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TRADE LAW MEMORANDUM

To: Clients and Friends

Re: TERRORIST ATTACKS ON THE UNITED STATES

Date: September 20, 2001

Insurance, Terrorism and Acts of War

1. Inevitably and regrettably, there will be litigation over the enormous damages caused by the terrorists in the United States last week. Even now, questions have come up about the extent to which insurance coverage could be denied. That depends on whether act-of-war clauses in individual contracts limit insurance companies' liability.
2. U.S. President Bush has described these horrible crimes as "acts of war". He was right in real down-to-earth terms. Both the magnitude of the attacks and the incalculable damage they inflicted made them *de facto* acts of war. Statements of some extreme Islamic groups, even before these attacks, that they considered themselves engaged in a war with the United States, means that they, too, see such acts as tantamount to acts of war.

3. The question, however, is whether these attacks are considered “acts of war” in the legal sense as that term is used in exclusionary clauses in insurance contracts. That ultimately will require judicial interpretation and there are some uncertain areas here.

4. Under classical international law, “war” means a condition of armed conflict between two or more sovereign States, fought with use of armed forces in uniform. “Acts of war” in this traditional sense are manifestations of that conflict. This was gradually modified after World War II, to include colonial struggles of independence as “wars”, even though one side was not a sovereign State but rather a group of independence fighters.

5. It is not clear whether customary international law, the common law among States as recognized by international courts or tribunals, has evolved to the point of including the recent terrorist attacks on the U.S., however horrible, unprovoked and egregious, as “acts of war” in a legal sense. This does not reduce the enormous seriousness of the terrorist threat or the risks these extremists pose to our society and to the international community at large. It simply means that international law may not have reached the point where these acts, however odious, fit the classical legal concept of “acts of war”.

6. Domestic courts, at least in some common law jurisdictions, may be more ready to accept the notion that armed attack, short of formal declarations of war and even where one side is not a sovereign State, may constitute “acts of war” in legal terms. Some contract cases litigated in the context of the Vietnam War, as examples, were decided on the basis that “war” existed in practical terms within the meaning of contractual wording, even if there was no official declaration of war by the U.S. and even if the conflict was not regarded as “war” under international law.

7. Assuming that these recent attacks were acts of war, at what point did “war” begin? Does it commence when the U.S. president declared that these are acts of war? What happens if there is no actual legal declaration of war by the executive or legislative branches, as in the case of the Falklands War or the Vietnam War? How can a “war” and an “act of war” exist in the legal sense when the perpetrators have not yet been identified?

8. None of this limits the right of the U.S. and its allies to take appropriate steps to eradicate this terrorist threat. As discussed below, Article 51 of the U.N. Charter recognizes that States have an “inherent” right of self-defense in case of “armed attack”. Neither Article 51 of the Charter nor international law requires a state of war to exist in order to exercise that right.

9. However, when it comes to individual state-of-war clauses and the extent of insurance and other contractual liability, inevitably these terms will fall to the domestic courts to interpret. It remains to be seen the extent to which traditional requirements for war to exist under international law will impact on these decisions.

State Responses to Terrorism

10. Even in the absence of a state of war in the strict legal sense, there is no question that the U.S. and its allies have a right to respond to the recent attacks on American territory. That right is accepted under international law. Principles of international law often (and regrettably) take a back seat to the way nations behave. But in this situation, international law fully supports both individual and collective action against the perpetrators of these acts.

11. First, the U.N. Charter, which is binding on Members, gives the Security Council a role in this matter. Article 39 of the Charter says,

The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.

12. Note the wording. The Security Council can act in cases where there is “any” threat to the peace or breach of the peace. The term “threat to the peace” or “breach of the peace” is not confined to war or other acts of aggression between States only. It clearly includes terrorist acts.

13. This does not mean that the world must wait for Security Council to act or, even if it does, that the Security Council will have the exclusive role in the matter. Independent of the Security Council, States have the inherent right in international law to take action individually and collectively to deal with terrorist attacks and to safeguard the peace and security of their populations.

14. Article 51 of the U.N. Charter codifies this right. It says that nothing in the Charter “shall impair the *inherent right* of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security”. The notion of individual and collective security as an inherent right of States is a fundamental principle of international law, quite apart from what the Security Council can or will do under the U.N. Charter.

15. Much has been heard in the present crisis about Article 5 of the North Atlantic Treaty. That provision sanctions collective action by NATO member States and says,

The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defence recognised by [Article 51 of the Charter of the United Nations](#), will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area. (emphasis added)

16. Article 5 goes on to say that any collective measures by NATO shall be terminated when the Security Council has taken the measures necessary to restore and maintain international peace and security. The only issue that may arise here in the interplay between the North Atlantic Treaty and the U.N. Charter is whether action by the U.S. and its allies at some point must give way to actions mandated by the Security Council.

17. Practically, this won't happen. Any resolution adopted by the Security Council will almost certainly confirm the course of action initiated by the U.S. and its allies (developing as a broad-based global coalition of States) to hunt down and, where possible, to destroy those terrorist organizations responsible for the recent atrocities. Article 5 of the NATO treaty will remain as a source of legal power to that end, based on the right of collective action, in turn enshrined in the U.N. Charter.

Self Help and Necessity

18. Supporting direct action by the U.S. and its allies is the legal doctrine of selfhelp in times of necessity, reflected in numerous decisions by the International Court of Justice and its predecessor, the Permanent Court of International Justice. In the case of *Nicaragua v. United States* in 1986, for example, the ICJ recognized this right. That doctrine, part of the inherent right of State security, allows States to take actions to protect themselves, individually and collectively, in cases of immediate and grave threats to international peace and security and to their own safety.

19. Self-help has been often abused as a means of justifying all kinds of aggressive behaviour. In the present crisis, provided that the response is proportional, there is no doubt that this doctrine supports action by the U.S. and its allies, including of course military action, to deal with the continuing terrorist threat to its own land and to the international peace and security of the world at large.

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