

## Converting existing reprocessing contracts to dry storage – a way out for BNFL

BNFL often claims that reprocessing must continue because contracts between them and their customers (the nuclear utilities) are legally binding. In addition, because large quantities of spent nuclear fuel have already been sent to Sellafield, and money has been paid up-front for this spent fuel to be reprocessed, it is sometimes argued that reprocessing this fuel is a commitment that cannot be broken.

It is true that if either an individual customer or a reprocessing company *unilaterally* broke a contract, there would be financial penalties to pay by whichever company broke the contract. In general these penalties are higher for older contracts and lower for newer ones (for example, the German post-2004 contracts with BNFL have much lower financial penalties attached if they are broken than the earlier ones do).

In addition to these financial penalties, proposals to break contracts have generally been followed by threats from BNFL, backed by the UK Government, to immediately return spent nuclear fuel or other nuclear wastes stored at Sellafield to the country of origin. These threats are irresponsible and wrong, particularly when facilities to store these wastes have not yet been constructed in the customer country. BNFL has also changed its reprocessing schedule when business from a particular country is under threat, to ensure the threatened contract is completed before a decision is taken to stop it. This happened with Swedish spent fuel in 1997 and again with Japanese spent fuel in 1999/2000.

However, apart from breaking contracts, there are two ways that contracts can be *changed by agreement*, in order to avoid both financial penalties and threats of immediate return of wastes. This would involve either

- re-negotiation of the contracts – ie agreement between BNFL and their customers
- agreement between governments, for example by a Decision under the OSPAR Convention
- or a combination of these two types of agreement.

The potential for such agreements means reprocessing of spent fuel under existing contracts can be stopped. Any such agreements would require the interim storage of spent fuel already delivered to Sellafield at that site, whilst dry stores are constructed in the country-of-origin, together with an immediate end to further imports of spent fuel to France and the UK.

### Contract re-negotiation

Contracts are routinely re-negotiated in all businesses. BNFL's biggest customer, British Energy, is currently seeking to convert all its

reprocessing contracts with BNFL to storage contracts<sup>1</sup>. It expects to save around £2.6 billion pounds by doing so. Michael Kirwan, British Energy's finance director, has said: "*As far as we are concerned, reprocessing is economic nonsense and should stop straight away.*"

Economists have estimated that ending reprocessing of German contracts with BNFL could save between £440 million and £526 million<sup>2</sup> compared to continuing reprocessing. These figures take into account the fact that money has already been paid for delivery of spent fuel to Sellafield, and already spent on building THORP. The savings would be apportioned between BNFL and its German customers during the contract re-negotiations. BNFL would retain business such as interim storage and packaging of spent fuel already delivered to Sellafield, and potentially gain work building stores for existing contracted fuel in Germany.

The duration and terms for interim storage for spent fuel already at Sellafield, whilst stores are constructed for it in Germany, would be also be a matter for negotiation. Such interim storage is unlikely to require a change in government policy, provided the existing time period for the return of reprocessing wastes (generally 25 years) is not exceeded. Because reprocessing increases the volumes of nuclear waste, far fewer nuclear transports back to customer countries would ultimately be required under this scenario than if reprocessing continues. Cost savings from conversion of Japanese contracts with BNFL are estimated at £209 to £571 million<sup>3</sup>. Financial figures for other BNFL customers, but the same principles apply.

Re-negotiation allows a win-win strategy for ending existing reprocessing contracts. This is because, as well as ending the environmental and nuclear proliferation detriments associated with reprocessing, money could be saved compared to the costs of continuing reprocessing, and some alternative jobs (in storage, waste conditioning and decommissioning) could be created at reprocessing sites. BNFL are reluctant to renegotiate the terms of their contracts under any circumstances. This is why an inter-governmental agreement to end reprocessing is necessary to make conversion of the contracts easier, and to stop continued reprocessing whilst the contracts are re-negotiated.

### **Inter-governmental agreement to end reprocessing**

Contracts between the reprocessing companies and their customers are commercially confidential<sup>4</sup>. However, they are known to contain "*force*

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<sup>1</sup> The Independent, "British Energy asks for £2.6bn discount on BNFL contract", Thursday 11 May, 2000.

<sup>2</sup> Sadnicki, M, Barker, F, MacKerron, G, "THORP: The Case for Contract Renegotiation", A report for Friends of the Earth, June 1999.

<sup>3</sup> *ibid*

<sup>4</sup> Whilst details of the contracts are commercially confidential, some aspects of the contracts were required to be made public during the 1977 Windscale Inquiry into THORP's construction in the UK. There is no reason why more details of the "*force majeure*" clauses

*majeure*" clauses<sup>5</sup>, which allow reprocessing to be stopped in the event of unexpected events (such as wars, fires or industrial action) or "*restraint of government or any other authority having jurisdiction in respect of the performance of any obligation [under the contract]*".

This means reprocessing can be stopped for regulatory reasons (for example if operation of the plant is declared unsafe or in breach of discharge authorisations), or if the governments in either the reprocessing country or the customer country make reprocessing illegal, or if they both make an international agreement to stop. In this case, provisions in the contracts already agreed in the event of cessation of reprocessing could be implemented (for example a five-year period before return of unprocessed fuel<sup>6</sup>), or, if the decision was made by international agreement, new terms could be negotiated to the mutual benefit of both parties.

Reprocessing contracts are supported by intergovernmental agreements not to prevent the return of waste after reprocessing<sup>7</sup>. In many cases these agreements also state that the customer government does not "*intend to take any legislative initiative which would prevent the due execution of the [reprocessing] contract*". However, these agreements have the status of administrative agreements, and are simple declarations of intent. Legal sanctions against an individual government that introduced a law to withdraw from reprocessing would be ruled out, because the change of circumstance would mean that government was no longer bound by the agreement<sup>8</sup>. If the decision to stop reprocessing is made by international agreement, rather than by an individual country, prevention of execution of the contracts is likely to be more straightforward, since a new *international* agreement could obviously over-rule the old ones.

## Conclusions

The Danish proposal to the 2000 meeting of the OSPAR Commission in Copenhagen, 26-30 June, "Draft OSPAR Decision 2000/XX on Substantial Reductions and Elimination of Discharges, Emissions and Losses of Radioactive Substances, with Special Emphasis on Nuclear Reprocessing" can readily be implemented, even though its adoption would prevent the execution of existing reprocessing contracts.

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could not be made publicly available, so that the contractual implications of not reprocessing contracted spent fuel are made more transparent.

<sup>5</sup> Service agreement for the reprocessing of irradiated fuel and related services between British Nuclear Fuels PLC and "the Company", 18 January 1990, para 10.1.

<sup>6</sup> *Ibid.*, para 10.4.

<sup>7</sup> BNFL, Intergovernmental letters for THORP, House of Commons Deposited Paper No. 98/ISSS, 17/12/98.

<sup>8</sup> Abridged legal opinion on the question of possible consequences under international law of a legal withdrawal from the reprocessing of radioactive fuel elements, drawn up by Dr. Ulrich Wollenteit, Attorney, on behalf of Greenpeace Deutschland e.V., 8 January 1999.

The proposal encourages the re-negotiation of existing contracts, which can be expected to be financially beneficial to all parties. The proposal also seeks an international agreement which would ultimately make execution of the contracts unlawful in reprocessing countries, by means of new discharge authorisations from existing reprocessing facilities. This agreement would act as a "*force majeure*" even if existing contracts were not re-negotiated.

In addition, the proposed immediate suspension of reprocessing of spent fuel creates a climate in which re-negotiation of the contracts, and re-authorisation of the plants to eliminate reprocessing discharges, can more readily take place, at the same time as preventing unnecessary discharges and other adverse consequences of continuing reprocessing (such as a build-up of plutonium and other radioactive wastes).