

About taxation in an area of application of the Treaty on Spitsbergen.

Exhaustion of existing deposits of gas and oil in Europe leads to a search of new sources of hydrocarbon's supply. In Europe remained not too many perspective provinces of gas and oil. Among them – spaces falling within the jurisdiction of the Treaty on Spitsbergen, signed at the Versailles peace conference in Paris in 1920. Juridical and physical persons of countries-participants of this agreement have the right of equal access here. According to article 8 of the treaty on Spitsbergen:

”Norway undertakes to provide for the territories specified in Article 1 (land territory of 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 labour conditions, shall exclude all privileges, monopolies or favours 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.”¹

Storting (parliament) of Norway has passed the law ”About the taxation on Spitsbergen” on July 15, 1925 on the basis of article 8 of the treaty (the new Law about the taxation on Spitsbergen is commissioned on November 29, 1996), and the law ”About taxation by the duty of coal, oil, other minerals and the rocks which are taken out from Spitsbergen” on July 17 the same year. Storting asserts annually the decision about taxes to property and incomes to Spitsbergen. These statutory acts establish rather low level of taxation of the juridical and physical persons engaged in economic activities on the archipelago and in its territorial waters and having in this connection the properties or claims.

Except for the duty stipulated in the treaty on minerals taken out it is necessary to mention the tax to the owner of property which changes depending on the cost of property from 2 ‰ (this rate is applied, in particular, to the ground areas) up to 1,5 ‰, the tax to incomes – 10 ‰, and also tax collections from holders of claims at a rate of 6000 Norwegian kroner or hardly less than 900 US dollars (in the 1920-ies when Norway coordinated the mining regulations with other countries which have signed the treaty on Spitsbergen, these tax collections equaled 500 kroner).

Besides the considered treaty provisions the Norwegian state has undertaken to entitle all nationals of countries-participants of the Treaty on Spitsbergen an opportunity to accrue the property right to the ground areas (article 7 and the annex to the treaty) for engagement in any kind of economic activities (article 3 of the treaty). In this connection the treaty provides, that for any person who has occupied

¹ ”St. prp. nr. 36 (1924). Om godkjennelse av traktaten om Spitsbergen (Svalbard)”, Oslo, Utenriksdepartement, s. 33-34.

a ground area shall be recognized the property right to it, including mining rights (articles 2 and 7) after abidance of the procedure established by the treaty.

Norway has managed to bypass the given obligation, using another treaty obligation – to develop stipulated in the article 8 of the treaty an additional international "gentlemen's" agreement – mining regulations for Spitsbergen. Norwegians have developed this agreement not on the principles of the treaty, but on the principles of national legislation, – private persons and companies accrue under the mining regulations not the property right to the ground areas, but the right of term using claims.

For realization of the principles of the mining regulations it was necessary to derivate the persons who have occupied the ground areas before signing of the treaty, a part of their rights already obtained, namely, the mining rights. Norwegians have solved in their own interests collision between principles of the treaty and the mining regulations created by themselves. The documents conferred by them on the exclusive right of property on the occupied ground areas do not provide recognition either the acquired rights in full (violation of article 6 of the treaty), or the exclusive right of the property to them (violation of annex of the treaty § 1 p.9 and § 2 p.11). At only external following to the treaty the mining regulations emasculates the essence of its seventh key article.

At communication of the draft mining regulations Norway has not declared substitution of principles of the Parisian treaty by principles of the legislation of a continental part of the country to the countries-participants of the treaty. Furthermore, the Norwegian government has elaborated the mining regulations as an international agreement, and has put it into effect as a document of a local legislation. In our opinion the application of such mining regulations has actually invalidated the treaty of 1920.²

Using provisions of the mining regulations, which do not possess necessary legal cleanliness, Norway aims at obtaining the rights, which have not been

² The above named issues are detailed by A.M.Oreshenkov in his article "Features of the sovereignty of Norway over Spitsbergen under the Parisian treaty of 1920", "Moscow journal of international law", 2003, No. 2.

stipulated for it by the treaty on Spitsbergen. In particular, Norway as the juridical person, in infringement of some provisions of the treaty, puts forward complaints upon the property right upon the most part of the land territory (93,2 %)³ and on a geological shelf within the limits of territorial waters of the archipelago. In this capacity Norway demands participation up to $\frac{1}{4}$ in activity of the companies and private persons, carrying on mining operations that, actually, increases a level of the taxation to them on 25 %. Norwegian executive bodies carry out such approach. Realization of such approach allows using the received sums of money not for needs of Spitsbergen, but in the interests of Norwegian state as a juridical person.

An absence of reaction of other countries-participants of the treaty on similar actions of Norway can be explained by their low interest in economic activities on the archipelago where the search of deposits of minerals is complicated not only by hard nature conditions, but also by legislative activity of the Norwegian state. By 2001 nature protection zones were established on 56 % of land and 72 % of water territory of the archipelago⁴, and, besides, in infringement of article 7 of the Treaty on Spitsbergen part of proprietors of the ground areas is deprived of their rights to use land belonging to them because of the internal law on environmental protection on Spitsbergen, authorized by the parliament of Norway in 2001.

Inadequate reaction of countries-participants of the treaty is caused also by the absence of unified approach to doctrinal fundamentals of the Treaty on Spitsbergen. The treaty has been elaborated on the basis of the project of the Convention on Spitsbergen 1910-1914 according to which the archipelago should get the status of "the territory for common use withdrawn from the sphere of covering of the state sovereignty".⁵ Using of such basis is one of the main reasons

³ "Report No.40 to the Norwegian Storting (1985 - 86) concerning Svalbard", Royal Ministry of Justice, p.13-14.

⁴ "Ot. prp. nr. 38, (2000-2001) "Om lov om miljøvern på Svalbard (Svalbardmiljøvernlov)", Oslo, Det Kongelige Miljøverndepartement, s.39.

⁵ 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.

of that proclaimed in article 1 "the full and absolute sovereignty" of Norway over Spitsbergen is limited by the provisions of the Parisian treaty of 1920.

According to preamble of the Treaty on Spitsbergen key provisions of this agreement are recognition of the sovereignty of Norway over archipelago and creation here "an equitable regime" for nationals of the countries-participants of the treaty. In the context of that norms of the international law, defining the order of acquisition of the property rights to the ground areas, are realized without transformation into the local legislation within the framework of this regime, it can be defined as an international legal regime.

According to the article 1 of the Treaty on Spitsbergen the countries-participants of this agreement have recognized the sovereignty of Norway over land territory of the archipelago on the conditions agreed in the treaty, and by virtue of the standard norms of international law it possesses the sovereignty as well over territorial waters of the archipelago. The recognition of Norway's sovereignty only over the land territory of Spitsbergen can be explained in particular that conditions of the articles 7 and 8 of the treaty define the order of acquisition of the rights to the ground areas including mineral rights by legal and physical persons of the countries-participants of the treaty on land territory of the archipelago.

One of bases of the regime of Spitsbergen is the principle of equality. According to the first paragraph of article 3 of the Treaty on Spitsbergen private persons and companies of the countries-participants of the Parisian treaty have the right to be engaged in mining and maritime operations in waters and fjords of the archipelago according to the norms of the local legislation and on a footing of absolute equality, and according to the second paragraph – in territorial waters and on land territory of the archipelago on the same conditions of equality. If the terms of the first paragraph represent geographical concepts and mean the waters adjoining to the land territory of Spitsbergen so terms of the second paragraph are legal concepts. Norway in exchange for recognition of the sovereignty over the archipelago has agreed to establish "an equitable regime" for nationals of the

countries-participants of the treaty not only on land territories of Spitsbergen, but also in water spaces adjoining to them.

The mining regulations by their juridical nature are an international agreement and according to article 8 of the treaty operate only on land. It means that Norwegian state has no right unilaterally to change spatial sphere of its operation. Despite of this fact Norway has spread its operation to the territorial waters of the archipelago.

Spreading of the spatial sphere of the operation of the mining regulations on a geological shelf within the limits of the territorial waters of Spitsbergen has had for an object to veil the obligation of Norway to frame the local legislation, regulating extraction of minerals, according to principles of the treaty on a geological shelf under the water spaces adjoining to the archipelago and specified in article 3 of the Treaty on Spitsbergen.

Norwegians have bypassed this treaty obligation due to spreading of action of the mining regulations on territorial waters of Spitsbergen and due to inclusion in their legislation provisions that Norwegian legislation on a continental shelf is not applied in internal waters and the territorial sea of Spitsbergen.⁶ Their position is based firstly upon provisions about "the full and absolute sovereignty" of Norway (article 1 of the Treaty on Spitsbergen) over the land territory of the archipelago. And secondly, on the juridical postulate using absence in the Treaty on Spitsbergen of mentions of its shelf (a legal concept "continental shelf" simply did not exist in 1920).

In view of it, from the Norwegian legislation follows, that limits of Norwegian continental shelf should be measured from continental Norway and Spitsbergen up to potential western, northern and eastern borders of "the Norwegian shelf" but rules applied on continental Norway should be basis of a regime of this shelf including shelf areas around Spitsbergen.

To speak about an establishment of a regime of the Parisian treaty on adjoining to Spitsbergen sea spaces and borders of its shelf areas is possible only

⁶ "Petroleumslaw" of November, 29th, 1996, § 1-4, http://www.npd.no/regelverk/r2002/Petroleumslaven_n.htm

after solution of a question on the juridical nature of the mining regulations. In turn, the solution of this question will allow speaking about an opportunity of establishment of the tax laws on shelf areas adjoining to Spitsbergen according to the provisions of the Parisian treaty of 1920.

This article is the lightly changed article of A.M.Oreshenkov from "Moscow journal of international law", 2004, No. 4, pages 164-169.