



BRILL

The Legal Framework of Capital Movements and Current Payments in Palestine and Its Compatibility with International Law

Author(s): Samer Fares

Source: *Arab Law Quarterly*, Vol. 23, No. 2 (2009), pp. 105-137

Published by: Brill

Stable URL: <https://www.jstor.org/stable/27650645>

Accessed: 09-01-2023 07:10 UTC

REFERENCES

Linked references are available on JSTOR for this article:

https://www.jstor.org/stable/27650645?seq=1&cid=pdf-reference#references_tab_contents

You may need to log in to JSTOR to access the linked references.

JSTOR is a not-for-profit service that helps scholars, researchers, and students discover, use, and build upon a wide range of content in a trusted digital archive. We use information technology and tools to increase productivity and facilitate new forms of scholarship. For more information about JSTOR, please contact support@jstor.org.

Your use of the JSTOR archive indicates your acceptance of the Terms & Conditions of Use, available at <https://about.jstor.org/terms>



JSTOR

Brill is collaborating with JSTOR to digitize, preserve and extend access to *Arab Law Quarterly*

The Legal Framework of Capital Movements and Current Payments in Palestine and its Compatibility with International Law

Samer Fares*

Institute of Law, Birzeit University, P.O. Box 14, Palestine

Abstract

Since its inauguration in 1994, the Palestinian Authority (PA) has taken responsibility over Palestinian economy and finance. The PA lifted all restrictions on the movement of capital and current payments. Although this has moved Palestinian economy from a heavily controlled economy to a market-based style, the liberalization process was not built on sound legal bases and thus created a legal vacuum. The PA has been working ever since to confirm the Palestinian free-market economy with the introduction of a new well-developed legal system consistent with international standards and norms. Therefore, the objectives of this article are to analyze the Palestinian liberalization process and its compatibility with international law obligations.

Keywords

West Bank, Gaza Strip, financial transaction, Palestinian economy, Palestinian Authority (PA)

Introduction

Since the occupation of the West Bank and Gaza Strip (WBGS) by Israel in 1967, the Israeli Military Government (IMG) has worked on integrating the Palestinian economy into that of Israel. This imposed integration was meant to serve Israeli political, military and economic interests. To this end, Israel enacted hundreds of military orders restricting all economic and financial activities of the Palestinian people and adding new constraints to the already complex legal system. For example, the Israeli Ministry of Defense, through the IMG, in cooperation with the Bank of Israel and the Ministries of Finance and Trade, restricted Palestinian imports and

* sfares@law.birzeit.edu

exports to and from third countries; imposed the Israeli currency on the Palestinian people; shut down Palestinian financial institutions; and introduced the licensed system on all local and foreign investment in the WBGS. This unfair and intentional treatment made the Palestinian economy completely dependent on the Israeli markets.¹

As a result of the Israeli-Palestinian (peace) agreements, the Palestinian Authority (PA) has taken control over most of the civilian responsibilities including local economic and financial affairs. In order to separate and free the Palestinian economy from direct Israeli control and to allow the inflow of capital necessary to build the Palestinian economic infrastructure, the PA has practically repealed all controls imposed by Israeli authorities including those concentrated restrictions on the free movement of capital and payments. This liberalization process, if it can be really considered one, was not built on sound legal bases. Although it has moved the Palestinian economy from a heavily controlled economy to a market-based style, it has created a legal vacuum. In order to bridge this vacuum, the PA gave the Palestinian Monetary Authority (PMA) in cooperation with the Ministry of Finance control over the economy and finance in Palestine. The PMA has been working ever since to confirm the Palestinian free-market economy with the introduction of a new well-developed legal system consistent with the international standards and norms.

Accordingly, the purposes of this paper are: firstly, to explain the legal framework of capital transactions in Palestine as a result of the inauguration of the PA in 1994; and, secondly, to study the compatibility of the Palestinian legal system with the international obligations of the General Agreement on Trade in Services (GATS) and the International Monetary Fund Agreement (IMF). Finally, a conclusion will be drawn.

1. Capital Transactions

The complex legal system prevailing in Palestine reflected itself clearly on capital and current transactions. Before the inauguration of the PA in 1994, capital and current transactions were subject to different legal frameworks in the WBGS. Many capital transactions were and still are subject to laws going back to the Ottoman and British periods in the Gaza Strip

¹ I. Diwan and R. Shaban (eds.), *Development under Adversity: The Palestinian Economy in Transition* (Washington, DC: The World Bank, 1999).

(GS) and the Jordanian rule in the West Bank (WB) as amended by the Israeli military orders such as real estate transactions. Moreover, some capital transactions have no legal framework to organize them such as capital market transactions. The PA, especially the PMA, has enacted and adopted many legislation and administrative decisions unifying most of the legal system covering capital transactions. Accordingly, in order to understand the legal framework and the current status of capital transactions in Palestine today, Section 1 will discuss foreign direct investment, banking and credit transactions, capital market transactions, real estate transactions, and other capital transactions in sub-sections 1.1-1.5.

1.1. Foreign Direct Investment

The IMG neither encouraged nor regulated investment in the WBGs up until 1991 when it enacted *the Military Order regarding Encouragement of Capital Investment No.1342 of 1991 in the WB² and No. 1055 of 1991 in the GS.*³ These two orders have established a department under the ICA responsible for (i) promoting and regulating all activities that encourage investment; (ii) approving the investment projects and their employment; and (iii) coordinating and solving any problems between the ICA and the investment projects. The objective of these Orders is to promote investment in the WBGs through incentives on income and property taxes for three years. These incentives were not enough to convince investors to invest in the occupied Palestinian territories.⁴

After its inauguration, the PA has enacted the *Law on the Encouragement of Investment in Palestine No. 1 of 1998 (Investment Law).*⁵ The objectives of this law are to create a Public Investment Promotion Authority for the promotion of investment in Palestine, to provide incentive and guarantees to investment projects and to create the suitable environment for

² *Proclamation, Orders and Appointments*, Issue No. 121 (July 1991) 373. As amended by *Military Order No. 1407 of 1993. Proclamation, Orders and Appointments*, Issue No. 151 (November 1993) 1419.

³ *Proclamation, Orders and Appointments*, Issue No. 93 (05/04/1992) 10339. As amended by *Military Order No. 1099 of 1993. Proclamation, Orders and Appointments*, Issue No. 96 (15/05/1994) 10599.

⁴ Molkner and R. Abdul-Hamid, *The Legal Structure of Foreign Investment in the West Bank and Gaza Strip* (Jerusalem: Israeli-Palestinian Center for Research and Information (IPCRI), 1994).

⁵ *Palestine Gazette*, Issue No. 23 (08/06/1998) 5. This Law replaced the *Investment Promotion Law No. 6 of 1995. Palestine Gazette*, Issue No. 5 (05/06/1995) 6.

investment.⁶ To this end, the Investment Law has, in addition to the introduction of a generous package of tax incentives and benefits,⁷ liberalized all capital movements connected with the investment project and opened most of the Palestinian economic sectors to foreign investors.⁸

1.1.1. Liberalization of Capital Movements Connected with FDI

Article 10 of the Investment Law states:

In compliance with the provision of Article 11 of this law and in accordance with the free market economy, the Palestinian Authority guarantees to all investors the unrestricted right of transferring all their financial resources outside Palestine including the capital, profits, dividends, capital profits, wages, salaries, interests, debt payments, management fees, technical assistance, other fees and compensation money for expropriation, cancellation of licenses, court decisions, arbitration awards and any other form of payments or financial resources. The investor may freely transfer all the financial resources outside Palestine at the rate of exchange in force and prevailing in the market at the time of transfer and in a convertible currency acceptable to the investor.⁹

This Article clearly liberalizes all capital movements connected with FDI. The Investment Law did not define the meaning of “financial resources”, but the Article indicates that it includes the principle capital, cash and

⁶ The PA enacted this law in close cooperation and coordination with many international organizations, especially the IMF. For more see, Kanaan, O., “The Peace Process, Uncertainty and Private Investment in the West Bank and Gaza Strip”, *Middle East Policy*, VI/2, October 1998, p. 67.

⁷ Articles 22-38 of the *Investment Law*. These Articles have classified investment projects to four investment categories and granted each category different exemptions. (i) A project with a capital of \$100,000 to \$1,000,000 shall be granted an exemption from income taxes for a period of 5 years and pays an income tax of 10% of its net profit for another 8 years. (ii) A project with a capital of \$1,000,000 to \$5,000,000 shall be granted an exemption from income taxes for a period of 5 years and pays an income tax of 10% of its net profit for another 12 years. A project with a capital of more than \$5,000,000 shall be granted an exemption from income taxes for a period of 5 years and pays an income tax of 10% of its net profit for another 16 years. Projects with, in accordance to a decision from the Cabinet of the PA upon a recommendation from the Commission, special capital and function shall be granted an exemption from the income tax for 5 years and pays an income tax of 10% of their net profit for another 20 years. For more see, Milhem, F. *The Legal Framework for Investment in the West Bank and Gaza Strip* (MA thesis (in Arabic), Birzeit University, Palestine, 2000).

⁸ S. Fisher, *et al.*, “Economic Developments in the West Bank and Gaza since Oslo”, *Economic J.*, 111/June (2001) 270.

⁹ The author's translation.

assets, and all capital connected to the investment such as profits, dividends, wages, salaries, interests, debt payments and other transactions numerated in the Article.¹⁰ The World Bank Investment Guide definition of financial resources includes the wages and savings of expatriate personal, investment profits, interest amounts owed in external debt obligations of the enterprise, amount needed to satisfy other contractual obligations of the enterprise and investment capital upon liquidation or sale of the investment. Accordingly, the PA approach is not only in conformity with international standards but has even gone further than the minimum demanded by the World Bank Investment Guide”.¹¹ For example, this Guide allowed member states to restrict the repatriation of the principle capital and its interest if such repatriation would cause a foreign exchange shortage.¹² Some might argue that Article 10 is inconsistent with the IMF rules since it has considered many transactions as capital transactions while the latter considered them current payments. These transactions include profits, dividends, capital profits, wages, salaries, interests, debt payments, management fees and technical assistance. Article 10 is considered consistent with the IMF because it did not define capital transactions but rather liberalized all transactions connected with the investment project without paying much attention to the definition of the IMF. The PA intentions are to assure foreign investors that their investments and financial assets will be firmly protected by the Investment Law.

1.1.2. *Opening Economic Sectors to Foreign Investors*

Article 3 of the Investment Law stipulates:

The investor may, pursuant to the provision of this law, invest in projects of any sector in the Palestinian economy unless prohibited by special laws.¹³

This Article is the most important article in the Investment Law and unfortunately it is also the most vague. The most important factor for every

¹⁰ For more see, D. Fidler, ‘Foreign Private Investment in Palestine Revisited: An Analysis of the Revised Palestinian Investment Law’, *Case Western Reserve J. Int’l Law*, 31/1-3 (1999) 293.

¹¹ *The World Bank’s Investment Guarantee Guide*: <http://www.miga.org/screens/pubs/guides/igpdfs/IGGen.pdf>.

¹² I. Shihata, *Legal Treatment of Foreign Investment: The World Bank Guidelines* (London: Martinus Nijhoff Publ., 1993) p. 83.

¹³ The author’s translation.

investor is to know exactly the economic sectors in which he/she can invest while going through the investment code of every country. The Palestinian Investment Law has adopted the negative list approach,¹⁴ which is the right approach if it contains all the prohibited sectors. Article 3 states that all the Palestinian economic sectors are open to foreign investment except those prohibited by special laws. It is not the investor's duty to go through all the Palestinian laws in order to know where can he/she put his/her money. In other words, this Article has failed to answer the question as to which economic sectors foreign investors are not allowed to invest in?

Article 4 of the Investment Law has supplied part of the answer by stating that investment in the following economic sectors is conditional upon prior approval of the PA Cabinet:

- (i) Manufacturing and distribution of arms and ammunition or spare parts;
- (ii) Aviation industries, including airport;
- (iii) Production and distribution of electricity;
- (iv) Re-processing of petroleum and its derivatives;
- (v) Recycling of garbage and solid waste;
- (vi) Telecommunications;
- (vii) Radio and television authority.

First of all, it is important to note that the language of the Article is exclusive and does not distinguish between Palestinians and non-Palestinians, which means that all investors, with no regard to their nationality, must obtain the approval enclosed. Some lawyers suggested that Article 4 does not prohibit investment in the above sectors but rather means that investors should obtain the approval of the PA Cabinet if they intend to benefit from the exemptions and privileges provided by the Investment Law.¹⁵ If the PA had intended to adopt this explanation, it could have done so explicitly as they did in Article 43, which states that:

All investments shall enjoy the incentives granted by this law with the exception of commercial projects, insurance, real estate except the development projects, banks,

¹⁴ The negative list means that investment in all sectors is allowed except for those numerated in the list.

¹⁵ Interview with Murad Fares, the internal legal adviser of the Palestinian Telecommunication Company.

money exchange companies, and any other financial institutions except real estate mortgage companies.¹⁶

This Article did not prohibit foreign investment in these sectors but simply excluded them from the scope of the Investment Law, which means that the provided incentives, privileges and guarantees do not cover investments in these sectors. Accordingly, the guaranteed right to transfer all capital movements connected with the FDI does not cover capital transfers for or from investments in commercial projects, insurance, real estate except the development projects, banks, money exchange companies, and any other financial institutions except real estate mortgage companies. In other words, the FDI and all transactions connected to these projects are subject to the laws and principles enacted by the PA.¹⁷ Thus, Article 4 contains some, but not all, sectors for which foreign and national investors are obliged to obtain the approval of the PA in order to invest in them. To fully answer the question about which sectors are prohibited, all the PA's enacted laws should be reviewed. Reviewing all laws that have been enacted in Palestine so far reveals that the PA,¹⁸ in addition to the approval of Article 4, has fully prohibited foreign investment in the following sectors:

- (i) Commercial agencies: Foreign investors have no right to invest in commercial agencies in accordance with Article 2 of the *Commercial Agency Law No. 2 of 2000*.¹⁹ This Article has confined investment in commercial agencies to Palestinians.
- (ii) Telecommunication: Foreign investors cannot invest in the telecommunication sector in accordance with the *Telecommunication Law No. 3 of 1996*.²⁰ Article 2 of the Law has given ownership of the telecommunication sector to the PA. However, Article 3 has authorized the PA to mandate this sector to private companies. The PA has exclusively mandated the Palestinian Telecommunication Company (PALTEL) to exploit this sector for 20 years.²¹ The first 10 years of the contract permit a full monopoly over all telecommunication

¹⁶ The author's translation.

¹⁷ Except for the transfer of bank profits, PA liberalized all transfers.

¹⁸ The review includes all the Palestinian enacted laws up until Issue No. 43 (09/05/2002) of the *Palestine Gazette*.

¹⁹ *Palestine Gazette*, Issue No. 32 (29/02/2000) 92.

²⁰ *Palestine Gazette*, Issue No. 12 (23/04/1996) 7.

²¹ The maximum is 20 years as provided by *Resolution of the Minister of Post and*

services except the Mobile Voice Telephone's monopoly, in which its monopoly is for 5 years or 120,000 lines, whichever comes first. Consequently, up until 2007²² foreign investors cannot invest in the telecommunication sector. With regard to, Mobile Voice Telephones, foreign companies can invest in this sector since PALTEL has registered more than 120,000 lines.

All in all, the PA has made foreign investment in some sectors conditional on prior approval such as those sectors provided in Article 4 or it has fully prohibited foreign investment in other sectors as provided by the Commercial Agent Law. While it is understandable to make investment in firearms, sold waste or even radio and television conditional on prior approval for public policy or public security reasons, it is completely ironic to make investment in the other sectors conditional on such approval. The real reason behind this approval is to protect PA economic interest since it monopolizes these sectors through private-state-controlled companies. Finally, the PA's approach in Article 3 does not promote investment in Palestine and, therefore, it must be amended to include all sectors that are closed to foreign investment.

1.2. Banking and Credit Transactions

After occupation of the WBGS in 1967, the Israeli Military Commander enacted *Military Order concerning Prohibition of Trading and of Monetary Transactions (Banks) No. 7 of 1967* in the WB²³ and *Military Order concerning the Closure of Banks in the Region No. 18 of 1967 in the GS*.²⁴ Article 1 of these Orders has ordered the closure of all banks, credit and financial institutions working in the WBGS and Article 2 has prohibited all kinds of banking and financial transactions, except money exchange agencies.²⁵ Israel allowed its banks to operate in the WBGS in order to bridge this financial vacuum. Up until 1987 when the first *Intifada* started, Israel had

Telecommunication Regarding the Telecommunication System No. 1 of 1996. Palestine Gazette, Issue No. 14 (27/08/1996) 6.

²² PALTEL has had a monopoly since 1997.

²³ *Proclamation, Orders and Appointments (West Bank)*, Issue No. 1 (11/08/1967) 27.

²⁴ *Proclamation, Orders and Appointments (Gaza Strip)*, Issue No. 1 (14/09/1967) 65.

²⁵ There were 13 banks with 32 branches working in the West Bank and Gaza at that time.

6 banks with 39 branches operating in the WB.²⁶ However, as a result of winning a case in the Israeli High Court, the Bank of Palestine was allowed to re-open its branch in Gaza City in 1981. Israel also allowed the Cairo-Amman Bank to reopen its branch in the city of Nablus in the WB in 1986.²⁷

As a result of the Paris Protocol, the PMA has taken responsibility over the financial system in Palestine.²⁸ The objectives of the PMA are to secure a stable and sound banking system, maintain monetary stability and encourage economic growth in Palestine in line with the general policy of the PA.²⁹ In particular, the PMA is responsible for supervising and regulating banks, including the regulation of all kinds of banking activities, their foreign activities; and the licensing of banks formed locally and of branches, subsidiaries, joint ventures and representative offices of foreign banks and the approval of controlling shareholders.³⁰ Accordingly, the PMA allowed the establishment of new national and foreign banks in the WBGS. Thus far the PMA has licensed 23 banks with 126 branches.³¹

Although the PMA allowed new banks to operate, it has not yet enacted the necessary laws to regulate banking activities such as the foreign currency control law. However, PMA practices reveal that it has adopted a liberal financial system and, therefore, did not restrict capital movements regarding banking and credit transactions. In principle that means that banking operations are free of all restrictions. For example, licensed banks in Palestine are not prohibited from lending, borrowing and giving letters of guarantee to residents in any convertible currency. Furthermore, licensed banks are allowed to engage, in addition to the acceptance of deposits, in

²⁶ The World Bank, *West Bank and Gaza: Creating a Framework for Foreign Direct Investment* (Washington, DC: World Bank, 1995) p. 28.

²⁷ In 1989 Israel allowed both banks to open branches in the territories, the Bank of Palestine had 5 branches in Gaza and the Cairo-Amman Bank had 8 branches in the West Bank by 1993. For more, see Harris, L., "Money and Finance with Underdeveloped Banking in the Occupied Territories". In: G. Abed, (Ed.), *The Palestinian Economy: Studies in Development under Prolonged Occupation* (London: Routledge, 1988) p. 191.

²⁸ The PMA was established on 1 December 1994.

²⁹ Article 5 of the Palestinian Monetary Authority Law No. 2 of 1997. *Palestine Gazette*, No. 21 (31/01/1998) 5.

³⁰ Article IV (7) of the Paris Protocol.

³¹ These are 10 Palestinian, 11 Arab (9 Jordanian and 2 Egyptian) and 2 foreign banks (Grindlays and HSBC). It is important to note that most of the Jordanian Banks operating in Palestinian are owned by a Palestinian Diaspora, which means that they are being considered as national banks.

management of investment portfolio, joint funds in any currency, margin trading in any currency, assets swapping and any other instruments for their customers' accounts.³²

This open policy was criticized as only benefiting the banks but not the Palestinian economy.³³ According to this opinion, at the end of 2001 the total individual and private deposits of the licensed banks reached \$3398.81 million of which \$1219.99 million served as loans and guarantees in Palestine,³⁴ which represents 35.9% of the total deposits.³⁵ These numbers mean that 63.9% of the total bank deposits in the WBGS are transferred and deposited in Jordanian banks. These savings are of course invested in Jordan, which means that licensed banks are encouraging the Palestinian population to save and then lend their savings abroad, thereby serving the Jordanian but not the Palestinian economy.

Trying to direct local savings to investments in the WBGS and to protect depositors, the PMA has introduced the following restrictions on banking and credit transactions:

- (1) PMA has introduced a floor on the ratio of lending to deposits, which is 40%, and a ceiling on the ratio of foreign assets to deposits, which is 65%.³⁶
- (2) On 23 December 2000, the PMA took Decision No. 86, which restricts the banks' credit operations as follows:³⁷
 - (i) Licensed banks are not allowed to grant guarantees, loans, or finance any direct or indirect investment to non-residents in the WBGS, including Jerusalem without the prior approval of the PMA.
 - (ii) Licensed banks are not allowed to grant guarantees, loans, or finance any direct or indirect investment outside the WBGS, Jerusalem is not included, without the prior approval of the PMA.

³² IMF, "West Bank and Gaza Strip Adopts Outward-Oriented Economic Strategy", *IMF Survey*, 22/January (1996) 25.

³³ A. Samara, "Globalization, the Palestinian Economy, and the Peace Process", *J. Palestine Studies*, XXIX/2 Winter (2000) 29.

³⁴ PMA, *Economic and Banking Developments in 2000-2001*, March (2002) 11.

³⁵ This percentage reaches 80% in Jordan and 90% in Israel.

³⁶ This Decision was interred into force on 31 December 1998. It has reduced the 65% ceiling on banks' investment abroad from 90%.

³⁷ The Palestinian Monetary Authority, *The Sixth Annual Report* (2000) 23.

- (iii) Licensed banks are not allowed to grant credit for buying or selling stocks, bonds or derivatives and to keep these financial instruments as a mortgage for this credit.
- (iv) Licensed banks are not allowed to grant credit or accept deposits for the purpose of engaging in financial brokerage in Palestine or any other country.
- (v) Licensed banks are not allowed to buy stocks, bonds, or other financial instruments in any non-Palestinian company (not registered with the Companies Controller) working in Palestine³⁸ or invest in financial instruments of companies working outside Palestine without the prior approval of the PMA.

This Decision means that the PMA has restricted licensed banks ability to engage in international credit operations. This approach would unlikely increase domestic lending, promote growth or contribute to financial stability, but it would rather impede the development of the banking sector and, therefore, lead to disintermediation. Furthermore, this approach is inconsistent with the PA's free market economy approach provided by the Palestinian Basic Law.

Trying to create a suitable and sound legal framework for finance in Palestine, the PA enacted the *Banking Law No. 2 of 2002*.³⁹ According to this law, financial companies intend to carry out banking, financial and all insurance activities must register themselves as public shareholding companies in accordance with the *Jordanian Company Law No. 12 of 1964*⁴⁰ in force in the WB and the *British Mandate Company Law No. 18 of 1929*⁴¹ in force in the GS. The Banking Law is regulating the establishment, management, capital, operation requirements and other aspects of banks and financial companies in Palestine. The Banking Law did not distinguish between Palestinian and foreign companies, which means that they are all subject to the same rights and obligations. However, the Banking Law has contained provisions that could be construed to include a limitation on foreign companies, these provisions are the following:

³⁸ These companies are mainly Israeli companies working in Jerusalem.

³⁹ *Palestine Gazette*, Issue No. 41 (06/06/2002) 5.

⁴⁰ *Jordanian Official Gazette*, Issue No. 1757 (03/05/1964) 493.

⁴¹ Drayton's Collection, 22/01/1937, Ch. 22, p. 181.

- (1) Article 11 states that foreign banks intending to operate through a branch must obtain a license from the PMA to operate in Palestine. The PMA will grant the license according to the following conditions:
 - (i) The foreign branch must identify the nationality and location of the headquarters of the parent bank.
 - (ii) It must be subject to the supervision of its home country's competent authority and must obtain its approval to operate in Palestine.
 - (iii) The principle of reciprocity must apply unless the PMA sees otherwise.
 - (iv) The branch must register itself in accordance with the PA law as a foreign branch connected to the parent bank.
 - (v) It must submit a written pledge from its parent bank stipulating that the licensed branch will comply with all PA laws and the instructions of the PMA. The licensed foreign branch must be subject to direct supervision and inspection of the PMA.
 - (vi) The parent company must provide a written pledge admitting its responsibility over the obligations of the branch and that it would support the branch financially if needed.
 - (vii) The home country's competent authority must provide a letter stating that the branch will respect the PMA's rules and supervision principles.
 - (viii) The PMA must make sure that the competent authority's supervision rules are based on sound banking supervision, the minimum of which must be the application of internationally recognized banking supervisory standards.

- (2) Article 32 states that the licensed foreign branch has no right to transfer its profits without a prior approval of the PMA. This is a direct limitation on the right of foreign investors to transfer all profits resulted from their investments in Palestine. The Banking Law's restriction on this right is incompatible with the open economy policy that adopted by the PA since its inauguration. The PA must amend this provision allowing foreign investors to transfer their profits if it is interested in attracting and promoting foreign investment in Palestine. However, it should be mentioned here that this restriction does not contradict the Palestinian Investment Law

since the latter has excluded financial institution from its scope in Article 43.

- (3) Licensed foreign branch must deposit 5-10% of its capital with the PMA. The branch will not be able to transfer this percentage without the approval of the PMA and, in case of liquidation, the branch has no right to dispose of or transfer abroad any of the branch assets or funds until it has closed all its obligations in Palestine.⁴² It is understandable that, in order to protect Palestinian savers, the foreign branch not be allowed to dispose or transfer its assets before closing all its obligations in Palestine. However, it is strange that the foreign branch be made to deposit 5-10% of its capital with the PMA. This percentage discriminates against the foreign branch and, therefore, gives other banks an advantage.⁴³

1.3. *Capital Market Transactions*⁴⁴

It is interesting first of all to know that the legal framework in Palestine has no regulations regulating capital markets transactions. Neither the Jordanian law in force in WB⁴⁵ nor the British Mandate law in force in GS regulated capital market transactions. The PA allowed the establishment of the first Palestinian capital market in Nablus in the WB in early 1995. The Palestine Securities Exchange (PSE) was incorporated as a private shareholding company, with the Palestine Development & Investment Company (PADICO) and (SAMED) as its major investors.⁴⁶ In August 1996, the PSE was fully operational and on November 7th of that year it signed an operating agreement with the PA, allowing for the licensing and qualification of brokerage firms to take place. On 18 February 1997, the PSE conducted its first trading session. Twenty-five shareholding companies are currently listed at the PSE. These companies cover a wide range of sectors including pharmaceuticals, utilities, telecommunications, and

⁴² Articles 58(5) and 66 of the Banking Law.

⁴³ The Jordanian Banking Law does not demand that a foreign branch make such a deposit.

⁴⁴ This title was prepared before the enactment of the Palestinian Securities Law and Capital Market Authority Law.

⁴⁵ Jordan enacted the first Securities Law in 1971 after the occupation of the WB by Israel.

⁴⁶ Some suggested that the establishment of the PSE was inconsistent with the Palestinian law. For more, see: R. Joza, *The Legal Framework of Palestine Stock Exchange* (MA Thesis (in Arabic), Birzeit University, Palestine, 2000).

financial services. The trading system is able to trade multiple instruments such as equities, bonds, money-market instruments, warrants and rights within a number of various trading books such as an odd-lot book for orders less than the round-lot board size and a special terms book for orders with special settlement or fill terms. The trading system allows for instruments to be traded and settled in different currencies.⁴⁷

The PA allowed the establishment of the PSE but has not regulated it as yet. Instead, the PA mandated the PSE, as a private company, to regulate itself in cooperation with the Ministry of Finance. A board of eight directors representing the PSE itself, investors and securities firms is regulating its operations such as listing requirements, secondary trading, settlement and clearing as well as the conduct and operations of member securities firms. The board formulates major policies regarding the operations and administration, establishes management objectives, and approves or amends its rules and regulations.⁴⁸ However, we have to keep in mind that all the trading in PSE is conducted under the direct supervision of the Palestinian Ministry of Finance. Currently, the PSE along with the Ministry of Finance and the International Finance Corporation has submitted a draft of the Securities Law and Palestine Securities Commission Law, which is expected to be ratified soon by the President of the PA.⁴⁹

Until the enactment of the Securities Law and other by-laws necessary for the proper functioning of the PSE, the Board of Directors has adopted an open policy in administering the PSE. This policy does not distinguish between residents and nonresidents, which means that there are no restrictions on foreign investment in the PSE.⁵⁰ The most important rules include the conditions on companies and brokerage firms listing in the PSE and the non-residents investment. With regard to their listing, companies (Palestinian or foreign) intend to register themselves in the PSE must meet the following:⁵¹

⁴⁷ J. Abusalqan, *Money and Finance in Palestine* (Ph.D. Thesis, Erlangen-Nurnberg University, Germany, 2001) p. 268.

⁴⁸ Palestine Securities Exchange, *About the Palestine Securities Exchange* (Nablus, PSE's Public Relation Office, 1997) p. 1.

⁴⁹ *Laws No. 82 and 83 of 2001*. The Palestinian Legislative Council has forwarded these laws to the PA President on 03/10/2001 for ratification.

⁵⁰ J. Abusalqan, *op. cit.*, p. 269.

⁵¹ P. Gamo-Alonso, *et al.*, *West Bank and Gaza Strip: Economic Developments in the Five Years of Oslo* (Washington, DC: IMF, 1999) p. 36.

- (i) Their subscribed capital must exceed \$750,000.
- (ii) The number of outstanding shares must exceed 100,000.
- (iii) The company must have at least 100 shareholders with \$100 shares at par value.
- (iv) The public must hold 25% of the common stock.
- (v) At least 50% of the subscribed capital must be paid-up.

With regard to brokerage firms, in order to be listed as members of the PSE, they must meet the following requirements:

- (i) The company applying for membership must be established and registered in Palestine.
- (ii) At least 50% of the company's Board of Directors must be residents in Palestine.
- (iii) The Company's paid-in capital must be at least \$1,000,000.

The PSE has restricted foreign brokerage firms from operating the Palestinian financial market when it demanded that it must be established in Palestine and 50% of its Board of Directors must be resident. This approach has meant to give the seven local brokerage firms, already members of the PSE, a period of time to train their teams and establish their own markets before allowing stronger and more experienced foreign brokerages to operate in the Palestinian market. Although this is understandable, this approach will not help the Palestinian brokerage firms since international competition is the driving force behind their development and the PSE as a whole.

Finally, The Board of Directors of the PSE has adopted a free and open policy regarding foreign participation in the PSE. This open policy includes the following:⁵²

- (i) Non-Palestinians have the full right to acquire domestic securities traded on PSE. Also, they can acquire domestic securities not traded on PSE after obtaining the approval of the Companies' Controller.
- (ii) Palestinian can also freely acquire foreign securities traded on PSE or not traded on a stock exchange.

⁵² Interview with advocate Haytham Zuabi, specialized in contract law.

- (iii) After obtaining the approval of the Ministry of Finance, Palestinian companies can sell their securities outside Palestine and non-Palestinian companies can sell their securities inside Palestine.
- (iv) After obtaining the approval of the Ministry of Finance, non-Palestinian securities can be placed in PSE, and Palestinian securities can be placed in a foreign securities market.

This open policy adopted by the PSE intended, in the first place, to involve Palestinians in the Diaspora in the building of the Palestinian economy.⁵³ A clear example of this policy is the Palestine Development and Investment Ltd. (PADICO). PADICO was incorporated by a group of Palestinian businessmen living in the Diaspora with a capital of \$200 million. After the signing of the Palestinian-Israeli Declaration of Principles in 1993, PADICO registered under the provisions of the *Liberian Business Corporation Act of 1976* as a Liberian limited-liability company. PADICO's Memorandum and Articles of Association were prepared in Accordance with common practice prevailing in the Middle East region and in conformity with the Liberian laws.⁵⁴ This company has issued its shares in Palestine, registered at PSE and been considered one of the most successful companies in Palestine.

1.4. *Real Estate Transactions*

Real estate transactions in the WB are subject to different laws from those of the GS. The laws regulating real estate lease and ownership by foreigners in the WB are those inherited from the Jordanian rule, which made the acquisition of real estate conditional on prior approval of the Council of Ministers.⁵⁵ Meanwhile, the laws covering real estate ownership in GS are those inherited from the Ottoman and British Mandate, which prohibited non-Palestinian natural persons from acquiring real estate in GS⁵⁶ and

⁵³ K. Gillespie, *et al.*, "Palestinian Interest in Homeland Investment", *Middle East J.*, 55/2 Spring (2001) 237.

⁵⁴ HANAFIS., "Between Two Words: Palestinian Businessmen from the Diaspora and the Building of a Palestinian Entity", *Economic Research Forum of the Arab Countries, Iran and Turkey*, 3/2 (1999) 21.

⁵⁵ In the West Bank: the *Law on Lease and Sale of Immovable Properties By Foreigners No. 40 of 1953* and the *Law on the Acquisition of Real Estate by Juridical Entities No. 61 of 1953*.

⁵⁶ In the Gaza Strip: the *Ottoman Land Code*, and the *Ottoman Law on the Acquisition of Real Estates by Juridical Entities*.

made the acquisition of non-Palestinian juridical entities conditional on a prior approval of the Head of the Land Department.⁵⁷

After the occupation of the WBGs by Israel in 1967, the IMG enacted the *Military Order concerning Land Transactions No. 25 of 1967*⁵⁸ in the WB and *No. 102 of 1967* in the GS.⁵⁹ Article 2 of these orders prohibited anybody (natural or juridical, Palestinian or non-Palestinian) from engaging in real estate transaction without the approval of the IMG, except contracts to rent, no longer than one year, buildings located within the limits of Municipalities in the WB. Then, the IMG enacted the *Military Order No. 419 of 1971 on Amending the Jordanian Law on the Acquisition of Real Estate by Juridical Entities No. 61 of 1953*.⁶⁰ Article 3 of this Order mandated the Military Commander and after him the Civilian Commander⁶¹ to authorize commercial, industrial, financial, charitable and religious juridical entities to acquire immovable property, in public or private, in the WB even if they did not meet the conditions provided by the Jordanian law. With regard to the GS, the Military Commander has obtained this authority in accordance with Article 6 of the Land Transfer Ordinance of 1920 explained above.⁶²

The term “in public” means to register the transaction with the regular Land Registration Department, while the term “in private” means the registration of the transaction with the Authorization Record created by the IMG regarding what is called Governmental Properties.⁶³ The Israeli

⁵⁷ As provided by the British Mandate in the *Land Transfer Ordinance of 1920*.

⁵⁸ *Proclamation, Orders and Appointments (West Bank)*, Issue No. 2 (15/09/1967) 51. As amended by *Military Orders No. 232 of 1968, No. 794 of 1979, No. 1030 of 1982, and No. 1054 of 1983*.

⁵⁹ *Proclamation, Orders and Appointments (Gaza Strip)*, Issue No. 5 (08/02/1968) 325. As amended by *Military Orders No. 139 of 1967 and No. 712 of 1981*.

⁶⁰ *Proclamation, Orders and Appointments (West Bank)*, Issue No. 27 (02/04/1972) 1002.

⁶¹ *Proclamation, Orders and Appointments (West Bank)*, Issue No. 57 (21/07/1983) 13.

⁶² The Military Commander in the GS took over all the authorities and powers enclosed in the legislation applicable in GS. *Proclamation concerning the Administration of Rule and Justice No. 2 of 1967. Proclamation, Orders and Appointments (Gaza Strip)*, Issue No. 1 (14/09/1967) 5.

⁶³ The Governmental Properties include the properties of the Government of Jordan (Egypt), its juridical entities and immovable properties confiscated to create military bases or for public interest. For more see *Military Order No. 59 of 1967 regarding the Governmental Properties in the WB and Military Order No. 423 of 1972 in the GS. Proclamation, Orders and Appointments*, Issue No. 5 (51/11/1967) 162, in the WB, and Issue No. 32 (02/07/1972) 2557, in the GS.

Military Order Concerning Registration of the Transactions in Certain Lands No. 569 of 1974 in the WB and *No. 524 of 1975* in the GS⁶⁴ allowed the IMG to grant immovable properties subject to these orders to anybody and open a special record (Authorization Record) to register these transactions. The IMG defined “anybody” as juridical entities or others who are not part of a juridical entity.⁶⁵ Governmental Properties includes most of the real estates outside the urban areas or lands, which were not subject to the *Land and Water Settlement Law of No. 40 of 1952*⁶⁶ at the time of the occupation of the WB.⁶⁷

Accordingly, during the Israeli occupation, a non-Palestinian natural person cannot acquire immovable properties in the WBGS, except if the immovable property were classified as a Governmental Property. In this case, the IMG can grant the immovable property to non-Palestinians, Israelis in particular. This conclusion explains how Israel justified the ongoing process of building Jewish Settlements in the WB. With regard to the juridical entities, they can own immovable properties anywhere in the WBGS if they obtained the approval of the IMG.

1.4.1. *The System Under the Palestinian Authority*

In order to discuss the PA jurisdiction over real estates in the WBGS, it is important to bear in mind that the contents of the Israeli-Palestinian Interim Agreement should be taken into consideration. The territorial jurisdiction of the PA regarding land includes Areas A and B but not Area C in the WB and all of the GS except the Jewish settlements. This fact means that the PA's lands regulatory authority includes Areas A and B but indeed not Area C, which is still subject to the legal jurisdiction of the IMG. For this reason, the PA has not regulated real estate transactions in Areas A and B, which raises the question whether the legal system that prevailed in the WBGS on 19/05/1994 is still valid in the territories under PA control.

From a legal viewpoint, the legal framework covering real estate transactions, which prevailed on the date of the inauguration of the PA, should be

⁶⁴ *Proclamation, Orders and Appointments*, Issue No. 35 (25/02/1976) 1409, in the WB, and Issue No. 39 (15/09/1977) 3349, in the GS.

⁶⁵ For example, as defined by the *Military Order No. 25 of 1967* and *Military Order No. 59 of 1967* explained above.

⁶⁶ *Jordan Gazette*, Issue No. 1113 (16/06/1952) 279.

⁶⁷ The legal treatment of real estate in the WB does not include Jerusalem, which became subject to the Israeli law in 1981, when Israel annexed Jerusalem.

valid today. This means that the Jordanian law, as amended by the Israeli military orders, should be followed in the WB and that the Ottoman-British Mandate law, as amended by the Israeli military orders, should be adhered to in the GS. Accordingly, the PA is responsible for approving all real estate transactions while the IMG is still responsible for approving real estate transactions in Area C.⁶⁸

From a practical viewpoint, however, the PA has not legally enacted legislation unifying the legal framework of real estate transactions in Areas A and B, the PA has adopted the following practices with regard to foreign acquisition of real estate in these territories:⁶⁹

- (i) With regard to the lease of immovable property by non-Palestinians, they (natural or juridical) can rent houses without restriction, which means that there are no restrictions on a non-Palestinian's right to rent buildings in PA areas. However, if a non-Palestinian intended to rent land, he/she must obtain the approval of the Land Authority.
- (ii) With regard to a non-Palestinian natural person's acquisition of real estate, which is necessary for his housing or business, he/she can acquire real estate in PA areas after obtaining the approval of the Land Authority.
- (iii) With regard to the acquisition of real estates by juridical entities, which is necessary for pursuing his business, non-Palestinian juridical entities must obtain the approval of the Ministry of Justice and the Land Authority if they intend to own real estates in PA areas. With regard to Palestinian juridical entities, they must obtain the approval of the Ministry of Justice for the acquisition of such real estate.
- (iv) Non-Palestinian natural persons and juridical entities (Palestinian or not) acquiring real estate for more than the amounts given above (i.e., for investment purposes) should obtain the approval of the PA Cabinet pursuant to recommendation from the Land Authority.

These practices indicate that the PA has ignored the legal framework, which was valid in the WBGs, regarding real estate transactions, and instead created its own system although it is not legally supported. This

⁶⁸ Interview with advocate Abdullah Jallad, specialized in Land Law.

⁶⁹ Interview with the Mr. Samer Kokhon, the Land Registration Department in Nablus, West Bank.

virtual system is, to some extent, liberal when compared with the system prevailing in Jordan. For example, lease of buildings in Palestine by non-Palestinians is free of all restrictions while it is conditional in Jordan on the principle of reciprocity and the approval of the Head of the Land Department or the Ministry of Finance, whatever the case might be. Furthermore, PA practices, unlike the Jordanian law, did not put limits on the size of real estates or distinguish between urban and rural areas and made both subject to same rules and procedures.

Finally, it is important to mention that the Palestinian Legislative Council tried to regulate real estate transactions in Palestine by preparing a draft law and transferring it to the PAs President for ratification on 30 September 1997.⁷⁰ The main features of this draft are the following:

- (i) Israelis are not allowed to acquire real estate in Palestine and all transactions that were concluded before the entry into force of this law are null and void.
- (ii) Non-Palestinian Arabs (natural or juridical) are not allowed to acquire real estate in Palestine, except through inheritance. Non-Palestinians can own real estate in accordance with the principle of reciprocity after the approval of the PA Cabinet.
- (iii) The PA Cabinet through a Ministerial Degree may allow non-Palestinian acquisition of real estate in urban areas for the purpose of economic development or public policy of Palestine.

The President of the PA has not approved this draft and I do not think that he would ever do so since this draft is inconsistent with the Palestinian-Israeli Agreements⁷¹ and the PA liberal economic policy.

1.5. *Other Capital Transactions*

During the occupation of the WBGS, the Israeli authorities have made residents and non-residents subject to a strict system of control with regard to financial transactions involving the Israeli currency or other foreign currencies and financial instruments. For example, the *Israeli Military Order*

⁷⁰ This draft was prepared as a direct result of the Israeli Government's announcement of their intentions to build a settlement at Abu Ghnaim Mountain in Jerusalem. For more see, A. Safian, "Can Arabs Buy Land in Israel", *Middle East Quart.*, 1/December (1997) 4.

⁷¹ PA has no powers over land in Area C since it is one of the final negotiation matters.

No. 973 of 1982 Concerning Money Entering into the West Bank⁷² and Military Order No. 973 of 1982 Concerning Money Entering into the Gaza Strip.⁷³ These orders prohibited residents and non-residents from bringing local and foreign banknotes, coins, credit cards, other means of payment and gold into the WBGs without permission from the Head of the ICA.⁷⁴ However, residents in the GS were allowed to bring with them, in any form, from outside up to JD400 without permission,⁷⁵ while WB residents were allowed to bring with them from outside, in any form, up to JD500 every two months without permission.⁷⁶

Another example is the *Israeli Military Order Concerning Currency Control No. 952 of 1981* in the WB⁷⁷ and *No. 719 of 1981* in the GS.⁷⁸ Article 2 of these orders prohibited residents from concluding any financial transaction in foreign currency within the WBGs or outside without permission from the IMG. Also, they did not allow non-residents, except tourists, from concluding any financial transaction in the WBGs or outside with regard to assets inside the WBGs without permission from the IMG. Article 3 of these orders prohibited residents and non-residents from taking with them money outside the WBGs without permission from the IMG. Finally, Article 6 of these orders also prohibited residents from possessing foreign currencies or any other foreign financial papers without permission from the IMG.⁷⁹

The Interim Agreement has transferred all monetary and financial issues to the PA, in particular to the PMA. In accordance with the Paris Protocol,

⁷² *Proclamation, Orders and Appointments (West Bank)*, Issue No. 55 (05105/1983) 5. As amended by *Military Orders No. 1070 of 1983, No. 1218 of 1988, No. 1243 of 1988, and No. 1272 of 1989.*

⁷³ *Proclamation, Orders and Appointments (Gaza Strip)*, Issue No. 57 (2810211984) 6273. As amended by *Military Orders No. 805 of 1983, No. 940 of 1988, No. 954 of 1988, and No. 981 of 1989.*

⁷⁴ Article 2 of the orders.

⁷⁵ *Proclamation, Orders and Appointments (Gaza Strip)*, Issue No. 89 (0810511991) 9851.

⁷⁶ *Proclamation, Orders and Appointments (West Bank)*, Issue No. 145 (02/1993) 1133.

⁷⁷ *Proclamation, Orders and Appointments (West Bank)*, Issue No. 53 (21/02/1983) 25. As amended by *Military Orders No. 1215 of 1988, No. 1237 of 1988, and No. 1395 of 1993.*

⁷⁸ *Proclamation, Orders and Appointments (Gaza Strip)*, Issue No. 52 (24/01/1983) 5595. As amended by *Military Orders No. 817 of 1983 and No. 949 of 1988.*

⁷⁹ For more see, F. Gharaibeh, *The Economies of the West Bank and Gaza Strip* (Colorado: Westview Press, 1985) p. 107.

the PMA has taken responsibility over the regulation and supervision of foreign exchange transactions within the WBGs and with the rest of the world.⁸⁰ Since its establishment, the PA has adopted a liberal financial policy. Therefore, it has repealed all Israeli restrictions on the free movement of capital between the WBGs and the rest of the world. The PA, in accordance with a recommendation from the PMA, enacted *Decision No. 20 of 1998 concerning the Revocation of Some Israeli Military Orders in the Gaza Strip*.⁸¹ This Decision has explicitly repealed all Israeli military orders restricting the free movement of capital to and from the GS. The PA has not done the same in the WB because of the complexity of the PA's jurisdiction as a result of Area C, which made it difficult for the PA to activate its civil authorities in the WB. However, although the PA has not explicitly repealed the restricting Israeli military orders in the WB, the practice on the ground indicates that virtually these orders are no longer valid.

Accordingly, it should be concluded that the PMA has, in practice, fully liberalized in- and outflow of capital between the WBGs and the outside world. Therefore, residents and non-residents are free to bring into and transfer out of the WBGs any foreign currencies they wish for any reason. Also, residents and nonresidents have the right to conclude all financial transactions in- or outside the WBGs using any convertible currency. The PMA has adopted such an open policy in order to help Palestinian financial institutions to integrate into the global financial system and to guarantee the inflow of foreign currencies badly needed for the Palestinian economic and financial reconstruction.⁸²

2. Current Transactions

2.1. Legal Framework Under Israeli Occupation

The legal status of current transactions in the WB were determined by the CBJ since it was part of Jordan, while their counterpart in the GS was determined by the Egyptian Central Bank since it was under the Egyptian administration. After the occupation of the WBGs by Israel in 1967, all financial and trade policies were transferred to the IMG administering it

⁸⁰ Article 4 (6) of the Paris Protocol.

⁸¹ *Palestine Gazette*, Issue No. 23 (08/06/1998) 60.

⁸² *PMA, Economic and Financial Developments in Palestine (in Arabic)* (Ramallah: PMA, 2002) p. 10.

in cooperation with the Israeli Ministry of Trade, the Israeli Ministry of Finance and the Bank of Israel. This policy's objective is to control and integrate the Palestinian economy as a whole into the Israeli economy and manage it in a manner consistent with broader Israeli economic and financial policies.⁸³ With regard to current transactions, the IMG, for example, imposed the Israeli currency to operate next to the JD in the WB by the *Military Order No. 76 of 1967 concerning Instituting Israeli Currency as Legal Tender*,⁸⁴ and replaced the Egyptian Pound in the GS with the Israeli currency as a sole legal tender by the *Military Order No. 40 of 1967 Order concerning Israeli Currency*.⁸⁵ Moreover, the IMG imposed 1% charges on the purchase of foreign currencies by residents in the WBGS by the *Military Order concerning Charges on the Purchase of Foreign Currency No. 1055 of 1983* in the West Bank⁸⁶ and *No. 809 of 1983* in the GS.⁸⁷

Furthermore, the IMG made all visible and invisible transactions subject to a strict licensing system and imposed high charges on them. For example, the IMG obliged residents to pay a 3% charge of the total amount of the credit letter or loan they take from money exchange firms working in the WBGS or from any other international source to conclude any visible or invisible transaction with the outside world by the *Military Order concerning Charges on Foreign Currency Credit No. 1225 of 1987* in the WB⁸⁸ and *No. 928 of 1987* in the GS.⁸⁹ The last example is the *Military Order concerning Charges on Imported Services and Foreign Assets No. 1182 of 1986*⁹⁰ in the WB and *No. 901 of 1986* in the GS.⁹¹ These orders obliged residents to pay a charge of at least 15% of the total value of the service if they engage in any invisible transaction outside the WBGS.

2.2. The PA's Regime

As a result of the Interim Agreement, the PA took responsibility over the financial policy in the WBGS. However, this policy is not exclusive but

⁸³ A. Weinblaat, "Sovereignty and Economic Development: The Case of Israel and Palestine", *Economic J.*, 111 June (2001) 292.

⁸⁴ *Proclamation, Orders and Appointments (West Bank)*, Issue No. 5 (15/11/1967) 191.

⁸⁵ *Proclamation, Orders and Appointments (Gaza Strip)*, Issue No. 2 (01/11/1967) 121.

⁸⁶ *Proclamation, Orders and Appointments (West Bank)*, Issue No. 60 (01/12/1983) 8.

⁸⁷ *Proclamation, Orders and Appointments (Gaza Strip)*, Issue No. 60 (28/11/1984) 6493.

⁸⁸ *Proclamation, Orders and Appointments (West Bank)*, Issue No. 76 (12/09/1990) 167.

⁸⁹ *Proclamation, Orders and Appointments (Gaza Strip)*, Issue No. 83 (25/09/1989) 8925.

⁹⁰ *Proclamation, Orders and Appointments (West Bank)*, Issue No. 76 (12/09/1990) 7.

⁹¹ *Proclamation, Orders and Appointments (Gaza Strip)*, Issue No. 78 (01/09/1987) 8305.

rather partial. For example, the PMA has limited powers regarding the exchange arrangements, while it has full authority over banking operations. The PA has virtually revoked all the above orders and replaced them with another policy serving, on the first place, the Palestinian economy.⁹² The PMA has so far done the following regarding current payments, in order to create the best financial economic environment in the WBGS.

With regard to the exchange arrangements: the Paris Protocol did not authorise the PA to introduce a Palestinian currency.⁹³ Until the introduction of the Palestinian Currency, the New Israeli Shekel (NIS), the Jordanian Dinar⁹⁴ and the U.S. Dollar will serve as three legal tenders in the WBGS and will legally serve there as means of payment for all purposes including official transactions. Any circulating currency will be accepted by the PA and by all its institutions, local authorities and banks, when offered as a means of payment for any transaction. Accordingly, the use of three currencies instead of one domestic currency made it difficult for the PMA to draw and influence the overall monetary policy in the WBGS. Most of the conventional indirect monetary instruments are not available to the PMA, especially the control over domestic money supply. The main indirect instruments currently available to the PMA are related to reserve requirements.⁹⁵

With regard to resident and non-resident accounts, exports and export proceeds, and payments and proceeds from invisible transactions and current transfers, The PMA has assumed full powers and responsibilities over all these transactions. In this regard the PMA has fully liberalised all payments and transfers for current international transactions. For example, the PMA has left all restriction enforced by the Bank of Israel on banking operations including resident and non-resident accounts. Today, resident

⁹² The term "virtually" has been used to indicate that the PA did not explicitly repeal these military orders but replaced them with practical rules circulated to the financial institutions concerned in the WBGS.

⁹³ Article IV(9b) states "both sides will continue to discuss, through the Joint Economic Committee, the possibility of introducing mutually agreed Palestinian currency or temporary alternative currency arrangements for the Palestinian Authority."

⁹⁴ Article 1 of the Palestinian-Jordanian Agreement regarding Cooperation on Banking and Monetary Issues. *Jordan Gazette*, No. 4028 (01/03/1995) 588.

⁹⁵ S. Barnett, "Monetary policy in the West Bank and Gaza Strip in the absence of a domestic currency". In: O. Kanaan *et al.*, *The Economy of the West Bank and Gaza Strip: Recent Experience, Prospects, and Challenges to Private Sector Developments* (Washington, DC: IMF, 1998) p. 29.

and non-residents can easily open accounts in any currency without any limitations on the amounts that can be credited, debited or on the purpose of such accounts.⁹⁶ Furthermore, residents and non-residents have the right to transfer without limitations any amounts they need to carry out any visible or invisible transactions.⁹⁷ On the other hand, the PA has limited powers and responsibilities with regarding import and import payments, which means that the PA cannot, outside lists A1, A2 and B, draw its own policy. Accordingly, the PA must follow the Israeli rates of customs, purchase tax, levies, excises and other charges, the regulation of licensing requirements, procedures and standard requirements.

All in all, the PA has liberalised through a big bang approach all capital and current transactions under its jurisdiction in 1994/1995 achieving full convertibility. This full convertibility has not been achieved by a legislative act but rather by practice. The PMA allowed licensed banks to conduct all banking and credit transactions without discrimination between resident and non-resident. Moreover, the PMA liberalised inflow and outflow of capital for visible, invisible or any other reason. Finally, the Palestinian Ministry of Finance has given the PSE the right to organise its own activities, in which no real limitations have been produced on foreign participation and membership. Then, in 1998 the PA started legally emphasising the free movement of capital and current transactions system by enacting the *Law on the Encouragement of Investment*, which emphasised the free movement of FDI and all transactions connected to it. Also, the PA enacted the *Banking Law of 2002* emphasising the free movement of all banking and credit transactions. Furthermore, many other laws are in the pipeline most importantly is the *Securities Law*, which also emphasise the free movement of capital market transactions.

⁹⁶ M. Zavadjil, et al., *Recent Economic Developments, Prospects, and Progress in Institution Building in the West Bank and Gaza Strip* (Washington, DC: IMF, 1997) p. 27.

⁹⁷ U. Von Allmen, and F. Fischer, "The Choice of Future Exchange Rate Regime in the West Bank and Gaza". In: R. Valsivieso, et al., (Eds.), *West Bank and Gaza: Economic Performance, Prospects, and Policies* (Washington, DC: IMF, 2001) p. 112.

Table 1. The legal status of Palestine's capital and current transactions

IMF membership	Palestine is not a member
Exchange arrangement	
Currency	Palestine uses INS, JD, and US\$ as three legal tenders
Exchange rate structures	No exchange rate policy
Exchange tax	No
Exchange subsidy	No
Arrangements for payment and receipts	
Bilateral payments arrangements	No
Administration of control	No
International security restrictions	No
Controls on trade in gold (coins and/or bullion)	No
Controls on export and import of banknotes	No
Resident accounts	
Foreign exchange accounts permitted	Yes
Foreign exchange accounts held domestically	Yes
Foreign exchange accounts held abroad	Yes
Accounts in domestic currency convertible into foreign currency	Yes
Non-resident accounts	
Foreign exchange accounts permitted	Yes but proof of domicile is required when non-resident accounts are opened.
Domestic currency accounts	Yes
Domestic currency accounts convertible into foreign currency	Yes
Blocked accounts	No
Import and Import payments	
Foreign exchange budget	No
Financing requirements for release of foreign exchange for imports	No
Import licenses and other non-tariff measures	The PA has only full powers over products enclosed in lists A1, A2, and B. No restrictions.

Table 1 (cont.)

Import taxes and/or tariffs	Subject to the Israeli determination
State import monopoly	Oil, cigarettes and cement imports are affected by state-controlled companies.
Exports and Export Proceeds	
Repatriation requirements	No
Financing requirements	No
Documentation requirements	No
Export licenses (without quotas)	No
Export taxes	No
Payment for invisible transactions and current transfers	
Controls on these transfers	No
Proceeds from invisible transactions and current transfers	
Repatriation requirements	No
Restriction on use of funds	No
Capital Transactions	
Controls on capital transactions	Yes
Controls on capital and money market instruments	<p>The brokerage firms must be established in accordance with Palestinian law and at least 50% of its Board of Directors must reside in Palestine in order to be listed in the PSE.</p> <p>The approval of the Ministry of Finance is required for Palestinian companies to sell their securities outside Palestine and for non-Palestinian companies to sell their securities inside Palestine.</p> <p>The approval of the Ministry of Finance is required for non-Palestinian securities to be placed in PSE and Palestinian securities to be placed in foreign securities market.</p>

3. The Compatibility of Palestine's Legal Rules with the GATS and IMF

3.1. *Capital Transactions and the GATS*

Palestine is not a member of the WTO. However, if Palestine joined the GATS with the current legal system prevailing in the WBGS, its capital commitments would be beyond the minimum demanded by the GATS. In the light of capital restrictions included in the Palestinian current laws and explained above, Palestine's schedule of specific commitments on capital transaction would include the following:

3.1.1. *Horizontal Commitments*

(1) Real Estate: Market access (Mode 3: commercial presence): All purchase of real estate by non-Palestinian firms must be subject to the approval of the Ministry of Justice pursuant to a recommendation from the Land Authority. For big investment projects, the acquisition must be related to the approved business activities and is subject to the PA Cabinet authorisation. Lease of real estate (lands) by non-Palestinian firms is subject to Land Authority approval. All juridical entities are prohibited from engaging in real estate trading.

(2) State-Owned Land:

- (i) Market access (commercial presence): Authorisation for purchase or lease of state-owned lands requires approval of the IMG.
- (ii) National treatment (commercial presence): All investments in public utilities are generally subject to concession. In sectors where service provision is granted by concession, commercial establishment must be in the form of Public Shareholding Companies.

3.1.2. *Sector-specific Commitments*

- (1) The Palestinian law has made investment in the following sectors conditional upon obtaining the approval of the PA Cabinet.
 - (i) Manufacturing and distribution of arms and ammunition or spare parts;
 - (ii) Aviation industries, including airport;
 - (iii) Production and distribution of electricity;
 - (iv) Re-processing of petroleum and its derivatives;
 - (v) Recycling of garbage and solid waste;

- (vi) Mobile voice telephones telecommunications; and
 - (vii) Radio and television authority.
- (2) The PA restricted foreign investment in commercial agencies: These services are confined to Palestinians. Also, the PA restricted foreign investment in telecommunications, except mobile voice telephones. PALTEL has the exclusive right until 2007. Starting no later than January 2008, foreign companies can invest in telecommunication services after obtaining the approval of the PA Cabinet.
- (3) With regard to financial services:
- (i) *Banking and credit transactions:*
 - (a) The PMA has introduced a floor on the ratio of lending to deposits, which is 40%, and a ceiling on the ratio of foreign assets to deposits, which is 65%.
 - (b) Licensed banks are not allowed to grant guarantees, loans, or finance any direct or indirect investment to non-residents in the WBGS, including Jerusalem, without the prior approval of the PMA.
 - (c) Licensed banks are not allowed to grant guarantees, loans, or finance any direct or indirect investment outside the WBGS and Jerusalem without the prior approval of the PMA.
 - (d) Licensed banks are not allowed to grant any guarantees for buying or selling stocks, bonds or derivatives and to keep these financial instruments as collateral for these guarantees.
 - (e) Licensed banks are not allowed to grant any guarantees or accept deposits for the purpose of engaging in financial brokerage in Palestine or any other country.
 - (f) Licensed banks are not allowed to buy stocks, bonds, or other financial instruments in any non-Palestinian company (not registered with the Companies Controller) working in Palestine (mainly Israeli companies working in Jerusalem) or invest in financial instruments of companies working outside Palestine without the prior approval of the PMA.
 - (g) Licensed foreign branch has no right to transfer its profits without a prior approval of the PMA.
 - (h) Licensed foreign branch must deposit 5-10% of its capital with the PMA.

- (ii) *Capital market transactions:*
- (a) Brokerage firms must be established in Palestine and at least 50% of its Board of Directors must be residents in Palestine to be a member of the PSE.
 - (b) Non-Palestinian acquisition of domestic securities not traded on PSE is conditional on the approval of the Company Controller.
 - (c) After obtaining the approval of the Ministry of Finance, Palestinian companies can sell their securities outside Palestine and non-Palestinian companies can sell their securities inside Palestine.
 - (d) After approval of the Ministry of Finance, non-Palestinian securities can be placed in the PSE and Palestinian securities can be placed in foreign securities markets.

GATS demands its members to liberalise all capital transaction necessary for or related to the conclusion of their commitments under the column of national treatment and their commitments under Modes 1 and 3 of the column of market access.⁹⁸ Except for the above restrictions, Palestine's would-be commitments have not only liberalised capital movements necessary for and related to the conclusion of its commitments with the rest of the world as demanded by the GATS, but also expanded it to include capital movements necessary for the conclusion of all services activities through all modes of supply. For example, Palestine has fully liberalised residents' and non-residents' inflow and outflow of capital for any reason. The fact that Palestine has restricted some capital transactions for public security, as is the case of real estate transactions, and prudential reasons, as provided by the *Banking Law of 2002*, does not change the compatibility of the Palestinian legal rules with international law since the latter is allowing such restrictions to be imposed.

3.2. *Current Transactions and the IMF*

It is important to bear in mind that Palestine is not yet a member of the IMF,⁹⁹ which means that it is not legally obliged to liberalise current trans-

⁹⁸ Articles XI(2) and XVI of the GATS.

⁹⁹ The PLO tried in the beginning of the 1970s, supported by the Arab and Islamic countries, to join the IMF but was vetoed by the USA. For more see, J. Gold, *Interpretation: The IMF and International Law* (The Hague: Kluwer Law International) 1996, p. 231.

actions with the international community and vice versa, international community is not obliged to liberalise current transactions with Palestine. Despite that, the IMF is actively working with the Ministry of Finance and the PMA on building the Palestinian economy and its financial institutions.¹⁰⁰

The PA's commitments in the field of current transactions are fully consistent with the IMF Agreement. All resident and non-resident payments and transfers for current international transactions can be done without any restrictions. Accordingly, if the PA joined the IMF tomorrow, it would be ready to accept the obligations of Article VIII, full convertibility regarding current transactions. Palestine legal rules are compatible with international law to the extent that Palestine has, except for normal short-term banking and credit facilities and transfers of profits by non-resident companies, adopted the IMF definition of current transactions.¹⁰¹

Finally, Palestinian law allows the restriction of current transactions for prudential and statistical reasons, tax considerations and for public policy and public security reasons. These restrictions are in line with the IMF Agreement. The IMF allows its members to restrict current transactions for the above reason after obtaining its approval. Therefore, if Palestine joined the IMF, such restrictions would not be considered an obstacle to its adoption of Article VIII.

4. Conclusion

Before the inauguration of the PA in 1994, capital and current transactions were subject to three different legal frameworks in the WBGS. Firstly, many capital transactions in the WB were subject to regulations that go back to the Ottoman and British periods in the GS and the Jordanian rule in the WB as amended by the Israeli military orders such as real estate transactions. Secondly, other capital transactions, such as capital market transactions, were simply not regulated at all. Thirdly, all other capital and

¹⁰⁰ The IMF has a large program of technical assistance with the PA involves its Fiscal Affairs Department, regarding tax and public expenditure management; Middle Eastern Department, regarding institutional building in the fiscal area; Monetary and Exchange Affairs Department, regarding the assisting of the PMA; and the Legal Department, regarding the legal environment. Zavadjil, *M., op. cit.*, p. 38.

¹⁰¹ PMA, "Palestinian Balance of Payments Records" *PMA Statistical Bulletin*, Issue No. 56 (2003).

current transactions were subject to Israeli military orders, such as personal capital movements and banking and credit transactions.

The PA was created in 1995 with limited powers over economy and finance in Palestine. Under the Paris Protocol, the PA has full powers and responsibilities over all economic activities with a local dimension such as banks and other financial institutions, financial markets and insurance activities. On the other hand, the IMG has retained the powers and responsibilities over all economic activities with an international dimension, such as the issuance of a Palestinian currency, import and import tax policy and indirect taxation. This partial jurisdiction made some capital and current transactions outside the legal jurisdiction of the PA such as exchange transactions, import and import tax policy and real estate transactions that are still under the Israeli occupation control.

The PA has liberalised through a big bang approach all capital and current transactions under its jurisdiction in 1994/1995, achieving full capital and current accounts convertibility. This full convertibility has not been achieved by a legislative act but rather by practice. The PMA allowed licensed banks to conduct all banking and credit transactions without discrimination between resident and non-resident. Moreover, the PMA liberalised in- and outflow of capital for visible, invisible or any other reason. Finally, the Palestinian Ministry of Finance has given the Palestinian Stock Exchange the right to organise its own activities, in which no real limitations have been placed on foreign participation and membership. Then, in 1998 the PA initiated the legalisation process of its practical free movement of capital and payments. The PA enacted the *Law on the Encouragement of Investment*, which emphasised the free movement of FDI and all transactions connected to it. Also, the PA enacted the *Banking Law of 2002* emphasising the free movement of all banking and credit transactions. Furthermore, many other laws are in the pipeline, most importantly the *Securities Law* that also emphasises the free movement of capital market transactions. The only restrictions on capital movements in the Palestinian legal framework today are those with regard to banking and credit transactions. The PMA, for example, restricted banks from granting guarantees and loans to non-residents or granting loans for investment outside Palestine. These restrictions intend to boost investment in Palestine.

Palestine is neither a member of the GATS nor the IMF, which means that the international community is not legally obliged to expand the GATS' partial freedom of capital and the IMF's full free movement of current payments to Palestine. In contrast, Palestine is not legally obliged to

liberalise its capital and current transactions. Despite that, Palestine has adopted a free policy towards capital transactions, which means that its conceived schedule of specific commitments would be quite liberal if it joined the GATS with the current legal system and therefore, it would go beyond the minimum demanded by the GATS' capital rules. On the other hand, Palestine has liberalised all international current transactions, which means that it would be ready to accept the obligations of Sections 2 and 3 of Article VIII if it were to join the IMF tomorrow.