

Kluwer Arbitration Blog

What Palestinian Statehood May Mean for Foreign Investors in Palestine

John Balouziyeh (Dentons) · Tuesday, June 18th, 2013

Resolution A/67/L.28 on the Status of Palestine at the United Nations was passed with an overwhelming majority at the General Assembly on November 29, 2012, thus upgrading the Palestinian Authority's status from a United Nations permanent observer entity to a non-member observer State. Although the Resolution does not necessarily mean that all States, such as Israel and others that voted against it or abstained, must recognize Palestinian Statehood, it does mean that Palestine will have access to various United Nations agencies and will be recognized as a sovereign State by most nations. Resolution A/67/L.28 may thus foreshadow future treaties to be signed between Palestine and other States and indicate a shift in the options available to foreign investors looking to resolve commercial disputes in Palestine.

A. Protecting Foreign Investment: Current Practices

States have traditionally recognized the importance of foreign direct investment and simultaneously sought to ensure the protection of their own investors in foreign nations. States have thus negotiated and ratified bilateral and multilateral treaties in order to promote and attract foreign investment by guaranteeing foreign investors access to fair and impartial mechanisms for dispute resolution.

A current trend in such treaties is to allow investors of one State to bring claims directly against the government of another State before an international arbitration tribunal, allowing investors to bypass local remedies, which may otherwise be skewed against foreign parties. Investors are thereby permitted to initiate a claim against a State under mutually agreed-to arbitration rules, such as those issued by the United Nations Commission on International Trade Law ("UNCITRAL") or the International Centre for Settlement of Investment Disputes ("ICSID").

B. The Unique Context of Palestine

Israel and Palestine are each among the other State's largest trade partners, with nearly US \$5 billion traded between the two partners annually. What this means is that a strong and continuous link between Israeli and Palestinian businesses occurs every day. However, unlike investment between sovereign nations, there is currently no foreign investment protection treaty in place between Israel and Palestine. Unlike the case of disputes that arise within the context of foreign investment amongst other nations, Israel does not recognize Palestinian Statehood and thus has no formal diplomatic relations or bilateral treaties with Palestine.

Moreover, unlike the case of disputes that arise between two parties situated within a domestic context, Israeli and Palestinian companies do not each have equal access to one another's courts. It can be difficult for Palestinian companies to participate in Israel-based judicial proceedings. Israeli companies may have difficulty in enforcing judgments in Palestinian territories, and vice versa. Moreover, the Israeli courts are sometimes perceived by Palestinians as biased. These are among the classic problems that have spurred many States to ratify foreign investment protection treaties, but such a solution will remain unachievable in the case of Israel and Palestine, unless Israel recognizes Palestine as a sovereign State and formal diplomatic relations are established.

C. Will Resolution A/67/L.28 Have Any Impact on Foreign Investment in Palestine?

1. Overview

Some might argue that Palestine has become a State by default, given the issuance of Resolution A/67/L.28 at the United Nations. However, the issue is not so simple. Resolution A/67/L.28 enters into a complex and unsettled question of international law: At what point does an entity achieve sovereignty as an independent State within the international community? Although the distinction has narrowed recently, there are two theories that provide guidance: (i) the declarative theory; and (ii) the constitutive theory.

2. The Declarative Theory

The declarative theory is the prevailing theory for the recognition of State sovereignty. It holds that an entity becomes a State when it satisfies the following objective criteria for Statehood, which were laid down in article 1 of the Montevideo Convention of on the Rights and Duties of States (1933): (i) permanent population; (ii) defined territory; (iii) effective government; and (iv) capacity to enter into relations with other States.

There is a great deal of controversy as to whether Palestine meets these criteria. In addition to the question of Palestine's "defined territory," the element that faces the most objection is the question of effective government. Given the rift between *Fatah* and *Hamas*, many critics argue that there is no Palestinian government with effective and consolidated control over all of Palestine's territory.

3. The Constitutive Theory

Yet even if Palestine were not to meet the elements of the declarative theory test, it may qualify for Statehood under the constitutive theory, which holds that an entity is a State if recognized as such by the international community. "Recognition" refers to the formal acknowledgement by other States that an entity is a State. The vote of the General Assembly, while not having *per se* legal force, will demonstrate the extent to which Palestine Statehood holds the support of the international community. The Resolution is thus instrumental in determining whether Palestine has achieved Statehood under the constitutive theory.

4. Will the General Assembly Vote Change the On-the-Ground Situation?

Many commentators have rightfully pointed out that despite Resolution A/67/L.28, the on-the-ground situation in Palestine will remain largely unchanged. For example, Israel, which will not recognize Palestine as an independent State, will continue to occupy the West Bank. Nations that opposed or abstained from Palestine's Statehood vote will refuse to recognize Palestine as a State or recognize Palestinian diplomatic missions or consulates.

However, there is one important consequence that Resolution A/67/L.28 will have: some of the nations that voted for the Resolution will likely enter into diplomatic relations with Palestine. This

means more than just recognizing Palestinian diplomatic missions; it likely means ratifying treaties with Palestine, setting up trade missions and, perhaps also, ratifying treaties establishing alternative dispute resolution mechanisms to protect foreign investors in Palestine.

This latter development is perhaps what is most needed between Palestine and Israel, given the abundant bilateral trade between Israel and Palestine, which contrasts the scarce options available for effectively resolving disputes. The irony in this lies in the fact that the businesses that most need an investment protection treaty will not benefit from the Resolution, since to date, Israel does not recognize Palestinian Statehood.

D. Solutions Implemented by Spontaneous Civil Society Initiatives

It is often the case that where governments fail to break through an impasse, civil society spontaneously implements the solutions. Such has been the case of alternative dispute resolution between Israeli and Palestinian companies. Oren Shachor, a retired Israeli military general and head of the International Chamber of Commerce of Israel, and Samir Hulleileh, chief executive of a large Palestinian conglomerate, recognized the need for a neutral dispute-resolution mechanism between Israeli and Palestinian companies. Their initial encounters focused on meeting a challenge that Israeli and Palestinian businesses faced. These early encounters, through much perseverance, transformed into an initiative known as the Jerusalem Arbitration Center. The Center, which began operations this year, aims to nurture the peaceful resolution of commercial disputes through a neutral and independent forum to serve Palestinians and Israelis.

Unless Palestine achieves recognition by Israel as a sovereign State, and treaties are concluded to ensure fair judicial mechanisms for resolving commercial disputes between Israeli and Palestinian companies, it is civil society initiatives such as the Jerusalem Arbitration Center that will provide the best chance for the peaceful resolution of commercial disputes.

E. The Jerusalem Arbitration Center: A Glimmer of Hope

What is remarkable about the Jerusalem Arbitration Center is that, in the words of [Professor Catherine Rogers](#) of Penn State Law, it is “seeking to bring peaceful dispute resolution to disputants from jurisdictions that are openly hostile to each other and that lack formal diplomatic relations.” The Center, despite a host of legal and logistical challenges, including chilled relations between the Israeli and Palestinian governments, provides a glimmer of hope in a land marked by conflict.

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