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The doctrine of “common territory” versus “terra nullius”: political geography in the political and legal context of Spitsbergen’s status in the late 19th century – first half of the 20th century

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Abstract. The role of scientific and commercial development in the modern status of Spitsbergen cannot be overestimated. The archipelago development before the signing of a treaty in 1872 between Russia and the Swedish-Norwegian Union was the conflict issue undermining the “terra nullius” doctrine, which was put into circulation in the first half of the 20th century to justify the “sovereignty” of Norway on this territory in the future. At the same time, several centuries before that, the Russian Pomors, Danes and others were actively developing the archipelago, and it is confirmed by historiography and modern archaeological data. For a long time, the phenomenon of diplomatic correspondence between Russia and Sweden-Norway, known as “Agreement of 1872”, did not receive sufficient coverage in scientific and legal literature. It seems extremely interesting from the standpoint of an alternative interpretation of the events related to Norwegian activation of fisheries in the Svalbard waters (this is how the archipelago is designated in the official documents of the Norwegian government) in the late 19th century – the early 20th century. The “common land” was the naming of Spitsbergen in the “Agreement of 1872”. The article examines the political and legal consequences of the “terra nullius” concept and its use for the archipelago status since the signing of the Treaty in 1920, including gradual extension of the Norwegian national law to replace the international treaty regime. The expansion of the 200-mile “fishing zone” and the adoption of the “Mining Charter”, which was, in fact, an intrinsic act, were the politico-geographical consequences of the “no man's land” concept, erroneously or deliberately used when signing the treaty in the early 1920s.

Introduction

Svalbard is the territory of a unique political and legal regime created due to the efforts of states to ensure international cooperation in the development of energy (primarily, coal), biological resources (fish) and security. This regime was established within the framework of the 1920 Spitsbergen Treaty (hereinafter – “Treaty”). It is also important that this act was one of the first documents in international practice that established Norway's obligations to “ensure the conservation and, if necessary, the restoration of fauna and flora”. The Treaty was a kind of harbinger of the universal international standard art. 119 of the United Nations Convention on the 1982 Law of the Sea (hereinafter – “1982 Convention”) related to the “reproduction” of marine bio resources. Moreover, the Convention on Fishery and



Protection of Living Resources of the High Seas, adopted in 1958 in the Art. 2 focused on “protective measures” that “must primarily ensure the supply of human food”, while the 1982 Convention emphasized an “ecological approach” and protected specific species. That is why the “revolutionary character” of the Treaty had become evident at that time.

However, the “legal basis” of the Treaty, due to certain historical, political, legal and procedural specifics, has not been able to ensure full and proper compliance with provisions set out in it. This was due to the actual absence of one of the main “players”, namely Russia, then the Soviet Union, among the States-parties of the agreement. The USSR joined the Treaty 15 years later (May 7, 1935), and it was the second state after Norway, maintaining a significant presence on the archipelago.

1. “Terra nullius” as a lobby tool for “Norwegianization” of Spitsbergen

The concept of Spitsbergen as “terra nullius” had a strong presence in the minds of generations and in the legal doctrine. The Treaty established the “sovereignty” of Norway over the archipelago. Art. 1 expressly set forth the Kingdom's “full and absolute” sovereignty over the archipelago within the following boundaries: from the Bear island (Bjørnøya), all islands located between 10° and 35° EL from Greenwich and between 74° and 81° NL, incl. West Spitsbergen, North-East Land, Barents Island, Edge Island, Kong Karls Land, Hope or Hopen island, and Prince Karl's land, along with all the islands, islets and rocks belonging to them.

It is believed that the concept of “terra nullius” on Svalbard was first announced by the Italian lawyer Camille Piccioni in 1909: “The issue would have been simpler if Spitzbergen, until now terra nullius, could have been attributed to a single state, for reasons of neighboring or earlier occupation. But this is not the case and several powers can, for different reasons, make their claims to this territory which still has no master.” [1].

Later, systematic conferences on Spitsbergen in 1910, 1912 and 1914 did not bring any significant results in establishing a political and legal regime on the archipelago.

However, according to a researcher Mary Katherine Jones, who analyzed more than 40 Norwegian publications on the Spitsbergen issue of the 19th and early 20th centuries, a process of active “literary lobbying” of Norway's interests on sovereign issues rights over the “no-man's land” of the archipelago was on the agenda of the Paris Peace Conference of 1919 [2]. Recognition of Spitsbergen as “no-man's land” during the work of the above-mentioned conference was also promoted by a prominent American lawyer and US Secretary of State Robert Lansing [3].

Roald Berg described the policy of the Norwegian government in relation to Spitsbergen in the second half of the 19th century even more boldly: “an offensive policy of expansionism, motivated by historical and geographical considerations and alleged rights to re-establish the Medieval Norse Empire” [4]. In addition, the author also used the term “Norwegianization” with a reference to the renaming of geographical objects.

However, the history of the archipelago's development suggests an entirely different legal design, which should have been applied to the archipelago – “common areas”. Professors A.N. Vylegzhanin and V.K. Zilanov underline several factors that testify to the centuries-long joint development of the archipelago by several states, incl. Britain, Netherlands, and Denmark, who, in different historical periods, claimed their territorial rights to the archipelago. Russian Pomors also owned this land but without territorial claims. Their interest was purely economic, not political. Some evidences that prove the presence of the Russian fishermen on Spitsbergen are historical facts:

1) in the 15th century, the ambassadors of Tsar Ivan III used the route to Western Europe (e.g., to Denmark in 1496) from the White Sea through the water area adjacent to Spitsbergen;

2) the active commercial development of Spitsbergen by Russian Pomors in the 15th and 16th centuries. They called the archipelago “Grumant” or “Gruland”, considering it as the continuation of Greenland;

3) Pomor settlements proven by archaeological evidence based on the results of expeditions of the Institute of Archeology of the USSR Academy of Sciences in 1979–1981; for example, a house located 14 km north from Gravschen Lagoon, near Stabbelva, built in 1557;

- 4) international correspondence as an evidence of the Moscow possessions in Gruland:
 - the letter of the Danish King Frederick II to a merchant Ludwig Munch on March 11, 1576;
 - the letter from a Nuremberg doctor, Professor of philosophy and medicine Jerome Munzer to the Portuguese King Juan (Joao) II on July 14, 1493;
 - the message from the Danish Admiral Severin Norby to the King of Denmark and Norway Christian in 1528;
- 5) early modern time mapping data:
 - G. Mercator's map (1569): 7 islands were called "Svyatie Russkie" ("Holly Russians") on the site of modern Spitsbergen;
 - "Karta severnykh zemel" ("Map of Northern lands"), end of 16th – beginning of 17th century: the islands were designated as "Russian land" [5].

The further active presence of Pomors on the archipelago is not contested in Norwegian historical literature. As J.P. Nielsen noted, a full-fledged Norwegian fishery began only in 1819 [6]. And we don't count scientific expeditions that allowed making significant progress in mapping and obtaining unique data. At the same time, Pomor fishermen participated in some expeditions as "local experts, sailors and pilots" [6]. Later, while negotiating the Agreement of 1872, the "common use" regime of the archipelago was confirmed. The absence of a condominium for any state provided the absolute unreasonableness of the term "terra nullius" in this regard [7].

2. Commercial expeditions as a "common use" factor

Officially, the archipelago, as well as Bear Island, located between Spitsbergen and continental Norway, is believed to be discovered in 1596 by a Dutch expedition of W. Barents. For a long time, only the coastline of the islands was investigated, because of the numerous whaling expeditions of the 17th and 18th centuries. They were operating on the coast of Spitsbergen, and did not move deeper into the island.

The first evidence of the scientific study on Spitsbergen was the expeditions of V.Ya. Chichagov in 1764–1766. They were organized upon an initiative of M.V. Lomonosov. The results of the two expeditions and their scientific observations made it possible to publish a description of the archipelago [8]. Then, English scientific expeditions of Phipps in 1773, the Norwegian Keilhau expedition in 1827, the French expedition on the ship Recherche in 1838–1839 and others were sent to Spitsbergen. Before the beginning of the 20th century, Swedish researchers played an important role in the scientific study of Spitsbergen. The most famous of them was Adolf Nordenskiöld, who compiled a detailed map of the archipelago and discovered a phosphorus-containing mineral – a raw material for obtaining artificial fertilizer on the western shores. Also, he immediately suggested that the Swedish government used the results of its research in favor of the state interests [9].

Several joint Swedish-Russian geodesic expeditions aimed at conducting the degree measurements in 1898–1902 became a notable milestone in the study of the islands.

The Russian expedition under command of the captain I rank V.Ya. Chichagov was the largest and the most complex of the late 18th century. Its goal was connected, strangely enough, with the search for the most optimal route to Kamchatka through the Arctic Ocean. According to the geographers of that time, the Ocean was ice-free. The route of the expedition was to pass along the coast of Greenland and the north-western tip of North America and then through the Bering Strait. Spitsbergen was chosen as a reference point for the start of the expedition. Two attempts in 1765 and 1766 failed, because of the ice, nebula and calm. After the mark of 80° 26' N Chichagov concluded that sailing across the Arctic Ocean was impossible. The memory of him was immortalized on Edge Island, East of Spitsbergen [6].

At the same time, the creation of the Norwegian steam fleet in the 19th century, as well as the activation of the "Norwegian State Expeditions to Spitsbergen" (Det Norske Statsunderstøttende Spitsbergenekspedisjoner – DNSS) in 1906–1925, financed by public and private donations that reached the amount of 1,875,730.03 kr. [10] by 1927, allowed Norwegians making the most effective presence and the "effective occupation" to justify their claims to sovereignty.

At the same time, it is important to note that the resources for Norwegian research in Svalbard were irregular. Until 1920, the participation of the state was insignificant. Since the signing of the Treaty it was characterized by significant growth both in absolute numbers and in relation to the state share [11].

However, Adolf Hoel, the permanent head of DNSS since 1912, highly assessed the potential of scientific activity in foreign policy: “Scientific research and exploration almost always take place prior to state annexation – political or economic – of new territories. In addition, states with the best knowledge of the region have an advantage in conflicts of interest and subsequent negotiations” [12].

3. Agreement of 1872 and the “commonly used lands” concept

In March 1871, the government of the Swedish-Norwegian Union sent a diplomatic note to several European countries, incl. Britain, France, Germany, Denmark, the Netherlands and Russia. Its content was reduced to the official intention of the government and the monarch to “take over” the Spitsbergen archipelago.

However, a further exchange of diplomatic notes involved Russia only (15/25.05.1871, 16/28.06.1872, 30.06/12.07.1872). It is known as “Agreement of 1872” in historical and politico-legal literature. Professor A.N. Vylegzhanin and V.K. Zilanov, highlighted the key theses of both sides. As for Sweden-Norway, the political and legal position was expressed as follows:

1) due to lack of settlements on the archipelago, the Kingdom citizens asked for protection and subsidies for the establishment of permanent settlements there, which would ensure their independent existence through fishing;

2) Swedish summer scientific expeditions to the islands of the archipelago had been conducted for a long period of time;

3) the islands of the archipelago had not been a part of any state, and therefore, objectively, due their nature and geographic location, they belonged to the Norwegian continent;

4) the King wished to be sure that none of the subjects of other states who had had their interests in the archipelago would oppose to the approval of his authority on that territory.

The response of the Russian diplomatic department can be described to the following position:

1) this format of interaction and consideration of interests of all interested parties was welcomed;

2) legal uncertainty was recognized regarding the rights of interested parties who at different times had tried to apply the principle of “effective occupation” of the archipelago at the expense of fisheries and permanent settlements;

3) due to the historical uncertainty, it was proposed to leave that issue without a specific political and legal solution and to apply the principle of accessibility of the archipelago for all interested parties, as before;

1) the parity of all legal “titles” of the interested parties that had ever developed the archipelago was affirmed;

2) the scientific colonization of the archipelago by Sweden based on the parity of all stakeholders was welcomed [5].

Quoting A.V. Petchurov [13] and R.V. Dekanozov [14], the authors came to a conclusion that Russia reacted negatively to the attempt to establish the Swedish-Norwegian sovereignty over the archipelago and was perfectly aware of further geopolitical risks. Addressing the diplomatic note not only to Russia, but also to other states, Sweden-Norway spoke about the established international status of the archipelago. And the absence of any protest notes regarding the statement of the Russian Ministry of Foreign Affairs on the “sovereignty” issue confirmed the consistency of the states’ positions in 1872. In a closing note of June 30/July 12, 1872, the Russian government confirmed the acquaintance with the “decision taken by the Swedish Government to refuse from the annexation of the islands of Spitsbergen after consideration of the statements in the note” of the Russian Government on May 15/May 27, 1871. Moreover, customary law of the sea, associated with freedom of the high seas, shipping and fishing had been valid in the sea area of Spitsbergen until the conclusion of the Spitsbergen treatise in 1920. It is evidence in favor of the international management regime of the archipelago.

Another fundamental issue is the assessment of the “effectiveness” of the occupation of Spitsbergen by the parties to the Agreement of 1872. As L.M. Poval notes, referring to Hugo Grotius as one of the founders of the modern international public law, an effective occupation of “no man's territory” is the main condition for the international recognition of sovereignty. According to H. Grotius, the acquisition of the state territory is made either by taking possession (“*occupationederelicti*”) or by means of a contract (“*pactionibus*”), or by means of conquest (“*victoriae jure*”). However, justifying freedom to use the sea, H. Grotius wrote that it could not be the property of any state [15]. It is obvious that at the beginning of the 1870s, there was no “effective occupation” of the archipelago by the Swedes and Norwegians and it was confirmed by the text of the Agreement of 1872.

The Agreement of 1872 reflected the foreign policy situation of the time when the Russian Empire was forced to act with the utmost caution, defending national interests. The territory of the Empire did not allow pushing its northern neighbors (especially Sweden) too actively. At that time Sweden had revanchist ideas on the return of the lost territories after the wars of the 18th century. These ideas were initiated by the Swedish King Oscar I, a successor of Karl XIV Johan (Bernadotte) [16].

One of the striking examples was a consistent change in the geography of the land border of Russia and Norway, related to the existence of the “frontier zones” phenomenon when Russia made concessions in the delimitation of the border area [17]. Moreover, on the land border of the two states, the “effective occupation” factor was of a rather controversial character, as it was linked with the infringement of rights of the Russian subjects – Lopari (pre-revolutionary Russian name of the Saami people) who led a semi-nomadic way of life [18].

This explained the actions of Russia that had the defense alliance with Britain and France of November 21, 1855 (the so-called “November Treaty”) in mind and tried to use the most neutral political levers to relieve the foreign political tension in the North. This was facilitated by the failure in the Crimean War, strained relations with Britain and France, and businessmen of the Arkhangelsk unit of the Imperial Free Economic Society who did not want to incur economic losses from a possible rupture of diplomatic relations with the Scandinavians.

Conclusion

Thus, scientific and commercial expeditions to Spitsbergen were of great importance for the formation of its political and legal status. The main reasons for the loss of the Russian Empire's influence in this region are the following:

- signing of the “November Treaty” in 1855;
- the broadest geographical space of the Russian Empire and the nuances of foreign policy related to the protecting the land border priority and the “sacrifice” of the territory for economic and political purposes (the role of the “Free Economic Society” in Arkhangelsk);
- serious climate fluctuations in the Arctic region [19], which influenced the formation of year-round fishing in Norway due to the Gulf Stream, and limited fishing in Russia, only along the coast in the warm season (May – October);
- Norwegian powerful steam fleet and their scientific and commercial development as an “effective occupation” factor;
- actual absence of a full-fledged merchant navy in the Russian Empire up to the Soviet period;
- removal of Russia as a political “player” in the negotiations on the Svalbard Treaty in 1920.

After the Svalbard Treaty of 1920, which implied a clear legal ambiguity and uncertainty about sovereignty and at the same time the international legal regime, the Norwegian government began to use various legal subtleties for the gradual extension of national law to the archipelago.

As it was mentioned by the lawyer and legal expert of the Arctic A.M. Oreshenkov, Norway managed to overcome Art. 2 and Art. 7 of the Treaty. The articles secured that any person who occupied a part of the land, upon fulfillment of the procedure established by the Treaty, got recognized ownership of it, including the rights to mining. The Norwegian part, using Art. 8, which established the requirement for the adoption of the Mining Regulations for Spitsbergen, developed an agreement not on the principles

of the Treaty, but as a national normative legal act, according to which individuals and companies did not acquire the right of ownership of land but right of urgent use of mining outlets. In A.M. Oreshenkov's opinion, this meant that the persons who occupied the land before the contract lost some of the acquired rights, namely, the rights to mining. The Norwegians used the conflict created between the principles of the Treaty and the mining charter in their own interests. The Norwegian documents on the exclusive right of occupied land ownership provided the recognition of neither acquired rights (violation of Art. 6 of the Treaty) nor exclusive property rights to them (violation of § 9, § 1 and § 11 of the Annex to the Treaty). In addition, the Norwegian government extended the scope of the "Mining Charter" to the territorial waters of the archipelago, including the continental shelf, which was also a violation of the Treaty regime of the archipelago.

Also, in the late 1970s, Norway established a 200-mile fishing zone, considering the provisions of the UN Convention on the 1982 Law of the Sea, which extended to the Treaty regime of the archipelago, without any regard to the fact that the Treaty itself did not provide the existence of such a zone.

Thus, it becomes obvious that the marking of Svalbard as "terra nullius" until the signing of the Treaty of 1920 existing to this day in a large layer of historical, political and legal literature, is the starting point for the violation of the international common use regime in relation to the Spitsbergen archipelago.

In conclusion, it cannot but be mentioned a scientist Adam Grydehøj who believes that Norway's Svalbard policy is historically focused on marginalizing Russian influence; but at the same time, however, it risks losing authority within Svalbard due to the strengthening of local democracy in Longyearbyen and increasing opportunities for the involvement of non-traditional Arctic actors such as the Asian economic powers [20].

Gratitude

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