Unilateral Revisions of International Nuclear Supply Arrangements

Nuclear power requires a massive and capital intensive infrastructure. Consequently, countries or enterprises choosing this option and purchasing a reactor to produce such power normally also try to secure long-range commitments from the same manufacturers or from others, for the supply of the fuel that will be required during the expected life of the reactor (some twenty to forty years), as well as for reprocessing irradiated nuclear materials either by a foreign facility or by securing in due course a suitable national plant. Having made such arrangements, the recipient becomes highly dependent on their fulfillment, as any substantial default could either result in an expensive, inoperative reactor and in a power shortage, or may require the conclusion under pressure of alternative and possibly less satisfactory contracts.

Nuclear suppliers have not been unconscious of this feature of their business,[1] and have generally been willing, even eager, to enter into arrangements of the requisite scope and duration. Almost invariably these include certain undertakings and control measures ("safeguards") designed to ensure that the assistance rendered for peaceful purposes will not enhance the recipient's ability to produce nuclear weapons. However, in a world of rapid political and technological developments, safeguards once considered to be adequate may later disclose unexpected deficiencies. In particular, the explosion of a nuclear device by India in 1974 caused many supplying countries to have second thoughts about the soundness of their commitments, especially in the following respects: the failure of some agreements to specify (as the Non-Proliferation Treaty (NPT)[2] clearly does, but most early safeguards agreements do not) that even allegedly "peaceful" explosions must be proscribed as they effectively constitute a proliferation of nuclear weapons

[1] *See, e.g.* the "Statement of Policy" and "Statement of Purpose" in §§ 2(b) and 3(b) of the Nuclear Non-Proliferation Act of 1978 (Pub. L. No. 95-242, 92 Stat. 120, 22 U.S.C. § 3201 *et seq.*, reproduced in XVII/2 I.L.M. 397-413), referred to in the next paragraph.

[2] Treaty on the Non-Proliferation of Nuclear Weapons, General Assembly Resolution 2373(XXII), Annex (12 June 1968), 729 U.N.T.S. 161, 21 U.S.T. 483, T.I.A.S. 6839 [hereinafter sometimes the NPT].

capability; that no country expected to remain a non-nuclear power should have access to an unsafeguarded reprocessing plant; and that far more stringent controls must be imposed on weapon-grade fissionable materials (especially on plutonium or highly enriched uranium stored for eventual use in a reactor, but even on irradiated fuel elements containing extractable plutonium).

The recently enacted U.S. Nuclear Non-Proliferation Act of 1978 sets out a number of such undertakings and measures,[3] many of which are deliberately more stringent than those contained in the Atomic Energy Act of 1954.[4] It is clearly intended that these new provisions be made applicable to existing arrangements—if at all possible by agreement with the other countries concerned,[5] failing which further supplies under existing agreement may be cut off by a complicated series of decisions involving the Nuclear Regulatory Commission, the President and Congress.[6]

The question is therefore posed: whether, and in what circumstances, may suppliers require recipients to accept more stringent safeguards than originally agreed, as a condition for receiving nuclear supplies already validly contracted for. The answer which follows, though formulated primarily in terms of legal considerations rather than of political or diplomatic ones, is not meant to constitute a rigorous legal analysis (which in any event could only be performed individually in respect of any particular supply arrangement), but merely to suggest the legally more promising approaches.

Nuclear supply arrangements may be concluded between parties one or both of which are governments, public institutions or private corporations, and thus these arrangements may be characterized as treaties, as executive agreements, or as public or private contracts. Nevertheless, underlying even a purely commercial international contract in this field there is always some intergovernmental agreement, and in any event a decision to abrogate or require the revision of an existing arrangement on safeguards grounds would always be a governmental one. Consequently the analysis below is expressed in terms of treaty law.[7]

The basic principle of treaty (indeed of all contractual) law is *pacta sunt servanda*—i.e, that treaty obligations must be performed by the parties in

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[3]*Op. cit.* note 1, §§ 127 ("Criteria Governing United States Nuclear Exports") and 401(a) ("Cooperation with Other Nations").

[4]Pub. L. No. 83-703, 68 Stat. 919, 42 U.S.C. §§ 2011-2281 (1954).

[5]*Op. cit.* note 1, § 404(a) ("Renegotiation of Agreements for Cooperation").

[6]*Ibid.*, § 304(a) ("Export Licensing Procedures").

[7]For convenience, the principles of treaty law relied on herein are related to particular provisions of the 1969 Vienna Convention on the Law of Treaties (the "Treaty Convention"). Although not yet in force, this instrument largely sets forth pre-existing and generally accepted principles of international law.

good faith.[8] Although possibilities exist for revising or terminating such obligations, they are narrowly circumscribed.

Naturally, obligations derived from a treaty must be clearly expressed in it. Thus if the agreement in question does not actually specify an obligation to supply particular items,[9] but merely foresees continued cooperation in nuclear matters, then the supplier cannot be held to any particular deliveries and the failure to agree to any would not constitute a violation.

It is of course always possible to revise[10] or terminate[11] a bilateral treaty with the consent of the other party. Such consent may properly be secured in various ways, including the application of certain pressures, but it would be improper to secure it by fraud,[12] the corruption of an official representative,[13] the coercion of such a representative[14] or of the State itself by the threat or use of force.[15] The extent to which mere economic pressure may be used for such purpose[16] is a matter not clearly settled by international law,[17] but presumably the threat of unilaterally cancelling an otherwise valid agreement or of refusing to fulfill obligations thereunder could not be considered proper.

Should some action of the recipient breach the supply agreement, the supplier may thereupon be entitled to terminate or suspend it.[18] However, if there is any disagreement about whether the act alleged to constitute a breach has actually occurred (e.g., whether a certain proscribed activity actually took place, and whether it used nuclear items provided by the supplier) or, more likely, whether a particular act really constitutes a breach (e.g., whether a "peaceful nuclear explosion" violates a "nonmilitary use" undertaking), then the supplier must seek to settle this difference either through some procedure specified by the supply agreement, or some general procedure binding on both parties, or by other means indicated in Article 33 of the UN Charter.[19] Incidentally, if

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[8]Treaty Convention, Art. 26.

[9]*See* SENATE REPORT ON THE NUCLEAR NON-PROLIFERATION ACT OF 1978, S. REP. NO. 95-467, Section-by-Section Analysis, § 2, ¶ (2), p. 3.

[10]Treaty Convention, Art. 39. Indeed, this is the preferred procedure foreseen by § 404(a) of the 1978 Act (see *supra* note 5).

[11]Treaty Convention, Art. 54(b).

[12]*Cf.* Treaty Convention, Art. 49.

[13]*Cf.* Treaty Convention, Art. 50.

[14]*Cf.* Treaty Convention, Art. 51.

[15]*Cf.* Treaty Convention, Art. 52.

[16]*E.G.* The 1976 Symington Amendment to the Foreign Assistance Act of 1961 (Pub. L. No. 94-329, § 305; 22 U.S.C. § 2429) bars the granting of certain military and economic assistance to a non-nuclear weapon State that operates reprocessing facilities unless it places all its nuclear facilities under IAEA safeguards and agrees to utilize multilateral reprocessing facilities when available.

[17]The UN Conference on the Law of Treaties adopted, as part of its Final Act, a Declaration solemnly condemning "the threat or use of pressure in any form, whether military, political, or economic by any State to coerce another to perform any act relating to the conclusion of a treaty."

[18]Treaty Convention, Art. 60(1). This penalty is explicitly foreseen in § 307 ("Conduct Resulting in Termination of Nuclear Exports") of the 1978 Act. (*op. cit.* note 1), 42 U.S.C. § 2158(2)(A).

[19]Treaty Convention, Art. 65. In addition, Article 66(b) of the Convention establishes a com-

the supply agreement is one subject to safeguards by the International Atomic Energy Agency (IAEA), then the IAEA Board of Governors might (as discussed further below) be the proper authority to make a determination as to whether any safeguards obligation has been breached.

Whether or not in connection with an alleged breach, or the mere threat of one, the resulting dispute about the meaning of the supply agreement may disclose that from the beginning there was a fundamental misunderstanding between the parties as to some essential term (e.g., the definition of military use). Such a circumstance could be invoked by either State to invalidate the treaty (subject, if challenged, to a disputes procedure), unless its own behaviour or neglect contributed to the misunderstanding.[20]

It is possible that a country might claim an unforeseen fundamental change in circumstances as a ground for terminating the supply agreement—relying on the so-called *clausula rebus sic stantibus.*[21] But the supplier would have to establish that such a change had radically transformed the extent of its obligation still to be performed under the agreement—a burden it is unlikely to be able to bear in a disputes proceeding if all that can be alleged is a new insight into the necessity for stricter safeguards, or perhaps the pressure of other suppliers to close ranks in favor of tighter controls.

A still bolder assertion supporting the termination or modification of a nuclear supply arrangement would be that, in the form concluded (i.e., with allegedly inadequate safeguards) it conflicts with some peremptory norm of general international law "accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted"—i.e., a so-called *jus cogens.*[22] Unfortunately, under prevailing circumstances, a supplier would have difficulty in demonstrating that nonproliferation or the safeguards necessary to ensure it have become such a universally accepted peremptory norm. At best, the conclusion of and the substantial participation in the NPT might be pointed to, as well as resolutions (though generally not unanimous) of international organs, such as the General Assembly,[23] the IAEA General Conference and various regional bodies. Perhaps such a norm is emerging, but it would seem unlikely that the World Court[24] would hold that it has already done so.

A country's desire to revise a supply agreement may be motivated more strongly than by mere policy considerations or external pressures: it may have

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pulsory conciliation procedure to be used if the dispute cannot otherwise be settled—but this procedure would only become applicable once the Convention enters into force.

[20]Treaty Convention, Art. 48.

[21]Treaty Convention, Art. 62.

[22]Treaty Convention, Art. 53 or 64.

[23]*See infra* note 29.

[24]To which all claims for terminating an agreement for violating a *jus cogens* must be referred, pursuant to Art. 66(a) of the Treaty Convention.

entered into other international treaties whose requirements are inconsistent with the earlier bilateral arrangement. For example, a party to the NPT may only supply nuclear materials to a non-nuclear weapons State subject to IAEA safeguards;[25] also, although no binding agreement has as yet emerged from the London Suppliers' Meetings,[26] it is conceivable that the participants might someday formally decide to desist from certain supply practices. Of course, if the receiving country also becomes a party to the later treaty, then it will be deemed to have consented to any necessary revision of the supply agreement.[27] But if it is not, then it is not bound to take account of any subsequent obligations assumed by the supplier, as these would be, with respect to the recipient, *res inter alios acta.*[28]

In attempting to revise or terminate a supply agreement, a supplier may attempt to rely on resolutions adopted by major representative international organs, such as the UN General Assembly and the IAEA General Conference, condemning proliferation and calling for stricter safeguards. But while such organs are competent to make non-binding recommendations to members of the respective organization, with which states may be under at least a moral obligation to consider compliance, they may not do so if thereby the rights of other countries are affected—even though these too may be members of the organizations and addresses of the same recommendations. Only if numerous, unambiguous resolutions were to be adopted with overwhelming majorities (which would then include most recipients) and with sufficient solemnity, could it be alleged that they reflected an emerging *jus cogens.* So far, there appears to be no such strong, clear condemnation of proliferation or such demand for more safeguards.[29]

If a recipient that is subject to IAEA safeguards should be found by the Agency's Board of Governors to have failed to observe all of its undertakings in connection with such controls (e.g., by violating a "no military use" pledge, or by refusing to accept inspections as to all nuclear materials under control), then the Board may direct that all IAEA members curtail or suspend the assistance that they are rendering to the delinquent country.[30] Each supplier

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[25]NPT, Art. III.

[26]*See* the "Guideline for Nuclear Transfers" communicated by the individual members of the London Suppliers' Meeting to the IAEA, as the "principles" in accordance with which they will act "when considering the export of nuclear material, equipment or technology" (IAEA document INFCIRC/254, reproduced in XVII/1 I.L.M. 220-234 (1978)).

[27]Treaty Convention, Art. 30(3) and 59.

[28]Treaty Convention, Art. 44.

[29]For example, the most recent resolution on this subject adopted by the General Assembly (32/87 F of 12 December 1977, adopted by a vote of 111:2:16) "*solemnly affirms* the . . . principle [that] (a) States should not convert civil nuclear materials or facilities to the production of nuclear weapons," an exhortation rather too weak to support the proposition that unsafeguarded nuclear activities are unqualifiedly condemned.

[30]*See* IAEA Statute, Art. XII.C.

that is a member of the Agency would then be required to comply with the Board's decision, whether or not the violation occurred in relation to a supply arrangement to which it was a party, and would thus be freed of its obligations under such arrangements.[31]

Aside from the rather special situation described in the preceding paragraph (which requires the finding that the recipient has committed an actual safeguards violation), there is one legally unobjectionable procedure whereby countries might be relieved of any obligation to supply recipients unwilling to accept sufficiently effective safeguards: that is for the UN Security Council to determine, pursuant to Article 39 of the UN Charter, that certain nuclear activities (e.g., peaceful nuclear explosions by a non-nuclear weapons state or the ownership by such a state of a reprocessing plant, or its possession of large stocks of plutonium not in IAEA custody) constitute a "threat to the peace"—a finding that would not be at all unreasonable objectively. Having made such a finding, the Council can further decide, under Charter Article 41, on any appropriate economic measures to give effect to its determination—which naturally could take the form of an export ban on nuclear assistance to any offending recipient. Under Charter Article 25, all UN members are obliged to carry out the decisions of the Security Council, and under Article 103 the obligations under the Charter supersede both prior and later international obligations (e.g., such as might derive from a bilateral supply arrangement). Even if it were objected that some aspects of this question impinged on the domestic jurisdiction of the recipient countries, Charter Article 2(7) specifically exempts such enforcement measures from this limitation. It should be noted that a determination of the Security Council under Article 39, or a decision under Article 41, requires the affirmative vote of at least 9 of the 15 Council members, and also that no permanent member may vote negatively.[32]

The preservation of world order requires that solemn treaty obligations, once freely undertaken, be faithfully complied with, even if one of the parties subsequently considers that they should be modified for the best of motives. But, as compliance with certain obligations—such as those deriving from nuclear supply arrangements—might actually be inimical to such world order, the international community has established mechanisms whereby such obligations may, if absolutely necessary, be terminated or modified.

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[31]Termination of U.S. nuclear assistance under such a contingency is clearly required by § 307 ("Conduct Resulting in Termination of Nuclear Exports") of the 1978 Act (*op. cit.* note 1), 42 U.S.C. § 2158(1)(C).

[32]UN Charter, Art. 27(3). Although this provision appears to require that all permanent members (China, France, U.K., U.S.A., U.S.S.R.) cast affirmative votes, the practice has long been established, and recently accepted by the World Court (in *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion,* 1971 I.C.J. Reports 16, at 22, ¶ 21-22), that a "veto" is only exercised if such a member casts a negative vote, while a mere abstention or non-participation does not prevent the taking of a decision if 9 other affirmative votes can be found.