УДК 341.6

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Genesis and development of alternative dispute resolution methods in interstate disputes

Since the emergence of the first states, society faced an urgent need to regulate the relationship between them and find ways to resolve conflicts and disputes. Power methods (such as war, aggressive action, etc.) have proven to be ineffective. Jurisdiction, which would be empowered to examine disputes between states without violating the principle of equality between them, did not exist in this regard, the state turned to alternative methods of dispute resolution (alternative dispute resolution – ADR). Today, in the twenty-first century, ADR gained special expansion and development. In view of this, studying of ADR impossible without an analysis of the genesis of ADR.

A significant contribution to the development problems and its research did Brooks W. Daily, Tjaco van den Hout, Gabriella Kaufman-Kohler, Henry Brown, Artur Marriot QC and others.

Paper objective is research of ADR between states.

First states were representatives of absolute monopoly concerning all areas. The state had absolutely no restrictions on the international stage and could actually perform any action. There were no any restrictions on the policy of foreign and domestic, in relation to its own citizens, economy and others. The law was different, those who are stronger are right. It was a principle that applies to all relationships that arise between state and citizen, the State and other State among citizens. With no rules disputes resolved by means of force. This state of affairs has led to the need to conclude agreements between states. However, even the agreements achieved voluntarily by the parties from time to time violated. Then the question arose of how disputes of this kind can and must be resolved. At that time methods of dispute resolution became to use by states, which we now call alternative – negotiation, arbitration, mediation.

During the negotiations the parties sought to reach agreement on their own, but due to the fact that each defended their position and would not give in, often they do not succeed. This method of dispute resolution was not effective. Latter parties began to attrack third neutral party – an arbitrator. Arbitration has emerged as an alternative to war.

To better understand the concept of arbitrage turn to its sources.

David Bederman [1] described the practice of arbitration between the Greek city-states and communities in the Roman Empire: «The Institute of the dispute settlement decision of a third party was founded by the Olympic gods» [2]. Hugo Grotius in his work «On the law of war and peace» (1625) defines arbitration as an alternative to war that can ensure the peaceful settlement of disputes between lords. Even back in the thirteenth century German cities of Hamburg and Lübeck have agreed to resolve the dispute through arbitration, and in 1291 the cantons Uri, Schwyz and Nidwald, which later became Switzerland also agreed to resolve disputes peacefully through arbitration [3].

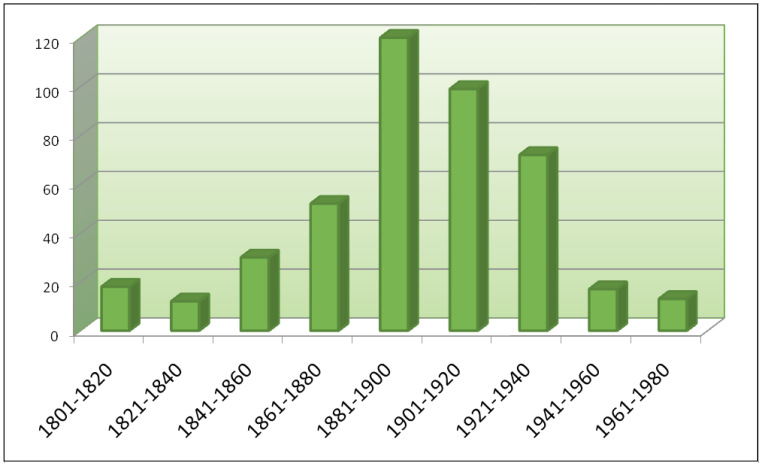
After Grotius, Emerich de Vatel is the most important author of the international law. Vatel was a diplomat, he outlined his views on how the world works and how international law cannot exist in the world in paper «Law of Nations» (1758). Vatel also promoted arbitration, as a practical, rational and moral way to solve international disputes. He proposed methods for enforcement of the arbitration

decision, one of which was next, weak state has to agree with the strong that the strong state was the first guarantor. This meant that the guarantor fought on behalf of the weak state if it wins the arbitration, but the other side – the third state – does not want to execute the arbitration decision [4].

Another method proposed Vatel is the fact that the parties to create a fund with assets of each side and transfer it to a third party or exchanged hostages until the end of arbitration. Vatel practices used by the founders of the USA. Thus, the Treaty Jay (Jay Treaty, 1794) United States and Britain agreed to use arbitration to resolve disputes arising in connection with the war for independence. Jay's Treaty provided for the creation of three mixed commissions which would represent both countries to address issues that remained outside the negotiating process.

During the years 1794–1804 on the basis of Jay Treaty was made 536 arbitration awards, starting with the judgment St. Croix River (1798), which defined much of the border between the United States and Canada. The use of arbitration between countries gradually increased as the nineteenth century rightly be called the golden age of arbitration.

Historical trends: Interstate arbitration (1801–1980)



Source: A. M. Stuyt, Survey of International Arbitrations 1974–1989 [5]

Arbitration often were used to resolve territorial disputes, the interpretation of contracts and on state responsibility.

Inter-state disputes are specific both in terms of their decision and execution due to the international principle of par in rarem non habet imperium («equal has no authority over an equal»). This principle means that the state has an obligation only for those contracts, which recognizes itself bound.

In international law, there are several ways to resolve international disputes involving states. The list of these methods is contained in Article 33 of the UN Charter, which states that the parties involved in any conflict, the continuation of which could threaten the maintenance of international peace and security, should first try to resolve the conflict through negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.

Negotiations, of course, is an integral part of any solution of international disputes. This is the easiest way of communication between states, it is often prescribed by international agreements due to the fact that it is not obligatory for the parties and therefore the state does not risk losing the advantage of agreeing to it. In addition the state may agree that the information to be disclosed during the negotiations can not be used in other processes for resolving disputes. The peculiarity of the negotiations is the lack of a third party, that they are carried out only with the parties to the conflict. In international law provisions for anticipated period of waiting, or cooling off period, which usually lasts from 3 to 12 months.

Considered that during this time the dispute has the potential to be solved through negotiations. It should also be noted that often parties defined negotiation as binding dispute resolution stage in treaties, and therefore the party that wants to address the court or arbitration, should document the process of starting negotiations by notification to the launch of negotiations on controversial issues.

If the party confirming such notification in any form (electronic, written or other) the opposite side or its representative (eg, in a dispute against the state – public authority), the date of receipt of the notification destination is the date of the beginning of negotiations.

After the expiration of the term, which is set in the contract or in an international instrument, a party may apply for protection of their violated rights or interests to arbitration, if provided. Negotiations between the states may be conducted through correspondence (notes, letters, appeals) or during meetings. The results of the negotiations are usually issued in the form of agreements or memorandum of understanding.

To resolve any dispute by the third party competence is essential in a particular body or of the arbitration panel. States give consent to the jurisdiction of certain international institutions initialling by international agreements. It should be noted that the parties to such agreements may make reservations to them, noting for example that a particular provision will not apply in their territory or jurisdiction of certain international jurisdictions will not apply to a particular category of cases (for example, Ukraine ratified UN Convention on the law of the sea with the provision that the main method of resolving disputes concerning the interpretation or application of the Convention is arbitration. It is also worth noting that the state may recognize the jurisdiction of certain international body after a dispute.

Consider other methods of dispute resolution involves the UN Convention on the Law of the Sea. According to Article 287 of the UN Convention on Law of the Sea when signing, ratifying or acceding to this Convention or at any time thereafter, a State shall be free to choose, by means of a written declaration, one or more of the following means for the settlement of disputes concerning the interpretation or application of the Convention:

– the International Tribunal for the Law of the Sea established in accordance with Annex VI;

– the International Court of Justice;

– an arbitral tribunal constituted in accordance with Annex VII;

– a special arbitral tribunal constituted in accordance with Annex VIII for one or more of the categories of disputes specified therein.

According to Part 5 of Article 287 if the parties to the dispute have not chosen thesame procedure to resolve the dispute, it may be submitted only to arbitration established in accordance with Annex 7, unless the parties agree otherwise. Thus, arbitration is a method of resolving disputes by default. Currently, the most effective and the

most common way to resolve international conflicts is arbitration, which recognized by the international community.

Through arbitration was decided one of the major disputes between the US and the UK about interference in the affairs of the state, which will be discussed further.

Case Alabama [6]

A diplomatic dispute between Britain and the U. S. arose during the American Civil War. The peaceful resolution of the dispute after 7 years after the war has created an important precedent of settling international disputes.

During the American Civil War United Kingdom was notified through the diplomatic corps on the need to preserve neutrality and non-interference. Instead, England was built a number of Confederate warships, the most famous of these was the «CSS Alabama». These warships looted and sank about 150 U. S. merchant ships that were sent to Europe during the years 1862–1864.

The U. S. demanded compensation for damages. They were huge. Charles Summer, chairman of the Senate Foreign Relations, said that the intervention of the UK Civil War continued civil war for two years and cost the United States hundreds of millions or even billions of dollars (2,152 billion dollars).

Negotiation on the dispute were threatening to fail until after the end of February 1871, both states have agreed to resolve the dispute by means of a special commission set up by the parties. The commission gathered in Washington March 8, 1871. In May 8 it has concluded the transfer of the Alabama case to solve by the Tribunal of Arbitration, convened in Geneva, which was composed of five members: one representative parties, King of Italy, President of the Swiss Confederation and the Emperor of Brazil.

The Tribunal ruled in September 1872, denying the US in compensation for consequential damages. US demanded compensation for losses incurred by them in connection with trade in Confederate cruisers, the cost of persecution of Confederate cruisers and expenses in connection with the continuation of the civil war. February 3, 1872 Britain said it would not abide by the decision of the arbitral tribunal, unless the issue of indirect losses will be open, but the tribunal has pleaded not competent in this matter. The United

States refused to requirements for indirect losses. The Tribunal ruled, under which the United Kingdom had to pay 15.5 million US dollars in compensation for Alabama case.

Another interesting case that was resolved through mediation and arbitration, is a matter concerning interference in state sovereignty, as well as moral and material damage caused by the actions of the state.

Case Rainbow Warrior [7]

In 1966, France conducted nuclear tests in Moruroa atoll (French Polynesia) in the South Pacific. New tests were planned in 1985. These tests were challenged by non-governmental organization Greenpeace, which protects nature. Greenpeace sent the ship Rainbow Warrior in New Zealand to do a protest nuclear testing by France. July 10, 1985 an explosion sank the ship when the ship was in Auckland harbor. One person was killed – Danish-Portuguese photographer Fernando Pereira. But France denied any participation in this incident .

22 September 1985 Prime Minister of France issued a communiqu , which confirmed that the ship Rainbow Warrior was sunk by French foreign intelligence agents on the order. French Foreign Minister informed the Prime Minister of New Zealand that France is ready to pay compensation for their actions. The incident caused the resignation of the defense minister and head of France's foreign intelligence service. Two agents of foreign intelligence under the guise of Swiss tourists were arrested in New Zealand in connection with the incident. November 4, 1985, they pleaded guilty on charges of manslaughter and willful damage to vehicles using explosives.

November 22, 1985, they were convicted by Chief Justice of New Zealand to 10 years in prison. The dispute arose between New Zealand, demanding compensation, and France, which required her to pass two agents. New Zealand said that France threatened to sever trade relations of the European Community and New Zealand, when both agents are not released. In June 1986 the two States referred all the problems between them arising from the Rainbow Warrior affair to the Secretary-General of the United Nations for a binding ruling.

France acknowledged that the attack on the ship Rainbow Warrior has caused the violation of territorial sovereignty of New Zealand and that it was guilty of violating international law. Also, France recognized

the right of New Zealand to compensate for damage caused by the attack.

UN Secretary General ruled that the French Prime Minister should apologize to the Prime Minister of New Zealand, and the French government – pay 7 million dollars in compensation. As for agents, New Zealand could be deported them, but said that France cannot continue to imprison agents and punishment because of absence of agreement between the countries that would regulate it. Taking into consideration aforesaid, the Secretary-General stated that New Zealand should transfer agents to military forces of France. In turn, France should send agents on the isolated island of Hao, which is located in French Polynesia, where they were required to be three years. During this period, they were forbidden to leave the island for any reason, except with the consent of both countries. They were isolated from people, including those from families and friends, except the military, in addition, they were not allowed to contact the media. France has to report on agents being referred to the island to New Zealand and the Secretary General every three months.

This case is an example of an alternative dispute settlement between states using mixed treatment – mediation and arbitration, conducted by UN Secretary General on the basis of mutual consent of the parties.

Historically, in case of failure to reach consensus states solve their disputes and conflicts through war. States started looking for other ways that could resolve their disputes through a neutral third party, negotiation or agreements. ADR applied throughout history, have passed the test of efficiency and were secured, as required for use in the event of dispute resolution in the UN Charter. Peaceful settlement of disputes is a principle of international law and is enshrined in several international instruments. International disputes are an integral part of the co-existence of nations. Therefore, ADR can solve complex disputes and develop a doctrine of international law through precedents.

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Я. П. Любченко

Возникновение и развитие альтернативных способов разрешения межгосударственных споров

В статье исследуется возникновение и развитие межгосударственных споров на основании работ исследователей и дипломатов, а также через анализ дел, которые были разрешены с помощью альтернативных способов разрешения споров.

Ключевые слова: *арбитраж, альтернативные способы разрешения споров, переговоры, спор, государство.*

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Виникнення та розвиток альтернативних способів вирішення міждержавних спорів

Постановка проблеми. *З моменту виникнення перших державних утворень постала гостра необхідність у регулюванні відносин між ними та пошуку способів вирішення конфліктів та спорів. Силові методи (як-то війна, загарбницькі дії тощо) довели свою неефективність. А оскільки судової юрисдикції, яка була б уповноважена розглядати спори між державами, не порушуючи принципу їх рівності між собою, не існувало, у зв'язку з чим держави звернулись до застосування альтернативних способів вирішення спорів (alternative dispute resolution, далі – ADR). Сьогодні, у*

XXI ст., ADR набули особливого поширення та розвитку. З огляду на це, актуальним стало їх вивчення, яке, на нашу думку, неможливе без аналізу генезису розвитку ADR.

Аналіз досліджень. *Значний внесок у розробку проблематики та її дослідження зробили Brooks W. Daily, Tjaco van den Hout, Gabriella Kaufman-Kohler, Henry Brown, Artur Marriot QC та ін.*

Метою статті є *дослідження ADR між державами.*

Виклад основного матеріалу. *Перші держави являли собою абсолютну монополію – щодо своїх громадян, у тому числі за кордоном, щодо регулювання майже всіх суспільних відносин, навіть щодо релігії. Держава не мала абсолютно ніяких заборон на міжнародній арені та могла вчиняти фактично будь-які дії. Були відсутні які-небудь обмеження щодо проведення зовнішньої та внутрішньої політики, по відношенню до власних громадян, економіки та ін. Право мало інший вигляд: воно було на стороні сильнішого. Це було принципом, який застосовувався до всіх відносин, що виникали між державою і громадянином, державою і іншою державою, між громадянами. Завдяки відсутності правил спори вирішувалися за допомогою силових методів. Такий порядок речей привів до необхідності укладення договорів між державами. Однак навіть ті домовленості, які досягалися сторонами добровільно, час від часу порушувалися. Тоді постало питання про те, як конфлікти такого роду можуть і мають бути вирішені. Саме в цей час почали виникати способи вирішення спорів, які ми сьогодні називаємо альтернативними – переговори, арбітраж, медіація.*

Висновки. *Історично склалося, що у випадку неможливості знайти консенсус держави вирішували свої спори та конфлікти за допомогою війни. Держави самостійно почали шукати інші способи, які змогли б вирішити їх спори за допомогою авторитетної третьої сторони, переговорів або угоди. ADR застосовувались протягом усієї історії, пройшли тест ефективності та були закріплені як обов’язкові для застосування у випадку вирішення спорів у статуті ООН. Мирне вирішення спорів є принципом міжнародного права та закріплене в ряді міжнародних документів. Міжнародні спори є невід’ємною частиною співіснування держав. Саме ADR дозволяють вирішувати складні спори та розвивати доктрину міжнародного права за допомогою прецедентів.*

Ключові слова: *арбітраж, ADR, переговори, спір, держава.*