**1ST AIDA CLIMATE CHANGE WORKING PARTY MEETING**

**III AIDA EUROPE CONFERENCE, AMSTERDAM**

12:30hrs-15:00hrs THURSDAY 26 MAY 2011

Henry Hudson II Room, NH Barbizon Palace,

Prins Hendrikkade, 59-72, 1012 AD Amsterdam

**MINUTES**

1. **Welcome and Introductory Remarks**

1.1 The Chairman welcomed everyone to the first meeting of the Climate Change Working Party.

1.2 Apologies were received from Prof. Marcel Fontaine, among others, but also a message from Marcel wishing success to the WP, which was read out. The Chairman said that the value of Marcel’s huge contribution to date should be acknowledged, as well as the benefit to the WP of his continuing support which was greatly appreciated.

1.3 Stijn Franken has agreed to serve as the Secretary of the WP.

1. **Purpose Scope/Terms of Reference**

2.1 The Chairman noted that Climate Change is not a legal discipline, but a phenomenon. As it cuts across the disciplines of many other AIDA working parties it will be important to look to co-operate with other WPs on areas of overlap. These areas may prove to be of the greatest value and interest.

2.2 Also, given the breadth of the subject it is essential that we concentrate on the insurance, and most especially, legal aspects of climate change.

2.3 Most pertinently, Marcel Fontaine had observed in the General Report:

*“...Literature on climate change in general is more than abundant, and much has also already been written on the various impacts of climate change on the insurance sector.... much less has been published on the legal aspects. By examining the legal aspects, we mean going beyond a mere description of initiatives taken by the insurance sector, to concentrate on their legal expression in clauses, general conditions or new types of policies, and on the new legal issues that have come up, or probably will in the near future*.”

**3. Work done to date/materials compiled / base for future projects/study**

3.1 The Chairman recalled the steps leading to the establishment of the Climate Change WP. 21 National Reports (and three other volunteered submissions) in response to the Paris AIDA XIIIth World Congress Theme Questionnaire, plus other presentations delivered at the Congress itself, had provided a good body of material upon which the General Report could be produced.

3.2 While some National Reports had been very good, others were thin, with one or two important National Sections not responding.

3.3 With no reports from China, India or the United States, three jurisdictions of such importance for the WP, it was of great encouragement to learn that China and India were each understood to be forming AIDA National Sections in 2011 with hopes, too, for some revitalisation of activity from the US section. Representation within the WP from those countries was essential.

3.4 Links should be strengthened with experts and associations, prominent in current work concerning the legal and insurance implications of climate change, wherever they are based, but especially where we may be presently underrepresented.

3.5 It was therefore opportune for the Chairman to be invited in January and February 2011 to deliver speeches to, and to participate in, events in both Singapore and Australia to publicise the publication of the General Report and the formation of the WP.

3.6 In Singapore he addressed the “*1st Climate Change Summit for Asia’s Insurance Industry*” staged jointly by Asia Insurance Review and the Geneva Association. The Geneva Association has undertaken some valuable work addressing liability issues and the economic impact of Climate Change upon insurance to which reference was made in our General Report.

3.7 Unlike AIDA its membership is drawn exclusively from leading insurance companies. As it is officially the “International Association for the Study of Insurance *Economics*”, akin to the AIDA Climate Change WP’s concerns with Insurance *Law*, in the study of the impact of Climate Change our roles are certainly complementary. Future exchanges of information and involvement in each other’s activities may well be very beneficial. Their senior representatives have already encouraged this.

3.8 The Chairman also stressed the importance of the Climate Change WP page on the AIDA website to serve as both a repository of materials, but also as a message board and reference point. Already posted are the General Report by **Marcel Fontaine** and the following presentations by the speakers at the Paris Congress:

* **Sandrine Noel**, CEA, Tackling climate change. The vital contribution of insurers;
* **Christopher J Rodd,** Australian Insurance Law Association, Variable Impacts of Climate Change;
* **Stijn Franken**, NautaDutilh, Amsterdam, Climate change: Alternative Risk Transfer;
* **Marco Frigessi di Rattalma**, University of Brescia, How are the risks linked to climate change to be defined. Problems of causal links;
* **François Guidin du Pavillon**, Fédération Francaise des Sociétés d’Assurances, Quelles perspectives sur les régimes futurs ? Changements climatiques et assurance des aléas naturels ;
* **Tim Hardy**, Vice President, British Insurance Law Association, Insurance products linked with CO2;
* **Søren Theilgaard**, Denmark, Insurers’ initiatives to develop new products;
* **Caroline Van Schoubroeck**, Leuven University, Belgium, Climate change: some reflections on insurers’ “defensive” measure; and
* **Yoshiro Yamano**, Aichi Gakuin University, Japan, Development of New Insurance Products to Face Climate Change.

3.9 Additional papers individually submitted for the Paris Congress by Rossana Bril and from Maria Kavanagh (both from Argentina) will also soon be added, together with the presentation in Australia delivered by the Chairman promoting the publication of the General Report. This will be done at the same time that the papers prepared for the present meeting are also posted.

3.10 The individual responses to the Questionnaire sent on behalf of each and every National Section are not presently posted in their entirety. Thought will be given to whether, and if so how, some only or a summary of some of the most important responses only may be posted in due course to make these less voluminous and more easily accessed.

**4. Future modus operandi/Working Sub-Groups**

4.1 The Chairman outlined what had already been identified as the likely main focus of the WP’s work going forward:

1. Analysis of reports on Climate Change (and insurance implications) generated by governments, industry, associations, research groups etc
2. Identification/consideration of significance of legislation and other regulatory measures /protocols/ initiatives (at national, regional and international level) implemented to combat effects of Climate Change
3. Evolution of Climate Change litigation in the US and elsewhere
4. Impact of Climate Change upon traditional lines of insurance and reinsurance (and legal issues arising)
5. Creation/development of new lines/types of (re)insurance and other products (and legal issues arising) and the classification of certain existing products (such as weather derivatives) in the insurance/financial markets.
6. Special interest topics (perhaps meriting formal collaboration with other AIDA WPs)

e.g.

i) Carbon Capture & Sequestration/Storage (with the Transportation and Marine Insurance WP?)

ii) Use of cat bonds/ART for weather/carbon market risks etc. (Reinsurance WP?)

 iii) Large –scale natural hazard/pollution liability issues (Civil Liability/Accumulation of Claims + Subrogation/Reinsurance WPs?)

1. Further areas as may be prompted by the evolution over time of the phenomenon of Climate Change, any reaction to it and the insurance and legal issues which emerge as being of the greatest interest.

4.2 To allow WP members to concentrate across such a broad topic upon areas of particular interest or professional importance to them and to speed progress, the Chairman promoted the idea of four “sub-stream” work area themes which may also potentially be accompanied by the creation of corresponding subgroups within the WP. These may need refinement once more detailed consideration had been given to them but as a starting point four discrete areas appeared to be:

* Impact of Climate Change and responses around the world (PROPOSED WORK AREA - I) ;
* Climate Change Liability and Litigation (PROPOSED WORK AREA –2);
* Carbon Insurance and other “new” products (PROPOSED WORK AREA -3);
* Reinsurance/ART/funding for weather/carbon-market risks and regulatory treatment (PROPOSED WORK AREA -4)

4.3 To help illustrate how these might be developed, to provide a structure for the presentations to be delivered at the meeting and to intersperse such discussion with the presentations each of the four workstream areas would be considered in turn.

**5. Impact of Climate Change and responses around the world (PROPOSED WORK AREA - I)**

5.1 The Chairman introduced the first presentation, by Chris Rodd of CGU Insurance, Melbourne concerning Australia and more specifically the “*Impact of the 2011 natural disasters and the immediate and potential implications for the Climate Change insurance and legal landscape”.*

5.2The Chairmandescribed how during his three weeks in Australia, addressing the AILA branch sections on Climate Change, the country was preoccupied both by a series of extreme weather events and near-saturation media discussion of almost every aspect of insurance-related implications.

5.3 As Cyclone Yasi closed in upon Queensland, the State of Queensland was already facing mounting scrutiny for its decision not to have insured its major infrastructures devastated by the earlier massive rainfall and extensive water releases from the major dam located close to Brisbane, whose operators were in turn caught in the crossfire of those seeking to attribute blame for major financial losses. Domestic policyholders were also angry to discover many insurers denied that their “storm” cover afforded them any protection against the peril of “flood”.

5.4 Chris Rodd outlined how a Royal Commission has been appointed to investigate the losses and to evaluate liabilities stemming from the operation of the dam. The lawmakers were keen to have blame passed to the operators of the dam for failing to follow guidelines. They in turn asserted that releases were strictly in accordance with the legislative provisions turning any potential liability back onto the lawmakers. The merits of standard “flood” cover, flood taxes and other issues all continued to merit heated public debate and in insurance, legal and political circles. Any longer-term impact upon climate change issues remained to be seen.

5.5 The second presentation was made by Dr Maria Silvia Moron Kavanagh from Buenos Aires. She spoke briefly about the “*Impact of Climate Change upon agriculture in Argentina*” with particular reference to the role there of wetlands in providing flood relief, coastal erosion protection, the moderation of local microclimates and serving as carbon sinks.

5.6 The Chairman informed the meeting that further interesting materials had been supplied by two other Argentinian representatives. Dr Rossana Bril, who had sent apologies, had supplied papers concerning “*Climate Change and Agricultural Insurance*” (recently delivered to the CILA meeting in Paraguay) and a review of recent decisions in Argentina involving mandatory environmental insurance issues. Dr Florencia Mangialardi had also submitted an updated paper on defensive measures adopted by insurers in Argentina in response to Climate Change.

5.7 Finally, the previous Friday, the British Insurance Law Association had provided a platform in London for two presentations to be delivered concerning the 2011Tohoku Japanese Earthquake and Tsunami: the Factual, Insurance & Early Legal Issues. These together with all other presentations would be posted on the Climate Change WP page of the AIDA website for the benefit of attendees and WP members.

5.8 In respect of this “workstream” and any further presentations which may be made at future WP meetings it was important for the WP to attempt to consider all major weather-related events and their insurance impact and aftermath as being of relevance to the workings of the Climate Change WP. This is irrespective of whether any immediate impact upon Climate Change mitigation or adaptation practices or defensive measures by insurers are apparent. As each such event has unfolded, discussion of Climate Change implications or issues considered in that context invariably come under review and so monitoring such events and their aftermath should form an important part of the WP’s work.

**6. Climate Change Liability and Litigation (PROPOSED WORK AREA –2)**

6.1 The Chairman noted that actual litigation connected to Climate Change has already proceeded in several jurisdictions, especially in the United States. This has raised complex issues including those of standing, causation and fault/strict liability. It can be predicted that climate change litigation will develop to a significant extent. A recent Munich Re report showed an escalation of actions commenced in 2010. This will affect not only property insurance covers, but also raise liability issues, such as for those in the public sector for failing to impose adequate preventive measures and/or claims against directors and officers of industries causing excessive greenhouse emissions. Life policies will also be impacted. All have significant consequences for the insurance sector.

6.2 If an important task for the WP is to monitor climate change litigation of significance to insurance in different jurisdictions, a first important question is, with limited resources and, as yet, not a fully global reach, how may this most effectively be done?

6.3 One identified valuable first reference source is the Columbia Law School Database of CC Litigation – US and non-US. The Chairman has received an invitation to be put in touch with Professor Michael Gerrard of Columbia University with view to his collaborating with the work of the WP. Were Professor Gerrard able to assist the WP and possibly address us at a future meeting that would be of great benefit. Members of the WP may in turn assist Professor Gerrard in his work by identifying any important cases in their own jurisdiction (or otherwise known to them) which are not presently included in the Columbia University database or which may in time need to be reported.

6.4 The Chairman has also already made contact with another important contributor to debate about the legal impact of Climate Change in the context of the insurance sector: Professor Jaap Spier, Attorney-General in the Netherlands Supreme Court and Professor at Maastricht University. Professor Spier has expressed great enthusiasm for collaboration in the WP’s work and has suggested a number of other influential names, some in jurisdictions where we are not presently well represented, who may share his enthusiasm. Indeed, he promoted the idea of a “think tank” being created for the benefit of the WP. This might particularly consider some of the most challenging issues, not necessarily yet the subject of climate change litigation, such as how far any existing recognized boundaries of liability may be extended or affected over time.

6.5 Meryl Lieberman of Traub Lieberman Straus & Shrewsberry LLP confirmed that at end of June the US Supreme Court is expected to deliver its important decision in the *American Electric Power* case. The important issue is whether legislating for what emissions levels should be observed are issues for the courts or political issues best left to Congress to regulate (the so -called “political question” doctrine).

6.6 The Chairman also highlighted that the WP should seek to keep itself informed about all relevant legislation, protocols and regulatory measures. This may require creating or monitoring further databases. This may include a range of measures across the environmental liability field. It would be a mistake to confine too narrowly the WP’s scope of reference.

**7. Carbon Insurance and other “new” products (PROPOSED WORK AREA -3)**

7.1 The Chairman observed that a very important area for the WP was to become familiar with and consider from a legal perspective many of the “new” insurance products which were emerging directly in response to the phenomenon of Climate Change. As had been observed in the General Report and by many responding to the Congress Questionnaire it has proved difficult often to gain sight of actual policy wordings in many cases. This posed problems of identifying exactly the extent, nature and purpose of many so-called “carbon insurance” products. Also, what precise form many such products took to allow any worthwhile legal analysis to be conducted.

7.2 This made the contribution of Cedric Wells of SCOR Global P & C (Senior Legal & Claims Manager) from Paris all the more welcome. He had just had an MBA dissertation accepted, with merit, on the subject of “*Carbon Credits & Insurance* – *Can Insurance address the current and future needs of the industries?”*  This had involved him analysing responses received from extensive enquiries made among a wide range of insurance market and legal practitioners, primarily in France, which he then outlined to the meeting.

7.3 He provided a snapshot of his wide-ranging analysis. This addressed the question of how companies forced to comply with cap and trade/Emissions Trading System (ETS) obligations presently managed their Climate Change-related risks. More particularly, whether they insured them, what products were presently available and their strengths and weaknesses. He concluded that increasing GHG emissions regulation brings new and greater compliance risks. Policy wordings needed fully to address the technicalities of carbon credits, focusing particularly on loss evaluation and mitigation issues.

7.4 The Chairman welcomed the presentation for delivering a clear picture of such a complex and technical area, commending that those interested should study both the presentation and Cedric’s dissertation which would both be posted on the WP page of the AIDA website.

7.5 The Chairman added that further WP study and sessions in this area could usefully include subjects as diverse as specific covers provided for alternative energy sources, Carbon Capture Sequestration or Storage (CCS) and microinsurance.

7.6 Maria Kavanagh (Argentina) then provided a further brief commentary upon the Argentine Carbon Fund and the carbon bond market, led in the region by Brazil, Mexico and Chile, and the impact on insurance activities upon which a paper was also being posted on the website.

7.7 Søren Theilgaard of Chartis (Denmark) expressed disappointment that there had been very little development over the past two years. The financial crisis had been hard on investments.

7.8 In Denmark there remained a widespread reluctance to accept land-based windmills. Few people welcomed them nearby. A law had been passed in late 2008 requiring the owner of any new land- based windmill construction to pay compensation to any neighbour’s property whose value had been adversely affected. Disputes had arisen over whether existing mill-owners could so claim. More expensive sea-based windfarms still predominated, but needed heavy subsidies. Slower financial returns deterred investors until any new corrective regulation was introduced.

7.9 On 18May 2011 the Chartis Group had announced the launch of a new product which insured the value of government subsidies to renewable energy. Linked to Sect. 48 of the US Internal Revenue Code (IRC) it protected the owner / investor who did not meet the requirements for the subsidies during the first five years of the renewable energy property and so had to return the value of the subsidy. PI cover was also extended to an installation manage failing, on account of errors or omissions, to manage the installation in accordance with the required rules. Similar products might be introduced elsewhere in the world to cater for protection of similar government subsidies.

7.10 At the Paris Congress last May it was emphasised that investors required financial security against the viability of a project to deliver returns from a renewable energy product. Insurance products could offer that security. The challenge for the new Chartis product, like other new such products, was the lack of claims history, but this would develop over time.

**8. Reinsurance/ART/funding for weather/carbon-market risks and regulatory treatment- PROPOSED WORK AREA -4**

8.1 The Chairman stressed the particular need to consider the legal nature and regulatory treatment of ART products, weather derivatives, catastrophe bonds and various funding and risk transfer mechanisms.

8.2 Stijn Franken reminded that as a supplement to reinsurance, alternative risk transfer may help to create a safer world in two ways. First it may help to spread the risks of climate change by 'insuring', by means of the capital market, risks that are uninsurable within the insurance market. Second, by doing so, it may enhance prevention. These alternative types of reinsurance will enable the insurance industry to take on climate-related risks and, consequently, in this field to act as a proactive risk manager, e.g. by endorsing or requiring loss-prevention behaviours or technologies.

8.3 Professor Frigessi stressed the importance of considering the issue of how weather derivatives were to be legally characterised. Traditionally, insurance and reinsurance companies have utilised standard insurance contracts to cover weather-related risks. By the end of the Nineties, they started to use alternative risk management products, such as derivatives and other structured products, entering those markets both as end-users and as offering issuers. The rapid expansion of weather derivatives recently turned this resource into a threat for the insurance industry, owing to the fierce competition with new players on the market.

8.4 If weather derivatives are deemed to be insurance policies, only a licensed insurance broker may sell the instrument: hence any derivatives counterparty, not licensed, would be acting unlawfully.

  **9. Final remarks**

9.1 The Chairman concluded the meeting by thanking all contributors for their valuable contributions and identifying the need for the WP now to address a number of important issues.

9.2 **Settled project topics, targets and timetables**: it was intended that an email would be prepared following this meeting which would be circulated to all attendees and other WP members and contacts designed to identify how the idea of the proposed work areas might best be advanced. Individuals would be invited to identify any favoured areas of study or activity.

9.3 **Recruitment of additional members/appointment of work area group leaders**: it was proposed that a database be established capturing full contact details of all who had attended this meeting and left their business cards and others wishing to participate in the WP’s future activities. Efforts would be made to widen the WP’s geographical reach and to enlist the support of individuals whose input would greatly enhance the WP’s work going forward.

9.4 **Collaboration with other groups/activities/events (inc. of other AIDA WPs):** it was important to identify upon what activities of relevance to our work other groups, both within and outside AIDA, were engaged to allow us to harness valuable information and a wider involvement. Any unnecessary duplication of labour should be avoided. A timetable of relevant events and useful links might helpfully be established.

9.5 **Future regular publication of work of the WP and collected materials**: efforts should be made to collate and publish the product of the WP’s activities in the most expedient and helpful fashion. This included the work generated for and from the AIDA World Congress last year and the meetings of the WP, as well as future work area projects and any valuable data gathered.

9.6 **Use of AIDA website**: the Climate Change WP page on the AIDA website would serve as the first point of reference for accessing materials produced, details about the WP, and scheduling of current and future WP activities. All were encouraged to visit the website page to access all materials which were soon to be posted as already described in the meeting.

9.7 **Review of AIDA World Congress 2014 Theme Questionnaire:** the Chairman reported that all WPs had been requested by the AIDA Presidential Council to consider and pass comment upon the principal theme Questionnaire prepared by the Italian National Section on the subject of the transparency of insurance contract provisions. This was to be done very shortly.

9.8 **Next meeting**: the next AIDA Presidential Council meeting was scheduled to take place in Tel Aviv where the Israeli National Section had arranged a colloquium between 7 and 10 September 2011. All WPs were being encouraged to stage meetings there and after such an encouraging start it was agreed that our WP should do so. Requests for confirmation of the availability of WP members to to attend in principle would be circulated shortly.

With no other business or time available the meeting closed.

NOTE:

As WP Secretary Stijn Franken was prevented from attending much of the early part of the meeting, Vice Chairman, Marco Frigessi kindly prepared Minutes of the Meeting upon which this final version is extensively based.