

INVESTMENT ARBITRATION: A ROUTE TO RESOLVING ECONOMIC INEQUITIES IN PALESTINE & ISRAEL

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I. INTRODUCTION

Despite a global pandemic, Middle East politics have not failed to give the world a show. For Israel and Palestine, in particular, what appeared to be a stagnant, interminable dispute in the face of failed attempts at peace has seen a significant shift in recent months. In September 2020, the world saw powerful regional leaders in the Middle East step away from the Palestinian problem and begin to see a potential trading partner in the modern Israeli state, taking significant steps back from what once were uncompromising policies in support of the Palestinian cause. Four months later, the Palestinian leadership announced, and subsequently cancelled, its first national legislative and presidential elections in over 15 years. In late May 2021, tensions between the Israel and Palestine hit a climax, as unlawful Israeli claims to Palestinian lands led to a bombardment of Gaza by the Israeli military and rocket fire into Israel by Hamas. The 11-day battle impelled settler violence in Jerusalem and international protests, further complicating the already instable and vastly evolving regional atmosphere. While Palestinians await their rightful freedoms, however, internal societal cooperation must be cultivated to encourage growth and development—beginning in the economic sphere.

An analysis of the experiences of neutral, investment-state arbitration bodies across the world has revealed that a forum dedicated exclusively to resolving disputes arising out of foreign investments may be critical to achieving peace between Palestine and Israel. Despite the unsuccessful creation of the Jerusalem Arbitration Center, there remains a dire need to foster economic and social development for the benefit of both sides. The establishment of a neutral investment arbitration regime between Palestine and Israel, detached from the jurisdiction of the International Commercial Court, is necessary to encourage investors to take part in the economies of either State and strengthen commercial relationships between individual businesses on a global scale. The creation of such a mechanism will work to offer a secure and impartial support system for investors and may help to assuage the financial risks involved in dealings with either party. Moreover, such economic development may prove vital in reaching a settlement over time.

This Note will examine the potential effects of a new foreign investment arbitration regime between Palestine and Israel on the path to peace. It will begin with an overview of the nature of the Israeli-Palestinian struggle, an introduction into investment arbitration, and a discussion of the current economic climates of Palestine and Israel, generally. Next, it will examine recent efforts to implement and modernize investment arbitration regimes in the Middle East, as well as a notable, yet ultimately fruitless attempt in Palestine and Israel specifically. To conclude, this Note will analyze the establishment of a non-partisan investment arbitration regime among

individual investors, and the positive implications it may have on the ongoing peace process.

II. THE ISRAELI-PALESTINIAN CONFLICT: A BRIEF OVERVIEW

The Israeli-Palestinian problem has defined the status of Middle East peace for decades. Not only has it shaped the political and social landscape of the region, but it has severely hindered its economic development, notably that of Palestine. This section will serve as a general introduction to the Middle East Conflict and major decisions such as the Oslo Accords, followed by an introduction into the issue of Palestinian sovereignty and its economic ramifications. Finally, this section will give a brief summary of the current economic conditions in Palestine and Israel, which will greatly benefit from increased protection via the implementation of an independent commercial arbitration measure.

A. *The Middle East Conflict and its Origins*

Entrenched in religion, culture, and politics, the conflict between Israel and Palestine has spanned more than 70 years. The roots of the conflict, however, span long before this time, dating back to Napoleon Bonaparte in 1799.¹ Nearly a century before the modern struggle for land began, the Zionist movement had gained significant traction across Europe throughout the 1800s, and by the 1880s had officially established itself and a major settlement in Palestine.² From this point forward, calls for a Jewish homeland amplified, and in the early 20th Century, they would be answered by the British Zionist movement, beginning with the 1917 Balfour Declaration.³ Following the First

¹*Napoleon Issues Proclamation Which Calls Jews Rightful Heirs of Palestine*, CTR. FOR ISRAEL EDUC., <https://israeled.org/napoleon-issues-proclamation-calls-jews-rightful-heirs-palestine/> (last visited Jan. 9, 2021). French emperor Napoleon Bonaparte first offered Palestine as a homeland for the Jewish people in a 1799 Proclamation, although the plan never came to fruition following Napoleon's defeat and withdrawal from the Near East. The proclamation was a catalyst for the Jewish movement for autonomy in Europe, later taking the form of modern-day Zionism. *Id.*

² See generally *Zionism*, ENCYC. BRITANNICA, <https://www.britannica.com/topic/Zionism> (last visited Jan. 29, 2021) (describing a Jewish nationalist movement emerging in Europe in the late 1800s, with the goal of creating a Jewish national home in the state of Palestine. The term "Zionist" comes from an ancient hill in Jerusalem named Zion).

³ See generally *Balfour Declaration*, ENCYC. BRITANNICA, <https://www.britannica.com/event/Balfour-Declaration> (last visited Jan. 9, 2021) (explaining the Declaration that was issued as an official statement of support for the creation of a Jewish homeland to be established in Palestine).

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World War, Britain had become the dominating colonial power in Palestine and included the terms of the Balfour Declaration in its Mandate, which was approved by the new League of Nations in 1922.⁴ Approval of the British Mandate would later lead to a series of Arab protests and uprisings against Jewish immigration in Palestine, as well as a violent Zionist response.⁵ After US-Zionist relations solidified in the 1940s, however, the creation of an independent Jewish state quickly followed, despite negative Palestinian and Arab public opinion.

Following the Second World War, the newly created United Nations negotiated and passed Resolution 181, known as the Plan of Partition (hereinafter “the Plan”).⁶ Wholly rejected by Palestinians and neighboring Arab nations, the Plan was considered by the Zionist movement to be a legal basis for the establishment of the independent state of Israel. For Palestinians however, it served as a land-grabbing mechanism and a catalyst for intense and unrelenting violence for years to come.

Following the United Nations’ official recognition of Israeli statehood in 1948, a series of wars between existing Arab nations and the newly established Israeli state began—the first of which, the Arab-Israeli War, remains a central issue in modern-day negotiations. The Arab-Israeli War lasted continued until 1949, followed by the implementation of armistice agreements mediated by the UN that resulted in territorial gain for Israel, including Western Jerusalem and annexations of Palestinian land by neighboring Arab states—Jordan and Egypt.⁷ Although the terms of the armistice agreements lasted until 1967, the following years were significant for both sides. The 1948 war resulted in both the flee and expulsion of approximately 750,000 Palestinian refugees, a mass migration known as the

⁴ *Id.*

⁵ See *Israel Profile—Timeline*, BBC (Apr. 9, 2019), <https://www.bbc.com/news/world-middle-east-29123668>.

⁶ See generally U.N. GAORG.A. Res. 181 (II) *Future Gov’t of Palestine*, A/RES/181(II) (Nov. 29, 1947). The Plan called for the partition of Palestine into two, distinct Arab and Jewish states. The city of Jerusalem was to be a separate entity governed by a special international regime as a safe space for three religions: Islam, Judaism, and Christianity. *Id.* at 132–35.

⁷ See generally *Armistice Lines (1949–1967)*, ISR. MINISTRY OF FOREIGN AFFS., <https://mfa.gov.il/mfa/aboutisrael/maps/pages/1949-1967%20armistice%20lines.aspx> (last visited Jan. 9, 2021) (showing Armistice agreements following the Arab-Israeli War that were made between Israel and the Arab states—Jordan, Egypt, Syria, and Lebanon. As a result, Jordan annexed Palestinian territory in the West Bank and Eastern Jerusalem, while Egypt annexed Gaza. Although both Iraq and Saudi Arabia were participants in the conflict, no such agreement was reached between the countries. Israel, on the other hand, took in about 78% of the Mandate area).

“Catastrophe”—or “Nakba” in Arabic—which created a refugee crisis that continues today.⁸ Nonetheless, the state of Israel was experiencing a transformation of its own at the time and throughout the 1960s, which would ultimately see the settlement of approximately one million Jewish refugees and immigrants from majority-Muslim countries, as well as the arrival of 250,000 Holocaust survivors.⁹

As Israeli settlement of formerly Palestinian lands continued, tensions between the two states persisted as well. In 1967, border clashes increased and the crisis along the Suez Canal intensified, culminating in what is now known as the Six-Day War, leaving the Arab states defeated and Israel with control over East Jerusalem, the West Bank, Gaza, and the Golan Heights—all of which had been recognized as “Palestine” in Resolution 181.¹⁰

In the years that followed, friction between Israel and the Arab States continued, leading to the Oslo Accords (hereinafter sometimes referred to as “Oslo”) in the 1990s.¹¹ In a series of agreements, Oslo attempted to negotiate key issues impeding on Middle East peace, including the self-government of

⁸ See generally *Palestine Refugees*, U.N. RELIEF AND WORKS AGENCY FOR PALESTINE REFUGEES IN THE NEAR EAST, <https://www.unrwa.org/palestine-refugees> (last visited Jan. 9, 2021) (explaining that today, there are about 5 million registered Palestinian refugees, more than 1.5 million of whom live in 58 recognized Palestine refugee camps in Jordan, Lebanon, and Syria. The camps are sponsored by the United Nations Relief and Works Agency for Palestine Refugees in the Near East, which was established in 1949 following the war).

⁹ See BBC, *supra* note 5.

¹⁰ See generally *Suez Crisis, 1956*, U.S. DEP’T OF STATE ARCHIVE (2001–2009), <https://2001-2009.state.gov/r/pa/ho/time/lw/97179.htm> (last visited Jan. 9, 2021) (explaining that in 1956, the Egyptian Government nationalized the European company that owned and operated the Suez Canal, threatening both the stock of European countries and their access to Middle Eastern oil. The British and French governments thus conducted a joint military operation involving Israel, in secret, to invade the Sinai and maintain European control over the Canal. The plan also resulted in Israel’s defeat of the Egyptian army and allowed the Israel’s to regain control of the Straits of Tiran. The consequences of the operation remain largely unresolved today); see also BBC, *supra* note 5.

¹¹ See generally U.N. Secretary-General, *Letter dated 8 October 1993 from the Permanent Representatives of the Russian Federation and the United States of America to the United Nations addressed to the Secretary-General*, U.N. SCOR Doc. A/48/486 (Oct. 11, 1993) [hereinafter 8 Oct. Letter]; see also CNN Ed. Rsch., *Oslo Accords Fast Facts*, CNN (Sept. 21, 2020), <https://www.cnn.com/2013/09/03/world/meast/oslo-accords-fast-facts/index.html> (detailing how the Oslo Accords were made up of two agreements: Oslo I (the Declaration of Principles) in 1993, which established a plan for an interim Palestinian government in Gaza and Jericho in the West bank, and Oslo II (the Israeli-Palestinian Interim Agreement on the West Bank and Gaza) in 1995, which expanded on Oslo I and provided for the complete withdrawal of Israeli troops from various Palestinian cities and towns).

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the Palestinian people, the transition of territory and border security, and the Palestinian refugee crisis and resettlement.¹² Although the Oslo Accords were meant to act as a temporary solution, awaiting a highly anticipated peace agreement, the international community ultimately failed in its effort, backing an inherently flawed agreement, leaving little room for improvement.¹³

Since Oslo, violence has continued as negotiations regarding the status of Palestine and the two-state solution have appeared to be at a standstill. Even more, the subjects of Oslo's failures have changed little in the years that have passed—disagreements over borders (with the Palestinians pushing for a return to the status quo preceding the 1967 war), the status of Jerusalem, and the right of return for Palestinian refugees, including Israel's recognition thereof.¹⁴

In all, a conclusion of the Middle East conflict remains elusive. Despite resolved agreements between Israel and various Arab nations, including Jordan and Egypt, and, more recently, Bahrain and the United Arab Emirates, diplomatic negotiations between the Israelis and the Palestinians have made dismal progress.¹⁵ Adding pressure to the conflict are also indefatigable Israeli land, air, and sea blockades in the Gaza Strip and increased Israeli settlement activity in the West Bank.¹⁶ Notwithstanding meticulous efforts by allies and the United Nations in advancing a two-state solution, tensions continue without an end in sight. As political, social, and

¹² 8 Oct. Letter, *supra* note 11, at 4.

¹³ See FADLE M. NAQIB, ECONOMIC ASPECTS OF THE PALESTINIAN-ISRAELI CONFLICT: THE COLLAPSE OF THE OSLO ACCORD, Discussion Paper No. 2002/100, 17, (U.N. Univ., World Inst. for Dev. Econ. Rsch. 2002).

¹⁴ See generally *The Oslo Accords and the Arab-Israeli Peace Process*, U.S DEP'T OF STATE OFF. OF THE HISTORIAN, <https://history.state.gov/milestones/1993-2000/oslo> (last visited Jan. 6, 2021) (explaining that compared to its idle approach in the Oslo negotiations, the United States, under the Clinton Administration, attempted to play a more active role in the Middle East peace process. In 2000, President Clinton hoped to reach a final settlement and convened a summit at Camp David, with both Israeli and Palestinian leaders present, but unresolved issues prevented any progress).

¹⁵ H.A. Hellyer, *Without the Palestinians, Israeli Normalization is Still Beyond Reach*, CARNEGIE ENDOWMENT FOR INT'L, PEACE (Sept. 15, 2020), <https://carnegieendowment.org/2020/09/15/without-palestinians-israeli-normalization-is-still-beyond-reach-pub-82702>.

¹⁶ See generally *Gaza Blockade*, U.N. OFF. FOR THE COORDINATION OF HUMANITARIAN AFFS., <https://www.ochaopt.org/content/gaza-blockade-restrictions-eased-most-people-still-locked> (last visited Jan. 5, 2021) (showing that despite the imposition of movement restrictions in the Gaza strip by Israeli beginning as early as the 1990s, the military blockade was initiated in June 2007 in response to a takeover of the strip by Hamas, a Sunni-Islamic militant organization, with Israel citing security concerns. 1.8 million Palestinians in Gaza remain essentially "locked in" the territory).

religious pressures remain, however, the conflict continues to take an immense toll on economic activity in the territory, furthering the need for an economic resolution as well.

B. Palestinian Sovereignty and the Economic Consequences of Occupation

Oslo's failures have been felt in nearly every aspect of the Palestinian-Israeli conflict; the economic ramifications, however, may have been the most damaging. Of these failures, perhaps the most fundamental was that of sovereignty, with the agreement addressing neither the territorial sovereignty of the Palestinians, nor the Palestinian right to economic independence.¹⁷ Over time, the sustained economic dependency of the Palestinian people on a growing Israeli nation and the mounting inequities between them has prevented any serious effort to revive the peace process.

At the time of Oslo, the economic domain was viewed as foundational for a lasting, comprehensive peace agreement.¹⁸ In 1994, the Palestinian Liberation Organization (hereinafter "PLO"), on behalf of the Palestinian people, and Israel signed a Protocol on Economic Relations, also called the Paris Protocol, which laid "the groundwork for strengthening the Palestinian economy and for exercising Palestine's right of economic decision-making in accordance with its own development plan and priorities."¹⁹ Through the Protocol, both parties recognized the importance of a stable and growing economic environment for their respective populations, and thus established a Joint Economic Committee (hereinafter "JEC") to carry out the terms of the economic cooperation agreement. Originally, the Protocol was intended to shape Palestinian fiscal policy in the interim, for a period of five years, but it has continued to shape the country's economic programs today.²⁰

C. Existing Economic Disparities Between Israel and Palestine

¹⁷ See NAQIB, *supra* note 13, at 1.

¹⁸ See generally Gaza-Jericho Agreement Annex-IV Econ. Protocol, *Protocol on Econ. Rel. between the Gov't of the State of Isr. & the P.L.O., representing the Palestinian People*, ISR. MINISTRY OF FOREIGN AFFS. (Apr. 29, 1994), <https://www.mfa.gov.il/MFA/ForeignPolicy/Peace/Guide/Pages/default.aspx?WPID=WPQ5&PN=20> (explaining how the Protocol established various economic terms binding on both parties, including import taxes and import policy, freight shipments, direct and indirect taxations, and other monetary issues).

¹⁹ See *id.*

²⁰ See U.N. Secretary-General, Doc. A/74/272, *Econ. Costs of the Israeli Occupation for the Palestinian People: Fiscal Aspects*, U.N. GAOR, at ¶ 8 (Aug. 2, 2019).

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Currently, the Palestinian economy, with a GDP of about \$15.6 billion, remains overwhelmingly reliant on Israel, whose GDP is nearly twenty-five times that of Palestine, at about \$402 billion.²¹ The disparity becomes even clearer when examining trade between the parties, as a substantial imbalance in the trade of goods between Israel and Palestine continues to show Palestinian economic dependency on Israel.²² This dependency on Israel remains largely unreciprocated, given Israel's rise in power in the Middle East and the relative strength and global support of its budding economy. In 2018, roughly 80% of Palestine's \$1.2 billion generated from global exports (\$967 million) went to Israel.²³ However, in the same year, a mere 5.7% of Israel's \$63.8 billion generated from global exports (\$3.62 billion) went to Palestine. For Palestine, this \$3.62 billion in Israeli imports constituted 61.9% of the country's total \$5.21 billion in global imports for 2018. In stark contrast, Israel's total global imports for 2018 amounted to \$76.6 billion, and just a fraction of that—\$958 million—came from Palestinian products.²⁴ The pre-existing economic disparities between Palestine's small, yet emergent economy and Israel's larger, more advanced economy are thus clearly reflected in their trading habits.

Despite Palestine's sizeable economic growth in recent years and Israel's rising global economic presence, trade and financial relationships between the parties continue to be greatly influenced by international security and political developments.²⁵ For both sides, the economic costs of the Israeli occupation of Palestine are vast. Under occupation, without autonomy, Palestine has lost an estimated \$47.7 billion in revenue between 2000 and 2017, equal to three times the present size of the country's economy.²⁶ Even for Israel, an economic and military powerhouse in the Middle East, the economic repercussions of the ongoing conflict do not go unfelt. Some note that the conflict limits Israel's potential for economic growth, believing that in times of peace, the Israeli economy could grow at a rate of 5-6%²⁷ Israel also

²¹ See *GDP (current US\$) – West Bank and Gaza*, THE WORLD BANK, <https://data.worldbank.org/indicator/NY.GDP.MKTP.CD?locations=PS> (last visited Nov. 18, 2021).

²² See YITZHAK GAL & BADER ROCK, *ISRAELI-PALESTINIAN TRADE: IN-DEPTH ANALYSIS 7* (Tony Blair Inst. for Glob. Change 2018).

²³ See *Palestine*, THE OBSERVATORY OF ECON. COMPLEXITY, <https://oec.world/en/profile/country/pse?yearSelector1=exportGrowthYear19> (last visited Nov. 18, 2021).

²⁴ See *id.*

²⁵ GAL & ROCK, *supra* note 22, at 10.

²⁶ U.N. Secretary-General, *supra* note 20, at 17.

²⁷ SHLOMO SWIRSKI, *THE COST OF OCCUPATION: THE BURDEN OF THE ISRAELI-PALESTINIAN CONFLICT 2012 REPORT 8* (Adva Center 2012).

incurs significant, realized costs in the form of both direct and indirect defense spending.²⁸ Currently, Israel's defense and related costs amount to 15% of its total GDP.²⁹ Once the conflict is settled, however, this percentage is expected to decrease gradually by approximately half, leading to an overall rise in Israel's GDP by nearly 7%.³⁰

III. INVESTMENT ARBITRATION AND FOREIGN INVESTMENT IN PALESTINE AND ISRAEL

The tense political and economic relationship between Palestine and Israel, as it currently stands, effectively acts as a “DO NOT ENTER” sign for weary investors. The success of a more proactive commercial arbitration mechanism serving the nations will depend largely on the commercial relationships that parties are willing to develop. The following section will introduce international investment arbitration and the relevant international agreements, followed by a brief overview of the current state of foreign direct investment in Palestine and Israel.

A. *International Investment Arbitration: An Introduction*

The existing framework of international investment arbitration was born out of the past pillars of investor-state arbitration, specifically the International Centre for Settlement of Investment Disputes (hereinafter “ICSID”) Convention and the current network of international investment agreements (IIAs), which expressly include clauses on investor-State arbitration.³¹ States initially moved away from domestic courts and into investment arbitration in order to “depoliticize” their investment systems, fearing the bias of national courts.³² Prior to ICSID, no mechanism existed for individual investors to bring suit against a nation-state, as such conflicts were

²⁸ GAL & ROCK, *supra* note 22, at 4.

²⁹ *Id.* at 5.

³⁰ *Id.*

³¹ *ICSID Convention: Rules and Regulations*, WORLD BANK GRP.: INT’L CTR. FOR SETTLEMENT OF INV. DISPS. (ICSID), <https://icsid.worldbank.org/resources/rules-and-regulations/convention/overview> (last visited Jan. 5, 2021) (The International Centre for Settlement of Investment Disputes Convention has been ratified by 155 nations and entered into force on October 14, 1966. The Convention creates an Administrative Council that adopts rules of procedure for arbitration and conciliation between individual investors and nation-states); GABRIELLE KAUFMANN-KOHLER & MICHELE POTESTÀ, WHY INVESTMENT ARBITRATION AND NOT DOMESTIC COURTS? THE ORIGINS OF THE MODERN INVESTMENT DISPUTE RESOLUTION SYSTEM, CRITICISM, AND FUTURE OUTLOOK 11 (Marc Bungenberg et al. eds., Eur. Y.B. of Int’l Econ. L. Special Issue 2020).

³² *Id.*

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not recognized by national courts.³³ The creation of ICSID in the 1960s, however, marked the launch of the first forum for the settlement of disputes for foreign investors, allowing *nationals* of a contracting party to sue the host state, so long as the host state is party to the ICSID Convention.³⁴ Although ICSID does not provide a dispute settlement tool for domestic investors, it has been effective in requiring Contracting Parties to enforce monetary obligations of arbitration awards in the same manner as a final judgement in their domestic court systems.³⁵ Such investment-arbitration mechanisms have since grown to include other forums such as UNICTRAL (created by the United Nations), the International Chamber of Commerce, and the Stockholm Chamber of Commerce, among others. The use of bilateral investment treaties (BITs) between nation-states has also become increasingly common, and today, more than 3000 BITs exist.³⁶ Such treaty agreements provide investors a “standing offer” to submit investment-related disputes to international arbitration, be it in ICSID, UNICTRAL, or other available mechanisms.

As the need for international economic cooperation and development grew across the world, so did the need for a policy framework that would effectively govern such ties between nations. Scholars Gabrielle Kaufmann-Kohler & Michele Potestà rightly identify three main reasons for the construction of an international treaty framework for the protection of foreign investments: (1) the aim of attracting foreign direct investment to host nations; (2) the depoliticization of investment disputes; and (3) the provision of an enforceable international remedy of investment-related disputes for individual foreign investors apart from inadequate domestic court systems.³⁷ In adopting policies aligning with these international principles, nation-states are expressing a necessary willingness to create favorable investment conditions within their borders, taking “a major step toward promoting an atmosphere of mutual confidence and thus stimulating a larger flow of private international capital into those countries which wish to attract it.”³⁸

³³ DANIEL C.K. CHOW & THOMAS J. SCHOENBAUM, *INTERNATIONAL BUSINESS TRANSACTIONS: PROBLEMS, CASES, AND MATERIALS* 381–396 (Wolters Kluwer, 4th ed. 2020).

³⁴ KAUFMANN-KOHLER & POTESTÀ, *supra* note 33, at 12. In order to settle a dispute arising out of an investment through ICSID arbitration, both the nation of the individual foreign investor and the host state must be contracting parties to ICSID and both parties must have consented to be subject to ICSID arbitration. *Id.*

³⁵ *Id.*

³⁶ *Id.* at 11.

³⁷ *Id.* at 13.

³⁸ *Id.* at 14 (citing Report of the Executive Directors on the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Section III, 18 March 1965, ¶¶ 9, 12).

For developing nations, such as Palestine, however, international cooperation in investor-state arbitration has proved difficult, with criticism centering on the substance and practice of the existing investor-state arbitration regime.³⁹ Regimes such as ICSID have been criticized by the developing world as having been established to serve the interest of wealthy, developed nations and *their* foreign investors.⁴⁰ Scholar Leon Trakman notes a related concern of ICSID arbitration:

[It has] done more to protect capital exporter states and the 'equitable' interests of their investors than address the economic and social interests of capital importing states in Africa, Asia, and Latin America that historically were economically exploited by colonial powers and their investors... The accusation of developing states is that principles of investment law are espoused through selective privileging under a rule of law regime devised by old world powers at the expense of the new developing world order.⁴¹

These same concerns are likely to be echoed in Palestine, a developing, unrecognized state under the occupation of a prosperous, developed state such as Israel. Therefore, in establishing an investment arbitration regime for the benefit of *both* parties, it is imperative to account for existing distrust and apprehension, pre-existing socio-political tensions aside.

B. *State of Foreign Direct Investment in Palestine*

The existing economic disparities between Israel and Palestine continue to impede efforts to alleviate political and social unease. However, these disparities have also obstructed the ability of local and foreign investors to readily participate within both two states, the consequences of which have been especially prevalent for Palestinians. In view of the ongoing occupation, absence of sovereignty, and lack of recognition from the international community, Palestinian businesses are forced to work in a stressed political

³⁹ Armand de Mestral, *The Impact of Investor-state Arbitration on Developing Countries*, CTR. FOR INT'L GOVERNANCE (Nov. 22, 2017), <https://www.cigionline.org/articles/impact-investor-state-arbitration-developing-countries/>.

⁴⁰ Leon E. Trakman, *The ICSID Under Seige*, 45 CORNELL INT'L L. J. 603, 607 (2012) (citing Ibrahim F.I. Shihata, *Towards a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA*, INVESTING WITH CONFIDENCE: UNDERSTANDING POLITICAL RISK MANAGEMENT IN THE 21ST CENTURY 2–35 (Kevin W. Lu et al. eds., 2009)).

⁴¹ *Id.* at 606–07.

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and social atmosphere, discouraging foreign investment within the nation's borders. However, as Scholars Marshall Breger & Shelby Quast rightly note, foreign investment within the West Bank and Gaza is vital not only to the economic growth of Palestine, but to Palestine's economic survival itself.⁴²

Between 2018 and 2019, Palestine saw a substantial decrease in foreign direct investment flows as Palestinian investments outwards continued to outweigh any incoming investments.⁴³ Although the nation's strategic geographic location and demand for large-scale infrastructure development make it a "largely unexploited market with good investment potential," investing in Palestine continues to be a high-risk venture for both current and potential investors.⁴⁴

Rampant corruption in the PA is one of the main reasons for the failure of domestic investments, in addition to the political and security complications in the Palestinian territories. Palestinian domestic investments are migrating to Jordan, Egypt, Turkey [,] and Latin [America] and are mainly concentrated in the industrial, commercial and real estate sectors... Meanwhile, Arab investments in Palestine, particularly in the West Bank, come from Saudi Arabia, the United Arab Emirates and Jordan, in addition to some foreign investments in the financial and service sectors. Investments are almost nonexistent in Gaza because of Hamas' control.⁴⁵

While domestic Palestinian investors are increasingly taking their capital abroad, the government has attempted to implement a new regulatory framework to attract investment inwards, following the principle of non-

⁴² Marshall J. Breger & Shelby R. Quast, *International Commercial Arbitration: A Case Study of the Areas Under Control of the Palestinian Authority*, 32 CASE W. RES. J. INT'L L. 185, 187 (2000).

⁴³ *Palestine: Foreign Investment*, SANTANDER: TRADE MKT., <https://santandertrade.com/en/portal/country-profile/162,palestine> (last visited Nov. 18, 2021).

⁴⁴ Adnan Abu Amer, *Palestine no longer a safe environment for investments*, AL-MONITOR (Oct. 8, 2019), <https://www.al-monitor.com/originals/2019/10/palestine-domestic-foreign-investments-leaving-pma-pcbs.html>.

⁴⁵ *Id.*

discrimination.⁴⁶ Despite these efforts, it is also evident that developments in Palestinian investment projects have been curtailed by the Israeli occupation, as Israel has set restrictions on the entry of various raw materials into Palestinian territories and has made it difficult to import and export between the West Bank and Gaza Strip.⁴⁷ With domestic investment generally concentrated in the commercial and real estate sectors, Palestine remains limited in the areas of production and manufacturing, considering the obstacles posed by the occupation, the lack of Palestinian autonomy over border crossings and ports, and the complexities of transferring funds between Palestinian banks, which work under the supervision of both the Palestinian and Israeli governments.⁴⁸ These factors have thus fostered an economic environment lacking the internal safeguards necessary for foreign direct investment inflow. Given the various obstacles the Palestinian Authority (PA) must overcome in order to effectively reassess its poor political, economic, and security structures, it is increasingly necessary that it put the protection of local and foreign investors, who have the capital to effectively revitalize the economy, at the forefront of its policymaking.

C. *State of Foreign Direct Investment in Israel*

In contrast to that of Palestine, the investment environment in Israel has become increasingly safe for investors as the economy continues to grow and modernize. In fact, Israel is ranked 16th among the top 20 host countries for foreign investment, making it one of the world's lowest-risk environments for such activities, despite ongoing geopolitical conditions.⁴⁹ Unlike the Palestinians, whose other major investment partners are neighboring Arab states, Israel has expanded its partnerships into the first-world, primarily working closely with the United States and the Netherlands, with Chinese

⁴⁶ *Id.* The principle of non-discrimination affords all benefits of the law to local and foreign investors equally. *See also, PCBS & PMA: The International Investment Position and External Debt Statistics, Second Quarter 2019*, STATE OF PALESTINE: PALESTINIAN CTR. BUREAU OF STAT. (Sept. 29, 2019), <https://www.pcbs.gov.ps/site/512/default.aspx?lang=en&ItemID=3557>. The Net Stock of the International investment Position (IIP) amounted to USD 1,921 million at the End of the Second Quarter 2019. *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *World Investment Report 2020: International Production Beyond the Pandemic*, U.N. CONF. TRADE & DEV. 1, 12 (2020).

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relations also expanding rapidly in recent years.⁵⁰ Unlike Palestine, Israel's investment is mostly focused in manufacturing, information, and communications, with investments in software, IT services, and consumer electronics becoming more common in Israel's high-tech sector as the country tops the world in research and development.⁵¹

Politically, the Israeli government has worked to minimize risks for investors to encourage foreign direct investment and has reworked its existing policy framework to meet these goals. The country has also made significant efforts to globalize its interest in foreign direct investment in entering into at least 35 bilateral investment treaties (BITs); as well as multilateral agreements such as TRIPs, GATS, and ICSID; and free trade agreements (FTAs) with the European Union, the United States, Turkey, and more recently Colombia in 2020.⁵² Compare Israel's significant activity to that of the State of Palestine, which currently has three of five signed BITs in force.⁵³ Additionally, the Palestinians are involved in six FTAs, such as those signed with the European Union, Turkey, and the Arab League, and three multilateral agreements, including the New York Convention—far behind its neighboring Israel.⁵⁴

The obvious disparities in the international economic activities of Israel and Palestine have continued to feed into the psychology of foreign

⁵⁰ See *2020 Investment Climate Statements: Israel*, U.S. DEP'T OF STATE (2020), <https://www.state.gov/reports/2020-investment-climate-statements/israel/>; see generally SHIRA EFRON ET AL., CHINESE INVESTMENT IN ISRAELI TECHNOLOGY AND INFRASTRUCTURE: SECURITY IMPLICATIONS FOR ISRAEL AND THE UNITED STATES (2020).

⁵¹ *Sectors*, INVEST IN ISRAEL: MINISTRY OF ECON. & INDUS. STATE OF ISRAEL, <https://investinisrael.gov.il/ExploreIsrael/sectors/pages/sectors.aspx> (last visited Nov. 18, 2021).

⁵² *International Investment Agreements Navigator: Israel*, INV. POL'Y HUB, <https://investmentpolicy.unctad.org/international-investment-agreements/countries/102/israel?type=bits> (last visited Jan. 6, 2021).

⁵³ *International Investment Agreements Navigator: State of Palestine*, INV. POL'Y HUB, <https://investmentpolicy.unctad.org/international-investment-agreements/countries/158/state-of-palestine> (last visited Jan. 6, 2021).

⁵⁴ The New York Convention, formally known as the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, is a primary instrument in international arbitration, and governs the recognition and enforcement of foreign arbitration awards through uniform standards. "The Convention's principal aim is that foreign and non-domestic arbitral awards will not be discriminated against. The Convention obliges Parties to ensure such awards are recognized and generally capable of enforcement in their jurisdiction in the same way as domestic awards. An ancillary aim of the Convention is to require courts of Parties to give full effect to arbitration agreements by requiring courts to deny the parties access to court in contravention of their agreement to refer the matter to an arbitral tribunal." Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3 [hereinafter New York Convention].

investors who are increasingly opting out of investing in Palestine's riskier economic climate. As these inequalities continue to develop, however, the risk of amplified geopolitical conflict becomes imminent, especially within Palestinian and Israeli societies. Although the loss of investment capital in Palestine can be attributed to the restrictions on investments established in the Paris Protocol discussed in Section I(b), which has prevented the establishment of a suitable economic environment that attracts foreign direct investment, the nations must do *more* than merely revise or rework existing economic agreements.⁵⁵ Here, it will be argued that recent efforts to establish an investment arbitration regime between the two nations has ultimately failed and that the creation of a fully non-partisan, depoliticized mechanism will be necessary to salvage what remains of the Palestinian economy and to maximize the economy's potential. For Israel, the creation of such a regime will likely bring greater investment opportunities and economic growth, while also working towards fostering peace without exhausting political and military resources.

IV. COMMERCIAL ARBITRATION ACROSS THE REGION

With political, legal, and commercial systems in the Middle East largely rooted in Islamic law, Western arbitral norms have long struggled to take hold in the region. Existing arbitration centers in the Middle East, such as those in the United Arab Emirates and Bahrain, reflect the historical reliance on arbitration as a dispute resolution mechanism within Islamic communities, though these cultural arbitration norms do not mirror so-called "modern" or "Western" arbitration systems.⁵⁶ As George Khoukaz points out, however, this systematic divergence in approaches to dispute resolution stems from a lack of knowledge and cultural understanding of the political and religious history of the Middle East, "which entails an inability to address and incorporate the interests of these Middle-Eastern states into the larger international system."⁵⁷ Because of this, it is necessary to understand the Middle-Eastern experience as a whole in order to put the dilemmas of the region's communities into perspective.⁵⁸

A. *An Ideological Divide: East Versus West*

⁵⁵ Abu Amer, *supra* note 46.

⁵⁶ George Khoukaz, *Sharia Law and International Commercial Arbitration: The Need for an Intra-Islamic Arbitral Institution*, 2017 J. DISP. RESOL. 181, 186 (2017).

⁵⁷ *Id.* at 182.

⁵⁸ *Id.* at 186.

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In the pre-Islamic Middle East, local societal norms heavily shaped the dispute resolution methods employed—focusing on the collective interest of the community, rather than individual interests.⁵⁹ Locals viewed conflict as destructive to society’s stability and wellbeing, focusing instead on the prompt and peaceful resolution of issues, a perception of dispute resolution strengthened with the rise of Islam in the region.⁶⁰ Khoukaz stresses, however, that this idea of community-based decision making contradicts the West’s positive view of conflict as a “catharsis to redefine relationships between individuals, groups and nations and makes it easier to find adequate settlement or possible solutions.”⁶¹

Islam recognizes two approaches to dispute resolution: *sulh* and *tahkim*—the former is similar to the concepts of negotiation and mediation, whereas the latter compares to arbitration.⁶² However, key differences exist between Islam’s approach to arbitration via *tahkim*, and the Western approach with which disputants are familiar. For example, Western arbitration generally results in an arbitral award that is binding on both parties, which is further enforced by widespread adherence to the New York Convention. On the other hand, *tahkim* relies on the free will of the parties, in that they must agree to enforce the award depending heavily on the credibility of the arbitrators.⁶³ As Islamic arbitration developed, it became part of a “fairly structured judicial system which required the approval of a *quadi* (court judge) before the enforcement of the arbitrator’s decision,”⁶⁴ furthering its discrepancies with Western practices.

B. *The Middle East and Enforcement under the New York Convention*

Today, a majority of Muslim countries, with the exemption of Saudi Arabia, have become contracting parties to the New York Convention, although that does not necessarily indicate adherence to Western principles given the cultural and religious roots of arbitration in the region. For example, the Convention allows an exemption to an award’s enforcement in two instances: where “(a) [t]he subject matter of the difference is not capable of settlement by arbitration under the law of that country; or (b) [t]he recognition

⁵⁹ *Id.*

⁶⁰ *Id.* at 186–87.

⁶¹ *Id.* at 187 (citing Aseel Al-Ramahi, *Sulh: A Crucial part of Islamic Arbitration 2* (London Sch. Of Econ. Islamic Law and Law of the Muslim World Research Paper Series, Paper No. 08-45 (2008))).

⁶² *Id.* at 188.

⁶³ *Id.*

⁶⁴ *Id.*

or enforcement of the award would be contrary to the public policy of that country.”⁶⁵ Thus, in the Middle East, countries abiding by Sharia law, specifically those such as Iran, Saudi Arabia, Bahrain, etc., may be relieved from enforcement on the grounds that an award contravenes the public policy of their Islamic regimes.⁶⁶ It should be noted, however, that whether a country will choose to exercise this exemption depends largely on its degree of acceptance of Western law. For example, scholar Arthur Gemmel points out that despite its ratification of the Convention, Saudi Arabia’s legal system allows neither for the recognition nor enforcement of agreements from foreign jurisdictions; Iran recognizes foreign awards only “conditionally;” and Egypt will only enforce a foreign award so long as it does not flout public policy or morals.⁶⁷ For Saudi Arabia in particular, enforcement of some awards is said to work contrary to the rules and laws of other New York Convention contracting parties, encouraging its non-enforcement practices.⁶⁸ Despite this divergence in enforcement, other nations in the region have shown a willingness to abide by the Convention, such as Syria, in which the Convention has overcome national law in cases of non-Syrian arbitral award enforcement, or Kuwait which routinely enforced foreign judgements even prior to becoming a signatory.⁶⁹

C. *Efforts to Harmonize Commercial Arbitration in the Middle East*

With the rise of international trade and a growing interest in the Middle East for commercial transactions, it became necessary for the region to make efforts to cooperate with the international arbitration system taking form. Today, countries throughout the Middle East have recognized that a modern approach to dispute resolution is critical for economic growth and have become party to various bilateral and multilateral treaties to encourage

⁶⁵ New York Convention, *supra* note 56, art. V(2)(a–b).

⁶⁶ Khoukaz, *supra* note 58, at 189. Khoukaz also states that nations like Iran and Saudi Arabia, both of which use Sharia law to govern their national laws and public policies, Article V(2)(b) is used frequently to relieve them of enforcement of arbitral awards under the NY Convention.

⁶⁷ Arthur J. Gemmel, *Commercial Arbitration in the Islamic Middle East*, 5 SANTA CLARA J. INT’L L. 169, 189 (2006).

⁶⁸ George A. Smith & Matthew A. Marrone, *Recent Developments in Arbitration Law in the Middle East*, Weinberg Wheeler Hudgins Gunn & Dial (last visited Mar. 10, 2021) (citing Gemmel, *supra* note 69, at 189, quoting Kristen Roy, *The New York Convention and Saudi Arabia: Can a Country Use the Public Policy to Refuse Enforcement of Non-Domestic Arbitration Awards*, 18 FORDHAM INT’L L. J. 920, 936 at 954 (1995)).

⁶⁹ *Id.*

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investment within their borders.⁷⁰ Since 2016, nations across the region have concluded more than 638 investment treaties, and the number continues to grow today.⁷¹ In light of this growth, however, Middle Eastern countries continue to face issues of clarity and precision with regard to investment agreements, threatening the effective resolution of such disputes.⁷²

1. KEY REGIONAL AGREEMENTS SUPPORTING THE RIGHTS OF INVESTORS TO ARBITRATION

One such agreement is the Unified Agreement for the Investment of Arab Capital in the Arab States (“the Arab Investment Agreement”), signed in November 1980 by 21 nations of the Arab League, including Palestine—all of which have ratified the agreement, with the exception of Algeria and Comoros.⁷³ Such an agreement proved a necessary step in the development of the Middle East as an international participant, working to create a conducive climate for investors, to enhance economic development and integration throughout the region, and, most importantly, to establish a clear legal system for the utilization of Arab capital. Under Chapter VI of the Arab Investment Agreement, the Middle East effectively established its first permanent forum for the settlement of investor-state disputes, the Arab Investment Court.⁷⁴ The Court, whose seat is located at the headquarters of the League of Arab States in Cairo, Egypt, has jurisdiction to settle disputes brought before it by either party to an investment, although the Court is more so a last resort for disputing parties who have failed to reach a solution through conciliation or arbitration. Such an achievement for the Arab world has had its shortcomings however, and in practice, the Arab Investment Agreement has been largely neglected, rarely used as an investment claim instrument as investors feel increasingly

⁷⁰ EMMA LINDSAY & CLAIRE MOREL DE WESTGAVER, INTERNATIONAL INVESTMENT ARBITRATION IN THE MIDDLE EAST: YEAR IN REVIEW 2016 1 (Bryan Cave LLP 2016) (providing investment treaties signed by nations in the Middle East include bilateral investment treaties, free trade agreements, and other treaties drafted with investment-related provisions).

⁷¹ *Id.*

⁷² Mayssa Khattar, *Recent Investor-State Arbitration Trends in the Middle East: #YoungITATalks in Dubai*, KLUWER ARB. BLOG (Jan. 29, 2019), <http://arbitrationblog.kluwerarbitration.com/2019/01/20/recent-investor-state-arbitration-trends-in-the-middle-east-youngitatalks-in-dubai/>.

⁷³ Unified Agreement for the Investment of Arab Capital in the Arab States (Nov. 26, 1980) (noting the Agreement was last amended in 2013).

⁷⁴ *Id.*

more comfortable resorting to arbitration, rather than the Arab Investment Court's litigation-based structure.⁷⁵

The passage of the Organization of Islamic Cooperation (OIC) Agreement in 1981 was another critical benchmark for the region, binding 27 states to the multilateral treaty and allowing for the resolution of investor-state disputes through ad hoc arbitration.⁷⁶ It was not until 2012, however, following the *Al-Warraq v. Republic of Indonesia* case, however, that the OIC Agreement was viewed as an option for investors to bring claims within its jurisdiction.⁷⁷ Article 17 of the OIC Agreement gives each party the right to refer the dispute to the Arbitration Tribunal for a final decision, following an attempt of conciliation.⁷⁸ In such a case, the Agreement provides for two party-appointed arbitrators who then come together to choose an umpire, whose role is to cast a vote in the case of a tie.⁷⁹ Where parties are unable to agree on the appointment of a tribunal, however, the Agreement requires the Secretary-General of the OIC to act as an appointing authority.⁸⁰ Since the Agreement's passage, however, the OIC Secretary-General has come under scrutiny due to a chronic lack of fulfillment of this obligation; the refusal to act has thus threatened investors' protections under the Agreement, while also undermining the OIC's efficiency as a regional dispute resolution organ.⁸¹

2. ARBITRAL FORUMS THROUGHOUT THE REGION

In light of efforts to revolutionize international trade in the Middle East and encourage greater investment activity, it became necessary to create

⁷⁵ Michael Farchakh, *The Arab Investment Court and Intra-Arab BITs: a Potential New Frontier?*, KLUWER ARB. BLOG (Dec. 29, 2020), <http://arbitrationblog.kluwerarbitration.com/2020/12/29/the-arab-investment-court-and-intra-arab-bits-a-potential-new-frontier/>.

⁷⁶ *Id.* See also International Investment Agreement Navigator: OIC Investment Agreement 1981, INVESTMENT POLICY HUB, UNITED NATIONS CONF. ON TRADE AND DEV. (1981) (the OIC Agreement was signed in 1981 and entered into force in 1988).

⁷⁷ Mike McClure, *Multilateral Investment Treaties in the MENA Region: The Next Big Thing?*, KLUWER ARB. BLOG (Apr. 27, 2015), <http://arbitrationblog.kluwerarbitration.com/2015/04/27/multilateral-investment-treaties-in-the-mena-region-the-next-big-thing/> (citing *Al-Warraq v. Republic of Indonesia*, UNCITRAL, Award on Respondent's Preliminary Objections to Jurisdiction and Admissibility of the Claims (Jun. 21, 2012)).

⁷⁸ *Agreement on Promotion, Protection and Guarantee of Investments Among Member States of the Organization of the Islamic Conference, June 1-5, 1981*, 2 INT'L INV. INSTRUMENTS: A COMPENDIUM 241, 248-49 [hereinafter "The OIC Agreement"].

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ Khattar, *supra* note 74.

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fully functioning arbitration centers in the region. One of the oldest such centers in the Middle East and Africa thus became the Cairo Regional Centre for International Commercial Arbitration (CRCICA), which was established in 1979 under the auspices of the Asian-African Legal Consultative Organization.⁸² Operating under the CRCICA Arbitration Rules, which are based on the United Nations Commission on International Trade Law (hereinafter “UNCITRAL”) rules with minor amendments, the forum has administered more than 1,200 cases since its establishment.⁸³ The CRCICA offers its services to settle trade and investment disputes via conciliation, mediation, and arbitration, while also offering advice to parties to international commercial and investment contracts.⁸⁴

In demonstrating its commitment to becoming a significant force in the international economy, the United Arab Emirates has also made substantial strides in its focus on the creation of international commercial dispute resolution forums. In 1994, the Dubai International Arbitration Center (DIAC) was established as an independent center for conciliation and arbitration with the goal of providing efficient and impartial management of commercial disputes, and the promotion of the culture of arbitration in the local, regional, and international spheres.⁸⁵ Through DIAC arbitration, parties are able to resolve their disputes using the rules and procedures adopted by the forum, or those agreed upon by parties.⁸⁶ The forum is divided into three organizational levels: the Board of Trustees; the Executive Committee; and the Administrative Body, all of which must abide by an obligation of confidentiality and impartiality.⁸⁷ Perhaps most importantly, the DIAC enjoys “full autonomy” in providing its arbitration or conciliation services and is

⁸² *The Cairo Regional Centre for International Commercial Arbitration (CRCICA)*, GLOB. ARB. REV., <https://globalarbitrationreview.com/organisation/the-cairo-regional-centre-international-commercial-arbitration-crcica> (last visited Mar. 10, 2021).

⁸³ *Id.*

⁸⁴ *Cairo Regional Centre for International Commercial Arbitration (CRCICA) Arab Republic of Egypt*, ASIAN-AFR. LEGAL CONSULTATIVE ORG., <https://www.aalco.int/arbitrationCRCICA> (last visited Mar. 10, 2021).

⁸⁵ See DUBAI INT’L ARB. CTR., <http://www.diac.ae/idias/>, (last visited Mar. 21, 2021).

⁸⁶ Statute of the Dubai Int’l Arb. Ctr., art. 4(1) (2019), <http://www.diac.ae/idias/resource/StatuteRules2019ENG.pdf/>.

⁸⁷ *Id.* at arts. 6, 22(a)–(c).

shielded from government interference.⁸⁸ Today, the DIAC acts as the largest dispute resolution forum in the region.

Taking it one step further, in 2008, the DIFC–LCIA was established through a partnership between the well-established London Court of International Arbitration and the Dubai International Financial Centre.⁸⁹ Since its establishment, the DIFC–LCIA has provided alternative dispute resolution services for local and foreign businesses in the region, working in various sectors including, *inter alia*, real estate, international trade, finance, and telecommunications.⁹⁰ Compared to other arbitration centers in the region, the DIFC–LCIA is uniquely placed in that it is the only Middle East arbitration center that applies an international set of rules, based upon those used in the London Court of Arbitration, while also working with a comprehensive understanding of the business practices and culture of the region, offering a truly neutral forum for international parties and a reliable one for locals.⁹¹ The Center published its most recent rules on January 1, 2021, which replaced the 2016 rules and mirror the 2020 update of the LCIA Rules of Arbitration.⁹² The DIFC–LCIA forum is especially appealing for international investors and commercial parties in that it offers more comprehensive recognition and enforcement of awards throughout the Arab world. For instance, where the DIFC–LCIA becomes the seat of arbitration—either by choice of the parties or by default—the DIFC Courts act as the curial court for purposes of arbitral award recognition and enforcement of the award against a respondent’s assets.⁹³ Because of this system, an arbitral award ordered by the DIFC–LCIA can then be enforced directly in Arab nations.⁹⁴ In leading the region in the

⁸⁸ *Id.* at art. 2(b). See also Dr. Habib Al Mulla et al., *UAE: No Surprise as Dubai Establishes Full Autonomy of Dubai International Arbitration Centre (DIAC)*, MIDDLE EAST INSIGHTS (Sept. 28, 2021), <https://me-insights.bakermckenzie.com/2021/09/28/uae-no-surprise-as-dubai-establishes-full-autonomy-of-dubai-international-arbitration-centre-diac/>.

⁸⁹ *Why was the DIFC–LCIA Established?*, DIFC–LCIA ARB. CTR., <http://www.difc-lcia.org/why-was-the-difc-lcia-established.aspx> (last visited Mar. 10, 2021).

⁹⁰ *Id.*

⁹¹ *Why is DIFC–LCIA the Preferred Alternative Dispute Resolution Forum, and What Makes it Unique?*, DIFC–LCIA ARB. CTR., <http://www.difc-lcia.org/why-is-difc-lcia-the-preferred-alternative-dispute-resolution.aspx> (last visited Mar. 10, 2021) [hereinafter *DIFC–LCIA*].

⁹² Aimy Roshan & Michael Turrini, *DIFC–LCIA Arbitration Centre Introduces New Arbitration Rules*, WHITE & CASE LLP (Jan. 25, 2021), <https://www.whitecase.com/publications/alert/difc-lcia-arbitration-centre-introduces-new-arbitration-rules>.

⁹³ *DIFC–LCIA*, *supra* note 93.

⁹⁴ *Id.*

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modernization of arbitration, the United Arab Emirates has provided investors and other parties with access to institutions of an international stature, leading the charge in regional development.

The above three arbitral institutions provide only brief insight into the development of international arbitration throughout the Middle East. While the region and its people have a background deeply rooted in the norms of sharia law, significant efforts to modernize arbitration laws and procedures today exemplify a renewed focus on international trade and economic development to meet the needs of today's fast-paced global business environment.

3. ISRAELI-PALESTINIAN ATTEMPTS TO FOLLOW ARBITRATION TRENDS

French philosopher Montesquieu historically developed the idea that “the development of trade leads to mutual dependency and, therefore, to peace.”⁹⁵ In line with these ideas and regional efforts as described above, a group of Israeli and Palestinian businessmen started to take advantage of arbitration's evolution across the Middle East and sought to create an institution dedicated to resolving their own commercial disputes. With the help of the International Chamber of Commerce (ICC), they were able to launch the Jerusalem Arbitration Center (JAC) in November 2013.⁹⁶

Closely inspired by the general framework of the ICC, the Jerusalem Arbitration Center's foundation is laid out in two charter-like documents: the Joint Venture Agreement and the JAC Cooperation Agreement.⁹⁷ The former agreement officially creates the JAC as an “independent, impartial, professional, apolitical, and enforceable” forum for the resolution of commercial disputes between Palestine (the West Bank and the Gaza Strip, including East Jerusalem) and Israel, while detailing the structure and function of the JAC upon its establishment.⁹⁸ The latter agreement, however, regulates the relationship between the forum's founders, the International Commercial

⁹⁵ Nadia Darwazeh, *The Jerusalem Arbitration Centre: From Tradition to Innovation*, 31 J. INT'L ARB. 121, 122 (2014).

⁹⁶ *Id.* at 122.

⁹⁷ *Id.* at 123.

⁹⁸ *Id.* at 124.

Court, ICC Palestine, and ICC Israel.⁹⁹ Although the National Committees, ICC Palestine and ICC Israel, are treated as the founders of the JAC—also called the “JAC Partners”—the ICC plays more of a supervisory role, overseeing the operation of the Center, particularly in its early stages.¹⁰⁰ For example, as scholar Nadia Darwazeh notes, various governing board members of the JAC, including the first presidents and vice-presidents, as well as members of the JAC Court of Arbitration are chosen and nominated by the ICC, although the Joint Venture Agreement gives this nominating power to the JAC Partners in consultation with the ICC in the next stage.¹⁰¹

Structurally, the JAC was created to mirror the ICC, a body made up of four organs: a Governing Body, a Court of Arbitration, a Secretariat, and a General Manager.¹⁰² As the executive body of the JAC, the Governing Board embodies the Center’s founding principles of equality and strict neutrality between Palestine and Israel, controlling the Center’s activities except those related to arbitration proceedings.¹⁰³ The JAC’s Court plays a supervisory role during the arbitral proceedings at the Center, including *prima facie* decisions on jurisdiction, decisions on challenges to arbitrators, and fixing the costs of arbitration.¹⁰⁴ As for the Secretariat, the Center’s administrative wing, the organ serves as an intermediary between the Court and its users/arbitrators,

⁹⁹ *Id.* at 125. Members of the ICC may organize into national committees, creating a network of committees that help to give the ICC access to national governments and members access to a network of international business contacts. ICC Israel, the national committee of that country, had already been established prior to the creation of the JAC. ICC Palestine, however, did not exist up until May 2009 when the group was created by the ICC. The ICC Palestine group did not formally exist until November 29, 2012, when it was granted status as a Non-Member Observer State at the United Nations General Assembly. Once UN membership was established, ICC Palestine was officially granted the status of a National Committee and was able to ensure equal representation in the process of creating the JAC alongside ICC Israel. *Id.* at 122, n.4.

¹⁰⁰ *Id.* at 125.

¹⁰¹ *Id.*

¹⁰² *Id.* at 126. The JAC mandates control of administrative, procedural, and legal issues to the Governing Body, Court of Arbitration, and Secretariat.

¹⁰³ *Id.* The Governing Board is made up of seven members, including a chairman and two co-chairmen who are nominated by each ICC National Committee. Among other things, the Governing Board has the power to appoint the General Manager, approve the JAC’s budget, modify the Center’s procedural rules, etc.

¹⁰⁴ *Id.* at 127. The make-up of the JAC Court was also created to embody the value of neutrality, made up of five international members, including a president and vice president, and four local members nominated by ICC Palestine and ICC Israel (two members each).

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answering procedural questions, and acting as a filter regarding monetary jurisdiction.¹⁰⁵

In jurisdictional terms, the JAC uses a classical concept of arbitration to decide its jurisdiction: the consent of the parties. That is, parties must explicitly agree to arbitrate their disputes in the JAC.¹⁰⁶ For the Center to formally accept jurisdiction, other thresholds must be met: (1) the request to arbitrate may not exceed the monetary jurisdiction of the court, (2) there must be a business dispute at issue, (3) the business dispute is related to Israel, the West Bank, and the Gaza Strip, including East Jerusalem; and (4) the existence of a JAC arbitration agreement under the rules must be *prima facie* satisfied.¹⁰⁷ The JAC procedural rules, however, call for a transfer of the dispute to the ICC in limited circumstances, therefore, in agreeing to JAC arbitration, parties implicitly agree to submit their dispute to ICC arbitration under the ICC rules in such a case.¹⁰⁸

As a final note on the JAC, perhaps the most innovative idea in its creation, notes Darwazeh, is the “virtual” seat of JAC arbitration.¹⁰⁹ In such a divisive conflict zone, it is critically important to preserve the impartiality of the JAC for all parties involved. For this reason, the Joint Venture Agreement establishes the seat of arbitration as Paris, France, with the physical hearings held at the JAC Hearing Center in East Jerusalem, unless the parties have agreed otherwise.¹¹⁰ “The ultimate goal of this . . . avant-garde [conception] is,” as Darwazeh emphasizes, “to preserve the Center’s mandate of neutrality,” shifting the focus away from Israel, Palestine, and the issues impeding on progress between them.¹¹¹

¹⁰⁵ *Id.* at 128. The Secretariat is made up of a Secretary General, the head of the Secretariat, and two Deputy–Secretary Generals, one representing ICC Palestine and the other representing ICC Israel. *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 128–29. For the JAC’s monetary threshold, where the claim in the arbitration request exceeds USD 7 million, the JAC is unable to directly administer the arbitration, and the dispute will be transferred to the ICC’s International Court of Arbitration. Where the JAC Court finds that one or more of the conditions is not met, the dispute is also transferred to the International Court of Arbitration, whose rules are applicable unless otherwise agreed upon by the parties. *Id.* at 130.

¹⁰⁸ *Id.* at 130–31.

¹⁰⁹ *Id.* The seat of arbitration affects the choice of the *lex arbitri*, or the law of the seat governing the procedure of the arbitration. Courts at the seat oversee the proceedings to ensure proper functioning and confirm or set aside the award at the end of the process, although most procedural issues will be governed by the JAC’s institutional rules. *Id.* at 132.

¹¹⁰ *Id.* at 132.

¹¹¹ *Id.* at 133.

As one of the newest institutions in the arbitration world, the JAC's creators sought to revolutionize the commercial arbitration sphere in a politically unstable environment. At the time of its creation, the JAC was "a milestone on the road of dialogue and mutual understanding between Israelis and Palestinians."¹¹² Since its establishment, however, little has been heard regarding the JAC or its progress, with no updates on its work since the announcement of its' launch in 2014. Despite the extensive work and cooperation it took to create the JAC, the lack of documentation is concerning since it seems to forecast the JAC's ultimate failure.

The creation of the JAC was the first attempt to encourage investment and commercial engagement within Palestine and Israel through an international dispute resolution regime. The JAC's disappearance could be attributed to various factors, including political instability, economic tensions, failed negotiations between parties, or the inadequacies of the national court systems involved. The substantial influence of the ICC on the JAC's affairs, however, may have catalyzed its failure, bringing greater division and distrust, rather than support and transparency. The scarcity of information regarding the JAC's work since its founding not only raises suspicion, but also calls into question the efficacy of an institution created at the hands of the ICC, an organization built around Western values without the input of the developing world.

V. REVITALIZING THE PALESTINIAN-ISRAELI ARBITRATION ENVIRONMENT

The economic disparities between Palestine and Israel are stark, and these disparities are only expanding as Israel's economy and global presence continues to grow.¹¹³ With nearly \$5 billion in trade between the two States presently, as highlighted in section II(C), the stabilization of the economic relationship between Israel and Palestine is key in encouraging investors to bring their capital and resources into the territories, especially for Palestine. Over the years, however, the lack of a neutral forum in which parties could bring potential disputes in their commercial dealings exacerbated legal insecurities for commercial endeavors, past, present, and future. Despite a seemingly failed attempt to remedy these insecurities through the JAC, investment arbitration remains a viable option for stimulating economic relationships and security within Palestine and Israel, so long as it is handled appropriately. Such an institution, however, must give due consideration to the

¹¹² Darwazeh, *supra* note 97, at 138.

¹¹³ See, e.g., *Palestine*, *supra* note 23.

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values and ideas fueling the development of arbitration across the Middle East, rather than abiding by the customs of the West.

The hallmarks of international arbitration are predictability and independence of the forum. In terms of predictability, arbitral regimes often boast the advantage of tailoring the resolution of disputes to the parties' needs with regard to the procedural rules in place, the scope of the arbitration, the finality of the decision, etc.¹¹⁴ Even more, in a territory plagued by perpetual political anxieties, genuine independence is often lacking, especially where the influences of institutional actors (i.e., the United Nations and the World Trade Organization) and national governments (i.e., the United States, Great Britain, and France) have as much force as they do within Israel and Palestine. Even the JAC works under the supervising hand of the ICC merely as "a pretext to promote the western business interest."¹¹⁵

In a developing nation like Palestine, with significantly less economic and political clout—locally, regionally, and globally—Western-leaning institutional biases operating against developing countries only work to maintain the status quo with minimal indication of improvement in coming years. Rather than create an arbitration system such as the JAC, which is dependent on the rules and views of the West, it is necessary to account for the unique needs and values of the developing world, even in what is now a modern, industrialized Israel. In this respect, the importance of culture and a willingness to understand the traditions and values of another party cannot be overstated. To create a truly independent, non-partisan, and protective commercial arbitration system for investors and businesses, there must be a dedication to the strengthening and promotion of regional arbitration centers, and thus a tapering dependency on the norms of the first world.

Perhaps the disappearance of the JAC could be attributed to a lack of statutory protection behind arbitration within Israel and Palestine as a whole, considering that Oslo's Paris Protocol continues to be the main economic settlement between the parties, despite the drastically changed political and economic landscapes that exist today.¹¹⁶ For an effective commercial arbitration forum to be founded, the national laws of *all* involved nations must be adjusted to reflect the States' support for such an initiative, which will further encourage local and foreign investors and businesses to bring capital into Palestinian and Israeli borders equally. Greater State-supported protection through legislation with a revised economic agreement will be necessary to the continued development and eventual success of the proposed forum.

¹¹⁴ See R. Rajesh Babu, *Int'l Comm. Arb. & the Developing Countries*, AALCO Q. BULL. 386, 389 (2006).

¹¹⁵ *Id.*

¹¹⁶ See U.N. Secretary-General, *supra* note 20, at ¶¶ 8–9, 11.

To counter the efficacy of such a proposal, some may make a more politically minded argument, pointing to recent efforts between Israel and Arab nations—namely, the United Arab Emirates and Bahrain—to normalize relations via the September 2020 Abraham Accords.¹¹⁷ Those normalization agreements seek to increase bilateral cooperation between Israel and Arab states, particularly in the areas of finance and investment.¹¹⁸ In light of such agreements, the Palestinian government has refused to participate in the talks, condemning the normalization of relations between Israel and its Arab neighbors or halting negotiations with Israel altogether. Such arguments may also be accompanied by fears that Palestinians may radicalize in response, which has affected the Arab stance against the Israeli occupation and for Palestinian sovereignty. The political steps taken by Israel and Arab states, with the help of the United States, however, have little to do with the usefulness of a change in economic relations with the Palestinians.

That said, this Note should not be construed as an argument *for* normalization between Palestine and Israel, but instead as a roadmap for stimulating a secure, reliable, and effective investment environment in the region. As an occupying power, Israel’s duty to cooperate with the Palestinians is not equivalent to its relationship with Arab states, and it is the duty of both parties to cooperate for the betterment of their respective societies. By proactively amending their national laws, and perhaps negotiating a bilateral treaty between them, the economy can be stabilized and may provide both a reliable backbone of protection for outside investors and legal security for an investment arbitration forum.

The following section will outline a proposed institutional structure for a neutral, independent commercial arbitration forum for use between Israel and Palestine, free of government interference. Physically, this hypothetical institution should be located in East Jerusalem—following the lead of the JAC in this respect—as an uncontroversial location between the parties, politically. Other issues, however, will require a departure from the JAC’s structural proposals. This section will analyze a theoretical structure for the forum, including its rules, methods of arbitrator selection, and the important jurisdictional issue of the “seat” of the arbitration. Next will be a discussion of necessary enforcement procedures and an emphasis on the cooperation and

¹¹⁷ See generally U. S. DEP’T OF STATE, THE ABRAHAM ACCORDS DECLARATION (2020) (declaring an ongoing peace treaty between several Middle Eastern countries and the United States).

¹¹⁸ See Meital Stavinsky et al., *Israel’s Abraham Accords: Unlocking New Bus. Opportunities, Insights*, HOLLAND & KNIGHT ALERT (Dec. 8, 2020), <https://www.hklaw.com/en/insights/publications/2020/12/israels-abraham-accords-unlocking-new-business-opportunities>.

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cultural understanding necessary for the forum's success. Finally, the section will conclude by addressing counterarguments that may arise, were this proposal to come to fruition.

A. *Proposed Institutional Structure—A Potential Route to Success*

Keeping in mind the East-West divide noted above, the way in which a potential arbitration mechanism is structured is of the utmost importance, not only for preserving the effectiveness of the tribunals and their decisions, but also for establishing a meaningful presence for such a forum within Palestine, Israel, and across the region. Structurally, the JAC and its levels of organization appear to be, at least on paper, very effective, especially for the first attempt at such a concept. It would be beneficial to mirror the operational structure of the JAC in establishing this new forum, but nevertheless, bringing the norms of the Middle East to the forefront. To further these goals, establishing a commercial arbitration body productively requires a focus on three fundamental issues: the rules guiding the forum, arbitrator selection, and the seat of arbitration.

1. *INSTITUTIONAL RULES*

Unlike the JAC, which followed an adapted version of the International Commercial Court (“ICC”) rules, the proposed arbitral forum will operate under a version of the rules lifted from similar regional arbitration centers, such as the DIAC introduced in section III(b).¹¹⁹ These rules, although not as established as tried-and-true systems such as the ICC Arbitration Rules and the UNCTAD rules, are tailored to the United Arab Emirates and the larger Middle East area which it serves. In the case of Palestine and Israel, the dichotomy between the nations is especially in need of a system tailored to the social circumstances that may affect arbitration, such as hostility between governments, societal tensions, and uneven economic power dynamics. By basing the regulatory structure of such a forum on a regional rule system, such as that of the DIAC, the rules are tailor-made for the unique nature of the conflicts between Palestine and Israel, rather than continuing to rely on the guidance of former colonial powers who have proven themselves to work against Palestinian interests time and time again. The rules used in a regional investment arbitration mechanism must not only embody the needs of *that* jurisdiction but must also represent the goals of *all* involved parties, without choosing sides.

2. *SELECTION OF ARBITRATORS*

¹¹⁹ Darwazeh, *supra* note 97, at 133–34.

Impartiality is essential in any arbitral forum, but for one operating between Palestine and Israel, impartiality and neutrality are of the utmost importance. For the purposes of this arbitral mechanism, a joint committee of Palestinian and Israeli experts should be formed, and it would be imperative that such a committee work away from any governmental or nongovernmental actors who could potentially apply pressure or bias committee members in any way. The committee should be made up of an odd number of individuals, ranging anywhere from three to nine, all of whom have experience in the law of arbitration, foreign investment, or commercial disputes generally. In terms of nationality, the committee's makeup shall be equal in the number of Palestinians and Israelis involved, with one, "chief" committee member of a diverse nationality to be appointed by a majority vote of the local committee members.¹²⁰ By allowing an equal number of local experts to head the committee, the awareness of domestic concerns and economic conditions remains intact, while appointing a chief committee member to act as a tiebreaker when necessary maintains the impartiality of the forum.

Once the joint committee is established, it shall be obligated to oversee proceedings that enter the forum, most importantly, the arbitrator selection process. As in many arbitration forums, three arbitrators will be required to participate in a tribunal, two of whom will be party-appointed, and the chair appointed by the joint committee. Parties choosing to bring their disputes into this new mechanism shall be required to appoint their own arbitrator. Where parties are unable to do so, the joint committee will be required to appoint an arbitrator from a list provided by the forum, similar to the DIAC, which considers applications for the registration of qualified arbitrators, conciliators, and mediators and compiles them into a list which may be used for such purposes.¹²¹ This way, the joint committee may ensure the neutrality, efficiency, and experience of involved arbitrators, also allowing the committee to "screen" potential participants for politically or socially sensitive biases as well. However, unlike the JAC, which gives the ICC significant influence in the final decisions on all nominations and appointments, the joint committee will be working independently, further enforcing the necessity of Palestinian and Israeli voices on such matters and limiting any international pressure that may emanate from an outside authority.¹²²

3. JURISDICTION AND THE SEAT OF ARBITRATION

¹²⁰ On this note, it should be emphasized that the nominated chief be of a diverse, and more importantly unbiased, nationality to allow for maximum neutrality of the forum. For example, it is not recommended that nationals of countries which clearly and vocally lean towards one State over the other on this issue be nominated for this position.

¹²¹ See Statute of the Dubai Int'l Arb. Ctr., Decree No. 17, art. 9(a)(5) (2019).

¹²² Darwazeh, *supra* note 97, at 135.

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Beyond continuous conflict, in a multi-religious, multi-cultural area such as Palestine-Israel, the founders of the JAC sought to preserve its neutrality, while also maintaining its local attributes, thus choosing to “seat” the arbitration in Paris, France, while maintaining the tribunal’s physical location in East Jerusalem.¹²³ However, in doing so, the JAC chose French law to govern both the formation of the arbitral tribunal and its makeup, as well as the procedures and award process.¹²⁴ Three “advantages” were subsequently presented: (1) France as a neutral ground for both parties; (2) the support of arbitration and non-interference by French national courts; and (3) under a 2011 decree, France’s Code of Civil Procedure allows a party to waive its right to set aside an arbitral award.¹²⁵

In the face of neutrality, however, why default to the choice of a Western European party? Since the beginning of the Palestinian-Israeli problem, France and other Western nations have not played a truly “neutral” role, often ignoring the core values of the Arab populations in their Middle East policies—take for example the Sharia roots of many Middle Eastern cultural and political systems—and playing a significant role in sustaining, even encouraging, anti-Muslim views.¹²⁶ When acting as “neutral” in conflicts concerning both majority-Muslim and majority-Jewish states, there is no guarantee that such views are not influencing those overseeing the arbitral tribunals in question.

To combat potential Western influence or possible anti-Muslim and anti-Semitic sentiment, the seat of arbitration should be decided on by the joint committee, fully understanding the implications of its choice. A strong proposal may be the choice of a Middle Eastern nation as the seat of arbitration. Two viable candidates are the United Arab Emirates and Bahrain, both of which are Muslim nations with efficient, although still developing, arbitral systems; but at the same time, both have promised to cooperate and work with Israel on various levels, including economically. Choosing such a nation may provide the neutral forum required of a successful tribunal, while also taking into account the cultural and religious values of the regional

¹²³ Darwazeh, *supra* note 97, at 131.

¹²⁴ *See id.* at 132.

¹²⁵ *See id.*

¹²⁶ *See generally* Elaine Ganley, *France Passes Anti-Radicalism Bill that Worries Muslims*, AP NEWS (Feb. 16, 2021), <https://apnews.com/article/polygamy-radicalism-secularism-elections-france-cbee2c916aa8c35380562277f0025c2b> (reviewing a recent French bill strengthening oversight of schools, sports clubs, and mosques in an effort to protect France from radical Islamists and promote respect for French values). Many have argued that the legislation, which was overwhelmingly accepted by French legislators, infringes on fundamental freedoms and targets Islam, which is currently the second most popular religion in the country. *Id.*

investors most likely to be involved and the fragile balance of partiality that may not be achieved by European nations, especially in the eyes of Palestinians or other potential Arab claimants.

These structural points are in no way a comprehensive approach to the organization of a potential arbitral tribunal to replace the JAC. In whatever form a lasting forum can be created, however, the values and traditions of both sides must be recognized and embodied in its procedures. In the Middle East in particular, depending on Western norms has proven unsuccessful, and given the number of successful arbitral institutions constantly increasing and improving across the region,¹²⁷ it would be worthwhile to take advantage of such forums and thus influence an institution custom-made to meet the distinctive needs of the region.

4. ENFORCEMENT OF TRIBUNAL DECISIONS

Under the New York Convention, to which both Israel and Palestine are party, arbitral awards made in either territory must be recognized and enforced, unless contrary to national law or public policy.¹²⁸ By adopting the terms of the Convention, both recognize the importance of the application of uniform rules and provide protection and reassurance for investors, encourage foreign investment within their borders, and thus stimulate economic development.¹²⁹ In Palestine, the arbitration environment faces various obstacles related to the enforcement of foreign arbitration awards, without which the available arbitration mechanisms are effectively meaningless.¹³⁰ Even in Israel, national law may often block enforcement of an arbitral award under the New York Convention, particularly for awards rendered within Israel.¹³¹

These issues of enforcement are not exclusive to Palestine and Israel but are present throughout the Middle East. With few exceptions, nearly every Arab nation has acceded to the New York Convention; countries in the region,

¹²⁷ Deborah Ruff and Julia Belcher, *International arbitration developments in the Middle East*, in 8 INT'L ARB. REP. 35–37 (Mark Baker et al., eds. 2017), <https://www.nortonrosefulbright.com/-/media/files/nrf/nrfweb/imported/international-arbitration-review---issue-8.pdf?revision=&revision=>.

¹²⁸ See New York Convention, *supra* note 56.

¹²⁹ See Mohammad Adeb Abu Shehab, *An Analysis of the Enforcement of Foreign Arbitration Awards in Palestine: Realities, Drawbacks, and Prospects*, 36 ARAB L. Q. 1, 6 (2020).

¹³⁰ See *id.* at 2–3.

¹³¹ See Yedidiya Melchior & Hadas Peled, *Israeli Arbitration Law in Knots? Foreign Serv. of Process for 'Made in Israel' Awards*, KLUWER ARB. BLOG (Feb. 9, 2018) <http://arbitrationblog.kluwerarbitration.com/2018/02/09/scheduled-israeli-arbitration-law-hadas-peled-lma-law/>.

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however, have appeared to deny enforcement of arbitral decisions without basis, violating its terms.¹³² Scholar Essam Al Tamimi offers three important potential justifications for this non-enforcement, any of which could be applied to the situation in Palestine and Israel:

- 1) A lack of legislative platforms to support arbitration and award enforcement;
- 2) Inexperience of local judicial systems and a lack of familiarity with international arbitration; and
- 3) Arbitrators lacking an understanding of local laws and culture, thus delivering awards that are unlikely to be enforced in Middle Eastern nations.¹³³

Al Tamimi thus argues that by failing to enforce arbitral awards based on any one of these justifications, Middle Eastern countries are not only violating their obligations under the New York Convention but are also harming their reputations as potential arbitration-friendly jurisdictions in a time where a strong presence in global trade is critical for economic development.¹³⁴

In order to improve on these enforcement issues, Middle Eastern nations, including Palestine and Israel, must rally *all* their resources in furtherance of this goal and they must have “the political will to develop and invest in arbitration.”¹³⁵ The most important aspect of this political will, beyond crafting and/or amending legislation, is judicial authority encouraging the developments of national judicial systems to participate and evolve with legal processes, such as arbitration. Al Tamimi rightly rejects arguments from Middle Eastern judicial authorities who justify their non-enforcement practices as protecting the public order and public policy, noting that “countries which are very protective of their jurisdictions and prove to be unfriendly to arbitration always lose more than they gain in protecting ‘public order.’”¹³⁶ By making the necessary changes internally, nations in the Middle East, specifically Israel and Palestine, whose laws often intersect, particularly in the economic sphere, can encourage enforcement of arbitral awards. By providing an effective basis for the consistent enforcement of local and foreign arbitral awards, investors, joint ventures, and other commercial endeavors are likely to utilize an arbitration mechanism in the territories due to the

¹³² See Essam Al Tamimi, *Enforcement of Foreign Arbitration Awards in the Middle East*, L. UPDATE, AL TAMIMI & CO. (Sept. 2014), <https://www.tamimi.com/law-update-articles/enforcement-of-foreign-arbitration-awards-in-the-middle-east/>.

¹³³ See *id.*

¹³⁴ See *id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

international system of reciprocity and a presumption for upholding such awards. To be awarded such treatment, however, both Israel and Palestine must actively work to develop their respective arbitration systems to align with changing regional and international norms.

B. *Counterarguments*

In an investment arbitration regime, tribunal independence and neutrality cannot be more important to the success of such a mechanism. In a politically, socially, and economically tense environment, such as that between Israel and Palestine, where the judicial system may be lacking amidst volatile and uncertain circumstances, international investment arbitration tribunals operate as “functional equivalents” to judicial systems in international law.¹³⁷ Opponents of such a mechanism, however, may argue that the territory’s political state may contribute to bias and pressure on arbitrators, affecting decisionmaking in what should be a neutral forum. According to scholar Georgios Dimitropoulos, there are three potential grounds of dependence and/or partiality within a tribunal: “(i) a personal, professional, or financial relationship between an arbitrator and a party; (ii) a similar relationship between arbitrator and counsel; and (iii) issue and subject-matter conflicts.”¹³⁸ Even within institutional rules, there is a “justifiable doubts” standard relating to the impartiality or independence of a tribunal. Under the United Nations Commission on International Trade Law rules, for example, such doubts are justifiable “if they give rise to an apprehension of bias in the eyes of an *objective, reasonable* observer.”¹³⁹ The International Centre for Settlement of Investment Disputes (“ICSID”) convention holds arbitrators to a similar standard, requiring them to be “relied upon to ‘exercise independent judgment’ and allows a party to propose the disqualification of any member of the tribunal taking into account ‘any fact indicating a manifest lack of the

¹³⁷ Georgios Dimitropoulos, *Constructing the Independence of International Investment Arbitrators.: Past, Present and Future*, 36 NW. J. INT’L L. & BUS. 371, 375 (2016).

¹³⁸ *Id.* at 394.

¹³⁹ Vitali Hiarlouski, *Arb.’s Impartiality & Indep.*, JUS MUNDI, ¶ 7 (Aug. 11, 2020) (citation omitted), <https://jusmundi.com/fr/document/wiki/en-arbitrators-impartiality-and-independence>.

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qualities required by paragraph (1) of Article 14 [of the ICSID Convention].”¹⁴⁰

If an arbitral tribunal, as proposed here, is to be created, various safeguards can be implemented to ensure maximum independence and impartiality of arbitrators within Israel and Palestine. In international law, agreements such as the New York Convention and the ICSID Convention create uniform standards by which Contracting States and parties must operate.¹⁴¹ Within a tribunal, an executive body would be obligated to create and enforce standards for the arbitrators and to monitor the arbitration process. This could include facilitating nominations, conflict of interest disclosures, and confirmations. The tribunal would end with an enforcement stage, set to take place within the State judiciary. At the nomination stage, the parties may benefit from a stricter disclosure standard to limit conflicts of interest or the potential influences of personal biases as much as possible. At the enforcement stage in either Israeli or Palestinian courts, it may also be useful to present the tribunal’s decision to State courts with party names and nationalities omitted, in an attempt to place less emphasis on the involved parties as individuals and limit the extent to which bias, political or otherwise, may appear.

Challengers may also argue, however, that amidst tense, ongoing conflict, state alliances and, on the other side, disagreements may also allow for greater opportunities of corruption and fraud within host states. Even in the broader commercial arbitration world, these issues of fraud and corruption have yet to be conclusively proscribed which raises concerns about claims of corruption (i.e., misinformation, fraud, bribery, etc.) between claimants and respondents and has foreign policy implications for relations between nations—a particularly difficult issue when considering such a forum in Palestine and Israel.¹⁴² Today especially, there remains a vast presence of corruption and bribery in cross-border transactions around the world.¹⁴³ In

¹⁴⁰ *Id.* at ¶ 9; *see also* Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, art 14, Oct. 4, 1966, No. 8359, 575 U.N.T.S. 159, 168 (citation omitted) [hereinafter ICSID Convention] (“Persons designated to serve on the Panels shall be persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment. Competence in the field of law shall be of particular importance in the case of persons on the Panel of Arbitrators.”).

¹⁴¹ *See generally In Brief*, N.Y. ARB. CONVENTION, <https://www.newyorkconvention.org/in+brief> (last visited Dec. 30, 2021); *About ICSID*, INT’L CTR. FOR SETTLEMENT OF INV. DISPS., <https://icsid.worldbank.org/About/ICSID> (last visited Dec. 30, 2021).

¹⁴² *See* Deeshka Malik & Geetanjali Kamat, *Corruption in International Commercial Arbitration: Arbitrability, Admissibility & Adjudication*, 7 ARB. BRIEF 1, 1–2 (2018).

¹⁴³ *See id.* at 9.

fact, the World Economic Forum has estimated that corruption costs the global economy at least 5 percent of GDP each year, or \$3.6 trillion.¹⁴⁴ Issues of corruption, therefore, do not only reflect the arbitrability of the dispute itself, but may very well have broader public policy implications that may be asserted by states, during recognition and enforcement.¹⁴⁵

Unfortunately, those arguing against the feasibility of a Palestinian-Israeli arbitral forum could point to corruption as a catalyst of major issues in the efficacy of the regime and in international commercial relations in particular. Even within the arbitral proceedings, the mere allegation of corruption can have adverse effects, as Malik & Kamat rightly point out:

When it comes to scrutinizing evidence with respect to issues of corruption in the field of international commercial arbitration, three points of consideration need to be taken into account. First, there exists the possibility of an adverse effect on the rule of burden of proof. Second, indirect evidence needs to be critically evaluated and thereafter, permitted to be brought before the tribunal. Third, there is an urgent need to strengthen the standard of proof in cases of serious allegations, especially where concerns of public policy, fraud, or corruption are at issue.¹⁴⁶

This insight into corruption within commercial arbitration and cross-border transactions is generally limited, as the topic of corruption remains extremely complex and struggles to balance with the existing public policy implications.

When a dispute is tainted by corruption, remedies are available both at the tribunal level and at the legislative level. At the arbitral level, scholar Andrew Bulovsky cleverly suggests that tribunals might use equitable estoppel to prevent host states from asserting a corruption defense. This allows cases to proceed to the merits phase where the tribunal may then use a “contributory fault” approach to determine liability.¹⁴⁷ This “incentivize[s] investment, combat[s] corruption, and promote[s] development,” which may be especially

¹⁴⁴ See World Econ. F., Glob.al Future Council on Transparency and & Anti-Corruption, *Agenda for Business Bus. Integrity*, GLOB. FUTURE COUNCIL ON TRANSPARENCY & ANTI-CORRUPTION (2020–2021).

¹⁴⁵ See Malik & Kamat, *supra* note 144, at 7.

¹⁴⁶ *Id.* at 12–13.

¹⁴⁷ Andrew T. Bulovsky, *Promises Unfulfilled: How Investment Arbitration Tribunals. Mishandle Corruption Claims and Undermine International Development*, 118 MICH. L. REV. 117, 136 (2019).

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worthwhile in disputes between investors in Palestine and Israel.¹⁴⁸ Where the host state is the respondent in a particular claim, rather than a fellow investor or business owner, Bulovsky argues that equitable estoppel would prohibit “the host state from invoking its own illicit conduct to deprive the tribunal of jurisdiction,” allowing the involved parties to then stand on equal grounds and force the state to abide by its own laws.¹⁴⁹ Such a framework may incentivize host states to minimize corruption, which is especially prevalent in the developing world, while also facilitating economic growth by monitoring and addressing corruption through greater enforcement. At the legislative level, Palestine and Israel would significantly benefit from stricter anti-corruption laws nationally and stronger individual accountability efforts for those in government, as well as a call for greater enforcement within the public sphere. While creating an arbitral forum with specific anti-corruption rules and procedures may substantially help carry out the states’ anti-corruption measures, it is also the duty of national legislatures to evolve existing law on the subject to suit the transformed nature of commercial relationships today.

VI. CONCLUSION

International arbitration has been seen as the optimal method of addressing and depoliticizing investment disputes and assuring a neutral and independent forum for investors in the developed world.¹⁵⁰ In the developing world, however, inequities in economic power and resources and inchoate legal systems play into the inadequacies of the arbitral forum, where recognition and enforcement of awards may be indiscriminately denied, where corruption and fraud may run rampant, or simply where public and foreign policy concerns may impede the effectiveness of such a forum. Between Palestine and Israel, areas defined by existing political and societal tension and

¹⁴⁸ *Id.* at 136–37 (“Currently, arbitral tribunals justify depriving investors of arbitral recourse because corruption violates international public policy and because corruption violates a host state’s laws. These justifications reflect a ‘traditional approach’ to handling corruption in international disputes, whereby both parties assume the risk of contract invalidation. The traditional approach works when either party could serve as respondent or claimant, meaning that neither party can ‘opportunistically anticipate whether they will be in the position of . . . walking away from the contract’ by invoking the corruption defense. But this logic falls apart in investment arbitration because the host state is almost always the respondent, which means that the investor (as the claimant) bears the risk of arbitral deprivation.”).

¹⁴⁹ *Id.* at 137.

¹⁵⁰ U.N. CONFERENCE ON TRADE & DEV., INVESTOR-STATE DISPUTES: PREVENTION & ALTERNATIVES TO ARBITRATION xxii (2010).

economic inequality, access to a neutral commercial arbitral forum must be provided immediately. Despite the issues that may arise within international commercial arbitration, the advantages of providing such a forum between these battling nations cannot be overemphasized.

The implementation of an arbitral forum between Israel and Palestine may work to encourage foreign investors and business enterprises to bring capital and resources into a developing Palestine and a growing Israel. By creating an arbitral mechanism that is culturally aware of the socio-political situation of the territory, the values of potential parties, and the cultural histories of involved states, investors may be encouraged to bring their capital and subsequent disputes to the region.

In depending on Western institutions and regulations to be retrofitted to the political and economic atmospheres of the developing world, prevailing cultural and political imbalances are often exaggerated, and differences in traditions and values are left unaddressed. By creating an independent commercial arbitration center for investors in Palestine and Israel, specifically tailored to the unique circumstances of the conflict and the region, economic development may very well be revitalized, resulting in newfound stability and modernization which may play a greater role in developing and advancing foreign relations generally. The creation of a successful commercial arbitration center may not be the key to “peace to the Middle East,” but it could very well enhance economic development in a territory deserving of greater economic opportunity.