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Foreign Private Investment in Palestine: An Analysis of the Law on the Encouragement of Investment in Palestine

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Foreign Private Investment in Palestine: An Analysis of the Law on the Encouragement of Investment in Palestine

David P. Fidler

Abstract

This Article analyzes the Investment Law and its prospects for encouraging foreign businesses to invest in Gaza and the West Bank (collectively, “Palestinian Territories”). A brief analysis of the importance of foreign private investment to the peace process between Israel and the Palestinian Liberation Organization, and the progress made towards attracting such investment in Gaza and the West Bank since the September 1993 signing of the Declaration of Principles on Interim Self-Government Arrangements, serves as a prelude to a detailed examination of the text of the Investment Law. The author then compares the Investment Law to the latest international practices and principles on the treatment of foreign private investment. Finally, the author considers the likely impact of the Investment Law on foreign private investment in the Palestinian Territories and the peace process.
FOREIGN PRIVATE INVESTMENT IN PALESTINE: AN ANALYSIS OF THE LAW ON THE ENCOURAGEMENT OF INVESTMENT IN PALESTINE

David P. Fidler*

ABSTRACT

This Article provides an in-depth analysis of the Law on the Encouragement of Investment ("Investment Law"), recently adopted by the Palestinian National Authority. A brief analysis of the importance of foreign private investment to the peace process between Israel and the Palestinian Liberation Organization, and the progress made towards attracting such investment in Gaza and the West Bank since the September 1993 signing of the Declaration of Principles on Interim Self-Government Arrangements, serves as a prelude to a detailed examination of the text of the Investment Law. The author then compares the Investment Law to the latest international practices and principles on the treatment of foreign private investment. Finally, the author considers the likely impact of the Investment Law on foreign private investment in the Palestinian Territories and the peace process.

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INTRODUCTION

The leaders, diplomats, and experts who have crafted the process of building peace between Israel and the Palestine Liberation Organization ("PLO") have repeatedly emphasized that the success of this peace process depends upon the economic development of the areas under Palestinian self-rule. Many believe that Palestinians who see no improvement in their standard of living or find no economic opportunities as a result of the peace process will question the wisdom of making deals with Israel and perhaps support forces that oppose the peace process. As a result, Israel, the PLO, and the international community have focused attention and resources on developing the economies of Gaza and the West Bank. A key aspect of the plans for Palestinian economic development is foreign private investment. Recognizing the importance of foreign private investment, in April of 1995, the Palestinian National Authority ("PNA") adopted the Law on the Encouragement of Investment ("Investment Law"). This Article analyzes the Investment Law and its prospects for encouraging foreign businesses to invest in Gaza and the West Bank (collectively, "Palestinian Territories").

I. ECONOMIC DEVELOPMENT AND THE PEACE PROCESS

The countries and international organizations involved in
the peace process between Israel and the PLO have given primary consideration to the economic conditions in the Palestinian Territories. The International Bank for Reconstruction and Development ("World Bank"), for example, conducted a comprehensive evaluation of the economic situation in the Palestinian Territories prior to the signing of the Declaration of Principles on Interim Self-Government Arrangements ("Declaration") by Israel and the PLO on September 13, 1993. In the words of one commentator, the World Bank report "makes gloomy reading." The World Bank identified serious infrastructure problems with the economies of the Palestinian Territories that would have to be remedied through significant economic reform and the assistance of international aid and private investment. Although the World Bank recognized the need for pub-

1. Edmund O'Sullivan, Putting Palestine Back to Work, MIDDLE EAST ECON. DIG., Oct. 1, 1993, at 2. Edmund O'Sullivan noted that "[r]emaking the Palestinian economy is as big a challenge for the makers of Middle East peace as reconciling Israel with its enemies. Some of the world's leading economists, every major development agency and practically the whole of the Western world are applying themselves to this task." Id. The importance of economic development to the peace process was recognized before the September 1993 signing of the Declaration of Principles on Interim Self-Government Arrangements. See, e.g., Joel C. Rosenberg, Why Economic Growth is Critical to Arab-Israeli Peace, HERITAGE BACKGROUNDER REP., Nov. 5, 1992; Warren Strobel, U.S. Offers Aid to Palestinians for Jobs, 'Needs', WASH. TIMES, May 5, 1993, at A7.


3. See 1-6 INTERNATIONAL BANK FOR RECONSTRUCTION AND DEVELOPMENT, DEVELOPING THE OCCUPIED TERRITORIES: AN INVESTMENT IN PEACE (1993) [hereinafter WORLD BANK REPORT]. The World Bank Report consists of six volumes: Volume 1 Overview, Volume 2 The Economy, Volume 3 Private Sector Development, Volume 4 Agriculture, Volume 5 Infrastructure, and Volume 6 Human Resources and Social Policy. For a summary of both the World Bank Report and another relevant study, Securing Peace in the Middle East: Project on Economic Transition, which was coordinated by Harvard University and conducted by a group of Palestinian, Jordanian, and Israeli economists, see Allan Thompson, Rush is on to Build Palestinian Economy, TORONTO STAR, Sept. 27, 1993, at D1. For an overview of the World Bank Report, see O'Sullivan, supra note 1, at 2.

4. O'Sullivan, supra note 1, at 3.

5. 1 WORLD BANK REPORT, supra note 3, at 9. For a detailed examination of the infrastructure problems in the Palestinian Territories, see generally 5 WORLD BANK REPORT, supra note 3.

6. 1 WORLD BANK REPORT, supra note 3, at 19. The World Bank estimated that approximately US$2.5 billion in external public capital inflows would be required during the five-year transition period to Palestinian self-rule. Id. at 24. For purposes of this Article, references to "foreign private investment" and "foreign investment" mean direct investment and not portfolio investment. Direct investment typically means that
lic assistance from the international community, it emphasized that the long-term economic viability of the Palestinian Territories would depend on the success of the private sector, including foreign private investment.8

The Declaration reflects the importance of economic development in Palestinian Territories.9 Article XI of the Declaration established an Israeli-Palestinian Economic Cooperation Committee to develop and implement economic development programs.10 Annex III of the Declaration contains a protocol on Israeli-Palestinian cooperation on various economic and development programs, including a Financial Development and Action Program “for the encouragement of international investment in the West Bank and the Gaza Strip, and in Israel.”11 In Annex IV of the Declaration, Israel and the PLO agreed to cooperate in a Development Program for the region, with a specific Economic Development Program for the Palestinian Territories.12 The economic development and cooperation provisions of the Declaration “indicate recognition by the two sides that the success of their peace deal depends in large part on bringing about an immediate tangible improvement in living standards for Palestinians under occupation as well as mutually satisfactory economic relations between Israel and the future Palestinian authority.”13

The Conference to Support Middle East Peace, sponsored by the United States less than a month after the signing of the Declaration, highlighted the urgency of rebuilding the economic...
mies of the Palestinian Territories. At the conference, forty-seven countries pledged approximately US$2 billion in public assistance over a five-year period to support the transition of the occupied territories to Palestinian self-rule.\textsuperscript{14} A key aspect of this promised international assistance was that such aid would be primarily used to build the economic infrastructure necessary to encourage private investment in the Palestinian Territories.\textsuperscript{15} The United States, for example, pledged a total of US$500 million over the five-year period to assist the transformation of the economy in the Palestinian Territories,\textsuperscript{16} and Vice President Al Gore launched an initiative to spur U.S. private investment in Gaza and the West Bank called Builders for Peace.\textsuperscript{17} The international community's activities indicated widespread acceptance of the view articulated by a U.S. administration official at the Conference to Support Middle East Peace: the Palestinian people "will need to see that peace brings prosperity."\textsuperscript{18}

\begin{enumerate}
\item Id.
\item Id.
\item Amy Kaslow, \textit{For Palestinians, Much is Promised}, \textit{CHRISTIAN SCI. MONITOR}, Oct. 4, 1993, at 1. Although the argument that economic development is vital to the peace process is frequently made, what is not often explored is the theoretical or philosophical assumptions underlying this argument. The case for Palestinian economic development made by the World Bank and United States carries with it the assumptions and objectives of liberal economic thought. The influence of liberal economic thinking can be found at four levels. First, the concern that individual Palestinians need to see that peace brings prosperity ties into the liberal economic tenet, famously expressed by Montesquieu, of \textit{doux commerce}, which holds that commerce tempers human passions and channels them into productive, peaceful endeavors. \textit{See Albert O. Hirschman, The Passions and the Interests} 56-66 (1977). Economic development is expected to dissipate any discontent among Palestinians, discontent that would otherwise fester and encourage Palestinians to embrace the ideas of radicals and extremists opposed to the peace process. Second, the emphasis in economic development plans on private investment and market forces demonstrates that the objective is the creation of a capitalist economy in the Palestinian Territories. The World Bank's definition of "good policy" in the Palestinian Territories indicates that it has a capitalist model of economic development in mind. \textit{See 1 World Bank Report, supra note 3, at 15; supra note 8 (quoting World Bank Report's definition of "good policy")}. Third, the plans to promote Palestinian economic development by integrating Palestinians into regional and global markets bear the imprint of the liberal belief that economic interdependence between peoples and states promotes peaceful international relations. \textit{Robert Gilpin, The Political Economy of International Relations} 81 (1987). Fourth, the liberal economic theory running throughout the strategy for Palestinian economic development has consequences for Palestinian political development because individual freedoms necessary to make \textit{doux commerce}, the invisible hand, and peace through free trade work will re-
II. ECONOMIC DEVELOPMENT AFTER THE DECLARATION

The euphoria that accompanied the signing of the Declaration and the holding of the Conference to Support Middle East Peace quickly faded as the difficulty of developing the economies of the Palestinian Territories became apparent. Such difficulty arose for four major reasons. First, the Declaration had not articulated the exact nature of the rights and responsibilities of Israel and the PLO in the economic development of the Palestinian Territories. The need for rapid economic development conflicted with the political need of both Israel and the PLO to establish their power and authority over the wide range of political, legal, and economic dynamics of the transition to Palestinian self-rule. Second, the international aid promised by donor countries at the Conference to Support Middle East Peace did not flow quickly because of difficulties between the PNA and donor countries. Third, foreign businesses expressed more willingness to talk about investing in the Palestinian Territories than to make investments. Finally, political violence between radical Palestinian groups and Israel and political instability in the prospective areas of Palestinian self-rule had a chilling effect on foreign businesses thinking of investing in the Palestinian Territories.

A. The Peace Process and Economic Relations

In the Declaration, Israel and the PLO agreed to establish economic development programs for the Palestinian Territories. Economic development naturally touched upon the issues of economic and political control, which were sensitive issues for both sides. The negotiations on the transfer of political and economic power in the Palestinian Territories leading to the Israel-PLO Agreement on the Gaza Strip and Jericho Area ("Cairo Agreement") and the Interim Agreement between

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19. Declaration, supra note 2, art. XI, 32 I.L.M. at 1532.
Israel and the PLO on the West Bank and Gaza Strip ("Interim Agreement") dealt less with actual economic development than with what the economic relations between the two sides would be after Israel transferred authority to the PLO.

Annex IV of the Cairo Agreement and Annex V of the Interim Agreement both contain the Protocol on Economic Relations between Israel and the PLO ("Economic Protocol"). The Economic Protocol established the political and procedural framework within which Israel and the PLO would work on actual economic development and, pursuant to Article XXIV of the Interim Agreement, applies to all the Palestinian Territories. Although necessary as part of the transition to Palestinian self-rule, the negotiations on the Economic Protocol, like the negotiations on the other aspects of the Cairo Agreement and the Interim Agreement, were lengthy and, at times, difficult.

From the perspective of a foreign investor evaluating a possible investment in the Palestinian Territories, the Economic Protocol provides information about how the movement of

21. Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip, Sept. 28, 1995, Isr.-PLO [hereinafter Interim Agreement] (on file with the Fordham International Law Journal). Technically, the Interim Agreement supersedes the Cairo Agreement. See Interim Agreement, art. XXXI(2). The author has, however, cited both the Cairo Agreement and the Interim Agreement where possible because no cites to an official source for the Interim Agreement can be given since, to date, it has not been published.

22. The transfer of authority to the Palestine Liberation Organization ("PLO") in the peace process involves two Palestinian governmental institutions. The Declaration called for the establishment of a Palestinian Interim Self-Government Authority (the "Palestinian Council"), which was to be elected democratically and to have jurisdiction over the West Bank and Gaza, except for those areas and issues subject to the permanent status negotiations to take place at a later date. Declaration, supra note 2, arts. I, II-V, 32 I.L.M. at 1527-29. The Cairo Agreement established the Palestinian National Authority ("PNA") as an interim authority and transferred responsibility for all the legislative, executive, and judicial functions in Gaza and Jericho to it. Cairo Agreement, supra note 20, arts. III-VII, 33 I.L.M. at 627-31. The Interim Agreement stated that once elected and inaugurated, the Palestinian Council would assume all powers and obligations transferred to the PNA under the Cairo and Interim Agreements. Interim Agreement, supra note 21, art. I. This article refers throughout to the PNA; but, after the Palestinian elections scheduled for 1996, the Palestinian Council will assume responsibility for the Investment Law's implementation.


24. Interim Agreement, supra note 21, art. XXIV.
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goods, labor, and capital between Israel and the Palestinian Territories will be treated by the two sides. Access to the Israeli market for manufactured goods and agricultural produce originating in the Palestinian Territories is ensured by Article VIII(1) and Article IX(1) of the Economic Protocol, which allow industrial goods and agricultural produce of both sides to move freely without customs, import taxes, or other restrictions. The Economic Protocol enshrines a strategy of close economic contact and cooperation between Israel and the Palestinian Territories. The Economic Protocol differs, however, from a traditional free trade agreement in that the Israeli import regulations and customs tariffs shall apply both in Israel and the Palestinian Territories, with a few specific exceptions where the PNA has the power to set import policy.

Although the Economic Protocol provides that both sides “will attempt to maintain the normality of movement of labor between them,” each side retains the right to determine “the extent and conditions of the labor movement into its area.” As a result, there will not be free movement of labor between Israel and the Palestinian Territories. Because Israel has systematically reduced the level of Palestinian employment in the Israeli econ-

25. Cairo Agreement, supra note 20, annex IV, arts. VIII(1), IX(1), 33 I.L.M. at 711, 715; Interim Agreement, supra note 21, annex V, arts. VIII(1), IX(1). The Economic Protocol contains some exceptions to the free movement of agricultural goods, namely the application of veterinary and phytosanitary measures and quotas on certain agricultural produce to be phased out through 1998. See Cairo Agreement, supra note 20, annex IV, art. VIII(2)-(10), 33 I.L.M. at 711-714; Interim Agreement, supra note 21, annex V, art. VIII(2)-(10).

26. Shlomo Avineri, Sidestepping Dependency, FOREIGN AFF., July/August 1994, at 12-13. Shlomo Avineri observes that “[a]ll . . . assume that close Israeli-Palestinian economic cooperation is the key to regional stability.” Id.

27. Cairo Agreement, supra note 20, annex IV, art. III(5), (10), 33 I.L.M. at 699-700; Interim Agreement, supra note 21, annex V, art. III(5), (10). The exceptions to the common customs policy are found in Article III(2). Cairo Agreement, supra note 20, annex IV, art. III(2), 33 I.L.M. at 698; Interim Agreement, supra note 21, annex V, art. III(2). A traditional free trade agreement allows each contracting party to establish its respective customs policy vis-a-vis third parties. The Economic Protocol combines elements of a free trade agreement and a customs union, but does not represent a common market because labor is not allowed to move freely between the two sides. Cairo Agreement, supra note 20, annex IV, art. VII, 33 I.L.M. at 709; Interim Agreement, supra note 21, annex V, art. VII. For a general discussion of the Economic Protocol in relation to free trade agreements, customs unions, and common markets, see Kleiman, supra note 23, at 352-55.

28. Cairo Agreement, supra note 20, annex IV, art. VII(1), 33 I.L.M. at 709; Interim Agreement, supra note 21, annex V, art. VII(1).
omy this "normality of movement of labor" between Israel and the Palestinian Territories enshrined in the Economic Protocol does not and will not create significant new employment opportunities for Palestinians in Israel. Thus, foreign investors in the Palestinian Territories will not face competition for labor from the Israeli economy because they will have a large pool of labor in the Palestinian Territories to tap into without fearing labor shortages or inflationary wage pressures caused by the Israeli labor market.

A foreign investor would also want to know how authority for taxation is divided between Israel and the PNA. The Interim Agreement contains a Supplement to the Economic Protocol that replaces Article V (Direct Taxation) and Article VI (Indirect Taxes on Local Production) in the original Economic Protocol with new articles addressing direct and indirect taxation that apply in the Palestinian Territories. Under Article V of the Economic Protocol, Israel and the PNA both have independent power to set "tax policy in matters of direct taxation, including income tax on individuals and corporations, property taxes, municipal taxes and fees." To the extent that levels of direct taxation differ greatly between Israel and the Palestinian Territories, a foreign investor will calculate the economic impact of the tax differential in evaluating an investment in the area.

As for indirect taxation, the PNA has the power to levy and collect value added tax ("VAT") and purchase taxes on local production. Purchase tax rates "within the jurisdiction of each tax authority will be identical as regards locally produced and imported goods." Additionally, the rate of Palestinian VAT cannot be more than two percent lower than the prevailing Israeli VAT rate.

30. See Interim Agreement, supra note 21, annex V, Supplement, Apps. 1-2. Appendix 1 replaces Article V of the Economic Protocol, which deals with direct taxation, while Appendix 2 supplants Article VI, dealing with indirect taxes on local production. Id. References to Articles V and VI of the Economic Protocol in this article shall refer to the Articles as they appear in the Supplement to the Economic Protocol in the Interim Agreement.
32. Id. annex V, Supplement, App. 1, art. VI(1).
33. Id. art. VI(2).
34. Id. art. VI(3).
The Economic Protocol also addresses monetary and financial issues that would be important to a foreign investor. The Economic Protocol establishes a Palestinian Monetary Authority ("PMA"), which will act as the central financial institution within the PNA. The PMA has responsibility for acting as the PNA's official economic and financial advisor and local and international financial agent. The PMA will also be charged with managing the PNA's foreign currency reserves, regulating foreign currency exchanges in the Palestinian Territories, supervising banks operating in the Palestinian Territories, and acting as the lender of last resort for the banking system in the Palestinian Territories. The PMA does not, however, have authority to issue a Palestinian currency, but the new Israeli Sheqel ("NIS") will be one of the legal currencies in the Palestinian Territories.

The convertibility of the NIS into foreign exchange will be of primary concern to foreign investors. Residents in the Palestinian Territories will be able to exchange NIS for foreign currency but only through the PMA, which can exchange NIS for foreign currency with the Bank of Israel in an amount determined by a formula. Consequently, there will not be free con-
vertibility of NIS in the Palestinian Territories. The convertibility of other currencies circulating in the Palestinian Territories (e.g., the Jordanian dinar in the West Bank) will ultimately depend on the foreign exchange reserves held by the PMA or on the ability of currency holders to exchange them for hard currency elsewhere.

The complexity of the economic relationships established by the Economic Protocol indicates that foreign investors will be faced with a novel economic framework in the Palestinian Territories, based as much on political compromise as economic necessity. This state of affairs might itself be a source of caution for foreign investors.

B. Flow of International Aid

Delays in the flow of aid promised by donor countries and the World Bank at the October 1993 Conference to Support Middle East Peace have hurt the prospects for economic development and foreign private investment in the Palestinian Territories. The reasons for these delays are numerous, and each participant in the aid process has blamed others for the delays.

Donor countries have withheld aid because they claimed that the PLO failed to set up institutions and procedures to manage and account for the expenditure of international aid.46 Immediately after the Conference to Support Middle East Peace, the United States Assistant Secretary of State for Middle Eastern Affairs stated that the “Palestinians need to create structures to receive and coordinate . . . assistance and to ensure that it is put to productive use.”47 Yasser Arafat, Chairman of the PLO, established the Palestine Economic Council for Development and Reconstruction (“PECDAR”)48 by decree on October 31, 1993, to act as the link between the PNA and the international donor community, but the PLO took six months to staff and organize

47. Kaslow, supra note 18, at 1.
48. The PLO established the Palestine Economic Council for Development and Reconstruction (“PECDAR”) to handle the flow of aid promised by donor countries. PECDAR’s mandate is to establish development priorities for the Palestinians, coordinate aid, and assist in the implementation of development projects. Economist Intelligence Unit, supra note 19. PECDAR consists of a fourteen member board of directors responsible to Arafat. Id.
Donor countries expressed frustration at how long Arafat took to establish and staff PECDAR.\textsuperscript{50} For example, in responding to PLO complaints about delays in aid, one U.S. official stated that there was no one to give aid to because the PLO had failed to create an aid infrastructure.\textsuperscript{51} In July 1994, the Council of Ministers of the European Union expressed concern "about the failure of the PLO to have in place appropriate structures to enable the disbursement of funds allocated by the European Union for assistance to the occupied territories."\textsuperscript{52} Israeli officials also expressed concern about the PLO's failure to appoint persons to key economic and financial positions.\textsuperscript{53} Furthermore, PECDAR came under criticism from some Palestinians who argued that Arafat had appointed close political allies to key positions and not professional economists and financial experts.\textsuperscript{54}

Palestinian officials have denied the claims of donor countries and Israel,\textsuperscript{55} and, in turn, the PLO has a number of criticisms of the international donor community. First, the PLO believes that the aid promised at the Conference to Support Middle East Peace was insufficient to relieve the poverty of the Palestinian Territories.\textsuperscript{56} Second, the PLO has argued that donor countries have broken their promises on providing aid.\textsuperscript{57} Third, the PLO has complained about the conditions, procedures, and supervision required by the international donor community before aid will flow.\textsuperscript{58}

\begin{thebibliography}{9}
\bibitem{50} Amy Kaslow, \textit{West Hesitates on Palestinian Aid}, CHRISTIAN SCI. MONITOR, May 24, 1994, at 2 [hereinafter \textit{Palestinian Aid}].
\bibitem{51} \textit{Id}.
\bibitem{53} \textit{Palestinian Aid, supra} note 50, at 2.
\bibitem{54} Economist Intelligence Unit, supra note 13; Murphy, supra note 49, at A10.
\bibitem{55} \textit{Palestinian Aid, supra} note 50, at 2.
\bibitem{56} Kaslow, supra note 18, at 1.
\bibitem{57} Sari Nusseibah, Deputy Director General of PECDAR, stated in May 1994 that the donor countries have broken their aid promises: "We heard that $1.2 billion was to be spent the first year, but some of it was supposed to be spent in 1994. It has not been spent. Not one single penny of it. We hear a lot of excuses." \textit{Palestinian Aid, supra} note 50, at 2.
\bibitem{58} See, e.g., Youssef M. Ibrahim, \textit{PLO Wants Aid Funds, Fast; But It Says Donors' Supervision is Humiliating}, INT’L HERALD TRIB., June 10, 1994, available in LEXIS, Nexis
\end{thebibliography}
The Israelis have likewise been criticized for contributing to the delay in the flow of aid. The border closings imposed by Israel following terrorist attacks on Israelis created economic hardship in the Palestinian Territories and contributed to the political instability in the Palestinian community. The political turmoil within the Palestinian community has forced the PLO to concentrate its attention on keeping the political situation from exploding rather than on economic development. If the PLO has in fact been slow to create the infrastructure needed for the receipt and disbursement of aid, then such slowness reflects the urgency and importance of the political issues that the PLO deals with daily. The political violence resulting from this turmoil has been particularly inhibiting to the flow of aid because donor countries have been hesitant to release billions of dollars of aid into an area, at times, approaching civil war. Finally, Israeli bureaucracy and red tape were also cited for contributing to the stagnant economic conditions in the Palestinian Territories.

The World Bank and donor countries have not withheld all aid funds, instead a pattern emerged in which donor countries and the World Bank would agree to release limited funds to help the PNA through a crisis. For example, in May 1994, eight months after the signing of the Declaration, the World Bank launched a US$1.2 billion, three-year emergency aid plan for the West Bank and Gaza. In December 1994, donor countries and the World Bank agreed to give the PNA US$200 million to pay public workers, create construction jobs, and begin infrastruc-

59. Nathaniel C. Nash, Donors Grant Arafat $200 Million to Tide Him Over in Gaza, N.Y. TIMES, Dec. 1, 1994, at A9. “The unemployment caused by the border closings is seen as a major contributor to political unrest in Gaza.” Id.

60. See Jill Hamburg, Massacre Slows Business; But West Bank Deals Will Survive, Many Say, ST. LOUIS POST-DISPATCH, Mar. 6, 1994, at 1A (discussing affect of violence on Palestinian economic development).


62. Joel Greenberg, International Aid for Palestinians Falls, INT'L HERALD TRIB., Mar. 14, 1995, available in LEXIS, Nexis Library, Curnws File. For example, of the US$800 million pledged for 1994, only US$228 million was actually delivered to the PNA. Id.

63. Rich Donors to Provide Massive Aid to Palestinians, supra note 46.
In March 1995, the United States pledged US$65 million in grants to the PNA.65 The ad hoc, crisis delivery of the aid, compared against the grand promises made at the Conference to Support Middle East Peace and the need for systematic reconstruction of economic infrastructure in the Palestinian Territories, gives potential foreign investors the sense that the international aid program for the Palestinians is, and will remain, a troubled and troubling endeavor.66

The multiple causes for the delays in the flow of aid and the continuing political friction caused by such delays has created further disincentives for private investors. This controversy: (1) suggests that the PNA had not yet put its economic house in order; (2) indicates that donor countries are losing their enthusiasm for economic development projects in Gaza and the West Bank; (3) demonstrates that Israeli security concerns and economic dominance in the region place limits on the process of Palestinian economic development; and (4) hampers the building of the infrastructure needed to attract and support private investment. The interdependence between public aid and private investment, identified by the World Bank and the donor countries as the key dynamic of economic development for Gaza and the West Bank, has not yet been established.67

C. Attitudes of Foreign Private Investors

Since the signing of the Declaration, the general attitude among foreign businesses towards investing in the Palestinian Territories has been one of cautious interest, with the caution outweighing the interest. The signing of the Declaration trig-

64. Nash, supra note 59, at A9.
66. See Greenberg, supra note 62.
gered interest in the Palestinian Territories amongst many in the international business community. In some cases, this interest translated into actual investment projects. For example, in September 1994, Vice President Gore and Builders for Peace jointly announced nine investment projects in the Palestinian Territories. The fanfare that accompanied the Builders for Peace announcement has, however, been replaced by a drought in private investment interest in the United States towards the Palestinian Territories. In testimony, in July 1995, on economic development in Gaza and Jericho before the Subcommittee on Near Eastern and South Asian Affairs of the U.S. Senate Foreign Relations Committee, Mel Levine, Co-President of Builders for Peace, expressed his frustration at the current state of private investment in the Palestinian Territories:

Since everyone recognizes the political urgency of private sector development, and since the raw material for such development is at hand, why is Pete Bucheit's impressive concrete plan in Gaza the only new Palestinian business we have been able to create in the year-and-a-half of our existence?

68. See BREAKTHROUGH! Builders for Peace Announces First Projects, BUILDING BLOCKS (Builders for Peace, Washington, D.C.), Sept. 1994, at 1 (celebrating announcement of first investment projects in Palestinian Territories); Ray Delgado, Nonprofit Group Builders for Peace Has Announced Nine Business Ventures in Gaza and the West Bank, L.A. TIMES, Nov. 17, 1994, at D5 (discussing Builders for Peace projects). The nine announced projects were: (1) construction of furniture and mattress factories by AMTEC International; (2) construction of condominiums by AMTEC International; (3) formation of bottled water company by ASTRUM International in conjunction with its subsidiary Culligan International Co.; (4) creation of a cement manufacturing plant by Bucheit International; (5) construction of two motel/business centers by SAFA International; (6) construction of ten deluxe condominiums by I.B. Cook Investments; (7) construction of Marriott Hotel in Gaza by GRdG; (8) construction of olive oil packaging and storage facility by West Bank and Gaza Development and Kramer Associates; and (9) construction of processing plant for crude oil and sale of byproducts like asphalt and establishment of service stations by Palestinian Fuels Co. See John S. McClanahan, In the Middle East, Too, It’s ‘Hey, Culligan Man’, INDUSTRY WK., Oct. 17, 1994, at 21; see also Michael Schneider, Utah Man Pushing Palestinian Refinery, PLATT’S OILGRAM NEWS, Oct. 24, 1994, at 1 (discussing possible construction of oil processing plant). See generally BUILDING BLOCKS, supra, at 4 (listing all nine projects).

69. Hearings, supra note 67 (testimony of Mel Levine). On the success of the cement plant, see Leisel Bucheit, How We Opened a Factory in Gaza, BUILDING BLOCKS (Builders for Peace, Washington, D.C.), May/June 1995, at 1. In early 1994, Culligan International Co. donated a water purification system to the Bethlehem Arab Society for Rehabilitation Hospital, a donation that “was touted as the first private American investment in the West Bank and Gaza as part of the Clinton Administration’s Builders for Peace program.” McClanahan, supra note 68, at 21. The Culligan donation was
Moreover, Mr. Levine directed much of his July 1995 testimony to explaining the obstacles that the Overseas Private Insurance Corporation ("OPIC"), a U.S. Government agency, was creating for the flagship investment project for Builders for Peace—the Gaza Marriott Hotel.

Four specific factors combined to make private investors hesitate to invest money in Gaza or the West Bank. First and foremost, the political violence that followed the Declaration and the Cairo Agreement between radical Palestinians and the PLO and Israel created an unstable political environment for private investors. Border closings by Israel in response to terrorist acts disrupted economic conditions in Gaza and the West Bank, further delaying the creation of a stable environment for private investors. Further, the violence within the Palestinian community threatened to escalate into civil war between the PLO and other radical Palestinian groups, like Hamas. A key aspect of the intra-Palestinian conflict has been the failure to fulfill promises of economic development. The New York Times reported the participants in the peace process sensing "that vast unemployment, declining economic activity and falling living standards in Gaza were adding to anti-Arafat sentiment and expanding the number of sympathizers of the fundamentalist Hamas organization." Private investors need peace to make
profits, and many do not see enough peace in the Palestinian Territories to warrant taking business and financial risks.\(^7\)

Second, investment in the Palestinian Territories seemed risky because the PNA had not created institutions and procedures readily comprehensible to the international business community. The controversy over the creation and composition of PECDAR and the handling of aid funds had parallels on the private investment front. For example, although foreign private investment was considered by all parties to the peace process as critical to its success, the PNA did not adopt a foreign investment law until April 1995.\(^7\) Before the Investment Law was adopted, how a foreign investor was to structure an investment, to whom the investment proposal should be made, and how the investment would be treated by the PNA in the future remained subject to ad hoc decisions and agreements absent any transparency or predictability. Investors, according to the *Washington Post*, have been “put off by Arafat’s insistence on personally approving all new projects.”\(^7\) In such an environment, stories like Arafat’s handling of the contract to develop the Palestinian telephone system, in which Arafat essentially awarded an exclusive contract to two different companies while continuing to negotiate with a

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third, did little to bolster the foreign business community's confidence in dealing with the PNA.\footnote{See Robert S. Greenberger & Amy Dockser Marcus, Arafat's Operators: Unlikely Paris Duo Advises Palestinians on Development Deals, WALL ST. J., Feb. 2, 1995, at A1. For further information on dissatisfaction with Arafat's overall governing style, see Murphy, supra note 49, at A10.}

In addition to concerns about Arafat's and the PNA's performance on investment matters is the larger issue about the nature of Palestinian self-rule: whether the Palestinians would enjoy democracy or suffer a dictatorship.\footnote{Compare William B. Quant, The Urge for Democracy, FOREIGN AFF., July/Aug. 1994, at 2 with Amos Perlmutter, Arafat's Police State, FOREIGN AFF., July/Aug. 1994, at 8. The Interim Agreement creates the framework for Palestinian democracy by providing for democratic elections of the Palestinian Council and the Chairman of the Executive Authority of the Palestinian Council. See Interim Agreement, supra note 21, art. II, annex II.}

If the PNA emerges as an undemocratic entity, then foreign private investors might consider the Palestinian Territories more politically and commercially risky.

Third, the peace process has opened economic opportunities in Israel and Jordan, two well-established states with the ability to absorb international investment effectively. The business conferences held in Casablanca, Amman, and Jerusalem in 1994 and 1995 focused on the economic opportunities opening up in the region because of Israel's peace deals with the PLO and with Jordan.\footnote{Bob Hepburn, Mideast Bonanza May Be Just a Desert Mirage; Private Investors Still See the Middle East as Risky for Business, TORONTO Star, Nov. 6, 1994, at C5. "Huge business conferences in Casablanca, Jerusalem, and Amman are the new symbol of the Middle East and the Arab world, staged to allow government and business leaders to seek ways to turn the recent Israel peace deals with Jordan and the Palestine Liberation Organization into regional economic miracles." Id. On the latest of these business conferences, see generally Mideast Summit: Public Ventures, Private Doubts, ECONOMIST, Nov. 4, 1995, at 48 (reporting on second Middle East and North Africa economic summit in Amman).}

attractive if the Arab nations continue to ease their primary, secondary, and tertiary boycotts of Israel.  

For foreign investors, the U.S.-Israel Free Trade Agreement ("Israel FTA") makes Israel even more attractive as a place to invest productive capacity because of the preferential treatment Israel-origin exports get in the United States. When Gaza and the West Bank were under Israeli occupation, many products produced there benefitted from the Israel FTA because they were marked "Made in Israel" and transshipped via Israel to the United States. The U.S. Customs Service has, however, put an end to this treatment of goods from the West Bank and Gaza by requiring that products from these regions imported into the United States must be marked either "Made in Gaza" or "Made in the West Bank."  

Goods from the West Bank and Gaza will no longer benefit from the preferential tariffs available to Israel-origin products under the Israel FTA. Although the United States has extended preferential tariff treatment to goods from the West Bank and Gaza under the U.S. General System of Preferences ("GSP"), Palestinian officials disputed that GSP treatment would provide benefits to the fledgling economy of the Palestinian Territories in the short-term because the product areas where Palestinians can currently export effectively, namely food and textiles, are excluded from GSP treatment. The United States eventually recognized the disadvantages the Palestinian Territories would face...
if goods from the Territories were treated less favorably than goods from Israel upon importation into the United States and in October 1995, the United States and the PNA took the first steps towards the creation of a U.S.-Palestinian free trade agreement under which the United States will not impose customs duties on Palestinian goods.89 This U.S.-Palestinian free trade agreement will eliminate the tariff advantage Israeli goods had over Palestinian goods under the Israel FTA.90

Another incentive to invest in either Israel or Jordan as opposed to Palestinian Territories is provided by the legal stability available in Israel and Jordan. The state of commercial law in Gaza and the West Bank is far more confusing and intimidating to a foreign investor than Israeli or Jordanian commercial law.91 For example, Gaza and the West Bank have different legal systems because of their different historical experiences and influ-

89. Kantor Sets Free Trade Deal with Palestinians, supra note 88.
90. The PNA claims that it also has concluded a trade agreement with Jordan and is negotiating other trade agreements with Egypt, Turkey, Morocco, Tunisia, and the United Arab Emirates. PALESTINIAN NATIONAL AUTHORITY, 2 INVEST IN PALESTINE: LAWS & REGULATION 26 (1995) [hereinafter INVEST IN PALESTINE: LAWS].
ences. Gazan law is a mixture of Ottoman and British law, Egyptian military orders, and Israeli military law, while the West Bank’s system of law is influenced more heavily by the Jordanian legal system as modified by Israeli military orders. The differences between the commercial laws of the two Palestinian Territories are complicated by the lack of transparency in those legal systems. Additionally, the commercial law that does exist must be updated to reflect contemporary international practice. Navigating the existing legal labyrinth might prove an expensive process for foreign companies.


93. Anis M. Al-Qasem, head of the PNA’s High Legal Commission, has stated that Palestinians

[H]ave to review the existing legal situation—the situation prior to Israeli occupation—to find out what legislation has to be repealed, up-dated, or unified. Most of the basic legislation was left undeveloped. For example, in the Gaza Strip, the company [corporate] law is an old 1929 statute. And between 1929 and the present, jurisprudence has developed considerably. Gary A. Hengstler, First Steps Towards Justice, 80 A.B.A.J. 52, 54 (1994) (quoting Anis Al-Qasem). The legislative challenge will be to modernize the legal system to protect investments while, at the same time, leaders are seeking investments. The World Bank concluded that “priority attention should be focused on the modernization and harmonization of the legal framework for business activities and property rights disposition.” 3 WORLD BANK REPORT, supra note 3, at 15. The importance of the domestic legal regime to foreign private investment has been analyzed in the context of Central and Eastern Europe. Cheryl W. Gray & William W. Jarosz, Law and the Regulation of Foreign Direct Investment: The Experience from Central and Eastern Europe, 33 COLUM. J. TRANSNAT’L L. 1 (1995). Gray and Jarosz argue that a domestic legal system can affect foreign investors in three ways: (1) by altering the prices for capital, labor, or technology; (2) by altering transaction costs; and (3) by determining the types and amounts of risks that foreign investors must bear. Id. at 12. The current condition of Palestinian commercial law could be seen as increasing a foreign investor’s ex ante and ex post transaction costs by creating uncertainty in the establishment of an investment, the operation of the investment, and the enforcement of legal rights. See id. at 19 (discussing different types of transactions costs). The legal uncertainty in Palestinian commerce also increases the risks a foreign investor must take, thus raising the costs of the investment. See id. at 13-14 (discussing effect of given legal regime on risk allocation).

94. See, e.g., Fidler, supra note 91, at 5 (describing one account of attempt to put together transaction between American company and Palestinian individual that included difficulties finding out state of law in Gaza). Builders for Peace and the Palestinian law firm of Mazen E. Qupty & Associates maintain that many of the concerns and
While it is not true that a legal vacuum exists in the Palestinian Territories, the need for harmonization and modernization in Palestinian commercial law creates psychological barriers as well as strictly legal problems for foreign investors.\textsuperscript{95} Foreign businesses pondering the legal framework for investment in the Palestinian Territories are not comforted by stories like the one about the US$200 million Palestinian investment company that was established to tap money from the Palestinian diaspora to invest in the Palestinian Territories, but was registered in Liberia because of uncertainty over the legal status of companies in the West Bank.\textsuperscript{96} The nature of the existing system of Palestinian commercial law, combined with concerns about the performance of the PNA on commercial issues, provides disincentives to foreign investors.

The presence in Israel and Jordan of established banking systems also makes them more attractive for investment than the Palestinian Territories. Since the 1967 occupation by Israel of the West Bank and Gaza, "the Palestinian economy has lacked banking services."\textsuperscript{97} Banks that have opened in the West Bank since the Declaration are mainly transferring deposits to Jordan where there are better investment opportunities.\textsuperscript{98} One Palestinian economist estimates that as much as US$500 million has been transferred out of the Palestinian Territories.\textsuperscript{99} Additionally, some Palestinian business persons prefer to do their banking with Israeli banks because of the undeveloped banking sys-
tem in the Palestinian Territories. Although the PMA is taking steps to increase local investment of bank deposit funds, the poor condition of the Palestinian economy will continue to hamper the development of a Palestinian banking system.

Fourth, the most visible American investment effort, the Gaza Marriott Hotel, has been frustrated by the reluctance of OPIC to provide loans for this project despite issuing a protocol to support it. On September 12, 1994, OPIC publicly announced that five of the nine Builders for Peace investment projects would receive U.S. Government financing and insurance under an agreement signed between the PLO and OPIC. OPIC pledged to provide US$125 million to American companies investing in the West Bank and Gaza, US$50 million of which would go to support five of the Builders for Peace projects, including the Gaza Marriott Hotel. OPIC has not, however, provided any funds to the parties planning to build the Gaza Marriott Hotel. According to Ziad Karram, President and Chief Executive Officer of GRdG, "OPIC's criteria have been in a constant state of change" since October 1994. OPIC's behavior caught the attention of U.S. Senator Hank Brown, Chair.
man of the Senate Foreign Relations Subcommittee on Near Eastern and South Asian Affairs, who called hearings to examine economic development in the Palestinian Territories on July 13, 1995.\footnote{The individuals testifying before the Subcommittee on Near Eastern and South Asian Affairs on July 13, 1995, were: Mel Levine, Co-President of Builders for Peace; Ziad Karram, President and CEO of GRdG; James Zogby, Co-President of Builders for Peace and President of the Arab American Institute; Margaret Carpenter, Assistant Administrator for the Agency for International Development; Richard Roth, Director of the Office of Israel and Arab-Israeli Affairs; and Christopher Finn, Executive Vice President of OPIC. See Hearings, supra note 67.}

While the details of the dispute between the Gaza Marriott Hotel project and OPIC are beyond the scope of this Article,\footnote{Apparently, the sticking point between the Gaza Marriott Hotel project and OPIC is over OPIC's insistence on an "operational completion guarantee" from the project participants equal to $14.4 million, which is 20\% of the project's estimated cost but 40\% of the proposed loan amount of $36 million. See Hearings, supra note 67 (testimony of Ziad Karram). According to Mr. Karram, OPIC informed GRdG on July 11, 1995, that the $14.4 million operational completion guarantee was not negotiable. Id. Two days later, Senator Brown called hearings on economic development in the Palestinian Territories before the Senate Subcommittee on Near Eastern and South Asian Affairs. In his testimony, Mr. Karram expressed his disbelief and frustration at OPIC's behavior: If such an absolute minimum criterion was so well established, why were we not told about it until June 15[, 1995]? Since this is a 'deal breaker' why were we not told about this from the beginning? Why were we not told about it before the announcement at the White House on September 12, 1994? Why were we not told before Chairman Arafat announced the project to the Palestinian people and to the world? Why were we not told before we spent over $1 million on this project? And why were we not told before we put our credibility on the line assuring that this project would be built? . . . We are apparently being penalized through the completion guarantee requirement because this project is in Gaza and the political risk is being converted to a business risk as earlier admitted by OPIC. Id.} OPIC's reluctance to fulfill commitments that were publicly made has cast a shadow over the commitment of the U.S. Government to economic development in the Palestinian Territories. Other countries and their business communities, no doubt, are taking note of the confused signals from Washington, D.C. on support for private investment in the Palestinian Territories.

III. ANALYSIS OF INVESTMENT LAW

This part of the Article analyzes the official English-language translation of the official Arabic text of the Investment
Law, which is provided as an appendix to this Article.\(^{109}\) The analysis outlines the provisions of the Investment Law and examines questions, ambiguities, and problems that arise from a reading of the text.\(^{110}\)

A. Definitions of Investor, Investment and Other Terms

1. Investor

The Investment Law, in Article 1, defines “Investor” to mean “any natural or legal person seeking or offering to invest in Palestine.”\(^{111}\) The application of the Investment Law to all potential investors in the Palestinian Territories makes the Investment Law comprehensive in that respect. This comprehensive approach to potential investors represents the first indication that the PNA seeks to treat all investors in a non-discriminatory manner — a principle expressly stated in Article 18.2 of the Investment Law.\(^{112}\) One question raised by this definition, however, is whether it encompasses both Palestinian and foreign investors. Although other provisions in the Investment Law make it clear that the Investment Law applies to foreign as well as Pal-
estinian investors, Article 1 could have made this explicit in its definition of "Investor."

2. Investment

The Investment Law, in Article 1, defines "Investment" as the "creation or addition of economic activities (production, industrial, tourist, agricultural, medical, educational, productive, construction services) in Palestine, including: (a) establishing new projects; [and] (b) adding new schemes of production and new machinery which results in increasing employment and production." It is not clear from this definition whether the Investment Law provides a comprehensive regime for all types of investments. First, it is not clear whether the Investment Law applies to investments in the service sector of the economy. The official translation reads "productive, construction services," and one interpretation of this phrase is that only investments in services directly related to production fall within the scope of the Investment Law. Accordingly, service sectors that do not directly relate to the production of goods may not benefit from the Investment Law. Given the growing importance of the service industry in the economies of other nations, the PNA needs to clarify whether the Investment Law is a comprehensive approach to investments in all service sectors of the economy. Second, the Investment Law apparently requires that investments in existing facilities or enterprises increase both employment and production. Investments to modernize operations or improve efficiency but which do not employ new workers might, therefore, be ineligible for the benefits of the Investment Law. Third, Article 14 of the Investment Law excludes certain economic sectors and activities from the procedures of the Investment Law and requires that any investments in these sectors receive prior approval directly from the PNA.

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113. See id. arts. 4.4-5, 18, Appendix at 605, 608-09 (discussing foreign investors in various contexts).

114. The Draft Translation, for example, expressly defined "Investor" to include local Palestinians, Palestinians from the diaspora, Arab, and foreign investors. Draft Translation, supra note 109, art. 1.

115. Investment Law, supra note 109, art. 1, Appendix at 603.

116. Id. In contrast, the IPCRI Translation reads "creative productive services," and the O'Neill Translation reads "services related to production." IPCRI Translation, supra note 109, art. 1; O'Neill Translation, supra note 109, art. 1.

117. Investment Law, supra note 109, art. 14, Appendix at 608.
The official PNA summary of the Investment Law states that the Investment Law prescribes that "investments involving a local presence must be done through a Palestinian registered company, which can be a wholly owned subsidiary." The Official Translation of the Investment Law does not, however, contain any provision that prescribes what form foreign investment must take in the Palestinian Territories. The existence of a requirement that foreign investors must use the corporate form as the investment structure raises three concerns. First, this requirement is not found in the Investment Law, which creates the concern that the Investment Law does not contain the entire legal regime covering foreign investment. Second, if local Palestinians can invest through partnerships as well as registered companies, then the requirement to use the corporate form would discriminate against foreign investors, in violation of the Investment Law's principle of non-discrimination. Third, the registered company requirement limits the flexibility of a foreign investor. A foreign investor could not, for example, invest through a branch or a partnership even if those investment vehicles better suited the investor's business strategy and operations.

3. Dues and Income Taxes

The final two definitions in Article 1 are "dues" and "income tax." "Dues" are defined as "customs duties and purchase tax imposed on machinery, equipment, and raw materials." The Investment Law does not indicate what the level of each of these taxes is or will be, nor does the definition seem to encompass dues on services. "Income tax" is defined as the "income tax levied on the net profit of investment projects." The Investment Law does not indicate what the rate of PNA income tax is or will be, nor does it indicate whether "net profit" is to be determined in accordance with international accounting stan-

118. INVEST IN PALESTINE: LAWS, supra note 90, at 11.
119. See Investment Law, art. 18.2, Appendix at 608-09 (setting forth rule on non-discrimination).
120. Investment Law, supra note 109, art. 1, Appendix at 603.
121. The PNA has stated elsewhere that customs duties vary depending on the imported item and that purchase taxes are payable by manufacturers or importers on the importation of certain consumer products. INVEST IN PALESTINE: LAWS, supra note 90, at 26, 25.
122. Investment Law, supra note 109, art. 1, Appendix at 603.
4. Undefined Terms

The Investment Law frequently uses other terms that it does not define. One of the most prominent terms, and most controversial with respect to its meaning, is “Palestine.” What exactly constitutes “Palestine” remains contentious in the peace process negotiations. Clearly, it is not in the political interest of the PNA to define “Palestine” in the Investment Law. The practical effect of not defining “Palestine” may be minimal because foreign investment is most needed in those areas clearly under the jurisdiction of the PNA pursuant to the Cairo and Interim Agreements.

Other terms that the Investment Law does not define and that may raise questions with potential foreign investors include: (1) “service fees” in Article 8; (2) “generally accepted practices” in Article 9; (3) “requisite licenses in accordance with applicable laws” in Article 11; (4) “paid-up capital” in Article 11; (5) “Palestinian workers” in Article 11; and (6) “life of the economic project” in Article 11. The lack of precision in drafting terms and provisions in the Investment Law creates interpretive problems for potential foreign investors.

5. General Comment on Definitions

The Investment Law’s failure to define important terms indicates that the drafting of the Investment Law was not as complete or thorough as one would expect given the vital importance of foreign investment to the future of the Palestinian economy. Further, the Investment Law fails to use its own defined terms consistently. This type of drafting places foreign inves-
tors in a defensive mode, trying to discern the intent of the PNA. It also suggests a lack of understanding about the importance to foreign investors of clarity, transparency, and predictability in legal systems.

B. Institutional Authority

1. Investment Agency

Each investor must submit an investment application to the Palestinian Higher Agency for the Encouragement of Investment ("Investment Agency"). Part II of the Investment Law establishes the Investment Agency and details its composition. The Investment Agency is supposed to be "an autonomous body corporate" that reports directly to the President of the PNA. The PNA's Minister of Economics, Trade and Industry chairs the Investment Agency's fifteen-member Board of Directors.

What is not clear from the text is whether all foreign investors must submit investment projects for review by the Investment Agency or only those seeking the exemption benefits provided by the Investment Law. The Investment Law does not appear to establish a procedure for reviewing investment proposals from investors not interested in or not able to meet the requirements for the exemption benefits provided by the Investment Law. The entire scheme of the Investment Law seems to be that only approved investors get economic benefits and incentives. Arguably, a foreign investor that is not seeking such benefits and incentives could establish an investment without any review by the Investment Agency. A more conservative reading of the Investment Law suggests that the Investment Agency must review all investment proposals, regardless of whether the investor seeks the benefits of the Investment Law's exemptions. If this conservative reading of the Investment Law is correct, then the Investment Law's protections with regards, for example, to expropriations and repatriation of capital and profits only apply to investors approved by the Investment Agency. Foreign investors raise unnecessary questions from a foreign investor because the exemptions in Article 11 are a key part of the Investment Law.

191. Id. art. 13.1, Appendix at 607.
192. Id. art. 2.1, Appendix at 603-04.
193. See id. art. 3.1, Appendix at 604 (giving detailed composition of Board of Directors). Counting the Chairman of the Board of Directors, the Board of Directors has 16 members. Id.
investing without approval would not enjoy any benefits or protections offered by the Investment Law.

To encourage economic investment in the Palestinian Territories, the Investment Agency, through its Board of Directors, has the following powers and responsibilities: (1) directing investment in accordance with the Palestinian economic plan; (2) publicizing information to attract development; (3) formulating suggestions to improve and develop the Investment Law; (4) collecting and publishing studies to encourage local Palestinian, Arab, and foreign capital investment in the Palestinian Territories; and (5) holding economic conferences for Palestinian, Arab, and foreign investors. Further, the Board of Directors has all the powers necessary to conduct the Investment Agency’s business in conformity with the objectives of the Investment Law.

The Investment Agency will have a Director-General and will be funded by contributions from the PNA, “service fees as determined by the Board of Directors,” and donations and grants that do not contradict public interest. The Investment Law does not define service fees and it does not indicate whether investors are required to pay them to fund the Investment Agency. Further, the Investment Law does not indicate the potential sources of donations and grants or what sort of donations and grants would not be in the public interest.

Investment Agency decisions are made by majority vote of the Board of Directors and, in the case of a tie, the Chairman of the Board of Directors casts the deciding vote. It is not clear whether the Chairman of the Board of Directors gets to vote on investment proposals when no tie vote exists. The quorum for the Board of Directors is two-thirds of its members. Article 6.3 contains a provision prohibiting any Board member from voting on matters in which such member has a direct or indirect interest.

134. Id. art. 4, Appendix at 604-05.
135. Id. art. 5, Appendix at 605.
136. Id. art. 7, Appendix at 608.
137. Id. art. 8, Appendix at 605-06.
138. Id. The public interest provision in Article 8 is most likely meant to prohibit potential foreign investors from buying influence with the Investment Agency by making handsome donations to the Agency’s budget. If this was the intent, however, the Investment Law could have been more explicit in its language.
139. Id. art. 6.1, Appendix at 605.
140. Id.
The Investment Agency can invite anybody to appear before the Board of Directors.\textsuperscript{141} The Board of Directors will appoint auditors to audit the Investment Agency's accounts "in conformity with generally accepted practices" and submit a financial report to the President of the PNA every six months.\textsuperscript{142} This provision indicates that the PNA realizes the importance of maintaining accurate books of account at the Investment Agency, but foreign investors and donor countries would be more reassured if the accounts of the Investment Agency were audited in accordance with internationally recognized accounting practices. The flow of public aid has been seriously hampered by donor countries' opposition to the PLO's accounting practices\textsuperscript{143} and the Investment Agency should attempt to avoid similar problems with foreign investors by adopting internationally accepted accounting practices.

2. Problems with Investment Agency

The Investment Agency's vulnerability to the politics of the PNA constitutes the greatest concern for potential foreign investors. Although the Investment Agency is supposed to be autonomous and independent, several features of the Investment Law combine to undermine its autonomy and independence. First, nine of the members of the Board of Directors will come from ministries in the PNA (i.e., the Ministries of Economics, Trade, and Industry, Finance, Planning and International Cooperation, Industry, Public Works, Housing, Local Government, PMA, and the ministry affected by a particular project) and five more will be appointed directly by the President of the PNA (i.e., the Director-General of the Investment Agency and four members from the private sector).\textsuperscript{144} Given the composition of the Board of Directors, it will be hard for the Investment Agency to be independent from the PNA and its politics. Decisions about for-

\textsuperscript{141} Id. art. 6.3, Appendix at 605. Presumably, Article 6.3 prevents a Board Member from voting on investment proposals in which the Board Member has a direct or indirect financial interest. The Investment Law would be stronger if the provision had been spelled out in detail, given the familial and financial networks that dominate the Palestinian business community.

\textsuperscript{142} Id. art. 6.4, Appendix at 605.

\textsuperscript{143} Id. art. 9, Appendix at 606.

\textsuperscript{144} See Ibrahim, supra note 58, at 2 (discussing donor countries various complaints concerning sending money to PLO).

\textsuperscript{145} Investment Law, supra note 109, art. 3.1, Appendix at 604.
eign investment involve political consequences and thus will trig-
ger political actions. What will deter foreign investors more,
however, is a politicized process for receiving approval for initiat-
ing and operating investments in the Palestinian Territories.
The appearance of autonomy and independence for the Invest-
ment Agency will not suffice in the long run if the investment
approval process becomes politicized.

Second, the Investment Agency's composition presents for-
eign investors with a formidable bureaucratic challenge. With
the interests of so many ministries represented in the deliber-
ations of the Board of Directors, its decision-making process will
not be transparent or predictable. The dynamics of the Board of
Directors may be such that only forceful direction from the Pres-
ident of the PNA will produce decisions. In such a situation, the
real power resides not in the Investment Agency but in the Presi-
dent's office, opening up even greater potential for politicized
decision-making.

C. Development Sectors

The Investment Law divides the areas under the jurisdiction
of the PNA into three sectors: A, B, and C. The locations of
the three development zones are not identified in the Invest-
ment Law, and the designation of the zones is left to the Invest-
ment Agency. Article 10.2 states that the Board of Directors of
the Investment Agency has the right to change the division of
the development sectors and to review the incentives applied to
each, except with respect to already established projects. The
Board of Directors may grant additional exemptions to specific
investments to promote the interests of the Palestinian econ-
omy.

The Investment Law does not indicate how development
sectors A, B and C, as investment regimes, will differ or how di-
viding the areas under PNA jurisdiction into three separate de-

146. Id. art. 10.1, Appendix at 606.
147. Id. The division of the areas under PNA jurisdiction into sectors A, B, and C
may represent the Investment Law's anticipation of the Interim Agreement's phased
withdrawal of Israeli forces from the West Bank. The Interim Agreement establishes
Areas A, B, and C and sets out the transfer of authority from Israel to the PNA for each
area. Interim Agreement, supra note 21, art. XI, annex III.
148. Investment Law, supra note 109, art. 10.3, Appendix at 606.
149. Id.
velopment sectors will advance the process of Palestinian economic development. As a result, the Investment Law fails to provide foreign investors with information on an important part of the PNA's investment and economic development strategy. Further, the discretionary powers given to the Board of Directors to change the classification of development sectors and their accompanying incentives\(^ {150} \) and to grant additional exemptions to specific investments\(^ {151} \) are not qualified by any guidelines or conditions. Consequently, foreign investors will not be able to tell from the text of the Investment Law when a development sector and its incentives may be changed or whether an investment qualifies for additional exemptions. Articles 10.2 and 10.3 grant the Investment Agency powers that have the potential to be exercised in an arbitrary and non-transparent manner.

**D. Exemptions**

The Investment Law exempts approved investment projects from paying income tax and duties for a period of years based on the combination of: (1) either the amount of capital invested or the number of Palestinian workers employed, and (2) the anticipated length of the investment. Article 11.1 of the Investment Law sets out the following exemption criteria:

<table>
<thead>
<tr>
<th>Project Description</th>
<th>Paid-up Capital</th>
<th>Permanent Palestinian Employees</th>
<th>Investment Period in Palestine</th>
<th>Exemption Period</th>
</tr>
</thead>
<tbody>
<tr>
<td>Category A Projects</td>
<td>$500,000+ OR</td>
<td>At least 25</td>
<td>At least 10-year investment</td>
<td>5 years</td>
</tr>
<tr>
<td>Category B Projects</td>
<td>$150,000+ OR</td>
<td>At least 15</td>
<td>At least 6-year investment</td>
<td>3 years</td>
</tr>
<tr>
<td>Category C Projects</td>
<td>$100,000+ OR</td>
<td>At least 10</td>
<td>At least 5-year investment</td>
<td>2 years</td>
</tr>
<tr>
<td>Category D Projects</td>
<td>$5,000,000+ AND</td>
<td>At least 50</td>
<td>At discretion of Investment Agency</td>
<td>At discretion of Investment Agency(^ {152} )</td>
</tr>
</tbody>
</table>

To receive the exemptions from income taxes and duties,\(^ {153} \)

\(^ {150} \) Id. art. 10.2, Appendix at 606.
\(^ {151} \) Id. art. 10.3, Appendix at 606.
\(^ {152} \) Id. art. 11.1, Appendix at 606-07.
\(^ {153} \) Article 11.1 exempts approved investments from “duties,” which is not defined in the Investment Law. Id. In all likelihood, the reference to “duties” in Article 11.1 should say “dues,” which is defined in Article 1. Id. art. 1, Appendix at 609.
an approved investor must first have "paid-up capital" of a specified amount invested in a project or must employ on a permanent basis a certain number of Palestinian workers. Category D projects, however, require both specific paid-up capital and permanent employee amounts. As mentioned earlier, the Investment Law does not define "paid-up capital," so it is not clear exactly what the Investment Agency will consider as paid-up capital for purposes of Article 11.1. Similarly, the Investment Law does not define "Palestinian workers," leaving open the possibility that it includes: Palestinians habitually resident in the Palestinian Territories, Palestinians from the diaspora, or any person residing in the Palestinian Territories at the time of employment. Further, "permanent" employment is not defined by the Investment Law. The Investment Law is also silent as to how the Investment Agency will determine whether a project satisfies the "life of the economic project" requirement.

Another problem with Article 11.1 involves the prospective nature of the requirements. At the time an investment project receives approval from the Investment Agency, the investor anticipates investing a certain amount of capital, employing a certain number of Palestinian employees, and remaining in the Palestinian Territories for a certain number of years. The Investment Law does not indicate at what point after approval an investor must satisfy the paid-up capital and permanent Palestinian employee requirements. Given the ability of the Investment Agency to cancel investment approval for failure to comply with the required conditions and to demand payment of all taxes and dues from which the investor was exempted from the time of approval through cancellation, an investor will be keen to know at what point it is subject to such a sanction in relation to the paid-up capital and permanent Palestinian employee requirements of Article 11.1.

Finally, simply meeting the requirements of any of the categories in Article 11.1 does not assure an investor of the receipt of the stated exemptions. Before qualifying for the exemptions in Article 11.1, an investor must obtain the approval of the Investment Agency and obtain all requisite licenses to

154. Id. art. 11.1, Appendix at 606-07.
155. Id. art. 19.1, Appendix at 609.
conduct business. Neither Article 11.1 nor any other provision in the Investment Law guarantees that when an investor invests a certain amount of money or employs a certain number of people the investment proposal will be approved. Apparently, other criteria can affect the approval process; but, other than the exclusion of certain economic sectors from the normal application procedure and the restriction on investments that might conflict with public morals, order, and security or environmental protection laws, the Investment Law does not state what other criteria should be considered. The Investment Agency's discretion in approving investment proposals is very broad, which could leave potential investors guessing about their chances for approval.

Article 11.1 sets out the requirements for the basic benefits available to investors under the Investment Law, but the Investment Agency has more discretion in granting additional benefits in three other situations. First, under Article 11.2, the Investment Agency "may grant certain projects additional exemptions depending on the nature of the project and the needs and development priorities of the Palestinians." The Investment Law contains no specific criteria for the granting of additional exemptions under Article 11.2 and does not indicate what the additional exemptions might be. Thus, the Investment Agency could exercise the power found in Article 11.2 in an arbitrary and non-transparent manner because no parameters discipline this power.

Second, Article 12 allows the Investment Agency to grant special exemptions to export projects. Such special exemptions may be granted to enterprises that export not less than twenty-five percent of their total output and whose products contain Palestinian-added value equal to not less than thirty percent of the total cost of the product. The Investment Law actually states that "special exceptional exemptions"
INVESTMENT IN PALESTINE

Law does not indicate whether the twenty-five percent of total output requirement means twenty-five percent of total output as determined against the total number of articles produced or the total value of articles manufactured. Nor does the Investment Law spell out how the Investment Agency will calculate the percentage of value added to any product in the Palestinian Territories. The Palestinian-added value requirement acts like a "rule of origin" to ensure that investors that get special export benefits under the Investment Law are utilizing Palestinian labor, parts, and/or raw materials. An investor, however, needs to know how to calculate the Palestinian-added value if it hopes to get special export exemptions under Article 12.

Third, Article 12 allows the Investment Agency to grant additional incentives for "export-oriented agricultural products." Again, the Investment Law provides no indication what these "additional incentives" might be. What constitutes an agricultural product is also not defined. Oranges, for example, would obviously be an agricultural product; but it is not clear whether exports of orange juice or other products derived from oranges would be agricultural products for purposes of the Investment Law.

A more general problem with Article 12 mirrors the troubling aspect of Article 11.2: the Investment Agency has total discretion to grant exceptional and additional exemptions and incentives. If an investor exports over twenty-five percent of

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may be granted to export projects "provided that the percentage of output processed for export is not less than 25 per cent of the total output and that the value is not less than 30 per cent of the total cost of the project." Id. The author of this Article, however, had to refer to the IPCRI, O'Neill, and Draft Translations to conclude that the last phrase quoted above meant that the product destined for export had to contain Palestinian-added value equal to at least 30% of the cost of the product. The PNA official summary of the Investment Law confirms this interpretation. See INVEST IN PALESTINE: LAWS, supra note 90, at 12.

162. Investment Law, supra note 109, art. 12, Appendix at 607. The distinction might be important if an investor can sell its products at a higher price overseas than in the Palestinian Territories. In such a case, the exports may exceed 25% of the total value of all articles manufactured but not exceed 25% of the total number of items produced. Id.

163. The U.S.-Palestinian free trade agreement will include rules of origin to define what products qualify as Palestinian products benefitting from duty-free treatment in the United States. The rules of origin in the free trade agreement may differ from Article 12's 30% requirement.

164. Investment Law, supra note 109, art. 12, Appendix at 607.

165. Id.
its total output and its products contain over thirty percent Palestinian-added value, the investor still may not get additional benefits under the Investment Law because of the discretionary nature of the Investment Agency's Article 12 power. Article 12, at least, suggests that the PNA wants to adopt an “export model” of economic development as opposed to an “import substitution” model, but the discretion given to the Investment Agency, along with the lack of precision and clarity in Article 12, creates obstacles for investors seeking to invest and export from the Palestinian Territories.

E. Procedures for Getting Exemption Benefits

1. General Procedure

Before an investor can apply to the Investment Agency for the exemption benefits available under the Investment Law, the investor must satisfy “all licensing procedures or any other requirements provided for under applicable laws and regulations.” The Investment Law provides a potential investor with no guidance as to what other licenses and other procedures have to be satisfied before an application is filed with the Investment Agency or from whom they must be obtained. Given the current state of Palestinian law, the prerequisite set forth in Article 13.1 is not a mere formality and exposes an investor to the confusion of existing Palestinian law. The requirement that an investor receive all other licenses and satisfy all applicable regulations before approaching the Investment Agency could deter investment because an investor would want approval from the Investment Agency before expending time, money, and energy getting licenses and satisfying other regulations. It would have been better to allow investors to get approval from the Investment Agency before getting all necessary licenses and permits and to condition receipt of the exemptions in Article 11.1 upon the receipt of all other regulatory permissions.

After having obtained all required licenses and fulfilled all applicable regulations, an investor must submit an application to

166. The import and customs provisions of the Economic Protocol do not give the PNA competence to establish customs duties, except in limited circumstances. Cairo Agreement, supra note 20, annex IV, art. III, 38 I.L.M. at 698; Interim Agreement, supra note 21, annex V, art. III; Kieiman, supra note 23, at 358-60.
167. Investment Law, supra note 109, art. 13.1, Appendix at 607.
the Investment Agency. The investor must support the application with a "technical and economic feasibility study of the project." The Investment Law provides no other guidelines or criteria to potential investors interested in applying for approval of an investment proposal.

The Investment Agency has between thirty and sixty days from the date of the application to provide the investor with an answer that includes the reasons behind the decision. If the Investment Agency gives its approval to the proposed project, the investor must present "an action plan detailing the steps to be followed to complete the project." The approved investment project must be started within six months of the date of approval. The fixing of a single date by which an investment project must be under way could create problems for some projects that need more lead time for starting up. The six-month start-up requirement essentially forces investors to be ready to go upon approval of the investment, which means the investor has to spend more time and money before approval is in hand. Thus, Article 13.3 raises yet another unnecessary obstacle to potential investors. Further, the investor undertakes to provide information and data concerning the project's implementation and operation and to allow any Investment Agency official to enter the premises of the project to verify whether the investor is performing as indicated. It is not clear whether Article 13.4 establishes a requirement for periodic reporting of information by the investor or only a requirement to submit information as requested by the Investment Agency.

2. Special Procedure

The Investment Law sets up a special approval procedure for investment proposals in weapons and ammunition, aviation (including airports), electrical power, waste disposal, petroleum, and telecommunications (including radio and television) indus-

168. Id.
169. Id.
170. Id. art. 13.2, Appendix at 607.
171. Id. art. 13.3, Appendix at 607.
172. Id.
173. Id. art. 13.4, Appendix at 607-08.
174. The IPCRI, O'Neill, and Draft Translations translate the provision in question to require submission of information as requested by the Investment Agency. See supra note 109 (discussing different translations of Investment Law).
tries. The PNA has to approve all investment proposals related to these industries. Whether Article 14, in substance, establishes a special approval procedure for specific economic sectors is questionable given how the PNA dominates the Board of Directors of the Investment Agency. Article 14 does not indicate what organ or branch of the PNA has the power of approval for investment proposals in those specified industries. Further, Article 14 provides no guidelines that indicate to an investor what the decision-making criteria will be for purposes of Article 14. As for the industries subject to Article 14, the list contains mostly industries that relate directly to economic infrastructure and basic economic needs. Given the desperate need for investment in such infrastructure and fundamental economic areas, the rationale behind singling these industry sectors out for explicitly political approval is unclear. While each of the listed industries has some "public good" element to it, the public interest could be protected through regulation rather than through an overtly political process of investment approval.

F. Transfer Issues

1. Transfer of the Investment Project

The Investment Law addresses the availability of exemptions already granted in situations where the original investor sells or otherwise transfers the project or the project’s assets to another investor. Article 15 provides that the new owner of an approved project will continue to benefit from the exemptions under the Investment Law so long as the new owner operates the enterprise in the same manner as the old owner and assumes all the rights and obligations undertaken by the previous owner in accordance with the Investment Law. The Investment Law apparently does not require that the Investment Agency recommend or approve of the transfer of an already approved project. The requirement that the new owner operate the enterprise in the same way as the old owner is problematical because the old owner’s operating manner may not be prudent or competitive. Clearly, the Investment Law does not condemn a new owner to
conduct business in conformity with a bad business strategy employed by the previous owner. Just how differently a new owner can operate the enterprise in search of business success is not clear. Finally, the Investment Law does not indicate whether the selling investor may repatriate the proceeds from the sale of the investment.

2. Transfer of Investment Assets

Article 16 provides that an approved investor may sell its fixed assets to "another project enjoying the same privileges under the provisions of this Law, provided that the Agency approves such a sale, giving priority in the purchase of these assets to Palestinian investors." Article 16 places two very significant restrictions on the free transferability of assets within the Palestinian Territories.

First, an approved investor can only sell its fixed assets to another approved investor enjoying the same exemptions under the Investment Law. A sale from a foreign approved investor to a local Palestinian company that is not enjoying exemptions under the Investment Law is not permitted under Article 16. Article 16 also does not allow fixed asset transfers that are de minimis transfers, transfers of old or obsolete equipment, or transfers of assets not essential to the core economic activity of the investment project.

Second, all asset transfers must be approved by the Investment Agency. The criteria by which the Investment Agency will decide on asset transfer proposals are not articulated in Article 16, except for the provision that the Investment Agency must give priority to Palestinian purchasers. Furthermore, the Investment Law does not state whether the proceeds from the sale of fixed assets may be repatriated by a foreign investor. The restrictions on the free transferability of assets in Article 16 will constitute a serious disincentive to potential investors, particular foreign investors.

179. Id. art. 16, Appendix at 608.
180. Id.
181. Id.
G. Nationalization, Non-Discrimination, and Repatriation of Capital and Profits

1. Nationalization

Article 18.1 states that "[n]o investment, irrespective of the investor's nationality, shall be nationalized, confiscated or expropriated in whole or in part without the investor's consent."

At first glance, this provision seems extraordinary because most states consider the right to expropriate property as an inherent attribute of sovereignty and exercisable without the agreement or consent of the foreign investor. The standard governing the compensation of the foreign investor for an expropriation of its property has been the controversial issue under international law. Article 18.1's requirement that the investor agree to any expropriation appears to indicate that the PNA is not claiming the full power to expropriate.

The second sentence of Article 18.1, however, qualifies the requirement of investor agreement to an expropriation by stat-

182. Id. art. 18.1, Appendix at 608.

183. Id. Significantly, the PNA could not claim under international law a sovereign right to expropriate because it does not have the status of a sovereign state under international law. The lack of competence over foreign affairs on the part of the PNA in the Cairo Agreement and the Interim Agreement deprives the PNA of one of the traditional hallmarks of sovereignty. See Cairo Agreement, supra note 20, arts. V(1)(b), VI(2)(a), 33 I.L.M. at 630; Interim Agreement, supra note 21, art. IX(5). As Hans-Peter Gasser observed in analyzing whether the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War applied in the Palestinian Territories after the Declaration:

Not only the text of the Declaration of Principles and of the Cairo Agreement but also political reality make it clear that the Autonomous Territories (the Gaza Strip and Jericho Area) lack essential elements of sovereignty. Absence of statehood precludes the Palestinian Authority from exercising powers which are essential to any sovereign State.

Hans-Peter Gasser, The Geneva Conventions and the Autonomous Territories in the Middle East, 26 SECURITY DIALOGUE, June 1995, at 173, 175-76. Yoram Dinstein also observes that "[i]t is incontrovertible that the exercise of autonomous power does not amount to sovereignty or statehood." Yoram Dinstein, Autonomy and Legal Status: A Rejoinder, SECURITY DIALOGUE, June 1995, at 185, 188. On the other hand, the Palestinian Territories are not merely a part of Israel because the Cairo Agreement and Interim Agreement give the PNA power over significant aspects of political, legal, and economic matters. As reflected in the decision by the U.S. Customs Service to require special country of origin marking requirements for goods from Gaza and the West Bank, the Palestinian Territories have a distinct identity and cannot be subsumed in any other political entity. For a discussion of autonomy and international law, see Hurst Hannum & Richard B. Lillich, The Concept of Autonomy in International Law, in MODELS OF AUTONOMY 215 (Yoram Dinstein ed., 1981).
ing that no investment shall be subjected to nationalization or expropriation "except in compliance with a final judgment handed down by a competent court."184 The Palestinian Council could pass a non-discriminatory law nationalizing or expropriating certain investments, and such law could be enforced by the Palestinian courts without the agreement of the investor. The second sentence of Article 18.1, in essence, preserves the power to expropriate without the consent of the investor, subject only to the principle that any expropriation cannot discriminate between investors on the basis of nationality. The Investment Law is silent as to the standard that would govern the compensation of an investor subject to an expropriation.

2. Principle of Non-Discrimination

Article 18.2 of the Investment Law states that all foreign, Arab, and expatriate Palestinian investors shall enjoy the same rights and privileges accorded the local Palestinian investor.185 Article 18.3 states that expatriate Palestinian investors, Arab investors, and other foreign investors "shall enjoy the right of permanent residence in accordance with applicable laws."186 Both Articles 18.2 and 18.3 support the principle of non-discriminatory treatment first expressed in Article 1's definition of investor.

3. Repatriation of Capital and Profit

Articles 18.4 and 18.5 provide that approved investors have the right to transfer capital and profits after paying the dues prescribed by the Palestinian laws and legislation.187 The Investment Law does not create a clear right to transfer capital and profits freely because the PNA could impose dues at a rate that effectively deters such transfers. Whether the Investment Law creates free transferability of capital and profits depends on the level of the dues imposed on such transfers by the PNA. The Investment Law also gives no indication about the present or future level of such capital and profit transfer dues. Every foreign investor will want to know the level of dues to be paid when making its calculation whether to invest in the Palestinian Territo-

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184. Investment Law, supra note 109, art. 18.1, Appendix at 608.
185. Id. art. 18.2, Appendix at 608-09.
186. Id. art 18.3, Appendix at 609.
187. Id. art. 18.4-5, Appendix at 609.
ries. A foreign investor will also want to know whether the proceeds from the sale of an investment or of fixed assets addressed in Articles 15 and 16 fall within the definition of "capital" or "profits" for purposes of Articles 18.4 and 18.5.

H. Suspension or Cancellation of Benefits

The Investment Agency may suspend or cancel the exemptions granted under the Investment Law prospectively or retroactively if the Investment Agency determines that an approved investor has failed to meet the conditions and obligations imposed by the Investment Law. The Investment Agency may also cancel an investor's investment license retroactively if it discovers that the investor obtained investment approval through fraud, bribery, or illegal acts.

It is important to note that, when the Investment Agency cancels an investment approval, the effect can be retroactive under Article 19.1 and will be retroactive under Article 19.2 to the date the approval was originally granted. An investor that has its approval canceled not only loses the future benefits of the exemptions available under the Investment Law but also may have to pay immediately to the PNA all taxes, dues, fees, and other sums from which it had been exempt, plus interest accrued on such amounts, all from the date of approval. The financial penalty for cancellation of an investment approval could potentially be severe. Under Article 19.3, the investor subject to a cancellation order may appeal within thirty days of such decision by the Investment Agency to the President of the PNA, whose decision on the appeal is final. This provision completely removes cancellation decisions from review by Palestinian courts under the general dispute settlement provision of the Investment Law. An investor has no recourse against a retroactive cancellation of investment approval made for political reasons by either the Investment Agency or the President of the PNA. As a result, an investor is clearly vulnerable to politicized investment decisions under Article 19.

188. Id. art. 19.1, Appendix at 609.
189. Id. art. 19.2, Appendix at 609.
190. Id. art. 19.1-2, Appendix at 609.
191. Id. art. 19.3, Appendix at 609.
192. See id. art. 20, Appendix at 609 (setting forth dispute settlement procedure).
I. Dispute Resolution

All disputes under the Investment law shall be resolved by Palestinian courts.193 This provision, of course, is qualified by Article 19.3’s procedure for final resolution of cancellation disputes by the President of the PNA.194 Article 20 seems to preclude an agreement between the investor and the PNA to submit disputes to binding independent arbitration, because such an agreement would bypass the jurisdiction of the Palestinian courts. Independent binding arbitration is, however, a frequently used mechanism in the settlement of international investment disputes. In its official summary of the Investment Law, the PNA claims that the Investment Law “admits the possibility of dispute resolution through arbitration.”195 No article of the Investment Law mentions, directly or indirectly, the possibility of arbitration to settle disputes. If the PNA wants to include arbitration as a dispute settlement mechanism for foreign investors, then it should do so expressly in the Investment Law. The Article 20 reference to “applicable Palestinian laws” suggests that all investment agreements between foreign investors and the PNA are to be governed by, and construed in accordance with, Palestinian law, a situation that is likely to make any foreign investor nervous given the current state of Palestinian law.196

J. General and Final Provisions

1. Non-Discriminatory Business Practices

In operating approved investments in the Palestinian Territories, investors must not discriminate on the basis of sex, race, or religion when employing local staff, procuring supplies, or conducting any other activity.197 This provision represents the Investment Law’s contribution to the development of the princi-

193. Id.
194. See id. art. 19.3, Appendix at 609. (setting forth role of PNA’s President in final dispute resolution).
195. INVEST IN PALESTINE: LAWS, supra note 90, at 12.
196. Investment Law, supra note 109, art. 20, Appendix at 609. Since the Palestinian Territories do not constitute a state and cannot claim sovereignty under international law, the PNA presumably cannot raise either sovereign immunity or act of state as defenses against a claim by a private investor. See supra note 189 (discussing PNA’s lack of sovereignty under international law). For a discussion of the doctrines of sovereign immunity and act of state, see IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 322-36, 507-08 (4th ed. 1990).
197. Investment Law, supra note 109, art. 21.1, Appendix at 610.
ple of non-discrimination in the Palestinian Territories. The exact content of the non-discrimination principle in Palestinian law is not, however, fully developed. Additionally, a foreign investor might worry that the Palestinian principle of non-discrimination will entail different business practices than required in other countries.

2. General Limitations on Investments

Investments in the Palestinian Territories can be made in any economic sector so long as they do not "conflict with public morals, public order, public security, and environmental protection laws." Perhaps the most troubling aspect of these broad, undefined terms is the condition that investments not conflict with "public morals." The Investment Law provides no guidelines for the investor to evaluate this condition prior to investment. The tension in Palestinian society created by the strength of Islamic fundamentalist groups like Hamas could elevate issues of "public morals" in connection with the impact of foreign investment on Palestinian society.

3. Status of Investment Law

Article 22 renders invalid and revoked any law that is inconsistent with or contrary to the Investment Law. This provision is important because it attempts to cut through the confusion of existing Palestinian law and enshrine the Investment Law as the supreme source of law in the area of foreign investment. Similarly, all competent authorities of the PNA in the Palestinian Territories are required to implement and execute the Investment Law.

IV. THE INVESTMENT LAW AND INTERNATIONAL PRACTICES

This part of the Article will compare the Investment Law to four different international standards: (1) the trend in liberalizing investment laws apparent in the late 1980's and 1990's

198. Id. art. 21.2, Appendix at 610. The IPCRI and O'Neill Translations render this condition as no conflict with "public order" and environmental protection legislation. See supra note 109 (discussing IPCRI and O'Neill Translations).
199. Investment Law, supra note 109, art. 22, Appendix at 610.
200. Id. art. 23, Appendix at 610.
among developing countries; (2) the principles in the recent agreements on trade-related investment measures and trade in services adopted under the new General Agreement on Tariffs and Trade ("GATT"),201 (3) the World Bank Guidelines on Direct Foreign Investment; and (4) the model U.S. bilateral investment treaty. The analysis in this part of the Article will indicate how the Investment Law compares against the latest international thinking and practices in the area of foreign private investment.

A. The Trend of Liberalization in Investment Laws

The treatment of foreign investments by most countries has generated significant controversy in the international system. Perhaps the most well-known example of the heated nature of the controversy is the standard applicable under international law for compensating a foreign investor subject to an expropriation of property.202 The nature of foreign investment laws in developing states has tracked the ebb and flow of the acrimonious North-South debate on international economic justice. Developing countries moved towards restrictive investment laws in the 1970's during the push for the New International Economic Order ("NIEO").203 The NIEO had essentially two basic goals: (1) to allow developing countries to regain economic sovereignty by reducing the power and influence of nationals and corporations from developed countries in the economies of developing countries,204 and (2) to increase the power and influence of developing countries in the international economic system.205 Restrictive
foreign investment laws were part of the NIEO strategy.\textsuperscript{206} New theories about foreign investment and economic development, like dependency theory, influenced the NIEO position on foreign investment.\textsuperscript{207}

The 1980's and 1990's, however, have witnessed developing states adopting more liberalized investment laws in order to attract foreign investment.\textsuperscript{208} This movement from restrictive to more liberal foreign investment laws happened for both practical and theoretical economic reasons. In practical terms, the restrictive policies implemented by developing countries did not result in significant economic growth.\textsuperscript{209} Eventually, the failure of restrictive economic policies led to a re-evaluation of the theoretical bases for such policies and to a rejection of the dependency thesis.\textsuperscript{210}

\textit{International economic system.} See \textit{generally} Economic Charter, supra note 204. For example, Article 13(1) of the Economic Charter states that every state has "the right to benefit from the advances and developments in science and technology for the acceleration of its economic and social development." \textit{Id.} art. 13(1), at 53. Article 14 of the Economic Charter states that the duty to cooperate in promoting expansion and liberalization of world trade means that states should:

\begin{quote}
[T]ake measures aimed at securing additional benefits for the international trade of developing countries so as to achieve a substantial increase in their foreign exchange earnings, the diversification of their exports, the acceleration of the rate of growth of their trade, taking into account their development needs, an improvement in the possibilities for these countries to participate in the expansion of world trade and a balance more favorable to developing counties in the sharing of the advantages resulting from this expansion.\textit{Id.} art. 14, at 53.
\end{quote}

\textsuperscript{206} \textit{Id.} art. 2(2)(a), at 52. Article 2(2)(a) of the Economic Charter states that each state has the right "]t]o regulate and exercise authority over foreign investment within its national jurisdiction in accordance with its laws and regulations and in conformity with its national objectives and priorities." \textit{Id.}

\textsuperscript{207} Dependency theory holds, essentially, that "foreign investment will not bring about meaningful economic development" and that "foreign investment is uniformly bad and rather than promote economic development, it keeps underdeveloped countries in a state of permanent dependence on the central economies of the developed states." SORNARAJAH, supra note 202, at 43-44. For a detailed discussion of dependency theory, see GILPIN, supra note 18, at 281-90.


\textsuperscript{209} GILPIN, supra note 18, at 292-94.

\textsuperscript{210} Gilpin notes that "[b]eliefs held by structuralists and dependency theorists alike that the less developed countries could not develop within the framework of an
The Investment Law reflects the trend towards liberal investment laws on the part of developing states seeking foreign investment to boost economic development in five areas. First, the Investment Law does not on its face prohibit foreign investors from investing in certain sectors of the economy, which has been a feature of investment laws of developed and developing countries. Nor does the Investment Law reserve certain economic sectors or industries for local investors. The Investment Agency, through Article 13, and the PNA, through Article 14, might in practice implement such prohibitions or protections, but any such practice would violate the principle of non-discrimination contained in the Investment Law.

Second, the Investment Law does not require any level of local equity participation in foreign investments through mandatory joint venture arrangements. Some developing and socialist states required foreign investors to have a local partner by forming a joint venture. The principle of non-discrimination in the Investment Law suggests that the Investment Agency will not create a de facto local equity mandate through the approval process.

Third, the Investment Law contains no limitations on foreign investors acquiring Palestinian companies. The investment laws of some countries regulate the acquisition of local companies either to prevent acquisitions from having anti-competitive effects or to protect domestic companies from foreign control and competition. The Investment Law’s definition of investment focuses on expanding employment and production, which could be achieved by the acquisition of a local Palestinian company as well as by establishing a new entity.

Fourth, the Investment Law does not mandate that management be composed of a certain number or percentage of resident Palestinians. The laws of some states require that the board of directors of a company or its local management contain cer-

unreformed world capitalism . . . are contradicted by the facts of the late twentieth century.” Id. at 305.
211. FOLSOM & GORDON, supra note 203, at 581.
212. Id. at 580.
214. SORNARAJAH, supra note 202, at 111-13, 115-16; FOLSOM & GORDON, supra note 203, at 581, 770.
215. FOLSOM & GORDON, supra note 203, at 584-85.
tain numbers of local residents, often in conjunction with local equity participation requirements.\textsuperscript{216} The Investment Law has no requirement that management of Palestinian companies include or be controlled by Palestinians.

Fifth, the Investment Law contains no performance requirements, which can take the form of local content rules, mandatory export targets, or mandatory transfers of technology.\textsuperscript{217} States implement such performance requirements ostensibly to benefit or protect the local economy. The Investment Law makes exemption benefits available to investors that hire a certain numbers of Palestinian employees,\textsuperscript{218} but this does not necessarily mean that a foreign investor must hire a certain number of local employees to invest or get Investment Agency approval. Further, an investor can get extra benefits by exporting a certain percentage of output containing a specified level of Palestinian content,\textsuperscript{219} but such an inducement is not a mandate to export.

While the Investment Law reflects in these five areas the liberal approach prevalent in investment laws adopted in the 1980's and 1990's by many developing states, it contains many significant measures reminiscent of provisions adopted by developing states in the 1970's. First, as already noted in Part III, the Investment Law's approval process and other decision-making procedures are highly discretionary in nature.\textsuperscript{220} The Investment Law is not a transparent regime with objective criteria upon which foreign investors can plan their investments with predictability and confidence. Second, the dominant role of the PNA in the Board of Directors of the Investment Agency creates the potential for a highly politicized investment process.\textsuperscript{221} Third, the Investment Law places significant restraints on the transfer of assets\textsuperscript{222} and leaves the door open for the PNA to restrict the repa-

\textsuperscript{216} Id. at 581, 771.
\textsuperscript{217} See Sornarajah, supra note 202, at 109-11 (offering examples of laws requiring export target requirements); Folsom & Gordon, supra note 203, at 585, 770-72 (noting examples of performance requirements).
\textsuperscript{218} Investment Law, supra note 109, art. 11, Appendix at 606-07.
\textsuperscript{219} Id. art. 12, Appendix at 607.
\textsuperscript{220} See, e.g., supra notes 146-51, 157-66 and accompanying text (discussing lack of transparency of Investment Law with regard to transfer and nationalization issues).
\textsuperscript{221} See, e.g., supra notes 145, 188-92 and accompanying text (pointing out vulnerability of foreign investor to politics of PNA).
\textsuperscript{222} Investment Law, supra note 109, arts. 15, 16, Appendix at 608.
triation of capital and profits. Fourth, the Investment Law does not state what the standard for compensating investors for expropriations will be in the Palestinian Territories. Fifth, the Investment Law eliminates an investor’s recourse to independent judicial or arbitral review for decisions canceling investment approval. Sixth, the Investment Law does not indicate whether the Investment Agency or PNA would be willing to submit investment disputes to binding independent arbitration. In weighing those aspects of the Investment Law that reflect the liberalization movement in foreign investment laws and those aspects that create a restrictive, opaque, and potentially politicized investment regime, the Investment Law cannot be viewed overall as a liberal foreign investment code fully in tune with the current historical movement in this area.

Whether the Investment Law in practice actually reflects the liberalization trend in host nation investment laws or is restrictive, discriminatory, and politicized depends on the behavior of the Investment Agency and the PNA and the nature of the legislation impacting foreign investment enacted by the PNA. Like many other investment laws, the review and approval process gives the supervising authority ample discretion to pursue many different objectives and policies. Folsom and Gordon observe that how a state regulates foreign investment is often not found in its written law but in its unwritten law: the “operational code.” Whether the Investment Agency develops an unwritten law to compliment or contradict the Investment Law remains to be seen.

B. The Investment Law, TRIMS, and GATS

For the first time in the history of GATT, the Uruguay Round negotiations included agreements on trade-related investment measures and trade in services. The rules and proce-

223. See id. art. 18.4-5, Appendix at 609 (setting forth capital and profit repatriation requirements). See also FOLSOM & GORDON, supra note 203, at 586-87 (offering examples of capital repatriation restrictions).

224. Investment Law, supra note 109, art. 19.3, Appendix at 609. See generally FOLSOM & GORDON, supra note 203, at 773 (discussing dispute settlement).

225. FOLSOM & GORDON, supra note 203, at 596-602.

226. “If the PNA’s apparent commitment to a ‘hands off’ style of economic management turns out to be real, the future Palestinian economy could be one of the most liberal in the Middle East.” Warmed Up with Nowhere to Run: Palestinian Private Sector, MIDDLE EAST Econ. Dig., Aug. 18, 1995, at 11.
dures of the Investment Law can be usefully compared to the key principles in the Agreement on Trade-Related Investment Measures 227 ("TRIMS") and the General Agreement on Trade in Services ("GATS"). 228

1. National Treatment

Both TRIMS 229 and GATS 230 contain the principle of national treatment. A Member of GATT may not apply a trade-related investment measure or a measure affecting market access for the supply of services in a way that treats a foreign investor or service supplier less favorably than domestic investors or service suppliers. 231 Trade-related investment measures that are inconsistent with the principle of national treatment include those that are mandatory or enforceable under domestic law or compliance with which is necessary to obtain an advantage and that require: (a) the purchase or use by an enterprise of products of domestic origin or from domestic sources, or (b) that an enterprise's purchases or use of imported products be limited to a volume amount or to the value of local products the enterprise exports. 232 Measures that Members of GATT may not take under GATS to restrict market access include limitations on: (a) the number of service suppliers; (b) the total number of service transactions or assets; (c) the total number of service operations

228. General Agreement on Trade in Services, Dec. 15, 1993, 33 I.L.M 44 (1993) [hereinafter GATS]. The following analysis does not imply that the PNA could become a member of GATT. The Cairo Agreement and Interim Agreement do not give the PNA the competence to enter into treaties like GATT. See Cairo Agreement, supra note 20, arts. V(1)(b), VI(2)(a)-(b), 33 I.L.M. at 629-30; Interim Agreement, supra note 21, art. IX(5) (discussing principles applicable to PNA's foreign affairs). Further, the following analysis does not purport to be a complete examination of TRIMS and GATS but only a comparison of their major principles with the Investment Law. For a more complete analysis of GATS, see generally Mary E. Footer, The International Regulation of Trade in Services Following Completion of the Uruguay Round, 29 Int'l L. 453 (1995); William C. Yue, Trade in Services Under GATS and the NAFTA, in The Commerce Department Speaks on International Trade and Investment 1994, at 195 (PLI Corporate Law and Practice Course Handbook Series No. B-863, 1994).
229. TRIMS, supra note 227, art. 2(2).
230. GATS, supra note 228, art. XVII, 33 I.L.M. at 60-61.
231. Id. art. XVI, 33 I.L.M. at 60. Article XVII of GATS states that Members shall accord to services and service suppliers of any other Member, with respect to all measures affecting the supply of services, treatment no less favorable than it accords to its own like services and service suppliers. Id. art. XVII, 33 I.L.M. at 60-61.
232. TRIMS, supra note 227, annex (1).
or total quantity of service output; (d) the total number of employees; (e) the type of entity through which a service supplier may supply a service; and (f) the participation of foreign capital in a service enterprise.\textsuperscript{233}

The Investment Law does not contain any of the trade-related investment measures or market-restricting service measures identified in TRIMS and GATS as violative of the principle of national treatment. As mentioned before, a key principle of the Investment Law is non-discrimination as between Palestinian and foreign investors.

2. Elimination of Quantitative Restrictions

Under TRIMS, each Member is obligated to eliminate quantitative restrictions affecting investment in goods,\textsuperscript{234} including restrictions on: (a) the importation by an enterprise of products used in or related to its local production; (b) the importation by an enterprise of products used in or related to its local production by restricting its access to foreign exchange; or (c) the exportation or sale for export by an enterprise of products.\textsuperscript{235} The Investment Law contains none of the quantitative restrictions prohibited by TRIMS.

3. Most-Favored-Nation Treatment

GATS, but not TRIMS, contains the principle that, with respect to any measure covered by GATS, each Member of GATT must accord to services and service suppliers of any other Member treatment no less favorable than it accords to like services and service suppliers of any other country.\textsuperscript{236} The Investment Law does not specifically contain a most-favored-nation principle for investments in either goods or services. The Investment Agency and PNA have not bound themselves to follow most-favored-nation practices in approving investments. The references

\textsuperscript{233} GATS, supra note 228, art. XVI, 33 I.L.M. at 60.
\textsuperscript{234} TRIMS, supra note 227, art. 2(1).
\textsuperscript{235} Id. annex (2).
\textsuperscript{236} GATS, supra note 228, art. II(1), 33 I.L.M. at 49. GATS allows Members to exempt specific measures from the most-favored-nation principle in an Annex. Id. art II(2), 33 I.L.M. at 49. A Member may confer advantages, not available to other Members of GATT, to adjacent countries in order to facilitate exchanges limited to contiguous frontier zones of services that are both locally produced and consumed. Id. art. II(3), 33 I.L.M. at 49.
in the Investment Law to investors in the Palestinian diaspora\textsuperscript{237} may in practice create favoritism towards such Palestinian investors. Such investors, however, may live in many different countries, making it difficult to sustain the argument that favoritism for Palestinian diaspora investors violates the most-favored-nation principle.

4. Payments and Transfers

GATS, but not TRIMS, states that a Member of GATT shall not apply restrictions on international transfers and payments for current transactions in those sectors where the Member makes specific commitments.\textsuperscript{238} A Member of GATT may impose restrictions on the free transferability of payments in the event of a serious balance-of-payments inequity or external financial difficulty.\textsuperscript{239} The requirement in the Investment Law that investors pay certain, unspecified dues before repatriating capital and profits\textsuperscript{240} may run into conflict with the principle contained in Article XI of GATS if the dues are set at a level that restricts or completely deters capital and profit transfers. High dues on capital and profit transfers could be justified, however, by the principle found in Article XII of GATS:

\begin{quote}
It is recognized that particular pressures on the balance of payments of a Member in the process of economic development or economic transition may necessitate the use of restrictions to ensure, inter alia, the maintenance of a level of financial reserves adequate for the implementation of its programme of economic development or economic transition.\textsuperscript{241}
\end{quote}

5. Transparency

Both TRIMS and GATS contain the transparency principle: that measures affecting investment in goods, market access for services, or the supply of services shall be made publicly avail-

\begin{footnotesize}
\begin{table}
\begin{tabular}{|c|c|}
\hline
237. & See, e.g., Investment Law, supra note 109, art. 18.2-5, Appendix at 608-09 (setting forth several rights of expatriate Palestinians). \\
238. & GATS, supra note 228, art. XI, 33 I.L.M. at 56. Article XI "assures the service provider will be able to repatriate profits made in doing business in GATS Member country." Yue, supra note 228, at 199. \\
239. & GATS, supra note 228, art. XII, 33 I.L.M. at 56-57. \\
240. & Investment Law, supra note 109, art. 18.4, Appendix at 609. \\
241. & GATS, supra note 228, art. XII, 33 I.L.M. at 56-57. \\
\hline
\end{table}
\end{footnotesize}
able.\textsuperscript{242} The Investment Law recognizes the importance of transparency by giving the Investment Agency the responsibility to publicize information in order to promote investment in the Palestinian Territories.\textsuperscript{243} The lack of transparency in many aspects of the Investment Law, as already noted in Part III,\textsuperscript{244} raises the question whether the Investment Law satisfies the transparency principle as contained in TRIMS and GATS.

C. The Investment Law and World Bank Guidelines on Direct Foreign Investment

In 1992, the Development Committee of the World Bank adopted Guidelines on the Treatment of Foreign Direct Investment ("Guidelines").\textsuperscript{245} The Guidelines are not rules of international law,\textsuperscript{246} but they have been influential in the diplomacy concerning the treatment of foreign investment by states.\textsuperscript{247} It is instructive to see how the Investment Law compares to the principles set forth in the Guidelines.

1. Admission

Article II of the Guidelines sets forth the principles on admitting foreign investments.\textsuperscript{248} The Investment Law satisfies Guideline II.1's principle that each state encourage foreign investment and Guideline II.2(a)'s principle of facilitating the admission and establishment of investment by foreign nationals.\textsuperscript{249} The requirement in the Investment Law that a potential investor first must obtain all necessary licenses and permits before seeking approval from the Investment Agency\textsuperscript{250} could be considered violative of Guideline II.2(b)'s principle that unduly cumbersome or complicated procedural regulations for the admission

\textsuperscript{242} TRIMS, \textit{supra} note 227, art. 6; GATS, \textit{supra} note 228, art. III, 33 I.L.M. at 49-50.

\textsuperscript{243} Investment Law, \textit{supra} note 109, art. 4.2, 4.4, Appendix at 605.

\textsuperscript{244} See, e.g., \textit{supra} notes 146-51, 157-66, 220 and accompanying text (discussing Investment Law's lack of transparency).

\textsuperscript{245} The Guidelines are reprinted in \textsc{Ibrahim F.I. Shihata}, THE LEGAL TREATMENT OF FOREIGN INVESTMENT: THE WORLD BANK GUIDELINES 155-64 (1993) [hereinafter \textsc{World Bank Guidelines}].

\textsuperscript{246} Sornarajah, \textit{supra} note 202, at 212.

\textsuperscript{247} See \textsc{World Bank Guidelines}, \textit{supra} note 245, at 146-50; Sornarajah, \textit{supra} note 202, at 212.

\textsuperscript{248} \textsc{World Bank Guidelines}, \textit{supra} note 245, art. II, at 157-58.

\textsuperscript{249} Id. arts. II.1, II.2(a), at 157.

\textsuperscript{250} Investment Law, \textit{supra} note 109, art. 13.1, Appendix at 607.
of foreign investments should be avoided.\textsuperscript{251}

Article II.3 of the Guidelines cautions states that performance requirements as conditions of admission are counterproductive because they discourage foreign investment or encourage evasion or corruption.\textsuperscript{252} Since the Investment Law imposes no performance requirements for admission, it is in accord with Article II.3 of the Guidelines.

Article II.4 of the Guidelines allows a state to deviate from the principle of free admission when a proposed investment is inconsistent with clearly defined requirements of national security or belongs to economic sectors reserved by law to nationals on account of economic development objectives or the strict exigencies of national interest.\textsuperscript{253} National security powers are beyond the competence of the PNA under the Cairo Agreement and Interim Agreement,\textsuperscript{254} but Article 21.2 of the Investment Law does state that an investment will not be approved if it is in conflict with public security.\textsuperscript{255} Article 21.2 does not, however, clearly define the requirements of public security as required by Guideline II.4(a). The Investment Law complies with Guideline II.4(b) because it does not reserve any economic sectors for Palestinians.

Guideline II.5 states that restrictions applicable to national investment on account of public policy (ordre public), public health, and the protection of the environment will apply equally to foreign investment.\textsuperscript{256} Article 21.2 of the Investment Law requires that investments not be in conflict with public morals, public order, public security, and environmental protection laws.\textsuperscript{257} Guideline II.6 encourages states to publish adequate and current information about laws, regulations, and procedures affecting foreign investment.\textsuperscript{258} The Investment Law gives the Investment Agency the power to publicize information in order to promote investment in the Palestinian Territories,\textsuperscript{259} but the

\begin{itemize}
  \item \textsuperscript{251} \textit{World Bank Guidelines}, \textit{supra} note 245, art. II.2(b), at 157.
  \item \textsuperscript{252} \textit{Id.} art. II.3, at 157.
  \item \textsuperscript{253} \textit{Id.} art. II.4, at 157.
  \item \textsuperscript{254} See \textit{supra} note 183 and accompanying text (discussing foreign affairs problems inherent in Cairo Agreement and Interim Agreement).
  \item \textsuperscript{255} Investment Law, \textit{supra} note 109, art. 21.2, Appendix at 610.
  \item \textsuperscript{256} \textit{World Bank Guidelines}, \textit{supra} note 245, art. II.5, at 158.
  \item \textsuperscript{257} Investment Law, \textit{supra} note 109, art. 21.2, Appendix at 610.
  \item \textsuperscript{258} \textit{World Bank Guidelines}, \textit{supra} note 245, art. II.6, at 158.
  \item \textsuperscript{259} Investment Law, \textit{supra} note 109, art. 4.2, Appendix at 605.
\end{itemize}
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PNA and Investment Agency might have a difficult time meeting the principle in Guideline II.6 given the current confused state of Palestinian commercial law.

2. Treatment

Guidelines III.2 and III.3(a) require states to extend to foreign investors fair and equitable treatment as favorable as that accorded to national investors in similar circumstances. The Investment Law contains the principle of non-discrimination, which essentially grants foreign investors national treatment. Guideline III.3(a) also requires that full protection and security be accorded to the foreign investor's property rights, including intellectual property. The PNA and Investment Agency might have difficulty satisfying this Guideline, not because they want to undermine a foreign investor's property rights, but because the existing Palestinian law governing property rights is not as clear and transparent as it needs to be.

Guideline III.3(b) requires that a state not discriminate among foreign investors on grounds of nationality. The non-discrimination principle in the Investment Law also proscribes discrimination as between foreign investors.

Guideline III.5(a) requires the state to issue promptly the necessary licenses, permits, and concessions for the uninterrupted operation of the admitted investment. The Investment Law's requirement that a potential investor acquire all necessary licenses and permits before submitting an application to the Investment Agency seems counter to the principle embodied in Guideline III.5(a). Guideline III.5(b) requires the state to authorize the investor to employ foreign personnel. The Investment Law contains no prohibitions on the employment of foreign nationals. The employment thresholds of permanent Palestinian employees established in the exemption benefit criteria

260. World Bank Guidelines, supra note 245, arts. III.2, III.3(a), at 158.
261. Id. art. III.3(a), at 158.
262. Israel and the PNA have agreed to cooperate on developing "adequate protection of intellectual property rights" in the Interim Agreement. See Interim Agreement, supra note 21, annex VI, art. VI(e).
263. World Bank Guidelines, supra note 245, art. III.3(b), at 158.
264. Investment Law, supra note 109, art. 18.2, Appendix at 608-09.
265. World Bank Guidelines, supra note 245, art. III.5(a), at 159.
266. Investment Law, supra note 109, art. 13.1, Appendix at 607.
267. World Bank Guidelines, supra note 245, art. III.5(b), at 159.
may indirectly restrict the hiring of foreign nationals, but such thresholds do not prohibit an investor from retaining foreign personnel.

Guideline III.6 deals with the transfer of wages, net revenue, debt payments, net sales proceeds, and compensation payments for expropriation or under dispute settlement. The Investment Law does not deal with the transferability of the wages of foreign employees, the transfer of debt payments, or the transfer of expropriation or dispute settlement compensation payments. The Investment Law allows the foreign investor to transfer capital and profits after paying dues required by Palestinian law. Since "dues" are defined as customs duties and purchase taxes, the Investment Law could be interpreted as in compliance with Guideline III.6(b) on the free transferability of net revenues. If the dues required by the PNA are high, the Investment Law may indirectly deter the transferability of capital and profits. The Investment Law might also violate the principle in Guideline III.6(1)(d), which requires the repatriation and transfer of the net proceeds of a liquidation or sale of an investment. The only exception provided by Guideline III.6(1)(a) is that a state may require proceeds to be repatriated in installments over a period not exceeding five years. The Investment Law is silent as to whether an investor that sells its investment may repatriate the sales proceeds.

Nothing in the Investment Law violates the principle in Guideline III.7, which requires each state to permit and facilitate the reinvestment in its territory of the profits realized from existing investments and the proceeds of sale or liquidation of such investment.

Guideline III.8 requires the state to take appropriate measures to prevent and control corrupt business practices, to promote accountability and transparency in dealing with foreign investors, and to cooperate with other states in developing international procedures and mechanisms to ensure the same.
Investment Law revokes approval of an investment and retroactively requires the payment of all taxes and other economic benefits from the initial date of approval if the Investment Agency determines that an investment license was granted through false pretense, deceit, bribery, or forgery.\(^{275}\) The Investment Law also has provisions that address issues of accountability and transparency. For example, the Investment Agency has the power and responsibility to: (1) direct investment in accordance with the Palestinian economic needs; (2) formulate information necessary to publicize and promote investment in the Palestinian Territories; (3) formulate recommendations on the improvement of the Investment Law; and (4) collect and publish studies encouraging investment in the Palestinian Territories.\(^{276}\) Much of the Investment Law, however, does not contribute to the transparency principle because it gives the Investment Agency broad discretion to approve investments, change incentives, create additional incentives, and cancel investment approvals.\(^{277}\)

Guideline III.9 permits states to provide tax exemptions and other fiscal incentives to foreign investors, provided that such exemptions and incentives are automatically granted to the extent possible, directly linked to the type of activity to be encouraged, and equally extended to national investors in similar circumstances.\(^{278}\) The only exemptions that are automatic in the Investment Law are the basic exemptions in Article 11.1, which “shall be granted” after an investment proposal has been approved and all requisite licenses obtained.\(^{279}\) The Investment Agency has total discretion to grant the additional exemptions available in Articles 10.2, 10.3, 11.2, and 12,\(^{280}\) and such exemptions may or may not be directly linked to the type of activity to be encouraged and may or may not be equally extended to foreign investors as to Palestinians.

3. Expropriation and Termination of Contracts

The Investment Law provides that expropriation of any in-

\(^{275}\) Investment Law, supra note 109, art. 19.2, Appendix at 609.

\(^{276}\) Id. art. 4, Appendix at 604-05.

\(^{277}\) See, e.g., id. arts. 10, 11, 12, 19, Appendix at 606-07, 609 (setting forth provisions that contribute to lack of transparency).

\(^{278}\) World Bank Guidelines, supra note 245, art. III.9, at 160-61.

\(^{279}\) Investment Law, supra note 109, art. 11.1, Appendix at 606-07.

\(^{280}\) Id. arts. 10.2-3, 11.2, 12, Appendix at 606, 607.
vestment is forbidden without the consent of the investor unless the expropriation is undertaken pursuant to a law or court ruling and on a non-discriminatory basis. The Investment Law does not mention any standards to govern compensation of the investor in the event of an expropriation. Guideline IV.1 provides that a state may not expropriate except where expropriation is done in accordance with applicable legal procedures, in pursuance in good faith of a public purpose, without discrimination on the basis of nationality, and against the payment of adequate, effective, and prompt compensation. The Guidelines provide definitions for adequate, effective, and prompt compensation. Arguably, the Investment Law's requirement that any expropriation without the consent of the investor only occur pursuant to a law or court ruling in a non-discriminatory fashion satisfies the Guideline's requirements for applicable legal procedures, good faith pursuance of a public purpose, and non-discrimination. What is missing from the Investment Law is any commitment on the standard to govern compensation for expropriations.

Guideline IV.11 applies the principle in effect for expropriations (i.e., action in conformity with applicable legal procedures, in good faith pursuance of a public purpose, without discrimination on the basis of nationality, and against the payment of adequate, prompt, and effective compensation) to unilateral termination of contracts by a host state for non-commercial reasons. The Investment Law does not address unilateral termination by the Investment Agency of an investment contract for non-commercial reasons.

4. Dispute Settlement

Guideline V.1 requires that disputes between foreign investors and the host state normally be settled first through negotiations and then through either national courts, conciliation, or binding arbitration. The Guidelines encourage the use of the International Centre for the Settlement of Investment Disputes.

281. Id. art. 18.1, Appendix at 608.
282. WORLD BANK GUIDELINES, supra note 245, arts. IV.2, IV.3, at 161.
283. Id. arts. IV.3-IV.8, at 161-63.
284. Investment Law, supra note 109, art. 18.1, Appendix at 608.
285. WORLD BANK GUIDELINES, supra note 245, art. IV.11, at 163-64.
286. Id. art. V.1, at 164.
("ICSID") for independent arbitration.\textsuperscript{287} The Investment Law states that disputes between an investor and the Investment Agency shall be resolved by Palestinian courts in accordance with Palestinian law.\textsuperscript{288} A major exception to this dispute settlement provision is the requirement that the President of the PNA personally decide appeals by investors who have had their approvals canceled by the Investment Agency.\textsuperscript{289} This particular provision of the Investment Law conflicts with Guideline V.1's requirement for access to judicial review. The Investment Law also seems to preclude the use of binding international arbitration as a dispute settlement mechanism, which Guideline V.1 encourages.\textsuperscript{290}

D. The Investment Law and the U.S. Bilateral Investment Treaty

A final comparison is between the Investment Law and the principles contained in the model U.S. Bilateral Investment Treaty. The United States and European capital-exporting countries have developed bilateral treaty programs that promote the protection of foreign investment.\textsuperscript{291} European capital-exporting countries have concluded more than 400 bilateral investment protection agreements.\textsuperscript{292} As of June 15, 1994, the United States had concluded thirty bilateral investment treaties, of which seventeen had entered into force.\textsuperscript{293} The model U.S. Bi-

\textsuperscript{287} Id. art. V.3, at 164.
\textsuperscript{288} Investment Law, supra note 109, art. 20, Appendix at 609.
\textsuperscript{289} Id. art. 19.3, Appendix at 609.
\textsuperscript{290} See id. art. 20, Appendix at 609 ("Palestinian courts shall have the competence and jurisdiction to resolve all disputes") (emphasis added).
\textsuperscript{292} Shenkin, supra note 291, at 548.
lateral Investment Treaty ("U.S. Investment Treaty") was selected for comparison rather than European examples because: (1) the U.S. Investment Treaty incorporates the principle of national treatment for the establishment of investments while European investment treaties usually do not; (2) the U.S. Investment Treaty prohibits the imposition of performance requirements as a condition for the establishment, expansion, or maintenance of investments, a prohibition not typically found in European investment treaties; and (3) the U.S. Department of Commerce revised the U.S. Investment Treaty in 1994, making it an up-to-date document against which to compare the Investment Law.

Article II(1) of the U.S. Investment Treaty provides that each party shall accord to investors of the other party the more favorable of national treatment or most-favored-nation treatment. As already mentioned, the Investment Law provides for national treatment but not for most-favored-nation treatment of foreign investors. Article II(3)(a) of the U.S. Investment Treaty states that each party shall at all times accord to covered investments fair and equitable treatment and full protection and security, and shall in no case accord treatment less favorable than that required by international law. The Investment Law contains no language similar to Article II(3) (a) of the U.S. Investment Treaty, the closest being the Investment Law’s principle of non-discrimination.

Article II(3)(b) of the U.S Investment Treaty provides that neither party can impair by unreasonable or discriminatory measures the management, conduct, operation, sale, or other

294. The text of the U.S. Investment Treaty can be found in Lewis, supra note 293, at 133-53.
296. Shenkin, supra note 291, at 548-49.
298. Shenkin, supra note 291, at 549.
299. Lewis, supra note 293, at 130.
300. U.S. Investment Treaty, art. II(1), Lewis, supra note 293, at 136-37. Article II(2) allows each side to adopt and maintain exemptions to the principles in Article II(1). Id. at 137.
301. See supra notes 236-37 and accompanying text (discussing most-favored-nation features of Investment Law).
302. U.S. Investment Treaty, art. II(3)(a), Lewis, supra note 293, at 137.
303. Investment Law, supra note 109, art. 18.2, Appendix at 608-09.
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disposition of covered investments.\textsuperscript{304} Since the Investment Law focuses on the investment approval process rather than the operation of an approved investment, it does not address most of the concerns of Article II(3)(b) of the U.S. Investment Treaty. Many of the laws and regulations that will govern the conduct of business in the Palestinian Territories in the future have not, however, been promulgated (e.g., health and environmental protection laws) and foreign investors will closely watch how new Palestinian laws affect the operation of an investment. Finally, the discretion given to the Investment Agency to approve asset sales is not subject to any standards or parameters in the Investment Law,\textsuperscript{305} which leaves open the possibility that such discretion could be used in an unreasonable and discriminatory manner.

Article II(4) of the U.S. Investment Treaty states that each party shall provide effective means of asserting claims and enforcing rights with respect to covered investments.\textsuperscript{306} The Investment Law would not satisfy Article II(4) of the U.S. Investment Treaty because an investor has no effective way of asserting a claim that its investment approval was wrongfully canceled. More specifically, an investor has no recourse against the decision of the President of the PNA.\textsuperscript{307} Further, Article II(5) of the U.S. Investment Treaty contains the transparency principle,\textsuperscript{308} and the lack of transparency in the Investment Law has already been noted.\textsuperscript{309}

Article III of the U.S. Investment Treaty contains the standard for legitimate expropriations of covered investments: expropriations must only be undertaken for a public purpose in a non-discriminatory manner, upon payment of prompt, adequate, and effective compensation and in accordance with due process of law and the general principles of treatment provided for in Article II(3).\textsuperscript{310} As mentioned earlier, the Investment Law arguably would satisfy the public purpose requirement because an expropriation without the consent of the investor must be

\begin{footnotes}
\item[304] U.S. Investment Treaty, art. II(3)(b), Lewis, \textit{supra} note 293, at 137.
\item[305] Investment Law, \textit{supra} note 109, art. 16, Appendix at 608.
\item[307] Investment Law, \textit{supra} note 109, art. 19.3, Appendix at 609.
\item[308] U.S. Investment Treaty, art. II(5), Lewis, \textit{supra} note 293, at 138.
\item[309] See, e.g., \textit{supra} notes 146-51, 157-66, 220, 277 and accompanying text (discussing lack of transparency in Investment Law).
\end{footnotes}
made pursuant to a law or court ruling. The Investment Law also requires expropriations in a non-discriminatory manner, which would satisfy another requirement of Article III(1) of the U.S. Investment Treaty. The Investment Law does not, however, address the standard for compensation; and it is unlikely that the PNA would argue that "prompt, adequate, and effective compensation" would be the proper standard to apply. Finally, the question whether the Investment Law provides investors with the right to assert and make a claim generated by Article II(4) of the U.S. Investment Treaty comes up again in relation to U.S. Investment Treaty Article III(1)'s requirement for due process of law and treatment under the principles of Article II(3).

Article IV of the U.S. Investment Treaty provides that each party shall: (a) accord national and most-favored-nation treatment to covered investments as regards any measure relating to losses that investments suffer in its territory owing to war or other armed conflict, revolution, civil disturbance, or similar event, and (b) accord restitution, or pay compensation in accordance with the provisions of Article III in the event that the losses referred to in (a) result from requisition or destruction of the investments by the party in question. While the level of political instability in the Palestinian Territories makes the issues implicated by Article IV of the U.S. Investment Treaty relevant, the Investment Law does not address them in any way.

Article V(1) and (2) of the U.S. Investment Treaty deal with transfers relating to a covered investment and require that such transfers be made freely, without delay, and in freely usable currency. A party may prevent a transfer only through the equitable, non-discriminatory, and good faith application of bankruptcy, securities, and criminal laws or of orders or judgments from adjudicatory proceedings. The discretion given to the Investment Agency to approve asset transfers is not implicated by Article V, because Article V deals only with the transfer of the proceeds from the sale of all or any part of an investment and

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311. Investment Law, supra note 109, art. 18.1, Appendix at 608.
312. Id.
313. U.S. Investment Treaty, art. IV(1), Lewis, supra note 293, at 139.
314. Id. art. IV(2), at 138-39.
315. Id. arts. V(1)-(2), at 140-41.
316. Id. art. V(4), at 141.
317. Investment Law, supra note 109, arts. 15, 16, Appendix at 608.
not with the approval of a sale of assets. The silence of the Investment Law as to the transferability of the proceeds from the sale of an entire investment might be problematic in connection to the above standard of free transferability enshrined in Article V of the U.S. Investment Treaty.\textsuperscript{318} If the taxes and dues applicable to the repatriation of profits and capital from investment in the Palestinian Territories\textsuperscript{319} are onerous enough to deter effectively such transfers, then the Investment Law and its associated regulations could be considered at odds with the free transfer principle of Article V of the U.S. Investment Treaty.

Article VI of the U.S. Investment Treaty prohibits each party from mandating or enforcing conditions on investments that require local content utilization, limit imports, require exports, limit sales, require technology transfers, or require research and development activities.\textsuperscript{320} The Investment Law does not contain any of the restrictions prohibited by Article VI of the U.S. Investment Treaty.

Article VII(1) of the U.S. Investment Treaty requires each party to allow nationals of the other party to enter and remain in its territory for purposes of working with an investment, subject to such party’s immigration laws.\textsuperscript{321} Article VII(2) requires each party to permit covered investments to engage managerial personnel, regardless of nationality.\textsuperscript{322} The Investment Law states that expatriate Palestinian investors, Arab investors, and other foreign investors shall enjoy the right of permanent residence under Palestinian law.\textsuperscript{323}

Article IX of the U.S. Investment Treaty addresses dispute settlement.\textsuperscript{324} The key principle of Article IX is that the investor, rather than the host government, has the choice of submitting investment disputes to local courts, agreed alternative dispute settlement procedures, or arbitration by ICSID.\textsuperscript{325} The Investment Law does not allow the investor a choice in the selection of a dispute settlement forum. Disputes have to be submitted to

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{318} U.S. Investment Treaty, art. V, Lewis, \textit{supra} note 293, at 140-41.
\item \textsuperscript{319} Investment Law, \textit{supra} note 109, art. 18.4, Appendix at 609.
\item \textsuperscript{320} U.S. Investment Treaty, art. VI, Lewis, \textit{supra} note 293, at 141-42.
\item \textsuperscript{321} \textit{Id.} art. VII(1), at 142-43.
\item \textsuperscript{322} \textit{Id.} art. VII(2), at 143.
\item \textsuperscript{323} Investment Law, \textit{supra} note 109, art. 18.3, Appendix at 609.
\item \textsuperscript{324} U.S. Investment Treaty, art. IX, Lewis, \textit{supra} note 293, at 144-45.
\item \textsuperscript{325} \textit{Id.} arts. IX(2) and (3), at 144-45.
\end{itemize}
\end{footnotesize}
Palestinian courts\(^\text{326}\) unless the dispute concerns cancellation of investment approval, in which case the problem comes before the President of the PNA for final resolution.\(^\text{327}\)

**E. Summary of Analysis**

Analyzing the Investment Law against the trends in foreign investment laws and the principles contained in TRIMS, GATS, the Guidelines, and the U.S. Investment Treaty demonstrates that the Investment Law has serious problems that preclude it from being in conformity with the latest international practices and standards on foreign investment. The problems appear frequently in the analysis: broad discretionary powers; a lack of transparency; restrictions on asset sales; potential problems with the free transferability of investment sale proceeds, asset sale proceeds, capital, and profits; a lack of standards for expropriation; and a flawed dispute settlement procedure. It is disturbing that the Investment Law fails to meet current international standards and practices, given the desperate need for foreign investment in the Palestinian Territories. In analyzing the legal structure for foreign investment present in Gaza and the West Bank before the adoption of the Investment Law, Keith Molkner and Ra'ed Abdul Hamid of IPCRI argued that legal structure was inadequate, *inter alia*, because: (1) there was too much discretion in the investment approval process; (2) the free transferability of capital and profits abroad was not guaranteed; (3) benefits could be retroactively canceled and severe penalties imposed without reference to objective standards and without adequate legal recourse against such a decision; (4) the lack of protection against expropriation and no standard of compensation; and (5) there was inadequate access to international arbitration as a dispute settlement mechanism.\(^\text{328}\)

The appearance of the very same problems in the Investment Law is discouraging and indicates that the Investment Law does not resolve many of the problems plaguing the prior legal regime on foreign investment in the Palestinian Territories.

\(^{326}\) Investment Law, *supra* note 109, art. 20, Appendix at 609.

\(^{327}\) Id. art. 19.3, Appendix at 609.

\(^{328}\) See Molkner & Hamid, *supra* note 92, at 33-38 (discussing legal regime applying to foreign investment in Palestinian Territories before Investment Law).
The Investment Law will not have a significant short-term impact on foreign private investment in the Palestinian Territories and, thus, on the economic development of the Palestinian economy. This lack of impact can be traced to political, legal, and economic obstacles.

A. Political Obstacles

As noted earlier, the political violence that has accompanied the peace process has deterred foreign private investors, and the Investment Law is not designed to deal directly with the political issues at the heart of such violence. Some commentators are arguing that the violence haunting the peace process threatens to destroy it. Amos Perlmutter argues in the May/June 1995 issue of *Foreign Affairs* that the Declaration “is for all intents and purposes dead” and that “the whole Oslo process is unravelling, jolted by a wave of fundamentalist terrorism that deepens the prevailing pessimism among even dovish Israelis.”

Such gloomy predictions, if not proven accurate in the event, certainly inject chilling doubt into the minds of potential foreign private investors. The signing of the Interim Agreement in late September 1995 steadied the peace process somewhat as both sides took another step towards peace. The assassination of Israeli Prime Minister Yitzhak Rabin on November 4, 1995, has, however, shaken the peace process and increased doubts in Israel, the Palestinian Territories, and elsewhere about the long-term prospects for peace.

Much political uncertainty remains, therefore, particularly with the approach of elections in both the Palestinian Territories and Israel in 1996. The peace process will undoubtedly undergo more severe stress and strain in the future, forcing foreign investors to think very hard before putting money into the Palestinian Territories. The “wait and see” mentality may continue to prevail to the detriment of Palestinian economic development.

B. Legal Obstacles

The legal status of the Investment Law under the peace process agreements is not certain, which raises the question whether the PNA can in fact implement it. Article IX of the Economic Protocol states that the "Palestinian side has the right to employ various methods in encouraging and promoting the development of the Palestinian industry by way of providing grants, loans, research and development assistance and direct-tax benefits." This provision suggests that the Economic Protocol empowers the PNA to draft and adopt the Investment Law. Israel has expressed the view that economic development in the Palestinian Territories is crucial to the peace process and has encouraged the PNA to establish institutions and procedures to foster economic development. Further, Article VI of the Cairo Agreement and Article IX(5) of the Interim Agreement give the PNA the power to conduct diplomacy and negotiations with states and international organizations specifically in the economic development area. While the Investment Law is not an international agreement, its provisions dealing with foreign investors are well within the authority of the PNA to work on the international level towards economic development.

Article VII of the Cairo Agreement contains several technical uncertainties regarding the PNA's legislative powers. All legislation promulgated by the PNA will have to be submitted for review to the Legislation Subcommittee of the Joint Civil Affairs Coordination and Cooperation Committee. The Legislation Subcommittee will then determine whether the legislation submitted for review exceeds the jurisdiction of the PNA or is otherwise inconsistent with the provisions of the Cairo Agreement. Legislation that is not sent through the process provided in Article VII will not enter into force under the terms of the Cairo Agreement. As of this writing, the Investment Law has not been submitted to the Legislation Subcommittee, which technically means that it is not in force and cannot be implemented by the PNA under the terms of the Cairo Agreement.

331. Cairo Agreement, supra note 20, annex IV, art. IX(2)(a), 33 I.L.M. at 715; Interim Agreement, supra note 21, annex V, art. IX(2)(a).
332. Cairo Agreement, supra note 20, art. VI, 33 I.L.M. at 630; Interim Agreement, supra note 21, art. IX(5).
Peace has been informed that the Investment Law will not go before the Legislation Subcommittee because this sort of legislation was not intended to undergo the review process. While this practice is reassuring in one respect to a foreign investor, in another respect it is disconcerting because the parties are deviating from the letter of the Cairo Agreement without clear guidelines to clarify what laws will go before the Legislation Subcommittee. This technical uncertainty could be overcome by having the elected Palestinian Council ratify the Investment Law under the powers it has pursuant to the Interim Agreement, but such a solution involves more delay in implementing a Palestinian investment regime.

Such a delay is very likely since it appears that the PNA will not implement the Investment Law until the Palestinian Council ratifies it sometime after the Palestinian elections in 1996. Whether the Palestinian Council decides to revise the Investment Law during ratification remains to be seen.

Another legal obstacle is that the Palestinian Council will have to set up the Investment Agency, appoint its personnel, and draft and implement regulations to fill in or interpret the Investment Law, to clarify ambiguities, to reduce the discretionary powers of the Investment Agency, and to improve the transparency of the Investment Law. The length of time the PLO and PNA took to draft the Investment Law does not bode well for prompt establishment of the Investment Agency and an efficient drafting and promulgation of needed regulations.

C. Economic Obstacles

Foreign private investment continues to face short term economic obstacles that will prevent it from contributing significantly to the economic development of the Palestinian Territories. First, the interdependence between public aid and private investment has still not been generated because international aid has been slow in flowing and infrastructure projects slower in

334. Telephone interview with Basil Kiwan, Director of Business Development, Builders for Peace (July 20, 1995).
335. Telephone interview with Joe DeSutter, Executive Director, Builders for Peace (Nov. 21, 1995).
336. The PNA claims that "[r]egulations are presently being drafted to clarify and facilitate the administrative procedures of the Law." INVEST IN PALESTINE: LAWS, supra note 90, at 11.
finishing. The private sector — the long-term heart of Palestinian economic development — needs infrastructure improvements in order to plant deep roots in the Palestinian Territories. Whether the international donor community succeeds in preparing the soil for private sector roots remains an unanswered question.

Second, the reluctance of OPIC to fund loans to American private investors despite the fanfare, rhetoric, and promises of the U.S. Government to support Palestinian economic development is sending chilling signals to the international community and the Palestinians. Without American leadership, the international business community will proceed with ever more caution and delay.

Third, the strategy of Builders for Peace, the group leading U.S. private investment initiatives, may have inadvertently hurt the prospects for foreign investment in the Palestinian Territories. The high-profile statements about investor interest and the public announcements of large-scale projects have come back to haunt Builders for Peace as the interest has not materialized and most of the announced projects have not progressed. The strategy may have backfired for a number of reasons. First, the economic infrastructure to be funded by international aid has not been built because of the problems between the PLO and the international donor community. Publicly announcing big investment projects without any progress on building economic infrastructure has created, in Mel Levine's words, "a fear that we are putting the cart before the horse." Second, the flagship project of Builders for Peace, the Gaza Marriott Hotel, appears out of touch with the overwhelming need in the Palestinian Territories for basic economic development. The one Builders for Peace project that has succeeded, the Bucheit International cement plant, produces a product directly connected to the infrastructure development needs of the Palestinians. While not as flashy as a five-star luxury hotel, the cement plant perhaps represents a better investment project model: smaller investments fo-

337. At the September 12, 1994 press conference announcing the nine Builders for Peace investment projects, Sabri El-Farra, one of the investors, said: "We are talking about a lot of fancy stuff here [the investment projects]. But unless we address the infrastructure in Gaza... none of this will ever get off the ground." Shalit, supra note 46, at 14 (quoting Sabri El-Farra).

338. Shalit, supra note 46, at 15 (quoting Mel Levine).
cused on existing capabilities to service the creation of an economic infrastructure. The failure, or perceived failure, of the Builders for Peace strategy may deter investors from pursuing investments akin to the cement plant.

Fourth, serious questions exist about whether the traditional strategy of providing investment procedures and incentives through an investment law will contribute to Palestinian economic development given the current state of the Palestinian economy. Massive unemployment, poor infrastructure, total dependence on the Israeli economy, no geographic or natural resource advantage over neighboring states, and the problems with international aid funds all combine to make a grim picture. Other economic development ideas have been advanced to deal with the troubling state of the Palestinian economy. As James Zogby, Co-President of Builders for Peace, has said: "A new approach must be found." The most popular idea currently is the "industrial estate" or "enterprise zone" concept, in which Israelis and Palestinians form special zones in the Palestinian Territories to encourage rapid economic growth. Twenty-two U.S. senators wrote to President Clinton on May 25, 1995, urging the Clinton Administration to support the rapid development of an industrial park in Gaza and the West Bank. Builders for Peace supports the industrial zone concept, and President Clinton has indicated he would "ask Congress to approve duty-free treatment of goods from special industrial zones on the West Bank and Gaza, if Israel and the Palestinians agreed to create the zones." The Interim Agreement incorporates the industrial zone idea as Israel and the PLO have agreed to cooperate to "seek ways to increase Palestinian industrial output through, inter alia, the promotion of a program of industrial zones." If pursued, the industrial zone concept could make the traditional foreign private investment strategy embodied in the Investment Law secondary in importance. Once industrial zones have

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339. Hearings, supra note 67 (testimony of James Zogby).
340. Id. (testimony of Chairman, Senator Hank Brown).
341. Id. (testimony of James Zogby).
343. Interim Agreement, supra note 21, annex VI, art. V(d).
gained a foothold, the Investment Law could find a place in attracting foreign investment to service and expand the growth facilitated by industrial zones. The industrial zone strategy embodies the conclusion that the Palestinian economy cannot in its current condition rely on traditional foreign investment to jump start economic development.

Fifth, the problems facing foreign investors in the Palestinian Territories and the presence of attractive investment opportunities elsewhere in the region and in the world suggest that investors pursuing Palestinian investment projects have strong non-economic motivations, such as helping Palestinian self-determination and the peace process. Perhaps this explains the leading role Palestinians in the diaspora have taken in encouraging and participating in investments in the Palestinian Territories. Expatriate Palestinian investors have also been some of the harshest critics of the PNA and Arafat's governing style.

Sixth, the division within the Palestinian community between the supporters of the peace process and the supporters of fundamentalist Islamic groups portends long-term trouble for the role of foreign investment in the economic development of the Palestinian Territories. Amy Chua has identified in Latin American and Southeast Asian countries a cycle of privatization and nationalization driven by economic forces and ethnicity. The period in the cycle of privatization and openness to foreign investors is driven by need for foreign investment to promote domestic economic development. The period in the cycle of nationalization and hostility towards foreign investors is driven by nationalism. Interestingly, Chua shows that the nationalism is not only directed externally against foreigners, but also

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344. See Warmed Up with Nowhere to Run, supra note 226, at 11 (discussing the leadership in Palestinian private sector activities shown by the Palestine Development & Investment Company); Middle East Summit: Public Ventures, Private Doubts, supra note 81, at 48 (reporting new US$250 million foreign private investment program developed by Palestinian expatriates in Qatar).
347. Id. at 223-24.
348. Id. at 262.
349. Id. at 263.
The pressing need for economic development combined with a divided community creates the potential for Palestinian oscillation between: (1) openness to foreign investment and those leaders in favor of it; and (2) hostility to foreign influences and the persons attempting to import them. The nationalistic part of this cycle would be driven not by ethnic tensions but by religious factors. The continued popularity of fundamentalist groups like Hamas among Palestinians might jeopardize the PNA's efforts to place the Palestinian Territories permanently into the mainstream of the international economic system.

Finally, the question remains whether the Palestinian Territories can develop a healthy and viable economy. The assumption of the leaders involved in the peace process, and one of the core premises of the entire process, is that the Palestinian economy can and will develop to support the basic needs and future aspirations of the Palestinian people. The chosen strategy, as outlined earlier, combines continued integration with the Israeli economy and massive amounts of foreign public aid and private investment. Some observers note that this strategy condemns the Palestinians to dependence on Israel and the West. Such dependence could feed resentment about the peace process and increase the power of radical nationalist and/or fundamentalist groups.

Arafat's warnings to the World Bank and the international donor community about the "humiliating" conditions for receiving aid indicates that dependence is already creating political problems for the PNA. Arafat has said that the Palestinian Territories have the potential to be either as economically vi-

350. Id. at 266.
351. Historical precedent exists in the Islamic world for an internationalist-fundamentalist cycle. Iran, under the Shah, was open to Western investment and influence, but the revolution led by Khomeini effectively closed, for religious reasons, Iranian society to Western investment influences. Now Iran is trying to attract foreign investment and trade to help its economy. See, e.g., Sarvenaz Bahar, Khomeinism, The Islamic Republic of Iran, and International Law: The Relevance of Islamic Political Ideology, 33 Harv. Int'l L.J. 145, 185 (1992). The presence of strong fundamentalist forces in Iran, however, casts a shadow on the attempt by Iranian officials to convince foreign investors that Iran is "open for business." See, e.g., Lamis Andoni, Second Revolution Brews in Iran, CHRISTIAN SCI. MONITOR, Apr. 12, 1995, at 6 (discussing riots by Iranian merchants and poor people in protest of President Rafsanjani's free-market economic reforms).
352. See Avineri, supra note 26, at 12-13.
353. See Ibrahim, supra note 58.
brant as Singapore or as economically desolate as Somalia. A third possibility exists, according to Shlomo Avineri, who argues that continued dependence by Palestinians on Israel creates the possibility that a "virtual Bantustan would develop on Israel's doorstep." Avineri recommends that the Palestinians build their economy "with as few links to Israel as possible" and with aid and investment primarily from Arab states rather than the United States and the European Union. The peace process is, however, pursuing exactly the opposite strategy. Foreign private investors analyzing the long-term viability of the Palestinian Territories will factor in the political, social, and economic consequences of Palestinian economic dependence.

CONCLUSION

The peace process between Israel and the Palestinians will remain a difficult endeavor. The lack of significant foreign private investment in the Palestinian Territories will make the endeavor more difficult because foreign private investment is considered vital for Palestinian economic development. The Investment Law will do little to attract foreign private investment because it leaves many important questions unanswered and creates potential problems for foreign investors. Other forces and events beyond the scope and control of the Investment Law will ultimately determine its relevance; but, in its present form, the Investment Law falls short of what is needed to encourage foreign investors to build and profit from peace in the Palestinian Territories.

354. *Hearings, supra* note 67 (testimony of Mel Levine).

355. Avineri, *supra* note 26, at 13. The term "Bantustan" historically referred to the black homelands established in South Africa during the apartheid regime. Although these black homelands nominally had independence, they were completely dependent on South Africa economically.

356. *Id.* at 14. Avineri's alternative approach to economic development for the Palestinians is not a rejection of economic dependence per se. He appears to believe that the Palestinians are better off dependent on Arab states than on Israel and the West. *Id.* at 14-15. Perhaps he believes that cultural and religious identity will make economic dependence on Arab states more palatable for Palestinians. The problem with grounding economic development strategy on cultural or religious terms is that it encourages division rather than community between Israel and the Palestinians.
APPENDIX

LAW ON THE ENCOURAGEMENT OF INVESTMENT

Having the approval of the Council of the Palestinian National Authority dated April 29, 1995, and in accordance with the public interest, the Chairman of the Executive Committee of the Palestinian Liberation Organization and the President of the Palestinian National Authority hereby promulgates the following law:

PART I

Definitions

Article 1

In this Law, the following words and expressions shall have the meanings shown below, unless the context otherwise requires:

<table>
<thead>
<tr>
<th>Term</th>
<th>Definition</th>
</tr>
</thead>
<tbody>
<tr>
<td>The Authority</td>
<td>The Palestinian National Authority</td>
</tr>
<tr>
<td>The Agency</td>
<td>The Palestinian Higher Agency for the Encouragement of Investment.</td>
</tr>
<tr>
<td>Investor</td>
<td>Any natural or legal person seeking or offering to invest in Palestine.</td>
</tr>
<tr>
<td>Investment</td>
<td>Creation or addition of economic activities (production, industrial, tourist, agricultural, medical, educational, productive, construction services) in Palestine, including: (a) Establishing new projects. (b) Adding new schemes of production and new machinery which results in increasing employment and production.</td>
</tr>
<tr>
<td>Dues</td>
<td>Customs duties and purchase tax levied on machinery, equipment and raw materials.</td>
</tr>
<tr>
<td>Income Tax</td>
<td>Income tax levied on the net profit of investment projects.</td>
</tr>
</tbody>
</table>

PART II

The Palestinian Higher Agency for the Encouragement of Investment

Article 2

1. A public agency known as “The Palestinian Higher Agency for the Encouragement of Investment” shall be established under the provisions of this Law. It shall be an autonomous body corporate and
shall report directly to the President of the Authority. The headquar-
ters of the Agency shall temporarily be located in the city of
Gaza, and its Board of Directors may establish branches or offices
inside or outside Palestine.

2. The Agency shall be concerned with encouragement of investment
so as to ensure implementation of the Palestinian economic develop-
ment needs in accordance with the objectives, priorities, and
policies set by the Board.

**Article 3**

1. The Agency shall be managed by a Board of Directors composed
of 15 members under the chairmanship of the Minister of Eco-
nomics, Trade, and Industry. Membership shall consist of follow-
ing:

   1. Director-General of the Agency.
   3. A representative of the Ministry of Planning and Interna-
tional Cooperation.
   5. A representative of the Ministry of Public Works.
   6. A representative of the Ministry of Housing.
   8. The Governor of the Palestinian Monetary Authority.
   9. The Presidents of both the Federation of Chambers of Com-
merce and Industry.
  
10. Four members from the private sector, who shall be appoin-
ted by decision of the President of the National Author-
ity.

11. A representative of the concerned Ministry, depending on
the project(s) proposed.

2. Other ministries and agencies shall be represented by undersecre-
taries or general directors. Membership shall be for a renewable
term of three years. If the seat of a member of the Board of Direc-
tors falls vacant, whoever has the right to appoint such a member
shall appoint a substitute for the remainder of the term of mem-
bership.

3. The Agency shall be chaired by the representative of the Ministry
of Finance in the absence of Agency's chairman.

**Article 4**

The Agency shall have the following powers and functions:

1. To direct investments according to the approved priorities and
polices based on the Palestinian economic needs and in cooperation with the Ministry of Economics, Trade, and Industry, and other concerned ministries.

2. To formulate and develop information packages to inform the Investor about available opportunities and to promote such opportunities by various mass media.

3. To formulate suggestions to improve and develop this Law when necessary.

4. To collect, coordinate and publish studies on the encouragement of local, Arab and foreign capital investment in various projects, and to contact agencies for the promotion of investment.

5. To hold economic conferences, and invite Palestinian, Arab and foreign investors, to participate.

Article 5
The Board of Directors shall have all the powers to conduct the business of the Agency and to formulate its general policy in a manner consistent with the objectives and functions provided for in this Law.

Article 6
1. Decisions of the Board of Directors shall be adopted by a majority vote of those present. The Chairman shall have the deciding vote in case of a tie. The quorum of the Board's meeting shall be the presence of two-thirds of the number of members.

2. The Board of Directors shall meet at least once a month or whenever so required at the convocation of the Chairman, or at the request of one-third of the members.

3. The Chairman or any member of the Board of Directors shall not participate in any decisions related directly or indirectly to the interests of that member.

4. The Board of Directors may invite any person, without having the right to vote, to attend its meetings if there is a need to render an interpretation or consultation.

Article 7
The Agency shall have Director-General, who shall be appointed by Authority's President.

Article 8
The Agency shall have an annual budget with revenues derived from:

1. Contributions of the Palestinian National Authority;
2. Service fees as determined by the Board of Directors; and
3. Donations and grants that do not contradict public interest.

**Article 9**

The Agency's Board of Directors shall appoint auditors to audit the accounts in conformity with generally accepted practices and submit a financial report to the President of the Authority every six months.

**PART III**

*Development Areas and Sectors*

**Article 10**

1. The development areas under the jurisdiction of Palestinian National Authority shall be divided into regions (A), (B) and (C) depending on their nature and relevant economic policies. The Agency shall designate and announce these regions pursuant to a decree to be published in the Official Gazette.

2. The Agency's Board of Directors may change the classification of the aforementioned development regions and specify appropriate incentives for each region. The investor shall have the right to object to the decision, but classification changes shall not apply to enterprises that have already been approved.

3. The Agency's Board of Directors may grant additional exemptions to specific economic investments required to promote the interests of the Palestinian national economy.

**PART IV**

*Exemptions*

**Article 11**

1. Projects which are approved by the Agency and which have obtained the requisite licenses in accordance with the applicable laws, shall be granted the exemptions provided for under this Law in conformity with following criteria:

   Category (A): A project with paid-up capital of more than five hundred thousand US Dollars ($500,000) or which permanently employs no fewer than 25 Palestinian workers, shall be granted an exemption from income taxes and from duties for a period of five years, provided that the life of the economic project is not less than ten years.

   Category (B): A project with paid-up capital of more than one hundred and fifty thousand US Dollars ($150,000) or which permanently employs no fewer than 15 Palestinian workers
shall be granted an exemption from income taxes and from

duties for a period of three years, provided that the life of the
economic project is not less than six years.

Category (C): A project with paid-up capital of more than one
hundred thousand US Dollars ($100,000) or which perma-
nently employs no fewer than 10 Palestinian workers shall be
granted an exemption from income taxes and from duties for
a period of two years, provided that the life of the economic
project is not less than five years.

Category (D): The Agency’s Board of Directors may grant excep-
tional exemptions to a project with a paid-up capital of more
than five million US Dollars ($5,000,000) and which employs
no fewer than 50 permanent Palestinian workers.

2. The Agency’s Board of Directors may grant certain projects addi-
tional exemptions depending on the nature of the project and the
needs and development priorities of the Palestinians.

Article 12

The Agency’s Board of Directors may grant special exceptional ex-
emptions to export projects, provided that the percentage of output
processed for export is not less than 25 per cent of the total output and
that the value is not less than 30 per cent of the total cost of the pro-
ject. The Board of Directors may also consider granting additional in-
centives for export-oriented agricultural projects.

PART V

Exemption Procedures

Article 13

1. To benefit from the exemptions provided for under this Law, an
investor shall submit an application supported by a technical and
economic feasibility study of the project and shall satisfy all licens-
ing procedures or any other requirements provided for under ap-
plicable laws and regulations.

2. The Agency shall within thirty to sixty days from the date of appli-
cation notify the applicant of its approval or rejection and shall
state the reasons therefor.

3. In the event of the approval of the exemptions, the investor shall
submit an action plan detailing the steps to be followed to com-
plete the project; provided that the project implementation start-
up period shall not exceed six months from the date of approval.

4. The Investor shall submit to the Agency information and data re-
quired concerning the project’s implementation and operation.
The Agency may designate official(s) to conduct field trips to verify the information presented.

**Article 14**

The exemption procedures provided for in this Law shall apply to all areas of investment except the following sectors and areas which require prior approval of the National Authority:

1. The manufacture and distribution of weapons, ammunition or their parts;
2. The aviation industries, including airports;
3. The electrical power generation and distribution;
4. The reprocessing of refuse and solid waste;
5. The processing of petroleum and its derivatives; and
6. Telecommunications services, including radio and television.

**Article 15**

Upon any transfer of ownership, the project shall continue to enjoy the same exemptions previously granted provided that it continues to be operated in the same manner by the new owner and who adheres to provisions of this Law.

**Article 16**

A project owner who benefits from the provisions of this Law may sell his exempted fixed assets to another project enjoying the same privileges under the provisions of this Law, provided that the Agency approves such a sale, giving priority in the purchase of these assets to Palestinian investors.

**Article 17**

The Agency shall publish a list of all approved projects in the Official Gazette every six months, giving a brief description of such projects.

**PART VI**

*Guarantees Against Nationalization*

**Article 18**

1. No investment, irrespective of the investor's nationality, shall be nationalized, confiscated or expropriated in whole or in part without the investor's consent. No investment shall be subjected to any such measure except in compliance with a final judgment handed down by a competent court.
2. Foreign, Arab and expatriate Palestinian investors shall enjoy the
same rights and privileges as those granted to local Palestinian investors.

3. Expatriate Palestinian investors, as well as Arab and foreign investors, shall enjoy the right of permanent residence in accordance with applicable laws.

4. An investor, having paid the dues provided for under the applicable laws, may repatriate the capital in accordance with the provisions of this Law.

5. Foreign, Arab and expatriate Palestinian investors may repatriate the capital and profits generated from investments approved under this Law, after payment of the dues provided for in applicable laws.

PART VII
Suspenion and Cancellation

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 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.

PART VIII
Settlement of Disputes

Article 20

The Palestinian courts shall have the competence and jurisdiction to resolve all disputes in accordance with applicable Palestinian laws.
PART IX
General and Final Provisions

Article 21

1. All investments shall be effected in accordance with the license granted to them, without any discrimination based on sex, race or religion when employing local staff, procurement or conducting any activity.

2. An investment may be made in any economic project, provided that it shall not conflict with public morals, public order, public security, and environmental protection laws.

Article 22

Any text contrary to the provisions of this Law shall be invalid and revoked.

Article 23

All competent authorities, within their respective areas of jurisdiction, shall execute this Law, which shall enter into force from the date of its issuance and shall be published in the Official Gazette.

Issued in Gaza on April 30, 1995.

Yasser Arafat
Chairman of the Executive Committee of the
Palestine Liberation Organization
President of the Palestinian National Authority