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# International Commercial Arbitration: A Case Study of the Areas under Control of the Palestinian Authority

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## ARTICLE

### INTERNATIONAL COMMERCIAL ARBITRATION: A CASE STUDY OF THE AREAS UNDER CONTROL OF THE PALESTINIAN AUTHORITY

*Marshall J. Breger & Shelby R. Quast\**

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I. INTRODUCTION

One necessary component to the success of the Israeli-Palestinian peace process is economic development and growth in the area under the control of the Palestinian Authority.<sup>1</sup> One of the principal requirements for economic growth, and quite possibly for the Palestinian Authority's economic survival, is foreign investment in WBG.<sup>2</sup> As they currently exist, laws concerning foreign investment in WBG are a quagmire. Indeed, it is a challenge for an investor to simply identify which law applies to which area, let alone to interpret the law. At the same time many of the protections often found in a transparent 'rule of law' society are still lacking in the WBG.

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<sup>1</sup> See The West Bank and Gaza Strip Private Economy: Conditions and Prospects, United Nations Office of the Special Coordinator in the Occupied Territories (visited Mar. 7, 2000) <<http://www.arts.mcgill.ca/mepp/unsco/private/private.html>> (noting that Palestine is attempting to improve conditions for sustainable economic development). The areas under the control of the Palestinian Authority consist of portions of the West Bank and the Gaza Strip. *Israeli-Palestinian Interim Agreement on the West Bank and Gaza Strip*, Sept. 28, 1995, Isr.-PLO, 36 I.L.M. 551 [hereinafter Interim Agreement]. The West Bank is divided into areas "A", "B" and "C." See *id.* art. XI. The area of Palestinian self-rule consists of areas "A" and "B". See *id.* Area "A" is currently comprised of eight Arab cities in the West Bank. *Id.* Area "B" is comprised of smaller towns and villages in which Palestinian jurisdiction extends to civil affairs, but where Israel retains control over internal security. *Id.* Area "C" consists of the Israeli-controlled remainder of the West Bank. *Id.* The Palestinian Council currently has jurisdiction over civil affairs in areas "A" and "B". See Interim Agreement, art. XI, *supra*; see also Keith C. Molkner, *Essay: Legal and Structural Hurdles to Achieving Political Stability and Economic Development in the Palestinian Territories*, 19 FORDHAM INT'L L.J. 1419, 1428-29 (1996) (discussing the division of areas under Palestinian self-rule). The geographic scope of the jurisdictions was to change continuously throughout the interim period. See Agreement on the Gaza Strip and the Jericho Area, May 4, 1994, art. II, 33 I.L.M. 622. The parties have failed to meet the timetable for the transfer of authority. For a discussion of the timetable, see Declaration of Principles on Interim Self-Government Arrangements, Sept. 13, 1993, art. IV, 32 I.L.M. 1525 (1993) (entered into force on Oct. 13, 1993) [hereinafter Declaration of Principles]. Thus, the final resolution of the reach of Palestinian jurisdiction has not yet been resolved. However, efforts are ongoing to reach a final status on the accords by fall 2000. See Danna Harmon, *PM, Arafat Agrees to Relaunch Talks: Summit Planned Today in Sharm el Sheikh to Announce Further Meetings in Washington*, JERUSALEM POST, Mar. 9, 2000, at 1; Aluf Benn, *The Barak-Arafat Ramallah Agreement*, HA'ARETZ, Mar. 7, 2000.

<sup>2</sup> By WBG we mean the West Bank and Gaza. We use the term as coterminous with the area under the control of the Palestinian Authority or Palestine.

This article provides an examination of one such issue—the commercial arbitration laws applicable to foreign investment in WBG.<sup>3</sup> It first briefly examines the operative arbitration laws applicable in the WBG. The paper addresses the Law on the Encouragement of Investment adopted by the Palestinian National Authority in 1995<sup>4</sup> and revised in 1998.<sup>5</sup> It then reviews existing standards in international conventions and in neighboring countries. Next, it addresses relevant PA legislation, the legal personality of the PA, and what the PA can do to respond to the international community's need for certainty in dispute resolution procedures. Next, it examines how a PA arbitration law fits into the Interim Agreement. It then reviews the PA's current draft arbitration law, and finally, it suggests a draft Palestinian international commercial arbitration law. It considers, as well, the relationship between the PA and Israel in terms of the PA's ability to make legal agreements prior to any final resolution of the Arab-Israeli conflict.

## II. THE OSLO AGREEMENT

On September 13, 1993, Israel and the Palestine Liberation Organization (PLO) signed the historic Declaration of Principles on Interim Self-Government Arrangements.<sup>6</sup> The agreement stated that “[t]he aim of the Israeli-Palestinian negotiations within the current Middle East peace process is . . . to establish a Palestinian Interim Self-Government Authority . . . for the Palestinian people in the West Bank and the Gaza Strip . . . leading to a permanent settlement.”<sup>7</sup> As a result of Oslo, the PLO established the Palestine Authority. Under an agreement signed the following year the PA gained the ability to legislate specific categories of laws for the areas under its control.<sup>8</sup> Recognizing the

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<sup>3</sup> The authors acknowledge that issues surrounding the peace process are complex; many factors are involved and far more developments are needed than merely creating new law regarding investment. This paper focuses on the narrow issue of international commercial arbitration, while recognizing there are many areas of importance not discussed in this paper.

<sup>4</sup> Law On the Encouragement of Investment (1995) (Palestinian Nat'l Authority), translated in David P. Fidler, *Foreign Investment in Palestine: An Analysis of the Law on the Encouragement of Investment in Palestine*, 19 FORDHAM INT'L L.J. 529, app. at 603-10 (1995) [hereinafter Investment Law].

<sup>5</sup> Law on the Encouragement of Investment in Palestine, No. 28 (1998) (Palestinian Authority) [hereinafter Revised Investment Law], reprinted in David P. Fidler, *Foreign Investment in Palestine Revisited: An Analysis of the Revised Palestinian Investment Law*, 31 CASE W. RES. J. INT'L L. 293, app. at 521, 523 (1999) (translation is (Revised) Official English Translation translated by the Palestinian National Authority Ministry of Economy and Trade).

<sup>6</sup> Declaration of Principles, *supra* note 1, at 1534.

<sup>7</sup> *Id.* at 1527.

<sup>8</sup> Israel-Palestine Liberation Organization Agreement on the Gaza Strip and Jericho Area, Article VII Legislative Powers of the Palestinian Authority, 33 I.L.M. 622 (1994).

importance of foreign investment to economic survival in WBG, the PA began work on revising the commercial laws of Palestine—specifically the investment laws.<sup>9</sup> The Palestinian Investment Law was enacted in 1995<sup>10</sup> and the Revised Investment Law passed in April 1998.<sup>11</sup>

Many countries and international organizations, recognizing the importance of economic development in WBG to the peace process, have offered their support.<sup>12</sup> The PA sought \$13 billion in external financing in

Article VII states that the “Palestinian Authority will have the power, within its jurisdiction, to promulgate legislation, including basic laws, regulations and other legislative acts.” *Id.*

<sup>9</sup> See Gary A. Hengstler & Richard L. Fricker, *Yasser Arafat: My Vision*, A.B.A.J., Feb. 1994, at 46, 49 (“Either we will be a Somalia because of the starvation of our people or we will have another economic tiger in this area,” Yasser Arafat responding to the question of the importance of economic investment of other countries in Palestine).

<sup>10</sup> Investment Law, *reprinted in* Fidler, *supra* note 4.

<sup>11</sup> The Revised Investment Law, *supra* note 5.

<sup>12</sup> See Palestinian National Authority Official Website, *Special Reports: MOPIC's 1998 First Quarterly Monitoring Report of Donor Assistance* (visited Jan. 23, 2000) <[http://www.pna.net/reports/aid\\_reports/150698.htm](http://www.pna.net/reports/aid_reports/150698.htm)>. Since the implementation of Oslo, donors have pledged \$349 million in aid. See *id.* For an overview of donor issues, see generally Rick Hooper, *The International Politics of Donor Assistance to the Palestinians in the West Bank and the Gaza Strip, 1993-1997*, in SARA ROY (ed.), 3 THE ECONOMICS OF MIDDLE EAST PEACE: A REASSESSMENT (Sara Roy & Karen Pfeifer eds., 1999). For a discussion of issues donors desire addressed, see Ben Lynfield, *Progress Report to Strengthen PA Relations with Donor Countries*, JERUSALEM POST, June 29, 1999, at 4.

“The United States pledged . . . \$100 million each year for five years (\$75 million in grants and \$25 million in OPIC loans and loan guarantees) beginning in 1994.” *Palestinians: U.S. Assistance*, CONG. RES. REP., Dec. 1, 1996, available in 1996 WL 13635536. The Middle East Peace Facilitation Act “MEPFA,” granted the President authority to suspend provisions of law prohibiting U.S. and United Nations assistance to the PLO. MEPFA allows U.S. contacts with and aid to the PLO and PA, so long as the PLO is abiding by commitments under the Declaration of Principles, see Declaration of Principles, *supra* note 1.

As of the third-quarter of 1997, the U.N. Office of the Special Coordinator in the Occupied Territories stated that \$3.62 billion had been pledged by donor countries to the PNA, \$3.03 billion had been committed and \$1.83 billion had been disbursed to support Palestinian development. See United Nations Office of the Special Coordinator in the Occupied Territories, *Special Report: The West Bank and Gaza Strip Private Economy* (Feb. 1998) (“Special Report”) <<http://www.arts.mcgill.ca/MEPP/unsco/private.html>> (visited Dec. 20, 1999). The majority of donor money to the WBG has been directed toward legal reform, institution and capacity building, public infrastructure, education, health and public safety. See *id.*

In response to the signing of the WYE agreement by Israel and the PLO, a donor's conference was held in Washington D.C. on November 30, 1998 where 50 foreign donors pledged to pay over \$3 billion in aid to the PNA over the next five years. See *Donor States Pledge Over 3bn in Aid*, BBC Summary of World Broadcasts, Dec. 8, 1998. See also MIDDLE EAST ECONOMIC DIGEST, Dec. 11, 1998, p.10.

connection with its Program for the Development of the Palestinian Economy, in the period between 1994-2000.<sup>13</sup> While millions of dollars have been pledged for foreign investment programs in Palestine, most of the money has not materialized.<sup>14</sup>

The lack of both public and private investment has been attributed to a number of factors including Israeli economic policy,<sup>15</sup> pervasive corruption,<sup>16</sup> and “general political instability in the [WBG].”<sup>17</sup> Legal factors, “including the lack of a stable legal framework” also contribute to this lack of economic development.<sup>18</sup>

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<sup>13</sup> See Hooper, *supra* note 12, at 63.

<sup>14</sup> Cf. Marjorie Miller, *Nasty Piece of Mideast Business: Pact with Israel in '93 Prompted a Return of Palestinian Entrepreneurs Who Now Struggle to Keep their Companies Afloat Amid Armed Clashes and Military Closures*, L.A. TIMES, Sept. 11, 1997, at A1, A23 (stating that Palestinian officials and economists agree that overseas investment in Palestine has been “disappointingly low”); see also Taghreed El-Khudary, *Israeli Checkpoints Scare Off Palestinian Investors*, AGENCE FRANCE-PRESSE, July 25, 1997, available in 1997 WL 2159002 (noting that the Palestinian territories have seen a “dramatic economic downturn” since the beginning of self rule in 1993).

<sup>15</sup> See generally Ephraim Kleiman, *Some Basic Problems of the Economic Relationships between Israel, the West Bank, and Gaza*, in THE ECONOMICS OF MIDDLE EAST PEACE (Stanley Fischler et al., eds., 1993) (attempting to explain the political and economic relationships between Israel, the West Bank, and Gaza); see also Samir Abdullah & Clare Woodcraft, *Israeli Closure Policy: Sabotaging Sustainable Development*, 3 THE ECONOMICS OF MIDDLE EAST PEACE: A REASSESSMENT, 1-28 (explaining how the closure policy of Israel leaves the Palestinian economy vulnerable to both internal and external economic forces).

<sup>16</sup> See Murray Kahl, *Vanishing U.S. Funds and U.S. Administration Complicity*, ISRAELI & GLOBAL NEWS, app. B: Recent Initiative by Congressman Saxton, Oct. 30, 1997 <<http://www.cmep.com/features.htm>>; see also Murray Kahl, *Corruption Within the Palestinian Authority*, ISRAELI & GLOBAL NEWS, Oct. 30, 1997 <<http://www.cmep.com/features.htm>>; Ilan Halevi, *Self-Government, Democracy, and Management Under the Palestinian Authority*, 27 J. PALESTINIAN STUD., Spring 1998, at 35, 40-41 (articulating that corruption is a “feature of the institutional landscape that thirty years of military occupation, with all its arbitrary rule and power abuse, could only aggravate in popular perceptions,” and the elements of the corrupted economy, such as “under-the-table payoffs and outright bribery,” which were carried over by the “institutional landscape”); Fidler, *supra* note 5, at 303-05.

<sup>17</sup> Steve Rodan, *Crisis of Confidence*, JERUSALEM POST, July 11, 1997, available in 1997 WL 7956597.

<sup>18</sup> *Id.* See Special Report, *supra* note 12; Edward Bennett Miller, *Implementing the Oslo Accords*, 6 CARDOZO J. INT'L & COMP. L. 363, 373-74 (1998) (explaining the reasons the Palestinian legal system discourages investment). See generally The Task Force Report by the Conference on Foreign Relations, *Strengthening Palestinian Public Institutions* 33-60 (Council on Foreign Relations, D.C., 1999) [hereinafter Council]. For a general discussion of Palestinian private sector investment, see Fidler, *supra* note 4, at 307-09 (discussing low levels of both domestic and foreign investment in the WBG).

Perhaps the most fundamental prerequisite, and one of the most difficult challenges, in advancing the WBG economy's prospect is development of its legal system.<sup>19</sup> Law reform efforts have been slow, in part, due to a lack of financial resources.<sup>20</sup> As one scholar has stated, "[t]he PA has yet failed to establish a regulatory and institutional environment that would attract needed levels of foreign investment that are so critical to the growth of the private sector."<sup>21</sup>

Another contributing factor is an inadequate court system in WBG.<sup>22</sup> The courts suffer from a host of maladies, including: "inadequate staffing at all levels, . . . inadequate salaries, repeated challenges to their independence from the Israeli military government, crumbling physical facilities, and administrative inefficiencies."<sup>23</sup>

Yet another factor is the concomitant difficulty in enforcing judgments (foreign or otherwise) in Palestinian areas, a complaint voiced by both Israelis<sup>24</sup>

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<sup>19</sup> See Special Report, *supra* note 12; see also Hiram E. Chodosh, *Reflections on Reform: Considering Legal Foundations for Peace and Prosperity in the Middle East*, 31 CASE W. RES. J. INT'L L. 427, 446-447.

<sup>20</sup> See Chodosh, *supra* note 19, at 447.

<sup>21</sup> Sara Roy, *The Palestinian Economy and the Oslo Process: Decline and Fragmentation* 3 (Emirates Center for Strategic Studies and Research, 1998) (Emirates Occasional Papers No. 24).

<sup>22</sup> See Rodan, *supra* note 17. See generally George E. Bisharat, *Palestinian Lawyers and Israeli Role: Law and Disorder in the West Bank*, 125-44 (1989) (discussing court systems in the West Bank); Miller, *supra* note 18 at 389-393.

<sup>23</sup> George E. Bisharat, *Peace and the Political Imperative of Legal Reform in Palestine*, 31 CASE W. RES. J. INT'L L. 253, 266 (1999). The donor community has invested significant resources in promoting the rule of law in Palestine. *Id.* at 286. See also Chodosh, *supra* note 19 at 430-32. An example of such efforts is the United Nations High Commissioner for Human Rights' grant of \$3.2 million for the technical cooperation project with the Palestinian Authority, which included both law reform efforts in the legislature and judicial sector and human rights training for Palestinian police. See United Nations High Commissioner for Human Rights, *Technical Cooperation Project with the Palestinian Authority: "Support for the Rule of Law"* (PAL/95/AH/24) (visited Jan. 29, 2000) <<http://www.unhcr.ch/html/menu2/4/project/palestin.htm>>. For analysis of one particular rule of law problem, executive interference in the Judiciary, see INDEPENDENT JUDICIARY UNIT, LAW-PALESTINIAN SOCIETY FOR THE PROTECTION OF HUMAN RIGHTS AND THE ENVIRONMENT, EXECUTIVE INTERFERENCE IN THE JUDICIARY (1999).

<sup>24</sup> "The Chamber of Commerce has asked the IDF to help them collect monies they say Palestinian merchants owe Israeli suppliers. IDF Gen. Mendior (phonetic), coordinator of activities in the territories, has been asked to look into canceling the entry permits of those Palestinian salesmen who have run up debts in the millions of shekels. Israeli business officials say they would prefer the debts be deducted from the monies the Finance Ministry transfers to the Palestinian Authority." CHAMBER OF COMMERCE ASKS ARMY TO HELP COLLECT DEBTS FROM PALESTINIANS (BBC Summary of World Broadcasts, May 6, 1997). Another commentator has observed: "Before the establishment of the PA Israeli judgments



and Palestinians.<sup>25</sup> Since the transfer of powers to the PA, there seems to be no legal way to enforce the payment of debts owed by Palestinians.<sup>26</sup> "Judgments given by Israeli courts cannot be enforced in the Territories, and dishonoured cheques cannot be executed."<sup>27</sup> For their part, Palestinians also have real problems in having judgments executed against other Palestinians, at least during the Intifada.<sup>28</sup>

A final factor is the lack of a WBG tax and trade policy which complements and encourages economic development.<sup>29</sup> There is a need in

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and dishonoured cheques could be enforced directly through the Israeli execution office. The Israeli law preventing a person from opening bank accounts and drawing cheques after ten of his cheques have been dishonoured, was adopted by the military authorities in Israel. As further example, Israel drivers who became involved in accidents with Palestinian vehicles bang their heads against a wall in attempts to collect insurance claims." Nadav Shragai, *Unsafe Passage*, HAARETZ (Oct. 10, 1999).

<sup>25</sup> "During the *Intifada*, . . . the Palestinian police officers charged with investigating crimes prosecuted in the local courts and executing their judgments, resigned in masse, causing the legal systems of the West Bank and Gaza Strip to all but cease to function." Bisharat, *supra* note 23, at 266.

<sup>26</sup> "If a contract is breached a businessman may theoretically turn to courts and court-sanctioned arbitration methods for relief. In reality, however, use of the courts is limited and Palestinians instead turn to conciliation, mediation, informal arbitration, and self-help to resolve their contract disputes. Unfortunately, these mechanisms are unreliable." Ayesha Qayyum & Tobias Nybo Rasmussen, *Contract Enforcement Mechanisms in the West Bank and Gaza Strip*, in COMMERCIAL CONTRACT ENFORCEMENT IN THE PALESTINIAN TERRITORIES 17, Commercial Law Report Series (IPCRI Law & Development Series 1997).

<sup>27</sup> Talia Einhorn, *The Need for a Rule-Oriented Israeli-Palestinian Customs Union: The Role of International Trade Law and Domestic Law*, 1997 NETH. INT'L L. REV. 315, 335 (1997).

<sup>28</sup> As one commentary has pointed out:

Before 1987, judgments passed by the Palestinian courts were executed through the police. The police in the West Bank and Gaza, though considered part of the Israeli Police, contained in its lowest ranks some Palestinians. These Palestinians were responsible for investigating offences where there was no Israeli interest, such as regulating traffic, and inter-Palestinian crime. They were also charged with executing the judgments of the civil courts.

At the beginning of the December 1987 Palestinian *Intifada*, the *Intifada* leadership called upon the Palestinians working in the Israeli police force to resign. Almost all of them did. The police stations and functions were taken over by the Military. The execution of the judgments passed by the civil court thus suffered as Palestinians did not ask the Israeli military to execute a civil judgment against other Palestinians.

International Commission of Jurists, *The Civilian Judicial System in the West Bank: Present and Future* 47-48 (International Commission of Jurists, Geneva, June 1994).

<sup>29</sup> See Amir Khoury, *International Trade and Commerce: A Bridge for the Israeli-Palestinian Peace*, 7 CARDOZO J. INT'L & COMP. L. 11, 46-47 (1999) (arguing that Palestinian economic progress and development of trade is necessary for stability in the

Palestine for a “secure, predictable, and transparent legal framework” for foreign investors “to conduct business activities.”<sup>30</sup> Local businessmen claim there is no coherent legal system in WBG, the “courts are not where disputes are settled, and the laws are either contradictory or obsolete.”<sup>31</sup> Foreign businessmen decry that “the lack of standard agreements deals a fatal blow to legal certainty,” on which international transactions must be based.<sup>32</sup> It is necessary to note that while the development of investment laws that meet international standards is important, a well-developed body of civil and commercial laws must also support them.<sup>33</sup>

Lastly, the role that peace plays within the process cannot be ignored, for “without more peace between Israel and the Palestinians, Palestinian trade will remain uncertain because of its vulnerability to Israeli security actions; but without more trade, the Palestinian people will continue to lose confidence in the peace process as unemployment, poverty, and despair create fertile ground for forces opposed to *rapprochement* with Israel.”<sup>34</sup> It is in this regard that the debate over the basic question of Palestine’s identity becomes relevant.<sup>35</sup>

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region); *see also* FOREIGN INVESTMENT ADVISORY SERVICE, WEST BANK AND GAZA: NOTES ON THE LAW ON THE ENCOURAGEMENT OF INVESTMENT 1 (1996) [hereinafter FIAS].

<sup>30</sup> FIAS, *supra* note 29, at 1.

<sup>31</sup> Amir H. Koury, *An American Bank in the Palestinian Authority: Investing in the Peace*, 24 BROOK. J. INT’L L. 739, 749-52 (1999).

<sup>32</sup> *Id.* at 752. “The conventional wisdom seems to be that foreign direct investment, necessary for kick-starting a country’s economy, will not migrate to the South unless the luggage includes an arbitration clause.” Amr A. Shalakany, *Arbitration and the Third World: A Plea for Reassessing Bias under the Specter of Neoliberalism*, 41 Harv. Int’l L.J. 419, 422 (2000).

<sup>33</sup> *See* Nathaniel Harrison, *US Halts Funding for Office to Promote Investment in West Bank, Gaza*, AGENCE FRANCE-PRESSE, July 17, 1997, available in 1997 WL 2154230 (attributing the U.S. Agency for International Development’s decision to stop funding to promote private U.S. investment in Palestine, in part, to “the failure of the Palestinian Authority to enact legislation governing commercial transactions and investment”).

<sup>34</sup> Fidler, *Peace Through Trade?, Developments in Palestinian Trade Law During the Peace Process*, 38 VA. J. INT’L L. 155, 186-87 (1998).

<sup>35</sup> *See infra*, Part X. *See generally* Omar M. Danjani, *Stalled Between Seasons: The International Legal Status of Palestine During the Interim Period*, 26 DENV. J. INT’L L. & POL’Y 27 (1997); John Quigley, *The Israel-PLO Interim Agreements: Are They Treaties*, 30 CORNELL INT’L L.J. 717 (1997); John Quigley, *Palestine’s Declaration of Independence: Self Determination and the Right of the Palestinians to Statehood*, 7 B.U. INT’L L.J. 1 (1989); M.C. Bassiouni, “Self Determination” and the Palestinians, AM. J. INT’L L., Sept. 1971, at 3 (discussing the rights of Palestinians as “people” rather than as refugees).

### III. OPERATIVE ARBITRATION LAWS APPLICABLE IN THE AREAS UNDER CONTROL OF THE PALESTINIAN AUTHORITY

The legal systems in WBG are complex and less than transparent to the outside investor. The laws pertaining to foreign investment and arbitration within WBG represent a “trilateral” legal system, drawing upon Jordanian, Israeli and Mandatory legal history.<sup>36</sup> Indeed, one can describe the composite legal system of the WBG the way Norman Bentwich described the legal system under the Mandate as “not Mosaic but *a* mosaic.”<sup>37</sup>

Law in mandatory Palestine derived from a variety of sources, both Ottoman and British. Land law, as an example, was largely Ottoman, while court procedure was largely British.<sup>38</sup> The Mandatory gave rise to four dispute resolution streams—the formal Mandatory court system, a set of informal ‘arbitration courts’ created by Jewish settlers to resolve disputes within the Jewish community, traditional rabbinical courts, and the so-called comrades courts run by the labor federation.<sup>39</sup> The informal courts “known by the Hebrew title of *Mishpat Shalom* or Peace Court . . . had their origin before the British Occupation, when the Jewish population avoided as far as possible . . . recourse

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<sup>36</sup> After being under military occupation, the British Mandate for Palestine came into force in 1923. Norman Bentwich, *The Legal System of Palestine Under the Mandate*, Vol. II MIDDLE EAST JOURNAL 33, 39 (1948); see also <http://www.yale.edu/lawweb/avalon/palmanda.htm>. The broad principle regarding the law under the Mandate was that the Ottoman legislation, as it existed in 1914, was maintained, subject to modification by any Ordinance or legislation by the British government. See *id.* If there were no provisions in Ottoman or Palestinian law concerning a specific matter, the Palestinian courts were to apply rules of English Common Law and English Equity. See *id.* The West Bank was occupied by Jordan in 1948 and annexed in 1950; the Gaza Strip was occupied by Egypt but was not annexed. See MAZEN E. QUPTY & ASSOCIATES, LEGAL ASPECTS OF DOING BUSINESS IN PALESTINE 2 (1995). Israel occupied both territories in 1967, but preserved the ‘administrative separation’ by assigning separate military commanders for the West Bank and the Gaza Strip. See Molkner, *supra* note 1, at 1430.

<sup>37</sup> Bentwich, *supra* note 36, at 33.

<sup>38</sup> See Norman Bentwich, *Law and the Courts of Palestine*, 2 CAMBRIDGE L.J. 37, 41-45 (1924). For Mandatory court structure see S.G. Kermack, *Courts and Legal Policy in Palestine*, THE SCOTS. L. TIMES, 81 (April 23, 1982). See also Leon H. Rose, *Judicial System of Palestine*, 29 COM. L.J. 245 (1934) (providing further explanation of the implementation of Palestinian law); Norman Bentwich, *supra*, 37-50; Philip Marshall Brown, *British Justice in Palestine*, 12 AM. J. INT'L L. 828 (1918). See generally RAJA SHEHADEH, FROM OCCUPATION TO INTERIM ACCORDS: ISRAEL AND THE PALESTINIAN TERRITORIES 74-79 (1997) (reviewing the legal system as derived from the different periods). For a quaint colonial description of the mandatory legal system, see WILLIAM BURDICK, THE BENCH AND BAR OF OTHER LANDS 522-37 (1939).

<sup>39</sup> See Assaf Likhovski, *The Invention of “Hebrew Law” in Mandatory Palestine*, 46 AM. J. COMP. L. 339, 343 (1998).

to the Turkish Courts.”<sup>40</sup> Use of these courts became “less regular”<sup>41</sup> in the 1920's and wound down after 1948.<sup>42</sup> By then only traditional Rabbinical Courts and institutional arbitration lay outside the state court system.

Under the Agreement on the Gaza Strip and the Jericho Area, the PA decreed that laws in force prior to 1967 would be valid in the Gaza Strip, the Jericho area, and all other areas that come under PA control in the future, until unification of the laws is complete.<sup>43</sup>

A further difficulty of the Court system in PA territories is the split in the legal system between the West Bank and Gaza Strip.<sup>44</sup> “Decisions of the High Court of Justice in Gaza do not bind lower-level courts in the West Bank, just as the Court of Appeals in Ramallah cannot bind lower-level courts in Gaza.”<sup>45</sup> Two discrete legal systems in the West Bank and Gaza give rise to a “lack of unity in the courts and legal confusion,” both impeding any type of effective court relief.<sup>46</sup>

The WBG systems of law fail to grant foreign investors the clarity, legal guarantees and incentives that modern investors have come to expect. Chief Justice Khalil Silwani, West Bank High Court of Appeals, noted “[o]ur law is based partially on what was left behind from the Ottoman Period. The

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<sup>40</sup> Norman Bentwich, *The Application of Jewish Law in Palestine*, 9 J. COMP. LEGIS. & INT'L L (3d. Ser.) 59, 65 (1927). Bentwich suggests that immediately after the ouster of the Ottomans “[it] was as rare for Jewish parties who were in dispute about a matter of civil or commercial law to take a case to the Courts of the Palestine Administration as it had been to take it before the War to the Ottoman courts.” *Id.* at 66 (suggesting that a distinctive Jewish jurisprudence is evolving from the Hebrew Courts of Arbitration). Rose suggests that “a distinctive Jewish Jurisprudence is evolving from those courts.” Rose, *supra* note 38, at 247.

<sup>41</sup> Similar “nationalist” attitudes fueled the use of arbitration in 19<sup>th</sup> century Poland under the Austro-Hungarian Empire. See e.g., RETT R. LUDWIKOWSKI, IREGULACJE HANDLU I BIZNESU MIĘDZYNAR-ODOWEGO [REGULATION MARKETING AND INTERNATIONAL BUSINESS] 125 (1996).

<sup>42</sup> Likhovski *supra* note 39 at 345-47 & n.30.

<sup>43</sup> Agreement on the Gaza Strip and the Jericho Area, May 4, 1994, Isr.-PLO, 33 I.L.M. 622 [hereinafter Gaza-Jericho Agreement]. For the most comprehensive review of the sources of Palestinian law, see Anis F. Kassim, *Legal Systems and Developments in Palestine*, 1 PALESTINIAN YEARBOOK OF INTERNATIONAL LAW 19, 19-35 (1984). For a review of the West Bank court system before the intifada, see RAJA SHEHADA, THE WEST BANK AND THE RULE OF LAW, 13-51 (Int'l Comm'n Of Jurists, 1980); A more up to date version can be found in Raja Shehada, *Occupier's Law*, 78-101 (Inst. for Palestine Stud., 1985). For a partial list of Palestine Mandate laws, see generally MOSES DOUKAN, O.B.E. ED., LAWS OF PALESTINE 1926 - 1931 (L.M. Rotenberg, Tel-Aviv 1932); LEON ROTENBERG, ED., LAWS OF PALESTINE 1934 - 1935 (L.M. Rotenberg ed., 1936).

<sup>44</sup> See Qayyum & Rasmussen, *supra* note 26, at 25.

<sup>45</sup> *Id.* at 26. Decisions of the courts in the West Bank cannot be appealed in Gaza, just as court decisions in Gaza cannot be appealed in Ramallah. See *id.*

<sup>46</sup> *Id.*

Jordanians have repealed these laws and enacted new ones. We are the only small piece of land which still uses [them]."<sup>47</sup>

As one World Bank consultant asked, "[t]he vital question is whether the mix of Turkish, British, Egyptian, Israeli and Jordanian laws inherent in the Palestinian territories can be forged into a coherent, hospitable commercial code for foreign investors or is the problem still political."<sup>48</sup>

Just what are Palestine's arbitration rules regarding international commercial agreements?<sup>49</sup> In Gaza, the PA administers the British Mandatory Arbitration Ordinance of 1926,<sup>50</sup> which is based almost entirely on the English Arbitration Act of 1889,<sup>51</sup> "with pre-1967 legislation by the Egyptian governors and the Gaza Assembly, and PNA enactments."<sup>52</sup> In "Jericho, . . . the PNA administers pre-1967 Jordanian law, with PNA enactments."<sup>53</sup> And "in the

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<sup>47</sup> Interview with Chief Justice Khalil Silwani, West Bank High Court of Appeals, IPCRI L. & DEV. PROGRAM BULL. (Israel/Palestine Center for Research and Information, Jerusalem, Israel), Summer 1995, at 3 ("address[ing] the benefits and possibilities of Israeli-Palestinian legal exchange and cooperation").

<sup>48</sup> Moustafa Ahmed Moustafa, *The Political Economy of the Peace Process in a Changing Middle East* 49 (United Nations University, World Institute for Development Studies No. 8, Dec. 1995).

<sup>49</sup> This raises the issue of just *what are* Palestinian domestic rules of arbitration. Do the operative Jordanian statutes - Jordanian Law No. 18 of 1953 regarding arbitration and Jordanian Law No. 8 of 1952 regarding enforcement of foreign judgments, and the laws under the British Mandate: Law No. 9 of 1926 regarding arbitration and Order No. 674 of 1930 regarding Foreign Arbitration Awards, apply as the domestic rules? *See text infra* at pp. 200-04 for a discussion of the New York Convention's effect on the Geneva Convention of 1927 noted in Order No. 674. *See generally* SHEHADEH, *supra* note 38, 74-79 (reviewing the legal system as derived from the different periods). For a quaint colonial description of the Mandatory legal system, see WILLIAM BURDICK, *THE BENCH AND BAR OF OTHER LANDS* 522-37 (1939).

<sup>50</sup> *See* ROBERT HARRY DRAYTON, *THE LAWS OF PALESTINE*, ch. 6 *Arbitration* 40 (1934); DOUKHAN, *supra* note 43, at 163; Daniel Kalman, Adv., *Recommendations for Improvement of Contract Enforcement Procedure in the Palestinian Territories*, in *COMMERCIAL CONTRACT ENFORCEMENT IN THE PALESTINIAN TERRITORIES* 47, 50 (5 IPCRI Commercial Law Reports Series 1997) [hereinafter "Enforcement"].

<sup>51</sup> Arbitration Act, 1889, 52 & 53 Vict., ch. 49 (Eng.); *see also* Enforcement, *supra* note 50, at 50.

<sup>52</sup> PATRICK MEAGHER ET AL., *COMMERCIAL LEGAL INSTITUTIONS IN THE WEST BANK AND GAZA*, 5 (Center for Institutional Reform and the Informal Sector Country Report No. 18, 1995); Enforcement, *supra* note 50, at 50.

<sup>53</sup> MEAGHER ET AL., *supra* note 52, at 5. Jordanian Law No. 18 of 1953 (West Bank) and Law No. 9 of 1926 (Gaza). *See*, RICHARD MEEDS, Vol. 1, *BUSINESS LAWS OF JORDAN* (1998), for an English translation of the Arbitration Act, Jordanian Law No. 18 of 28 December 1952 (Official Gazette No. 1131 dated 17 January 1953).

The legal structure for the encouragement of foreign investment in the Gaza Strip and Jericho prior to the Israeli withdrawal is equally nontransparent. According to Molkner the "legal

West Bank, . . . the Israeli Civil Administration applies . . . pre-1967 Jordanian law . . . [and some] Military Orders.”<sup>54</sup>

#### A. *Jordanian Law of 1953*

Jordanian arbitration laws passed in 1953 govern the West Bank. The laws are Law No. 18 of 1953 regarding arbitration (the “Arbitration Law”)<sup>55</sup> and Law No. 8 of 1953 regarding enforcement of foreign judgments (the “EFJ”).<sup>56</sup> They are a “scarce improvement” over the mandatory ordinances.<sup>57</sup>

The Arbitration Law provides that “an arbitration agreement may not be revoked except with the consent of the parties thereto or the approval of the Court.”<sup>58</sup> The Arbitration Law provides that every action brought by the provision of this Law “shall be filed with the court.”<sup>59</sup> The “arbitration agreement may not be revoked without the consent of the parties or the

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structure consisted of: [Jordanian Temporary Law No. 1 for 1967: The Encouragement of Capital Investment Law], two Israeli military orders: The Encouragement of Capital Investment, Military Order 1055 of June 17, 1991 (Gaza District) (Isr.), and The Encouragement of Capital Investment, Military Order 1342 of July 7, 1991 (Judea and Samaria) (Isr.)], and a set of policy directives issued by the Israeli Civil Administration in the West Bank: The Encouragement of Investment Act (as amended 21 November 1991); Civil Administration of Judea & Samaria (Judea and Samaria) and Unnumbered Directives on The Encouragement of Foreign Investment.” Molkner, *supra* note 1, at 1432 & nn. 37-39. “These laws, orders, and directives relied on discretionary decision-making and heavy administrative control while granting insufficient incentives and legal guarantees to investors.” *Id.* at 143.

<sup>54</sup> MEAGHER ET AL., *supra* note 52, at 5. The administrative and legal framework in which the Military Administration operated is described in Meir Shamgar, *Legal Concepts and Problems of the Israeli Military Government – the Initial Stage*, in *MILITARY GOVERNMENT IN THE TERRITORIES ADMINISTERED BY ISRAEL 1967-1980*, vol. 1, 22-31 (Meir Shamgar ed., 1982). Since that time over 1200 military orders have been promulgated. Raja Shehada, *The Legislative Stages of the Israeli Military Occupation in INTERNATIONAL LAW AND THE ADMINISTRATION OF OCCUPIED TERRITORIES 151-168* (Emma Playfair ed., Oxford U. Press 1992). For a discussion of changes in Israeli law pursuant to military orders, see V. EYAL BENVENISTI, *LEGAL DUALISM: THE ABSORPTION OF THE OCCUPIED TERRITORIES INTO ISRAEL 33-39* (Westview Press, 1990).

<sup>55</sup> See ABDUL HAMID EL-AHDAB, *ARBITRATION WITH THE ARAB COUNTRIES 239* (2d ed. 1999) (“The Jordanian Arbitration Law of 1953 . . . repealed the old Palestinian Act of 1933 (as modified in 1946) and also the Arbitral Proceedings of 1935”).

<sup>56</sup> See *The Law of Enforcement of Foreign Judgments*, Law No. 8 (1952) (Jordan), *reprinted in Law of Enforcement of Foreign Judgments, THE BUSINESS LAWS OF JORDAN, supra*, note 53.

<sup>57</sup> Kalman, *supra* note 50. The Arbitration Law “was influenced largely by the old English arbitration law . . . [It] kept the main features of the previous act which had been issued during the British mandate of Palestine.” EL-AHDAB, *supra* note 55, at 239.

<sup>58</sup> The Arbitration Law No. 18 of 1952, art 6, *supra* note 53.

<sup>59</sup> *Id.* art. 3.

approval of the court” and “shall have the force of a court judgment in all respects.”<sup>60</sup> The Jordanian Court recognizes arbitration agreements and when requested by a party, shall issue an injunction suspending court proceedings where the parties have previously agreed to arbitration, provided the court is satisfied that the party requesting the suspension will move ahead with the arbitration and there are no reasons precluding the transfer to arbitration.<sup>61</sup> The court may, in the following situations, set aside an arbitration award:

- (1) If it was based on a void arbitration agreement, or was issued after the expiry of the period fixed for delivery thereof, or if the arbitrator has acted *ultra vires*;
- (2) If either party to the arbitration, the umpire or any arbitrator did not have full capacity, such as being a minor or under legal restraints; or
- (3) If the award was delivered by arbitrators who were not duly appointed, or if the award was delivered by some of the arbitrators without being authorized to deliver the judgment in the absence of the others.<sup>62</sup>

“[T]he Court may endorse an arbitration award if it is evident that the respondent was fully served and has failed to submit an objection within the prescribed time limit.”<sup>63</sup> Once endorsed by the court, the award “shall be executed in the same manner as any court judgment or decision.”<sup>64</sup> The Arbitration Law shall also apply to arbitrations to which the government is party.<sup>65</sup> Jordan’s 1952 Law on the Enforcement of Foreign Judgments<sup>66</sup> defines foreign judgments as “every judgment passed by a court outside the Hashemite Kingdom of Jordan concerning civil procedures and entailing the payment of a sum of money . . . including the arbitrators’ award if the award is, by force of law, capable of being enforced as a court’s judgment in the country where the arbitration occurred.”<sup>67</sup> A foreign award may be enforced by filing an application before the appropriate court and providing a certified copy, in Arabic, of the judgment.<sup>68</sup> The court may dismiss a petition requesting the enforcement of a foreign judgment if (i) “the court which passed judgment was not a competent court;” (ii) the court did not have personal jurisdiction; (iii) proper service was not effected; (iv) the judgment was obtained by fraud; (v) the judgment is not final; or (vi) “the cause of action is contrary to public policy

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<sup>60</sup> *Id.* art. 4.

<sup>61</sup> *Id.* art. 6.

<sup>62</sup> *Id.* art. 13.

<sup>63</sup> *Id.* art. 16.

<sup>64</sup> *Id.* art. 17.

<sup>65</sup> *Id.* art. 20.

<sup>66</sup> The Law of Enforcement of Foreign Judgments, *supra* note 53.

<sup>67</sup> *Id.* art. 2.

<sup>68</sup> *Id.* art. 3.

or public morals.”<sup>69</sup> Jordan has a requirement of reciprocity and may “dismiss a petition requesting the enforcement of a foreign judgment passed by a court of any country whose laws prohibit the enforcement of judgments passed by the Court of Jordan.”<sup>70</sup>

Both law No. 8 and No. 18 are still in use in Jordan today. However, a draft commercial arbitration act “the Jordan bill” is currently under review by Jordanian authorities.<sup>71</sup>

Jordan was one of the first Arab States to sign and ratify the Arab Convention on the Enforcement of Judgments.<sup>72</sup> Jordan is also party to two standard international arbitration conventions: the Convention on the Settlement of Investment Disputes Between States and Nationals of other States, as well as the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.<sup>73</sup> The EFJ is consonant with the NY Convention.

### B. *British Law*

After two years as a military occupation force, Britain assumed the Mandate for Palestine in 1923.<sup>74</sup> The British began to revamp the Ottoman law in a variety of areas including the procedure and recognition of arbitrations.<sup>75</sup> Since 1926 the arbitration laws operative in the Mandate (and even now in Gaza) consists of the following: (i) Law No. 9 of 1926,<sup>76</sup> (ii) Law No. 14 of 1928,<sup>77</sup> and (iii) Law No. 30 of 1934.<sup>78</sup> His Majesty’s Government adhered, on behalf of Palestine, to the Protocol on Arbitration Clauses in Commercial

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<sup>69</sup> *Id.* art. 7.

<sup>70</sup> *Id.* art. 8.

<sup>71</sup> See EL-AHDAB, *supra* note 55, at 267.

<sup>72</sup> *Id.*, at 240.

<sup>73</sup> See discussion *infra* Part IV for a discussion of these conventions.

<sup>74</sup> See Terms of the British Mandate for Palestine confirmed by the Council of the League of Nations, in THE ARAB-ISRAELI CONFLICT AND ITS RESOLUTION: SELECTED DOCUMENTS 25 (Ruth Lapidoth & Moshe Hirsch eds., 1992) (providing that agreement entered into force on Sept. 29, 1923); See also DAVID FROMKIN, A PEACE TO END ALL PEACE 518-26 (1989) (providing background leading up to Britain’s acceptance of the mandate).

<sup>75</sup> The relevant clauses of the Ottoman law or Mejlle regarding arbitration can be found in THE MEJELLE, vol. 16, Chapter IV, sections 1841-1851, 325-26 (3d ed., 1980). See also Bentwich, *supra* note 36, at 67. See also Kassim, *supra* note 43, at 20-21 for a general discussion of the Ottoman law background to Mandate Law.

<sup>76</sup> Arbitration Ordinance, March 11, 1926 Official Gazette, 1925, 622; 1926, 117. , reprinted in LAWS OF PALESTINE, *supra* note 43.

<sup>77</sup> DRAYTON, *supra* note 50 at 40-45.

<sup>78</sup> *Id.*



Agreements signed at Geneva on the September 24, 1923,<sup>79</sup> and on March 12, 1926, the instrument was filed with the League of Nations and the accession took effect.<sup>80</sup> The primary focus of the Geneva Protocol was to require enforcement of arbitration agreements.<sup>81</sup> The Geneva Protocol also addressed the enforcement of awards, but only within the state where such awards were made.<sup>82</sup> The Geneva Convention extended the Geneva Protocol to the Execution of Foreign Arbitral Awards of 1927 to require enforcement of awards rendered pursuant to the Geneva Protocol within *any* contracting state.<sup>83</sup> Britain, on behalf of Palestine, signed the Geneva Convention.<sup>84</sup>

Under Mandatory law foreign awards are discussed in the Arbitration (Foreign Awards) Act, 1930<sup>85</sup> which provides that foreign arbitration awards subject to the provisions of the Act will be enforceable.<sup>86</sup> These awards will be treated as “binding for all purposes on the persons as between whom it was made, and may accordingly be relied on by any of those persons by way of defense, set off or otherwise in any legal proceedings in England.”<sup>87</sup> For a foreign award to be enforced, it must have (i) been made in pursuance of a valid agreement for arbitration; (ii) been made by the tribunal named in the agreement; (iii) been made in conformity with the law governing the arbitration; (iv) become final in the country where it was made; and (v) been a matter that could be lawfully arbitrated under the law of England.<sup>88</sup>

The purpose of the Geneva Convention of 1927 was to widen the scope of the Geneva Protocol by providing for the recognition and enforcement of arbitration awards pursuant to the Geneva Protocol within the territory of any contracting state, rather than only the state where the award was made.<sup>89</sup> “The Geneva Protocol and [the Geneva] Convention were major early steps towards an effective international framework for commercial arbitration,”<sup>90</sup> and were

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<sup>79</sup> See Protocol on Arbitration Clauses, *opened for signature* Sept. 24, 1923, 27 L.N.T.S. 157 [hereinafter Geneva Protocol].

<sup>80</sup> *Id.*

<sup>81</sup> See *id.*, at 158-59.

<sup>82</sup> See *id.*

<sup>83</sup> Arbitration (Foreign Awards Act, 1930 at 2451 (1930) [hereinafter Foreign Awards Act]; Convention on the Execution of Foreign Arbitral Awards, art. I, Sept. 26, 1927, 92 L.N.T.S. 301, 305 [hereinafter Geneva Convention].

<sup>84</sup> See Geneva Convention, *supra* note 83, at 303.

<sup>85</sup> *Id.* at 2451.

<sup>86</sup> See Foreign Awards Act, *supra* note 83.

<sup>87</sup> *Id.* at 2452.

<sup>88</sup> See *id.*

<sup>89</sup> Geneva Convention, art. I, *supra* note 83, at 305; see also GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION IN THE UNITED STATES 17 (1994).

<sup>90</sup> Born, *supra* note 89, at 17. For a helpful explanation of the 1923 Protocol and 1927 Convention see John Collier and Vaughn Lowe, *The Settlement of Disputes in International*

both succeeded by the New York Convention of 1958. The New York Convention provides that both the Geneva Convention and Protocol “shall cease to have effect between Contracting States on their becoming bound and to the extent they become bound, by this Convention.”<sup>91</sup> Great Britain is party to the New York Convention and by so doing is no longer party to the Geneva Convention.

#### IV. OVERVIEW OF STANDARDS IN INTERNATIONAL ARBITRATION

The standards in international commercial arbitration have been largely defined by international agreements and rules.<sup>92</sup> The agreements take several forms, including conventions and bilateral treaties, and the rules can be invoked in institutional or *ad hoc* arbitration proceedings.<sup>93</sup> The most effective mechanism for developing a standard in international commercial arbitration has been the ratification, by individual countries, of international conventions.

The United Nations has been very influential in developing such conventions. Most notably, it sponsored the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which has been signed by over 121 countries.<sup>94</sup> Recognizing that domestic laws on arbitration are generally unsatisfactory for the resolution of international disputes, the U.N. developed additional mechanisms to further define the standards: it sponsored

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*Law*, 55-6 (1999). See also Paolo Contini, *International Commercial Arbitration: The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 8 AM. J. COMP. L. 283, 287-90 (1959).

<sup>91</sup> Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, art. VII, 21 U.S.T. 2517, 330 U.N.T.S. 38 [hereinafter New York Convention]. See ALAN REDFERN & MARTIN HUNTER, *LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION* 63 & n.30 (2d ed. 1997) (“[T]he Geneva treaties are now only relevant for arbitral awards made in Portugal or Mauritius.”); Susan Choi, *Judicial Enforcement of Arbitration Awards Under the ICSID and New York Conventions*, 28 N.Y.U. J. INT’L L. & POL. 175 (1996) (noting that the New York Convention was drafted specifically to replace the 1927 Geneva Convention).

<sup>92</sup> See generally INTERNATIONAL ARBITRATION IN THE 21ST CENTURY: TOWARDS “JUDICIALIZATION” AND UNIFORMITY? (Richard B. Lillich & Charles N. Brower eds., 1994) (“There was much cross-fertilization in drafting these rules: ICC experience was well-known to those who prepared ICSID Rules; experts in ICSID and ICC cases helped draft UNCITRAL Rules; and, in turn, UNCITRAL’s approach strongly influenced LCIA and AAA international Rules”).

<sup>93</sup> See GLOBAL ECONOMIC CO-OPERATION: A GUIDE TO AGREEMENTS AND ORGANIZATIONS 413 (Bernard Colas ed., 1994) [hereinafter GLOBAL ECONOMIC CO-OPERATION]. For a general discussion of the various mechanisms that are used in international commercial arbitration, see generally CHRISTIAN BÜHRING-UHLE, *ARBITRATION AND MEDIATION IN INTERNATIONAL BUSINESS* 45-55 (1996) (discussing types of international commercial arbitration); REDFERN, *supra* note 91, at 39-69 (providing an overview of different types of international arbitration); GLOBAL ECONOMIC CO-OPERATION, *supra*, at 408-22.

<sup>94</sup> New York Convention, *supra* note 91.

the United Nations Commission on International Trade Law (“UNCITRAL”) Rules<sup>95</sup> and the UNCITRAL Model Law on International Commercial Arbitration.<sup>96</sup> These international commercial arbitration mechanisms have allowed the development of international standards, recognized and accepted by foreign investors and businessmen worldwide. While the PA cannot currently be party to the majority of these agreements,<sup>97</sup> it should be familiar with the significant conventions and models in order to evaluate its laws and amend them accordingly.

### A. Conventions

The New York Convention has been described as the “most important international treaty relating to international commercial arbitration.”<sup>98</sup> This convention sets out the enforcement and jurisdiction aspects of international commercial arbitration<sup>99</sup> and ensures the recognition of arbitral awards by excluding any review of the merits of foreign awards and limiting the grounds for refusal to recognize and enforce the award.<sup>100</sup> Only states may be party to

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<sup>95</sup> “UNCITRAL adopted Arbitration Rules in 1976, Conciliation Rules in 1980, [and] Guidelines for Administering Arbitration under the UNCITRAL Arbitration Rules in 1982. . . One of UNCITRAL’s specific objectives is the promotion of the New York Convention.” REDFERN, *supra* note 91, at 479. “Membership is restricted to states.” *Id.*

<sup>96</sup> United Nations Commission on International Trade Law, Model Law on International Commercial Arbitration (1985) was designed for use by “States with different legal, social and economic systems in order to contribute to the development of harmonious international economic relations.” G.A. Res. 4/72, U.N. GAOR, 40<sup>th</sup> Sess., 112<sup>th</sup> mtg, at 308, U.N. Doc. A/40/935 (1985). The Model Law is designed to be used together with the New York Convention and the UNCITRAL Rules on arbitration to “significantly contribute to the establishment of a unified legal framework for the fair and efficient settlement of disputes arising in international commercial relations.” *Id.* See generally Holtzman and Neuhaus, GUIDE TO THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION (Kluwer 1989); Broches, COMMENTARY ON THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION (Kluwer 1990).

<sup>97</sup> See *infra* pp. 224-28.

<sup>98</sup> REDFERN, *supra* note 91, at 63.

<sup>99</sup> New York Convention, art. II, *supra* note 91. The parties to the Convention agree to: “(i) recognize an agreement in writing,” and “(ii) to submit . . . all or any differences to arbitration . . . [for] settlement.” *Id.* art. II. “The term ‘Agreement in Writing’ shall include an arbitral clause in a contract or an arbitration agreement.” *Id.* The Convention sets out that “[t]he court of a Contracting State . . . shall . . . refer the parties to arbitration, unless it finds the agreement is null and void, inoperative or incapable of being performed.” *Id.*

<sup>100</sup> See *id.* art V. The Convention includes two reservations: (i) a state may decide to apply the Convention only to awards made in other Contracting States, and (ii) a state may decide that it will apply the Convention only to matters involving commercial law. See *id.* art. I.

this Convention.<sup>101</sup> Because Palestine is not considered to be a state, it is ineligible to be party to the New York Convention at this time.<sup>102</sup>

The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States ("ICSID") provides for arbitration between World Bank member states and nationals of member states.<sup>103</sup> ICSID Arbitration proceedings are insulated in all contracting states from any judicial

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<sup>101</sup> As of April 1999, 121 states were party to the convention, including 10 states in the Middle East: Jordan, Bahrain, Tunisia, Algeria, Syria, Kuwait, Egypt, Morocco, Saudi Arabia and Israel, each of which has ratified the Convention. Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), UNCITRAL Home Page [www.un.or.at/uncitral/status/.htm](http://www.un.or.at/uncitral/status/.htm) visited Aug. 29, 2000. See also [www.internationalADR.com](http://www.internationalADR.com) visited Aug. 29, 2000.

<sup>102</sup> See discussion pp. 224-28. In June of 1998, the New York Convention recognized its 40th anniversary. The passage of time has also seen enforcement of foreign awards through mechanisms other than the New York Convention, including the passage of international commercial arbitration acts. The New York Convention was not intended to prevail "where national rules or . . . other treaties . . . are more favourable to enforcement," or replace legal systems or prevent national laws from expanding enforcement beyond that New York Convention. Jan Paulsson, *Rediscovering the N.Y. Convention: Further Reflections on Chromalloy*, MEALEY'S INT'L ARB. REP., Apr. 1997, at 20.

<sup>103</sup> Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, *opened for signature* Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159 [hereinafter ICSID Convention]. The ICSID Convention established the International Centre for Settlement of Investment Disputes [hereinafter ICSID]. *Id.* at 162. ICSID was sponsored by the World Bank "to facilitate the settlement of investment disputes between governments and foreign investors . . . to promote increased flows of international investment." *The World Bank Group, International Centre for Settlement of Investment Disputes, About ICSID* (visited Mar. 4, 2000) <<http://www.worldbank.org/icsid/about/main.htm>>; See Ibrahim F.I. Shihata, *The Settlement of Disputes Regarding Foreign Investment: The Role of The World Bank, with Particular Reference to ICSID and MIGA*, 1 AM. U. J. INT'L L. & POL'Y 97 (1986), for a discussion of the World Bank's role in ICSID and MIGA. For an analysis of the effectiveness of ICSID arbitration, see Malcolm D. Rowat, *Multilateral Approaches to Improving the Investment Climate of Developing Countries: The Cases of ICSID and MIGA*, 33 HARV. INT'L L.J. 103, 105-18 (1992); REDFERN *supra* note 91 at 47.

Ratification of the ICSID Convention is not an obligation to use ICSID as a mechanism to settle a dispute, use of the Convention is within the sole discretion of each contracting state. See Georges R. Delaume, *Should Investment in the Third World be Internationally Protected? What Role for the United Nations*, 79 AM. SOC'Y INT'L L. PROC. 378, 383 (1985).

As of October 1, 1999, the ICSID Convention had been signed by 149 countries, 131 of which have ratified the convention, including numerous Arab States: Algeria, Bahrain, Egypt, Jordan, Kuwait, Morocco, Oman, and Tunisia. See World Bank Group, *ICSID: List of Contracting States and Other Signatories of the Convention* (visited Aug. 29, 2000) <<http://www.worldbank.org/icsid/constate/c-states-en.htm>>; International ADR, ICSID Signatories at [www.internationalADR.com](http://www.internationalADR.com), visited Aug. 29, 2000.

control or intervention, protecting both the investor and the contracting state.<sup>104</sup> Not being a sovereign state,<sup>105</sup> Palestine is not party to the ICSID Convention.

In 1978 ICSID established the "Additional Facility" to extend the Convention to parties who were not member states.<sup>106</sup> Although the Additional Facility allows arbitration for parties that are not member states, it only allows arbitration between a *state* or a national of a *state*.<sup>107</sup> Theoretically the PA could have access to the Additional Facility through Israel; however this is not practical. In effect, because Palestine is not a sovereign state, it does not have access to ICSID's Additional Facility

### B. Models

The aim of the UNCITRAL Rules<sup>108</sup> is "to establish a procedural framework" for arbitration which will "ensure a general international acceptance" of the arbitration result, particularly under the New York Convention.<sup>109</sup> The Rules were designed to be equally "acceptable . . . in the North, South, East and West," and were unanimously adopted by the General Assembly of the United Nations in December 1976.<sup>110</sup> Parties do not need to be a member of UNCITRAL to apply UNCITRAL Rules.<sup>111</sup>

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<sup>104</sup> Insertion of an ICSID clause is widely used in many Bilateral Investment Treaties (BITs), national investment laws and codes, as well as individual agreements. Rowat, *supra* note 103, at 118.

<sup>105</sup> See discussion pp. 224-28.

<sup>106</sup> The Additional Facility was sponsored by the World Bank to "facilitate foreign private investment by providing a dependable dispute resolution mechanism that would be acceptable both to host governments and foreign investors." See Rowat, *supra* note 103, at 118 fn 62. The World Bank's involvement in the development of the WBG, as an area separate from any member state, dates back to 1992. At which time the World Bank was asked to conduct an in-depth assessment of the development needs of select economies of the Middle East Region, including the WBG. Shihata, *supra* note 103.

<sup>107</sup> See World Bank Group, *ICSID Additional Facility, Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the International Centre for the Settlement of Investment Disputes (Additional Facility Rules)* (visited April 2, 2000) <<http://www.worldbank.org/icsid/facility/3.htm>>.

<sup>108</sup> The UNCITRAL Rules [hereinafter Rules] were promulgated by the General Assembly of the United Nations in December 1966. See *Report of the United Nations Commission on International Trade Law on the Work of its Eighteenth Session*, U.N. GAOR 40<sup>th</sup> Sess. Supp. (No. 17) at 1, U.N. Doc. A/40/17 (1985).

<sup>109</sup> REDFERN, *supra* note 91, at 480.

<sup>110</sup> *Id.*

<sup>111</sup> See Gerold Herrman, *The UNCITRAL Arbitration Law: A Good Model of a Model Law*, 3 UNIFORM L. STUD. 483, 484 (1998).

The UNCITRAL Model Law on International Commercial Arbitration (1985)<sup>112</sup> reflects a worldwide consensus on the principles and important issues of the practice of international commercial arbitration. The Model Law was designed for use by States with “different legal, social and economic systems” to contribute to the development of harmonious international economic relations and to help establish “a unified legal framework for the fair and efficient settlement of disputes arising in international commercial relations.”<sup>113</sup> The Model Law covers all stages of the arbitral process, beginning with the arbitration agreement and ending with the recognition and enforcement of the arbitral award.<sup>114</sup>

The Model Law is a *model* that nations can use in its entirety or as a guide. As a guide, the Model law provides internationally accepted principles relating to the support for, and control of, arbitration by national courts. At present, it is unlikely that any country introducing new legislation relating to arbitration will do so without first examining the text of the Model Law.<sup>115</sup> Even when the state does not adopt the Model Law *in toto*, it will adopt a similar format to make its own law more accessible and transparent to foreign lawyers.<sup>116</sup>

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<sup>112</sup> For the text of the Model Law, see *United Nations Commission on International Trade Law, Model Law on International Commercial Arbitration*, U.N. GAOR 40th Sess., Supp. (No. 17), Annex I, at 81, U.N. Doc A/40/17 (1985) [hereinafter Model Law], reprinted in *Model Law on International Commercial Arbitration* 24 I.L.M. 1302 (1985).

<sup>113</sup> *Id.*

<sup>114</sup> Model Law, *supra* note 112, reprinted in 24 I.L.M. 1302.

<sup>115</sup> See Herrman, *supra* note 111, at 484-85. “[M]ore than one quarter of the world’s territory is covered by enactments based on the UNCITRAL Model . . . and more countries are to follow.” *Id.* at 485.

<sup>116</sup> Cf. REDFERN, *supra* note 91, at 525. The Model law can be adopted with accompanying modifications, as was the case with Egypt when it promulgated their new Arbitration act, Law No. 27/1994. See Gerold Herrman, *Does the World Need Additional Uniform Legislation on Arbitration?*, 15 ARB. INT’L 211, 212-13 (1999). Today, Cairo is emerging rapidly as a center of Arab business and money, perhaps due in part to enacting the Model Law. Cf. EL-AHDAB, *supra* note 55, at 157.

Thirty-seven countries and states have enacted legislation based on the Model Law. UNCITRAL Home Page, Current Status on Conventions and Model Laws <<http://www.un.or.at/uncitral/status/htm>> visited April 1, 1999. Legislation based on UNCITRAL Model Law has been enacted in Australia, Bahrain, Bermuda, Bulgaria, Canada, Cyprus, Egypt, Germany, Guatemala, Hong Kong Special Administrative Region, Hungary, India, Iran (Islamic Republic of), Ireland, Kenya, Lithuania, Malta, Mexico, New Zealand, Nigeria, Oman, Peru, Russian Federation, Singapore, Sri Lanka, Tunisia, Ukraine, within the United Kingdom of Great Britain and Northern Ireland: Scotland; within the United States of America: California, Connecticut, Oregon and Texas; and Zimbabwe. *Id.*

“The Model Law, its language and structure did exert a strong influence” in the drafting of the 1996 English Arbitration Act. William A. Park, *The New English Arbitration Act*, MEALEY’S INT’L ARB. REP., June 1998, at 22 (noting that England’s new Arbitration Act took effect in 1997).

While states adopting the Model Law can modify it to cover both domestic and international arbitration, the Model Law was specifically designed for international commercial arbitration.<sup>117</sup> The Model Law provides those countries without a modern arbitration law with a complete system of arbitration that is in harmony with the international community. There are "Model Law countries in all continents, of all sizes and all stages of economic development, covering altogether more than one quarter of the world's territory."<sup>118</sup>

The U.N. Secretariat recently stated: "It is apparent that any State, if it were to follow the Model Law closely in drafting its new arbitration law, would be in very good company, would benefit from that company, would give yet another, and probably the clearest, signal of having joined the global league of nations with a hospitable legal climate and infrastructure for international commercial arbitration."<sup>119</sup> An entity does not, however, have to be a state to adopt the UNCITRAL Model Law, thus, the PA is free to adopt the Model Law *in toto* or use it as a guide.

#### V. INTERNATIONAL ARBITRATION ACTS AND INVESTMENT LAWS IN NEIGHBORING COUNTRIES

To facilitate economic development, Palestine should now be exploring the mechanisms and techniques developed in legal reform efforts elsewhere to see if they may be useful as models for Palestine in the reformation of its arbitration laws.<sup>120</sup> Because of both direct influence and a common foreign influence, Egypt and Jordan have, or had, legal processes, which closely resemble those in the WBG.<sup>121</sup> Both Egypt and Jordan have begun structural legal reform efforts, which have included reforms in international commercial arbitration.<sup>122</sup> Egypt has a relatively new International Commercial Arbitration Act, which adopts the Model Law with minor alterations,<sup>123</sup> and Jordan passed

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<sup>117</sup> See Model Law, *supra* note 112, art. 1 ("[T]his law applies to international commercial arbitration").

<sup>118</sup> Herrman, *supra* note 115, at 212.

<sup>119</sup> See *id.*, at 492. See also Mauro Rubino-Sammartano, *Developing Countries viv-a-vis International Arbitration*, 3 J. of Int'l Arb. 21 (1996) (stating that "developing countries seem to need arbitration, at least as much as developed countries, in order to settle their international disputes.")

<sup>120</sup> See Institute for the Study and Development of Legal Systems, *The Development of the Palestinian Civil and Criminal Justice Processes 7* (March 1995) (unpublished, on file with authors).

<sup>121</sup> Hiram E. Chodosh and Stephen A. Mayo, *The Palestinian Legal Study: Consensus and Assessment of the New Palestinian Legal System*, 38 HARV. INT'L L. J. 375, 394 (1997).

<sup>122</sup> See *id.*

<sup>123</sup> See Abdul Hamid El-Ahdab, *Enforcing Foreign Awards in the Middle East*, in COMMERCIAL LAW IN THE MIDDLE EAST 323, 336 (Hilary Lewis & Chibli Mallat eds., 1995) (discussing the UNCITRAL Model Law).

an Encouragement of Investment law in 1995 and is currently reviewing its international commercial arbitration laws.<sup>124</sup> Many Arab states are in the process of modernizing their laws.<sup>125</sup> Examining the international commercial arbitration laws in neighboring Arab countries, as well as the countries outside the region, allows the PA to learn from its experience as well as help the PA to create a law that meets both global and regional standards.

#### A. *Egypt*

In 1994, Egypt enacted a new arbitration act, Law on Arbitration in Civil and Commercial Matters (the “New Law”),<sup>126</sup> bringing its arbitration laws within international standards. Due, at least in part, to its new arbitration act, Egypt has experienced increased foreign investment.<sup>127</sup> The New Law largely

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<sup>124</sup> See EL-AHDAB, *supra* note 55, at 267.

<sup>125</sup> “[T]he future of Arab law . . . depends on its ability to comprehend and to adapt to the social and economic realities whose symmetry worldwide has become increasingly evident.” GEORGE N. SEFIR, *MODERNIZATION OF THE LAW IN ARAB STATES* 16 (1998).

<sup>126</sup> The Law Concerning Arbitration in Civil and Commercial Matters, (1994) (Egypt) [hereinafter *New Egyptian Law*]. For commentary on the 1994 arbitration law, see generally Amazu A. Asouzo, *The Egyptian Law Concerning Arbitration in Civil and Criminal Matters*, AFR. J. INT’L & COMP. L., Mar. 1996, 139; Mohiedin I. Alamedin, *Arbitration in Egypt*, 18 COMP. L. Y.B. INT’L BUS. 81, 81 (1996) (discussing the notable provisions of the law and their effect). “Egypt [was] the first country in the Arab Middle East to . . . [draft] an arbitration law based on the UNCITRAL model.” Michael H. Davies, *The Draft Arbitration Law in Egypt*, 3 ARAB L.Q. 119, 120 (1988).

<sup>127</sup> See EL-AHDAB, *supra* note 55, at 157 (“[M]ost foreign investors were waiting for an arbitration act which enabled them to settle by way of arbitration any disputes as to their investment . . . . [I]nvestments were waiting for its issuance.”); see also Michael Avramovich, *The Protection of International Investment at the Start of the Twenty-First Century: Will Anachronistic Notions of Business Render Irrelevant the OECD’s Multinational Agreement on Investment?*, 31 J. MARSHALL L. REV. 1201, 1237 n. 200 (quoting from Amy Dockser Marcus, *Egypt Quickly Turns An Investment Famine into Times of Plenty*, WALL ST. J., Apr. 10, 1997, at A1 (“Just a few years ago, [Egypt] had negligible foreign reserves, a huge budget deficit and no willing lenders. Today, foreign reserves exceed \$19 billion, the budget deficit is less than 1% of gross domestic product, and inflation is under control. Egypt now has an investment-grade rating from Standard and Poor’s, and it recently told the International Monetary Fund that it has no need to drawn [sic] on a line of credit available under an IMF agreement. U.S. companies, from Microsoft Corp. to McDonald’s Corp., have set up shop . . . [and] tourism is booming”).) We should not, of course, neglect the effect of Egypt’s foreign investment law. Cf. JESWALD W. SALACUSE, *Foreign Investment and Legislative Exemptions in Egypt: Needed Stimulus in New Capitalizations?*, in *SOCIAL LEGISLATION IN THE CONTEMPORARY MIDDLE EAST* (Lawrence O. Michalek & Jeswald W. Salacuse, eds., 1986) (providing that Egypt’s 1974 and 1977 Investment law). For a discussion of the modernization of Egypt’s civil justice process, see Hiram E. Chodosh et al., *Egyptian Civil Justice Process Modernization: A Functional and Systemic Approach*, 17 MICH. J. INT’L L. 865 (1996) (noting the need for modernization of legal processes to resolve commercial disputes when there is increased trade).



tracks the UNCITRAL Model Law.<sup>128</sup> Egypt has also ratified the New York Convention, ICSID and the Convention of 1974 on the Settlement of Investment Disputes Between the Arab States and the Nationals of other States.<sup>129</sup>

The New Law differs from the Model Law in several areas. The New Law applies to arbitrations having venue in Egypt as well as those taking place abroad where the parties have agreed to Egyptian Law, and to both domestic and international arbitrations.<sup>130</sup>

The arbitration is considered international when the subject matter of the arbitration agreement relates to international commerce, the parties are not from the same state; the parties agree to refer their arbitration to a "permanent arbitration organization," whether in or outside Egypt; the subject matter is linked to more than one state; or the designated place of arbitration or the place most closely linked to the dispute is outside Egypt.<sup>131</sup> To be enforced, the agreement must be in writing.<sup>132</sup> If there is a settlement during the arbitration, the arbitral tribunal shall, at the parties' request, terminate the proceedings.<sup>133</sup> This settlement must be included in the arbitral award.<sup>134</sup>

The language of the New Law leads to the determination that Egyptian courts, when examining awards for leave to enforce "are not bound by the decisions of the courts of the country where the award was made, or under whose law the award was made."<sup>135</sup> Under Egyptian law a relevant court will enforce a foreign award unless (i) the period for bringing an action to invalidate the award as set forth below has not expired, (ii) the award contradicts a judgment previously issued by the Egyptian courts on the matter in dispute, (iii) the award has not been validly served on the party against whom it was made,

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<sup>128</sup> See Abdul Hamid El-Ahdab, *Enforcement of Arbitral Awards in the Arab Countries*, 11 ARB. INT'L 169, 176 (1995) (discussing the variations in the Egyptian law from the Model Law).

<sup>129</sup> See Sameh Zezaa & Mohamed A. Ghannam, *The Commercial Laws of Egypt*, in DIGEST OF COMMERCIAL LAWS OF THE WORLD, Rel. 95-1, April 1995, at 57 [hereinafter *The Commercial Laws of Egypt*].

<sup>130</sup> See New Law *supra* note 126, art. 1. The reasons behind adopting an arbitration law, which applies to national and international arbitration are politically based. See EL-AHDAB, *supra* note 55, at 157. Egypt did not support returning to what they felt was a "mixed court" system, which was applied in Egypt when it was occupied by the English army." *Id.*

<sup>131</sup> See New Law *supra* note 126, art. 3.

<sup>132</sup> *Id.* art. 12.

<sup>133</sup> *Id.* art. 41.

<sup>134</sup> See *id.*

<sup>135</sup> The Commercial Laws of Egypt, *supra* note 129, at 178 (Egypt did not adopt Article 36 of Model Law regarding the setting aside of international arbitration awards).

or (iv) the award contravenes *public order* in Egypt.<sup>136</sup> The New Law provides the award can be set aside if it contravenes *public order*, whereas the Model Law provides for setting aside the award if it contravenes *international public order*.<sup>137</sup> This would seem to give Egyptian courts a great deal of discretion.<sup>138</sup> Some have interpreted these few changes from the Model Law as a step backward.<sup>139</sup> Overall however, the New Law is seen as a positive step for the Egyptian economy and investment in Egypt.

The enactment of the New Law has helped the Cairo Regional Centre for International Commercial Arbitration become a stronger presence for arbitration in the Middle East,<sup>140</sup> as well as have a positive impact on trade in

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<sup>136</sup> See *id.* at 55. Art. 53(1) of the Egyptian Arbitration Act allows for annulment of an arbitration award, namely (d) if the arbitral award fails to apply the law agreed by the parties to the subject matter of the dispute. *Id.* See *Chromalloy Aeroservices v. Arab Republic of Egypt*, 939 F. Supp. 907 (D.D.C. 1996). In *Chromalloy*, a \$16.2 million (U.S.) award “was rendered in 1994 against [Egypt], in favor of Chromalloy Aeroservices Inc.” Paulsson, *supra* note 102, at 21. Chromalloy “petitioned the U.S. District Court in Washington [D.C.] for confirmation of the award, whereupon [Egypt] brought an action before the Court of Appeal of Cairo seeking annulment of the award” based on the argument that the arbitral tribunal failed to apply the law agreed upon by the parties. *Id.* Thereafter, the Egyptian Court set aside the U.S. District Court award. See *id.* The U.S. Court granted enforcement of the arbitral award in spite of the Egyptian annulment. See *id.*; see also Stephen T. Ostrowski & Yuval Shany, Note, *Chromalloy: United States Law and International Arbitration at the Crossroads*, 73 N.Y.U. L. REV. 1650, 1653 (1998).

<sup>137</sup> “Public order is the limit of party autonomy and is different in national and international arbitrations. In national arbitration, one applies national public order whereas in international arbitration, one applies international public order . . . . It is strange that the new Egyptian Arbitration Act, whilst it distinguishes between national and international arbitration did not grant this distinction the effects which are generally linked to it in all arbitration acts which make such a distinction.”

EL-AHDAB, *supra* note 55, at 159.

<sup>138</sup> However, Egyptian courts have refused jurisdiction where a party has tried to invalidate an arbitration clause based on Egyptian public policy. The Court of First Instance refused jurisdiction where a standard ICC arbitration was present in the agreement. See Davies, *supra* note 126, at 122. “[T]he Court held that the arbitration clause effectively ousted the jurisdiction of the Egyptian Courts and rejected an argument as to the invalidity of the arbitration clause based on the failure of the parties to nominate the arbitrators in the arbitration clause.” Davies, *supra* note 126, at 122 (discussing a judgment rendered on January 27, 1987 by the Gaza Court of First Instance). The highest Court of Appeal in Egypt, the Court of Cassation, “held that the requirements of public policy did not prevent a dispute from being validly referred to arbitration outside of Egypt governed by procedural rules different from the Egyptian procedural rules.” *Id.* (discussing the decision of April 15, 1956).

<sup>139</sup> See El-Ahdab, *supra* note 128, at 176 (discussing the differences in the Model Law and Egyptian New Law).

<sup>140</sup> See The Cairo Regional Centre for International Commercial Arbitration (CRCICA) (visited Jan. 21, 2000) <<http://www.crcica.org.eg/crcica98.htm>>. It is expected that 200

Egypt. Legal scholars and practitioners in Egypt are currently participating in round table discussions regarding the status of Egypt's new arbitration law and the effect of the changes made from the UNCITRAL Model Law.<sup>141</sup>

In 1982, Egypt signed a bilateral investment treaty with the United States, which entered into force in 1992.<sup>142</sup> This treaty defines the rights of individual investors with respect to their investments in the other contracting country and protects their ability to secure arbitration in a neutral forum.<sup>143</sup>

### B. *Jordan Post 1953*

In 1989, Jordan began its economic reform program, with a concentration on trade liberalization. In an effort to create a friendly investment environment, Jordan continued the reform in 1995 with new and amended laws.

On September 16, 1995, the Jordanian parliament approved the Law for the Promotion of Investment.<sup>144</sup> This law applies to investments, by non-Jordanians, in the Kingdom. Law No. 16, Art 33 provides for the settlement of investment disputes:

Investment disputes between an Investor of foreign capital and Jordanian Government corporations shall be amicably settled. If no such settlement is reached within a period not exceeding six months, any party to the dispute may bring court action or refer the matter for adjudication before the 'International Centre for the Settlement of Investment Disputes' for its settlement by arbitration or conciliation in accordance with the 'Agreement for Settlement of Investment Disputes between Countries and Nationals of other Countries' signed by the Kingdom.<sup>145</sup>

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cases will have been filed with the Centre by the end of 1999. Mohie Eldin I. & Alman Eiden, *ARBITRAL AWARDS OF THE CAIRO REGIONAL CENTRE FOR INTERNATIONAL COMMERCIAL ARBITRATION*, vii (Kluwer 2000). For a description of the CRCICA's objectives, scope, role, ADR measures, fees, and rules, see *id.* See also, Cairo Centre for Commercial Arbitration (visited Feb. 9, 2000) <<http://www.lac.com.jo/news37.htm>>. For an analysis and evaluation of the Regional Centre, see YVES DEZALAY & BRYANT G. GARTH, *DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER* 241-431(1996).

<sup>141</sup> Letter from Dr. M.I.M. Aboul-Enein, Director, Cairo Regional Centre for International Commercial Arbitration, to Shelby R. Quast, 1 (Sept. 30, 1998) (on file with author) (stating that the round table discussions are still ongoing, but that they "are tending to make the Egyptian Law more and more patterned on the UNCITRAL Model Law.") For a detailed discussion of Egypt's new Arbitration Act, see EL-AHDAB, *supra* note 55, at 155-202.

<sup>142</sup> See Treaty Concerning the Reciprocal Encouragement and Protection of Investment, Sept. 29, 1982, U.S.-Egypt, S. TREATY DOC. NO. 99-24 (1986), 21 I.L.M. 927, 1982.

<sup>143</sup> See *id.* art. 6.

<sup>144</sup> Law for the Promotion of Investment of 1995, Law No. 16 (1995), *reprinted in* BUSINESS LAWS OF JORDAN (Feb. 1998).

<sup>145</sup> *Id.* art. 33.

As of this date, Jordan has not enacted a new arbitration law; the 1952 Laws on Arbitration and Enforcement of Foreign Judgments are still in effect.<sup>146</sup> However, Jordan has draft revisions to its commercial arbitration act on the table.<sup>147</sup> The revisions follow certain aspects of the UNCITRAL Model Law such as the definition of agreement to arbitrate and areas of party autonomy.<sup>148</sup> However, the proposed revision restricts arbitrability to “matters which may be subject to an amicable settlement.”<sup>149</sup>  $\text{N}_U\text{N}_U$

In 1997, Jordan entered into a bilateral investment treaty with the United States.<sup>150</sup> This treaty defines the rights of individual investors with respect to their investments in the other contracting country and protects their ability to secure arbitration in a neutral forum.<sup>151</sup>

### C. *Israel*

The Israeli Arbitration Law was enacted in 1968 and amended in 1974.<sup>152</sup> The 1974 amendment addresses foreign arbitral awards.<sup>153</sup> As amended, the arbitration law provides the Israeli courts with a good deal of discretion over arbitration agreements and awards. If a dispute with an arbitration clause “is brought in court . . . a party to the action who is a party to the arbitration agreement applies for a stay of proceedings in the action.”<sup>154</sup> The court shall stay the proceedings between the parties to the agreement, provided the applicant is prepared to move ahead with the arbitration.<sup>155</sup> However, the court may refrain from staying the proceeding “if it sees a special reason why the

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<sup>146</sup> Jordan, however, is in the process of drafting a new arbitration law.

<sup>147</sup> See EL-AHDAB, *supra* note 55, at 267.

<sup>148</sup> See *id.* at 268-76.

<sup>149</sup> *Id.* at 268 (“matters concerning public order, bankruptcy or any dispute of a criminal character cannot be arbitrated.”). El-Ahdab provides a thorough discussion of the proposed revisions.

<sup>150</sup> See Treaty Concerning the Encouragement and Reciprocal Protection of Investment, July 2, 1997, U.S.-Jordan, 36 I.L.M. 1498.

<sup>151</sup> See *id.* art. 9.

<sup>152</sup> Arbitration Law, 5728-1968, passed by the Knesset on the 5th Av, 5728 (30th July, 1968) and published *Sefer Ha-Chukkim* No. 535 of the 15th Av, 5728 (9th August, 1968) 184, as amended by Arbitration (Amendment) Law, 5734-1974, passed by the Knesset on the 12th Tammuz (2nd July, 1974) and published in *Sefer Ha-Chukkim* No. 737 of the 20th Tammuz, 5734 (10 July 1974) 93, reprinted in 3 INTERNATIONAL COMMERCIAL ARBITRATION IV Israel, 1-17 (Kenneth R. Simmonds ed., 1992) [hereinafter Arbitration (Amendment) Law]. For a comprehensive review of Israel’s arbitration law, see S. Ottolenghi, *Bo rerut Din-Va-Nohal* (1991) (in Hebrew).

<sup>153</sup> See Arbitration (Amendment) Law, *supra* note 152.

<sup>154</sup> See *id.* art. 5(a).

<sup>155</sup> *Id.*

dispute should not be dealt with by arbitration.”<sup>156</sup> The law, however, does not define “special reason,” but states that where the court decides that a “dispute shall not be dealt with by arbitration, any stipulation in the agreement between the parties making the commencement or termination or arbitration a pre-condition of the realization of a right between them shall be void.”<sup>157</sup>

The arbitration law provides that where an action is brought into court in a dispute which the parties had agreed to refer to arbitration, and an international convention to which Israel is party applies to the arbitration, and “such convention lays down provisions for a stay of proceedings,” the court shall exercise its power to stay the proceeding in accordance with and subject to those provisions.<sup>158</sup> The court also has the discretion to, “on the application of a party who has appointed an arbitrator, appoint that arbitrator, or another person, as sole arbitrator.”<sup>159</sup> “Where an additional arbitrator or an umpire has been appointed, whether under the arbitration agreement or by the court, the court may, on the application of a party, notwithstanding anything contained in the arbitration agreement, appoint that arbitrator as sole arbitrator if it sees a special reason for doing so in the interests of instituting or completing the arbitration.”<sup>160</sup>

The Israeli Arbitration Law provides that “an arbitrator shall, in the arbitration, have the same power of summoning witnesses to give evidence or produce documents as a court has in an action brought before it, and he may award remuneration and expenses.”<sup>161</sup> The court has the same powers, in respect to arbitration, as an action brought directly before it to: (i) summon a witness and determine their remuneration and expenses; (ii) adopt coercive and punitive measures “against a witness who has not answered a summons of the arbitrator or of the court or has refused to testify;” (iii) take evidence “forthwith or out of the jurisdiction;” (iv) substitute “service of notice or documents on the litigants;” and (v) attach property, prevent departure from Israel, security for the production of property, the appointment of a receiver, a mandatory injunction and a prohibitive injunction.<sup>162</sup>

The Israeli law recognizes arbitral decisions as having the same effect as a decision of the court.<sup>163</sup> However, filing “an application with the court in connection with an arbitration . . . shall not stay the arbitration proceedings unless the court or arbitrator so directs.”<sup>164</sup>

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<sup>156</sup> *Id.* art. 5(c).

<sup>157</sup> *Id.* art. 5 (b).

<sup>158</sup> *Id.* art. 6.

<sup>159</sup> *Id.* art. 8(c).

<sup>160</sup> *Id.* art. 9.

<sup>161</sup> *Id.* art. 13(a).

<sup>162</sup> *Id.* art. 16(b).

<sup>163</sup> *Id.* art. 17(b).

<sup>164</sup> Arbitration (Amendment) Law, *supra* note 152, art. 18.

The Arbitral Award must be in writing and must “be signed by the arbitrator, indicating the date of signature.”<sup>165</sup> Unless there is a contrary provision in the arbitration agreement, “the arbitral award binds the parties and their successors as *res judicata*.”<sup>166</sup> The Israeli courts “may, on the application of a party, confirm an arbitral award.”<sup>167</sup> Upon confirmation, the award shall “be treated as a judgment of the court.”<sup>168</sup> The court will not, however, “entertain opposition to the confirmation of an arbitral award,” except via an application to set it aside.<sup>169</sup> The court may only “set aside an award, wholly or in part, or supplement or amend it, or remit it to the arbitrator” for a number of defined reasons.<sup>170</sup> The arbitration law further provides that “an application for the confirmation or setting aside of a foreign arbitral award to which an international convention applies to which Israel is party and which lays down provisions as to the [subject] matter in question shall be filed and dealt with in accordance with and subject to those provisions.”<sup>171</sup> Israel is party to the New York Convention<sup>172</sup>

A review of the Israeli statute suggests that it gives far more discretion to its own courts than does the UNCITRAL model. In that regard, Israel uses a ‘national’ model of arbitration rather than the ‘a-national’ model supported by the consensus of recent commentators<sup>173</sup> and exemplified by the UNCITRAL Model Law. To that respect, the Israeli statute lags behind the international consensus exemplified in the PA draft law we recommend herein.

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<sup>165</sup> *Id.* art. 20.

<sup>166</sup> *Id.* art. 21.

<sup>167</sup> Arbitration (Amendment) Law, *supra* note 152, art. 23(a).

<sup>168</sup> *Id.*

<sup>169</sup> *Id.* art. 23(b).

<sup>170</sup> *Id.* art. 24 (the defined reasons are: (1) the arbitration agreement was not valid; (2) the award was made by an arbitrator nor properly appointed; (3) the arbitrator acted without authority or exceeded the authority vested in him by the arbitration committee; (4) a party was not given a suitable opportunity to state his case or to produce his evidence; (5) the arbitrator did not determine one of the matters referred to him for determination; (6) the arbitrator did not assign reasons for the award though the arbitration agreement required him to do so; (7) the arbitrator did not make the award in accordance with law though the arbitration agreement required him to do so; (8) the award was made after the period for making it had expired; (9) the contents of the award are contrary to public policy; and (10) a ground exists on which a court would have set aside a final, non-appealable judgment.).

<sup>171</sup> Arbitration (Amendment) Law, *supra* note 152, art. 29(A).

<sup>172</sup> See New York Convention, *supra* note 91.

<sup>173</sup> For a discussion of the trend toward a national arbitration in furtherance of the goal of party autonomy, see Hans Smit, *A-National Arbitration*, 63 TULANE L. REV. 629 (1989); see generally, Jan Paulsson, *Arbitration Unbound, Award Detached from the Law of its Country of Origin*, 30 INT’L & COMP. L.Q. 358 (1981).

## VI. THE STATUS OF ARBITRATION IN PALESTINE - RELEVANT PALESTINIAN LEGISLATION

### A. *Sulha*

Many Arab states, after achieving independence, founded their legal systems on Western constitutional concepts.<sup>174</sup> "Arab *societies*, however, [often] continued to practice traditional customary law."<sup>175</sup> Being under the rule of Israel, Palestinian society "retained the use of customary law even more than other Arab societies."<sup>176</sup> This was true both for commercial disputes as well as traditional inter-personal conflicts. Customary law in Palestine is viewed as the "intermediate state of the road to statehood—a means of linking the mostly traditional society to the embryonic semi-state structure."<sup>177</sup>

"The rituals vary from Israel-Palestine to Lebanon and Jordan, but the basic philosophy is based on *sulh* (settlement), *musalaha* (reconciliation), *musafaha* ('partaking of salt and bread' *i.e.*, hand-shaking), and *mumalaha* (breaking bread together)."<sup>178</sup> Arbitration and *Sulha*, a form of community mediation,<sup>179</sup> are "the two forms of alternative dispute resolution currently used

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<sup>174</sup> Ifrah Zilberman, *Palestinian Customary Law in the Jerusalem Area*, 45 CATH. U. L. REV. 795, 795 (1996).

<sup>175</sup> *Id.* See *e.g.*, Joseph Ginat, BLOOD DISPUTES AMONG BEDOUIN AND RURAL ARABS IN ISRAEL (U. of Pittsburgh Press 1987); G. Salahut, THE CUSTOMARY LAW (Acer, Dar al-Aswar. Arb. 1987); F.H. Stewart, TRIBAL LAW IN THE ARAB WORLD, A Review of Literature, 17 IJMES 474 - 480 (1987); CATHIE J. WITTY, MEDIATION AND SOCIETY: CONFLICT MANAGEMENT IN LEBANON (1980) (discussing means of conflict resolution in Arab society). For a useful discussion of conflict resolution in a mature Arab legal system, see John S. Murray, *The Cairo Stories: Some Reflections on Conflict Resolution in Egypt*, NEGOTIATIONS J., Jan. 1997, at 39, 39-60. An insightful summary of arbitration in Egypt's business sector can be found in: Nathan J. Brown, THE RULE OF LAW IN THE ARAB WORLD 228-35 (Cambridge, Cambridge U. Press 1997). For an analysis of commercial arbitration in Egypt from the perspective of the arbitration community, see DEZALAY & GARTH, *supra* note 140, at 219-49.

<sup>176</sup> Zilberman, *supra* note 174, at 795. See also ELIAS J. JABBOUR, *SULHA: PALESTINIAN PEACEMAKING PROCESS* (House of Hope Publications 1996), pp. 53-57.

<sup>177</sup> Zilberman, *supra* note 174, at 796.

<sup>178</sup> George E. Irani, *Reconciliation and Peace: Rituals for the Middle East*, MIDDLE E. INSIGHT Sept.-Oct. 1998, at 24, 26. ("The three main pillars of the *Sulha* (from *musalaha*, or reconciliation) are: forgiveness (*musamaha*), shaking hands (*musafaha*), and partaking of salt and bread, or sharing a meal (*mumalaha*). This is essentially a practice remaining from biblical traditions.")

<sup>179</sup> Palestinian Legal Study, *Solutions to Contemporary Problems in the Palestinian Civil and Criminal Systems*, Report by the Institute for the Study and Development of Legal Systems 10 (July 25, 1996) (*Sulha* is a local form of Palestinian mediation, overseen by the senior community leader, used to resolve civil disputes). See also JABBOUR, *supra* note 176; SAMIR SALEH, *COMMERCIAL ARBITRATION IN THE MIDDLE EAST: A STUDY IN SHARI'A AND*

by Palestinians outside the [court system].”<sup>180</sup> According to Islamic law (Shari’a), “the purpose of sulh is to end conflict and hostility among believers so that they may conduct their relationships in peace and amity.”<sup>181</sup> The communal Arab ritual of sulha is “a non-Western indigenous application of the process of acknowledgment, apology, compensation, forgiveness, and reconciliation.”<sup>182</sup>

### B. Dispute Resolution in the Legal System

In sharp contrast, “[i]n the larger Arab cities, individuals involved in conflicts are more likely . . . to resort to the official legal system to settle their disputes.”<sup>183</sup> This may be because the existing domestic arbitration scheme is ill-defined. At the initial hearing, the judge asks the parties if they wish to arbitrate or mediate. In the West Bank, with the consent of parties, judges may enquire whether the parties want conciliation. Furthermore, in domestic arbitration, arbitrators are “required by law to follow all judicial procedures;” however, arbitrators in WBG generally do not have legal or professional training.<sup>184</sup> This lack of legal training often “results in procedural or substantive *legal* error” in the arbitration process.<sup>185</sup> Thus, in WBG either a procedural or substantive error can be the basis for vacating an arbitral process, effectively resulting in a *de novo* trial.<sup>186</sup> Arbitration in WBG therefore lacks the quality of finality and the arbitrators in WBG generally lack the “*legal*

STATUTE LAW (1984); see generally Palestinian Conflict Resolution Center, *Wi’am: Sulha – Traditional Elements* (visited Feb. 4, 2000) <[www.planet.edu/~alaslak/work/sulha/elements.htm](http://www.planet.edu/~alaslak/work/sulha/elements.htm)> (discussing traditional elements of Sulha); Palestinian Conflict Resolution Center, *Wi’am: Sulha: Yesterday and Today* (visited Feb. 4, 2000) <<http://www.planet.edu/~alaslak/work/sulha/sulha.htm>> (providing an overview of Sulha yesterday and today).

<sup>180</sup> George E. Irani, *Islamic Mediation Techniques for Middle East Conflicts*, 5 MERIA. J. 19 (1999).

<sup>181</sup> M. Khadduri, *Suhl*, in C.E. BOSWORTH et al., *THE ENCYCLOPEDIA OF ISLAM*, Vol. IX (Brill, 1997), pp. 845-6.

<sup>182</sup> Zilberman, *supra* note 174, at 796.

<sup>183</sup> Irani, *supra* note 180, at 25. “The legal system is clogged, however, and corruption is pervasive.” *Id.*

<sup>184</sup> Palestinian Legal Study, *supra* note 179.

<sup>185</sup> *Id.* (stating that both procedure and substantive error can provide “a basis for vacating an arbitral award and results effectively in a *de novo* trial, causing even greater delay in the civil justice process.”)

<sup>186</sup> *Id.* In Gaza, “the Court may set aside the award . . . [w]here an arbitrator or umpire has misconducted himself or an arbitration award has been improperly procured.” DRAYTON, *supra* note 50 at Ch. 6, Arbitration, Art. 13 (1933). On the West Bank, “awards may be set aside . . . [if] the arbitration of award has been improperly procured, . . . and . . . the arbitrator or umpire has misconducted himself or the proceedings.” *Id.* ARBITRATION, Par. 621 at 329 (Vol. 2).



sophistication” required in the resolution of international commercial disputes.<sup>187</sup> Thus, in the WBG, formal arbitration “judgments are [often] enforceable only on the basis of honor and social or family pressure.”<sup>188</sup>

While it may make a great deal of sense for Palestinian society to follow customary law or *Sulha* for local disputes; most international investors require a more familiar and standard form of arbitration. This is particularly true for Israeli investors who are demanding access to arbitration in international transactions.<sup>189</sup> In the spring of 1998, Mandy Barak, director of the international trade division of the Federation of Israeli Chambers of Commerce, brought 30 federation members to Gaza to discuss investing in a proposed Gaza Industrial Estate. The main concern raised by these companies was “how can you secure our investments?”<sup>190</sup> The potential investors were concerned about the lack of Palestinian legislative framework that could secure their investments.<sup>191</sup> The former director-general of the Israeli Treasury recently stated that “Israeli businessmen refuse to give up the right to arbitrate . . . outside the Israeli legal system,” particularly in a developing legal system where the alternative is not clear.<sup>192</sup> Palestinian judges and attorneys have recognized the need for modernized alternative dispute resolution mechanisms to expedite the handling of commercial cases.<sup>193</sup> Only so much, however, can be done under existing law.

### 1. The Palestinian Law on the Encouragement of Investment

Recognizing the problems within the existing investment structure, the PA began reforming Palestinian commercial law to conform the legal structure “to

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<sup>187</sup> Palestinian Legal Study, *supra* note 179, at 11.

<sup>188</sup> *Investing in the PA Areas: Rules for Doing Business, Franchising Opportunities*, MIDDLE E. EXEC. REP., May 1997, at 20, 21.

<sup>189</sup> See Patricia Golan, *Marketing a Hard Sell Called Gaza Industrial Estate*, JERUSALEM POST, Nov. 30, 1998, at 17.

<sup>190</sup> *Id.*

<sup>191</sup> Zilberman, *supra* note 174, at 796.

<sup>192</sup> Golan, *supra* note 189, at 17 (quoting Ezra Sada, a private economic consultant, speaking about why he cannot sell the idea of investing in Gaza).

<sup>193</sup> Palestine Legal Study, *supra* note 179, at Status Report 9 (April 15-20, 1996 Meetings, Gaza, Hebron, Nablus, Ramallah) (members included well-respected judges from Gaza and the West Bank, leading commercial and civil attorneys, leading criminal defense attorneys, lead prosecutors in the tradition and security courts of Jenin, and the former Attorney General of the West Bank).

more modern standards.”<sup>194</sup> The unified investment law represents the PA’s first effort.<sup>195</sup>

On April 29, 1995, the PA promulgated the Law on the Encouragement of Investment. The Investment Law created a new legal structure for investment in the WBG and revoked all prior inconsistent legislation.<sup>196</sup>

The World Bank Guidelines on Legal Treatment of Foreign Investment defines effective investment guarantees as including: “(i) the availability of an independent and *fair forum* to settle the dispute between investors and the state, and (ii) the enforcement of the award rendered.”<sup>197</sup> These guidelines recommend that disputes between foreign investors and the host state be settled first through negotiations, then national courts, conciliation or binding arbitration.<sup>198</sup>

## 2. 1995 Palestinian Investment Law and Dispute Resolution

In contrast to World Bank guidelines, the 1995 Investment Law does not allow foreign investors any dispute settlement mechanisms other than the national courts and gives the PNA President (i.e. Yasser Arafat) the right to

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<sup>194</sup> See MAZEN E. QUPTY, et al., Mazen E. Qupty and Associates, *LEGAL ASPECTS OF DOING BUSINESS IN PALESTINE* 13-14 (1995).

<sup>195</sup> Cf. *Interim Agreement*, art. XVIII, *supra* note 1, (providing the Council has the power, within its jurisdiction, to adopt legislation). See also, *Investment Law*, *supra* note 4, at app. 603.

<sup>196</sup> See *Investment Law*, *supra* note 4, at app. 603-10. Article 22 provides that all other laws “contrary to this Law shall be invalid and revoked.” *Id.* Albeit, the question then raised is whether the PA or this law are “in the position to revoke all other relevant . . . inconsistent” laws or if this law simply adds to the “multilayered legal environment.” FIAS, *supra* note 29, at 23.

Article XVII of the Interim Agreement states that “[t]he territorial jurisdiction of the Council shall encompass Gaza Strip territory, except for the Settlements and Military Installation Area . . . , and West Bank territory, except for Area C which . . . will be gradually transferred to Palestinian jurisdiction . . .” *Interim Agreement*, art. XVII, *supra* note 1. Because Area “C” is not yet under Palestinian self-rule, the Investment Law does not apply to this area. Cf. *id.*, art. XVII, XVIII. See *supra* Part V for a discussion of pre-existing laws regarding arbitration, enforcement of foreign awards and investment.

<sup>197</sup> FIAS, *supra* note 29, at 18. See World Bank Development Committee, *Guidelines on the Treatment of Foreign Direct Investment*, reprinted in IBRAHIM F.I. SHIHATA, *THE LEGAL TREATMENT OF FOREIGN INVESTMENT: THE WORLD BANK GUIDELINES* (1993).

<sup>198</sup> See James D. Nolan, *A Comparative Analysis of the Laotian Law on Foreign Investment, The World Bank Guidelines on the Treatment of Foreign Direct Investment, and Normative Rules of International Law on Foreign Direct Investment*, 15 ARIZ. J. INT’L & COMP. L. 659, 688 (1998). For a discussion of the benefits of principles imbedded in the World Bank Guidelines, see Enrique R. Carrasco & Randall Thomas, *Encouraging Relational Investment and Controlling Portfolio Investment in Developing Countries in the Aftermath of the Mexican Financial Crisis*, 34 COLUM. J. TRANSNAT’LL. 539, 606-11 (1996).

approve any investor appeals. Article 20 of the 1995 Investment Law: Settlement of Disputes provides that “[t]he Palestinian courts shall have the competence and jurisdiction to resolve all disputes in accordance with applicable Palestinian laws.”<sup>199</sup> However, directly after Oslo, the Palestinian legal system was in a state of “profound deterioration.”<sup>200</sup> After many generations of political and military occupation, the Palestinian legal processes had been “divested of institutional resources, professional expertise, and legal procedures that are indispensable to the formation of a productive civil society.”<sup>201</sup> The legal system is still in need of significant reform and the judiciary is not yet fully developed.<sup>202</sup> This law falls short of the World Bank definition of effective investment guarantees: this is hardly the required independent and *fair forum* where foreign investors can resolve disputes.

Article 19 of the 1995 draft, requires that the President of the PNA personally decide the appeals of investors who have had their approval denied.<sup>203</sup> This requirement denies investors access to judicial review (and certainly

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<sup>199</sup> Investment Law, art. 20, *supra* note 4, at app. 609-10.

<sup>200</sup> Palestinian Legal Study, *The Restoration and Modernization of the Palestinian Civil and Criminal Justice Processes*, INST. FOR THE STUDY & DEV. OF LEGAL SYS. at 9 (1995) (reporting the culmination of a collaborative study by Palestinian and U.S. legal opinion leaders, including judges, lawyers and scholars).

<sup>201</sup> *Id.* at 9.

<sup>202</sup> Keith Molkner, A CRITICAL ANALYSIS OF THE PALESTINIAN LAW ON THE ENCOURAGEMENT OF INVESTMENT, 2 IPCRI Commercial Law Reports Series at 22 (1995). See John Quigley, *Judicial Autonomy in Palestine: Problems and Prospects*, 21 U. DAYTON L. REV. 697 (1996) (speculating about the prospects of judicial autonomy in an independent Palestine state); John Quigley, *The Role of Law in a Palestinian-Israeli Accommodation*, 31 CASE W. RES. J. INT'L L. 351 (1999) (discussing legal norms in Palestine).

<sup>203</sup> See Investment Law, art. 19, *supra* note 4, at app. 609.

#### Article 19

(1) Should the Agency find an investor, who has been granted a license, has failed to comply with the provisions of this Law or its regulations, or if an investor fails to abide by the conditions specified in the investment license, the Agency shall notify the investor in writing of its intention to cancel or suspend the licensed exemptions in the future or retroactively.

(2) Should the Agency find that the license was granted to the investor under false pretense, deceit, bribery or forgery or in a manner contrary to this Law and its regulations, the Agency may revoke such a license as of the date of its issue. All taxes, duties and other benefits and privileges granted to the investment shall be deemed to be payable immediately, with interest accrued from the date of [sic] the license was issued.

(3) In either of the two above mentioned occurrences, the investor may complain, within thirty days from the date of notification of the decision to the President of the Authority whose decision shall be final.

*Id.* art 19, translated in Fidler, *Foreign Investment in Palestine: An Analysis on the Law on the Encouragement of Investment in Palestine*, 19 FORDHAM INT'L L.J. 529, at 609.

cannot guarantee a neutral review) as well as precludes the use of binding international arbitration. As could be expected, many academicians and practitioners have argued that Articles 20 and 19.3 do not meet international standards. As example, academicians at the Foreign Investment Advisory Service (“FIAS”), a joint facility of the International Finance Corporation and the World Bank, concluded that the dispute settlement mechanism in the 1995 law is flawed because it lacks any judicial review mechanisms and prohibits “the use of binding international arbitration.”<sup>204</sup> Others noted that the Investment Law would be more attractive to foreign investors if it expressly recognized the option of using international commercial arbitration mechanisms.<sup>205</sup>

The PA responded to the criticism regarding the 1995 Investment Law, and in May 1998 revised the Investment Law.<sup>206</sup> Article 41 of the 1998 Revised Investment Law addresses many of the dispute resolution concerns that Article 20 (1995) did not.<sup>207</sup> In disputes between the “[i]nvestors and the National Authority that relate to rights and obligations provided for in the Investment Law”<sup>208</sup> “either party shall have the right to take the dispute to: . . . binding, independent arbitration as provided in the Regulations.”<sup>209</sup> However, either party to a dispute “must request good faith negotiations before it may have access to . . . arbitration.”<sup>210</sup> While this allows the investor more options, and eliminates the requirement that disputes be tried only in national courts under Palestinian laws, exactly “what the Regulations will propose is unclear.”<sup>211</sup> There are still questions regarding whether the right to international arbitration will be an effective right: (i) can the parties choose the law and place of the arbitration; (ii) will the national courts honor and enforce the arbitration agreement; or (iii) will the national courts enforce an arbitration award. Each is an area of great concern to the international investor.

The Revised Investment Law eliminates many of the investment approval concerns of the 1995 Investment Law. Article 4 (1998) provides that an

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<sup>204</sup> FIAS, *supra* note 29, at 18.

<sup>205</sup> Molkner, *Legal and Structural Hurdles*, *supra* note 1 at 45. Cf. Fidler, *supra* note 4, at 573 (stating that “[n]o article of the Investment Law mentions, directly or indirectly, the possibility of arbitration to settle disputes”).

<sup>206</sup> See Revised Investment Law, *supra* note 5, at 521. “[T]he Investment Law supercedes and replaces all prior Laws dealing with Investment in Palestine.” *Id.* art. 46, app. at 535.

<sup>207</sup> Compare *id.* art. 41, app. at 534 and Investment Law, *supra* note 4, art. 20.

<sup>208</sup> Revised Investment Law, *supra* note 5, art. 40, at 534.

<sup>209</sup> Fidler, *supra* note 5, at 342.

<sup>210</sup> *Id.* art. 41, app. at 521, 534 (providing that once either an Investor or the National Authority has “request[ed] good faith negotiations,” it shall have access to dispute settlement; and “either party [then] shall have the right to . . . binding, independent arbitration”).

<sup>211</sup> Fidler, *supra* note 5, at 342.

investor may invest in any sector of the Palestinian economy, except those areas prohibited by specific law.<sup>212</sup> But there are still concerns surrounding an investor's right to appeal the Agency's decisions to suspend or cancel confirmation of exemptions and incentives.<sup>213</sup> The investor has the right to appeal as defined in the Regulations.<sup>214</sup> Again, these regulations have not yet been promulgated.

In an effort to improve the environment for investors the 1998 revisions provide for a "Palestine Board for Investment Incentive."<sup>215</sup> Article 13 (1998) provides that the Board shall be "an independent judicial person and shall enjoy full legal jurisdiction to ensure its capacity to achieve and practice all its activities according to law."<sup>216</sup> The Board shall be responsible for encouraging and facilitating investment in Palestine, presenting investors and investment in Palestine with guarantees, granting incentives to investors, and creating the appropriate atmosphere to encourage investment in Palestine.<sup>217</sup>

The Board is managed by a board of directors, consisting of 13 voting members.<sup>218</sup> Article 16 provides that the Board's responsibilities shall include (i) monitoring the implementation of the investment law and submitting suggested changes to the Council of Ministries and the Palestinian Legislative

<sup>212</sup> Revised Investment Law, *supra* note 5, at 523.

<sup>213</sup> *See id.* arts. 16(17), 33(C), at 527, 532 ("An investor may appeal the Agency's decision to cancel the Confirmation of Investment [or incentives] under the procedures specified in the Regulations.").

<sup>214</sup> *See id.* art. 33, at 532.

<sup>215</sup> *Id.* art. 13, at 525.

<sup>216</sup> *Id.*

<sup>217</sup> *See id.* art. 16, app. at 526-27.

<sup>218</sup> *See id.* art. 15, app. at 521, 525. The voting members on the board of directors shall be: the Minister of Economy and Trade (chair); a representative of each of the (a) Ministry of Finance (deputy), (b) Ministry of Industry, (c) Ministry of Agriculture, (d) Ministry of Tourism, (e) Ministry of Housing, (f) Ministry of Planning and International Cooperation, and (g) Monetary Authority; and five representative of the Palestinian private sector to assume their functions in an independent manner. *See id.* art. 15.

One commentator has trenchantly pointed out that:

"The board's great dissatisfaction in determining exemption levels combined with the fact that 13 of the board's 15 members are political appointees, is cause for concern among potential investors who fear a process that is guided more by politics, favoritism, and corruption than by sound economics and development considerations. Board posts, furthermore, are not full-time positions. Thus, appointees can be expected to have private financial interests that may come into conflict with the board's jurisdiction. The investment law is also vague in specifying the procedures by which the board members are dismissed and replaced."

Gil Feiler & Joshua Zaretsky, *An Unforeseen Rivalry: The Peace Process and the Jordanian and Palestinian Economies*, in *THE ECONOMICS OF MIDDLE EAST PEACE: A REASSESSMENT*, *supra* note, at 150.

Council;<sup>219</sup> (ii) monitoring any Palestinian law or regulation that might limit, restrict or undermine any rights and guarantees stipulated by the investment law, and submitting suggested changes of these laws and regulations;<sup>220</sup> (iii) supporting the PA in abiding by any investment agreement that might be signed with another country or international organization;<sup>221</sup> and (iv) considering updating and developing investment legislation, approving plans and programs that contribute to the creation of an appropriate atmosphere for investment.<sup>222</sup> While the 1998 Law provides a vehicle for the Board to submit suggestions for an international commercial arbitration law, there is nothing that requires it to do so. The Board can only be as effective as the suggestions it makes and the reception these suggestions receive, for the Board has no power to enforce these suggestions. If action is taken, it is the decision of the Council of Ministries and the Palestinian Legislative Council.

Although the changes are an improvement, the investment laws are still vague and open to excessive discretion. One commentator states that the Revised Investment Law is “disappointing when compared to international standards and practices in protecting foreign investment.”<sup>223</sup> If the Palestinian Council wants to follow international practice and include arbitration as a dispute settlement mechanism, it must do so expressly and transparently.<sup>224</sup> Where foreign investment is desired—transparency of the legal structure and applicable laws is required and, at a minimum, these laws should meet international standards.

## VII. REGIONAL COMMERCIAL ARBITRATION CONVENTIONS IN ARAB STATES

There are two main regional Arbitration Conventions among Arab States: the Riyadh Convention on Judicial Cooperation,<sup>225</sup> and the Amman Arab Convention on Commercial Arbitration.<sup>226</sup>

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<sup>219</sup> See Revised Investment Law, *supra* note 5, art. 16(10).

<sup>220</sup> See *id.* art. 16(11).

<sup>221</sup> See *id.* art. 16(12), at 526.

<sup>222</sup> See *id.* art. 16(15), at 527.

<sup>223</sup> Fidler, *supra* note 5, at 343.

<sup>224</sup> *Id.*

<sup>225</sup> Riyadh Arab Convention on Judicial Cooperation, Apr. 6, 1983 [hereinafter Riyadh Convention], reprinted in INT'L HANDBOOK ON COMM. ARB., annex I-1-4 (Kluwer L. Int'l) (Jan. 1990). The member states of the Arab League include: “Jordan, United Arab Emirates, Bahrain, Tunisia, Algeria, Djibuti, the Kingdom of Saudi Arabia, Sudan, Syria, Somalia, Iraq, the Sultanate of Oman, Palestine, Qatar, Kuwait, Lebanon, Libya, Morocco, North Yemen, Mauritania and South Yemen.” Abdul Hamid El-Ahdab, *General Introduction on Arbitration in Arab Countries*, in INT'L HANDBOOK ON COMM. ARB. 1, 17 n.47 (Kluwer L. Int'l) (Dec. 1998).

The Riyadh Convention is a regional multilateral convention between Arab States and thus applies only to foreign awards made in other member Arab States.<sup>227</sup> When an award is referred to a court for enforcement, the court cannot examine the substance of the dispute; it can only enforce or refuse to enforce the award.<sup>228</sup> The Riyadh Convention is a step forward for those countries that have not signed the New York Convention. Palestine is party to this Convention.<sup>229</sup>

The Amman Convention is also signed only by Arab States and, once again, Palestine is a signatory.<sup>230</sup> It provides that the high court of each member country has jurisdiction to grant enforcement of arbitral awards.<sup>231</sup> The Amman Convention created the Arab Centre for Commercial Arbitration ("Centre"), headquartered in Rabat, Morocco, for the settlement of disputes between Arab entities.<sup>232</sup> Awards made by the Centre are executory and *must* be enforced by the high court of each member state; however, the high court can refuse to enforce the award if it is against public order.<sup>233</sup> The Amman Convention does not allow for judicial appeal of awards made by the Centre, such awards can only be set aside by the centre.<sup>234</sup> In reality, the Amman Convention has not yet

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<sup>226</sup> Amman Arab Convention on Commercial Arbitration, April 14, 1987 [hereinafter Amman Convention], reprinted in INT'L HANDBOOK ON COMM. ARB. Annex II-1 (Kluwer L. Int'l) (Jan. 1990); and Mahir Jaili, *Amman Arab Convention on Commercial Arbitration*, 7 J. INT'L ARB. 139, annex at 146 (1990). The Amman Convention was signed by fourteen states on April 14, 1987. See *id.*

For a thorough examination of commercial arbitration in the Middle East, see generally EL-AHDAB, *supra* note 55; El-Ahdab, *General Introduction on Arbitration in Arab Countries*, *supra* note 225, at 1.

<sup>227</sup> El-Ahdab, *supra* note 123, at 331. "The Riyadh Convention affirms the executory character of arbitral awards made in a member state without taking into account the nationality of the winning party." *Id.*

<sup>228</sup> See *id.* The court can only refuse in certain defined cases. See *id.* at 332-33. Under the Riyadh Convention a court can "refuse enforcement of an award if it contains provisions contrary to the principles of the *shari'a*, even if the current notion of public order in the enforcing country would allow such a provision." *Id.* at 333.

<sup>229</sup> See Jaili, *supra* note 226, at 139.

<sup>230</sup> See *id.*

<sup>231</sup> See Amman Convention, *supra* note 226, art. 35, reprinted in INT'L HANDBOOK ON COMM ARB. Annex II-7 (Kluwer L. Int'l) (Jan. 1990), and Jaili, *supra* note 233, annex at 152 (1990); see also *id.*, at 144.

<sup>232</sup> See Amman Convention, *supra* note 226, arts. 4, 12, reprinted in INT'L HANDBOOK ON COMM ARB. Annex II-2-3 (Kluwer L. Int'l) (Jan. 1990), and Jaili, *supra* note 226, at 147-48.

<sup>233</sup> See Amman Convention, *supra* note 226, art. 35; see also Jaili, *supra* note 226, at 144. The meaning of the term "public order" may differ in each member state; and the Amman Convention does not indicate whether international awards must comply with national public order or international public order. *Id.* at 334.

<sup>234</sup> See Amman Convention, *supra* note 226, art. 27; and Jaili, *supra* note 226, at 150.

become operative and the Centre thereby has not yet been established. To date, no commercial dispute has been settled or even referred to arbitration under the Amman Convention:

Concerning the enforcement of arbitral awards, the Arab countries can be classified into three categories:<sup>235</sup>

1. Arab countries which have not acceded to the New York Convention include Iraq, Oman, Qatar, Libya, The United Arab Emirates, Yemen, and Sudan.<sup>236</sup> “[T]hese countries do not distinguish between national and international arbitration.”<sup>237</sup>

2. Arab countries that have acceded to the New York Convention include Jordan, Bahrain, Tunisia, Algeria, Syria, Kuwait, Egypt, Morocco and Saudi Arabia.<sup>238</sup>

3. Arab countries which have passed International Arbitration acts and whose laws distinguish between domestic and international arbitration and thereby “went farther” than the New York Convention include Lebanon, Algeria, Tunisia and Egypt.<sup>239</sup>

Because it is not recognized as a state, Palestine cannot, at present, accede to the New York Convention.<sup>240</sup> However, it is signatory to both Arab arbitration conventions.<sup>241</sup> Clearly there are a number of Arab states that have modern, sophisticated international arbitration acts.<sup>242</sup> Palestine’s inability to accede to the New York Convention, does not prevent it from joining this

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<sup>235</sup> See El-Ahdab, *supra* note 128, at 169.

<sup>236</sup> See *id.* at 170. For a discussion of each country’s laws, including when the national laws provide that the courts can set aside arbitration awards, see generally *id.* at 170-74. It has also been noted that the “reception policy” is paramount. *Id.* at 180. It provides that in Arab countries, which have not acceded to the New York Convention, an award may be enforced in another Arab country which acceded to the Convention. See *id.* at 180-81.

<sup>237</sup> See *id.* at 170.

<sup>238</sup> See *id.* at 174.

<sup>239</sup> See *id.* at 175. These countries include Lebanon, Algeria, Tunisia and Egypt. Each of these countries has passed an International Arbitration Act: Lebanon - Decree-law no. 90 dated 16 September 1983; Algeria - Legislative decree no. 83.09 dated 25 April 1993; Tunisia - Law no. 93.42 dated 26 April 1993; Egypt - Law issued on 15 April 1994 and effective as of 15 May 1994. Both Algeria and Lebanon were strongly influenced by French law, while Tunisia and Egypt were strongly influenced by the UNCITRAL Model Law. *Id.*

<sup>240</sup> See discussion *infra* pp. 224-28.

<sup>241</sup> *Id.*

<sup>242</sup> We should not forget that much Middle Eastern opposition to international arbitration tends to be “articulated increasingly in terms of a demand for incorporating the Islamic legal tradition in the international practice of arbitration; the claims stand in stark contrast to the earlier critiques of arbitration itself as a distributively biased mechanism of dispute settlement.” Shalakany, *supra* note 32, at 419.



category of Arab states which have passed international arbitration acts and whose laws are more advanced than the New York Convention. “[I]n countries which have adopted the 1985 UNCITRAL Model Law, enforcement of foreign awards may be achieved on exactly the same bases as under the [New York] Convention without any need to refer to it.”<sup>243</sup>

### VIII. WHAT IS THE LEGAL PERSONALITY OF PALESTINE?

As we can readily see, the ability of Palestine to enter into arbitration agreements or treaties depends on the question of whether Palestine can validly sign agreements with other countries? This question forces us to review the legal status of the PA as an entity under international law.

International law generally provides that for an entity to be considered as a state it must meet four requirements: (i) “a permanent population;” (ii) “a defined territory;” (iii) an authority exercising governmental functions, and (iv) a capacity to conduct foreign relations.<sup>244</sup> There is considerable academic debate as to whether Palestine meets the international requirements of statehood.<sup>245</sup> Both the PLO and the PA have accrued some indicia of statehood. The PA has 86 diplomatic missions abroad<sup>246</sup> and over 20 countries have representative offices to the PA.<sup>247</sup> Under the Oslo process, the PA provides

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<sup>243</sup> Paulsson, *supra* note 102, at 20 (noting that the passage of time has seen enforcement of foreign awards through mechanisms other than the New York Convention, including the passage of international commercial arbitration acts).

<sup>244</sup> Convention on the Rights and Duties of States, Dec. 26, 1933, art 1, 49 Stat. 3097, 3100, 165 L.N.T.S. 19, 25. For our purposes the relevant issue is whether Palestine can validly sign agreements with other countries, and moreover, what can these agreements concern. This depends, of course, on the legal status of the PA as well as the powers, if any, afforded the WBG under OSLO implementation agreements.

<sup>245</sup> See, e.g., Frank L.M. Van De Craen, *The Territorial Title of the State of Israel to “Palestine”: An Appraisal in International Law*, 14 REVUE BELGE DE DROIT INT’L 500, 532 (1978) (discussing Palestine’s “rights to sovereignty and independence”); Richard Wilner, *Nationalist Movements and the Middle East Peace Process: Exercises in Self-Determination*, 1 U.C. DAVIS J. INT’L L. & POL’Y 297, 326 n.124 (1995) (arguing that “Palestine currently possesses the necessary elements required for recognition as a state in international law”); Francis A. Boyle, *Correspondence*, 84 AM. J. INT’L L. 879, 880-81 (1990) (arguing that Palestine meets the requirements for statehood). *But see* note 253 *infra* for arguments that Palestine is not a state). See generally Danjani, *supra* note 35; John Quigley, *Palestine’s Declaration of Independence: Self-Determination and the Palestinians*, 65 AM. SOC’Y INT’L L. PROC. 31 (1971).

<sup>246</sup> See Palestinian National Authority Official Website, Foreign Affairs, *Embassies, Missions, General and Special Delegations of Palestine Abroad* (visited Feb. 10, 2000) <<http://www.pna.net/faffairs/embassies.htm>>.

<sup>247</sup> See Palestinian National Authority Official Website, Foreign Affairs, *The Representative Offices to the Palestinian Authority (PA)* (visited Feb. 10, 2000) [http://www.pna.net/faffairs/diplomatic\\_corpse.htm](http://www.pna.net/faffairs/diplomatic_corpse.htm) [hereinafter Representative Offices to the PA].

(under certain Israeli restrictions) passports and postage stamps; over 79 countries have acknowledged the Palestinian passport.<sup>248</sup> Together the PLO and the PA do have a permanent population, a defined territory (as defined in various peace agreements), a governmental body, and the ability to enter into relations with other states, at least in areas of economic development.<sup>249</sup> “In November 1998, the PA opened an airport in the Gaza Strip, an act many saw as a “potent symbol of statehood and development for the Palestinian people.”<sup>250</sup>

Notwithstanding the above, the PA “lacks direct authority over the population and territory of Palestine.”<sup>251</sup> While it “directly governs segments of the [Palestinian Territories], its authority is subordinated to Israel’s and it is prohibited by the [the Declaration of Principles] and subsequent agreements from independently participating in international affairs.”<sup>252</sup> The traditionally accepted view of international lawyers is that Palestine is not yet a state.<sup>253</sup> Even international commercial agreements to which other Arab states can be signatories refuse to accept membership of the PA at this time.<sup>254</sup> The ‘managers’ of most international conventions or institutions believe that the

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<sup>248</sup> Palestinian National Authority Official Website, Foreign Affairs, *Countries Who Have Already Acknowledged the Palestinian Passport* (last modified Mar. 13, 1999) <[http://www.pna.net/ffairs/pal\\_passport\\_recognize.htm](http://www.pna.net/ffairs/pal_passport_recognize.htm)>. See generally Danjani, *supra* note 35, at 60-69 (discussing Palestinian Interim Self-Government authority). Indeed, Palestine will soon receive its own suffix or domain on the web. See Jeri Clausing, *Web Domain to Be Assigned for Palestinian Territory*, N.Y. TIMES, Dec. 6, 1999, at C10.

<sup>249</sup> See Danjani, *supra* note 35, at 78-79 (“[T]he PLO and the PA fulfill aspects of the objective criteria for statehood at least as well as some recognized States.”).

<sup>250</sup> Stephen J. Glain, *Palestinian Opening of Airport Symbolizes Emerging State Jobs*, WALL ST. J., Nov. 24, 1998, at A19.

<sup>251</sup> See Danjani, *supra* note 35 at 79.

<sup>252</sup> *Id.* at 79-80.

<sup>253</sup> See generally, e.g., James L. Prince, *The International Legal Implications of the November 1988 Palestinian Declaration of Statehood*, 25 STAN. J. INT’L L. 681 (1989) (reviewing in part the “objective requirements for statehood” relative to Palestine). For a discussion of the issue, see generally John Quigley, *Sovereignty in Jerusalem*, 45 Cath. U. L. Rev. 765 (1996); Kathryn M. McKinney, *The Legal Effects of the Israeli-PLO Declaration of Principles: Steps Toward Statehood for Palestine*, 18 SEATTLE U. L. REV. 93 (1994) (arguing that Palestine falls short of statehood during the interim period, but that statehood “will be established after the interim period”). See also, RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 206 (1987).

<sup>254</sup> See, e.g. Convention Establishing the Multilateral Investment Guarantee Agency, Oct. 11, 1985, 24 I.L.M. 1598 [hereinafter MIGA Convention] Member states in the middle east include Algeria, Azerbaijan, Bahrain, Lybian Arab Jamahiriya, Oman, Pakistan, Egypt, Jordan, Saudi Arabia, and Yemen, but not Palestine. See *id.* at 1634..

West Bank and Gaza, at this time, “do not, together, form a unit independent and unified enough to constitute a State.”<sup>255</sup>

It should not be forgotten that the various PLO declarations of its intention to create a “provisional Government of the State of Palestine” never resulted in international recognition of the PLO as a sovereign government, “but only as the (sole legitimate) ‘representative of the Palestinian people.’”<sup>256</sup> As an example in November 1988, the PLO declared the establishment of the state of Palestine.<sup>257</sup> However, the follow-up U.N. vote in which “104 members ‘recognized the declaration of the State of Palestine,’”<sup>258</sup> is best understood as a “gesture of solidarity” rather than recognition in the traditional sense.<sup>259</sup> The plain fact is that “[r]ecognition statements alone are seldom a safe guide to the intention of the recognizing State.”<sup>260</sup> For as Ian Brownlie points out, the question of recognition depends in part on “the intention of the government using it.”<sup>261</sup>

The same is true with other gestures as, for example, the 1974 U.N. vote inviting Palestine to serve as a permanent observer.<sup>262</sup> Or for the July 1998 U.N. vote upgrading Palestine’s status and granting it the right to participate in

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<sup>255</sup> Danjani, *supra* note 35, at 79.

<sup>256</sup> Stefan Talmon, *Recognition of Governments in International Law, with particular reference to Governments in Exile*, 17 (Oxford 1998).

<sup>257</sup> Palestine National Council’s Declaration of Independence, in U.N. Doc. A/43/827-S/20278, Ann. III, at 15 (1988), 27 ILM 1668 (1988) (the Palestine National Council declared the “establishment of the State of Palestine”). For an analysis of the legal aspects of the Declaration, see MUSA E. MAZZAWI, *PALESTINE AND THE LAW: GUIDELINES FOR THE RESOLUTION OF THE ARAB-ISRAEL CONFLICT 272-74* (1997).

<sup>258</sup> YEZID SAYIGH, *ARMED STRUGGLE AND THE SEARCH FOR A STATE: THE PALESTINIAN NATIONAL MOVEMENT 1949-1993* 624(1997). Even before this declaration the PLO had entered into agreements with Lebanon and Jordan on the dispensation of Palestinian refugee aid in those host countries. See Feuer, *Les accords passés par les Gouvernements Jordanien et Libanais avec les organisations palestiniennes*, 16 ANN. FRANCAIS DE DROIT INT’L 177 (1970).

<sup>259</sup> See Talmon, *supra* note 256, at 42 & n.105. Note that “[m]ost states that have recognized the ‘state of Palestine’ . . . have elevated the PLO office in their country to the status of embassy.” *Id.* at 158, n.236 Most states have done little else to implement that ‘recognition.’

<sup>260</sup> *Id.* at 42.

<sup>261</sup> Ian Brownlie, *Recognition in Theory and Practice*, 53 B.Y.B.I.L. 197, 199 (1982).

<sup>262</sup> G.A. Res. 3237, 29 U.N. GAOR. Supp. (No. 31) at 4, U.N. Doc. A/9631 (1974). Permanent observers have a permanent invitation to observe the U.N. General Assembly sessions, they can speak when recognize, but cannot vote. Guidelines for Implementation of General Assembly Resolutions Granting Observer Status on a Regular Basis to Certain Regional Intergovernmental Organizations, the Palestine Liberation Organization and the National Liberation Movements in Africa, 1975 U.N. JURID. Y.B. 164, 167, U.N. Doc. ST/Leg/SER.C/13.

General Assembly's general debate, including the right to co-sponsor draft resolutions and decisions on Palestine and Middle East issues.<sup>263</sup>

When it comes to substance not gesture, as a practical matter most international organizations, including the United Nations, fall on the side of caution and have not allowed Palestine to join as a member *state*.<sup>264</sup> However, several Arab regional organizations and Islamic organizations have given the PLO the status and privileges of a member state. These include the League of Arab States, the Organization of the Islamic Conference, the Arab Monetary Fund, the Council of Arab Economic Unity, and the Islamic Development Bank.<sup>265</sup> Further the PA<sup>266</sup> has signed numerous bilateral and a number of multilateral treaties.<sup>267</sup>

We recognize that the 1994 Declaration of Principles assumed that negotiations would yield a permanent, or "final status" settlement by May 1999.<sup>268</sup> That date has come and gone. While the status of the Oslo accords after May 4 remain open to dispute,<sup>269</sup> the PA has claimed that it will declare a Palestinian state 'not later than' September 13, 2000.<sup>270</sup> Whether they will do so and whether such a declaration will be "recognized" by other states remains to be seen.

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<sup>263</sup> *Israel Downplays U.N. Decision to Upgrade Status of Palestinians*, JEWISH TELEGRAPHIC AGENCY, July 7, 1998.

<sup>264</sup> See G.A. Res., 3237, 29 U.N. GAOR Supp. (No. 31) at 4, U.N. Doc. A/9631 (1974). Whether Palestine is a state also raises the issue of sovereign immunity and the Act of State doctrine. The Act of State doctrine traditionally precludes courts in the United States from inquiring into the validity of the public acts of a recognized foreign sovereign power committed within its own territory. See De Vries, *supra* note 255; *Banco Nacional de Cuba v. Sabatino* 376 U.S. 398, 401 (1964). Because Palestine is not a sovereign state, it is presumably not protected by the Act of State doctrine or sovereign immunity. See Boyle, *supra* note 245.

<sup>265</sup> See generally, Yearbook of International Organizations (33d ed. 1996).

<sup>266</sup> Or the PLO on behalf of the PA.

<sup>267</sup> See discussion *supra* Part VI.

<sup>268</sup> Declaration of Principles, *supra* note 1, at 1528-29.

<sup>269</sup> The legal issue if whether the Oslo Accords terminated on May 4 has been mooted by subsequent agreements at Wye and Cairo. The "pure" question, however, of May 4, 1999, is discussed in HERBERT HANSELL & NICHOLAS ROSTOW, LEGAL IMPLICATIONS OF MAY 4, 1999 (Washington Institute for Near East Policy, 1999).

<sup>270</sup> The September Deadline, THE JERUSALEM POST, Mar. 6, 2000, at 9; see also Israeli Prime Minister's Office Comments on Palestine's State Declaration, BBC World Broadcasts, Mar. 7, 2000 (Yasser Arafat declared that he intends "to declare a [Palestine] an independent state on September 13<sup>th</sup>.".) September 13, 2000 is the seventh anniversary of "the historic Rabin-Arafat handshake on the White House lawn." *Id.*

Accepting that the WBG is neither a state, "nor a constitutive unit of a federal state," its "legal personality. . . is not clearly identifiable or defined."<sup>271</sup> Thus, Palestine holds a rather unique place in international legal discourse. Its legal personality differs in part whether looked at from the perspective of the Third World (which has all but embraced it)<sup>272</sup> or the developed world, particularly the United States (which has kept its distance).<sup>273</sup> While likely not yet a 'state',<sup>274</sup> it still has a legal personality that cannot be ignored.

#### IX. WHAT CAN THE PALESTINIAN AUTHORITY DO TO RESPOND TO THE INTERNATIONAL COMMUNITY'S REQUEST FOR CERTAINTY AS TO DISPUTE RESOLUTION PROCEDURES?

If the PA is going to attract the foreign investment it requires, it is imperative that it create a legal environment that is receptive to foreign investors.<sup>275</sup> Central to this environment is a dispute resolution law that governs international commercial transactions. The PA can enact its own legislation to create a clear international commercial arbitration law, which provides the required access to commercial dispute settlement mechanisms, including the recognition and enforcement of foreign awards.<sup>276</sup> When drafting such a law the PA should look to the international models available, specifically the UNCITRAL Model Law, the experience of its neighbors (including Egypt, Jordan and Israel), and the parties with whom the PA would like to enter into agreements.

When attempting to modernize their international commercial arbitration laws and attract foreign investment, many states have looked to the

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<sup>271</sup> Mala Tabory, *The Legal Personality of the Palestinian Autonomy*, in *NEW POLITICAL AND PRIVATE INTERNATIONAL LAW* 139 (Amos Shapiro & Mala Tabory eds., 1999).

<sup>272</sup> See, discussion *supra* pp. 224-26.

<sup>273</sup> On September 27, 2000, the House voted 385-27 in the HR 5272, middle East Peace Through Negotiations Act, 2<sup>nd</sup> Sess. 106<sup>th</sup> Cong. Sept. 25, 2000, to cut off all but humanitarian aid to Palestine should there be a unilateral declaration of statehood.

<sup>274</sup> See discussion *infra* p 235..

<sup>275</sup> See generally, *supra* notes 32, 33, 377 (noting that if countries want to attract foreign capital, they must give assurances to foreign private investors regarding the safety of their investments, and that access to international commercial arbitration is critical to foreign investment incentives).

<sup>276</sup> See e.g., Sultanate Decree No. 47/97 issuing the Act on Arbitration in Civil and commercial Matters, Official Gazette No. 602 (1997) (Oman), translated in *WORLD TRADE & ARB. MATTERS*, Jan. 1998, at 173 (providing an example of domestic legislation, which recognizes the importance of international arbitration in settlement of disputes). This new Omani Arbitration Act resembles the Egyptian Act on arbitration issued in 1994. See Abdul Hamid El-Ahdab, *The New Omani Arbitration Act in Civil and Commercial Matters*, *J. INT'L ARB.*, Dec. 1997, at 59, 60. The Egyptian Act is modeled on the UNCITRAL Model Law. See *id.* See also Abdelrahman Mohammed Elnafie, *Oman Reforms Its Judicial System: New Commercial Court Law*, 20 *MIDDLE E. EXECUTIVE Rep.* 3, 8 (1997).

UNCITRAL Model Law.<sup>277</sup> The Model Law was created as a “legal regime geared to international commercial arbitration, without affecting any relevant treaty in force in the State adopting the Model Law.”<sup>278</sup> It “is easily recognizable, meets the specific needs of international commercial arbitration, and provides an international standard with solutions acceptable to parties from different States and legal systems.”<sup>279</sup>

In adopting the Model Law, Germany commented that “the user friendliness and the arbitration friendliness of a law is ensured when the drafters do not omit any important provisions from the text of the Model Law and do not add too many provisions [thus] preserv[ing] the original spirit and regulatory framework of the Law.”<sup>280</sup> Indeed, the Secretary of UNCITRAL, Mr. Gerold Herrman, recently noted that in countries that have adopted the Model Law deviations are rare, but where deviations have occurred real problems were encountered.<sup>281</sup> Indeed, Egypt recently discovered that the majority of difficulties in the new arbitration law are where they deviated from the Model Law.<sup>282</sup>

While some modifications are necessary, it is important to retain the transparency of the law. The Scottish Advisory committee put it aptly when it stated that:

[t]he main object of the Model Law is to provide a framework for arbitration which is readily understandable by people of very different legal cultures. Accordingly, the Committee recommends that any legislation to give effect

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<sup>277</sup> See e.g. Klaus Peter Berger, *the Implementation of the UNCITRAL Model Law in Germany*, MEALEY'S INT'L ARB. REP., Jan. 1998, 38-39; Park, *supra* note 116; Tracey S. Work, *India Satisfies Its Jones for Arbitration: New Arbitration Law in India*, 10 TRANSNAT'L LAW. 217, 218, 239 (1997) (explaining that both India and the Province of Ontario are modeled after the UNCITRAL Model Law); Robert Morgan, *The English Arbitration Act 1996 and Reform of Arbitration Law in Hong Kong and Singapore: A Brave New World?*, MEALEY'S INT'L ARB. REP., Dec. 1996, at 20, 20 (1996); Peter W.G. Carey, *International Commercial Arbitration in Ontario: A Judicial Shift of Perspective*, MEALEY'S INT'L ARB. REP., Sept. 1996, at 31, 31; Dr. M.I.M. Aboul-Enein, *Reflection on the New Egyptian Law on Arbitration*, 11 ARBITRATION INT'L 75 (1995); Sami Kallel, *The Tunisian Law on International Arbitration*, 4 AM. REV. INT'L ARB. 233, 235 (1993); Dahmane Ben Abderrahman, *New Algerian Legislation on International Arbitration*, MID. E. EXEC. R., Dec. 1993, at 9, 9 (discussing the fact that the Algerian legislation considered the UNCITRAL Model Law).

<sup>278</sup> *Explanatory Note by the UNCITRAL Secretariat on the Model Law International Commercial Arbitration* (visited Feb. 9, 2000) <<http://www.uncitral.org/english/texts/arbconc/ml-arb.htm>> [hereinafter Explanatory Note].

<sup>279</sup> See *id.*

<sup>280</sup> See Berger, *supra* note 277, at 38-39.

<sup>281</sup> See Herrman, *supra* note 116.

<sup>282</sup> See *id.*, at 212-13. For a description of the Egyptian Act and how it diverges from the UNCITRAL Model Law, see EL-AHDAB, *supra* note 55, at 155-202.

to its proposals should depart from the language of the Model Law only where essential. This is the course of action which has been taken in those countries which have already adopted the Model Law.<sup>283</sup>

The Canadian Court of Appeals has also strongly endorsed the Model Law's principles of international commercial arbitration. It recently stated "predictability in the enforcement of dispute resolution provisions is an indispensable precondition to any international business transaction and facilitates and encourages the pursuit of freer trade on an international scale."<sup>284</sup> Germany found an added advantage in drafting the wording of the new arbitration act as closely as possible to the Model Law—"the translation of the law could use the original wording of the official English" text, allowing foreign practitioners to quickly identify that "the new German law is in line with the original text of the Model Law."<sup>285</sup>

While the Revised Palestinian Investment Law provides that the Board can submit suggestions for an international commercial arbitration law,<sup>286</sup> there is no need to wait for a Board to make suggestions, which will then be modified in the hurley-burley of the Palestinian legislative process. Instead the PA should take a forthright position and adopt its own separate international commercial arbitration act, such as the draft suggested in this article.

By adopting a new international commercial arbitration act as domestic legislation now, when Palestine becomes a sovereign state it will already have the domestic legislation needed to sign and ratify the relevant international arbitration conventions, namely the New York and ICSID Conventions. Ratification of these treaties will not conflict with the inter-Arab arbitration agreements.<sup>287</sup> In short, the PA national commercial arbitration laws will already be in conformity with international standards.

#### X. HOW A PALESTINIAN ARBITRATION LAW FITS INTO THE INTERIM AGREEMENT

Under the Interim Agreement, the Palestinian National Council ("PNC") has the power to adopt legislation in the areas within its jurisdiction.<sup>288</sup> Within the PNC's jurisdiction is the power to (i) "formulate and conduct Palestinian policies and supervise their implementation;" (ii) "issue any rule or regulation under powers given in approved legislation and administrative decisions necessary for the realization of Palestinian self-government;" (iii) "employ

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<sup>283</sup> Lord Dervaird, *Scotland and the UNCITRAL Model Law: The Report to the Lord Advocate of the Scottish Advisory Committee on Arbitration Law*, 6 *ARB. INT'L* 63, 67 (1990).

<sup>284</sup> *Automatic Systems Inc. v. Bracknell Corp.*, 18 O.R.(3d) 257, 264 (C.A. 1994).

<sup>285</sup> Berger, *supra* note 277, at 43.

<sup>286</sup> *See* Revised Investment Law, art. 16, *supra* note 5, at app. 521, 526.

<sup>287</sup> *See* discussion *infra* Part X.

<sup>288</sup> Interim Agreement, art. XVIII(2), *supra* note 1.

staff, sue and be sued and conclude contracts;" and (iv) "keep and administer registers and records."<sup>289</sup> The PNC's jurisdiction explicitly does not include the sphere of foreign relations, including the "establishment abroad . . . of embassies, consulates or other types of foreign missions."<sup>290</sup> Notwithstanding these limitations,<sup>291</sup> "the PLO may conduct negotiations and sign agreements with states or international organizations for the benefit of the Council in four defined areas:

- (1) economic relations as "specifically defined" in Annex V of the Interim Agreement;
- (2) agreements with donor countries implementing arrangements for assisting the PA;
- (3) agreements implementing regional development plans or agreements entered into in the framework of the multilateral talks; and
- (4) cultural, scientific and educational agreements."<sup>292</sup>

Annex V, the Protocol for Economic Relations, provides for Israeli and Palestinian recognition of each other's economic ties with other markets and the need to create a better economic environment.<sup>293</sup>

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<sup>289</sup> Interim Agreement, art. IX(2), *supra* note 1.

<sup>290</sup> Interim Agreement, Annex V, preamble, *supra* note 2.

The expression "foreign relations," as defined under Article VI, paragraph 2.a., includes the establishment abroad, or in the Gaza Strip or Jericho area, of embassies, consulates or other types of foreign missions and posts, the appointment or admission of diplomatic and consular staff, and the exercise of diplomatic functions. However, certain dealings between the Authority and representatives of foreign states and international organizations, and the establishment in the Gaza Strip and Jericho Area of representative offices, other than those above-mentioned, are not deemed to constitute activities falling under the definition of foreign relations, provided such activities are for the purpose of implementing the economic agreements.

Under the Agreement, the PLO is the organization authorized to conduct negotiations and sign agreements with states or international organizations for the benefit of the PA. Such authorization, however, is limited to the following cases: *economic agreements*, agreements with donor countries for purposes of implementing arrangements of the provision of assistance to the PA, agreements to implement the regional development plans detailed in Annex IV of the Declaration and cultural, scientific and educational agreements. *Emphasis added.*

Ibrahim F.I. Shihata, *Legal Aspects of the World Bank's Assistance to The West Bank and the Gaza Strip*, VII THE PALESTINIAN YEARBOOK OF INTERNATIONAL LAW (Al-Shaybani Society of International Law 1992/944), *reprinted in* Ibrahim F.I. Shihata, *The World Bank in a Changing World* 355, 369 (1995). For the standard Israeli discussion, see, e.g., Joel Singer, *Aspects of Foreign Relations Under the Israel-Palestinian Agreements on Interim Self-Government Arrangements for the West Bank and Gaza*, 28 ISRAEL L. REV. 268 (1994).

<sup>291</sup> Interim Agreement, art. IX, *supra* note 1.

<sup>292</sup> *Id.*



Annex V defines “economic” to include: import taxes and import policy, monetary and financial issues, direct and indirect taxes, labor, agriculture, industry, and tourism, insurance.<sup>294</sup> Specifically, under the sphere of industry, Palestine has the right “to employ various methods in encouraging and promoting the development of the Palestinian industry,” including those “methods of encouraging industry resorted to in Israel.”<sup>295</sup> Both Israel and Palestine shall exchange information about the methods employed by them in the encouragement of their respective industries.<sup>296</sup> Most recently, in the Wye River Memorandum, Israel and the PLO committed “to . . . promote economic development in [WBG].”<sup>297</sup>

A. *An Argument that PA Arbitration Agreements Do Not Violate the Paris Protocols*

Israel’s strategic purpose in placing constraints on PA treaty behavior is clearly to “disallow the PA from participating in the international process in any way that could influence its international status.”<sup>298</sup> There is no necessary reason, however, why a Palestinian arbitration agreement should do so. Given sufficient goodwill, it should prove possible to craft a PA arbitration agreement that would accommodate Israeli fears that such an agreement provides support for PA statehood claims. Indeed bilateral arbitration agreements could be specifically classified as economic agreements, which are already allowed under Oslo.<sup>299</sup> Surely, Palestinian “BITs” can fit within that rubric (and such

<sup>293</sup> Interim Agreement, Annex V Protocol on Economic Relations, Preamble, *supra* note 2. Singer argues that:

“[t]he four spheres in which, as an exception to the general rule, the PLO is permitted to enter into agreements for the benefit of the Palestinian Authority are clearly specified. Thus, sub-paragraph (1) of paragraph VI(2)(b) does not provide a blanket permission covering all economic agreements, but rather is limited to those economic agreements “specifically provided by Annex IV,” i.e. in the Protocol Concerning Economic Relations.”

Singer, *supra* note 290, at 286-87.

<sup>294</sup> Interim Agreement, *supra* note 1, arts. I – XI.

<sup>295</sup> *Id.* art. IX (2). Israel, for example, has entered into a Free Trade Agreement with the United States, establishing a free trade area which removes trade barriers; and, in 1975, established a bilateral free trade area with the European Community. See Avraham Azrieli, *Improving Arbitration Under the U.S.—Israel Free Trade Agreement: A Framework for a Middle-East Free Trade Zone*, 67 ST. JOHN’S L. REV. 187, 191-99 (discussing the Free Trade Agreement).

<sup>296</sup> Interim Agreement, *supra* note 1, art. IX (b).

<sup>297</sup> Wye River Memorandum, Oct. 23, 1998, Isr.-PLO, art. III, para. 1, 37 I.L.M. 1251.

<sup>298</sup> See Danjani, *supra* note 35, at 68.

<sup>299</sup> See discussion *supra* Part II.

BITs can contain arbitration clauses).<sup>300</sup> Other agreements like the Jordanian-Palestinian General Agreement for Cooperating and Coordination can be styled as an economic agreement<sup>301</sup> as can innumerable “state to state” agreements covering both the “core” and the “periphery” of economic activity.<sup>302</sup>

Second, even if an arbitration treaty is deemed to be “foreign relations”, if the legal relations between the PA and Israel called for in Oslo continue to “warm up,”<sup>303</sup> Israel may well be prepared to acquiesce in the Palestinians signing arbitration agreements with third parties – or willing multilateral parties – in that a functioning PA arbitration regime is good for both countries. This notion of acquiescence is bolstered by treaty law. Article 45 of the Vienna Convention on the Law of Treaties provides that a state (in this case, Israel) cannot suspend or terminate a treaty (in this case the Interim Agreement) if, “after becoming aware of the facts,” Israel either (a) expressly agrees that the Agreement remains in force, or (b) Israel “must by reason of its conduct be considered as having acquiesced in the validity of the treaty or in its maintenance in force or in operation, as the case may be.”<sup>304</sup> In other words, Israel can expressly waive the relevant limitations of the Interim Agreement, or it can impliedly acquiesce in specific PA deviations from those limitations. While the Israeli ‘acquiescence’ is irrevocable it is limited to the specific area of acquiescence, such as arbitration treaties, and would not extend to other areas of non-economic activity.

In a situation where neither Israel nor the PLO oppose a treaty “for the benefit of the Palestinian Authority”<sup>305</sup> (like the PLO-Jordan treaty) such a treaty might well be considered “as subsequent State practice within the meaning of international treaty law. As such, this might eventually lead to extending the powers of the Council beyond dealings referred to in Article 6, paragraph 2(c) of the Cairo agreement” (now art. 9, para, 5(c) of the Interim

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<sup>300</sup> See discussion *infra* pp. 234-36

<sup>301</sup> For text see, 24 J. PALESTINE STUD. (O. 3) 138 (1995).

<sup>302</sup> See Sanford R. Silverberg, *Diplomatic Recognition of States In Statu Nascendi: The Case of Palestine*, 6 TULSA J. COMP. & INT’L L 21, 40-46 (1998) (providing a partial list of such state-to-state agreements).

<sup>303</sup> Toga Tzimuki, *Legal Cooperation Between Israel and PA Tightened*, YEDIOTH AHRONOTH (Oct. 7, 1999)

<sup>304</sup> Vienna Convention on the Law of Treaties, Article 45, 8 I.L.M. 679, 697 (1969). As discussed later in this paper, Israel already has functionally “acquiesced” to the EU - PLO trade Agreement. See discussion *infra* pp. 236-40. For what it is worth, note also that Great Britain in 1944 acquiesced to Palestine signing a postal agreement with the U.S. See Parcel Post Agreement, May 10, 1943 & Sept. 8, 1944 EAS 439, 10 Barons 651, 58 stat. 1522.

<sup>305</sup> Thilo Marauhn, *Financing Autonomy Through Financial Autonomy? Fiscal and Monetary Aspects of the Israeli-Palestinian Agreements From a Public International Law Perspective*, in NEW POLITICAL ENTITIES IN PUBLIC AND PRIVATE INTERNATIONAL LAW 291, 311 (Amos Shapira & Mala Tabory eds., 1999).

Agreement).<sup>306</sup> And indeed, there is evidence that the PA has engaged in sufficient international contacts that the subsequent state practice doctrine might allow the PA a wider ambit of diplomatic activity in the international arena (although not statehood). As but one example, states like Morocco have credentialed representatives to the PA in Gaza<sup>307</sup> and entities like the Vatican recently concluded an agreement on religious freedom with the PA.<sup>308</sup> Note also that the official Palestinian representative in Egypt is designated as a PNA official.<sup>309</sup> “The PLO representative in Moscow signed a protocol on security cooperation with Russia in the name of the PNA. Also, the PNA joined the International Airport Council as the PNA, all in violation of Article [6](2)(b).”<sup>310</sup> But there is no reason for scholars and international lawyers to go that far.

Indeed, other than an excess of caution, drawn largely from concern over domestic political fallout, there is no necessary reason why treaty making is a dispositive indicia of statehood. While the Vienna Convention on the Law of Treaties explicitly states that “every state possesses capacity to conclude treaties,”<sup>311</sup> it leaves open the door for treaty-signing by non-state entities. Indeed, the Convention states further that “[t]he fact that the present Convention does not apply to international agreements concluded between States and other subjects of international law or between such other subjects of international law . . . shall not affect (a) the legal force of such agreements.”<sup>312</sup> Thus, even if the PA is not a state in terms of the Vienna Convention, it is hard to argue that the PA is not a ‘subject of international law.’ And as Geoffrey Watson has recently made clear, “there appears to be ample precedent for the proposition that a national liberation movement ... [like the PA]... has the capacity to enter into binding international agreements with states.”<sup>313</sup>

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<sup>306</sup> *Id.*

<sup>307</sup> See Representative Offices to the PA, *supra* note 247.

<sup>308</sup> See Sarah Delaney, *Vatican, PLO Strengthen Ties*, WASH. Post, Feb. 16, 2000, at A17. “The Vatican and the [PLO] agreed . . . to open holy sites and strengthen and clarify their relations. . . . The two sides signed a document recognizing the PLO as the representative for [the PA].” *Id.* “[T]he Vatican signed an agreement today with the Palestine Liberation Organization that would protect freedom of religion and the legal status of Christian churches.” Alessandra Stanley, *Vatican and P.L.O. Sign Pact Guaranteeing the Church’s Rights*, N.Y. TIMES, Feb. 16, 2000, at A7.

<sup>309</sup> This is formally a violation of article 6(2)(a) of the Peace Treaty.

<sup>310</sup> Silverberg, *supra* note 302, at 39.

<sup>311</sup> Vienna Convention on the Law of Treaties, May 23, 1969, art. 6, 1155 U.N.T.S. 332, 334.

<sup>312</sup> *Id.* art. 3(a), 1155 U.N.T.S. at 333 (*emphasis added*). Early drafts of the Convention explicitly stated that non-states can enter into treaty obligations. The matter is fully reviewed in Jan Klabbers, *The Concept of Treaty in International Law*, 47-48 (Kluwer 1996).

<sup>313</sup> GEOFFREY R. WATSON, *THE OSLO ACCORDS* 58, 91-102 (Oxford, 2000).

We propose that the PA raise with Israel the possibility of Israeli acquiescence to PA arbitration treaties with the understanding that such acquiescence is for a specific purpose and neither reflects an enlarged Israeli view toward general PA authority in this area nor provides support for the PA claims to statehood.

*B. Existing Bilateral and Multilateral Agreements of the PA that Include Arbitration Provisions*

Under the Interim Agreement, the PLO can enter into economic and trade agreements for the benefit of the PA. The PLO is currently party to several agreements, which contain arbitration clauses. These agreements currently state that either party, including the PLO, will implement the decision of the arbitrator. It is not clear exactly how these agreements relate to current arbitration laws operative within WBG. One example of these agreements is the EU-PLO agreement, which contains a dispute settlement clause.<sup>314</sup> Either party may refer a dispute relating to the application or interpretation of the Agreement to the Joint Committee.<sup>315</sup> If the Joint Committee cannot settle the dispute either party may appoint an arbitrator and the Joint Committee shall appoint a third arbitrator. Each party to the dispute must take the steps required to implement the decision of the arbitrator.<sup>316</sup>

Another example is the EFTA-PLO Agreement, which also contains an arbitration procedure.<sup>317</sup> This agreement provides that disputes “which have not been settled through consultation or in the Joint Committee within 6

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<sup>314</sup> Euro-Mediterranean Interim Association Agreement on Trade and Cooperation, Feb. 24, 1997 OJ (L 187), art. 67.

Either Party may refer to the Joint Committee any dispute relating to the application or interpretation of this Agreement.

The Joint Committee may settle the dispute by means of a decision.

Each Party shall be bound to take measures involved in carrying out the decision referred to in paragraph 2.

In the event of it not being possible to settle the dispute in accordance with paragraph 2 either Party may notify the other of the appointment of an arbitrator; the other Party must then appoint a second arbitrator within two months.

The Joint Committee shall appoint a third arbitrator.

The arbitrators' decisions shall be taken by a majority vote.

Each party to the dispute must take the steps required to implement the decision of the arbitrator.

<sup>315</sup> *Id.*

<sup>316</sup> *Id.*

<sup>317</sup> EFTA Agreement between the EFTA States and the PLO for the benefit of the Palestinian Authority, Nov. 30, 1998, art. 29 (visited Mar. 11, 2000) <<http://www.efta.int/docs/EFTA.htm>> (providing agreement in Adobe Acrobat format) [hereinafter EFTA-PLO Agreement].

months, may be referred to arbitration.”<sup>318</sup> “The arbitral tribunal shall settle the dispute in accordance with the provisions of this Agreement and applicable rules and principles of international law.”<sup>319</sup> “The award of the arbitral tribunal shall be final and binding upon the parties to the dispute.”<sup>320</sup> The agreement further defines the make up of the arbitral tribunal and the autonomy of such tribunal to determine the rules of procedure.<sup>321</sup> The Agreement does not however determine which law shall be used, the language of the arbitration, the place of the arbitration, etc.

While the EU and EFTA have arbitration mechanisms, none of the bilateral agreements we have seen contain such a dispute resolution clause. They should. The PA may want to include a provision in its new international commercial arbitration act extending the Act’s protections to those agreements already in existence with PLO.

### C. *Agreements with Palestine’s Trade Partners*

The PA may want to explore entering into bilateral investment treaties (BITs) with specific trade partners.<sup>322</sup> Indeed it has already begun to do so. The PNA has entered into an international trade agreement with Jordan,<sup>323</sup> and an Interim Cooperation Agreement on Trade with Egypt,<sup>324</sup> as well as a reciprocal

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<sup>318</sup> *Id.* EFTA-PLO Agreement, art. 29.

<sup>319</sup> *Id.* EFTA-PLO Agreement, art. 29(3).

<sup>320</sup> *Id.* art. 29(4).

<sup>321</sup> *Id.* art. 29(2). (“The constitution and functioning of the arbitral tribunal is governed by Annex VI.”)

<sup>322</sup> For a listing of over 1,300 BITs involving at least 160 states, see UNITED NATIONS CONFERENCE ON TRADE & DEV., *BILATERAL INVESTMENT TREATIES IN THE MID-1990S* 159, 217; *see also* U.N. CONFERENCE The World Bank Group, International Centre for Settlement of Investment Disputes (ICSID), *Bilateral Investment Treaties 1959-1996* (visited Feb. 4, 2000) <<http://www.worldbank.org/icsid/treaties/treaties.htm>> (providing links to a list of bilateral treaties for ISS countries).

<sup>323</sup> *See* Agreement of Cooperation on Trade Matters Between the Hashemite Kingdom of Jordan and the Palestine National Authority (signed Jan. 26, 1995, Amman, Jordan), (published in *Official Gazette* issue no. 4028, p. 594, Mar. 1, 1995). Personal Communication, Mahmoud Hmoud, Legal Advisor, Ministry Foreign Affairs, June 12, 2000. Earlier agreements with Jordan include The Economic Cooperation Agreement Between the Hashemite Kingdom of Jordan and the Palestine Liberation Organization dated Jan. 7, 1994, endorsed by the Jordanian Cabinet on Jan. 8, 1994 and by the PLO Executive Committee on Jan. 9, 1994. *See* 8 PALESTINE YEARBOOK OF INTERNATIONAL LAW 163 (1994/5) (Kluwer). Further agreements were signed in a variety of areas including monetary and banking issues (*Id.* at 167).

<sup>324</sup> Signed February, 1997. Personal Communication with Saad al-Khatib, Ministry of Trade, Palestinian Authority, Apr. 27, 2000. Saudi Arabia has unilaterally provided preferential treatment for Palestinian agricultural products and processed foods admitting

free trade agreement with Canada<sup>325</sup> and a preferred trade agreement with the Czech Republic.<sup>326</sup> The PNA states that it is negotiating trade agreements with Morocco, Tunisia, Turkey, and the United Arab Emirates.<sup>327</sup> The negotiations with Turkey are on hold due to the negative effect such a free trade agreement would have on nascent Palestinian industry.<sup>328</sup> In 1994 the PLO entered into an Agreement with the United States on Encouragement of Investment.<sup>329</sup>

These treaties or agreements should define the treatment of foreign investors, the conditions of expropriation and the measure of compensation payable, the right to free transfer without delay of profits and other funds associated with investments. For example, “[t]ypical language found in the U.S. BITs provides that ‘[e]ach party shall provide effective means of asserting claims and enforcing rights with respect to investment, investment agreements, and investment authorizations.’”<sup>330</sup> This has been understood by the Model OPIC Investment Incentive Agreement and many other BITs as requiring that each country ensure *access to international arbitration for settlement of investment disputes*.<sup>331</sup> BITs provide investors with a variety of protections

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them duty free. Personal Communication with Saad al-Khatib, Ministry of Trade, Palestinian Authority, Sept. 14, 2000.

<sup>325</sup> Joint Canadian-Palestinian Framework for Economic Cooperation and Trade Between Canada and the Palestinian Liberation Organization on Behalf of the Palestinian Authority, Feb. 27, 1999, <<http://www.dfair-maeci.gc.ca/tna-nac/framework-e.asp>> (visited June 6, 2000). See also BBC, Palestinian Authority, Canada Sign Free Trade Agreement, Mar. 9, 1999.

<sup>326</sup> Personal Communication with Saad al-Khatib, Ministry of Trade, Palestinian Authority, Apr. 27, 2000. See also *Gregr in Favour of Trading with Palestine*, World Rep., Dec. 2, 1998, available in 1998 WL 21340393.

<sup>327</sup> See *Trade Agreements* (visited Feb. 24, 2000) <<http://www.palent.com/inv/trdagree.htm>> (describing trade agreements with the European Union, Jordan, and the United States, as well as other agreements being negotiated). See also Jack I. Garvey, *Regional Free Trade Dispute Resolution as Means for Securing the Middle East Peace Process*, 47 AM. J. COMP. L. 147, at n. 23 (1999).

<sup>328</sup> Personal Communication with Saad al-Khatib, Ministry of Trade, Palestinian Authority, Apr. 27, 2000.

<sup>329</sup> It should be noted that the agreement is with the PLO, not the PA, so as to maintain the ‘fiction’ that the PA was not dealing with foreign policy. See *Agreement on Encouragement of Investment Between the United States and the Palestine Liberation Organization for the Benefit of the Palestinian Authority Pursuant to the Agreement on the Gaza Strip and the Territories Area*, Aug. 11 & Sept. 12, 1994, available at 1994 WL 621519.

<sup>330</sup> See e.g. language in Treaty Concerning the Reciprocal Encouragement and Protection of Investment, Sept. 29, 1982, U.S.-Egypt, S. TREATY DOC. NO. 99-24 (1986), 21 I.L.M. 927, 1982; and the more sophisticated Treaty Concerning the Reciprocal Encouragement and Protection of Investment, July 2, 1997, U.S.-Jordan, 36 I.L.M. 1498.

<sup>331</sup> See Robert C. O’Sullivan, *Model OPIC Investment Incentive Agreement, art. III*, reprinted in 1 BASIC DOCUMENTS OF INT’L ECONOMIC L. (CCH) 665 (1990) (this model agreement states the rights included in most U.S. bilateral investment agreements).

from their investment including investment neutrality, investment security, transparency, and significant investment protection against both private and public infringement.<sup>332</sup> It typically calls, as well, for a structural dispute resolution program. While some early BITs did not require third-party arbitration, most contemporary BITs provide that:

an investor may compel the host state to submit any dispute involving the interpretation or application of the BIT to binding, third party arbitration, typically under the rules of the International Centre for the Settlement of Investment Disputes (ICSID). If the host state refuses to participate, the BIT makes provision for an appointing authority to appoint arbitrators on behalf of the host state so that the arbitration will go forward even without cooperation of the host state. Any award issued by the arbitral tribunal will be enforceable in municipal courts under the terms of the ICSID Convention and the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.<sup>333</sup>

The rights under a BIT are in addition to any dispute resolution procedures provided in the investors' contract. BITs and Free Trade Agreements, like the one between Israel and the United States, bear a strong similarity. Where a Free Trade Agreement eliminates trade barriers for industrial entities between the country parties, a BIT is intended to protect the individual investors and their activities in the other contracting state.<sup>334</sup> When they contain a modern and specific commercial arbitration mechanism, BITs can give investors the level of protection and comfort required when the contracting parties have major cultural, political, economic, racial or religious differences.

#### *D. The Dispute over the European Union Agreement and its Meaning for a PA Arbitration Treaty*

One dispute which some consider dispositive as to the limit of PA treaty authority is the 1997 trade agreement entered into between the EU and PLO.<sup>335</sup>

In November 1995, as part of the Euro-Mediterranean partnership,<sup>336</sup> the European Union and Israel concluded the EU-Israel Association Agreement<sup>337</sup>

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<sup>332</sup> Kenneth J. Vandevelde, *Sustainable Liberalism and the International Investment Regime*, 19 MICH. J. INT'L. L. 373, 395-99 (1998) (suggesting improvements to the BIT language).

<sup>333</sup> Kenneth J. Vandevelde, *The BIT Program: A Fifteen-Year Proposal*, 86 AM. SOC'Y INT'L L. PROC. 532, 538 (1992).

<sup>334</sup> The term "state" is not used here to signify that only sovereign states can be party to bilateral trade agreements.

<sup>335</sup> Euro-Mediterranean Interim Association Agreement on Trade and Cooperation, Feb. 24, 1997 OJ (L 187) 3. *See also EU/Palestine - Interim Association Agreement Signed by Arafat - Kinkel Urges Europe to be Modest*, Reuter Textline, February 25, 1997.

<sup>336</sup> *See* Commission Communication of 8 March 1995 to the Council and the European Parliament on Strengthening the Mediterranean Policy of the European Union: Proposals for

allowing Israeli goods to enter the European Union market duty free. The EU limited the territorial scope of the Agreement to Israel's pre-1967 borders, excluding "Israeli settlements in the West Bank and Gaza Strip, and the unilaterally annexed areas of East Jerusalem and the Golan Heights."<sup>338</sup>

In 1997 the PLO, for the benefit of the PA, entered into an interim trade agreement with the European Union.<sup>339</sup> This agreement gives Palestine trade advantages and access to EU funds to finance development projects.<sup>340</sup> The agreement states that the objective of the cooperation between the EU and PA will be to "approximate Palestinian Council legislation to that of the Community, in the areas covered by the Agreement."<sup>341</sup> The Agreement provides for arbitration of disputes in areas covered by the agreement, including economic development and free trade between the EU and the PA.<sup>342</sup>

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Establishing a Euro-Mediterranean Partnership, COM (95) 72 final, reported in BULL. EUR. UNION, Mar. 1995, point 1.4.57. See generally Jacqueline Klosek, Note, *The Euro-Mediterranean Partnership*, 8 INT'L LEGAL PERSP. 173 (1996), for a discussion of the history and background behind the partnership. The economic consequences of this agreement region-wide are discussed in Alfred Tovias, *The Economic Impact of the Euro-Mediterranean Free Trade Area on Mediterranean Non-Member Countries*, 2 MEDITERRANEAN POLITICS 113 (1997). The impact on Israel is discussed at 122-25. *Id.*

<sup>337</sup> See Draft Association Agreement with Israel, EUR. COMM'N BULL. EUR. UNION, Nov. 1995, at § 1.4.69 at 81. The agreement builds on a 1975 Cooperation Agreement between Israel and the (then) EEC. See Agreement Between the European Economic Community and the State of Israel 1975 O.J. (L136)3. Cf. Daphna Kapeliuk-Klinger, *A Legal Analysis of the Free Trade Agreement between the European Community and the State of Israel*, 27 ISR. L. REV. 415, 415 (1993) (providing that the 1975 agreement "set out to create a free trade area in the territories of the contracting parties"). See *id.* See also 1975 O.J. (L136) 3-9. *updated* in Daphne Kapeliuk-Klinger, *Legal Analysis of the Free Trade Agreement of 1975 between the European Community and the State of Israel* (1995 University Press, Leuven) (Leuven Law Series 1).

<sup>338</sup> III. Exports to the European Community of Goods from Israeli Settlements in the West Bank and Gaza Strip, East Jerusalem, and the Golan Heights (last modified Sept. 1998) <[http://www.eu-del.org.il/code/comm\\_index.html](http://www.eu-del.org.il/code/comm_index.html)> (continuing implementation of the Interim Agreement on Trade and Trade-related Matters Between the European Community and Israel) (constituting a communication from the European Commission to the Council and the European Parliament) [hereinafter Community Communication].

<sup>339</sup> Euro-Mediterranean Interim Association Agreement, 1997 OJ (L 187) 3. See also *EU/Palestine - Interim Association Agreement Signed by Arafat - Kinkel Urges Europe to be Modest*, *supra* note 335. In November 1998, the European Free Trade Association signed an interim free trade agreement with the PLO which is to come into force in July 1999. See *Palestinians Sign Trade Pact with European Free Trade Assoc.*, DOW JONES INT'L NEWS SERVICE, Nov. 30, 1998, available in WESTLAW, ALLNEWSPLUS.

<sup>340</sup> See Euro-Mediterranean Interim Association Agreement, 1997 OJ (L 187) 3.

<sup>341</sup> *Id.* art. 42.

<sup>342</sup> *Id.* art. 67.



As one can readily imagine this innocent language soon took on political overtones. Two issues soon emerged; a conceptual question whether the PA had the authority to sign the EU agreement under the powers given it under the so-called "Paris Protocol" and the second whether the EU-PLO agreement violates explicit terms of that Agreement.

### *E. The Jurisdictional Power to Sign*

Article 38 of the EU/Israel Association Agreement provides that the Agreement shall apply to the area covered by the State of Israel.<sup>343</sup> The EU argued that this area excludes WBG, claiming that prior to 1996 the PA was not in existence to police the customs territory and since that time, an Association Agreement has been signed with the Palestinians.<sup>344</sup>

For its part, Israel argued that the Interim Agreement provides that the final status negotiations not the EU-PLO Agreement shall cover such issues as the delineation of borders.<sup>345</sup> Until then there is only one "customs envelope" which includes both Israel and the PA areas and as a result, products originating in the PA areas should be regarded as Israeli goods under the Association Agreement.<sup>346</sup> Otherwise one would have two customs zones covering two distinct entities: Israel and the PA<sup>347</sup>--in violation of the Paris Accords..<sup>348</sup>

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<sup>343</sup> See Draft Association Agreement with Israel, *supra* note 337.

<sup>344</sup> The issue came up regarding Israeli obstacles preventing exports to the EU of products as if originating in Israel while they were effectively produced in: (i) the Israeli settlements, East Jerusalem and the Golan Heights; and (ii) the West Bank and Gaza Strip.

The communication discussed that Israel was exporting products to the EU that did not originate in Israel. Community Communication, *supra* note 338. *Protocol 4* of the EC-Israel Interim Agreement specifies the origin criteria for categories of products. Products are considered to have originated in Israel (i) if they are "wholly obtained in Israel," such as vegetables grown and harvested in Israel, or (ii) products obtained in Israel which contain materials not wholly obtained in Israel, provided that those material have undergone sufficient working or processing in Israel within the meaning of the Protocol. The communication states that Israel was (1) exporting to the European Community products "from the Israeli settlements in the West Bank and Gaza Strip, East Jerusalem and the Golan Heights as if they were Israeli originating products; and (2) . . . products effectively produced in the West Bank and Gaza Strip as if they were Israeli originating products." *Id.*

<sup>345</sup> Cf. Interim Agreement, art. X, *supra* note 1.

<sup>346</sup> See *Israeli Memorandum on Trade and Economic Relations between Israel and the European Community* 1, 4 (Israel Sept. 29, 1997).

<sup>347</sup> *Europe Moves Toward Israel on Forged Juice and Exports*, ISRAEL BUS. TODAY, Sept. 15, 1998; see also Community Communication, *supra* note 338, at section III ("All relevant United Nations Security Council Resolutions lead to the conclusion that neither Israeli settlements in the West Bank and Gaza Strip, nor East Jerusalem and the Golan Heights, can be considered as part of the State of Israel. . . . these United Nations Security Council

The Israelis claim that the EU - PLO Agreement does not respect the Paris Protocol notion of a single Israeli-PA "customs envelope."<sup>349</sup> Israel claims that the EU, through its agreement with Palestine, treats WBG as a separate customs territory, and the PA as having full competence "in the field of external trade relations to fulfill its rights and obligations under the EU - PLO Agreement."<sup>350</sup> Thus, the Israelis claim the EU - PLO Agreement is in violation of the Paris Protocol.<sup>351</sup>

Another disputed issue is the definition of "economic agreements."<sup>352</sup> The Interim Agreement allows the PLO to sign economic agreements with third parties, on behalf of the PA, however, the PA itself is specifically precluded from entering the sphere of foreign relations. When the PA is acting within the approved spheres of cultural, scientific, economic and educational agreements, its actions are not considered foreign relations under the Interim Agreement.<sup>353</sup> The reality however, is that "it's practically impossible to separate economics from politics, especially when it comes to actions of a third party."<sup>354</sup> The EU's reading of the Interim Agreement allows the Palestinians, through the PLO, to sign their own trade agreements with third parties (countries or entities), while Israel claims that the Interim Agreement allows only economic cooperation agreements, not independent trade agreements.<sup>355</sup>

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resolutions may be regarded as legally binding, or at least as an authoritative interpretation of international law.")

<sup>348</sup> See *id.* Israel further pointed out that once products originated in the EU are imported into Israel, they are "legally and de facto in free circulation within all areas under its control and within the 'customs envelope';" thus "free access" should be in both directions within the principles underlying the Israel-EU contractual relations. *Id.* at 5.

<sup>349</sup> Annex V, Protocol on Economic Relations (Paris Protocol) to Israeli Palestinian Interim Agreement (Sept. 28, 1995).

<sup>350</sup> See *supra* note 346, at 5.

<sup>351</sup> See Annex V, *supra* note 349; see also *Europe Moves Toward Israel on forged Juice and Exports*, ISRAEL BUSINESS TODAY, Sept. 15, 1998 ("Israel simply does not recognize this agreement; from its perspective there is only one economic agreement between itself and the EU . . . Israel speaks of a single customs zone that includes it and the PA areas; but Europe refers to two customs zones covering two discrete entities, Israel and the PA."). See also European Commission Memorandum on Trade and Economic Relations Between Israel and the European Community (July 24, 1997) (requesting that Israel "allow the full implementation of the E.C.-PLO Interim Association Agreement . . . especially its economic protocol"). Israel has interpreted this as asking Israel and the "PLO-PA to infringe the Paris Protocol and Israeli-Palestinian Interim Agreement." See *supra* note 346, at 5. Israel claims that this will scuttle the peace process, and that is something that Israel will not do. *Id.*

<sup>352</sup> *Id.*

<sup>353</sup> Thus, preventing the PA from acting in any way that could influence its international status.

<sup>354</sup> HA'ARETZ, *The power of the weak* (July 22, 1998) <<http://www.haaretz.co.il>>.

<sup>355</sup> See *Reading the EU*, THE JERUSALEM POST, May 22, 1998, at 16.

Further, Israel has argued that the EU-PLO agreement is not an "economic" agreement, as defined by the Peace Accords.<sup>356</sup> It is hard to understand this argument. While Israel can properly claim the "two envelope" model is in violation of the Paris Accords, it cannot claim that economic agreements entered into for "the benefit of the PA" *per se* violate the Paris Accords. Rather, any such agreement must be "compatible with the Interim Agreement."<sup>357</sup>

In April 1999, Israel "expressed a readiness to 'acknowledge' (although not formally recognise) [sic] the existence of the interim trade agreement between the EU and the PLO, but once again, Israel and the EU disagreed on the territorial coverage of the agreement."<sup>358</sup> The deputy director-general for Israeli economic affairs at the Foreign Ministry said "[w]e will facilitate the implementation of the EU-PLO agreement . . . on condition that it does not contradict the Paris protocol . . . and does not prejudice any kind of political subject that is on the agenda of the final settlement."<sup>359</sup> The EU has recognized that, "[i]n practice, . . . full implementation of the [EU-PLO] Agreement is not feasible unless Israel allows it to take place."<sup>360</sup> In any event, since the recent election in Israel (and unconnected internal EU management scandals in Brussels) the EU has seemingly dropped the issue so as "not to upset the peace process."<sup>361</sup>

To the extent to which Israel's acquiescence to the EU-PLO agreement can be understood as a waiver of the foreign affairs preclusion in the Paris Accords it may open the way for Palestine to sign multilateral conventions ordinarily limited to states (such as the New York Convention) if both sides agreed that such a signing in no way should be understood as a general waiver of Israel's rights under the Paris Accords. Given Israel's interest in promoting both Palestinian economic growth and Palestinian integration into a global legal regimen such consent might be mutually beneficial.

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<sup>356</sup> See generally Singer, *supra* note 290; John Quigley, *The Israel-PLO Interim Agreements: Are They Treaties?*, 30 CORNELL INT'L L.J. 717 (1997).

<sup>357</sup> See *supra* note 346.

<sup>358</sup> See Alan George, *Israel Wins First Round of Trade War with EC*, MIDDLE E., May 1999, at 9.

<sup>359</sup> See David Zev Harris, *EU: Israel Notes EU-PA Trade Pact*, JERUSALEM POST, Nov. 11, 1998, at 12. *But see*, Alan George, *Tempers cool on EU-Israel Trade Conflicts*, MIDDLE E., Jan. 1999, at 43 (stating that Israel refuses to recognize the EU-PLO agreement because it conflicts with the Paris Protocol).

<sup>360</sup> Community communication, *supra* note 240, at IV.a.

<sup>361</sup> Judy Dempsey, *Israeli Exports Breach EU Trade Agreements Rules on Origin, Brussels Aims for Diplomatic Solution over Products Made in Jewish Settlements*, FIN. TIMES, Feb. 29, 2000, at 14.

## XI. DOMESTIC VERSUS INTERNATIONAL ARBITRATION LAWS

There is a growing consensus among international law scholars and practitioners that it is preferable to keep international arbitration laws separate from domestic arbitration laws.<sup>362</sup> This is particularly true in the Middle East where there is a history of informal domestic arbitration and mediation. The majority of Middle East States have laws that support enforcement of domestic arbitration decisions, but do not always include enforcement of international arbitration decisions.<sup>363</sup> Many of the domestic arbitrations are based on religious principles and traditions.<sup>364</sup> And indeed, domestic laws are often inappropriate for “the special needs and features of international arbitration.”<sup>365</sup> Foreign investors, often unfamiliar with these practices, have greater confidence in international dispute resolution mechanisms in what may be referred to as an international, neutral, and more familiar, forum.

## XII. NATIONAL LAWS AND THE COURTS

The national laws of the country where an international arbitration takes place or where an award is to be enforced are of primary importance.<sup>366</sup> The arbitration authority comes not only by agreement between the parties but also

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<sup>362</sup> See Albert Jan Van Den Berg, *The New York Arbitration Convention of 1958 and the Arab Countries*, 1 EURO-ARAB ARBITRATION CONFERENCE 54, 58-59 (1987); see also EL-AHDAB, *supra* note 55 at 157 (“[N]ational commerce has rules and customs which are quite different from those of international commerce. An arbitration act which is good for national commerce is not necessarily so for international commerce.”).

<sup>363</sup> See Fathi Kemicha, *Future Perspectives on International Commercial Arbitration in the Arab Countries*, in INTERNATIONAL COUNCIL FOR COMMERCIAL ARBITRATION, INTERNATIONAL COMMERCIAL ARBITRATION IN A CHANGING WORLD 225 (Albert Jan Van den Berg ed., 1993)

<sup>364</sup> The notion of arbitration in Muslim Law is very different from the Western conception of arbitration. See El-Abdab, *supra* note 225 (according to Muslim-law, when a Muslim is party to the controversy, Muslim law, as applicable to Muslims, govern the controversy including the Muslim notion of public order). A solution for countries that have domestic arbitration “based on long traditions” is to “introduce a new law specifically dealing with international arbitrations within their own country. . . . The adoption of the Model Law may be the easiest solution for countries wishing to have a separate law for international arbitration.” Van Den Berg, *supra* note 362, at 59.

<sup>365</sup> Herrman, *supra* note 111, at 486.

<sup>366</sup> “[T]he various conventions relating to international commercial arbitration . . . operate through the national law of those states which have agreed to be bound by them.” REDFERN, *supra* note 91, at 68. “[T]he national legal systems are of central importance because . . . [they] determine the validity and the effect of the arbitration agreement . . . [as well as] incorporate and implement any pertinent international conventions.” Bühring-Uhle, *supra* note 93, at 55-56. “National law . . . gives arbitration its legally binding character.” William W. Park, *National Law and Commercial Justice: Safeguarding Procedural Integrity in International Arbitration*, 63 TUL. L. REV. 647, 656 (1989).

from the legal systems that support the arbitral process.<sup>367</sup> National laws and the courts play a pivotal role in international arbitration.

The last decade has shown an increase in national legislation that respects the autonomy of the arbitral process from court intervention and supervision.<sup>368</sup> This is true “even [in] countries that were traditionally hostile to international commercial arbitration.”<sup>369</sup> The UNCITRAL Model Law has been instrumental in effecting this trend.<sup>370</sup> The majority of these national laws “provide for: enforcement of arbitration agreements; court assistance with the conduct of the arbitration proceedings; fewer mandatory procedural rules and less court interference with arbitration proceedings; a limited scope of judicial review of arbitral awards rendered with the jurisdiction; and limited grounds under which local courts can refuse the recognition and enforcement of foreign arbitral awards.”<sup>371</sup> An arbitration award will have a binding effect only if its *res judicata* effect is recognized and enforced by the national courts.<sup>372</sup> States need to integrate arbitration, as a mechanism of resolving commercial disputes, and the enforcement of foreign arbitral awards into their national laws. In order to ensure the utility of international arbitration proceedings national legal systems must be structured so that arbitration is binding and to provide a system of arbitration that is highly regarded for its level of integrity.<sup>373</sup>

### XIII. A SUGGESTED INTERNATIONAL ARBITRATION ACT FOR PALESTINE

With the support of the World Bank, the PA Ministry of Justice recently proposed a draft legislation on arbitration.<sup>374</sup> While the Draft Legislation is a

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<sup>367</sup> See Park, *supra* note 366, at 657. These legal systems include (i) the law used to enforce an arbitration agreement; (ii) the law which provides for recognition and enforcement of an arbitration award; and (iii) the law of the situs of the arbitration hearing. See *id.*

<sup>368</sup> See Bühring -Uhle, *supra* note 93, at 59-60.

<sup>369</sup> *Id.* at 59.

<sup>370</sup> See *id.* at 60.

<sup>371</sup> *Id.* at 59-60. Despite its potential for abuse, a minimum standard of court review operates as a safeguard to public policy (international or domestic) and is desirable to ensure the quality for dispute resolution. However, appeals on the merits are not acceptable in the modern climate, even if limited to points of law. See REDFERN, *supra* note 91, at 435.

[T]he modern trend is against challenges to an award on the basis of mistake in fact or law . . . . This is in line with the growing conviction that, as far as international commercial arbitrations are concerned, the parties should be prepared to accept the decision of the arbitral tribunal.

*Id.*

<sup>372</sup> See Park, *supra* note 116, at 91.

<sup>373</sup> See Park, *supra* note 366, at 658.

<sup>374</sup> Draft Legislation on Arbitration (Nov. 1999) (Palestine) [hereinafter Draft Legislation], translated in JIL at Appendix A. The Draft Legislation was submitted to the Palestinian

vast improvement from the existing arbitration laws currently applicable in the WBG, it falls short of providing the PA with a transparent arbitration law that reflects international standards. We have reviewed the Draft Legislation as well as earlier drafts.<sup>375</sup> Looking to the Model Law and the experience of other countries which have adopted the Model Law we make the following suggestions for drafting an International Commercial Arbitration Act for Palestine.

We suggest that Palestine carve out a specific international commercial arbitration law (the "Act") from its proposed domestic and international draft statute.<sup>376</sup> That law should be based on the UNCITRAL Model Law, taking advantage of the international transparency of an established model.<sup>377</sup> While certain changes are necessary to accommodate local conditions in Palestine, the transparent framework of the Model Law is ensured when the drafters do not radically change the model.<sup>378</sup> An added advantage of the Model Law is that Arabic is one of the Model's six official languages.<sup>379</sup> The Draft Legislation contains several provisions that are similar to the Model Law; however, the structure of the Draft Legislation is not the same as the Model Law, thereby taking away the advantage of transparency and familiarity which the Model Law brings with it.<sup>380</sup>

We propose that the suggested Act apply only to international commercial arbitrations. While an integrated law may appear simpler, we recommend that the PA keep their domestic and international arbitration laws separate at this time. Domestic arbitration in Palestine is filled with local particularities and is

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legislature in November 1999. We are working from a non-official translation of the November draft.

<sup>375</sup> See, e.g., Draft Legislation on Arbitration (April 1999) (Palestine), art. 8 (unofficial English translation on file with the authors).

<sup>376</sup> While the November 1999 version of the Draft Legislation on Arbitration does separate domestic and international arbitration it does so within the same Act thus causing considerable confusion as to what clauses apply. See Draft Legislation, *supra* note 374, translated in JIL Appendix A.

<sup>377</sup> "[A]n acceptable law for international commercial arbitration . . . should be of good quality with solutions that are sound and suitable to the specific needs of international arbitration; it should be easily recognizable and understandable to foreign users; and, building on these two conditions, it should be similar to the law of many other States embodying generally recognized principles . . . [A]ll [these] conditions are best met by legislation that follows, as closely as possible, the UNCITRAL Model Law."

Gerold Herrman, *Presentation of the UNCITRAL Model Law*, 3 EURO-ARAB ARBITRATION 165, 168-69 (1991).

<sup>378</sup> See *id.* at 169.

<sup>379</sup> *Id.* at 171.

<sup>380</sup> For example, the Model Law has 36 clearly defined articles, whereas the Draft Legislation has 58 articles. See Model Law, *supra* note 112, reprinted in 24 I.L.M. 1302; see also Draft Legislation, *supra* note 374, translated in JIL Appendix A.

geared toward domestic participants who are familiar with Palestinian culture. In contrast, international commercial arbitration is specifically geared to meet the needs of global business and private investors with the transparency and certainty they need to invest in a developing country. Thus, like the UNCITRAL Model Law, the PA's international commercial arbitration act should apply only to international arbitrations,<sup>381</sup> allowing domestic arbitration to continue while providing foreign practitioners with transparency and mitigating any fears of local particularities. At present, the Draft Legislation applies to *every* arbitration and does not provide for a separate law for international commercial arbitrations. The proposed PA modifications to the UNCITRAL Model law include those discussed below.

## A. Arbitration Agreement

### 1. Mediation

We propose that the Palestinian Draft arbitration law include language providing that once a dispute has been submitted for arbitration there will be a 30 to 60 day waiting period.<sup>382</sup> During that period the parties shall use best

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<sup>381</sup> Like Hong Kong, if the PA desires, it can amend its law in the future to include domestic arbitration. *See Reformation of Hong Kong Arbitration Law Enters Next Phase*, MEALEY'S INT'L ARB., June 28, 1998, at 17. In 1990, Hong Kong enacted an international commercial arbitration act based on the Model Law while keeping domestic arbitration separate. *See id.* In 1996 Hong Kong began looking at changing to a unitary system bringing the domestic arbitration law in line with the Model Law. *See id.*

<sup>382</sup> "Arabic and Islamic societies are known for their emphasis on conciliation." Bernardo M. Cremades, *Overcoming the Clash of Legal Cultures: The Role of Interactive Arbitration in Conflicting Legal Cultures in Commercial Arbitration*, Old Issues and New Trends, in STUDIES IN COMPARATIVE CORPORATE AND FINANCIAL LAW 147, 150 (1999). "Arab and Islamic societies characterized by the existence of a strong commercial system to promote amicable settlement of disputes through negotiation/mediation is a first step that could lead ultimately at a later stage to conciliation/arbitration." (quoting Ahmed Sadelc-El-Kosheri from his 1996 ICCA Conference Report). *Id.* This is also practiced widely throughout Asia. *See Yasuhei Taniguchi, The Changing Attitude to International Commercial Dispute Settlement in Asia and the Far East*, 1997 ARB. & DISP. RESOL. L.J. 67, 74-75 (describing the Asian emphasis on conciliation); *see also* Andrew Sagartz, *Resolution of International Commercial Disputes: Surmounting Barriers of Culture Without Going to Court*, 13 OHIO J. DISP. RESOL. 675, 700,705 (1998) (discussing the optimal situation of combining conciliation and arbitration in international commercial dispute settlement). *See generally* David W. Plant, *Mediation in International Commercial Arbitration: Some Practical Aspects*, 4 J. INT'L & COMP. L. 329 (discussing the fundamental, practical, and ethical considerations of informal resolution prior to arbitration); Steve Burton, *Combining Conciliation with Arbitration of International Commercial Disputes*, 18 HASTINGS INT'L & COMP. L. REV. 637 (discussing a combination of conciliation and arbitration as a way to settle international disputes). UNCITRAL is considering dealing with the issue of conciliation (mediation) prior to arbitration at its March 2000 meeting. UNCITRAL

efforts to resolve the dispute through mediation.<sup>383</sup> During that period the parties shall use best efforts to resolve the dispute through mediation. If the parties are not successful, the dispute shall then proceed to arbitration.

## 2. Definition of Dispute

The Model Law provides that an arbitration agreement is “an agreement by the parties to submit to arbitration *all or certain disputes* which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.”<sup>384</sup> The Model Law also provides that the “agreement shall be in writing.”<sup>385</sup> The Draft Legislation provides a similar definition of arbitration agreement as well as requires that agreement be in writing.<sup>386</sup> The Draft Legislation requires if arbitration is agreed upon following a dispute, that the agreement should include the subject of the arbitration, otherwise it is considered invalid.<sup>387</sup> The Draft Legislation is not clear whether it requires that all agreements to arbitrate include the subject of arbitration; if so, it narrows the application of the arbitration law quite a bit.<sup>388</sup> We propose that the Act follow the Model Law’s broad definition of Arbitration Agreement.

## 3. Definition of “Commercial”

The UNCITRAL Model Law provides, in a footnote, that the term “commercial” in commercial arbitration should be given broad interpretation.<sup>389</sup>

*Considering Possible Future Work*, 54 DISP. RESOL. J. 7 (Aug. 1999). The most popular addition to the model law is the issue of mediation. See Herrman, *supra* note 111, at 496.

<sup>383</sup> This idea is also stated in the 1998 Investment Law. See Revised Investment Law, *supra* note 5, art. 41(A) (“Either party to a dispute must request good faith negotiations before it may have access to the dispute resolution procedures...”).

<sup>384</sup> The Model Law, *supra* note 112, art. 7(1).

<sup>385</sup> The Model Law, *supra* note 112, art. 7(2).

<sup>386</sup> Draft Legislation, *supra* note 374, art. 5, translated in JIL Appendix A.

An arbitration agreement is an agreement between two or more parties which stipulates to refer all or part of the dispute that results or may result in the future from disagreement on a particular legal relationship whether it is binding or non-binding. The arbitration agreement can be a condition appearing on a separate contract or agreement.

The Arbitration Agreement must be in writing.

Draft Legislation, *supra* note 374, art. 5, translated in JIL Appendix A.

<sup>387</sup> *Id.* art. 5(4), translated in JIL Appendix A.

<sup>388</sup> *Id.*, translated in JIL Appendix A.

<sup>389</sup> Model Law, art. 1, *supra* note 112:

The term “commercial” should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of



The Law Concerning Arbitration in Civil and Commercial Matters includes the definition of commercial in the text and provides that an arbitration is commercial if the dispute arises out of a legal relationship having an economic nature.<sup>390</sup> The New Egyptian Law also provides that an arbitration is commercial if the dispute arises out of a legal relationship having an economic nature. The New Omani Arbitration Act presents a broad definition of commercial arbitration.<sup>391</sup> The Draft Legislation applies to international "dispute[s] over economic, trade and civil issues."<sup>392</sup> We propose that the PA follow the Draft Legislation and broadly define the term commercial within the text of the Act to include transactions that involve international commerce, including any special items surrounding the industrial zone area, as well as relationships which have an economic nature, while excluding "civil issues" from the definition.

### B. Definition of "International"

The Model Law provides that an arbitration is "international" if the parties "have their places of business in different states," the place of arbitration or substantive part of the relationship is outside the state in which the parties have their business, or "if the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country."<sup>393</sup> In reference to subject matter, the New Egyptian Law requires only that it relate to more than

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a commercial nature include, but are not limited to, the following transactions: any trade transactions for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business co-operation; carriage of goods or passengers by air, sea, rail or road.

*Id.*

<sup>390</sup> New Egyptian Law, *supra* note 126, provides that an arbitration is commercial if: the dispute arose over a legal relationship of an economic nature, [which included (but is not limited to)] . . . the supply of commodities or services, commercial agencies, construction and engineering or technical know-how contracts, the granting of industrial, touristic and other licenses, technology transfer, investment and development contracts, banking, insurance and transport operations, exploration and extraction of natural wealth, energy supply, the laying of gas or oil pipelines, the building of roads and tunnels, the reclamation of agricultural land, the protection of the environment and the establishment of nuclear reactors.

<sup>391</sup> Act on Arbitration in Civil and Commercial Matters, issued July 28, 1997; published in the Omani Official Gazette, No. 602, English version published in 10 W.T.A.M., January 1998 [hereinafter Omani Act]. The New Omani Arbitration Act resembles the Egyptian Act on arbitration issued in 1994. See El-Ahdab, *supra* note 275, at 60. The Egyptian Act is modeled on the UNCITRAL Model Law. See *id.*

<sup>392</sup> See Draft Legislation, *supra* note 374, art. 3, translated in JIL Appendix A.

<sup>393</sup> The Model Law, art. 1(3), *supra* note 112.

one state, not that the parties *expressly* agree.<sup>394</sup> The Draft Legislation provides a broad definition of an international arbitration that includes: when the subject matter is commercial and the headquarters of the parties are in different countries; when the subject of dispute involves more than one country; and when the place of arbitration or implementing the commitments, or place closely related to the subject of the dispute is located in another country.<sup>395</sup> We suggest that the PA follow a modified version of the Draft Legislation's broad definition combining "commercial" and "international", thereby giving the parties the benefit of the doubt while not requiring that the parties expressly agree.<sup>396</sup>

### C. Place of Arbitration

The provisions of the Model Law "apply only if the place of arbitration is in the territory of this State."<sup>397</sup> Both Germany and Egypt have removed the requirement "only if the place of arbitration is in this State."<sup>398</sup> The Draft

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<sup>394</sup> New Egyptian Law, *supra* note 126, art 3(3).

<sup>395</sup> Draft Legislation, *supra* note 374, art. 3(2), translated in JIL Appendix A.

Arbitration is considered international when its subject is a dispute over economic, trade or civil issues in the following cases:

- a. When the headquarters of the parties to arbitration are located in different countries at the time of signing the arbitration agreement. If a party has several headquarters, the more frequently used one is the one that relates to the arbitration agreement. If a party does not have a headquarters, the party's usual residence is the one that relates to the arbitration agreement.
- b. If the subject of dispute in the arbitration agreement involves more than one country.
- c. If the central headquarters of the parties to arbitration is located in the same country at the time of signing the arbitration agreement, and if one of the following places is located in another country:
  - c.1 The place where the arbitration occurs as designated by the arbitration agreement or if reference is made as to how it should be designated.
  - c.2 The place of implementing a substantial part of the commitments resulting from trade relations between the parties.
  - c.3 The place that is closely related to the subject of the dispute.

<sup>396</sup> We suggest removing the term *civil* from the definition, as well as removing the language regarding residence.

<sup>397</sup> Model Law, art. 1(2), *supra* note 112. Any reference to "this State" in the Model Law shall refer to the area under the control of the Palestinian Authority and is not used to imply that by enacting an international commercial arbitration act Palestine is declaring statehood.

<sup>398</sup> New Egyptian Law, *supra* note 126, art. 1. "The provision of this Law shall apply to all arbitrations between public law or private law persons, whatever the nature of the legal relationship around which the dispute revolves, when such arbitration is conducted in Egypt or when the parties to an international commercial arbitration conducted abroad agree to subject it to the provisions of this law." *Id.* See Berger, *supra* note 277.

Legislation seems to apply to international arbitrations taking place in Palestine as well as foreign arbitrations occurring outside Palestine, but it does not specifically state where the provisions apply.<sup>399</sup> We suggest that the PA follow the Model Law, but like Germany and Egypt remove the word “only” from the Model Law text, thereby expressly providing that the Act be applied in Palestine or abroad, provided the parties agree to be subject to the Act. This is a particularly important point for the PA at this time because it is recommended that international commercial arbitrations take place outside the WBG in a state that is party to the New York Convention (or other convention providing for the recognition of foreign awards), until such time as the PA’s international commercial arbitration law is established.<sup>400</sup> This will help to protect the PA as well as foreign investors by giving the award a more binding effect outside the WBG.<sup>401</sup>

#### D. Concept of Party Autonomy

One of fundamental concepts of an international arbitration is party autonomy.<sup>402</sup> Party autonomy in this context is defined as “the autonomy of the parties to decide on all aspects of an international arbitration procedure, subject only to certain limitations of mandatory law.”<sup>403</sup> These concepts are expressly provided in the articles of the Model Law which provides the parties the

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<sup>399</sup> Draft Legislation, *supra* note 374, art. 2, translated in JIL Appendix A (“subject to art. 4 of the Law, this Law shall apply to every arbitration between natural or legal persons, having full capacity over the rights involved in the matter subject to arbitration and in accordance with the international agreements to which Palestine adheres.”)

<sup>400</sup> “As the arbitration law of the place of arbitration plays an important role in international arbitration, it is equally important to chose a country which has an adequate arbitration law. That country should also be Party to the New York Arbitration Convention of 1958.” Van Den Berg, *supra* note 362, at 57.

<sup>401</sup> Use of foreign courts is currently not a common practice in Palestine. For example, “although a Palestinian businessman importing from or exporting to a foreign country could theoretically use that country’s courts to resolve contract disputes, this is rarely if ever done. In fact, according to one Gazan entrepreneur, in over 30 years of doing business internationally, he has been involved on only one lawsuit utilizing a foreign court. “Interview with Sa’ad Hirzallah, June 14, 1995.” Qayyum and Rasmussen, *supra* note 26, at 27 n. 28.

<sup>402</sup> Karl-Heinz Bockstiegel, *The Role of Party Autonomy in International Arbitration*, 52 SUM. DISP. RESOL. J. 24, 24 (1997) (The principle of party autonomy is fundamental to arbitration in general and to international arbitration in particular). See e.g. New Egyptian Law, *supra* note 390, art 13; Arbitration Act, 1996, ch. 23, §§1, 34, 46 (Eng.); the Dutch Arbitration of 1986, van den Berg, van Delden, Sniijders, Netherlands Arbitration Law 56 (Deventer, Boston 1993) (Arts. 1036 and 1054); the French Nouveau Code de Procedure Civile (Arts. 1449 and 1496); and the SWISS PRIVATE INTERNATIONAL LAW ACT OF 1987, Lalive, Poudret, Reymond, Le Droit de l’Arbitrage Interne et International en Suisse 348 (Lausanne 1989) (Arts. 182 and 187).

<sup>403</sup> Bockstiegel, *supra* note 402, at 25.

autonomy to agree on: the number of arbitrators;<sup>404</sup> the procedure appointing the arbitrator(s);<sup>405</sup> “the procedure to be followed by the arbitral tribunal in conducting the proceedings;”<sup>406</sup> “the language(s) to be used in the arbitral proceedings;”<sup>407</sup> and the place of arbitration.<sup>408</sup> These concepts of party autonomy should be included as an integral part of the Act.

### *E. Laws*

It is recommended that the parties to an agreement to arbitrate choose as governing law an established legal system that is outside of the WBG, at least until the laws in the WBG are more defined and transparent to investors. The Model Law provides that the parties can choose “the procedure to be followed by the tribunal” as well as “the rules of law . . . applicable to the substance of the dispute.”<sup>409</sup> The Draft Legislation provides that the parties can agree on the rules of procedure and the rule of law to be applied to the arbitration.<sup>410</sup> If the parties fail to agree, the Arbitration Commission shall choose the most suitable law.<sup>411</sup> The Draft Legislation further provides that if the arbitration is international, the “procedure stipulated by the law chosen by the parties” is applied; if there is a conflict, “the principles of the Laws of Palestine” are applied.<sup>412</sup> We suggest that the PA follow the language of the Model Law regarding party autonomy.

### *F. Language*

The Model law provides that “[t]he parties are free to agree on the language to be used in the arbitral proceeding.”<sup>413</sup> Failing such agreement by the parties, the arbitral tribunal shall determine the language to be used in the proceedings. The Draft Legislation provides that “arbitration is to be carried out in Arabic, unless otherwise stated by the parties.”<sup>414</sup> If the parties use different languages, the Commission will choose the arbitration language to be

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<sup>404</sup> Model Law, art. 10(1), *supra* note 112.

<sup>405</sup> *See id.* art. 11(2).

<sup>406</sup> *Id.* at art. 19(1). “The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute.” *Id.*, art. 28(1).

<sup>407</sup> *Id.* art. 22(1).

<sup>408</sup> *See id.* art. 20(1).

<sup>409</sup> Model Law, *supra* note 112, arts. 19(1), 28(1).

<sup>410</sup> Draft Legislation, *supra* note 374, arts. 18 & 20, *translated in* JIL Appendix A.

<sup>411</sup> Draft Legislation, *supra* note 387, art. 18, *translated in* JIL Appendix.

<sup>412</sup> Draft Legislation, *supra* note 374, art. 19, *translated in* JIL Appendix A.

<sup>413</sup> Model Law, art. 22, *supra* note 112.

<sup>414</sup> Draft Legislation, *supra* note 374, art 22, *translated in* JIL Appendix A.

used.<sup>415</sup> The New Egyptian Law provides that, unless the parties have agreed to another language, the arbitration shall be conducted in Arabic.<sup>416</sup> We suggest that the Act provide that the parties make the language determination in the first instance, failing such provision, the arbitral tribunal can determine the language to be used, designating Arabic as the default language.

### G. Court involvement

The Model Law follows “the trend in favour of limiting court involvement in international commercial arbitration,” reflecting the view “that parties to an arbitration agreement . . . prefer expediency and finality to protracted court battles.”<sup>417</sup> Article 5 of the Model Law states that the reader will find all instances of possible court intervention in the Law, and beyond such instances, “no court shall intervene.”<sup>418</sup> These instances are divided into two groups. The first group refers to the arbitrators and comprises appointment, challenge and terminations of the mandate of an arbitrator (art. 11, 13 and 14), jurisdiction of the arbitral tribunal (art. 16) and setting aside of the arbitral award (art 34).<sup>419</sup> The Model Law provides that a specially designated court should perform these functions.<sup>420</sup> The second group comprises court assistance in taking evidence (art. 27), recognition of the arbitration agreement (art. 8 and 9), and recognition and enforcement of arbitral awards (art. 35 and 36). The Draft Legislation provides for a “designated court” for an international arbitration shall be “the court of first instance in Jerusalem, the capital of Palestine or the temporary site in Gaza.”<sup>421</sup> The courts in Palestine are overburdened with cases and it is important the enforcement of arbitration agreements and enforcement of awards not get caught up in the delays. We suggest that the PA follow the Model Law and further suggest that the PA actually create an expedited system for arbitration matters, thereby encouraging parties to resolve commercial disputes outside of the already overburdened court system. Further, it is essential to the success of the Act that the Courts respect the Parties’ autonomy.

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<sup>415</sup> See *id.* art. 22, translated in JIL Appendix A.

<sup>416</sup> New Egyptian Law, *supra* note 126, art. 29.

<sup>417</sup> See Explanatory Note, *supra* note 278.

<sup>418</sup> Model Law, art. 5, *supra* note 112. This assurance that the reader does not have to search outside of the Act is quite valuable to the foreign practitioner who is not familiar with the particularities of each country.

<sup>419</sup> See *id.*

<sup>420</sup> *Id.* art. 6.

<sup>421</sup> Draft Legislation, *supra* note 374, art. 1, translated in JIL Appendix A.

When the arbitration is international and takes place in Palestine, the designated court is the court of first instance that has jurisdiction over the matter. In the case of a foreign arbitration, the designated court is the court of first instances in Jerusalem, the capital of Palestine or the temporary site of Gaza.

Draft Legislation, *supra* note 374, art. 1, translated in JIL Appendix A.

## H. Arbitrators

### 1. Nationality

The Model Law provides that “[n]o person shall be precluded by reason of his nationality from acting as an arbitrator, unless otherwise agreed by the parties.”<sup>422</sup> The Omani law contains a provision not foreseen in the Model Law. The Omani law provides that it is not required that the arbitrator be of a given *gender* or nationality unless the parties agree otherwise.<sup>423</sup> The Draft Law is silent on this matter. Although the April draft law contained a clause providing that “[n]o person is prevented from acting as an arbitrator because of his nationality, as long as the parties do not agree to the contrary,” it was removed from the November draft, which makes the default composition to be “agreed upon by the parties.”<sup>424</sup> We suggest that the Act include language similar to the Omani law, thereby allowing a greater pool of arbitrators from which to choose.

### 2. Number

The Model Law provides that the parties can determine the number of arbitrators; however, if the parties do not provide for a number of arbitrators, the “number . . . shall be three.”<sup>425</sup> The Draft Legislation provides the parties can agree on the composition of the arbitrator commission—meaning number and individuals; if the number is more than one, the arbitrators “shall designate an arbitrator with a casting vote.”<sup>426</sup> The draft further provides that “[t]he arbitrator must have legal capacity and shall enjoy full civil rights and shall not be convicted of a crime, felony, or misdemeanor, be adjudicated bankrupt or be found guilty of dishonor.”<sup>427</sup> We agree that the parties should have the autonomy to determine the number of arbitrators, but in an effort to keep arbitration costs reasonable, suggest that the default number be one arbitrator. We agree that the parties should have the autonomy to appoint an arbitrator or arbitrators of their choosing. The Draft legislation further provides that the court may appoint an arbitrator whose name appears on the list of certified arbitrators recognized by the Department of Justice.<sup>428</sup> While this list may be helpful, it should only be a suggested list. It is important to keep the arbitration process unbiased.

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<sup>422</sup> Model Law, art. 11, *supra* note 112.

<sup>423</sup> Omani Act, *supra* note 391, art 16(2).

<sup>424</sup> Draft Legislation, *supra* note 374, art. 8, *translated in* JIL Appendix A.

<sup>425</sup> Model Law, art. 10, *supra* note 112.

<sup>426</sup> Draft Legislation, *supra* note 374, art 8, *translated in* JIL Appendix A.

<sup>427</sup> *Id.* art. 9, *translated in* JIL Appendix A..

<sup>428</sup> *Id.* art. 11, *translated in* JIL Appendix A.

### 3. Challenge

The Model law provides that an arbitrator may not be challenged except where circumstances give rise to serious doubt of his impartiality or independence.<sup>429</sup> The Omani Arbitration Act further provides that an arbitrator must accept his mission in writing, and at the time of acceptance “the arbitrator must point out any circumstances likely to give rise to doubts as to his independence or impartiality. If such circumstances arise out of his appointment or during the proceedings, the arbitrator must take the initiative to inform the parties to the arbitration and the other arbitrators thereof.”<sup>430</sup> The Draft Legislation provides that “[t]he Commission should underline, when accepting the arbitration, the duty of neutrality and impartiality.”<sup>431</sup> We suggest that the PA Act adopt a writing requirement for arbitrators as well as a requirement to point out, at any time, circumstances likely to give rise to doubts as to his independence or impartiality.

### 4. Law

The Model Law provides that “[t]he arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute. . . [and f]ailing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.”<sup>432</sup> The New Egyptian Law provides that the parties have “the right to agree on the procedures to be followed by the Arbitral Tribunal.” And that in absence of agreement the arbitral tribunal does not have to resort to the conflicts of laws rules but rather, at its own discretion, suitable.<sup>433</sup> Germany, Italy, and Switzerland all apply the classic test to determine the law applicable to contract relations: look to the “law of the state with which the subject matter is most closely connected.”<sup>434</sup> The Draft Legislation is now silent on the matter.<sup>435</sup> The April draft provided if the parties fail to agree on the law to be used in an international arbitration taking place in Palestine, Palestinian rules of law apply.<sup>436</sup> We suggest that the PA not follow the “classic test” but that the Act provide that, where the parties have not specifically stated which law is to be used in their agreement, the arbitral

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<sup>429</sup> Model Law, art. 12, *supra* note 112.

<sup>430</sup> Omani Act, *supra* note 39, art. 19(3).

<sup>431</sup> Draft Legislation, *supra* note 374, art. 12, *translated in* JIL Appendix A.

<sup>432</sup> Model Law, art. 28, *supra* note 112.

<sup>433</sup> New Egyptian Law, *supra* note 126, art. 25.

<sup>434</sup> Berger, *supra* note 277, at 46, *citing The New German Arbitration Law, available and translated at* <<http://www.uni-muenster.de/Jura.iwr/english/berger/resar/10Zpoe.html>> at sec. 1051 para. 2.

<sup>435</sup> Draft Legislation, *supra* note 374, *translated in* JIL Appendix A.

<sup>436</sup> Draft legislation, *supra* note 374, art. 20.

tribunal has the freedom to determine, in its discretion, the rules of law to be applied, taking into account “the principles that govern relations between the two parties.”<sup>437</sup> It is important that the Act state that the Palestinian courts will honor the choice of law made by either the parties or the arbitral tribunal.<sup>438</sup> This is especially important in the WBG, where the laws are still developing. It is recommended that the arbitration committee draft a model arbitration clause that includes clearly defined terms (law, rules, place and language) that is available for inclusion in commercial agreements.

#### a. Enforcement of Foreign Awards

The Model Law provides that a party applying for enforcement of an award “shall supply the duly authenticated original award or . . . certified copy thereof, the original arbitration agreement[,]” and (3) if the agreement is not in the official language of the state, “a certified translation.”<sup>439</sup> The Draft legislation provides that a party applying for registration of the award should provide the court with: (a) certified copy of the foreign award, “authenticated by the Palestinian political or consular representative in the country where the decision was issued,” and (2) an Arabic translation “by a legal translator whose signature is authenticated by the political or consular Palestinian representative in the country of the applicant or is certified by a Palestinian translator.”<sup>440</sup> We suggest the Draft Legislation requirements are too onerous and may, at this time, be impossible to fulfill, as there are many states that do not have a Palestinian political or consular representatives. We further suggest that the Act follow the Model Law.

#### b. Setting Aside an Award

The Model Law provides that an application for setting aside of the arbitral award can be made if the court finds that “(i) the subject matter of the dispute is not capable of settlement by arbitration under the law of this State, or (ii) the award is in conflict with public policy of this State.”<sup>441</sup> The Draft Legislation provides that the court can refuse to record or implement a foreign arbitration decision if it “contradicts the general law in Palestine [or] [i]f the decision is not compatible with international conventions and agreements in force in Palestine.”<sup>442</sup> The Draft Legislation further provides that the “law does not apply. . . . [in c]ases concerning public order in Palestine;” “[c]ases where arbitration is precluded,” and “[d]isputes involving the personal status.”<sup>443</sup> The

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<sup>437</sup> *Id.* art. 19(2), translated in JIL Appendix A.

<sup>438</sup> *Id.*, translated in JIL Appendix A.

<sup>439</sup> Model Law, art. 35(2), *supra* note 112.

<sup>440</sup> Draft Legislation, *supra* note 374, art. 50, translated in JIL Appendix A.

<sup>441</sup> Model Law, art. 34(2), *supra* note 112.

<sup>442</sup> Draft Legislation, *supra* note 374, art 49, translated in JIL Appendix A.

<sup>443</sup> *Id.* art. 4, translated in JIL Appendix A.



April Draft Legislation contained an additional clause prohibiting the arbitration of administrative disputes “concern[ing] the government or public institutions.”<sup>444</sup> We suggest that the PA Act also include language stating awards will be enforced unless they contravene *international public order*.<sup>445</sup> Furthermore, the PA should explicitly define and state the subject matter not capable of settlement by arbitration as well as any relevant public policy within the Act. This will keep the Model Law’s spirit of transparency alive and clarify the role of arbitration proceedings.

#### XIV. DRAFT PALESTINIAN INTERNATIONAL COMMERCIAL ARBITRATION LAW

In June 1999 we chaired a roundtable on ADR and international arbitration hosted by the PA Minister of Trade of Economy in Ramallah. Representatives from the PA’s legal community, legal scholars and practitioners participated in the meeting. The participants discussed the unique elements of international commercial arbitration in Palestine. Based on those discussions, we proposed a draft Palestinian International Commercial Arbitration Law [See Appendix B.] The law is based on the Model Law with modifications specific to Palestine.

While the PA can and should enact an international commercial arbitration law that incorporates international standards, it cannot, at this time, be party to most multilateral treaties. In our view, the PA can make arbitration treaties consonant with its responsibilities under Oslo (they certainly can do so with Israeli acquiescence) but it is not certain that the consensus of states or international organizations will accept their validity. While we fully recognize the national sensitivities involved, we suggest that for an interim period (perhaps 5 years) the PA and parties contracting in the PA arbitrate their disputes outside of the WBG in a state that is party to one of the international conventions on the recognition of foreign awards. This will ensure that the arbitration award is recognized in states outside WBG. The PA’s own international arbitration act will be sufficient to ensure that the agreement to arbitrate as well as the award is recognized in Palestine.

We also suggest that the Board for Investment Incentive write a model arbitration clause for inclusion in commercial agreements to which the PA or Palestinian businesses are party. This clause should state the place of arbitration, the rules, the law and the language to be used in the settlement of the dispute. Because the WBG legal system is not yet fully developed, we suggest naming a legal system that is more established. One possibility is naming Egyptian law as the law of arbitration and Egypt as the place of the

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<sup>444</sup> Draft Legislation, *supra* note 374, art. 4, translated in JIL Appendix A.

<sup>445</sup> Draft Legislation art. 48, translated in JIL Appendix A. See Kenneth-Michael Curtin, *Redefining Public Policy Arbitration of Mandatory National Laws*, 271 DEFENSE COUNSEL J. 271 (1997) (advocating the formation of “international” and “transnational” public policy exceptions to replace “national” public policy exceptions).

arbitration. This offers the advantage of a law that is more transparent than the current WBG legal regime.<sup>446</sup> It also affords the possibility of using an institutional arbitration manager such as the Cairo Regional Centre for International Commercial Arbitration and its rules. The Arab Association for International Arbitration in Amman is another option,<sup>447</sup> as are the recent Arbitration Centers created in Lebanon,<sup>448</sup> Tunisia,<sup>449</sup> Yemen,<sup>450</sup> and the GCC.<sup>451</sup> Reference to rules and laws outside of Palestine, may, at least in the interim period, provide a practical solution for the enforcement of commercial arbitration awards—a matter of importance to all parties.

One other possibility is to “formalize” the present private arbitration scheme of the Palestinian Chamber of Commerce in Gaza and require the Chamber to follow the PA arbitration statute in its dispute resolution activities.<sup>452</sup> Whether or not the Gaza Chamber is the forum of choice for resolution of most commercial disputes between Gazan businessmen, (as it appears to be),<sup>453</sup> its influence is certainly significant. Through agreements with other Arab Chambers it offers arbitration between Gazans and many foreign countries.<sup>454</sup> It has no dispute resolution mechanism, however, with Israel.

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<sup>446</sup> Another option is the UNCITRAL Rules. Parties do not need to be a member of UNCITRAL to apply the rules.

<sup>447</sup> The AAAI was created in 1991 and has worked closely with certain arbitration institutions. See Abdul Hamid El-Ahdab, *Why Create the Arab Association for International Arbitration?*, 9 J. INT’L ARB. 29 (1992). The AAAI asserts that “disputes submitted to the . . . [International Chamber of Commerce, the American Arbitration Association and the London Court of International Arbitration] are in safe hands, even more so as there is an Arab participation in the arbitral tribunals composed by these centers to settle disputes.” *Id.* at 32. These institutions provide “mixed tribunals which respect Arab laws, where applicable.” *Id.* We must note that there have been no cases taken, as yet, under the Amman Convention. See Jaili, *supra* note 226.

<sup>448</sup> See *Lebanese Arbitration Associated Created*, MEALEY’S INT’L ARB., (NOV. 1995), at 17 (explaining that the aim of the association is to create arbitration centers).

<sup>449</sup> See Tunisia - Economic Policy and Trade Practices, MARKET REP., Feb. 1991, available in LEXIS, Country Reports, Tunisia Country Information File.

<sup>450</sup> See Announcement of establishment of the Yemeni Centre for Conciliation and Arbitration in Eugene Cotran, and Chibli Mallat, 3 YEARBOOK OF ISLAMIC AND INTERNATIONAL LAW 555-58 (1996).

<sup>451</sup> See generally Richard H. Kreindler, *An Overview of the Arbitration Rules of the Recently Established GCC Commercial Arbitration Centre, Bahrain*, 12 ARAB L.Q. 3 (1997) (discussing the background, development and possible future of the GCC Centre among Arab states).

<sup>452</sup> See ENFORCEMENT, *supra* note 50, at 35-58.

<sup>453</sup> *Id.* at 35, fn. 60.

<sup>454</sup> *Id.* at 36, fn. 64. We have no information as yet about the West Bank Chamber in this regard.

## XV. CONCLUSION

“International arbitration is closely linked to international commerce, to international investments, and therefore to money and business.”<sup>455</sup> Palestine’s economic development is important to the success of the peace process, and foreign investment in Palestine is a primary requirement for the economic development. The PA must address foreign investment issues so that its laws are not only up to international and regional standards, but transparent to would be investors.

Although the PA cannot currently ratify the international conventions regarding arbitration, it can enact laws that clearly reflect these standards and offer investors those incentives and protections they require; in particular, providing for the recognition and enforcement of agreements to arbitrate and recognition of foreign awards. The UNCITRAL Model law is internationally recognized and is becoming more standard in the Middle East, and certainly within the EU. Most new international commercial arbitration laws are at least based on the Model Law. The PA, by basing its law on the Model Law, can provide investors with the transparency and protections they demand.

Of course merely enacting a new law is not the entire solution. Practical solutions require long term commitment from political, institutional and professional sectors in WBG, as well as the commitment of the international community to invest. Investment in WBG must be free from political influence and the courts must enforce arbitration agreements as well as foreign awards. Thus, one recent commentator has suggested, “it is important for the Palestinian Authority to build a solid track record of working with the legal and regulatory framework and to avoid measures that would increase the perceived risk of future government meddling and arbitrary intervention in private activities.”<sup>456</sup> An international commercial arbitration act based on the Model Law and bilateral investment agreements goes far in that regard. To attract investment from the international community, the PA must amend their laws. To attract foreign investment now, the PA must act now. A clear international commercial arbitration law, reflecting international standards, will benefit both the WBG and foreign investors.

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<sup>455</sup> El-Ahdab, *supra* note 123, at 336.

<sup>456</sup> Oussama Kanaan, *The Peace Process, Uncertainty and Private Investment in the West Bank and Gaza Strip*, Vol. 6, MIDDLE EAST POLICY (No. 2) 67-75 (1998).