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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 Garabct Badrajn, 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. 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. Both Palestinians and Israelis claim Jerusalem to be their own true capital since the beginning of time. 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. A “partition plan” to divide Palestine into separate Jewish and Arab states was brought up in 1937. 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. Ultimately, the United Nations stepped in and sought to work out an agreement that would be acceptable to both parties. 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. 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. 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. 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. Israel attained victory in under a year, cementing the establishment of the State of Israel. More importantly, the Israeli government was able to establish their state on 77% of


2 Id.

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


8 See Thomas, supra note 9, at 392.

9 Id.
the disputed territory and force 85% of the Palestinian Arabs out of Israeli land, 70% of which became refugees in neighboring Arab states. These refugees were refused re-entry into Israeli land, and their homes were used to house Jewish immigrants. Furthermore, Jordan and Egypt occupied the remaining 23% of Palestinian territory. 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.

In 1967, the region erupted in what is known as “The Six Day War,” primarily involving Israel, Syria, Egypt, and Jordan. Israel was victorious once again, capturing the territories previously occupied by Jordan and Egypt after the First Arab-Israeli War. Jewish settlements were quickly established in these newly acquired territories, pushing Palestinians even further out from the land they had for centuries called home. 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. 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”).

The PLO was founded with the purpose of representing the Palestinian Diaspora as an umbrella organization for the Palestinian political movements. The PLO created “The Palestine National Charter,” a declaration of Palestinian identity and sovereignty, with the expressed goal of establishing a sovereign Palestinian state. 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.” 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.

13 Id.
14 Id.
18 Id.
21 1967 War, supra note 17.
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.\(^2\) The resolution, \textit{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.\(^2\) 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.\(^2\)

In 1988, the PLO adopted the Declaration of Independence of Palestine, proclaiming the new State of Palestine.\(^2\) 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.\(^3\) However, this is as close to membership in the United Nations, or recognition as a state, that Palestine has been accorded.\(^3\) 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."\(^3\) 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)."\(^3\)

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 Charter\(^4\) provides that: "Membership in the United Nations is open to all other peace-loving states which accept the obligations contained in the


\(^{27}\) 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.


\(^{33}\) 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
THE PALESTINIAN BID FOR STATEHOOD

present Charter and, in the judgment of the Organization, are able and willing to carry out these obligations. 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.

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. 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. 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.

Meanwhile, the remaining two requirements are not objectively ascertainable. 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. Thus, the admission of new members into the United Nations is ultimately at the judgment of those already members of the United Nations Organization.

Article 4, paragraph 2, sets the process for an applicant nation to be accepted as a member of the United Nations. 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. PHILIPPE 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.
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.\textsuperscript{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.\textsuperscript{45} The Secretary-General then forwards the application to the Security Council for consideration.\textsuperscript{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."\textsuperscript{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.\textsuperscript{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.\textsuperscript{49}

Upon recommendation of the Security Council, the application is presented before the General Assembly.\textsuperscript{50} Like the Security Council, the General Assembly must determine whether the applicant nation fulfills the aforementioned four requirements necessary for Membership.\textsuperscript{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.\textsuperscript{52} Membership becomes effective for a successful applicant on the date that the resolution for admission is adopted by the General Assembly.\textsuperscript{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.\textsuperscript{54} There are several types of observer statuses, each with their own specific benefits and constraints.\textsuperscript{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,

\textsuperscript{44} Id.
\textsuperscript{46} Id.
\textsuperscript{48} About UN Membership, supra note 45.
\textsuperscript{50} About UN Membership, supra note 45.
\textsuperscript{52} About UN Membership, supra note 45.
\textsuperscript{53} Id.
\textsuperscript{55} Observer Status at the UN, supra note 27.
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. 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. Currently, only the Holy See, the universal government of the Catholic Church, holds NMSPO status.

The rights and privileges of observers often vary and precedents have referred to a broad spectrum of “activities” or “powers” made available to observers. This “broad spectrum” stems from the multiple processes by which an applicant can acquire observer status. 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.

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.

The main difference between United Nations Membership and NMSPO status is that NMSPOs cannot vote or propose resolutions. 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.

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. 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. Naturally, because of the absence of the Security Council and

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50 Id.
51 Id.
53 Observer Status at the UN, supra note 27.
54 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.
55 Id.
56 Id.
59 Observer Status at the UN, supra note 27.
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.  

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. 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. 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. 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. 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. 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. The United States, Russia, China, France, and the United Kingdom all possess veto power with...
THE PALESTINIAN BID FOR STATEHOOD

regards to the acceptance of new members into the United Nations. 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. Palestinian Authority Foreign Minister Riyad al-Maliki contends, “Some 150 countries will recognize a Palestinian state within the 1967 borders.” 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. 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.” 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. 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.” The U.S. still believes in a two-state solution with both states living side by side in peace and security. 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. 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. 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.
79 Id.
82 UN General Assembly 2011, supra note 78.
with their long-standing ally as U.N. membership would put Palestine on equal footing in negotiations, something Israel very much disfavors.  

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. 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.” 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). 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.

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. 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. 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. The Montevideo Convention also stipulated that, “the existence of a state is not dependent on the recognition of the state by other states.” 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

88 Id.
91 van der Vyver, supra note 69 (describing four requirements for statehood).
92 Cohen, supra note 90.
established fact. Specifically, the Montevideo Convention’s requirements for statehood were born from the declaratory theory of state recognition. The declaratory theory is one of the two competing theories of state recognition, the other being the constitutive theory of state recognition. As opposed to the declaratory theory, the constitutive theory imposes a fifth requirement for statehood by recognition. 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.

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.” This sentence lays out exactly the approach that the declaratory theory asserts. 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.” 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. Recognition should be automatic based on specified criteria because the

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93 Id.
95 William Worster, Sovereignty: Two Competing Theories of State Recognition, EXPLORING GEOPOLITICS (Feb. 2011), http://www.exploringgeopolitics.org/Publication_Worster_William_Sovereignty_Constitutive_Declaratory_Stat ehood_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, AKEHURST'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.
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. 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.” 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. While a permanent or identifiable population is required for statehood, there is no minimum number of inhabitants required to create such a population. 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. Essentially, the criterion of a permanent population constitutes the physical basis for the existence of a state.

Meanwhile, a defined territory is some given area, considered as an entity, that sustains that permanent population. Geographical areas separated by borderlines from other areas and united under a common legal system define the concept of territory. However, there is no rule that the territory of the state must be precisely delimited and defined. Neither must there be a size threshold that a defined territory must overcome. 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.

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. Specifically, the government criterion entails a requirement of effective control over the territory and its population by the government. There are two aspects following from this control, one internal and the other external. Internally, the existence of a government implies the capacity to establish and maintain a legal order in the sense of constitutional autonomy. 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.
105 Id.
106 Id.
107 MALANČUK, supra note 95, at 76.
108 ROTHWELL, supra note 104, at 220.
109 MALANČUK, 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 MALANČUK, supra note 95, at 77.
116 Id.
THE PALESTINIAN BID FOR STATEHOOD

legally dependent on other states within the international legal order. 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.

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. This criterion essentially encompasses that of the constitutive theory, as one state’s recognition of another is crucial in order to enter into relations.

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. In the past two years, several Latin American countries have recognized Palestine, bringing the total number of countries to 105. 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. 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. 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. 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.
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.
125 Worster, supra note 95.
refuse to recognize the “new” state. 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.

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. Put more plainly, collective recognition assists in the corroboration of statehood, but does not equate nor entail U.N. membership. 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. 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”. The Security Council must apply these requirements to Palestine in deliberations before they vote on their application.

Applying these to Palestine, the question of its population and capacity to enter into relations with other states are uncontroversial. It is undeniable that Palestine has a permanent population as the Palestinians share a common culture, history, and nationality. The population in the territories is known by the world, and especially the United Nations, as the “Palestinian” people or “Palestinian” refugees. 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

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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.
THE PALESTINIAN BID FOR STATEHOOD

recognition that they have some nationality. 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. These states have recognized Palestine
as an independent sovereign State. 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. 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.” 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. Palestine and Israel have agreed that, “negotiations on
a permanent settlement will lead to the implementation of Security Council Resolutions 242 and
338.” Furthermore, it has been stressed that the lack of precisely settled borders are not an
obstacle to statehood. 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. 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. 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. Instead, the Palestinian government is asserting its autonomy by going against Israel, and thus showing independence.

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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.
139 Id.
140 Id.
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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{152} Meanwhile, the Palestinian Authority has joint control over the West Bank and East Jerusalem with Israel.\textsuperscript{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.\textsuperscript{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.
THE PALESTINIAN BID FOR STATEHOOD

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

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\(^{155}\) Liu Yulin, Statehood Theory and China’s Taiwan Policy, 2 TSINGHUA CHINA L. REV. 1, 5 (2009).


\(^{157}\) Id. at 751.

\(^{158}\) Id. at 752.


\(^{161}\) Taylor, supra note 156, at 752.

\(^{162}\) Id. at 755.

\(^{163}\) Id. at 752.

\(^{164}\) Sovereignty, supra note 160.
actors. These “other actors” includes outsiders who may not interfere with the sovereign’s governance within its own territory. 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. 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. As such, external sovereignty is limited as one nation cannot extend their sovereignty upon another nation without that nation’s consent. Significantly, external sovereignty depends on recognition by outsiders. 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.

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.” 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. More theoretically, sovereign immunity maintains the independence of states to administer internal policies without outside interference. Sovereign immunity is deemed necessary to maintain comity between states and ensure that each state has the independence to direct its own domestic policies. Sovereign immunity can also be delegated to officials, consular, ambassadors, and representatives, referred to as “Diplomatic (or Consular) Immunity.” This is done to ensure the efficient and effective performance of these officials’ missions on behalf of their governments.

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. International legal personality entails the ability to make international treaties and agreements among states. 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

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166 Sovereignty, supra note 160.
167 Id.
168 Tokdr, 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.
177 Id.
179 Id.
claims to the International Court of Justice, the most visible international decision making body with regards to international law.\textsuperscript{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.\textsuperscript{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.\textsuperscript{182}

\textbf{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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

\begin{footnotesize}
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\item \textsuperscript{180} Id.
\item \textsuperscript{181} Id.
\item \textsuperscript{182} Id.
\item \textsuperscript{183} U.N. Charter, supra note 43, at para. 1.
\item \textsuperscript{184} Mwita, supra note 178.
\item \textsuperscript{185} Kattan, supra note 121.
\item \textsuperscript{186} Id.
\item \textsuperscript{187} Id.
\item \textsuperscript{188} Ethan Bronner, In Seeking Statehood, Palestinians Stir Concern, N.Y. TIMES, Sept. 11, 2011, at A10.
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international community and the mechanisms of the international legal system.\textsuperscript{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.\textsuperscript{190} Thus, the establishment of Palestine would formally level the playing field between Israel and itself, especially on the diplomatic level.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{196} While the General Assembly cannot admit Palestine as a member, it can still be declared an observer state.\textsuperscript{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.\textsuperscript{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.\textsuperscript{199} This would not require approval by the

\textsuperscript{189} Azarov, \textit{supra} note 75.

\textsuperscript{190} Id.

\textsuperscript{191} Kattan, \textit{supra} note 121.

\textsuperscript{192} Id.

\textsuperscript{193} Id.

\textsuperscript{194} U.N. Charter art. 51.

\textsuperscript{195} Bronner, \textit{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.

\textsuperscript{196} Id.

\textsuperscript{197} Id.

THE PALESTINIAN BID FOR STATEHOOD

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. 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. 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. Still, history suggests that this route is an attractive option for Palestine, as it is likely to succeed. 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. Currently, Palestine’s gross domestic product sits at $12.79 billion. 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%. As of now, due to the restrictions the Israeli government has put on access and movement, donor aid rather than

201 Id.
203 Ibid., supra note 199.
206 Invest in Palestinian Authority, supra note 204.
private sector economic activity comprises the majority of the Palestinian economy.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{210} Thus, the population in the Gaza Strip is reliant on large-scale humanitarian assistance, more so than those populating the West Bank.\textsuperscript{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.\textsuperscript{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.\textsuperscript{213} Expanding the jurisdiction of the ICC and ICJ to Palestine would enable Palestine to bring cases against Israel.\textsuperscript{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."\textsuperscript{215} The liberation of Palestine's economy would allow the private sector to grow and trade to take place freely with the Arab world.\textsuperscript{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.\textsuperscript{217} The sector has grown from less than one

\textsuperscript{207} West Bank, supra note 205.
\textsuperscript{209} West Bank, supra note 205.
\textsuperscript{211} Id.
\textsuperscript{212} West Bank, supra note 205.
\textsuperscript{214} Id.
\textsuperscript{217} Kershner, supra note 208.
THE PALESTINIAN BID FOR STATEHOOD

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
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/law/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 urgent 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"). 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. In determining whether an act is jure
imperii or jure gestionis, the "nature" and "purpose or motive" of the act concerned is
analyzed. 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. 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
testory of sovereign immunity, either by statute or judicial precedent. However, absolute
sovereign immunity is still followed by some countries, especially those in South America.
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.

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. 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. Still, such protections cover only disputes arising out of the contract. 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.” 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

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.
234 Id.
act as agents in the areas in their respective control.\textsuperscript{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.”\textsuperscript{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


\textsuperscript{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.