

2004

## Looking Beyond the Sunset: International Perspectives on the Terrorism Risk Insurance Act of 2002 and the Issue of its Renewal

Irene S. Kaptzis

Follow this and additional works at: <https://brooklynworks.brooklaw.edu/bjil>

---

### Recommended Citation

Irene S. Kaptzis, *Looking Beyond the Sunset: International Perspectives on the Terrorism Risk Insurance Act of 2002 and the Issue of its Renewal*, 29 *Brook. J. Int'l L.* (2004).

Available at: <https://brooklynworks.brooklaw.edu/bjil/vol29/iss2/7>

This Note is brought to you for free and open access by the Law Journals at BrooklynWorks. It has been accepted for inclusion in Brooklyn Journal of International Law by an authorized editor of BrooklynWorks.

# LOOKING BEYOND THE SUNSET: INTERNATIONAL PERSPECTIVES ON THE TERRORISM RISK INSURANCE ACT OF 2002<sup>1</sup> AND THE ISSUE OF ITS RENEWAL

“The willingness to take risk is essential  
to the growth of a free market economy.”<sup>2</sup>  
– Alan Greenspan<sup>3</sup>

## I. INTRODUCTION

The terrorist attacks of September 11, 2001 caused severe loss of life and property,<sup>4</sup> but the economic and legal ramifications of that day continue to plague the United States (“U.S.”). The U.S. legislation H.3210,<sup>5</sup> known as the Terrorism Risk Insurance Act of 2002 (“TRIA”), serves as a perfect exam-

---

1. Terrorism Risk Insurance Act of 2002, Pub. L. No. 107–297, 116 Stat. 2322 (codified at 15 U.S.C.A. §§ 248, 1610, 6701 (West Supp. 2003)). See also *President Signs Terrorism Insurance Act*, The White House website, Nov. 26, 2002, (providing an overview of the Act’s finalization), at <http://www.whitehouse.gov/news/releases/2002/11/print/200211261.html> (last visited Jan. 15, 2004).

2. PETER BERSTEIN, *AGAINST THE GODS: THE REMARKABLE STORY OF RISK* 328 (1996) (quoting Alan Greenspan, Chairman of the Federal Reserve Board), quoted in Todd V. McMillan, *Securitization and the Catastrophe Bond: A Transactional Integration of Industries Through a Capacity-Enhancing Product of Risk Management*, 8 CONN. INS. L.J. 131, 132 (2001/2002).

3. Alan Greenspan serves as the chairman of the U.S. Federal Reserve Board. When this man speaks, the nation listens, as he is arguably one of the most knowledgeable individuals in the world of economics and international finance. For more information on Alan Greenspan, see the Federal Reserve Board’s Biography website at [www.federalreserve.gov/bios/greenspan.htm](http://www.federalreserve.gov/bios/greenspan.htm) (last updated Oct. 3, 2003). See also *Greenspan Warns of “Unexpected Events” as Risk to Markets*, AFP, Jan. 13, 2004, at [http://www.business.com/search/rslt\\_default.asp?r4=t&query=balanced+care+&type=news](http://www.business.com/search/rslt_default.asp?r4=t&query=balanced+care+&type=news) (last visited Feb. 2, 2004).

4. See *September 11: Chronology of Terror*, CNN.COM, Sept. 12, 2001, (reporting the time-line for the occurrences of September 11), at <http://www.cnn.com/2001/US/09/11/chronology.attack/index.html> (last visited Nov. 22, 2003).

5. Terrorism Risk Insurance Act of 2002, Pub. L. No. 107–297, 116 Stat. 2322 (codified at 15 U.S.C.A. §§ 248, 1610, 6701 (West Supp. 2003)).

ple of such late blooming economic consequences requiring close legal scrutiny. As of November 15, 2002, this Act requires all U.S. property insurers to cover terrorist risk in order to protect the nation from a hesitant insurance industry, which proved unwilling to bear the future risk of terrorism in light of the costs of September 11, 2001.<sup>6</sup> TRIA presently offers U.S. insurers the financial security necessary for providing terrorism insurance, the only limitation being that the legislation also comes with an expiration date.<sup>7</sup> On December 31, 2005,<sup>8</sup> the U.S. government must again decide what is necessary for the nation: continued TRIA-provided terrorism reinsurance or deregulation.<sup>9</sup>

As the U.S. government intends for TRIA to serve as a temporary insurance support mechanism,<sup>10</sup> the legislation also mandates that the U.S. Treasury Department measure the program's success through reports that indicate the program's vi-

---

6. See *infra* Part II.A.1.

7. Terrorism Risk Insurance Act of 2002, Pub. L. No. 107-297, § 108(a), 116 Stat. 2322, 2336.

8. *Id.* However, the Secretary of Treasury still retains the authority to continue the government insurance's program for the purposes of taking the actions "necessary to ensure payment, recoupment, reimbursement, or adjustment of compensation for insured losses arising out of any act of terrorism occurring during the period in which the Program was in effect..." *Id.* § 108(b).

9. The Secretary of Treasury will need to report TRIA's progress to Congress by June 30, 2005. *Id.* § 108(d)(2). See Jeffrey S. Bragg, Terrorism Risk Insurance Program, U.S. Treasury Department, at 7 (noting that the U.S. government plans to evaluate TRIA's success as a program), at <http://www.treas.gov/offices/domestic-finance/financial-institution/terrorism-insurance/press/> (last visited Jan. 5, 2004); Tara Bradshaw, Fact Sheet on Surveys of Terrorism Risk Insurance Markets, Dept. of Treasury Office of Public Affairs, Oct. 23, 2003, at <http://www.treas.gov/offices/domestic-finance/financial-institution/terrorism-insurance/press/> (last visited Nov. 20, 2004). See also Steven Brostoff, *Industry Uncertain About TRIA Strategy*, NAT. UNDERWRITER, Jan. 29, 2004, available at 2003 WL 69822569 (reporting that the insurance industry is unsure as to whether to seek changes in TRIA or simply to push for the legislation's renewal despite its weaknesses).

10. The legislation's main purpose, as indicated by the statute itself, is "to establish a temporary Federal program that provides for a transparent system of shared public and private compensation for insured losses resulting from acts of terrorism..." Terrorism Risk Insurance Act of 2002, Pub. L. No. 107-297, § 101(b), 116 Stat. 2322, 2323 (emphasis added).

2004] *TERRORISM RISK INSURANCE ACT OF 2002* 829

ability and progress.<sup>11</sup> The U.S. government's Terrorism Risk Insurance Program ("TRIP") has already invested in the assistance of the Westat corporation,<sup>12</sup> which will provide the federal government with surveys and economic perspectives for the government's insurance program.<sup>13</sup> Since the U.S. insurance and reinsurance industries continue to shy away from fully covering terrorism in their policies,<sup>14</sup> the situation's gravity re-

---

11. *Id.* § 108(d)(1–2). See also Mario L. Ugoletti, Implementing the Terrorism Risk Insurance Act of 2002, 5–6 (June 12, 2003) (presentation before the Terrorism Risk Assessment and Insurance Coverage Forum, Westin Grand, Washington D.C.), at <http://www.treas.gov/press/releases> (last visited Jan. 15, 2003).

12. Westat, Corp. is a statistical survey research organization that has also contracted with Marsh, Inc. in order to create questionnaires and contact reference lists. Mark Warshawsky, Terrorism Risk Insurance Act of 2002, Sept. 15, 2003, at 9 (Presentation of the U.S. Treasury Acting Assistant Secretary for Economic Policy at the Underwriting Conference, Orlando, FL), at <http://www.treas.gov/press/releases/po1050.htm> (last visited Jan 15, 2004). More information on Westat, Corp. is available at <http://www.westat.com/> (last visited Feb. 12, 2004). For more information on Marsh, Inc., visit the corporation's website at <http://www.marshweb.com/MarshPortal/PortalMain> (last visited Feb. 13, 2004).

13. The U.S. Treasury Department held a meeting on January 30, 2003 with insurance representatives in order to discuss the drafting of survey questionnaires and to select contractor bids for the undertaking. *Id.*

14. Insurers' hesitations particularly rest on the issue of potential bankruptcy upon another terrorist attack. Dwight Jaffe & Thomas Russell, Extreme Events and the Market for Terrorism Insurance 4 (Feb. 1, 2002) (U.C. Berkley paper presented at the Nat'l Bureau of Econ. Research Conf. on Ins., Cambridge, MA) (examining the reaction of markets after the occurrence of low "frequency/high cost" events"), available at <http://faculty.haas.berkeley.edu/jaffee/papers/Jrinsfeb02.pdf> (last visited Feb. 12, 2003). "[T]he probability that an insurance firm would be made bankrupt by a particularly bad terrorist loss during one year is substantially higher than the probability that the same firm would be made bankrupt by a particularly bad run of, say, auto insurance losses during a year." *Id.* The insurance industry remains uncomfortable with bearing the entire risk of insuring against terrorism arguably because of the absence of historical data on the matter. See Christian Gollier, Insurability 24 (Feb. 1, 2002) (paper prepared for the Nat'l Bureau of Econ. Research Conf. on Ins., Cambridge, MA), available at <http://www.nber.org/~confer/2002/insw02/insurprg.html> (last visited Oct. 17, 2002). For example, no one knows the likelihood of a "large terrorist attack next year." *Id.* Interestingly enough, however, this ambiguity does not paint the entire picture, as insurance theorists claim ambiguity alone is not determinative. *Id.* Gollier explains that the insurance industry's aversion to cover terrorist-related harm exemplifies the "weight of evidence dilemma." *Id.* at 24–25. He provides

quires that the U.S. government quickly determine TRIA's destiny, even if it means renewing the legislation again on a short-term basis.<sup>15</sup> The legislation's passage strongly rested on its temporary nature;<sup>16</sup> yet with the continuing terrorist threat, the legislation may require either a strong alternative or some serious alterations.<sup>17</sup> U.S. officials will need to carefully examine the program's statistical data as well as other insurance and national safety considerations before selecting a national terrorism insurance coverage option.

This Note will serve to clarify the legal and economic concerns that surround the forthcoming issue of TRIA's renewal through a comparison of the U.S. government's terrorism insurance program with the parallel programs available in the United Kingdom ("U.K.") and Israel. An international perspective brings to light both TRIA's limitations and achievements. As this Note will reveal, TRIA still has much room for improvement. These issues can also potentially pose a significant

---

Keynes-Ellsberg's "two color problem" in order to illustrate this evidentiary issue:

[T]here are two urns each containing red and black balls. Urn 1 contains 50 red balls and 50 black balls, whereas urn 2 contains 100 red balls and black balls in unknown proportion. A ball is drawn at random from an urn and receives 100 euros or nothing depending on the color of the ball. The fact that people are indifferent to bet on red or black is used to indicate that their subjective probability for each color is 0.5, as in urn 1. [One seeking to maximize their probabilities] should thus be indifferent to using urn 1 or urn 2 for gambling. However, most people prefer to gamble with the unambiguous urn 1, where the "weight of evidence" is larger.

*Id.* at 25. The insurability problem arises when insurers are "systematically more adverse than consumers." *Id.* But see John Hillman, *Terrorism Insurer: Americans Forget the Lessons of Sep. 11*, BESTWIRE, Dec. 10, 2003, available at LEXIS, Nexis News & Bus. Library (reporting that the vice president of ACE USA's terrorism underwriting department claims that in the event that the U.S. government does not renew TRIA, ACE will still be able to offer clients "other type[s] of protection.").

15. Insurers are also confronting the dilemma of TRIA's upcoming expiration. See Lee Ann Gjertsen, *P/C Outlook: Higher Rates, Consolidation*, AM. BANKER, Dec. 30, 2003, at 1.

16. Terrorism Risk Insurance Act of 2002, Pub. L. No. 107-297, § 101(b), 116 Stat. 2322, 2323 (codified at 15 U.S.C.A. 248, 1610, 6701 (West Supp. 2003)).

17. See Michele Heller & Rob Blackwell, *Treasury: No Terror-Risk Extension*, AM. BANKER, Dec. 16, 2003, at 4.

2004] *TERRORISM RISK INSURANCE ACT OF 2002* 831

cost burden for taxpayers, making room for some improvement necessary. For this reason, this Note argues in favor of TRIA's renewal, but contingent on serious alterations that would make the legislation more meaningful and helpful to the nation.<sup>18</sup>

After this introduction, Part II provides background information necessary for understanding the reasoning behind the unavailability of insurance and reinsurance within the U.S. after-September 11, 2001 and also discusses TRIA's legislative details. Part III introduces the analogous insurance dilemma faced by the U.K. in England and in Northern Ireland from 1992 until today, explaining the nation's most recent legal developments as well as the implications of government insurance assistance for the nation's insurance industry. Part III also introduces Israeli legal intervention in terrorism insurance coverage, demonstrating widespread public insurance techniques used for involving the private sector in mandatory national terrorism coverage. Part IV then presents a critical analysis of TRIA and compares the U.S. government insurance program with the Note's proffered international models.<sup>19</sup> This comparison then provides a global backdrop for the legislation, allowing for a critical comparative analysis and policy direction in sup-

---

18. See generally Warshawsky, *supra* note 12.

19. Please note that in the case of the U.K.'s relations with Northern Ireland and Israel's with respect to Palestine, the right to self-determination under international law also applies. This Note, however, focuses on the economic aspect of national terrorism insurance programs, as perceived by each implementing State. For more information on this issue in relation to the Palestinian-Israeli conflict, see John Quigley, *Displaced Palestinians and a Right of Return*, 39 HARV. INT'L L.J. 171 (1998) (focusing on the Palestinian right of return as addressed in the Israel/Palestine Liberation Organization negotiations); Richard Wilner, *Nationalist Movements and the Middle East Peace Process: Exercises in Self-Determination*, 1 U.C. DAVIS J. INT'L L. & POL'Y 297 (1995) (noting that Palestinians and Israelis have a "common but conflicting" right to self-determination). For an analysis of recent developments in the U.K. with respect to the right to self-determination in Northern Ireland, see Colleen J. O'Loughlin, *A Peace Process Perspective Northern Ireland and the Agreement Reached in the Multi-Party Negotiations Belfast, April 10, 1998*, 13 N.Y. INT'L L. REV. 91 (2000). See also Geoff Gilbert, *Autonomy and Minority Groups: A Right in International Law?*, 35 CORNELL INT'L L.J. 307 (2002). See, e.g., David Wastell & Valerie Elliot, *Focus the Relentless Campaign: The IRA is the Government Really Going to Change the Rules of Engagement?*, SUNDAY TELEGRAPH LONDON, Dec. 20, 1992, available at 1992 WL 9566473 (exemplifying that many consider the IRA's plights as examples of Irish nationalism).

port of TRIA's renewal. Part V concludes with a summary of the alterations necessary for TRIA's maximum effectiveness as a facilitator of terrorism insurance coverage.

## II. TRIA'S LEGISLATIVE HISTORY

### A. *The American Insurance Dilemma — Changes After September 11th*

As a result of the insurance industry's realization of its immense underestimations of underwriting terrorism due to September 11, 2001,<sup>20</sup> insurance contracts renegotiations quickly crumbled thereafter.<sup>21</sup> In fact, although unknown to many, January 1, 2002 was a monumental day in the history of American insurance coverage. That day set the stage for TRIA's passage, marking the date when most reinsurance and insurance companies refused to renegotiate practically all insurance contracts, including terrorism coverage.<sup>22</sup>

The reinsurance industry's extensive refusal was devastating to insurance companies, since reinsurance serves as the prime insurance of insurers.<sup>23</sup> Contractual agreements, also known as "treaties,"<sup>24</sup> between reinsurers and insurers play a monumental

---

20. See Gordon Woo, Quantifying Insurance Terrorism Risk 1 (Feb. 1, 2002) (paper prepared for the Nat'l Bureau of Econ. Research Conf. on Ins., Cambridge, MA) available at <http://www.nber.org/~confer/2002/insw02/in surprg.html> (last visited Oct. 17, 2002). See also Gollier, *supra* note 14, at 26. The occurrence of an "underestimated" risk effectively penalizes underwriters as such losses pose a direct threat to their company's loss ratios. *Id.* For this reason, in such adverse situations, underwriters prefer to "overestimate" their risks instead. *Id.*

21. See *infra* Part II.

22. See 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, 583 (2002). Insurance terminology refers to insurance companies that offer reinsurance as "reinsurers," while insurance companies that seek the cover of reinsurance benefit are known as the "reinsured" or "ceding" companies. John S. Butler, *Legal Nature and Types of Reinsurance*, in LAW AND PRACTICE OF INTERNATIONAL REINSURANCE COLLECTIONS AND INSOLVENCY 10 (David M. Spector & John Milligan eds., 1988).

23. See 44A AM. JUR. 2d *Insurance* § 1809 (2003) (Reinsurance — Definitions and Characteristics).

24. Reinsurance treaties usually apply to a large number of insurance policies that reinsurance companies underwrite for long terms on a "continual basis" with annual or quarterly cancellation provisions, allowing for insurance companies to include additional policies as long their portfolios meet original

2004] *TERRORISM RISK INSURANCE ACT OF 2002* 833

role in the viability of the insurance industry.<sup>25</sup> Through the dispersion of market-liability,<sup>26</sup> reinsurers provide insurers with financial protection.<sup>27</sup> Reinsurance agreements allow insurance companies to provide policyholder protection by transferring, or ceding, a part of the insured risk to a reinsurance company.<sup>28</sup> At a later time, reinsurance companies can then choose to reassign their own risk to other investors by “retrocession.”<sup>29</sup> For this reason, the reinsurance industry prevents the insolvency of insurers by assisting in the apportionment of liability for a particular event.<sup>30</sup>

---

agreement conditions and standards. ROSS PHIFER, *REINSURANCE FUNDAMENTALS: TREATY AND FACULTATIVE* 12, 46 (1996).

25. See *id.* at 6–15; Michael A. Knoerzer, *Reinsurance*, 690 *PLI/LIT* 719, 723 (2003) (offering general information on the reinsurance market’s role in insurance).

26. Insurers find that instead of multiple insurers covering one asset the most cost effect way to insure large risks, such as bridges and large buildings, is through one insurer who then can cede their risk to a reinsurer. Knoerzer, *supra* note 25, at 743.

27. See *id.* at 743.

28. No privity exists between the reinsurer and the reinsured, as the ceded portion creates a relationship that only relates to the ceding insurer and reinsurer. *Id.* at 721; 44A *AM JUR.* 2d *Insurance* §1812 (Reinsurance — Nature of Reinsurer’s Relationship to Original Policy Holder).

29. See John S. Diaconis, *Introductory Comments and Basic Overview in a Changing Global Environment*, 778 *PLI/COMM* 7, 12 (1998) (explaining fundamental reinsurance terminology). See also Kendall, *supra* note 22, at 579. See generally ROBERT RIEGEL ET AL., *INSURANCE PRINCIPLES AND PRACTICES: PROPERTY AND LIABILITY* (6th ed. 1976).

30. The following example elaborates on how reinsurance provides insurance coverage for assumed risks:

Building B has a value of [\$]10 million. It is insured by insurance companies X and Y, with each insuring fifty percent of the total value of the building. X and Y reinsure their risks with reinsurers R sub [to R sub n], respectively, through reinsurance contracts while retaining forty percent of their respective risks for their own accounts. If the building is destroyed, the [\$]10 million loss will no longer be borne entirely by X and Y. X and Y will have to pay for the loss up front but, ultimately, their net payout will be limited to [\$]2 million each.

William B. Bice, Comment, *British Government Reinsurance and Acts of Terrorism: The Problems of Pool Re*, 15 *U. PA. J. INT’L BUS. L.* 441, 445 (1993), incorporating an example from: 1 KLAUS GERATHEWOHL ET AL., *REINSURANCE PRINCIPLES AND PRACTICE* 3–6 (John Milligan–Whyte eds., 1988). Note, however, reinsurance treaties for the most part serve as indemnity contracts, which means that the reinsurer does not make any payments until the ceding



However, the September 11 attacks pushed the U.S.' intricate insurance system to its limit, and led reinsurers to withdraw from such expansive liability for terrorist damage exposure, as reinsurers were reportedly liable for 60 to 80% of insurance payments.<sup>31</sup> Reinsurance companies' new policies and renewal options excluded terrorism liability and, therefore, severely limited insurers' terrorism coverage.<sup>32</sup> This overt exclusion led many property owners and developers to scramble to find pricey alternatives before TRIA's enactment.<sup>33</sup>

As a result of high insurance premiums and, in many cases, lack of coverage offered, nearly half of U.S. businesses had no terrorism insurance coverage before the legislation's enactment.<sup>34</sup> In fact, the property industry asserted that new building projects estimated at \$15 billion<sup>35</sup> were stalled due to the

---

company pays a percentage of the reinsurer's portion for each claim. *See* PHIFER, *supra* note 24, at 230.

31. Jim Saxton, Economic Perspective on Terrorism Insurance 4 (May 2002) (paper prepared for the Joint Economic Congressional Committee) available at <http://www.house.gov/jec/terrorism/insur.pdf> (last visited May 12, 2003).

32. *See* Kendall, *supra* note 22, at 581–87.

33. *See, e.g.*, William Sherman, *Putting a Premium on Disaster: Insurance Costs Skyrocketing after Attacks*, DAILY NEWS, April 28, 2002, at 22. Several prominent insurance deals that took place after contract renewal either required much higher premiums or completely excluded terrorist harm: (1) After October 31, New York's Metropolitan Transit Authority ("MTA") faced an increase in insurance rates from \$6 million for \$1.5 billion coverage and now is paying \$18 million for \$500 million coverage, a 200% increase, and the MTA also needed to purchase separate coverage for terrorism coverage at a \$7.5 million premium for \$70 million worth of coverage; (2) San Francisco's Golden Gate bridge's new insurance policy doubled and did not cover terrorism; (3) Yankee stadium's insurance premium increased 125%, but the team stated that it would not increase admission; (4) The Meadowland's insurance premium significantly increased from \$700,000 to \$2.1 million; and (5) Co-op and condominium buildings' premiums increased 30% to 50%. *Id.* In addition, Times Square's Condé Nast building was found to be in default on its mortgage because of the building's lack of terrorism insurance, creating a heated legal dispute between the mortgaging bank and property owners. Thomas J. Walsh, *4 Times Square Runs Into Terrorism Coverage Problem*, May 13, 2002, at [http://www.crnewspage.com/4\\_times\\_story.html](http://www.crnewspage.com/4_times_story.html); Michael Kercheval, *A Policy on Terrorism Insurance: Who Will Pay Out if Terrorism Strike Malls?*, CHAIN STORE AGE EXECUTIVE WITH SHOPPING CENTER AGE, May 1, 2002, at 92.

34. *See Look, No Umbrella*, ECONOMIST, Sep. 7, 2002, at Fin. & Econ. sec.

35. George W. Bush, President Reiterates the Need for Terrorism Insurance Agreement, (Oct. 3, 2002) (transcript available at <http://www.white>

2004] *TERRORISM RISK INSURANCE ACT OF 2002* 835

lack of terrorism insurance availability.<sup>36</sup> As a result, insurance uncertainty was negatively affecting the U.S. economy.<sup>37</sup> Had the U.S. government refrained from assisting in the reinstatement of terrorism insurance coverage, another terrorist attack could have easily driven many businesses into bankruptcy, destroyed existing bank loans secured by properties of which the underlying value would have significantly diminished, limited future project funding and damaged pension funds as property investments would fail to reap profitable reimbursements.<sup>38</sup> Due to these devastating prospects, TRIA presently provides governmental support to the insurance industry as a reinsurer of “last resort.”<sup>39</sup>

The primary burden of covering the costs of the attacks was carried by insurance and reinsurance companies under “all risk”<sup>40</sup> insurance coverage for businesses and property owners in

---

house.gov/news/releases/2002/10/print/200210003-6.html (last visited Nov. 22, 2002)). *But see Look, No Umbrella*, *supra* note 34, (pointing to a total sum of \$8 million).

36. *See Adjustments to the NIPA's for the Impact of the September 11<sup>th</sup> Terrorist Attacks, 2001: Third Quarter*, Survey of Current Business, Bureau of Econ. Analysis (Nov. 2001).

37. *Id.*

38. For this reason, secured lenders and insurance company/relationship lenders took various approaches in handling the issue of terrorism insurance. Richard R. Goldberg, *Real Estate Financing Documentation: Coping with the New Realities*, SH004 ALI-ABA 537, 549 (2003). Securitized lenders required terrorism insurance coverage on new loans and also demanded similar insurance on existing loans and projects. *Id.* at 549. In contrast, insurance company and relationship lenders allowed for terrorism insurance waivers, but some of these companies waived the procurement of terrorism insurance until it was commercially available to other similarly situated property owners. *Id.* *Cf. Bice*, *supra* note 30, at 448 (noting the implication of lack of terrorism coverage in the case of the U.K.).

39. *Cf. Paul Durman, Government Shares Bomb Insurance*, INDEPENDENT, Dec. 22, 1992, at 1 (referring to the U.K.'s terrorism insurance scheme as one where the government serves as the “reinsurer of last resort”).

40. *See HOLMES' APPLEMAN ON INSURANCE* 2d § 1.10. The standard definition of “all risk” insurance coverage is as follows:

[A]ll risk coverage should be interpreted to be just that — “All Risks.” Once the loss is proven by the insured to be caused by some risk generally covered...other than normal depreciation or inherent vice or defect, the insurer should have the burden to prove that the loss does not fall within some specified exclusion or exception. That the insurer has the burden of proof to prove no coverage under an all risk

the downtown World Trade Center area.<sup>41</sup> According to the insurance industry, insurance payouts for the attacks have marked the steepest financial burden for the U.S. insurance industry since Hurricane Andrew<sup>42</sup> as well as the largest insurance catastrophe ever worldwide.<sup>43</sup> Although the primary insurance industry could possibly have sidestepped the costs of the September 11 attacks through a “war exclusion” clause found in most “all risk” policies, the insurance industry refrained from using this legal backdoor.<sup>44</sup>

---

policy is the American rule in all the states, with the possible exception of Texas.

*Id.* See also Joseph P. Snyder & Susan A. McAllister, *Risk Management: Keeping Abreast of Insurance Policies: Review of Available Property/Liability Coverages*, 14 COMM. LEASING L. & S. 3 (2001). The insurance industry provides a multitude of coverage options that are slowly eroding the past popular “all risk” insurance coverage. *Id.* Snyder and McAllister elaborate this point:

Property insurance coverage...protects the owner of property and others who have insurable interest in the property against loss due to fire and other perils. There are two general types of property insurance coverage: (1) “Named Perils” coverage, which clearly identifies the specific risks or perils insured against..., and (2) “Special Form” coverage, which covers all direct physical loss or damage to the insured unless it is caused by a peril specifically excluded from coverage under the terms of the policy. Special form coverage is by far the most common type of coverage purchased. It is the successor to “All Risk” insurance and is more expansive than its predecessor because it more specifically limits the occurrences excluded from coverage. Though many leases still require “All Risk” coverage, it has disappeared from the titles of insurance companies.

*Id.* For a list of items typically excluded in U.K. “all risk” insurance contracts, see DIGBY C. JESS, *THE INSURABILITY OF COMMERCIAL RISK: LAW AND PRACTICE*, 316–17 (Sweet & Maxwell 3rd ed. 2001).

41. However, the World Trade Center’s insurance coverage may have actually been higher than the national average due to the building’s previous experience from the 1993 attack.

42. In 1992, Hurricane Andrews reportedly created damage that cost insurers \$15.5 billion in losses. *The Ten Most Costly Catastrophes, United States, 1989–1999, reported in THE FACT BOOK 2001*, 93 (Insurance Information Institute 2001).

43. See Jeffrey W. Stempel, *The Insurance Aftermath of September 11: Myriad Claims, Multiple lines, Arguments Over Occurrence Counting, War Risk Exclusions, the Future of Terrorism Coverage, and New Issues of Government Role*, 37 TORT & INS. L.J. 817 (2002); Jeffrey E. Thomas, *Exclusion of Terrorist Related Harms From Insurance Coverage: Do The Costs Justify the Means?*, 36 IND. L. REV. 397, 399 (2003).

44. See Stempel, *supra* note 43, at 817.

2004] *TERRORISM RISK INSURANCE ACT OF 2002* 837

War exclusion clauses specify that insurance companies should not have to pay for the costs of damages inflicted by an enemy state.<sup>45</sup> For example, in *Pan American World Airways, Inc. v. Aetna Casualty & Surety*,<sup>46</sup> the Court of Appeals for the Second Circuit ruled that Aetna did not have recourse to the war exclusion clause in the aftermath of the Pan American commercial airplane hijacking.<sup>47</sup> In this case, terrorists had forced a plane to land in Egypt in order to use the threat of harm as a bargaining tool for their cause, which ultimately led to the plane's destruction. The Court reasoned that war can exist between "quasi-sovereign entities"<sup>48</sup> and can also "exist between sovereign states,"<sup>49</sup> but insisted that the Popular Front for the Liberation of Palestine's ("PFLP") actions were independent from other Palestinian entities and, therefore, unrelated to any type of sovereign's act of war.<sup>50</sup>

Despite this legal precedent, insurance companies could have made the claim that the September 11 events were acts of war in light of President Bush's declaration to that effect and subsequent U.S. military intervention in Afghanistan. The insurance industry could have also pointed to the strong ties between the Taliban and Al Qaeda.<sup>51</sup> Nevertheless, after carefully consider-

---

45. See generally Kendall, *supra* note 22, at 573 (explaining the history of war exclusion clauses).

46. *Pan American World Airways, Inc. v. Aetna Casualty & Surety*, 505 F.2d 989 (2d Cir. 1974). See also *Holiday Inn, Inc. v. Aetna Insurance*, 571 F. Supp. 1460, 1500 (S.D.N.Y. 1983) (noting that: "It is not sufficient [for a terrorist group] to achieve [state] status [when] that ... group or entity in question occupy territory within the boundary of the sovereign state upon the consent of that state's *de jure* government."). But see *Wilker Bros. Co. v. Lumbermans Mutual Casualty Co.*, 529 F. Supp. 113 (S.D.N.Y. 1981) (excluding loss from coverage for a mob looting of a manufacturing plant in Nicaragua during the nation's civil war). For a thorough analysis of the case law regarding war exclusion clauses in insurance contracts, see John W. Stamper, *Looking at the Events of September 11: Some Effects and Implications*, 69 DEF. COUNS. J. 152 (2002).

47. See *Pan American World Airways, Inc. v. Aetna Casualty & Surety*, 505 F.2d at 1009. See also *Sunny South Aircraft Service, Inc. v. American Fire & Casualty Co.*, 140 So. 2d 78 (Fla. Dist. Ct. App. 1962), *aff'd*, 51 So. 2d 276 (Fla. 1973).

48. *Pan American World Airways, Inc. v. Aetna Casualty & Surety*, 505 F.2d at 1009.

49. *Id.* at 1013.

50. *Id.*

51. See Stamper, *supra* note 46, at 152.

ing the public relations and cost ramifications of such action and the court's probable leniency towards insured parties,<sup>52</sup> the insurance industry chose not to pursue any possible "war exclusion" argument.<sup>53</sup>

Before September 11, underwriters freely assumed the risk of terrorism under "all risk" insurance policies.<sup>54</sup> At that time, insurers considered the chances of domestic terrorist attacks on the U.S. as reasonably miniscule in comparison to other insurance coverage costs.<sup>55</sup> The costs of the September 11 World Trade Center attacks, however, were far from miniscule. The tragedy of September 11 cost insurers an estimated \$100 billion.<sup>56</sup> Although the insurance industry was able to pay for most of the damages, another terrorist catastrophe would, according to the industry, deplete their financial reserves and force many insurers into bankruptcy, potentially devastating the U.S. insurance business.<sup>57</sup> In the case of the World Trade Center disaster, the insurance industry had not anticipated such major losses due to terrorism and this lack of foresight forced insurers and reinsurers to assume a substantial portion of the damages of September 11.<sup>58</sup>

---

52. See *Westchester Resco Co. v. New England Reinsurance Corp.*, 818 F.2d 2 (2d Cir. 1987) (holding that insurance policy ambiguities are "construed strictly against" the insurer). See also Thomas, *supra* note 43, at 420-23 (explaining the transaction costs associated with litigating terrorism exclusion from insurance and reinsurance coverage).

53. See Stempel, *supra* note 43, at 817.

54. See Thomas, *supra* note 43, at 402.

55. See RICHARD J. HILLMAN, U.S. GENERAL ACCOUNTING OFFICE, *TERRORISM INSURANCE: ALTERNATIVE PROGRAMS FOR PROTECTING INSURANCE CONSUMERS 1* (2001) (Testimony before the Subcommittee on Capital Markets, Insurance, and Government Sponsored Enterprises, Committee on Financial Services House of Representatives).

56. Gregg J. Loubier & Jason B. Aro, *Insuring the Risk of Terror: Questions of the Costs and Application of Terror Insurance Remains Open*, 25 *AUG. L.A. L.* 18 (2002).

57. The National Association of Insurance Commissioners ("NAIC") noted that even a \$25 million loss for a primary insurance property/casualty insurer would pose solvency issues for 886 companies, which represents 44% of companies providing for such insurance. Thomas, *supra* note 43, at 403.

58. See *World Trade Center Attack — The Ramifications*, Tyser Group Limited, (explaining and listing the monetary losses that insurance companies faced world wide due to the September 11 attacks), at <http://www.tyseruk.co.uk/wtc.pdf> (last visited Jan. 18, 2004). In fact, the World Trade Center's bombing also changed the lender's insurance requirements at closing, as one

2004] *TERRORISM RISK INSURANCE ACT OF 2002* 839

In order to prevent this exorbitant cost exposure, reinsurers redrafted their insurance treaties to exclude terrorism. Primary insurers and reinsurers' agreements involve a high level of contract negotiability, which allows for such reinsurance exclusions.<sup>59</sup> Insurers and reinsurers draft sophisticated negotiation with regard to treaties as compared to the standard boilerplate policies that primary insurers provide to insured parties.<sup>60</sup> The distinction poses significant legal implications. The inherent flexibility of treaties allows each party to include or exclude terms through negotiation.<sup>61</sup> Moreover, reinsurance treaties usually maintain provisions requiring dispute resolution through private arbitration, which further limits judicial intervention.<sup>62</sup> This freedom of contract limited the U.S. courts' and government's intervention in such insurance matters.<sup>63</sup>

---

of the hotly litigated issues with respect to insurance coverage for the damages were the existence of the actual insurance policies themselves. Goldberg, *supra* note 38, at 548. The billion-dollar World Trade Center transaction was closed through the use of insurance binders placed with multiple carriers. *Id.* The use of these insurance binders or ACORD 27 certificates meant that insurance policies were never issued; nevertheless, the court used these binders in order to construe an applicable insurance policy. *Id.*

59. See James A. Johnson, *Gentlemen's Agreement*, 81 MICH. B.J. 20, 23 (2002) (providing background information on reinsurance practice).

60. See also ROBERT MERKIN ED., WHAT IS REINSURANCE? A COMPARATIVE STUDY 2, 51 (AIDA Reinsurance Working Party, 1998).

61. See *id.*

62. See LAW OF REINSURANCE § 21:1 (1993); MERKIN, *supra* note 60, at 51. However, the reinsurance markets globalization has increased the amount of litigation involving claim disputes. *Id.* at 2. See also Jonathan F. Bank & Patricia Winters, *Reinsurance Arbitration: A U.S. Perspective*, in LAW AND PRACTICE OF INTERNATIONAL REINSURANCE COLLECTIONS AND INSOLVENCY 554–86 (David M. Spector & John Milligan eds., 1988) (providing a historical overview and analysis of U.S. reinsurance arbitration); Richard G. Waterman, *Reinsurance Arbitration: A Process in Transition*, 854 PLI/COMM 477 (2003); Michael C. Zeller, *Procedures for the Resolution of U.S. Insurance and Reinsurance Disputes*, 854 PLI/COMM 487 (2003). For a general introduction to international arbitration, see W. MICHAEL REISMAN ET AL., INTERNATIONAL COMMERCIAL ARBITRATION — CASES, MATERIALS AND NOTES ON THE RESOLUTION OF INTERNATIONAL BUSINESS DISPUTES (David L. Shapiro et al. eds., 1997).

63. See Kendall, *supra* note 22, at 584 (“Whereas state regulatory agencies exercise veto power over the specific terms of insurance policies intended for issuance to consumers by direct writers, they exercise little power over the terms of reinsurance treaties as a matter of longstanding practice.”). However, reinsurers still face regulation through their ceding companies, since state law limits the “ceding company’s ability to take credit on its statutory

Due to the cessation of contractual obligations after January 1, 2002, many reinsurers were free to abstain from providing terrorism insurance coverage and this was the option that most insurers chose to take.<sup>64</sup> The few reinsurance companies that did provide such insurance post January 1, 2002 nearly doubled their premium rates while simultaneously decreasing their total coverage.<sup>65</sup> As a result, the insurance industry was left on a tightrope without the assumed safety net of reinsurance. Despite this, however, the primary insurance industry needed to satisfy state regulation standards.<sup>66</sup> Thus, in part, the lack of legal intervention forced the insurance industry to consider the discontinuation of terrorism related insurance.

### 1. The State-Level Domino Effect of Insurance Deregulation

As most reinsurance companies dropped terrorism coverage, the insurance industry struggled to provide terrorism policies for their clients. The National Association of Insurance Commissioners ("NAIC")<sup>67</sup> asked for each state to allow for the Insurance Services Office's ("ISO")<sup>68</sup> exclusion modifications, which would exclude losses stemming from less costly acts of

---

financial statement for the reinsurance" coverage if a reinsurer is not licensed to transact business in the state. Anthony B. Sherman, *United States — General Framework and Conduct of Business*, in *THE IN-HOUSE COUNSEL'S GUIDE TO INSURANCE AND REINSURANCE 2003*, 89 (Rob Mannix et al. eds., 2003).

64. As reinsurers conduct business on an international scale with sophisticated insurance companies, reinsurers face limited government regulation. See Thomas, *supra* note 43, at 403. For this reason, reinsurers were easily able to subtract terrorism insurance coverage from their treaty negotiations with insurers. See *id.*

65. See *supra* note 33 and accompanying text.

66. See *infra* Part II.A.1.

67. The National Association of Insurance Commissioners ("NAIC") serves as an insurance regulation organization, representing all fifty states, the District of Columbia and the four U.S. territories. The NAIC provides a forum for uniform insurance policy development and assists state regulators in protecting the interests of insurance consumers for the provision of common financial objectives and conduct regulation. For more information, see the NAIC's website at <http://www.naic.org/> (last visited Oct. 3, 2003).

68. For more information on the Insurance Services Office's ("ISO") most current stance on terrorism insurance, see the ISO's website at <http://www.iso.com/filings/response.html> (last visited Jan. 5, 2004). The ISO's website also provides forms and policy writing rules in response to TRIA's requirements.

2004] *TERRORISM RISK INSURANCE ACT OF 2002* 841

terrorism.<sup>69</sup> The ISO supplies hundreds of U.S. insurance companies with advice and standard forms of insurance policy provisions,<sup>70</sup> and established licensed forms for terrorism exclusions.<sup>71</sup> The ISO's exclusionary clauses limited insurance companies' exposure to a maximum of \$25 million<sup>72</sup> within a seventy-two hour time frame, or for the death of fifty or more people; furthermore, the threshold amount did not include terrorist activity using nuclear, chemical or biological weapons.<sup>73</sup> Thus, terrorism coverage excluded properties and development projects requiring coverage greater than proscribed, especially trophy buildings and national landmarks.<sup>74</sup>

While most states allowed for insurance deregulation, several prominent states such as New York, California, Texas, Georgia and Florida withheld approval.<sup>75</sup> New York and California ardently opposed the ISO's exclusionary clause.<sup>76</sup> California re-

---

69. See S. Roy Woodall, Jr., *Terrorism Insurance — The 2002 Market Place*, CRS REPORT RS21106, at 3–4, available at <http://www.globalsecurity.org/security/library/report/crs/RS21075.pdf> (last visited Feb. 12, 2004).

70. For more information, see the ISO's website at <http://www.iso.com> (last visited Jan. 5, 2004).

71. Terrorism, as defined by the ISO, consisted of:

Activities against persons, organizations or property of any nature:  
(1) That involve the following or preparation of the following: (a) Use or threat of force or violence; or (b) Commission or threat of a dangerous act; or (c) Commission or threat of an act that interferes with or disrupts an electronic, communication, information, or mechanical system; and (2) When one or both of the following applies: (a) The effect is to intimidate or coerce a government or the civilian population or any segment thereof, or to disrupt any segment of the economy; or (b) It appears that the intent is to intimidate or coerce a government, or to further a political, ideological, religious, social or economic objectives or to express (or express opposition to) a philosophy or ideology.

ISO Properties, Inc., *Exclusion of Terrorism (with Limited Exception) and Exclusion of War and Military Action*, (2001), at 1–2.

72. The adoption of the \$25 million limit stemmed from insurers' concerns that any higher amount would create a severe threat to the solvency of a substantial percentage of insurers of property and casualty insurance. See Thomas, *supra* note 43, at 404.

73. *States Adopt Terror Exclusion Clauses in Absence of Any Federal Solution*, INS. DAY, Mar. 5, 2002, at law sec. [hereinafter *States Adopt Terror Exclusion Clauses*].

74. See Look, *No Umbrella*, *supra* note 34.

75. Loubier & Aro, *supra* note 56, at 19.

76. MERKIN, *supra* note 60.



fused to accept the ISO's terrorism exclusion since the state's regulators found: the ISO's definition of terrorism to be too broad; the \$25 million threshold of national damage overwhelmingly low; and the seventy-two hour time period as plainly arbitrary.<sup>77</sup> New York state regulators voiced similar grievances with the ISO's exclusion clause, and further noted that the \$25 million threshold would exclude practically every building in downtown Manhattan, especially buildings near the World Trade Center site.<sup>78</sup>

Since insurance regulation primarily falls under state law,<sup>79</sup> insurers who wished to follow the exception clause started writing property insurance policies through affiliated companies conducting business within insurance-friendly states.<sup>80</sup> Despite a limited amount of insurers,<sup>81</sup> who established their own terrorism insurance coverage in separate policies, terrorism insurance remained extremely expensive and scarce.<sup>82</sup> Meanwhile, the insurance industry also significantly increased commercial property insurance premiums in order to assist covering September 11 costs.<sup>83</sup> As the insurance industry limited its in-

---

77. *States Adopt Terror Exclusion Clauses*, *supra* note 73.

78. *Id.*

79. McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015 (2000). For an overview of insurance rate regulation, see SCOTT E. HARRINGTON, *INSURANCE DEREGULATION AND THE PUBLIC INTEREST* (Washington, D.C. 2000).

80. Loubier & Aro, *supra* note 56, at 19.

81. According to one source, five carriers offered terrorism insurance coverage with limits of \$200 million, charging premiums that "far outweighed the costs of regular casualty insurance." Richard R. Goldberg, *Real Estate Financing Documentation: Coping with New Realities*, SH004 ALI-ABA 537, 548 (2003). The list of such insurers was extremely limited, and included the following insurers: Lloyd's, AIG and ACE. See *Look, No Umbrella*, *supra* note 34.

82. *Look, No Umbrella*, *supra* note 34.

83. Bob Howard, *Commercial Real Estate; Tenants to Pay Increased Rents in 2002*. See also *Insurance: Fees for Commercial Property Will Jump, as Landlords Face Premiums Hikes of 30% to 100%*, LOS ANGELES TIMES, Dec. 25, 2001, at 5 (This article indicates that the insurance industry hiked up premiums also due to years of under-pricing and a general decline in the equity market, which stemmed from insurance companies' previous practice of investing premiums into the stock market for a profit that would in turn minimize premiums.).

2004] *TERRORISM RISK INSURANCE ACT OF 2002* 843

volvement in insurance claims arising from terrorist acts, the nation turned to the U.S. government for a solution.<sup>84</sup>

*B. U.S. Congressional Action: A Myriad of Changes Before TRIA's Enactment*

Due to the lack of insurance for properties and major building projects, the U.S. government moved to support the insurance industry in Congress' first and second sessions. After countless deliberations, the legislature enacted the "Terrorism Risk Insurance Act of 2002,"<sup>85</sup> which many now refer to as TRIA. The main difficulty in passing the bill was merging the House of Representatives' plan, H.R. 3210<sup>86</sup> (the Terrorism Risk Protection Act), with the Senate's plan, S. 2600<sup>87</sup> (the Terrorism Risk Insurance Act of 2002), in order to establish TRIA. Both plans entailed the federal government's monetary support only after the insurance industry's costs of terrorist-instigated damages exceeded an established monetary threshold; however, each house differed in terms of deductible amounts, government assumption of risk, limits on punitive damages and repayment arrangements.<sup>88</sup> The final version of the bill incorporated bits and pieces of both houses' legislative plans. For this reason, an understanding of the final product requires some attention to the deliberation proceedings, since the Act provides no explanations or legislative history.

The House's "Terrorism Risk Protection Act" structured a reinsurance scheme that would provide insurers a way to spread their losses after a catastrophic terrorist attack in a manner very different from the enacted legislation.<sup>89</sup> Under the House's plan, the federal government would assume 90% of the insur-

---

84. See *Adjustments to the NIPA's for the Impact of the September 11<sup>th</sup> Terrorist Attacks, 2001: Third Quarter*, Survey of Current Business, Bureau of Econ. Analysis, (Nov. 2001); Claire Wilkinson, *United States — Uninsured Terror Risks Set to Rise, Congress Warned*, LLOYD'S LIST, Mar. 1, 2002, at 6.

85. Terrorism Risk Insurance Act of 2002, Pub. L. No. 107-297, 116 Stat. 2322 (codified at 15 U.S.C.A. §§ 248, 1610, 6701 (West Supp. 2003)).

86. Terrorism Risk Protection Act, H.R. 3210, 107th Cong., 1st Sess., (2001).

87. Terrorism Risk Insurance Act of 2002, S. 2600, 107th Cong., 2d Sess., (2002).

88. CBO STUDY, *Federal Reinsurance for Disasters*, Sept. 2002, at 25-26, available at <http://www.cbo.gov> (last visited May 13, 2003).

89. See H.R. 3210 § 2.

ance industry's losses when such losses amounted to over \$1 billion within a year of the terrorist activity.<sup>90</sup> The House's plan also provided assistance for smaller insurance claims, if such claims threatened the solvency of a participating smaller insurer.<sup>91</sup> For example, the government could intervene even when an insurance claim for losses caused by terrorism exceeded 10% of an effected insurance company's surplus capital and net premiums.<sup>92</sup> Therefore, a claim as relatively small as \$100 million, under the House's plan, may have merited government support.<sup>93</sup>

Despite the House's seeming cornucopia of reinsurance coverage, insurance companies would eventually have to repay the government for a large part of the financial assistance received.<sup>94</sup> For losses under \$20 million, insurers would have been liable to the government for three-quarters of the total amount the government paid.<sup>95</sup> Within the first year, insurers would have been responsible for one-quarter of the repayment due.<sup>96</sup> Under the House's plan, insurers would have to reimburse the government's financial assistance after an unstated number of years at a rate set at insurers' annual assessments, not exceeding 3% of their premiums.<sup>97</sup> For claims over \$20 million and under the budgetary cut off of \$100 billion, policyholders' premiums would have faced governmental surcharges of up to 3% of their premiums,<sup>98</sup> but the government would not have required insurers to pay interest.<sup>99</sup>

Alternately, the Senate's reinsurance plan offered terrorism insurance coverage without requiring insurance companies to

---

90. Elaine S. Povich, *House OKs Insurance Bill; Measure Would Allow Coverage Against Terrorist Acts*, NEWSDAY (NY), Nov. 30, 2001, at A65 (noting that the White House endorsed the House's plan, but prefers the Senate's legislation).

91. CBO STUDY, *supra* note 88, at 25.

92. *Id.*

93. *Id.*

94. *See* H.R. 3210 § 5-7.

95. *Id.*

96. *Id.*

97. CBO STUDY, *supra* note 88, at 25.

98. *Id.* *See* Paul Teller, H.R. — Terrorism Risk Protection Act (Oxley), Republican Study Committee Legislative Bulletin, *available at* <http://www.house.gov/bulletin/RSC/> (last updated Nov. 29, 2001).

99. H.R. 3210 § 8(c).

2004] *TERRORISM RISK INSURANCE ACT OF 2002* 845

reimburse the government, similar to the law's final version. After a series of unsuccessful House bills,<sup>100</sup> the Senate enacted its own version of the Terrorism Risk Insurance Act.<sup>101</sup> The Senate's reinsurance initiative provided insurance funding without repayment, but only after the insurance industry first paid a certain deductible.<sup>102</sup> Under the Senate's plan, if a catastrophic event were to occur within the first year<sup>103</sup> of the program's implementation, the insurance industry would have been liable for the initial \$10 billion in losses.<sup>104</sup>

After the insurance industry had paid the \$10 billion, the government would pay for 80% of all losses up to the maximum of \$100 billion.<sup>105</sup> Similar to the House's strategy, the Senate's bill allowed for government assistance for losses under \$10 billion only when the solvency of an individual insurance firm was at stake.<sup>106</sup> The deductible would have been the insurer's market share percentage multiplied by the government's \$10 billion requirement.<sup>107</sup> In this way, the Senate hoped to allow the federal government to assume terrorism risk funding only after the insurance industry had already assumed their initial responsibility to make payments after the occurrence of a terrorist act.

Regardless of the drastic differences between the House and Senate's legislation, Congressional debates mainly involved dis-

---

100. The following bills were unsuccessful in the first session of the Senate's 107th Congress: S. 1743, S.1744, S. 1748, and S. 1751.

101. *See* S. 2600.

102. *See id.* §§ 3(7) & 4(e).

103. If the treasury decided to extend the program for more than one year, then insurers would be responsible to pay a deductible of \$15 billion in initial losses.

104. *See* S. 2600 § 4(e)(II).

105. *See id.* § 4(e)(I)(A).

106. *See id.* § 3(7)(A-B).

107. According to the Senate's Terrorism Risk Insurance Act of 2002, an insurer's market share would have been:

[C]alculated using the total amount of direct written property and casualty insurance premiums for the participating insurance company during the 2-year period preceding the year in which the subject act of terrorism (or during such other period for which adequate data are available, as determined by the Secretary [of the Treasury]), as a percentage of the aggregate of all such property and casualty insurance premiums industry-wide during that period.

*Id.* § 3(4)(A).

agreement on tort reform.<sup>108</sup> Although both Houses agreed that terrorism insurance assistance would require state preemption,<sup>109</sup> and that the Secretary of the Treasury should be appointed as final adjudicator of insurance claims,<sup>110</sup> the House's bill also added prohibitions against claims seeking punitive damages, limited cases to federal courts, and sought to cap attorneys' fees at 20% of awarded damages with penalties for disobedience.<sup>111</sup> However, the Senate refused to pass legislation minimizing the legal rights of litigants and their attorneys,<sup>112</sup> leading to a bipartisan debate that lasted the entire second session of Congress, and that went unresolved, ultimately leaving these sections out of the bill.<sup>113</sup> Interestingly enough, the issue of whether the U.S. government should assist in terrorism insurance coverage rested heavily upon attorneys' fees.

### C. *The Terrorism Risk Insurance Act of 2002 ("TRIA")*

TRIA ended all debates with important concessions made by both Houses. The legislation now offers a version of insurance financial backing similar to the Senate's bill, for a temporary three-year span.<sup>114</sup> TRIA specifically mandates that all property insurance companies must cover terrorism risk coverage,<sup>115</sup> ex-

---

108. See Loubier & Aro, *supra* note 56, at 21.

109. H.R. 3210 § 12; S. 2600 § 10.

110. H.R. 3210 § 3; S. 2600 § 4(a)(2).

111. H.R. 3210 § 15(a)(7) (included in the Nov. 29, 2001 and Dec. 3, 2001 versions of the bill).

112. In fact, many senators opposed the passage of such legislation, since many felt that the government's contemplated reinsurance scheme and litigation reform would in effect act as a "sop to corporate America." Povich, *supra* note 90.

113. See *id.*; CBO STUDY, *supra* note 88, at 25 (noting that the House and Senate differed on the matter of punitive damages).

114. Terrorism Risk Insurance Act of 2002, Pub. L. No. 107-297, §§ 108(a), 102 (11)(D).

115. TRIA requires that all insurance companies that fall under the Act's provision must participate. See *id.* §§ 102(6), 103(a)(3). TRIA defines "insurer" to include: (1) any insurance entity licensed to conduct business in any state in the U.S.; (2) all eligible insurers under the NAIC's listing of Alien Insurers; (3) federally approved insurers providing coverage for maritime, energy or aviation activity; (4) state residual market insurance entities or state workers' compensation funds; and (5) any other entity that fall under section 103(f) of TRIA, which requires that an entity wishing inclusion in TRIA must apply before the occurrence of a terrorist act. *Id.*

2004] *TERRORISM RISK INSURANCE ACT OF 2002* 847

cluding reinsurance,<sup>116</sup> making all terrorism exclusions previously approved by various state commissions now void.<sup>117</sup>

Legislative constraints have also created many compromises between the two extremes taken by the House and the Senate. TRIA permits suits for punitive damages, but excludes the government from suit, thus freeing the nation from potential liability.<sup>118</sup> There is no language referring to attorneys' fees and non-economic damages;<sup>119</sup> however, the law limits suits for damages arising from terrorist attacks to a Congressionally designated federal court.<sup>120</sup> This jurisdictional distinction might very well produce smaller awards in damages than pro-litigant state courts.<sup>121</sup> However, the merging of pending legislation regarding

---

116. *Id.* § 108(a-b).

117. *Id.* §§ 102(6)(A-C), 105(a-c). Lorelie S. Masters et al., *Overview of the Terrorism Risk Insurance Act*, 686 PLI/LIT 427 (2003). TRIA does not obligate reinsurers to provide insurance for terrorism related harm, as the U.S. government under the Act takes on this role. *See* Terrorism Risk Insurance Act of 2002, Pub. L. No. 107-297, §§ 102(6)(A-C), 105(a-c). Section 105 simply states that: "Any terrorism exclusion in a contract for property and casualty insurance that is in force on the date of enactment of this Act shall be void to the extent that it excludes losses that otherwise be insured losses." *Id.* § 105(a-c) (emphasis added). However, the amount of coverage that TRIA provides for the general public is questionable, as TRIA requires the availability of terrorism insurance coverage; it does not specify how much it should cost. *See* Thomas, *supra* note 43, at 404. Accordingly, terrorism insurance coverage remains expensive for most businesses, which means that insurers are not insuring terrorism in all of their property and casualty policies. *Id.* Furthermore, the U.S. Treasury Department explains in an interim guideline that TRIA requires that insurers make terrorism insurance "available," but the Act does not require that insurers cover all risks that relate to terrorism damage, such as nuclear, biological and chemical damages. Masters, *supra* note 117, at 430-31. Furthermore, TRIA also has a provision that allows insurers to add their previous terrorism exclusions in their contracts after providing their insured notices of such or if the policy holder does not pay for the additional terrorism coverage. *Id.* *See also* Terrorism Risk Insurance Act of 2002, Pub. L. No. 107-297, § 105(c). For additional analysis of the ramifications of these provisions, see *infra* Part IV.

118. *See* Terrorism Risk Insurance Act of 2002, Pub. L. No. 107-297, § 107(a)(5).

119. *See id.* § 107.

120. *Id.* § 107(a)(4).

121. *See generally* RICHARD L. MARCUS ET AL., *CIVIL PROCEDURE: A MODERN APPROACH* (West Group 3d ed. 2000). This jurisdictional limitation may also make it difficult for foreign individuals and companies to prosecute claims outside of the U.S. Aon Reed Stenhouse Corp., *The U.S. Federal Terrorism Risk Insurance Act of 2002 Implications for Canadian Insureds*, AON STATUS

frozen terrorist assets ameliorates TRIA's escape-valve with respect to punitive damages,<sup>122</sup> although it remains questionable whether or not such a provision will have force.<sup>123</sup>

The government's terrorism insurance assistance scheme allows the Secretary of the Treasury to determine and provide insurance-loss coverage, up to \$100 billion for commercial property and casualty insurers' liabilities resulting from future terrorist attacks,<sup>124</sup> excluding traditional acts of warfare.<sup>125</sup> Only the Secretary of the Treasury, Secretary of State and Attorney General can determine whether a situation falls under the category of a terrorist attack,<sup>126</sup> their determination being final without the option of judicial review.<sup>127</sup>

Government assistance under TRIA covers insurance losses exceeding the amount of \$5 million.<sup>128</sup> At that point, insurers

---

REPORT, Dec. 6, 2002, at 4 (noting that since there are fifty states, there may very well be fifty different regulatory interpretations of terrorism insurance coverage) [hereinafter Aon Report].

122. Terrorism Risk Insurance Act of 2002, Pub. L. No. 107-297, § 107(a)(5) ("Nothing in this section shall in any way limit the liability of any government, an organization, or person who knowingly participates in, conspires to commit, aids and abets, or commits any act of terrorism....").

123. See *id.* at § 201 ("Satisfaction of judgments from blocked assets of terrorists, terrorist organizations, and State sponsors of terrorism."). See, e.g., *Smith ex rel. Smith v. Islamic Emirate of Afghanistan*, 262 F. Supp. 2d 217, 226. See also *Decision of Interest; United States District Court, Southern New York*, N.Y. L.J., Sept. 17, 2003, at 24; Martin Flumenbaum et al., *Second Circuit Review, Recovering Frozen Terrorist Assets; Attorney Work Product*, N.Y. L.J., Dec. 2, 2003, at 3. See also Marshal S. Shapo, *Compensation for Victims of Terror: A Specialized Jurisprudence of Injury*, 36 IND. L. REV. 237 (2003); Deborah M. Mostaghel, *Wrong Place, Wrong Time, Unfair Treatment? Aid to Victims of Terrorist Attacks*, 40 BRANDEIS L.J. 83 (2001).

124. See Terrorism Risk Insurance Act of 2002, Pub. L. No. 107-297, § 103(e)(2)(A)(i). For the Senate and House versions of this provision before the TRIA's enactment, see S. 2600 § 4; H.R. 3210 §§ 3, 6(c). See also Paul Teller, *supra* note 98.

125. See Terrorism Risk Insurance Act of 2002, Pub. L. No. 107-297, § 102(1)(B)(i). See also S. 2600 § 3(1)(B)(i); H.R. 3210 § 19(1)(B)(v).

126. Terrorism Risk Insurance Act of 2002, Pub. L. No. 107-297, § 102(1)(A).

127. *Id.* § 102(1)(C).

128. *Id.* § 102(1)(B)(ii). The \$5 million threshold applies to the aggregate property and casualty insurance losses stemming from an act of terrorism, and not on a policy-by-policy basis. Ugoletti, *Implementing TRIA*, *supra* note 11, at 4. Ugoletti also provides the following illustrative example: "if \$7 million in aggregate property and casualty losses from a certified act of terrorism

2004] *TERRORISM RISK INSURANCE ACT OF 2002* 849

remain responsible for a deductible that is adjusted according to each year's percentile incremental deductible increase.<sup>129</sup> TRIA assesses insurers' deductible as an amount equal to the value of insurers' direct earned premiums over the calendar year multiplied by 7, 10 and 15% for each year the program progresses.<sup>130</sup> Section 103(e)(6)(A–C) also requires insurance companies to hold aggregate retention amounts of \$10 billion, \$12.5 billion and \$15 billion.<sup>131</sup> Therefore, the federal government's total possible exposure would be \$90 billion for the first year, \$87.5 billion for the second year and \$85 billion for the program's last year.<sup>132</sup>

TRIA also sets requirements for insurance companies that were not previously established in either House's proposed bills. It places a statutory limit on premium increases to a maximum of 3% of the premium charged for property and casualty insurance coverage under each policy.<sup>133</sup> The legislation also requires that insurers send coverage notices to their insured stating the premium charged for claims that TRIA covers.<sup>134</sup> This requirement attempts to serve as a mechanism for assisting property owners in deciding whether or not to purchase terrorism insurance in addition to their regular property and casualty insurance.<sup>135</sup> TRIA, however, retains state commission's regulatory authority over insurance companies,<sup>136</sup> and signifies that con-

---

were distributed among 10 policy holders, those losses could contribute to an insurance compan[y's] ability to access the TRIA backstop...." *Id.*

129. *See id.* § 102(7)(A–E). "Exposure...equals to the insurer's deductible and 10% of insured losses in excess of the deductible. If an insurer had \$200 million in direct earned premiums in 2002, its [2003] deductible...would be equal to \$14 million, and 10[%] loss sharing would kick in above \$14 million in insured losses." Warshawsky, *supra* note 12, at 5.

130. Terrorism Risk Insurance Act of 2002, Pub. L. No. 107–297, § 102(7)(A–E).

131. *See id.* § 103(e)(6)(A–C). *See also* Warshawsky, *supra* note 12, at 4.

132. Morgan O' Rourke, *Senate Passes Terrorism Insurance Bill*, RISK MGMT. MAG., Nov. 2002, at 20.

133. Terrorism Risk Insurance Act of 2002, Pub. L. No. 107–297, § 103(e)(8)(C).

134. *Id.* § 103(b)(2).

135. *See* NAIC Model Bulletin, at 7 (providing insurers with some assistance in complying with the Terrorism Risk Insurance Act of 2002), at <http://www.naic.org/pressroom/releases/EmergencyResponse.htm> (last visited Jan. 23, 2004). *See also* Masters, *supra* note 117, at 431.

136. Masters, *supra* note 117, at 427.



sumer waivers of terrorism insurance will not apply to states that have legislation requiring insurers to include standard fire provisions in their policies.<sup>137</sup>

In addition, TRIA requires insurers to repay the difference between their marketplace aggregate retention and the aggregate amount that the federal government is not compensated for because of the amount being within insurers' deductibles or within the portion that the government does not cover.<sup>138</sup> However, this reimbursable amount can potentially have a diminished value, as the statute further provides that if the uncompensated losses exceed insurers' aggregate retention, insurers are absolved of their recoupment requirement and in certain cases the Secretary of the Treasury has discretion to release insurers of their duty to reimburse the government.<sup>139</sup>

Under TRIA, the Secretary of the Treasury has "sole discretion" over claim determinations, with no opportunity for judicial review.<sup>140</sup> In fact, TRIA also bestows upon the Secretary of the Treasury complete power to carryout the government's insurance program, including investigating and auditing claims, establishing rules for filing claims, employing personnel and contracting the government's insurance program to other agencies.<sup>141</sup>

Because of the U.S. Treasury Department's role, TRIA now stands as the U.S.' current legal mechanism for terrorism insurance coverage. However, as several Congressional reports

---

137. See NAIC Model Bulletin, *supra* note 135, at 7. *Id.* at 431.

138. Terrorism Risk Insurance Act of 2002, Pub. L. No. 107-297, § 103(e)(7)(A). TRIA explains the recoupment of insurers' "federal share" as follows:

[T]he mandatory recoupment amount...shall be the difference between — (i) the insurance marketplace aggregate retention amount...; and (ii) the aggregate amount, of all insurers, of insured losses during the during such period that are not compensated by the Federal Government because such losses — (I) are within the insurer deductible for the insurer subject to the losses; or (II) are within the portion of losses of the insurer that exceed the insurer deductible, but are not compensated pursuant to paragraph (1).

*Id.* See also *id.* § 103(e)(1) (Paragraph (1) explains the government's "federal share.").

139. *Id.* §§ 103(e)(7)(D), 103(e)(1).

140. See *id.* § 102(1)(C).

141. *Id.* § 104(a-d).

2004] *TERRORISM RISK INSURANCE ACT OF 2002* 851

have stressed the need for international templates concerning government-established terrorism insurance,<sup>142</sup> other international examples of government implemented terrorism insurance procedures offer insight into conceivable national expectations and differences. In a world where war has shifted from national intervention to terrorist action, the realities of terrorism and its threat to a nation's security and economy constitute an issue of international magnitude.<sup>143</sup> The U.K. has dealt with terrorist activity in major British metropolitan areas and in Northern Ireland. Meanwhile, Israel's ability to function as an economically viable state depends on its ability to withstand frequent terrorist activity. The next section serves as a window on these parts of the world that have faced similar insurance challenges and have reached legal solutions of their own.<sup>144</sup>

## III. INTERNATIONAL TERRORISM INSURANCE PERSPECTIVES

“Men walk almost always in the paths trodden by others, proceeding in their actions by imitation....so that if he does not attain to their greatness, at any rate he will get some tinge of it.”<sup>145</sup>  
– Niccolo Machiavelli<sup>146</sup>

*A. The U.K.'s Insurance Assistance Scheme: Has History Repeated Itself?*

## 1. The U.K.'s Private/Public Terrorist Insurance Combination

Similar to the U.S.' current reinsurance crisis, the U.K. faced an insurance industry unwilling to assume the risks of terrorism in the early 1990's.<sup>147</sup> The U.K.'s insurance industry re-

---

142. See Lee Barnes, *A Closer Look at Britain's Pool Re*, RISK MGMT. MAG., May 2002, at 21.

143. See Terrorism Risk Insurance Act of 2002, Pub. L. No. 107-297, § 101(a)(1).

144. See *supra* note 19 and accompanying text.

145. NICCOLO MACHIAVELLI, *THE PRINCE AND THE DISCOURSES* 19-20 (Luigi Ricci trans., Modern Library 1950).

146. Niccolo Machiavelli is considered as the “first commentator of power,” and his work, *The Prince*, serves as a complex treatise in political realism. See *id.* xxvi-xxxi.

147. The Association of British Insurers (“ABI”) announced in a press release made in November 1992 that British insurers decided to exclude terror-

quired minimal regulation in the past.<sup>148</sup> However, in light of terrorist attacks on the British mainland throughout the 1990s, the government was faced with a potential economic crisis.<sup>149</sup> In 1992, the U.K. resolved the issue of insurance and reinsurance coverage for terrorism through a pool reinsurance system (known as "Pool Re").<sup>150</sup> The British Parliament passed the Terrorism Reinsurance Act of 1993<sup>151</sup> in order to establish "Pool Reinsurance Co., Ltd."<sup>152</sup> This government action occurred in the wake of the Irish Republican Army's ("IRA") bombings of Bishopsgate and St. Mary Axe in the financial district of England.<sup>153</sup> The nation's damages for both bombings were around \$2 billion dollars.<sup>154</sup>

---

ism insurance coverage in light of upcoming reinsurance treaties renewable on January 1, 1993. Nicholas Munday, *UK Commercial Property Insurance: Terrorism Pool Put to the Test*, INT. I.L.R. 1993, 1(5), at 124. For more general information on the insurance industry's regulation in the U.K., see Ambereen Salamat & Jonathan Teacher, *United Kingdom — General Framework and Conduct of Business*, in THE IN-HOUSE COUNSEL'S GUIDE TO INSURANCE AND REINSURANCE 2003, 79 (Rob Mannix et al. eds., 2003) and the U.K.'s Financial Services Authority (FSA) Handbook of Rules and Guidance, available at <http://www.fsa.gov.uk/handbook> (last visited Jan. 15, 2004).

148. See John Young, *United Kingdom*, in THE REGULATIONS GOVERNING INSURANCE: AN INTERNATIONAL GUIDE, (Euromoney Publications et al., 1991).

149. For an in depth analysis of the U.K.'s terrorism insurance issues in the 1990s, see Bice, *supra* note 30, 446–64.

150. Jane Croft and Jean Eaglesham, *'Insurer of Last Resort' Set to Extend Its Cover*, FIN. TIMES (LONDON), July 19, 2002, at 5.

151. Reinsurance Act (Acts of Terrorism), 1993, ch. 18, § 1(1) (Eng.). See also Symon Ross, *UK Office of Fair Trading to Exempt Pool Re from Competition Legislation*, INS. DAY, Feb. 9, 2004, available at 2004 WL 57515055 (reporting that the U.K.'s Office of Fair Trading ("OFT") decided that Pool Re's terrorism coverage should be exempt from the nation's competition law). For a time line that displays the history of Pool Re, see *Provisions of Terrorism and Riot Coverage in Different Countries*, Astre Scor, at <http://astre.scor.com/astrehelp/en/Assur/inc/extensionuk/terrorism.htm#Insurance> (last visited Feb. 18, 2004) [hereinafter Astre Scor report].

152. See Michael Pollack, *Bills Seek Stability in Insurance for Terrorist Acts*, N.Y. L.J., Sept. 30, 2002, at S1.

153. Alex Beatty, *Technical Support: Political Risk; Bombs Away?*, REINSURANCE MAG., Aug. 31, 1998, at 18; Barnes, *supra* note 142.

154. For estimates of the costs the U.K. incurred in 1993 allegedly due to the IRA's bombings, see Beatty, *supra* note 153, at 18 (noting that the costs of the St. Mary Axe explosion equaled to approximately \$500 million) and Barnes, *supra* note 142, (estimating costs of the Bishopsgate explosion at \$1.5 billions dollars).

2004] *TERRORISM RISK INSURANCE ACT OF 2002* 853

Pool reinsurance differs from the usual insurance practice of subdividing risk by spreading a specific property's risk among many shareholders; rather, pooling creates a collection of numerous individual risks, not individually subdivided, which are grouped together.<sup>155</sup> The program specifically covers the insurers of commercial properties, and residential properties in commercial ownership.<sup>156</sup> Pool Re serves as a governmental insurance mechanism that joins insurers together under government supervision in order to financially prepare for any potential massive losses incurred as a result of terrorism. The government-established Pool Re system works as a mutual insurance company<sup>157</sup> incorporated under the "Companies Acts,"<sup>158</sup> after having gained authorization from Britain's Department of Trade and Industry ("DTI"),<sup>159</sup> providing reinsurance coverage under the regulations of the "Insurance Companies Act of 1982."<sup>160</sup> The British Secretary of State for Trade and Industry runs Pool Re as a quasi-governmental entity.<sup>161</sup> However, a tribunal oversees any challenges to the Secretary of State's decisions.<sup>162</sup> Currently, a small staff runs Pool Re with an annual expense budget of £1 million (approximately \$1.5 million).<sup>163</sup>

Hence, the British Parliament intended to establish a reinsurance arrangement that would guarantee that Britain's industry and commerce would continue to receive terrorism insurance coverage.<sup>164</sup> In this way, the British Parliament felt that it could assist the nation's injured insurance industry and

---

155. Jaffe & Russell, *supra* note 14, at 4.

156. See Steve Atkins, *UK Terrorism Insurance — Where Are We Now?*, Insurance Institute of London, Jan. 23, 2003, at <http://www.iilondon.co.uk/ppt/Satkings23103.PPT> (last visited Dec. 12, 2003).

157. Munday, *supra* note 147.

158. Companies Acts, 1985, ch. 6, § 1 (Eng.).

159. For more information, see the U.K.'s Department of Trade and Industry web page at <http://www.dti.gov.uk/> (last visited Nov. 16, 2003).

160. Insurance Companies Act, 1982, ch. 50 (Eng.). See Mark Stallworthy, *The Reinsurance (Acts of Terrorism) Act 1993*, I.B.F.L. 1993, 12(3), at 21.

161. See Beatty, *supra* note 153, at 18. Pool Re entered into a retrocession agreement with the U.K.'s Secretary of State for Trade and Industry on July 30, 1993. Astre Scor report, *supra* 151, at para. 10.

162. This tribunal consists of Pool Re representatives and government officials, and this tribunal holds the final say. Barnes, *supra* note 142.

163. See *id.*; Peter Gregoire & Belinda Schofield, *Insurance: A New Brand of Terror*, LEGAL WEEK, June 5, 2003, available at 2003 WL 8422875.

164. See Beatty, *supra* note 153, at 18.

at the same time regain the ability to insure against terrorism in such a way that would also secure the State's benefit.<sup>165</sup> According to British legislative representatives, Pool Re's establishment would also guarantee that Britain would incur "zero costs" for terrorism claims after several years of implementation.<sup>166</sup> This assertion has proven accurate as Pool Re has met several claims without requiring any financial assistance from the U.K. government.<sup>167</sup>

As a result of Pool Re's financial soundness, the U.K. government's reinsurance scheme allows for the accumulation of monetary funds that ultimately shelters the British government and Pool Re's participant insurers from exorbitant liability exposure.<sup>168</sup> In the program's earlier stages, Pool Re even dispersed its remaining yearly profits among all its participating entities.<sup>169</sup> Moreover, Pool Re has worked in the U.K.'s favor since the government only acts as "retrocessionaire" to its own pool reinsurance program.<sup>170</sup> Only the complete depletion of Pool Re's financial reserves would require the government to cover any remaining uncovered costs, and many argue that Pool Re could now easily handle a major catastrophe in the U.K.<sup>171</sup>

---

165. See U.K. Treasury Announcement, *Changes to the Pool Re Scheme*, July 23, 2002, at <http://www.hm-treasury.gov.uk/media/61876/ACF1D0D.PDF> (last visited Jan. 15, 2004) [hereinafter U.K. Treasury Announcement].

166. *The Way We Live Now*, CONV. & PROP. LAW, Nov/Dec 1993, at 418–20 (noting that within its first year Pool Re was expected to have an income of £350 million, which shows that the government established reinsurance pool program could also be profitable).

167. See Barnes, *supra* note 142; HILLMAN, *supra* note 55, at 8.

168. As of December 2000, Pool Re's accumulated surplus equaled to approximately £665 million. *Pool Re and Terrorism Insurance in Great Britain*, TILLINGHAST-TOWERS PERRIN UPDATE, Oct. 2001, at 3, available at [http://www.tillinghast.com/tillinghast/publications/publications/till\\_update\\_uk/Uk\\_Pool\\_Re\\_and\\_Terrorism/2002052111.pdf](http://www.tillinghast.com/tillinghast/publications/publications/till_update_uk/Uk_Pool_Re_and_Terrorism/2002052111.pdf) (last visited Jan. 10, 2004) [hereinafter TILLINGHAST UPDATE].

169. As of Jan 1, 2003, Pool Re no longer provides insurers with surplus gains due to the program's expansion of terrorism coverage, as the program now requires an increased amount of revenue in order to cover its increased exposure. See U.K. Treasury Announcement, *supra* note 165.

170. See Bice, *supra* note 30, at 453–56.

171. However, the British Pool Re system has not been tested in its full capacity, being that very few claims materialized after the early 1990s. See Andrew Cave, *City — Companies Pay Double for Insurance Against Terrorism*, DAILY TELEGRAPH, Jan. 4, 2003, at 31, available at 2003 WL 2831376.

2004] *TERRORISM RISK INSURANCE ACT OF 2002* 855

Insurers in Britain wishing to offer terrorism insurance can group with other insurers in order to minimize the impact of any potential terrorist losses. However, Pool Re requires that reinsurers obtain terrorism coverage for all of their portfolio properties, not only for their high-risk properties.<sup>172</sup> Thus, Pool Re spreads the volume of risky coverage onto less risky properties nationwide. Before gaining terrorism insurance, each insurer seeking terrorism coverage for their properties must be assessed according to three factors: (1) an insured's aggregate value of total properties insured; (2) the location of the property at risk;<sup>173</sup> and (3) the property's target risk.<sup>174</sup> Pool Re divides the British mainland into four zones: the first covers the U.K.'s highest risk areas, which covers the heart of London and Westminster; the second covers the rest of London as well as major cities and their business districts; the third encompasses the rest of the England except Devon and Cornwall; and the fourth covers the U.K.'s counties and towns in the outskirts of the towns of Scotland and Wales.<sup>175</sup>

The U.K. government sets insurers coverage liability based on Pool Re's "retention" requirements.<sup>176</sup> Pool Re originally set U.K. insurers' terrorism coverage retention at £100,000;<sup>177</sup> however, as of January 1, 2003, Pool Re now implements a "per event retention" and "annual aggregate limit" model.<sup>178</sup> This model was formulated as a result of the September 11 attacks in order to increase terrorism insurers' retention rates in the event of multiple attacks on the U.K.<sup>179</sup> This new method caps

---

172. Some property owners turn to alternatives for their "single location basis" properties that require terrorism insurance coverage. Pollack, *supra* note 152, at S1.

173. *See id.* Properties located in Central London, for example, have premium rates of "0.144 percent or \$144 for every \$1 million of coverage." *Id.*

174. *See* Bice, *supra* note 30, at 451-53.

175. Beatty, *supra* note 153, at 18.

176. Pool Re's retention requirements refer to the total costs that an individual insurer bears based on the "number of heads of cover affected." U.K. Treasury Announcement, *supra* note 165, at 2-5.

177. This amount totals to \$157,000. Sarah Veysey, *United Kingdom Expands the Scope of Pool Re Coverage*, BUS. INS., July 23, 2002, available at <http://www.buisnessinsurance.com/cgi-bin/news.pl?newsId=1127> (last visited Jan. 30, 2004).

178. U.K. Treasury Announcement, *supra* note 165, at 3.

179. *Id.* The U.K.'s concern was based on the September 11 legal battles between insured owners and insurance companies with respect to the number

insurers' exposure both on a terrorist event and per annum basis.<sup>180</sup> Insurers presently have a maximum industry-wide retention of £30 million per event and £60 million per annum.<sup>181</sup> Furthermore, these retention rates will increase annually in a predetermined manner up until January 1, 2006, which the British government and private insurance industry hope will help reinsurers take a larger a role in terrorism insurance coverage.<sup>182</sup>

---

of occurrences of terrorist attacks that insurance companies had to cover as a result of their contractual agreements with their clients. See *SR Intern. Business Ins. Co. Ltd. v. World Trade Center Properties L.L.C.*, 222 F. Supp. 2d 385 (S.D.N.Y. Sept. 25, 2002), *aff'd*, *World Trade Center Properties, L.L.C. v. Hartford Fire Insurance Co.*, 345 F.3d 154 (2d Cir. 2003) (construing the World Trade Center's insurance binder agreement as implicating that the insurers were responsible for the occurrences of one event and not for two). The U.K. has also faced the U.S.' September 11 issue regarding the number of occurrences. See Gillian D. Bell, *Terrorism and Insurance*, KSB Law, at <http://www.ksblaw.co.uk/articles/property/propart13.html> (last visited Jan. 18, 2004). The U.K. Court of Appeals handled the issue of multiple occurrences, stating that a single occurrence requires either the unity of time or the unity of place. *Mann v. Lexington Insurance Co.*, [2000] 2 All E.R. (Comm.) 163; 2000 WL 976023 (QBD (Comm. Ct)), *rev'd*, [2001] 1 All E.R. (Comm.) 28; 2000 WL 1421262 (CA). See also Stempel, *supra* note 43, at 832–43 (analyzing the number of occurrences insurance issue in the U.S. due to the September 11 attacks); James E. Branigan, *Insurance and Risk Management in Commercial Real Estate Transactions: A New World of Concerns*, 489 PLI/REAL 59 (2003); Tara Loomis, *WTC Attack is One Event, Judge Rules*, LAW.COM, Sept. 26, 2002, at <http://www.law.com> (last visited Sept. 30, 2002); Michael F. Aylward, *Twin Towers: The 3.6 Billion Question Arising from the World Trade Center Attacks; Was It One "Occurrence" or More than One? There Are Complexities Galore That Are Bound to Arise in Insurance Contracts*, 69 DEF. COUNS. J. 169 (2002).

180. U.K. Treasury Announcement, *supra* note 165, at 3 (allowing insurers the security of knowing exactly how much they owe in any one given year and per number of terrorist attacks).

181. *Id.*

182. *Id.* at 3–4 (offering a chart that displays the per event and per annum requirements for year up until January 1, 2006, which reports the increases as follows: (1) January 1, 2003 — per event: £30 million, per annum: £60 million; (2) January 1, 2004 — per event: £50 million, per annum: £100 million; (3) January 1, 2005 — per event: £75 million, per annum: £150 million; and (4) January 1, 2006 — per event: £100 million, per annum: £200 million). Pool Re's new retention rates indicate the insurance industry's maximum retention, but these figures do not represent each insurer's liability, as this amount will bear heavily on the distribution of claims amongst insurers in the U.K. *Id.* at 4.

2004] *TERRORISM RISK INSURANCE ACT OF 2002* 857

Although several property owners have decided to self-insure terrorism damages as a result of the program, the insurance industry has benefited from Pool Re overall.<sup>183</sup> The program's success sparked the British government to pass new legislation further extending the capacity and extent of Pool Re's terrorism coverage.<sup>184</sup> After the events of September 11, the British Parliament discussed the need to expand their reinsurance scheme in order to maximize the nation's insurance protection, but at the same time create new incentives to increase commercial insurance competition.<sup>185</sup>

Accordingly, the British Parliament has made monumental changes to the Terrorism Reinsurance Act of 1993. The definition of what actually constitutes an act of terrorism has been recently altered to comprise all destructive acts meant to terrorize the British people and government, including domestic acts of terrorism taken by extremist radical groups such as new wave environmentalists.<sup>186</sup> The British government has also expanded Pool Re's overall coverage. Now, Pool Re also encompasses destruction caused by biological contamination, aircraft attacks and damage by floods,<sup>187</sup> the last of which is particularly necessary for Britain's well being since any terrorist attack on

---

183. See William Glyon, *Insurance Against Terrorism*, L. SOC'Y GAZETTE, June 9, 1993, at 20.

184. Katherine Griffiths, *News Analysis: Insurers Call for Greater Government Aid to Meet Terrorism Bill; Evidence is Mounting that Lack of Terror Cover is Exacerbating the US Business Downturn*, INDEP. (LONDON), Feb. 12, 2002, at 15 (commenting that the "U.S. is also grappling with [the issues of terrorism reinsurance coverage] but it is at a less advanced stage than the U.K.").

185. *Pool Re Scheme*, U.K. Parliament 73100, available at <http://www.parliament.the-stationary-off...0102/cmhansrd/cm020723/text/20723w21.htm> (last visited Nov. 12, 2003). See also U.K. Treasury Announcement, *supra* note 165.

186. See Reinsurance (Acts of Terrorism) Act, 1993, ch. 18, § 2(2) (Eng.) ("[A]cts of terrorism' means acts of persons acting on behalf of, or in connection with, any organisation which carries out activities directed towards the overthrowing or influencing, by force or violence, of Her Majesty's government in the United Kingdom or any other government de jure or de facto."). See also U.K. Treasury Announcement, *supra* note 165, at 5.

187. Yvette Essen, *Pool Re Offers Terrorism Cover*, DAILY TELEGRAPH (LONDON), July 24, 2002, at 29. This expansive coverage, however, does not cover electronic hacking and virus damages, as the British government feels that it is difficult to prove that such damage actually results from a terrorist attack. U.K. Treasury Announcement, *supra* note 165, at 2.



London's enormous dam could potentially flood a huge portion of the metropolitan area.<sup>188</sup> In addition, the British parliament has made arrangements to further extend terrorism insurance coverage to cover nuclear contamination.<sup>189</sup> These legal changes ensure the industry's well-being and mark a savvy grasp of the ever expanding varieties of terrorist activity.<sup>190</sup>

## 2. The U.K.'s Public Terrorism Insurance in Northern Ireland

In Northern Ireland, however, where damages from terrorist activity have become part of the region's everyday reality, most insurers refuse outright to assume the risk of terrorist-caused property damage, and this tendency especially holds true in the case of commercial properties.<sup>191</sup> The Reinsurance (Acts of Terrorism) Act of 1993 does not cover Northern Ireland under Section 3(2) of the statute.<sup>192</sup> Rather, the British government directly takes responsibility for terrorism damage recovery, acting as the insurer itself.<sup>193</sup>

Two pieces of legislation require the direct payment of terrorist insurance claims by the British government: the Criminal Injuries to Properties (Compensation) Act of 1971<sup>194</sup> and the

---

188. *See id.*

189. U.K. Treasury Announcement, *supra* note 165, at 5.

190. *See Cave, supra* note 171, at 31 (reporting that the U.K. has expanded its coverage in order to adapt to new terrorism concerns). *C.f. Gregory Pressman, Attacks Require Fresh Look at Old Concepts*, N.Y. L.J., Nov. 26, 2001, at S1 (discussing the changing concerns that exist with respect to terrorism).

191. *See House of Lords, Manchester Bombing: Restoration of City Centre*, U.K. Parliament, Dec. 11, 1996, available at <http://www.parliament.the-stationary-of...697/ldhansrd/vo961211/text/61211-01.htm> (last visited Jan. 5, 2004); Teresa Hunter, *City - Money - Insurance - Insurers Press the Panic Button Alarmed by the Prospect of Chemical or ...*, SUNDAY TELEGRAPH, Mar. 30, 2003, available at 2003 WL 7194529.

192. Reinsurance Act (Acts of Terrorism), 1993, ch.18, § 3(2) (Eng.). *See Stallworthy, supra* note 160.

193. Richard W. Stevenson, *Britain to Help Insurers Cover Terrorism Risks*, N.Y. TIMES, Dec. 22, 1992, at D2. Insurers presently provide normal insurance coverage for domestic property and automobiles in Northern Ireland; however, a governmental compensation agency primarily reimburses the costs for commercial property damage caused by terrorism, and it also compensates victims of terrorism in Northern Ireland as well. *See Hunter, supra* note 191.

194. Criminal Injuries to Property (Compensation) Act, N. Ir. Stat., ch. 8 (1971).

2004] *TERRORISM RISK INSURANCE ACT OF 2002* 859

Criminal Damage (Compensation) Order of 1977.<sup>195</sup> These two acts obligate the British government to compensate property owners in Northern Ireland who are harmed by terrorist acts.<sup>196</sup> The government covers terrorist-caused damage claims from premiums paid to the government through tax revenues.<sup>197</sup> Reimbursement for damages inflicted by terrorist activity requires three steps: (1) regional police must authenticate that terrorists actually caused the property damage; (2) each property owner must obtain a certificate proving the validity of their claim; and (3) owners may then establish their compensation claim against the British government after presenting their certificate.<sup>198</sup>

Many insurance specialists, however, argue that this type of government insurance program encourages false claims.<sup>199</sup> British officials have discovered numerous alleged compensation claims for self-inflicted damages under the rubric of terrorist activity.<sup>200</sup> In fact, the British government is primarily concerned with systematic fraudulent claims where IRA sympathizers purposely allow the IRA to damage their property, in order to split governmental cash settlements with them.<sup>201</sup> In addition, resentment also exists due to the government's differing insurance approaches on the U.K. mainland and in Northern Ireland.<sup>202</sup> Nevertheless, with practically no insurers covering major terrorist damages, governmental subsidy is the region's only plausible system for redeveloping terrorist-stricken regions.<sup>203</sup>

---

195. Criminal Damage (Compensation) Order, N. Ir. Stat., No. 1247 (1977).

196. See Bice, *supra* note 30, at 463–64.

197. *Id.*

198. *Id.* at 449; Gloyn, *supra* note 183, at 20. Presently, an act of terrorism that would satisfy the compensation certification requirement would be an act as defined by the “Terrorism Act 2000.” Terrorism Act 2000, ch. 11 (Eng.).

199. Insurance specialists refer to the risk of fraudulent claims as *ex post* moral hazard. Gollier, *supra* note 14, at 11 (noting that 10% of the insurance industry's automobile and homeowner insurance premiums stem from fraudulent claims, and that larger penalties could potentially deter policyholders from making fraudulent insurance claims).

200. *Insuring Against Terror*, ECONOMIST, Dec. 12, 1992, at 19.

201. *Id.*

202. House of Lords, Trade and Industry — Terrorism, U.K. Parliament, Nov. 1, 1996, available at [http://www.parliament.the-stationary-of...697/cm\\_hansrd/vo961101/text/61101w04.htm](http://www.parliament.the-stationary-of...697/cm_hansrd/vo961101/text/61101w04.htm) (last visited Jan. 5, 2004).

203. See Hunter, *supra* note 191.

During the 1990's, the British government was able to partially remedy the issue of liability exposure through political and legal means.<sup>204</sup> The U.K. government took significant steps to decrease the resentment that its controversial measures fostered when combating the IRA.<sup>205</sup> Due to the IRA's terrorist efforts, the U.K. had implemented many controversial mechanisms for countering terrorism, such as: exclusion orders, which banned certain people in Northern Ireland from entering the U.K.'s mainland without a trial; and internment powers that allowed police to hold a suspect in detention without trial.<sup>206</sup> However, in 1997, the U.K. changed its approach in handling the IRA threat, when the British Parliament repealed its previous exclusion orders and internment measures.<sup>207</sup> In addition, the U.K. also expanded its definition of criminal terrorism in order to include serious instances of terrorism.<sup>208</sup> The ratification of the Good Friday Peace Agreement<sup>209</sup> minimized the threat of IRA terrorism due to the prospect of peace between the British government and Northern Ireland activists.<sup>210</sup> Even though the peace agreement does not guarantee the compliance of other IRA splinter organizations,<sup>211</sup> so far it has proven beneficial to the British government since claims in Northern Ire-

---

204. Richard Norton-Taylor & Duncan Campbell, *Measures to Counter IRA Terrorism Will End, New Law Will Cover Whole UK and Broaden Terms For Use of Violence*, GUARDIAN, Oct. 31, 1997, available at 1997 WL 14738341. See also *Northern Ireland: 1998-1999*, BBC NEWS, Oct. 23, 2003, available at [http://news.bbc.co.uk/1/hi/northern\\_ireland/539391.stm](http://news.bbc.co.uk/1/hi/northern_ireland/539391.stm) (last visited Feb. 2, 2004).

205. Norton-Taylor & Campbell, *supra* note 204.

206. *Id.* See also Kieran McEvoy, *Prisoners, the Agreement, and the Political Character of the Northern Ireland Conflict*, 22 FORDHAM INT'L L.J. 1539 (1999); Carol Daugherty Rasnic, *Northern Ireland's Criminal Trials Without Jury: The Diplock Experiment*, 5 ANN. SURV. INT'L & COMP. L. 239 (1999).

207. Norton-Taylor & Campbell, *supra* note 204.

208. *Id.*

209. Northern Ireland Act, 1998, ch.47, pts. I-IX. The Good Friday agreement is also known as the Belfast Agreement. For an online version of this statute and more information on the Good Friday agreement, see the Northern Ireland Office's website at <http://www.nics.gov.uk/htbin/betsie/parser.pl/0005/www.hms0.gov.uk/acts/acts1998/19980047.htm#aofs> (last visited Feb. 2, 2004).

210. See Beatty, *supra* note 153, at 18.

211. For example, "Continuity IRA" and "True IRA" are organizations opposed to the U.K.'s peace offerings. *Id.*

2004] *TERRORISM RISK INSURANCE ACT OF 2002* 861

land have dramatically decreased.<sup>212</sup> Nevertheless, the U.K. now faces a new breed of terrorist threats and has shifted its focus from the issues in Northern Ireland<sup>213</sup> to the multitude of terrorist groups that presently threaten the nation.<sup>214</sup>

*B. Israel's Tax Management and Public/Private Coordination for the Provision of National Terrorism Insurance*

Similar to the public terrorism insurance available in Northern Ireland, Israel also insures for terrorism.<sup>215</sup> The Property Tax and Compensation Fund<sup>216</sup> and the Victims of Hostile Action<sup>217</sup> grant the government the authority to assist with terror-

---

212. *But see Bomb Rocks Enniskillen Following Call From Continuity IRA*, HERALD COMPANY, Feb. 11, 2003, available at 2003 WL 2663929.

213. *See* Hunter, *supra* note 191 (reporting current terrorism concerns in the U.K. and Europe in general). For an overview of the U.K.'s current issues with terrorism, see U.K. Cabinet Office, *The United Kingdom and the Campaign against International Terrorism — Progress Report*, Sept. 9, 2002, at <http://www.cabinet-office.gov.uk/reports/sept11/coi-0809.pdf> (last visited Jan. 12, 2004). After September 11, the U.K. government's heightened safety concerns primarily focus on terrorist groups with a foreign, i.e. Middle Eastern, cause, as the nation's criminal laws target foreign nationals. *See* Kavita Modi & John Wadham, *Anti-Terrorism Legislation in the United Kingdom and the Human Rights Concerns Arising from It*, LIBERTY ORG., Mar. 31, 2003, at <http://www.liberty-human-rights.org.uk/resources/articles/pdfs/terrorism-april-2003.pdf> (last visited Jan. 15, 2004) (noting that the U.K. government's expansion of the nation's Terrorism Act and criminal law violates the human rights of many individuals).

214. U.K. faces terrorism from political activists representing the concerns of Northern Ireland, Middle East, North Africa, Kurdish Separatists, and other domestic groups, such as the Animal Liberation Front. Alan J. Fleming, *Terrorism Coverage in the United Kingdom*, DJR, at [http://www.drh.com/special/wtc/w3\\_065.html](http://www.drh.com/special/wtc/w3_065.html) (last visited Jan. 12, 2004).

215. Aside from insuring terrorism, Israeli legislation also clearly protects the interest of the insured in all insurance matters as, for example, the nation's laws require that insurance changes can be made only if they are favorable or "more beneficial" to the insured party. *See* David M. Sassoon, *Legal Aspects of Insurance*, in ISRAELI BUSINESS LAW: AN ESSENTIAL GUIDE 337, 337-39 (Alon Kaplan et al., 1996). Israel's Insurance Contract law of 1981 establishes these pro-consumer provisions. Insurance Contract Law, 1981, 35 L.S.I. 91, (1980/1981). For an online copy of this law, see the website of Levitan, Sharon & Co. at <http://www.israelinsurancelaw.com/site/index.php?module=ContentExpress&func=display&bttitle=CE&mid=&ceid=61> (last visited Dec. 15, 2004).

216. Property Tax and Compensation Fund, (1961), 15 L.S.I. 101, (1960/1961).

217. Victims of Hostile Action, (1970), 24 L.S.I. 131, (1969/1970).

ist-caused damages.<sup>218</sup> Through these two pieces of legislation, the Israeli government both funds and administers terrorism insurance for citizens, and in certain instances even for tourists.<sup>219</sup> Each program, however, governs a particular domain: the Property Tax and Compensation Fund covers property and casualty insurance and the Victims of Hostile Action covers life and health insurance.<sup>220</sup>

Under the Property Tax and Compensation Fund, the Israeli government, through the Israeli Income and Property Tax commission,<sup>221</sup> collects a property tax primarily from Israeli businesses.<sup>222</sup> The Property Tax Commission then reimburses claims resulting from terrorism, but up to the property's market value immediately before an attack.<sup>223</sup> The nation's compensation fund also covers the loss of household items at "full replacement value" without accounting for depreciation.<sup>224</sup> However, due to the high number of property damage occurring in a commercial area after an attack, the tax commission takes on the role of fixing the damage through "price adjusters" and con-

---

218. For the history behind Israel's development of its government compensation programs, see Hillel Sommer, *Providing Compensation For Harm Caused By Terrorism: Lessons Learned in The Israeli Experience*, 36 IND. L. REV. 335, 353-55 (2003) (starting from the nation's formation to the present).

219. See *Terrorism Insurance: Alternative Programs for Protecting Insurance Consumers*, 107th Cong. 8 (2001), (testimony of Thomas J. McCool, Managing Director of Financial Markets and Community Investment before the Senate Committee on Banking, Housing and Urban Affairs), available at <http://news.findlaw.com/hdocs/docs/gao/terrins102401mccool.pdf> (last visited Jan. 12, 2004).

220. *Id.*

221. For more information, see Israel's Income and Property Tax Commission's website at <http://www.mof.gov.il/itc/eng/mainpage.htm> (last visited Jan. 5, 2004).

222. HILLMAN, *supra* note 55, at 8.

223. *Id.* Property owners can receive compensation for all of their "real damages," which means that the government reimburses the lesser amount of either: (1) the "difference between the value of the asset before the damage occurred and the market value of the asset immediately after the damage occurred;" or "the cost of restoring the asset to its prior condition." Sommer, *supra* note 218, at 356.

224. Sommer, *supra* note 218, at 355. The Commission compensates household items such as "furniture, appliances, electronics, books, and similar items," but it does not provide coverage for "jewelry, art, antiques, and cash." *Id.* at 355, n.124.

2004] *TERRORISM RISK INSURANCE ACT OF 2002* 863

tractors.<sup>225</sup> If a property owner wishes to obtain greater coverage, private or additional state coverage is available in order to account for any discrepancies in the State's replacement price evaluations.<sup>226</sup>

Meanwhile, the Victims of Hostile Action (Pensions) Law provides coverage for the personal costs incurred from terrorist harm through a state program called Law for the Compensation of Victims of Hostile Action,<sup>227</sup> which the National Insurance Institute ("NII") administers.<sup>228</sup> The situations that can qualify under this statute are quite numerous, as the legislation covers any harm that may occur to an Israeli citizen, resident or visitor that faces harm due to a terrorist attack.<sup>229</sup> In addition, the

---

225. *Id.* at 356. Thus, the Israeli Tax Commission takes on the role of restoring terrorist stricken property, despite the fact that the Property Tax Compensation Fund law states that individuals are to be financially compensated. *Id.* However, the nation seems to be benefiting from this administrative system, as it "significantly reduces the amount of time it takes for life to return to normal following a terrorist attack." *Id.*

226. See HILLMAN, *supra* note 55, at 8.

227. See 24 L.S.I. 131-37. See also Howard Kunreuther, The Role of Insurance in Managing Extreme Events: Implications for Terrorism Coverage, BUS. ECON., April 2002, at 14, available at [http://www.Ideo.columbia.edu/C\\_HRR/Roundtable/Kureuther\\_Howard\\_Note.pdf](http://www.Ideo.columbia.edu/C_HRR/Roundtable/Kureuther_Howard_Note.pdf) (last visited Jan. 10, 2004).

228. In 1954, the Israeli government established the National Insurance Institute ("NII") in order to administer Israel's social security programs. Yehuda Kahane, *Insurance In the Israeli Economy*, in ISRAELI BUSINESS LAW: AN ESSENTIAL GUIDE 341 (Alon Kaplan et al., 1996). This government agency is responsible for the administration of various social oriented laws. *Id.* For example, the NII operates the following government programs: victims of hostile activities compensation, military service salaries, unemployment insurance, alimony provisions, coverage for work related injuries, nursing care for the elderly/disabled, child support, maternity leave payments and health insurance. *Id.* at 341-42. Israeli employers, employees and the self-employed primarily finance the NII's programs, as the government requires that they pay "contributions" to the national program that can account for a substantial portion of their salary and/or earnings. *Id.* at 342. As of January 2003, the income ceiling for such contributions is "five times the national average wage for both employers and employees." NII Home Page, Definitions and Terms Used, at [http://www.btl.gov.il/English/btl\\_indx.asp?name=pdf/pamphlets\\_Eng.htm](http://www.btl.gov.il/English/btl_indx.asp?name=pdf/pamphlets_Eng.htm) (last visited Jan. 15, 2004). For more information, see the NII's website at [http://www.btl.gov.il/English/eng\\_index.asp](http://www.btl.gov.il/English/eng_index.asp) (last visited Dec. 15, 2003). See also National Insurance Institute, *Compensation for Foreign Residents Victims of Hostile Acts*, at [http://www.btl.gov.il/English/btl\\_indx.asp?name=pdf/pamphlets\\_Eng.htm](http://www.btl.gov.il/English/btl_indx.asp?name=pdf/pamphlets_Eng.htm) (last visited Jan. 20, 2004).

229. The Victims of Hostile Action (Pensions) Law defines an "enemy-inflicted injury" in the following way:

legislation loosely defines terrorist acts in such a manner that it can even include harm caused as a result of self-defense actions against terrorists.<sup>230</sup> The compensation law's definition also mirrors to a certain extent the broad definition of terrorism found in the Israeli Prevention of Terrorism Ordinance 5708–1948, which establishes the criminality of such acts. According to the Israeli criminal statute, a terrorist organization is one that resorts “to acts of violence” in a calculated fashion in order “to cause death or injury to a person” or “threats of such acts of violence.”<sup>231</sup> This definition is very broad,<sup>232</sup> which means that

---

(1) [A]n injury caused through hostile action by military or semi-military or irregular forces of a state hostile to Israel, through hostile action by an organization hostile to Israel or through hostile action carried out in aid of one of these or upon its instructions, on its behalf or to further its aims....

24 L.S.I. 131, § 1. This statute also lists the individuals that can fall under the category of a victim of an “enemy inflicted injury” as either: (1) “an Israel national or resident, whether the injury was sustained in Israel or outside of it;” or “a person who entered Israel under a visa or permit issued under the Entry into Israel Law....” *Id.* § 3.

230. Sommer, *supra* note 218, at 339 (explaining that Israeli legislation covers even “friendly fire,” “as is the accidental explosion of ammunition stocked in anticipation of terrorist attacks”). However, the classification of what actually constitutes a “hostile act” is not clear, as harm can fall into the categories of either criminal or terrorist. *Id.* at 340.

231. Prevention of Terrorism Ordinance, 1948, 1 L.S.I. 76, (1948). *See also* Prevention of Terrorism Ordinance (Amendment) Law, 1980, 34–35 L.S.I. 211, (1979/1980); Prevention of Terrorism Ordinance (Amendment No. 2), 1986, 39 L.S.I. 229, (1984/1986). For the current English translation of the above law and its amendments up until 1993, see Israel's Ministry of Foreign Affairs website at <http://www.mfa.gov.il/mfa/go.asp?MFAH07tu0> (last visited Jan. 10, 2004).

232. In fact, the statute also makes it illegal for an Israeli citizen to sympathize terrorist groups by publishing, in a written or verbal manner, any words of praise or sympathy for terrorist groups. *See* Prevention of Terrorism Ordinance, 1948, 1 L.S.I. 76, (1948) at § 4. *But cf.* U.S. Patriot Act 18 U.S.C.A. § 2339(B) (section entitled “Providing *Material* Support or Resources to Designated Foreign Terrorist Organizations”) (emphasis added); U.S. CONST. amend. I (In contrast to this particular Israeli law's approach to speech and association, the U.S. Constitution mandates that “Congress shall make no laws respecting an establishment of religion, or prohibiting the free exercise of speech thereof; or abridging the freedom of speech, or of the press,” which offers a very different national approach to the handling of opinions and expressions contrary to the State). *See also* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 1055–1306 (6th ed. 2000) (providing historical background and analysis for the development of free speech in the U.S.);

2004] *TERRORISM RISK INSURANCE ACT OF 2002* 865

any such act is compensated under the nation's insurance program. Moreover, victims also have the presumption of an occurrence being a terrorist attack in their favor, as the Victims of Hostile Action Law explains that "[w]here a person has been injured under circumstances affording reasonable grounds for believing that he [or she] has sustained an enemy inflicted injury, the injury shall be regarded as enemy inflicted unless the contrary is proved."<sup>233</sup> When the National Insurance Institute determines that the applicant has a legitimate claim, it then administers the eligible victim's compensation in a manner very similar to the U.S. Social Security system in that it provides medical care, lost wages, family assistance, and personal injury settlements, with the only exception being that it also applies to tourists visiting the nation.<sup>234</sup>

Nevertheless, the government limits its overall liability through insurance regulation, as it does not reimburse for damages that insurance companies are forced to insure by law.<sup>235</sup> For example, Israel does not cover certain costs such as business interruption; in such cases, businesses can find such coverage only through private insurance.<sup>236</sup> Therefore, insurance companies wishing to provide their business to Israeli citizens are legally required to pay for their portion of damages caused

---

Miriam Gur-Arye, *Can Freedom of Expression Survive Social Trauma: The Israeli Experience*, 13 DUKE J. COMP. & INT'L L. 155 (2003). *But see* Tracey Topper Gonzalez, *Individual Rights Versus Collective Security: Assessing the Constitutionality of the U.S. Patriot Act*, 11 U. MIAMI INT'L & COMP. L. REV. 75 (2003).

233. 24 L.S.I. 132, § 2. *See also* Sommer, *supra* note 218, at 340.

234. HILLMAN, *supra* note 55, at 8. Israel insures practically all of the nation's residents, differing in coverage depending on age. MEIR HETH, *THE LEGAL FRAMEWORK OF ECONOMIC ACTIVITY IN ISRAEL* 72 (1967).

235. *See* HILLMAN, *supra* note 55, at 8.

236. *See* 15 L.S.I. 101–03 (restricting coverage to actual property damage as the statute does not mention business interruption as falling into one of the categories of reimbursable harm). *See also* Kunreuther, *supra* note 227, at 14; Sommer, *supra* note 218, at 357 (noting that this sum also includes all indirect damage such as business interruption and loss of earnings). This limitation has proved restraining as many business owners have faced up to an 80% deduction in reduced business as a result of the high frequency of terrorist activities occurring in the nation's commercial areas. *Id.* at 358. However, the Israeli government has decided to potentially cover business interruption damages resulting from terrorism if the government approves such a claim. *Id.* at 358.



by any given terrorist attack.<sup>237</sup> Through the Israeli government's strict division of fiscal responsibility between government and insurers, the insurance industry can comfortably issue insurance knowing in advance that they will not be responsible for the entire risk of property damage.

#### IV. DOMESTIC LEGAL ANALYSIS THROUGH INTERNATIONAL EXAMPLES

“Lay plans for the accomplishment of the difficult before it  
becomes difficult; make something big  
by starting with it when small.”<sup>238</sup>  
– Lao Tzu, Taoist philosopher<sup>239</sup>

##### A. U.S. Government Assistance — Prudent Solution, Short Term Scapegoat, or a Little Bit of Both?

A comparative legal analysis of TRIA provides important insights and potential solutions to some of the problems that the U.S. terrorism insurance program now faces. Part IV lays the foundation for this Note's international analysis, beginning with a critical analysis of TRIA that explains the legislation's limitations as well as its accomplishments. This analysis is then followed by an international comparison of TRIA with the terrorism insurance programs available in Israel and the U.K. Through international comparison, this Note presents helpful solutions for TRIA's potential renewal.

#### 1. National Issues That Remain Unresolved

As terrorists coordinate their attacks to inflict maximum damage and devastation, they simultaneously achieve maximum exposure for their own cause.<sup>240</sup> For this reason, the issue

---

237. See Sommer, *supra* note 218, at 358.

238. LAO TZU, TAO TE CHING 70 (D.C. Lao trans., 1963).

239. Lao Tzu, “an older contemporary of Confucius,” is believed to have written several anthologies based on the cultivation of the proper way of life and the true meaning of human virtue. *Id.* at viii. Tzu's works, as most ancient Chinese philosophers, not only grapple with the ideals of the personal realm, but his teachings also cover politics and ethics in terms of government and ruling. *Id.* at xxviii.

240. Terrorist organizations have a “hydra-like feature,” which makes them inherently dangerous and evasive as they can establish network characteris-

2004] *TERRORISM RISK INSURANCE ACT OF 2002* 867

of terrorism insurance coverage effects most dramatically the security of properties that either have great symbolic or practical value to the U.S.<sup>241</sup> As a result, the unavailability of terrorism coverage effects the insurability of properties that fit into what the insurance industry classifies as “Tier 1” or “Tier 2” properties,<sup>242</sup> which means that they face a higher risk of serving as targets of another terrorist attack.<sup>243</sup> In addition, since the cost of terrorism insurance remains extremely high, owners of lower potential risk property currently refrain from purchasing terrorism insurance.<sup>244</sup> Therefore, TRIA does not insure the entire nation against terrorism; instead, it primarily serves as a mechanism for providing government reinsurance coverage for insurers wishing to cover properties that are commercial or

---

tics that allow for individual actors to spontaneously act on a “common cause.” See Woo, *supra* note 20, at 3, 9 (highlighting Margaret Thatcher’s observations on the IRA media’s coverage, as she noted that the “oxygen of publicity” fuels the terrorist drive to inflict harm).

241. See Peter R. Orszag & Joseph A. Pechman, Testimony before the Subcommittee on Cybersecurity, Science, and Research & Development and the Subcommittee on Infrastructure and Border Security, House Select Committee on Homeland Security, Sept. 4, 2003, at 7 (arguing for government intervention), available at <http://www.iwar.org.uk/cip/resources/energy/orszag090403.pdf> (last visited Jan. 18, 2004); Saxton, *supra* note 31, at 6. *But see* Loubier & Aro, *supra* note 56, at 18 (noting that terrorism can potentially occur anywhere and that the risk does not rest only on landmark assets).

242. See Mario Suarez & Steven Abrams, *Outside Counsel: Terrorism Risk Insurance and the Real Estate Industry*, N.Y. L.J., Dec. 10, 2002, at 4. Moody’s investor service has established terrorism risk categories in order to classify buildings: Tier 1 properties include genuine ‘trophy’ buildings, regionally well-known properties or assets located near trophy assets; Tier 2 assets consist of large “Class A or B-type central business district buildings and major shopping malls;” and the Tier 3 category includes all others assets. *Id.*

243. *Id.* *But see* DARIUS LAKDAWALLA & GEORGE ZANJANI, INSURANCE, SELF PROTECTION, AND THE ECONOMICS OF TERRORISM 1 (Nat’l Bureau of Econ. Res., Working Paper No. 9215, 2002) (“Potential targets of terrorism have incentives to protect themselves against attack, but rational terrorists will substitute away from fortified targets and [instead shift their attention] toward[s] vulnerable ones.”), available at <http://www.nber.org/papers/W9215.pdf> (last visited Nov. 12, 2002).

244. Terrorism insurance coverage in its very essence is primarily commercial insurance concern. See Jaffe & Russell, *supra* note 14, at 20 (comparing terrorism insurance with natural catastrophe insurance, which tends to primarily cover “personal homeowner insurance”).

have a high profile status — either symbolically or economically.<sup>245</sup>

In fact, insurance analysis companies report that only 25% of owners with properties worth \$100 million or more throughout the U.S. have elected to acquire terrorism insurance.<sup>246</sup> Property owners currently refrain from purchasing terrorism coverage because insurance companies continue to charge substantial premiums for the additional coverage.<sup>247</sup> Therefore, despite TRIA's mandate that all U.S. insurance carriers must make

---

245. See Jaffe & Russell, *supra* note 14, at 20; Woo, *supra* note 20, at 10 (noting that terrorist can “switch intermittently between political, commercial and economic targets”). See also Goldberg, *supra* note 38, at 549; U.S. Office of Public Affairs, *Treasury Department Announces Proposed Regulation Implementing Claims Procedures Under the Terrorism Risk Insurance Act*, (quoting Jeffrey S. Bragg, Executive Director of the U.S. Terrorism Risk Insurance program, in regards to his statement on the program's role as a reinsurance provider), Nov. 25, 2003, at <http://www.treas.gov/press/release/js1022.htm> (last visited Jan. 5, 2004) [hereinafter U.S. Office of Public Affairs, *TRIA Announcement*]. But see LAKDAWALLA & ZANJANI, *supra* note 243, at 17 (This article clarifies how the effect of terrorism on commercial properties can ultimately concern the nation. It provides the following illustrative example: “A construction project founding in Manhattan due to lack of affordable insurance coverage may be seen as a national public policy issue, while similar founding associated with windstorm or earthquake insurance coverage is not.”).

246. Christian Murray, *City Properties Lack Terror Insurance*, NEWSDAY, Mar. 27, 2003, at A46. Interestingly enough, however, smaller and mid-sized companies that possess property have shown a greater tendency to purchase terrorism coverage since terrorism insurance is less costly for properties in their price bracket. *Id.* See also Barbara Pinckney, *Response to Terrorism Insurance is Underwhelming*, BUS. REV., April 21, 2003, at <http://www.bizjournals.com/albany/stories/2003/04/21/story2.html> (last visited Jan. 5, 2004); Jon Chesto, *Few Seek Terrorism Insurance*, BOSTON HERALD, Feb. 24, 2003, at 23. Due to the limited purchasers of terrorism insurance, insurers complain about the costs TRIA imposes by requiring stringent notification standards. Sam Friedman, *Terrorism Rate Hikes To Fall To Single-Digits*, NAT. UNDERWRITER — PROP. & CASUALTY, Nov. 10, 2003, available at LEXIS, Nexis News & Bus. Library. The U.S. Treasury Department has also taken notice of the nation's low rate of terrorism insurance purchases even after TRIA's enactment. See Ugoletti, *Implementing TRIA*, *supra* note 11, at 6.

247. See John W. Schoen, *Firms Still Shun Terror Insurance*, MSNBC, Feb. 24, 2003, available at <http://msnbc.msn.com/Default.aspx?id=3073016&p1=0> (last visited Jan. 1, 2004). See, e.g., Jill Cueni-Cohen, *School Board Declines Insurance for Terrorism*, PITTSBURGH POST-GAZETTE, Feb. 5, 2003, at N8. But see, e.g., Jill Cueni-Cohen, *Districts Insure Against Terrorism*, PITTSBURGH POST-GAZETTE, Jan. 29, 2003, at N2. See also Bragg, *supra* note 9, at 15.

2004] *TERRORISM RISK INSURANCE ACT OF 2002* 869

terrorism insurance “available” to their customers in a manner that offers protection similar to other property insurance plans, prices remain high.<sup>248</sup>

Premiums remain elevated because insurers find themselves in a situation that insurance specialists refer to as *ex ante* moral hazard.<sup>249</sup> Insurers raise their premiums because terrorist-risk mitigation still remains inefficient.<sup>250</sup> Although such price setting may prove reasonable for the insurance industry, a limited amount of consumer force regulates the premiums and deductibles that insurers need to pay while participating in TRIA’s government insurance program.<sup>251</sup> TRIA establishes the insurance industry’s deductible for claim payments,<sup>252</sup> but it

---

248. Terrorism Risk Insurance Act of 2002, Pub. L. No. 107–297, § 103(c). However, the U.S. treasury is currently evaluating whether to continue TRIA’s “mandatory availability” provision for upcoming insurance contracts that are approaching renewal. See U.S. Office of Public Affairs, *Treasury Announces Administrative Changes to the Terrorism Risk Insurance Program*, Dec. 23, 2003, at <http://www.treas.gov/press/releases/js1067.htm> (last visited Jan. 5, 2004). Commercial insurance lines tend to face less government regulation as commercial insurance firms “appear to be less willing and perhaps less able to marshal public protests against unfair premiums.” Jaffe & Russell, *supra* note 14, at 20.

249. “*Ex ante* moral hazard” refers to insurers’ anticipation of a low degree of risk prevention and a greater frequency of losses, which ultimately results in higher premiums. Gollier, *supra* note 14, at 10. In general, however, “moral hazard” describes an insurer’s increased probability of loss due to policyholders’ “carelessness” in mitigating an insured potential harm. Kunreuther, *supra* note 227, at 9. The issue of moral hazard poses a significant dilemma for the insuring of terrorism under TRIA, as Professor Kunreuther explains that “[i]t is...extremely difficult to control behavior once a person is insured.” *Id.* at 9. Government assistance, on the one hand, helps influence self-protection by encouraging the purchase of terrorism insurance, but, on the other hand, such policies can also discourage self-protection as insurance can cover most of a policy holder’s potential losses, making it more efficient to refrain from any further protection expenditures. LAKDAWALLA & ZANJANI, *supra* note 243, at 2.

250. See Kunreuther, *supra* note 227, at 10.

251. See KENNETH S. ABRAHAM, *DISTRIBUTING RISK: INSURANCE, LEGAL THEORY, AND PUBLIC POLICY* 39 (Yale University Press, 1986) (noting that local consumer groups are less organized and financed than the U.S. insurance industry to truly influence state insurance legislation). See also FEDERAL-STATE REGULATION OF THE PRICING AND MARKETING OF INSURANCE 8–9 (Paul W. MacAvoy ed., 1977) (discussing the regulation of property-liability insurance companies in the U.S.); Jaffe & Russell, *supra* note 14, at 20.

252. Terrorism Risk Insurance Act of 2002, Pub. L. No. 107–297, § 102(7). *But see* Department of Treasury, 68 Fed. Reg. No. 40, 9815 (Feb. 28, 2003) (to

does not regulate the insurance industry's premiums.<sup>253</sup> Most importantly, however, if the insurance industry's deductibles prove low, the U.S. will assume much of the financial burden of another terrorist attack.<sup>254</sup> In other words, taxpayers will have to pay the cost of an attack despite the insurance mechanisms currently available.<sup>255</sup>

For insurers that have the capacity to provide terrorism insurance at reasonable, albeit still high, rates, TRIA also creates a discrepancy between different states' coverage.<sup>256</sup> TRIA requires that each insurer's terrorism insurance cover items that fall within its usual property and casualty coverage plans.<sup>257</sup> However, each state has its own regulations on matters that insurance companies must cover in their plans.<sup>258</sup> As a result,

---

be codified at 31 C.R.F. pt. 50) (noting that the government is currently investigating special purpose entities that insurance companies may be establishing in order to circumvent paying their deductible requirements).

253. See Pinckney, *supra* note 246; Tamara Loomis, *Rates Mixed After Terror Insurance Act*, N.Y. L.J., Mar. 11, 2003, at 1. See also Murray, *supra* note 246, at A46 (providing the insurance industry's perspective on this matter of premium regulation and highlighting the fact that many insurers still do not feel that they have the capital necessary to comfortably price terrorism).

254. Howard B. Epstein & Theodore A. Keyes, *Corporate Insurance Law: The Terrorism Risk Insurance Act of 2002: Analysis and Review*, N.Y. L.J., Sept. 8, 2003, at 3. See Gollier, *supra* note 14, at 23 (explaining that effective government assistance requires that the government's deductibles in offering reinsurance coverage should also correspond to the insurance market's capacity).

255. See BROWN ET AL., FEDERAL TERRORISM RISK INSURANCE 8 (Nat'l Bureau of Econ. Research, Working Paper No. 9271, 2002), available at <http://www.nber.org/papers/w9271> (last visited Nov. 12, 2002).

256. See Aon Report, *supra* note 121 at 4. See also ABRAHAM, *supra* note 251, at 37 (pointing out the disorganization of state insurance legislation due to the variations present from state to state).

257. Terrorism Risk Insurance Act of 2002, Pub. L. No. 107-297, § 103(c).

258. McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015 (2000). Terrorism Risk Insurance Act of 2002, Pub. L. No. 107-297, § 106(a). Treasury Department, Interim Guidance Concerning Definition of Insurers, Scope of Insurance Coverage, and Disclosures Mandated by the Terrorism Risk Insurance Act, 13-14 (listing each states' residual market mechanism); Treasury Department, Interim Guidance Concerning New Statutory Disclosure Mandatory Availability Requirements of the Terrorism Risk Insurance Act of 2002, 5 (explaining TRIA's "make available" requirement as applied to each state's insurance laws). See also PMA Insurance Group, *Terrorism Risk Insurance Act of 2002: Outline* (noting that the states retain their authority to allow insurance companies to reinstate terrorism exclusion clauses in their prop-

2004] *TERRORISM RISK INSURANCE ACT OF 2002* 871

many property owners may have a “false sense of security” about the terrorism coverage that their insurance provider offers them.<sup>259</sup> In the event of another terrorist attack, insurance companies may have opportunities to make use of such legislative loopholes to their clients’ detriment.<sup>260</sup> In addition, since the legislation is silent on the states’ role in regulating terrorism insurance coverage, tension between federal and state law may also arise.<sup>261</sup>

Thus, the issue remains: what happens to property owners who choose to refrain from obtaining terrorism insurance?<sup>262</sup> In

---

erty/casualty policies), at [http://www.pmagroup.com/risk\\_tria\\_legislationsummary.htm](http://www.pmagroup.com/risk_tria_legislationsummary.htm) (last visited Jan. 5, 2004); Bragg, *supra* note 9, at 15.

259. See *US Insurance Review*; *US Insurance Stars Aim to Earn Stripes*, POST MAG., Dec. 4, 2003, at 16 (noting the limitation of terrorist acts that TRIA includes in its definition of terrorism) [hereinafter *Insurance Review*]. For example, the typical model consumer disclosure forms, which most insurers used to notify their clients, do not specify any state law implications on terrorism insurance coverage. Sample disclosure forms can be found on the Treasury Department’s website at <http://www.treas.gov/offices/domestic-finance/financial-institution/terrorism-insurance/press/> (last visited Jan. 5, 2004) and on the NAIC website at <http://www.naic.org/pressroom/release/discloseonefinal.pdf> or <http://www.naic.org/pressroom/release/disclosetwofinal.pdf> (last visited Jan. 15, 2004).

260. See Myra E. Lobel, *Current Issues in Drafting Reinsurance Contracts*, 854 PLI/COMM 7, 39 (2003) (noting that there are currently many variations on “TRIA clauses,” but due to the lack of significant case law on the subject the interpretation and enforceability of such clauses remain unclear). An important issue that remains unresolved is how TRIA’s mandated terrorism coverage integrates with other coverage issues within an insurance policy. Aon Report, *supra* note 121, at 6. For example, some states require property insurance to include fire-damage in their policies; however, in a state that does not have such a requirement, it remains questionable whether a fire-related damage due to a terrorist attack will qualify. See *id.*

261. See, e.g., Department of Treasury, 68 Fed. Reg. No. 40, 9815 (Feb. 28, 2003) (to be codified at 31 C.F.R. pt. 50) (noting that federal law currently provides limited requirements or standards for approving insurers that can fall under TRIA’s mandate).

262. Insurance professionals call this issue the “Samaritan’s dilemma,” whereby the government finds itself in a difficult position when faced with victims who have not taken precautionary steps and those who prudently protected themselves in advance. BROWN ET AL., *supra* note 255, at 11. Nevertheless, a national policy or program helps establish a system that offers incentives for “preventative measures” and expedites the compensation process in the event of a terrorist attack. *Id.* But see Orszag & Pechman, *supra* note 241 (posing the line-drawing question of: “[w]here does the regulatory process stop?”).

effect, TRIA creates an “adverse selection” issue.<sup>263</sup> In the case of U.S. property terrorism insurance coverage, the adverse selection problem relates to owners who weigh their chances in favor of not insuring their properties against terrorism-related harm.<sup>264</sup> There are three categories of property owners who decide to sidestep terrorism insurance coverage: those who consider their chance of facing a terrorist attack as minimal; those who acknowledge a possibility, but choose to self-insure their property; and/or those who weigh their losses in the hope that the government will ultimately intervene and assist in their recovery from any terrorist act.<sup>265</sup> Accordingly, the U.S. government faces a host of uninsured properties and may encounter a significant financial burden should there be another terrorist attack. As a result, the nation may struggle with the same challenge of providing additional financial relief to victims in the event of another terrorist attack,<sup>266</sup> which is the very

---

263. See Bragg, *supra* note 9, at 15. Adverse selection occurs when those with a greater potential for risk disproportionately seek the protection of insurance coverage. Kunreuther, *supra* note 227, at 8. As a result insurers face yielding a “negative expected return” on their insurance portfolio policies. *Id.*

264. Terrorism insurance in the U.S. currently displays what insurance experts would refer to as an “extreme case” of adverse selection as agents who face a lower terrorism-related risk consider even the current terrorism insurance premiums too high, and instead choose not to insure the risk at all. See Gollier, *supra* note 14, at 9.

265. See, e.g., Civia Katz, *Penn Discusses Terrorism Insurance*, INTELLIGENCER J., July 16, 2003, at B7 (reporting that a Pennsylvania township declined to spend \$522 for terrorism insurance coverage, as their other policies increased from 17 to 137%); Kate Alexander, *County May Pass on Terror Insurance*, AUSTIN AM. STATESMAN, Dec. 23, 2003, at B1 (setting aside reserves to cover any potential terrorist threat). See also *Insurance Review*, *supra* note 259, at 16 (indicating that 44% of property owners who are advised to obtain terrorism insurance refrain from making such a purchase); Sarah Veysey, *Governments Providing Terror Coverage Backstops: But a Specialist Terrorism Insurer Closes to New Business Due to Lack of Demand*, 37 BUS. INS. 23 (2003), available at 2003 WL 9138389 (reporting that although nations — such Germany, Austria, France, Spain, and the U.K. — have assisted in the availability of terrorism insurance, many property owners still refrain from purchasing such cover).

266. See Gollier, *supra* note 14, at 16 (noting that social pressures after a catastrophic event will strongly press for the government indemnification of uninsured victims).

2004] *TERRORISM RISK INSURANCE ACT OF 2002* 873

situation that the U.S. government intended TRIA to address and may ultimately prove extremely costly to tax payers.<sup>267</sup>

Commentators have also noted that TRIA reduces property owners' incentive to mitigate the risks and damages associated with terrorism.<sup>268</sup> In fact, insurance at high premiums tends to signal the stark reality behind these observations.<sup>269</sup> Many of the properties that are receiving the benefit of terrorism insurance have limited mechanisms to protect their buildings and occupants from another terrorist attack.<sup>270</sup> For example, a commercial building may have financial coverage for terrorism related property and casualty losses, but its property owners at the same time may have taken few steps to mitigate the harm.<sup>271</sup> This discrepancy means that TRIA may protect the insurance industry from facing a fatal blow, but it does not necessarily

---

267. See Terrorism Risk Insurance Act of 2002, Pub. L. No. 107-297, § 101(b)(1).

268. LAKDAWALLA & ZANJANI, *supra* note 243, at 1 (arguing that government subsidizing of terrorism coverage can potentially keep agents from protecting themselves, which in turn raises vulnerability). Cf. Geoffrey Heal & Howard Kunreuther, *You Can Only Die Once 12-13* (April 12, 2002) (paper prepared for the "Risk Management Strategies in an Uncertain World Conference," Palisades, N.Y.) (noting that insurance in theory should serve as a mechanism for encouraging airlines to heighten security, but instead can potentially produce the opposite effect of free-loading security by airlines who face less stringent requirements for their own insurance coverage), available at [http://www.Ideo.columbia.edu/CHRR/Roundtable/Kunreuther\\_white.pdf](http://www.Ideo.columbia.edu/CHRR/Roundtable/Kunreuther_white.pdf) (last visited Oct. 10, 2002). See also BROWN ET AL., *supra* note 255, at 6 (noting that "the virtues of unfettered markets is the incentives they generally provide for market actors to invest and behave in a socially optimal fashion").

269. See Kureuther, *supra* note 227, at 8-12.

270. See Thomas P. Bloch, *Commercial Real Estate Leases: Selected Issues in Drafting and Negotiating in Current Market*, SH008 ALI-ABA 277, 280-82 (2003) (suggesting lease provisions for commercial landlords). Landlords have begun to include lease provisions that provide exceptions for service interruption caused by a whole array of potential terrorist-risks and are spreading the costs of additional security measures through lease provisions that allow for rent escalations based on heightened security measures. *Id.* But see LAKDAWALLA & ZANJANI, *supra* note 243, at 4 (suggesting that enhanced security measures can also theoretically lead to an increase of terrorist funding as terrorists may take such actions as a sign of insecurity, which marks an accomplishment that they will seek to repeat).

271. "In fact, insurers could find it in their best interest to earn the good will of their clients by treating claimants generously at the expense of the government." BROWN ET AL., *supra* note 255, at 7.



indicate that the people occupying these insured spaces are being protected.

Another important characteristic of TRIA is that it also looks at terrorism as being perpetuated by foreign groups.<sup>272</sup> The U.S. government considers terrorist groups, such as the one involved in the September 11 attacks, as international.<sup>273</sup> TRIA's definition of terrorism is thus quite specific in contrast to the ISO's general terrorism exclusion clauses,<sup>274</sup> and may leave potential targets of domestic terrorism, such as the small airplane crash in Florida<sup>275</sup> or even Timothy McVeigh's Oklahoma bombing, uncovered altogether, rendering government intervention in effect obsolete.

The lending industry also has some serious reservations about TRIA, as the legislation does not provide any specifications that protect lenders.<sup>276</sup> TRIA requires that insurers notify their insurance carriers, but nowhere does it state that the lender securing a mortgage for each property also needs notification.<sup>277</sup> Accordingly, lenders argue that TRIA does not foster communication between insurers and lenders.<sup>278</sup> This lack of information has proven troubling to lenders as the law does not

---

272. See Terrorism Risk Insurance Act of 2002, Pub. L. No. 107-297, § 102(1)(A)(iv).

273. See *id.* See also H.R. 3210 § 19(1) (definition of an "act of terrorism"); S. 2600 § 3(1), (definition of an "act of terrorism").

274. See *supra* Part II (elaborating on the issues regarding the ISO's definition of terrorism). See also Emanuel Gross, *Democracy in the War Against Terrorism — The Israeli Experience*, 35 LOY. L.A. L. Rev. 1161, 1162 (2002) (commenting on the definition of terrorism).

275. See *An Explosive Situation*, INS. DAY, Jan. 8, 2002, available at LEXIS, Nexis News & Bus. Library (discussing the light aircraft crash into the Bank of America forty-two story building in Tampa, Florida, which involved an American youth having allegedly sympathized with Osama bin Laden's cause).

276. See Kenneth M. Block & Jeffrey B. Steiner, *Terror Insurance Uncertainty Still Exists Despite New Federal Law*, N.Y. L.J., July 16, 2003, at 5; Epstein & Keyes, *supra* note 254, at 3. For an overview of lender attorneys' new insurance considerations as a result of September 11, see Goldberg, *supra* note 38, at 548-51.

277. Block & Steiner, *supra* note 276. See generally Terrorism Risk Insurance Act of 2002, Pub. L. No. 107-297.

278. At this time, lenders must directly contact their borrowers in order to figure out whether their borrowers have obtained terrorism insurance for their mortgaged properties. Block & Steiner, *supra* note 276.

2004] *TERRORISM RISK INSURANCE ACT OF 2002* 875

require notification of their borrowers' decision to insure or refrain from insuring against terrorism.<sup>279</sup>

## 2. TRIA's Accomplishments

Although TRIA still has many issues that must be resolved in order to be fully effective, the government program that the legislation established does alleviate some of the major problems that the insurance industry had in underwriting terrorism, especially for trophy buildings and large commercial projects. Since terrorist threats to property primarily stem from the unique political positions of target nations,<sup>280</sup> the political component of insuring terrorist risk makes terrorism coverage unfavorable to insurance and reinsurance companies,<sup>281</sup> because terrorist activity directly correlates to government action and not pure probability,<sup>282</sup> which insurers rely on and have learned

---

279. *Id.* Lenders now complain that TRIA fails to ensure that terrorism insurance be "available" to lenders, as borrowers have the option to decline terrorism coverage if their loan documents do not require it. *Id.* Nonetheless, lenders do have the opportunity to contractually resolve these matters in their loan documents and negotiations.

280. For example, U.S. involvement in the Middle East has driven many terrorist groups, such as Al' Qaeda, to seek vengeance against American culture and economy. See Yang Razali Kassim, *Is the Fight Against Terrorism on the Right Track?*, BUS. TIMES (SINGAPORE), Jan. 18, 2003, available at 2003 WL 2349714. See also *US Foreign Policy Amounts to International Terrorism - Chomsky*, TWN, Feb. 2, 2002, at <http://www.twinside.org.sg/title/pa4.htm> (last visited Feb. 12, 2004). The U.K. faces dual terrorist opposition from the IRA's defiance towards the British government's stronghold in Northern Ireland as well as constant terrorist threats from groups adamantly against the nation's Middle East foreign policy, especially due to the nation's alliance with the U.S. and Israel. See Fleming, *supra* note 214. Meanwhile, territorial disputes spark constant conflict between Israelis and groups supporting the Palestinian cause. See Amanda Rogers, *Where is 'Palestine'? Country-less people live in West Bank, Gaza*, FORT-WORTH STAR-TELEGRAM, Jan. 13, 2004, available at 2004 WL 56484224.

281. For a more detailed discussion of this matter, see *supra* Part II.

282. See Orszag & Pechman, *supra* note 241, at 2-3 (arguing for government intervention). The financial exposures that the private industry faces proves troubling as U.S. bankruptcy laws limit corporation and individual's financial exposure to terrorism caused losses, which serves to limit the private sector's incentive to take preventative precautions. *Id.* at 3-4.

to calculate.<sup>283</sup> TRIA has been instrumental in promoting: (1) investment and construction by providing insurers the financial safety net of reinsurance necessary as the problem of insurability still troubles the reinsurance industry;<sup>284</sup> and (2) seeks to limit the repercussions of prolonged political involvement in the private sector.<sup>285</sup>

Implementing national terrorism risk-exposure legislation is undoubtedly a costly endeavor given the near impossibility of quantifying the consequences of a major terrorist attack;<sup>286</sup> furthermore, the financial aspects of the “catastrophic risk”<sup>287</sup> potential of terrorist attacks urge the need for the government’s intervention.<sup>288</sup> Large financial reserves, however, prove difficult for insurers to accumulate due to the uncertainty of a potential “early hit” that may require more financial backing than the limited amounts that the insurance industry can raise within a short time.<sup>289</sup> Infrequency, coupled with high losses,

---

283. See Stempel, *supra* note 43, at 877 (noting that the insurance industry needs to develop analytical mechanisms that will assist underwriters in assessing the risk of terrorism).

284. See Kunreuther, *supra* note 227, at 7. See also BROWN ET AL., *supra* note 255, at 5; Suarez & Abrams, *supra* note 242.

285. See Sarah Bagnall & Nicholas Wood, *Insurers Seek Bomb Cover Safety Net; Terrorist Bomb Blasts*, TIMES (LONDON), Dec. 5, 1992, available at 1992 WL 10918367 (noting the concerns the U.K. government had when establishing Pool Re).

286. Actuaries are still struggling with the challenge of pricing commercial insurance for terrorism coverage. *News Round-Up; Actuaries Face Pricing Challenge*, REINSURANCE MAG., Dec. 17, 2003, at 9. See also *TRIA ‘Has Helped the US Economy’*, INS. DAY, Nov. 28, 2003, available at LEXIS, Nexis News & Bus. Library (noting the insurance industry’s present discomfort with the underwriting of terrorism).

287. For a general discussion of what actually constitutes a “catastrophic risk,” see John D. Pollner, *Catastrophe Risk Management: Using Alternative Risk Financing and Insurance Pooling Mechanisms*, WORLD BANK, available at <http://econ.worldbank.org/view.php?type=5&id=1421> (last visited Nov. 21, 2003).

288. See Gollier, *supra* note 14, at 21.

289. *Id.* Insurance companies depend on their ability to transfer wealth through time in order to diversify their potential risks. *Id.* at 23. Furthermore, corporate finance frowns upon firms holding large financial reserves because, in corporate world views, such accumulation of capital is a sign of inefficiency. *Id.* This corporate reality, therefore, makes it difficult for insurance companies to accumulate large monetary reserves. *Id.* Insurance companies can also use capital markets in order to obtain the reinsurance backing necessary to cover terrorism; however, the securitization of terrorist and

2004] *TERRORISM RISK INSURANCE ACT OF 2002* 877

necessitates large permanent reserves,<sup>290</sup> but high taxes levied on such monetary reserves also would make it impractical for insurers to assume such responsibility.<sup>291</sup> For this reason, the U.S. and its international counterparts have chosen to intervene in terrorism coverage, especially when the insurance industry finds its reserves already depleted.

Specifically, TRIA now ends the insurance industry's hunt for reinsurance backing, as the U.S. itself serves as the reinsurer.<sup>292</sup> The government insurance program currently provides the insurance industry with the liquidity it needs in order to insure terrorism.<sup>293</sup> For example, rebuilding costs for a property such as the Empire State Building would require over \$2 billion.<sup>294</sup> TRIA now allows for the insurability of such properties and in effect keeps insurers in the picture until they can feel comfortable with underwriting the risk for themselves.<sup>295</sup> In addition, insurers' terrorism insurance premiums have in fact decreased,<sup>296</sup> which has allowed for the provision of the terrorism

---

catastrophic risks in general are not presently developed enough in order to financially support the insurance coverage of potential U.S. terrorism. BROWN ET AL., *supra* note 255, at 4. *See also* Johnson, *Gentlemen's Agreement*, *supra* note 59, at 21 (explaining insurers' need to reduce their own reserve retention through reinsurance); Pollner, *supra* note 287, at 9.

290. *See* Pollner, *supra* note 287, at 19. However, certain insurance companies insuring terrorism in the U.S. may be utilizing special purpose entities in order to circumvent paying their deductibles, which can potentially limit the amount that TRIA can save in government reserves. *See* Department of Treasury, 68 Fed. Reg. No. 40, 9815, (Feb. 28, 2003) (to be codified at 31 C.R.F. pt. 50).

291. *See* Jaffe & Russell, *supra* note 14, at 12 (noting that the "U.S. tax rules require full taxation of profits that are being retained as reserves against future losses" due to terrorist-inflicted property damage).

292. *See* Terrorism Risk Insurance Program; Initial Risk Insurance Program; Initial Claims Procedures, 68 Fed. Reg. No. 230, 67101, (Dec. 1, 2003) (to be codified at 31 C.R.F. pt. 50); U.S. Office of Public Affairs, Remarks by Peter R. Fisher, Implementing the Terrorism Insurance Risk Act of 2002, Jan. 29, 2003, at <http://www.treas.gov/press/releases/kd3810.htm> (last visited Jan. 5, 2004).

293. *See* Suarez & Abrams, *supra* note 242, at 4.

294. Jacqueline S. Gold, *Terror Insurance Fall Short; Despite New Law, Landmark Buildings Can't Get Full Coverage*, CRAIN'S N.Y. BUS., Jan. 13, 2003, at 1 (highlighting the price ranges of New York city properties that are "classic" terrorist targets).

295. *See* Orszag & Pechman, *supra* note 241, at 8.

296. Terrorism insurance premiums are now 50% lower than before TRIA's enactment, and various insurance surveys report that premiums for terrorism

insurance coverage required by major construction projects and mortgage lenders of commercial properties.<sup>297</sup>

Governments that choose — or rather are required — to intervene in terrorism insurance coverage must also prevent temporary assistance from becoming a permanent subsidy,<sup>298</sup> all the while balancing other national economic needs, especially during times of international insecurity.<sup>299</sup> The U.S. government designed TRIA in a manner that will hopefully allow the insurance market to gradually take on a larger role in terrorism insurance coverage.<sup>300</sup> Insurer's deductibles are set to increase incrementally every year, and the legislation requires that TRIP work closely with NAIC.<sup>301</sup>

The coalition between the U.S. Treasury Department and the insurance industry creates a means of communication between insurance companies and the U.S. government,<sup>302</sup> which in turn makes the government insurance program much more efficient.<sup>303</sup> Several reinsurance companies now provide terrorism

---

insurance fall “between 10 to 30 percent of a property’s overall property-casualty premiums.” Epstein & Keyes, *supra* note 254, at 3.

297. See Goldberg, *supra* note 38, at 549.

298. See BROWN ET AL., *supra* note 255, at 8.

299. See *id.* See also Gollier, *supra* note 14, at 27 (noting that nations intervene in the case of catastrophic risk coverage “[d]ue to [the State’s] natural creditworthiness and its long time horizon, [it] is better shaped than insurance companies to smooth shock over time”).

300. Terrorism Risk Insurance Program; Initial Risk Insurance Program; Initial Claims Procedures, 68 Fed. Reg. No. 230, 67100, (Dec. 1, 2003) (to be codified at 31 C.R.F. pt. 50).

301. Terrorism Risk Insurance Act of 2002, Pub. L. No. 107–297, § 103(e)(6).

302. See Dennis Kelly, *Treasury Issues Payment Procedures for Terrorism Insurance Backstop*, BESTWIRE, Dec. 2, 2003, available at LEXIS, Nexis News & Bus. Library. See also Ugoletti, *Implementing TRIA*, *supra* note 11, at 6.

303. Not only does the collaboration between the insurance industry and government make government insurance coverage more efficient, it also enhances the focus on preventing future terrorist attacks. As the insurance underwriting industry is currently generating methods of assessing the terrorist-related risk in insuring property, these underwriting efforts also keep the private sector informed as to national security concerns and measures that the government takes to mitigate such concerns. For example, risk assessment companies, such as AIR Worldwide Corp., have accepted the opportunity to attempt to calculate the risk of terrorism with the help of experts in the FBI, CIA and U.S. Defense department. Schoen, *supra* note 247. Had such public/private interaction been in place prior September 11, perhaps there would have been a greater public awareness of the terrorist risk that the nation would ultimately face. For example, in 2000, the Pentagon conducted

2004] *TERRORISM RISK INSURANCE ACT OF 2002* 879

deductible coverage for insurers who participate in the program, which signals that the reinsurance industry remains in the picture, despite the U.S. government's intervention.<sup>304</sup> Accordingly, it seems that TRIA does not necessarily serve as a bailout for the insurance industry;<sup>305</sup> rather, U.S. government involvement lays the foundations of the terrorism underwriting process as the insurance industry builds the expertise and capacity to cover such claims for themselves.<sup>306</sup>

*B. International Lessons on National Insurance Programs*

In order to decrease economic vulnerability to potential terrorist attacks, nations need to provide their own insurance mechanisms.<sup>307</sup> As Part III of this Note illustrated, different nations have their own unique ways of handling the threat of terrorism. National government insurance implementation varies greatly according to each nation's needs. The U.K. and Israel have already developed their own means of supplying terrorism risk insurance in manners that best support the needs of their nations. In Israel and in Northern Ireland, public insurance assistance affords property compensation for victims who

---

an undercover study titled "Terror 2000," which the U.S. government coordinated in order to inform the intelligence sector about potential terrorist threats. Woo, *supra* note 20, at 16. "One of the prescient conclusions of the study" presented at this meeting forewarned that terrorist groups imminently would attempt to "conduct simultaneous bombings, perhaps in different countries, to maximize the devastation and publicity." *Id.* The study's message fell on deaf ears as such a devastating prospect seemed unrealistic. *Id.* Post-September 11, both the U.S. government and insurance industry now enjoy the advantages of hind-site, and such reports will probably be taken much more seriously in the future. Furthermore, the private sector's involvement in terrorism insurance coverage will also demand such government reporting in order to prevent terrorist-related insurance losses.

304. See *Terrorism — Tackling a Burning Issue*, REINSURANCE, Aug. 11, 2003, at 36, available at 2003 WL 66909703 [hereinafter *Tackling a Burning Issue*].

305. Cf. Barnes, *supra* note 142 (noting that the similar public/private insurance scheme established in the U.K. does not serve as a mere bail out for the insurance industry).

306. See Graydon S. Staring, Law of Reinsurance pt. 5, § 23:6, para. 3 (2003); BROWN ET AL., *supra* note 255, at 8.

307. See Wastell & Elliot, *supra* note 19; Jorn Madslie, *Insurance Industry Adjusts*, BBC NEWS, Sept. 2, 2002, at [http://news.bbc.co.uk/1/hi/in\\_depth/wo...02/september\\_11\\_one\\_year\\_on/2207645.stm](http://news.bbc.co.uk/1/hi/in_depth/wo...02/september_11_one_year_on/2207645.stm) (last visited Jan. 5, 2004).

face the devastation of terrorism on a more frequent basis. Meanwhile, on the British mainland, the U.K. government supplies insurers with the reinsurance backing necessary to keep the nation's insurance industry involved in terrorism coverage. These international models serve as the ideal typological templates for government intervention as each has dealt with the insurance issues that presently plague the U.S. In order to be economically prepared for a future terrorist attack, the U.S. government should renew the legislation, but only after considering certain alterations that would improve the government program's effectiveness. The U.K. and Israeli models provide the necessary solutions.

### 1. The Governmental Power to Tax: An Incentive All in Its Own

In terms of financial risk management, Northern Ireland and Israel's current insurance programs spread the risk of terrorism nationwide, with multiple taxes supporting such an insurance option.<sup>308</sup> Terrorism insurance in Northern Ireland, for example, seems beneficial since it allows for the entire U.K. to assume the particular region's risks.<sup>309</sup> However, such an assumption of risk is only viable for limited regional coverage, as evidenced by the U.K.'s limitation to Northern Ireland,<sup>310</sup> because geographic expansion of government responsibility would require an overwhelming tax base, thus raising implementation costs to overwhelming levels.<sup>311</sup> Meanwhile, a national taxation solution such as Israel's seemingly alleviates the burden on major metropolitan areas, but at a cost to the nation overall.<sup>312</sup> Despite the fact that a *purely public* national terrorism insurance

---

308. However, Israel has changed its governmental insurance coverage with respect to foreign trade risks in order to serve as the reinsurer of last resort to insurance companies bearing the initial burden of such claims. See *Foreign Risk Up for Privatization and Split Up*, ISRAELI BUS. TODAY, Mar. 31, 1998, available at 1998 WL 10113749.

309. See Bice, *supra* note 30, at 463-64.

310. See *id.*

311. *Id.*

312. See HETH, *supra* note 234, at 172. "A substitute for market insurance is to organize an implicit or explicit system of solidarity for the unlucky citizens through an indemnity financed by the taxpayers." Gollier, *supra* note 14, at 16.

2004] *TERRORISM RISK INSURANCE ACT OF 2002* 881

system would lighten the burden of insurance costs that states such as New York and California currently face, the U.S. Accounting Office estimates that if the U.S. government solely provided terrorism coverage, the loss to federal tax reserves would be tremendous.<sup>313</sup> TRIA's private/public dichotomy solves this problem by allowing the private insurance industry to assume responsibility for most claims, as many claims could potentially fall within the Act's established insurers' deductible requirements. Despite temporary intervention on the part of the U.S. government in the nation's recent insurance crisis, concerns remain regarding the permanence the federal insurance subsidies.<sup>314</sup> If the insurance industry's current government deductible falls too low, another attack may still leave the U.S. vulnerable to the costs of another attack.<sup>315</sup> Furthermore, if the insurance industry finds comfort in the U.S. government's "reinsurance," insurers may take a longer time to resume fully insuring terrorism risk through private reinsurers. A future attack, therefore, may still leave the government paying for most of the risk assumed by insurers.<sup>316</sup> However, the U.S. government faces the grimmer prospect of what might happen to properties that decline to participate in TRIA's program. The political reality is that if another terrorist attack occurs, the situation will require government assistance and compensation.<sup>317</sup> U.S. government assistance in the aftermath of a tragic event, therefore, fails to make use of TRIA and the insurance industry's expertise and goes against the very purpose of the establishment of the U.S. government's Terrorist Insurance Program.<sup>318</sup>

---

313. See CBO STUDY, *supra* note 88, at 27–35.

314. See BROWN ET AL., *supra* note 255, at 8 (pointing out that “a continuing government role in the terrorism risk insurance market could hinder the development of private capacity to cover terrorism risk”). Cf. HILLMAN, *supra* note 55, at 16 (contemplating the benefits of having permanent government involvement in terrorism insurance).

315. See CBO STUDY, *supra* note 88, at 26–30 (suggesting massive economic problems to U.S. insurance industry even with a government program).

316. See HILLMAN, *supra* note 55, at 3; Orszag & Pechman, *supra* note 241, at 4 (noting that if the government does not convince the private sector that it will not provide any bailouts in the case of another attack, the nation may have to intervene).

317. See Gollier, *supra* note 14, at 16.

318. Terrorism Risk Insurance Act of 2002, Pub. L. No. 107–297, § 103.



The common reason why property owners do not purchase terrorism insurance is due to high premiums. At this time, owners have no incentive aside from the protection of extra coverage to purchase terrorism insurance.<sup>319</sup> TRIA does not provide the purchasers of terrorism insurance any incentives.<sup>320</sup> Meanwhile, insurers have the main incentive of reinsurance backing through the nation's federal government.<sup>321</sup> Consumers, however, primarily face external incentives from their lenders.<sup>322</sup> For example, many lenders now require terrorism insurance for large commercial buildings and new large-scale construction projects.<sup>323</sup> The problem then remains, for example, in the case of properties that already have mortgages, as it is highly unlikely that lenders will aggressively file loan defaults for the failing owners to purchase terrorism insurance, since many have not done so already.<sup>324</sup>

The Israeli system and the U.K. government's insurance intervention in Northern Ireland provide some insight as to how the U.S. government can make use of the American tax system

---

319. See Orszag & Pechman, *supra* note 241, at 5 (asserting that the Federal government could make the purchase of terrorism insurance coverage mandatory, which would in turn enhance the insurance industry's ability to force purchasers into taking greater security measures). See also Gollier, *supra* note 14, at 10 (noting that the enforcement of a policy in support of risk prevention alleviates the disparities that ex ante moral hazard situations create); Orszag & Pechman, *supra* note 241, at 2 (explaining the economic theory of "negative externality" in terms of national security relating to terrorism). Terrorist attacks undermine a nation's sovereignty in the same manner as an invasion and as a result the costs of such an attack "extend well beyond the immediate areas and people affected," imposing costs on the entire nation. *Id.* For this reason, private markets and individuals "undertake less investment in security than would be socially desirable" in order to reach satisfactory profit levels. See *id.* Therefore, government intervention must bridge the security level discrepancy. *Id.*

320. For example, the question of whether borrowers can impute their purchase of terrorism insurance to their loan principal still remains unclear. See Block & Steiner, *supra* note 276, at 5. For cases that dealt with this issue before TRIA's enactment, see *Four Times Square Associates, L.L.C. v. Cigna Investments, Inc.*, No. 107745/02 N.Y. Sup. Ct. 2002, *rev'd*, 2003 N.Y. App. Div. Lexis 6170 (1st Dep.), and *Philadelphia Plaza Phase II v. Bank of America National Trust and Savings Ass'n*, 2002 WL 1472337 (Pa. CCP 2002).

321. See U.S. Office of Public Affairs, *TRIA Announcement*, *supra* note 245.

322. See Block & Steiner, *supra* note 276.

323. *Id.*

324. *Id.*

2004] *TERRORISM RISK INSURANCE ACT OF 2002* 883

in order to encourage terrorism insurance coverage. The U.S. probably would not benefit from a social security type system similar to that available in Israel because Israel's constant property damage requires more intense government involvement in the protection of property and citizenry.<sup>325</sup> The U.S. can learn a lesson, however, from the Israeli and U.K. government insurance systems in order to implement its own incentives to help induce property owners into purchasing terrorism insurance.<sup>326</sup> In particular, the U.S. can create incentives for consumers of terrorism insurance by incorporating some changes to current U.S. tax laws that would work parallel to TRIA.

Offering tax incentives to property owners for terrorism coverage would help induce property owners to obtain terrorism insurance coverage in addition to property and casualty insurance.<sup>327</sup> U.S. tax law currently allows for the deduction of business and property losses for damaged property.<sup>328</sup> As insurance

---

325. See Sommer, *supra* note 218, at 359.

326. However, insurance specialists note that even social insurance systems can face the same problems that trouble the private insurance industry, meaning that purely public "solidarity systems" may also face the problems of adverse selection, fraud, and moral hazard. See Gollier, *supra* note 14, at 16.

327. Terrance Chorvat & Elizabeth Chorvat, *Income Tax as Implicit Insurance Against Losses From Terrorism*, 36 IND. L. REV. 425, 426 (arguing that by "forcing the government to provide insurance for its failures, the tax system can overcome potential public choice problems....[as] without additional behavioral incentives, individuals will not behave in a socially optimal way with respect to protection from terrorist attacks"); Orszag & Pechman, *supra* note 241, at 5. See also LAKDAWALLA & ZANJANI, *supra* note 243, at 13 (explaining how governmental budget considerations can incorporate public protection and government insurance subsidies). Cf. Heal & Kunreuther, *supra* note 268, at 13 (suggesting the direct taxation of airline companies in order to encourage heightened baggage security); Martin F. Grace et al., *The Demand for Homeowners Insurance with Bundled Catastrophe Coverage*, (Paper prepared for the Wharton Project on Managing and Financing Extreme Risks, April 4, 2001) (examining the role of government incentives on inducing consumers to purchase insurance coverage for natural perils), available at <http://www.aria.org/rts/proceedings/2000/homeowners.pdf> (last visited Feb. 12, 2004).

328. IRC § 162 (2000) (enumerating trade and business losses that fall under the category of a legitimate loss for tax deduction purposes); IRC § 165 (2000) (allowing for deduction of losses occurring within the taxable year). An example can help illustrate how U.S. tax laws work with respect to the deductibility of losses:

[A]ssume A has a business and the total assets of the business are worth \$100,000 at the beginning of the year, including a \$10,000

premiums represent the expected value of loss,<sup>329</sup> the U.S. tax system could provide the public with an incentive to purchase terrorism insurance by allowing for the deduction of such insurance premiums in the same manner that the U.S. Internal Revenue Code would calculate a loss, and such recoveries should be exempt from income.<sup>330</sup>

Incorporating such a tax incentive in support of terrorism insurance will also require the U.S. government to incorporate such tax estimates into the nation's overall budget, which will encourage decision-makers to incorporate the potential risks of terrorism and evaluate their resources in a manner that best works to prevent future terrorist attacks in the U.S.<sup>331</sup> The Israeli governmental insurance system requires the nation to include its insurance claims in the government budget, and this self awareness places the issue of national protection at the forefront of their political process.<sup>332</sup> The U.S. can similarly take terrorism insurance into account in a manner that would simultaneously limit its financial exposure of having to pay the cost of another terrorist attack.

## 2. The Public/Private Terrorism Insurance Dichotomy and All It Can Offer

Even though a nation can arguably bear the burden of solely assuming the financial costs of insuring against terrorism, bear-

---

computer. If the computer is destroyed and has to be replaced, A has suffered a \$10,000 loss and the net value of assets of the business is \$90,000. Because there has been a net decrease to wealth, A's taxable income is reduced by \$10,000. Hence, the amount of income tax A owes will be reduced by \$10,000 multiplied by the tax rate.

Chorvat & Chorvat, *supra* note 327, at 429 (exploring U.S. income tax rule incentives in certain basic situations).

329. Insurance policies should charge an insurance premium that is equal to the cost of the potential loss multiplied by the risk of loss. *Id.* at 430.

330. *Id.* Such a tax scheme is justified as no "net change in wealth" has occurred. *Id.* In other words, a person who receives an insurance payment that is equal to their loss does not earn anything additional. Instead, insurance payments simply reinstate the property owner at the same state as before the loss had occurred. Therefore, tax deductibles should not apply in situations where insurance payments "over-compensate" an insured for their losses. *Id.*

331. *Id.* at 443.

332. *See generally* Sommer, *supra* note 218.

2004] *TERRORISM RISK INSURANCE ACT OF 2002* 885

ing the entire risk alone would prove to be highly inefficient.<sup>333</sup> If the U.S. government took on the role of insurance carriers, the responsibility would also include risk management and documentation, which have proven to be extremely time consuming and expensive in the wake of September 11.<sup>334</sup> TRIA and Pool Re similarly sidestep this problem by establishing public/private insurance schemes that seem beneficial for a smoother implementation of terrorism coverage, private industry re-development, and national security.<sup>335</sup> Both insurance programs have many things in common, but they also have important differences that highlight areas where TRIA needs some improvement.<sup>336</sup>

Both TRIA and Pool Re work to keep the insurance industry involved in the coverage of terrorist attacks. The insurance industry's assumption of the risks of others requires that the industry also provide incentives for risk management through a lowering of premiums.<sup>337</sup> Although governments can establish reimbursement incentives, such programs do not prove entirely beneficial, as studies have shown that consumers do not take full advantage of such opportunities.<sup>338</sup> The insurance industry's involvement in terrorism coverage, however, serves to force property owners seeking terrorism insurance to assume increased responsibility for ensuring safety and satisfying the

---

333. See HILLMAN, *supra* note 55, at 3 (explaining that the federal government's size and sovereign power provide it with the ability to provide insurance in a way that the private sector could not).

334. See BROWN ET AL., *supra* note 255, at 7. See also Terrorism Risk Insurance Program; Initial Risk Insurance Program; Initial Claims Procedures, 68 Fed. Reg. No. 230, 67101 (Dec. 1, 2003) (to be codified at 31 C.R.F. pt. 50) (explaining how the insurance the insurance industry is currently processing and administering claims).

335. See Terrorism Risk Insurance Act of 2002, Pub. L. No. 107-297, § 103; U.K. Treasury Announcement, *supra* note 165, at 8. See also LAKDAWALLA & ZANJANI, *supra* note 243, at 13 (arguing that even with mechanisms of public protection in place, government insurance subsidies prove to be the optimal approach in increasing terrorism protection).

336. See *Finding a TRIA Replacement*, INS. DAY, Dec. 12, 2003, available at LEXIS, Nexis News & Bus. Library.

337. See THOMAS VON UNGERN-STERNBERG, STATE INTERVENTION ON THE MARKET FOR NATURAL DAMAGE INSURANCE IN EUROPE 16 (CESifo, Working Paper No. 1067, 2003), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=464601](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=464601) (last visited Jan. 12, 2004).

338. See Woo, *supra* note 20.

requirements of their lenders.<sup>339</sup> TRIA and Pool Re keep the insurance industry intact, and in this way these programs allow for private intervention in terrorism risk mitigation.

Furthermore, TRIA and Pool Re take advantage of the insurance industry's capability to process detailed documentation regarding specific properties' insurance needs and potential requirements.<sup>340</sup> The risk management actions that the private sector offers entail any of the following: building design, structure evaluations, safety equipment, evacuation plans, exit strategies, and heightened security systems for trophy properties — insurers then underscore each action with a reduced principle.<sup>341</sup> By maintaining private sector involvement, both programs allow insurers to keep checks on protection measures.<sup>342</sup> The private sector's involvement, therefore, helps ensure that adequate measures protect insured properties from terrorist calamity.<sup>343</sup> TRIA and Pool Re's implementation allow the insurance industry to set higher standards for the mitigation of potential damages caused by terrorism.

---

339. See Block & Steiner, *supra* note 276, at 5.

340. The insurance industry provides data on insured losses through reports known as "bordereau" to their reinsurers, and TRIA makes use of this practice by requiring insurance companies to maintain and create such records for the federal program, which in turn keeps this insurance industry practice intact for a later time when the government will cease to regulate terrorism insurance. See Department of Treasury, 68 Fed. Reg. No. 230, 67100, 67102-3 (Feb. 28, 2003) (to be codified at 31 C.R.F. pt. 50).

341. See BROWN ET AL., *supra* note 255, at 6-7 (explaining that a "profit maximizing firm will invest in risk mitigation up to the point where the marginal costs of additional mitigation is equal to the marginal cost of insuring against that risk"). Two categories of risk mitigation exist: (1) investments that help protect existing buildings from terrorist attack (such as enhanced security, strengthening structural supports, shatter proof windows, and improved air vents, etc.); and (2) influence on new building construction, which includes development considerations such as building size, location, architectural design, etc. *Id.*

342. See Jason B. Lee, *Restructuring Building Design Against Terrorism*, RISK MGMT., Nov. 2002, available at <http://rmmag.com/MGTtemplate.cfm?Section=RMMagazine&NavMenuID=128&tem> (last visited Nov. 11, 2002).

343. However, insurance companies' incentives to mitigate terrorist risks may also influence developers to avoid constructing high profile buildings or projects. See BROWN ET AL., *supra* note 255, at 7. See also HILLMAN, *supra* note 55, at 15 (arguing that the insuring of any risk should also incorporate the private insurance industry).

2004] *TERRORISM RISK INSURANCE ACT OF 2002* 887

TRIA undisputedly resembles the British Pool Re system, but it differs in many respects as Pool Re has had significant time to mature as a mutual reinsurance program and the U.K. as a nation has thirty years of experience in facing the issue of terrorism.<sup>344</sup> Pool Re has been covering the U.K.'s terrorism insurance program for eleven years and has gained a substantial amount of monetary leverage and experience.<sup>345</sup> Similar to the U.S., Pool Re's fate as a government terrorism insurance system was questionable,<sup>346</sup> but over the years the program has expanded in a manner that allows it to adapt to current terrorism concerns.<sup>347</sup> Accordingly, the U.S. can learn from Pool Re's experience. The U.S. can specifically take note of the U.K.'s Pool Re approach in expanding coverage, defining terrorism, establishing premium requirements, and allowing for the review of Pool Re's decisions.

Pool Re has proven successful in providing the nation's terrorism reinsurance needs, and, for this reason, the program has expanded to cover terrorism-related perils that at one time were covered by neither the insurance industry nor the governmental program.<sup>348</sup> Unlike the U.S., where many states require fire coverage, the U.K. initially did not include this type of damage in the terrorism insurance package offered by Pool Re.<sup>349</sup> As the U.K. program has gained adequate capital in its reserves, Parliament decided that it would expand its Pool Re program to cover more terrorist-related risks after September 11.<sup>350</sup> The U.K. now provides coverage for nuclear disaster, flood, etc.<sup>351</sup> The U.S. Terrorist Insurance Program falls short of such cover-

---

344. See U.K. Cabinet Office, *The United Kingdom and the Campaign Against International Terrorism*, Sept. 9, 2002, at 12, at <http://www.cabinet-office.gov.uk/reports/sept11/coi-0809.pdf> (last visited Jan. 5, 2004).

345. See TILLINGHAST UPDATE, *supra* note 168, at 3.

346. In *Pool Re's* earlier stages, many insurance specialists expressed serious concerns and reservations regarding the government program. See, e.g., Fleming, *supra* note 214.

347. See generally U.K. Treasury Announcement, *supra* note 165.

348. See generally TILLINGHAST UPDATE, *supra* note 168. But see, e.g., Andrew Bolger, *Norwich Union Stresses Stance on War Cover*, FIN. TIMES, Jan. 4, 2003, at 4, available at 2003 WL 3429735 (noting that certain insurers in the U.K. are not willing to provide expansive terrorism insurance coverage).

349. See U.K. Treasury Announcement, *supra* note 165, at 5.

350. See *id.* at 1.

351. *Id.* See also U.K. Cabinet Office, *supra* note 344, at 14.

age, allowing for claims arising from more conventional methods of terrorist attacks.<sup>352</sup> As many commentators argue that terrorists probably will strike in a manner that has not been accounted for,<sup>353</sup> traditional forms of terrorism may be changing.<sup>354</sup> Accordingly, if the U.S. government allows for TRIA's survival, the legislation will also have to include different varieties of terrorist risk; otherwise its coverage may realistically prove minimal and it may spark litigation in the future.<sup>355</sup>

The U.K. has also accounted for the changing nature of terrorism as it has broadened the nation's definition of terrorism overall.<sup>356</sup> A terrorist attack in the U.K. includes domestic terrorist groups of all types.<sup>357</sup> The definition of a terrorist occurrence in the U.K. focuses on the effects of such an attack and the intent of such action on the nation.<sup>358</sup> The U.S., on the other

---

352. Terrorism Risk Insurance Act of 2002, Pub. L. No. 107-297, § 103.

353. See, e.g., PANEL DISCUSSION, COMMERCIAL MORTGAGE-BACKED SECURITIES ROUNDTABLE, IN REAL ESTATE FINANCE AND INVESTMENT JANUARY 13, 2003 (Gale Group, Inc., 2003) (At this roundtable discussion, Joe Franzetti, director of Salomon Smith Barney, emphasized that insurers are currently concerned about bio-terrorism, whereby terrorist could potentially tamper with a building's HVAC system, which insurers believe could be accomplished more easily than more truck bombings, etc.); Ruth Gastel, *Computer Security-Related Insurance Issues*, INS. INFO. INST., Sept. 2003, available at LEXIS, Nexis News & Bus. Library (listing "cyber terrorism" as a new issue for first and third party insurance coverage). See generally Thomas, *supra* note 43, at 413-17 (taking into account the different transaction costs involved in insurance litigation of matters that fall in categories beyond the scope of "traditional terrorism," i.e., bombings, political hostage-taking and airplane hijacking).

354. See *id.* See also Orszag & Pechman, *supra* note 241, at 11 (explaining that enhanced security is essential for preventing terrorist uses of chemical and biological plants in their plans of mass destruction); U.K. Treasury Announcement, *supra* note 165, at 2 (noting that terrorist can find ways to go beyond expected or typical scenarios).

355. See Lobel, *supra* note 260, at 39 (noting that nuclear, biological and chemical terrorism-caused losses are not presently included in property coverage and that if an attack is labeled as a terrorist act, then it remains unclear whether such exclusionary clauses will remain enforceable if terrorism is found to be the proximate cause of an attack).

356. See Reinsurance (Acts of Terrorism) Act, 1993, ch. 18, § 2(2) (Eng.). But see *Terror Threat to Insurance Cover*, BIRMINGHAM POST, Feb. 13, 2003, at 22, available at 2003 WL 15602566.

357. Reinsurance (Acts of Terrorism) Act, 1993, ch. 18, § 2(2) (Eng.)

358. *Id.* In fact, as a result of the U.K. government's decision to expand the definition of terrorism, insurers have also made the similar changes in their

2004] *TERRORISM RISK INSURANCE ACT OF 2002* 889

hand, restricts the definition of terrorism<sup>359</sup> to attacks by malicious foreign groups.<sup>360</sup> This important distinction reflects how each nation also views the problem of terrorism. The U.K.'s definition holds a terrorist act to be any act that goes against the Crown and the U.K.;<sup>361</sup> however, the U.S. approach plainly focuses on terrorist organizations with roots from abroad without realizing that the problem could just as well be a domestic one.<sup>362</sup> Plainly, terrorist groups do not need to be cultivated abroad; terrorism may also be "homegrown."<sup>363</sup> The U.S.' limited legislative definition of terrorism also poses practical problems for the insurance companies that provide terrorism coverage because TRIA's definition limits the scope of coverage<sup>364</sup> to exclude circumstances where wider coverage is necessary.<sup>365</sup>

---

own policies. See, e.g., *RSA Goes Solo on Terrorism*, POST MAG., May 15, 2003, at 2, available at 2003 WL 8531267; *RISK Report — Preparing for Combat*, POST MAG., Feb. 13, 2003, at 36, available at 2003 WL 8530503.

359. Terrorism Risk Insurance Act of 2002, Pub. L. No. 107-297, § 102(1)(A)(iv).

360. TRIA defines terrorism as an act "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 population of the United States or to influence the policy or affect the conduct of the United States Government by coercion." *Id.*

361. Reinsurance (Acts of Terrorism) Act, 1993, ch. 18, § 2(2) (Eng.).

362. Terrorism Risk Insurance Act of 2002, Pub. L. No. 107-297, § 103. See also TRIA Department Announces Proposed Regulation Implementing Claims Procedures Under the Terrorism Risk Insurance Act, U.S. OFFICE OF PUBLIC AFFAIRS, Nov. 25, 2003, JS-1022 (quoting Treasury Assistant Secretary for Financial Institutions, Wayne Abernathy, who notes that TRIA protects the U.S. economy from "international terrorism"), at <http://www.treas.gov/pres/s/releases/js1022.htm> (last visited Jan. 5, 2004).

363. Suarez & Abrams, *supra* note 242 (reflecting on the Oklahoma City bombing example). TRIA also gives deference to the U.S. Secretary of Treasury to decide whether a U.S. citizen who sympathizes with a foreign interest falls under TRIA's definition of a terrorist. *Id.* See also Epstein & Keyes, *supra* note 254, at 3.

364. For example, a terrorist act stemming from war could potentially be excluded from TRIA's terrorism definition. Michael Bradford, *Terrorism Coverage Poses Challenges, Opportunities; CPU Society 2003 Annual Meeting*, BUS. INS., Nov. 17, 2003, at 24H (contemplating the exception that would arise had Congress officially declared a war on Iraq and a terrorist attack took place in support of Iraqi interests). However, the U.S. Secretary of Treasury asserts that the war exclusion only applies to "acts of terrorism committed in connection with a formal, congressionally declared war" and not pursuant to military actions connected to the President's role as the nation's commander-in-chief. Letter from John W. Snow, U.S. Secretary of Treasury, to Michael G. Oxley, Chairman of Department of Treasury's Committee of Financial Ser-



In contrast to the U.K.'s expansive definition of terrorism and coverage exposure, Pool Re initially set specific premiums for all its participating insurance members,<sup>366</sup> and continues to implement a "no adverse selection" principle.<sup>367</sup> Pool Re no longer mandates specific premium prices for the insurance industry's terrorism insurance packages; however, this change arrived long after Pool Re had established its own substantial financial reserves.<sup>368</sup> The program also clearly demarcates the maximum monetary amount for which the insurance industry would be responsible with regard to terrorist events that occur in one year, which allows insurers to calculate their potential losses in advance.<sup>369</sup> In addition, regardless of the U.K.'s current premium deregulation, Pool Re members and the U.K. Treasury Department are still in the process of negotiating the program's financial issues, such as premium rates and membership participation thresholds.<sup>370</sup> Pool Re also allows for insurance companies to adjust the premium rates that they charge if their clients take certain "prescribed risk management" steps.<sup>371</sup> In

---

vices (May 19, 2003), available at <http://www.treas.gov/offices/domestic-finance/financial-institution/terrorism-insurance/> (last visited Jan. 15, 2004). However, Mr. Snow also concludes this letter noting that the "letter is not meant to interpret or provide any opinion as to...privately negotiated limitations and exclusions" found in private insurance contracts. *Id.* See also Terrorism Risk Insurance Program, 68 Fed. Reg. No. 133, 41252 (July. 11, 2003) (to be codified at 31 C.R.F. pt. 50).

365. Staring, *supra* note 306, at para. 5 (noting that the requirement of having two separate policies will especially hold true in the case of marine insurance policies, which tend to require broader international insurance coverage). See also Terrorism Risk Insurance Act of 2002, Pub. L. No. 107-297, § 106(a)(2)(A).

366. Note that Pool Re no longer regulates the insurance industry's premiums. See U.K. Treasury Announcement, *supra* note 165, at 4. However, the U.K. Treasury and Pool Re members will continue to discuss Pool Re's finance issues, which undoubtedly include the adjustment of premiums. *Id.* at 7.

367. Atkins, *supra* note 156; TILLINGHAST UPDATE, *supra* note 168, at 3. Participating insurers must specifically refer to Pool Re's rate manual for premium prices. *Id.* Insurers then must cede this premium amount to Pool Re. *Id.*

368. See *Premiums Set to Increase After Changes at Pool Re Terrorism Insurance Pricing is Set to Rise Again*, LLOYD'S LIST INT'L, Jan. 2, 2003, available at 2003 WL 3047367; TILLINGHAST UPDATE, *supra* note 168, at 3.

369. See *id.* U.K. Treasury Announcement, *supra* note 165, at 7.

370. U.K. Treasury Announcement, *supra* note 165, at 7.

371. TILLINGHAST UPDATE, *supra* note 168, at 3.

2004] *TERRORISM RISK INSURANCE ACT OF 2002* 891

contrast, TRIA allows insurers to charge premiums based on their own ability to cover terrorist harm, and as a result, many insurers use this option as a legal loophole to circumvent providing terrorism insurance.<sup>372</sup> TRIA technically requires all insurers to make terrorism insurance “available” to their clients, but the U.S. Treasury confirmed to many apprehensive insurance companies that this requirement would not also stipulate that rates be reasonable.<sup>373</sup> However, insurers still feel uncomfortable with TRIA’s lack of specificity in that the Act covers amounts that surpass the aggregate threshold amount, but the statute and program have not indicated how the program will approach the number of occurrences issue the nation faced with September 11. For this reason, insurers’ ability to plan their own financial exposure is limited.<sup>374</sup>

---

372. See Michael Prince, *Insurers Frustrate Serio on Terror Law; State Insurance Superintendent Blames Coverage Failure on Industry*, CRAIN’S N.Y. BUS., Mar. 24, 2003, at 23 (reporting the details of an interview with Gregory Serio, New York State Department of Insurance’s superintendent, who noted that TRIA requires insurers to provide terrorism insurance coverage, but at the same time insurers have reacted by increasing their terror insurance premiums by 600% or by requesting approval for “broad-based terrorism exclusions”). Insurers, who manage to circumvent potential buyers of their terrorism insurance, can then apply under TRIA for the reinstatement of their terrorism risk exclusions. Terrorism Risk Insurance Act of 2002, Pub. L. No. 107–297, § 105(c). See also Epstein & Keyes, *supra* note 254, at 3; BROWN ET AL., *supra* note 255, at 10 (explaining that underwriters have a limited actuarial basis in calculating “probable maximum loss” for the pricing of terrorism insurance). However, the U.S. Treasury has indicated that it plans on compiling information on insurers’ insurance premium rates through corporate surveys in order to make this information available to Congress, which signifies that the U.S. government is overseeing the insurance industry’s actions. See Warshawsky, *supra* note 12, at 6, 8. These surveys intend to capture TRIA’s effect on insurers’ deductibles on a yearly basis until 2005. *Id.* at 11–21 (providing an overview of TRIA’s surveys). The Treasury Department particularly seeks to establish the insurance industry’s change in capacity towards insuring terrorism. *Id.* at 18.

373. Terrorism Risk Insurance Act of 2002, Pub. L. No. 107–297, § 103; Masters, *supra* note 117, at 430–31. See also Gollier, *supra* note 14, at 9, 11 (noting that the prohibition of “discrimination or public information” can artificially increase the premium rate even for low risk agents, which actually serves to enhance the adverse selection problem, but at the same time a policy that allows for pricing discrimination balances policyholders’ incentive to invest in “risk reducing activities”).

374. See Terrorism Risk Insurance Program, 68 Fed. Reg. No. 133, 41250, 41252 (July. 11, 2003) (to be codified at 31 C.R.F. pt. 50) (noting that the

Nevertheless, the U.K.'s system can place restrictions on Pool Re insurance members, because it also limits insurers ability to insure with reinsurers who wish to participate in the government-sponsored program.<sup>375</sup> Pool Re does not require insurers to participate in the program,<sup>376</sup> but its participating insurers cannot seek private or additional reinsurance coverage.<sup>377</sup> The U.K. program mandates that all of its participating members supply their deductibles solely to Pool Re.<sup>378</sup> As a result, over the program's lifetime, these provisions have allowed for Pool Re to expand its own reserves, decreasing the U.K.'s chances of withdrawing from the nation's own monetary reserves in the event of another major terrorist attack on the British mainland.<sup>379</sup>

The U.S. could potentially apply such restrictions on participation; however, such restrictive provisions interfere with the government's intention of keeping the program temporary.<sup>380</sup> TRIA seeks to encourage reinsurers to cover terrorism insurance and for this reason the government insurance program does not limit insurers' capabilities to work with reinsurance companies.<sup>381</sup> In fact, many insurers of terrorism risk in the

---

Treasury Department cannot ascertain a time frame requirement that the Secretary of Treasury can follow in the event of multiple terrorists attacks due to the "inherent uncertainty" involved in such situations).

375. See *Cost of Terrorist Attack Insurance Falls by Half*, TIMES (LONDON), July 31, 2003, available at 2003 WL 62398122 (reporting that a number of insurers can presently provide customers with competitive rates at lower rates than Pool Re's participants, making such insurers especially attractive to property owners with covering single "prestige" buildings).

376. *Id.*; Barnes, *supra* note 142.

377. See Fleming, *supra* note 214, at 8. Pool Re's participation restrictions seem to benefit national insurance companies over international ones. *Id.* However, private terrorism insurance coverage outside of Pool Re has also developed. See Lloyd's Terrorism Bulletin No. 4, Oct. 24, 2001, at <http://www.millerinsurance.co.uk/Downloads/Terrorism4.doc> (last visited Jan. 18, 2004) [hereinafter Lloyd's Terrorism Bulletin].

378. TILLINGHAST UPDATE, *supra* note 168, at 3. However, private terrorism insurance coverage outside of Pool Re has also developed. See Lloyd's Terrorism Bulletin, *supra* note 377.

379. See TILLINGHAST UPDATE, *supra* note 168, at 3.

380. See Terrorism Risk Insurance Act of 2002, Pub. L. No. 107-297, § 101. See also BROWN ET AL., *supra* note 255, at 9 (noting the "persistent concern that long-term government dominance...will mean a loss of the efficiency and innovation fostered by competition within the private sector.").

381. See Terrorism Risk Insurance Act of 2002, Pub. L. No. 107-297, § 103(g)(1).

2004] *TERRORISM RISK INSURANCE ACT OF 2002* 893

U.S. have obtained reinsurance coverage for their government deductible in the likelihood of another terrorist attack.<sup>382</sup> Reinsurers' reemergence in the realm of U.S. terrorism insurance coverage is two-fold: first, reinsurers are slowly feeling more comfortable with providing insurance companies coverage for the risk of terrorism; second, TRIA provides the insurance industry with a clear cap on its potential losses, which is a sum that insurers can incorporate in their transactions.<sup>383</sup> It remains unclear, however, whether the reinsurance industry would continue to allow insurers to cede their terrorism risks without TRIA's limitations on potential liability. Nevertheless, Pool Re's example exemplifies the fact that the U.S. can effectively provide support for terrorism insurance coverage without forcing all insurers to participate. The U.K.'s governmental reinsurance model also demonstrates that premium setting plays a huge role in gaining public clientele at least at such a program's initial stages.

Since the formation of TRIA's coverage guidelines and managerial procedures are still in process, it also remains to be seen whether any issues may arise due to the lack of judicial review.<sup>384</sup> Despite U.K. provisions allowing for judicial review of Pool Re's determinations, the authoritative appeal tribunal originates within the agency itself, potentially undermining the objectivity of the ultimate rulings. However, at least the U.K. allows for some sort of review. Although no crisis has seemingly emerged from the U.K.'s limited review possibility, TRIA's lack of judicial review may prove to be problematic in the U.S. as the legislation forecloses any possibility of judicial review.<sup>385</sup>

---

382. See *Tackling a Burning Issue*, *supra* note 304, at 36.

383. Terrorism Risk Insurance Act of 2002, Pub. L. No. 107-297, § 103(e)(2).

384. Masters, *supra* note 117, at 431.

385. Terrorism Risk Insurance Act of 2002, Pub. L. No. 107-297, § 103(e)(5). Several commentators attempted to thwart TRIA's intolerance for judicial review by arguing that the Administrative Procedure Act ("APA"), 5 U.S.C. § 554, requires the U.S. Treasury Department to allow for claim determination appeals, under Section 102(3) of the APA. Terrorism Risk Insurance Program, 68 Fed. Reg. No. 133, 41250 (July 11, 2003) (to be codified at 31 C.R.F. pt. 50). However, the Treasury Department has countered such legal contentions by asserting that the APA's hearing requirement applies only where a statute requires a hearing on the record, adding that the Supreme Court also supports this interpretation, and since TRIA specifically forbids such hearings, the Treasury Department concludes that the APA does not apply. *Id.*

Such a restriction reduces the transaction costs tied to litigation, but it ultimately may also sacrifice fairness and insurers' confidence in the government program.<sup>386</sup> Despite TRIA's rigidity on judicial review,<sup>387</sup> the U.S. Department of Treasury currently works closely with the NAIC in order to establish a program geared to assisting the insurance industry's needs.<sup>388</sup>

## V. CONCLUSION

The question of TRIA's renewal ultimately lies in who should potentially bear the costs of a terrorist attack — taxpayers, after the fact, or consumers through a previously established insurance system.<sup>389</sup> Undoubtedly, the insurance industry will argue for the program's continuance, but the real concern should be the U.S. economy and the public's main interest in the long run. TRIA has assisted in lowering the costs of terrorism insurance coverage, but, in order to give the program its true force, the legislation needs further tailoring to meet the current circumstances that the nation faces.

The U.S. must consider offering property owners incentives to purchase terrorism coverage and fine-tuning TRIA's regulation of the insurance industry. Through tax incentives, property owners will most likely have a greater compulsion to invest in additional coverage for terrorist-related harm. In addition, the U.S. should make insurance company participation in the government's terrorism insurance program discretionary, as most inflated premium rates serve as deliberate means of evading terrorism coverage. These high premiums then distort the perspective of consumers, deterring the purchase of such insurance coverage. Incorporating these changes in the government's ex-

---

*See also* U.S. Lines Inc. v. Federal Maritime Commission, 584 F.2d 519 (D.C. Cir. 1978) (citing U.S. v. Florida East Coast R. Co., 410 U.S. 224, 234–38 (1973)).

386. *See generally* Thomas, *supra* note 43. However, insurers do have the opportunity to request a general interpretation of the statute by written submission to TRIP or through an informal oral hearing. Bragg, *supra* note 9, at 11.

387. Terrorism Risk Insurance Act of 2002, Pub. L. No. 107–297, § 103(e)(5).

388. *Id.* § 101. *See also* Terrorism Risk Insurance Program; Initial Risk Insurance Program; Initial Claims Procedures, 68 Fed. Reg. No. 230, 67100 (Dec. 1, 2003) (to be codified at 31 C.R.F. pt. 50).

389. *See* Gollier, *supra* note 14, at 17 (explaining that super-terrorism creates an “undiversifiable risk....that must be allocated to...consumers”).

2004] *TERRORISM RISK INSURANCE ACT OF 2002* 895

isting program will help ignite the demand for terrorism insurance cover and may also simultaneously accelerate the insurance and reinsurance industries' capacity and desire to insure terrorism on their own. Stronger market forces will help further decrease terrorism insurance premiums, and the larger consumer base will bring forth larger profits.

As the terrorism insurance market gains its own capacity,<sup>390</sup> the U.S. government should also strongly consider expanding TRIA's scope and coverage. Since terrorism tactics and techniques evolve with time, insurance coverage should also develop accordingly. TRIA now offers the reinsurance backing necessary for insurers to cover conventional means of terrorism, but it stops at conventional methods taken by foreign groups. Instead, U.S. terrorism insurance coverage should expand in order to be prepared for the worst. Furthermore, TRIA's foreign based terrorist agendas shifts the focus to problems abroad; however, such problems can develop from within the nation as well. Therefore, TRIA has initiated the process of preparing the insurance industry to insure the risk of terrorism, but the groundwork for complete terrorism coverage is far from being complete.

Although TRIA's scheduled sunset is approaching, the risk of terrorism remains.<sup>391</sup> This lingering risk continues to chill the nation's insurance industry from fully embracing terrorism coverage.<sup>392</sup> The protection of a nation's citizenry requires both national security and financial planning.<sup>393</sup>

---

390. Schoen, *supra* note 247 (quoting P.J. Crowley, vice president of the Insurance Information Institute).

391. "Simple calculations suggest that, despite international counter-terrorist action, the risk is currently substantial, as indeed it was before September 11, 2001." Woo, *supra* note 20, at 17.

392. *But see* BROWN ET AL., *supra* note 255, at 15 (arguing that one of the "key features" of the U.S. terrorism risk insurance program is its "defined exit strategy").

393. In addition to establishing the right insurance plan for the nation, the U.S. government also must simultaneously focus on the nation's defensive mechanisms in order to prevent a terrorist attack from occurring again in the U.S. This Note has not emphasized national security mechanisms only because this issue is not within its scope. The issue of U.S. "Homeland Security" legislation and government security programs require their own legal analysis. However, a nation's security mechanisms are invaluable to the prevention of terrorism. Any mitigation of terrorist risk would also have a positive counter-effect on the nation's insurance industry's ability to insure property.

TRIA represents a nation moving forward, overcoming immense suffering and loss. Hopefully, the U.S. will never have to face another terrorist attack, but at least the U.S. has taken one important step, as other nations have done in the past, in preparation.

*Irene S. Kaptzis\**

---

\* J.D. Candidate, 2004, Brooklyn Law School; B.A., 2001, New York University. The author would like to dedicate this Note to her family as their unwavering support and affection ensures, or rather *insures*, her own well-being and accomplishments.