

INTERNATIONAL INSURANCE LAW ASSOCIATION/ AIDA

WORLD CONGRESS

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Topic IV - POLLUTION INSURANCE - METHODS, COVERAGE AND BENEFICIARIES

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REPORT OF: AIDA URUGUAY

QUESTIONNAIRE

(Answered by Andrea Signorino and Marcelo J. Cousillas,
for AIDA-Uruguay section)

Introduction

The topic relating to environmental damage insurance covering losses resulting from pollution was selected by AIDA's Brazilian Chapter for discussion during the World Congress to be held in Rio de Janeiro, in October 2018.

Such choice was justified by the growing frequency and intensity of environmental damages worldwide that sometimes affect entire communities and stop the production of goods and the supply of basic public services. History has been disclosing events of great impact relating to chemical industries (such as Seveso/1976 and Bhopal/1984), to oil industries (such as black tides from oil spill in several locations, and Exxon Valdez in the Gulf of Alaska/1989), to nuclear industry (such as Three Miles Island, Chernobyl), and, recently, the explosion at Deepwater Horizon in 2010, in the Gulf of Mexico, that produced a significant repercussion.

In Brazil, environmental pollution has been raising great awareness and discussions, particularly in view of the last relevant event occurred in Mariana city (State of Minas Gerais), in November 2015, resulting from the collapse of the Fundão dam, that spilled 50 million cubic meters of mine wastes downstream, contaminated the Doce River in its whole extension, and caused huge environmental, social and economic impact to populations and cities.

This context requires an analysis on how national legislations address the matter, as well as on the contribution provided by the insurance industry to either remedy or mitigate the impact from environmental damages. The local reports shall be particularly useful to the assessment of an issue whose perceptions may vary on a significant basis, depending on national legal and administrative peculiarities. Please prepare your report in such a way as to submit the information as required for a correct and full understanding of the answers to the questions made herein.

This questionnaire contains only indicative questions. Please try to inform all the issues you may deem as important to the study of the topic, in the light of your country's scenario. Any information and comments shall be relevant. As the purpose of this questionnaire is to know the situation in your country, we kindly ask you to provide answers that specifically refer to such scenario.

PRELIMINARY REMARK:

Please note that the questions under “1. Environmental Legal Aspects” relating to liability issues are aimed at ensuring a better understanding of the pollution insurance law and practice in different countries. Answering those questions is left to the sole discretion of the national reporter who may freely choose to answer only questions relating to insurance law aspects (i.e. to questions from “2. Legal aspects on environmental insurance policies” to “7. Academic development”).

1. Environmental legal aspects (answer is optional)

1.1. Which are the major general rules on civil liability arising from environmental damages in your country?

The main rule is Article 4 of Law No. 16,466 of January 19, 1994 (Law on Prevention and Evaluation of Environmental Impact), supplemented by the second paragraph of Article 3 and Article 16 of Law No. 17,283 of 28 November 2000 (General Law for the Protection of the Environment).

1.2. Please describe the main characteristics and objectives of environmental civil liability in the light of national legislation and court precedents.

1.2.1. How are environmental damages described under the law?

The second paragraph (in fine) of article 3 of Law No. 17.283, of November 28, 2000 (General Law for the Protection of the Environment), defines environmental damage as "any loss, reduction or significant detriment inflicted on the environment. " However, the norm that specifically provides for civil liability in environmental matters, Article 4 of Law No. 16,466 of January 19, 1994 (Law on Prevention and Evaluation of Environmental Impact), does not refer to who causes environmental damage, but whoever "causes depredation, destruction or contamination of the environment in violation of what is established by the articles of this law" (referring to the Law on Prevention and Evaluation of Environmental Impact).

1.2.2. Who may be (either directly or indirectly) made liable?

The law only refers to "who causes depredation, destruction or contamination of the environment (...) will be civilly liable" (article 4 of Law No. 16,466, of January 19, 1994, known as Law of Prevention and Evaluation of Environmental Impact).

1.2.3. How is the determination of causal link of environmental damages?

It must be proved according to the rules of common law.

1.2.4. Does your legislation provide for strict or fault-based environmental liability?

The doctrine considers that it is a responsibility based on fault, for the referral made by Article 4 of Law No. 16,466, of January 19, 1994 (Law on Prevention and Evaluation of

Environmental Impact), to the rules of Law common, when it says "will be civilly responsible".

Some authors have held strict or strict liability, based on the same article 4 of Law No. 16,466, of January 19, 1994. However, there is agreement in that there is a specific case, in which the law expressly attributes the strict or objective nature to civil liability for the discharge of pollutants into the waters, coming from ships, aircraft and naval artifacts. (Article 10 of Law No. 16,688, of December 22, 1994).

1.3. Are there peculiarities regarding environmental damages resulting from pollution? If so, are there differences in the legal treatment to air, soil or water pollution?

Only in the case of contamination of water by pollutants from ships, aircraft and naval devices (Article 10 of Law No. 16.688, of December 22, 1994), regarding the objective or strict nature of liability, as indicated in 1.2.4.

1.4. Which are the governmental entities in charge of authorizing and supervising activities that produce environmental impacts or pollution?

It is the Ministry of Housing, Territorial Planning and Environment (MVOTMA), through the National Environment Directorate (DINAMA), according to article 7 of Law No. 16,466, of January 19, 1994 (Law on Prevention and Evaluation of Environmental Impact).

1.4.1. What is the scope of activity of these entities?

It is a member administrative body of the Central Administration, with national jurisdiction.

1.4.2 How do they operate, and on which legal grounds?

It works on the basis of an environmental impact assessment procedure, of conformity with the provisions of the Environmental Impact Assessment and Environmental Authorization Regulations, approved by Decree 349/005, of September 21, 2005

1.5. Is there a legal system of procedural mechanisms in case of environmental offenses?

There are no specific procedural mechanisms for the protection of the environment, nor does the Penal Code include environmental crimes, whose protected legal asset

is the environment, a project in this sense is still under study by the Legislative Power.

1.5.1. Who is in charge of keeping the environmental protection?

In principle, it is an administrative competence under the responsibility of the Ministry of Housing, Territorial Organization and Environment (MVOTMA), through the National Directorate for the Environment (DINAMA), in accordance with the provisions of the article. 3º of the Law N° 16,112, of May 30, 1990 (Law for the creation of the MVOTMA). In the area of the Judicial Branch, there is no specialized jurisdiction, which is why it is necessary to address the proceedings brought before the ordinary civil justice system

1.5.2. How does this system work?

Any judicial procedure is governed by the procedural rules of the ordinary trial, although a special and broad legitimation is foreseen for the so-called "diffuse interests" (Article 42 of the General Code of the Process), among which the law includes specific "issues relating to the defense of the environment", in which case they will be entitled to intervene in order to promote the relevant process: the Public Prosecutor's Office, any interested party and the institutions or associations of social interest that according to the law or in the judgment of the tribunal, guarantee an adequate defense of the committed in addition of the Ministry of Housing, Territorial Organization and Environment (MVOTMA) itself, by virtue of the provisions of the article 6th of Law No. 16,112, of May 30, 1990.

Meanwhile, Article 220 of the same Code, provides a special effect res judicata in proceedings promoted in representation of diffuse interests, awarding general effectiveness to the sentence, "unless it is absolutory for lack of evidence, in which case, another legitimated one will be able to raise the question in another process".

2. Legal aspects on environmental insurance policies (answer is required)

2.1. Is there a specific legal framework to regulate environment insurance policies? If so, please describe such legislation, as well as the major features thereof.

No. There is not a specific legal framework to regulate environment insurance policies

2.2. In the event of a negative response to the question 2.1, please inform if there is any administrative rule, or any other kind of legal regulation that applies to environmental insurance policies. In this case, please describe such regulation, as well as the major features thereof.

No, there is not. Although the Ministry of Housing, Territorial Organization and Environment (MVOTMA) can demand administratively as a complementary measure to ensure compliance with the rules of environmental protection, including insurance or guarantees, real or personal, sufficient in the opinion of the Administration, "for the faithful fulfillment of the obligations derived from the environmental protection norms or for the damages that could be caused to the environment or to third parties" (literal C of article 14 of Law N^o 17.283, of 28 November 2000, known as the General Law for the Protection of the Environment).

2.3. Does the law provide for compulsory environmental insurance?

No, the law does not include mandatory environmental insurance, except in the case of contamination of water by pollutants coming from ships, aircraft or naval devices, in which "the shipowner, owner of the ship or naval device, for the purpose of verifying cleaning, must have insurance against spills and discharges and a contract with a pollution control company with a seat in our country "(second paragraph of Article 10 of Law No. 16.688, of December 22, 1994, in the wording given by the article 6^o of the Law N^o 19.012, of November 23, 2012).

2.3.1. If so, which would be the relevant risks, covered items and limits?

Only in the case of contamination of water by pollutants from ships, aircraft or naval devices, the insurance should allow verification of "cleanliness" of spills and discharges (second paragraph of Article 10 of Law No. 16.688, of December 22 of 1994, in the wording given by article 6 of Law N^o 19.012, of November 23, 2012).

2.4. In case of a legal requirement or regulation, when should an environmental insurance policy be obtained?

2.4.1. In which step of a venture should such policy be submitted under the law?

The warranty is necessary to obtain the authorisation, previous to start the business or industrial activity that could pollute the environment.

3. Operational methods for pollution insurance (answer is required)

3.1. Which are the pollution insurance's modalities that are offered in the market? Performance bonds or civil liability insurance?

Liability insurance, although very limited as will be said.

3.1.1. What kinds of risks should be covered thereunder?

Some contamination (for example, water) is covered but sudden and unexpected or accidental.

3.2. Does the law or administrative rule define upper limits for losses or coverage?

They do not determine.

3.2.1. Which are the criteria that should apply to limits' definition?

They are not provided.

3.3. Is there any difference in the legal treatment to state-owned and private ventures?

There is no law or market, but administrative resolutions that require insurance or guarantees as complementary measures to ensure compliance with environmental standards, are often imposed on projects and private companies and sometimes exclude projects and public companies (such as in the case of wind farms generating electricity).

3.4. Is there any difference in the legal treatment to fix and mobile facilities?

They are not planned.

3.5. Is there any difference in the legal treatment to underground works, mines or underground quarries?

They are not planned. However, in the case of the so-called "large-scale mining", a guarantee of compliance is foreseen, among other things, for the faithful fulfillment of the obligations derived from the environmental protection norms and the recomposition of the damages to the environment and other damages derived from strictly mining activities and related to them, which among other instruments, can be surety bond (Article 18 and 27 of Law No. 19.126, of September 11, 2013).

3.6. Do insurers use to insert pre-contractual provisions in the policy (pre-contractual disclosure)?

Yes, it is usually required to disclose all information that may be relevant to assess the risk to be insured

3.6.1. Which are the most usual ones?

The most common are those related to technical-preventive elements, in order to evaluate the eventual requirement of additional insurability requirements.

4. Coverage under pollution insurance (answer is required)

4.1. Which are the major covered risks relating to civil liability arising from pollution?

The main risks covered are specific damages to people and property. The damage to an element of the environment could be covered if it is a sudden, unforeseen or accidental damage.

4.2. Which are the major covered guarantees for events arising from pollution?

Idem answer point 4.1.

4.3. Which are the major covered operational risks arising from pollution?

Operating risks are usually not covered by the specific pollution policy. The company can have insurance against all operational risk due to the company's usual operations, which usually excludes the risk of environmental damage

4.4. Does the insurance cover fines?

Is not usual.

4.5. Is there coverage for individual moral damages, being understood as such any physical or psychological suffering experienced by the victim and/or injury against his/her honor or personality?

Is not usual to cover the moral damage.

4.6. Is there coverage for collective moral damages, being understood as such any moral injury undergone by a group of certain persons who are interconnected by a fundamental legal relationship or by a same event experienced by all of them, or any injury to non-determinable trans-individual rights?

It is not usual to cover the collective moral damage, but there is also no express recognition of the doctrine or jurisprudence of the possibility of their claim. While the drive is legitimized on the basis of diffuse interests, among which the law specifically includes "questions relating to the defense of the environment" (see answer 1.5.2), there is no agreement in the doctrine on the possibility that such legitimation also includes the collective moral damage and its compensation.

4.7. Is there coverage for punitive damages, being understood as such any penalty levied on the agent of the illicit conduct, in addition to the compensation of damages themselves?

Punitive damages are not usually covered in national insurance, but there is also no express recognition of the doctrine or jurisprudence of the possibility of their claim in relation to environmental damage or even common civil liability.

5. Beneficiaries (answer is required)

5.1. Who is entitled to be beneficiary of losses recoverable under pollution insurance? Any individuals, legal entities, state-owned or private institutions, collectivities?

Therefore, all those who could suffer specific damages to their person or property could be beneficiaries. In some cases, it has been foreseen that the State or the environmental agency will be beneficiaries. While the drive is legitimized on the basis of diffuse interests, among which the law specifically includes "questions relating to the defense of the environment" (see answer 1.5.2), there is no agreement in the doctrine on the

possibility of making beneficiaries to the people or entities legitimized to represent such interests

6. Market status (answer is required)

6.1. What is the percentage of participation of environmental insurance at the insurance market in its whole?

It is very poor. There are no official data because in the financial statements of the insurance companies published by the Central Bank of Uruguay, this type of insurance is included in civil liability insurance or in "Other"..

6.1.1 As regards the figures thereof, what is the yearly participation of premiums collected under environmental insurance?

There are no official data, for the above reasons.

6.2. Which are the sectors of economic activity that use to obtain environmental insurance?

Companies or large projects, in sectors such as pulp, energy, afforestation or mining.

6.3. During the last 5 (five) years, what is the sum of losses paid by virtue of environmental damages?

No major incidents have been recorded in the country in the last 5 years. There are no official data.

6.3.1. What percentage of the aforesaid losses was covered under insurance?

There are no official data, for the above reasons

7. Academic development (answer is required)

7.1 Are there research institutes focused on the study of environmental insurance? Please identify them.

Center for Environmental Law (CDA-Uruguay) of the Faculty of Law (University of the Republic), <https://www.fder.edu.uy/cda>
Environmental Law Commission of the Uruguayan Bar Association (CAU), which is

studying the issue of liability for environmental damage and insurance,
<http://www.colegiodeabogados.org>

7.2 Are there academic and scientific works produced in the fields of law, economy, environment or other similar area, that specialize in environmental insurance? Please indicate some reference legal manuscripts and books, and the main authors thereof.

At a national level, the works we know are:

"Civil Responsibility and Environmental Insurance", presentations by Osvaldo Contreras (Chile) and Marcelo Cousillas (Uruguay), in VI National Insurance Law Days, Montevideo, April 26 and 27, 2006, <http://www.aidauruguay.org.uy/>
"Environmental insurance as an instrument to protect the employer and environmental safeguard", presentation by Pery Saraiva Neto (Brazil), at the 11th Insurance Law Conference, Montevideo, April 12 and 13, 2012, <http://www.aidauruguay.org.uy/>

"Climate change and its importance in insurance", presentation by Hilda Zornosa (Colombia), at the 11th Insurance Law Conference, Montevideo, April 12 and 13, 2012, <http://www.aidauruguay.org.uy/>

"Environmental insurance (adequate coverage in the context of oil exploration and exploitation and mining)," presentation by María Silvia Morón (Argentina), at XIII Insurance Law Conference, Montevideo, April 24 and 25, 2014, <http://www.aidauruguay.org.uy/>

"Environmental risks in Uruguay current and future outlook", presentation by Marcelo Cousillas (Uruguay), in XV Conference on Insurance Law, Montevideo, May 12 and 13, 2016, <http://www.aidauruguay.org.uy/>

"Liability insurance ...", by Andrea Signorino, chapter on environmental civil liability, Ed. FCU, Montevideo, 2011.

"Civil liability insurance. Current issues ", by Andrea Signorino, chapter on environmental civil liability, Ed. Ibáñez, Colombia, 2017.

"Exploration and Exploitation of the Exclusive Economic Zone and the Continental Platform", VVAA, chapter on insurance related to exploitation and exploration of offshore hydrocarbons, by Andrea Signorino, Ed. La Ley, Montevideo, 2016.

(Answer Andrea Signorino and Marcelo J. Cousillas, for AIDA-Uruguay section)
