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Counter-piracy efforts updated

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Counter-piracy efforts, particularly in waters of the western Indian Ocean, continue unabated. Warships from an impressive array of nations continue to patrol, mostly in the Gulf of Aden. Piratical attacks, though, also continue. The frequency of attacks in the western Indian Ocean has decreased of late, but this is likely due to the monsoon weather conditions prevailing in the area. When the weather improves, expected to occur in early September, all forecasts are for the level of attacks to rise. The naval patrols, though, have helped reduce the success rate for the attacks that have occurred of late. Attacks in other waters, particularly in Southeast Asia and off Nigeria, have recently increased, although not to the level experienced off Somalia.

There has been a recent spate of activity both by the United States and by the International Maritime Organization (IMO) to further define the situation and address the risks being encountered by the marine industry. Important issues, though, remain to be resolved.

US initiatives

On May 11, 2009, the US Coast Guard issued a Maritime Security Directive to owners and operators of US-flag vessels that operate in waters at high risk of piracy or armed robbery. The Directive was designated as Sensitive Security Information (SSI), so its exact contents are not available for public dissemination. According to the news release issued at the same time, the Directive provides the US maritime industry with specific, risk-based measures to take to deter, detect, or disrupt piracy. Prior to entering high-risk waters, US vessels should establish an anti-piracy plan that includes hardening of rigging and operating vessels in a manner to prevent attacks and subsequent boarding. Ships shall also use established transit lanes, erratic ships maneuvering, increased speed, and cooperation with military forces patrolling the area. During transits through high-risk waters, it is the ships' responsibility to maintain a vigilant anti-piracy watch and ensure all shipboard anti-piracy precautions are in force.

Vessel security plans for US ships that operate in high-risk waters must have security protocols for terrorism, piracy, and armed robbery against ships. The security plans must meet the performance standards established in the Directive. Additional specific measures are required of US ships transiting Horn of Africa and Gulf of Aden high-risk waters. All vessel security plans for US ships must be submitted to the Coast Guard for review and approval.

The Directive was followed shortly by the publication of three Port Security Advisories, which have been generally distributed. The first, PSA 3-09, provides guidance on self-defense or defense of others by US-flag commercial vessels operating in high-risk waters. The second, PSA 4-09, addresses compliance with the US International Traffic in Arms Regulations (ITAR) when placing weapons on board US-flag commercial vessels intending to operate outside the United States. The third, PSA 5-09, establishes minimum guidelines for contracted security services on US-flag commercial vessels operating in high-risk waters. These documents provide important and valuable information regarding protection of the crew and vessel from piratical attacks and from armed robbery against ships. The documents also provide a good explanation of the US common law of self-defense and defense of others.

A bill was introduced in the US House of Representatives that, if adopted into law, would provide immunity from federal prosecution for an owner, operator, master, or crewmember exercising reasonable care in the use of force (including lethal force) in protection against piratical attack. Another bill was approved by the House of Representatives that would authorize embarkation of military personnel on US ships carrying government-impelled cargo in high-risk waters.

IMO initiatives

The IMO issued a circular, MSC.1/Circ.1332, relating to piracy and armed robbery against ships in waters off the coast of Somalia. The circular forwards an updated set of best management practices to deter piracy in the Gulf of Aden and off the coast of Somalia, which was developed by a working group of industry organizations. The practices are intended to address the unique challenges presented in this area.

A second circular, MSC.1/Circ.1333, provides recommendations to Governments for preventing and suppressing piracy and armed robbery against ships. For a variety of reasons, the IMO recommends that flag States strongly discourage the carrying and use of firearms by seafarers for personal protection or for the protection of the ship. Seafarers are civilians and use of firearms requires special training and aptitudes. The risk of accidents with firearms carried on board ship is great. The circular provides advice on the investigation of piratical attacks and the prosecution of those involved, as well as a draft agreement for enhanced regional cooperation in preventing and suppressing acts of piracy and armed robbery against ships.

The third anti-piracy circular, MSC.1/Circ.1334, provides guidance to owners, operators, masters and crews on preventing and suppressing acts of piracy and armed robbery against ships worldwide. Among other things, it recommends carriage of additional crewmembers when the ship is scheduled to operate in waters at high risk of piratical attack and increased emphasis on security training and drills.

Areas of common ground

The positions and policies of the United States Government and the IMO with regard to addressing the threats posed by piracy and armed robbery against ships are consistent on many aspects. Both agree on the importance of developing and implementing security plans. Both agree on the adoption of best management practices prior to entering waters at high risk of attack. Both agree on cooperation and coordination with naval patrols, where extent. Both agree on the use of non-lethal means (such as fire hoses, razor wire, and long-range acoustic devices) to deter attacks.

Disagreement with respect to lethal weapons

The point on which the United States and the IMO disagree is with respect to the carriage of lethal weapons on merchant ships. While the US does not mandate carriage of lethal weapons by ships planning to transit high-risk waters, it makes approval of vessel security plans more likely if those plans call for deployment of lethal weapons. The IMO strongly recommends that merchant vessels not carry lethal weapons. The only caveat to the IMO position is with regard to lethal weapons carried by military personnel assigned to the merchant vessel by the flag State.

Except for a few highly vocal individuals, the maritime industry strongly supports the policy espoused by the IMO. The industry raises concerns about the ability of merchant mariners to safely and effectively use lethal weapons in a highly-charged piratical attack. Even use of a special security team raises questions about the safety of discharging firearms on a ship, particularly oil or gas tankers. There are fears that carriage of lethal weapons by merchant ships may result in an escalation in the level of violence from the attackers. Finally, there are potential liability and insurance issues involving the crew (and anyone else on board), the ship, the charterer, cargo interests, and other third parties if the ship engages in a fire-fight with attackers. Liability and insurance questions are reasonably well-settled if defense of the ship is limited to non-lethal means. The same cannot be said in future incidents involving use of lethal weapons by a merchant ship. It behooves government agencies and the maritime industry to work through the legal issues prior to large-scale deployment of lethal weapons on commercial vessels.

Uncertainties

An area not covered by the documents is the law of self-defense and defense of others in foreign jurisdictions. Under international law, piracy can only occur on the high seas (e.g., more than 12 nautical miles offshore). Unlawful attacks against a ship occurring within the territorial sea or internal waters of a country are generally defined as armed robbery, and local law applies. It should be remembered that the Coast Guard definition of high-risk waters is not limited to the high seas. What self-defense standards would be applied in a court in Somalia, Yemen, Indonesia, Nigeria, or elsewhere if a US master or crewmember is arrested there for shooting a local citizen? In addition, what local laws apply to having weapons on board a ship calling in a port of that country or even transiting the territorial sea? The US Department of State has sent inquiries to various nations, particularly in the Middle East, seeking information regarding their laws, regulations, and policies with respect to the carriage of defensive weapons by merchant vessels calling in their ports and transiting their waters. Responses have yet to be received.

Efforts have been initiated in northeast Africa and the Middle East to build the capacity to arrest, prosecute, and incarcerate pirates. Similar efforts are getting underway in Somalia specifically, but these present a special challenge as the central government is not particularly strong. There are also efforts underway in the autonomous region of Puntland to professionalize its fledgling local coast guard. Only time will tell whether these important projects bear fruit.

There are numerous contractual issues involving owners, operators, charterers, unions, insurers, and cargo interests that will need to be considered. This is a complex point for which there are no easy answers. Charter parties and bills of lading vary widely with regard to clauses that might be implicated as the result of a piratical attack. Likewise, insurance policies (whether hull & machinery, protection & indemnity, or war) are not uniform. The laws under which a dispute might be resolved (US, UK, or elsewhere) will be an important factor in determining the outcome. It is highly unlikely that financial recovery from the pirates will be forthcoming, so the issue will be which of the various victims of the piratical attack will bear the loss.

Known unknowns and unknown unknowns

Former Secretary of Defense Donald Rumsfeld added to our body of understanding by explaining known unknowns and unknown unknowns. Those turn out to be important concepts with regard to counter-piracy. We don't know exactly what the pirates will do next, but we know that we don't know. We know that there are differences of opinion with regard to carriage of lethal weapons on merchant ships. We know that the rules in various nations with regard to carriage and use of lethal weapons on foreign ships entering their waters or calling at their ports are not well publicized and understood. We are aware of the uncertainty surrounding the various liability issues that might arise as a result of a piratical attack. What we do not know is how and when all of this will be resolved.