“COMMERCIAL PEACEMAKING”—
THE NEW ROLE OF THE INTERNATIONAL COMMERCIAL ARBITRATION LEGAL ORDER

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INTRODUCTION

International commercial arbitration (ICA) has risen to prominence over the past several decades as the most efficient and effective mechanism for resolving cross-border disputes between commercial entities,1 and has long been considered by the international business community as “the normal means of settling disputes arising from international transactions.”2 ICA offers disputing parties an accessible, neutral, and private mechanism that is distinct from any specific national legal system;3 a “kind of social jurisdiction, opposed to State jurisdiction.”4 It has thus been considered by some to constitute a specialized international regime,5 a form of “transnational” or “global” governance,6 or an autonomous legal order.7

Building on this conception of ICA as an autonomous legal order, this Article assigns a new “commercial peacemaking” role to it, concerned with the resolution of commercial disputes between

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1 This paper concerns only arbitration of such cross-border disputes, and therefore excludes investor-State arbitration.
7 EMMANUEL GAILLARD, LEGAL THEORY OF INTERNATIONAL ARBITRATION (2010).
parties from rival states through tailor-made local ICA institutions or processes. This proposed new role is rooted in two interrelated rationales. The first rationale is that the absence of effective mechanisms for the resolution of these disputes constitutes an informal trade barrier, and that devising such mechanisms would remove this barrier and would facilitate trade between members of rival states. The second rationale is that such increased trade would in turn promote political cooperation at the interstate level and contribute to resolving broader conflicts and advancing peace.

This new role of the ICA legal order is currently being tested, albeit in different ways, by two pairs of rival states: Israel and Palestine, and North and South Korea. While bilateral trade between Israel and Palestine is already quite significant, the absence of an effective mechanism for the resolution of cross-border commercial disputes, among other challenges, has resulted in inefficient commercial practices and hinders further bilateral trade development. In the Korean Peninsula, the Kaesong Industrial Complex, situated north of the Demilitarized Zone dividing North and South Korea, is the only remaining economic interaction between the two countries. One of the barriers to further development of the Kaesong Complex, as well as broader private sector cross-border economic cooperation, is the lack of an effective mechanism for the resolution of disputes arising from commercial activity taking place in the Complex.

In order to fill these dispute resolution lacunas, Israeli and Palestinian businesspeople have recently established a local ICA institution, the Jerusalem Arbitration Center, specifically for the resolution of cross-border commercial disputes between Israeli and

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8 For the purpose of this Article, “rival states” refers to neighbours or near neighbours that are engaged in a conflict over political or security issues, historical or ethnic differences, or territorial claims. SHAHEEN RAFI KHAN, Foreword, in REGIONAL TRADE INTEGRATION AND CONFLICT RESOLUTION (Shaheen Rafi Khan ed., 2009).

9 It should be noted that, in addition to the advancement of bilateral trade, the development and use of a cross-border ICA system by parties from rival states may in itself improve cooperation, lead to the creation of “shared norms”, and promote peaceful relations, as argued by constructivist and interactional theories of sociology and international relations. A detailed discussion of such theories, however, is beyond the scope of this Article.

10 The status of Palestine as a state is controversial. For the purpose of this Article, reference to “Palestine” or the “Palestinian Territories” includes both the West Bank and the Gaza Strip, unless otherwise indicated.


Palestinian businesses. Similarly, the two Korean governments have recently put in motion the establishment of a “South-North Commercial Arbitration Committee” that was envisioned in a bilateral agreement signed in 2003 and that is dedicated to the resolution of commercial disputes arising out of the Kaesong Complex.13 These initiatives reflect the evolution and manifestation of the new “commercial peacemaking” role of the ICA legal order, a role that could also be utilized by other rival states around the world.

Part II of this Article will discuss the two interrelated rationales for this new role of the ICA legal order: first, the dispute resolution lacuna that exists with respect to commercial disputes between parties from rival states and its effect on cross-border trade, and second, the potential impact of improved bilateral trade on interstate political cooperation and peaceful relations. Part III will examine the concept of ICA as an autonomous legal order and the particulars of its proposed “commercial peacemaking” role, and Part IV will analyze this role in the context of the Jerusalem Arbitration Center and the North-South Korea Commercial Arbitration Committee. Finally, Part V will consider the potential application of the new role of the ICA legal order to India and Pakistan, and Part VI will offer conclusions.

I. TRADE, PEACE, AND COMMERCIAL DISPUTE RESOLUTION BETWEEN PARTIES FROM RIVAL STATES

The natural effect of commerce is to bring about peace.14

The two rationales for the proposed new role of the ICA legal order draw linkages between effective dispute resolution, improved bilateral trade, and increased interstate cooperation leading to peaceful relations between rival states. This section will analyze these rationales and consider the significance of effective cross-border dispute resolution in light of their interrelationship.

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A. First Rationale: Effective Cross-Border Dispute Resolution Facilitates Bilateral Trade Between Rival States

The first proposed link is between effective dispute resolution and improved bilateral trade. Disputes are a natural by-product of all business relationships, and their effective and efficient resolution is crucial for maintaining the flow of commerce. This is so since the inability to resolve disputes often leads to inefficient and inadequate commercial behaviour of individual trading parties, for instance by relying on trust-based systems or no cash transfers, which increases transaction costs and creates informal trade barriers. In fact, empirical studies have shown that traders who were previously avoiding a particular international market for lack of appropriate legal protection will engage in that market when recourse to an effective dispute resolution mechanism, such as arbitration, is introduced.

Parties from rival states, however, often do not have effective ways of resolving their commercial disputes, since lack of cooperation, chronic distrust and resentment, enhanced fear of bias, and technical barriers may prevent them from accessing or using established dispute resolution mechanisms. Therefore, while some of the most enduring rivals in the international system maintain some degree of bilateral trade relations, these tend to be limited not only as a result of political tensions and restrictive trade policies, but also as a result of “behind-the-border barriers” such as inadequate or entirely absent cross-border dispute resolution mechanisms. In fact, the absence of “trade facilitation” measures that increase “connectivity,” such as effective dispute resolution mechanisms, is said to be one of “the biggest constraints to trade” in some regions, and is viewed as crucial for producing trade benefits between rival states.

15 Lynch, supra note 5, at 84.
16 Khan, supra note 8, at 134.
17 Id. at 133–34.
19 Khan, supra note 8, at 85, 131–33.
21 Id. at 98–99, 102.
Moreover, where some degree of trade at the micro level exists between parties from rival states, but there is no effective and neutral mechanism for resolving the inevitable disputes that arise from such trade, these parties may ultimately derive less benefits from otherwise favourable trade relationships and may lose their incentive to engage in further, or any, trade as a result. This may be the case, for instance, where there is an imbalance in the negotiating power of commercial parties from rival states. In such circumstances, when a dispute arises the weaker party may suffer injustice as a result of being pressured to submit to the judicial system of its stronger counterparty or may incur financial losses as a result of having to accept a lower payment or damaged goods. This may not only cause the weaker party to lose its incentive to engage in further trade, but may also lead to frustration and resentment toward the stronger party, thereby potentially aggravating an existing conflictual relationship.\textsuperscript{22}

On the other hand, where there are effective mechanisms for the resolution of commercial disputes between parties from rival states, "actors are more likely to suppress hostilities," which may in turn dissolve tensions and lead both to increased commercial activity and improved general relations.\textsuperscript{23} This is so since the private business sector is frequently a “shaper of public opinion” regarding trade, and can garner popular support for trade normalization between rival states.\textsuperscript{24} Such support is unlikely, however, where cross-border commercial interactions are scarce, inefficient, and costly, causing the private business sector to invest its efforts in other markets.

B. Second Rationale: Improved Trade Relations Between Rival States Reduces Conflict And Promotes Peace

The second proposed link is between improved bilateral trade and increased interstate cooperation leading to peaceful relations. This link is founded on popular liberal claims that “systems of closer commercial relations could serve as the means to the im-

\textsuperscript{22} Barbieri, \textit{supra} note 14, at 37–38.
\textsuperscript{23} \textit{Id.} at 82.
provement of political relations and the maintenance of peace,”25 and that “improved economic and political relations in a globally interdependent market place can further peace-building efforts between countries.”26

There are two main reasons for this potential outcome. First, trade increases the “cost of war” since it creates significant long-term economic, political, and geostrategic benefits, such as promoting prosperity and reducing poverty, which war is likely to disrupt.27 Trade, as an “integrative arrangement,” merges “key socio-economic processes such that conflict would be so reciprocally destructive of economic activity in each party that it becomes less attractive, conceivable, and probable.”28 Since leaders presumably consider such “welfare losses” associated with trade interruptions in their political calculations, they would be deterred from engaging in a military conflict with a trading partner, may decide to terminate conflicts more rapidly, or prevent them from escalating.29 Therefore, “the more countries trade, the more peaceful towards one another they become.”30

Second, trade may also contribute to positive social transformation by creating an atmosphere of confidence between parties from rival states and establishing civilizing and pacifying “moral capital” that alters relationships between societies.31 This is so since “[c]ommerce . . . polishes and softens . . . barbaric ways”32 and “breaks down the barriers and prejudices associated with na-
tional identities.”33 By forging “new identifications among politically relevant strata” in each of the rival states,34 trade reduces the likelihood of conflict between them.35 Therefore, by creating economic incentives for peace,36 easing social tensions,37 and “plant[ing] seeds for cooperation which gradually spread through the total conflict arena to achieve the desired outcomes,”38 trade can improve interstate relations and become an effective tool for ending conflicts. One historical example of this is the creation of the coal and steel community, which ended a centuries-old conflict in Europe and ultimately led to the formation of the European Union.39

It should be noted, however, that this “peace by trade” theory is not without its critics. Some empirical research suggests that trade cannot be viewed as the sole, or even main, reason for the presence or absence of war, since factors such as the particular institutional setting, the existence of preferential trade agreements, the democratic character of states, and power balance, must be considered as well. It has also been argued that the peace-promoting and war-reducing effects of trade may depend on a “minimal degree of state effectiveness” in the form of property rights, the enforcement of contracts, the rule of law, and the absence of arbitrary and autocratic rule. Finally, the applicability of the “peace by trade” theory to conflicts characterized by international terrorism or to non-democratic countries rich in oil or other natural resources has been doubted.40 Despite such findings and criticisms, the “peace by trade” theory continues to gain empirical support and is viewed by some as “intuitive.” As one Asian statesman has

33 Id. at 27.
34 Reisman, supra note 28, at 39.
35 Schwartz et al., supra note 27, at 3; Weede, supra note 27, at 169.
36 KHAN, supra note 8, at 12.
37 Miki Malul et al., An Economic Development Road Map for Promoting Israeli-Palestinian Cooperation, 14 PEACE ECON., PEACE SCI. & PUB. POL’Y 1, 2 (2008), available at http://in.bgu.ac.il/fom/business4peace/DocLib/Pages/%D7%9E%D7%90%D7%99%D7%9D/an%20economic%20development%20road%20map.pdf.
39 Id. at 37; Reisman, supra note 28, at 39.
reportedly commented, “the alternative to free trade is not just poverty, it is war.”

In sum, bilateral trade between rival states can lead to the reduction of political tensions and the promotion of peaceful relations. Such bilateral trade, however, is arguably hindered where there is no effective mechanism for the resolution of cross-border commercial disputes. Effective dispute resolution, on the other hand, is considered “good commercial behaviour,” is viewed as a “trade driver” that facilitates commercial relations at the individual level, and is a “confidence building measure” designed to reduce tensions at the interstate level by “creating a constituency that would have a growing interest in further regional economic development rather than in its violent destruction.”

II. THE ICA LEGAL ORDER AND ITS NEW “COMMERCIAL PEACEMAKING” ROLE

Arbitration is as old as mankind; it is older than State Courts.

In order to effectively resolve cross-border commercial disputes between parties from rival states, and thereby potentially improve bilateral trade and facilitate peaceful interstate relations, an autonomous and non-national dispute resolution mechanism is required. This section will argue that the best-suited mechanism for this purpose is ICA, since it constitutes an autonomous and transnational legal order that is distinct from any national legal system. It will first discuss the notion of a legal order and why ICA should be viewed as constituting a legal order. It will then discuss why this ICA legal order is better suited to resolve cross-border commercial disputes between parties from rival states than other dispute resolution mechanisms, and how it could best be used as a “commercial peacemaker” in this context.

42 KHAN, supra note 8, at 44.
43 Id. at 134.
44 Id. at 16.
45 Malul et al., supra note 37, at 18.
46 Jakubowski, supra note 4, at 175.
COMMERCIAL PEACEMAKING

A. ICA as an Autonomous Legal Order

The term “legal order” has been given numerous interpretations, ranging from a mere “coherent collection of rules” to more complex theories rooted in natural law, autonomy of sources, institutionalism and plurality, and normativism. For present purposes, a “legal order” is considered to be a “social structure or community that . . . produce[s] [its] own laws,” which “in principle prevail in all matters properly belonging to [that] order.” Or to put it more succinctly, a “legal order” is understood to be “a set of norms acknowledged by a social group as authoritative.”

Some argue that, rather than constituting an autonomous legal order, ICA merely forms part of the legal order of the seat of arbitration, or is rooted in the plurality of national legal orders concerned with a given arbitration. Nonetheless, scholars, practitioners, and national courts have increasingly recognized a distinct transnational ICA legal order independent from any national legal system. There are both practical and theoretical reasons why such an autonomous ICA legal order should be recognized.

47 Gaillard, supra note 7, at 39.
48 Id. at 40-45.
49 Id. at 39.
51 Gaillard, supra note 7, at 8, 39.
55 Paulsson, supra note 53.
In practical terms, the “social group” that has devised the ICA legal order and continues to use and develop it is comprised of arbitrators, counsel in arbitrations, representative of arbitration institutions, and arbitration scholars, who form a “global community.”\textsuperscript{57} The norms created by this social group have evolved into an “autonomous normative system” which has “become more sophisticated in its organization and accordingly tend[s] towards becoming a legal system, as opposed to a mere social normative system.”\textsuperscript{58} The constitutive elements of this “legal system” include “national laws, non-national arbitration rules, international instruments, the mixed nationalities of the parties and the arbitrators, the neutral place of the arbitration and the special purpose procedure.”\textsuperscript{59}

In this legal system, moreover, arbitrators can, and do, “disconnect their interpretation of the law applicable to the merits from the interpretation a court would make of the same norm,” and as a result questions relating to the merits of disputes and the arbitral procedure have gradually become internationalized.\textsuperscript{60} This, for instance, allows arbitrators to decide disputes on the basis of \textit{lex mercatoria} rather than national commercial law, to choose rules of procedure that are different from those of any particular state, and to decide on their own jurisdiction in accordance with the \textit{competence-competence} principle. Therefore, while domestic laws continue to play a role in the ICA legal order, this role is residual and their application in practice is preceded by the application of transnational legal principle, international practices, and expressions of party autonomy, all of which comprise the autonomous ICA legal order.\textsuperscript{61}

In theoretical terms, two accounts support the conception of ICA as an autonomous legal order. First, ICA has a hybrid nature that combines the authority of the local law and party autonomy. Therefore, it has a mixed “jurisdictional-contractual” nature that maintains a link to domestic legal systems while awarding control over much of the arbitral process, including its very existence, to the parties. While it is national law and domestic legal systems that ultimately ensure adherence to the fundamental standards of ICA

\textsuperscript{57} THOMAS SCHULTZ, TRANSNATIONAL LEGALITY: STATELESS LAW AND INTERNATIONAL ARBITRATION 120 (2014).

\textsuperscript{58} Id. at 126–27.

\textsuperscript{59} Lew, supra note 54, at 186.

\textsuperscript{60} SCHULTZ, supra note 57, at 137.

\textsuperscript{61} Dallhuisen, supra note 52, at 133.
and govern the relationship between arbitral tribunal and state courts, most frequently in a manner that supports ICA and gives it effect, there could be no arbitration absent the agreement of the parties. To a large extent it is the parties who determine “the form of arbitration, the issues to be resolved, the number and persons of the arbitrators, the law or rules to be applied to determine the substantive rights and obligations of the parties, and the procedure to be followed.”\(^{62}\) This private “proceduralization” and regulation of ICA by its users may in fact be viewed as the cause of national arbitration laws, and further evidences the existence of an autonomous ICA legal order since “a private field that is more fully self-regulated, that looks more like what we usually recognize as a legal system, more easily triggers a state policy of laissez-faire.”\(^{63}\)

The second theoretical account is concerned with the fact that ICA is based on states’ entire “normative activity.”\(^{64}\) This is not limited to the national laws of the various states that may be involved in a particular arbitration, but includes also the fact that, “[S]tates broadly agree on the conditions that an arbitration must meet in order for it to be considered a binding method of dispute resolution, the result of which, the award, deserves their sanction in the form of legal enforcement.”\(^{65}\) This account is admittedly rooted in legal positivism and is based on states’ sovereignty in recognizing and enforcing arbitral awards. However, it is precisely this “horizontal” system of state recognition and enforcement of awards, in which no one state holds a monopoly, coupled with the multitude of national laws that affect a single arbitration, which leads to “a system rising above each national legal system taken in isolation.”\(^{66}\) Therefore, even where national laws apply in some way to international commercial arbitrations, they become part of the transnational ICA legal order and no longer function in a purely domestic manner.\(^{67}\)

In sum, ICA may be viewed as an autonomous legal order since it is comprised of “common rules of arbitration law” that have a transnational nature and are based on the laws of the majority of states.\(^{68}\) Furthermore, this system of rules “address[es] all of the questions arising as between its subjects and reflect[s] on its

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\(^{63}\) Schultz, supra note 57, at 127.

\(^{64}\) Gailhard, supra note 7, at 46.

\(^{65}\) Id.

\(^{66}\) Id.

\(^{67}\) Dalhuisen, supra note 52, at 134.

\(^{68}\) Gailhard, supra note 7, at 47–52, 54.
sources and its relations with other legal orders.” The component parts of this autonomous ICA legal order include formal legal instruments such as the 1958 New York Convention and the UNCTAD Model Law, transnational legal principles such as lex mercatoria, national arbitration laws, a complex network of private international contracts and informal regimes based on “general standards of behaviour,” and international arbitration institutions and practitioners that partake in an ICA “legal culture.”

B. The ICA Legal Order Is Best-Suited To Resolve Cross-Border Commercial Disputes Between Parties From Rival States

Being an autonomous legal order that is based on states’ normative activity but at the same time transcends any particular national legal system, ICA is arguably best-suited to resolve commercial disputes between parties from rival states. In a cross-border environment characterized by profound absence of trust and cooperation, neutral decision making by “international judges” within a framework of non-national, clear, and accepted rules may present the best, and in some cases the only, way in which such parties can overcome deep-seated differences and resolve their commercial disputes effectively.

This is so since neither litigation nor non-binding dispute resolution mechanisms such as negotiation and mediation are likely to take place, or succeed, between parties from rival states. While litigation may be advantageous in this context since it is a final and binding process in which the parties can present their respective cases and obtain a decision based on law, it is unlikely to occur between parties from rival states. Such parties would be unlikely to entrust their dispute to each other’s courts, which they may view as bias or political, and which they may not have physical or legal access to.

Negotiation, mediation, and similar mechanisms, while often useful in resolving disputes quickly, efficiently, and cost-effectively, are unlikely to succeed in these circumstances for several reasons. First, such processes are cooperative in nature and require parties

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69 Id. at 56; KARTON, supra note 6; Lew, supra note 54, at 189–90.
70 LYNCH, supra note 5, at 84–85.
71 GAILLARD, supra note 7, at 59.
72 Id. at 59.
to make voluntary concessions in order to reach a joint agreement. When parties share a history of political, social, or other deep-rooted conflicts, however, they may find it particularly difficult to make such concessions and may prefer a binding decision rendered by a third party. Moreover, these processes are vulnerable to abuse where asymmetric relations exist and one party is more powerful and can pressure the other party into making concessions, which may in turn lead to resentment, aggression, and further disputes.\(^73\) A neutral, binding, and effective dispute resolution mechanism is therefore required in order to resolve cross-border commercial disputes between parties from rival states.

C. The ICA Legal Order as a “Commercial Peacemaker”

In order to be used effectively by parties from rival states as a “commercial peacemaking” mechanism, the existing manifestation of the ICA legal order, namely \textit{ad hoc} and institutional arbitration, should be adapted. Since \textit{ad hoc} arbitration requires parties to agree on all aspects of the arbitration, including the appointment of the arbitrators, the applicable laws, and the seat of the arbitration, they must have a high level of cooperation and an interest in maintaining stable and long-term business relations with each other in order to create a workable arbitral process. This is particularly important where, as is often the case, such details are not included in the arbitration clause and must be agreed upon after a dispute has arisen. Parties from rival states, however, not only tend to exhibit low levels of cooperation, but are also subject to volatile political and economic conditions beyond their control that may negatively affect their business relationship. Their interests therefore tend to be short-sighted and oriented toward immediate profits rather than preserving a stable long-term business relationship. The likelihood of such parties reaching an agreement on the details of an \textit{ad hoc} arbitration is therefore relatively low.\(^74\)

While both international institutions, such as the ICC\(^75\) and LCIA,\(^76\) and regional institutions, such as the CRCICA\(^77\) and

\(^{73}\) KHAN, supra note 8, at 45. 

\(^{74}\) Although this problem can be overcome to some extent by using the UNCITRAL Arbitration Rules, for instance.


SIAC,\textsuperscript{78} exist to address the dispute resolution needs of commercial parties, these may be beyond the reach of parties from rival states. First, such parties may not be legally sophisticated or well versed in ICA practice, and may therefore be reluctant to entrust an unknown and distant institution with the administration of their dispute. Moreover, the costs associated with institutional ICA tend to be higher as a result of these institutions’ administrative fees and the choice of arbitrators in some cases, thereby effectively preventing some parties, particularly those from less developed countries, from accessing these institutions.\textsuperscript{79} In addition, existing ICA institutions may be limited in their ability to understand and account for the unique circumstances, background, culture, and dynamics of parties from rival states. For instance, concepts such as neutrality and impartiality may have a particular, more profound and crucial, meaning where disputes between such parties are concerned. An arbitral institution that is not intimately familiar with the broader conflict between the relevant rival states, the nature of the parties’ relations, and their “cultural mentalities”\textsuperscript{80} risks inadvertently selecting arbitrators that may not be perceived as truly neutral or impartial by the disputing parties, thereby compromising the legitimacy of the arbitral process as a whole.

The current manifestation of the ICA legal order therefore requires some adaptation in order for it to serve as an effective “commercial peacemaker” between business parties from rival states. This need for adaptation, however, does not make the ICA legal order any less suitable in this context. By virtue of its dynamic nature, this regime “can be ‘transformed’ or significantly altered in [its] character and structure of rights and rules . . . .”\textsuperscript{81}

\begin{footnotes}
\item[80] Id. at 228.
\item[81] \textit{Lynch, supra} note 5, at 92–93; Kemicha, \textit{supra} note 79, at 221.
\end{footnotes}
III. THE NEW ROLE OF THE ICA LEGAL ORDER –
THE JERUSALEM ARBITRATION CENTER AND THE
NORTH-SOUTH KOREA COMMERCIAL
ARBITRATION COMMITTEE

International commercial arbitration . . . is concerned with ensuring that the arteries of international trade and commerce are kept open and maximized.82

An adaptation of the existing ICA legal order to dispute resolution between parties from rival states is currently taking place in two different forms. The first is the Jerusalem Arbitration Center, an arbitration institution established to resolve cross-border commercial disputes between Israeli and Palestinian businesses. The second is the North-South Commercial Arbitration Committee, an arbitration body intended to facilitate the resolution of disputes arising between North and South Korean businesses operating in the Kaesong Industrial Complex. This section will review these initiatives and consider how they can each promote bilateral trade across a troubled border and thereby facilitate peaceful interstate relations.

A. The Jerusalem Arbitration Center

The Israeli-Palestinian conflict is a complex and protracted dispute characterized by deep-rooted hostility and distrust that have been reinforced over the years by the parties’ conflicting narratives of history and justice.83 However, notwithstanding the military and political tensions between Israelis and Palestinians, there is active cross-border trade taking place that is primarily motivated by geographical proximity and respective economic advantages.84

For instance, in 2009 approximately 72% of the Palestinian Authority’s (PA) total imports originated in Israel and 89% of its exports were to Israel. Israel’s export of goods and services to the PA was estimated at approximately $3.2 billion that year, which

82 Lynch, supra note 5, at 84–85.
constituted 4.7% of its total export and made the PA Israel’s second export destination after the United States. Israel’s imports from the PA in 2009 were estimated at approximately $605 million, which constituted 1% of its total imports and included mostly traditional products such as shoes, furniture, textile, and agricultural products.85

The bilateral trade between Israel and Palestine, however, is far from reaching its full potential. Many economic sectors, including tourism, technology, agriculture, infrastructure, and services would benefit from further economic cooperation between the sides.86 Moreover, it has been suggested that “an increase in the scope of trade between Israel and the Palestine can decrease political tensions by reducing the growing economic gap between the two economies.”87 Such increase in trade, however, is hindered not only by formal trade barriers and lack of diplomatic cooperation, but also by the absence of an effective cross-border mechanism to resolve commercial disputes between Israeli and Palestinian businesses.

This is so since the inability of Israeli and Palestinian parties to resolve their business disputes in an effective, enforceable, and impartial way increases transaction costs, leads to inefficient commerce, and depresses further trade development. In order to avoid disputes, business transactions between these parties are frequently conducted by way of cash on delivery or through bank or other guarantees, or are avoided altogether.88 If a contract is concluded, Israeli courts are usually chosen as the forum for the resolution of disputes since the Israeli side is often the stronger negotiating party and it is generally not possible for Israelis to appear before Palestinian courts. This situation, however, creates difficulties for both sides—the Palestinian party may be reluctant to appear before the courts of its Israeli counterparty, which it may view as unfavourable, while the Israeli party is likely to find the enforcement of decisions and rulings by Israeli courts in the Palestinian Territo-

85 Agmon, supra note 83.
87 Malul et al., supra note 37, at 5.
ries to be virtually impossible. Moreover, it seems that Israeli and Palestinian parties generally do not consider or use existing alternative disputes resolution mechanisms, such as mediation or arbitration in existing institutions or ad hoc. As discussed above, this may be a result of, among others, limited access to such mechanisms, impracticability due to mutual distrust and lack of cooperation, and insufficient awareness or understanding among local lawyers and businesspeople.

The need for an accessible, neutral, effective, and enforceable cross-border dispute resolution mechanism is therefore great, and has recently been addressed through the establishment of the Jerusalem Arbitration Center (JAC). The JAC is a private joint Israeli-Palestinian arbitration institution dedicated to the resolution of cross-border business disputes. It embodies the new “commercial peacemaking” role of the transnational ICA legal order, while adapting it to the nature of Israeli-Palestinian commercial disputes and the often uncertain political and economic circumstances of the region. Accordingly, the JAC adopted the tried and true institutional arbitration model of the International Court of Arbitration of the International Chamber of Commerce (ICC), and adjusted it to local conditions in several ways.

With respect to the JAC Rules of Arbitration, these resemble the ICC Arbitration Rules in many respects, including the method for nominating and appointing arbitrators, the use of Terms of References, and the scrutiny of arbitral awards by the JAC Court. However, there are also several important differences, intended to reinforce the JAC’s impartial nature, facilitate the parties’ access to the institution, and equalize any potential imbalance in their bargaining power.

First, while the ICC Rules do not include a default seat of arbitration and leave this decision to the parties or, in the event they fail to select a seat, to the ICC Court, the JAC Rules provide for a “virtual” Paris seat as a default seat for JAC arbitrations, unless the parties agree otherwise. This provision has several objectives: to provide the parties with a pre-determined neutral option that they can use to facilitate the proceedings; to detach JAC arbitrations

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89 In spite of attempts in the Oslo Accords to provide for the mutual recognition and enforcement of judicial decisions and rulings, in practice the enforcement of Israeli court decisions in Palestinian areas is virtually impossible. The JAC Challenge, ICC ISRAEL, http://www.iccisrael.co.il/the-challenge.html (last visited July 6, 2014) (Isr.).

from the Israeli and Palestinian courts and national laws, thereby further neutralizing the proceedings; and to eliminate the parties’ ability to apply to the French courts to set aside JAC arbitral awards, in accordance with Article 1522 of the French Code of Civil Procedure, unless they agree otherwise. This excludes one of the few opportunities the parties would have to challenge a JAC arbitral award and effectively leaves them with the sole option of objecting to its recognition and enforcement by the courts at the place of enforcement.

Moreover, the cost of JAC arbitrations set out in the Rules is significantly lower than that of ICC arbitrations, in order to reflect the generally lower monetary value of commercial transactions between Israelis and Palestinians and the limited financial capabilities of some local businesses. In addition, the JAC Hearing Center in East Jerusalem, which is relatively easy to access for both Israelis and Palestinians, is fixed in the Rules as the place of hearings for JAC arbitrations unless the parties agree otherwise. This was intended to provide them with a pre-determined neutral setting and prevent either party from pressuring the other into conducting hearings on its side of the border. The Rules also contain a detailed provision dealing with the conduct of hearings via video conferencing, in the event that restrictions on the mobility of the parties may prevent them from attending a hearing in person.

Two additional ways in which the JAC Rules seek to protect the neutrality of the proceedings and facilitate the arbitral process include the composition of JAC arbitral tribunals and the language of the proceedings. The JAC Rules provide that sole arbitrators and presidents of JAC arbitral tribunals may not be nationals or residents of Israel, the West Bank or the Gaza Strip, and East Jerusalem, unless the parties agree otherwise. Moreover, when the JAC Court confirms or appoints arbitrators, it must consider not only their nationality, but also their place of residence and relationship with the countries or territories which the parties or the other arbitrators are nationals or residents of, in evaluating their independence and impartiality. With regard to the language of arbitration, the rules provide for English as the default language, and

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91 Id. at appendix III.
92 Id. at art. 15(2).
93 Id. at art. 15(3).
94 Id. at art. 10(4).
95 Id. at art. 10(1).
the parties are not permitted to opt for another language.96 Since all JAC arbitrations must include at least one international arbitrator, either as sole arbitrator or president of the tribunal, who presumably would not be conversant in either Hebrew or Arabic, this provision was intended to prevent logistical difficulties and increased costs associated with translations of documents and hearings, as well as to ensure the neutrality of the proceedings and the equality of the parties.

The structure of the JAC, again modeled after that of the ICC, was also intended to ensure neutrality, professionalism, and international presence and support. The JAC thus consists of three main bodies: a Board of Directors; a Court, which has similar functions and responsibilities as the ICC Court; and a Secretariat, which manages the daily aspects of JAC arbitrations and advises the Court. Both the JAC Board and Court include a majority of international figures. The Court is comprised of nine arbitration experts, with an international President and Vice-President, two Court Members appointed by each of the Israeli and Palestinian ICC National Committees, and three international Court Members.97 The Secretariat is headed by an international Secretary General and includes two Deputy Secretary Generals, an Israeli and a Palestinian. The JAC headquarters are located in East Jerusalem, with two corresponding offices in Tel Aviv, Israel and Ramallah, Palestine.98

Another important hallmark of the JAC, and reflection of the ICA legal order, is the enforceability of its awards. As already mentioned, there is no reciprocal enforcement of Israeli and Palestinian court decisions, as Israeli court decisions are practically impossible to enforce in Palestine. The enforcement of JAC arbitral awards, on the other hand, has been secured through commitments of the appropriate authorities in both jurisdictions, and such awards will be enforced in accordance with their respective arbitration laws. Since the default seat of JAC arbitrations is Paris, France, arbitral awards would be considered as foreign awards by Israeli courts, and therefore subject to the New York Convention and its limited grounds for refusing recognition and enforcement. While Palestine is currently not a signatory to the New York Convention, the Palestinian arbitration law that governs recognition

97 Id. at appendix I, arts. 2–3.
98 Id. at art. 1(6).
and enforcement of foreign arbitral awards is being revised and aligned with accepted international arbitration practice.

In sum, the distinctive features of the ICA legal order, albeit adjusted to local needs, as well as its new role of “commercial peacemaking,” are clearly evident in the JAC. First, the JAC is a private non-governmental initiative created by businesspeople for the use of businesspeople. As has been said of commercial arbitration generally, it “exists for one purpose only: to serve the commercial man . . . .”99 Accordingly, the creation and development of the JAC has been entirely detached from both governments, and is focused on the effective resolution of individual business disputes. Second, the JAC itself, as well as JAC arbitrations, are governed by clear rules devised and agreed upon by the parties themselves. These rules are independent of Israeli and Palestinian domestic laws and courts, and serve to protect the neutrality, independence, and professional nature of the institution. Third, the JAC provides disputing parties with accessible, private, and confidential dispute resolution services. The local nature of the JAC makes it accessible to parties that may be unfamiliar with international arbitral practice or reluctant to entrust their dispute to a foreign institution. Its private and confidential nature not only allows parties to air their differences in a private forum, but also protects their commercial interests and enables them to maintain a long-term business relationship.

Finally, for any cooperative initiative to succeed in a highly conflictual environment it must produce short-term direct benefits to the participating populations, since “assuring long-term benefits . . . requires responding to short-term needs.”100 The JAC, as a manifestation of the ICA legal order, provides the Palestinian and Israeli business communities with such short-term benefits by enabling them to effectively resolve their commercial disputes. While the long-term benefits of this in terms of improved bilateral trade relations and the reduction of tensions at the interstate level admittedly remain to be seen, the mere existence of the JAC is a tremendous achievement and a testament to the “commercial peacemaking” potential of the ICA legal order. The fact that these enduring rivals have successfully cooperated in the establishment of such a joint institution in itself evidences the consensus and confidence building capabilities of the ICA legal order, as well as the

99 Lord Mustill, New Lex Mercatoria, cited in Karton, supra note 6, at 35.
100 Schwartz et al., supra note 27, at 12.
dispute resolution lacuna that its new “commercial peacemaking” role is intended to fill.

B. The North-South Korea Commercial Arbitration Committee

Hostile relations between North and South Korea have lingered since the 1950 to 1952 Korean War.\textsuperscript{101} Economic links between the two countries were initially severed until they began to trade on a small scale, indirectly, and via third countries, during the 1980s.\textsuperscript{102} During the 1990s, North Korea deepened its economic relations with South Korea\textsuperscript{103} and the latter became one of its main trading partners.\textsuperscript{104} In 2005, inter-Korean trade was estimated at over $1 billion, although the vast majority of the flow of goods northward was in the form of aid rather than commercial transactions.\textsuperscript{105} South Korean companies have continued to invest in North Korea despite it being typically unprofitable to do so due to family connections and patriotism, i.e., eventual reunification.\textsuperscript{106}

Nonetheless, since 2008, political tensions, reoccurring military provocations on the part of North Korea, and a hazardous business environment in the North have brought to a halt any normal trade relations between the two Koreas, and have prevented them from achieving their full trading potential, namely for South Korea to be “North Korea’s largest economic, trade, and investment partner.”\textsuperscript{107} In fact, the only remaining economic interaction between the two countries over the past few years has been through the

\begin{footnotesize}
\begin{enumerate}
\item Jeffries, supra note 101, at 16.
\item Stephan Haggard & Marcus Noland, North Korea’s Foreign Economic Relations, 8 INT’L REL. OF THE ASIA-PACIFIC 219, 221–22 (2008).
\item Jeffries, supra note 101, at 416; Lim Wonhyuk, Inter-Korean Economic Cooperation at a Crossroads, in DYNAMIC FORCES ON THE KOREAN PENINSULA: STRATEGIC & ECONOMIC IMPLICATIONS 147 (2007).
\item Jeffries, supra note 101, at 16–17.
\end{enumerate}
\end{footnotesize}
Kaesong Industrial Complex situated north of the Demilitarized Zone (DMZ) dividing the two Koreas.  

The Kaesong Industrial Complex was created in an agreement between the two Korean governments in 2000, under which the North guaranteed “a free economy and private ownership at a . . . complex to be developed by South Korea.” Approximately 120 small and medium-size South Korean companies operate from Kaesong, which employs around 50,000 North Koreans and is a major source of foreign currency for North Korea’s economy. Companies that operate in Kaesong are permitted to develop and invest in the region under a special “Law on the Kaesong Industrial District” enacted by North Korea in 2002. With 76% of the total inter-Korean trade in 2010 attributed to it, Kaesong has been considered by some to be “the centerpiece of North/South economic cooperation.”

The Kaesong Complex seems to have a broad coalition of support in both South and North Korea. It helps maintain stability on the Peninsula and ease tensions across the DMZ, and provides a possible benchmark for market reforms in North Korea that could expose it to outside influences and market-oriented businesses. It may also provide a “bridge for communication and a catalyst for cultural interaction . . . and create stakeholders . . . with a shared interest in stability, liberalization and increased communication across the DMZ,” which may in turn improve the political relations between the two countries. Moreover, closing the complex would be damaging for both governments—for the North it would mean a loss of revenue and potential social unrest, and for the

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112 Manyin & Nanto, supra note 101, at 1.
113 Gwertzman, supra note 107.
114 Id.
115 Manyin & Nanto, supra note 101, at 5.
116 Id. at 16.
117 Kim & Lim, supra note 108, at 90.
South it would mean insurance liability for the South Korean companies using the complex.\textsuperscript{118} 

However, one of the barriers preventing further development of Kaesong and inter-Korean bilateral trade is the lack of an effective mechanism for resolving cross-border disputes arising from commercial activities taking place in the Complex.\textsuperscript{119} Such a mechanism would provide “a stable framework that takes into account the extraordinary situation of South and North Korea and their significantly different systems \textit{vis-à-vis} international practices, setting the stage for future agreements between the two Koreas.”\textsuperscript{120} The potential of the ICA legal order to provide such a mechanism was recognized by the two Korean governments in a bilateral agreement ratified in 2003, which envisioned a “South-North Commercial Arbitration Committee” to “resolve commercial disputes arising in the course of economic exchanges and cooperation”, as well as investment disputes.\textsuperscript{121}

According to this agreement, the Arbitration Committee was to include a chairperson and four committee members from both countries,\textsuperscript{122} and was tasked with preparing a Register of thirty arbitrators from each side\textsuperscript{123} who must be “well versed in relevant laws and international trade and investment matters.”\textsuperscript{124} An arbitral tribunal established to resolve a particular dispute was to comprise of three arbitrators appointed by mutual agreement of the parties, or, if they fail to do so, by the Arbitration Committee according to the Register or, in the case of the “chief arbitrator,” by ICSID.\textsuperscript{125} Unless otherwise agreed by the parties, the Arbitral Tribunal “shall apply the relevant laws and regulations of the South or the North, general principles of international law, and the customary practice of international trade in rendering an arbitral award.”\textsuperscript{126} Finally, the two governments agreed that “unless there are special circumstances to consider, [they] shall recognize the arbitral award as binding and ensure that such an arbitral award is enforced in the same manner as the final and conclusive judgment

\begin{thebibliography}{9}
\bibitem{} Seong-Ho, \textit{supra} note 12, at 32; Lim, \textit{supra} note 111, at 37.
\bibitem{} North-South Agreement, \textit{supra} note 13, at arts. 2, 3, 8.
\bibitem{} \textit{Id.} at art. 2.
\bibitem{} \textit{Id.} at art. 5(1).
\bibitem{} \textit{Id.} at art. 6.
\bibitem{} \textit{Id.} at art. 10.
\bibitem{} \textit{Id.} at art. 12.
\end{thebibliography}
of their respective relevant court. The Arbitration Committee shall determine whether such special circumstances exist.”

Although these principles were agreed upon over a decade ago, only as recently as March 2014 did the two governments establish a “Commercial Arbitration Committee of the Kaesong Industrial Complex” to decide the details of the arbitration procedures and rules to govern the resolution of disputes arising from the commercial operations in Kaesong. A number of experts from the private sector also attended the meetings of the Committee, “raising hopes for the establishment of a system that can effectively deal with future conflict.” The two sides are also in the process of appointing thirty arbitrators each to hear potential disputes.

Despite such cooperation, many clarifications are required to the provisions of the 2003 agreement in order to ensure an effective and impartial cross-border arbitration mechanism. For instance: the precise relationship and division of power and responsibilities between the Arbitration Committee and arbitral tribunals deciding the actual disputes must be clarified; international arbitrators should be included in the Roster and appointed to act as chairpersons of arbitral tribunals; detailed arbitral rules must be devised or adopted; and the circumstances under which an arbitral award may be refused enforcement should be clearly set out and conform to international arbitration standards, particularly since North Korea is not a signatory to the New York Convention.

Finally, and perhaps most importantly, in light of the extensive involvement of the two Korean governments in the creation of the Arbitration Committee and the Register of arbitrators, assurances must be provided to the private sector that future deterioration in the political relationship between the two countries would not jeopardize the existence or operation of the arbitral mechanism. Deeper government involvement in creating this mechanism may be justified in the case of North and South Korea as a result of the suppressive and isolationist regime and the weak private sector in

127 North-South Agreement, supra note 13, at art. 16.
128 YONHAP NEWS AGENCY, supra note 110.
130 GAR NEWS, Two KOREAS PLAN ARBITRATION CENTRE (Mar. 13, 2014) (on file with author); YONHAP NEWS AGENCY, supra note 110.
131 Seong-Ho, supra note 12, at 33–35.
the North, as well as the nature of the Kaesong Complex as a “large-scale national project” for both countries. Nevertheless, as the Northern government has “a horrendous problem with credibility” and the attitude of the Southern public and government toward the North appears to be increasingly hardened, any effective cross-border arbitral mechanism must be based on the principle of political and economic separation and must safeguard private interests and be perceived by the private sector, for whose use it is created, to be neutral, independent, and dependable.

Therefore, considerable work remains to be done before the envisioned arbitration mechanism for the resolution of cross-border commercial disputes between South and North Korean businesses could reasonably be launched. Still, the fact that both governments, as well as the private sector in both countries, have recognized the need for and value in having such a mechanism, and are cooperating to achieve it, further supports the new role of the ICA legal order and its potential contribution to “economic prosperity and political peace” between rival states. Moreover, the fact that the arbitration mechanism established by the two Koreas will likely operate quite differently from the JAC, as it seems to be less institutionally-oriented and there is considerably more governmental involvement on both sides, illustrates the dynamic nature of the ICA legal order and its ability to adapt to the particular circumstances of different rival states.

IV. THE NEW ROLE OF THE ICA LEGAL ORDER – INDIA AND PAKISTAN?

*The thirst for decent methods for solving disputes will . . . generate alternatives.*

The new “commercial peacemaking” role of the ICA legal order advanced in this Article and exemplified by the Commercial Arbitration Committee of the Kaesong Industrial Complex and the JAC, could potentially be used by other rival states to strengthen

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133 Lim, *supra* note 111, at 32.
135 Lim, *supra* note 111, at 28.
their bilateral trade relations and promote cooperation and peace. This section will explore this potential with respect to India and Pakistan.

During the first few decades after partition, India and Pakistan maintained relatively cordial bilateral trade ties. However, the 1965 and 1971 wars “severely disrupted” these ties and they “never really recovered” since. Moreover, the continuous political and territorial tensions between the two countries have created a “trust deficit” and hostility at the social and individual levels. Even though in 2011 Pakistan decided to award India Most Favored Nation status, arguably paving the way for a normal trade relationship between the two countries, the granting of the status has been delayed due to domestic political opposition in Pakistan. As a result of their strained relations, the volume of bilateral trade between Pakistan and India in 2013 was less than $3 billion, and there continues to be virtually no bilateral trade in services and no foreign direct investments.

Estimates suggest that trade between India and Pakistan could reach $40 billion and lead not only to an increase in respective household incomes and GDPs in both countries, but also to more cooperative bilateral relations that may pave the way to progress on political issues. The lack of official trade channels between In-

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dia and Pakistan, however, has instead led to the creation of an underground market, unofficial trading practices, and trade diversion to third countries, which are all inefficient and costly. In addition to formal trade barriers faced by Indian and Pakistani businesses engaged in cross-border trade, such as political tensions, security concerns, and visa and customs restrictions, they also have no effective mechanism for resolving commercial disputes that arise between them, which further “prevent[s] . . . mutually beneficial exchanges from taking place.” The absence of this “trade facilitation” and “connectivity” measure, moreover, may reduce the trade benefits to India and Pakistan even if formal barriers to trade are removed, since it increases transaction costs, weakens the relationship between businesspeople from the two countries, diminishes their interactions, and thereby stymies any goodwill that may exist between them.

Therefore, an “expeditious, inexpensive, and equitable” mechanism based on the ICA legal order should be created to facilitate bilateral trade between Indian and Pakistani businesses, either by the private business sectors in both countries, as in the case of the JAC, or by the Indian and Pakistani governments, as in the case of the Commercial Arbitration Committee of the Kaesong Industrial Complex. Such a mechanism could be devised, for instance, by existing joint private economic bodies, such as the Confederation of Indian Industries, the Federation of Indian Chambers of Commerce and Industry, the Pakistan Business Council, or the Federation of Pakistan Chambers of Commerce and Industry, with government involvement and support as needed, so long as the arbitration mechanism remains independent, neutral, and detached from the political relationship between the two countries.

If such a dispute resolution mechanism is successful in increasing trade between Indian and Pakistani businesses, it may also im-

143 Malhotra, supra note 142, at 119; CUTS INTERNATIONAL, supra note 25 at iii; Kugelman, supra note 24 at 1; Kochhar & Ghani, supra note 20, at 103.
144 Malhotra, supra note 142.
145 Kugelman, supra note 24, at 13; Kochhar & Ghani, supra note 20, at 102.
147 Kochhar & Ghani, supra note 20, at 107; De et al., supra note 146, at 10.
148 Kugelman, supra note 24, at 9, 12; Kochhar & Ghani, supra note 20, at 112.
149 Husain, supra note 139, at 68.
150 Malhotra, supra note 142, at 3; Kugelman, supra note 24, at 13; Husain, supra note 139, at 68–69.
prove public opinion in both countries, reduce tensions, strengthen cooperation, and advance the trade and political relations of their respective governments. Such developments, in turn, may create stakeholders who place a high value on preserving good bilateral relations. The Pakistan Business Council, for instance, has estimated that trade volumes between India and Pakistan in the range of $10 to $15 billion will make the gains from trade “large enough for economic wellbeing to outweigh geostrategic preoccupations,” thereby reducing the likelihood of conflict and paving the way to more peaceful relations.

V. Conclusion

There are many challenging barriers to cross-border trade and peaceful relations between rival states. Most of these barriers are created and maintained by governments and have little prospects of being eliminated so long as political, security, or military conflicts persist. Other barriers, however, may be overcome by private sector or governmental initiatives that are business-oriented and detached from the broader interstate political or military dispute. One such barrier is the lack of an effective mechanism for the resolution of business disputes between parties from rival states, which mechanism could increase cross-border trade, strengthen cooperation, and promote peaceful interstate relations.

As this Article argues, such a mechanism can be created by adopting and adapting the ICA legal order in its new “commercial peacemaking” role, to provide local, neutral, independent, and efficient dispute resolution. In a significant, albeit indirect, way, the tried and true principles of ICA may not only improve commercial relations and build confidence between individual parties from rival states, but also alleviate political tensions and promote peaceful interstate relations, as “foreign trade maintain[s] communication and keep[s] up good feeling among nations.” This is crucially important both to rival states themselves and to the international community as a whole, since even though trade between two countries is bilateral, the entire world has a stake in its peaceful outcomes.

151 Nabi, supra note 140, at 46.
152 Jean Bodin, cited in Barbieri, supra note 14, at 6.
153 Mahmood, supra note 138, at 27.