

NUCLEAR MATERIALS OWNERSHIP IN THE RUSSIAN FEDERATION

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Babich Sergey A.

Postgraduate Student of the Department of Energy Law
of the Kutafin Moscow State Law University (MSAL)

■ Lab.kenergy@msal.ru

In response to the challenges of the epoch, “nuclear” laws currently regulate safety issues related to handling of nuclear materials, nuclear facilities operation, related transactions, nuclear waste processing and disposal, state control over the nuclear energy use, and international cooperation in the nuclear sphere. One of the most important institutions of the “nuclear” regulation system in Russian law is the institution of ownership of nuclear materials, understood by the modern legislator as materials containing, or capable of reproducing, fissile (fissionable) nuclear substances. Consolidating the rules of nuclear materials ownership, the legislator further formulates requirements for nuclear materials control and accounting, transactions procedure, and safe operation of nuclear facilities, as well as introduces liability for violation of such requirements. Today, many aspects related to the legal status of nuclear materials owners and the notion of handling nuclear materials deserve a deep legal analysis, since the current legal regulation has gaps and contradictions. The legal writing method used to word such norms, structures, and basic notions must meet the criteria of clarity, unambiguous interpretation, and absence of regulatory gaps, that is why the system of legal regulation of the institution of nuclear materials ownership needs further improvement.

Keywords: energy law, legal regulation in the field of nuclear energy use, ownership of nuclear materials.

Despite its rather short history, the legislation in the field of nuclear energy use has developed from a set of isolated technical norms in unclearly structured acts of Soviet state authorities of the 1960s to 1980s, to, albeit not codified, but a rather harmonious system of legal regulation of public relations. Such evolution was driven by the rapid development of nuclear power industry itself: having emerged as a “by-product” of the military

program, the “peaceful atom” has become by now an integral element of the energy balance of both Russia and the most developed countries of the world [1]. In response to the challenges of the epoch, “nuclear” laws currently regulate safety issues related to nuclear materials handling, nuclear facilities operation, related transactions procedure, nuclear waste processing and disposal, state control over the nuclear energy use, and international cooperation in the nuclear

sphere, and, according to V.V. Romanova, enjoys “the most extensive and detailed regulation as compared to other branches of the energy sector”. [2]

Many issues of nuclear law are the subject of legal research. [3] V.V. Romanova, exploring the current state and development trends of legal regulation in the field of nuclear energy use at the national and international levels, notes that despite the fact that nuclear law is one of the most established institutions of energy law, many aspects of legal regulation in the field of nuclear energy used at the national and international levels need legal research, including the legal regimes for facilities using nuclear energy, the legal status of nuclear industry companies, and contractual regulation. [4]

One of the most important institutions of the nuclear regulation system in Russian law is the institution of ownership of nuclear materials, understood by the modern legislator as materials containing, or capable of reproducing, fissile (fissionable) nuclear substances. Legislated in Federal Law No. 170-Φ3 *On the use of nuclear energy* dated November 21, 1995, this institution has also evolved, from the state monopoly to lawfully own nuclear materials to the fundamental recognition of private property rights.

According to S.V. Matiyaschuk, at the institution’s initial development stage, state ownership of nuclear materials “served as a credible guarantee of the state’s fulfillment of its obligation to ensure nuclear and radiation safety and to respect and protect the rights of citizens to a favorable environment” [5]. Nuclear materials could be transferred to legal entities only for use and only subject to a license to operate in the field of nuclear energy use.

However, the development of economic relations in the field of energy, not only within the country, but also at the international level, required a fundamentally new approach to regulating the relations concerned: without abandoning the paradigm of the exclusive state ownership of nuclear materials, further development of nuclear energy would be simply impossible, especially in the context of the growing international competition in Western markets and nuclear technology race.

And such step towards a new approach was taken: Federal Law No. 13-Φ3 *On the peculiarities of managing and disposing of property and shares of organizations operating in the field of atomic energy use and on amending certain legislative acts of the Russian Federation* adopted on February 5, 2007, amended Article 5 of Federal Law *On the use of nuclear energy* to stipulate that nuclear materials could be in federal ownership (in the ownership of the Russian Federation), and in the ownership of foreign states and Russian and foreign legal entities.

A range of prerequisites necessitated these changes, particularly:

The need to eliminate the actual contradiction between the established practice of moving nuclear products through the production process stages, which takes place in the form of non-gratuitous transactions between the enterprises involved in the production chain, with the provisions of Article 5 of Federal Law *On the Use of Nuclear Energy* on the exclusive state ownership of nuclear materials and that nuclear materials may be provided to such enterprises only for use;

Low investment appeal of the Russian nuclear industry, since it was impossible to set up international uranium enrichment centers in Russia (such centers set up as joint ventures involving foreign participants were not permitted to own nuclear materials), with the Russian Federation “automatically” acquiring the ownership of nuclear materials imported in its territory as tolling raw materials;

The lack of development prospects for the nuclear industry’s mineral resource base, since domestic investors are not interested in exploring uranium reserves and producing uranium in Russia, if it is impossible to obtain ownership of the natural uranium they mine. [6]

The domestic regulatory system’s non-recognition of the right of private ownership to nuclear materials testified to that it was falling behind the needs of the nuclear materials market participants in the constantly changing nuclear industry. These facts, undoubtedly, are worth analyzing as the drivers of a transition to a completely new level of regulation of this sphere of public relations. However, one should not consider the old approach absolutely inefficient:

foreign countries' experience supports the opposite opinion as well, asserting the possibility of a successful development of nuclear materials market (and the nuclear industry as a whole) where the nuclear materials ownership is vested in public entities.

This can be illustrated by the system of nuclear materials rights distribution existing in the member states of the European Atomic Energy Community (Euratom): the ownership of special materials is assigned to the Community itself, while member states and their enterprises enjoy an unlimited right to use and consume special materials that have duly become their property. [7] At the same time, in contrast to the regime of nuclear materials ownership previously in force in Russia, this regulation system also provides for detailed regulation of the procedure for transferring the materials from the possession of participants of the European nuclear materials market to other participants of the same market or consumers from foreign countries; [8] this is why the Euratom countries managed to avoid the aforementioned contradiction between the statutory regulation and the established economic practice of handling special materials.

Currently, the nuclear materials ownership is governed by an entire set of legal norms, based on the norms of the Constitution of the Russian Federation: in accordance with Part 2, Article 8, and Parts 1 and 2, Article 36, everyone may own, possess, use, and administer property, whether individually or jointly with other persons, and all forms of ownership (private, state, municipal and others) are recognized and protected equally. At the same time, apart from declaring the recognition and equal legal protection of various forms of ownership, including private property ownership, the Constitution also indicates the possibility to restrict the owner's right: such a right can be limited by a Federal Law only, and only in the cases and to the extent specified by such Law.

Such cases include the limitation of the ability of some entities to own nuclear materials. In accordance with Article 5 of the Federal Law *On the Use of Nuclear Energy*, there are three groups of persons vested with the right to beneficially own nuclear materials:

The Russian Federation;

Russian legal entities included in the List of Russian Legal Entities Entitled to Own Nuclear Materials as approved by Decree of the Russian President No. 556 *On Restructuring the Nuclear Power Industry Complex of the Russian Federation* dated April 27, 2007 (hereinafter referred to as the "List");

Foreign states and legal entities.

Thus, the list of entities that may own nuclear materials is limited to legal entities and public entities. It does not include individuals, irrespective of their Russian citizenship or citizenship in general.

An indirect justification for vesting particularly legal entities with the right to beneficially own nuclear materials can be found in the earlier mentioned explanatory note to bill No. 356085-4. In particular, the stated tasks to be solved by the bill include the prevention of the potential loss of state control over the nuclear materials proliferation in the context of the proposed enabling of the right of private property to them. Obviously, achieving this goal is impossible without an efficient system for nuclear materials movement accounting (i.e. a system recording the already accomplished facts of materials management), or, equally, without the preliminary validation of the decisions on such management made by economic activity participants.

Such preliminary control can be ensured, if the state retains the mechanisms for controlling (including an indirect control) the participants of the nuclear materials market. Such control will be efficient only if such participants are legal entities: it will be possible to exercise control through participation in their authorized capital, appointment of their management bodies, preliminary approval of transactions with nuclear materials, etc. This thesis is actually supported by the List: all the legal entities listed are part of the corporate structure (holding) of Rosatom State Atomic Energy Corporation.

Thus, by enabling Russian legal entities to own nuclear materials, the legislator, in order to prevent an uncontrolled circulation of nuclear materials, at the same time has created conditions for maintaining an efficient state control in this area of public relations.

However, there are other legal restrictions of the ownership: a specific legal regime has been introduced for a range of nuclear materials. Such a regime is explained by the state's need to pay deliberate attention to the materials that can be used to manufacture weapons of mass destruction, that is why such materials (hereinafter also referred to as "special nuclear materials") can be in federal ownership only. At present, in accordance with the List, such special materials include (with some exceptions) uranium enriched to at least a 20% content of uranium-235 isotope, plutonium, as well as uranium-233 and neptunium-237 nuclides.

One should note, though, that the regime of the exclusive state ownership is not the only justifiable way to show the state's special care for the special nuclear materials integrity and safe handling. For example, in the United States of America, regulation of the issues of such materials possession, use, and administration is regulated based on a different principle: Paragraph 70 of the US Code of Federal Regulations [9] enables legal entities to beneficially own special nuclear materials, including plutonium, with the procedure for handling such materials detailed in rigorous licensing requirements.

In order to develop international cooperation in the field of atomic energy use, the legislator recognizes foreign states' and foreign legal entities' ownership to nuclear materials imported into, or purchased in, the territory of Russia. It should be pointed out, though, that the legal regulation of the issue of foreign ownership of the above-mentioned special nuclear materials is somewhat ambiguous, since the wording of Parts 2 and 4, Article 5 of Federal Law *On the Use of Nuclear Energy*, taken together, allows for an ambiguous interpretation. On the one hand, the rule of Part 2 unambiguously states the exclusive federal ownership (i.e. the Russian Federation's ownership) of special nuclear materials, dictating the conclusion that it is impossible for such materials while in the territory of Russia to belong to a foreign state or legal entity (another instance allowing ambiguous interpretation is the "automatic" acquisition by the Russian Federation of ownership of special nuclear materials imported into its territory). On the other hand, Part 4, indicating recognition of foreign

states' and foreign legal entities' ownership of the materials imported to the territory of the Russian Federation, uses the notion of "nuclear materials", which can be recognized as a generic notion covering both special and other nuclear materials, thus allowing us to make an opposite conclusion that the actual presence of special nuclear materials belonging to foreign states and legal entities in the territory of the Russian Federation is possible.

As mentioned above, the law recognizes the possibility of nuclear materials ownership by foreign states and foreign legal entities, while with respect to Russian legal entities, it introduces an additional requirement, such as the inclusion in the List. However, what particular powers does the legislator vest in the nuclear materials owner? To answer this question, one should start with an analysis of "handling nuclear materials", which, perhaps, is the key notion for understanding the essence of nuclear materials ownership.

The Federal Law *On the use of nuclear energy* uses term "handling" in relation to nuclear materials many times, but gives it no legislative definition, and the inconsistent mentioning of the term in the law does not allow us to derive such a definition based on its contextual use. In particular, when defining the notion of the full life cycle of a nuclear facility, handling of such facilities (including nuclear materials) is referred to as one of the numerous items in the list of the operations included in the life cycle of such facility along with other similar elements, for example, transportation, and storage. This gives us grounds to assume that these notions belong to the same level and do not intersect. However, in the list of the licensed types of operations, these concepts are used as generic and specific: handling nuclear materials during their transportation and storage, etc.

An example of the use of the term "handling" in relation to radioactive waste can be found in the Federal Law *On Handling Radioactive Waste and on Amending Certain Legislative Acts of the Russian Federation* (hereinafter also referred to as the "RW Handling Law"): in Article 3 of the Law, handling is understood as collection, segregation, processing, conditioning, transportation, storage, and disposal of waste.

Searching for a definition of the notion of handling nuclear materials, one should also consider criminal law. For instance, Article 220 of the Criminal Code of the Russian Federation (“Russian Criminal Code”), while lacking a definition of the notion of handling nuclear materials (i.e. as a certain set of actions compliant to the law), still allows (at least for the purposes of Article 220 of the Russian Criminal Code) to derive the components of the notion of lawful handling from the definition of an opposite notion, unlawful handling, understood as illegal acquisition, storage, use, transfer, or destruction of nuclear materials. Within such regulatory structure, handling, as in the mentioned Article 3 of the RW Handling Law, is equated to the very set of actions performed in relation to nuclear materials: acquisition, storage, etc.

The *Model Law on Control over the Radioactive Materials Circulation* is also worth consideration; it is not a regulatory legal act, but is important as a legislative guideline for the CIS member states defining handling of radioactive materials (which term is also understood as including nuclear materials) as the administrative and operational activity associated with the production, supply, receipt, possession, storage, use, transfer, transportation, maintenance, processing, and disposal of radioactive materials. Despite the fact that this model law does not further disclose the meaning of administrative and operational activities either, a structural analysis of this “regulation” allows us to highlight the following: handling is not something similar to separate actions listed, i.e. production, supply, processing, etc., but is the type of activity inherent in all these actions performed in relation to nuclear materials.

It can be assumed that the physical contact with nuclear materials, which should be the essence of the handling process, may be the common feature of all the actions listed. In other words, it is the physical interaction with nuclear materials during their production, storage, transportation, and other operations with nuclear materials, which represents the process of handling nuclear materials.

While recognizing the right to own nuclear materials vested in a range of persons, the law states that nuclear materials can be handled by

duly licensed Russian legal entities only (Part 11, Article 5 of the Federal Law *On the Use of Nuclear Energy*). Thus, the ability to own the materials and the ability to physically handle them are separated. At the same time, in some cases it is legally possible for an entity to be both the owner of, and the entity entitled to handle, nuclear materials (for example, for a Russian legal entity licensed to handle nuclear materials). In other cases, such combination of powers is completely ruled out: a foreign legal entity that is the owner of nuclear materials in the territory of the Russian Federation will in any case be deprived of the right to handle them and will be forced to engage for that purpose a duly licensed Russian organization.

The said legal structure of the owner’s powers raises an important question: is the nuclear materials owner not possessing an appropriate license entitled to possess, use, and administer such materials at all? It seems that the answer to this question is positive: by separating the nuclear materials ownership from the right to physically handle nuclear materials, the legislator declares the possibility to exercise the powers of possession, use, and administration without the direct physical interaction with (handling) nuclear materials by the owner. Remaining the owner, but not being allowed (due to statutory requirements) to physically handle nuclear materials, a state or a legal entity may at the same time possess, use, and administer its property through an intermediary, a person licensed to perform the required operations. As an example, let us consider a foreign legal entity purchasing nuclear fuel in the territory of the Russian Federation: the physical handling of the fuel during its storage, packaging, and transportation across the territory of Russia will be performed by a specialized duly licensed Russian organization.

The legal rules and structures considered in this article form the core of the entire Russian system of regulation of peaceful nuclear energy use in general: they set the regulatory direction for the legislator who further builds requirements for nuclear materials control and accounting, transactions procedure, and safe operation of nuclear facilities, as well as introduces liability

for violation of such requirements. For this reason, the legal writing method used to word such norms, structures, and basic notions must meet the criteria of clarity, unambiguous

interpretation, and absence of regulatory gaps, that is why the system of legal regulation of the institution of nuclear materials ownership needs further improvement.

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