

2013

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Recommended Citation

Berzak, Joshua (2013) "The Palestinian Bid for Statehood: Its Repercussions for Business and Law," *Journal of International Business and Law*: Vol. 12: Iss. 1, Article 6.

Available at: <http://scholarlycommons.law.hofstra.edu/jibl/vol12/iss1/6>

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THE PALESTINIAN BID FOR STATEHOOD: IT'S REPERCUSSIONS FOR BUSINESS AND INTERNATIONAL LAW

*Joshua Berzak**

INTRODUCTION

The purpose of this note is to analyze the potential impact of the Palestinian Authority's bid for membership into the United Nations on international business. Over the course of the past six decades, much has been written about the Palestine Authority's legitimacy as an independent nation as defined by international law. Debate has ranged between those who have argued Palestine's accordance with the requirements for statehood, and those who have vehemently denied statehood for the Palestinians. This note examines how the impact that a bid for membership in the United Nations, and a claim to statehood, will potentially affect Palestine's economic environment. Palestine's economy is substantially supported by foreign aid. Yet, there are repercussions to Palestinian statehood that could allow its economy to grow exponentially with varying effects on international business.

The Arab Spring, a revolutionary wave of demonstrations and protests in the Arab world, has led to a reawakening in the aggressive pursuit by Palestinians for statehood. The Palestinian Authority, an administrative body representing the Palestinian people, has gone against years of negotiations between Israel and itself by acting unilaterally in an effort to achieve their long anticipated goal of independent statehood that has stalled under said negotiations. The Palestinian Authority has officially announced their intent to bid for United Nations membership as part of an effort to be legally accepted as a state by the international community. Palestine's bid for statehood has gained worldwide attention, with legal analysts and media outlets airing their opinion on the hottest topic currently in international law.

First, Section I briefly introduces the historical and contextual background surrounding the Palestinian's status. Section II analyzes the United Nations Charter's requirements and processes of application for membership and non-member state permanent observer status, as well as the likelihood of success of Palestine's bid for membership. Section III presents the requirements for statehood pursuant to the declaratory theory of state recognition, and applies said theory to Palestine's bid. This section also provides an analysis as to why recognition alone does not equate statehood. Section IV analyzes what the consequences will be if the Palestinian Authority achieves statehood, is admitted to U.N. membership, or achieves non-member state permanent observer status. Lastly, Section V examines the impact of statehood on international business emanating from a successful statehood claim by the Palestinian Authority.

I. A Brief Historical and Contextual Background to the Palestinian Statehood Status

* J.D. Candidate, 2013, Maurice A. Deane School of Law at Hofstra University. I would first like to thank Professor James E. Hickey for helping me select this topic and providing extraordinary guidance throughout the writing process. I too would like to thank my family, my parents and sister, for their resolute support and encouragement throughout the writing and editing process. I would like to specifically thank my father, Robert A. Berzak, whose humor and belief in me has provided levity over the course of my law education. Finally, I would like to thank the staff of the *Journal of International Business & Law*, especially Garabet Badrajan, for giving me this opportunity and their excellent work in preparing this Note for publication.

The territory of Israel and the autonomous territory given to the Palestinians is home to many sites deemed sacred to the world's three great religions.¹ Jerusalem alone, called by many the "holiest city in the world", is home to such structures as the Dome of the Rock, the al-Aqsa Mosque, the Western Wall of the Temple Mount, and the Church of the Holy Sepulchre.² Both Palestinians and Israelis claim Jerusalem to be their own true capital since the beginning of time.³ Thus, it is of no surprise that said territory has been a center of dispute for centuries.

As far back as the early years of the 20th century, Palestine was becoming a trouble spot of competing territorial claims and political interests and, during World War I, Great Britain took control over much of the territory by mandate.⁴ A "partition plan" to divide Palestine into separate Jewish and Arab states was brought up in 1937.⁵ However, the Arabs and the Zionists rejected this plan as the Arabs would not accept the formation of a Jewish state and the requirement that some Palestinians live under "Jewish domination," while the Zionists believed that the boundaries would confine the Jewish state to little more than a ghetto.⁶ Ultimately, the United Nations stepped in and sought to work out an agreement that would be acceptable to both parties.⁷ In November of 1947, a United Nations proposal called for leaving Jerusalem as an international city, however this proposal was rejected by Palestinians and several Arab states.⁸ Despite this, Jewish immigration continued into Palestine and, as a result of the Palestinians resistance to this immigration, tension between the Jews and Arabs had reached a boiling point.⁹ On May 14, 1948, on the day in which the British Mandate over Palestine expired, the Jewish People's Council gathered and proclaimed the establishment of the State of Israel.¹⁰ This proclamation was not well received by neighboring Arab nations, who invaded "the new State" in an act of support of the Palestinian Arabs, resulting in the 1948 Arab-Israeli War.¹¹

Israel attained victory in under a year, cementing the establishment of the State of Israel.¹² More importantly, the Israeli government was able to establish their state on 77% of

¹ *Palestine's Holy Sites*, SALAAM, http://www.salaam.co.uk/themeofthemonth/may02_index.php?l=2 (last visited Nov. 2, 2011) [hereinafter, *Holy Sites*].

² *Id.*

³ *Committee on Jerusalem and Holy Sites*, YALE ACCORDS RESEARCH, <http://www.yale.edu/accords/jerusalem.html> (last visited Nov. 2, 2011) [hereinafter, *Committee on Jerusalem*].

⁴ *The British Mandate in Palestine*, MIDDLE EAST RESEARCH AND INFORMATION PROJECT, http://www.merip.org/palestine-israel_primer/brit-mandate-pal-isr-prime.html (last visited Oct. 29, 2011).

⁵ Mitchell Bard, *The Partition Plan*, JEWISH VIRTUAL LIBRARY, http://www.jewishvirtuallibrary.org/jsource/History/partition_plan.html (last visited Nov. 3, 2011) [hereinafter, *The Partition Plan*].

⁶ *Id.*

⁷ *Id.*

⁸ *Committee on Jerusalem*, *supra* note 3.

⁹ See generally Baylis Thomas, *How Israel Was Won: A Concise History of the Arab-Israeli Conflict*, 11 PAL. Y.B. INT'L L. (Kluwer L. Int'l) 391, 392 (2000-2001).

¹⁰ *The Declaration of the Establishment of the State of Israel*, ISRAEL MINISTRY OF FOREIGN AFFAIRS, (May 14, 1998), <http://www.mfa.gov.il/MFA>

(follow "Peace Processes" to "Guide" hyperlink; then follow "establishment in 1948" hyperlink in text).

¹¹ See Thomas, *supra* note 9, at 392.

¹² *Id.*

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the disputed territory and force 85% of the Palestinian Arabs out of Israeli land, 70% of which became refugees in neighboring Arab states.¹³ These refugees were refused re-entry into Israeli land, and their homes were used to house Jewish immigrants.¹⁴ Furthermore, Jordan and Egypt occupied the remaining 23% of Palestinian territory.¹⁵ Specifically, Jordan occupied East Jerusalem and the West Bank, while Egypt took control over the Gaza Strip. In 1949, the United Nations General Assembly passed a resolution accepting Israel as a member into the United Nations, further establishing them as a state on the international stage.¹⁶

In 1967, the region erupted in what is known as “The Six Day War,” primarily involving Israel, Syria, Egypt, and Jordan.¹⁷ Israel was victorious once again, capturing the territories previously occupied by Jordan and Egypt after the First Arab-Israeli War.¹⁸ Jewish settlements were quickly established in these newly acquired territories, pushing Palestinians even further out from the land they had for centuries called home.¹⁹ With no territory to speak of, the Palestinian community was dispersed across several Middle Eastern nations. However, even though the attempt to establish a Palestinian state proved fruitless, the Six Day War still had a positive consequence for Palestinians.²⁰ As a result of the Six Day War, the Palestinian national movement emerged as a major actor via the political and military groups that made up the Palestine Liberation Organization (“PLO”).²¹

The PLO was founded with the purpose of representing the Palestinian Diaspora as an umbrella organization for the Palestinian political movements.²² The PLO created “The Palestine National Charter,” a declaration of Palestinian identity and sovereignty, with the expressed goal of establishing a sovereign Palestinian state.²³ The PLO “is comprised of numerous organizations of the resistance movement, political parties, popular organizations, and independent personalities and figures from all sectors of life.”²⁴ In 1974, the collective Arab nations designated the PLO as the “sole legitimate representative” of the Palestinian people, and reaffirmed their right to establish an independent state.²⁵ Following from this

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *The United Nations Partition Plan*, MIDDLE EAST RESEARCH AND INFORMATION PROJECT http://www.merip.org/palestine-israel_primer/un-partition-plan-pal-isr.html (last visited Oct. 29, 2011).

¹⁶ See Admission of Israel to Membership in the United Nations, G.A. Res. 273 (III), U.N. Doc. A/RES/273(III) (May 11, 1949).

¹⁷ *The June 1967 War*, MIDDLE EAST RESEARCH AND INFORMATION PROJECT, http://www.merip.org/palestine-israel_primer/67-war-pal-isr-primer.html (last visited Nov. 2, 2011) [hereinafter, *1967 War*].

¹⁸ *Id.*

¹⁹ See Sam Blumenfeld, *The Israeli Settlements and Palestinians*, THE NEW AMERICAN, Nov. 10, 2011, <http://thenewamerican.com/reviews/opinion/item/10888-the-israeli-settlements-and-palestinians>.

²⁰ See *History of Palestine IV*, SALAAM, http://www.salaam.co.uk/themeofthemonth/may02_index.php?l=11 (last visited Nov. 3, 2011) [hereinafter, *Palestine IV*].

²¹ *1967 War*, *supra* note 17.

²² The Reut Institute, *Palestine Liberation Organization (PLO)*, <http://reut-institute.org/en/Publication.aspx?PublicationId=685> (last updated Sept. 3, 2006).

²³ See Palestine Liberation Org. [PLO], *The Palestine National Charter*, (June 17, 1968) available at <http://www.un.int/wcm/content/site/palestine> (follow “PLO” hyperlink on left side of page; then follow “Palestine National Charter” hyperlink; then follow “Palestine National Charter of 1968” hyperlink).

²⁴ *Introduction*, PERMANENT OBSERVER MISSION OF PALESTINE TO THE UNITED NATIONS, <http://www.un.int/wcm/content/site/palestine/pid/12003> (last visited Nov. 28, 2011) [hereinafter, *Introduction*].

²⁵ MADIHA RASHID AL MADFAL, JORDAN, THE UNITED STATES AND THE MIDDLE EAST PEACE PROCESS, 1974–1991 21 (Roger Owen et al. eds., Cambridge University Press, 1993).

recognition, the PLO was recognized by the majority of the international community, as the sole legitimate representative and was ultimately granted observer status by the United Nations General Assembly resolution.²⁶ The resolution, *inter alia*, invited the PLO to participate in the sessions and the work of the General Assembly, and partake in the international conferences convened under its auspices, in the capacity of observer.²⁷ The resolution also provided that the PLO is entitled to participate as an observer in the sessions and the work of all international conferences convened under the purview of other organs of the United Nations.²⁸

In 1988, the PLO adopted the Declaration of Independence of Palestine, proclaiming the new State of Palestine.²⁹ As an acknowledgment of the declaration, the United Nations upgraded the observer seat of the PLO, according it the designation "Palestine," without explicitly referring to it as a state.³⁰ However, this is as close to membership in the United Nations, or recognition as a state, that Palestine has been accorded.³¹ Palestine has not proactively sought membership status in the United Nations since the late 1980s. With Palestine's long and arduous past efforts to attain statehood, it is no longer restricting its push for recognition to individual nations, but rather undertaking what Palestinian leaders are refer to as "Plan B."³² Plan B represents "a multifaceted approach to achieving recognition of a Palestinian State from four major international bodies: the U.N. Security Council, the U.N. General Assembly, the International Court of Justice (ICJ), and the International Criminal Court (ICC)."³³

II. United Nations Charter Requirements for United Nations Membership and Non-member State Permanent Observer Status

A. United Nations Membership

Article 4 of the United Nations Charter³⁴ provides that: "Membership in the United Nations is open to all other peace-loving states which accept the obligations contained in the

²⁶ See Observer status of the Palestinian Liberation Organization, G.A. Res. 3237 (XXIX), U.N. Doc. A/RES/3237(XXIX) (Nov. 22, 1974).

²⁷ *Background on Observer Status at the UN*, PERMANENT OBSERVER MISSION OF PALESTINE TO THE UNITED NATIONS, <http://www.un.int/wcm/content/site/palestine/pid/11550> (last visited Nov. 1, 2011) [hereinafter, *Observer Status at the UN*].

²⁸ *Id.*

²⁹ *Id.*

³⁰ See *Id.* By referring to the PLO as Palestine, the United Nations is inferring its likeness to a state despite it only holding observer status.

³¹ QUIGLEY, JOHN B., *PALESTINE AND ISRAEL* 230 (1990).

³² Adam G. Yoffie, *The Palestine Problem: The Search for Statehood and the Benefits of International Law*, 36 *YALE J. INT'L L.* 497, 499 (2011).

³³ *Id.*

³⁴ In October of 1943, the United States, Russia, Great Britain, and China met in Moscow in an attempt to create a world in which "men in all lands may live out their lives in freedom from fear and want." *History of the Charter of the United Nations*, THE UNITED NATIONS <http://www.un.org/aboutun/charter/history/moscowteheran.shtml> (last visited Oct. 30, 2011). The resulting "Moscow Declaration" would provide a definition for the basis of a world organization that could further their aforementioned goal. *Id.* The "Joint Four-Nation Declaration," one of the four separate parts comprising the

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present Charter and, in the judgment of the Organization, are able and willing to carry out these obligations.”³⁵ Thus, there are four requirements for membership: the applicant (1) must be peace-loving; (2) must be a State; (3) must accept and respect the obligations of the Charter; and (4) must be able and willing to undertake the obligations of the Charter.³⁶

The requirement that the applicant nation must accept and respect the obligations of the Charter, including the obligation to neither threaten nor infringe on the sovereignty of another nation, is objectively ascertainable.³⁷ Specifically, the requirement is objectively ascertained by a required declaration by the applicant nation, made in a formal instrument, that it accepts the obligations contained in the Charter.³⁸ The condition that the applicant nation be a State can be objectively ascertained as well, but through criteria provided by the Montevideo Convention on the Rights and Duties of States.³⁹

Meanwhile, the remaining two requirements are not objectively ascertainable.⁴⁰ Rather, according to Rule 60 of the Rules of Procedure of the Security Council and Rule 125 of the Rules of Procedure of the General Assembly, the answers to the questions as to whether an applicant nation is peace-loving or is able and willing to carry out the obligations contained in the Charter depends on the discretion of the U.N. Security Council and the General Assembly, respectively.⁴¹ Thus, the admission of new members into the United Nations is ultimately at the judgment of those already M=members of the United Nations Organization.⁴²

Article 4, paragraph 2, sets the process for an applicant nation to be accepted as a member of the United Nations.⁴³ “The admission of any such state to membership in the United Nations will be effected by a decision of the General Assembly upon the

Moscow Declaration, provided that the four nations “recognize the necessity of establishing at the earliest practicable date a general international organization, based on the principle of the sovereign equality of all peace-loving states, and open to membership by all such states, large and small, for the maintenance of international peace and security.” The Joint Four-Nation Declaration, U.S.-China-Gr. Brit.-Russ., Oct. 30, 1943, <http://avalon.law.yale.edu/wwii/moscow.asp>. The formulation of the plans for such an organization took place over several years and several conferences, culminating at the San Francisco Conference in 1945 where, upon the basis of proposals prepared by the four sponsoring nations, the United Nations Charter was drafted. PHILLIPE SANDS & PIERRE KLEIN, *BOWETT’S LAW OF INTERNATIONAL INSTITUTIONS* 22 (6th ed. 2009). As such, the United Nations Charter was heavily influenced by the terms and ideas present in the Joint Four-Nation Declaration. *See generally* U.N. Charter.

³⁵ U.N. Charter art. 4, para. 1.

³⁶ *Id.* Per the International Court of Justice, these conditions must be regarded not merely as the necessary conditions, but also as the conditions that suffice, and thus these elements are all that is required of an applicant for membership.

³⁷ HANS KELSEN, *THE LAW OF THE UNITED NATIONS* 67 (7th ed. 2008).

³⁸ U.N. SEC. COUNCIL, *PROVISIONAL RULES OF PROCEDURE OF THE SECURITY COUNCIL*, at 10, U.N. Doc. S/96/Rev.7, U.N. Sales No. E.83.I.4 (1983).

³⁹ Montevideo Convention on Rights and Duties of States, Dec. 26, 1933, 49 Stat. 3097, T.S. 881. However, it should be noted that the United Nations has a history of bending the rules to suit their interests and have granted membership to entities that do not yet meet the criteria of the Montevideo Convention. Thus, how objective the second requirement is depends on the United Nations’ strict interpretation of the Montevideo Convention.

⁴⁰ KELSEN, *supra* note 37, at 67.

⁴¹ *Id.*

⁴² *See id.* In sum, membership into.

⁴³ U.N. Charter art. 4, para. 2.

recommendation of the Security Council.”⁴⁴ Thus, in order for an applicant nation to become a member of the United Nations, they must first submit an application to the Secretary-General and a letter formally stating that it accepts the obligations under the Charter.⁴⁵ The Secretary-General then forwards the application to the Security Council for consideration.⁴⁶

According to Article 27 of the U.N. Charter, “Decisions of the Security Council on all other matters shall be made by an affirmative vote of nine members including the concurring votes of the permanent members.”⁴⁷ As such, in order to make a recommendation for membership, nine of the fifteen members of the Security Council must vote for the recommendation and, of those nine, the five permanent members (United States, Russia, China, France, and the United Kingdom) must all concur.⁴⁸ Thus, this rule of “great Power unanimity”, often referred to as the “veto” power, allows a single permanent member to prevent the admission of an applicant nation to U.N. Membership if they refuse to concur.⁴⁹

Upon recommendation of the Security Council, the application is presented before the General Assembly.⁵⁰ Like the Security Council, the General Assembly must determine whether the applicant nation fulfills the aforementioned four requirements necessary for Membership.⁵¹ However, the voting process is different than before the Security Council, as a two-thirds majority vote is all that is necessary for the successful admission of a new State to Membership in the United Nations.⁵² Membership becomes effective for a successful applicant on the date that the resolution for admission is adopted by the General Assembly.⁵³

B. Non-member State Permanent Observer Status

Membership in the United Nations is not the only avenue by which an applicant nation can have some form of consistent relationship with the Organization. Rather, it is possible to obtain “observer status,” a status by which states and certain other entities and organizations gain constrained access to key international bodies.⁵⁴ There are several types of observer statuses, each with their own specific benefits and constraints.⁵⁵ Of these types, there is one of great significance to this discussion, “Non-Member State Permanent Observer” status (“NMSPO”). NMSPO status can be granted to aspiring members as a possible prelude,

⁴⁴ *Id.*

⁴⁵ *About U.N. Membership*, UNITED NATIONS, <http://www.un.org/en/members/about.shtml> (last visited Oct. 31, 2011) [hereinafter *About U.N. Membership*].

⁴⁶ *Id.*

⁴⁷ U.N. Charter art. 27, para. 3. *But see supra* note 45 (indicating that an applicant must receive nine votes for membership). U.N. SEC. COUNCIL & U.N. DEP’T. OF POLITICAL AND SEC. COUNCIL AFFAIRS, REPERTOIRE OF THE PRACTICE OF THE SECURITY COUNCIL, at 150-51, U.N. Sales No. 10.VII.2 (2011).

⁴⁸ *About UN Membership, supra* note 45.

⁴⁹ *See UN Security Council: Members*, THE UNITED NATIONS (last visited Oct. 30, 2011), <http://www.un.org/sc/members.asp> [hereinafter, *UN Security Council*].

⁵⁰ *About UN Membership, supra* note 45.

⁵¹ U.N. Rules of Procedure of the General Assembly rule 136.

⁵² *About UN Membership, supra* note 45.

⁵³ *Id.*

⁵⁴ Mohammed Daraghmeh, *Palestinians To Seek Upgraded Observer Status at UN*, http://www.huffingtonpost.com/2011/11/09/palestinian-statehood-bid_n_1084263.html (last visited Sep. 26, 2012).

⁵⁵ *Observer Status at the UN, supra* note 27.

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or stopgap, to later Membership into the United Nations, as there are multiple cases where NMSPOs have been subsequently put forward by certain States that later became United Nations Members.⁵⁶ Strangely, the origin of this status is based purely on practice, as there are no provisions for it in the United Nations Charter, and it dates from 1946, when the Secretary-General accepted the designation of the Swiss Government as a Permanent Observer to the United Nations.⁵⁷ Currently, only the Holy See, the universal government of the Catholic Church, holds NMSPO status.⁵⁸

The rights and privileges of observers often vary and precedents have referred to a broad spectrum of “activities” or “powers” made available to observers.⁵⁹ This “broad spectrum” stems from the multiple processes by which an applicant can acquire observer status.⁶⁰ These multitudes of processes allow for an assemblage of factors to come into play and, as such, the activities and powers granted to an observer vary in many different facets.⁶¹ There can be differences in; (1) access to U.N. principal organs, U.N. subsidiary organs and U.N. conferences; (2) access to the areas and facilities provided for participation in the U.N. system; (3) participation in substantive issues and participation in procedural issues; and (4) issues related to immunities and privileges.⁶² The main difference between United Nations Membership and NMSPO status is that NMSPOs cannot vote or propose resolutions.⁶³ Thus, while NMSPOs may not have substantive power due to their lack of ability to vote or propose resolution, their free access to most meetings and relevant documentation, as well as their general right to speak at U.N. General Assembly meetings, still provides an influential position within the United Nations Organization.⁶⁴

As previously stated, the status of a NMSPO is not found within the provisions of the United Nations Charter. Rather, it is based entirely on the practice of the General Assembly.⁶⁵ Therefore, there is no concrete law as to the process by which an entity becomes a NMSPO. This provides a fairly uncomplicated and accessible procedure by which the General Assembly can grant entities NMSPO status. Contrary to the admission process for membership in the United Nations, the elevation of status from permanent observer to non-member observer state can be obtained by a simple majority in a vote by the General Assembly’s 193 Members.⁶⁶ Naturally, because of the absence of the Security Council and

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *A Short History of the Diplomacy of the Holy See*, THE PERMANENT OBSERVER MISSION OF THE HOLY SEE, <http://www.holyseemission.org/about/history-of-diplomacy-of-the-holy-see.aspx> (last visited Nov. 3, 2011).

⁵⁹ *Observer Status at the UN*, *supra* note 27.

⁶⁰ *Id.* The multiple processes are: (1) the language of the relevant General Assembly resolution granting the observer status; (2) any additional resolutions granting more rights and privileges to a particular observer; and (3) established practice in this regard, including the interpretation by the Secretariat of those resolutions.

⁶¹ *Id.*

⁶² *Id.*

⁶³ See John Cerone, *The UN and the Status of Palestine – Disentangling the Legal Issues*, 15 AM. SOC’Y INT’L LAW INSIGHTS 26 (2011). NMSPOs may have various rights of participation in United Nations deliberations.

⁶⁴ *About Permanent Observers*, THE UNITED NATIONS, <http://www.un.org/en/members/aboutpermobservers.shtml> (last visited Nov. 1, 2011) [hereinafter, *About Permanent Observers*].

⁶⁵ *Observer Status at the UN*, *supra* note 27.

⁶⁶ *Etat membre, observateur permanent: quel statut pour la Palestine? [Member State Permanent Observer: What status for Palestine?]*, LE MONDE (Paris), Sept. 21, 2011, <http://www.lemonde.fr/proche->

the need for fewer votes in the General Assembly, it is substantially easier for an applicant nation to achieve NMSPO status than it is admission as a Member in the United Nations Organization.⁶⁷

C. Palestine's Likelihood of Success in their Bid for U.N. Membership

To say that Palestine faces incredible adversity in its efforts regarding its bid for United Nations membership would be an understatement. As previously stated, U.N. membership is only open to those entities deemed states.⁶⁸ According to the declaratory theory of state recognition, an entity must fulfill the four requirements expressed by the Montevideo Convention: (1) a permanent population; (2) a defined territory; (3) a government; and (4) the capacity to enter into relations with other states.⁶⁹ As the declaratory theory is the preeminent theory regarding state recognition in international law, it follows that an entity must first overcome the requirements laid out by the Montevideo Convention before it is worthy of consideration as a member of the United Nations. Likewise, the entity must also comply with the requirements for membership presented by the United Nations Charter, among them statehood.⁷⁰ Thus, so long as Palestine meets the elements of statehood, as well as the requirements deemed necessary for acceptance into the United Nations, it should be eligible for membership.

However, there is a difference between eligibility for membership and a right to membership. Even if an entity qualifies as a state per the Montevideo Convention, it does not necessarily follow that they will be able to advance through the application process for U.N. membership. Besides statehood, there are a multitude of factors that also must be taken into account.⁷¹ While ideally these factors would be limited to those requirements emphasized by Article 4 of the U.N. Charter, outside political factors have also been known to influence the Security Council's decision-making process. With that said, Palestine faces an uphill battle in demonstrating its disposition as a state.

As previously discussed, nine of the fifteen members of the Security Council must vote for a recommendation to the General Assembly to table an applying entity's bid.⁷² Of those nine who voted in favor of the applicant, all of the five permanent members must be a part, otherwise the application will effectively be, for the lack of a better word, dead.⁷³ The United States, Russia, China, France, and the United Kingdom all possess veto power with

orient/article/2011/09/21/etat-membre-observateur-permanent-quel-statut-pour-la-palestine_1575235_3218.html (modified, Sept. 22, 2011), translated in ONLINENEWSPAPER.COM, Sept. 21, 2011, <http://onewspaper.com/news/mid-east-news/member-state-permanent-observer-what-status-for-palestine-4963.html>.

⁶⁷ *Id.* Thus, while admission to Membership in the United Nations requires two-thirds of the General Assembly's 193 Members to admit the applicant upon recommendation by the Security Council, NMSPO status only requires more than half (97) of the General Assembly to admit them as so.

⁶⁸ U.N. Charter art. 4.

⁶⁹ J.D. van der Vyver, *Statehood in International Law*, 5 EMORY INT'L L. REV. 9, 11 (1991).

⁷⁰ U.N. Charter art. 4, para. 1.

⁷¹ *Id.*

⁷² *About UN Membership*, *supra* note 45.

⁷³ *See id.*

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regards to the acceptance of new members into the United Nations.⁷⁴ Thus, an applicant must have all five countries in its favor or risk rejection.

Palestine maintains that it has the backing required in the General Assembly to be accepted as the newest member of the United Nations should the Security Council recommend that they table Palestine's bid for a vote.⁷⁵ Palestinian Authority Foreign Minister Riyad al-Maliki contends, "Some 150 countries will recognize a Palestinian state within the 1967 borders."⁷⁶ There are currently 193 U.N. member states, all a part of the U.N. General Assembly, and therefore Palestine has well above the required two-thirds majority of the General Assembly willing to vote in favor of its acceptance as a member state.⁷⁷ Despite this overwhelming support, it means little if Palestine does not have the support of the aforementioned permanent members, as is the present case.

The United States already has announced that it does not support Palestine's "unilateral initiative."⁷⁸ United States President Barack Obama expressed that the U.S. believes that a Palestinian state only can come about as the result of negotiations with Israel.⁷⁹ Obama explicitly stated that, "Peace will not come through statements and resolutions at the United Nations – if it were that easy, it would have been accomplished by now."⁸⁰ The U.S. still believes in a two-state solution with both states living side by side in peace and security.⁸¹ Simply put, the U.S. will veto the Palestinian initiative, and this veto ensures that Palestine's attempts to become a full member of the United Nations will fail.⁸² Beneath the United States' spoken reason for its insistence on a veto lays Israel's role as a crucial ally of the U.S. in the tumultuous Middle East region and their pursuit of installing democracy there.⁸³ There are those detractors of the United States' decision who claim that the true underlying reason of the veto is because of this alliance. Specifically, the U.S. fears tension

⁷⁴ *UN Security Council*, *supra* note 49.

⁷⁵ Valentina Azarov, *A Comment on Palestine's Statehood, Recognition and UN Membership*, INTERNATIONAL LAW OBSERVER (June 22, 2011), <http://internationallawobserver.eu/2011/06/22/a-comment-on-palestine%E2%80%99s-statehood-recognition-and-un-membership/>.

⁷⁶ Elinor Levy, *PA: 150 State to Recognize Palestine by Sept.*, YNETNEWS.COM, Mar. 3, 2011, <http://www.ynetnews.com/articles/0,7340,L-4036984,00.html>.

⁷⁷ *What are Member States?*, THE UNITED NATIONS, <http://www.un.org/depts/dhl/unms/whatisms.shtml> (last visited Feb. 4, 2012).

⁷⁸ *UN General Assembly 2011: Palestinian Statehood Bid Explained*, HUFFINGTON POST, http://www.huffingtonpost.com/2011/09/20/un-general-assembly-2011-palestine_n_972542.html (last updated Nov. 20, 2011) (hereinafter, *UN General Assembly 2011*).

⁷⁹ *Id.*

⁸⁰ Alex Spillius, *Barack Obama Tells Mahmoud Abbas US Will Veto Palestinian Statehood Bid*, THE TELEGRAPH (Sept. 22, 2011), <http://www.telegraph.co.uk/news/worldnews/barackobama/8780859/Barack-Obama-tells-Mahmoud-Abbas-US-will-veto-Palestinian-statehood-bid.html>.

⁸¹ Catherine Chomiak & Andrea Mitchell, *Palestinians Face US Counteroffensive on UN Vote*, MSNBC (Sept. 16, 2011), http://worldblog.msnbc.msn.com/_news/2011/09/16/7800659-palestinians-face-us-counteroffensive-on-un-vote.

⁸² *UN General Assembly 2011*, *supra* note 78.

⁸³ Devin Dwyer, *Obama Tells Jewish Donors: 'No Ally More Important Than Israel'*, ABC NEWS (Nov. 30, 2011), <http://abcnews.go.com/blogs/politics/2011/11/obama-tells-jewish-donors-no-ally-more-important-than-israel/>.

with their long-standing ally as U.N. membership would put Palestine on equal footing in negotiations, something Israel very much disfavors.⁸⁴

However, the U.S. is not the only Security Council member to have expressed their displeasure with Palestine's initiative. Any hopes of Palestine being able to isolate the U.S. by getting majority support on the Security Council perished when France, Great Britain, and Colombia all announced their intent to abstain.⁸⁵ French President Nicolas Sarkozy has gone even further, recommending that Palestine apply for NMSPO as it is "an important step forward to the final status."⁸⁶ Thus, while Palestine's bid for U.N. membership has ceased before it has truly even started, there are still other "intermediate" avenues that can be taken as further step towards membership in the future. While Palestine has yet to act on France's recommendation, United Nations Educational, Scientific and Cultural Organization ("UNESCO") has already voted to admit Palestine as a member (the U.S. has cut funding to UNESCO as a result).⁸⁷ Palestine has signaled their intent to pursue membership in a number of other specialized U.N. agencies, which have their own rules for membership and where the United States does not have veto power.⁸⁸

III. Requirements For Statehood

In December of 1993, wishing to conclude a convention on the rights and duties of States, twenty governments from across the Americas met for the Seventh International Convention of American States in Montevideo, Uruguay.⁸⁹ The classic definition of the existence of a state, and identification as to when a political entity is recognized as a state, was born from this convention.⁹⁰ According to the Montevideo Convention's Article 1, the four requirements for statehood are that the political entity claiming to be a state must have (1) a permanent population; (2) a defined territory; (3) a government; and (4) the capacity to enter into relations with other states.⁹¹ The Montevideo Convention also stipulated that, "the existence of a state is not dependent on the recognition of the state by other states."⁹² Thus, it appears that in this Convention, which reflects international custom, the opinion that the existence of a state is dependent upon its recognition by other states was rejected and, according to this Convention, recognition by other states is merely a statement of an

⁸⁴ Tom Cohen & Elise Labott, *U.S. in Tough Spot with Palestinian Statehood Bid*, CNN (Sept. 20, 2011), http://articles.cnn.com/2011-09-20/politics/politics_us-palestinians-israel_1_palestinian-statehood-statehood-bid-israel-palestinian?_s=PM:POLITICS.

⁸⁵ Barbara Plett, *New Setback for Palestinian Hopes on UN Membership*, BBC NEWS (Nov. 3, 2011), <http://www.bbc.co.uk/news/world-middle-east-15587250>.

⁸⁶ *Palestine Should Become Observer State at UN as an Intermediate Step, France Says*, UN NEWS CENTRE (Sept. 21, 2011), <http://www.un.org/apps/news/story.asp?NewsID=39660>.

⁸⁷ Collum Lynch, *UNESCO Votes to Admit Palestine; U.S. Cuts Off Funding*, THE WASHINGTON POST (Oct. 31, 2011), http://www.washingtonpost.com/world/national-security/unesco-votes-to-admit-palestine-over-us-objections/2011/10/31/gIQAmlcYZM_story.html.

⁸⁸ *Id.*

⁸⁹ Montevideo Convention on Rights and Duties of States, Dec. 26, 1933, 49 Stat. 3097.

⁹⁰ Amichai Cohen, *U.N. Recognition of a Palestinian State: A Legal Analysis*, THE ISRAEL DEMOCRACY INSTITUTE (Sept. 10, 2011), <http://www.idi.org.il/sites/english/OpEds/Pages/UNRecognitionOfPalestinianStateALegalAnalysis.aspx>.

⁹¹ van der Vyver, *supra* note 69 (describing four requirements for statehood).

⁹² Cohen, *supra* note 90.

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established fact.⁹³ Specifically, the Montevideo Convention's requirements for statehood were born from the declaratory theory of state recognition.⁹⁴ The declaratory theory is one of the two competing theories of state recognition, the other being the constitutive theory of state recognition.⁹⁵ As opposed to the declaratory theory, the constitutive theory imposes a fifth requirement for statehood by recognition.⁹⁶ Despite the theories being described as competing, the declaratory theory of state recognition is far more widely held than the constitutive theory, and is thus the theory that the majority of contemporary scholars and commentators favor.⁹⁷

A. The Declaratory Theory of State Recognition

Article 3 of the Montevideo Convention states that, "The political existence of the state is independent of recognition by the other states."⁹⁸ This sentence lays out exactly the approach that the declaratory theory asserts.⁹⁹ Specifically, the declaratory theory provides that, "recognition is almost irrelevant because states have little to no discretion in determining whether an entity constitutes a state...rather the status of statehood is based on fact, not on individual state discretion."¹⁰⁰ The declaratory theory looks to the purported state's assertion of its sovereignty within the territory it exclusively controls to determine if it can access the international plane.¹⁰¹ Recognition should be automatic based on specified criteria because the

⁹³ *Id.*

⁹⁴ Sameer Boray, *The Law of Recognition Under International Law*, LET'S TALK ABOUT THE LAW (Dec. 20, 2011), <http://letstalkaboutthelaw.wordpress.com/tag/montevideo-convention-1933/> [hereinafter *Law of Recognition*].

⁹⁵ William Worster, *Sovereignty: Two Competing Theories of State Recognition*, EXPLORING GEOPOLITICS (Feb. 2011), http://www.exploringgeopolitics.org/Publication_Worster_William_Sovereignty_Constitutive_Declaratory_Statehood_Recognition_Legal_View_International_Law_Court_Justice_Montevideo_Genocide_Convention.html. The constitutive theory insists that, "a state is only a state when it is recognized as such and other states have a considerable discretion to recognize or not." *Id.* Thus, according to the constitutive theory, the creation of a new state, for the purposes of international law, depends on its acceptance as a state by that of present states. *Law of Recognition*, *supra* note 94. Quite simply, with regards to this theory, recognition has a constitutive effect in the sense that it is a necessary condition for the constitution of the state or government concerned. PETER MALANCZUK, *AKELHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW* 83 (7th ed. 1997). Therefore, a new state will have the rights and duties at the time of it being recognized as a state by other present states. *Law of Recognition*, *supra* note 94. Yet, there is still no official definition of recognition in international law, and in practice the criteria for recognition are heavily political and often depend on regional developments. Elizabeth Samson, *Palestinian Statehood and International Law*, 5 *INFOCUS QUARTERLY* n.3 (2011). However, under customary international law, state practice in relation to recognition integrates the declaratory and the constitutive theories, one more so than the other. *Id.* What has developed is a combination of the two, with an aspiring state fulfilling its requirements for statehood from the more dominant declaratory theory, while the subsequent recognition of its existence by other states under the constitutive theory is incorporated into the declaratory theory's fourth and final criteria, the capacity to enter into relations with other states. *Id.*

⁹⁶ See Worster, *supra* note 95.

⁹⁷ *Id.*

⁹⁸ Montevideo Convention on Rights and Duties of States art. 3, Dec. 26, 1933, 49 Stat. 3097.

⁹⁹ *Law of Recognition*, *supra* note 94.

¹⁰⁰ Worster, *supra* note 95.

¹⁰¹ *Law of Recognition*, *supra* note 94.

status of statehood is based on fact, not on individual state discretion.¹⁰² Thus, the declaratory theory claims that a state will be formed free from the consent of other states, just after the state meets certain “international requirements.”¹⁰³ The international requirements referred to are those four requirements previously stated to be clearly laid out in the first article of the Montevideo Convention.

A permanent population is defined exactly as worded; there must be some sort of stable community within the defined territory of the state.¹⁰⁴ While a permanent or identifiable population is required for statehood, there is no minimum number of inhabitants required to create such a population.¹⁰⁵ There is also no requirement that the people which comprise a “permanent population” be of a certain defined or distinctive ethnicity, as international law and practice suggests that permanent populations which are multiracial or comprised of peoples from many different races and ethnic backgrounds are permissible.¹⁰⁶ Essentially, the criterion of a permanent population constitutes the physical basis for the existence of a state.¹⁰⁷

Meanwhile, a defined territory is some given area, considered as an entity, that sustains that permanent population.¹⁰⁸ Geographical areas separated by borderlines from other areas and united under a common legal system define the concept of territory.¹⁰⁹ However, there is no rule that the territory of the state must be precisely delimited and defined.¹¹⁰ Neither must there be a size threshold that a defined territory must overcome.¹¹¹ Instead, essentially all that the criteria suggests is that the state has made efforts to define the limits of its territory, or that it is currently exercising clear control over the defined territory.¹¹²

With regards to the government requirement, the presence of an effective, functioning government capable of exercising certain levels of control over the state is essential to fulfilling the criteria.¹¹³ Specifically, the government criterion entails a requirement of effective control over the territory and its population by the government.¹¹⁴ There are two aspects following from this control, one internal and the other external.¹¹⁵ Internally, the existence of a government implies the capacity to establish and maintain a legal order in the sense of constitutional autonomy.¹¹⁶ Thus, the government must be effective and functional in the sense that it can provide infrastructure and for the basic needs of its people. Externally, it means the ability to act autonomously on the international level without being

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ ROTHWELL ET. AL, *INTERNATIONAL LAW: CASES AND MATERIALS WITH AUSTRALIAN PERSPECTIVES* 219 (2011).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ MALANCZUK, *supra* note 95, at 76.

¹⁰⁸ ROTHWELL, *supra* note 104, at 220.

¹⁰⁹ MALANCZUK, *supra* note 95, at 76.

¹¹⁰ ROTHWELL, *supra* note 104, at 220.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.* at 222.

¹¹⁴ Cerone, *supra* note 63.

¹¹⁵ MALANCZUK, *supra* note 95, at 77.

¹¹⁶ *Id.*

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legally dependent on other states within the international legal order.¹¹⁷ Furthermore, the government must be its own and not a mere puppet of another. It is important to note that international law is indifferent towards the nature of the internal political structure of the government and, additionally, a government only exists if it is free from direct orders from and control by other governments.¹¹⁸

The final criterion, the capacity to enter into relations with other states, is the most contested. The requirement asserts that an entity is not a state unless it has competence, within its own constitutional system, to conduct international relations with other states, as well as the political, technical, and financial capabilities to do so.¹¹⁹ This criterion essentially encompasses that of the constitutive theory, as one state's recognition of another is crucial in order to enter into relations.¹²⁰

B. Recognition Does Not Equate Statehood

Since Palestine's declaration of independence in 1988, over 100 countries across the globe have declared their recognition of Palestine as a fellow state.¹²¹ In the past two years, several Latin American countries have recognized Palestine, bringing the total number of countries to 105.¹²² Furthermore, the Palestinian National Authority, a Palestinian administrative organization established to govern parts of the West Bank and Gaza Strip, reportedly predicts it will have 135 recognitions in the near future; which is more than two-thirds of the General Assembly.¹²³ However, Mahmoud Abbas, the current chairman of PLO and President of the Palestinian National Authority, has described "Plan B" as not only a strategic attempt at international recognition of Palestine as a state, but also a bid for full membership in the United Nations.¹²⁴ This distinction between the "prongs" of Palestine's statehood strategy, made by the equivalent of the head of state of Palestine, implies Palestine's acknowledgment of the disparity between recognition and statehood. More expressly, Palestine's premiere political figure recognizes the prevalence of the declaratory theory of state recognition in international law, and the need for Palestine to qualify as a state under said theory, not just the more favorable constitutive theory.

Despite the deluge of recognition Palestine has obtained from nations over the past two decades, it is telling that there is still dispute as to whether it is truly a state or not. The declaratory theory of state recognition still reigns supreme over its constitutive "brother," and thus it follows that the majority in international law simply does not equate recognition with statehood.¹²⁵ According to the declaratory theory, the act of recognition is a discretionary political act and a prerogative of the recognizing state, and it does not bind other states that

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 78-79.

¹¹⁹ *Id.* at 79.

¹²⁰ *Id.* at 80.

¹²¹ Victor Kattan, *A State of Palestine: The Case for UN Recognition and Membership*, AL-SHABAKA (May 27, 2011), <http://al-shabaka.org/policy-brief/politics/state-palestine-case-un-recognition-and-membership>.

¹²² *Id.* at n.2 (stating that PLO sources would even hold this number to be as high as 112).

¹²³ Azarov, *supra* note 75.

¹²⁴ See Mahmoud Abbas, Op-Ed., *The Long Overdue Palestinian State*, N.Y. TIMES, May 17, 2011, at A27.

¹²⁵ Worster, *supra* note 95.

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refuse to recognize the “new” state.¹²⁶ Thus, recognition does not have as serious an effect as U.N. membership. Membership strongly implies statehood because admission to the United Nations is, by definition, recognition of statehood. According to Article 4 of the U.N. Charter, membership is open only to States.¹²⁷

Although recognition itself does not constitute statehood, it does help substantiate Palestine’s state status. Additional recognitions would provide Palestine with further means to gain more rights and obligations in the international legal order.¹²⁸ Put more plainly, collective recognition assists in the corroboration of statehood, but does not equate nor entail U.N. membership.¹²⁹ As such, a state’s recognition of an entity’s statehood only provides obligations between the recognizing state and the entity being recognized, not the international community as a whole. Nevertheless, the established state committing the recognition of the entity would owe no legal obligation to that entity upon said recognition.¹³⁰ Thus, while recognition provides a means by which an entity can march closer to the “destination” of statehood, it by no means encompasses it.

C. Palestine and the Declaratory Theory of State Recognition

Even if Palestine is able to get the United States and other states opposing their bid for membership to reconsider, Palestine does not legally qualify as a state necessary for acceptance into the United Nations as per the U.N. Charter. It should be reminded that the first article of the Montevideo Convention provides the requirements necessary for consideration of statehood, and that the international community, and thus the premiere international organization, the United Nations, largely accepts this “declaratory theory”.¹³¹ The Security Council must apply these requirements to Palestine in deliberations before they vote on their application.¹³²

Applying these to Palestine, the question of its population and capacity to enter into relations with other states are uncontroversial.¹³³ It is undeniable that Palestine has a permanent population as the Palestinians share a common culture, history, and nationality.¹³⁴ The population in the territories is known by the world, and especially the United Nations, as the “Palestinian” people or “Palestinian” refugees.¹³⁵ Thus, the international community acknowledges some sort of community of individuals of shared origin by referring to them as “Palestinians.” Even Israel, in government documents, refers to “Palestinians,” thus implying

¹²⁶ See Iain Scobbie et al., *Recognizing Palestinian Statehood*, YALE J. OF INT’L AFFAIRS, (Aug. 25, 2011), <http://yalejournal.org/2011/08/recognizing-palestinian-statehood/>.

¹²⁷ U.N. Charter art. 4.

¹²⁸ Azarov, *supra* note 75.

¹²⁹ See Scobbie, *supra* note 126.

¹³⁰ Azarov, *supra* note 75.

¹³¹ van der Vyver, *supra* note 69.

¹³² See *About UN Membership*, *supra* note 45.

¹³³ Scobbie, *supra* note 126.

¹³⁴ See *id.*

¹³⁵ Berdal Aral, *What Does Palestine’s UN Bid For Statehood Mean?*, TURKISH REVIEW (Nov. 24, 2011), http://www.turkishreview.org/tr/newsDetail_getNewsById.action?newsId=223149.

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recognition that they have some nationality.¹³⁶ In relation to Palestine's capacity to enter into relations with other states, the overwhelming majority of states formally recognizes the PLO or the Palestinian Authority ("PA") as the representative of the Palestinian people and maintains bilateral relations with it, sometimes to the level of full diplomatic relations.¹³⁷ These states have recognized Palestine as an independent sovereign State.¹³⁸ Additionally, Palestine has been accepted into membership in the Non-Aligned Movement, the Organization of the Islamic Conference, the United Nations Economic and Social Commission for Western Asia, the Group of 77, and UNESCO.¹³⁹

Of the two remaining criteria, a defined territory and a government, only the defined territory criterion is likely to be fulfilled. According to Security Council ("UNSC") resolutions 242 and 338, Israel must withdraw to the 1949 armistice lines, thus "indicating that the West Bank, including East Jerusalem, and the Gaza Strip occupied by Israel in 1967 constitute the territory of the Palestinian state."¹⁴⁰ The international community, including the International Court of Justice, "the Quartet" on the Middle East (the U.N., the U.S., the European Union, and Russia), as well as the Palestinians and Israelis themselves, has accepted this.¹⁴¹ Palestine and Israel have agreed that, "negotiations on a permanent settlement will lead 'to the implementation of Security Council Resolutions 242 and 338'."¹⁴² Furthermore, it has been stressed that the lack of precisely settled borders are not an obstacle to statehood.¹⁴³ Thus, Palestine meets the third criterion that requires a defined territory.

The serious obstacle for Palestine's argument for statehood is the government criterion. The criterion is not just the existence of a government in general, but rather the requirement of effective control over the territory and its population by that government.¹⁴⁴ This additional requirement is to recognize only those governments that display sovereign control over their people and territory, and to exclude those governments who are not independent, such as puppet regimes.¹⁴⁵ For this reason there is a presumption against the legitimacy of a state created on occupied territory, but such is not a worry for Palestine because the nation which Palestinians claim is their occupier, Israel, is opposing the Palestinian bid for statehood.¹⁴⁶ Instead, the Palestinian government is asserting its autonomy by going against Israel, and thus showing independence.¹⁴⁷

¹³⁶ See Ronny Shaked, *Thousands of Palestinians Apply for Israeli Citizenship*, YNETNEWS.COM (Nov. 7, 2007), <http://www.ynetnews.com/articles/0,7340,L-3468672,00.html>. Especially those documents regarding the offering of Palestinians Israeli citizenship,

¹³⁷ Scobbie, *supra* note 126.

¹³⁸ Colum Lynch, *Inside the Security Council Deliberations on Palestine*, FOREIGN POLICY (Nov. 9, 2011, 2:16 PM), http://turtlebay.foreignpolicy.com/posts/2011/11/09/inside_the_security_council_deliberations_on_palestine.

¹³⁹ *Id.*

¹⁴⁰ Scobbie, *supra* note 126.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ Lynch, *supra* note 138.

¹⁴⁴ Cerone, *supra* note 63.

¹⁴⁵ See Scobbie, *supra* note 126.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

However, the Palestinian government in question does not actually control—exclusive of other sovereigns—at least some part of its population and territory.¹⁴⁸ The Palestinian Authority does not control any part of the West Bank to the exclusion of Israeli authority, and it exercises no control at all in the Gaza Strip.¹⁴⁹ Of the three Palestinian states that the United Nations could potentially accept as a member, two are real and arguably could meet the requirements for statehood.¹⁵⁰ The issue in this case, however, is that the third, the one being presented to the United Nations, does not have the functioning government with the level of effective control required by international law.¹⁵¹ Hamas and the Palestinian Authority are those two who could arguably meet the requirements for statehood, while the hypothetical Palestine nation being advanced to the United Nations by the Palestinian Authority alone simply cannot. Hamas is in control of forty percent of the population of Palestine, specifically the Gaza Strip.¹⁵² Meanwhile, the Palestinian Authority has joint control over the West Bank and East Jerusalem with Israel.¹⁵³ The Palestinian Authority delivers governmental services in about forty percent of the West Bank, while the remaining sixty percent of the West Bank and East Jerusalem is controlled by Israel.¹⁵⁴ Thus, there are separate entities exhibiting control over the territory that the Palestinian bid claims to be under its sovereign control. But, to have these separate entities in control goes against the very definition of sovereignty. In conclusion, the hypothetical Palestinian state being presented in this bid simply does not have the governmental control over its population and territory in its entirety, and is thus not sufficient enough to be considered a state under the guidelines of the Montevideo Convention.

IV. The Consequences of Statehood, Membership, and Permanent Observer Status

Upon Palestine's announcement of their intent to seek membership into the United Nations, the media across the world, as well as legal publicists, created a furor in response. All streams of media were abuzz with Palestine's first attempt at "statehood legitimacy" in over two decades. Opinions and analysis were voiced, diverging in support and in disparagement of Palestine's potential as not only a member in the predominant international organization, but a state as well. Judging from the multitude, and intensity, of reactions by the world to news of Palestine's intent, it is safe to surmise that statehood and membership into the United Nations is a largely momentous proposition. The criticality of an entity's potential for membership, let alone statehood, lies in the benefits and consequences awaiting it once it achieves such lofty distinction. Thus, it is no surprise that Palestine has long desired statehood ever since Great Britain discharged its dominion over the territory, and has long labored for its consummation as such.

¹⁴⁸ David B. Rivkin Jr. & Lee A. Casey, Letter to the Editor, *The Legal Case Against Palestinian Statehood*, WALL ST. J., Sept. 20, 2011, at A15.

¹⁴⁹ *Id.*

¹⁵⁰ Steven J. Rosen, *The Palestinians' Imaginary State*, FOREIGN POLICY (Aug. 3, 2011), http://www.foreignpolicy.com/articles/2011/08/03/the_palestinians_imaginary_state?page=full.

¹⁵¹ *Id.*

¹⁵² Lynch, *supra* note 138.

¹⁵³ Scobbie, *supra* note 126.

¹⁵⁴ *Id.*

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Specifically, the “tools” at its disposal resulting from statehood would allow Palestine to better protect its people, provide for a better economy, and put it on equal, or close, footing with its longtime “adversary,” Israel, and other states in the international community. However, obstacles, both political and geographical, have stood in the way of Palestine’s desire for statehood. Despite its best efforts, particularly the garnering of recognition by current states, statehood and U.N. membership has proved elusive. Unfortunately, recognition as a state does not provide the same bounty as that of statehood.

A. Consequences of Statehood

As provided by the declaratory theory of state recognition, states are sovereign entities that comprise a territory, population, legal framework, cohesive force and institution.¹⁵⁵ Despite the advancement of technology, specifically communication, and its ability to penetrate borders with tenuous control by states, most theorists still believe that the state is and will remain the lead actor on the international stage, a position referred to as “State Primacy.”¹⁵⁶ Since the Peace of Westphalia in 1648, traditional legal theory holds that the state is the primary actor on the international stage and that each state possesses equal sovereign powers.¹⁵⁷ Thus, all states enjoy a crucial attribute that reinforces the identification of the state as the primary legitimate actor on the world stage: sovereignty.¹⁵⁸ Sovereignty is the catalyst by which all benefits obtained as a result of statehood are born. As such, it can be said that sovereignty is the most important aspect of statehood.¹⁵⁹

Sovereignty, though its meanings have varied across history, has a core meaning, namely the “supreme authority within a territory.”¹⁶⁰ Sovereignty is also regarded as the primary mechanism through which a state maintains its standing with other present state actors.¹⁶¹ Sovereignty, like ownership, contains many constituent elements.¹⁶² Sovereign attributes are typically thought to include the ability to exercise exclusive jurisdiction over citizens of the state, equality with other states, and the power to structure policies constrained only by the impact of those policies on other states or by agreements entered into with other states.¹⁶³ Sovereignty can be dissected into “internal” and “external” sovereignty, which are not exclusive sorts of sovereignty, but rather different aspects of sovereignty that are coexistent and omnipresent.¹⁶⁴ Internal sovereign authority is a single, stable and supreme state power structure exercised inside the boundaries of a state, unchallenged by other

¹⁵⁵ Liu Yulin, *Statehood Theory and China's Taiwan Policy*, 2 TSINGHUA CHINA L. REV. 1, 5 (2009).

¹⁵⁶ Celia R. Taylor, *A Modest Proposal: Statehood and Sovereignty in a Global Age*, 18 U. PA. J. INT'L ECON. L. 745, 747 (1997).

¹⁵⁷ *Id.* at 751.

¹⁵⁸ *Id.* at 752.

¹⁵⁹ Stacy Humes-Schulz, *Limiting Sovereign Immunity in the Age of Human Rights*, 21 HARV. HUM. RTS. J. 105, 108 (2008).

¹⁶⁰ *Sovereignty*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY, <http://plato.stanford.edu/entries/sovereignty> (last updated June 8, 2010).

¹⁶¹ Taylor, *supra* note 156, at 752.

¹⁶² *Id.* at 755.

¹⁶³ *Id.* at 752.

¹⁶⁴ *Sovereignty*, *supra* note 160.

actors.¹⁶⁵ These “other actors” includes outsiders who may not interfere with the sovereign’s governance within its own territory.¹⁶⁶ Thus, internal sovereignty is absolute, and a state cannot be held accountable for actions it has committed within its own borders. The Peace of Westphalia in 1648 provided the first instance of external sovereignty, as the interference in other states’ governing prerogatives became illegitimate.¹⁶⁷ Specifically stated, external sovereignty is defined as a state acting as a recognized entity on the international scene, without being submitted to any foreign power.¹⁶⁸ As such, external sovereignty is limited as one nation cannot extend their sovereignty upon another nation without that nation’s consent.¹⁶⁹ Significantly, external sovereignty depends on recognition by outsiders.¹⁷⁰ To states, this recognition is what a no-trespassing law is to private property — a set of mutual understandings that give property, or the state, immunity from outside interference.¹⁷¹

Sovereign immunity is one consequence of sovereignty, and thus a consequence of statehood. Sovereign immunity is defined as “a government’s immunity from being sued in its own courts without its consent.”¹⁷² On a practical level, sovereign immunity recognizes that a national court has no power to enforce a verdict against a foreign state, rendering its judgments null and void.¹⁷³ More theoretically, sovereign immunity maintains the independence of states to administer internal policies without outside interference.¹⁷⁴ Sovereign immunity is deemed necessary to maintain comity between states and ensure that each state has the independence to direct its own domestic policies.¹⁷⁵ Sovereign immunity can also be delegated to officials, consular, ambassadors, and representatives, referred to as “Diplomatic (or Consular) Immunity.”¹⁷⁶ This is done to ensure the efficient and effective performance of these officials’ missions on behalf of their governments.¹⁷⁷

State recognition also functions with regards to establishing a state’s political existence and its ability to exude and enjoy a legal international personality, implying both the full obligations and rights of the state.¹⁷⁸ International legal personality entails the ability to make international treaties and agreements among states.¹⁷⁹ Thus, once an entity is granted statehood, as implied by the requirement to have the capacity to enter relations with other states, it then able to commit acts of diplomacy. Statehood also allows an entity to submit

¹⁶⁵ Adrián Tokár, *Something Happened. Sovereignty and European Integration*, EXTRAORDINARY TIMES, IWM JUNIOR VISITING FELLOWS CONF. VOL. XI/2, at 1,3 (2001) (Ger.) <http://www.iwm.at/publ-jvc/jc-11-02.pdf>.

¹⁶⁶ *Sovereignty*, *supra* note 160.

¹⁶⁷ *Id.*

¹⁶⁸ Tokár, *supra* note 165, at 2.

¹⁶⁹ *Id.*

¹⁷⁰ *Sovereignty*, *supra* note 160.

¹⁷¹ *Id.*

¹⁷² BLACK’S LAW DICTIONARY 818 (9th ed. 2009).

¹⁷³ Humes-Schulz, *supra* note 159, at 109.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Diplomatic and Consular Immunities*, U.S. DEPARTMENT OF STATE, <http://www.state.gov/m/ds/immunities/c9118.htm> (last visited Jan. 3, 2012).

¹⁷⁷ *Id.*

¹⁷⁸ Kichere Mwita, *Testing Veto Power before the UN General Assembly: Mahmoud Abbas and International Law Perspectives on Palestinian Statehood*, PEACE & CONFLICT MONITOR, http://www.monitor.upeace.org/archive.cfm?id_article=848 (last updated Dec. 6, 2011).

¹⁷⁹ *Id.*

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claims to the International Court of Justice, the most visible international decision making body with regards to international law.¹⁸⁰ Also, statehood provides an entity the capacity to participate fully in various international bodies such as the International Monetary Fund (“IMF”), the World Bank, the UNESCO, and, as previously discussed, the United Nations.¹⁸¹ In order for a state to achieve its full capacity as a state, it needs international membership into these various international organizations, and as required in order to do so, statehood subject to international law.¹⁸²

B. Consequences of Membership

Naturally, statehood means opportunity for membership in the United Nations so long as the entity can pass through the membership process required by the United Nations Charter. As previously discussed, Article 4 of the U.N. Charter requires that, “Membership in the United Nations is open to all other peace-loving states,” and thus all applying entities must be states to even be considered for membership.¹⁸³ As such, an entity deemed a state should be able to achieve United Nations membership barring any outstanding political incongruities or altercations, especially those with permanent members of the Security Council. Thus, consistently, a member of the United Nations will have those attributes previously discussed as inherent to being a state: sovereignty and its ilk.¹⁸⁴

Among benefits conferred to full-fledged U.N. member states, Palestine would be able to draft, propose, and table its own resolutions, as well as vote on them and others.¹⁸⁵ Additionally, Palestine would be in a position to join a plethora of international organizations without contest, such as the World Health Organization (“WHO”), and UNESCO, which would give it extra rights that can only be granted to states.¹⁸⁶ While Palestine could technically still be granted membership to these international organizations without being a genuine U.N. member state, it would be able to so with the uncontested legitimacy and acceptance of the entirety of the international forum. Palestine could also conceivably be elected as a non-permanent member of the Security Council.¹⁸⁷ Yet, there is more at stake for Palestine in this venture than the ability to vote on General Assembly resolutions and participate in international organizations directly linked to the U.N.

More importantly to Palestine, full membership in the United Nations, through the Security Council, brings greater stature and more obligations from fellow member states.¹⁸⁸ This “greater stature” effect allows substantially more political posturing by the member in its diplomatic endeavors. Specific to the situation before us, membership will allow Palestine to “pursue claims against Israel at the United Nations, human rights treaty bodies and the International Court of Justice” and gain more political leverage against Israel through the

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ U.N. Charter, *supra* note 43, at para. 1.

¹⁸⁴ Mwita, *supra* note 178.

¹⁸⁵ Kattan, *supra* note 121.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ Ethan Bronner, *In Seeking Statehood, Palestinians Stir Concern*, N.Y. TIMES, Sept. 11, 2011, at A10.

international community and the mechanisms of the international legal system.¹⁸⁹ Membership would open new avenues for Palestine to gain access to international justice and accountability mechanisms for violations of international law, which is in many ways a condition for resolving the Israeli-Palestinian conflict.¹⁹⁰ Thus, the establishment of Palestine would formally level the playing field between Israel and itself, especially on the diplomatic level.¹⁹¹ In other words, it would become a relationship between states rather than between a state and a non-state actor, and therefore Palestine would be able to formally join the international community and insist upon a relationship based on sovereign equality.¹⁹²

With U.N. membership, Palestine could insist that Israel's settlements and continued occupation in its territory are a breach of its sovereignty, territorial integrity, and political independence.¹⁹³ They could then demand that Israel withdraw from their territory and, if Israel refuses, Palestine could take their dispute to the U.N. Security Council to potentially take measures to force Israel's departure from its territory.¹⁹⁴ If the dispute with Israel escalates and force is used, Palestine could insist on its right to self-defense under Article 51 of the U.N. Charter, which states that, "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations."¹⁹⁵ So long as they were not the first aggressor, Palestine's acts of offense against Israel would no longer be considered terrorism, but rather an act of self-defense by a nation in order to protect its inherent right to sovereignty. Thus, for all the aforementioned reasons, full-fledged U.N. member state status would be an integral step to Palestine's ultimate goal of state recognition and sovereignty over its long disputed territory.

C. Consequences of Non-member State Permanent Observer Status

Even if Palestine was to fail in its bid for United Nations membership, they could still pursue Non-member State Permanent Observer Status directly from the 193-member General Assembly, where there is no veto and a pro-Palestinian majority.¹⁹⁶ While the General Assembly cannot admit Palestine as a member, it can still be declared an observer state.¹⁹⁷ But the key word is "state," because that would allow it to join a host of international agencies and treaty groups, including the International Criminal Court ("ICC"), the International Court of Justice ("ICJ"), UNESCO and others.¹⁹⁸ Palestinians would then be able to level charges against Israel in the ICC, and otherwise confront Israel in new venues that could produce favorable and binding rulings.¹⁹⁹ This would not require approval by the

¹⁸⁹ Azarov, *supra* note 75.

¹⁹⁰ *Id.*

¹⁹¹ Kattan, *supra* note 121.

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ U.N. Charter art. 51.

¹⁹⁶ Bronner, *supra* note 188. On November 29, 2012, Palestine was granted Non-member Permanent Observer State status by the United Nations. This note was submitted prior to this date.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ Karl Vick, *The Palestinians' Statehood Dilemma: Full U.N. Membership or Observer Status?*, TIME (Sept. 1, 2011), <http://www.time.com/time/world/article/0,8599,2091317,00.html>.

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Security Council, only a simple majority at the General Assembly, but the rights and privileges of this status are nowhere defined, so the exact implications of Palestine becoming a non-member observer state are unclear.²⁰⁰ In fact, since PLO obtained observer status in 1974, the General Assembly has progressively increased Palestine's rights of participation to the point where its privileges are already almost identical to those of a non-member observer state.²⁰¹ Thus, Palestine obtaining NMSPO status would be more of a symbolic victory than a practical one, which would still be an important, yet intermediate, step towards full member status.²⁰² Still, history suggests that this route is an attractive option for Palestine, as it is likely to succeed.²⁰³ Ultimately, Palestine would be acknowledged as a state by the General Assembly, and would hold status in the international arena roughly similar to that of the Vatican, and Switzerland prior to its bid for membership in 2002.

V. Statehood's Potential Impact on Business in Palestine

There has been plenty of talk regarding the impact that statehood and United Nations membership would have on Palestine under the political context, but very little has been said on what statehood would mean to business conducted within a new Palestinian state's borders. Although it is fairly unlikely that Palestine will achieve their goal for statehood in its current bid, there is no denying they have improved their status within the international community and have the potential to obtain state status in the future. For this reason international businessmen must remain ever vigilant in their dealings with Palestine.

A. Channels of Trade and the Palestinian Economy

Over the last thirty years, the Palestinian economy has deeply suffered from the occupation by Israel, which prevented it from seizing numerous development opportunities.²⁰⁴ Currently, Palestine's gross domestic product sits at \$12.79 billion.²⁰⁵ Nevertheless, all signs suggest that, once peace and stability has been restored, the recovery will be rapid, and this, in all sectors of the economy as, during periods of relative lull that occurred in the 1990s, the Palestinian economy recorded annual growth rates exceeding 10%.²⁰⁶ As of now, due to the restrictions the Israeli government has put on access and movement, donor aid rather than

²⁰⁰ *The Palestinian Bid for UN Membership and Statehood Recognition*, AMNESTY INTERNATIONAL (Oct. 4, 2011), <http://www.amnesty.org/en/library/asset/MDE21/003/2011/en/23682ea1-ffac-4f93-be36-a9813be1922d/mde210032011en.html>.

²⁰¹ *Id.*

²⁰² Amy Teibel et al., *Palestinian Statehood Bid: Palestinians To Seek Full U.N. Membership*, HUFFINGTON POST, http://www.huffingtonpost.com/2011/09/20/palestinians-un-statehood_n_971904.html (last updated Sept. 20, 2011).

²⁰³ Vick, *supra* note 199.

²⁰⁴ *Invest in Palestinian Authority*, ANIMA INVESTMENT NETWORK, http://www.animaweb.org/en/pays_palestine_en.php (last visited Feb. 11, 2012) (hereinafter, *Invest in Palestinian*).

²⁰⁵ CENTRAL INTELLIGENCE AGENCY, THE WORLD FACT BOOK – WEST BANK (2012) [hereinafter, *West Bank*], available at <https://www.cia.gov/library/publications/the-world-factbook/geos/we.html> (last visited Feb. 11, 2012).

²⁰⁶ *Invest in Palestinian Authority*, *supra* note 204.

private sector economic activity comprises the majority of the Palestinian economy.²⁰⁷ According to the World Bank, the economy is currently not strong enough to support a state, and remains too dependent on foreign aid despite steady progress toward building the institutions required by a future state.²⁰⁸ Despite the Palestinian Authority's largely successful implementation of economic and security reforms and the easing of certain restrictions by the Israeli Government, Israeli policies continue to disrupt labor and trade flows, industrial capacity, and basic commerce, thus eroding the productive capacity of the Palestinian economy.²⁰⁹ Specific to the Hamas controlled territory, Israeli-imposed border closures have resulted in high unemployment, elevated poverty rates, and the near collapse of a private sector that had relied on export markets.²¹⁰ Thus, the population in the Gaza Strip is reliant on large-scale humanitarian assistance, more so than those populating the West Bank.²¹¹ Ultimately, the biggest impediments to economic improvements remain the Palestinians' lack of access to land and resources in Israeli-controlled areas, and import and export restrictions.²¹²

Once Palestine achieves statehood, Israel's restrictions would presumably be lifted, allowing for unimpeded growth of the Palestinian economy. As a fully-fledged member of the United Nations, the ICJ's jurisdiction would automatically apply to the Palestinian territories.²¹³ Expanding the jurisdiction of the ICC and ICJ to Palestine would enable Palestine to bring cases against Israel.²¹⁴ Ultimately, if Palestine became a bona fide state, the international community would be able to pressure Israel to cease control of its territories, and thereby removing its restrictions on Palestinian land. Ahmad Aweidah, CEO of the Palestinian Stock Exchange, has been quoted, "[Palestine] cannot talk of any kind of sustainable economic development unless we have control on our borders, on our land, on our water resources . . . , unless we are able to freely conclude our own trade agreements that suit our own interests."²¹⁵ The liberation of Palestine's economy would allow the private sector to grow and trade to take place freely with the Arab world.²¹⁶

The small but burgeoning Palestinian technology sector, which many of those involved say is on the verge of significant expansion, is a testament to the impediment of the Palestinian economy by Israeli restrictions.²¹⁷ The sector has grown from less than one

²⁰⁷ *West Bank*, *supra* note 205.

²⁰⁸ Isabel Kershner, *West Bank's Emerging Silicon Valley Evades Issues of Borders*, N.Y. TIMES (July 29, 2012), http://www.nytimes.com/2012/07/30/world/middleeast/palestinians-building-tech-hub-in-west-bank.html?_r=1&..

²⁰⁹ *West Bank*, *supra* note 205.

²¹⁰ CENTRAL INTELLIGENCE AGENCY, THE WORLD FACT BOOK – GAZA STRIP (2012) [hereinafter, *West Bank*], available at <https://www.cia.gov/library/publications/the-world-factbook/geos/we.html> (last visited Feb. 11, 2012).

²¹¹ *Id.*

²¹² *West Bank*, *supra* note 205.

²¹³ Hannah Russell, *Palestinian Statehood: A Step in the Right Direction*, ACADEMIA.EDU 4 (Oct. 3, 2011), http://www.academia.edu/1479162/Palestinian_Statehood_A_Step_in_the_Right_Direction.

²¹⁴ *Id.*

²¹⁵ Matthew Bell, *The State of the Palestinian Economy*, PRI'S THE WORLD (Aug. 9, 2012), <http://www.theworld.org/2012/08/palestinian-economy/>.

²¹⁶ See Ghanem M. Nuseibeh, *Two States Must Start with Palestine's Economic Liberation*, COMMON GROUND NEWS SERVICE (Sept. 11, 2012), <http://www.commongroundnews.org/article.php?id=32000&lan=en&sp=0>.

²¹⁷ Kershner, *supra* note 208.

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percent of the Palestinian economy to more than five percent today.²¹⁸ When compared with other industries that the anemic Palestinian economy might look to develop, the information and communications technology sector has an advantage: it is much less affected by impediments to movement.²¹⁹ Thus, there is a strong correlation with Israeli restrictions and the dire Palestinian economy and, if no restrictions existed, the economy would see growth. However, in order for these restrictions to be alleviated, Palestine must become a bona fide state and challenge them. As such, foreign aid cannot sustain long-term economic growth. Instead, a dynamic, private sector-led economy is needed, and only possible if the Palestinian Authority obtains statehood.²²⁰

B. Nationalization and Waivers of Sovereign Immunity

Where a corporation chooses to engage in foreign direct investment in a foreign country, political uncertainties and legal risk have frequently resulted in a loss of assets through expropriation or nationalization.²²¹ The ability to expropriate or nationalize foreign businesses is obliged to the sovereignty of a nation, which is in turn born from statehood. Nationalization is the process of taking an industry or assets into government ownership by a national government or state, while expropriation is nationalization but without compensation by the state to the previous owner.²²² In conjunction with sovereign immunity, which provides government immunity from being sued in its own courts without its consent, savvy businessmen must always be prepared and cautious when dealing with investments in foreign nations.²²³ Thus, an entity being granted statehood provides a profound impact on business and how it must be conducted in the newly “instated” nation. This is no different for Palestine’s potential for statehood.

The immunity of a state from the jurisdiction of the courts of another state is an undisputed principle of customary international law.²²⁴ According to the restrictive theory of sovereign immunity, immunity would be granted to the state if the case arose from acts of the

²¹⁸ *Id.*

²¹⁹ *Id.* These “impediments to movement” include the barriers, checkpoints and permit requirements that Israel imposes on the territory in the name of security.

²²⁰ See Bell, *supra* note 215.

²²¹ Chris A. Carr & Donald O. Mayer, *International Law*, REFERENCE FOR BUSINESS, ENCYCLOPEDIA OF BUSINESS, <http://www.referenceforbusiness.com/encyclopedia/Int-Jun/International-Law.html> (last visited Feb. 12, 2012).

²²² *Nationalization*, THEFREEDICTIONARY.COM, <http://www.thefreedictionary.com/nationalization> (last visited Feb. 12, 2012).

²²³ BLACK’S LAW DICTIONARY 818 (9th ed. 2009).

²²⁴ *What is the Restrictive Theory of Sovereign Immunity?*, APOSTILLE US, http://apostille.us/faq/q_what_is_the_restrictive_theory_of_sovereign_immunity.shtml (last visited Feb. 12, 2012) (hereinafter, *Restrictive Theory*). There are two competing theories of sovereign immunity in international law, the “absolute” theory of sovereign immunity and the “restrictive” theory of sovereign immunity. Historically, the absolute theory of sovereign immunity deemed that states had immunity from the jurisdiction of foreign courts with no exceptions. *Id.* However, at the turn of the twentieth century, as governments increasingly engaged in state-trading and various commercial activities, it was urged that the immunity of states engaged in such activities was not required by international law, and that it was undesirable: immunity deprived private parties that dealt with a state of their judicial remedies, and gave states an unfair advantage in competition with private commercial enterprise. *Id.* As such, the “newer” restrictive theory of sovereign immunity gained widespread popularity after World War II. *Id.*

foreign government or its agents which were of a purely governmental character (“*jure imperii*”), but would deny immunity in instances where the acts engaged in were of a commercial or proprietary nature which could be carried on by any individual or corporation (“*jure gestionis*”).²²⁵ Thus, a state is immune from any exercise of judicial jurisdiction by another state in respect of claims arising out of governmental activities, but not immune from the exercise of such jurisdiction in respect of claims arising out of activities carried on by private persons, such as a commercial transaction.²²⁶ In determining whether an act is *jure imperii* or *jure gestionis*, the “nature” and “purpose or motive” of the act concerned is analyzed.²²⁷ The test turns on whether the act is taken pursuant to a public law or private law contract, with a public law contract being granted immunity.²²⁸ Thus, if a contract has a public purpose, it is maintained that sovereign immunity is still available to the sovereign nation. The majority of industrialized nations, including the United States follow the restrictive theory of sovereign immunity, either by statute or judicial precedent.²²⁹ However, absolute sovereign immunity is still followed by some countries, especially those in South America.²³⁰ As such, the restrictive theory is not a standard of customary international law and it follows that Palestine would not necessarily adopt it once considered a state.²³¹

A state or a state enterprise that is legally part of the state itself can waive immunity either expressly or implicitly by a contractual provision or an arbitration clause in a contract with another party.²³² A contractual waiver of sovereign immunity can provide increased protection for the non-state individual by contractually obliging the sovereign to renounce claims to sovereign immunity as a defense to the execution of any award that arises out of the contract.²³³ Still, such protections cover only disputes arising out of the contract.²³⁴ Thus, a contractual waiver of sovereign immunity is an effective instrument for individuals doing business with foreign nations.

According to Palestinian law, “all foreign companies distributing goods and investing in Palestine must appoint a direct agent who is to register with the Ministry of National Economy.”²³⁵ Agents are widely used in the West Bank and the Gaza Strip, and the Palestinian Authority and Hamas has regulations that only agents registered with either can

²²⁵ *International Law—Sovereign Immunity—The First Decade of the Tate Letter Policy*, 60 MICH. LAW REV 1142 n.08 (1962).

²²⁶ *Restrictive Theory*, *supra* note 224.

²²⁷ A.F.M. MANIRUZZAMAN, *Sovereign Immunity and the Enforcement of Arbitral Awards against State Entities*, in AM. ARBITRATION ASS’N, HANDBOOK ON INTERNATIONAL ARBITRATION PRACTICE 341 (Juris, 2010).

²²⁸ *Id.*

²²⁹ Carr & Mayer, *supra* note 221.

²³⁰ MALANCZUK, *supra* note 95, at 119.

²³¹ *Id.*

²³² MANIRUZZAMAN, *supra* note 227, at 344.

²³³ Alexis Blane, *Sovereign Immunity as a Bar to the Execution of International Arbitral Awards*, 41 N.Y.U. J. INT’L L. & POL. 453, 498 (2009).

²³⁴ *Id.*

²³⁵ *Commercial Laws*, PALESTINIAN INV. PROMOTION AGENCY, http://www.pipa.gov.ps/comercial_laws.asp#2 (last visited October 22, 2011).

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act as agents in the areas in their respective control.²³⁶ Thus, there is a governmental element in all commercial transactions and foreign direct investment in Palestine. As such, investors must be aware of the role that the Palestinian Authority may play in their investments and what role Palestinian agents will have in their dealings, especially if Palestine achieves statehood. Additionally, while the Palestinian Authority has promised no expropriations or nationalizations of foreign businesses by way of their implemented reforms, they have indicated that they will do so for a “public purpose.”²³⁷ Even so, once statehood is achieved, the new Palestinian government could amend these reforms to be more favorable to their sovereignty as a nation. They will then have the stature and recognition required by the international community to negotiate with other countries, not having to provide as favorable laws in order to promote foreign investment. Thus, it is important that current and potential investors are mindful of the impact that the sovereignty of a newly regarded state would have on their dealings and, as such, waivers of sovereign immunity can provide a safeguard by which investors can assure themselves of protection from potential acts of sovereignty by the sovereign party in the transaction.

VI. CONCLUSION

The Arab Spring has renewed a sense of purpose for Palestinians as to their long-awaited goal of statehood. Negotiations with Israel have been more or less stalled and the Palestinian Authority has taken it upon itself to achieve statehood by unilateral means. An independent state of Palestine cannot be achieved so long as negotiations for a two-state solution meander. Rather, Palestine has taken the initiative to try and force Israel’s hand in helping them establish an independent Palestinian nation.

Palestine’s bid for United Nations membership is an attempt by Palestine to affirm their status as an independent nation, exhibiting recognition of their statehood by the international community. While it is entirely apparent that current nations recognize Palestine as a state, membership into the U.N., would provide Palestine a greater legal argument as to its existence as a state. Statehood, specifically the sovereignty that it provides, would bestow Palestine an enviable amount of “tools” necessary to establish itself as an entity independent of Israel and on equal terms with its long-time occupier. Sadly, Palestine’s bid for statehood, and U.N. membership, is not sufficient in its current state.

Palestine’s status within the international community is ever improving; already well above what it was decades ago. Well over a hundred nations have vocally recognized Palestine as a state and have entered into relations with it. If the constitutive theory of state recognition was a standard of international law, Palestine would be well on its way to becoming a member of the United Nations, as its statehood would be clear. However, the declaratory theory of state recognition is the prevailing theory in international law, and Palestine’s theoretical state, as is being presented in their bid, simply does not suffice. Specifically, the Palestinian government does not have the requisite control over its claimed

²³⁶ *Doing Business with the Palestinian Territories*, BRITISH CONSULATE-GENERAL JERUSALEM, <http://ukinjerusalem.fco.gov.uk/en/business/help-for-uk-companies/doing-business-in-palestine> (last updated May 26, 2010).

²³⁷ Law on the Encouragement of Investment in Palestine, Law No. (28) of 1998, Ch. 2 art. 9.

territories necessary to be considered a state. A fractured representation of the Palestinian people, with Hamas having control over the Gaza Strip and the Palestinian Authority having joint control with Israel over the West Bank, does not elicit the same control as delineated by the declaratory theory highlighted in the Montevideo Convention. Even if Palestine was able to have the characteristics sufficient to be considered a state under the Montevideo Convention, the membership process would not allow Palestine's admittance into the U.N. as the Security Council would veto its application before it is even tabled by the General Assembly.

However, there are other intermediate options by which the Palestinian Authority can build foundations for a future, more successful bid for statehood. Non-member state permanent observer status would provide a symbolic step towards statehood. The word "state" as a part of its official title in its role within the United Nations provides an improvement from which to take the last step to full member state status. Additionally, they already have the required support for such a status. While this avenue would not elicit wholesale changes regarding Palestine's practical abilities, it would be a statement to the international community that an independent Palestinian state is imminent.

Despite Palestine's lack of success with their bid, the impact that potential statehood would have on business conducted within their borders cannot go unnoticed, especially by foreign investors. The lessening of restrictions on Palestine's channels of trade would lead to a healthier economy and help sustain long-term economic growth. Sovereignty, by way of statehood, would provide Palestine with sovereign immunity, or rather immunity from being brought to court without its consent. This represents great risk to foreign investors who may have future quarrels with a Palestinian government. There is no foreseeing whether a future Palestinian nation would adopt an absolute or restrictive theory of sovereign immunity and, as such, it is important that foreign investors be ever vigilant with regards to their dealings with the Palestinian Authority. Thus, waivers of sovereign immunity are clauses that international businessmen should have ready in their contracts with the Palestinian Authority in the present and future. These will ensure a certain level of protection in case of the official international establishment of a Palestinian state, which is a likely reality in the future.