

## COMMENTS

### WINNING THE RISKY GLOBAL BUSINESS GAME: PARRYING THE THRUSTS OF TERRORISM WITH AN INTERNATIONAL INSURANCE COALITION

In this era of heightened nationalism and patriotism both in the United States and abroad, as well as of global economic downturn, people need to guard against the antiglobalization tendencies, which have previously led the world community to protectionism and war, and reaffirm instead shared cosmopolitan values as “citizens of the world.” From such shared values come not only a shared prosperity, but also sustainable peace.<sup>1</sup>

#### INTRODUCTION

In response to the attacks on the World Trade Center on September 11, 2001, the George W. Bush administration,<sup>2</sup> specifically, U.S. Trade Representative Robert Zoellick, advocated that trade is precisely the way to combat terrorism.<sup>3</sup> In support of this theory, the United States Congress granted President Bush “fast track” or “trade promotion authority” so he could negotiate trade agreements that Congress may only approve or disapprove, but not modify.<sup>4</sup> In November 2001 at the Doha, Qatar round, member nations of the World Trade Organization (“WTO”) began negotiations to lower even

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1. Linda Lim, *Keynote Address: Terrorism and Globalization: An International Perspective*, 35 VAND. J. TRANSNAT'L L. 703, 710 (2002).

2. George W. Bush was sworn in as the 43<sup>rd</sup> President of the United States on January 20, 2001. The White House, President George W. Bush, *available at* <http://www.whitehouse.gov/president/gwbbio.html> (last visited on Nov. 12, 2003).

3. See Robert B. Zoellick, Remarks at the National Press Club, *available at* [http://www.ustr.gov/speech-test/zoellick/zoellick\\_26-npc.PDF](http://www.ustr.gov/speech-test/zoellick/zoellick_26-npc.PDF) (Oct. 1, 2002). “America’s strategy to promote a more secure world recognizes the ties of free trade and free societies . . . [and] [o]ur campaign against [terrorists] . . . should employ economic and trade policies to underpin America’s long-term security.” *Id.*

4. See John F. Murphy, *The Impact of Terrorism on Globalisation and Vice Versa*, 36 INT’L LAW 77, 81 (2002). One of the House of Representatives’ justifications for passing the bill is that promotion of trade is integral to the fight against terrorism. *Id.* at 81 n.39 (citing Jon E. Hilsenrath, *Globalization Persists In Precarious New Age*, WALL ST. J., Dec. 31, 2001, at A1).

more trade barriers.<sup>5</sup> One of the expressed concerns during the negotiations was the threat of the events of September 11<sup>th</sup> on trade flows.<sup>6</sup>

To successfully pursue this public commitment to combat terrorism through international trade and business, multinational companies (“MNCs”)<sup>7</sup> require terrorism insurance to protect their interests. However, following September 11<sup>th</sup> insurance companies either significantly increased their rates for terrorism insurance or were completely unwilling to insure terrorism risks.<sup>8</sup> If MNCs do not insure against terrorism and leave their business interests at risk, how will it effect the promotion of international business and trade?

As a leader of globalization, the U.S. has been encouraging the harmonization of political, economic, social and cultural philosophies and practices by signing trade agreements and promoting U.S. exports of goods, services and manufacturing facilities.<sup>9</sup> MNCs, in addition to adhering to both the U.S.’ and the host country’s requirements for regulatory compliance, must also obtain insurance to protect their investments and activities. Globalization, along with the economic benefits it has bestowed on both developed and developing economies through the facilitated movement of goods, people, ideas and technology with minimal governmental interference,<sup>10</sup> has also facilitated the globalization of terrorism.<sup>11</sup> Though terrorism owes its success to globalization, it also works as a force to prevent it.<sup>12</sup> One way to continue the globalization process while guarding against terrorism is to insure terrorism risks. However, the difficulty in calculating terrorism risks causes high-priced premiums or hinders availability of coverage.<sup>13</sup>

Part I of this comment defines globalization for the purpose of understanding global insurance needs and describes the effect of terrorism on

5. See WTO Ministerial Declaration (adopted Nov. 14, 2001), available at [http://www.wto.org/english/thewto\\_e/minist\\_e/min01\\_e/mindecl\\_e.htm](http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm).

6. See Mike Moore, Preparations for the Fourth WTO Ministerial Conference, available at [http://www.wto.org/english/news\\_e/spmm\\_e/spmm72\\_e.htm](http://www.wto.org/english/news_e/spmm_e/spmm72_e.htm) (Oct. 9, 2001).

7. MNCs include corporations that are connected to foreign markets through product sales, international contracts or foreign direct investment. Linda A. Mabry, *Multinational Corporations and U.S. Technology Policy: Rethinking the Concept of Corporate Nationality*, 87 GEO. L.J. 563, 567-68 (1999) (examining the relationship between globalization and nationalism and advocating an “economic commitment” test that studies a corporation’s structure, organization and operations to determine a corporation’s national identity).

8. See Spinner, *infra* note 47.

9. See Alex Y. Seita, *Globalization and the Convergence of Values*, 30 CORNELL INT’L L.J. 429, 430, 432-33 (1997) (proposing that globalization should be embraced because of the potential it has to de-emphasize factors that cause divisions among human beings such as race, religion and ethnicity).

10. See, e.g., Teresa Edwards, Comment, *The Relocation of Production and Effects on the Global Community*, 13 COLO. J. INT’L ENV’T L. & POL’Y 183, 185 (2002) (explaining globalization in the context of environmental regulations).

11. John B. Attanasio & Don S. DeAmicis, *Foreword: The Limits of Globalization?*, 36 INT’L LAW. 1 (2002).

12. *Id.*

13. See Patterson, *infra* note 127.

globalization. Part II focuses on the Terrorism Risk Insurance Act of 2002 and the impact it will have on U.S.-based MNCs pursuing business interests abroad. It also explains the legislative and corporate responses of other countries that provide terrorism insurance. Part III describes the various unilateral responses to provide terrorism insurance. The article ultimately posits that an international arrangement, rather than several unilateral endeavors, will most effectively insure terrorism risks for MNCs conducting international business and trade.

## I. THE EFFECT OF TERRORISM ON GLOBALIZATION

### A. *Defining Globalization in the Context of Global Insurance Needs*

Generally, globalization is the movement of goods, services, capital, information, ideas and people around the world.<sup>14</sup> It has helped integrate domestic markets to the international arena through evolutions in international communication, global transportation, information technology and dissolution of trade barriers.<sup>15</sup> Globalization is also characterized by a social change that alters the space where social relations are conducted.<sup>16</sup> Geographic limits and social relations shift as telecommunication technology deconstructs the barriers posed by distance and time.<sup>17</sup> To account for these geographical and social shifts, governments have responded with policies that reduce trade barriers and steer their domestic markets into a global arena.<sup>18</sup>

The primary cause of globalization is technology.<sup>19</sup> Laws and regulations have facilitated technology's role in the global market, and have empowered non-state actors to have an impact on the process.<sup>20</sup> Though technology facilitates the performance of international business and trade, it also opens MNCs to greater risks that require insurance.<sup>21</sup> For example, communication networks, financial markets and transportation systems all depend on information systems and networks.<sup>22</sup> New issues arise for protecting these

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14. World Bank, *Poverty in an Age of Globalization*, at 1, available at <http://www.worldbank.org/economicpolicy/globalization/documents/povertyglobalization.pdf> (last visited Nov. 12, 2003).

15. *Id.* at 2.

16. Heba Shams, *Law in the Context of "Globalisation": A Framework of Analysis*, 35 INT'L LAW. 1589, 1599 (2001).

17. *Id.* at 1600.

18. Joe Kendall et al., *Terrorism's Burdens on Globalization*, 36 INT'L LAW. 49, 50 (2002) (arguing that because the private sector is at the forefront of the war on terrorism, it must exercise due diligence to help prevent future terrorist attacks so that it will not be left in the position of having to react to them).

19. *See id.*; Shams, *supra* note 16, at 1599.

20. Shams, *supra* note 16, at 1602.

21. *See generally* Iain Gillespie & Taizo Nakatomi, *Security in the New Economy*, 231/232 SCI. & TECH. 47, 48 (2002).

22. *Id.*

systems against malfunction, hacking or cyber-terrorism.<sup>23</sup> Though technological innovations have significantly improved information security, they also exposes these networks and infrastructures to potentially greater attacks.<sup>24</sup> With an estimated 70% of a company's value embedded in its information assets, a cyber attack can have devastating results on a company's financial strength.<sup>25</sup>

In response, at least one insurer, American International Group ("AIG"), now offers cyber-terrorism insurance.<sup>26</sup> The policy, endorsed by President Bush, covers computer attacks launched by terrorists from groups such as Al-Qaeda or Hamas.<sup>27</sup> The White House issued a "National Strategy to Secure Cyberspace Report" that "recommends cyber-insurance 'as a means of transferring risk and providing for business continuity.'"<sup>28</sup>

Another feature of globalization is the transfer of power from state to international and domestic non-state actors.<sup>29</sup> Insurers are non-state actors who protect against the risks associated with the vehicles of globalization, namely, telecommunication, transportation and technology. Without this protection MNCs may stall their international expansion, thus frustrating globalization, or assume enormous risk with potentially devastating results. Terrorism threatens the infrastructures that support telecommunication, transportation and technology.<sup>30</sup> In light of terrorism, insurers must be able to respond to the needs posed by globalization in order to protect MNCs that pursue international business.

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23. *Id.*

24. *Id.*; see Seita, *supra* note 9, at 431 (illustrating the advancement of criminal and terrorist activities as a negative effect of globalization because globally available technology facilitates terrorist organizations to "operate like efficient international businesses").

25. Russ Banham, *Preventing the Chain Reaction*, REACTIONS, Apr. 1, 2003, available at <http://www.reactionsnet.com/story.asp?id=27902> (last visited Nov. 17, 2003).

26. *Id.*

27. *Id.*

28. *Id.*

29. See Shams, *supra* note 16, at 1626. Some state actors have also contributed, such as the Overseas Private Investment Corporation ("OPIC"), a U.S. Government agency that provides political risk insurance for U.S. companies investing in developing countries. See Overseas Private Investment Corporation, OPIC at a Glance, at [www.opic.gov](http://www.opic.gov) (last visited Nov. 12, 2003). In an effort to support continued foreign direct investment, OPIC now offers stand-alone terrorism insurance to "companies whose main insurance concerns are terrorist related." Meg Green, *U.S. Agency to Offer Stand-Alone Terrorism Insurance*, BESTWIRE (Aug. 7, 2003).

30. See Lim, *supra* note 1, at 707.

## B. The Impact of Terrorism on Globalization Within the Insurance Industry

### 1. Terrorism Defined

While there are numerous proposed definitions of terrorism, there is not one universally accepted definition.<sup>31</sup> A single definition is not possible because terrorism must be understood in the context of violent activity.<sup>32</sup> Violent activity is in constant flux because it is influenced and controlled by technology, international support, media and religion.<sup>33</sup> In addition, interpretations of the word “terrorism” change over time, in part according to various uses by nations and the media.<sup>34</sup> For example, different nations are not always willing to classify certain acts as “terrorist.”<sup>35</sup>

The United Nations (“UN”) defines terrorism as “the act of destroying or injuring civilian lives . . . or civilian or government property . . . by individuals or groups acting independently of governments on their own accord and belief, in the attempt to effect some political goal.”<sup>36</sup> U.S. government agencies employ various broad and narrow definitions for terrorism to allow flexibility in foreign policy and intelligence investigations.<sup>37</sup> The State Department defines it as “premeditated, politically motivated violence . . . against noncombatants . . . intended to influence an audience.”<sup>38</sup> The FBI criminalizes terrorism as “the unlawful use of force or violence . . . to intimidate or coerce a Government, [or] the civilian population . . . in furtherance of political or social objectives.”<sup>39</sup> The U.S. also distinguishes domestic terrorism from international terrorism.<sup>40</sup>

For purposes of this Comment, a broad definition of terrorism that includes the common terms of several states will be used. Terrorism is the use of acts that are intended to kill or injure civilians with the purpose of intimidating or coercing civilians, a government or an international organization.<sup>41</sup>

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31. See JOHN M. MARTIN & ANNE T. ROMANO, *Multinational Crime: Terrorism, Espionage, Drug & Arms Trafficking*, in *STUDIES IN CRIME, LAW, AND JUSTICE* 1992, at 34 (James A. Inciardi ed., 1992) (studying the criminology of terrorism and other multinational crimes and the international settings in which they operate).

32. See JONATHAN R. WHITE, *TERRORISM: AN INTRODUCTION* 7 (3d ed. 2002) (recognizing that definitions for terrorism change in light of political, religious and social factors).

33. See *id.* at 17.

34. MARC MILLER & JASON FILE, *TERRORISM FACTBOOK: OUR NATION AT WAR!* 13 (2001) (explaining why terrorism is so challenging to define).

35. MARTIN & ROMANO, *supra* note 31. Terrorists need to also be distinguished from other perpetrators of political violence, including, but not limited to guerillas, dissidents, insurrectionist rebels and separatists. *Id.* at 31.

36. WHITE, *supra* note 32, at 12.

37. MILLER & FILE, *supra* note 34, at 14.

38. 22 U.S.C. § 2656f(d) (2003).

39. WHITE, *supra* note 32, at 12.

40. See 18 U.S.C. § 2331(1), (5) (2003).

41. See MILLER & FILE, *supra* note 34, at 15. Cf. Alison R. Orleans, Notes & Comments, *Anti-Terrorism Banking Issues: Terrorism Insurance and Commercial Real Estate: The New*

This definition considers political, religious and criminal objectives as well as the intent to strike at the foundations of a particular society or lifestyle.<sup>42</sup>

## 2. *The Impact of Terrorism on Globalization*

There are two competing views regarding the impact of terrorism on globalization. The first asserts that because most goods are sent by sea, and shipping costs have increased very little since September 11<sup>th</sup>, terrorism has had little impact on trade and globalization.<sup>43</sup> The other posits that terrorism may frustrate globalization because the need for increased security and insurance will raise the costs of international trade, travel, transportation and capital flows.<sup>44</sup> The financial consequences rest on the backs of MNCs, because their operating costs for security in offices, mailrooms and cyber networks, as well as shipping costs and insurance premiums, have all increased substantially.<sup>45</sup>

Terrorists struck at the core of U.S. globalization philosophy when they targeted and destroyed the World Trade Center towers in New York. Such an event could not escape having an impact on globalization. Of the many burdens terrorism poses on globalization, a principal one is on the insurance industry.<sup>46</sup> The increased scope of terrorism has re-defined the risks insurance companies are willing to undertake in insuring against it. Following September 11<sup>th</sup>, reinsurers ceased coverage for terrorism.<sup>47</sup> Without reinsurance, primary insurers could not afford to cover terrorism and thus completely ceased offering the coverage.<sup>48</sup>

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*Frontier*, 7 N.C. BANKING INST. 93, 113-15 (2003) (comparing various attempts to arrive at a global definition of terrorism and advocating that the insurance industry agree upon a single definition of terrorism).

42. *Id.*

43. See John F. Murphy, *The Impact of Terrorism on Globalization and Vice-Versa*, 36 INT'L LAW. 77, 81 (2002) (proposing "a sensible process of globalization" may be an effective deterrent to terrorism) (citing *Is it at Risk—Globalisation—Recent events have rattled the global economic order*, ECONOMIST, Feb. 2, 2002, at 65).

44. Lim, *supra* note 1, at 707.

45. Stephen Roach, *Sand in the Gears of Globalization*, NEWSWEEK, Feb. 4, 2002, at 43. The author is the chief economist for Morgan Stanley. *Id.*

46. See Attanasio & DeAmicis, *supra* note 11, at 5. For background information on insurance and the terrorism exclusion, see generally Jane Kendall, Comment, *The Incalculable Risk: How the World Trade Center Disaster Accelerated the Evolution of Insurance Terrorism Exclusions*, 36 U. RICH. L. REV. 569 (2002).

47. Jackie Spinner, *Terrorism Insurance Bill Passed by Senate*, WASH. POST, June 19, 2002, at E1.

48. *Id.* Reinsurers provide coverage to a primary insurer to help it diversify its risk of loss for catastrophic events and to free up some of the primary insurer's reserve capital to invest in other policies. ERIC MILLS HOLMES, 1 HOLMES'S APPLEMAN ON INSURANCE 317-18, 320-21 (2d 1996).

Estimated insured losses from September 11<sup>th</sup> range from forty<sup>49</sup> to fifty billion U.S. dollars.<sup>50</sup> The foreign reinsurer Swiss Re estimated the insurance industry lost 200 billion dollars in capital since September 11<sup>th</sup>, and has only recovered twenty-six billion dollars in 2001 and nineteen billion dollars in 2002 to compensate the losses.<sup>51</sup> Several individual international insurance companies endured significant financial losses due to the World Trade Center attacks. Lloyd's of London lost 2.8 billion dollars, Munich Re lost 2.6 billion, Swiss Re lost two billion, Germany's Allianz AG lost 1.3 billion and Zurich Financial Services lost 900 million dollars.<sup>52</sup> Financial analyst firm Morgan Stanley estimated the premium rates for commercial insurance would rise from 148 billion dollars in 2000 to between 210 to 240 billion dollars in 2002.<sup>53</sup> MNCs fear the rise in maintenance and expansion costs of their international operations due to terrorism.<sup>54</sup> Whereas globalization formerly facilitated the outsourcing of production, foreign investments and trade flow, September 11 disrupted the status quo by upsetting the major world economies simultaneously.<sup>55</sup>

### 3. Terrorism Insurance Coverage Prior to September 11<sup>th</sup>

Prior to September 11<sup>th</sup>, terrorism insurance was usually included gratuitously on policies because the risk of such a catastrophic event was considered very low.<sup>56</sup> Terrorism risks were primarily covered by reinsurers, who

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49. Joseph B. Treaster, *Senate Passes Bill Limiting Insurers' Liability After an Attack*, N.Y. TIMES, Nov. 20, 2002, at A15.

50. Christopher Oster, *Terrorism Bill Boosts Insurers' Risk*, WALL ST. J., Nov. 27, 2002, at C9.

51. Andrew Bolger, *Companies and Finance International—Reinsurance Rates Weaken*, FIN. TIMES, Jan. 27, 2003, at 26.

52. Lucien J. Dhooge, *The Terrorism Insurance Market After September 11: The Case for Limited Federal Intervention*, 34 MCGEORGE L. REV. 27, 33 (2002) (citations omitted).

53. Roach, *supra* note 45.

54. *See generally id.*

55. *Id.*

56. Patrick Lenain et al., *The Fallout from Terrorism: Security and the Economy*, 231/232 OBSERVER 9, 11 (2002). *See* Pan Am. World Airways, Inc. v. Aetna Cas. & Sur. Co., 505 F.2d 989 (2d Cir. 1974) (holding acts of terrorism are not exempt from policy coverage under the war risk exclusion). *See also* Annemarie Sedore, Note, *War Risk Exclusions in the 21<sup>st</sup> Century: Applying War Risk Exclusions to the Attacks of September 11<sup>th</sup>*, 82 B.U. L. REV. 1041, 1061 (2002) (arguing insurers could have legally invoked war risk exclusions because the U.S.' response to the terrorist attacks, but that it was proper for them not to given the potential negative consequences to the insurance industry); Steven Plitt, *The Changing Face of Global Terrorism and a New Look of War: An Analysis of the War-Risk Exclusion in the Wake of the Anniversary of September 11, and Beyond*, 39 WILLAMETTE L. REV. 31, 91-92 (2003) (asserting war-risk exclusions should not apply to acts of global terrorism and the federal terrorism insurance should be provided to promote U.S. exports and trade in a globalized world).

typically underwrite catastrophic coverage.<sup>57</sup> In the past, the insurance industry has recovered from catastrophic events independently.<sup>58</sup> What is it that makes terrorism insurance different than other types of catastrophic coverage, from which the insurance industry has been able to recover and continue coverage free of help from the federal government?<sup>59</sup>

#### 4. Insurance Coverage Subsequent to September 11<sup>th</sup>

Numerous types of insurance policies realized claims due to the September 11<sup>th</sup> attacks.<sup>60</sup> Though several types of insurance policies are needed in order to conduct international business, this comment will focus on two types of coverage: commercial property and business interruption insurance.<sup>61</sup> Commercial property insurance covers the value of the physical property that has been destroyed.<sup>62</sup> Business interruption coverage compensates the insured for lost income resulting from destroyed property or any disruption to the insured's business.<sup>63</sup> The purpose of business interruption insurance is to restore the insured to the same position they would have been in had there been no interruption to the business.<sup>64</sup> Since September 11<sup>th</sup>, businesses have been greatly concerned with the availability and coverage for business interruption insurance.<sup>65</sup>

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57. Jeffrey R. Brown et al., *Federal Terrorism Risk Insurance*, 55 NAT'L TAX J. 647, 648-49, Sep. 1, 2002, available at 2002 WL 22917511 (rationalizing a temporary role for the U.S. government to provide a backstop for terrorism insurance).

58. *Id.* at 648 (explaining the insurance industry's recovery process, without outside assistance, after Hurricane Andrew in 1992).

59. *Id.*

60. See NAIC Statement Regarding Impact of Tragedy on the Insurance Industry (News Release, Sept. 12, 2001), available at <http://www.naic.org/pressroom/releases/EmergencyResponse.htm>. The various types of claims expected to be submitted were for 1) property losses for the buildings and their contents; 2) business interruption claims due to damaged property and prohibited continuance of business; 3) workers' compensation; 4) health insurance claims for injuries not covered by workers' compensation; 5) life insurance; and 6) auto insurance for vehicles damaged or destroyed near the World Trade Center site. *Id.*

61. See Robert L. Carter et al., *Business Interruption Coverage: The Basics*, in MAXIMIZING INSURANCE RECOVERY FOR BUSINESS INTERRUPTION CLAIMS 33, 35 (2002). "After the tragic events of September 11, 2001 in Washington D.C., New York, and Pennsylvania, the insurance world's attention has turned to property insurance and business interruption insurance." *Id.*

62. Randy Paar, *The Elements of a Business Interruption Claim*, in MAXIMIZING INSURANCE RECOVERY FOR BUSINESS INTERRUPTION CLAIMS 7, 10 (2002).

63. *Id.*

64. Carter et al., *supra* note 61, at 35.

65. Paar, *supra* note 62, at 9. "Five elements (that) typically contribute to a business interruption claim: 1) a covered peril; 2) the covered peril must result in a loss of covered property; 3) the loss of covered property must result in an interruption of the policyholder's business operations; 4) the business interruption must result in a covered loss; and 5) the covered loss must occur during the 'period of restoration,' while the lost or damaged property is restored or replaced." *Id.* at 12-13.



September 11<sup>th</sup> radically altered the way the insurance industry conducts its business.<sup>66</sup> Even if the actual risk remains low,<sup>67</sup> insurers no longer provide coverage free of charge. They must integrate terrorism risks within their risk-management models and strive to predict the possibilities of future attacks.<sup>68</sup> The uncertainty of calculating risks, targets and scope of damage is what differentiates terrorism from other catastrophic events.<sup>69</sup> Though it will require an arduous effort to develop an accurate system for such statistics, it is not impossible.<sup>70</sup> In addition, because terrorist acts are not entirely arbitrary, intelligence information may be a source to help determine premium rates.<sup>71</sup> The insurance industry, employing its experts in risk control management, may be best qualified to compose contingency plans and aid a corporation in increasing its protection against terrorist attacks.<sup>72</sup> Risk control experts can use their expertise in the control of loss to create plans to control the spread of a fire or recovery from an explosion.<sup>73</sup>

Insurance policies had to pay for workers' compensation, life, property and business coverage resulting from the events of September 11<sup>th</sup>. Encompassed within the policies were the losses pertaining to telecommunication, transportation and technology, the primary vehicles of globalization. When the Department of Homeland Security raises its terror alert level, business owners grow more concerned about potential threats to their businesses.<sup>74</sup> Considering the potential damage to a company's infrastructure in the event of another devastating terrorist attack, the need for effective insurance coverage against these risks becomes increasingly apparent. In response, the U.S. followed the lead of other countries and created a national terrorism insurance program where the federal government serves as a reinsurer to primary insurance companies.

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66. Kevin T. Kenny & Judith L. Robinson, *The Insurance Market Today*, in INSURANCE LAW: UNDERSTANDING THE ABCS 41, 50 (2d ed. 1996).

67. *Id.*

68. *Id.*

69. See Brown et al., *supra* note 57, at 648.

70. *Id.*

71. See *id.* at 652. Risk managers could take into account warnings from the Departments of State and Homeland Security to help calculate risks.

72. See Gene Rappe, *The Role of Insurance in the Battle Against Terrorism*, 12 DEPAUL BUS. L.J. 351, 355 (1999).

73. *Id.* at 356.

74. *Heightened U.S. Terror Alert Prompts Public Service Release of Risk and Insurance Information to Businesses*, PR NEWSWIRE, May 23, 2003, at Financial News.

## II. DOMESTIC AND INTERNATIONAL RESPONSES TO TERRORISM'S IMPACT ON THE INSURANCE INDUSTRY

### A. U.S. Response to the Insurance Crisis Posed by the September 11<sup>th</sup> Terrorist Attacks

#### 1. Terrorism Risk Insurance Act of 2002

In responding to claims from September 11<sup>th</sup>, insurance companies did not try to claim a "war-time" exclusion<sup>75</sup> but rather agreed to pay according to the policies.<sup>76</sup> However, they were reluctant to insure against future terrorist attacks.<sup>77</sup> In response to this reluctance, the U.S. government proposed the Terrorism Risk Insurance Act of 2002 ("TRIA"),<sup>78</sup> under which the government *compels* insurance companies to insure for terrorism.<sup>79</sup> In its statement of purpose, Congress recognized that "the ability of businesses and individuals to obtain property and casualty insurance at reasonable and predictable prices . . . is critical to economic growth . . . as well as to the promotion of United States exports and foreign trade in an increasingly interconnected world."<sup>80</sup> Congress enacted TRIA to provide continued coverage and affordable and predictable premiums for terrorism insurance while the insurance sector stabilizes from its September 11<sup>th</sup> losses.<sup>81</sup>

#### a. TRIA Definition for Act of Terrorism

TRIA defines an act of terrorism as:

a violent act or act that is dangerous to human life; property; or infrastructure . . . committed by an individual or individuals *acting on behalf of any foreign person or foreign interest*, as part of an effort to coerce the civilian

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75. A war-time exclusion normally provides that the insurer is not liable for any event occurring during a declared, undeclared or civil war; any typical war action by a military; or any acts in pursuit or defense of an insurrection, revolution or rebellion. Sedore, *supra* note 56, at 1061 n.10 (citing Andrew J. Nocas, *Are You Covered When We're at War? Are You Sure?*, 1991 A.B.A. 20 SUM BRIEF 10, 13 (1991)).

76. Sedore, *supra* note 56, at 1057.

77. Brown et al., *supra* note 57, at 655.

78. Terrorism Risk Insurance Act of 2002, Pub. L. No. 107-297, 116 Stat. 2322 (2002) [hereinafter TRIA] (to be codified at 31 U.S.C. § 50).

79. See generally Dhooge, *supra* note 52 (comparing the three primary proposals for federal terrorism insurance and evaluating the primary provisions of TRIA).

80. TRIA § 101(a)(1) (emphasis added).

81. *Id.* § 101(b)(1)-(2); see NAIC, The Terrorism Risk Insurance Act of 2002: Summary Based on November 11, 2002 Draft, Section 101, at [http://www.naic.org/pressroom/releases/terrorism\\_risk\\_ins\\_act\\_2002.pdf](http://www.naic.org/pressroom/releases/terrorism_risk_ins_act_2002.pdf) (Nov. 15, 2002).

population of the United States or to influence the policy or affect the conduct of the United States Government by coercion.<sup>82</sup>

It only covers acts of terrorism where the ensuing damage occurs in the U.S.,<sup>83</sup> or outside the U.S. if aboard an air carrier, vessel or on the premises of a U.S. mission.<sup>84</sup> Congress asserts that this is the sole definition to be used in determining an act of terrorism. Any conflicting state law or federal agency definitions for terrorism are preempted when applying TRIA.<sup>85</sup> The Secretary of Treasury, in agreement with the Secretary of State and the U.S. Attorney General, determines whether or not a certain act will be considered an act of terrorism.<sup>86</sup> The final determination of what is a terrorist act is not subject to judicial review.<sup>87</sup>

### *b. Insurers' Participation and Responsibilities*

The Department of Treasury administers TRIA.<sup>88</sup> The Act requires all primary insurers to participate and offer terrorism insurance to their policyholders.<sup>89</sup> Reinsurance coverage under TRIA is only available to primary insurers, which are defined as "any entity . . . [or] affiliate . . . that is licensed or admitted to engage in the business of providing primary or excess insurance in any State."<sup>90</sup> TRIA annuls any provisions in insurance policies that exclude a primary insurer from providing terrorism insurance.<sup>91</sup> It also invalidates any state's approval to exclude terrorism coverage in an insurance contract.<sup>92</sup> A preexisting terrorism exclusion provision can only be reinstated if: 1) the policyholder expressly authorizes its reinstatement;<sup>93</sup> or 2) the policyholder does not pay the increased premium that provides for the terrorism coverage and is given notice of the reinstatement of the exclusion provision.<sup>94</sup>

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82. TRIA § 102(1) (emphasis added). Thus, acts executed by domestic terrorists or occur as a part of a war declared by the U.S. Congress are excluded from coverage. *Id.* § 102(1)(B)(i). See Orlans, *supra* note 41, at 118 (critiquing TRIA's definition of terrorism).

83. United States is defined to include the fifty states, the Commonwealths of Puerto Rico and the Northern Mariana Islands, all U.S. territories and possessions, the U.S. continental shelf and the U.S. territorial sea (twelve miles from the U.S. baseline, as determined according to international law). TRIA § 102(1)(15); 18 U.S.C. §§ 2280, 2281.

84. TRIA § 102(1)(A)(iii)(I), (II).

85. *Id.* § 106(a)(2)(A).

86. *Id.* § 102(1)(A).

87. *Id.* § 102(1)(C). See also Dhooge, *supra* note 52, at 56 (comparing TRIA's definition of terrorism to definitions of terrorism found in other federal statutes).

88. TRIA § 103(a)(1).

89. *Id.* §§ 103(a)(3), 103(c).

90. *Id.* § 102(6)(A)(i). Non-licensed insurers also qualify if they are eligible as surplus line carriers on the NAIC's Quarterly Listing of Alien Insurers. *Id.* § 102(6)(A)(ii).

91. *Id.* § 105(a).

92. *Id.* § 105(b).

93. *Id.* § 105(c)(1).

94. *Id.* § 105(c)(2)(A)-(B).

If a qualifying terrorist act occurs, government coverage will take effect only if the terrorist act causes over five million dollars in damage to losses covered by property and casualty insurance.<sup>95</sup> TRIA requires primary insurers to pay a fixed percentage of their annual premiums to compensate policyholders, while the U.S. Government remunerates ninety percent of the remainder of the claim.<sup>96</sup> The percentages to be paid are set forth in the following schedule: 1) In 2002, the insurer pays one percent of its 2002 premiums it has received until the time of the attack; 2) In 2003, the insurer pays seven percent of its 2002 premiums; 3) During 2004, the insurer must pay up to ten percent of its 2003 premiums; 4) For acts occurring during 2005, the insurer must pay fifteen percent of its premiums earned during 2004.<sup>97</sup> The government will not pay for any terrorism-insured losses that exceed \$100 billion in a given year.<sup>98</sup> There is also a partial repayment provision where the government will place a surcharge on property and casualty insurance policyholders.<sup>99</sup>

### *c. Litigation Under TRIA*

For any disputes resulting from property damage, personal injury or death due to the terrorist act, TRIA creates an exclusive federal cause of action.<sup>100</sup> The federal action precludes litigation in state courts.<sup>101</sup> The court must apply the state law where the terrorist attack occurred, unless the state law is preempted by federal law.<sup>102</sup> Related cases may be consolidated in one district court.<sup>103</sup>

Corporations enjoy no immunity from being sued for damages resulting from a terrorist attack.<sup>104</sup> Any punitive damages awarded will not be considered insured losses for the corporate defendant.<sup>105</sup> As for the perpetrators of the devastating act, TRIA does not limit the liability of any government or organization that in any way knowingly contributes to the terrorist act.<sup>106</sup> If

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95. *Id.* § 102(1)(B)(ii). Property and casualty insurance include excess insurance, workers' compensation and surety insurance. It does not include insurance for private mortgages, financial guarantees, medical malpractice, Federal crop insurance and reinsurance. *Id.* § 102(12)(A)-(B)(vii).

96. *Id.* § 103(e)(1)(A).

97. *Id.*

98. *Id.* § 103(e)(2)(A). To receive compensation, the policyholder must file a claim with the insurer, who processes the claim and submits it to the Secretary of Treasury. *Id.* § 103(b)(1), (3), (4).

99. *Id.* § 103(e)(8)(A)(i).

100. *Id.* § 107(a)(1).

101. *Id.* § 107(a)(2).

102. *Id.* § 107(a)(3).

103. *Id.* § 107(a)(4).

104. *Id.* § 107(a)(5)

105. *Id.*

106. *Id.* § 107(b).

there is a judgment against a terrorist, TRIA allows for its enforcement by permitting the blocking of terrorist assets.<sup>107</sup>

#### *d. The Future of TRIA*

TRIA is scheduled to terminate on December 31, 2005.<sup>108</sup> Prior to termination, the Secretary of Treasury, the NAIC, insurance industry representatives, policyholder representatives and insurance experts will convene to assess TRIA's utility.<sup>109</sup> The working group will discuss whether the insurance industry will be able to offer terrorism insurance at a reasonable expense after TRIA expires.<sup>110</sup> Representatives for insurers will consider insurers' capacity for all types of policyholders, but will focus on the insurers for transportation and shipping systems.<sup>111</sup> The working group shall present a report of its assessment to Congress no later than June 25, 2005.<sup>112</sup> The expected long-term result of TRIA is that insurers will be able to once again provide terrorism insurance for affordable premiums.<sup>113</sup>

The Department of Treasury is currently seeking comments from corporations and insurance providers before it finally implements TRIA.<sup>114</sup> It issued interim guidance for specific TRIA provisions on December 11, 2002,<sup>115</sup> December 26, 2002,<sup>116</sup> January 29, 2003<sup>117</sup> and March 27, 2003.<sup>118</sup> Along with each notice, the Department of Treasury explained that the interim guidance may be relied upon unless the actual regulations of subsequent instructions supplant them.<sup>119</sup> It is still accepting comments on the in-

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107. *Id.* § 201(b)(1).

108. *Id.* § 108(a). See also U.S. Dep't of the Treas., Interim Final Rule, at <http://www.ustreas.gov/offices/domestic-finance/financial-institution/terrorism-insurance/> (Apr. 15, 2003) [hereinafter Interim Final Rule].

109. TRIA § 108(d)(1).

110. *Id.*

111. *Id.*

112. *Id.* § 108(d)(2).

113. Christian Murray, *Business Lauds Insurance Bill/Terror Aid Seen as Economic Boost*, NEWSDAY, Nov. 27, 2002, at A27.

114. For explanatory and contact information, see Interim Final Rule, *supra* note 108.

115. See Interim Guidance I, 67 Fed. Reg. 76,206 (Dec. 11, 2002) (to be codified at 31 U.S.C. § 50) (addressing statutory disclosure obligations and the requirement that insurers must provide terrorism insurance).

116. See Interim Guidance II, 67 Fed. Reg. 78,864 (Dec. 26, 2003) (to be codified at 31 U.S.C. § 50) (clarifying categories of insurers required to participate and what losses are to be covered under the program).

117. See Interim Guidance III, 68 Fed. Reg. 4544 (Jan. 29, 2003) (to be codified at 31 U.S.C. § 50) (focusing on issues for foreign insurers and further addressing disclosure and certification inquiries).

118. See Interim Guidance IV, 68 Fed. Reg. 15,039 (Mar. 27, 2003) (to be codified at 31 U.S.C. § 50) (instructing insurers how rebut the presumption of control explained in the first set of interim instructions).

119. Interim Final Rule, *supra* note 108.

terim final rules it published on February 25, 2003 and April 15, 2003 that will be codified in the Code of Federal Regulations.<sup>120</sup>

## 2. Critiques of TRIA

### a. Insurers' Perspectives

Initially, there was dissent among insurers concerning whether or not September 11<sup>th</sup> actually launched an insurance crisis. Some experts said the insurance industry, with over three trillion dollars in assets, had more than enough capital on hand to manage the payouts and still remain financially solvent.<sup>121</sup> Others asserted September 11<sup>th</sup> was the greatest insured loss in history and the effects devastated the industry.<sup>122</sup> Even though the industry survived the September 11<sup>th</sup> payouts, the subsequent withdrawal of reinsurers coupled with the difficulty of pricing terrorism coverage created a disruption in the terrorism insurance market.<sup>123</sup> Not surprisingly, many insurers welcomed TRIA as a positive method to allow the insurance industry to recover from all the losses it suffered.<sup>124</sup> Insurers also applaud TRIA because it protects consumers by keeping insurance rates affordable.<sup>125</sup>

Despite its enthusiasm, the insurance industry has voiced a few concerns over TRIA. First, because terrorism coverage is mandatory, insurers may be liable for amounts that are very high in comparison to their capital.<sup>126</sup> Second, because it is difficult to price terrorism, insurers may create policies exceeding risk levels they normally would undertake.<sup>127</sup> Third, liquidity is a worry because it is unknown how quickly the government will reimburse insurers.<sup>128</sup> Fourth, TRIA does not apply if terrorist acts occur during a U.S. Congress-declared war, which has potential for many ambiguities.<sup>129</sup> Finally, legal proceedings may be involved in the settlement disputes, which may prove costly and lengthy.<sup>130</sup>

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120. *Id.*

121. See NAIC Statement Regarding Impact of Tragedy on the Insurance Industry, *supra* note 60. "Due to the tragic events that occurred in the United States yesterday . . . [p]olicyholders can rest assured knowing that the insurance industry in the United States is an \$850 billion industry with assets of over \$3 trillion." *Id.*

122. *Id.* (asserting the President of the American Insurance Association stated the insured losses from September 11 would surpass the industry's profits for the previous three years).

123. Brown et al., *supra* note 57, at 655-56.

124. See *Terror Act Requires Notification*, INS. & TECH. 10, Feb. 1, 2003.

125. Editorial, *Terrorism Insurance; Needed Government Backup Comes with a Mandate for Insurers*, BUFF. NEWS, Dec. 5, 2002, at B8.

126. Dean Patterson, *Insurers Ratings Likely Hurt by New U.S. Terrorism Insurance Law—S&P Update*, AFX NEWS LTD., Nov. 26, 2002, at Company News.

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

The industry's concerns can be summarized as fear of being "on the hook for greater risk but [with] limited savvy or experience in managing it."<sup>131</sup> Consequently, insurance industry financial ratings are in jeopardy.<sup>132</sup> The government has only tried to allay one of its concerns. The President, in a statement to the Secretary of Treasury, urged proposing a rule where the Treasury Department would provide advanced approval for any insurer's proposed settlement arising from an act of terrorism.<sup>133</sup>

*b. Corporations' Perspective*

Corporations have voiced a few objections to TRIA. First, there is a re-payment provision where a policy surcharge will be applied to recover any federal payments that surpass the statutory "mandatory recoupment amount" during any of the program's functioning years.<sup>134</sup> Second, businesses are concerned that the definition of a terrorist act is to be determined by the Secretary of Treasury and is not subject to judicial review.<sup>135</sup> Third, some claim TRIA does not go far enough because it does not cover acts of domestic terrorism, making it difficult to find an insurer who will include such coverage in a policy.<sup>136</sup> Fourth, if Congress declares war prior to a terrorist attack on U.S. soil, there is worry the coverage will not take effect.<sup>137</sup> Fifth, given the anthrax threat and possibility of a dirty bomb, businesses would also prefer coverage for acts arising from nuclear, chemical or biological weapons.<sup>138</sup> Sixth, some corporations secured terrorism insurance prior to passage of TRIA. For these "double coverage situations," it is unclear what is to come of the premiums they have already paid.<sup>139</sup> Seventh, because TRIA is in effect for only three years, companies are concerned about what will replace it.<sup>140</sup>

Finally, the most voiced concern of corporations is that any punitive damages awarded in a civil lawsuit will not qualify as insured losses under TRIA.<sup>141</sup> Members of Congress argue that if such protection was afforded, it could prevent businesses from taking precautionary steps against a future

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131. *Id.*

132. *Id.*

133. George W. Bush, *Memorandum for the Secretary of the Treasury*, available at <http://www.whitehouse.gov/news/releases/2002/11/20021126-13.html> (Nov. 26, 2002).

134. Diana Morrissey & Andrea Carruthers, *What the Terrorism Insurance Law Means for Business*, Faegre & Benson Legal Updates, at [www.faegre.com/articles/article\\_776.asp](http://www.faegre.com/articles/article_776.asp) (last visited Nov. 13, 2003) [hereinafter Faegre Report].

135. *Id.*

136. Christine Dugas, *Many Firms Shun Federal Terrorism Insurance*, USA TODAY, Apr. 3, 2003, at 6B.

137. *Id.*

138. *Id.*

139. Faegre Report, *supra* note 134.

140. Dugas, *supra* note 136.

141. TRIA § 107(a)(5). The bill in the House of Representatives allowed punitive damages to be considered as insured losses. See Orland, *supra* note 41, at 108.

terrorist attack.<sup>142</sup> Corporations fear the potentially devastating amounts of damages awarded to victims in civil lawsuits.<sup>143</sup> However, because TRIA allows for consolidation of suits, uncertainty is reduced because of the single forum and legal standard to be employed.<sup>144</sup>

### *c. Taxpayers' Perspective*

Taxpayers' central concern with TRIA is that their money is being used to fund a potentially enormous federal liability that serves as nothing but a bailout for the insurance industry.<sup>145</sup> If the insurance industry remains financially solvent following its payouts for the September 11<sup>th</sup> attacks, taxpayer money should not be used to compensate the industry. The National Taxpayers' Union ("NTU") is concerned that the government-backed program will allow insurers to subscribe high-risk policyholders they would not normally subscribe.<sup>146</sup> TRIA would thus effectively eliminate an insurer's motivation to be cautious in underwriting certain risks.<sup>147</sup> The lack of caution in underwriting could create a terrorism insurance industry that would not be sustainable without federal backing. The insurance industry's response to using taxpayer money is that terrorism insurance raises national security concerns, and taxpayers are sharing the burden with insurers.<sup>148</sup>

### *d. Consumers' Perspective*

Although the Consumer Federation of America ("CFA") recognizes the need for some aid to the insurance industry, it has been a strong opponent of TRIA. The chief consumer concern is that a federal backstop will prevent insurance agencies from being able to independently offer affordable coverage for terrorism risks.<sup>149</sup> CFA alleges TRIA's expansive coverage prevents holding the private industry responsible for responding to the problem of ter-

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142. U.S. Senator Patrick Leahy, President Signs Terrorism Insurance Bill (Nov. 26, 2002) (reaction of Senate Judiciary Chairman Patrick Leahy), available at <http://www.senate.gov/~leahy/press/200211/112602a.html> (last visited Feb. 2, 2003). *But see* Orleans, *supra* note 41, at 121-22 (arguing building owners should not be liable for punitive damages because no amount of prevention and responsiveness can alleviate the risk of terrorism due to its arbitrary character).

143. *See* Orleans, *supra* note 41, at 121-22.

144. Brown et al., *supra* note 57, at 655.

145. Gregg J. Loubier & Jason B. Aro, *Practice Tips: Insuring the Risks of Terror*, 25 L.A. LAW. 18, 20 (2002). *See also* Dan Levy, *Bush Signs Law to Shield Insurers*, S.F. CHRON., Nov. 27, 2002, at B1, available at 2002 WL 4036722.

146. Richard Allyn & Heather McNeff, *Justice in a Changed World: The Fall and Rise of Terrorism Insurance Coverage Since September 11, 2001*, 29 WM. MITCHELL L. REV. 821, 833 (2003) (statement of David A. Moss, Associate Professor, Harvard Business School).

147. *Id.*

148. Symposium, *A Risky Business? What Happens to Terrorism Coverage If Insurers Can't Afford To Offer It?*, 9 CORP. COUNS. 64 (2002).

149. *But see* Loubier & Aro, *supra* note 145, at 18.



rorism insurance.<sup>150</sup> In addition, the government's role could inhibit the necessary private development of the insurance industry and could upset the private markets.<sup>151</sup>

In January 2002, CFA published a report contending: 1) there is too much capital in the insurance industry; 2) medium and larger size companies bore most of the problems resulting from September 11<sup>th</sup> because of high insurance rates; 3) the economic cycle, and not just the terrorist attacks, were also responsible for the insurance problem; 4) banks continued to loan money to companies despite the lack of terrorism insurance; and 5) there essentially was no major economic problem caused by the lack of availability of terrorism insurance.<sup>152</sup> For these reasons, CFA argued that Congress should not have felt compelled to pass the legislation.<sup>153</sup> Because CFA believes there was no potential economic crisis due to the lack of terrorism insurance, it contends TRIA is an unnecessary and ineffective response.

### *B. Foreign Responses to the Insurance Crisis Resulting from the Terrorist Attacks of September 11<sup>th</sup>*

The U.S. is not the first country to implement legislation for terrorism insurance. Nor was it the first country to pass insurance legislation as a direct response to the September 11<sup>th</sup> attacks. For other countries that have already addressed the problem, coverage generally falls under one of two categories: the foreign government acts either as a reinsurer or as a direct insurer.<sup>154</sup> For those countries that passed insurance legislation as a direct result

150. Levy, *supra* note 145.

151. Brown et al., *supra* note 57, at 651.

152. Allyn & McNeff, *supra* note 146, at 834 (citing J. Robert Hunter, *How the Lack of Federal Backup for Terrorism Insurance has Affected Insurers and Consumers: An Analysis of Market Conditions and Policy Implications* (2002)).

153. *Id.*; but see Testimony of Mark J. Warshawsky Before U.S. House of Reps. (Feb. 27, 2002) (explaining the negative economic impact resulting from the non-availability of terrorism insurance), available at [www.ustreas.gov/offices/economicpolicy/press/testimony\\_terrorism\\_risk\\_insurance.pdf](http://www.ustreas.gov/offices/economicpolicy/press/testimony_terrorism_risk_insurance.pdf).

154. Israel serves as direct insurer for terrorism claims. See Dwight Jaffee & Thomas Russell, *Extreme Events and the Market for Terrorist Insurance* (for presentation to Nat'l Bureau of Economic Research Insurance Conference, Feb. 2002), available at <http://faculty.haas.berkeley.edu/jaffee/Papers/JRInsFeb02.pdf> (revised draft Jan. 11, 2001). It created two mandatory terrorism insurance programs funded by taxes; private policies provide additional coverage for business interruption insurance. Thomas J. McCool, *Terrorism Insurance: Alternative Programs for Protecting Insurance Consumers*, Rep. GAO-02-199T, available at [http://www.securitymanagement.com/library/gao02199t\\_terror0202.pdf](http://www.securitymanagement.com/library/gao02199t_terror0202.pdf) (Oct. 21, 2001). It also pays medical bills and lost wages for victims to personal injury victims and their families for citizens, visitors and tourists. *Id.* Northern Ireland enacted the Criminal Damage (Compensation Order of 1977) to cover damages incurred by either riotous assembly or malicious acts committed on behalf of an unlawful association; insurers effectively regard these as terrorism claims. *Terrorism Coverage Elsewhere*, RISK MGMT. MAG., available at [http://www.drj.com/special/wtc/w3\\_066.htm](http://www.drj.com/special/wtc/w3_066.htm) (last visited Apr. 12, 2003). Spain's Consorcio de Compensación de Seguros ("Consortio") is a mandatory government-financed insurance pool to cover terrorism claims as well as natural catastrophes; private insurers may provide

of September 11<sup>th</sup> or are in the process of doing so, the countries primarily followed the model established by Britain's Pool Re insurance scheme.<sup>155</sup>

### *1. Insurance Coverage for Terrorist Attacks: Britain's Pool Re*

Following a sequence of terrorism attacks in Great Britain, global reinsurers ceased covering primary insurers who insured commercial property in Great Britain.<sup>156</sup> In 1993, in order to prevent terrorist acts from disturbing commercial transactions and the economy, the British government set up what is commonly known as Pool Re, a mutual insurance company that insures commercial properties against terrorism.<sup>157</sup> Pool Re insures for damages to physical property and for losses resulting from the loss of use of property.<sup>158</sup> Pool Re defines a terrorist act as "an act of any person acting on behalf of or in connection with any organisation with activities directed towards the overthrowing or influencing of any government de jure or de facto by force or violence."<sup>159</sup> In its capacity as a reinsurer to Pool Re, the U.K. government is an insurer of last resort.<sup>160</sup> Participation in Pool Re is not mandatory.<sup>161</sup> However, the government's reinsurance payments are only available through Pool Re.<sup>162</sup>

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additional coverage, such as for business interruption. *Id.* France requires insurers to provide terrorism insurance for property damage; the primary insurer can either retain the risk or reinsure it with a private reinsurer or a French government-controlled reinsurer. *Id.* In addition, French insurers are required to contribute to a national pool to compensate victims harmed in a terrorist attack. *Id.* The South African government teamed up with the fifteen largest direct insurers to create the South African Strikes and Riots Insurance Association ("SASRIA"). *Id.* The government acts as an insurer of last resort and has been able to meet most of the country's business needs. *Id.* To learn more about Israel's insurance programs, Spain's Consorcio, South Africa's SASRIA and the U.K.'s Pool Re, see Mark Boran, Note, *To Insure or Not to Insure, That is the Question: Congress' Attempt to Bolster the Insurance Industry After the Attacks on September 11, 2001*, 17 ST. JOHN'S J. LEGAL COMMENT. 523, 548-60 (2003).

155. Andrew Bolger, *Terrorism: Outside the U.S.: Organisations Dealing with 'Extraordinary Risk' Have Seen Their Profiles Soar Since September 11*, FIN. TIMES (London), May 24, 2002, at 2.

156. *Pool Re and Terrorism Insurance in Great Britain*, TILLINGHAST-TOWERS PERRIN NEWSL., at [http://www.tillinghast.com/tillinghast/publications/publications/tillupdateuk/Uk\\_Pool\\_Re\\_and\\_Terrorism/2002052111.pdf](http://www.tillinghast.com/tillinghast/publications/publications/tillupdateuk/Uk_Pool_Re_and_Terrorism/2002052111.pdf) (Oct. 2001) [hereinafter Tillinghast Report]. Tillinghast-Towers Perrin is a leading global consultant in the insurance industry. *Id.* For a detailed comparison of Pool Re to the antecedents of TRIA, see Andrew S. Neuwalt, *The Impact of September 11 on Terrorism Insurance: Comparing Senate Bill 2600, House of Representatives Bill 3210, and the United Kingdom's Pool Re*, 9 ILSA J. INT'L & COMP. L. 473 (2003).

157. Tillinghast Report, *supra* note 156.

158. *Id.*

159. *Provisions of Terrorism and Riot Coverage in Different Countries*, at <http://astre.scor.com/astrehelp/en/assur/inc/extensionuk/terrorism.htm> (emphasis added) (last visited Mar. 22, 2003). Scor is a French-based global reinsurance company. *Id.*

160. See Jaffee & Russell, *supra* note 154.

161. See Tillinghast Report, *supra* note 156.

162. *Id.*

The majority of businesses in London were not persuaded to purchase terrorism insurance through Pool Re until about ten years after its inception.<sup>163</sup> In response to September 11<sup>th</sup>, insurers and companies urged the British government to extend Pool Re's coverage to include employee liabilities and personal injury.<sup>164</sup> The system was evaluated in light of September 11<sup>th</sup> and several changes to the Pool Re system became effective January 1, 2003.<sup>165</sup> One change expands coverage from damages caused by fire and explosion to all types of risks.<sup>166</sup> An exclusion was created for cyber attacks, due to the difficulty in proving such an attack is perpetrated by terrorists.<sup>167</sup> There is no longer an exclusion for terrorist attacks caused by nuclear weapons.<sup>168</sup> Finally, there are no changes to Pool Re's war risk exclusion or property coverage; only commercial properties remain eligible for coverage.<sup>169</sup>

## 2. Foreign Legislative and Corporate Responses to the Insurance Crisis Posed by the Terrorist Attacks of September 11<sup>th</sup>

Many countries, several of which already had some form of terrorism insurance in place, quickly responded to the September 11<sup>th</sup> attacks by enacting legislation for terrorism insurance.

### a. France

Prior to September 11<sup>th</sup>, the French-government based reinsurer Caisse Centrale de Reassurance ("CCR") reinsured any event classified as a "natural catastrophe" according to French law.<sup>170</sup> French law considers terrorist acts to be "natural catastrophes."<sup>171</sup> In response to September 11<sup>th</sup>, France was the first country to enact new terrorist insurance legislation. It created the Gestion de l'Assurance et de la Reassurance des Risques Attentats et Actes de Terrorisme, or GAREAT, in January 2002.<sup>172</sup> GAREAT is a state-

163. Brendan Noonan, *Brokers, Insurers Struggle with Rollout of Terror Coverage*, BEST WIRE, Apr. 8, 2003.

164. Bolger, *supra* note 155.

165. Julian Coglán, *Terrorism: Changes to Pool Re Summary Paper*, at <http://astre.scor.com/astrehelp/en/qualif/env/pool%20re%20changes.htm> (last visited Mar. 22, 2003).

166. *Id.*

167. Bolger, *supra* note 155.

168. *Id.*

169. In addition to Pool Re, small and medium-sized companies are purchasing terrorism insurance through the joint efforts of the British Insurance Brokers' Association and underwriters from Lloyd's of London, who are providing terrorism coverage to smaller businesses interested in insuring possible liabilities to the public and employees. Andrew Bolger, *Cover for Terrorism Offered to Smaller Companies*, FIN. TIMES, Sept. 2, 2003, at 2.

170. *Id.*

171. *Id.*

172. Ben Dyson, *Government Terrorism Schemes: With a Little Help From Their Enemies*, REACTIONS, July 1, 2002, available at <http://www.reactionsnet.com/story.asp?id=21242>.

backed commercial insurance pool for terrorist acts, managed by representatives from insurance and reinsurance companies.<sup>173</sup> Direct insurers pay for the first 250 million euros in annual loss due to terrorism claims.<sup>174</sup> The next 750 million euros are covered by international insurance and reinsurance markets.<sup>175</sup> The French government pays the next 500 million euros worth of claims.<sup>176</sup> The final 1.5 billion euros of available coverage is provided by the CCR.<sup>177</sup>

### *b. Germany*

In November 2002, Germany created Extremus AG, a state-backed insurance pool to help the private insurance market cope with terrorism claims.<sup>178</sup> Extremus AG is composed of private insurers who provide coverage for acts of terrorism that result in claims costing from twenty-five million to three billion euros.<sup>179</sup> The German government receives a percentage of the premiums paid to the private insurers.<sup>180</sup> In exchange, it provides an additional ten billion euros in coverage.<sup>181</sup> Since its inception, Extremus has executed 855 insurance contracts with annual premiums reaching 1.4 million euros.<sup>182</sup> Demand has been limited thus far, but it claims “the tensions caused by terrorism will continue to exist[,]”<sup>183</sup> thus requiring Extremus to maintain its offering of services.

### *c. Australia*

In October 2002 Australia proposed the Terrorism Insurance Bill, which created the Australian Reinsurance Pool Corporation that took effect July 1, 2003.<sup>184</sup> Private insurers will pay the first ten million Australian dollars (6.4 million U.S. dollars) in claims.<sup>185</sup> The insurance pool will pay for costs surpassing the ten million mark up to one billion Australian dollars (640 million U.S. dollars), and the Australian government will pay for further losses of up

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173. See Tillinghast Report, *supra* note 156.

174. Bolger, *supra* note 155.

175. *Id.*

176. *Id.*

177. *Id.*

178. Dyson, *supra* note 172.

179. Bolger, *supra* note 155.

180. *Id.*

181. *Id.*; Dyson, *supra* note 172.

182. Herbert Fromme, *Low Demand for German Terrorism Cover*, LLOYD'S LIST (London), Apr. 3, 2003, at 2.

183. *Id.* (quoting Bruno Gas, Chief Executive Officer of Extremus).

184. Parliament of Australia, Department of the Parliamentary Library, *Australian Terrorism Insurance Bill 2002*, Bill Digest No. 110, available at <http://www.aph.gov.au/library/pubs/bd/2002-03/03bd110.htm> (last visited Mar. 22, 2003).

185. Valerie Mason, *Insurance Premiums to Increase for Australian Businesses Over Terrorism Fears*, WORLD MARKETS ANALYSIS, Aug. 18, 2003.

to nine billion Australian dollars (5.7 billion U.S. dollars).<sup>186</sup> The scheme plans to cover damages caused by terrorist activities resulting from fire, floods, explosions, airplane crashes and biological and chemical weapons, but not by nuclear weapons.<sup>187</sup> It will cover for loss or damage to physical property, business interruption and resulting third-party liabilities if they are related to the insured property.<sup>188</sup>

The main difference between Australia's Terrorism Insurance Bill and TRIA is that, in Australia, subscription to the coverage will be mandated.<sup>189</sup> Whether a covered property is considered low-risk for a terrorist attack, or it employs competent risk management that could prevent a terrorist attack, all organizations will need to subscribe to it.<sup>190</sup> All policyholders will be required to pay an additional two percent of their premium payments to the government as a levy.<sup>191</sup> Organizations with properties in the capitals of Australian states and territories will pay an additional ten percent surcharge while those in other urban areas will pay an additional two percent surcharge.<sup>192</sup> The program is expected to raise approximately 300 million Australian dollars from the levies and surcharges.<sup>193</sup> While the Association of Risk and Insurance Managers of Australasia Ltd. is pleased the Legislature has addressed the issue of terrorism insurance, it does not believe participation should be mandatory.<sup>194</sup> However, the Australian Bankers' Association welcomes the compulsory nature of the bill because it ensures their borrowers are sufficiently protected from terrorism risks.<sup>195</sup>

#### *d. Corporate and Other Responses*

In a private effort, a group of European insurers entered into an agreement to provide terrorism insurance.<sup>196</sup> Allianz, a German insurance group, set up the first corporate insurance pool based out of Luxembourg, Bel-

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186. Parliament of Australia, *supra* note 184.

187. *Id.*

188. Michael Bradford, *Aussies May See Terror Cover Mandate*, BUS. INS., Apr. 28, 2003, at 17.

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.*

193. Peter Hunt, *New Tax for Terrorism*, WKLY. TIMES (Australia), May 14, 2003, at 21.

194. Bradford, *supra* note 188. The Australian insurance industry is concerned that certain foreign insurers will ignore the Terrorism Insurance Act and not contribute to the pool fund, leaving their clients without coverage for potential devastating liabilities. Morgan Mellich, *Local Business Cover at Risk*, AUSTRALIAN FIN. REV., Aug. 18, 2003, at 5.

195. Bradford, *supra* note 188.

196. See Lenain et al., *supra* note 56, at 11. "[A] group of European insurance and reinsurance companies has recently announced their intention to set up a pool to cover against limited terrorism risk." *Id.*

gium.<sup>197</sup> The company, called Special Risk Insurance and Reinsurance Luxembourg S.A. (“SRIR”), provides limited coverage to property insured against acts of terrorism.<sup>198</sup> The policies do not provide business interruption coverage, and focus their coverage in Europe.<sup>199</sup> Coverage is limited to 275 million euros and policies are provided to both insurers and reinsurers.<sup>200</sup> Accused of undermining requests for state-backed programs for terrorism insurance, SRIR did not intend to replace any government-sponsored insurance pools that have been created in response to September 11<sup>th</sup>.<sup>201</sup> It merely provides a complementary avenue for insurance coverage.<sup>202</sup> However, less than one year after it initially offered its services, SRIR is no longer accepting new business because there is little demand for its product.<sup>203</sup> SRIR is not underwriting new policies because of the presence of several government-backed insurance programs.<sup>204</sup> In addition, though companies are more aware of terrorism risks, “[t]he syndrome ‘I am not a terror risk’ certainly prevails,”<sup>205</sup> thus countering incentives for a corporation to purchase terrorism insurance.

Several other countries are considering implementing some form of terrorism insurance. The Marine and Fire Insurance Association of Japan continues to hold discussions concerning the set-up of a “terrorism risk pool,” and plans to implement one should the demand come from corporate customers.<sup>206</sup> Italy’s National Association of Insurance Companies (“ANIA”) submitted a proposal to set up a government-backed reinsurance pool to cover acts of terrorism and natural catastrophes.<sup>207</sup> Singapore’s insurance industry is seeking financial coverage from its government to help it provide commercial terrorism insurance.<sup>208</sup> Even risk managers in Canada, who per-

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197. *Allianz Plans to Set Up Terrorism Insurance Unit*, FIN. TIMES (London), Feb. 21, 2002, at 1.

198. Press Release, Special Risk Insurance and Reinsurance Luxembourg S.A., (Apr. 4, 2002), available at [www.scor.fr/pdf/SRIR\\_ik.pdf](http://www.scor.fr/pdf/SRIR_ik.pdf) (on file with California Western Law Review/International Law Journal). The corporate shareholders include Zurich Financial Services, XL Capital Ltd., Swiss Re, Hannover Re, Allianz and Scor. *Id.*

199. *Id.*

200. *Id.*

201. Tony Major, *Insurance Attempt to Meet Growing Demand for Policies Since September 11*, FIN. TIMES (London), Apr. 5, 2002, at 25.

202. *Id.*

203. Sarah Veysey, *Terrorism Insurer Closing Its Doors*, BUS. INS., Mar. 13, 2003, available at [www.businessinsurance.com/cgi-bin/news.pl?newsId=2108&print=Y](http://www.businessinsurance.com/cgi-bin/news.pl?newsId=2108&print=Y).

204. *Id.*

205. *Id.*

206. Kunio Ishihara, The Statement of the Chairman of the Marine and Fire Insurance Association of Japan (Sept. 19, 2002, Tokyo) (translation), available at [http://www.sonpo.or.jp/english/topics/state\\_20020919e.html](http://www.sonpo.or.jp/english/topics/state_20020919e.html).

207. Alfonso Desiata, President’s Report to the Annual Assembly (June 13, 2002, Rome) (translation by author), available at <http://www.ania.it/search.html> (search “assicurazione del terrorismo,” document title “Relazione Annuale del Presidente Alfonso Desiata”).

208. *Singapore Insurers Seek Government Help to Provide Commercial Terrorism Cover*, CHANNEL NEWS ASIA, Mar. 31, 2003.

ceive terrorism risks in their country to be much lower than risks in the United States, recognize some value in terrorism insurance.<sup>209</sup> Though it is not currently a big issue, terrorism insurance is either unavailable for large buildings or available only at extremely expensive premiums.<sup>210</sup> Thus, Canada is also “moving in the same direction as the United States” in regards to terrorism insurance.<sup>211</sup> In brief, there is demonstrated international concern regarding the availability of terrorism insurance.

### III. PROPOSAL TO SUPPORT INSURING CORPORATE INTERESTS AGAINST TERRORISM

In a globalized world, where political leaders stress the importance of continued trade and globalization to combat terrorism, terrorism insurance is needed to protect business interests and promote the channels of globalization. Considering the domestic and international state-backed efforts to provide terrorism insurance, the issue is whether a concerted, global effort will be more efficacious in providing terrorism insurance to MNCs rather than several individual programs.

#### A. TRIA Analyzed

##### 1. Current Status of Terrorism Insurance in the U.S.

In the U.S., despite the availability of terrorism insurance, not many corporations have actually purchased it.<sup>212</sup> A survey by the Council of Insurance Agents and Brokers concluded that less than ten percent of small businesses have purchased it, while about twenty percent of medium size businesses have opted for the coverage.<sup>213</sup> Large businesses are purchasing it, but are searching for other solutions given the high cost and limited coverage.<sup>214</sup> Even though there was an increase in sales for terrorism insurance prior to the invasion of Iraq, most businesses are not purchasing it.<sup>215</sup> In the event of another terrorist attack, corporations may simply expect federal assistance

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209. Thomas G. Dolan, *Terrorism Insurance: Risk Managers Wrestle with Terrorism Insurance Options*, 27 NAT'L APARTMENT ASS'N UNITS 34, Apr. 1, 2003, at 34.

210. *Id.*

211. *Id.*

212. Joseph B. Treaster, *Insurance For Terrorism Still a Rarity*, N.Y. TIMES, Mar. 8, 2003, at C1.

213. Christine Dugas, *Many Firms Shun Federal Terrorism Insurance*, USA TODAY, Apr. 2, 2003, at 6B.

214. *Id.* Though a survey of large businesses have reported that the coverage costs an additional 24% of their overall premiums, some brokers note that some clients were charged 81-100% of their overall premiums. Meg Green, *A Glass Half Full*, 104 BEST'S REV. 50 (Sept. 1, 2003).

215. Jackie Spinner, *War Exemption Limits Terrorism Insurance*, WASH. POST, Apr. 3, 2003, at E1.

just as they did following the September 11<sup>th</sup> attacks.<sup>216</sup> Though TRIA is a worthy effort to respond to corporate and insurance industry's needs concerning terrorism coverage, it is limited in some applications.

#### *a. Limited Definition of Terrorism*

The definition of terrorism is limited to acts performed on behalf of *foreign* interests.<sup>217</sup> This may raise ambiguities where a U.S. citizen commits a terrorist act, and it is difficult to discern whether the act was executed on behalf of a foreign interest. The definition also excludes acts of domestic terrorism, such as the Oklahoma City bombing. Finally, the definition is too narrow because the Secretary of Treasury's determination of a terrorist act is not subject to judicial review.<sup>218</sup> This grants great discretionary authority to the Secretary. In the event of litigation concerning the definition of a terrorist act, the non-availability of judicial review could raise some constitutional concerns,<sup>219</sup> which may result in lengthy and costly litigation.

#### *b. Exclusions from Coverage*

TRIA excludes too many events to adequately serve the terrorism insurance needs of businesses. The war-time exclusion is unclear because it does not clarify whether an event occurring during a U.S. Congress-declared war, but unrelated to the war, will be covered. TRIA does not require coverage for catastrophes caused by weapons of mass destruction, such as nuclear, chemical and biological agents.<sup>220</sup> Given the possibility of an anthrax or other biological attack, TRIA simply does not cover enough potential types of terrorism.

#### *c. Litigation*

The non-immunity provision for corporations in civil lawsuits deters interested companies from purchasing terrorism insurance. In addition to business concerns, the provision raises an international issue. Because victims of terrorism will be able to sue corporations for damages, including foreign corporations, it may be viewed by some countries as an intrusion of sover-

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216. Treaster, *supra* note 212.

217. TRIA § 102(1).

218. *Id.* § 102(1)(C).

219. The provision stating the Secretary of Treasury's determination of a terrorist act is not subject to judicial review may raise two Constitutional issues: 1) It is possibly an unconstitutional delegation of judicial power to the Executive branch for final determination of an act of terrorism; and 2) there is potential the Secretary's determination of a terrorist act will not be supported by the Constitution.

220. Dugas, *supra* note 213.



eighty.<sup>221</sup> This, in turn, may lead to similar laws and lawsuits being rendered against the U.S. government,<sup>222</sup> or U.S.-based MNCs.

#### *d. What U.S. Corporations Are Doing for Terrorism Insurance*

The novelty of terrorism insurance, its high cost and numerous uncertainties have deterred businesses from purchasing it. Many businesses feel TRIA does not adequately respond to the raised concerns.<sup>223</sup> As a result, large businesses have started to purchase stand-alone coverage, which is more expensive, but better responds to policyholders' needs.<sup>224</sup> Some companies are contemplating forming a mutual insurance company to cater policies to their needs and allow for more manageable costs.<sup>225</sup>

### *2. Role of TRIA in the International Terrorism Insurance Market*

Though one of the stated purposes of TRIA is to promote the U.S. economy's role in a globalized world and continue pursuing economic success through U.S. exports, international trade and globalization, it does not address the needs of MNCs who require insurance abroad.<sup>226</sup> Companies must purchase a separate terrorism policy to cover acts of terrorism occurring in international locations. Because these policies will not be backed by TRIA, a MNC may have difficulty in locating an insurer who is willing to insure for such a risk, and will likely pay high-priced premiums because of the lack of government backing. In addition, having different insurers for various business aspects may prove to be burdensome and unduly expensive.

Take, for example, a U.S. headquartered technology corporation with production facilities in Indonesia and Mexico, subsidiaries in France and

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221. See Bruce Zagaris, *U.S. Terrorism Insurance Act Provides for Civil Causes of Act*, 19 INT'L ENFORCEMENT L. REP. 71 (2003). Currently, the only exception to foreign sovereign immunity the U.S. may utilize when suing a foreign state is found in the Foreign Sovereign Immunities Act. It states that an action for money damages may be brought against a nation if personal injury or death is caused by "torture, extrajudicial killing, aircraft sabotage, [or] hostage taking . . . if the foreign state is designated as a state sponsor of terrorism." 28 U.S.C. §1605(a)(7) (2003). The countries currently designated as state sponsors of terrorism are Cuba, Iran, Iraq, North Korea, Libya, Sudan and Syria. 15 C.F.R. 740 (Supp. 2003).

222. Zagaris, *supra* note 221.

223. See *supra* notes 134-44 and accompanying text.

224. Dugas, *supra* note 213, at 6B.

225. *Id.*

226. An insurance expert encourages captives domiciled outside the U.S., such as a U.S. subsidiary, to review TRIA and inform the Secretary of Treasury and the NAIC of the situation so that they may consider applying TRIA to other captives. Michael Mead, *Captives, the Terrorism Risk Insurance Act, and the Market* (Jan. 2003) at [www.irmi.com/expert/articles/Mead005.asp](http://www.irmi.com/expert/articles/Mead005.asp). International Risk Management Institute is a U.S. research and publishing company working in insurance and risk management. A captive is a subsidiary that a company establishes for the sole purpose of insuring the parent company's risk. Boran, *supra* note 154, at 536. Because TRIA applies to domestic captives, many large companies are either creating or reorganizing existing captives to insure terrorism risks. Green, *supra* note 214.

Germany and a major customer in Israel. The corporation would have to purchase stand-alone terrorism insurance to insure its production facilities in Indonesia and Mexico, who currently have no state-backed terrorism insurance programs. In France and Germany, it may participate in GAREAT and Extremus, both providing different definitions for terrorist acts, various scales for premiums and differing scopes of coverage. When visiting its main customer in Israel, the MNC would have to purchase Israeli insurance for foreign travelers, since most of the state-backed policies do not offer casualty insurance for events occurring outside of their borders. How is international business and trade, which can combat terrorism, to be pursued when insuring terrorism risks requires either costly stand-alone terrorism insurance or burdensome efforts to purchase state-backed coverage in each country of business?<sup>227</sup>

### *B. The Consequences of Not Having A Multilateral Response to the Need for Terrorism Insurance*

The number of MNCs evidences the globalized and interdependent nature of individual national economies.<sup>228</sup> Currently, there are over 65,000 MNCs that maintain about 850,000 foreign affiliates.<sup>229</sup> A dichotomy exists because there is a keen interest to have terrorism insurance available, yet consumer purchases remain low. Either these MNCs do not envision themselves as being in danger of terrorism attacks, or the coverage is too costly.

One way to address the dichotomy is to create a multilateral effort to provide terrorism insurance. Especially during economic declines, it is burdensome for MNCs to purchase separate policies for each office and subsidiary. Buying terrorism insurance is not cost-effective if each host country has a unilateral policy that demands various premiums for diverse definitional acts of terrorism.<sup>230</sup>

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227. MNCs at risk for terrorism attacks include those going to Iraq to help rebuild the country's infrastructure. As of October 29, 2003, thirteen contracts and six grants have been awarded to companies to help reconstruct Iraq's financial, agricultural, transportation, education, and health systems, and the U.S. government is currently seeking to award more contracts. See Iraq Reconstruction Task Force, *Awarded Contracts & Grants*, at <http://www.export.gov/iraq/contracts/index.html> (Nov. 14, 2003). However, MNCs operating anywhere are at risk due to the reorganization of Al-Qaeda. David Johnston & Don Van Natta, Jr., *Aftereffects: Terrorist Threat, U.S. Officials See Signs of a Revived Al-Qaeda*, N.Y. TIMES, May 17, 2003, at A1.

228. Cynthia A. Williams, *Corporate Social Responsibility in an Era of Economic Globalization*, 35 U.C. DAVIS L. REV. 705, 720-21 (2002).

229. Thomas Andersson & Georgina Schemberg, *Transnational Corporations and Export Competitiveness*, UNCTAD's World Investment Report 2002, available at <http://www.iked.org/pdf/UNCTAD.pdf> (last visited Nov. 14, 2003).

230. See Thomas A. Player, Jr. et al., *A Global Definition of Terrorism* 6 (June 15, 2002), at [http://mmlaw.com/articles/article\\_152.pdf](http://mmlaw.com/articles/article_152.pdf) (advocating a global definition of terrorism because a "patchwork of definitions" in a series of unilateral state-backed insurance schemes could greatly increase confusion for MNCs in conducting risk management and cause lapses in coverage between primary insurers and the state-backed programs).

Initially, terrorism insurance initiatives in the U.K., Israel, Spain and South Africa were created to address particular threats; now they must adjust their programs to account for the heightened terrorist threats posed by the events of September 11<sup>th</sup>.<sup>231</sup> As evidenced by the several unilateral measures that were in place prior to September 11<sup>th</sup>, terrorism was primarily a national concern. Now, terrorism has an international dimension.<sup>232</sup> U.S. leaders have explicitly stated international business and trade is integral to fighting a war on terrorism.<sup>233</sup> If terrorism insurance aids MNCs in these endeavors, then it should be more cost-effective and will properly respond to MNC's needs.

Private companies must play the primary role in protecting their assets against terrorist attacks.<sup>234</sup> In order to prevent burdensome government regulations aimed at helping companies protect their assets, the government could play a minimal role and instead allow insurance companies to require additional precautionary measures.<sup>235</sup> Insurers could give financial incentives to those who take more precautions.<sup>236</sup>

For MNCs, coverage that applies at an international level will be most cost efficient and productive. In the interests of promoting business and creating a feasible mechanism to insure international terrorism risks, an international private-public endeavor should be pursued. For example, a private international mutual insurance group, backed by an organization such as the Organization for Economic Cooperation and Development ("OECD"),<sup>237</sup> could be effective. The international mutual insurance group could serve as the primary insurer for the MNCs. The primary insurer could then spread the risk to various reinsurers. Finally, countries interested in protecting their MNCs could act as insurers of last resort. An international umbrella organization could facilitate the coverage, where a country agrees to provide the

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231. Bolger, *supra* note 155.

232. September 11<sup>th</sup> was not the first terrorist attack aimed at Americans to result in the killing of many foreigners. On January 8, 1999, 224 people, including Americans, Kenyans and Tanzanians, were killed in a terrorist bombing on the U.S. embassies in Nairobi, Kenya and Dar es Salaam, Tanzania. See IHEKWOABA D. ONWUDIWE, *THE GLOBALIZATION OF TERRORISM* 123 (2001).

233. See Zoellick, *supra* note 3, at 11.

234. Dana H. Allin et al., *The Democratic Party and Foreign Policy*, 20 *WORLD POL'Y J.* 7 (Spring 2003), at <http://www.worldpolicy.org/journal/articles/wpj03-1/allin.html>.

235. *Id.*

236. *Id.*

237. OECD discussed the problems associated with the decreased availability and affordability of terrorism insurance and is open to suggestions on how to cover terrorism risks and "assess the respective roles of the insurance industry, financial markets and governments . . . [for terrorism] risks." Player et al., *supra* note 230, at 4 n.12. Currently, the OECD ministers have mandated the OECD Insurance Committee to develop policy analysis and formulate suggestions for defining terrorism risks and considering the respective roles the insurance industry, financial markets and governments could play in covering terrorism risks. An initial paper discussing the topics is due to come out at the end of 2003, and should be finalized in 2004. *Email Correspondence with Cécile Vignial, OECD Principal Administrator of Financial Affairs Division* (on file with California Western Law Review/International Law Journal).

international organization with a certain percentage of coverage for participating MNCs in the event of a terrorist attack. The percentage of coverage could vary according to the percentage of participating MNCs from the participating country. In effect, the resources that are to be used for several unilateral state-backed insurance programs can be effectively applied to an international private-public insurance pool.

## CONCLUSION

Because terrorism has used the tools of globalization to help carry out its objectives, it follows that unilateral action against terrorism is insufficient, and a multinational response is more appropriate.<sup>238</sup> On September 28, 2001, the United Nations passed a Security Council Resolution that denounced terrorism and proposed multilateral actions.<sup>239</sup> The Resolution strongly urges nations to combat terrorism and authorizes the use of force to do so.<sup>240</sup> If terrorism is an international concern whose occurrences are not limited by national borders, then a multilateral response is necessary to maintain the national security of the international community.<sup>241</sup>

There are currently twelve international treaties that deal with international terrorism.<sup>242</sup> The European Union ("EU") has engaged in multilateral actions, including increased law enforcement and judicial cooperation, to combat terrorism.<sup>243</sup> The EU's counter-terrorism efforts have been greatly facilitated by its legal framework.<sup>244</sup> Similarly, pursuing an international coalition to insure against terrorism, under an established legal framework such as the OECD, may be the most efficient way to provide terrorism insurance that will protect MNCs that pursue international business and trade.

If MNCs either pull out of international business and trade operations or forego an opportunity to pursue such interests, only terrorists will result as the victors. Following the post-September 11<sup>th</sup> terrorist attacks on Western targets in Riyadh, Saudi Arabia, foreign policy advisor to Crown Prince Abdullah, Adel al-Jubeir, urged American companies to refuse any contempla-

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238. Jay M. Vogelsson, *Multinational Approaches to Eradicating International Terrorism*, 36 INT'L LAW. 67, 69 (2002). Cf. JEFFREY F. ADDICOTT, WINNING THE WAR ON TERROR 199 (2003) (submitting that a key component of the war on terror is a strong U.S. leadership role, and includes the deployment of U.S. troops whose presence in a region both deters aggression and has the ability to defeat any challenges that arise).

239. Vogelsson, *supra* note 238, at 70.

240. *Id.*

241. Barry Kellman, *An Introduction to Terrorism and Business*, 12 DEPAUL BUS. L.J. 21, 27 (1999/2000). Note, however, that terrorists view international law as Western-imposed norms that have no authority when dealing with infidels or those of another class, people or religion. WALTER LACQUER, THE NEW TERRORISM 276 (1999).

242. MARJORIE A. BROWNE, FOCUS ON TERRORISM 169 (Edward V. Linden ed., Nova Science Publishers, Inc. 2002).

243. Bruce Zagaris, *EU Initiates New Counter-Terrorism Cooperation*, 17 No. 11 INT'L ENFORCEMENT L. REP. 459 (2001).

244. *Id.*

tion of withdrawing their businesses from Saudi Arabia because such an act would "amount to 'a victory for the terrorists.'"<sup>245</sup> In an industry based on uncertainty and risk, a multilateral effort, as opposed to disparate unilateral efforts, can provide MNCs with the certainty and consistency they require to be successful. Fighting antiglobalization is precisely the way to combat terrorism because globalization battles the economic disparity that feeds terrorism. Helping MNCs protect the channels of globalization by providing them with effective international insurance coverage will enable them to promote international business and trade. By promoting such economic prosperity, MNCs will emerge the victors, rather than the victims, of terrorism.

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245. Douglas Jehl, *Aftershocks: Riyadh Attacks*, N.Y. TIMES, May 17, 2003, at A9.

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