cir. 2012), *cert. denied*, 2013 WL 215609 (2013).

¹⁶ *Id.* at 640–41.

the definition of piracy included violent conduct.¹⁷ Both the High Seas Convention and UNCLOS define piracy as including acts of violence committed on the high sea for private ends, not necessarily including an actual taking.¹⁸ The *Dire* court noted that the United States was a signatory to the High Seas Convention, along with 62 other parties, and not a signatory to UNCLOS, which has 162 state parties.¹⁹ The number of signatories to UNCLOS represents the majority of member states of the United Nations.²⁰ However, the *Dire* court noted that even though the United States is not a signatory, it may still be enforceable within the jurisdiction.²¹ Additionally, the United States did sign United Nations Security Council Resolution 2020, which incorporates the UNCLOS definition of piracy, further supporting the argument that the UNCLOS definition is accepted in United States courts.²²

The question currently being debated is whether terroristic activities and actions involving one ship as opposed to two constitutes “private ends,” with some arguing that it does.²³ Some scholars argue that “private ends” is not defined in UNCLOS and should not be seen to include insurgent groups or other state or politically motivated non-state actors.²⁴ However, the *Hasan* court noted that the answer is unnecessary in determining that the

¹⁷ See *Dire*, 680 F.3d at 456–64 (stating that it was necessary to define the crime of piracy by “expressly incorporating the definition of piracy under the law of nations”); *Hasan*, 747 F. Supp. 2d at 616 (“To ascertain how the law of nations defined piracy, the [Smith] Court consulted ‘the works of jurists, writing professedly on public law[s,] the general usage and practice of nations[, and] judicial decisions recognizing and enforcing [the law of nations on piracy].’”).

¹⁸ U.N. Convention on the High Seas art. 15, Apr. 29, 1958, 450 U.N.T.S. 11 (defining piracy as including “any illegal acts of violence, detention or any act of depredation”); U.N. Convention on the Law of the Sea art. 101, Dec. 10, 1982, 1833 U.N.T.S. 397 (defining piracy as including “any illegal acts of violence or detention, or any act of depredation”).

¹⁹ *Dire*, 680 F.3d at 458–59.

²⁰ *Id.* at 462 (stating that there are 192 member countries in the United Nations out of a total 194 countries recognized by the United States State Department (citing *Hasan*, 747 F. Supp. 2d at 633–34)).

²¹ See *id.* at 461 (holding that “[a] treaty can either ‘embod[y] or create[] a rule of customary international law,’ and such a rule ‘applies beyond the limited subject matter of the treaty and to nations that have not ratified it.’” (alterations in original) (quoting *Hasan*, 747 F. Supp. 2d at 633)).

²² See S.C. Res. 2020, ¶ 7, U.N. Doc. S/RES/2020 (Nov. 22, 2011) (“further reaffirming that international law, as reflected in the United Nations Convention on the Law of the Sea of 10 December 1982, sets out the legal framework applicable to combating piracy and armed robbery at sea, as well as other ocean activities[.]” (emphasis in original)).

²³ *Hasan*, 747 F. Supp. 2d at 637.

²⁴ Sandra L. Hodgkinson et al., *Piracy: New Efforts in Addressing This Enduring Problem*, 36 TUL. MAR. L.J. 65, 117–18 (2011).

core definition of piracy includes acts of violence without an actual taking.²⁵

The critical distinction between piracy and other crimes is that pirates attack vessels outside the territorial jurisdiction of any nation, causing devastating effects on global commerce and navigation; for this reason, courts have labeled pirates *communis hostis omnium*, “common enemy of all,” and *hostis humani generis*, “enemies of all mankind.”²⁶ In response to this trans-national enemy, the International Maritime Bureau (IMB) created a Piracy Reporting Centre, focused on suppressing piracy and armed robbery against ships. The IMB’s definition of piracy is more expansive than any United States’ court decision, for it encompasses acts that do not occur “on the high seas,” that is, outside of a nation’s territorial jurisdiction. Piracy, for purposes of IMB statistics, is “[a]n act of boarding or attempting to board any ship with the apparent intent to commit theft or any other crime with the apparent intent or capability to use force in the furtherance of that act.”²⁷ This definition was meant to be more encompassing than previous definitions, and includes all actual or attempted attacks on vessels while in port, anchored, berthed or underway.

Although the judiciary and international sources like IMB seem to be expanding the definition of piracy to comport with modern issues, UNCLOS still draws a line and excludes politically motivated acts. Under Article 101, UNCLOS defines piracy but does not include terroristic activity and other politically motivated actions that in recent times have become blurred with piracy. The distinction is difficult since some piratical acts clearly falling within the international definition seem to be more politically motivated, coming from third-world nations against first-world countries. Additionally, 80% of today’s pirate attacks occur in territorial waters and while ships are in port, thereby excluding them from the

²⁵ *Hasan*, 747 F. Supp. 2d at 637.

²⁶ *See Dire*, 680 F.3d at 454; *Hasan*, 747 F. Supp. 2d at 608.

²⁷ *IMB Piracy Reporting Centre*, ICC COMMERCIAL CRIME SERVICES (Nov. 17, 2012), <http://www.icc-ccs.org/piracy-reporting-centre>. *IMB Reports Drop in Somali Piracy, but Warns Against Complacency*, ICC COMMERCIAL CRIME SERVICES (Oct. 22, 2012), <http://www.icc-ccs.org/news/811-imb-reports-drop-in-somali-piracy-but-warns-against-complacency>; *Piracy*, RISK INTELLIGENCE, (Sept. 27, 2013), <http://www.riskintelligence.eu/about/approach/piracy/>.

UNCLOS definition for failing to meet the “high seas” element.²⁸ Perhaps the IMB definition may be best suited to deal with modern times by including all acts, regardless of private or political motivation, committed against a vessel or its crew as an act of piracy. In conjunction with UNSC 2008, which gave some precedent to apprehend pirates in territorial waters, IMB may have provided the most functional definition of modern piracy.

Although the legal definition of piracy may be subject to change,²⁹ and it may be argued that other international sources such as UNSC 2008 and IMB have provided a more practical definition for the judiciary, how does this affect other policies such as insurance coverage for vessels and cargo? Does the definition of piracy, for insurance purposes, include the more expansive notions of attacks on ships both in port and at sea, whether or not amounting to the level of robbery or, for a successful claim, is it required that the UNCLOS definition be satisfied, or even the more narrow 1820 definition of the Supreme Court in *Smith*?

III. INCREASE IN ATTACKS

Despite a slight decline recently, piracy as a whole has been on the rise in the past five years. As of August 2013, IMB reported that there had been a total of 176 attacks worldwide with 10 vessels hijacked in 2013.³⁰ Most of the recent piratical activity occurred off the coast of Somalia and in the Gulf of Aden. Last year the centre’s information showed a decline in reported attacks, but a warning against complacency was issued due to an increase in violent attacks and hijackings in different waters, including the Gulf of Guinea. Preliminary figures from October 2012 showed that pirates for that year had been the cause of six deaths, had taken 448 hostages, boarded 125 vessels, fired upon 26 vessels, and attempted attacks on 58 others.³¹ An interesting statistic related to actual thefts showed that unlike

²⁸ Helen B. Bendall, *Cost of Piracy: A Comparative Voyage Approach*, IAME 2009 (June 6, 2009), <http://www.maritrade.com.au/publications/IAME-09.pdf>.

²⁹ See Roger. L. Phillips, *United States Supreme Court Gets its Chance*, PIRACY-LAW (Oct. 19, 2012), <http://piracy-law.com/2012/10/19/united-states-supreme-court-gets-its-chance/> (citing petition for certiorari filed in *United States v. Dire*, which was subsequently denied by the Supreme Court in 2013).

³⁰ *Piracy & Armed Robbery News & Figures*, ICC COMMERCIAL CRIME SERVICES (Aug. 31, 2013), <http://www.icc-ccs.org/piracy-reporting-centre/piracynewsfigures>.

³¹ *IMB Piracy Reporting Centre*, *supra* note 27.

in the past, they mostly occurred on anchored vessels.³² As a result of their work, three-quarters of the way through 2012, pirates had already netted \$160 million dollars.³³ As of August, 2013, Somali pirates were still holding a total of 57 hostages.³⁴

Comparatively, in 2008, attacks were more prominent in the Somalia and Gulf of Aden areas. Reports showed that one out of every ten ships that sailed the waters was subjected to pirate attack.³⁵ These attacks were by and large successful. Pirates held their captured vessels for an average of three months and received an average of one million dollars ransom per ship.³⁶ In 2008, the net profit for pirates from ransom monies was \$120 million.³⁷ Despite the decline in recent months, pirates are still having a substantial effect on international trade and the international economy. Perhaps the decline will continue, or perhaps not. Reports are showing that many flourishing pirate ports and towns are now abandoned, but the effect of this may be more negative than positive. Although the pirates themselves have left these towns, they have left behind a substantial amount of poverty for the other town occupants. Additionally, due to the decline, sponsors are now abandoning their antipiracy armies, much to the detriment of those relying on their services. These disbanded antipiracy groups have left behind hundreds of trained and well-armed men who are forced to fend for themselves to make a living.³⁸

The question now becomes, what are these individuals resorting to as a means to survive? Speculation shows that many of these individuals are

³² *Id.* (providing statistics showing that out of 51 reported thefts caused by pirates, 46 occurred while the ship was in port or anchored slightly off the coast).

³³ Myles Neligan & Jonathan Saul, *Insurers Face Tougher Times as Somali Piracy Drops*, REUTERS (Sept. 21, 2012), available at <http://www.reuters.com/article/2012/09/21/us-insurance-pirates-idUSBRE88K0IG20120921>.

³⁴ *Piracy & Armed Robbery News & Figures*, *supra* note 30.

³⁵ Bendall, *supra* note 28, at 4.

³⁶ *Id.*

³⁷ *Id.* Somalia has been in a state of unrest since the collapse of the Soviet Union and the end of the Cold War in the early 1990s. Similar identity-based civil wars occurred in other African nations where small factions, or clans, fought for political power and resources. *See generally* AFYARE A. ELMI, UNDERSTANDING THE SOMALIA CONFLAGRATION: IDENTITY, POLITICAL ISLAM AND PEACEBUILDING 16–27 (2010).

³⁸ Mark Mazzetti & Eric Schmitt, *Private Army Formed to Fight Somali Pirates Leaves Troubled Legacy*, N.Y. TIMES (Oct. 4, 2012), http://www.nytimes.com/2012/10/05/world/africa/private-army-leaves-troubled-legacy-in-somalia.html?_r=0.

turning to the other side and joining the pirates they once were charged with keeping at bay. Others are joining terroristic groups such as Al Qaeda, and still others are selling themselves to the highest bidder in the Somali clan wars.³⁹ This increase in both pirate and terrorist groups could lead to another potential increase in attacks, however the world's shipping industry is not as complacent as it appears on first glance. Vessels have increased their efforts to ward off pirate attacks through various antipiracy measures. Many reroute their shipping lanes to steer clear of the troubled regions of Somalia and the Gulf of Aden, while still others are hiring private protection firms and employing alternative prevention methods.⁴⁰

Despite the preventative measures employed by the shipping industry and others sailing on international waters, the unsettled definition of piracy is still creating a problem. Many in the industry subjecting themselves to the risk of attack purchase insurance to obtain peace of mind. However, insurance policies cover very specific attacks, in specific areas and by specific individuals. Depending on what the definition of piracy is will depend on whether modern day attacks fit within piracy insurance clauses. Shippers have the responsibility to prepare for these attacks, and as discussed in the next section the classification of responsibility under international shipping laws further mandates that the increase in pirate attacks be recognized with a modernized definition of piracy.

IV. CLASSIFICATION UNDER THE CISG

The amount of pirate attacks today has mandated some recourse be available for the loss of goods and profits that accompanies the attacks. The maritime insurance industry has flourished as a result of this need. Shipping laws have placed the responsibility of loss in the hands of the shipper, and because the risk of such substantial loss exists, business owners have sought insurance to prevent bankruptcy as a result of a single pirate attack.

³⁹ *Id.*

⁴⁰ Long Range Acoustic Devices (LRADs) are increasing in popularity. LRADs are non-lethal weapons that use sound waves to debilitate individuals for short periods of time. *See* LRAD CORPORATION, <http://www.lradx.com/site/content/view/259/110> (last visited Oct. 13, 2013) [hereinafter LRAD].

Under the Convention for the International Sale of Goods (CISG), piracy would seemingly fall under the category of a foreseeable risk.⁴¹ Pirates are active in today's market and even more common than natural disasters. Pirate attacks are a risk associated with international shipping, especially in certain international shipping lanes and areas.⁴²

Loss, under the CISG, includes the destruction of goods.⁴³ Loss can occur in a variety of circumstances, but certainly encompasses occurrences in transporting the goods from one party to the other. Additionally, loss also covers third-party damage to the goods (i.e., pirates).

The need for insurance in the maritime shipping industry arose as a result of this foreseeable risk of loss caused by pirate attacks. The CISG, commonly used in international commerce, places the responsibility of the shipped goods in the hands of the seller until the point of delivery.⁴⁴ Even though a specific loss may be outside of the seller's control, it is still considered the responsibility of the seller.⁴⁵ The CISG under Article 79 places strict liability on the seller.⁴⁶ No showing of fault is necessary in order for the seller to be liable for damages.⁴⁷ The only exception to strict liability arises when the failure to perform is due to an "impediment."⁴⁸

The amount of damages for which the seller is responsible is equal to that of the value of the goods.⁴⁹ The risk and responsibility for the goods

⁴¹ See generally U.N. Convention on Contracts for the International Sale of Goods arts. 25, 74, Apr. 11, 1980, 1489 U.N.T.S. 3.

⁴² Additionally, if a party breaches a contract due to a foreseeable risk it can be considered a fundamental breach and expose the breaching party to certain remedies only available in the case of a fundamental breach. Alexander Lorenz, *Fundamental Breach under the CISG*, available at <http://www.cisg.law.pace.edu/cisg/biblio/lorenz.html#fn1> (last updated Sept. 21, 1998).

⁴³ Johan Erauw, *CISG Articles 66–70: The Risk of Loss and Passing It*, 25 J.L. & COM. 203, 204 (2005).

⁴⁴ Lorenz, *supra* note 42, at art. 69.

⁴⁵ *Id.*

⁴⁶ *Id.* at art. 79; Harry Flechtner, *Article 79 of the United Nations Convention on Contracts for the International Sale of Goods (CISG) as Rorschach Test: The Homeward Trend and Exemption for Delivering Non-Conforming Goods*, 19 PACE INT'L L. REV. 29 (2007).

⁴⁷ Flechtner, *supra* note 46 (Strict liability places responsibility on the seller in the event of a failure to perform any contractual obligation).

⁴⁸ Lorenz, *supra* note 42, at art. 79 (Piracy is not considered an impediment, but instead it is a foreseeable risk falling under the strict liability).

⁴⁹ Lorenz, *supra* note 42, at art. 74. (The seller is only responsible for the monetary amount of damage to the actual goods and potentially additional damages suffered by the buyer as a result of the "loss.").

only passes to the buyer when he takes control of the goods, or the goods are delivered and placed at his disposal.⁵⁰ In the context of international shipping, because the point of delivery usually is not usually the seller's place of business, the risk typically passes to the buyer when delivery is due and the buyer becomes aware of the fact that the goods are placed at his disposal at the place of delivery.⁵¹

The notion of responsibility under the CISG is important in an economy that relies heavily on transportation of goods by means of international waters. Ninety percent of the world's trade and commerce is dependent on international shipping.⁵² In 2010, 80% of the world's trade traveled on the sea; there were 93,000 merchant vessels, 1.2 million seafarers, and six billion tons of cargo.⁵³ These numbers place international shipping in a crucial place within the world economy, and attacks on the shipping industry are not only extremely detrimental, but lucrative for some. It is estimated that pirates make substantial profits from attacks on the shipping industry, but cost the international economy even more.

It is estimated that piracy costs may cost up to \$16 billion every year.⁵⁴ Economic costs associated with piracy are both obvious and more obscure, but it affects multiple areas of a consumer's everyday purchases.⁵⁵ Direct economic costs associated with piracy include ransoms,⁵⁶ insurance,⁵⁷ rerouting of vessels,⁵⁸ the purchase and maintenance of deterrent security equipment,⁵⁹ the cost to national naval forces,⁶⁰ and the eventual costs of

⁵⁰ Lorenz, *supra* note 42.

⁵¹ *Id.*

⁵² Daniel Toth, *Maritime Piracy and the Devastating Impact on Global Shipping*, EXAMINER (July 31, 2009), <http://www.examiner.com/article/maritime-piracy-and-the-devastating-impact-on-global-shipping>.

⁵³ Anna Bowden et al., *The Economic Cost of Maritime Piracy* (One Earth Future Working Paper, 2011), available at http://oceansbeyondpiracy.org/sites/default/files/documents_old/The_Economic_Cost_of_Piracy_Full_Report.pdf.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ The total cost of ransoms to Somali pirates in 2011 was \$160 million. ANNA BOWDEN & SHIKHA BASNET, *THE ECONOMIC COST OF SOMALI PIRACY 2011 I* (One Earth Future Working Paper 2012), available at http://oceansbeyondpiracy.org/sites/default/files/economic_cost_of_piracy_2011.pdf.

⁵⁷ The total cost of insurance against piracy in 2011 was \$635 million. *Id.*

⁵⁸ In 2011, to increase the speed of vessels and/or reroute them entirely was \$2.713 billion and \$583 million, respectively. *Id.*

⁵⁹ To increase security equipment, it cost ships \$1.112 billion in 2011. *Id.*

prosecution for charged pirates.⁶¹ Piracy also affects consumers more indirectly by increasing the costs of regional trade, forcing an inflation of food prices, and reducing the revenue of both foreign and our domestic economy.⁶²

V. INSURANCE AGAINST PIRACY

Recognition of the need for insurance against pirate attacks began back in Great Britain in the seventeenth century, when merchants realized the profits for their goods were only realized when those goods reached their destination.⁶³ The problem with the first type of insurance was that a merchant would obtain credit by a cash advance, but this was a tenuous form of security.⁶⁴ Lenders could not reasonably loan the cash sought due to such a high risk of losing their investment.⁶⁵ In response to the problem, credit was sought by a different financier who, instead of advancing cash, guaranteed the financial outcome of the merchant ship voyage in return for a consideration.⁶⁶

These practices remained constant and led to the embodiment of the Marine Insurance Act, which developed five main principles: insurable interest, utmost good faith, proximate cause, indemnity, and subrogation.⁶⁷ The Marine Insurance Act states that “the purpose of any form of insurance is to replace that which has been lost [and] that the assured . . . should merely be in no worse position than he was before the loss occurred.”⁶⁸ Modern day marine insurance comes in various clause forms serving two purposes: specifically identifying the risk covered and limiting the risk

⁶⁰ Pirates cost governments \$1.273 billion in 2011 to fund military preventative measures against piracy. *Id.*

⁶¹ The prosecution costs in 2011 against indicted pirates totaled \$16 million. *Id.*

⁶² Overall, piracy cost the industry \$5.3–5.5 billion in 2011. *Id.*

⁶³ Christopher M. Douse, *Combating Risk on the High Sea: An Analysis of the Effects of Modern Piratical Acts on the Marine Insurance Industry*, 35 TUL. MAR. L.J. 267, 276 (2010).

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.* (The consideration in this instance is synonymous today with the premiums paid for marine insurance).

⁶⁷ *Id.* at 276–77.

⁶⁸ *Id.*; see also Marine Insurance Act (1993), available at <http://www.admiraltylaw.com/statutes/Marine%20Insurance%20Act.htm>.

covered by the insurer.⁶⁹ For example, a hull policy, to protect a ship-owner from loss or damage to the vessel, indemnifies the insured for repair costs due to injury suffered from perils covered by the policy.⁷⁰ Traditionally, “perils” included “‘pirates, rovers, and assailing thieves,’ ‘takings at sea,’ and ‘enemies.’”⁷¹ However, if the policy includes a “free of capture and seizure clause” then these perils are removed from coverage and the insured would need to seek additional coverage from a war risk clause.⁷²

War risk clauses grew in popularity as a result of both World Wars, when insurers placed the burden on the merchant to bear the risks associated with shipping cargo through hostile seas.⁷³ “War risk insurance covers loss ‘caused by, resulting from, or incurred as a consequence of . . . hostile or warlike operations.’”⁷⁴ Additionally, war risk clauses usually cover “sabotage, acts of vandalism, and terroristic actions.”⁷⁵ However, litigation over these clauses has shown that piracy is not always included in the coverage. One English court noted that there may be more than one meaning for the word “piracy,” and that what might be considered piracy for purposes of international law may not be piracy within the meaning of insurance contracts.⁷⁶ The court viewed insurance coverage contracts as “business document[s]” and as such a popular meaning, that is the meaning attached by the ordinary person, must be used.⁷⁷

⁶⁹ *Douse*, *supra* note 63, at 277.

⁷⁰ *Id.* at 278.

⁷¹ *Id.*

⁷² *Id.* at 279–80. It is important to note that broader coverage can be received under a cargo-related policy. These policies provide property insurance coverage for merchants and are often in an “all risk” form. However, this is not always all encompassing and a merchant may still need to purchase additional war risk insurance in order for property damage or loss of cargo to be covered in the event of a pirate attack.

⁷³ *Id.* at 280. Declaring an area a “war risk” area increases shipping costs by 13%. See Timothy Besley, Thiemo Fetzer & Hannes Mueller, *The Welfare Costs of Lawlessness: Evidence from Somali Piracy* (July 27, 2012), available at <http://econ.lse.ac.uk/~tbesley/papers/BFMJuly2012.pdf>.

⁷⁴ *Douse*, *supra* note 63. Interestingly, war risk insurance usually only applies to certain specified territories. Currently, these territories typically include the Gulf of Aden and the Suez Canal (do to past hostilities). Despite the fact that shipping officials have stated that these areas now present a minimal risk, shippers must pay tens of thousands of dollars a day in extra war zone insurance to cross these areas. *Id.* at 287.

⁷⁵ *Id.* at 281.

⁷⁶ *Id.* at 282 (citing *Republic of Bolivia v. Indemnity Mutual Marine Insurance Co.*, (1909) 1 K.B. 785).

⁷⁷ *Douse*, *supra* note 63, at 282.

These issues also apply outside the scope of shipping goods. Pirate attacks can occur against both merchant vessels and passenger cruise ships. The issue is when cruise ship insurers provide coverage in the event of a pirate attack. To determine the scope of the coverage of the liability imposed on both cruise lines and passengers, courts strictly enforce the provisions on the passenger ticket.

Passenger ticket provisions set forth the available causes of action.⁷⁸ For example, Royal Caribbean exempts themselves from injury resulting from acts of “terrorism,” but not necessarily acts of “piracy.”⁷⁹ The issue is in modern-day acts of terrorism and piracy are remarkably similar; this is a debatable issue that runs through the course of this note, but arguably for these purposes, terrorism and piracy still retain separate characteristics and legal definitions.⁸⁰ There could be multiple explanations for the exclusion, but some of the most likely include the idea that the cruise line may indeed be contributorily negligent in continuing to provide cruises in areas where there have been warnings that risks of pirate attacks are high.⁸¹ For a cruise line to be able to mitigate their liability in this instance it would have to heed the warnings issued pertaining to a high risk of pirate attack. To do so would include changing some ports of call and rerouting cruise lines to avoid areas of water that pose potential high risks of attack—both solutions would inevitably lead to a drop in profits without some counter measure of raising prices elsewhere.⁸² Another possibility that could reduce liability, but would require additional capital to purchase and maintain, would be the use of certain anti-piracy measures—such as new preventative technology,⁸³ private security firms, and the like. High risk areas do employ

⁷⁸ Elaine Vullmahn, Note, *Determining the Potential Liability of a Cruise Line for the Injuries or Death of Their Passengers as a Result of a Pirate Attack*, 37 *Transp. L.J.* 219, 230–31 (2010).

⁷⁹ *Id.* at 232 (citing Ticket Contract for Brilliance of the Seas, ROYAL CARIBBEAN INT’L, http://www.royalcaribbean.com/content/en_US/pdf/CTC_BR_Only.pdf (last visited Oct. 1, 2010)).

⁸⁰ Vullmahn, *supra* note 78, at 234.

⁸¹ *Id.* at 233.

⁸² *See generally id.* at 239.

⁸³ Long range acoustic devices (LRADs) are now being used by some vessels, which operate as a deterrent by admitting high frequency sound waves that can temporarily affect or incapacitate the crew of an oncoming vessel. *See LRAD, supra* note 40.

anti-piracy measures and attacks on cruise ships are much less common than attacks on cargo ships.⁸⁴

Insurance against pirate attacks in both instances proves to be something that may be considered necessary considering the high risks. Returning to focus solely on the area of shipping costs, an evaluation of the effect piracy has on those costs can show how insurance is necessary to maintain an economy that can afford to purchase goods traded via international waters. Economists have named the loss associated with piracy (among other things) a welfare loss. A welfare loss is a transfer from consumers (who ultimately pay the costs) of traded goods to pirates as given.⁸⁵ If pirates make approximately 120 million U.S. dollars then there is a welfare loss of .9 to 3.6 billion on the world economy.⁸⁶ Alternatively, if a tax of .8% were imposed on shipped goods with the profits going to pirate countries, like Somalia, then the extra spending could finance one year of employment for 1.2 million Somalis at the market rate in 2010.⁸⁷

At the most basic, the point is this: insecurity due to piracy leads to a rise in shipping costs, which in turn leads to a rise in overall total trade costs. One extra-anticipated pirate attack increased the daily charter rate by approximately .6% in the Somali region.⁸⁸ After 2008, the current state of lawlessness in the Somali region has increased the total costs of shipping by approximately 8.2%.⁸⁹ To combat pirate attacks, one option is hiring a private security company; the cost of a four-person security crew is \$3,000 per day.⁹⁰ There are multiple costs that result to the shipping industry including: damage to vessels, loss of hire and delay to cargo delivery while a ship is held to ransom, costs of defensive measures, and re-routing of

⁸⁴ Although rare, attacks on cruise ships do occur. The *Oceania Nautica* was fired upon in 2008 while en route from Rome to Singapore, and the *Seaburn Spirit* was attacked with automatic weapons and rocket-propelled grenades in 2005. See generally Oliver Smith, *Pirates Attack Luxury Cruise Ship Off Somali Coast*, THE TELEGRAPH (Dec. 1, 2008), <http://www.telegraph.co.uk/travel/cruises/3538744/Pirates-attack-luxury-cruise-ship-off-Somali-coast.html>.

⁸⁵ See Besley, Fetzner & Mueller, *supra* note 73, at 2–3.

⁸⁶ *Id.* at 1.

⁸⁷ *Id.* at 27. It is important to note that this does not necessarily mean such a tax would be effective, but shows that scale of losses to the industry relative to the reality of the Somali economy.

⁸⁸ *Id.* at 11.

⁸⁹ *Id.* at 12.

⁹⁰ *Id.* at 27.

vessels to avoid areas at risk.⁹¹ Overall, the estimate of total piracy costs is 758 million U.S. dollars, and in a competitive market like our world economy, these costs pass on to the consumer who pays a higher price for goods.

The liability for individuals and goods traveling on the high seas increases when vessels enter high threat areas. As stated earlier, marine insurance premiums have increased for travel through the Gulf of Aden and the Suez Canal, especially for those ships carrying vulnerable cargo such as oil and chemicals.⁹² The issue for shippers is that the definition of piracy provided by UNCLOS and applied to these attacks is limited and fails to take into account most modern day acts of piracy, including attacks in these areas. Under UNCLOS, piracy must occur “on the high seas,” but today many piratical acts occur in territorial waters and ports.⁹³ Recently, these insurance premiums as a whole have decreased with the recognized lessened risk for pirate attacks (excluding the aforementioned high risk areas).⁹⁴ The demand for insurance is directly correlated to the pirate’s success. The insurance grew rapidly at the outset of increased attacks from being worth nearly nothing to upwards of \$250 million, but now ship owners have been able to negotiate discounts on premiums of nearly 50% in recognition of the reduced risks of being hijacked.⁹⁵ Although the number of attacks has decreased, and correspondingly the likelihood of being attacked, pirates are still turning a profit. The average ransom payment increased from approximately \$5 million in 2011 to \$6.5 million in 2012.⁹⁶ Although shippers and insurance companies recognize the reduced risk, when a claim arises it is costing the industry more and more.

VI. PIRACY AS A POSITIVE?

Could it be argued that piratical activity is actually having a positive impact in some regards? Although pirate attacks have created a very lucrative insurance industry, the balance between costs to ship-owners and

⁹¹ *Id.* at 41–43.

⁹² Douse, *supra* note 63, at 287.

⁹³ *Id.* at 290.

⁹⁴ Neligan, *supra* note 33.

⁹⁵ *Id.*

⁹⁶ *Id.*

the loss the industry faces when forced to pay a claim seem to be a very low, if any actual profit when the two sides are balanced out. Piracy has had a positive effect on some third-world countries, such as Somalia, but even that was short lived and has forced funds to be directed inappropriately.⁹⁷ In 2008, Somali pirates earned \$150 million, with an estimated \$1–2 million made per ship.⁹⁸ That money, when placed in the hands of the pirates, is turned around and put back in the Somali economy—increasing the livelihood for many port city businesses. However, 30 percent of these profits collected from ransoms went into the hands of government officials.⁹⁹

It is also difficult to characterize this increase in Somali business as a positive for ordinary Somali citizens. The increase in funds flooding the economy raised the cost of living for Somali citizens. The exchange rate fluctuated constantly with the pumping of large amounts of U.S. dollars into the economy. On average, the income in Somalia for one individual is approximately \$600 per year and with the cost of goods and services increasing, the ability to take advantage of them decreased for all, except the pirates.¹⁰⁰

Despite the ordinary Somali citizen, piracy is the second largest generator of money in Somalia—bringing in an average of \$200 million annually.¹⁰¹ Because it is the most lucrative form of employment in the country, many ordinary individuals have turned to piracy as a career. Many fishermen have turned their livelihood of working on the sea into a means to become successful pirates, and many coastal communities have a vested interest in supporting pirates (for pirates have invested in them).¹⁰² Although piracy may increase profits for both these coastal communities and insurance companies, the negatives far outweigh the positives.

⁹⁷ Phillip Hafner, *Piracy Boosts Somali Economy*, GLOBAL ENVISION (Apr. 27, 2009), <http://www.globalenvision.org/2009/04/27/piracy-boosts-somali-economy>.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ Christopher Alessi & Stephanie Hanson, *Combating Maritime Piracy*, COUNCIL ON FOREIGN RELATIONS (Mar. 23, 2012), <http://www.cfr.org/france/combating-maritime-piracy/p18376>.

¹⁰² *Id.*

VII. PIRACY AS A NEGATIVE

Piracy may have a few perks, especially for the pirates themselves, the overall effect of piracy on the world economy is overwhelmingly negative. Global costs for piracy prevention have risen steadily over the years from \$7 to \$12 billion annually.¹⁰³ Pirate attacks have caused an 11% decrease in exports and an increase of \$28 billion in trade related costs internationally.¹⁰⁴ The effects, although spread throughout the international community, are bore most heavily by the nations with the highest GDP and therefore they have the highest interest in eliminating the costs.

There are no quantitative, all-encompassing figures as to the total cost of piracy, but an equation for how to approximate those costs would look something like this: “Total cost of piracy = Insurance risk premiums + ransom payments + (costs of negotiations x time spent) + impact on world trade + value put on human trauma suffered by both crew and family + international preventatives (i.e. naval forces).”¹⁰⁵

The estimate as to what all these factors yield can be highly variable, but shows the costs of piracy can be anywhere from \$1 billion to \$16 billion annually.¹⁰⁶ That total is steadily increasing with piracy adding millions of dollars per year to the costs of shipping, either through rerouting (time and fuel expenses) or through increased insurance premiums. Due to its vast effects on multiple areas piracy affects both developed and undeveloped economies.

VIII. CONCLUSION

It is obvious that the negatives of piracy far outweigh the positives. However, it is difficult to solve these issues or to prepare for attacks when a settled definition of piracy does not exist. The evolving definition could change piracy prosecutions, insurance coverage, and subsequent claims. Although the Supreme Court has declined the recent petitions for certiorari,

¹⁰³ *Id.*

¹⁰⁴ Sami Bensassi & Inmaculada Martinez-Zarzoso, *How Costly is Modern Maritime Piracy for the International Community?*, 3 (Munich Personal RePec Archive, Paper No. 27134, 2010), available at <http://mpira.ub.uni-muenchen.de/27134/>.

¹⁰⁵ Bendall, *supra* note 28, at 6.

¹⁰⁶ *Id.*

it could be argued that this is because the Court agrees with the current definition provided by the law of nations. However, it is still unsettled as to whether that definition encompasses all acts of violence, and whether international law would recognize those acts that occur in territorial waters as opposed to on the high seas. If a legal definition were settled would piracy be included in war risk insurance clauses? Would that lead to less insurance being necessary or would premiums just increase—leading to the shipping industry seeking the same amount of coverage just classified as a different name? Also, have we reached a point where we can simply lump pirate and terroristic activities occurring on waters in the same category? Regardless of the unsettled definition, it is certain that insurance coverage would still exist and still be necessary for the international shipping industry due to the definitions of liability in the CISG.

Insurance coverage may change in policy name only, but not necessarily in amount. However, it would be beneficial if a settled definition existed for legal prosecution and contractual purposes. This difficulty in identifying today's pirates does need to be resolved in order for the shipping industry to know how to deal with pirate versus terrorist attacks and to be able to anticipate how the world will respond to these occurrences. Are today's pirates more like Al Qaeda terrorists or are they sticking true to their roots flying under the Jolly Roger?