THE EFFECT OF SAFEGUARDS ON THE CONTRACTUAL RELATIONS OF NUCLEAR SUPPLIERS

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This paper outlines Canadian safeguarding and other requirements governing the export from Canada of nuclear equipment and material, the effect of these requirements on supply contracts, and some suggested ways in which the supplier can protect himself under his contract of supply.

Ce document est un sommaire des garanties de sécurité Canadiennes et des autres exigences qui gouvernent les exportations de l'équipement et du matériel nucléaires du Canada, des effets de ces exigences sur les contrats d'approvisionnement, ainsi que quelques méthodes par lesquelles le fournisseur peut se protéger sous son contrat d'approvisionnement.
The term "nuclear supplier" may well include anyone who contributes goods or services of any kind to the construction or operation of a nuclear installation. Similarly "safeguards" includes the whole system of control over the peaceful uses of atomic energy that is executed under the safeguard system of the International Atomic Energy Agency or by regional, bilateral, or trilateral governmental agreements. In this paper I propose to discuss one aspect of this subject and that is the effect of Canadian safeguard requirements on the Canadian exporter of nuclear equipment and uranium, and how he can best protect his interests under the contract of supply.

CANADA'S SAFEGUARD REQUIREMENTS

Canada is a major exporter of natural uranium, and with the development of the CANDU reactor is also an exporter of nuclear equipment, heavy water, and related technology. As an adherent to the Non-Proliferation Treaty, Canada has, of course, undertaken not to provide fissionable material or equipment designed for its use to any country unless such material is subject to IAEA safeguards.

Canada's safeguard requirements in respect of the sale abroad of Canadian nuclear technology facilities and material are set out in a statement made by the Minister of Energy, Mines and Resources in the Canadian House of Commons on 20 December, 1974. These requirements may be summarized as follows:

(a) The export of designated nuclear equipment, including reactors, fuel fabrication and reprocessing plants, and heavy water plants, and their major components and related technology, will require safeguards.

(b) The safeguard provisions to be administered by the IAEA, or through appropriate alternate procedures meeting the requirements of the Non-Proliferation Treaty, will cover:

   (i) all nuclear facilities and equipment supplied by Canada for the life of those facilities and equipment;

   (ii) all nuclear facilities and equipment using Canadian-supplied technology;

   (iii) all nuclear material - uranium, thorium, plutonium, heavy water, supplied by Canada, and future generations of fissile material produced from or with these materials;

   (iv) all nuclear material, whatever their origin, produced or processed in facilities supplied by Canada.

(c) All safeguard arrangements will contain binding assurance that Canadian-supplied nuclear material, equipment and technology will not be used to produce a nuclear explosive device, whether the development of such a device is stated to be for peaceful purposes or not.
for sale must be approved by the regulating agencies before an export licence for delivery is issued. The contract shall be limited to a maximum of ten years from the date of signing of the contract with contingent approval possible for an additional five years. The uranium must be exported in the most advanced form possible in Canada. Uranium will not be exported at a more favourable price than sold to domestic purchasers.

EFFECT OF SAFEGUARDS ON SUPPLIER'S CONTRACT

As is readily apparent, the Canadian supplier may be completely unable to perform his undertakings under a contract of supply in the event of:

(a) a failure on the part of his Government to execute satisfactory safeguard arrangements with the importing State;

(b) non-approval of the contract by the regulatory agency and consequent refusal to grant a licence to permit deliveries;

(c) a breach of safeguards while the contract is in effect.

PROTECTIVE MEASURES AVAILABLE TO SUPPLIER

I have no doubt that the nuclear supplier who has been in business for a quarter of a century has incorporated in his supply contract all conceivable protective clauses, and I take it for granted that the nuclear exporter like any other exporter is thoroughly familiar with his government's export laws and policies. I also know that an audience of such distinguished legal authorities would not welcome a treatise or expose of the doctrine of frustration in the law of contracts. I do, however, have two suggested provisions for inclusion in the supplier's contract.

First, the contract should contain force majeure provisions, having in mind the ancient familiar words to the lawyer trained in the common law of Paradine v. Jane (1647) Aleyn 26, 82 E.R. at page 27:

"but when the party by his own contract creates a duty or charge upon himself he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it in his contract."

Halsbury, 3rd ed., page 181, paragraph 314, reads as follows:

"Force majeure clauses: Many contracts specifically provide for performance to be excused if rendered impossible by such circumstances as Act of God or the Queen's enemies, force majeure, vis major, or unavoidable cause, and stipulations to that effect are enforceable provided they are not uncertain in their terms."

A sample force majeure clause in a contract for the export of uranium from Canada reads as follows:

"Neither party shall be responsible or liable for the payment of any damages to the other party or deemed in breach of this agreement for any failure or delay in the performance..."
party from any of its obligations but shall merely suspend the performance of the obligations involved during the period of the Force Majeure. The affected party shall within two weeks after the occurrence of the Force Majeure give written notice to the other party of the cause and likely duration of non-performance. It shall use all possible diligence to remedy the Force Majeure as quickly as possible; it is not required, however, to settle strikes, lockouts or other labour difficulty by the party involved, contrary to its wishes.

The term "Force Majeure" as employed hereinbefore shall mean an act of God, strike, lockout or other industrial disturbances, war, blockade, public riot, lightning, fire, storm, flood, governmental restraints imposed by statute or by decision of a competent tribunal or authority of any governmental agency, including prohibitions and restrictions which affect the export and import of uranium, inability to obtain licences, inavailability of equipment or any other cause (except inability to pay money) whether the kind specifically mentioned above or otherwise none of which are reasonably within the control of the party claiming the suspension and which cannot be prevented nor could not have been prevented by reasonable diligence on its part.

Secondly, the contract should contain specific provisions making it subject to the granting of the requisite licences or approvals of the control agencies of the exporting and importing countries, and any country through which the nuclear material may pass. The following is a provision from a contract involving the supply of uranium from Canada, toll enrichment in another country, and final delivery in the country of the purchaser:

"Notwithstanding anything contained in this Agreement deliveries under this Agreement shall be subject to the following provisions:

(a) to the granting by the Governments of Canada or any State or Authority having jurisdiction of the requisite approvals permits or consents; and

(b) to such safeguards provisions as shall be mutually acceptable to any of those Governments and to the parties hereto and in particular to the provisions of the Tripartite Agreement between the International Atomic Energy Agency, the Government of Canada and the Government of ------- for the application of Agency Safeguards relating to the Bilateral Agreement between those Governments for co-operation in the Peaceful Uses of Atomic Energy, signed and in force ------- June -------."

CONCLUSION

In the field of civil liability for nuclear damage we have seen some of the ingenious methods found by the nuclear supplier to protect himself from possible recourse by the operator of a nuclear installation for on site damage. As I indicated earlier, I am confident that most supply contracts already contain the kind of protective clauses I have suggested here. In any event, I am grateful to the International Nuclear Law Association for provid-