

INTERNATIONAL LEGAL REGULATION OF EXPORT OF RUSSIAN URANIUM PRODUCTS TO THE USA

K. S. Ilyashchev,
post-graduate student,
All-Russian Academy of Foreign Trade

The foreign trade activity of states is initially regulated by norms of the internal law. At this, in the conditions of strengthening and deepening of the tendency of globalization and internationalization of international relations, the role of international legal regulation of the international economic relations increasingly gains in significance. The atomic energy sphere is no exception. It is regulated both on bilateral, and multilateral levels. This article sets forth the description of two key international treaties regulating deliveries of Russian uranium to the US territory.

It is a question of the historical Agreement between the Government of the Russian Federation and the Government of the USA «On highly enriched uranium» dated February 18, 1993 (HEU-LEU Agreement) and Agreement suspending the antidumping investigation on uranium from the Russian Federation dated October 16, 1992 (ASAI Agreement).

The intergovernmental HEU-LEU agreement was concluded during a very difficult time for Russia from the point of view of the political tension, namely: in the conditions of a deep economic crisis and uncertainty of the internal and foreign policy conjuncture.

The HEU-LEU agreement deals with the delivery of low enriched uranium (LEU), downblended from Russian military highly enriched uranium (HEU) (i.e. actually from nuclear warheads) from the territory of Russia to the United States of America. Thus, military uranium as a result of its conversion becomes peaceful uranium used as fuel at atomic power stations.¹

Deliveries from Russia to the USA, under the HEU-LEU Agreement, of low enriched uranium (LEU) downblended from highly enriched uranium (HEU) extracted from nuclear weapons, is a major element of the world nuclear market. According to experts estimates, realization of the HEU-LEU Agreement raises the share of Russia in the

¹ *Matthew Bunn and John P. Holdren*. Managing Military Uranium and Plutonium in the United States and the Former Soviet Union. Energy Environ 1997. P. 472.

world market of services in uranium enrichment from 19,6% to 33,0%, making it the world's largest player on the nuclear market. However there are a number of factors, first of all, antidumping measures in the USA which make the above figures ambiguous. Despite considerable Russia's currency inputs generated by the export of LEU downblended from HEU, there is a number of serious factors destabilizing the performance of this agreement, many of which have originally resulted from the antidumping investigation carried out in the USA on Russian uranium.

Key parameters of the HEU-LEU Agreement and of the related implementing contract are as follows:

A) *the term of the HEU-LEU Agreement: 1995-2013*

B) *the Parties:*

1. The Russian Federation. The executive organ is the Ministry of the Russian Federation of atomic energy, the executive agent (exporter) is OAO Tekhsnabekspport.

2. The USA. The executive agent of the US Government is the U.S. Enrichment Corporation (USEC). At the moment of signing the Agreement the US Department of Energy was the Executive agent. This Executive agent has been changed in connection with the detachment of the USEC corporation from the US Department of energy.

B) *Volumes of deliveries:* For the entire term of the practical realization (1995-2013), about 15, 3 thousand tons of low enriched uranium downblended from 500 tons of highly enriched uranium, extracted from approximately 20 thousand nuclear warheads had to be delivered to the USA. In terms of energy equivalent that volume of uranium is comparable with 3 billion tons of coal, or 10 billion barrels of oil, and makes 3 billion kW/h which is enough to meet the requirements in electric power of the entire USA within 2 years.

C) *Cost of export:* Cumulative cost of the low enriched uranium exported from Russia makes about 12 billion US dollars (this amount varies depending on market and contract prices).

D) *Currency gain received by Russia (by December 1, 2000):*

From the moment of the first delivery of LEU-HEU in May 1995 till September 2000, the currency gain by Russia has made 2,3 billion US dollars, which accounted in 2000 for 20% of non-tax input into the Federal budget of the Russian Federation.

E) *LEU-HEU share in the cumulative consumption of uranium products:*

The annual LEU-HEU deliveries (since 1998) comprise 5, 5 million SWU (separative work units) that makes: 48% of the US market

requirements and 15% of the world market requirements in uranium enrichment.

It is necessary to note separately the set of agreements on the interdepartmental level which according to the international legal terminology also represent international treaties.

A brilliant illustration thereof is the above mentioned Agreement suspending the antidumping investigation on uranium from the Russian Federation concluded between the Ministry of atomic energy of Russia and the US Commerce department (ASAI Agreement). In November 1991, an antidumping investigation in relation to Russian uranium products was initiated in the USA following a sharp increase in the offer of uranium from the Soviet Union (subsequently — from Russia) and on the basis of the petition submitted by an interested group of American manufacturers. On May 29, 1992 the Import administration of the US Commerce department (the US Ministry of trade) established a preliminary duty at the rate of 115,82% on all uranium products delivered from the Russian Federation. Alternatively to a definitive establishment of the above antidumping duty the Russian Federation was compelled to go for a voluntary restriction of uranium products export. As a result, on October 16, 1992, the ASAI Agreement between the RF Ministry of atomic energy and the US Commerce department was concluded according to which the Russian side at first had been forced to assume rigid restrictions on delivery of uranium products, and then it practically completely lost a possibility to carry out uranium deliveries to the US market.

In the literature the above mentioned agreements are often called as “voluntary export restrictions”. However the term «vertical agreement» cannot be applied to the ASAI Agreement since the contracting parties thereof are departments of two sovereign states. Thus, theoretically, if the ASAI Agreement would be concluded between the US Commerce department and the commercial organization supplying uranium products (OAO «Tekhsnabeksport») then it would be a «vertical» or «diagonal» agreement.²

The ASAI Agreement was concluded on the basis of the statute (legislative) mandate, providing to the US government freedom of actions in the case of suspension of investigations, co-coordinating conditions of access on the market for non-market economy countries on the basis of granting quotas (possibility of deliveries of strictly stipulated

² The term «diagonal agreement» is used, in particular, in works of candidate of juridical sciences A.M. Saenko, expert in the international investment law.

amounts). Market economy countries are not provided such a right under similar agreements. It is necessary to notice, that at the moment of conclusion of the ASAI Agreement, the Russian Federation for the purpose of commerce legislation was not a market economy country. However in 2002 the US competent organ (US Commerce department) officially recognized Russia as a market economy country for the purpose of commerce legislation applied by the Commerce department. According to the US commerce legislation the given change has had the following impact on the further investigations:

1. *A different dumping methodology in case of dumping investigations.* The most notable effect following the granting of a market economy country status is that any calculation of dumping rates for Russian imports is based on expenses and the prices, used by Russia, and not by any «surrogate» country. Nevertheless, the Commerce department in its decision has afforded itself a considerable freedom of actions, not taking into consideration the prices operating in Russia if these prices do not influence market realities or among other things, do not cover expenses of the manufacturer.

2. *Less flexible rules for the ASAI Agreement.* According to the US legislation the Commerce department has a wide freedom of actions at the conclusion of agreements on suspending agreements with non-market economy countries on the basis of quotas providing a possibility to carry out import deliveries at less fair prices as the agreement prevents the using of lower domestic prices. The Commerce department has chosen a liberal application of the above specified law in relation to the ASAI Agreement which ensures import of a large volume of Russian military uranium.

It is necessary to notice, that statute positions on suspending agreements for market economy countries do not allow the Commerce department to agree on the specified conditions on the basis of quotas. Thus, in the future the Commerce department will not be able to freely conclude agreements on the conditions specified in any new suspension agreement, negotiated with the Russian side after changing of Russia' status. (However, nevertheless, the current suspension agreements remain in force and, it appears, that the Commerce department can continue supplementing those agreements according to legal provisions regulating the non-marker economy status).

A more detailed characteristic of the ASAI Agreement is set forth below.

The subject of the Agreement — suspension of the antidumping investigation in exchange for the acceptance by the Russia's Ministry

of atomic energy of obligations concerning a voluntary restriction of deliveries of uranium products on the US territory.

The object of the Agreement — public relations connected with international deliveries of uranium products on the US territory from the Russian Federation.

The parties to the Agreement — the Ministry of atomic energy of the Russian Federation and the US Commerce department. It is necessary to notice, that the ASAI Agreement directly applies also to Russian commercial companies (and their affiliated persons), carrying out export of uranium products, in particular, OAO «Tekhsnabeksport».

The term. Formally the ASAI Agreement is operative till March 31, 2004.³ However under the private agreement between the Russian and American sides, the term of the ASAI Agreement is prolonged for an uncertain time. Thus it is necessary to notice, that the Russian side had grounds not to make concessions to the US Commerce department and to demand a transforming of the ASAI Agreement into a «market format», that is to replace quotas with price limits. Thereby, it is possible to ascertain the presence of a formally-uncertain and inconsistent status of the ASAI Agreement.

It is necessary to note, that since 2003, taking into account the signed annexes, the ASAI Agreement does not allow the export of uranium products to the USA (except for deliveries under implementing contracts related to the HEU-LEU Agreement).

Thus, now the main problem of application of antidumping measures in the USA against the Russian side consists in the fact that, since 2003, the ASAI Agreement has not provided a possibility to export to the USA of Russian commercial uranium, intended for ultimate consumption in the USA, due to the expiration of all previously accorded quotas and «approved» contracts.

Currently, the commerce treatment created by the ASAI Agreement is characterized by following basic factors:

- A possibility of duty-free deliveries of the material under the HEU-LEU Agreement is fixed in the ASAI Agreement; thus, a major disarmament initiative has appeared to be a hostage of the discriminative trade agreement.

- the ASAI Agreement, within the limits of the established quotas, provides the realization of duty-free deliveries of the material on the US territory with its subsequent re-export (including in the form of processed products of the delivered material). Thus, the Russian storage of

³ See Preamble of the Annex to ASAI Agreement № 59 FR 15373 of April 1, 1994.

enriched uranium initially created in the USA for ensuring deliveries under grandfathered contracts (i.e. contracts concluded prior to the signing of the ASAI Agreement) is qualified by the US Commerce department as being under a re-export treatment, that, naturally, reduces the size of total re-export quotas. The unilateral withdrawal of the Russian side from the ASAI Agreement is fraught today with blocking of re-export deliveries which are extremely important for execution of foreign trade contracts in the Japanese and Mexican markets.

- Swap operations (transactions of purchase/sale of uranium through a special system of material accounts) with the material and indirect export are forbidden. It complicates a possibility of realization of any operations with the natural uranium received in the territory of the North America. So, the material, which a Russian exporter of enriched uranium («EUP») is to receive from Asian customers on account of a partial payment for EUP delivered to them, cannot be returned to Russia owing to the absence of a «Cooperation agreement in the sphere of peaceful uses of atomic energy» between Russia and USA, and its realization on the American market can be treated as an infringement of ASAI Agreement terms. As a result goods made on commission from not-American customers of enriched uranium appear to be blocked on the US territory: there is no possibility either to sell them in the USA, or to return to Russia.

The basic recent developments related to the ASAI Agreement are as follows:

1. The conclusion of another additional agreement to the ASAI Agreement according to which the Ministry of atomic energy has agreed with the Commerce department that the Russian uranium processed in any third country, is considered a uranium of the Russian origin and, accordingly, falling under antidumping restrictions.⁴

2. «Sunset review» — (a special administrative procedure carried out under the US laws⁵ every 5 years with a view to revise the outcome of an antidumping investigation).

The second «Sunset review»⁶ of the implementation of the ASAI Agreement began in summer 2005; the following organizations took part in that review:

⁴ Additional agreement to ASAI Agreement CIIAP № 61 FR 56665 of November 4, 1996.

⁵ Section 751 (C) of Tariff Act of 1930 as amended

⁶ Department of Commerce. International Trade Administration. A-821-802. Final Results of Five-Year Sunset Review of Suspended Antidumping Duty Investigation on Uranium from the Russian Federation.

From the US Commerce department:

- USEC — national manufacturer of services in enrichment of uranium and US executive agent under the HEU-LEU Agreement;
- Power Resources Inc., Crow Butte Resources — companies supervised by the Canadian company Cameco;
- «Trade union» of American manufacturers.

From the US International trade commission: the participants mentioned above plus RWE Nukem and the ad hoc committee of American power companies.

USEC, the companies supervised by Cameco and the trade union spoke in favor of preservation of antidumping restrictions; RWE Nukem and the power companies spoke in favor of their cancellation.

The Russian side decided not to participate in that process because of high cost and low probability of a positive result. On January 17, 2006, as a result of the above sunset review, the Commerce department in absentia ruled out that the termination of the ASAI Agreement would most probably result in the continuation or recurrence of dumping.⁷

Correlation of international treaties regulating the application of antidumping measures concerning Russian uranium products

As it has already been underlined, the basic international treaties regulating deliveries of Russian uranium in the USA are the ASAI Agreement and the HEU-LEU Agreement which have appeared to be closely connected with each other. The HEU-LEU Agreement was concluded 4 months after the signing of the ASAI Agreement.

Let us remind, that since 2003 according to provisions of the ASAI Agreement the Russian party has completely lost the possibility to carry out commercial deliveries of uranium products to the US market (except for deliveries under implementing contracts related to the HEU-LEU Agreement).

According to the provisions expressly stipulated by the ASAI Agreement, trade restrictions do not apply to deliveries carried out under the HEU-LEU Agreement. It means that in case of the unilateral withdrawal of the Russian party from the ASAI Agreement trade restrictions will apply to the deliveries of uranium under the HEU-LEU Agreement. Thus, a legal trap successfully lobbied by the US Commerce department is available. It should be underlined, that the idea of the announcement by the Ministry of atomic energy of Russia of the

⁷ Department of Commerce. International Trade Administration. A-821-802. Final Results of Five-Year Sunset Review of Suspended Antidumping Duty Investigation on Uranium from the Russian Federation.

unilateral termination of the ASAI Agreement⁸ looks rather perspective. In that case the ASAI Agreement becomes invalid 60 days after the moment of forwarding of such a notice to the Commerce department. Legal consequences of the ASAI Agreement termination will be as follows: the Commerce department resumes the antidumping investigation. Any deliveries of uranium from the Russian Federation will be subject to antidumping restrictions, namely: an antidumping duty at the rate of 116 % on Russian uranium products will be established that will make such deliveries inexpedient. And the most important thing is that antidumping measures will apply also to deliveries carried out under the HEU-LEU Agreement that will cause destabilization of the Russian-American trade relations and will seriously affect the reputation of Russia as a reliable supplier of uranium and economic partner. It is a question of impossibility of execution of the foreign trade contracts under the HEU-LEU Agreement as with the resuming of the antidumping investigation deliveries under the HEU-LEU Agreement will become economically inexpedient and actually impracticable. At this the above mentioned interrelation between the ASAI Agreement and the HEU-LEU Agreement has another interesting legal nuance. The matter is that the US President within his powers in the sphere of ensuring national security can issue an Order (decree), which might be conditionally called Order «On termination of application of the antidumping investigation to deliveries to the US territory of Russian highly enriched uranium extracted from nuclear weapons». The issuance of such an order would allow overcoming the legal trap ASAI-HEU-LEU. However one cannot ignore the fact of strong lobbyist possibilities of representatives of the American nuclear industry in the person of the American company USEC which, certainly, will be able to block the signing by the American President of such an order. Moreover, such an order can be appealed against in the US Supreme court. It should be noted, that the adoption by the US Congress of a special bill would be a more reliable solution. And, finally, the third possible variant of releasing the HEU-LEU Agreement from under the antidumping investigation (which is the most difficult for lobbying) is a special US statute (Act). It can conditionally carry the name “Act on ensuring uninterrupted deliveries”.

It should be separately underlined, that the Russian Federation possesses rather powerful political levers of pressure upon the US Administration which is extremely interested in ensuring the national

⁸ A possibility of the unilateral termination of the ASAI Agreement is provided in art. XII of that Agreement.

power security through the realization of the HEU-LEU Agreement. According to experts, essentially the United States is more interested in uninterrupted deliveries of uranium under the HEU-LEU Agreement. Therefore, prior to a possible cancellation of the ASAI Agreement, Russia could carry out informal negotiations with the US Commerce department and other competent bodies about a possible legal protection of the HEU-LEU Agreement, for example, by means of the issuance of the above mentioned Order of the US President on releasing the HEU-LEU Agreement from under antidumping restrictions. Such an Order could refer to the US national security since deliveries under the HEU-LEU Agreement account for about 50% of nuclear fuel consumed by American atomic power stations.

Positions of Russia and USA under bilateral international treaties regulating deliveries of uranium products

The Russian Federation has consistently supported the termination of the antidumping investigation and, accordingly, the termination of the ASAI Agreement, or at least the inclusion into that Agreement of additions which would allow Russian exporters to carry out commercial uranium deliveries in the coordinated volumes.

In turn, the United States has adhered to an opposite position and insisted on the preservation of antidumping restrictions provided under the ASAI Agreement in full. As it has already been noted, the American party is extremely interested in uninterrupted deliveries under the implementing contracts related to the HEU-LEU Agreement; accordingly, USA aspires to avoid even a slightest destabilization of the HEU-LEU Agreement. Hence, the terms of the current version of the ASAI Agreement cannot but satisfy the US Commerce department.

It should be mentioned, that in course of fulfillment of the ASAI Agreement between the Ministry of atomic energy of Russia and the US Commerce department there have been different interpretations of separate provisions of the Agreements. In particular, the contracting parties had different views as to the term of the ASAI Agreement. Thus, according to the Annex to the ASAI Agreement № 59 FR 15373 of April 1, 1994, the term of the ASAI Agreement was to expire on March 31, 2004. The Russian party insisted on its actual and legal termination with all ensuing legal consequences, namely: termination of the antidumping investigation by the American competent bodies and granting to the Russian atomic companies of a free and not discriminatory access on the American market. In turn, the US Commerce department has favored an automatic prolongation of the ASAI Agreement without making any amendments to the international treaty. In

virtue of the rigid counteraction from the part of the US Commerce department, the sides could not be able to make amendments to the treaty according to which the ASAI Agreement would lose its force. Therefore the sides have informally come by default to a verbal arrangement on the extension of the ASAI Agreement for an uncertain term.

In summary, it seems valid to draw the following conclusions:

1. The ASAI Agreement is one of the key international legal sources of ensuring deliveries of Russian uranium on the US market, unlike the HEU-LEU Agreement; by its legal nature it is a horizontal agreement concluded on the interdepartmental level.

2. The most reliable tool of releasing the HEU-LEU Agreement from under the antidumping investigation is the adoption by competent authorities of a special US statute (Act) — «Act on insuring of uninterrupted deliveries under the HEU-LEU Agreement».

3. In case of the unilateral withdrawal of the Russian party from the ASAI Agreement the execution of foreign trade contracts related to the HEU-LEU Agreement would be put in danger that would not correspond to interests of either the American, or Russian parties.

4. The term of the second additional agreement to the ASAI Agreement according to which Russian uranium processed in any third country, is considered uranium of the Russian origin and falls under antidumping restrictions, contradicts the principles of international trade and fundamental norms of the international customs law according to which, the re-exported goods, subjected to an essential processing in the given country are considered to be made in this given country.