

# Kluwer Arbitration Blog

## Turkey and Libya: Full Protection and Security or (Gunboat) Diplomacy?

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A widespread debate on the legitimacy of (and backlash against) investor state dispute settlement (ISDS) has been on-going for several years now. Put colloquially, this debate asks essentially whether ISDS in its current form is capable of handling international investment disputes, generally, and such disputes that implicate a public interest element, in particular. Moreover, it asks whether all stakeholders' concerns are taken into account in the contemporary practices and whether and how the procedural framework should evolve to reflect this. Should there be (several) moderate reforms put in place or a more systematic reform of both international investment agreements (IIAs) and ISDS? Naturally, we cannot cover the entire debate here. This post focuses on a particularly interesting development in Libya. It is argued that the developments in Libya should be analyzed through the lens of historical backlash rather than contemporary backlash.

We are living through some very turbulent times. In this respect, Professor Hobér and Dr. Dahlquist rightly noted that the ISDS “universe is not shielded from the trend towards nationalism and protectionism currently sweeping many parts of the world.”<sup>1)</sup> In that light, one should never lose sight of the central goal of developing a robust international investment law (IIL) and ISDS. The substantive protection and procedural guarantee was put in place in order to protect (and therefore indirectly promote) private capital through foreign direct investment (FDI). Investors did not trust that municipal courts of host States would be neutral enough to adjudicate investment disputes. Moreover, investors were not particularly happy with diplomatic protection as a vehicle for redressing investment grievances—in particular not small and medium enterprises, who would often not be able to convince their home State to engage in a political stand-off for their sake. And worse yet was the occasional show-off by gunboat diplomacy (a form of post-colonial hegemonial warmongering). It is only at a time of political chaos, where the global rule of law is at its weakest, that a country can use gunboat diplomacy and get away with it.

Gunboat diplomacy manifests a total rejection of the utility of transnational adjudication. As a practice it has been unheard of for the last centuries (in its express means—the reader may consider that there are implicit forms of gunboat diplomacy and we would happily receive such comments below). Now it seems that the concept has come back to haunt an already weakened regime of ISDS.

### Turkey and Libya: What's Next?

Several ISDS claims have been brought against Libya following its *two* civil wars. Hundreds of infrastructure projects were initiated in Libya, a large portion of which came from the Turkish construction industry.<sup>2)</sup> More specifically, in February 2011 “there were an estimated 100 construction firms from Turkey operating in Libya, with over 270 unfinished projects worth an estimated 28 billion US dollars (USD)”.<sup>3)</sup> In the first civil war, many Turkish investments were suspended. However, some projects were reinitiated subsequent to the first civil war when the newly formed government gave signals of economic and political recovery (between 2012 and 2014); this temporary improvement took yet another turn with the second civil war (triggered on 16 May 2014).<sup>4)</sup> As a result, in the aftermath of Libya’s failure to offer *inter alia* [full protection and security](#), many investors turned to ISDS in order to remedy their grievances.

These investors did the right thing. Turkey and Libya had signed a bilateral investment treaty, which offered full protection and security and included an ISDS clause. In fact, the legal community and the global rule of law did not let them down. Many investors were highly successful in their claims—but not *all*. For example, in a recent [award](#) all claims on the merits were rejected but in others claims have been [upheld](#) (sometimes [some](#) of the claims).

Despite this, things have recently taken an unexpected turn. Turkey [decided](#) to support the internationally-backed Libyan government through its military—and has even promised engagement if necessary. Apart from possibly being a political show-off or geopolitical positioning, it has been [described](#) by Turkish officials themselves as an aim “to salvage billions of dollars of business contracts thrown into limbo by the conflict and secure more leverage in the scramble for oil and gas in the Mediterranean”.

In light of the Turkish investors’ experience, Turkey’s main goal seem to be to ensure that the construction projects will eventually be [resumed](#). This makes sense, given the value associated with the projects, approximately \$18 billion. Despite the two civil wars and multiple ISDS procedures, there are in fact plenty of costly construction projects that could possibly be resumed—including hospitals, shopping malls, parks, universities, hotels, etc. The intervention brings with it diplomatic talks, such would include the resumption of the contracts. It has been [reported](#) that Turkish-Libyan Contracting Joint Working Group “has agreed to start work on the continuation of the unfinished projects of Turkish companies in Libya”. In fact, it seems that many Turkish investors are [keen](#) on resuming their unfinished projects.

## Concluding Remarks

This leaves us with one main question: Why did Turkey decide to engage militarily?

If Turkey did indeed decide to deploy troops in Libya in order to secure a favorable investment climate for its many investors or to recoup lost profits through diplomatic pressure (even if only partly), Turkey may have turned the tides on the evolution of international investment law and ISDS by re-inviting a new era of gunboat diplomacy or informal and coercive diplomatic protection. This could be one of many manifestations of the unintended consequences of the contemporary misinformed backlash debate. This new era gunboat diplomacy (or diplomatic protection) is not a component of the contemporary backlash debate, but rather relevant to the historic debate on the need for IIL and ISDS.

These developments must be monitored carefully. Meanwhile, IIAs with robust investment protection and ISDS clauses should be strenuously praised as a great invention in legal (and human) civilization. IIAs with ISDS clauses depoliticized investment disputes and enabled cross-border investments at a rate never seen before. Any deviation from ISDS for redressing international investment disputes would be a dangerous development.

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