
The Sovereign Wealth Fund Initiative December 2011

Returning Libya's Wealth

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Before he was killed by Libyan revolutionaries, Moammar Gadhafi placed an estimated \$200 billion in bank accounts, real estate, and corporate investments around the world. Most of these assets were placed under the names of government institutions such as the Central Bank of Libya, the Libyan Investment Authority (“LIA”), the Libyan Foreign Bank, the Libyan National Oil Corp., and the Libya African Investment Portfolio. Nevertheless, Gadhafi and his family treated these assets as their own and could still access them.²

On February 26, 2011, amidst the rebellion in Libya, the United Nations Security Council froze approximately \$150 billion of Libyan assets, largely from oil exports, held in foreign accounts. Under UN Security Council resolutions, the freeze order covered thirteen Libyan individuals and six entities, including the Libyan central bank, the Gadhafi family, and certain former Libyan government officials.³ Subsequently, the European Union placed a similar asset freeze on twenty-seven individuals and forty-eight entities linked to Gadhafi.⁴ The U.S. Treasury Department froze \$32 billion of Libyan assets in U.S. banks while France, Italy, England, and Germany seized control of another \$30 billion.

As the National Transitional Council (“NTC”), which led the rebellion to oust Gadhafi, has gained acceptance as the voice for Libya's new government, the restrictions on Libya's assets have been eased slightly. In September 2011, the UN permitted the U.S. to release \$1.5 billion in assets to support humanitarian needs of the NTC. As of late October, 2011,

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² Paul Richter, *As Libya Takes Stock, Moammar Kadafi's Hidden Riches Astound*, L.A. Times (Oct. 21, 2011), <http://articles.latimes.com/2011/oct/21/world/la-fg-kadafi-money-20111022>

³ Laurence Norman, *Unfreezing Libyan Assets 101*, Wall St. J. (Aug. 26, 2011), <http://blogs.wsj.com/brussels/2011/08/26/unfreezing-libyan-assets-101/>

⁴ *Id.*

approximately \$700 million had been distributed.⁵ The U.S. Treasury Department also partially lifted certain Libya sanctions in order to allow transactions involving the state-owned Libyan National Oil Corporation and its subsidiaries and eased restrictions on transactions involving the Government of Libya, its agencies, instrumentalities, and controlled entities, and the Central Bank of Libya. Generally, such transactions are allowed provided no benefits accrue to anyone affiliated with Gadhafi.

In response to Libya's dire shortage of funds, the UN Security Council is currently attempting to increase the rate at which assets are unfrozen. As of November 30, 2011, of the \$150 billion frozen, only approximately \$18 billion has been released by the Council's Sanctions Committee and only about \$3 billion been available for use in Tripoli.⁶ Council members are working to establish a task force to speed up the process while remaining aware of the concerns over legal ownership of the remaining unfrozen assets. A number of countries have expressed reservations over turning over assets to which Gadhafi, his family, or his associates may rightfully claim ownership. As such, while some countries have received permission from the UN Security Council to unfreeze assets, the release of money has remained conditioned on the funds being used solely for humanitarian purposes.⁷ Other countries, such as India, have stated a desire to keep the assets frozen until an elected government has replaced the current, interim administration. Still, recognizing Libya's urgent need for liquid funds, the UN Security Council has been encouraging countries to unfreeze assets as quickly as possible.

The EU is also working to provide the country of Libya with continued support. At the first EU delegation in Tripoli, the EU High Representative for Foreign Affairs and Security Policy, Catherine Ashton, discussed the current priorities and future plans of Libya, including the unfreezing of Libyan assets, with the Chairman of Libya's National Transitional Council. The EU has already provided € 155 million in aid to Libya and refocused € 50 million for the period of 2012-2013 for development of the new Libyan government.⁸

In general, the issues surrounding the unfreezing of the assets are relatively straightforward. As the new government in Libya is recognized by more countries, and as it shows continuing signs of credibility and stability, it appears clear that the UN Security Council and its member countries will unfreeze the country's assets. The U.S., for example, could unfreeze the assets with an Executive Order. When it does so, the U.S. would be unlikely to serve as an arbiter of those funds but would instead release them to the new government in Libya and allow it to resolve competing claims. The timing and scope of further modifications of the asset freeze, however, are likely to be dictated by political and strategic considerations. Among other things, the U.S. is clearly using the freeze as leverage to ensure that the new government works expediently to achieve stability and legitimacy and also to ensure that the US has a voice

⁵ Jennifer Liberto, *Libya Set to Get Back \$37 Billion from U.S.*, CNN Money (Oct. 20, 2011), http://money.cnn.com/2011/10/20/news/economy/Libyan_assets/index.htm

⁶ Patrick Worsnip, *UN Council Wants to Free More Libyan Assets-Envoy*, Reuters Africa (Nov. 30, 2011), <http://af.reuters.com/article/energyOilNews/>

⁷ *Id.*

⁸ *Ashton commits to support Libya*, New Europe Online (Nov. 14, 2011), <http://neurope.eu/article/ashton-commits-support-libya>

in the shape of the new Libyan government. Regardless of when it occurs, the US and the other countries that have frozen Libyan assets will undoubtedly unfreeze those assets and turn them over to Libya.

In August 2011, the NTC appointed Mahmoud Badi, formerly a senior civil servant in the Gadhafi regime, to track down Libya's foreign assets, including those held by the LIA.⁹ Badi has also been tasked with investigating corruption at the sovereign wealth fund. According to Rafik Nayed, the LIA's acting chief executive, the fund is suspending its investment operations during the investigation.¹⁰

Ironically, to the extent Gadhafi and his family viewed the funds in Libya's sovereign vehicles as their own, they apparently did not feel the need to transfer these funds into personal accounts. As a result, the funds in those vehicles may be easier to secure. The much more problematic issue will be locating and repatriating any proceeds of corruption that Gadhafi, other Libyan leaders, and their families did transfer to personal accounts and out of the country. Such assets are generally more difficult to identify, trace, freeze, confiscate, and eventually repatriate.

On the plus side, countries appear more focused than ever before on working together to identify and repatriate proceeds of corruption. For example, the United Nations Convention against Corruption ("UNCAC"), the first legally binding global anti-corruption agreement, which was entered into force on December 14, 2005, currently has 140 signatory governments and 147 other signatory jurisdictions. In addition to other requirements aimed at attacking corruption, the instrument requires the cooperation of its members in efforts to freeze, confiscate, and return stolen assets. In another key development, the World Bank and the United Nations Office on Drugs and Crime initiated the Stolen Asset Recovery ("StAR") Initiative in 2007 to recover and return assets stolen by corrupt leaders, other officials, and their close associates.

Individual countries have also placed greater focus on this issue. For example, in November 2009, with great fanfare, the U.S. Department of Justice announced its Kleptocracy Asset Recovery Initiative, aimed at tracing and recovering assets laundered through the U.S. by means of civil forfeiture proceedings. These efforts at preventing and/or reversing the plunder of sovereign wealth have also been aided by the significant enhancements that financial centers have made to their money laundering controls in the wake of the 9/11 terrorist attacks.

On the down side, even with the enhanced international focus and cooperation, efforts to locate and repatriate stolen assets are largely unsuccessful. It has been estimated that proceeds of crime, corruption, and tax evasion amount to between \$1 trillion and \$1.6 trillion *each year*.

⁹ Lia Saigol, *Libya Rebels Probe State Fund Corruption*, Fin. Times (Aug. 25, 2011), <http://www.ft.com/intl/cms/s/0/147e5e82-cf3f-11e0-b6d4-00144feabdc0.html>

¹⁰ Samuel Rubinfeld, *New Libyan Sovereign Wealth Fund Chief Seeks Probes*, Wall St. J. (Sept. 23, 2011), <http://blogs.wsj.com/corruption-currents/2011/09/23/new-libyan-sovereign-wealth-fund-chief-seeks-probes/?KEYWORDS=lia>

However, officials with StAR estimate that *over the past 15 years*, only \$5 billion in stolen assets have been repatriated.¹¹

Assets are often transferred to off-shore or other locations that provide heightened secrecy. The trail of the assets is then often hidden in complicated financial transactions and misleading accounting entries. The movement of assets from one country to another necessarily implies that any efforts to trace and retrieve assets will require understanding the differing legal requirements and standards for doing so in each country. Notwithstanding the enforcement of UNCAC, efforts to recover assets must be conducted on a country-by-country basis and the differences in the various legal systems create obstacles to and delay the process.

Complicating matters, many victim countries do not have judicial systems that meet internationally accepted legal standards. They lack the capacity to collect, preserve and present evidence, to adjudicate cases and obtain valid convictions, and to trace proceeds of corruption and obtain necessary orders for their recovery. The process of promptly tracing and repatriating stolen assets is difficult for even those countries that have developed legal systems. Without this critical legal platform from which to initiate the process of taking actions to recover plundered assets, the chances of recovering those assets diminishes significantly.

Unfortunately, Libya's legal system does not meet most international standards for justice and rule of law. Simply put, Gadhafi's 42-year rule destroyed any semblance of an independent judiciary. Under Gadhafi, connections, and in particular connections to the Gadhafi family, trumped all other considerations. The failings of the Libyan judicial system have been highlighted in Libya's efforts to have Gadhafi's son Seif al-Islam Gadhafi tried in a Libyan court rather than in the International Criminal Court. Many human rights advocates have suggested that Libya's judicial system is simply incapable of handling such a legal proceeding.

While NTC has promised a significant reform of the Libyan justice system, that process will take time. Even then, one wonders how successful the new government will be at eliminating the lingering influence of Gadhafi and other former Libyan leaders. Unless that influence is eliminated, legal efforts to identify and repatriate assets stolen by those same leaders will be severely compromised.

In sum, by taking prompt action to freeze assets held in the name of Libya and its leaders, countries containing some of the world's largest financial centers may have averted larger problems. However, where Gadhafi and other Libyan leaders and their families had or have taken steps to move their proceeds of corruption out of Libya and into accounts or other assets not readily traced to them, the process of recovering those assets will be a long and difficult one that is, sadly, unlikely to lead to much success.

¹¹ U.N. Office on Drugs & Crime, *Stolen Asset Recovery (StAR) Initiative: Challenges, Opportunities, and Action Plan* (2007), citing Raymond Baker, *CAPITALISM'S ACHILLES HEEL: DIRTY MONEY AND HOW TO RENEW THE FREE-MARKET SYSTEM* (John Wiley & Sons, Inc., 2005).