

Brooklyn Journal of International Law

Volume 23

Issue 2

Symposium:

Creating Competition Policy for Transition

Economies

Article 8

12-1-1997

Proposal of Dispute Resolution Mechanisms for the Israeli-Palestinian Interim Agreement: A Crucial Step in Establishing Long-Term Economic Stability in Palestine and a Lasting Peace

Jasmine Jordaan

Follow this and additional works at: <https://brooklynworks.brooklaw.edu/bjil>

Recommended Citation

Jasmine Jordaan, *Proposal of Dispute Resolution Mechanisms for the Israeli-Palestinian Interim Agreement: A Crucial Step in Establishing Long-Term Economic Stability in Palestine and a Lasting Peace*, 23 Brook. J. Int'l L. 555 (1997).

Available at: <https://brooklynworks.brooklaw.edu/bjil/vol23/iss2/8>

This Note is brought to you for free and open access by the Law Journals at BrooklynWorks. It has been accepted for inclusion in Brooklyn Journal of International Law by an authorized editor of BrooklynWorks.

PROPOSAL OF DISPUTE RESOLUTION MECHANISMS FOR THE ISRAELI- PALESTINIAN INTERIM AGREEMENT: A CRUCIAL STEP IN ESTABLISHING LONG-TERM ECONOMIC STABILITY IN PALESTINE AND A LASTING PEACE

I. INTRODUCTION

The conflict between Israel and Palestine is one in which both sides stubbornly believe that their own religion and history has given them the right to the land. These deep-rooted beliefs have created a conflict in which communication has been thought of as unproductive. As a result, this conflict has been traditionally settled by warfare and bloodshed and has placed the focus in the region on preparedness for war. Israel and the Palestinian territories (Palestine) are places where everyone takes bomb drills seriously, where children frequently abandon playgrounds to go into shelters, and where you can feel the constant pressure of a dense stifling tension.

Since Israel came into existence in 1948, the Israelis and the Palestinians have not had any successful discussions regarding a permanent solution to the conflict. However, with the secret negotiations between the Palestinian Liberation Organization (PLO) and Yitzchak Rabin's administration, a process towards peace began. The recognition by an Israeli administration of the PLO as the representative of the Palestinian people was a crucially important first step in this process. By this recognition, the Rabin administration showed its earnest desire to engage in serious negotiations. These negotiations have, and still require, each side to learn to overcome centuries of distrust while proving its own accountability. To achieve a final peace it is essential that the parties establish a peaceful means to address grievances so they do not resort to their familiar battlegrounds for solving disputes.

This Note is a proposal to the Israeli government to submit disputes under the Israeli-Palestinian Interim Agreement on the West Bank and Gaza Strip¹ (Interim Agreement) to a

1. Israeli-Palestinian Interim Agreement on the West Bank and the Gaza

dispute settlement mechanism. To maintain a fruitful atmosphere of negotiations it is essential for the provisions of the Interim Agreement to be binding. The creation of a binding dispute settlement mechanism would increase economic stability in the West Bank and Gaza and would, over time, decrease Palestinian hostilities, thereby reducing Israeli security concerns and ensuring a lasting peace. The importance of a stable relationship between Israel and Palestine is unquestionable and the failure of the current process will have negative ramifications for the entire region. This Note presupposes that the success of an Israeli-Palestinian peace is intricately intertwined with Palestinian economic stability. Thus, in order to further economic growth in Palestine, Israel needs to adopt policies which would advance Palestine's efforts to develop its own industries and attract foreign investment by fostering confidence in the international financial community.

Economic growth in Palestine has been hindered mainly by Israel's security concerns. Although these are valid concerns, grounded in years of hostilities between the parties and reinforced by continued terrorist attacks, they also may escalate rather than decrease hostilities. This Note advances the proposition that the current hostilities are largely attributable to the Palestinians' economic disadvantage. It is not surprising that the economically disadvantaged, who have little control over their economic future, would be hostile towards their economically advantaged neighbors who are, in the case of Israel and Palestine, living in such close proximity.

This Note focuses on reducing hostilities by submission to dispute settlement in order to increase economic stability. It does not discount the fact that Palestinian hostilities are rooted, to a certain degree, in the lack of Palestinian sovereignty and aimed at the creation of a Palestinian state. Rather, it advances the proposition that the current hostilities are a mixture of unrest, due to the delay of the overall goal, and anger due to economic disadvantage. Further, since the parties

Strip, Sept. 28, 1995, Isr.-P.L.O. (State of Israel, Ministry of Foreign Affairs print) [hereinafter Interim Agreement]. The Interim Agreement provides for gradual withdrawal of Israeli forces from the West Bank and Gaza Strip. It also provides a framework for a Palestinian Authority to represent the population of the new autonomous areas. The agreement also provides guidelines for security, economic cooperation and a Liaison Committee. The provisions of the Interim Agreement pertinent to this Note will be discussed in Part III.

are working towards solving their conflict through peaceful negotiations, it should be possible to reduce the hostilities by initiating a binding dispute settlement mechanism, thereby demonstrating to Palestinians that the Interim Agreement has resulted in an increase in their sovereignty, albeit limited. As a result, support for the fundamentalist Palestinian factions, such as Hamas, who believe that the only means to gain complete Palestinian statehood is by holy war, will decrease. Moreover, submission by Israel to a binding dispute resolution panel would result in decisions being rendered by a neutral party and therefore would increase, although to a limited degree, Palestinian autonomy. This will increase foreign investment in Palestine because the resulting increased political stability will reduce the risks of doing business there.² This increase in investment will directly address Palestinian economic frustrations. Thus, both sovereignty and economic concerns will be decreased by a binding dispute settlement mechanism.

The creation of a binding dispute resolution panel also is needed because of Israel's constantly changing parliamentary majority, as exemplified by the recent shift in majority from the Labor Party to the Likud, which has increased concerns about the stability of the already fragile Interim Agreement. Moreover, Benjamin Netanyahu, the Likud's leader and Israel's Prime Minister, has shaken Palestinian confidence in the negotiation process by proposing unilateral changes to some of the terms in the Interim Agreement and by delaying implementation of some of the already agreed-upon steps.³ The frustrations of the Palestinian people with the current government have been expressed by Hanan Ashrawi, Minister of Higher Education of the Palestinian National Authority:

Where is the credibility of the state of Israel? We did not sign an agreement with the Labor Party or with Meretz. We signed an agreement with the state of Israel, witnessed by

2. See Fernando R. Tesón, *The Kantian Theory of International Law*, 92 COLUM. L. REV. 53, 77 (1992) (observing that "[f]ree trade inclines diplomacy toward peace because international business transactions require stability and predictability to be successful").

3. Mr. Netanyahu has denounced the Interim Agreement since its inception. See Benjamin Netanyahu, *McCarthyism in Tel-Aviv*, N.Y. TIMES, Nov. 10, 1995, at A33 (clarifying Likud opposition to the Oslo agreements); Ilene R. Prusher, *U.S. Drive in Mideast Hits Speed Bumps*, CHRISTIAN SCIENCE MONITOR, August 21, 1997 (International), at 5.

the co-sponsors and by the major powers, and by the Arab countries. Now, these agreements are supposed to be binding. Where is accountability, intervention, even arbitration? And the peace process is left to be hostage entirely to this Israeli government's policies and practices [T]here is increasing alarm and serious, serious concern that this peace process is rapidly getting nowhere, that Israel is unilaterally destroying it, and therefore that all these plans at economic normalization and joint ventures are not going to materialize, given the political climate and the tremendous instability of the situation.⁴

If there was a binding dispute resolution mechanism, Mr. Netanyahu would not be able to unilaterally change the Interim Agreement and would have to submit proposed changes to a panel in order to determine if they are consistent with the current agreement. This panel would help insure that the parties were taking steps towards furthering negotiations and increasing Palestinian autonomy rather than perpetuating the status of Palestine as an Israeli territory.

This Note focuses on the relationship between policy and economic health, and discusses how an enforcement mechanism would aid in developing long-term peace between Israel and Palestine. Part II of this Note focuses on the general issue of why countries willingly forgo some sovereignty power in exchange for economic stability. This section begins with a discussion of the problematic economic situation in Palestine and provides examples of how Israeli policies are interfering with Palestinian economic development. Additionally, this section discusses comparative situations that show how increasing economic stability could help decrease hostilities. This section continues with an in-depth discussion of three multilateral agreements that illustrate how the need for economic stability has been the justification for a reduction in sovereignty. The multilateral agreements discussed are: (1) the agreement establishing the European Economic Union and how its origins lay in the mutual recognition among the European nations that they must forge an economically dependent union in order to prevent the occurrence of another world war;⁵ (2) the North

4. Hanan Ashrawi, (address before the National Association of Arab Americans, Oct. 17, 1996), reprinted in *FEDERAL NEWS SERVICE*, October 17, 1996, available in LEXIS, News Library, Fednew File.

5. See Christopher J. Iamarino, Note, *Technical Barriers to Trade Under the*

American Free Trade Agreement (NAFTA),⁶ and (3) the General Agreement on Tariffs and Trade (GATT)⁷ including an elaboration on why the GATT was unsuccessful without a dispute resolution mechanism, which resulted in the contracting parties' agreement to establish the World Trade Organization (WTO).⁸ The discussion of the above agreements will be bifurcated, commencing with a discussion of the motivations for the reduction of sovereignty, and continuing with a discussion of the agreed-upon enforcement mechanism. Part III discusses the existing agreement between Israel and Palestine and will include a brief history of the events leading to the Interim Agreement, as well as elements of the Interim Agreement and current political conditions which are problematic. Part IV incorporates the enforcement mechanisms previously discussed, and provides suggestions for several possible enforcement frameworks for the Interim Agreement. These possible frameworks range from a dispute settlement panel with limited jurisdiction over investment disputes, such as that created in the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (ICSID),⁹ to a judicial body with jurisdiction over the entire scope of the Interim Agreement. Finally, the conclusion proposes that, although Israel should submit to some form of dispute settlement, it may be more practical for Israel to give up sovereignty powers gradually and in proportion with a demonstrated increase in Palestinian compliance with the Interim Agreement.

NAFTA System: A Call For Legitimate Protection, 21 J. LEGIS. 111, 114 n.23 (1995).

6. North American Free Trade Agreement, done Dec. 17, 1992, Can.-Mex.-U.S., art. 2022, 32 I.L.M. 296, 32 I.L.M. 605, 698 (1993) [hereinafter NAFTA].

7. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194 [hereinafter GATT].

8. Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 31; 33 I.L.M. 1144 (1994) [hereinafter WTO Agreement].

9. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159 [hereinafter ICSID Convention].

II. THE SOVEREIGNTY ISSUE

A. *Israel and Palestine*

The issue of sovereignty is central to the thesis that Israel should submit to a dispute settlement mechanism because essentially Israel would be giving up control over some of its strategic security policies, and subjecting them to the possibility that they are in violation of the Interim Agreement. Thus, Israel will be decreasing its control over the West Bank and Gaza. It is essential, therefore, that the benefits received by Israel from the reduction in its sovereignty outweigh its loss of complete authority.

It is evident from the Israeli decision to pursue a peaceful solution, which began by the acknowledgment of the PLO and the signing of the Declaration of Principles on Interim Self-Government Arrangements (Declaration of Principles),¹⁰ that Israel places great importance on the value of peaceful relations with its Palestinian neighbors. There was a recognition by the Israeli government that the continuation of the *status quo* regarding the territories was not solving the problem, that the fundamentalist elements in the territories were gaining support, and that the Intifada was resulting in international sympathies for the Palestinians. Shimon Perez, Israel's former Minister of Foreign Affairs, wrote regarding the Intifada and fundamentalism that:

[P]eople can acquire arms which are not as dangerous, such as stones, or, maybe even eventually nuclear bombs. And we should not be light-minded about it. The reason for their belligerency is, as I have said, want, discrimination, and starvation. Can you kill starvation with a rifle? Can you solve the dangers of fundamentalism by bombing it from the air? . . . Unless we go to the roots of the problems and try to organize ourselves to answer them, we shall pay dearly and heavily.¹¹

Additionally, the former minister captured both the motiva-

10. Israel—Palestine Liberation Organization: Declaration of Principles on Interim Self-Government Arrangements, Sept. 13, 1993, Isr.-P.L.O., 32 I.L.M. 1525 [hereinafter Declaration of Principles].

11. Shimon Perez, *A Better World*, 27 N.Y.U. J. INT'L L. & POL. 281, 284 (1995).

tions for pursuing peace, and gave direction to that pursuit when he wrote:

We took food from the mouths of our children, prevented young people from having a proper education, and instead invested money in the metals of tanks and planes. Who will pay for this folly . . . [But] we can change it. And that is what we are now beginning to do by building a new economy in the Middle East. The focus must be regional and the goals must be economic, not strategic.¹²

The parties' goal of attaining long-term peace is put forth in the Preamble to the Interim Agreement where the parties reaffirmed "their determination to put an end to decades of confrontation and to live in peaceful coexistence, mutual dignity and security, while recognizing their mutual legitimate and political rights."¹³ Moreover, the recognition that this goal is not achievable without economic stability in the region is made evident by the inclusion of the Protocol on Economic Relations between the Government of the State of Israel and the PLO, Representing the Palestinian People¹⁴ (Economic Protocol). The Economic Protocol, an integral part of the Interim Agreement, states in its preamble that "[t]he two parties view the economic domain as one of the cornerstone[s] in their mutual relations with a view to enhance their interest in the achievement of a just, lasting and comprehensive peace."¹⁵

It is therefore evident that Israel has recognized the importance of economic development in Palestine and has taken the initial steps to provide Palestinians with some autonomous powers. However, this process has been fraught with violent encounters from both sides.¹⁶ These clashes have supplied

12. *Id.* at 287. As Perez stated succinctly, "I believe that, without solving the economic problems, we do not have a chance to enjoy a permanent peace." *Id.* at 286.

13. Interim Agreement, *supra* note 1, Preamble.

14. Protocol on Economic Relations between the Government of the State of Israel and the P.L.O., representing the Palestinian People, Interim Agreement, *supra* note 1, Annex V, reprinted in 33 I.L.M. 696 [hereinafter Economic Protocol].

15. *Id.* Preamble. The preamble continues to state that "[b]oth parties shall cooperate in this field to establish a sound economic base for these relations, which will be governed in various economic spheres by principles of mutual respect of each other's economic interests, reciprocity, equity and fairness." *Id.*

16. See Serge Schmemmann, *West Bank Strife Spreads as Israel Awaits U.S. Mediator*, N.Y. TIMES, March 27, 1997, at A6 (describing recent eruptions of vio-

those against the peace process with ammunition to attempt to derail it. It is unwise for Israel to respond to these negative forces by resorting to the familiar retaliation-in-the-name-of-security response. This response just lengthens the inevitable phase of resistance to the peace process. Rather, Israel should remember the violence that existed before the initiation of the peace process and be motivated to move forward to create a lasting peace. The emphasis should not be on the need for complete sovereignty, but rather on what could be gained as a result of an exchange of some sovereignty power. As one author, Joel P. Trachtman, stated:

Sovereignty, viewed as an allocation of power and responsibility, is never lost, but only reallocated. The attractiveness of a reallocation of sovereignty should be measured by reference to whether it allows social goals to be achieved more effectively. Thus the question raised regarding the reallocation is whether the recipient of enhanced power and responsibility will exercise power and recognize its responsibility more effectively [I]t may be viewed as a question of what is received, and by whom, in exchange for a reduction in the state's sovereignty, rather than simply a question of whether sovereignty is reduced.¹⁷

In order to advance the argument that Israel will ultimately benefit from an enforcement of the Interim Agreement it is important, first, to gain an understanding of the current economic situation in Palestine and, second, to establish how hostility is intertwined with economic instability through an analysis of comparative situations.

1. The Palestinian Economy

The West Bank and Gaza are crippled by severe economic hardship, from rising unemployment to a lack of foreign investment.¹⁸ The economic negotiator for the Palestinian Authority (PA), Mohammed Shatyyeh, summarized the situation as follows:

lence between Palestinian protesters and Israeli soldiers).

17. Joel P. Trachtman, *Reflections on the Nature of the State: Sovereignty, Power and Responsibility*, 20 CAN.-U.S. L.J. 399, 400 (1994).

18. See David Harris, *A Closed Economy*, JERUSALEM POST, Oct. 9, 1996, (Economics), at 6, available in LEXIS, News Library, Curnews File.

There is 38% unemployment of the workforce in the West Bank, 51% in Gaza. Per capita income in the West Bank has declined from \$2,000 to \$950 and in Gaza from \$1,200 to about \$600. There has been a drop of about 25% in GDP overall, a decline in foreign investment, a deficit increase. Tax collection is also in a bad way. If there is no business, there is no tax collection.¹⁹

It is impossible to discuss Palestine's economy in a vacuum since many of its economic difficulties are directly attributable to Israeli policies. After the many bus bombings in Israel in late 1994 and early 1995, then Prime Minister Yitzchak Rabin instituted a policy of separation between the Israelis and Palestinians which resulted in the Palestinian people being unable to enter Israel during periods of security closures. This policy was continued by Prime Minister Shimon Perez in response to the suicide bombings of early 1996. Shatyyeh explained that these Israeli border closures have been the main reason for the slowdown of business activity.²⁰ Although the PA has been able to create about 68,000 jobs since 1994, it has not been able to absorb the approximately 120,000 Palestinians that have lost their jobs in Israel due to the border closures.²¹

The deterrent effect that the border closures have had on foreign investment was emphasized by former U.S. Congressman Mel Levine, who described a South Carolina furniture maker whose plans to do business in Gaza were frustrated:

[An] illustrative example involves a successful manufacturer

19. *Id.* (referring to economic changes occurring over a two-year period between 1994 and 1996).

20. *Id.* (observing that restricted access to a region hinders potential investors' ability to manage their money and, hence, discourages investment). Shatyyeh gave the following example of the closure adversely affecting foreign investment:

people were very enthusiastic to come and invest in the PA industrial zones, but I think the closure and related measures . . . make[] private sector business life extremely difficult and ha[ve] put people off. We have \$85 million of projects on the ground, but during the closure these have been hit hard. We couldn't get cement into Gaza. PEC DAR [Palestine Economic Council for Development and Reconstruction] has 144 employees—70 here in the head office—but only 30 can get in from Nablus, Jenin and Bethlehem, and this has delayed the public investment program for more than a year.

Id.

21. *See id.*

of furniture in South Carolina who wants to compete for European markets. Gaza's geographic proximity and labor costs could put him in an ideal position to do so. He studied the market and its costs and arranged for land and a business partner in Gaza, but his business plan calls for him to import a container of raw materials and export a container of finished product every day. This requires routine movements of goods in and out of Israeli ports, across Israel, and across the Gaza border, in both directions. He promptly discovered that Gaza's borders are not traversable on a reliable enough basis to pursue the risk. His plans are now on hold because, without reliable ingress and egress, he can neither establish himself as a reliable supplier to the new markets nor make payments on an enabling loan. [The Overseas Private Investment Corporation] and others provide political risk insurance, but it does *not* cover [Israeli] border closings²²

Moreover, not only do the closures have the effect of delaying outside investment, they have also hindered the Palestinian investments already in progress. A typical example of how Palestinian businesses have been affected is a clothing factory called ABACO in Nablus.²³ ABACO opened in 1993, shortly after the Oslo accords, and has been extremely successful with more than a million dollars in sales in 1995.²⁴ Unfortunately, due to Israel's tight blockade of Nablus, which was instituted after terrorist acts, ABACO has had to delay its October delivery of about 6,600 jeans to a European retailer.²⁵ Although a sympathetic retailer may understand ABACO's predicament, it is unlikely that any retailer could afford to tolerate the non-delivery of goods for a lengthy period.

Palestinian companies are not only having problems shipping their goods but are also being prevented from receiving raw materials. These companies have incurred storage fees they cannot afford while their shipments are being detained. For example, the "Arab Paint Company, which employs 26 people, has had to pay storage fees and fines for raw materials

22. Mel Levine, *Palestinian Economic Progress Under the Oslo Agreements*, 19 *FORDHAM INT'L L.J.* 1393, 1405 (1996).

23. See Christopher Hines, *Palestinian Economic Development Goes from Bad to Worse*, *AGENCE FRANCE PRESSE*, Oct. 8, 1996, (International News), available in *LEXIS*, News Library, Curnews File.

24. See *id.*

25. See *id.*

stuck at the port of Tel Aviv" for several weeks due to the Nablus blockade.²⁶

Nevertheless, Israel's policy of separation and customs restrictions has not been the only cause of the terrible economic situation in Palestine. The PA, led by Mr. Arafat, has been under constant attack from extremist Palestinian groups, such as Hamas, to confirm to the Palestinian National Charter,²⁷ which has not yet been truly amended, as was promised by the PLO in the Declaration of Principles. As previously mentioned, radical Palestinian groups do not believe in the gradual autonomy of the territories but rather prefer a holy war approach to regaining the territories. Moreover, the failure of the Palestinian Council to denounce the Palestinian National Charter has been a significant hurdle in establishing trust between the Israelis and Palestinians. The Palestinian National Charter not only denounces Israel,²⁸ but also vows to continue the armed struggle until the entirety of Palestine, which includes all of the current territory of Israel, is in Palestinian control.²⁹ As long as the Palestinian National Charter is left unamended, the Israeli government can justify its security measures. Sadly, as one commentator remarked, "Arafat has so often promised to delete the death warrant for Israel built into the Palestinian Charter, and collected so often, that a revision becomes a nasty comedy, of little value even if carried out."³⁰ Therefore, the PA

26. *Id.*

27. Palestinian National Charter (1968), reprinted in 3 *THE ARAB-ISRAELI CONFLICT* 705-11 (John N. Moore ed. 1974) (instrument of the National Congress of the Palestinian Liberation Organization, held in Cairo, July 1-17, 1968) [hereinafter *Palestinian National Charter*].

28. *See id.* art. 19:

The partition of Palestine in 1947 and the establishment of the state of Israel are entirely illegal, regardless of the passage of time, because they were contrary to the will of the Palestinian people and to their natural right in their homeland, and inconsistent with the principles embodied in the Charter of the United Nations, particularly the right to self-determination.

29. *See id.* art. 9:

Armed struggle is the only way to liberate Palestine. Thus it is the overall strategy, not merely a tactical phase. The Palestinian Arab people assert their absolute determination and firm resolution to continue their armed struggle and to work for an armed popular revolution for the liberation of their country and their return to it. They also assert their right to normal life in Palestine and to exercise their right to self-determination and sovereignty over it.

30. A.M. Rosenthal, Editorial, *Israel's Red-Line Map*, N.Y. TIMES, Feb. 18,

is doing the Palestinians a disservice by not abiding by their commitment to firmly denounce the Palestinian National Charter.

The instability and inconsistencies of the PA has made the international community wary of investing in Palestine.³¹ The PA has attempted to diminish the fear of investment by instituting the Law on the Encouragement of Investment (Investment Law) in November, 1995.³² Although the Investment Law is meant to provide a legal framework and inducements for foreign investment in Palestine, it possesses some significant deficiencies,³³ and has been overshadowed by the current internal instability within the PA and current Israeli policies.

Many commentators have remarked that the territories are about to explode with frustration at the lack of visible benefit from the Interim Agreement. Arafat's supporters are becoming increasingly restless with the negotiation process. Although Hamas has urged Muslims to confront Israel forcefully, Arafat has managed to keep the situation contained.³⁴ The Israeli practices geared to prevent future hostilities, no matter how legitimate or justified, may shortly prove only to have added to the fermentation of hostilities. While Israel may need to continue some border closures and strict border controls to safeguard its population, it simultaneously needs to institute complementing policies and measures which will be geared at improving the economic conditions in Palestine. For example,

1997, at A19.

31. See Norma Greenway, *Fears of Civil War Scaring Off Economic Investment in Gaza*, VANCOUVER SUN, Nov. 25, 1994, at A19. Although this article was written before the election of the Palestinian Council, the same concerns apply now.

32. See David P. Fidler, *Foreign Private Investment in Palestine: An Analysis of the Law on the Encouragement of Investment in Palestine*, 19 FORDHAM INT'L L.J. 529, 529 (1995). A full-text version of the law, with minor grammatical changes, is appended to this article. See *id.* at 603.

33. Fidler points to the following problems: "broad discretionary powers; 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." *Id.* at 594.

34. See, e.g., David Ott, *Arafat Running Out of Time*, SCOTLAND ON SUNDAY, October 6, 1996, at 15 (reporting that "calls by the movement Hamas for 'total confrontation' with Israel by Muslim worshippers after Friday's prayers were largely ignored as Palestinians decided to give Arafat the benefit of the doubt—for the time being").

Mel Levine noted that:

[T]he Israelis themselves operate special "convoys" on a routine, scheduled basis to transport Palestinian goods to Israeli factories and distributors who rely on Gazan suppliers. Police inspections and escort patrols are provided so that interruptions are rare and delivery schedules can be met. These are no doubt expensive and logistically difficult exercises for the Israeli security system, but it demonstrates that creative solutions are possible.³⁵

Although the above example is a possible short-term complementary measure which could be expanded to non-Israeli businesses, the Palestinians need to be able to rely on Israeli measures meant to help their economy. Thus, a binding dispute resolution mechanism would strengthen the dependability of any Israeli measures. Examining comparative situations of economically disadvantaged people will highlight the need for Israel to take serious steps toward furthering the economic goals of the peace process.

2. How Hostilities are Intertwined with Economic Instability

Montesquieu observed that increasing economic stability is associated with reduced hostilities. Author Albert Hirschman, examining the views of Montesquieu and others on that point, quotes the historian William Robertson, who in 1769 stated the idea quite succinctly: "[c]ommerce tends to wear off those prejudices which maintain distinction and animosity between nations."³⁶ Of course, the alternative concept is also true, that economic disadvantage increases hostility.

The struggle against apartheid by the impoverished black majority in South Africa is illustrative of how economic disparity and, in this case, racial discrimination, can lead to retaliation and hostilities. Additionally, the success of the African National Congress is a good example of how gaining political control is only a first step, and of how maintaining successful momentum is contingent on the party's achievement of a requi-

35. Levine, *supra* note 22, at 1407.

36. ALBERT HIRSCHMAN, *THE PASSIONS AND THE INTERESTS* 61 (1977) (quoting WILLIAM ROBERTSON, *THE PROGRESS OF SOCIETY IN EUROPE*, (Felix Gilbert ed., University of Chicago Press 1972) (1769).

site level of economic and social development.³⁷ As stated by one commentator, the current South African government is facing the challenge of strengthening the economy before militant factions gain support since "[w]ithout commitment to a program of economic justice, South Africa's attempt to build a democratic society will be at significant risk of violent political backlash."³⁸

Critics of Israel's domestic policy have contended that it is analogous to South Africa's apartheid system.³⁹ Although this path of inquiry is beyond the scope of this article, it is useful for Israel to learn from South Africa's past and present experiences and thus help prevent similar difficulties by aiding the current Palestinian government in creating economic stability before the militant fundamentalist factions gain overwhelming popular support.

Yasser Arafat once said during an interview "either we will have a Somalia because of the starvation of our people or we will have another economic tiger in this area, especially because we have the capability to do it."⁴⁰ Although it has been shown that economic disadvantage increases hostilities, it has also been shown that the emergence of a middle class within the disadvantaged group has significantly decreased hostilities. For example, Professor Kenneth L. Karst has observed in regard to American ethnic groups that:

37. See Kim Robinson, Note, *False Hope or Realizable Right? The Implementation of the Right to Shelter Under the African National Congress' Proposed Bill of Rights for South Africa*, 28 HARV. C.R.-C.L. L. REV. 505, 519 (1993).

38. *Id.* at 512 & n.28 (further observing that "[t]he disaffection, hostility and pessimism bred by poverty and income disparity create an unstable foundation upon which to build democratic structures").

39. See, e.g., John Quigley, *Apartheid Outside Africa: The Case of Israel*, 2 IND. INT'L & COMP. L. REV. 221 (1991). The author contends that Israeli legislation and policies have discriminated against Arabs in the context of economic, political and social rights. He analogizes Israel's ideology of being a state for Jews, to South Africa's apartheid ideology. For example, the fact that any Jew may immigrate to Israel, while none of the displaced Palestinians possess an automatic right to citizenship. See *id.* at 229. Another example is Israeli legislation which prohibits the sale of most land to anyone who is not Jewish. See *id.* at 235. Mr. Quigley contends that these, and other, examples show how Israel has limited "a racial group's participation in the social or economic life of the country" in violation of the Apartheid Convention. *Id.* at 243. This author does not share Quigley's view.

40. Gary A. Hengstler & Richard L. Fricker, *Yasser Arafat: My Vision*, A.B.A. J. Feb. 1994 at 46, 49.

Each success for the group in the politics of the wider community, each material advance, integrates more and more members of the group into the institutions and processes of the dominant culture . . . The achievement of the group's goals opens progressively more opportunities for members of the group in the larger society, with the inevitable result that the group declines as a separate political force.⁴¹

He also observed that, "[c]onsciousness of ethnicity, which is shared widely at all socio-economic levels, decreases as a factor influencing behavior for people in the middle class."⁴² Thus, if Israel strives to help establish a Palestinian middle class, the result may be a middle class consciousness that is unwilling to sacrifice its attained place in society by aggressively supporting fundamentalist factions. Also, the formation of a middle class may serve to alleviate the uncertainties Israelis have regarding the type of government which will emerge in the West Bank and Gaza Strip since "[w]hen a country enjoys economic prosperity, almost any system of government seems functional."⁴³ This author is not advancing a proposition that a totalitarian government in Palestine would be acceptable, only that a prosperous middle class would most likely lead to election of a type of government which is representative of this class' economic concerns. The government elected by a prosperous middle class is also unlikely to sacrifice economic gain by engaging in detrimental hostilities.

The above examples serve to bolster the proposition that increasing economic stability reduces hostilities. It is interesting to note that countries which have dedicated themselves to economic growth have been intolerant of surrounding hostilities which threaten their internal economy. For example, the Economic Community of West African States intervened to stop the carnage in Liberia.⁴⁴ One scholar, Anne-Marie Burley, remarked that, "the intervenors in West Africa were not

41. Kenneth L. Karst, *Paths to Belonging: The Constitution and Cultural Identity*, 64 N.C. L. REV. 303, 330, 331 (1986).

42. *Id.* at 330 n.178.

43. Carlos Santiago Nino, *The Debate Over Constitutional Reform in Latin America*, 16 FORDHAM INT'L L.J. 635, 635 (1993).

44. See Anne-Marie Burley, *Toward an Age of Liberal Nations*, 33 HARV. INT'L L.J. 393, 401 (1992).

members of a collective security organization at all, but of an *economic* organization organized around free market principles and directly threatened by a flood of refugees."⁴⁵ Burley also noted that "[t]he European Community has similar motives not only for peacekeeping in Yugoslavia, but indeed for aiding the transition to democracy throughout Eastern Europe."⁴⁶ Although these examples are of multilateral unions, they are nonetheless demonstrative of the view that hostilities and economic growth are incompatible.

This Note continues under the premise that by increasing economic stability in Palestine, Israel could expect a gradual decrease in hostilities. Currently Israel's efforts are geared at maintaining internal security and are not motivated by economic development concerns for the territories. Although recommending economic policies is not within the scope of this Note, Israel's general goal should be a long-term plan to help Palestinians establish a thriving economy, as the well known "ancient African proverb instructs us: 'Give a man a fish and you have fed him for one day, teach him how to fish and you have fed him for a lifetime.'"⁴⁷ Further, because this Note proposes that Israel should reduce its sovereignty by submitting to a dispute resolution panel, it will continue by discussing, first, why other countries have agreed to reduce their sovereignty and, second, what enforcement mechanisms those countries decided were most appropriate.

B. *The European Union*

1. Motivations Behind the Formation of the European Union

The European Union had its inception in the idea that collective security would be insured by a common market.⁴⁸ As one international legal scholar has observed, "the first European Community was the European Coal and Steel Community, formed in 1951 to integrate production of these critical factors of war in order to deprive individual states of the abili-

45. *Id.*

46. *Id.*

47. See, e.g., Janice D. Villiers, *Closed Borders, Closed Ports: The Plight of Haitians Seeking Political Asylum in the United States*, 60 BROOK. L. REV. 841, 928 (1994).

48. See Iamarino, *supra* note 5, at 114.

ty to wage war alone."⁴⁹ The concept behind the formation of the first agreement was that when states reduce their sovereignty in exchange for a system of economic interdependence they gain an intensified security because none of the individual states would risk losing valuable economic ties.

The commitment of the European countries to form a union was motivated by a history of hostilities within Europe which culminated with World War II. One of the inciting factors leading to Hitler's rise to power was Germany's comparative economic disadvantage to its French and English neighbors. Popular support for Hitler increased as the Germans began to feel the rewards of Hitler's initial economic policies. Subsequently, the desire for economic advantage was transformed into a yearning for retribution for the "humiliation" Germany suffered under the Versailles Peace Accord. Also, as history later showed, the German people turned a blind eye to Hitler's atrocious violations against humankind in order to pursue their goal of European domination.

Since the end of War World II, and the near destruction of Europe and its population (50 million people died), the European countries have been on a gradual path towards total unification. The original six members of the European Community (EC)⁵⁰ included Germany. The other five members agreed that Germany should be a part of the European Community, not only out of a desire to reduce the German security threat, but also out of a recognition that having Germany as an ally would better protect the EC against the rising military threat of the Soviet Union.⁵¹

49. Joel P. Trachtman, *L'Etat, C'est Nous: Sovereignty, Economic Integration and Subsidiarity*, 33 HARV. INT'L L.J. 459, 464 (1992).

50. The original members of the European Community were the Federal Republic of Germany, Belgium, France, Italy, Luxembourg, and the Netherlands. See Jeffrey L. Thompson, *The North American Patent Office? A Comparative Look at the NAFTA, The European Community, and the Community Patent Convention*, 27 GEO. WASH. J. INT'L L. & ECON. 501, 529 n.46 (1993-1994).

51. See G. Porter Elliott, *Neutrality, The Acquis Communautaire and the European Union's Search for a Common Foreign and Security Policy Under Title V of the Maastricht Treaty: The Accession of Austria, Finland and Sweden*, 25 GA. J. INT'L & COMP. L. 601, 612 (1996).

2. The Creation of Enforcement Mechanisms

The EC members began the establishment of an enforcement mechanism by signing the Brussels Convention in 1968,⁵² which declared their mutual commitment to submit disputes in the area of civil and commercial matters to a common panel whose decisions would be acknowledged by all member states to supersede their national law. As one commentator noted, "[t]he Brussels Convention ensures that judgments may move as freely as goods, workers, and capital in the common market of Europe."⁵³ In order to effectuate this result the member states decided that the panel should take the form of a court and established the European Court of Justice (ECJ) in 1971.⁵⁴ Additionally, acquiescence to the enforcement procedures of the ECJ was a compulsory part of joining the EC. Although several adjustments were made when subsequent states joined the EC, the basic principles of the Brussels Convention were left intact.⁵⁵ The period of the Cold War further motivated the European countries to unite in order to guarantee their mutual security. Because the Brussels Convention's jurisdiction was limited to civil and commercial matters, the European countries signed the Conference on Security and Cooperation in Europe (the Helsinki Accords).⁵⁶ The Helsinki Accords directly addressed issues of security that could jeopardize the collective security of its members. Although the Helsinki Accords did not address the issue of economic instability directly, economic stability was the underlying motivation of the agreement.

Revisions of the Helsinki Accords have gradually increased the collective powers of the European Union. For example, the

52. Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, Sept. 27, 1968, 1972 O.J. (L 299) 32, *reprinted in* 8 I.L.M. 229.

53. Robert C. Reuland, *The Recognition of Judgments in the European Community: The Twenty-Fifth Anniversary of the Brussels Convention*, 14 MICH. J. INT'L L. 559, 573 (1993).

54. See Protocol on the Interpretation by the Court of Justice of the Convention of Sept. 27, 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, June 3, 1971, 1978 O.J. (L 304) 50. This convention, in an updated and consolidated version, appears at 1990 O.J. (C 189) 1, *reprinted in* 29 I.L.M. 1413.

55. See Reuland, *supra* note 53, at 568.

56. See Conference on Security and Cooperation in Europe: Final Act, Aug. 1, 1975, U.S. Dep't of State Pub. No. 8826, Gen 14 I.L.M. 1292.

Final Report of the Conference on Security and Cooperation in Europe Meeting of Experts on Peaceful Settlement of Disputes (CSCE Report) asserts in its introduction that:

The existence of appropriate dispute settlement procedures is indispensable for the implementation of the principle that all disputes should be settled exclusively by peaceful means. Such procedures are an essential contribution to the strengthening of the rule of law at the international level and of international peace and security, and justice . . . Compliance with binding decisions reached through procedures for the peaceful settlement of disputes is an essential element in any overall structure for the peaceful settlement of disputes.⁵⁷

The CSCE Report contains many provisions regarding avenues available for peaceful dispute resolutions, but most importantly, the members of the Helsinki Accords agreed to subject themselves to a mandatory involvement of a third party when they are not able to settle the dispute through the other avenues provided.⁵⁸ Subjection to the involvement of a third party is another example of reduction in sovereignty by the EC members due to a recognition that collective security supersedes an individual member's foreign affairs agenda.

Furthermore, in February 1992, the EC signed The Treaty on European Union, (also known as the Maastricht Treaty) that entered into force on November 1, 1993.⁵⁹ It is interesting to note that "[i]n 1991 Germany sought at Maastricht to promote political and monetary union on the self-deprecating basis that it is prudent further to bind Germany to Europe now, before it derives too much independence and strength from unification."⁶⁰ The Maastricht Treaty created an even closer European Union (EU). The new EU system, not only subjected itself to a common economic policy, but also to a unified foreign security policy, as well as other rights and obligations such as automatic membership to a national of a mem-

57. Report of the Conference on Security and Cooperation in Europe Meeting of Experts on Peaceful Settlement of Disputes, Feb. 8, 1991, 30 I.L.M. 382, 386-87.

58. See *id.* at 388.

59. TREATY ESTABLISHING THE EUROPEAN COMMUNITY, Feb. 7, 1992, O.J. (C 224) 1 (1992), [1992] 1 C.M.L.R. 573 (1992).

60. Trachtman, *supra* note 49, at 464.

ber state. As a result, the EU is no longer exclusively an economic union.⁶¹ Although a discussion of the foreign policy provisions of the EU are beyond the scope of this paper, the agreement to act as a united body is illustrative of the European decrease in individual state sovereignty in exchange for the benefits of an interdependent union with a new legal order.⁶²

3. The European Court of Justice as a Model of Dispute Resolution

The ECJ has the challenge of creating a common legal process out of the fundamental principles expressed in the many EC treaties and those found in the member states' legal tradition.⁶³ Such principles include the fundamental rights of individuals, the principle of fair trial, concepts of legal certainty and non-retroactivity, and the right to be heard in administrative proceedings.⁶⁴ Although all the member states share the above principles, their interpretation by the individual states' courts vary. As a result, the ECJ has had to establish its own unique legal process.

An example of innovative ECJ rulings has been the ECJ's removal of the obstacle of sovereign immunity in order to insure compliance by member states with EC law.⁶⁵ This removal of sovereign immunity enables individuals to bring claims against their own state, as well as against another EU member, for violation of an EC law. Kurt Riechenberg, clerk to Judge García-Valdecasas, Court of First Instance of the European Community, Luxembourg, discussed the general principles that have been set down to determine member state liability under provisions of EC law. Riechenberg contends that in the *Francovich & Bonifaci v. Italian Republic* decision, for instance, the ECJ "laid down three conditions for the establishment of [a member state's] liability: (1) an implied grant of rights to individuals, (2) the provision identifies the content of

61. See Sari K.M. Laitinen-Rawana, *Creating a Unified Europe: Maastricht Treaty and Beyond*, 28 INT'L LAW. 973, 990 (1994).

62. See Kurt Reichenberg, *The Merger of Trading Blocks and the Creation of the European Economic Area: Legal and Judicial Issues*, 4 TUL. J. INT'L & COMP. L. 63, 67-68 (1995).

63. See *id.* at 71.

64. See *id.*

65. See *id.*

those rights, and (3) a casual link must exist between the breach of the Member State's obligation and the harm suffered."⁶⁶ Satisfying the above conditions is a prerequisite to receiving damages for a member state's breach of EC law. The existence of a private cause of action within the EU will be discussed as a possible model for broad jurisdiction in the proposal of dispute settlement section of this Note.

For the purpose of this Note it is enough to understand that the EU has chosen to create a common court as its dispute settlement mechanism. It has given this court the power to interpret how all the treaties work together, as well as what type of damages the losing state would be responsible to pay. This court's jurisdiction has gradually expanded, as illustrated by the ability of an individual from any EU state to bring a cause of action against any EU country. This broad jurisdiction has contributed to the view that the European countries are really unified.

C. Discussion of NAFTA and its Dispute Resolution

1. Reasons for the Formation of NAFTA

The impetus behind the formation of NAFTA is very different from the concern for mutual security which motivated the formation of the EU. Because the United States, Canada and Mexico's history of conflict is relatively mild, they did not have to focus on mutual security as the goal of integration. Rather, the formation of NAFTA arose out of a recognition that regional economic integration and interdependence would be mutually beneficial on an economic level.

Each NAFTA country had its own reasons for wanting to take part in the agreement. Mexico, as the smallest economy of the three countries, had the most to gain from NAFTA since membership could "help alleviate Mexico's crippling debt service burden and help finance the current account deficit by encouraging foreign direct investment and the return of flight capital"⁶⁷ Additionally, membership in NAFTA would give Mexico access to the broader North American market, as

66. *Id.* at 72 (citing *Francovich & Bonifaci v. Italian Republic*, Joined Cases C-6/90 & C-9/90, 1991 E.C.R. I-5357).

67. Gary C. Hufbauer & Jeffrey J. Schott, *Options for a Hemispheric Trade Order*, 22 U. MIAMI INTER-AM. L. REV. 261, 282 (1991).

well as help implement its domestic reforms.⁶⁸

The Canadian and U.S. interests were quite different from Mexico's. Canada's motivations were geared toward defending its existing interests under the U.S.-Canada Free Trade Agreement, and dealing "with such questions as trade in automobiles and parts and natural gas flows."⁶⁹ The United States' motivations were both political and economic. The United States felt that economic integration would help promote a stable democratic government in Mexico, which would serve as a model for other countries in Latin America.⁷⁰ Additionally:

A prosperous Mexico would become a thriving market for U.S. exports, providing a particular boost to the economies of border states such as California, Texas, New Mexico, and Arizona. At the same time, growth in the Mexican economy would create new jobs and increase wages in Mexico and thus help stem the tide of illegal immigration.⁷¹

Although both the United States and Canada stood to lose some of their labor-intensive industries due to the low wages in Mexico, they hoped to eventually off set this loss by exporting more sophisticated equipment to Mexico, and by being more competitive in the world market by accessing Mexico's pool of low-wage labor.⁷²

As demonstrated, each party had its own incentives for seeking economic integration. However, unlike the EU, the parties wanted to achieve this integration with a minimal reduction in sovereignty. Gary N. Horlick noted that:

The main debate about NAFTA in terms of sovereignty was over the labor and environmental side agreements. Now this is interesting, because the agreements by their terms make no change at all in the labor and environmental laws of any of the three countries. The discussion was explicitly limited to ensuring that each country enforces its own laws. Obviously you have a sovereign right to decide if you are enforcing your own laws, and what was being talked about was "giving that up." But you were not talking about changes in either

68. *See id.*

69. *Id.*

70. *See id.*

71. *Id.* at 282-83.

72. *See id.* at 283.

who enforces the laws or what the laws were. Again, contrast this with the European Union, where international bureaucrats in Brussels make the rules, and often ensure enforcement.⁷³

As exemplified by the above-mentioned side agreements, NAFTA is aimed at limited concessions of sovereignty. However, some concessions were made on the part of Mexico, which were attributable to its desire to be included in a regional free trade agreement. For example, a Chapter 11 investor-state dispute resolution system was basically aimed at Mexico giving up its Calvo Clause, which limits investors to suing in the courts of the host country.⁷⁴ Thus, instead of having to resort to Mexican courts to address Mexican NAFTA violations, the investor can resort to arbitration.⁷⁵

2. Type of Dispute Resolution Mechanism Chosen

The parties to NAFTA agreed to arbitration as the main dispute settlement mechanism. NAFTA requires the Free Trade Commission to establish an arbitration panel upon request from a complaining party.⁷⁶ NAFTA's Chapter 20⁷⁷ governs the Dispute Settlement Procedures agreed to between the parties. Andrew Kayumi Rosa elaborated on Chapter 20 and noted that:

The general dispute settlement provisions of NAFTA apply in three situations: first, where a dispute exists between the Parties over the interpretation or application of NAFTA; second, where a Party believes that another Party's actual or proposed measure is inconsistent with NAFTA; and finally, where a Party believes such a measure is consistent with NAFTA but causes nullification or impairment of any benefit reasonably to be expected under most NAFTA provisions.⁷⁸

73. Gary N. Horlick, *Sovereignty and International Trade Regulation*, 20 CAN.-U.S. L.J. 57, 60 (1994).

74. *See id.* at 61.

75. *See id.*

76. *See* NAFTA, *supra* note 6, art. 2008(2), 32 I.L.M. 695.

77. *Id.* arts. 2001-2022, 32 I.L.M. 693-99.

78. Andrew Kayumi Rosa, *Old Wine, New Skins: NAFTA and the Evolution of International Trade Dispute Resolution*, 15 MICH. J. INT'L L. 255, 262-63 (1993) (citations omitted).

Additionally, Chapter 20 establishes that if there are any disputes which arise under both NAFTA and the GATT then the party bringing the claim has a choice as to which forum will hear the claim.⁷⁹ However, if the third party wants to take part in the claim and the two parties cannot agree on the forum, then the NAFTA forum will prevail.⁸⁰

Under NAFTA, parties must use consultations and arbitration prior to requesting the formation of an arbitration panel.⁸¹ If the parties are unable to solve their dispute, they may request the NAFTA Commission to provide "good offices, conciliation, [or] mediation."⁸² However, if within thirty days the Commissions involvement proves unhelpful then either party may request an arbitration panel.⁸³ NAFTA's arbitration panels are made up of five panelists selected from a roster comprised of persons with "expertise or experience in law, international trade," or other matters appropriate to dispute resolution under NAFTA.⁸⁴ The disputing parties have to agree on the panel's chairperson. Then each party may choose two citizens from the opposing party's list of nominees.⁸⁵ Once a panel is selected, the dispute settlement procedures allow for at least one hearing. The procedures further provide for an opportunity to submit writings explaining a party's initial position and rebutting the positions of the other party or parties. Under the procedures all hearings, deliberations, and written submissions are confidential.⁸⁶

Once the proceedings are completed, the panel must issue an initial report within a period specified under Article 2016 of NAFTA (90 days) or under such other period as may be agreed upon by the parties or pursuant to procedural rules authorized by Article 1202(1) of NAFTA.⁸⁷ After the submission of the panel's initial report, the parties have fourteen days to make

79. See NAFTA, *supra* note 6, art. 2005(1), 32 I.L.M. 694.

80. See *id.* art. 2005(2), 32 I.L.M. 694.

81. See *id.* art. 2007, 32 I.L.M. 695.

82. *Id.* art. 2007(5)(b), 32 I.L.M. 695.

83. See *id.* art. 2008(1), 32 I.L.M. 695.

84. *Id.* at art. 2009(2), 32 I.L.M. 695.

85. See *id.* art. 2011(1), 32 I.L.M. 696. These procedures differ slightly where more than two parties are involved in a dispute. See *id.* art. 2011(2), 32 I.L.M. 696.

86. See *id.* art. 2012(1), 32 I.L.M. 696.

87. See *id.* arts 2012(1)(b), 2016(2), 32 I.L.M. 696, 697.

comments, if they so choose.⁸⁸ As one commentator noted, "[t]his phase provides parties with another opportunity to voice their views, and therefore may increase compliance with panel reports because parties are more likely to feel they had significant input into the panel decision."⁸⁹ Subsequently, the panel may modify its determinations and within thirty days issue its final report.⁹⁰ The final report does not identify which panelists are associated with majority and minority opinions contained therein.⁹¹ Moreover, this final report is not eligible for an appeal unless it concerns a trade dispute.⁹² The above panel composition, secrecy provisions, and possibility of appeal are illustrative of a possible model for a proposed dispute settlement mechanism for the Interim Agreement, and will be referred to in Part IV of this Note.

Finally, NAFTA's enforcement of the dispute is left to the disputing parties. The preferred resolution is for the losing party to conform to the ruling. Failing such a resolution, the losing party may pay compensation to the victorious party.⁹³ If the parties are unable to agree on the appropriate compensation then the victorious party may suspend benefits of equivalent effect until a mutually agreed-upon solution is negotiated.⁹⁴

In light of these provisions NAFTA's dispute resolution provisions can accurately be characterized as more of an aid to the parties in their conflict rather than an imposition of a mandatory solution. Significantly, NAFTA does not provide for surveillance of the parties' progress, which is another indication that NAFTA is a self-monitoring agreement. As a result, NAFTA relies on the parties' compliance and desire to maintain an economic union. This Note, in Part IV, will rely on the

88. See *id.* art. 2016(4), 32 I.L.M. 696.

89. Samuel C. Straight, Note, *GATT and NAFTA: Marrying Effective Dispute Settlement and the Sovereignty of the Fifty States*, 45 DUKE L.J. 216, 228 (1995).

90. See NAFTA, *supra* note 6, arts. 2016(5), 2017(1), 32 I.L.M. 697.

91. See *id.* art. 2017(2), at 697. "This secrecy," one author observed, "could provide greater compliance with panel reports as parties have no basis to complain that decisions were made according to the national interests of the panelists." Straight, *supra* note 89, at 228 (but additionally cautioning that "secrecy may cause countries to reject panel decisions based on a *belief* that decisions are secretly partisan").

92. See NAFTA, *supra* note 6, art. 1904(5), 32 I.L.M. 683.

93. See *id.* art. 2018(2), 32 I.L.M. 697.

94. See *id.* art. 2019(1), 32 I.L.M. 697.

NAFTA model of dispute resolution, with its minimal decrease in sovereignty, as a possible starting point for resolutions of disputes between Israel and Palestine.

C. *From the GATT to the WTO*

1. Reasons for the Formation of the GATT and the WTO

The original contracting parties to the GATT unified in order to create an "international economic law."⁹⁵ The GATT grew out of negotiations by the victorious allied countries in 1947, and since then has expanded to include most of the world's nations.⁹⁶ One student of the GATT noted that:

[t]he drafters of the GATT 1947 were amenable to the inclusion of a provision on customs unions and frontier traffic, perhaps to insure the agreement of the European countries, particularly in light of their strong leaning toward regionalism. Because economic troubles were a major factor behind World Wars I and II, a certain degree of economic cohesion in Europe was viewed as a mechanism which would prevent further hostilities.⁹⁷

Thus, the founders of the GATT recognized the motivation of the European countries to forge an economic union in order to reduce their security concerns, and factored in these concerns when drafting the GATT agreements.

Over the years the GATT has evolved from solely covering trade in goods to encompassing trade in services, aspects of foreign direct investment, agreements on agriculture and textiles, and intellectual property rights.⁹⁸ It has also reduced tariffs in diverse sectors such as pharmaceuticals, automobiles,

95. Curtis Reitz, *Enforcement of the General Agreement on Tariffs and Trade*, 17 U. PA. J. INT'L ECON. L. 555, 555 (1996).

96. See *id.* at 555-56.

97. Paul Carrier, *An Assessment of Regional Economic Integration Agreements After the Uruguay Round*, 9 N.Y. INT'L L. REV. 1, 6 (1996) (citations omitted). Carrier quotes a former U.S. State Department Official as observing that "[a] customs union creates a wider trading area, removes obstacles to competition, makes possible a more economic allocation of resources, and thus operates to increase production and raise planes of living." *Id.* at 8 (quoting CLAIR WILCOX, A CHARTER FOR WORLD TRADE 70-71 (1949)).

98. See William J. Aceves, *Lost Sovereignty? The Implications of the Uruguay Round Agreements*, 19 FORDHAM INT'L L.J. 427, 427-28 (1995).

steel, and food products.⁹⁹ These latest additions to the GATT emerged in 1994 during the Uruguay Round in which the contracting parties agreed to the formation of the WTO.¹⁰⁰ Additionally, during these rounds of negotiations, the contracting parties agreed to the "development of a mechanism for authoritative interpretation and enforcement of GATT substantive law,"¹⁰¹ which was to be incorporated into the functions of the WTO.

The original contracting parties, and those that followed, accepted the fact that in order to thrive in this increasingly global market there must be a monitoring system. Submission of disputes for resolution has been in existence since the first GATT agreements, but unfortunately the original GATT dispute resolution mechanism was not very effective because it lacked provisions for enforcement of rulings.¹⁰² Instead, compliance was left to the discretion of the losing state.¹⁰³ As one commentator pointed out, results of a study conducted by Professor Robert E. Hudec, who analyzed all of the GATT's dispute resolutions since its inception, indicated a recent decline in the extent of compliance with panel decisions:

From 1948 until the cases of the 1980's, in cases with known rulings in favor of complainants, Hudec classified twenty-seven (100%) as ending with full satisfaction or partial satisfaction; none had a "negative outcome," and most (eighty-six percent) were in the "full satisfaction" group. This picture, however, changed substantially in the decade of the 1980s. During this period, Hudec placed seven cases (eighteen percent) in the category of negative outcomes. Hudec classified five cases (thirteen percent) as complete defiance (no action); in two cases (five percent) the losing party complied but only after the complainant paid a "price" to which the violator was not entitled under the ruling or by GATT law. This increase in noncompliance and "negative outcomes" provided an impetus to restructure the GATT dispute resolution system.¹⁰⁴

Because of this ineffectiveness, the parties made several modi-

99. *See id.*

100. *See Reitz, supra* note 95, at 556-57; WTO Agreement art. 1.

101. *Reitz, supra* note 95, at 558.

102. *See id.* at 564.

103. *See id.* at 570.

104. *Id.* at 570-72.

fications which culminated in the formation of the 1994 Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU).¹⁰⁵ The formation of the DSU was so crucial because inaction in light of increasing non-compliance could have transformed non-compliance into international custom, thereby placing the entire force of GATT obligations in jeopardy. To prevent this result, the contracting parties agreed that membership in the WTO would be mandatory for all GATT members, and that decisions by the WTO's Dispute Settlement Body (DSB) would be binding.¹⁰⁶

The WTO's stronger enforcement mechanism has brought the issue of loss in national sovereignty to the forefront. Professor Curtis Reitz observed that:

Chauvinistic believers in unfettered national sovereignty see the WTO dispute resolution system as a major threat. Views of that kind will be found in all parts of the world, from the most developed to the least developed nations. Their cries of alarm will sound particularly in democracies in election times. There is, of course, another, and better, view. It is in each nation's deepest sovereign interest to be part of a legal order that stimulates and regulates growth of the global economy. National interests will be advanced both economically and politically by an effective international legal order.¹⁰⁷

Contracting parties that are willing to forego all GATT

105. Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, WTO Agreement, Annex 2, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 1; 33 I.L.M. 1226 (1994) [hereinafter DSU].

106. *Id.* art. 2.

107. Reitz, *supra* note 95, at 599. Reitz further observed that:

[e]nlightened national government leaders see the explosive growth of multinational enterprises (MNEs) as an important reason for the establishment of a regime of international economic law. As MNEs grow in size and economic power, they have the capacity to take actions that are effectively beyond the control of any national government.

Id. at 599 n.201.

One commentator contends that:

critics charge that the WTO will be run by international bureaucrats who will operate in secrecy with no accountability and no conflict of interest rules. The essence of these arguments rests on the notion of lost sovereignty—in signing the Uruguay Round Agreements, the United States has lost much of its negotiating authority on international trade matters and has subjected domestic matters to international regulation.

See Aceves, *supra* note 98, at 428 (citations omitted).

benefits because they fear infringement of their sovereignty, can utilize a provision which gives every country a right to withdraw from the WTO. Some countries that do not want to lose all GATT benefits, but who fear that their national sovereignty is being jeopardized, have implemented complimentary national legislation to address their concerns. For example, the United States Congress is in the process of reviewing proposed legislation which will institute a national WTO Dispute Settlement Review Commission to complement the United States' implementing legislation of the DSU.¹⁰⁸ The proposal provides that "any Member of Congress can introduce a Joint Resolution to disapprove of U.S. participation in the WTO if the Commission makes three affirmative determinations [that the interests of the United States are not being served by membership in the WTO] in any five-year period."¹⁰⁹ However, even if this proposed legislation becomes national law, it will not effect U.S. international obligations, unless the United States decides on complete withdrawal from the WTO.¹¹⁰ This legislation appears to be purely political since a complete United States withdrawal from the WTO is extremely unlikely and would result in a total loss of rights provided by the WTO—such as Most Favored Nation status—thereby decreasing United States competitiveness in the global market.

Since none of the contracting parties, including the ones which have complained about the reduction of sovereignty, have exercised their right to withdraw from the WTO,¹¹¹ it is evident that they recognize the overriding importance of economic integration and how essential it is to continue moving toward increased enforcement in order to create a uniform international economic order. As one commentator contends "states must choose between the uncertainty of multilateral cooperation and the short term benefits of unilateral action."¹¹² Also, as noted by Robert Keohane:

108. See Aceves, *supra* note 98, at 471.

109. *Id.* at 471.

110. *Id.* at 474.

111. See *id.* at 436.

112. *Id.* at 472. Aceves finds this situation analogous to Rousseau's parable of the stag hunt: "[i]n the parable of the stag hunt, several hunters agree to cooperate to catch a stag When one hunter defects from the group in order to catch a rabbit, the group fails to catch the stag." *Id.* at n.238 (quoting J.J. Rousseau, *Discourse on the Origins of Inequality*, in BASIC POLITICAL WRITINGS OF

Committing oneself to an international regime implies a decision to restrict one's own pursuit of advantage on specific issues in the future. Certain alternatives that might otherwise appear desirable—imposing quotas, manipulating exchange rates, hoarding one's own oil in a crises—become unacceptable by the standards of the regime Where there are substantial common interests to be realized through agreement, the value of a reputation for faithfully carrying out agreements may outweigh the costs of consistently accepting the constraints of international rules. To pursue self-interest does not require maximizing freedom of action. On the contrary, intelligent and far-sighted leaders understand that attainment of their objectives may depend on their commitment to the institutions that make cooperation possible.¹¹³

2. The WTO's Enforcement Powers and Panel Makeup

The DSU provides for an extremely elaborate dispute resolution mechanism. The striking difference between the pre-1994 DSB and the current one is the establishment of an Appellate Body which has very similar characteristics to a judiciary body and is empowered to look beyond the materials provided by the litigants to formulate its decisions. Furthermore, this Appellate Body's purpose is to establish a uniform substantive law on which the contracting parties can rely. The Appellate Body's decisions will serve as an interpretive aid to lower DSB panels. This Appellate Body is creating a system of *stare decisis* in order to provide conformity and stability in international economic law. The creation of an Appellate Body within the Interim Agreement, and in the future within the final agreement, could help Israel and Palestine create their own economic law suitable to their unique situation.

Another important divergence from the pre-1994 DSB is the creation of remedies for victorious contracting parties. While in the past the system was based solely on the consensus of the DSB's members, which consist of all the contracting parties, and empowers each with one vote, the new system

JEAN-JACQUES ROUSSEAU 62 (Donald Cress trans. 1987).

113. ROBERT KEOHANE, AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY 258-59 (1984).

allows remedies to be enforceable even if there are dissenting parties. In this way no one country can derail the DSB's decision.

The remedies available are based on a preference system. The most favored remedy is compliance. This is the least controversial method and requires no enforcement. If a country refuses to comply, then the DSU provides that the parties enter into compensation negotiations and the WTO Secretariat's office may assist them to make sure they are in conformity with the GATT agreements.¹¹⁴ However, the compensation remedy is a voluntary process that must be entered into with the agreement of both parties. Therefore, if the losing party is not complying and is refusing to enter into compensation negotiations,¹¹⁵ the prevailing party can proceed to the third remedy, which is the suspension of concessions or obligations that does not require the assent of the losing party.¹¹⁶ The complaining party may apply to the DSB for the establishment of a panel to rule on the appropriate suspension of concessions or obligations.¹¹⁷ The Secretariat will then nominate three individuals to compose this panel.¹¹⁸ This three-tiered approach to remedies may be a useful guide in the development of the enforcement provisions of the proposed dispute settlement mechanism.

Throughout the GATT's dispute resolution process a major concern has been to ensure that the panelists are not influenced by their respective governments. As a result of the above concern, panels established by the DSB's are not comprised solely of government officials but also include third party non-government experts. Neither government officials nor non-government experts may serve on a panel where they will be placed in the position of being citizens of a party to the dispute.¹¹⁹ Governments are, moreover, forbidden from attempt-

114. See Reitz, *supra* note 95, at 590.

115. Before proceeding to this third remedy, a complaining party must have been unable to solve a dispute through negotiations, or through the utilization of procedures provided by the DSU such as consultations, good offices, conciliation or mediation. See Aceves, *supra* note 98, at 439.

116. See Reitz, *supra* note 95, at 591.

117. Aceves, *supra* note 98, at 439.

118. See *id.*

119. DSU art. 8(3) (but creating an exception to this requirement where "the parties to the dispute agree otherwise").

ing to influence any of their citizens who are serving on a panel.¹²⁰ Additionally, parties are not permitted to object to panel nominees unless they have a "compelling reason."¹²¹ If any of the parties objects to these nominations and cannot agree within twenty days, then the DSU calls for the Director-General to choose the "most appropriate" panelists following consultations with the parties, the chairman of the DSB, and the committee or council handling the dispute.¹²² Having a supervising committee within the proposed dispute settlement mechanism of the Interim Agreement may be a necessary element, and the reasons will be discussed in that section.

Once the final panel is in place, the parties provide it with written reports and are given two opportunities to present oral argument.¹²³ As mentioned previously, the panel is empowered to look beyond the sources provided by the parties, as well as to consult its own experts.¹²⁴ Moreover, the panel must follow prescribed procedures which are in place to alleviate the concerns of politically motivated decision making.¹²⁵ Finally, the panel's deliberations are confidential until it issues its Interim Report.¹²⁶

This third stage in the remedy process, although not requiring assent, still embodies some of the pre-1994 GATT consensus ideology. The prevailing party has to submit its suggestions for suspension of concessions to the DSB. The DSB then considers whether to authorize a suspension of concessions or obligations.¹²⁷ Professor Curtis Reitz elaborated on this process and noted that:

When the DSB considers authorizing a suspension of concessions or obligations, the GATT 1947 consensus rule applies, not the new GATT 1994 consensus rule that applies to adoption of reports. If one member present at the meeting of the

120. *Id.* art. 8(9).

121. *Id.* art. 8(6). A compelling reason for an objection might include a party's belief that a panelist may be biased. See Rosine Plank, *An Unofficial Description of How a GATT Panel Works and Does Not*, 4 J. INT'L ARB. 53, 71 (1987).

122. DSU art. 8(7).

123. See Aceves, *supra* note 98, at 440.

124. See *id.*

125. See Michael K. Young, *Dispute Resolution in the Uruguay Round: Lawyers Triumph Over Diplomats*, 29 INT'L LAW. 389, 406 (1995). Young criticizes the procedural rules as being too weak.

126. See *id.*

127. See Reitz, *supra* note 95, at 592.

DSB formally objects to the DSB's granting authorization without arbitration, a consensus would be lacking and the DSB could not act beyond noting that it failed to reach a consensus. Since parties to a dispute are not disqualified from participation in DSB deliberations, the losing party can block the suspension proposed by the prevailing party.

Of the possible DSB actions, resort to the arbitration procedure is the course most likely to occur. Parties who have lost in the merits phase of cases will face considerable political pressure not to block DSB action on a motion to refer the action to arbitration.¹²⁸

Therefore, even though consensus is needed for a decision not to go to arbitration, it only goes to arbitration on the question of whether the recommended suspension of concessions is "equivalent to the level of nullification or impairment."¹²⁹ The parties must accept, and the DSB must approve, the results of this arbitration. The only way to block this decision is for the DSB to decide "by consensus not to adopt the report" of the arbitration panel.¹³⁰

Another change in the DSB is its authorization to establish an Appellate Body to hear appeals from panel reports.¹³¹ As one author points out, the Appellate Body's "report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the report within thirty days following its circulation to the DSB Members."¹³² The entire process, from the establishment of the panel, to the determination of the time frame for the implementation of the remedies, may not exceed fifteen months.¹³³

In order to increase enforcement under the DSU, the DSB has been empowered to conduct continuous surveillance of the losing party's compliance with the panel's decision. For exam-

128. *Id.* at 592 (citations omitted).

129. *Id.* at 593 (quoting DSU art. 22(7)).

130. Aceves, *supra* note 98, at 441.

131. *See id.*

132. *Id.*

133. *See id.* at 441-42 (noting that "[p]rompt compliance with recommendations and rulings of the DSB is essential to ensure the DSB's effective resolution of disputes. If it is impracticable to comply immediately with the DSB's recommendations and rulings, the Member State is granted a reasonable time in which to do so").

ple, the DSB now requires the losing party to submit a compliance time frame, and automatically approves unilateral decisions by the prevailing party to withdraw concessions approved by the panel if that time frame is not followed.¹³⁴ However, there are many critics of the withdrawal of concessions. For example, Professor Michael K. Young noted that:

[i]f the economic disparity between the disputants is great, this threat may be of relatively little significance to the offending country. Moreover, as economists often note, withdrawing concessions is the oddest sort of sanction because it frequently hurts the country enforcing the sanction almost as much as it hurts the country against which the sanction is imposed.¹³⁵

Additionally, Young observed that:

[t]he GATT does not provide for any concerted action against the offending party, [such as] expulsion from the GATT, or any other types of international sanctions that would genuinely ensure compliance [Thus] until the sanctions for non-compliance are enhanced, enforcement of rulings and recommendations will always remain somewhat problematic.¹³⁶

Further, the DSB is not empowered to take any action once a country has withdrawn from the WTO. As a result, every country has the ability to disregard the DSB's decisions, but as mentioned above, this disregard is at the cost of losing a crucial membership in the global economic order.

Although there are critics who claim that the DSB falls short of the enforcement necessary to make the process truly binding, most agree that the GATT and the global economic order, are steadily moving in the right direction and that the DSU is an improvement in the enforcement mechanism. Even critic Michael K. Young, acknowledged that:

On balance the changes generated by the Understanding are a clear step in the direction of creating a more coherent, consistent, comprehensive, and obeyed set of GATT principles and rules. The provisions of the Understanding appreciably increase the likelihood that GATT disputes will be more effi-

134. See Young, *supra* note 125, at 402-05.

135. *Id.* at 408.

136. *Id.*

ciently resolved and that the parties will enjoy more of the benefits for which they negotiated.¹³⁷

The discussion of the above international agreements will aid in the formulation of proposals of an enforcement mechanism for the Interim Agreement. It is first important to understand the Interim Agreement, since it is the governing agreement between the parties, as well as to understand the current problems which may constitute violations of the Interim Agreement.

III. THE INTERIM AGREEMENT

The current version of the Interim Agreement, which was signed in Washington, D.C., on September 28, 1995,¹³⁸ is another step in a series of negotiations that began with the 1978 Camp David Accord, where the issues of territorial autonomy and self-government of the West Bank and Gaza Strip were raised as identified goals.¹³⁹ These proposed negotiations were slow to begin because of the increasing hostilities between the parties and the reluctance of Israel to recognize the PLO as the official representative of the Palestinian people, as well as the matched reluctance of the PLO to recognize Israel as a state.¹⁴⁰ Nevertheless, Israel began secret negotiations with the PLO's leader Yasser Arafat which led to the Norway negotiations,¹⁴¹ and culminated with the Declaration of Principles in 1993.¹⁴²

Since the Declaration of Principles was signed in 1993, Israel and the PLO have continued negotiations and have implemented several steps, such as the Israeli military withdrawal from Gaza and Jericho in the summer of 1994,¹⁴³ as well as the election of a Palestinian Council on January 20, 1996. Although these steps complied with the Interim Agree-

137. *Id.* at 409.

138. Interim Agreement, *supra* note 1, at 29.

139. See A Framework for Peace in the Middle East Agreed at Camp David, Sept. 17, 1978, Isr.-Egypt, 1136 U.N.T.S. 196.

140. See Palestinian National Charter, *supra* note 27, at 709.

141. See Clyde Haberman, *How Oslo Helped Mold the Mideast Pact: The Secret Peace*, N.Y. TIMES, Sept. 5, 1993, at A1.

142. See Declaration of Principles, *supra* note 10.

143. See Agreement on the Gaza Strip and the Jericho Area, May 4, 1994, Isr.-P.L.O., 33 I.L.M. 622.

ment, the surrounding political situation, which was discussed previously, has led to economic decline in the territories.

A. *Is The Interim Agreement Binding?*

The first issue that emerges when discussing the Interim Agreement is that Israel and Palestine do not have equal recognition by international legal standards. Israel is a recognized state, while Palestine is only an autonomous territory. Although several autonomous regions have enjoyed equal rights under such prominent international treaties as the GATT,¹⁴⁴ the Vienna Convention on the Law of Treaties (Vienna Convention)¹⁴⁵ has codified the international norm that treaties are enforceable only if they are concluded between states.

Whether the current status of Palestine qualifies it as a state under international law is a matter of great debate.¹⁴⁶ Under the RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, in order to qualify as a state, Palestine must possess four basic qualities. These qualifications are: (1) a permanent population; (2) a defined territory; (3) government; and (4) capacity to enter into relations with other states.¹⁴⁷ Although Palestine has a defined territory, a population, and government, it lacks full capacity to enter into relations with other states.¹⁴⁸ Under the Interim Agreement it is evident that Israel clearly refuses to embody the territories with state status. Article 9 of the Interim Agreement specifically states that:

144. See *Hong Kong Joins GATT, Separate Membership to Continue Even Under Chinese Sovereignty*, 3 INT'L TRADE REP. (BNA) 581, 581 (1986) (reporting that "A GATT announcement April 23 said Hong Kong would be a full contracting party as a result of a British declaration to the GATT Secretariat under Article XXVI/5 (c) of the agreement. This article states that, if any colony acquires full autonomy, it shall be eligible for GATT membership as though it were an independent country").

145. Vienna Convention on the Law of Treaties, done May 23, 1969, art. 1, 1155 U.N.T.S. 331, 333 (entered into force Jan. 27, 1980) [hereinafter Vienna Convention].

146. See Jeffrey Weiss, *Terminating the Israel-PLO Declaration of Principles: Is it Legal Under International Law?*, 18 LOY. L.A. INT'L & COMP. L.J. 109, 126 (1995); see also RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 201 (1987) [hereinafter RESTATEMENT (THIRD)].

147. See RESTATEMENT (THIRD), *supra* note 146, § 201.

148. See Weiss, *supra* note 146, at 127 (observing that the Declaration of Principles "and subsequent agreements . . . limit control exercised by the autonomous PLO, and nullify any PLO authority to conduct international relations").

In accordance with the DOP, the Council will not have powers and responsibilities in the sphere of foreign relations, which sphere includes the establishment abroad of embassies, consulates or other types of foreign missions and posts or permitting their establishment in the West Bank or the Gaza Strip, the appointment of or admission of diplomatic and consular staff, and the exercise of diplomatic functions.¹⁴⁹

Thus, by the terms of their agreement, it appears that Palestine does not meet the qualifications needed to be recognized as a state under international law.

This Note assumes, for the above reasons and under the Vienna Convention, that the Interim Agreement is not fully enforceable by Palestine under international law. The Palestinian fear that they have entered into an unenforceable agreement has been the basis for the increasing distrust, insecurity, and the Palestinians' sense of being at the "mercy" of the Israeli government. Also, the Israeli delays and threats to change the Interim Agreement have fostered distrust in the international investment community because it is unclear which governmental authority will be responsible for overseeing the investment. For example, if a company enters into an investment contract with the PA under the beneficial terms of the Palestinian Investment Law, and, subsequently, the Israeli government decides to usurp Palestinian control, then the investor is left unsure if its contractual rights would be guaranteed by Israel. This investor insecurity could be rectified by establishing a dispute settlement panel, accessible to private parties, which could enforce the terms of the original contract regardless of Israeli intervention. This would off set the fear of investment in Palestine while not foreclosing Israel's ability to act for security reasons. The different types of dispute settlement arrangements, including the proposal of a limited jurisdiction for foreign investors, will be advanced later in this Note after the following elaboration on what has been currently agreed to in the Interim Agreement.

149. See Interim Agreement, *supra* note 1, art. 9(5).

B. Clauses in the Interim Agreement which Illustrate the Need for an Enforcement Mechanism

The Interim Agreement demonstrates that the Israeli government is not willing to diminish its control over Palestine. The Interim Agreement, like the Declaration of Principles, is an arrangement that will only be successful if the Parties act in good faith.¹⁵⁰

The constant shift in power within Israel further exacerbates the problem of enforceability being dependent on the goodwill of the parties, since any implementation of an added provision needs to be arrived at by mutual agreement. Article 21 of the Interim Agreement, which governs settlement of differences and disputes, calls first for negotiations between the parties¹⁵¹ and, second, for conciliation to be agreed upon between the parties.¹⁵² Where a dispute cannot be settled either through negotiation or conciliation, the Interim Agreement provides for the possibility of submission of a dispute to an Arbitration Committee.¹⁵³ However, this possibility is wholly contingent upon the agreement of both parties.¹⁵⁴ Article 26 of the agreement elaborates on the Joint Israeli-Palestinian Liaison Committee (Committee). It states that the Committee shall be made up of an equal number of members from each party, and that it should reach decisions by agreement. The Committee is also responsible for monitoring the implementation of the Interim Agreement.¹⁵⁵ The same language is found in the Economic Protocol with regard to the Joint Economic

150. For instance Weiss writes that:

the provision [in the DOP] requiring the negotiation of a final status arrangement leaves much "to the goodwill of the two Parties," and an agreement "is to a large extent contingent upon the future *political* attitude of the Parties and their continuing desire to come to terms and strike substantive deals on this intricate web of problems."

Weiss, *supra* note 146, at 130 n.106 (quoting Antonin Cassese, *The Israeli-PLO Agreement and Self-Determination*, 4 EUR. J. INT'L L. 564, 568 (1993)).

151. See Interim Agreement, *supra* note 1, art. 21(1).

152. See *id.* art. 21(2) (providing that "[d]isputes which cannot be settled by negotiations may be settled by a mechanism of conciliation to be agreed between the parties").

153. See *id.* art. 21(3).

154. See *id.* (providing that "[t]he parties may agree to submit to arbitration disputes relating to the interim period, which cannot be settled through conciliation. To this end, upon the agreement of both Parties, the Parties will establish an Arbitration Committee").

155. See *id.* art. 24(1), (2).

Committee, which is responsible for the implementation of the Protocol.¹⁵⁶ Although these references to cooperation and implementation exist in the Interim Agreement, there are no actual procedures beyond the aspirational language. These procedural voids can only be filled by the parties reaching a decision by "agreement,"¹⁵⁷ which means by consensus of both parties. As was discussed in the context of the GATT dispute settlement mechanism, the contracting parties abandoned most of the consensus based decision making because it was ineffective in bringing disputes to settlement.

Additionally, the Interim Agreement is steeped with vague generalized language. For example, Article 9(3), which governs industry within the Economic Protocol, states that "[e]ach side will *do its best* to avoid damage to the industry of the other side and will take into consideration the concerns of the other side in its industrial policy."¹⁵⁸ Because there is no neutral dispute settlement mechanism, each party is currently responsible for deciding what constitutes *doing its best*. This has enabled Israel to interpret the Interim Agreement broadly in order to continue its policies of separation and tight customs restrictions.

Nevertheless, several articles are very specific regarding obligations. For example, Article 15, entitled "Prevention of Hostile Acts," states that, "[b]oth sides shall take all measures necessary in order to prevent acts of terrorism, crime and hostilities directed against each other, against individuals falling under the other's authority and against their property, and shall take legal measures against offenders."¹⁵⁹ This article exemplifies the Israeli fear that when Israeli forces withdraw from the territories, the PA forces will not "take all measures necessary" in order to control the Palestinian people. This article further illustrates how the previously mentioned articles are not meant to be binding, since where Israel wanted the Interim Agreement to be binding, the agreement contains enabling language.

Additionally, Article 15 is a reiteration of Israel's right under international law to do whatever is necessary in the

156. See Economic Protocol, *supra* note 14, art. 2, 33 I.L.M. 697.

157. Interim Agreement, *supra* note 1, art. 24(4).

158. Economic Protocol, *supra* note 14, art. 9(3) (emphasis added).

159. Interim Agreement, *supra* note 1, art. 15(1).

name of security.¹⁶⁰ Jeffrey Weiss, who analyzed the legality of a full unilateral termination of the Interim Agreement, noted that although there may be international political circumstances for a termination, "[a]s a matter of international law, suspension or termination would be within Israel's rights."¹⁶¹ Therefore, any proposal for dispute settlement, no matter how binding, would never foreclose Israel from protecting its people in the case of a security threat.¹⁶²

IV. PROPOSALS FOR DISPUTE RESOLUTION MECHANISMS

The type of dispute settlement panel which should be established depends on the range of problems which Israel believes needs to be addressed and the amount of sovereignty it is willing to forego. Since Israel would be decreasing its sovereignty it could begin the process by agreeing to empower a DSB with limited jurisdiction and increase the DSB's jurisdiction as the parties become more economically interdependent.

A good starting point for Israel would be to subject itself to jurisdiction which will focus solely on strengthening the reliability of foreign investment in Palestine. One example might be recognition of causes of action which would enable only foreign investors to bring claims of infringements of their economic rights by Israel, such as those provided by ICSID. This type of jurisdiction would protect Israel from direct claims from Palestinians, since Palestine is not a member of ICSID, and since claims can only be brought by nationals of a contracting state. Additionally, by submitting to dispute resolution only claims with private parties, Israel is not reducing its sovereignty with regard to other states. Furthermore, although this type of arrangement may undermine several of Israel's policies as infringing on the ability to do business, it is unlikely to limit Israel's ability to respond in times of crisis, as mentioned

160. See Vienna Convention, *supra* note 145, art. 73 (The provisions of the Vienna Convention "shall not prejudice any question that may arise in regard to a treaty from a succession of States or from the international responsibility of a State or from the outbreak of hostilities between States").

161. Weiss, *supra* note 146, at 141.

162. As Henry Kissinger said, "Israel cannot commit suicide for the sake of clauses in an agreement." *Kissinger Sends Message to Nobel Prize Winners*, XINHUA NEWS AGENCY, Dec. 9, 1994, available in LEXIS, News Library, Wires File.

previously. Thus, since it is universally recognized that a country can act to protect its security,¹⁶³ Israel needs to reduce foreign investors' fears of losing the benefits guaranteed under the new Palestinian Investment Law in the event that Israel would need to take over the territories. It is essential for Israel to guarantee that any contract a foreign investor enters into with the PA would be honored by Israel.

Israel has two options with regard to ICSID. First, it can agree to submit all investment disputes under the Interim Agreement to the already established ICSID arbitration mechanism. Or, second, it can establish its own ICSID-type arbitration in a mutually agreed-upon location with Palestine, thereby making the whole dispute resolution more local. The second option is preferable because it would be a more visible sign that Israel is willing to subject itself to binding arbitration to further economic success in the territories. This type of jurisdiction would not only reduce the risk of foreign investment in Palestine, but may also motivate the Overseas Private Investment Corporation (OPIC) and other political insurance providers, to cover the border closings as a political risk. Currently, a foreign investor cannot receive any damages as a result of an Israeli border closing, but if an ICSID-type jurisdiction existed, Israel may have to pay damages if it continues this practice. Since under OPIC, and other similar insurance, an insured must first exhaust local remedies, and in this scenario an insured would have a possible remedy, OPIC, therefore, would be more inclined to include border closings in its insurance policy.

The next step on behalf of Israel would be to expand the limited jurisdiction to include the Palestinian private investors. This expansion is more difficult because it would result in a political challenge from the private sector. For example, a Palestinian private investor would most likely challenge the economic obstacles brought about by the border closures. This in essence is a policy challenge and, because it is made by a Palestinian, would likely bring up the issues of the Israeli-Palestinian conflict. However, Israel could maintain discretion over the types of disputes which can be brought before the panel, or have the ability to provide compensation if it wishes to continue a policy.

163. See Vienna Convention, *supra* note 145, art. 73.

The above suggestions have been limited to investment disputes and an ICSID-type jurisdiction. The following suggestions will incorporate the discussion in the previous sections of NAFTA, the GATT, and the EU's ECJ, in that order. A proposal fashioned after NAFTA will be discussed first because NAFTA has a comprehensive dispute settlement mechanism which has been arrived at with a minimal decrease in sovereignty. Following the NAFTA model is the GATT model, which provides for stronger enforcement, and consequently requires the parties to reduce their sovereignty to a greater degree. Finally, the ECJ will be discussed as a possible aspirational model for the formation of a bilateral judiciary, and eventually a Middle Eastern court system.

A possible starting point for a comprehensive dispute model is one fashioned after NAFTA, where jurisdiction would encompass disputes between the PA and the Israeli government. Those disputes would be settled by arbitrators rather than a formal dispute settlement body. This arbitration model seems more likely to be adopted as an initial measure since Israel has already agreed to consider arbitration in the Interim Agreement's Article 21(3). As Article 21(3) provides, "[t]he Parties may agree to submit to arbitration disputes relating to the interim period, which cannot be settled through conciliation."¹⁶⁴ Consequently, Israel could modify the language to read that the parties have agreed to submit to arbitration.

Initially this model could be limited to conflicts which may be in violation of the Interim Agreement's Economic Protocol. However, regardless of how limited the original jurisdiction is, Israel should agree to a procedural time frame, such as the NAFTA time frame discussed in Part II.B. Further, this procedure would include the panel selection process, which under NAFTA is limited to each party choosing two citizens from the opposing party's list of nominees, and agreeing on the panel's chairman.¹⁶⁵ Additionally, it is important that the identity of those panel members siding with a majority, or a minority, decision be kept confidential. This will make it more difficult for a party to complain that a majority of the panel merely voted according to national interests.

164. Interim Agreement, *supra* note 1, art. 21(3).

165. See NAFTA, *supra* note 6, art. 2011(1), 32 I.L.M. 696.

Moreover, a structure similar to NAFTA would mean that the enforcement of the dispute is left to the parties, Israel would be subjecting itself to a self-monitoring system, rather than a situation involving a third party. Because this model calls for self-monitoring, it must include such NAFTA remedies as compensation and suspension of benefits of equivalent effect.¹⁶⁶

Currently, the suspension of benefits may hurt Palestine more than Israel, since it is the weaker economy. However, as the Palestinian economy grows and Israel increases its trade with Palestine, Israel would have more to lose by non-compliance. Moreover, as Gary Horlick noted, the acceptance of trade sanctions is:

not giving up your sovereignty; . . . [but] in effect saying "I can reject what this international process decides, if I am willing to pay a price in trade sanctions by retaliation against my own goods." So the acceptance of trade sanctions is a maintenance of sovereignty, it is "I am willing to pay a price to stay sovereign."¹⁶⁷

Also, just as it is in the United States' interest to have a prosperous Mexico as its neighbor, it is in Israel's best interest to create a prosperous Palestine, which would be a market for Israeli products. Additionally, as the Palestinian economy grows, Israel's interest in its own investments would be protected by an already established dispute settlement mechanism.

A further step that could be taken by Israel is submission to a GATT-type DSB. This DSB could be empowered with jurisdiction over disputes arising under the entire Interim Agreement. Thus, it could respond to such questions as: whether an Israeli security policy that is effecting trade is in violation of the security provisions of the Interim Agreement, as well as a barrier to full implementation of the Economic Protocol. It could also enable Israel to submit several claims of Palestinian violations which have decreased Israel's faith in the Palestinian commitment to the Interim Agreement. For example, Israel may argue that the following violations are a mate-

166. *See id.* arts. 2018(2), 2019(1), 32 I.L.M. 697.

167. Horlick, *supra* note 73, at 60.

rial breach of the Interim Agreement under the principle *pacta sunt servanda*, espoused in Article 26 of the Vienna Convention.¹⁶⁸ "failure to amend the PLO's Charter; failure to act to prevent violence against Israelis; arming of nonauthorized forces; failure to enforce prohibitions against unauthorized possession of weapons; failure to refrain from hostile propaganda against Israel; and unilateral enactment of legislation within the autonomous regions."¹⁶⁹ Israel could then argue that it is not in violation of the Economic Protocol since its primary concern, and threshold level of self-defense, has not been met. If Israel receives a decision that orders Palestine to make the above changes, the hostilities of the Palestinian people would be transferred from Israel to the DSB, which would ultimately reduce the existing tensions. Conversely, if Israel is required to comply with an order, such as to find alternatives to border closures, it would not reflect adversely on the current government.

The enforcement mechanism of this DSB panel would be similar to GATT's DSB and, thus, would enable the parties to: first, comply with the decision; second, to voluntarily enter into a compensation agreement; or third, to request a suspension of concessions. However, as mentioned previously, compensation agreements are voluntary and therefore may not be implemented. Moreover, the current effect of a Palestinian suspension of concession on Israel would be minimal. For example, in the case of the border closures, Israel has adapted to its own closures by replacing the Palestinian labor force with recent Russian immigrants. Furthermore, trade sanctions against Israel would hurt the Palestinian businesses which rely on exports to Israel. Thus, this more expanded jurisdiction should be implemented at a stage when Israel has increased its investment in Palestine. At that stage, a GATT-type surveillance mechanism will be in the best interests of both parties.¹⁷⁰

Finally, the identity of the panelists is a crucial element when considering the formation of the DSB panel. Since this

168. See Vienna Convention, *supra* note 145, art. 26 (agreeing that "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith").

169. Weiss, *supra* note 146, at 136.

170. This Note assumes that Israel will be increasing its investment in Palestine as part of its commitment to greater economic reciprocity, as set forth in the Economic Protocol, *supra* note 14, Preamble.

DSB would be making decisions concerning the entire Interim Agreement and possibly survey the losing party's compliance, the presence of a neutral third party will be extremely important. Without a neutral third party the panel may be deadlocked on crucial issues. This is particularly important since if there was a majority of either country on the panel, the results may be attributed to the national interests of the panelists, thereby providing the losing party with an argument that the decision should not be binding. Even if the decision would be arrived at in secrecy, like in NAFTA, the losing party could easily assume that it lost because it lacked the vote of the opposing country's representative. Thus, to avoid these suspicions there needs to be a neutral third party, meaning a non-citizen of Israel or Palestine.

The idea of a neutral third party is not foreign to Israel in the context of solving local disputes. Israel has already agreed to the involvement of a neutral third party under the Treaty of Peace with Egypt.¹⁷¹ Under that treaty, during a boundary dispute which the parties agreed to arbitrate,¹⁷² one panelist was a national of Israel, another was a national of Egypt, and three panelists were nationals of other countries. The involvement of foreigners helped achieve the neutrality needed in the panel and increased the probability of compliance. In fact, Israel, the losing party, did comply with the panel's decision even though it was strongly opposed to the results.

Another element that may increase compliance with panel decisions, either under the NAFTA or GATT models, is for the panel to issue an interim report, giving the parties a chance to express their views and objections. This interim opportunity has been found to decrease the parties' reluctance to comply, and is the reason why both NAFTA and GATT adopted these measures.

The final model for consideration is that of the ECJ. The establishment of a bilateral court system would be a very strong message that Israel views this process as a long-term solution. This Israeli-Palestinian court could start with responsibility over selected parts of the Interim Agreement as men-

171. Treaty of Peace Between the Arab Republic of Egypt and the State of Israel, Mar. 26, 1979, Egypt-Isr., 18 I.L.M. 362.

172. See Agreement to Arbitrate the Boundary Dispute Concerning the Taba Beachfront, Sept. 11, 1986, Egypt-Isr., 26 I.L.M. 1.

tioned above. The establishment of a judicial mechanism would initiate an interpretation of the law as it applies to the special circumstances of the area. This court's jurisdiction could expand proportionately to Israel's reduction of sovereignty and could ultimately reach such broad jurisdiction as granting individuals a cause of action, as was accomplished within the context of the ECJ's holding in the *Francovich & Bonifaci* case.¹⁷³

The most far reaching goal would be for the region to form a Middle Eastern Court of Justice, modeled after the ECJ, which would establish its own Middle Eastern legal process. This step would be a recognition by the Middle Eastern countries that the security benefits of forming a union outweigh the losses associated with the decrease of sovereignty. Although these goals seem difficult to accomplish in view of the current hostilities, they are possible if incremental steps are followed.

V. CONCLUSION

This Note recognizes the immense historical obstacles that are facing the Israelis and Palestinians in their goal of achieving peace. Nevertheless, whether Israel sees the Interim Agreement as a process creating an autonomous region, or whether Israel is resigned to full Palestinian sovereignty over the West Bank and Gaza, the importance of a peaceful resolution of disputes is unquestionable. Because this conflict is so deeply rooted, and forged over many centuries, it is unlikely that long-term solutions could happen with great strides. Rather, it is better to have a plan which will gradually evolve in stages. As was discussed above, the rational progression of this body's jurisdiction should be from limited jurisdiction over investment disputes, to disputes over the Interim Agreement's Economic Protocol, and eventually to disputes over the entire Interim Agreement. Ultimately, the jurisdiction could expand to include disputes arising under an Israeli-Palestinian final accord. If the parties commence final status negotiations before implementation of the Interim Agreement, as was recently proposed by the Netanyahu government,¹⁷⁴ they must include a dispute settlement mechanism in order for the final accord to

173. See Reichenberg, *supra* note 62, at 70-71.

174. See Schmemmann, *supra* note 16, at A6.

be successful. This Note submits that the same gradual increase in the DSB's jurisdiction, as was recommended for the Interim Agreement, would be appropriate for a final peace accord. However, unless these two adversaries learn to settle their disputes through peaceful resolution, they are destined to resort to the form of resolution which has been utilized: violence.

This Note, which has made a comparative analysis of other multilateral agreements and their dispute resolution mechanism, is not solely to motivate Israel to enter into a binding dispute resolution, but also to highlight the importance of regional agreements. Although the proposal of a regional trade agreement is beyond the scope of this Note, it is a union Israel should strive to help organize. The formation of the EU illustrates the conceptual shift from resorting to punishment and retribution, as was the model during the Versailles Peace Accord, to embracing cooperation and economic integration in order to maintain security and stability. Therefore, an economically interdependent regional agreement could serve to bind the Middle East out of a desire to reduce the high regional security concerns.¹⁷⁵ Further, an effective dispute settlement mechanism is not only an essential step for the Interim Agreement, but also an essential factor in improving needed regional peace and eventually effectuating a system of Middle Eastern unity.

Jasmine Jordaan

175. As one commentator noted:

[B]ilateral deals on borders, security cooperation and the non-use of force are the most practical legal documents. They achieve European reunification. They settle border disputes. They neutralize potential military threats. They are not held hostage to the consensus or participation of a multitude of governments. But in the end, the bilateral agreements are band-aids. They are not the stuff of collective security.

Symposium, *International Law and Collective Security: Excerpts From the 1991 Friedmann Conference*, 29 COLUM. J. TRANSNAT'L L. 487, 536 (1991).

