The Hypocrisy of Anti-ISDS Groups – Part 2

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Nikos Lavranos (NL-Investmentconsulting)

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Not so long ago, I reported on the recent documented discovery that anti-ISDS groups have been making and continue to make a handsome profit from the anti-ISDS/anti-trade/anti-globalization campaign, which they have unleashed over Europe with the active financial support of the European Commission and several EU Member States.

This time I would like to draw the attention to an interesting dispute between two NGOs, which is currently dealt with by the Swiss National Contact Point (NCP) that has been established to deal with complaints of NGOs against investors which supposedly have violated the OECD Guidelines for Multinational Enterprises (better known as the OECD Guidelines).

In February 2016, Survival International (an NGO based in London) submitted its claim against the World Wildlife Fund (WWF), which is headquartered in Switzerland. According to the NCP report:

> "The submission concerns the rights of the Baka people of southeast Cameroon related to the environmentally protected areas which the government of Cameroon has introduced with the financial and logistical support of WWF, but according to the submitting party without the free, prior and informed consent (henceforth referred to as "FPIC") of the Baka.
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> As a consequence, the Baka has been denied or seriously curtailed access to their traditional territories and natural resources on which they depend (the 'Land Issue'). The submitting party further states that the Baka people have been subjected to violent abuse by the ecoguards and other law enforcement officials who patrol the protected areas with WWF's support (the 'Ecoguard Issue').
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> The submitting party claims that the responding party has violated the OECD Guidelines by failing to conduct a due diligence and not making its support for the demarcation of the protected areas conditional upon the FPIC of the Baka. Moreover, WWF should have supported ecoguard patrols only if effective steps were taken to ensure that the patrols focused on commercial poachers rather than Baka hunting for subsistence, and that ecoguards should be held accountable if they used or threatened violence against the Baka. The result of the non-intervention of WWF has been a denial of Baka rights to their land and natural resources, and a conflict with the governmental forces.
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> According to the submission, the development and management of protected areas in southeast Cameroon has required significant expenditure and expertise with WWF being the government's most important source of funds and logistical support. As a

> consequence, the protected areas have depended and continue to depend heavily on WWF, which has been able to set the agenda and determine priorities. The submitting party further states that the Ministry of Forests and Wildlife in Cameroon describes WWF as the "joint manager" of each of the parks of the Jengi Southeast Forest Program1. It also mentions that WWF has regarded ecoguards as crucial to its operations, and thus established its own Wildlife Law Enforcement Programme in Cameroon. Furthermore, WWF until the mid-2000 organized workshops to train ecoguards about wildlife law and criminal prosecution and supported the deployment of a heavily armed military unit called the Bataillon d'Intervention Rapide on anti-poaching patrols. Ecoguards were also supported financially and logistically by WWF.
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> In the view of the submitting party, the responding party should fund an independent consultation of the Baka in which they can express their own views on the way forward and ensure that in future the Baka have an effective say in decisions that affect them, and can protect themselves against physical and other forms of abuse. Consequently, the WWF procedures in order to respect the human rights of the Baka should be revised."

This dispute is interesting and relevant for the investment arbitration community for several reasons.

The Creeping Hard-Law Effect of the OECD Guidelines

Firstly, it should be recalled that the OECD Guidelines, while intended to be voluntary and of soft-law character, are increasingly turned into hard-law obligations for foreign investors.
This is evidenced by the fact that CETA and the other recently negotiated EU trade and investment agreements (EU FTAs) make direct reference to the OECD Guidelines, which to some extent brings them into the scope of application of CETA and the other EU FTAs.

Moreover, at the 2017 OECD Global Forum on International Investment, which took place on 6 March 2017, practically all participants underlined the importance of strengthening and enhancing the observance and enforcement of the OECD Guidelines as a tool to show that foreign investors are capable of making "good" investments, which benefit the whole society. Indeed, some went as far as claiming that the observance of the OECD Guidelines could be used as a positive tool against the current backlash against globalization and multinationals and foreign investors generally.

In other words, there is a general expectation that the OECD Guidelines must be respected by all investors.

NGOs Can Be Qualified as "Multilateral Enterprise"

Secondly, it is noteworthy that the Swiss NCP qualified the WWF as falling within the scope of a "multinational enterprise" within the meaning of the OECD Guidelines. In this context, the NCP notes that

> "[T]he WWF network employs around 6,200 full time staff and has dedicated around USD11.5 billion to charitable activities like conservation projects since its foundation in 1961."

But more importantly, the NCP concluded that

> "WWF's approach to conservation is to a certain extent market based and it undertakes commercial activities (e.g. income of the WWF network from royalties as well as from other trading activities). WWF for example sells collectors' albums and the panda emblem for more environmentally friendly products. This would not be possible without projects such as the ones in southeast Cameroon which are part of its activities to protect the environment. Therefore, WWF's involvement in the establishment and maintenance of protected areas in southeast Cameroon can also be considered as activities of commercial nature, to which the OECD Guidelines are applicable."

In other words, this is another important decision clarifying that also NGOs can be qualified as multilateral enterprises with commercial activities, similar to foreign corporate investors.

A Meritorious Claim

Thirdly, the initial assessment of the Swiss NCP is that issues raised in this submission "merit further consideration", and the Swiss NCP therefore accepts the specific instance. However, and at the same time, the NCP stresses that this "conclusion should not be construed as a judgment of whether or not the corporate behaviour or actions in question were consistent with observance of the OECD Guidelines and should not be equated with a determination on the merits of the issues raised in the submission."

Accordingly, one must wait for the final assessment of the NCP. Nonetheless, it seems clear that the claims by Survival International are not unfounded or without merit, which in itself is an important and relevant conclusion.

No Transparency

Fourthly, the NCP stresses that

> "The role of the Swiss NCP is to offer a forum for discussion and to assist the parties concerned to deal with the issues raised. The submitting party has engaged in a mainly written exchange with the responding party prior to this submission during the last two years. The Swiss NCP considers that by accepting this specific instance and offering a confidential setting for discussions, it could foster the continuation of this previous exchange between the responding and the submitting party. Thereby, the NCP could contribute to a better understanding among parties and help them reach a mutually acceptable outcome concerning the issues raised with regard to the future situation of the Baka related to the engagement of WWF in Cameroon."

At the end of its report, the NCP repeats again that full confidentially must be maintained even after the final outcome of the proceedings:

> "The Swiss NCP requests parties concerned to agree to maintain confidentiality during the further proceedings. In order to establish an atmosphere of trust, the OECD Guidelines foresee that no information regarding the content of the proceedings may be shared with third parties or supporters of the complaint. If sensitive business information is provided or discussed during the meetings of the Swiss NCP, special requirements concerning the treatment of confidential information can be agreed upon by the parties involved in this specific instance. The NCP informs the parties that it reserves the right to stop the

> proceedings if one or other of the parties does not respect this confidentiality. Even after the proceedings have finished, parties concerned remain committed to treat information received during the proceedings in a confidential way unless the other party agrees to their disclosure."

The issue of confidentiality is of particular interest when contrasted with the criticism against the (limited) confidentiality, which exists in investment treaty arbitration.

No Need for NGOs to Exhaust of Local Remedies

Another interesting point to note is the preference of the NCP as an international dispute settlement forum by Survival International, instead of using Swiss courts. Again, this contradicts the call of anti-ISDS groups to include the exhaustion of local remedies in EU FTAs, thereby forcing foreign investors to first spend a couple of years of proceedings before national courts prior of being allowed to turn to an international dispute settlement forum. This was repeated several times by anti-ISDS NGOs at the EC's stakeholder meeting on the multilateral investment court (MIC), which was held some weeks ago.

The Same Standards Should Apply to All Investors

While the NCP proceedings are obviously different from international arbitral proceedings, there are interesting parallels. In this specific case, it is interesting to note the different standards, which the NGOs proclaim for themselves but which at the same time ferociously criticize in their anti-ISDS campaign. It is this kind of hypocrisy that has so much contaminated the current debate.

Instead, NGOs should be submitted to the very same standards as foreign investors. Accordingly, it is to be applauded that the Swiss NCP qualified WWF as a multilateral enterprise, thereby requiring it to fully observe the OECD Guidelines.

Similarly, the same standards of transparency as is called for in investment arbitral proceedings and as proposed in the investment court system (ICS) of the EU should be applied to NGOs, i.e. the UNCITRAL Transparency Rules. Indeed, this may require to align on this point the OECD Guidelines with the UNCITRAL Transparency Rules.

As far as the exhaustion of local remedies is concerned, if that were to be made a general rule in EU FTAs or in the proposed multilateral investment court (MIC), that would necessitate a modification of the OECD Guidelines as well.

In sum, there is no need for double standards for NGOs, nor is there any need for more hypocrisy from anti-ISDS NGOs.