



AIDA CLIMATE CHANGE WORKING PARTY

Questionnaire for 8th AIDA CCWP Meeting – Rome – 29 September 2014

Fracking: Legal and coverage problems presented by the extraction of shale gas and oil

21 AIDA National Sections (and three individuals) supplied answers to a Questionnaire prepared by Prof Marcel Fontaine which informed his General Report upon Climate Change and Insurance Law arising out of discussions held at the XIII AIDA World Congress in Paris in May 2010. Since then much has happened. The AIDA Climate Change Working Party has been formed. It has already held seven meetings. It is now looking to update information previously gathered on a range of topics and supplement this with areas which are new or have grown in importance. Fracking (or hydraulic fracturing) and the insurability of any adverse effects is one of these.

In Rome for its eighth meeting – on **29 September 2014** – one of the topics being considered by the AIDA Climate Change Working Party is ***Fracking: Legal and coverage problems presented by the extraction of shale gas and oil.***

At only one previous meeting (in London in September 2012) have we received (from Peter Kochenburger) only the briefest outline of the problems being encountered in the United States, where most activity has centred to date. The implications are of huge interest to all concerned with the economically and technically viable extraction of shale gas and oil identified as potentially being assessed in over 40 countries around the world.

To help inform discussions in Rome it is therefore timely for us to consider together a few pertinent questions about fracking and the most immediate legal and coverage problems of greatest interest to us. Self-evidently the scale and speed of progress is uncertain in many countries, but the impact of the extraction of shale gas and oil has already had far-reaching effects in terms of energy policy and how both short-term energy needs and longer-term emissions reduction targets may best simultaneously be met. At the same time many environmental concerns have been raised as has the related ease or difficulty with which the risk of unforeseen adverse effects may be borne by the financial and/or insurance markets. Much may be learnt from past environmental or other long-tail claims and from other areas where fossil fuels have been more traditionally extracted onshore over many years, but some aspects will undoubtedly pose novel problem areas.

We have deliberately aimed to keep this questionnaire short. The purpose behind the series of questions is hopefully self-explanatory. We recognise that in many territories there is no shale gas or oil or economic extraction remains far off. In such cases we encourage those responding to move directly on to providing answers about any insurers or reinsurers in your jurisdiction which are providing (or declining) coverage terms for fracking operations elsewhere. Those later in the questionnaire encourage those responding to identify from their own experience or that of their own jurisdiction or region any particular issues of a legal nature which more directly have an impact or are expected to raise concerns regarding the interpretation or effectiveness of policy terms or schemes or their regulation. If any parallels may be usefully drawn with reference to other onshore mining operations or fossil fuel extractions, carbon capture & storage (CCS) or other areas then please provide details.

Please also feel free to include in your answers any links to materials described or to introduce at the end any topics not specifically addressed, but thought to be of interest. For details of the Agenda for the Rome meeting and for registration details for the XIVth AIDA World Congress please visit the AIDA Climate Change Working Party page of the AIDA website: http://www.aida.org.uk/workpart_climatechange.asp.

Name: _____ AIDA National Section: _____ Date: _____



With reference to your own country or region:

<p>1. <u>Existence of shale gas or oil:</u></p> <p>Has any shale gas or oil been identified as being potentially suitable for extraction by the use of fracking?</p> <p>[If not, go straight to Q5 so far as appropriate.]</p> <p>Has any such extraction yet started?</p>	
<p>2. <u>Ownership of oil/gas or land in which to be found/extracted:</u></p> <p>Is any oil or gas deemed by law to belong to the State, to the landowner of any land beneath which it lies or to someone else or does it vary according to circumstances?</p> <p>What rights do landowners have to constrain extraction, or enjoy the financial benefits derived from shale gas or oil extracted?</p>	
<p>3. <u>Objections to extraction by fracking:</u></p> <p>Have any objections been raised? If so in what form, by whom, and have any reached legal tribunals? If so, with what result?</p>	
<p>4. <u>Regulation of fracking practices:</u></p> <p>Describe what regulation, if any, is in place or in prospect concerning fracking practices. Is this new regulation, specifically addressing</p>	



<p>fracking practices or existing regulation applying to all extraction of fossil fuels or damage to the environment, or both?</p> <p>Do any regulations specifically address the question of what insurance coverage is in place? Is insurance coverage mandatory for any operators or operations?</p>	
<p>5. <u>Private market insurance products:</u></p> <p><u>Property insurance:</u></p> <p>i) As a general rule, is any loss or damage resulting from fracking activities, conducted on or under one's own property, currently <i>expressly</i> covered or excluded by most household, property owners or commercial property policies?</p> <p>ii) If there is no <i>express</i> provision, will coverage/exclusion simply depend upon what perils <i>are</i> expressly covered/excluded?</p> <p>iii) Which areas of potential coverage/exclusion are considered of greatest concern? Seismic (earthquake, tremors, movement, subsidence, heave, sink holes, landslip); explosion; pollution of water resources; methane gas/other emissions; or others?</p> <p>iv) Which, if any, other forms of loss are likely to be of concern: failure of utilities; diminution in value; loss of attraction/denial of access; loss of rent?</p> <p><u>Liability insurance:</u></p> <p>v) Are property/business owners/fracking operators generally covered against any third party liability which may owed for loss/damage caused to people or property, alleged nuisance, negligence, breach of regulatory or other duty, arising from fracking?</p> <p>vi) Are any restrictions/ exclusions commonly in operation (e.g. pollution exclusions, requirements that losses be sudden and</p>	



<p>unexpected)?</p> <p>vii) Do any domestic insurers or reinsurers within your jurisdiction provide specific insurance products to cover fracking operations <i>per se</i> (e.g. operations extra expense insurance, environmental site liability, D&O liability insurance)? If yes, please provide some description of what is available.</p> <p>viii) Have any insurers modified existing insurance products by extensions, limitations or exclusions, to cater for any new risks identified as arising from fracking?</p> <p>ix) Are these more usually sold independently of, or as an extended part of a wider package of property/catastrophe risk insurance or liability covers?</p> <p>x) Please provide some guide to the volume of business written of this kind in terms of annual premium income, if known.</p>	
<p>6. <u>Insurance pools or other forms of State-supported compensation schemes:</u></p> <p>Do any insurance pools or State-supported schemes exist (financial or insurance by nature) to provide any safeguards or compensation for any who allege loss or damage has arisen from fracking operations or for those performing them?</p>	
<p>7. <u>Environmental damage/Liability regime:</u></p> <p>In the event of any alleged environmental damage is there any element of strict liability or something akin to “polluter pays” principles in operation?</p>	
<p>8. <u>Major problem areas/limitations upon insurance business written:</u></p> <p>Which of the following (of any, or identify others) would you describe as the <i>greatest</i> problems facing the successful wider provision of</p>	



<p>responsive and affordable insurance protection against damage arising from fracking practices, either from the policyholder, insurer or the State's perspective?</p> <ul style="list-style-type: none"> • Too few fracking operations yet approved or in operation to allow risks to be underwritten easily or affordably? • Regulation of fracking operations still too unsettled to enable underwriting terms to be offered? • Each fracking operation likely to vary considerably in terms of risk profile? • Lack of investment/data for managing underwriting risk/claims handling? • Lack of local technical support/capability/insurance capacity/appetite for risk? 	
<p><u>9. Particular legal or contractual problem areas of note to be expected or already encountered from an insurance perspective:</u></p> <p>What issues are proving (or are expected to prove) the most contentious or difficult in the provision or interpretation of insurance products or other forms of relief/coverage or in complying with or implementing a regulatory framework?</p> <ul style="list-style-type: none"> • Are terms of cover/perils/policy conditions/exclusions (e.g. pollution exclusions; requirement of sudden/unexpected event) clearly enough expressed/capable of enforcement/compliance? • Event/loss occurrence trigger provisions, overlapping covers, allocation/aggregation issues, causation/contributory negligence concerns, potential long-tail nature of damage manifesting/limitation or prescription issues? • Need for duties of respective parties to be more clearly 	



<p>defined?</p> <ul style="list-style-type: none">• Are legislation or enforcement provisions fit for purpose, especially to contend with any growing Climate Change impacts? If not, what is identified as most particularly in need of change and how?	
<p>10 . <u>Major disputes:</u></p> <p>Has any litigation or formal dispute resolution procedure taken place in the last five years by which challenges have been made of any kind over the terms of any fracking operations and/or insurance provisions or other forms of relief or in respect of their governance/legislation? Please describe and any outcome or if still pending.</p>	
<p><u>Other comments or observations:</u></p> <p>Are there any other issues, not necessarily described above, which merit particular mention in terms of the present regime for any financial and/or insurance protection of fracking operations and the impact of Climate Change more generally?</p>	