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Businesspersons, Governments, and International Law

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Businesspersons, Governments, and International Law

Halil Rahman Basaran *

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INTRODUCTION

International law is a matter primarily for governments. Governments form and administer international law,¹ and in this context, governments

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fascinatingly react to private commercial and financial initiatives. Businesspersons often challenge governments, and defining and conceptualizing this challenge is necessary to understand international law.

United States President Donald Trump's approach to international trade law should be seen in this light. He believes that the previous U.S. administrations did not make the necessary effort vis-à-vis corporations and foreign governments to favor the U.S. in foreign trade. President Trump believes that he is now giving the correct signals and incentives to businesspersons to contribute to the U.S. foreign trade and economy.

A similar sort of tension exists in the approach of governments worldwide to the issue of cryptocurrency. Cryptocurrencies, e.g., Bitcoin, constitute a challenge to the current international financial and trade system as regulated by governments. Governments wish to control the development of cryptocurrencies through taxation, regulation, or even through prohibition.

This Article sets forth two examples of evidence to substantiate the above argument: it starts by discussing international commercial law as a concept, with a focus on international commercial arbitration ("ICA"). This Article highlights the similarities between ICA and public international law dispute settlement. The Article then turns to cryptocurrencies, particularly bitcoin, the most important cryptocurrency for market capitalization.

I. INTERNATIONAL COMMERCIAL LAW

The International Chamber of Commerce ("ICC") is the foremost private business and commercial organization worldwide. The study of the ICC helps us to see the relationship between businesspersons and governments and understand international commercial law.

A. The International Chamber of Commerce

International disputes or the prospect of international disputes disturb businesspersons and corporations, which therefore take initiatives to counter them. This disturbance is obvious in the fact that entrepreneurs established the ICC just after World War I in 1919. Businesspersons

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1. See Frederic Megret, *Globalization*, in 4 MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 493, 497 (Rüdiger Wolfrum ed., 2012).

believed that governments that did not consider business interests caused World War I; those businesspeople thus took the opportunity to enhance international commerce without relying on any government's endorsement or initiative.

Corporations are part of the so-called international community.² The relationship between corporations and the international community is contradictory as international law generally does not grant corporations the status of subject.³ The ICC is businesses challenging governments—that is, businesses wish to be endorsed by governments as part of the so-called international community. The establishment of the ICC signals to governments that the concerns of businesses are common and universal and that they would be strongly voiced by the ICC.

Nevertheless, “there is no general international corporate law as such and the recognition of international legal personality for corporations remains elusive.”⁴ Although the International Court of Justice (“ICJ”) has recognized separate legal personalities for corporations,⁵ this recognition does not confer upon corporations the status of the “subject of international law.” A corporation's personality stems from national laws and therefore does not, and cannot, represent an international legal personality participating in international law.

The ICC is a private enterprise of corporations. It is the most representative business organization worldwide and is considered a platform for networking and establishing acquaintances.⁶ The ICC represents the notion that businesses possess a global language. Business gatherings have long existed, but the ICC innovatively instilled a permanent staff and secretariat, the objective of which is to create a clearing house for business information.⁷ Governments are too ideological and nationalistic—acting only in narrow self-interest—to act as the neutral

2. Andrea Paulus, *International Community*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (Rüdiger Wolfrum ed., 2013).

3. A subject of international law is deemed capable of having rights and obligations and can contract on the international stage. A subject of international law can sue other subjects before international courts and tribunals. See Megret, *supra* note 1, at 496.

4. Peter Muchlinski, *Corporations in International Law*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶52 (Rüdiger Wolfrum ed., 2014).

5. Barcelona Traction, Light and Power Company, Limited (Belg. v. Spain), Judgment, 1970 I.C.J. Rep. 3 (Feb. 5); Ahmadou Sadio Diallo (Guinea v. Dem. Rep. Congo), Preliminary Objections, Judgment, 2007 I.C.J. Rep. 582 (May 24).

6. John H. Fahey, *The International Chamber of Commerce*, 94 ANNALS AM. ACAD. POL. & SOC. SCI. 126, 128–29 (1921).

7. *Id.* at 127.

medium of business information. The ICC represents the idea that “[g]lobal issues are issues that arise at the level of the entire world, and for which the State as a normative unit is deemed ultimately insufficient.”⁸

Because of its information-production capacity, entrepreneurship, and dispute resolution functions, the ICC has established a certain “commercial order”—a commercial order established under the auspices of private operators without the intricacies of national sovereignty, which inherently leads to conflicts and wars. The ICC has primarily created a certain autonomous space of maneuver for inter-business relations and disputes. By establishing common standards for commerce and inter-business dispute settlement modalities, such as mediation and arbitration, the ICC established a certain protected domain of businesses. The ICC intended for the “new commercial order” to lead a global logic of capital, trade, and investment.

The ICC is thus the embodiment of the rationality of the international commercial community. Although it is not the only business organization, it remains the most comprehensive. ICC arbitration is also the most popular commercial arbitration worldwide. The ICC does not represent the repudiation of public international law; rather, it strengthens international law by closely realigning it with commercial matters outside the intricacies of diplomacy. ICA closely resembles mainstream dispute settlement mechanisms in public international law.

This perspective of the ICC is more understandable in modern times. At present, governments patently seek to “harness international law for commercial ends.”⁹ Public international law seems to be the focus of contention in international commerce. U.S. President Donald Trump’s criticism of the World Trade Organization (“WTO”) is evidence of such contention. President Trump has promised “to slap tariffs on foreign imports or to walk away from decades-old defence pacts.”¹⁰ President Trump insists on the central role of the American government to “rectify mistakes” so that the American economy and American businesses may

8. Megret, *supra* note 1, at 498.

9. Sonya Seats, *Trumpian Isolationism Could Help China Become a Leader in International Law*, CHATHAM HOUSE (Jan. 19, 2017), <https://www.chathamhouse.org/expert/comment/trumpian-isolationism-could-help-china-become-leader-international-law> [http://perma.cc/A396-TPSM].

10. *How Donald Trump Thinks About Trade*, ECONOMIST (Nov. 9, 2016), <http://www.economist.com/news/united-states/21709921-americas-next-president-wants-pull-out-existing-trade-deals-and-put-future-ones> [http://perma.cc/5RW6-GKV7].

flourish again.¹¹ Indeed, this rhetoric contributed to President Trump's election victory as American citizens felt that their government had not done enough to keep businesses and jobs at home. The WTO, a public international law organization, does not sufficiently cater to American interests.

President Trump has argued that the previous American administrations did not make "good" agreements with the rest of the world.¹² This statement is a direct criticism of current public international law—intergovernmental law. For example, he argued that the Trans-Pacific Partnership Agreement ("TPP")¹³ was too liberal a treaty and would undermine the American economy.¹⁴ Indeed, Trump's first action following his inauguration was issuing an executive order blocking the TPP. His blocking of the TPP is an example of the perception that international law—for example, trade treaties—is an instrument for governments when pursuing national trade interests. Governments politicize and instrumentalize trade with their domestic constituencies in mind, yet governments' policies and actions may not always ensure success for businesses, which often feel that the "government approach" may not effectively serve their interests.

It is not only the current U.S. president, but also other candidates and former presidents who have made international trade the centerpiece of their domestic policies,¹⁵ confirming that international law, and international commercial law in particular, has always been a matter for domestic politics. "States' preferences for a rule-based system of international law can turn on how domestic policy decisions are made and how international law can change domestic politics."¹⁶ Often, "[government officials] value

11. "Mr Trump will demand the renegotiation of existing trade pacts or would threaten to pull out of them . . . 'The era of trade deficits is over.'" *Id.*

12. Louis Nelson, *Trump blames past presidents as far back as George H.W. Bush for economic woes*, POLITICO (Mar. 7, 2018), <https://www.politico.com/story/2018/03/07/trump-us-economy-past-presidents-444076> [<https://perma.cc/T6C6-EXB2>].

13. The TPP is a draft trade agreement between Canada, Australia, Brunei, Japan, Chile, Mexico, Malaysia, Peru, New Zealand, Singapore, Vietnam, and the United States. The United States withdrew from the TPP on January 23, 2017. The text of the TPP is accessible at <http://tpp.mfat.govt.nz/text> [<http://perma.cc/D33A-TH36>] (last visited Feb. 7, 2019).

14. *How Donald Trump Thinks About Trade*, *supra* note 10.

15. *Trade, At What Price?*, ECONOMIST (Apr. 2, 2016), <https://www.economist.com/united-states/2016/04/02/trade-at-what-price> [<http://perma.cc/Z6HE-TEFM>].

16. Rachel Brewster, *Rule-Based Dispute Resolution in International Trade Law*, 92 VA. L. REV. 251, 253 (2006).

international law when it offers an advantage in domestic politics.”¹⁷ The ICC is thus the business response to the politicization of public international law.

The government–business nexus often emerges in the international system. As it gained momentum at the start of the 20th century among governments, businesses began closely scrutinizing public international law, the physical evidence of which is the “Peace Palace” in the Hague, Netherlands.¹⁸ Andrew Carnegie originally built it as a home for the Permanent Court of Arbitration after the 1899 Hague Conference and that now houses the International Court of Justice; additionally, John D. Rockefeller,¹⁹ another prominent businessman, donated the land on which the headquarters of the United Nations was built. Businessmen donating land and buildings does not mean that international law is or has been under the control of the global capital and the business community; rather in the development of public international law, a close symbiosis and interaction between governments and business has existed with bilateral influence.

For instance, one of the earliest and foremost subjects of public international law—the protection of aliens—has generally concerned the protection of overseas business interests.²⁰ Businesses resort to their own governments when they feel the host government has wronged them and blocked their access to justice. The case of a wronged individual in the hands of the host government becomes a matter for the assertion of the legitimate sovereign rights of the home state against the host state.²¹ The strong presence of governments and the near-absence of businesses in this classical equation of international law is so stark that governments have near-absolute authority to pursue or renounce a business claim. In

17. *Id.*

18. MARK MAZOWER, *GOVERNING THE WORLD, THE HISTORY OF AN IDEA, 1815 TO THE PRESENT* 82–83 (Allen Lane ed., 2013).

19. *Id.* at 219.

20. ANTONIO CASSESE, *INTERNATIONAL LAW* 32–33 (2d ed. 2005).

21. *See* The Mavrommatis Palestine Concessions, Judgment, 1924 P.C.I.J. 12 (ser. A) No. 2. By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights—its right to ensure, in the person of its subjects, respect for the rules of international law. The question, therefore, whether the present dispute originates in an injury to a private interest, which in point of fact is the case in many international disputes, is irrelevant from this standpoint. Once a State has taken up a case on behalf of one of its subjects before an international tribunal, in the eyes of the latter, the State is the sole claimant. *Id.*

addition, as soon as the government adopts the business claim, it becomes solely a government claim. The ICC initiative, however, aims to reverse the complete dependence of businesses on governments with regard to dispute settlement, information, and enforcement. The ICC thus represents a rebalancing initiative that favors business in the government–business equation.

The ICC has not eliminated the ability of businesses to lobby governments, which remains commonplace. Informally, businesses continue to lobby their governments to act, such as in the WTO. The ICC has created, however, a formal, systematic, and more tangible mode of lobbying and has helped institutionalize and formalize businesses' lobbying of governments—for instance, via consultative membership of the ICC in the United Nations Economic and Social Council.

Intergovernmental organizations such as the United Nations (“UN”) and the WTO are the foremost representatives of public international law, and the ICC intensely lobbies both to communicate business concerns. For example, the former Secretary General of the ICC, John Danilovich, had both an ambassadorial and a business background and developed relations with intergovernmental organizations.²² The ICC Secretary General is an entrepreneur dealing with both governments and companies alike, a post that necessitates a language and a style to address both. From the ICC's beginning, personalities with experience in business, government, or both have composed the ICC administration.²³ That is to say, the ICC is aware of the close relationship between the international commercial order and public international law.

B. The International Commercial Order and Public International Law

The government–business symbiosis reached its apex with the foundation of the ICC in 1919 and the WTO in 1995. The ICC was envisaged as a purely business-oriented institution, with membership restricted to businesses and business chambers; it became a platform for businesses to develop business-facilitating ideas and lobby governments.

In contrast, the WTO is an intergovernmental organization, albeit one that does not regulate all international trade. Only governments address each other on the WTO platform; businesses do not have a formal presence in the WTO, and only governments agree upon WTO rules. Although

22. See *Chairmanship and Secretary General*, INT'L CHAMBER COM., <https://iccwbo.org/about-us/governance/chairmanship-secretary-general/> [http://perma.cc/R29Y-LJUS] (last visited Feb. 7, 2019).

23. Fahey, *supra* note 6, at 129.

governments may resort to WTO dispute settlement, businesses cannot. Only governments may sue and be sued before the WTO panels, and businesses may only lobby governments to take such an initiative in the WTO. The WTO order involves constant interaction between governments and businesses.²⁴

The ICC “commercial order” involves a specific dispute settlement different from the WTO; arbitration among private commercial operators is the lynchpin of this commercial order. The commercial order excluded, to a great extent, the interference of national governments and national courts. This exclusion protects the “privacy” of dispute settlement from the intricacies of national judiciaries. The ICC fills the gap the incomplete intergovernmental system of the WTO left.

ICA completes international law. That is, arbitration, as referred to in the UN Charter,²⁵ is not limited merely to arbitration between governments. The term “arbitration” covers commercial disputes between private operators as well. Nothing in the UN Charter limits the scope of arbitration to only intergovernmental disputes.

Hence, the ICC order and its most important component, the ICA, are integral parts of the international legal order that the League of Nations established in the 20th century and that continue under the successor institution, the UN. The ICC order constitutes a specific kind of law—namely, the ICC law. Notwithstanding the differences between the institutions and the stakeholders, public international law as the UN represented it and “private” international commercial law as the ICC represented it have, after World War I, undertaken parallel trajectories that have influenced each other. Indeed, both international law and the ICC law promote open markets for goods and services.

24. Brewster, *supra* note 16, at 277–78. A typical example of companies convincing their governments to go to the WTO dispute settlement is the American photographic paper and film company Kodak’s complaint against the Japanese government’s purported policy favoring another photographic paper and film company, the Japanese Fuji. The U.S. administration took Kodak’s claim to the WTO dispute resolution over alleged Japanese unfair trade practices favouring Fuji. *Id.*; WORLD TRADE ORG., REPORT OF THE PANEL, DS44/R, JAPAN – MEASURES AFFECTING CONSUMER PHOTOGRAPHIC FILM AND PAPER (1998), https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds44_e.htm [http://perma.cc/FNC2-SSUW].

25. U.N. Charter art. 33, ¶ 1 (“The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.”).

The reference in the UN Charter to the economic dimension of international peace and security²⁶ bolsters the assertion that international commerce and ICA are natural components of international law. This economic dimension necessitates the participation of private actors. Traditional public international law regulating the relations between governments, as the UN embodied, is not necessarily against “private” participation. And the ICA, as private actors operate it, is not a dispute settlement system isolated from public international law.

The counterargument is that there is no need to integrate private international commerce and the ICA within the paradigm of classical public international law, as commerce has a logic of its own and the ICA is a *sui generis* dispute settlement method with its own understandings and paradigms. Forcing ICA into the straitjacket of public international law would create an artificial holism and would be a fruitless academic effort. International law has already greatly fragmented.

The proliferation of international courts and tribunals that lack centralized coordination epitomizes the fragmentation. The ICJ, also known as the World Court, does not sit hierarchically at the top of these international courts, nor does it exercise appellate function over other courts and tribunals. The ICJ is not the “constitutional court” of the world legal order. The term “constitutional” denotes comprehensiveness, consistency, and harmony in the system. The ICJ cannot invoke these values against other international courts and tribunals. Likewise, the ICJ does not oversee ICA.

Be that as it may, ICA still operates within the confines of public international law. This conclusion is not a result of an artificial and purely theoretical categorization but is based rather on evidence like the similarities between ICA and dispute settlement mechanisms in public international law.

C. Similarities of International Commercial Arbitration and Public International Law Dispute Settlement

Dispute settlement is essential to understanding the identity of a system. A dispute forces the limits of a system and demonstrates the ultimate capacity and flexibility of the established legal order. Two

26. *Id.* pmb1. (“[T]o employ international machinery for the promotion of the economic and social advancement of all peoples . . .”). *Id.* art. 1, ¶ 3 (“To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion . . .”).

purportedly different legal orders cannot be compared merely through their formal laws and regulations. Rather, the real benchmark for differentiating legal orders is the legal orders' treatment of disputes. The similarities and parallels between ICA and public international law dispute settlement—the mainstream dispute settlement in public international law—lead to the conclusion that ICA is merely an extension of public international law's dispute settlement mechanism. This conclusion in turn leads to the inference that the current world system is still government-based.

1. Western Foundations

Western leadership exists both in public international law dispute settlement and in ICA. This could be inferred from the fact that major international dispute settlement venues are in the West, such as the International Court of Justice—The Hague—and the International Chamber of Commerce—Paris. International dispute settlement methods primarily originate in the Western world, and Western governments and companies have developed and refined the methods through disputes and challenges. Although the “Western way”—if it may be termed such—of settling disputes has not forcibly imposed itself upon the rest of the world, it remains a truism that the fundamental ideas and principles underlying international dispute settlement stem from Western legal systems.

The ICJ is the judicial organ of the UN, an institution Western powers primarily established,²⁷ and judges representing the main Western legal systems on the bench of the ICJ have always existed. Concomitantly, the WTO is chiefly a creation of the U.S. and Europe;²⁸ the West took the initiative for the establishment of both the UN and the WTO. The Western world can thus be said to be the standard bearer and the institution entrepreneur.

Western predominance is also palpable in the ICA. Intra-Western debates generally direct ICA discussions. For instance, the current debate on the “discovery” process—a way of evidence-gathering in U.S. courts allowing one party to the dispute to demand all relevant evidence from the opposing party—and the objections by adherents of European civil law to its compatibility with the nature of the ICA point to an intra-Western debate between American legal culture and continental European legal

27. See generally MARK MAZOWER, *NO ENCHANTED PALACE: THE END OF EMPIRE AND THE IDEOLOGICAL ORIGINS OF THE UNITED NATIONS* (2009).

28. Eyal Benvenisti & George W. Downs, *The Empire's New Clothes: Political Economy and the Fragmentation of International Law*, 60 *STAN. L. REV.* 595, 616 (2007).

culture. Indeed, the International Bar Association's rules on evidence—which many commercial arbitral tribunals voluntarily follow—represent a balance between the American mode of discovery and the continental European habit of demanding only a limited amount of evidence.²⁹ American and European arbitrators' and counsels' dominant presence in the international arbitral world is a natural fact.³⁰ Arbitrators' and counsels' discussions among themselves as to the style and procedure do not question, challenge, or threaten the Western foundations of the ICA. The ICC is an institution established as a result of the deal between Americans and Europeans—the advanced capitalist world—in the aftermath of World War I. The ICC is the result of an intra-western business vision and subsequent cooperation.³¹

2. Lack of Binding Precedent

Neither the ICA nor public international law dispute settlement techniques consider the entire picture. Both methods focus on the dispute on hand; they do not claim to harmonize and reconfigure the international system. Granted, the ICJ, the foremost court of public international law dispute settlement, regularly refers to its previous decisions to convey the idea that international law is a harmonious system. The panels and appellate bodies of the WTO—currently the most popular public international law dispute settlement mechanism—also refer to the WTO's previous decisions. However, there is no rule of binding precedent in those two prominent public international law dispute mechanisms; there is also no formal obligation to refer to previous decisions.

Previous decisions do not have a formal binding force upon later similar cases. In public international law dispute settlement, merely an acknowledgement of previous decisions exists. In both the ICJ and the WTO systems, previous decisions have an “influence” upon subsequent cases. The ICJ always refers to its previous rulings, and the WTO Appellate Body, in its *Japanese Alcoholic Beverages* case,³² explained that

29. *New revised IBA Rules on Taking of Evidence in International Arbitration*, INT'L B. ASS'N (June 30, 2010), http://www.ibanet.org/ENews_Archive/IBA_30_June_2010_Enews_Taking_of_Evidence_new_rules.aspx [http://perma.cc/T7TT-4CEG].

30. See generally YVES DEZALAY & BRYANT G. GARTH, *DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER* (1996).

31. Fahey, *supra* note 6, at 127.

32. WORLD TRADE ORG., APPELLATE BODY, AB-1996-2, JAPAN – TAXES ON ALCOHOLIC BEVERAGES 13 (1996), <http://www.mofa.go.jp/policy/economy/wto/>

the previous WTO panel and Appellate Body rulings affect later ones. The use of prior panel and Appellate Body rulings is extensive in the WTO jurisprudence. Put simply, there is an altruistic and public dimension to general dispute settlement in international law. The ICJ and the WTO's method is not comparable to national common law or national civil law systems—this is an idiosyncratic feature of international law. Arguably, the distinction is merely because of the paradoxical attitude of governments to international law: on the one hand, governments, in theory, do not wish to limit their sovereignty through consistent past decisions of an international court. On the other hand, when governments run into a concrete legal dispute with other governments, they wish to see reliable decision-making mechanisms by the international courts they establish.

Likewise, business-oriented private arbitral dispute resolutions possess a public dimension. “Private” ICA decisions have repercussions for the entire international commercial system, which one cannot ignore or neglect. Although no formal binding precedent rule exists in ICA, arbitrators compensate for that. Arbitrators, particularly experienced arbitrators, internalize a certain style of decisions in similar cases. The disputing parties choose arbitrators on the basis of their previous decisions. Whether arbitrators favor sticking to the letter of the contract, have a specific method of contract interpretation, or favor the host country or the investor, determines a certain kind of binding precedent in the personality of arbitrators.

3. *Legal Standing of Individuals*

Public international law dispute settlement is concerned not only with disputes between governments; individuals—both natural persons and corporations—are becoming more prominent in international dispute settlement. This prominence is evident in the ascendancy of international human rights law and regional human rights courts, such as the European Court of Human Rights. The ICC epitomizes the rising status of the individual in the international legal landscape, in that it permits the legal

cases/WTDS8ABR.pdf [http://perma.cc/HV8F-FTXE] (“Adopted panel reports are an important part of the GATT *acquis*. They are often considered by subsequent panels. They create legitimate expectations among WTO Members, and therefore, should be taken into account where they are relevant to any dispute.”); *id.* at 13 n.30 (“[T]he Statute of the International Court of Justice has an explicit provision, Article 59, to the same effect. This has not inhibited the development by that Court (and its predecessor) of a body of case law in which considerable reliance on the value of previous decisions is readily discernible.”).

standing of individuals. ICA confirms the individual's rising status all the more as it elevates the standing of the individual entering into cross-border commercial transactions. The individual no longer relies upon his government to vindicate his commercial rights at an international level; rather, he can now unilaterally invoke his commercial interests.

ICA protects a specific type of individual, namely the wealthy businessperson or the corporation, whereas international human rights law protects the individual, regardless of status. ICA, rather than being a universally applicable remedy, can therefore protect a closed and already privileged group. ICA may not be an integral part of international law, as the world vision and the specific concerns of this closed group shape it. ICA's role in international law should therefore not be overstated.

Even if not integral to international law, ICA has contributed to international law. International law has long tried to regulate international commerce, an effort that culminated in the establishment of the WTO in 1995.³³ The WTO represents the intergovernmental method of dealing with international commerce, with individuals and businesses having only a marginal role—that is, through the lobbying of their respective governments to act in the WTO. ICA thus fills a gap that the intergovernmental WTO created because it lifts the private individual in dispute settlement to a global level and gives him a formal status. The individual is no longer left to the mercies of his own government in the context of commercial affairs.

The individual ICA envisaged engages in cross-border commercial activity, and by connecting different markets and jurisdictions, the individual engages in activities distinct from the rest of society. In doing so, he accepts certain benefits and risks that result in involvement in cross-border activity. It is this specific individual with whom ICA deals. It is therefore natural to expect a specific method of dispute settlement. ICA treats special commercial connectors in a tailored manner and does not discriminate among them. This is obvious from the fact that the constituent documents of ICA, such as the arbitration rules of the ICC, do not make any discrimination among the commercial operators wishing to engage the ICC.³⁴ The special treatment of a delineated individual does not exclude ICA from international law. Rather, ICA strengthens international law by extending the reach of law to a specific individual—the businessperson.

33. *The multilateral trading system—past, present and future*, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/whatis_e/inbrief_e/inbr01_e.htm [https://perma.cc/XB6L-P4V9] (last visited Feb. 7, 2019).

34. *Arbitration Rules*, INT'L CHAMBER COM., <https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/> [https://perma.cc/KE8R-F23F] (last visited Jan. 19, 2019).

4. *Commerce and International Peace and Security*

Public international law dispute settlement does not always directly deal with the issues of peace and security; an economic and prosperity dimension also exists, and ICA is in the context of the latter. From a global perspective, ICA cannot be reduced to isolated, ad hoc, and purely technical commercial dispute settlements. As such, ICA has a wide background—arguably, effective commercial dispute settlement increases the quantity and the quality of international business transactions and cross-border trade. In turn, ICA contributes to international peace and security. ICA therefore improves the prosperity and wellbeing of the international community.

At a minimum, ICA must not violate international peace and security, which is the foremost objective of the UN. ICA is a method of preventing commercial disputes from turning into a threat to international peace and security. Thanks to this understanding, ICA is an integral part of international law that serves international peace and security.

Striving for peace and security is in line with the emergence of modern international law, as per the First and Second Hague Conferences, in 1899 and 1907 respectively.³⁵ The motivations of both conferences were to limit potential arms races and to hinder the dire economic consequences of such rivalries. As such, international law efforts from the outset have viewed international peace and security through the lens of both hard power—armaments and the use of force—and soft power—the economic and commercial dimension.

International law aims to open markets to goods and services and the free flow of capital as proved by the WTO and the International Monetary Fund (“IMF”) policies. Economic and commercial stability and prosperity are thus crucial and inseparable parts of international peace and security objectives, and are embedded within those objectives. It was not merely a clash of ideologies, systems, cultures, or values that caused the two world wars, but rather commercial competition and a clash of trading interests, a fact of which the creators of the post-World War II international order were all too cognizant. This economic dimension of international law is evident in ICA, too. Peace and stability among businesses and corporations contribute to international peace and security.

35. *The Laws of War*, AVALON PROJECT, http://avalon.law.yale.edu/subject_menus/lawwar.asp [<http://perma.cc/35NW-JSV2>] (last visited Dec. 15, 2018) (providing links to multiple conventions and declarations from the two Hague Conventions).

5. *Practicalities*

Public international law dispute settlement represents the tension between the theory and the practice of law. Law achieves its ultimate objective as soon as authoritative decisionmakers resolve practical challenges to the theory of law.³⁶ The decisions of the ICJ and the WTO are such resolutions to challenges. Likewise, theoretical commercial contracts turn into sound and operable commercial practice because of ICA.

ICA represents the highest practical dimension of international commercial law. The commercial arbitral tribunal that applies the provisions of the contract in question addresses the issues that are a result of the practical gap in the contract. Arbitration is about the practical interpretation of a contract, whereby parties argue that they have acted in conformity with the provisions of the contract. ICA is an appropriate authority to deal with the practical concerns of the international business community. Contracts cannot cover every practical matter. New developments and exceptions may emerge over the duration of a written agreement that challenge the frontiers of the contract, and only an authoritative decisionmaker can decide these frontiers. ICA is such an authority in commercial matters.

The parties to a dispute may invoke different textual or teleological interpretations of the commercial contract. For instance, in a contract, the parties may stipulate a specific sanction for a specific violation. As to whether a court can apply the same sanction if a type of violation is not specifically indicated in the contract, the textualist interpretation states that one must stick to the wording of the contract and that one cannot enlarge or expand the wording of the contract of one's own volition. Modern contract theory, however, favors teleological interpretations and allows for the application of the sanction to a non-indicated type of violation with a view to realizing the objective of the contract. For the effectiveness of the contract in practice, judges may prefer flexible interpretations over textualist interpretations. The arbitral tribunal makes this choice.

36. ROSALYN HIGGINS, *PROBLEMS & PROCESS: INTERNATIONAL LAW AND HOW WE USE IT* 9 (1994) ("To remain 'legal' is to ensure that decisions are made by those authorized to do so, with important guiding reliance on past decisions, and with available choices being made on the basis of community interests and for the promotion of common values.").

6. Accessibility

The accessibility of public international law dispute settlement is limited. Even the most accessible dispute settlement methods have a certain isolation from the “uninitiated.” For instance, only states can be parties to dispute settlement before the ICJ; international organizations, corporations, and individuals cannot sue or be sued before the ICJ. A background in the ICJ’s functioning and decision-making is necessary to understand its jurisprudence. For laymen, it is difficult to analyze the references and connections the court makes and to interpret its jurisprudence.

The same inaccessibility applies to the WTO. Indeed, some developing countries do not resort to WTO dispute settlement as they find it overly complex, costly, and risky, and feel that they possess neither the required expertise nor the resources to invoke their rights before WTO panels.³⁷ For instance, developing African countries do not challenge U.S. cotton subsidies before WTO dispute settlement bodies, although the subsidies do, in fact, negatively impinge upon their own cotton trades and production to a great extent.³⁸

In gross terms, public international law dispute settlement has the veneer of a club of experts and the initiative of an epistemic community—consisting of former and present judges, academics, counsels, law firms, and legal news reporters—who interpret and contextualize the decisions

37. Brewster, *supra* note 16, at 257 (“The economic power of the parties remains important because governments must still resort to self-help mechanisms—limiting national market access—to enforce WTO decisions. Consequently, governments that have large import markets have greater economic power to sanction violators.”); *id.* at 258 (“The European Union’s market is larger than Thailand’s and thus the European Union has a greater capacity to sanction the United States by restricting access to its market. The United States would therefore likely be willing to make greater concessions to the European Union than Thailand after an adverse panel ruling.”).

38. Krzysztof J. Pelc, *Why the Deal to Pay Brazil 300 Million USD Just to Keep US Cotton Subsidies Is Bad for the WTO, Poor Countries, and US Taxpayers*, WASH. POST (Oct. 12, 2014), https://www.washingtonpost.com/news/monkey-cage/wp/2014/10/12/why-the-deal-to-pay-brazil-300-million-just-to-keep-u-s-cotton-subsidies-is-bad-for-the-wto-poor-countries-and-u-s-taxpayers/?utm_term=.f094dc9116c5 [http://perma.cc/GS45-XKC4] (“[T]he other countries with a high stake in cotton are poor African nations, and filing a dispute comes at considerable financial and political cost In Benin, Burkina Faso, Chad, and Mali, known collectively as the ‘Cotton Four’, the more than 10 million people relying on cotton revenue will continue to compete against subsidized American farmers.”).

of the dispute settlement. These “interpreters” constitute something akin to a “club” of professionals who constitute and carry the understanding and the implementation of the ICJ and WTO decisions—no different than in the case of ICA. The much less transparent “jurisprudence” of ICA has a certain epistemic community—present and former arbitrators, counsels, and law firms.

In addition to the above evidence, cryptocurrencies and governments’ reaction thereto constitute the second proof of the preponderance of governments.

II. CRYPTOCURRENCIES

Governments have been trying to deal with cryptocurrencies since 2008—the date when bitcoin first emerged. The governmental reactions to cryptocurrencies demonstrate an interesting government–business rivalry in the governance of international financial and commercial law.

A. Bitcoin as a Challenge to Governments

Cryptocurrency exists only digitally and relies on cryptography to prevent fraudulent transactions.³⁹ Cryptocurrencies have no physical representation and are used solely in online transactions.⁴⁰ At present, bitcoin is the most popular cryptocurrency and presents a challenge to government-based public international law by enabling cross border trade and finance without national currencies and government oversight. Cryptocurrencies upgrade the status of businesspersons, and governments are not certain how to treat cryptocurrencies stemming from businesspersons.

Some countries, like Japan, treat bitcoin as valid tender,⁴¹ whereas others, such as Bangladesh, prohibit its use.⁴² Bangladesh has even legislated prison penalties as the appropriate punishment for the use of

39. *Cryptocurrency*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/cryptocurrency> [<http://perma.cc/PM96-NDW4>] (last visited Feb. 7, 2019).

40. *Id.*

41. *Cryptocurrency Regulations in Japan*, COMPLYADVANTAGE, <https://complyadvantage.com/knowledgebase/crypto-regulations/cryptocurrency-regulations-japan/> [<http://perma.cc/ZLF7-84PG>] (last visited Feb. 7, 2019).

42. *Regulation of Cryptocurrency Around the World*, LIBR. CONG., <https://www.loc.gov/law/help/cryptocurrency/world-survey.php> [<http://perma.cc/3838-5VL9>] (last visited Feb. 7, 2019).

bitcoin. Some countries, such as the Netherlands⁴³ and Turkey,⁴⁴ have adopted a wait-and-see approach, but other countries regard bitcoin as property primarily for taxing purposes. Rather than decisively defining bitcoin as property, currency, or security, the United States prefers to grant licenses to bitcoin exchange agencies and thereby subject them to money laundering and other financial supervision regulations.⁴⁵

China has prohibited banks and financial institutions from transacting with bitcoin, but has not prohibited bitcoin; bitcoin transactions between private individuals are permitted.⁴⁶ Hence, little coherence exists among governments vis-à-vis bitcoin and bitcoin transactions. Yet, governments around the world wish to control bitcoin, either via regulation, taxation, or outright prohibition. Governments regard bitcoin as a challenge to government control from the private sphere—from the realm of the businessperson.

Governmental reactions to bitcoin are a stark reminder that they—governments—wish to control any speculative initiative stemming from businesspersons. Businesspersons represent the concept and institution of private power, in contrast to and often pitted against public power, which the government epitomizes, embodies, and symbolizes. Bitcoin promises increased anonymity for private economic actors and helps businesspersons to avoid government scrutiny in the management of their wealth. Public powers, however, tend to intervene in the private sphere to obtain the necessary revenue and resources for providing public services and for covering the costs of the state apparatus.

Governmental intervention takes place if private powers create value. Bitcoin creates value, although no precious metal like gold or silver supports it, and despite there being no central institution that can underpin and guarantee the value of bitcoin. Interestingly, it seems that human beings have created a value from nothing through bitcoin.⁴⁷ Bitcoin's value

43. *Id.*

44. Interestingly, Turkish authorities have still not made any law or regulation in the field of cryptocurrencies although the trade of cryptocurrencies has been increasing in the Turkish market.

45. *Cryptocurrency Regulations in the United States*, COMPLYADVANTAGE, <https://complyadvantage.com/knowledgebase/crypto-regulations/cryptocurrency-regulations-united-states/> [http://perma.cc/7XAV-PKNE] (last visited Feb. 7, 2019).

46. *Cryptocurrency Regulations in China*, COMPLYADVANTAGE, <https://complyadvantage.com/knowledgebase/crypto-regulations/cryptocurrency-regulations-china/> [http://perma.cc/R6HS-B68U] (last visited Feb. 7, 2019).

47. CNBC, *According To Alan Greenspan, Bitcoin Is 'Not A Rational Currency'*, YOUTUBE (Dec. 6, 2017), <https://www.youtube.com/watch?v=7yN8wQ5c7uk>.

is that it allows peer-to-peer transactions without any need for an intermediary. Bitcoin relies on the belief that there is no need to trust government, governmental agencies, or government-confirmed institutions to enter into economic transactions.

Bitcoin is leading the way for other cryptocurrencies, of which there are hundreds, although many, if not most, are in fact different versions of bitcoin.⁴⁸ Bitcoin demonstrates a new way of entering into economic transactions—proof that transactions across national borders without a third party are possible. Bitcoin's anonymous quality means that it is difficult and costly to identify the owner of the bitcoin account. A bitcoin user, through his private key, may create dozens of public keys to receive and send bitcoins in transactions with other bitcoin users;⁴⁹ he may use multiple accounts to send or receive bitcoins. These accounts—digital codes—do not include the identities of bitcoin users, and governments therefore invest considerable time, resources, and effort to track and identify bitcoin users. To discover the identity of bitcoin users, the constant and close supervision of the flow of bitcoins and exchange platforms is necessary, which may be ineffective because a bitcoin user may use mixers and tumblers⁵⁰ to make it very difficult to follow the transactional trail. Thus, although not impossible, it is a costly challenge for law enforcement agencies to trace the owners of bitcoin transactions, identify bitcoin users, and tax them.

The difficulty with tracing bitcoin transactions does not mean that governments will stop being governments. An increased use of bitcoins and other cryptocurrencies in national and international trade without correspondent regulation and taxation terrifies governments. That can be inferred, as mentioned above, from different reactions of different governments to bitcoin. There exists no coherence. It is the ardent and primal wish of governments to identify the owners of wealth and to control capital, mostly via taxation. A loss in tax revenue is something all governments wish to avert. If the market share of bitcoin transactions grows to constitute an important part of national economies, losing tax revenue may prove to be a very real and alarming possibility. If bitcoin

48. Some examples for cryptocurrencies are: Ethereum, Litecoin, and Iota. Top 100 cryptocurrencies with their market capitalization are accessible at: <https://coinmarketcap.com/> [<http://perma.cc/X5MM-HHC4>] (last visited Feb. 7, 2019).

49. *Public Key*, INVESTOPEDIA, <https://www.investopedia.com/terms/p/public-key.asp> [<http://perma.cc/28KU-88H8>] (last updated July 30, 2018).

50. *What is a Bitcoin Mixer (Tumbler) and How Does It Work?*, CRYPTALKER, <https://cryptalker.com/bitcoin-mixer/> [<http://perma.cc/2PRG-J86V>] (last visited Feb. 7, 2019).

users, however, do not use intermediaries such as exchange platforms—which intermediate by turning bitcoins into national legal currencies and vice versa, thus facilitating bitcoin transactions—and only enter peer-to-peer transactions, it becomes difficult to tax them. Hence, taxing merely bitcoin exchange platforms may not be a sufficient method to control the overall bitcoin transactions.

B. Businesspersons and Bitcoin

Some may argue that bitcoin users are not all businesspersons and that ordinary individuals may also be bitcoin users. In this context, bitcoin may be a challenge from ordinary citizens to government. Indeed, the purported founder of bitcoin's paper introducing the bitcoin to the international community, Satoshi Nakamoto,⁵¹ makes the case that bitcoin is a payment mechanism, rather than an investment and speculation instrument. Ordinary citizens simply wish to use bitcoin to pay for goods and services and are therefore not acting as businesspersons.

In this respect, the term “businessperson” should be clarified to avoid distorting the understanding of bitcoin and other cryptocurrencies. The term “businessperson” denotes a person, natural or legal, who enters into economic transactions to make advantageous economic exchanges. The volume of the economic transactions of the individual and the amount of the profit acquired or targeted are not the criteria required to acquire the status of a businessperson; what matters is the wish to conduct quick, effective, and profitable transactions. Hence, readers should understand the term “businessperson” in a broad sense. To use bitcoin merely as a payment mechanism may also be a profit as it constitutes a better and more profitable payment mechanism for the businessperson.

The assumption is that businesspersons who wish for security for their transactions also wish to avoid the government. Indeed, businesspersons would prefer to have their dealings completed as a matter of pure confidentiality, without government interference. Governments thus represent unwanted but necessary guardians and supervisors of economic transactions. In this respect, bitcoin users argue that the network-based ecosystem based upon a distributed ledger technology—blockchain technology—that confirms and authenticates every transaction involving bitcoin provides a natural security for businesspersons.

51. Satoshi Nakamoto, *Bitcoin: A Peer-to-Peer Electronic Cash System*, BITCOIN, <https://bitcoin.org/bitcoin.pdf> [<http://perma.cc/5WFJ-M3QW>] (last visited Feb. 7, 2019).

Every businessperson of the network has an access to the ledger.⁵² There is no central authority with monopoly on the ledger because every transaction is registered on the ledger. There is thus no need for a trusted third party—government, a government agency, or any financial or bureaucratic institution—to maintain the bitcoin registry and to realize bitcoin transactions. The network, not a third party, confirms and validates the transaction between the two bitcoin users. Network validations are all visible on the distributed ledger. There is no need for a central clearing house or a central bank as the guarantor of last resort. Bitcoin is a businessperson-to-businessperson enterprise without the need for intermediary public powers.

Bitcoin challenges governments' control of the legal currency market because it proves to governments and the international community that private initiatives and private consent may be sufficient to transact exchanges. The existence and the value of bitcoin depends merely on the participation and the consent of businesspersons. True, a government may control bitcoin in the event that it invests huge amounts of computer power to produce bitcoins or aggressively buys bitcoins on the market. A group of powerful bitcoin users—the early entrants or those with huge capital—could also try to achieve control of the bitcoin market. Yet, the underlying philosophy of bitcoin rested, and continues to rest, on the fact that no dominant power would control the production and the ownership of bitcoins. The objective is democratization and the privatization of payment and exchanges. Bitcoin aims to remain a consensus-based private network.

Bitcoin is the laboratory that tries to prove that the credit expansion banking transactions cause is merely based upon the trust of depositors and the citizens in their governments, in government-regulated banks and in financial institutions. The criticism that bitcoin is created from nothing, that nothing backs it up, and that its value stems merely from people jumping on the bandwagon without a rational calculation, is exactly the same criticism against the current financial and commercial system of the world. Indeed, commercial banks produce credit ten times the value of the money central banks create. In banking terms, the process of producing credit is called “fractional reserve banking,” through which credit expansion is multiplied on the basis of money the central bank prints.⁵³

52. *Bitcoin*, INVESTOPEDIA, <https://www.investopedia.com/terms/b/bitcoin.asp> [http://perma.cc/A5DZ-NF5H] (last updated Aug. 5, 2018).

53. *Fractional reserve banking*, CAMBRIDGE U., <https://dictionary.cambridge.org/dictionary/english/fractional-reserve-banking> [http://perma.cc/U96H-7U7L] (last visited Feb. 7, 2019); *Fractional Reserve Banking*, INVESTOPEDIA, <https://www.investopedia.com/terms/f/fractionalreservebanking.asp> [http://perma.cc/6NHT-M5JL] (last updated Aug. 9, 2018).

The credits commercial banks distribute exceed and overspill the money collected from depositors. Ordinary citizens believe that banks are selling these deposits to the market with interest attached to them and are thus profiting from the deposits. Credit that commercial banks give to the market, however, is in fact much greater than the money the central bank creates and the deposits bank account holders keep.

This credit expansion is based on the trust ordinary citizens and depositors place in the government and government-regulated institutions, and the current debt economy rests on this same trust in government. Bitcoin wishes to change the direction of citizens' trust by refocusing it on a private network rather than the government. If the government can create a value from nothing, that is, if a government can create money and credit without any back-up value, then a private network of businesspersons should be able to create value from nothing, too.

If there is no real equivalence between the creation of money and the "real" economy of production of goods and services, and if central banks can create money on an enormous scale, the fractional reserve banking system may be an abuse of the trust citizens place in central banks and governments. The reason governments, central banks, commercial banks, and national currencies exist is because the general populace trusts them. It is the people's trust that allows them to exist, operate, and prosper. With people's trust in mind, bitcoin and other cryptocurrencies exist because network members trust them. Bitcoin therefore does not need to correspond to the "real" economy of production. Through bitcoin, businesspersons may grant the same kind of trust to a non-governmental structure.

C. Bitcoin and International Trade and Finance

Bitcoin is a challenge to the assumption that monetary, financial, and commercial matters are intergovernmental as a matter of nature. In fact, this assumption was rooted in the facts on the ground until the emergence of bitcoin—a non-governmental currency—in 2008. Non-governmental currencies—such as bitcoin—have been increasing their share in monetary, financial, and commercial matters worldwide. Rather than governments arranging their national currencies and looking to intergovernmental institutions such as the IMF for the stabilization of world monetary affairs, bitcoin relies solely on the network of bitcoin users for the determination of the value of bitcoin. Supply and demand alone within the bitcoin user network determine its value.

The exchange rate of national currencies affects international trade to a great extent. Various governments deliberately and systematically try to

manipulate their currencies to gain an edge over competitors in international commerce. Governments devalue or revalue their national currencies against other government currencies. Currently, the biggest U.S. complaint about Chinese monetary and commercial policy is that China “artificially” keeps its national currency’s value low, which gives China an advantage in its export markets, especially when exporting to the United States.⁵⁴ With a low currency, Chinese exports become cheaper and thus take a great share of global world markets.

Bitcoin is a message to the entire world that national fiat currencies⁵⁵ and disputes between governments as it relates to the exchange rates of these currencies should not monopolize international trade and finance. Rather than disputes between governments and the intervention of the IMF for the stability of national currencies, bitcoin proposes the supply and demand of the bitcoin network. Hence, bitcoin actually challenges the international politics of money in that it isolates, within a specified network, natural and actual levels of supply and demand, free from government intervention.

Bitcoin does not violate international law. International law does not state that only national currencies may exist, nor does it require specific fiat currencies to be employed in international trade. International law also does not prohibit private digital money, nor does it require a specific definition of money. What concerns international law is the proper exchange of goods and services with other goods, services, or money. Actually, this objective has justified the existence of two international organizations—the WTO and the IMF. Indeed, international law is technologically neutral in the face of payment mechanisms. This neutrality is clearly indicated in the 1996 United Nations Commission for International Trade Law Model Law on Electronic Commerce⁵⁶ and the United Nations Convention on the Use of Electronic Communications in

54. *Trump accuses China of ‘manipulating’ its currency*, BBC NEWS (Aug. 21, 2018), <https://www.bbc.com/news/business-45251091> [<http://perma.cc/4YML-NANW>].

55. Fiat currency signifies a currency that precious metals do not back up and that has value simply because a government says so.

56. MODEL LAW ON ELECTRONIC COMMERCE WITH GUIDE TO ENACTMENT 3, 5, 8, U.N. COMM’N ON INT’L TRADE L. (1996), http://www.uncitral.org/pdf/english/texts/electcom/V1504118_Ebook.pdf [<http://perma.cc/P7QD-Y577>] (arts. 1(a), 5, 7(b), 11).

International Contracts.⁵⁷ International law requires the reliable transference of money and data from one party to the other party.

Bitcoin highlights the basic definition of money. The state need not produce money. Money does not need the support of any state. One can privately produce it and use it as a medium for investment, storage, and exchange. The only element necessary to establish the validity of a form of money is *trust* in the existence of money. If one believes that money exists and if one believes he can buy goods and services in exchange for it, then money exists. The existence of a state or a state central bank to back up money is not necessary. The fiction of money does not need the confirmation of the state. Private individuals—businesspersons— may sustain it and support it through their network.

The current international commercial and financial order, however, is purportedly based upon national currencies. International law expects the exchange of goods and services, the proper payment of debts, and the use and transfer of property according to its value by national currency. The valuation process is evident in the fact that there is no global money. The reestablishment of the international system after World War II did not accept the recommendations of economists like John Maynard Keynes to create an international currency for the world economy.⁵⁸ The international monetary order was naturally based upon national currencies with the most powerful and prestigious national currency—the U.S. dollar—for central banks to use as reserve currency all around the world.

Likewise, previously, “the world of the 1920s was an attempt to reconstitute an international monetary order”⁵⁹ among governments after World War I. During World War I, the gold standard was standard, with most countries decreeing the use of fiat money with strong foreign exchange controls, export-import restrictions, and limitations on the outflow of gold.⁶⁰ The world monetary order was a natural consequence of the interaction between national currencies, the most popular reserve currency in the period between the two world wars being the British pound.

57. MODEL LAW ON ELECTRONIC COMMERCE WITH GUIDE TO ENACTMENT 5, U.N. COMM’N ON INT’L TRADE L. (2007), https://www.uncitral.org/pdf/english/texts/electcom/06-57452_Ebook.pdf [<http://perma.cc/3CQF-UXCG>] (art. 9(1)).

58. Ryan Cooper, *How John Maynard Keynes’ Most Radical Idea Could Save the World*, WEEK (May 27, 2016), <http://theweek.com/articles/626620/how-john-maynard-keynes-most-radical-idea-could-save-world> [<http://perma.cc/A4H8-NAH3>].

59. MURRAY N. ROTHBARD, A HISTORY OF MONEY AND BANKING IN THE UNITED STATES 437–38 (2002).

60. *Id.* at 439.

The German bilateral free trade agreements with various countries between the two world wars were a challenge to the British pound in world markets as these German-led trade treaties favored the national currencies of Germany and its counterparts in bilateral trade rather than the British pound.⁶¹ The national trade wars, in a way, were also national currency wars and represent one of the reasons behind World War II. Post-World War II financial and trade organizations—that is, international law—are set against this background.

The current inaction of both the IMF and the WTO in the face of bitcoin and other cryptocurrencies evidences the organizations' uncertainty of how to respond. At present, the international organizations and governments can tolerate cryptocurrency transactions as long as the latter affect only a small share of the world economy. If cryptocurrencies begin to occupy an important part of the national market and play more prominent roles in international transactions, however, then the IMF and the WTO would no longer be able to remain passive. The popularity and increasing market share of bitcoin and similar cryptocurrencies would force the international community to formulate a response.

If cryptocurrencies are goods or commodities, the WTO can wholly regulate the area—the WTO, as an international organization, regulates the international trade of goods. But, the WTO has not yet acted in this regard. Likewise, the IMF has not taken any initiative for cryptocurrencies. The IMF does not have cryptocurrency reserves that could be employed in the event of a speculative bitcoin user attack against a national currency. Both the WTO and the IMF have adopted a wait-and-see approach. The silence of the intergovernmental organizations—the UN, the IMF, and the WTO—is unsurprising in the face of digital currencies. International organizations can act only if governments have a more or less clear idea about what to do with cryptocurrencies.

For the moment, the reaction of governments need not be direct. Governments may keep an eye on the growing cryptocurrency market by keeping a certain distance. Rather than directly regulating the cryptocurrencies, governments may choose to affect the formation and the growth of cryptocurrencies. At the same time, governments may create a favorable environment for cryptocurrencies in their national economies and boost financial liquidity. Governments may use cryptocurrencies as a support for their national economies by giving autonomy to the cryptocurrencies within their national borders.

61. See generally Kerry A. Chase, *Trading Blocs: States, Firms and Regions in the World Economy* 51–104 (2005), <https://www.press.umich.edu/pdf/047209906X-ch3.pdf> [<http://perma.cc/G59C-TDBH>].

The Japanese government's policy deserves attention. The Japanese government endorses cryptocurrencies but maintains a distance from them. Although government-backed, the Japanese Authority of Digital Assets ("JADA") was not a governmental organization but a self-regulatory authority that cryptocurrency operators founded. JADA generally advised its members on best practices.⁶² Hence, the Japanese government respects the private nature of the cryptocurrency industry; the country prefers self-regulation of the cryptocurrency industry over direct government intervention. At present, the Japan Blockchain Association ("JBA") has replaced JADA with more governmental participation. Yet, the cryptocurrency industry will probably still exert a strong presence in the JBA as well.⁶³

Private cryptocurrencies are commended as a way of freedom from the state and heralded as a victory for private enterprise. The state, however, continues to provide the ultimate guarantee against cryptocurrency fraud. For instance, when Mt. Gox, the cryptocurrency exchange platform in Japan, was declared bankrupt with losses of over \$500 million worth of digital currencies because of hacking, it was the Japanese government and the Japanese courts that were called upon by the injured investors to intervene.⁶⁴ The state provides the ultimate guarantee for orderly economic transactions, despite the distance it keeps with cryptocurrencies. In other words, the government may be necessary for the smooth and effective running of cryptocurrencies.

The private cryptocurrency network may not function as expected for a number of reasons: (1) a minority might capture the network; (2) the members of the network may have unequal statuses due to first-come advantages, with members that enter the system at the start having advantages that accumulate with the growth of the network; (3) the differences between the computer power of the network members may have a distorting effect, as members that have more computer power and active status in the network can mine and gain more coins than the others

62. Kelly McConnell, *Best Practice for Bitcoins: Regulatory, Legal and Financial Approaches to Virtual Currencies in a Hesitant, Global Environment* 50 (unpublished thesis, Monash University), <https://www.aph.gov.au/DocumentStore.ashx?id=46d34817-cdc7-42a5-97ec-e3ff59bd6634&subId=301945> [http://perma.cc/S9NU-QF2K] (last visited Jan. 21, 2019).

63. Jon Southurst, *New Japan Blockchain Association: We Have the Best Contacts*, BITCOIN (Apr. 29, 2016), <https://news.bitcoin.com/new-japan-blockchain-assoc/> [http://perma.cc/E36M-KLGM].

64. *MtGox CEO says 'Not Guilty' at Missing Bitcoin Trial in Japan*, DAILY MAIL (July 11, 2017), <http://www.dailymail.co.uk/wires/afp/article-4683466/MtGox-CEO-goes-trial-Japan-missing-Bitcoins.html> [http://perma.cc/A7UR-GB6L].

on the digital platform; or (4) important discrepancies between the network members may appear, and the risk of a limited number of people having considerable power is also ever-present. Cryptocurrencies thus may not actually be fully egalitarian and fair, which may justify government intervention.

Governments may deem themselves competent to rectify extreme inequalities stemming from cryptocurrencies. Extreme inequality may disrupt public order and governments have the right and duty to protect public order. Indeed, the G-20, the 19 largest economies in the world plus the European Union, currently has cryptocurrencies on its agenda.⁶⁵ It is highly unlikely that this collection of the world's most powerful countries would leave cryptocurrencies to operate autonomously without some state or government oversight or supervision. Governments would prefer to maintain their regulatory role and sovereignty in international financial and commercial systems.

D. Financial Inclusion

Cryptocurrencies present an attractive opportunity for developing countries or, in particular, countries that are alienated from the international finance and economy. Rather than try to regulate cryptocurrencies, governments themselves may engage in cryptocurrency commerce. The insufficient U.S. dollar reserves of some developing countries cause considerable difficulties in foreign trade. Developing countries with unstable national currencies may tend to opt for a cryptocurrency that would facilitate financial and commercial transactions in their foreign trade. Through cryptocurrencies, developing countries may feel more included within the international trade and finance system that currently does not provide adequate rights or access to a large number of nations, companies, and individuals.

For instance, foreign workers could send remittances to their home countries in a more cost-effective and efficient manner through bitcoin.⁶⁶ Although remittances are an important source of revenue for developing countries, sending remittances is still, interestingly, a somewhat costly

65. *India Sends Tax Notices to Cryptocurrency Investors as Trading Hits 3.5 Billion*, UNTV NEWS (Jan. 23, 2018), <https://untvweb.com/news/india-sends-tax-notices-cryptocurrency-investors-trading-hits-3-5-billion/> [http://perma.cc/Y55Z-TVXE].

66. See Rebecca L. Stanley & Ross P. Buckley, *Protecting the West, Excluding the Rest: The Impact of the AML/CTF Regime on Financial Inclusion in the Pacific and Potential Responses*, 17 MELB. J. INT'L L. 83, 84 (2016).

business.⁶⁷ Currently, the most popular way of sending money across borders takes place through the Society for Worldwide Interbank Financial Telecommunication (“SWIFT”) system.⁶⁸ The SWIFT system involves fixed fees that are often disproportionate to the value of the money being sent.⁶⁹ Indeed, at the 2009 Summit in Pittsburgh, the G-20 countries declared that they wished to improve access to financial services for the poor.⁷⁰ The technology of Ripple, a type of cryptocurrency, has already been employed to operate money transfers between many banks.⁷¹

Some governments try to create their own cryptocurrencies. The “governmental” process of creating cryptocurrencies, however, runs against the basic logic and rationality of cryptocurrencies. Cryptocurrencies, foremost among them being bitcoin, have asserted their non-state qualities to acquire their current popularity. But some states wish to be active actors in the world of cryptocurrencies. For instance, Russia has been working on a “national” digital currency. A national currency could be a way for Russia to circumvent embargoes the West imposed on its economy after the Ukraine-Crimea crisis—the military intervention of Russia into Ukraine⁷²—an embargo that has led to huge losses for the Russian national currency over the last two years. A Russian cryptocurrency could foreseeably help the Russian economy.

The private nature of cryptocurrencies does not prevent governments from adopting or co-opting them. Rather than ban them outright—as Bangladesh and Morocco⁷³ have—governments may use cryptocurrencies for the furtherance of their national interests. Russia’s initial hesitation toward cryptocurrencies is a case in point. Russia initially considered banning cryptocurrencies but decided against it, and Russia is now working to form its own cryptocurrency.⁷⁴ Russia’s journey took the

67. *Id.* at 89.

68. Shobhit Seth, *How the SWIFT System Works*, INVESTOPEDIA, <https://www.investopedia.com/articles/personal-finance/050515/how-swift-system-works.asp> [<http://perma.cc/S7CA-WF5A>] (last updated Sept. 12, 2017).

69. Stanley & Buckley, *supra* note 66, at 91.

70. *Id.* at 87.

71. *Id.* at 105.

72. John Simpson, *Russia’s Crimea Plan Detailed, Secret and Successful*, BBC (Mar. 19, 2014), <http://www.bbc.com/news/world-europe-26644082> [<http://perma.cc/F25L-ANZD>].

73. *See Regulation of Cryptocurrency Around the World*, *supra* note 42.

74. Stephen O’Neal, *CryptoRuble: How Stable Could Russian National Stablecoin Be?*, COINTELEGRAPH (Nov. 17, 2018), <https://cointelegraph.com/news/cryptoruble-how-stable-could-russian-national-stablecoin-be> [<http://perma.cc/2ZXC-YQYY>].

country from favoring an outright ban to a position of creating a “national” cryptocurrency.⁷⁵ Likewise, Venezuela has created its own cryptocurrency, the “petro,”⁷⁶ supported by oil and gas. The extreme loss of value of the Venezuelan national currency has led the Venezuelan government today to regard the cryptocurrency as a panacea for all its economic ills, one that will help it overcome and circumvent U.S. economic sanctions.

E. An Inchoate International Financial Law

As aforementioned, states that are not wholly integrated into the international financial system are co-opting cryptocurrencies. States that are incurring or that may incur Western economic sanctions are planning to employ cryptocurrencies for their own economic, commercial, and political objectives. The conspicuous absence of formal international law concerning money and finance—in stark contrast to extensive trade regulations under WTO law—is a significant contributing factor to situation. Rather, what has evolved is an international financial “soft law” of sorts.⁷⁷

In other words, this bemusement in the face of cryptocurrencies is linked to the lack of international law in the field, and government-backed cryptocurrencies are entering into this legal vacuum. The bemusement also has to do with the apathy of international law in the face of the huge gap

75. Ben Chapman, *Bitcoin Latest: Vladimir Putin ‘Considers Launching Cryptocurrency to Help Russia Evade Sanctions’*, INDEPENDENT (Jan. 2, 2018, 2:29 PM), <https://www.independent.co.uk/news/business/news/bitcoin-latest-updates-putin-cryptocurrency-russia-sanctions-blockchain-tech-sergei-glazev-a8138021.html> [<http://perma.cc/2QYK-8J64>]; Audrey Ostroukh & Jack Stubbs, *Russia Ready to Regulate, Not Ban Cryptocurrencies*, REUTERS (Jan. 25, 2018, 3:09 AM), <https://www.reuters.com/article/us-russia-cryptocurrencies-bill/russia-ready-to-regulate-not-ban-cryptocurrencies-idUSKBN1FE0Y0> [<http://perma.cc/MG7Q-WL5R>]; Max Seddon & Martin Arnold, *Putin Considers ‘Cryptorouble’ as Moscow Seeks to Evade Sanctions*, FIN. TIMES (Jan. 1, 2018), <https://www.ft.com/content/54d026d8-e4cc-11e7-97e2-916d4fbac0da> [<http://perma.cc/B3CM-2MEX>].

76. Rachele Krygier, *Venezuela Launches the ‘Petro,’ Its Cryptocurrency*, WASH. POST (Feb. 20, 2018), https://www.washingtonpost.com/news/worldview/s/wp/2018/02/20/venezuela-launches-the-petro-its-cryptocurrency/?noredirect=on&utm_term=.feadd5fadff3 [<http://perma.cc/2QA5-C6SG>].

77. See Roger Aitken, *Greek Economic Crisis: Is A ‘Parallel’ Currency The Answer?*, FORBES (July 5, 2015, 1:00 PM), <https://www.forbes.com/sites/rogeraitken/2015/07/05/greek-economic-crisis-is-a-parallel-currency-the-answer/#318b9da66392> [<http://perma.cc/7TYS-KQJC>].

between the real economy and its financial counterpart. Several financial products do not have real equivalences, notwithstanding their money appearance.⁷⁸ International law does not curb the discrepancy between the real production economy and the financial economy, and the UN does not regard the economic gap as a matter for international peace and security; nor do the IMF and the WTO take measures against highly speculative global financial transactions or plug the gap between the real economy of production and international finance, although this gap likely caused the 2007–2008 crisis.

In 2009, bitcoin and other cryptocurrencies took advantage of both the under-regulation in international law and the gap between the real and the financial economies to place themselves into the financial world.⁷⁹ Under international law, no one can legally or legitimately argue that bitcoin is illegal simply because it has no backup value or intrinsic value. International law has always condoned the national fiat currencies that lack backup value and intrinsic value. Although cryptocurrencies are legal in the gray area, international financial law itself was a gray area before the advent of cryptocurrencies, cryptocurrencies have merely highlighted this grayness.

Governments wish to remain the intermediaries in this gray global economic and financial system. Governments established the post-1945 world economic system. The international economic organizations that constitute the bedrock of the current global economic relations—such as the IMF, the World Bank, and the WTO—all came into being because of the cooperation of governments under the leadership of the victors of World War II. It is all the more understandable that governments do not want to leave the most important terrain of global economy—money—to businesspersons.

Most states will likely continue to strive for the regulation and the taxation of cryptocurrencies.⁸⁰ The governmental effort for regulation may damage cryptocurrencies; that is, their prices may be negatively affected. Governments will argue that cryptocurrencies create too many

78. Vasilis Kostakis & Chris Giotitsas, *The (A)Political Economy of Bitcoin*, 12 TRIPLEC 431, 432 (2014).

79. Jon Nielsen, *What Triggered the Creation and Success of Cryptocurrencies?*, COINCODEX, <https://coincodex.com/article/1072/what-triggered-the-creation-and-success-of-cryptocurrencies/> [http://perma.cc/XM66-W8V7] (last visited Feb. 7, 2019).

80. See Andrew Nelson, *Cryptocurrency Regulation in 2018: Where the World Stands Right Now*, BITCOIN MAG. (Feb. 1, 2018, 2:42 PM), <https://bitcoinmagazine.com/articles/cryptocurrency-regulation-2018-where-world-stands-right-now/> [http://perma.cc/F2G7-FMNQ].

speculations and that the government ought to protect citizens and consumers against them.⁸¹ The more cryptocurrencies are regulated and have the shadow of the state looming over them, the more their “private nature” will be endangered. Actually, “[w]ere bitcoin stripped of its near-anonymity, it would be hard to justify its current price.”⁸²

CONCLUSION

ICA and cryptocurrencies are typical examples of businesspersons’ challenges to governments. International commercial and financial law constitute a contested terrain for both parties. Government–businessperson interaction is inherent in international organizations. Governments still have an edge over businesspersons in the current world system, yet, the challenge from businesspersons is possible, in particular, where government-based international law does not adequately respond to the current needs of international trade and finance. Businesspersons fill the gaps governments leave and they thus force governments to act. Indeed, in the field of ICA and bitcoin, and other cryptocurrencies, businesspersons force governments to act. In particular, the current popularity of bitcoin stems from the fact that bitcoin seems to upgrade the prospects of businesspersons to an unexpected degree vis-à-vis governments.

81. See Kenneth Rogoff, *Bitcoin’s Price Bubble Will Burst Under Government Pressure*, GUARDIAN (Oct. 9, 2017, 8:00 PM), <https://www.theguardian.com/technology/news-blog/2017/oct/09/bitcoin-price-bubble-government-cryptocurrency> [<http://perma.cc/J83L-56GE>].

82. *Id.*