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WHEN UNITED NATIONS SANCTIONS IMPACT INTERNATIONAL FINANCIAL GOVERNANCE: LESSONS FROM THE LIBYAN SOVEREIGN WEALTH FUND

DINI SEJKO* AND DALEY J. BIRKETT**

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I. INTRODUCTION

The Libyan Investment Authority (LIA) is the Sovereign Wealth Fund (SWF) of the state of Libya and is the biggest African SWF.[1]

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The Gaddafi regime established the LIA in 2006 to streamline the management of Libya's excess oil revenues and foreign reserves and to better integrate Libya into international markets.[2] The purpose of the LIA is enshrined in Libyan law:

> The [LIA's objectives] shall be investment of Libyan Funds / Monies abroad in the various financial and economic fields, on sound economic basis, as would contribute to *development of the national economic resources* and diversification thereof for achieving the best financial revenues for supporting the *Public Treasury resources*, and minimizing income fluctuations and other revenues of *the State*.[3]

The LIA forms part of the International Forum of Sovereign Wealth Funds (IFSWF),[4] a group of SWFs whose members endorse the Santiago Principles. The Santiago Principles are a series of guiding principles issued in 2008 as a result of complex multilevel negotiations

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1. Different sources estimate the valuation of the assets managed by the LIA to be between USD 60 and 70 billion. *See, e.g.*, *Libyan Investment Authority*, SOVEREIGN WEALTH FUNDS INST., https://www.swfinstitute.org/swfs/libyan-investment-authority/ (last visited Sept. 12, 2018); Sami Zaptia, *UN Libya Experts Panel Seeking to Establish the True Value of Libya's Frozen Assets*, LIBYA HERALD (Mar. 13, 2018), https://www.libyaherald.com/2018/03/13/un-libya-experts-panel-seeking-to-establish-the-true-value-of-libyas-frozen-assets/; Matthew Campbell & Kit Chellel, *Hot Mess: How Goldman Sachs Lost $1.2 Billion of Libya's Money*, BLOOMBERG BUSINESSWEEK (Oct. 14, 2016), https://www.bloomberg.com/features/2016-goldman-sachs-libya/ (contrasting with other sources that claim that, after more than seven years of the asset freeze, the value of assets currently managed by the LIA is as low as USD 34 billion).

2. *See* Julien Chaisse et al., *Emerging Sovereign Wealth Funds in the Making: Assessing the Economic Feasibility and Regulatory Strategies*, 45 J. WORLD TRADE 837, 842 (2011); Int'l Working Grp. of Sovereign Wealth Funds [IWG], *Generally Accepted Principles and Practices: "Santiago Principles"* (Oct. 2008), http://www.ecgi.org/codes/documents/iwg_santiago_principles_oct2008_en.pdf [hereinafter *Santiago Principles*].

3. Libyan Inv. Auth. v. Goldman Sachs Int'l [2016] EWHC (Ch) 2530, [13] (Eng.) (emphasis added) (quoting General People's Committee, No (125) of 1375 PD (2007 A.D.)).

4. *See Our Members*, IFSWF, http://www.ifswf.org/our-members (last visited Sept. 8, 2018); *see generally Santiago Principles*, *supra* note 2.

involving the International Monetary Fund (IMF) in collaboration with other supranational bodies, a significant number of SWFs, and investment-recipient States.[5] The aim of the Santiago Principles is to help SWFs improve their governance and enhance their transparency standards and, in this way, to sustain open flows of capital.[6]

During the Arab Spring, Libya experienced a popular uprising, fueled in part by a "lingering resentment" against Libyan leader Muammar Gaddafi's regime.[7] In 2011, implementing United Nations Security Council (UNSC) Resolutions 1970 and 1973, several Western countries froze, among other financial resources, the assets of the LIA.[8] This was the first time assets of a SWF were the target of a UNSC asset freeze.[9] The resolutions aimed to prevent Gaddafi from using the resources of government entities as a source of funding for his regime, which was soon engaged in a bloody civil war with rebel forces.[10] Muammar Gaddafi's death in October 2011 led to the downfall of his regime. However, some of the LIA's assets remained (and still remain) frozen.[11] The UNSC has noted that the frozen assets will be made available to, and for the benefit of, the Libyan people "as

5. *Santiago Principles*, *supra* note 2, at 1–2.

6. *See generally* EDWIN M. TRUMAN, SOVEREIGN WEALTH FUNDS: THREAT OR SALVATION? (2010) (analyzing the role of various sovereign wealth funds in the global economy).

7. *See* DIRK VANDEWALLE, A HISTORY OF MODERN LIBYA 204 (2d ed. 2012) (discussing the regime's ability to suppress opposition over the four decades preceding the revolution).

8. *See* S.C. Res. 1973, ¶¶ 19–21 (Mar. 17, 2011); *see also* S.C. Res. 1970, ¶¶ 17–21 (Feb. 26, 2011); David Cutler, *Factbox - Sanctions against Libya*, REUTERS (Mar. 14, 2011, 10:25 AM), https://www.reuters.com/article/idINIndia-55568420110314.

9. *See* Mariya Gordeyeva & Olzhas Auyezov, *BNY Mellon Freezes $22.6 Billion in Kazakh Oil Fund Assets*, REUTERS (Dec. 21, 2017, 12:47 AM), https://www.reuters.com/article/us-kazakhstan-bny-mellon-lawsuit/bny-mellon-freezes-22-6-billion-in-kazakh-oil-fund-assets-idUSKBN1EF0F2 ("The freezing of the assets comes weeks after President Nazarbayev threatened to sack his cabinet if they failed to make large state companies bring back cash held abroad.").

10. *See* VANDEWALLE, *supra* note 7, at 204 (stating that the United Nations and Europe targeted Gaddafi and his family with a number of sanctions as the war spread).

11. *See* Giulia Paravicini, *Millions Flow from Gaddafi's 'Frozen Funds' to Unknown Beneficiaries*, POLITICO (Feb. 8, 2018, 4:02 AM), https://www.politico.eu/article/muammar-gaddafi-frozen-funds-belgium-unknown-beneficiaries/.

soon as practical."[12] The LIA's management claims that because the assets remain frozen, the fund has experienced notable losses, instead of what would have been returns on its investments if its assets had been properly invested.[13]

This article examines a set of issues related to the LIA's activities and governance, with a particular focus on the impact of the UNSC sanctions. The article questions whether it is justifiable to perpetuate the sanctions on the LIA's assets to the detriment of the fund's activities and the people of Libya, for whose benefit the LIA was first established. The article makes four critical points. First, the article highlights that the LIA remains subject to U.N. sanctions, seven years after Gaddafi's death, which have had negative effects on the LIA's governance.[14] Second, the article questions the continued validity of the reasons provided by the U.N. Sanctions Committee for the LIA's continued listing. To make this assertion, the article notes that the asset freezing measures against the LIA were ordered so the resources of the LIA could be not used as a source of funding for the Gaddafi family to finance the perpetuation of his regime. The article proposes that, following Gaddafi's loss of power, the basis for the sanctions was no longer sustainable and should have been revisited by the UNSC to avoid measures aimed at advancing the interests of the Libyan people from having the opposite effect. Third, the article demonstrates that the partial sanctions relief ordered by the UNSC had limited impact

12. *See* S.C. Res. 2040, ¶ 9 (Mar. 12, 2012) ("[T]he Committee shall, in consultation with the Libyan authorities, lift the designation of these entities as soon as practical to ensure the assets are made available to and for the benefit of the people of Libya.").

13. Ibrahim O. A. Dabbashi, Letter dated 21 Mar. 2016 from the Permanent Rep. of Libya to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2016/275 (Mar. 23, 2016) [hereinafter Dabbashi] ("The LIA estimates that in 2014 alone, instead of increasing the value of its assets base, it had real losses of $721 million. Furthermore, it lost an additional $1.6 billion to $2.3 billion in what would have been returns on investment if its assets had been properly invested. . . .").

14. The LIA is the first SWF to have been explicitly listed by the UNSC, i.e. the first such entity to have had its economic resources frozen as a result of being named on a UNSC sanctions list. In contrast, for example, the Kuwait Investment Authority, the SWF of the State of Kuwait, was impacted by sanctions imposed by the UNSC against Iraq following its invasion of Kuwait in the early 1990s, but was not "listed" per se. *See, e.g.*, S.C. Res. 661, (Aug. 6, 1990) (providing for sanctions and other measures intended to help restore the legitimate government of Kuwait).

on the LIA's governance. Fourth, the article examines the LIA's governance structure, investment strategy, and the Santiago Principles to provide explanations as to why the fund remains subject to U.N. sanctions while other entities have been removed from the Sanctions List. An analysis of the LIA's governance structure is essential to clarifying the reasons behind the continued application of the sanctions, and to addressing the effects of the asset freezing measures on the LIA's investment strategy and governance. An examination of the Santiago Principles and the potential consequences of their application to the current governance of the Libyan SWF, leads us to conclude that to improve the governance, transparency, and risk management of the LIA further adherence to the Santiago Principles is necessary.

To support our thesis that the UNSC's reasons for the continued listing of the LIA are obsolete, and that demonstrable improvements in governance—proven in part through a recommitment to the Santiago Principles and the IFSWF—will signal the LIA has the capacity to re-assume management of its assets, the article is divided into four parts. While Section I provided a brief overview of the article and its context, Section II discusses the evolving asset freezing measures adopted by the UNSC Sanctions Committee with respect to Libya. Section III critically assesses the LIA, scrutinizing its investment strategy and compliance with international standards. This section also highlights the LIA's disputed management and leadership, focusing on the political struggles that still divide the state at the time of writing. Section IV analyzes the perpetuation of asset freezing measures following the death of Gaddafi, despite the arrest or death of a number of members of his family and his former regime. Section IV of the article summarizes and highlights the critical points raised herein.

II. THE ASSET FREEZE

In this section we discuss the political situation in Libya in 2011, which the UNSC determined to represent a threat to international peace and security, and which led the UNSC to request that states freeze Libyan assets so as to prevent the Gaddafi family from using them to prolong the civil war. The first set of UNSC sanctions against the LIA, which ordered states to freeze the fund's assets, were adopted

in March 2011. In September 2011, these sanctions were partially relaxed. We analyze this process in detail in the following section.

A. THE INITIAL LISTING

The Libyan uprising started in February 2011 in the eastern city of Benghazi, triggered by protests against the Libyan security forces' arrest of Fathi Tarbil, a human rights lawyer and critic of the Gaddafi regime.[15] The local demonstrations quickly turned into fighting that spread across Libya's northern coast,[16] with reports of hundreds of deaths and injuries as rebels clashed with pro-government forces in Benghazi while attempting to take control of Libya's second most populous city.[17] The UNSC initially expressed regret at the violence and civilian deaths in a press statement,[18] and then, on February 26, 2011, it reacted unanimously in adopting Resolution 1970.[19] Paragraph 17 of the Resolution provides:

> [A]ll Member States shall freeze without delay all funds, other financial assets and economic resources which are on their territories, which are owned or controlled, directly or indirectly, by the individuals or entities listed in Annex II of this resolution or designated by the Committee established pursuant to paragraph 24 below, or by individuals or entities acting on their behalf or at their direction, or by entities owned or controlled by them, and decides further that all Member States shall ensure that any funds, financial assets or economic resources are prevented from being made available by their nationals or by any individuals or entities within their territories, to or for the benefit of the individuals or entities listed in

15. *See* VANDEWALLE, *supra* note 7, at 204 (explaining that these protests quickly spread through the economically neglected eastern part of the nation).

16. *Id.*

17. *See* Martin Chulov, *Libyan City Dubbed 'Free Benghazi' as Anti-Gaddafi Troops Take Control*, GUARDIAN (Feb. 23, 2011, 9:08 AM), https://www.theguardian.com/world/2011/feb/23/libya-free-benghazi-anti-gaddafi-troops (detailing the weapons and tactics used by the regime to remain in control of the city).

18. Press Release, Security Council, Security Council Press Statement on Libya, U.N. Press Release SC/10180-AFR/2120 (Feb. 22, 2011) [hereinafter Press Release, Security Council Press Statement on Libya] (calling for an immediate end to the violence).

19. *See generally* S.C. Res. 1970, (Feb. 26, 2011).

> Annex II of this resolution or individuals designated by the Committee. . . .[20]

The UNSC listed six individuals in Annex II of Resolution 1970: the Libyan leader, Muammar Gaddafi,[21] and five of his children.[22] No entities were listed in this Resolution. However, following an escalation of hostilities in Libya, the UNSC adopted Resolution 1973 on March 17, 2011,[23] which extended the asset freeze measures in Resolution 1970.[24] In addition to the individuals designated as subject to asset freeze measures,[25] the LIA was one of five entities the UNSC listed in Annex II of Resolution 1973 as subject to measures imposed by Resolution 1970.[26] According to the UNSC, the justification for freezing the LIA's assets was that the Libyan SWF was "[u]nder [the] control of Muammar Gaddafi and his family, and [a] potential source of funding for his regime."[27] Notably, in paragraph 20 of Resolution 1973, the UNSC also affirmed "its determination to ensure that assets frozen pursuant to paragraph 17 of Resolution 1970 (2011) shall, at a later stage, as soon as possible be made available to and for the benefit of the people of the Libyan Arab Jamahiriya."[28]

UNSC resolutions calling upon States to freeze assets are, of course, not self-executing and require implementation by States.[29] In this

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20. *Id.* ¶ 17.

21. Gaddafi's positions of responsibility, according to UNSC Res. 1970, included "Leader of the Revolution" and "Supreme Commander of Armed Forces." *Id.* at Annex II.

22. *Id.*

23. S.C. Res. 1973, (Mar. 17, 2011).

24. *Id.* ¶ 19.

25. *See id.* at Annex II.

26. *See id.* ¶ 22 ("Decides . . . that the individuals and entities listed in Annex II shall be subject to the asset freeze imposed in . . . resolution 1970 (2011)"). The other four entities listed in the Annex were the Central Bank of Libya, the Libyan Foreign Bank, the Libyan Africa Investment Portfolio, and the Libyan National Oil Corporation. *See id.* at Annex II.

27. *Id.* at Annex II.

28. *Id.* ¶ 20.

29. *See, e.g.*, Vera Gowland-Debbas, *Implementing Sanctions Resolutions in Domestic Law*, *in* NATIONAL IMPLEMENTATION OF UNITED NATIONS SANCTIONS: A COMPARATIVE STUDY 33, 35 (Vera Gowland-Debbas ed., 2004) (asserting that although such UNSC resolutions are not self-executing, States are not exempt from their implementation by invoking domestic law).

sense, implementation can take place at the domestic and/or supranational levels. Following the adoption of Resolution 1970, the Council of the European Union adopted Regulation No. 204/2011 on March 2, 2011,[30] which provides for measures to implement Resolution 1970 in the E.U. legal order.[31] The United Kingdom also took measures to implement Resolution 1970 by way of an Order in Council, The Libya (Financial Sanctions) Order 2011.[32] Unfortunately, it is difficult to precisely quantify the assets frozen by States pursuant to the sanctions.[33] This is due to a lack of transparency on the part of the LIA and its subsidiaries on the one hand and, on the other hand, the fragmentation and lack of transparency that characterize the execution of asset freezing proceedings.[34]

B. THE PARTIAL EASING

In September 2011, the UNSC revisited the asset freeze measures imposed upon several Libyan entities, removing two organizations—

30. Council Regulation 204/2011 of Mar. 2, 2011, Concerning Restrictive Measures in View of the Situation in Libya, 2011 O.J. (L 58) 1 (EU) (following a series of amendments, Regulation 204/2011 was repealed and replaced by Council Regulation 2016/44 of 18 Jan. 2016, Concerning Restrictive Measures in View of the Situation in Libya).

31. Regulation 204/2011 was adopted in accordance with Council Decision 2011/137/CFSP of 28 Feb. 2011, Concerning Restrictive Measures in View of the Situation in Libya. *See* Council Regulation 204/2011, *supra* note 30; Council Decision 2011/137/CFSP of Feb. 28, 2011, Concerning Restrictive Measures in View of the Situation in Libya, 2011 O.J. (L 58) 53 (EU).

32. The Libya (Financial Sanctions) Order 2011, SI 2011/548 (U.K.).

33. There are no precise assessments of the amount of LIA assets that have been frozen as a result of the UN sanctions, but it has been claimed (for example by Mohsen Derregia, who was Chairman and CEO of the LIA for 11 months from April 2012) that the figure could include 95% of the assets under the LIA's management. *See* Chris Wright, *The Battle for the Libyan Investment Authority*, EUROMONEY (Mar. 26, 2013), https://www.euromoney.com/article/b12kjxb33l8zry/the-battle-for-the-libyan-investment-authority [hereinafter Wright, *The Battle for the Libyan Investment Authority*] (noting that $20 billion dollars of assets are subject to attachment orders).

34. *See* Marina Mancini, *UN Sanctions Targeting Individuals and the ICC Proceedings: How to Achieve a Mutually Reinforcing Interaction*, *in* COERCIVE DIPLOMACY, SANCTIONS AND INTERNATIONAL LAW 228, 242–44 (Natalino Ronzitti ed., 2016) ("Generally, however, the amount and location of property and assets frozen pursuant to a Security Council Resolution or in execution of an ICC request are strictly confidential.").

the Libyan National Oil Corporation and the Zueitina Oil Company—from the list.[35] However, with respect to the LIA, Resolution 2009 (from 2011) modified the asset freeze measures, deciding: (1) that all assets (*i.e.* "funds, other financial assets and economic resources")[36] frozen outside Libya as of the date of the resolution would remain frozen;[37] (2) that the LIA "shall no longer be subject to the measures imposed in paragraphs (*sic.*) 17 of resolution 1970 (2011)";[38] and (3) that the LIA funds frozen by U.N. Member States could be accessed, for one (or more) of the following purposes:

> (i) humanitarian needs;
>
> (ii) fuel, electricity, and water for strictly civilian uses;
>
> (iii) resuming Libyan production and sale of hydrocarbons;
>
> (iv) establishing, operating, or strengthening civilian government institutions and civilian public infrastructure; or
>
> (v) facilitating the resumption of banking sector operations, including supporting or facilitating international trade with Libya. . . .[39]

In other words, U.N. Member States are "no longer required to ensure that any funds, financial assets or economic resources are prevented from being made available by their nationals or by any individuals or entities within their territories, to or for the benefit of [the LIA]."[40] However, assets frozen outside Libya prior to Resolution 2009 (from 2011) are to remain frozen subject to the foregoing exceptions.[41] As will be demonstrated below, these limited adjustments have failed to ease pressure on the LIA and its operations.

Libyan officials have sought relief at the U.N. level for some of the restrictions the asset freeze placed upon its SWF. Most prominently,

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35. *See* S.C. Res. 2009, ¶ 14 (Sept. 16, 2011).
36. *Id.* ¶ 15(a).
37. *Id.*
38. *Id.* ¶ 15(b).
39. *Id.* ¶ 16.
40. *Id.* ¶ 15(b).
41. S.C. Res. 2009 ¶ 15 (lifting certain restrictions imposed on designated Libyan financial institutions).

on March 21, 2016, the then Libyan Permanent Representative to the United Nations, Ibrahim Dabbashi, sent a letter to the President of the UNSC, petitioning the UNSC to amend Resolutions 1970, 1973, and 2009 "to explicitly allow the LIA to engage in fund management within the frozen accounts to prevent the further dissipation of LIA assets."[42] According to the letter:

> The LIA estimates that in 2014 alone, instead of increasing the value of its assets base, it had real losses of $721 million. Furthermore, it lost an additional $1.6 billion to $2.3 billion in what would have been returns on investment if its assets had been properly invested in conservative investments with competitive interest rates.[43]

Mr. Dabbashi therefore requested that the UNSC take urgent action on behalf of the Libyan people to adapt the sanctions regime to "protect the value of the LIA assets."[44] However, at the time of this writing, the LIA remains on the list of entities and other groups subject to asset freeze measures pursuant to Resolution 1970.[45] The reasons that the LIA remains on the list reflect the reasons provided for its initial listing in Resolution 1973.[46] The LIA also remains subject to sanctions by the European Union[47] and the United Kingdom.[48] Indeed, the status quo prevails despite the fact that, in Resolution 2278 of 2016, the UNSC:

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42. Dabbashi, *supra* note 13, at 1.

43. *Id.*

44. *Id.* at 2.

45. *See* U.N. Libya Sanctions Comm., The List Established and Maintained Pursuant to Security Council Res. 1970 (2011), at 5, https://scsanctions.un.org/fop/fop?xml=htdocs/resources/xml/en/consolidated.xml&xslt=htdocs/resources/xsl/en/libya-r.xsl (last visited Oct. 28, 2018) [hereinafter Sanctions List].

46. *See Libyan Investment Authority*, UN (Oct. 29, 2014) https://www.un.org/sc/suborg/en/sanctions/1970/materials/summaries/entity/libyan-investment-authority (reasoning that the fund is "[u]nder control of Muammar Qadhafi and his family, and potential source of funding for his regime").

47. *See* Council Implementing Regulation 2017/489 of Mar. 21, 2017, Implementing Article 21(5) of Regulation (EU) 2016/44 Concerning Restrictive Measures in View of the Situation in Libya, 2017 O.J. (L76) 3, Annex VI (EU).

48. *See Consolidated List of Financial Sanctions Targets in the UK*, GOV.UK (Mar. 17, 2011), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/602635/libya.pdf.

> Reaffirm[ed] its intention to ensure that assets frozen pursuant to paragraph 17 of resolution 1970 (from 2011) shall at a later stage be made available to and for the benefit of the Libyan people and taking note of the [March 21, 2016 Letter] . . . affirm[ed] the Security Council's readiness to consider changes, when appropriate, to the asset freeze at the request of the Government of National Accord. . . .[49]

As to the effects of the partial easing at the domestic level, in July 2012 the Italian Court of Appeal in Rome, in response to a request from the LIA, decided to unfreeze LIA assets seized pursuant to a cooperation request from the International Criminal Court.[50] The U.K. Court of Appeal has also interpreted the partial easing of U.N. sanctions in favor of the LIA. In *Libyan Investment Authority v. Maud*,[51] the Court of Appeal held that, according to Moore-Bick LJ, "the payment of debts arising under obligations which came into existence before sanctions were imposed is to be regarded as . . . making new funds available rather than dealing with existing assets."[52] However, despite these developments, as will be demonstrated in Section IV below, the partial relaxation of U.N. sanctions has failed to improve the LIA's ability to manage and improve returns on these assets and consequently, its ability to better manage risk.[53] As mentioned, a large part of the fund's assets still remain frozen pursuant to its initial listing.[54] Before turning to this issue, the article will first examine the LIA in greater detail to demonstrate that, in addition to the sanctions, fragmented and politically-motivated governance has contributed to the decrease in value of the LIA assets.

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49. S.C. Res. 2278, ¶ 11 (Mar. 31, 2016).

50. *See Corte di Appello di Roma* (Rome Court of Appeal), *Sezione Quarta Penale*, N4/12 R.G.I.E. 23.7.2012 (on file with author); *see also* Mancini, *supra* note 34, at 242.

51. *See generally* Libyan Inv. Auth. v. Maud [2016] EWCA (Civ) 788 (Eng.) (finding no grounds for setting aside the statutory demand and holding that appeal should be permitted).

52. *Id.* [19].

53. *See generally* Laurence Boisson de Chazournes, *Collective Security and the Economic Interventionism of the UN—The Need for a Coherent and Integrated Approach*, 10 J. INT'L ECON. L. 51, 58 (2007) (detailing various instances of frozen national assets and the "side effects" on the civilian population).

54. *See* Paravicini, *supra* note 11.

III. THE TROUBLED LIFE OF THE LIA

This section provides an overview of the LIA from its establishment to the problems it currently faces. Initially, this article analyzes the fund's inception and how it functions. Subsequently, the article turns to the Santiago Principles (Principles), the commitments contained therein, and LIA's adoption of the Principles. In the last part of this section, the article examines the struggle for leadership and control of the LIA, and it sheds light on the complex governance of the fund, which reflects clear political divisions.

A. THE LIA'S INCEPTION, STRUCTURE, AND INVESTMENT STRATEGY

The LIA was established in 2006 to improve the management of Libyan Foreign Exchange (ForEx) reserves deriving from the sale of oil[55] and to integrate Libya into international financial markets.[56] The decision to establish the LIA was taken in 2003 and 2004, after the UNSC and the United States lifted the sanctions imposed against Libya in response to the destruction of Pan Am Flight 103 over Lockerbie, Scotland, and the Union de transports aériens Flight 772 over Niger.[57]

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55. For an analysis of the macroeconomic and legal background for the establishment of a SWF, *see* Chaisse et al., *supra* note 2, at 842 (estimating assets under the Libyan Investment Authority from 2007–2010 to be worth $70 billion due to oil revenue).

56. The IMF assisted with and supported the establishment of the LIA and advised the Libyan Government during and after the establishment of the SWF. *See* IMF, *The Socialist People's Libyan Arab Jamahiriya: Selected Issue—Medium-Term Economic Reform Strategy, and Statistical Appendix*, at 22, IMF Country Report No. 06/137 (Apr. 2006) (recommending that Libya establish a "Stabilization and Savings Fund"). In subsequent IMF Country Reports, the IMF team offered suggestions on how to improve the governance of the funds until 2013 when the IMF Art. IV Consultations were interrupted. *See e.g.*, IMF, *Libya 2013 Article IV Consultation*, at 4, IMF Country Report No. 13/150 (May 2013) (offering suggestions on how to improve the governance of the funds).

57. *See* S.C. Res. 1506, ¶ 1 (Sept. 12, 2003); Press Release, Security Council, Security Council Lifts Sanctions Imposed on Libya After Terrorist Bombings of Pan Am 103, UTA 772, U.N. Press Release SC/7868 (Sept. 12, 2003) [hereinafter Security Council Lifts Sanctions Imposed on Libya After Terrorist Bombings of Pan Am 103, UTA 772]. It is important to note that in the mid-2000s, as a result of the increase in oil prices, many oil-producing States in Africa, the Arabian Peninsula, and Asia established SWFs in order to better manage and diversify oil revenues.

Although Libya's integration into international financial markets is a logical and popularly accepted reason for the establishment of LIA,[58] it is only partially true. Libya was already active in international financial markets despite the application of international sanctions. The Libyan Arab Foreign Investment Company (LAFICO), one of the subsidiaries of the LIA, held almost $6 billion in assets in European companies as early as 2000.[59] One of the objectives of LAFICO was to invest in Western markets in such a way as to circumvent loosely regulated international sanctions through "financial engineering operations."[60] In this way the number of entities, subsidiaries, and shell companies owned by LAFICO quickly increased and their operations grew by participating in investment operations related to the privatization of European companies in the 1990s.[61]

The LIA's mandate was to be "a world-class provider of investment management for the benefit of the *Libyan state* and the long-term future and *well-being of its citizens*."[62] To achieve this mandate, the LIA was equipped with foreign cash reserves and incorporated as subsidiaries pre-existing entities that had been active in international markets before the UNSC and the US lifted sanctions against Libya in 2003 and 2004.[63] These subsidiaries include LAFICO, the Libyan

58. *See* Libyan Inv. Auth. v. Goldman Sachs Int'l [2016] EWHC (Ch) 2530, [1] (Eng.) (noting that the LIA was established for the purpose of investing money for the benefit of Libya's present and future citizens).

59. *See* Vernon Silver, *Qaddafi's Money Manager*, GLOB. POLICY FORUM (Oct. 25, 2001), https://www.globalpolicy.org/component/content/article/195/42361.html (recognizing that many European countries welcomed Libyan investments despite that the UN sanctions ordered that Libyan assets be frozen).

60. In the interview with Bloomberg's Vernon Silver, Mohamed Ali El Huwej, Chairman of LAFICO and the Libyan Consulting Board for Foreign Investment at the time of the interview, explained the investment strategy: "minority stakes, *shell companies and interlocking share holdings* -- that won't attract the attention of US authorities." (emphasis added). *Id.* Moreover, many European countries accepted Libyan investments. In this way, in the early 2000s, Libyan state-controlled entities had more than US $8 billion worth of assets in foreign countries. *Id.*

61. *Id.*

62. *Santiago Principles*, *supra* note 2, at 39 (emphasis added).

63. *See* Security Council Lifts Sanctions Imposed on Libya After Terrorist Bombings of Pan Am 103, UTA 772, *supra* note 57; Silver, *supra* note 59 ("[T]he country has a total portfolio of $8 billion . . . including 5 percent of Banca di Roma SpA, Italy's fourth-largest bank; $1 billion in U.K. real estate; and stakes in 72 companies in more than 45 countries, many of which do business in the U.S.").

African Investment Company (LAICO), the Libyan African Investment Portfolio (LAP),[64] the Long-Term Investment Portfolio (LTP), and the Libyan Local Investment and Development Fund (LLIDF).[65] These subsidiaries were managed by people in the inner circle of former Libyan leader Muammar Gaddafi and retained a high degree of autonomy in their investment strategies.[66]

Soon after its establishment, the LIA was under governmental pressure to invest in international markets.[67] Immediately after the establishment of the fund, the LIA team led by Mohammed H. Layas started to work to build a credible governance and operational structure.[68] To this end, the LIA pledged to adopt international standards, inviting external private auditors and advisors to assist in the process.[69] The LIA started investment operations in early 2007,

64. The LAP is listed separately from the LIA on the Sanctions List due to the particularities of its operations and its possession of large quantities of cash. Mr. Bashir Saleh Bashir chaired the LAP during the Gaddafi era, benefiting from a high degree of autonomy in its investment strategy, distant from the oversight of the LIA. Supposed to hold the keys of many secrets related to LAP investments made for the benefit of Gaddafi, he managed to evade a series of international arrest warrants and recently survived a gun attack in Johannesburg. *South Africa: Hammer-Wielding Robbers Attack, Shoot Former Gaddafi Banker*, ALL AFR. (Feb. 28, 2018), https://allafrica.com/stories/201803020738.html.

65. LIBYAN ORG. OF POLICIES & STRATEGIES, GOOD GOVERNANCE OF THE LIBYAN INVESTMENTS AND FUNDS ABROAD 7 (Nov. 2016), http://loopsresearch.org/media/images/photopvq3j176ir.pdf.

66. *See* Stephanie Nebehay, *Assets of Subsidiaries of Libya's Investment Arm Freed-UN Panel*, REUTERS (Feb. 16, 2012, 1:24 PM), https://www.reuters.com/article/libya-sanctions-idAFL5E8DG4LA20120216 (recognizing the UN sanctions regime was meant to prevent Gaddafi, his family, and his associates from using financial assets and property in Libya and overseas to fund repression against the Libyan people).

67. *Santiago Principles*, *supra* note 2, at 39 (quoting Executive Director of the LIA, Mohamed H. Layas, "The Libyan Investment Authority is committed to managing and developing the funds entrusted to it by employing the highest level of financial expertise to invest across a range of international markets and asset classes.").

68. *See* James Titcomb, *How Libya Bet Billions on Prosperity – and Lost*, TELEGRAPH (Aug. 23, 2014), https://www.telegraph.co.uk/finance/newsbysector/banksandfinance/11052281/How-Libya-bet-billions-on-prosperity-and-lost.html.

69. *See* Chris Wright, *Libyan Investment Authority: The KPMG Reports*, EUROMONEY (Mar. 26, 2013), https://www.euromoney.com/article/b12kjxb1jc96yl/libyan-investment-authority-the-kpmg-reports (discussing KPMG's leaked audit reports from 2010 and insight into where the LIA had invested); *Santiago*

and even though the president of the fund pledged to manage and develop the fund by employing the highest level of financial expertise to invest across a range of international markets and asset classes,[70] this would have been hard to achieve in a short time, especially in light of the Gaddafi regime's interference.[71]

The assets under the management of the LIA included investments in highly liquid instruments, conservative instruments such as treasury bills and bonds, but also alternative investments in structured products, private equity, and derivatives that were externally managed.[72] The decisions that led to the use of sophisticated financial instruments by an inexperienced fund like the LIA do not appear to have been based on an economic analysis of the instruments.[73] Conversely, these decisions derived from shady practices and took place under unclear chains of command and external influences that affected the judgment of the fund's managers.[74] Some believe that these investments were made with the intention to disguise the LIA's assets and mislead international authorities in case of the application of further international sanctions.[75] From the outset, these investments

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Principles, *supra* note 2, at 39 ("[The] LIA intends to meet high transparency standards and a new decree in 2008 requires that LIA publish annual reports on its website in both English and Arabic.").

70. *See Santiago Principles*, *supra* note 2, at 39 (identifying LIA's mandate to be a world class provider of investment management for the Libyan state and its citizens).

71. *See* Chris Wright, *Ousted Head of Libyan Investment Authority Speaks Out*, FIN. TIMES (Apr. 8, 2013), https://www.ft.com/content/b53434fd-1b03-3504-81ac-faf4b80ce83f [hereinafter Wright, *Ousted Head of Libyan Investment Authority Speaks Out*] (citing an interview with the former Chairman and CEO of the LIA, Mohsen Derregia, who noted that the ad hoc investments and decision making by Gaddafi and his father did not fit the profile of LIA).

72. LIBYAN ORG. OF POLICIES & STRATEGIES, *supra* note 65, at 1.

73. Lina Saigol & Cynthia O'Murchu, *After Gaddafi: A Spent Force*, FIN. TIMES (Sept. 8, 2011, 2:53 PM), https://www.ft.com/content/1b5e11b6-d4cb-11e0-a7ac-00144feab49a (citing a report by KPMG that audited the LIA in May 2010 which described "an institution in deep disarray and unable to manage its ambitious investment strategy").

74. *Id.* ("[T]he LIA quickly became home to an opaque and often convoluted network of investments run by a tight-knit circle including a close friend of Seif al-Islam.").

75. This argument was also raised, albeit without success, in the case between the LIA and Goldman Sachs. *See* Libyan Inv. Auth. v. Goldman Sachs Int'l [2016] EWHC (Ch) 2530, [317], [425]–[426] (Eng.).

raised doubts on the part of Klynveld Peat Marwick Goerdeler (KPMG), which audited the fund and discovered that some of the operations were producing major losses to the SWF, as were the high fees that the fund managers were already seeking.[76] Later, additional scrutiny of the fund's structured investment operations led to international corruption investigations, and private disputes involving the LIA and its managers.[77]

The LIA and its subsidiaries have invested in a broad range of markets mainly in Europe, the United States, and Africa.[78] Although many of these investments were made strategically so as to gain influence in specific countries' economic sectors, and despite the Libyan identity of the investing entities, the LIA, LAFICO, and other subsidiaries were nevertheless allowed to invest and hold equities in different economic sectors without facing any particular barriers from the respective host countries.[79] These sectors include, *inter alia*: the entertainment industry,[80] media,[81] the automotive industry,[82] the

76. Saigol & O'Murchu, *supra* note 73 ("The LIA lacks operational robustness to effectively manage investments of this complexity.").

77. *See, e.g.*, *Libyan Inv. Auth.*, [2016] EWHC (Ch) 2530, [317], [425]–[426] (noting the LIA's argument that Goldman Sachs unduly influenced it to enter into the Disputed Trades and that the Disputed Trades amounted to unconscionable bargains); Michael Stothard & Jane Croft, *SocGen Agrees €963m Settlement with Libyan Investment Authority*, FIN. TIMES (May 4, 2017), https://www.ft.com/content/7dc88450-3094-11e7-9555-23ef563ecf9a ("The French bank said on Thursday it had signed a confidential settlement agreement with the LIA in a dispute over $2.1bn of trades executed between 2007 and 2009, before Muammar Gaddafi was deposed as Libya's leader.").

78. *See* Paravicini, *supra* note 11 (noting the UN Sanctions targeted the assets of the Gaddafi regime in countries across the world).

79. *Id.*

80. *See id.* (discussing LIA's assets in in the carmaker Fiat, the soccer club Juventus, Royal Bank of Scotland, and Pearson, the then publisher of the Financial Times); Saigol & O'Murchu, *supra* note 73.

81. Pearson Plc published the Financial Times. *See* Paravicini, *supra* note 11; Saigol & O'Murchu, *supra* note 73.

82. *See, e.g.*, Saigol & O'Murchu, *supra* note 73; Tom Bawden, *Libya's Oil Money Has Made it Major World Shareholder*, GUARDIAN (Feb. 21, 2011), https://www.theguardian.com/world/2011/feb/21/libya-oil-money-major-world-shareholder (explaining that the LIA had approximately 2% stake in Fiat).

financial sector,[83] telecommunications,[84] energy,[85] and heavy industry tied to the military sector.[86]

The governance structure of the LIA is determined by Law No. 13, which was implemented in 2010 around four years after the inception of the LIA.[87] Law No. 13 establishes two main organs: (1) the Board of Trustees and (2) the Board of Directors.[88] The Board of Trustees is composed of prominent individuals from Libya's political and governmental bodies, including the Prime Minister, who acts as Chairman; the Ministers for Planning, Finance, Economy, and Trade; the Governor of the Central Bank of Libya; and a number of experts.[89] The Board of Trustees has oversight powers and monitors the LIA's

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83. *See* Saigol & O'Murchu, *supra* note 73 (discussing the LIA's controversial stake of 7.5% interest in Italy's largest bank, Unicredit); *see also* Tom Bawden & John Hooper, *Gaddafi's Hidden Billions: Dubai Banks, Plush London Pads and Italian Water*, GUARDIAN (Feb. 22, 2011), https://www.theguardian.com/world/2011/feb/22/gaddafi-libya-oil-wealth-portfolio (providing that the Unicredit CEO did not inform his board of the LIA's increased stake, resulting in him being ousted and the bank freezing LIA's shareholding in line with EU sanctions).

84. *See, e.g.*, *Libyan Investment Authority: Management Information Report*, GLOB. WITNESS 6 (June 30, 2010), https://www.globalwitness.org/sites/default/files/lia.pdf [hereinafter *KPMG Report*] (identifying LIA's equity in France Telecom).

85. *See* Mario Beauregard, *SNC-Lavalin Fraud Case with Links to Libya Put Off Until February*, GLOBE AND MAIL (May 15, 2018), https://www.theglobeandmail.com/report-on-business/industry-news/the-law-page/snc-lavalin-fraud-case-with-links-to-libya-put-off-until-february/article26842703/ (noting SNC-Lavalin was charged with fraud and corruption for allegedly defrauding various Libyan organizations); *see also KPMG Report*, *supra* note 84, at 6 (identifying LIA's equity in General Electric Co. and SNC-lavalin Group Inc.).

86. *See* Paravicini, *supra* note 11; *see also KPMG Report*, *supra* note 84, at 6 (identifying LIA's equity in Lagardere S.C.A. & Finmeccanica S.P.A.).

87. *See* Chris Wright, *Inside Libya: The Other Side of the LIA Story*, FORBES (July 24, 2015, 2:14 PM), https://www.forbes.com/sites/chriswright/2015/07/24/inside-libya-the-other-side-of-the-lia-story/#7eead92a6cf3 [hereinafter Wright, *Inside Libya: The Other Side of the LIA Story*].

88. *See* Sami Zaptia, *LIA Gets New Board of Trustees, New Board, Confirms Chairman and Reform Plan*, LIBYA HERALD (July 17, 2017), https://www.libyaherald.com/2017/07/17/lia-gets-new-board-of-trustees-new-board-confirms-chairman-and-reform-plan/ [hereinafter Zaptia, *LIA Gets New Board of Trustees, New Board, Confirms Chairman and Reform Plan*].

89. *What Is Law 13?*, LIBYA INVEST. AUTH., http://www.lia.com.mt/en/what-is-law-13/ (last visited Mar. 5, 2018) [hereinafter *What is Law 13?*] ("By Decree No. 2 of 2014, the Council of Ministers, the executive branch of the Libyan Government appointed in accordance with the governmental mandate of the elected House of

operations.[90] More importantly, the Board of Trustees appoints the six members of the Board of Directors and the Chairman who represents the LIA in its transactions with third parties.[91] The Board of Directors is the organ in charge of the LIA's management.[92] In addition to representing the LIA, the Chairman is also required to ensure that the LIA functions as an accountable, transparent, and apolitical institution.[93] Three subcommittees (Nomination and Compensation, Governance, and Audit and Risk) assist the Board of Directors in the management of the LIA through frequent reporting.[94] The Board of Directors also appoints the LIA's Chief Executive Officer.[95]

The LIA operates and has offices in Tripoli, La Valletta, and London.[96] Since November 2014, the general office and investment operations have been run out of the La Valletta office.[97] As we will show in the following sections, the LIA's multiple offices have added an additional layer of complexity to disputes over the LIA's leadership

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Representatives, decreed the Board of Trustees to comprise the Prime Minister as a Chairman, the Minister of Finance and Planning, the Minister of Economy and Industry, the Governor of the Bank of Libya and one named individual.").

90. *See* Zaptia, *LIA Gets New Board of Trustees, New Board, Confirms Chairman and Reform Plan*, *supra* note 88 (recognizing Fayiz Serraj as Chairman of the Board of Trustees); Wright, *Inside Libya: The Other Side of the LIA Story*, *supra* note 87 (noting Law 13 "outline[s] how the LIA is deeply embedded in the democratic principles and statutes of Libya's constitution").

91. Law No. 13 of 2010, art. 13 (Libya); *see* Wright, *Inside Libya: The Other Side of the LIA Story*, *supra* note 87.

92. Law No. 13 of 2010, arts. 10–11 (Libya); *see* Wright, *Inside Libya: The Other Side of the LIA Story*, *supra* note 87.

93. *See* Zaptia, *LIA Gets New Board of Trustees, New Board, Confirms Chairman and Reform Plan*, *supra* note 88.

94. *See id.*

95. *See What Is Law 13?*, *supra* note 89.

96. *See* Sami Zaptia, *LIA Forced to Abandon its Tripoli HQ Due to Militia Coercion*, LIBYA HERALD (Aug. 8, 2018), https://www.libyaherald.com/2018/08/08/lia-forced-to-abandon-its-tripoli-hq-due-to-militia-coercion/ (noting the LIA has not revealed its new headquarters after being force to abandon its Tripoli location due to military interference; however, there is speculation the new HQ is located in Malta); Paravicini, *supra* note 11 (commenting that the LIA office in Valletta served simply as a "LIA advisory").

97. *See Company Overview of The Libyan Investment Authority*, BLOOMBERG (Sept. 13, 2018), https://www.bloomberg.com/research/stocks/private/snapshot.asp?privcapId=46056598; Paravicini, *supra* note 11.

and have been used by the different factions to support their separate agendas.

B. GOOD GOVERNANCE AND THE SANTIAGO PRINCIPLES

In the mid-2000s, investments in Western economies by SWFs from Arab and Asian countries generated concerns in markets and among politicians because the entities' top leaders were government officials.[98] Moreover, concerns existed over the possible strategic nature of some SWF investments, and the entities' lack of transparency as to where their funding comes from.[99] These worries triggered protectionist behaviors in the host States, which were then reflected in legislation that increased the control of the host State over foreign investments.[100] To address the concerns related to SWFs and keep markets open to investment flows in the prelude of the Global Financial Crisis, the IMF worked with SWFs and other international bodies and established a Working Group on SWFs.[101] The Working Group on SWFs was tasked with drafting new rules to improve SWF governance, as well as transparency in SWF operations.[102]

After two productive meetings, the Working Group agreed to and released The Generally Accepted Principles and Practices (GAPP) in Santiago, Chile in October 2008.[103] The Santiago Principles are part of

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98. *Cf.* Steven R. Weisman, *Concern About 'Sovereign Wealth Funds' Spreads to Washington*, N.Y. TIMES (Aug. 20, 2007), https://www.nytimes.com/2007/08/20/business/worldbusiness/20iht-wealth.4.7186699.html (highlighting that Arab and Asian countries are not as transparent in their activities as countries like Norway).

99. *See id.* (highlighting that "[a]s Asian countries and petro states get rich, they certainly have the money to try to exert influence").

100. *See id.* (discussing the Bush administration pressure on the IMF and World Bank to examine the behavior of sovereign investment funds and to develop codes of conduct).

101. IMF, *International Working Group of Sovereign Wealth Funds is Established to Facilitate Work on Voluntary Principles*, Press Release No. 08/97 (May 1, 2008), https://www.imf.org/en/News/Articles/2015/09/14/01/49/pr0897.

102. Joseph J. Norton, *The 'Santiago Principles' for Sovereign Wealth Funds: A Case Study on International Financial Standard-Setting Processes*, 13 J. INT'L ECON. L. 645, 648 (2010) (suggesting "that these Principles are unearthing a type of international 'rule-oriented' process and set of 'best practices' which are having an ongoing impact on the operation, governance and decision-making of sovereign wealth funds").

103. *Santiago Principles*, *supra* note 2, at 1.

a broader, growing trend in international economic law that relies on soft law norms to regulate the behavior of state and non-state actors.[104] Soft law formulations, although not legally binding, may still have practical effects.[105] The first twenty-three Principles cover substantive requirements regarding the nature, investment, and strategy of SWFs, and are conventionally divided in three macro-areas ("pillars") that explain and provide guidelines with respect to: (a) the legal frameworks, objectives, and coordination with SWFs' macroeconomic policies (Principles 1 to 5); (b) the institutional frameworks and governance structures of SWFs (Principles 6 to 17); and (c) SWFs' investment and risk management frameworks (Principles 18 to 23).[106] SWFs' compliance with the Santiago Principles is crucial. A few of the principles are of critical importance in this particular case. First, Principle 19 calls for the maximization of risk-adjusted financial returns[107] and requires a fund to disclose in its investment policy any non-economic and/or non-financial considerations that shape its investment strategy.[108] Additionally, the

104. INTERNATIONAL INVESTMENT LAW AND SOFT LAW 82–83 (Andrea K. Bjorklund & August Reinisch eds., 2012) (explaining that "[r]ecent developments in investment law, however, together with the trends in international law more generally, suggest that it is now appropriate to consider the potential use of soft law instruments within international investment law, and indeed, the feasibility of the narrower task of codification of its principles and rules."); *see also* Norton, *supra* note 102, at 645 (characterizing the process of working with and regulating sovereign wealth funds as "a *sui generis*, ad hoc, multi-level, rule-oriented governance network process"); Chris Brummer, *Why Soft Law Dominates International Finance—and Not Trade*, 13 J. INT'L ECON. L. 623, 623–24 (2010) ("Both trade and finance are clearly key areas addressed by 'international economic law,' and their rules have important consequences for global markets.").

105. A classic definition of soft law is: "rules of conduct which, in principle, have no legally binding force but which nevertheless may have practical effects." Francis Snyder, *Soft Law and Institutional Practice in the European Community*, *in* THE CONSTRUCTION OF EUROPE: ESSAYS IN HONOUR OF EMILE NOËL 197, 198 (Steve Martin ed., 1994); *see* Christine M. Chinkin, *The Challenge of Soft Law: Development and Change in International Law*, 38 INT'L COMP. L.Q. 850, 857 (1989) (noting that the notion of instant customary soft law seems incompatible with most "revolutionary" soft law).

106. *Santiago Principles*, *supra* note 2, at 11.

107. *Id.* at 8 ("The SWF's investment decisions should aim to maximize risk-adjusted financial returns in a manner consistent with its investment policy and based on economic and financial grounds.").

108. *Id.* ("If investment decisions are subject to *other than* economic and financial considerations, these should be clearly set out in the investment policy and be

use of sophisticated financial instruments with the objective of avoiding the application of UNSC sanctions explicitly clashes with Principle 19,[109] and with the Santiago Principles in general. Moreover, Principle 22 requires a fund to have a risk management framework and culture to: (1) identify, (2) assess, (3) manage its risks and to (4) protect its assets and stay within the tolerance levels set in its investment policy.[110]

In general, most of the Santiago Principles prescribe the nature and form of SWFs' existence, governance, and operations. However, Principle 24 focuses on the adoption and implementation of the Santiago Principles through the creation of a review mechanism based on a self-assessment or third-party assessment to be determined by the SWF leadership and its owner.[111] In April 2009, the International Working Group that drafted the Santiago Principles was transformed into the IFSWF.[112] The IFSWF is a voluntary group that works on improving adherence to the objectives of the Santiago Principles and enhancing transparency so as to contribute to an open investment environment.[113]

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publicly disclosed.") (emphasis in original).

109. *Id.*

110. *Id.* at 23 ("The SWF should have a framework that identifies, assesses, and manages the risks of its operations."); *id.* ("It is important for the SWF to have a strong risk management culture, where senior management is engaged in crafting and enforcing risk management processes, and a well-functioning risk management framework to ensure that it is able to identify, assess, and manage its risks to protect its assets and stay within the tolerance levels as set in the investment policy.").

111. *Id.* at 9 ("A process of regular review of the implementation of the GAPP should be engaged in by or on behalf of the SWF.").

112. *"Kuwait Declaration" Establishment of the International Forum of Sovereign Wealth Funds*, IFSWF (Apr. 6, 2009), http://www.ifswf.org/santiago-principles-landing/kuwait-declaration [hereinafter *Kuwait Declaration*] ("[T]he IWG reached a consensus ('Kuwait Declaration') on April 6, 2009 in Kuwait City to establish the International Forum of Sovereign Wealth Funds.").

113. *Santiago Principles*, *supra* note 2, at 4 ("The generally accepted principles and practices (GAPP), therefore, is underpinned by the following guiding objectives for SWFs: i. To help maintain a stable global financial system and free flow of capital and investment; ii. To comply with all applicable regulatory and disclosure requirements in the countries in which they invest; iii. To invest on the basis of economic and financial risk and return-related considerations; and iv. To have in place a transparent and sound governance structure that provides for adequate operational controls, risk management, and accountability.").

The LIA, together with some of the most influential SWFs, was a member of the Working Group and has been a member of the IFSWF since its establishment.[114] Endorsing the Santiago Principles is a precondition for SWFs looking to join the IFSWF.[115] When the Santiago Principles were issued, the LIA's leadership pledged to increase the fund's transparency and to publish annual reports online in both Arabic and English.[116]

The IFSWF has published the results of two self-assessment procedures, evaluating compliance with the Santiago Principles.[117] The first assessment results were published in 2014 and involved fifteen SWFs,[118] and the second assessment results were issued in 2016 and involved twelve SWFs.[119] The self-assessments are not compulsory; rather, SWFs perform assessments on a voluntary basis, because they are expected to do so as members of the IFSWF, and because performing these self-assessments demonstrates the SWF's commitment to better governance and greater transparency.[120] It is important to note that the LIA did not participate in either of the two procedures, which could negatively affect the LIA's reputation vis-à-vis investment-recipient countries (and the UNSC) for failing to adhere to expectations and principles outlined in international soft law instruments.[121] Conversely, the LIA's lack of participation in these

114. *See Our Members*, *supra* note 4.

115. *Kuwait Declaration*, *supra* note 112 ("Membership will be open to other Funds who meet the Santiago Principles definition of a SWF and endorse the Santiago Principles.").

116. *See Santiago Principles*, *supra* note 2, at 39 (discussing "Reporting and transparency").

117. *See* INT'L FORUM OF SOVEREIGN WEALTH FUNDS, IMPLEMENTING THE SANTIAGO PRINCIPLES: 12 CASE STUDIES 5 (Nov. 2016), http://www.ifswf.org/sites/default/files/IFSWF_CaseStudies_Nov2016_0.pdf [hereinafter SANTIAGO PRINCIPLES: 12 CASE STUDIES]; *see also* INT'L FORUM OF SOVEREIGN WEALTH FUNDS, SANTIAGO PRINCIPLES: 15 CASE STUDIES 6 (Nov. 2014), http://www.ifswf.org/sites/default/files/SantiagoP15CaseStudies1_0.pdf [hereinafter SANTIAGO PRINCIPLES: 15 CASE STUDIES].

118. *See* SANTIAGO PRINCIPLES: 15 CASE STUDIES, *supra* note 117, at 5.

119. *See* SANTIAGO PRINCIPLES: 12 CASE STUDIES, *supra* note 117, at 5.

120. *See* SANTIAGO PRINCIPLES: 15 CASE STUDIES, *supra* note 117, at 5.

121. It deserves to be mentioned that, despite the difficulties faced, the Malta-based management has engaged with international consultants (i.e. Oliver Wyman), which have audited the accounting and organization of the LIA. *See* SANTIAGO PRINCIPLES: 12 CASE STUDIES, *supra* note 117, at 2; *see also id.* at 3. *But see* Sarah

procedures may not have undermined its reputation at all being that a large number of SWFs have not joined the IFSWF or pledged to comply in any way with the Santiago Principles.[122] However, the application of the Santiago Principles would help the LIA to improve its international profile. A 2016 assessment by the Natural Resource Governance Institute (NRGI) determined that the LIA is not in compliance with the Santiago Principles.[123] The LIA needs to take steps in this regard to demonstrate that its management is making serious efforts to improve its transparency,[124] governance, and overall compliance with internationally accepted standards. [125] We argue that such actions would positively affect many aspects of the fund's activities, such as governance and investment results.

The UNSC has also echoed this call for compliance. In Resolution 2009, the UNSC requested that the IMF and World Bank "work with the Libyan authorities on an assessment of Libya's public financial management framework, which would recommend steps to be taken by Libya to ensure a system of transparency and accountability with respect to the funds held by Libyan governmental institutions,

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Townsend, *This is the Wealth of the Libyan People and it Has to Come Home*, ARABIAN BUS. (Aug. 1, 2015, 2:41 PM), https://www.arabianbusiness.com/-this-is-wealth-of-libyan-people-it-has-come-home--601012.html (stating that Bouhadi seeks to restructure the LIA in accordance with the proposal of Oliver Wyman, an international consultant).

122. *See* IE FOUND., SOVEREIGN WEALTH FUNDS 2017 17 (2017), https://www.ie.edu/fundacion_ie/Investigacion_Aplicada/Centros/SOVEREIGN_WEALTH_LAB_REPORT_2017.pdf (noting there are more than 115 "operating or prospective" sovereign wealth funds in 2017 even though the IFSWF is comprised of 33 members).

123. *See* Yusser Al-Gayed, *New Libyan Oil Wealth Fund Chief Talks Reform, Transparency*, NAT'L RES. GOVERNANCE INST. (Sept. 30, 2016), https://resourcegovernance.org/blog/new-libyan-investment-authority-chief-talks-house-cleanup-organizational-mandate (stating the NRGI determined that the LIA met only four of the sixteen regulatory standards, thus concluding "the LIA is non-compliant with the Santiago Principles").

124. *See Libyan Investment Authority*, *supra* note 1 (noting the LIA received a Transparency Rating of 4 out of 10 on the Linaburg-Maduell transparency index).

125. At the time of writing, the LIA's website does not provide clear and comprehensive information in relation to the composition of its board, its governance, its past and present economic situation, or its investment portfolio and strategy. *See* LIBYAN INV. AUTH., http://www.lia.com.ly/ar/ (last visited Mar. 8, 2018).

including the LIA."[126] Despite UNSC action, the LIA has not collaborated with the IMF since 2013.[127] Consultations between Libya and the IMF in application of Article IV of the IMF's Articles of Agreement —which provides for regular, annual visits of IMF staff to the state—were interrupted in 2013.[128] The last IMF Country Report for Libya offers a critical analysis of the LIA's condition:

> Staff argued that the Libyan Investment Authority (LIA) should be integrated into the fiscal framework. Libya's sovereign wealth fund (SWF) system, operating through the LIA and the budget reserve account (BRA) at the CBL, should be fully integrated into this framework, with well-defined and transparent rules determining the inflows to and outflows from the LIA and the BRA. Currently, *the LIA lacks a clear definition of objectives and the rules governing the accumulation, management, and use of its resources*. Accordingly, staff recommended that the LIA should function as a savings fund for future generations as well as a stabilization fund to better manage oil price cycles . . . . Along with well-defined investment objectives, *the LIA also needs to improve transparency and accountability in its governance, consistent with international good practices*.[129]

The IMF's suggestions are a clear reference to the application of the Santiago Principles, which develop the transparency and good practice governance standards for SWFs.[130] The report also indicates that, at the time, the Libyan authorities appreciated the suggestions made by

126. S.C. Res. 2009, *supra* note 35, ¶ 18.

127. *See* IMF, *List of IMF Member Countries with Delays in Completion of Article IV Consultations or Mandatory Financial Stability Assessments Over 18 Months*, at 2 (June 2018), http://www.imf.org/en/Publications/Policy-Papers/Issues/2018/06/28/pp062818-list-of-imf-members-with-delayed-article-ivs\ (noting that Libya's last consultation occurred in May 2013).

128. *See id.* (noting the "Main Reason for Delay" is the "Political/security situation" in Libya).

129. IMF, *Libya: 2013 Article IV Consultation*, at 17–18, Country Report No. 13/150 (May 2, 2013), https://www.imf.org/external/pubs/ft/scr/2013/cr13150.pdf [hereinafter IMF, *Libya: 2013 Article IV Consultation*] (emphasis added).

130. *Compare* IMF, *Libya: 2013 Article IV Consultation*, *supra* note 129, at 20 ("The authorities need to articulate and then implement a strategic vision for economic development which includes steps to set up a governance framework linked to transparency and accountability, including anti-corruption elements."), *with Santiago Principles*, *supra* note 2, at 4 (naming one of the GAPP rules objectives, "iv. To have in place a transparent and sound governance structure that provides for adequate operational controls, risk management, and accountability.").

the IMF team and committed to tackling problems related to the LIA's governance framework.[131] These commitments were followed by a period of inaction stemming from the instability in the LIA's management, due to Libya's political struggles.[132] However, in 2016, the LIA started to collaborate with the NRGI to improve transparency and good governance.[133] In the following section we discuss the power play for the LIA's leadership and look at the Gaddafi regime's influence, and the political divisions that have undermined the LIA's governance, creating negative consequences for the fund's assets and Libyan people as the fund's intended beneficiaries.

C. A "GAME OF THRONES" AND THE LONG SHADOW OF THE REGIME

The LIA's management and leadership are of paramount importance, and the relationship between the fund's high-level personnel and the Gaddafi family and regime has had serious implications for the current management of the fund. The fund's past and current management leadership is at the center of disputes in domestic courts concerning abuses of the fund that may cause further dissipation of the Libyan national wealth.[134]

At the establishment of the fund, experts with a long history and credentials in the Arab banking environment were appointed to the LIA's leadership.[135] Mohammed H. Layas was appointed as the LIA's founding President[136] and Hatim Gheriani was named Chief

131. IMF, *Libya: 2013 Article IV Consultation*, *supra* note 129 (quoting Mr. Shakour A. Shaalan, Executive Director for Libya: "On behalf of the Libyan authorities, I thank staff for their recent engagement and constructive Article IV Consultation discussions. The authorities highly value the views of the Fund on Libya's economic policies and institution-building efforts.").

132. *See* Al-Gayed, *supra* note 123 (stating that the LIA's organizational structure "fractured" causing "a split into two parallel authorities").

133. We were not able to find any substantial outcome of this collaboration at the time of writing. *Id.* ("NRGI is assisting Libya to improve governance throughout the natural resource value chain. NRGI will host a 26 October workshop to present its findings to the LIA steering committee and other stakeholders.").

134. *See generally* Libyan Inv. Auth. v. Goldman Sachs Int'l [2016] EWHC (Ch) 2530 (Eng.).

135. *See id.* [21]–[24].

136. *See id.* [14], [204]. Before becoming Head and CEO of the LIA, Mr. Layas held senior positions in the Libyan Arab Foreign Bank and the Arab Banking

Investment Officer.[137] But individuals notorious for their close connection to members of the Gaddafi family were also appointed to the LIA's ranks.[138] For example, Mustafa Zarti,[139] a close friend of Saif al-Islam Gaddafi (Muammar Gaddafi's son), was appointed Mohammed Layas' deputy.[140] Zarti has been described as the person who is, de facto, in charge of the fund.[141] This leadership triumvirate was a façade used to mask the regime's control over the SWF.[142] Evidence suggests that the SWF's investment strategy was also influenced by the regime.[143] Since the fall of the Gaddafi regime, the LIA has faced continuous challenges due to the political divisions within the state and because of disputes about whether the fund's management should remain in place.[144] In some cases, the experts called in to lead the LIA post-Gaddafi have been accused of links to

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Corporation (which counts among its major shareholders the Central Bank of Libya and the Kuwait Investment Authority).

137. *See id.* [15]–[16]. Gheriani was working in the private sector before joining the LIA, where he also headed the Alternative Investments Team.

138. *See id.* [189].

139. Even though Mr. Layas and Mr. Gheriani possess strong credentials and have had successful careers, their financial expertise has been criticized in relation to some of the financial operations that caused important losses to the LIA. They have been also subjected to further scrutiny that has led to litigation in the UK and the US. *See id.* [197]–[223].

140. *See* Libyan Inv. Auth. [2016] EWHC (Ch) [14], [189].

141. *See* Hugh Miles, *How Libya's Saif Al-Islam Gaddafi Seduced the West*, BBC NEWS (Mar. 4, 2011), https://www.bbc.com/news/world-12626320 (last visited Sept. 9, 2018) (explaining from an interview with a Libyan investment banker that Zarti was not named deputy chairman of the LIA because he was a talented investor, but rather Saif appointed his "old college friend" Zarti because of he was loyal).

142. *See id.* (stating that new evidence suggests that Saif controlled the LIA's sovereign wealth fund).

143. *See* Wright, *Ousted Head of Libyan Investment Authority Speaks Out*, *supra* note 71 (citing an interview with Mohsen Derregia, who stated that at the time of his arrival, some investment decisions were made by Seif Gaddafi and his father on behalf of the LIA board to invest in "all kinds of ad hoc investments" that created a "huge mess" in the portfolio).

144. This division is conspicuously evidenced by two competing websites, one with its country code top-level domain in Malta (http://www.lia.com.mt/), and the other in Libya (http://lia.ly/). Heba Saleh & Andrew England, *Libya Sovereign Wealth Fund Chief to Appeal to UN Over Frozen Assets*, FIN. TIMES (Apr. 19, 2017), https://www.ft.com/content/a9be923c-2349-11e7-8691-d5f7e0cd0a16 ("But Mr Mahmoud has two domestic rivals each claiming to be the rightful leader of the fund — disputes that reflect deep political divides.").

the Gaddafi regime, even when the links were tenuous.[145]

In April 2012, Mohsen Derregia interrupted his career as an academic in the United Kingdom to take on a new and difficult role as LIA's CEO in the aftermath of the fall of the Gaddafi regime.[146] He brought claims against the Italian Government that led to the unfreezing of accounts and shares held by the LIA in Italy[147] and performed internal reviews that then led to the LIA bringing claims against Goldman Sachs and Société Générale S.A.[148] After a year of Derregia's activism and initial success in regaining control over some of the LIA's assets located in Italy, he was replaced *pro tempore* by the deputy governor of the Central Bank of Libya, Ali Mohamed Hibri.[149] Hibri, in turn, stepped down when Abdulmagid Breish was appointed Chairman in June 2013.[150] However, in 2014, Breish was investigated for his participation in the former regime, given that under the Political and Administrative Isolation Law, officials from the Gaddafi era may not hold government positions.[151] Breish stepped

145. Chris Wright, *Inside Libya: Interview With LIA Sovereign Wealth Fund Chairman Breish*, FORBES (July 23, 2015, 5:00 AM), https://www.forbes.com/sites/chriswright/2015/07/23/inside-libya-interview-with-lia-sovereign-wealth-fund-chairman-breish/#854c58854259 [hereinafter Wright, *Inside Libya: LIA Breish Interview, Part Two*] ("Breish, who was chairman of the LIA, then had to step down while he was investigated for his previous links with the Gaddafi administration, then was cleared of those links by a Libyan court and (he says) reinstated, though the competing LIA in Malta contends that he has not been reinstated at all.").

146. *See* Wright, *The Battle for the Libyan Investment Authority*, *supra* note 33 (stating that prior to being named chairman of the Libyan Investment Authority, Mohsen Derregia was a professor at University of Nottingham Business School).

147. *See Corte di Appello di Roma* (Rome Court of Appeal), *Sezione Quarta Penale*, N4/12 R.G.I.E. 23.7.2012 (on file with author).

148. The LIA was unable to prevail in its claim against Goldman Sachs. *See* Libyan Inv. Auth. v. Goldman Sachs Int'l [2016] EWHC (Ch) 2530, [427]–[428] (Eng.).

149. *See* Wright, *The Battle for the Libyan Investment Authority*, *supra* note 33.

150. *See* Tim Wallace, *Libyan Investment Authority's Case Against Goldman Sachs and SocGen is Back On*, TELEGRAPH (July 2, 2015, 10:23 PM), https://www.telegraph.co.uk/finance/newsbysector/banksandfinance/11713902/Libyan-Investment-Authoritys-case-against-Goldman-Sachs-and-SocGen-is-back-on.html.

151. *See* Jess Delaney, *Libya's Sovereign Fund May Hold Key to Country's Civil War*, INSTITUTIONAL INV'R (Jan. 6, 2016), https://www.institutionalinvestor.com/article/b14ywvp62n58qr/libyas-sovereign-fund-may-hold-key-to-countrys-civil-war (stating that because of the Political and Administrative Isolation Law, Breish stepped down after one year of holding the holding the position of Chairman); Feras

down during the investigation[152] and was substituted *ad interim* by the former Minister of Oil, Abdulrahman Ben Yezza.[153] Meanwhile, following the June 2014 House of Representatives elections, the "Tobruk government" was formed.[154] The Tobruk government had some international recognition, and Prime Minister Abdullah al-Thani, appointed Hassan Bouhadi as CEO of the LIA.[155] Bouhadi operated the LIA from the fund's Malta offices.[156] After being cleared by the investigation, Breish resumed his role as CEO, working out of the Tripoli offices, with support from the Tripoli-based legislative authority, the General National Congress.[157]

Although Bouhadi and Breish both claimed the leadership of the LIA, both parties agreed that the frozen LIA assets and Libyan African Investment Portfolio should remain so, pending the establishment of a Government of National Accord (GNA), "which was also the best protection against misappropriation."[158] Both parties also agreed on pursing the disputes against Goldman Sachs and Société Générale to retrieve lost structured financial instruments.[159] Meanwhile, both contenders were also engaged in multiple-front legal battles over the LIA's leadership.[160] Breish initiated domestic legal proceedings to

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Bosalum & Ulf Laessing, *Head of Libya Investment Fund Steps Down Over Political Law*, REUTERS (July 9, 2014, 7:37 PM), https://www.reuters.com/article/libya-investment/head-of-libya-investment-fund-steps-down-over-political-law-idUSL6N0PK5Q120140709.

152. Bosalum & Laessing, *supra* note 151 ("Breish quit after an investigation under a law which bans people from taking a public office if they had a function in the regime of late strongman Muammar Gaddafi. . . .").

153. *Id.* ("Former Oil Minster Abdulrahman Benyezza has taken over as acting head of the fund. . . .").

154. *Libya's Tripoli Government to Step Down*, BBC NEWS (Apr. 5, 2016), https://www.bbc.com/news/world-africa-35974641 (last visited Oct. 7, 2018) ("The Tobruk government is backed by what is still the internationally recognised parliament and Libya's only legislative body under a UN-backed agreement.").

155. *See* Delaney, *supra* note 151.

156. *See id.*

157. *See id.*

158. *See* Final Report of the Panel of Experts on Libya Established Pursuant to Resolution 1973 (2011), ¶ 230, U.N. Doc. S/2016/209 (Mar. 9, 2016) [hereinafter *2016 Report of the Panel of Experts on Libya*].

159. Delaney, *supra* note 151 ("Breish . . . agreed with Bouhadi to make a joint application to the High Court to appoint a receiver, or trustee, to instruct the lawyers on the LIA's behalf until the rival claims to the fund's authority were resolved.").

160. Wright, *Inside Libya: LIA Breish Interview, Part Two*, *supra* note 145 ("For

challenge his opponent for the LIA's leadership.[161] On the other hand, Bouhadi, who was still heading the LIA and managing part of its assets[162] from the Malta office,[163] challenged Breish's leadership in the UK courts.[164] In light of the Libya Political Agreement, in which both of the parties pledged support for the GNA as the sole legitimate government of Libya endorsed by the UNSC,[165] Judge Blair adjourned the proceedings.[166] In his decision, Judge Blair also cited UNSC

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all practical purposes I consider myself to be the chairman and I consider them to be rogue directors. I have filed with the public prosecutor in Libya criminal cases against them.").

161. *See* Claire Milhench, *LIA Leadership Case Adjourned, Judge Says Premature to Rule*, REUTERS (Mar. 6, 2016, 7:06 PM), https://www.reuters.com/article/us-libya-security-swf/lia-leadership-case-adjourned-judge-says-premature-to-rule-idUSKCN0W9003.

162. Bouhadi sought the right to manage the frozen accounts to avoid ulterior losses to the LIA without challenging the validity of the sanctions. *See* ANGELA CUMMINE, CITIZENS' WEALTH: WHY (AND HOW) SOVEREIGN FUNDS SHOULD BE MANAGED BY THE PEOPLE FOR THE PEOPLE 51–52 (2016) (describing Mr. Bouhadi's appointment as LIA chairman by the Board of Trustees in October of 2014); *see also* Libby George & Dmitry Zhdannikov, *Libya Investment Fund Seeks Management Right Amid Freeze*, REUTERS (July 8, 2015, 8:41 AM), https://www.reuters.com/article/libya-investment-fund/libya-investment-fund-seeks-management-right-amid-freeze-idUSL8N0ZO17220150708.

163. *See* CUMMINE, *supra* note 162, at 51–52; *see also* George & Zhdannikov, *supra* note 162.

164. Jane Croft, *Power Struggle Over Libya's LIA Spills into UK High Court*, FIN. TIMES (Sept. 7, 2015), https://www.ft.com/content/a6e22040-5561-11e5-9846-de406ccb37f2.

165. S.C. Res. 2259, ¶ 3 (Dec. 23, 2015) ("*Endorses* the Rome Communiqué of 13 December 2015 to support the Government of National Accord as the sole legitimate government of Libya") (emphasis in original). Further, after a meeting of Foreign Ministers in 2017, the G7 group "welcome[d] progress made in the Libyan economic dialogue and recall[ed] the necessity of an exclusive control of the [Presidency Council] over Libyan economic institutions and resources[,] encourage[d] effective cooperation between the [Presidency Council], the GNA, and the Central Bank of Libya (CBL) to ensure the GNA has the necessary tools to implement its fiscal and monetary policies for the wellbeing of all Libyans[,] [and] call[ed] on the GNA and the CBL to fully implement their agreement to keep the legitimate economy functioning, ensure the necessary funds for government activities, [and] bring the budget under control and end the liquidity crisis." Group of Seven [G7], *G7 Foreign Ministers' Meeting Lucca, 10–11 April 2017 Joint Communique*, at 10–11 (Apr. 10-11, 2017), http://www.g7italy.it/sites/default/files/documents/G7_FMM_Joint_Communique.pdf (last visited Oct. 7, 2018) (alteration to the original).

166. Bouhadi v. Breish, [2016] EWHC (Comm) 602, [1], [45] (Eng.).

Resolution 2259, which calls upon the GNA to protect the integrity and unity of the LIA.[167] The U.K. court's decision and the broad international support for the GNA did not pacify the two factions, which continued to disagree over the rightful management of the LIA.[168] In August 2016, after compelling Bouhadi to step down, the Tobruk government appointed Ali Shamekh to lead the LIA from the fund's La Valletta office.[169]

In August 2016, Fayez Serraj, leader of the Presidency Council of the GNA, issued a decree that formed an Interim Steering Committee for the LIA's administration.[170] Dr. Ali Mahmoud was appointed to act as President of the Steering Committee.[171] The Committee was "appointed to temporarily administer and steer the [LIA] and ha[d] the privileges and terms of reference of the Board of Directors and Chairman with a view to safeguard the normal administration of the company."[172] However, the Committee was not permitted "to undertake any measures regarding disposition of the [LIA]'s assets and their transfer."[173] As President of the Committee, Dr. Mahmoud was therefore empowered to, *inter alia*, undertake legal action on behalf of the LIA, but was not permitted to engage in management of the fund *stricto sensu*.[174] At the same time, Breish,[175] still in control of

167. *Id.* [45].

168. *See* Sami Zaptia, *Contending LIA Chairman Breish Slams Serraj and his LIA Appointee*, LIBYA HERALD (June 4, 2017), https://www.libyaherald.com/2017/06/04/contending-lia-chairman-breish-slams-serraj-and-his-lia-appointee/.

169. *See* Sami Zaptia, *LIA Chairman Bouhadi Resigns as HoR Appoint Their Man Shamekh as CEO*, LIBYA HERALD (Aug. 13, 2016), https://www.libyaherald.com/2016/08/13/lia-chairman-bouhadi-resigns-as-hor-appoint-their-man-shamekh/.

170. *See* Libyan Investment Authority [LIA], *The Presidential Council of the Government of National Accord, Decision Number (115) in 2016 Regarding the Formation of a Steering Committee and Commissioning of Tasks*, art. 1 (Aug. 15, 2016), http://www.lia.com.mt/wp-content/uploads/2016/08/Presidential-Council-Resolution-No.-115-of-2016-English-Certified-Translation.pdf.

171. *See id.*

172. *Id.* art. 2.

173. *Id.* art. 4.

174. *Id.* art. 3 ("The Committee is assigned to pursue all grievances and lawsuits locally and abroad initiated by or against the Authority, whether these were before a judiciary or arbitration committee or other similarly appointed committees. To work on safeguarding all the rights of the Authority and to ensure all appropriate measures are undertaken.").

175. Saleh & England, *supra* note 144.

the fund's Tripoli offices,[176] continued to claim the leadership over the Libyan SWF[177] and Shamekh continued to represent the LIA in international gatherings of SWFs.[178] Breish succeeded in challenging the validity of the Interim Steering Committee in the Libyan courts, and in January 2017 the Tripoli Appeals Court ordered the cancellation of the Presidential Council of the GNA's Decision 115.[179]

This contested leadership and its effects on the LIA have also been noted by the six-person Panel of Experts on Libya established under UNSC Resolution 1973 (2011), which issued its Final Report on June 1, 2017.[180] Referring to an earlier report issued by another Panel of Experts established pursuant to the same UNSC resolution,[181] the Panel observed the impact of sanctions on the governance of the LIA:

> The Panel has previously reported on the rigidity of the current sanctions regime and how the Authority's assets lose value after investments have matured because they cannot be reinvested. . . . This situation remains unchanged, to the frustration of the Authority's managers. However, it will be difficult to modify the sanctions regime and resolve such management issues while the fund remains divided.[182]

The Panel of Experts' argument is valid. While the leadership of the SWF remains divided it could be risky to vary the sanctions regime. However, the following section will show that, although such a claim

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176. *Id.*

177. Breish challenged the legitimacy of the Steering Committee in the Libyan courts. *See* CUMMINE, *supra* note 162, at 51–52.

178. For example, Shamekh attended the Global Sovereign Wealth Forum 2017, which took place in London in March 2017. The event was not organized by the IFSWF. *See Breish: The So-Called LIA Interim Steering Committee Creates 'Uncertainty and Confusion'*, LIBYAN EXPRESS (Oct. 24, 2016, 2:35 PM), https://www.libyanexpress.com/breish-the-so-called-lia-interim-steering-committee-creates-uncertainty-and-confusion/.

179. *See Exclusive: Tripoli Appeals Court's Order Shows Cancellation of PC's LIA Steering Committee*, LIBYAN EXPRESS (Feb. 7, 2017, 4:40 PM), http://www.libyanexpress.com/exclusive-tripoli-appeals-courts-order-shows-cancellation-of-pcs-lia-steering-committee/print/.

180. Final Rep. of the Panel of Experts on Libya Established Pursuant to Resolution 1973 (2011), ¶¶ 216–26, U.N. Doc. S/2017/466 (June 1, 2017) [hereinafter *2017 Report of the Panel of Experts on Libya*].

181. *See 2016 Report of the Panel of Experts on Libya*, *supra* note 158, ¶¶ 227–30, 252–60 (describing the parameters regarding the frozen assets of the LIA).

182. *2017 Report of the Panel of Experts on Libya*, *supra* note 180, ¶ 227.

might have merit, the original justification for the inclusion of the LIA on the Sanctions List—to prevent its assets being used as a source of funding for the Gaddafi regime—has been without merit since the collapse of the Libyan Arab Jamahiriya upon Gaddafi's death.

Only in July 2017 did the GNA form a new Board of Trustees, which, in application of Law No. 13 of 2010, includes the Prime Minister of the GNA; the Ministers of Finance, Planning, and Economy; and the Governor of the Libyan Central Bank.[183] Consequently, the new Board of Trustees appointed the former members of the Interim Steering Committee to the Board of Directors, and appointed Dr. Ali Mahmoud to be Board's the new Chairman.[184]

This section has shown that LIA's relationship with the regime in Libya has been detrimental to the governance of the SWF. This is evidenced by the influence of the Gaddafi family over the fund, and the power struggles between the different factions, which are reflective of the state's unstable political situation. In the past decade, domestic politics have undermined the governance of the fund, its ability to acquire know-how, and ability to properly invest and generate returns. Despite initial involvement in international procedures and bodies that work to improve governance and transparency of SWFs, the LIA has repeatedly failed to meet the international standards set in the Santiago Principles. The LIA's political divisions and disputed management have been reflected in the IFSWF's weakened membership, which has in turn negatively affected the LIA's reputation as an international investor. On the other hand, similar circumstances in the future might require the IFSWF to take action to address issues of contested management and membership.

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183. Zaptia, *LIA Gets New Board of Trustees, New Board, Confirms Chairman and Reform Plan*, *supra* note 88 (providing a statement from Faiez Serraj saying "[t]his is a positive step that reaffirms the LIA as the authoritative and rightful body mandated by the Presidential Council and the GNA, thus endorsed and supported by the United Nations and the International Community").

184. *See GNA Appoints New LIA Board of Trustees*, LIBYA-BUS. NEWS (July 18, 2017), https://www.libya-businessnews.com/2017/07/18/gna-appoints-new-lia-board-of-trustees/. The new Board of Directors has established an annual plan that includes among its primary objectives working towards good governance and transparency and improving the LIA's adherence to the Santiago Principles.

Despite the aforementioned, there is still hope. The belated solution to address political divisions led to the formation of a new Board of Directors, which benefits from greater political support.[185] The new Board is gaining control over the LIA and is starting to consider investment projects.[186] While Shamekh eventually gave up his leadership position within the LIA,[187] Breish, on the other hand, still claims to be the LIA's Chairman.[188] As of the moment of writing this article, the authors expect and suggest a greater engagement on the part of the LIA with the IFSWF and other International Financial Institutions (IFIs). Such engagement with the IFSWF, and the provision of self-assessments to show adherence to the Santiago Principles, will help to enhance the LIA's transparency and improve its governance.[189] It will also help the LIA build its reputation as a credible and reliable international investor. One can hope that the LIA

185. Aidan Lewis, *Libya's U.N.-Backed Government Moves to Take Control of Wealth Fund*, REUTERS (July 18, 2017, 11:02 AM), https://www.reuters.com/article/us-libya-swf/libyas-u-n-backed-government-moves-to-take-control-of-wealth-fund-idUSKBN1A31O0 ("[T]he new board of trustees included the GNA's prime minister, the ministers of finance, planning, and economy, and the governor of Tripoli's central bank."); *see generally supra* Section III.A (explaining LIA's troubled history).

186. *See* Sami Zaptia, *LAP Considering Increased Investments in "Profitable" Morocco*, LIBYA HERALD (Mar. 13, 2018), https://www.libyaherald.com/2018/03/13/lap-considering-increased-investments-in-profitable-morocco/ (providing that the LIA subsidiary, Libya Africa Investment Portfolio, has been "considering increasing its investments in Morocco").

187. *See* Claire Milhench, *Ali Shamekh Resigns from CEO Post at Libyan Sovereign Fund*, REUTERS (Mar. 1, 2018, 6:43 AM), https://www.reuters.com/article/us-libya-swf-shamekh/ali-shamekh-resigns-from-ceo-post-at-libyan-sovereign-fund-idUSKCN1GD4UI (following his resignation as chief executive of the LIA, Shamekh provided a statement claiming that it was impossible to implement a viable program due to divisions within Libya).

188. *See Breish: Political Interference in the Libyan Investment Authority Must Stop*, LIBYAN EXPRESS (Feb. 24, 2018, 12:12 PM), http://www.libyanexpress.com/breish-political-interference-in-the-libyan-investment-authority-must-stop/ (considering himself to be the Chairman, Breish has voiced his concerns of the confusion surrounding the legality of the LIA's funds).

189. Larry C. Backer, *International Financial Institutions (IFIs) and Sovereign Wealth Funds (SWFs) as Instruments to Combat Corruption and Enhance Fiscal Discipline in Developing States*, INT'L REV. L., May 9, 2015, at 4–5, http://www.qscience.com/doi/10.5339/irl.2015.swf.5 ("It now appears that IFI's may come to view the SWFs as a useful part of the IFI's lending and capacity building toolkits for developing states that meet certain criteria.").

has already taken its first steps towards good governance as the new Board has begun to engage closely with the NGRI and the Oman Investment Fund.[190] However, we are cognizant that political stability and support for the GNA are necessary preconditions to the LIA making such progress.

IV. REVISITING THE ASSET FREEZE ON THE LIA

The UNSC requested the asset freeze measures in Resolution 1970 under Article 41 of the U.N. Charter,[191] measures that, according to Article 39 of the same document, "shall be taken . . . to maintain or restore international peace and security."[192] Additionally, in listing the LIA as an entity whose funds must be frozen, the UNSC identified the utility of the SWF to the Gaddafi family and regime as the justification for its inclusion.[193] However, Muammar Gaddafi was killed by rebel forces in his hometown of Sirte on October 20, 2011, and his regime collapsed at his death, if not earlier.[194] Additionally, of the surviving members of the Gaddafi family and regime named on the 1970 Sanctions List, the majority either fled Libya and/or were captured,

190. *See, e.g.*, *GNA Appoints New LIA Board of Trustees*, *supra* note 184. Libyan media reports that key staff members from the Oman Investment Fund are assisting the LIA to improve its governance standards and to adopt the Santiago Principles. The Oman Investment Fund, which shares its date of inception with the LIA, is not currently a full member of the IFSWF. With the difficulties to access information one can only imagine that the other Omani SWF, the State General Reserve Fund, which has been an IFSWF member since March 2015 and is compliant with the Principles, is also playing a role in the process. The SGRF has recently been active and held a workshop with the IFSWF focused on communication and reporting.

191. U.N. Charter art. 41 (stipulating that the Security Council may choose from measures that include the "complete or partial interruption of economic relations"). The measures in Resolutions 1973 and 2009 were also adopted under Chapter VII.

192. *Id.* art. 39.

193. S.C. Res. 1970, ¶ 17 (Feb. 26, 2011) ("[A]ll Member States shall ensure that any funds, financial assets or economic resources are prevented from being made available by their nationals or by any individuals or entities within their territories, to or for the benefit of the individuals or entities listed in Annex II of this resolution or individuals designated by the Committee.").

194. *See, e.g.*, VANDEWALLE, *supra* note 7, at 208.

with a number facing trial in Libya and overseas.[195] In the words of the March 21, 2016 Letter:

> When the assets freeze was originally put in place, it was of course not intended as a punishment to Libya, but rather a protective measure to protect the assets against dissipation during the revolution and the transition after the fall of the Gaddafi regime. Yet the assets freeze is now having a very serious negative impact on the interests of the Libyan people.[196]

When the UNSC adopted Resolutions 1970 and 1973, the justification put forward for the inclusion of the LIA reflected a legitimate concern that the access of the Gaddafi family and regime to LIA funds might serve to prolong the violence in Libya. However, it can hardly be plausibly argued that the threat posed by the Gaddafi regime and family, most of whom are in custody and/or reside outside of Libya,[197] and have no (claim to) control over the LIA, continues to provide the rationale for including the SWF on the Resolution 1970 Sanctions List. Rather, as the March 21, 2016 Letter proposes, the justification for its continued listing is to avoid the "dissipation" of assets during the transition period.[198] Nonetheless, the "narrative summaries of reasons for listing individuals and entities" provided in 2011 continues to be invoked.[199] This is not necessarily to say that the UNSC should have lifted the sanctions imposed on the LIA, although such an argument could perhaps be made. Rather, in the view of the authors, the UNSC ought to have revisited, and revised, the reasons for its inclusion on the Sanctions List following the fall of the Gaddafi regime in Libya.

There is a delisting procedure available to individuals and entities listed on U.N. sanctions lists. However, as of the time of this writing, only two individuals—and no entities—listed by the Libya Sanctions

195. Of the 20 individuals listed on the Resolution 1970 Sanctions List at the time of writing, six are believed to be deceased, four are believed to be in custody or with restricted movement, and four are believed to be residing overseas (but not in custody). *See* Sanctions List, *supra* note 45.

196. Dabbashi, *supra* note 13, ¶ 3.

197. *See* Sanctions List, *supra* note 45; S.C. Res. 2253, ¶ 35 (Dec. 17, 2015).

198. Dabbashi, *supra* note 13, ¶ 1.

199. *See* Sanctions List, *supra* note 45.

Committee have submitted de-listing requests to the body tasked with considering such requests.[200]

As for the rationale behind providing "narrative summaries of reasons for listing individuals and entities," discussing the Sanctions Committee pursuant to Resolutions 1267 (1999) and 1989 (2011) concerning Al-Qaida and associated individuals and entities,[201] Clemens Feinäugle expressed the view that the obligation to publish a narrative summary "serves due process purposes, i.e. the right to be informed and thus the fair procedure . . . and which increases transparency concerning the reasons for listings."[202] In reaching this conclusion concerning the Al-Qaida Sanctions Committee, Feinäugle cites the Guidelines of the Committee for the Conduct of its Work, the latest version (incorporating individuals and entities associated with ISIL or Da'esh) which provides:

> For all entries on the ISIL (Da'esh) and Al-Qaida Sanctions List, the Committee, with the assistance of the Monitoring Team and in coordination with the relevant designating State(s), shall continue to make accessible on its website narrative summaries of reasons for listing.[203]

Although the guidelines of the Libya Sanctions Committee for the conduct of its work do not explicitly provide for such a procedure, the Committee nevertheless provides such reasons on its website. The guidelines for the conduct of the Committee's work also make reference to 'reasons for listing available on the Committee's website'.[204] It is these reasons, which remain displayed on the

200. *See Delisting Requests*, UN (Sept. 6, 2018), https://www.un.org/sc/suborg/en/sanctions/delisting/de-listing-request-stats (last visited Oct. 7, 2018) (providing that the Security Council Committee received four requests for de-listing, two of which are being processed although none of the individuals has been successfully delisted to date).

201. S.C. Res. 2253, ¶¶ 15, 17 (expanding the individuals and entitles listed in Resolutions 1267 and 1989 to include those associated with the Islamic State in Iraq and the Levant (ISIL, also known as Da'esh)).

202. Clemens A. Feinäugle, *UN Smart Sanctions and the UN Declaration on the Rule of Law*, *in* ECONOMIC SANCTIONS AND INTERNATIONAL LAW 113, 126 (Matthew Happold & Paul Eden eds., 2016).

203. S.C. Sanctions Comm., Guidelines of the Committee for the Conduct of Its Work, ¶ 9(a) (Dec. 23, 2016), https://www.un.org/sc/suborg/en/sanctions/1267/committee-guidelines.

204. S.C. Sanctions Comm., Provisional Guidelines of the Committee for the

Committee's website at the time of this writing, it is argued in this article, that these reasons are no longer valid with respect to the LIA. In 2015, the UNSC adopted Resolution 2213 (2015), which reaffirmed the sanctions against the LIA and other listed individuals and entities as follows:

> [T]hese measures also apply to individuals and entities determined by the Committee to be engaging in or providing support for other acts that threaten the peace, stability or security of Libya, or obstruct or undermine the successful completion of its political transition, and decides that such acts may include but are not limited to . . . threatening or coercing Libyan State financial institutions and the Libyan National Oil Company, or engaging in any action that may lead to or result in the misappropriation of Libyan state funds. . . .[205]

This reasoning would provide a much clearer, and more accurate, rationale for the LIA's continued listing by the Libya Sanctions Committee.

Maintaining the LIA on the Sanctions List has had profound implications for its returns on investments and has affected its investments strategy. Laurence Boisson de Chazournes discussed the (negative) "side effects" of U.N. sanctions, which she categorizes into three groups of consequences: (i) political, (ii) humanitarian, and (iii) economic.[206] She observes that these "side effects obviously affect the target State . . . but not necessarily in the manner in which they are intended,"[207] often causing the most serious harm to its civilian population. These "side effects," particularly the economic ones, are

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Conduct of Its Work, ¶ 5(g) (Oct. 25, 2011), https://www.un.org/sc/suborg/en/sanctions/1970/guidelines ("The Secretariat shall, after publication but within one week after a name is added to the List . . . remind States receiving such notification that they are required to take, in accordance with their domestic laws and practices, all possible measures to notify or inform in a timely manner the newly listed individuals and entities on the List of the measures imposed on them, any information on *reasons for listing available on the Committee's website* as well as all the information provided by the Secretariat in the above-mentioned notification.") (emphasis added).

205. S.C. Res. 2213, ¶ 11(d) (Dec. 17, 2015).

206. Boisson de Chazournes, *supra* note 53, at 57 (discussing debates within the UN regarding the sanctions' compatibility "with rules of international human rights law and humanitarian law").

207. *Id.* at 58.

clearly visible with respect to Libya. Elaborating on the losses experienced by the LIA in 2014 (that is, real losses of $721 million and $1.6 billion to $2.3 billion in lost returns on investment), Mr. Dabbashi observed as follows:

> [T]he LIA has three main investment portfolios: equity investments, fixed income investments and alternative investments. The LIA has no access to its equity portfolio and, hence, cannot respond to market changes or currency fluctuations, which erode the value of that portfolio further. Moreover, most of the bonds the LIA had in its fixed income portfolio have matured, and the proceeds are in frozen accounts, where they are earning zero or negative interest rates. Also, the alternatives portfolio is inaccessible to the LIA external managers, who still charge management fees, even though they are not managing the funds. In fact, if the fund is underperforming, the LIA is not able to close the fund or transfer it to another manager. Thus, there is no incentive for financial institutions and managers holding LIA funds to provide competitive interest rates or to manage funds effectively.[208]

Mr. Dabbashi therefore requested that the UNSC vary the sanctions regime, permitting the LIA to: (i) transfer funds between accounts; (ii) to open and close accounts; and (iii) to liquidate accounts and (re)invest their funds, subject to three conditions:

> (i) any transfer is to a frozen account that is in the same name as the transferor; (ii) the transfer does not represent, directly or indirectly, a transfer of any interest of the LIA to any other person subject to sanctions under the Security Council; and (iii) the transfer is in accordance with the applicable procedures of the Member State(s) which have jurisdiction over the funds or other financial assets and economic resources.[209]

Mr. Dabbashi was consequently not arguing that the LIA's assets be unfrozen, but that the LIA be permitted to manage the assets, subject to a number of safeguards. This was to avoid their dissipation at the expense of the people of Libya, in whose name the LIA was conceived.[210] In other words, according to the March 21, 2016 Letter, the U.N. sanctions regime constitutes an obstacle to the proper

208. Dabbashi, *supra* note 13, ¶ 5.
209. *Id.* ¶ 9.
210. *Id.* ¶ 10.

governance of the Libyan SWF.[211]

V. CONCLUSION

The LIA is the first SWF to have been subjected to UNSC sanctions. This article analyzes the application of the UNSC sanctions to the LIA by addressing a series of interrelated and complex issues. The challenge has been made more difficult by the lack of transparency that characterizes the existence and the activities of LIA, and by the domestic political struggle that has led to a tripartite division in the management of the SWF, which reflects the concentrations of power in Libya.

First, the article analyzes the LIA's establishment, governance, and investment strategy, examining the fund's initial engagement with IFIs so as to improve its governance structure. But, more importantly, the article highlights the problems that the LIA faces, posed by the continued application of the U.N. sanctions almost seven years after the death of Muammar Gaddafi, whose close association with the LIA first led to its listing by the U.N. Sanctions Committee.

Our conclusions are two-fold but interrelated. Firstly, in relation to the UNSC sanctions, the article highlights a potential problem with the framing of the LIA asset freeze. One proposal put forward in this article is that this association between the Gaddafi regime and the LIA should no longer serve as the legal basis for the continued listing of the LIA. The article identifies some of the reasons behind the continued freezing of the LIA's assets, which include the contested management of the SWF, and the risk of misappropriation of its assets that could result if this situation is perpetuated, due to the fractured nature of Libyan society. The ongoing asset freeze continues to generate negative effects for the fund's management, which has been—and remains—unable to react to market changes, address currency fluctuations, and reinvest investments that have matured. Because of the freeze, the LIA has lost opportunities to take advantage of overall positive market conditions as other funds have done.[212] This

211. *See generally id.*

212. By way of example, the Australian Future Fund, a member of the IFSWF, has over the past 10 years had a return on its investments of 8.5 percent per year, while its benchmark is set at 6.7 percent per year. *See Portfolio Update at 31 March*

has, on the one hand, prevented the possible growth of the fund and, on the other, caused losses to the fund.[213] This means that the LIA is unable to operate for the benefit of the Libyan people for whose benefit the SWF was first established. Such application of the sanctions has, in contrast, been to the detriment of the wealth of the Libyan people.[214] Considering the broader picture, the negative economic consequences that the LIA is experiencing can serve as a stepping-stone for rethinking the application of sanctions to SWFs. In this regard, the UNSC might consider involving IFIs such as the IMF, the World Bank Treasury (and possibly the IFSWF) in its freezing procedures to ensure better management of frozen assets.

A related issue put forward in this article refers to the partial relaxation of the U.N. sanctions against the LIA, which has enabled the LIA to use new funds made available to it. This article has shown, however, that the easing of asset freeze measures has failed to alleviate the governance issues caused by its initial listing and the consequent

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2018, FUTUREFUND (Apr. 23, 2018), http://www.futurefund.gov.au/news-room/2018/04/23/00/21/portfolio-update-to-31-march-2018.

213. Against this view, one might argue that the UNSC sanctions are aimed at preventing misappropriation and dissipation of the LIA's assets. However, we believe that this position is weak, at least since the establishment of the GNA and its Board of Trusties and Board of Directors, which not only have international support but, more importantly, are the product of broader agreements between Libyan political groups and factions. *See New LIA Chief Wants UN to Introduce "Smart Sanctions"*, LIBYA HERALD (Aug. 24, 2017), https://www.libyaherald.com/2017/08/24/new-lia-chief-wants-un-to-introduce-smart-sanctions/; *cf.* Lorenzo Totaro & Boris Groendahl, *EU Said to Agree to Freeze Libyan Fund, Central Bank Assets*, BLOOMBERG (Mar. 8, 2011, 12:23 PM), https://www.bloomberglaw.com/product/blaw/document/LHR1N51A1I4H?bc=W1siU2VhcmNoIFJlc3VsdHMiLCIvcHJvZHVjdC9ibGF3L3NlYXJjaC9ibGF3L3NlYXJjaC9yZXN1bHRzLzU5NDllZjI0NjMxMjkxZDE3NjdmOTk3Y2U4YWRkMzVlIl1d--3ea6a18a0e855a1e02cb32203ea6a18a0e855a1e02cb3220c0729878b40eddd3&headlineOnly=false&highlight=EU+to+freeze+Libyan+sovereign+wealth+fund+assets.

214. *See, e.g.*, PAUL SALEM & AMANDA KADLEC, LIBYA'S TROUBLED TRANSITION 6 (June 2016), https://carnegieendowment.org/files/libya_transition.pdf (describing a $40 billion USD injection in 2011 that allowed the government to finally resume payment to hundreds of thousands of its employees, many of whom went unpaid once Libyan assets were frozen); Sophie Quinton, *The Quest for Libya's Frozen Assets*, ATLANTIC (Aug. 26, 2011), www.theatlantic.com/international/archive/2011/08/the-quest-for-libyas-frozenassets/244171 (providing that Libya's Transitional National Council contended that it needed more than $5 billion USD to fund stabilization efforts immediately).

freezing of the majority of the assets under its control. A final point in this regard is a suggestion to the LIA to continue legally challenging the freezing of its assets in specific States. While litigation might seem cumbersome, it would enable the LIA to regain access to assets that might be used by the fund and has already had success in the Italian courts and, albeit to a lesser extent and in a different fashion, in the U.K. High Court.

Second, in relation to the LIA's governance, management, and investment strategy, the article proposes that making funds available to the GNA-appointed LIA executives, who already enjoy U.N. support, would enable the LIA to use and better administer its funds. Such measures would prevent future possible losses of value in the LIA's assets being caused by the UNSC measures. This would not only benefit the LIA but would also serve to increase the legitimacy of the GNA, which should have sole and effective oversight over the LIA. More importantly, regaining control of the frozen assets would enable the LIA to better manage them in pursuit of the objectives enshrined in its constituent law. A prerequisite to the better management of the LIA's assets by its new Board is finding a solution to its past governance problems. Such difficulties were exacerbated by political interference and divisions, which led to a weak and confused management that overlooked adherence to the Santiago Principles and ignored the LIA's membership in the IFSWF. To address these longstanding problems, the LIA needs to increase its collaboration with IFIs, such as the IMF and the World Bank Treasury, and to improve its governance by complying with the Santiago Principles, which we anticipate will eventually reduce political influence on its management.