

Features of the sovereignty of Norway above Spitsbergen under the Parisian treaty of 1920.

Modern international legal position of Spitsbergen is considered as a phenomenon in international law. It has been granted to the archipelago and separately located Bear Island on the basis of the Parisian treaty developed at the Versailles peace conference in 1920. The treaty on Spitsbergen defines the state appurtenance of the land territories located between 10° and 35° eastern longitude, 74° and 81° northern longitude, also provides creation of an international legal régime (preamble and article 1) on them.

According to article 1 countries-participants of the Parisian treaty have agreed to recognize the sovereignty of Norway above these land territories on the conditions established in the treaty. These conditions stated in a number of articles of the treaty about Spitsbergen, provide, in particular, that Norway besides an establishment of the sovereignty above the archipelago will create for nationals of countries-participants of this agreement an international legal treatment of acquisition of the right of ownership on landed property, including mineral rights.

Article 7 of the treaty about Spitsbergen says: "With regard to methods of acquisition, enjoyment and exercise of the right of ownership of property, including mineral rights, in the territories specified in Article 1, Norway undertakes to grant to all nationals of the High Contracting Parties treatment based on complete equality and in conformity with the stipulations of the present Treaty.

Expropriation may be resorted to only on grounds of public utility and on payment of proper compensation"¹.

Article 7 plays a key role in definition of volume of the rights of private persons and companies about which the countries-participants of the treaty have agreed at the establishment of a regime of Spitsbergen. By consideration of volume

¹ "St. prp. nr. 36 (1924). Om godkjennelse av traktaten om Spitsbergen (Svalbard)", Oslo, Utenriksdepartement, s.33.

of these rights it is important to take into account two moments. Firstly, mineral rights are a component of the right of ownership of property and, secondly, the right of ownership on land not only acquires, but also recognizes according to article 7 of the treaty on Spitsbergen (it will be considered below). According to provisions of this article for exercise of mineral rights is necessary presence of the right of ownership of property, right on minerals and right to be engaged in mining operations.

Creation of a uniform treatment of acquisition of landed property, including mineral rights, complicated occupation of some land by private persons and companies before the signature of the treaty about Spitsbergen. The right of these persons on land and their depths, including the right to be engaged in any kind of economic and scientific activity within the limits of land, has not been made documentary out because of the lack of the legislation and authorities on the archipelago in connection with that Spitsbergen since 1872 had the status of "the territory for common use withdrawn from the sphere of spreading of the state sovereignty"².

During the international conferences past in Oslo in 1910-1914 and devoted to giving of regulated character to regime of Spitsbergen, the question on the maintenance of the right on land – the property right or the right of use – had disputable character. Under the Parisian treaty of 1920 this question is solved according to article 7 within the framework of the treatment of acquisition of the right of ownership of property specified in this article.

The treaty about Spitsbergen provides, that nationals of countries-participants of this agreement, including the persons which occupied land before the signature of the Parisian treaty and acquired the mineral rights according to norms of the international custom, acquired the right of ownership on landed properties, including mineral rights, on the basis of article 7.

Article 6 of the Parisian treaty says: "Subject to the provisions of the present Article, acquired rights of nationals of the High Contracting Parties shall be

² R.V.Dekanozov "International legal position of Spitsbergen", Sverdlovsk, the Dissertation on competition of a scientific degree of the candidate of jurisprudence, 1966, p. 139.

recognised.

Claims arising from taking possession or from occupation of land before the signature of the present Treaty, shall be dealt with in accordance with the Annex hereto, which will have the same force and effect, as the present Treaty”³.

In the basis of this article lays the theory of ”acquired rights” having many supporters in Great Britain, France and USA, that is just in those countries which have participated active in development of the treaty about Spitsbergen. According to this theory an individual or an organization acquire subjective rights according to effective rules of law. ”After that... the state cannot declare such actions illegal any more and cancel the acquired subjective rights. As such rights have arisen, i.e. have been acquired by individuals or organizations, they should be protected within the framework of legal system of other country. The subsequent changes which have come in legal system of their native land, have no value for other legal system. It should protect them in that form in what they have arisen”⁴.

Consequent realization of principles of the named theory within the framework of regime of Spitsbergen means a recognition of the acquired rights and their protection by the Norwegian state in that form in what they have arisen. And it, in turn, does necessary to have a clear idea about what represented the acquired rights belonging to private persons and companies, which occupied land according to norms of the international common law before carrying of the treaty into effect.⁵ Thus it is necessary to take into account, that understanding about recognition of the rights of private persons and companies within the framework of regime of Spitsbergen represents the certain complexity, and in the scientific literature in general there are no researches on this question.

The treaty provides a recognition of the acquired rights according to article 6 and their transformation in the framework of a treaty regime of Spitsbergen by

³ ”St. prp. nr. 36 (1924)...”, s.32-33.

⁴ A.A.Rubanov ”Theoretical bases of the international interaction of national legal systems”, Moscow, ”Science”, 1984, p. 109-110.

⁵ The question on what the acquired rights of the persons which have occupied land before carrying of the treaty about Spitsbergen into effect represent, in the compressed form is considered above. The rights acquired according to norms of the international common law had not only private persons and the companies which have occupied land before the signature of the treaty about Spitsbergen, but also the Dutch company ”Nespiko” which has occupied ground areas Barentsburg and Bohemanflya after the signature of the treaty, but before its carrying into effect.

adjustment of claims of the persons which have occupied land before the signature of the Parisian treaty, on conditions of the annex to this agreement. Provisions of article 6 could be realized only under condition of their observance by the countries which have signed the treaty of 1920.

The treaty on Spitsbergen does not provide, that according to article 6 the right of ownership on the occupied land shall be acquired or recognized. The third paragraph of article 2 of the treaty about Spitsbergen contains the following direction: "Les occupants dont les droits seront reconnus selon les termes des articles 6 et 7..." (French) – "Occupiers of land whose rights have been recognised in accordance with the terms of Articles 6 and 7..." (English)⁶.

In this phrase the important role plays correct understanding of the time form of a verb "to recognize".⁷ Verb "to recognize" in the French text of the treaty is applied in future time in the form of a Passive Voice "seront reconnus", and in English – in present perfect time in the form of a Passive Voice "have been recognised". "The verb in present time of group Perfect designates the action already made during the previous period till the moment of speech, but having direct connection with the present moment"⁸.

The direction of article 2 of the treaty on Spitsbergen provides a recognition of the acquired rights belonging to persons occupied land before the signature of this treaty, according to article 6 and a recognition of the acquiring right of ownership of property, including mineral rights, for any occupier of land in the territories, specified in article 1 of the Parisian treaty, according to article 7 of this treaty.

The presumption, that the persons which have occupied land before the signature of the Parisian treaty, did not acquired, and them have been only recognized the rights specified in article 7 of the treaty on Spitsbergen, is equal to the statement that Norway has undertaken to establish a treatment of acquisition of

⁶ "St. prp. nr. 36 (1924)...", s.29.

⁷ This question is detailed by A.M.Oreshenkov in article "The comparative terminological analysis of some documents on Spitsbergen", "Moscow journal of international law", 1996, No. 1.

⁸ N.A.Bonk, G.A.Koty, N.A.Lukjanova "Textbook of English language", Moscow, "Dekont + - GIS", 2000, part 1, p.572

the rights specified in article 7, only on that part of land territory of the archipelago which remain free after settlement of the question about the acquired rights of the persons specified in article 6 of the treaty on Spitsbergen.

With regard to methods of acquisition of the right of ownership of property, including mineral rights, the Parisian treaty does not carry out any difference between persons which have occupied land before the signature of the treaty and which have the right to make the same after it's carrying into effect. The persons specified in article 6 of the treaty on Spitsbergen, acquired the property right to the occupied land, and with it repeatedly (but already on conditions of article 7 of the treaty) mineral rights within the limits of these landed properties according to the annex of the treaty. Their rights are recognized according to articles 6 and 7 of the treaty. Rights of all other persons at acquisition of the similar rights are recognized according to article 7 of the treaty on Spitsbergen.

The treaty on Spitsbergen provides accumulation of various on volume and maintenance rights (specified in articles 6 and 7) and their implementation in the local Norwegian legislation (annex to the treaty § 1 item 9 and § 2 item 11). In this connection it establishes for the Norwegian government the obligation to confer documents on the exclusive right of the property to occupiers of land, whose rights have been recognized according to articles 6 and 7 of Parisian treaty (i.e. have been recognized according to norms of international law).

Annex to the treaty on Spitsbergen § 1 item 9 and § 2 item 11 say: "The Norwegian Government shall take necessary steps to confer upon claimants whose claims have been recognised by the Commissioner (whose claims have been recognised by the Tribunal), a valid title securing to them the exclusive property in the land in question, in accordance with the laws and regulations in force or to be enforced in the territories specified in the Article 1 of the present Treaty, and subject to the mining regulations referred to in Article 8 of the present Treaty"⁹.

Conferring of such documents meant a recognition by the Norwegian government to the persons which have occupied land before carrying of the treaty

⁹ "St. prp. nr. 36 (1924)...", s. 39-40, 43-44.

on Spitsbergen into effect, the exclusive right of the property on land, but according to norms of the local legislation.

The rights, specified in articles 6 and 7 of the treaty about Spitsbergen, are recognized according to the norms of international law exercised without transformation in the local legislation after an establishment of the sovereignty by Norway above the archipelago¹⁰. Procedure of a recognition of these rights is carried out by the international bodies (the commissioner and the international arbitration court) and the Norwegian government. It is necessary to take into account, that the international bodies don't recognize the property right on land or the acquired rights. They recognize validity of claims of private persons and companies occupying land. Property rights of the named persons are recognized by the Norwegian government.

Thus the international bodies apply the norms specified in articles 6 and 7 of the treaty about Spitsbergen, and this recognition represents juristic act. And for the Norwegian government a recognition of the rights specified in articles 6 and 7 of the treaty, and also in annex to the treaty on Spitsbergen § 1 item 9 and § 2 item 11, are consequence of execution of treaty obligations and represents juristic event.

For the persons which have occupied land on the archipelago before the signature of the treaty on Spitsbergen, procedure of acquisition of the ownership to these landed properties was based on norms of the international common law (simultaneous occupation of land and acquisition of a right on its depths and also a right to be engaged in any kind of economic and scientific activity in its limits), annex to the treaty on Spitsbergen (protection of claims on occupied land upon the international bodies and a recognition of rights according to articles 6 and 7 of the treaty) and the local Norwegian legislation (reception of documents on the exclusive property right to the land in question and a recognition of the same right).

And the recognition of the rights, which have arisen in connection with occupation of land on the basis of norms of the international common law,

¹⁰ See. A.M.Oreshenkov "Features of an international legal regime of Spitsbergen", "Moscow journal of international law", 1992, No. 3.

according to articles 6 and 7 of the treaty on Spitsbergen and also to the local Norwegian legislation, means, that such occupation corresponded to norms of the treatment established by article 7.

Thus, for the persons which have occupied land before the signature of the treaty on Spitsbergen, the whole procedure of acquisition of the right of ownership on landed properties, including mineral rights, was based on norms of international law (except for reception of documents on the exclusive right of the property on them and recognition of the same right). In turn, after acquisition of the rights specified in article 7 of the treaty on Spitsbergen, private persons and companies of countries-participants of this agreement could enjoy and exercise these rights according to the local Norwegian legislation developed according to principles of the treaty.

Here is a basis of possible distinctions between methods of acquisition, enjoyment and exercise of the right of ownership of property, including mineral rights. But character of the treatment specified in article 7 of the treaty on Spitsbergen and a relationship between methods of acquisition, enjoyment and exercise of the right of ownership of property, including mineral rights in many respects should define the mining regulations (see below).

Within the framework of the annex to the treaty on Spitsbergen norms of international law according to which private persons and companies acquired the rights specified in article 7 of the treaty, are exercised without transformation in the local Norwegian legislation. And it means regulation of domestic relations directly by norms of the international public law on a part of territory of one of the participants of this international agreement.

For settlement about the rights of the persons which have occupied land before the signature of the treaty, within the framework of the annex to the treaty are used provisions of articles 6, 7 and 8 of the treaty on Spitsbergen. All these articles adjust the questions connected to mineral rights. Article 8 of the treaty on Spitsbergen says: "Norway undertakes to provide for the territories specified in Article 1 (land territory of the archipelago – a comment of the author) mining

regulations which, especially from the point of view of imposts, taxes or charges of any kind, and of general or particular labor conditions, shall exclude all privileges, monopolies or favors for the benefit of the State or of the nationals of any one of the High Contracting Parties, including Norway...

Taxes, dues and duties levied shall be devoted exclusively to the said territories and shall not exceed what is required for the object in view.

So far, particularly, as the exportation of minerals concerned, the Norwegian Government shall have the right to levy an export duty which shall not exceed 1 % of the maximum value of the minerals exported up to 100.000 tons, and beyond that quantity the duty will be proportionately diminished. The value shall be fixed at the end of the navigation season by calculating the average free on board price obtained.

Three months before the date fixed for their coming into force, the draft mining regulations shall be communicated by the Norwegian Government to the other Contracting Powers. If during this period one or more of the said Powers propose to modify these regulations before they are applied, such proposals shall be communicated by the Norwegian Government to the other Contracting Powers in order that they may be submitted to examination and the decision of a Commission composed of one representative of each of the said Powers. This Commission shall meet at the invitation of the Norwegian Government and shall come to a decision within a period of three months from the date of its first meeting. Its decisions shall be taken by a majority”¹¹.

The acquired rights which component are mineral rights, have been recognized according to article 6. The property right on land, including mineral rights have been acquired and recognized on the basis, in framework and according to article 7. The treaty obligation of the Norwegian government is to confer to the persons which have occupied land before the signature of the treaty on Spitsbergen, whose claims are recognized by the international bodies, documents on the exclusive right of ownership on these landed properties according to

¹¹ ”St. prp. nr. 36 (1924)...”, s. 33-34.

provisions not only annex to the treaty, but also subject to the mining regulations referred to in article 8 of the treaty.

From the spatial point of view provisions of articles 7 and 8 of the treaty on Spitsbergen operate in the whole land territory of the archipelago and Bear Island. The annex to the treaty § 1 item 9 and § 2 item 11 oblige the Norwegian government to confer documents on the exclusive right of the property subject to the mining regulations because the persons which have occupied land before the signature of the Parisian treaty, have been acquired mineral rights not according to the mining regulations, and according to the annex to the treaty which adjusts the order of acquisition of the right of ownership on land, including mineral rights, only on a part of the land territory specified in article 1 of the treaty on Spitsbergen.

Absence of the obligation about conferring of documents on the property right to land subject to the mining regulations could lead to that the mining regulations from the point of view of acquisition of mineral rights, in general, would not operate on the above-stated part of land territory of Spitsbergen.

Development of the mining regulations on principles of the treaty, including procedure of acquisition of the property similar to the appendix, and conferring of documents on the exclusive right of the property according to provisions not only annex to the treaty, but also subject to the mining regulations allowed Norway to grant nationals of countries-participants of the treaty on Spitsbergen a uniform treatment of acquisition of the right of ownership of property, including mineral rights, according to provisions of articles 7 and 8 of this agreement in the whole land territory of the archipelago and Bear Island.

For the Norwegian government the obligation to confer documents on the exclusive right of the property on land subject to the mining regulations means necessity of inclusion of provisions about conferring of the documents providing the property right to the occupied land, in the mining regulations.

The instruction of the third paragraph of article 2 of the treaty on Spitsbergen mentioned above, provides, that according to article 7 of the treaty for

any person which has occupied land, without dependence from the purpose of occupation of land, can be recognized the right of ownership of property, including mineral rights. As it was already considered above, the recognition of the acquired/acquiring rights is a component of a treatment of acquisition of the right of ownership of property, including mineral rights, established by the treaty about Spitsbergen. In this connection the above-named provisions of articles 2 and 7 of the treaty on Spitsbergen should be applied at a recognition of the rights of private persons and companies during acquisition of land, including acquisition of mineral rights, within the framework of the mining regulations.

The same provisions of the treaty don't provide application of the annex to the treaty or the mining regulations for a recognition of the property right on land or mineral rights (see below). Regarding acquisition of the right of ownership of property, including mineral rights, the treaty obliges the Norwegian government to use the local legislation only for execution of provisions of the Parisian treaty.

According to preamble and article 1 of the treaty on Spitsbergen key provisions of this agreement are recognition of the sovereignty of Norway above the archipelago and creation here an international legal regime for nationals countries-participants of the treaty. In a basis of the local legislation lays article 1 of the treaty according to which Norway establishes the sovereignty above Spitsbergen, and other articles define obligations of the Norwegian state on creation of the regime specified in a preamble, and volume of the rights of nationals within the framework of this regime. Besides the Parisian treaty especially stipulates duties of nationals countries-participants of the treaty (the third paragraph of article 2 and the first paragraph of article 3 of the treaty), and also the order of exercise of the rights of the Norwegian state within the framework of a regime of the archipelago (the second paragraph of article 2 of the treaty).

Under the treaty on Spitsbergen Norway has accepted the obligation to grant to the persons which have occupied land before its signature an opportunity to acquire the exclusive right of the property on them not according to norms of the local Norwegian legislation based on article 1 of the treaty, and according to norms

of the annex to the treaty, exercised within the framework of a regime specified in article 7, i.e. according to norms of international law. Thus it is necessary to take into account, that in a basis of conferring of documents on the exclusive right of the property on land lays norms of international law and the local Norwegian legislation, and in a basis of a recognition of the same right lays only norms of the local legislation.

At the moment of acceptance of obligations to grant nationals countries-participants of the treaty a treatment of acquisition of the property on land, including mineral rights, based on norms of international law, and to provide the mining regulations for the archipelago Norway had not the sovereignty above Spitsbergen. It means, that it has agreed to grant a treatment specified in article 7 of the treaty, and has undertaken to provide the mining regulations for land territory of Spitsbergen not as the state-carrier of the sovereignty above the archipelago, and as one of participants of the treaty on Spitsbergen. It has acted in two these qualities simultaneously only after establishment of the sovereignty above Spitsbergen (on August, 14, 1925).

Character of the established regime in many respects should define the mining regulations. The sixth paragraph of article 10 of the treaty on Spitsbergen provides its development and carrying into effect after coming into force of the treaty. Absence in the treaty of references to the juridical nature of the mining regulations and acceptance of the obligation by Norway to develop the mining regulations for the territory which was not under its sovereignty, did desirable introduction of the special instruction in the treaty concerning the juridical nature of the mining regulations.

The article 2 of the treaty where is stipulated the order for realization of the rights to exercise nature protection measures by the Norwegian state within the framework of a regime of Spitsbergen, contains the provisions on the juridical nature of these measures. Article 5 of the treaty on Spitsbergen providing regulation of scientific activity on the archipelago by norms of international law, also contains the provision on the juridical nature of the international conventions.

The treaty don't make Norway a duty to develop these conventions though as the state-carrier of the sovereignty and the participant of the treaty on Spitsbergen, first of all, it is obliged to create a corresponding regime on the archipelago. Nevertheless, Norway has agreed with the treaty provision providing regulation of domestic relations, concerning scientific activity, according to norms of international law.

But according to article 7 of the treaty on Spitsbergen it has assumed obligation to grant an opportunity to the persons, which have occupied land before the signature of the Parisian treaty, to acquire the right of ownership on these properties, including mineral rights, according to norms of international law, and also similar methods of acquisition of the same rights to all (other) private persons and companies within the framework of a regime specified in the same article 7 of the treaty.

Hence, in a basis of acquisition of the above-named rights and, accordingly, of the mining regulations should lay article 7, but not article 1 of the treaty on Spitsbergen. To create a regime specified in article 7 of the treaty on Spitsbergen, and by that to execute the treaty obligation regarding creation of an international legal treatment of acquisition of the property on land, including mineral rights, Norway could due to development and carrying of the mining regulations into effect as an international "gentlemen's" agreement.

From the conclusion of the Ministry of Justice of Norway about expediency of accession of the Norwegian state to the Parisian treaty follows, that the order of development of the mining regulations established by the treaty was unusual and insulting, and from the formal point of view is incompatible with dignity of the sovereign state. In opinion of the Ministry, at an establishment of a regime of Spitsbergen in strict conformity with provisions of the Parisian treaty the sovereignty of Norway above the archipelago would be no more than visibility. In this connection it did not recommend the government of Norway to sign the treaty draft on Spitsbergen in the offered form¹².

¹² T.Mathisen, "Svalbard i internasjonal politikk. 1871 - 1925", Oslo, "H.Aschehoug & Co. (W.Nygaard)", 1951.,

It is possible to explain these recommendations to that Norway agreed on application of norms of international law without transformation in the local legislation after an establishment of the sovereignty above the archipelago (see the annex to the treaty on Spitsbergen). Besides not having the sovereignty above Spitsbergen, it agreed that after an establishment of its sovereignty above this territory the additional international agreement (the mining regulations) which by virtue of principles of the Parisian treaty will adjust also domestic relations on the archipelago without transformation in the local legislation. And, at last, by virtue of principles of the theory of equity (annex to the treaty on Spitsbergen § 2 item 9) Norway agreed on application of norms of the foreign law by the international arbitration court on the archipelago, already being under its sovereignty¹³.

The above-named founds to draw a conclusion that it is impossible to consider the restraints established by the treaty on Spitsbergen, as display of the sovereignty of the Norwegian state above the archipelago. Norway at the moment of acceptance of obligations under the Parisian treaty above the archipelago had no "the full and absolute sovereignty" (article 1 of the treaty on Spitsbergen) above it.

Norway has assumed obligation to grant an international legal treatment of acquisition of property on Spitsbergen to nationals of countries-participants of the treaty of 1920 not as the carrier of the sovereignty above the archipelago, and as the participant of the Parisian treaty. The obligation to create an international legal treatment of acquisition of property, specified in article 7 of this agreement, can be considered not as display, and as the restraint of the sovereignty of Norway above Spitsbergen.

The government of Norway, being guided on opinion of the Ministry for Foreign Affairs, has signed the treaty in the offered form, having coordinated little change with participants of the Parisian conference. The Norwegian government has suggested to develop a draft of the mining regulations before ratification of the

s.234-235.

¹³ "The theory of equity" proceeds from that "basically national legal system is free in the approach to the international interaction with other legal systems.... The reasons concerning "equity" are formulated by the judge under his free discretion" - A.A.Rubanov, op. cit., page 157. With reference to Spitsbergen it meant, that the international bodies at own discretion could apply norms of the foreign law on the territory being under the sovereignty of Norway.

treaty as from reasons of the constitutional and parliamentary order it was necessary for it to present the treaty and the mining regulations for ratification simultaneously¹⁴.

There are not present instructions on the juridical nature of the mining regulations in article 8 of the treaty on Spitsbergen, determining one of obligations of Norway on creation of an international legal regime on the archipelago. Norway as the participant of the treaty on Spitsbergen, assumed obligation to develop the mining regulations, has coordinated it as the international agreement before an establishment of the sovereignty above the archipelago, did not ratify it, but at the moment of carrying of the Parisian treaty into effect has put the mining regulations in force as the instrument of the local Norwegian legislation.

At carrying of the treaty into effect it "has corrected a deficiency" of this agreement and in one of footnotes to the law on Spitsbergen, developed on the basis of article 1 of the treaty, has specified, that the mining regulations represents Norwegian by-law.¹⁵

It was one of infringements by the Norwegian state of the treatment specified in article 7 of the treaty on Spitsbergen. Other infringement of this treatment was development of the mining regulations on principles of the legislation of continental Norway which did not correspond to principles of the treaty on Spitsbergen. According to these principles for realization of mineral rights are granted claims, but not landed properties. In this connection in the mining regulations there are no provisions about conferring of documents on the property right to land¹⁶.

As a result of these infringements the basis of the treatment specified in article 7 of the treaty on Spitsbergen has been completely changed. Norway has granted an opportunity to acquire the property right to land only on a part of territory of Spitsbergen and only to the persons which have occupied land before

¹⁴ T.Mathisen, op. cit., s.238.

¹⁵ "Svalbard. Samling av lover, forskrifter og bestemmelser", "Otto Falch Hurtigtrykkeri", Oslo, 1986; § 4 "Lov om Svalbard", s. 5.

¹⁶ See A.M.Oreshenkov "About the property right of Norway to "Public Lands" of Spitsbergen", "Moscow journal of international law ", 1994, No. 3.

carrying of the Parisian treaty into effect. However, the Norwegian government has not recognized for these persons either mineral rights, or the exclusive right of the property.

Norway has not granted to all nationals countries-participants of the treaty an opportunity to occupy land and to acquire the property right to them either under the mining regulations, or according to norms of the local legislation, i.e. has not granted a treatment specified in article 7 of the treaty on Spitsbergen. In this connection within the framework of a regime specified in a preamble of the treaty on Spitsbergen, there is no basis for realization of the rights of nationals countries-participants of this agreement according to articles 3, 5 and 8 of the Parisian treaty.

Special complexity for understanding of legal relationships, real-life within the framework of a present regime of the archipelago, is represented that the persons which have occupied land before carrying of the treaty on Spitsbergen into effect, have no either the mineral rights, or the exclusive right of the ownership to these property in spite of the fact that formulations of documents on the exclusive right of the property to the occupied land, granted by the Norwegian government, word for word repeat formulations of annex to the treaty on Spitsbergen § 1 item 9. In conditions when the Norwegian government has developed the mining regulations on the principles which are not corresponding to principles of a treatment, specified in article 7 of the Parisian treaty, these formulations represented a collision with provisions of the third paragraph of article 2 of the treaty on Spitsbergen concerning a recognition of the rights.

This collision has arisen because of distinction in bases of realization of the mineral rights under the treaty and under the mining regulations. If under the treaty on Spitsbergen such basis is the right of ownership on landed properties so under the mining regulations for Spitsbergen such basis is the right of urgent using of claims. According to the mining regulations a component of the right of urgent using of claim is the exclusive right to minerals (§ 14 item 1) and the right to be engaged in mining operations (in §§ 15 and 16 of the mining regulations this right

is coordinated to the right of urgent using)¹⁷.

According to the second sentence of item 3 in § 35 of the mining regulations ”bestemmelsene i denne bergverksordning kommer i sin helhet til anvendelse på utmålene” (Norwegian) – ”the regulations of this ordinance apply to the claims” (English). Item 1 of the same paragraph provides, that ”the persons and companies who, pursuant to the provisions of the annex to the Spitsbergen Treaty, are recognised as proprietors of a certain territory, shall be granted as many claims as they desire within the boundaries of their property...” (as it was considered above rights of persons which have occupied land before the signature of the treaty about Spitsbergen are recognized according to articles 6 and 7 of the treaty – comment of the author). I.e. provisions of the mining regulations provide ”additional”, third acquisition of mineral rights by these persons. In other words, one more, not stipulated in article 7 of the treaty on Spitsbergen method of acquisition of mineral rights.

Complexity of understanding of this provision sets down that in the mining regulations is spoken not about acquisition of the mineral rights, and about acquisition of their basis – claims. An owner of landed property has acquired mineral rights within limits of his landed property third time not as its owner, and as the holder of claims.

Thus, from the formal point of view the collision between the treaty on Spitsbergen and the mining regulations for Spitsbergen, created by the Norwegian government as a result of development of the mining regulations on principles of the legislation of a continental part of the country, is led to the following.

On the one hand, the treaty obligation of the Norwegian government is the recognition of the rights specified in articles 6 and 7 of the treaty about Spitsbergen, and on the other hand, the opportunity created on the basis of the mining regulations to grant out to the persons which have occupied land on Spitsbergen before the signature of the Parisian treaty, the documents which are not providing the exclusive right of the property on these land.

¹⁷ ”Svenska Riksarkivet, UD:s arkiv, 1920-års dossiersystem, Volum 1984, Akt No. VI”.

In the mining regulations and the local Norwegian legislation there are no provisions about deprivation of mineral rights of persons, whose rights are recognized by the international bodies according articles 6 and 7 of the treaty on Spitsbergen. And such deprivation is a necessary condition for the next acquisition of mineral rights by these persons. Absence of similar provisions in the mining regulations and the local legislation, and also an establishment by the Norwegian government of the third procedure of acquisition of mineral rights for the above-named persons means, that the Norwegian government has not recognized them mineral rights according to articles 6 and 7 of the treaty on Spitsbergen and the exclusive right of the property to land according to the local legislation, not having informed about it other countries-participants of the treaty.

The recognition of mineral rights is a part of the treatment specified in article 7 of the treaty on Spitsbergen. Refusal of the Norwegian government to recognize the mineral rights for the persons which have occupied land before carrying of the treaty on Spitsbergen into effect, on the basis of the mining regulations as instrument of local legislation represents infringement of articles 6, 7 and annex to this international agreement. Application of the mining regulations even without definition of its juridical nature for a recognition of mineral rights means infringement of article 2 of the treaty, and application by the Norwegian government of the mining regulations as an instrument of local legislation for the same purposes means, besides assignment by Norway of the rights which are not provided for it by the treaty about Spitsbergen.

The Norwegian government has not recognized in full acquired rights of the persons which have occupied land before signature of the treaty on Spitsbergen and by that has deprived them of mineral rights. Besides it has not paid any indemnification to the above-named persons for expropriation of these rights. Instead of it Norway has granted to them a tax privilege according to which they pay nothing for the claims "acquired" within the limits of their landed properties (the mining regulations § 35 item 3), and also has created the privilege as (fourth) opportunity to acquire the right to be engaged in mining operations about which it

will be told below. Both represents infringements of article 8 of the treaty on Spitsbergen.

Norway, using the treaty obligation to develop the mining regulations, has outraged provisions of the Parisian treaty about a recognition of the rights of nationals countries-participants of this agreement and tries to acquire the rights which are not provided for it by the treaty about Spitsbergen. For the mining regulations typically absence of legal cleanliness on a lot of the essential provisions regulating relationships of the property on the archipelago. Its carrying into effect has led to infringement of a preamble, articles 1, 2, 6, 7 and annex to the treaty. Norwegians used erosion of terminology of the treaty in the mining regulations, substitution of principles of the treaty by principles of the internal legislation and the approach to the mining regulations as to the instrument of local Norwegian legislation for the subsequent infringement of articles 3 and 8 of the treaty about Spitsbergen. Application of such mining regulations has actually invalidated the Parisian treaty of 1920 in territory of the archipelago.

Under the mining regulations there are various methods of acquisition of the mineral rights. The right on minerals and the right to be engaged in mining operations is acquired by holders at acquisition of urgent using of claims. Besides the Norwegian state has created in the mining regulations for the persons which have occupied land before carrying of the treaty on Spitsbergen into effect, the privilege as an opportunity to acquire the right to be engaged in mining operations in quality of "the proprietor of any private ground"¹⁸. This right has no absolute character, i.e. is not exclusive. According to the mining regulations § 19 item 1 "the proprietor of any private ground" can acquire the right "to participation in operations (of holder) for not exceeding one fourth" on the conditions specified in this paragraph in the event that the commissioner of mines will allocate to somebody claims within the limits of its landed property.

Using not having necessary legal and terminological cleanliness of

¹⁸ To the term "the proprietor of any private ground" (§ 19 of the mining regulations) despite of its difference from the similar term in article 4 of the treaty about Spitsbergen ("owner of landed property") is not given legal definition in the mining regulations.

provisions of the mining regulations and the law about Svalbard (the Norwegian name of Spitsbergen), Norway puts forward complaints upon acquisition to be engaged in mining operations as the legal person – ”the proprietor of any private ground” on so-called ”statens grunn (Norwegian) – Public Lands (English) – *Domaine Public*”¹⁹ (French) (term is entered in § 7 of the mining regulations and there is not granted legal definition to it) with the reference thus on the rights ostensibly following from article 1 of the treaty about Spitsbergen.

These claims represent infringement of provisions of article 7 of the treaty on Spitsbergen as a basis for acquisition of the landed property, including mineral rights, for legal persons are provisions of the seventh, but not the first article of the treaty on Spitsbergen. Norway as the legal person did not acquire the property right to these lands according to article 7.

Known Norwegian lawyer J.Andenes, considering in the work ”Suverenitet og eiendomsrett på Svalbard” – ”Sovereignty and property right on Svalbard” changes in the approach of the Norwegian legislators to the property right of Norway to ”statsgrunn”²⁰(Norwegian) – ”State land”²¹ (English), pays attention that according to an original project of the law about Svalbard, developed in 1922, it was provided, that private persons and companies can acquire the disposal of ground areas on the ”State land” by renting them for limited time²².

I.e. in 1922 members of the Norwegian parliament considered an opportunity of creation on the archipelago of a regime of acquisition of urgent using of land on the basis of the local legislation that represented infringement of article 7 of the treaty about Spitsbergen. Further they have refused this idea and within the framework of a present regime of Spitsbergen, in general, there is no

¹⁹ The origin of term ”*domaine public* - public lands - *statens grunn*” used in the mining regulations takes from the term ”*domaine public*” (French.) - ”public lands” (English), used in the project of the convention on Spitsbergen. In clause 41 of this agreement in French was spoken: ” Sur le sol du Spitsberg, lequel demeurera toujours *domaine public*, ne pourra être acquis qu'un droit d'occupation et d'exploitation sujet aux conditions et restrictions de la présente Convention” (”On the land of Spitsbergen which will constantly remain the public land, the right of occupation and using can be acquired only subject to terms and restrictions of the present Convention”). ”News of the Ministry for Foreign Affairs of Russia. Diplomatic correspondence. Spitsbergen 1871 - 1912”, Saint Petersburg, V.K.Kirshbaum's Printing house, 1912, p. 37.

²⁰ ”Svalbard. Samling av lover, forskrifter og bestemmelser”, ”Otto Falch Hurtigtrykkeri”, Oslo, 1986, ”Lov om Svalbard”, s. 7.

²¹ ”Report No. 40 to the Norwegian Storting (1985-86) concerning Svalbard”, Royal Ministry of Justice, p. 75.

²² Johs. Andenæs, ”Suverenitet og eiendomsrett på Svalbard”, Oslo, ”Universitetsforlaget”, 1984, s.21.

procedure of acquisition not only the property rights, but also in general any rights to land on the stayed free most part of land territory of the archipelago.

Attempts of the Norwegian state to assert for it as the legal person the monopoly (in economic value of this word) on acquisition of the right to be engaged in mining operations in quality of "the proprietor of any private ground" on "Public Lands" – "State land"²³ (93,2 % of land territory of the archipelago) represents infringement of articles 3 and 8 of the treaty on Spitsbergen. For a substantiation of the property right to these lands the Norwegian state bodies use §§ 22, 23 law about Svalbard and statements about the full and absolute sovereignty of Norway above the archipelago, ignoring thus not settled status of the most part of the lands of the archipelago, arisen as a result of a lot of infringements by the Norwegian state of article 7 of the treaty on Spitsbergen.

Provisions of the above-named paragraphs do not possess necessary legal cleanliness. § 22 of the law, for example, says: "All grunn, som ikke blir tilkjent nogen til eiendom efter Svalbardtraktaten, er statsgrunn og er som sådann undergitt statens eiendomsrett".²⁴ (Norwegian) – "All land which is not assigned to any person as his property pursuant to the Treaty relating to Svalbard shall be State land and as such be subject to the State's right of ownership"²⁵. As it has been considered above, the Norwegian state recognizes the property right, including mineral rights, on land according to article 7 of the treaty on Spitsbergen and the exclusive right of the property to land according to norms of the local legislation.

From the point of view of a recognition of the exclusive right of the property the mentioned substantiations of the property right of Norway on so-called "Public Lands" – "State land" of Spitsbergen are legally insolvent as the exclusive right of the property is recognized according to norms of the local legislation, but not to norms of the treaty on Spitsbergen. The property right to land is not only

²³ "Report No. 40 to the Norwegian Storting (1985-86) concerning Svalbard", Royal Ministry of Justice, pages 78,81. In English version of the mining regulations, applied to this report, term Public Lands appears as State land, and term "the proprietor of any private ground" as "the proprietor of any ground".

²⁴ "Svalbard. Samling av lover, forskrifter og bestemmelser", "Otto Falch Hurtigtrykkeri", Oslo, 1986, "Lov om Svalbard", s. 7.

²⁵ "Report No. 40 to the Norwegian Storting (1985-86) concerning Svalbard", Royal Ministry of Justice, p. 75. There is a lot of divergences between brought out the text of this paragraph of the law in the Norwegian language and its translation into English.

recognized, but also is acquired not simply "after traktaten" – "pursuant to the treaty", but in conformity, on the basis and within the framework of article 7 of the treaty on Spitsbergen. And authors of the law on Spitsbergen "have overlooked" to mention it in § 22.

There are insolvent as well the provisions of this paragraph that land of Spitsbergen are "subject to the State's right of ownership". Norway has undertaken to grant a uniform treatment of acquisition and a recognition of the property right to land, including mineral rights, in the whole territory of the archipelago according to article 7 of the treaty on Spitsbergen, i.e. according to norms of international law. It is possible to speak with definiteness, that sphere of action of "the State's right of ownership" regarding "enjoyment and exercise of the right of ownership of property, including mineral rights" (article 7 of the treaty), can from the spatial point of view be not "State", but only those land on which the Norwegian government has conferred documents on the exclusive right of the property according to the local legislation.

The Norwegian state began to demand for itself a share of participation in mining operations of private persons and companies acquiring the mineral rights and, accordingly, claims on the so-called "Public Lands" – "State land" in the beginning of the 1960-ies²⁶.

But the Norwegian government has not stopped on these infringements of the treatment specified in article 7 of the treaty on Spitsbergen. In 1973 it has developed the first Royal Decree (by-law) about creation of nature protection zones²⁷. By 2001 nature protection zones have been established already on 56 % of land and 72 % of water territory of the archipelago²⁸. On the basis of these by-laws some companies, and also the Norwegian state as the legal person, have been deprived a component of the property right to land – rights of using of their landed properties. Besides these by-laws contained the provisions carrying into effect an interdiction on acquisition of the mineral rights. I.e. on the basis of by-laws the

²⁶ A.Hoel "Svalbard. (Svalbards historie 1596-1965)", Oslo, "Sverre Kildahls boktrykkeri", bn. 3, 1967, s.1479.

²⁷ "Ot. prp. nr. 38, (2000-2001) "Om lov om miljøvern på Svalbard (Svalbardmiljøvernlov)", Oslo, Det Kongelige Miljøverndepartement, s.11.

²⁸ "Ot. prp. nr. 38..."", s.39.

Norwegian state has terminated effect of the international "gentlemen's" agreement on the most part of land territory of Spitsbergen.

The Norwegian members of parliament have lifted this interdiction on a level of the law About environmental protection on Spitsbergen (it is carried into effect on July, 1, 2002). There is not mentioned an opportunity of claiming of indemnification for expropriation of the rights of using of landed properties²⁹ as the Norwegian government have proved an opportunity of such expropriation by provisions of article 2, but not of article 7 of the treaty on Spitsbergen. In comments to this law distinction of the points of view on the juridical nature of the mining regulations is marked, and also is underlined that provisions of the mining regulations have fragmentary character and in this connection (without dependence from approaches to interpretation of the juridical nature of this international agreement) it is necessary "to supplement" it by instruments of the local legislation³⁰.

In the 1920-ies the Norwegian government for acquisition of the rights which have been not stipulated for Norway by the treaty on Spitsbergen, has developed the mining regulations so as if it is intended for regulation of usual relationships of the property by the standard image. Absence of reaction to these actions of the Norwegian government explains erosion of terminology of the treaty and fragmentary character of provisions of the mining regulations³¹, considerably complicated understanding of relationships of the property within the framework of a regime of Spitsbergen.

In 2001 the Norwegian parliament under the pretext of necessity of "addition" of provisions of the mining regulations by norms of internal legislation has granted Norwegian executive bodies the right to deprive owners of landed properties of a component of the right of ownership of property (right of use) and to break provisions of the international "gentlemen's" agreement by development

²⁹ "Ot. prp. nr. 38..." , s.168-181.

³⁰ "Ot. prp. nr. 38..." , s.21-22.

³¹ A.M.Oreshenkov. The Author's abstract of the dissertation on competition of a scientific degree of the candidate of jurisprudence on a theme: "International legal regime of land territory of Spitsbergen", Moscow, 1997, pages 16-17.

and carrying into effect by-laws providing, mainly, creation of nature protection zones in any place of the archipelago, recognized suitable to this purpose by the Norwegian ecologists. However any infringement of the treaty on Spitsbergen and the mining regulations without dependence from the importance of the purpose represents infringement of norms of international law and by that principle *pacta sunt servanda*.

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