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# THE ROLE OF INTERNATIONAL COMMERCIAL ARBITRATION IN THE DEVELOPMENT OF PUBLIC AND PRIVATE INTERNATIONAL LAW

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## I. Introduction

Over the past half century, International Commercial Arbitration (hereinafter “ICA”) has ceased to be merely a mechanism for resolving private law disputes; it has evolved into a constitutive actor in the evolution of both private international law (“PrIL”) and public international law (“PIL”). Sabahi, Laird and Gismondi express this situation strikingly and emphasize that the field of modern international investment law “public international law has a unique overlap with topics found in private international law”<sup>2</sup>. This overlap is no coincidence: the ICA has evolved into an institutional practice that continually redraws the boundary between contractual dispute resolution and state sovereignty.

The main thesis of this article is that the ICA is a passive practitioner in neither the PrIL nor the PIL domain; rather, it is a catalytic actor in the doctrinal, institutional, and normative development of both domains. This study attempts to examine the historical development of the ICA, including the period before and after the New York Convention, and its evolution up to the present day, particularly considering differing doctrinal perspectives. We will examine this thesis through two different theoretical lenses. The first lens is the Bourdieian

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<sup>2</sup>Sabahi B., Laird I. A., Gismondi G. E. International Investment Law and Arbitration: History, Modern Practice, and Future Prospects. International Investment Law and Arbitration, 2017. Vol. 1, No. 1. P. 2.

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sociology of law put forward by Yves Dezalay and Bryant G. Garth in *Dealing in Virtue*<sup>3</sup>: ICA can be read as a field where "symbolic capital" and elite networks are built in a field of global law. The second lens is the framework of "three representations" systematically put forward by Emmanuel Gaillard: monolocal, Westphalian and transnational (arbitral legal order) representations.<sup>4</sup>

The flow of the study is as follows; the second part presents Gaillard's theoretical framework and deals with critical readings of this framework developed by Cuniberti and Radicati di Brozolo. The third part presents the institutional-historical background centered on the International Chamber of Commerce ("ICC") and the 1958 New York Convention. The fourth chapter analyzes the contributions that the ICA has made to PrIL through party autonomy, separability, *lex mercatoria*, and other doctrinal innovations. The fifth chapter examines the ICA's contributions to the PIL through investor-state dispute settlement ("ISDS"), government contracts, sovereignty, and transparency. The sixth chapter deals with the structural tensions of the system and the recent reform debates. The conclusion suggests that the tension between the three representations is the main source of the transformative effect of the ICA.

### II. Three Representations: The Theoretical Framework

The most enduring contribution of Gaillard's Legal Theory of International Arbitration is his systematic distinction between three different "representations" of international arbitration. **The first representation** is the monolocal approach: arbitration derives its binding force from a single legal order, typically the law of the seat of arbitration. **The second representation** is the Westphalian (multilocal) approach: arbitration relies simultaneously on multiple national legal orders that are ready to recognize the award. **The third representation** that Gaillard himself defends is the arbitral legal order (*l'ordre juridique arbitral*): it is

<sup>3</sup>Dezalay Y., Garth B. G. *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order*. Chicago/London: The University of Chicago Press, 1996. P. 90.

<sup>4</sup>Gaillard E. *Legal Theory of International Arbitration*. Leiden/Boston: Martinus Nijhoff, 2010. P. 1.

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a set of convergent common norms that emerge when national laws are considered collectively.

It is of great importance that this third representation is not confused with the *lex mercatoria* theories of the 1960s. As Radicati di Brozolo insists, Gaillard's concept of arbitral legal order is not opposed to state laws, but based on their cumulative convergence.<sup>5</sup> In Gaillard's own words, this representation is "completely based" on the normative activity of states, only treating it as a whole, not as a collection.<sup>6</sup> Radicati di Brozolo emphasizes that today's states do not see arbitration as a threat to their sovereignty, but as a "beneficial to international business", that is, a beneficial mechanism for international trade.<sup>7</sup> For this reason, most states give arbitrators a wide discretion and avoid interfering in the process. These three representations are not just an academic distinction; each has concrete legal implications. According to which law will the validity of the arbitration agreement be determined? From which legal sources can arbitrators be fed? Can a state court recognize a judgment that has been annulled in another country? These are some of the actual questions of International Commercial Arbitration. The answer to these questions varies according to the representation adopted.<sup>8</sup> Cuniberti, on the other hand, looks at it from a critical perspective: According to Cuniberti, the approach that Gaillard calls the "functional method", that is, the treatment of the *lex mercatoria* not as a "list of rules" but as a comparative "decision-making method"<sup>9</sup>, gives arbitrators such a wide discretion that it seriously weakens the predictability of the outcome for the parties.<sup>10</sup>

Radicati di Brozolo, on the other hand, points to the practical superiority of Gaillard's approach: the traditional approach centered on national law cannot solve the problem of conflict of laws and produces fragmented, unpredictable

<sup>5</sup>Radicati di Brozolo L. G. Emmanuel Gaillard's Theory of International Arbitration: The Basis for a Uniform Law of International Arbitration. In: Racine J.-B. et al. (eds.). *Liber Amicorum Emmanuel Gaillard*. Leiden: Brill, 2024. P. 2.

<sup>6</sup>Gaillard E. *Legal Theory of International Arbitration*. P. 45-46.

<sup>7</sup>Radicati di Brozolo L. G. Emmanuel Gaillard's Theory of International Arbitration. P. 4.

<sup>8</sup>Gaillard E. *Legal Theory of International Arbitration*. P. 67.

<sup>9</sup>Cuniberti G. Three Theories of *Lex Mercatoria*. *Columbia Journal of Transnational Law*, 2014. Vol. 52, No. 2. P. 383.

<sup>10</sup>Cuniberti G. Three Theories of *Lex Mercatoria*. P. 391.

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results, especially in international disputes.<sup>11</sup> The transnational common norms offered by the third representation are at least a necessary infrastructure for the ICA to become a truly international dispute resolution system.

### III. Historical and Institutional Background

The ICA's current institutional architecture is built on three founding moments. The first step is the International Chamber of Commerce (ICC), founded in Paris in 1923. Dezalay and Garth's groundbreaking sociological study<sup>12</sup> reads the ICC not just as an arbitral institution, but as an elite venue for global "merchants of law." As Walch summarizes in his review of this work, the authors' main empirical finding is striking: "the practice of international business arbitration is limited to a few institutions"<sup>13</sup>, that is, the practice of international commercial arbitration is limited to a few institutions and is conducted by a relatively small number of selected arbitrators on both sides of the Atlantic. Walch cites Dezalay and Garth as describing the ICC as an "institution of choice" and concluding that Paris remains the heart of international commercial arbitration today.<sup>14</sup>

The second founding moment is the 1958 New York Convention ("Convention") on the Recognition and Enforcement of Foreign Arbitral Awards. The Convention established a uniform international regime for the recognition and enforcement of foreign arbitral awards; Today, it has been approved by more than 170 states. Khalilova cites that Germany ratified the Convention on 30 June 1961 and subsequently reformed its domestic arbitration law on the basis of the United Nations Commission on International Trade Law's ("UNCITRAL") Model Law.<sup>15</sup> Radicati di Brozolo emphasizes that the Convention functions, in Born's words, as a "constitutional instrument" and that its impact goes far beyond its lettering: the Convention mandates not only the enforcement of arbitration

<sup>11</sup>Radicati di Brozolo L. G. Emmanuel Gaillard's Theory of International Arbitration. P. 5-6.

<sup>12</sup>Dezalay Y., Garth B. G. Dealing in Virtue. P. 90.

<sup>13</sup>Walch K. S. Book Review: Dealing in Virtue. Ohio State Journal on Dispute Resolution, 1997. Vol. 12, No. 3. P. 828.

<sup>14</sup>Walch K. S. Book Review: Dealing in Virtue. P. 829.

<sup>15</sup>Khalilova Z. Practice of Commercial Arbitration and Recognition and Enforcement of Foreign Arbitral Awards Concerning Disputes in Uzbekistan: A Comparison with Germany. PhD thesis, University of Bremen, 2020. P. 59-60.

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agreements and awards, but also the "pro-arbitration" interpretation of national laws.<sup>16</sup>

The third founding moment is the doctrine of the "new lex mercatoria", which began in the 1960s with the article *Frontières du droit et lex mercatoria* published by Berthold Goldman and developed in parallel by Clive Schmitthoff. Cuniberti states that Goldman and Schmitthoff are considered the "intellectual fathers of the new lex mercatoria", but the idea of complete autonomy from national legal orders was mainly advocated by Goldman and his disciples.<sup>17</sup> In the same period, the 1965 International Centre for Settlement of Investment Disputes ("ICSID") Convention established a separate arbitration regime for investment disputes; the oil arbitrations of the 1970s-80s brought the tension between the ICA and state sovereignty to the stage of history.

Dezalay and Garth read these oil arbitrations as the context for the "invention" of the lex mercatoria.<sup>18</sup> Cuniberti summarizes this sociological thesis as follows: European continental arbitrators developed the lex mercatoria to give them "total discretion" in disputes between Western oil companies and newly independent Third World states.<sup>19</sup> The formulation of the "general principles of international trade" provided the young states with the opportunity to claim independence from the law of the former colonial powers, while allowing the arbitrators to decide the dispute as they wished.

The global expansion of the ICA is not just a Western-centric story. Khalilova's comparison of Germany vs. Uzbekistan provides a concrete case for how the ICA was internalized in post-Soviet and emerging economies.<sup>20</sup> Khalilova shows how Uzbekistan sought to harmonize the Soviet-era arbitration tradition called "Treteyskii sud" with modern international arbitration standards after independence; the Arbitral Tribunals Act of 2007 and the "Draft Law on

<sup>16</sup>Radicati di Brozolo L. G. Emmanuel Gaillard's Theory of International Arbitration. P. 9-10.

<sup>17</sup>Cuniberti G. Three Theories of Lex Mercatoria. P. 379.

<sup>18</sup>Dezalay Y., Garth B. G. Dealing in Virtue. P. 87.

<sup>19</sup>Cuniberti G. Three Theories of Lex Mercatoria. P. 406.

<sup>20</sup>Khalilova Z. Practice of Commercial Arbitration. P. 26-27.

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International Commercial Arbitration" drafted in 2018 build on the principles of the UNCITRAL Model Law. This process is a concrete example of the "convergence" thesis proposed by Gaillard: national laws converge in line with the transnational needs of the ICA.

### IV. ICA Contribution to Private International Law (PrIL)

#### A. Party Autonomy and Choice of Law

Party autonomy, which has become one of the most fundamental principles of modern PrIL, has been consolidated and universalized largely through the practice of ICA. The parties have the authority to freely determine both the dispute resolution method and the substantive law applicable to the dispute. Khalilova shows that in the case of Germany, the parties' freedom of choice is recognized under ZPO (Zivilprozessordnung)<sup>21</sup> Art. 1051 and the UNCITRAL Model Law, and that this freedom is not limited to the choice of a national law, but also includes the choice of non-national norms such as the *lex mercatoria*.<sup>22</sup> While the EU's Rome I Regulation explicitly recognizes the freedom of choice of law in contractual relations, it specifically excludes arbitration agreements.<sup>23</sup> This exception is an attitude that recognizes that the ICA is a *sui generis* area within the PrIL; arbitration is subject to a peculiar and more flexible choice of law regime, outside of the traditional conflict of law rules.

#### B. Doctrinal Innovations and Migration to State Courts

The ICA has produced not only procedural but also substantive doctrinal innovations; these innovations have spread to national courts over time. In Born's monumental work, *International Commercial Arbitration*, this doctrinal background is systematically examined.<sup>24</sup>

Four basic doctrines stand out:

**(1) Separability doctrine:** The arbitration clause has a legal existence independent of the main contract in which it is included. The invalidity of the

<sup>21</sup> German Code of Civil Procedure

<sup>22</sup>Khalilova Z. *Practice of Commercial Arbitration*. P. 58-60.

<sup>23</sup>Cuniberti G. *Three Theories of Lex Mercatoria*. P. 386,

<sup>24</sup>Born G. B. *International Commercial Arbitration*. Alphen aan den Rijn: Wolters Kluwer. 2021. § 3.01

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articles of association does not automatically invalidate the arbitration clause, for example due to a material error, illegality or incapacity. This doctrine allows arbitrators to independently evaluate their jurisdiction.<sup>25</sup>

**(2) Competence-competence doctrine:** The arbitral tribunal has the authority to decide on its own authority. This doctrine prevents the state court's premature intervention in the arbitration process and ensures the autonomy of the ICA. The positive (arbitrators first examine their own authority) and negative (tribunals have to expect this) dimensions of the doctrine have been adopted in most modern national arbitration laws.<sup>26</sup>

**(3) Group of companies / Non-signatory doctrine:** According to this doctrine, symbolized by the ICC's 1982 Dow Chemical decision, group companies that have not signed the arbitration agreement can also be considered a party to the arbitration if they have actually participated in the negotiation, performance or termination of the agreement on the basis of economic reality. This doctrine is intended to prevent avoidance of arbitration obligation by hiding behind the institutional structure.<sup>27</sup>

**(4) Validation principle:** The interpretation that supports the validity of the arbitration agreement is preferred to the interpretation that leads to its invalidity. This principle is a tangible manifestation of the favor arbitration and is also embraced by national courts. Khalilova shows that German courts have systematically adopted the interpretation in favor of arbitration agreements.<sup>28</sup>

### C. Lex Mercatoria: A New Source of Funds

The most controversial contribution of the lex mercatoria to the PrIL is its positioning as a "transnational" set of resources alongside national legal orders. Berger suggests that this process can be called "creeping codification"; Tools such as the UNIDROIT Principles and the TransLex list have transformed a

<sup>25</sup>Born G. B. International Commercial Arbitration. § 7.01.

<sup>26</sup>Born G. B. International Commercial Arbitration. § 7.01.

<sup>27</sup>Born G. B. International Commercial Arbitration. § 10.02 [E].

<sup>28</sup>Khalilova Z. Practice of Commercial Arbitration. P. 75-77.

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scattered doctrinal body into a usable format.<sup>29</sup> Berger emphasizes that this transnational legal process radically revises traditional legal theory: in modern business relations, the contract has assumed the function of a "source of law" in a way that traditional legal concepts do not cover.<sup>30</sup>

The classic example Berger gives is the Antwerp diamond trade: millions of dollars worth of diamonds a day change hands only with the consent of the parties, mutual trust, a handshake and a special formula; while breach of contract results in a worldwide trade ban.<sup>31</sup> Such informal, trust-based commercial practices are concrete manifestations of a transnational normative order.

However, Cuniberti counters this doctrine with empirical skepticism. According to ICC data, of the 8,911 conventions brought to the Court between 1999 and 2012, only 148 (about 1.7%) chose non-national rules; When the CISG (United Nations Convention on Contracts for the International Sale of Goods) is excluded, this rate drops to less than 1%.<sup>32</sup> According to Cuniberti, this data clearly shows: "commercial parties rarely choose to subject their contracts to *lex mercatoria*" Commercial parties very rarely choose to subject their contracts to *lex mercatoria*.<sup>33</sup> This inference illustrates the vast gap between *lex mercatoria*'s academic interest and practical use.

Gaillard's response to these criticisms is the "functional method" approach: the *lex mercatoria* should be treated as a method of comparative decision-making, not a list of rules. The arbitrator determines the resolution of the majority of the national laws related to the dispute through comparative analysis and applies this widespread solution.<sup>34</sup> While acknowledging the theoretical elegance of this method, Cuniberti argues that it allows arbitrators "a great deal of flexibility and discretion" and undermines the parties' capacity for foreseeability.<sup>35</sup> This tension

<sup>29</sup>Berger K. P. *The Creeping Codification of the Lex Mercatoria*. The Hague: Kluwer Law International, 1999. P. 105-106.

<sup>30</sup>Berger K. P. *The Creeping Codification of the Lex Mercatoria*. P. 108.

<sup>31</sup>Berger K. P. *The Creeping Codification of the Lex Mercatoria*. P. 108.

<sup>32</sup>Cuniberti G. *Three Theories of Lex Mercatoria*. P. 399.

<sup>33</sup>Cuniberti G. *Three Theories of Lex Mercatoria*. P. 403.

<sup>34</sup>Gaillard E. *Legal Theory of International Arbitration*. P. 107.

<sup>35</sup>Cuniberti G. *Three Theories of Lex Mercatoria*. P. 391.

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between the two perspectives reflects the transformative and controversial nature of ICA's impact on PrIL.

### **D. Procedural Innovations and Construction of Uniform Standards**

Another contribution of the ICA to PrIL is the construction of procedural standards at the transnational level. Radicati di Brozolo emphasizes that the ICA today produces its own soft law norms in areas such as evidence presentation, conflict of interest, ethics and transparency: instruments such as the IBA's Rules on the Taking of Evidence in International Arbitration and Guidelines on Conflicts of Interest have gained almost universal acceptance and have become the cornerstones of the international arbitration order.<sup>36</sup> These standards have replaced national rules of civil procedure and made it possible for the ICA to function as a truly transnational practice.

This procedural convergence is also an indication that the ICA has ceased to be a mere institution and has turned into a legal production area in its own right. Radicati di Brozolo states that this process is still not complete and that there are still no comprehensive uniform rules on issues such as *res judicata* (final judgment), interim measures, privilege (attorney-client confidentiality), third-party financing and confidentiality.<sup>37</sup> This deficiency is tried to be overcome by arbitral institutions developing their own rule-making capacities and producing increasingly comprehensive default rules.

### **V. ICA's Contribution to Public International Law (PIL)**

#### **A. Investor-State Arbitration and the Reshaping of the PIL**

The ICA's most visible and transformative contribution to the PIL has been through the Investor-State Dispute Settlement (ISDS). Together with the 1965 ICSID Convention and the booming bilateral investment treaties ("BITs") since the 1990s, 3,079 BITs were signed between 1990 and 2015, and today a wide

<sup>36</sup>Radicati di Brozolo L. G. Emmanuel Gaillard's Theory of International Arbitration. P. 11.

<sup>37</sup>Radicati di Brozolo L. G. Emmanuel Gaillard's Theory of International Arbitration. P. 10, footnote 29.

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network of more than 3,000 BITs has been formed, as noted by Sabahi, Laird and Gismondi.<sup>38</sup>

This regime has radically transformed the traditional diplomatic protection mechanism. In the classical PIL paradigm, a foreign citizen cannot claim legal protection from the host state; For this, it needs the diplomatic intervention of its own state. Sabahi, Laird, and Gismondi emphasize that modern investment law breaks this paradigm and grants investors the right to sue directly ("direct right of investor-State arbitration").<sup>39</sup> This is a radical revision of the Westphalian interstate PIL paradigm. Popa Tache states that this regime is positioned "on the border between international law and domestic law" and that the "hybrid" nature of investment arbitration is manifested in the participants, the remedies invoked, the grounds of jurisdiction and the applicable law.<sup>40</sup>

### **B. Essential Standards and Case Law**

Investment arbitration has shaped the concrete content of essential standards such as fair and equitable treatment ("FET"), most-favoured-nation ("MFN") treatment, full protection and security and indirect expropriation through case law. Popa Tache cites in the case of *Azurix v. Argentina*<sup>41</sup> that the tribunal highlights the dependence between FET and full protection and security standards: according to the tribunal, security is not only physical security; "The stability provided by a secure investment environment is equally important to the investor".<sup>42</sup>

In the context of the definition of investment, the three criteria recognized by the *Salini v. Morocco* (2001) decision; contribution, duration and risk, were developed by subsequent tribunals and became an international standard. Khalilova shows that in *Romek v. Uzbekistan*<sup>43</sup> the tribunal, by referring to Black's Law Dictionary and applying the Salini criteria, ruled that a sales contract

<sup>38</sup>Sabahi B., Laird I. A., Gismondi G. E. International Investment Law and Arbitration. P. 3.

<sup>39</sup>Sabahi B., Laird I. A., Gismondi G. E. International Investment Law and Arbitration. P. 2.

<sup>40</sup>Popa Tache C.-E. Introduction to International Investment Law. Bucharest: ADJURIS International Academic Publisher. 2021. P. 139.

<sup>41</sup>ICSID ARB/01/12, 14 July 2006

<sup>42</sup>Popa Tache C.-E. Introduction to International Investment Law. P. 151.

<sup>43</sup>UNCITRAL Case No. AA280, 26 November 2009

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supplying wheat to Uzbek parties could not be considered an "investment" within the meaning of the BIT.<sup>44</sup> Khalilova also cites the tribunal in *Metal-Tech Ltd. v. Uzbekistan* (4 October 2013) where the tribunal invalidated the BIT protection on the grounds that the investment was corrupt, which is a concrete demonstration of the capacity of investment arbitration to internalize PIL issues such as corruption.<sup>45</sup>

Popa Tache reveals that the typical structure of BITs is built on four pillars: (i) national treatment and non-discrimination through most-favored-nation (MFN) clauses, (ii) substantive protection through the FET standard, (iii) protection against direct and indirect expropriation and the right to fair compensation, and (iv) the right to direct recourse through ISDS. This structure implies a qualitative break with the classic diplomatic protection mechanism: the investor has become an actor capable of claiming rights directly at the PIL level, without depending on the political discretion of his own state. Sabahi, Laird and Gismondi emphasize that this conceptual transformation is a concrete example of modern international law departing from the traditional positivist understanding and including non-state actors in its field.<sup>46</sup>

### **C. State Conventions and "Internationalization"**

The ICA also played a decisive role in the process of "internationalization" of government contracts. In cases such as *Texaco Overseas Petroleum, Aminoil and BP of the 1970s-80s*, arbitrators developed jurisprudence that government contracts could be excluded from national law and subject to transnational principles and the PIL. Berger emphasizes that this process has a dialectical structure: arbitration case law shapes contract practices, and contract practices guide arbitration case-law. In the realm of investment contracts, this process is particularly pronounced; "there is a major chance for the consolidation of public international law of expropriation". There is a serious chance for the

<sup>44</sup>Khalilova Z. *Practice of Commercial Arbitration*. P. 90-91.

<sup>45</sup>Khalilova Z. *Practice of Commercial Arbitration*. P. 92-93.

<sup>46</sup>Sabahi B., Laird I. A., Gismondi G. E. *International Investment Law and Arbitration*. P. 2.

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consolidation of public international law on expropriation because the parties generally act rationally.<sup>47</sup>

### **D. The Tension Between State Sovereignty and the Three Representations**

Gaillard's three representations are the area where the tension between state sovereignty and the ICA is most clearly revealed.<sup>48</sup> The monolocal view binds the state firmly to the sovereign law of the seat of arbitration; The Westphalian view leaves the recognition of the decision to the approval of a large number of states; The transnational view, on the other hand, appeals to an independent order arising from the convergence of state laws. These three representations express the transformation of the classical understanding of sovereignty in three different ways.

Radicati di Brozolo observes that today's states have largely avoided interference in the arbitration process, and that this has happened "almost enthusiastically": most states refrain from examining arbitral awards on the merits, going beyond the minimum requirements imposed by New York Convention.<sup>49</sup> This situation can be read as a practical equivalent of Gaillard's third representation: the arbitral legal order develops in a field opened up by the voluntary withdrawal of states.

### **E. Transparency, Amicus Curiae, and Public Accountability**

The fact that investment arbitration has gradually evolved from a private mechanism to a public medium is another important contribution of the ICA to the PIL. In *Methanex Corporation v. United States* (2001) and *Aguas Argentinas v. Argentina*, the tribunals acknowledged the intervention of non-governmental organizations in their capacity as amicus curiae, a historical break with the secrecy of classical arbitration. Popa Tache elaborates on how the UNCITRAL Transparency Rules, which came into force in 2014, systematize this evolution: they regulate the publication of information at the beginning of the procedure, the publication of documents, the interference of third parties (amicus curiae),

<sup>47</sup>Berger K. P. *The Creeping Codification of the Lex Mercatoria*. P. 108.

<sup>48</sup>Gaillard E. *Legal Theory of International Arbitration*. P. 35.

<sup>49</sup>Radicati di Brozolo L. G. *Emmanuel Gaillard's Theory of International Arbitration*. P. 4.

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observations by non-treaty states, hearings and the storage of published information.<sup>50</sup>

United Nations Conference on Trade and Development's ("UNCTAD") Investment Policy Framework for Sustainable Development reveals the political dimension of this process.<sup>51</sup> UNCTAD recommends that a comprehensive reform of the ISDS regime should go beyond the provisions of the international investment treaty ("IIA") and should also include the rules of arbitral institutions such as ICSID or UNCITRAL. The framework includes multi-layered policy recommendations to protect the regulatory authority of host states, concretize investors' obligations [Corporate Social Responsibility ("CSR") standards, International Labour Organization ("ILO") principles, United Nations Business and Human Rights Guiding Principles] and create a framework aligned with sustainable development goals.

UNCTAD also emphasizes that modern international law has entered a period in which it "moves away from a narrowing, rigid view and includes non-state actors where appropriate".<sup>52</sup> This trend is also seen in the ICC's 2012 Guiding Principles, which stipulate the obligation of investors to comply with the rules of national and international business law of the host state. The transfer of investor obligation to the PIL level indicates that the ICA has started to become a more balanced actor in global governance, rather than an institution that protects only investor rights.

### VI. Structural Stresses and Reform

The historical success of the ICA system carries with it significant structural tensions. Cuniberti's critique of agency theory is at the center of these tensions. According to Cuniberti, arbitrators can pursue their own professional interests and not those who appointed them, since the ambiguity of *Lex Mercatoria* gives arbitrators wide discretionary power, this creates a serious agency problem that

<sup>50</sup>Popa Tache C.-E. Introduction to International Investment Law. P. 145.

<sup>51</sup>UNCTAD. Investment Policy Framework for Sustainable Development. Geneva: United Nations Conference on Trade and Development, 2015. P. 107-108.

<sup>52</sup>UNCTAD. Investment Policy Framework. P. 35.

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threatens the legitimacy of the international arbitration system.<sup>53</sup> This critique is also in line with the sociological findings of Dezalay and Garth: the narrowness of the referee pool and elite closures are structural problems.<sup>54</sup>

The second line of structural tension has become evident in the relationship between EU law and investment arbitration. In the judgments of *Achmea* (2018) and *Komstroy* (2021), the Court of Justice of the EU ruled that the ISDS provisions in intra-EU BITs were incompatible with EU law, thus effectively ending the intra-EU investment arbitration regime. Popa Tache states that this process started with the 2015 press release of the EU Commission: while demanding the end of intra-EU BITs, the Commission stated in its justification that the agreements in question create discrimination based on citizenship according to the case-law of the EU Court of Justice, as they only grant rights to certain member state investors, and are incompatible with EU law.<sup>55</sup> Popa Tache also emphasizes that the case of *Micula v. Romania* is a concrete example of this tension: the tribunal's compensation award against Romania conflicted with EU state aid rules.<sup>56</sup>

The third tension is investor nationality and the question of "treaty shopping". Popa Tache cites the cases of *Tokios Tokelés v. Ukraine* (29 April 2004) and *Champion Trading v. Egypt* (21 February 2003) as classic examples of this problem: the nationality of a legal entity investor can be disputed through the tension between the place of incorporation and the place of control, while natural person investors raise the question of whether they fall under the jurisdiction of ICSID through dual citizenship.<sup>57</sup> In the case of *Champion Trading*, the tribunal ruled that under Article 25(2)(a) of the ICSID Convention, natural person application is not possible if one of their second nationality belongs to the

<sup>53</sup>Cuniberti G. Three Theories of Lex Mercatoria. P. 416.

<sup>54</sup>Dezalay Y., Garth B. G. Dealing in Virtue. P. 90.

<sup>55</sup>Born, International Commercial Arbitration, § 6.03 [C], dn. 85.; Popa Tache C.-E. Introduction to International Investment Law. P. 107.

<sup>56</sup>Popa Tache C.-E. Introduction to International Investment Law. P. 187

<sup>57</sup>Born, International Commercial Arbitration, § 1.04 [A], dn. 891.; Popa Tache C.-E. Introduction to International Investment Law. P. 56-59.

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respondent state.<sup>58</sup> The "procurable nationalities" created by Citizenship by Investment ("CBI") programs in recent years have taken this classic tension to a new level: citizenship obtained through investment can be used as a means of access to the protection umbrella of BITs.

On the reform front, UNCITRAL Working Group III has been negotiating the structural reform of the ISDS system since 2017. The proposal for a Multilateral Investment Court and the model put forward by the EU in new generation agreements such as CETA and EU-Vietnam IPA are the most concrete manifestations of this reform. Sabahi, Laird and Gismondi emphasize that this reform process is a fundamental part of the EU's aim to transform the traditional investor-state arbitration system into an Investment Court System ("ICS").<sup>59</sup> Radicati di Brozolo offers a more institutionalist proposal: arbitral institutions can contribute to the formation of a uniform legal body specific to the ICA by developing "default rules" that will be applied unless the parties agree otherwise, in a way that protects party autonomy.<sup>60</sup>

The fourth axis of the reform debates is the question of the consistency of decisions and the unity of jurisprudence. One of the main criticisms of the ISDS system is that different tribunals can make decisions that contradict each other on similar sets of facts; for example, in the cases of *Lauder v. Czech Republic* (UNCITRAL) and *CME v. Czech Republic* (UNCITRAL), almost the same facts were linked to different conclusions. As Cuniberti points out, this inconsistency is an inevitable consequence of the wide discretionary power granted to arbitrators.<sup>61</sup> The proposal for a multilateral investment, Tribunal aims to reduce this discrepancy with an appellate mechanism and a permanent pool of judges, but it also requires renegotiating the ICA's key attributes that it has historically valued, such as flexibility, confidentiality and party autonomy.

<sup>58</sup>Born, *International Commercial Arbitration*, § 1.04 [A]Papa Tache C.-E. *Introduction to International Investment Law*. P. 59.

<sup>59</sup>Sabahi B., Laird I. A., Gismondi G. E. *International Investment Law and Arbitration*. P. 1.

<sup>60</sup>Radicati di Brozolo L. G. *Emmanuel Gaillard's Theory of International Arbitration*. P. 11.

<sup>61</sup>Cuniberti G. *Three Theories of Lex Mercatoria*. P. 416-417.

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### VII. Conclusion

The thesis of this paper was that ICA is neither a passive practitioner in the field of PrIL nor PIL; rather, it is a constitutive and catalytic actor in the evolution of both fields. Through the sociological lens of Dezalay and Garth, the ICA appears as a field built by a global legal elite; the scarcity of institutions and the limited number of arbitrators are the source of both its strength and its vulnerability of legitimacy.<sup>62</sup> Viewed through Gaillard's theoretical lens,<sup>63</sup> ICA is a combination of three separate legal representations with monolocal, Westphalian and transnational tensions. The tension between these three representations is the main source of the dynamic effect of the ICA.

Cuniberti's critical warning recalls the system's own inherent problems: agency problems, insufficient predictability, and elite closures.<sup>64</sup> The "unique overlap" between international investment law and private international law, in the words of Sabahi, Laird and Gismondi, makes the ICA the most dynamic and controversial crossroads of international law today.<sup>65</sup>

The main question of the coming period is in which direction this junction will evolve. In the direction of a uniform "uniform arbitration law", as proposed by Radicati di Brozolo,<sup>66</sup> or in the direction of fragmentation and retreat pointed out by Cuniberti<sup>67</sup>. The answer to this question will be decisive not only for arbitration theorists, but also for the legitimacy of the global economic order. In Berger's words, in an age where the contract has become a source of law,<sup>68</sup> the normative order produced by arbitration will continue to live with and through state law, not next to or beyond it.

As a final observation, it should be added that the impact of ICA on PrIL and PIL has also blurred the boundaries of classical categories. Sabahi, Laird, and

<sup>62</sup>Dezalay Y., Garth B. G. *Dealing in Virtue*. P. 90.

<sup>63</sup>Gaillard E. *Legal Theory of International Arbitration*. P. 151.

<sup>64</sup>Cuniberti G. *Three Theories of Lex Mercatoria*. P. 406.

<sup>65</sup>Sabahi B., Laird I. A., Gismondi G. E. *International Investment Law and Arbitration*. P. 2.

<sup>66</sup>Radicati di Brozolo L. G. *Emmanuel Gaillard's Theory of International Arbitration*. P. 10-11.

<sup>67</sup>Cuniberti G. *Three Theories of Lex Mercatoria*. P. 433-434.

<sup>68</sup>Berger K. P. *The Creeping Codification of the Lex Mercatoria*. P. 108.

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Gismondi emphasize that modern international investment law is defined as "an area of public international law" while at the same time "having a unique overlap with private international law, international dispute resolution, and national law."<sup>69</sup> This overlap is not only a matter of the ICA "contributing" to different branches of law; it is also the power of the ICA to redefine these branches. PrIL, which traditionally regulates national inter-legal relations, is taking on an increasingly transnational character through the ICA; the PrIL, which traditionally regulates relations between states, makes individuals and companies active subjects of international law through investor-state arbitration. This two-way transformation is one of the most important manifestations of the international legal order of the 21<sup>st</sup> century and has transformed the ICA from just a dispute resolution tool to one of the main constituent actors of the global legal order.

This multi-layered nature of international commercial arbitration cannot be explained solely by its location at the intersection of different fields of law; what is decisive is the capacity to actively reproduce the boundaries between these areas. The ICA incorporates elements of both private law and public law simultaneously, making it a "hybrid normative field" that extends beyond classical categories. This situation leads to a redefinition of the balance between state sovereignty and contractual autonomy. Arbitration is no longer just a mechanism that resolves disputes between the parties; at the same time, it emerges as a structure that produces, interprets and legitimizes norms to a certain extent. In this respect, ICA has ceased to be a passive tool that expands the application of law, but has become an active actor that draws the boundaries of law, however, this transformative power of the ICA comes with serious structural risks.

Especially in a system dominated by a limited number of actors, the fact that norm production is carried out by a closed epistemic community makes legitimacy

<sup>69</sup>Sabahi B., Laird I. A., Gismondi G. E. International Investment Law and Arbitration. P. 2.

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debates inevitable. Despite the increasing influence of arbitral awards, the fact that these awards are not subject to democratic review and predictability issues persist creates a fundamental tension for the sustainability of the system. In this context, the future of the ICA will be determined not only by further institutionalization or uniformity, but also by the extent to which the principles of transparency, accountability and normative diversity will be internalized. Otherwise, the central role of the ICA in the global legal order could just as quickly turn into a crisis of legitimacy.

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