Could ENI Bring an Arbitral Claim Against Turkey for Obstructing Oil Exploration in Cyprus' Waters? The Extra-Territoriality of BITs Against Occupying Powers

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This post navigates the possibility of expanding the protection of a Bilateral Investment Treaty (BIT) to foreign investments made in the territory of a country, which is partially occupied by the State that is a Contracting Party to that BIT. By taking into account a real-life situation – which may result into an investment arbitration – and in the lights of the most recent precedents touching upon this matter, the post attempts to argue the viability of wielding BITs provisions against occupying powers and their unlawful interference, thus circumventing recurrent diplomatic deadlocks.

Background

In February 2018, Turkish navy has repeatedly prevented ENI S.p.A., an Italian oil company, from conducting offshore hydrocarbon explorations in Cyprus' Exclusive

Economic Zone. Turkish warships stopped Eni-operated Saipem 12000 drillship as the drillship was approaching the well nicknamed “Soupia” (cuttlefish) located in Block 3, which is licensed to ENI by the Cypriot Energy Service of the Ministry of Commerce, Industry and Tourism (MCIT). The well in question lies southeast of the Cypriot island, in an area of the Mediterranean Sea disputed by Turkey and *its* Turkish Republic of Northern Cyprus, on one hand, and the Republic of Cyprus, on the other hand. Under the pressure and threats by five Turkish warships, the drillship desisted from exploring Block 3 and changed its route by heading towards North Africa.

Diplomatic standoff

On one side, Cyprus President, Mr. Nicos Anastasiades, drew the attention of the President of the European Council, Mr. Donald Tusk, on the issue to urge Turkey to cease these continuing illegal actions and respect the Exclusive Economic Zone of Cyprus as well as Cyprus’ sovereign rights to explore and exploit its natural resources in accordance with International Law. Italy’s Minister of Foreign Affairs, Mr. Angelino Alfano, also attempted to unlock Turkish navy’s illegal blockade by engaging with Turkey’s Minister of Foreign Affairs, Mr. Mevlut Cavusoglu.

On the other side, however, Turkey stays firm with the block conducted by its navy over the Cyprus-licensed explorations southeast of the island.

To add fuel to the fire, as two ExxonMobil-operated vessels began in mid-March hydrocarbon exploration in the southwestern part of the Cyprus’ Exclusive Economic Zone (in Block 10), three U.S. navy ships arrived in the waters off Cyprus, suggesting the intention to deter any Turkish navy activity against the U.S. energy giant, Exxon Mobil.

In this diplomatic stalemate, before the situation turn into literally a *double* gunboat diplomacy scenario, could an investment arbitration between the direct stakeholders be the most peaceful and effective way to tackle the issue? In other words, could ENI (or any other extractive company that finds itself in a similar position) initiate an arbitration against Turkey for blocking its operations in Cyprus’ Exclusive Economic Zone?

Jurisdictional hurdle: the territorial scope of Bilateral Investment Treaties

The majority of BITs provides for a jurisdictional requirement that links the

protection afforded under the treaty to *the territory of the other State Party*, where the foreign investment needs to be made, if the foreign investor wish to avail itself of such special protection (please, read Christopher R Zheng for a thorough analysis of arbitral precedents over the territorial boundaries of investment treaties' protection). Italy-Turkey bilateral investment treaty is no exception to this jurisdictional requirement, since its Article 1.1 defines the term "investment" as any kind of asset invested by a natural or juridical person of one Contracting Party *in the territory* of the other. This would entail that ENI's investment in the territory of Cyprus (essentially, a third state with regards to the dispute) may fall – at first glance – outside of the definition of qualified investment under the applicable BIT and, accordingly, could not benefit of the rights thereunder.

However, new precedents are on their way which may score in favour of foreign investors, whose investments have been hampered not necessarily by the host state per se, but rather by the state occupying – partially or totally – the host state, or meddling in the host state's affairs.

The Crimea jurisdictional precedents

In the aftermath of the Russian annexation of Crimea, many Ukrainian investors suffered consequential damages, including expropriation of their properties. These Ukrainian investors – which were regarded as domestic investors – acquired the feature of "foreign", following the 2014 annexation. This allowed them to institute multiple arbitral proceedings against the Russian Federation, pursuant to the 1998 "Agreement between the Government of the Russian Federation and the Cabinet of Ministers of Ukraine on the Encouragement and Mutual Protection of Investments" (Ukraine-Russia BIT). In these arbitrations – which are registered with the Permanent Court of Arbitration (PCA) and being conducted under the UNCITRAL Arbitration Rules 1976 (UNCITRAL Rules) – the Ukrainian claimants contend that the Russian Federation violated its obligations under Articles 2, 3 and 5 of the Ukraine-Russia BIT, by interfering with and expropriating their investments in the territory of Crimea. As the proceedings are moving forward to the merits phase, the recent decisions on jurisdiction issued in these arbitrations indicate that the various tribunals (constituted under the UNCITRAL Rules), firstly, uphold their jurisdiction to adjudicate the disputes submitted to them and, secondly, find Claimants' claims admissible (e.g. LLC Lugzor and Four Others vs Russian Federation, Everest Estate LLC et al. v. The Russian Federation PJSC Ukrnafta vs Russian Federation, and Stabil LLC and Ten Others vs Russian Federation).

Furthermore, and more importantly, on 2 May 2018, one of these UNCITRAL tribunals issued a unanimous award in favour of the claimants amounting to approx. $159 million USD in compensation for the unlawful expropriations (Everest Estate LLC and Others v. Russian Federation).

Even though these arbitrations are still pending and the jurisdictional rulings are not publicly available yet, they may already exercise a persuasive influence on future cases, with the effect of giving the green light to a foreign investor' s arbitral claim a) against the interference of an occupying State over investments situated officially in the territory of another State, and b) arising out a BIT entered into between the investor's home-State and the occupying State (and not between the investor home-State and the official host-State, where the investment actually lies).

Observations pursuant to Chapters II and I of the Articles on State Responsibility

The Articles on State Responsibility seem to confirm such a possibility by providing for a wide range of attribution options for an internationally wrongful conduct to a State. Articles 4 to 10 cover the whole spectrum of actions that can be attributed to a State, ranging from the conduct of State organs to the conduct of insurrectional movements (namely, Articles 4, 5, and 8 play a pivotal role in addressing attributability issues in investor-State disputes).

In the potential case at hand, the conduct of the Turkish Navy could easily be attributed to Turkey under Article 5, which ascribes the conducts of entities exercising public powers (like the military) to the State.

Such conduct would engage Turkey's international responsibility under Article 2(b) of the Articles on State Responsibility, since it is incompatible with Turkey's obligations as per Article 2(2) of the Italy-Turkey BIT, to the extent that ENI's drillship has been subject to harassment, intimidation, and threat by the Turkish Navy while operating in a territory *de facto* and *unlawfully* controlled by Turkey.

In this regard, *Desert line v Yemen* constitutes a benchmark in terms of framing malicious state actions of harassment, intimidation and threat as a violation of the fair and equitable standard contained in a BIT (*Desert Line v Yemen*, Award 2008, paras. 151-194, 289-291 and Operative Part C.2).

Estoppel considerations

It goes without saying that the doctrine of estoppel would prevent Turkey from raising a jurisdictional objection as to the inapplicability of such BIT because of its extraterritorial application. Turkey (as a Respondent State) should not benefit from its *own wrongdoing* (in this case, *the unlawful occupation* of part of the Cypriot island as well as its waters) in preventing a foreign investor – directly affected by its measures – from instituting an arbitration against Turkey. After all, the doctrine of estoppel prevents a Party from taking unfair advantage of a predicament in which that Party's own bad behavior has placed its Counterparty.

Conclusion

In sum, should ENI launch an investor-State arbitration against Turkey for breaching Article 2 of the Italy-Turkey BIT by preventing with the use of force its research in Cyprus' waters, its claims would have good chances of being heard by an UNCITRAL tribunal as well as being considered admissible, in the light of the jurisdictional rulings and recent award in the "Crimea investor-State arbitrations". Indeed, it is worthy to recall that, although in arbitration precedents are not binding on third parties, they do carry considerable weight with tribunals seized of disputes sharing similar traits with earlier cases.

The views expressed in this article are those of the author and DO represent those of the law firm Bottega DI BELLA*.*

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