



Dutch National Contact Point (NCP) for the OECD Guidelines for Multinational Enterprises

Final Statement

FIVAS, the Initiative to Keep Hasankeyf Alive and
Hasankeyf Matters vs. Bresser

20 August 2018

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Final statement by the Dutch National Contact Point ('NCP') for the OECD Guidelines for Multinational Enterprises ('the Guidelines'). This final statement concerns the notification of a specific instance by the Association for International Water Studies, Norway (FIVAS), the Initiative to Keep Hasankeyf Alive and Hasankeyf Matters. It relates to an alleged non-observance of the Guidelines by Bresser.

Table of Contents

1. Introduction	1
2. The NCP procedure	1
2.1 Details of the parties submitting the notification	1
2.2 Details of the enterprise	2
2.3 The Dutch NCP procedure in this specific instance until the initial assessment	2
3. Summary of the notification	2
4. Summary of Bresser's position	3
5. The NCP's assessment of the specific instance	3
5.1 Scope of the assessment	3
5.2 Applicability of the Guidelines	4
6. The NCP's good offices	4
6.1 Course of the procedure	4
6.2 The NCP's observations	5
6.3 The NCP's recommendations	5
6.4 Monitoring	5

1. Introduction

This final statement describes the process and outcomes of the dialogue facilitated by the NCP after receiving the notification. It is based on the information received from the parties and the outcomes of the dialogue meeting. Confidential information disclosed to the NCP in the course of the procedure has not been used in the preparation of this final statement.

This final statement marks the completion of the procedure by the NCP.

2. The NCP procedure

2.1 Details of the parties submitting the notification

The Initiative to Keep Hasankeyf Alive is working on behalf of its members, who are residents of Hasankeyf and the surrounding towns and cities. It was founded in 2006 and is a coalition of local and regional activists, local authorities, professional organisations and NGOs struggling against the Ilisu Dam project and promoting social, cultural and ecological development in Hasankeyf and the Upper Tigris Valley.

Hasankeyf Matters was formed in Istanbul in 2012 with the goal of assembling information about Hasankeyf, its history and its potential for economic development.

The Association for International Water Studies, Norway (FIVAS) was established in 1988 in response to the Norwegian company Kværner's involvement with a hydropower project in Malaysia. In the three ensuing decades, the organisation has focused on the destructive social and environmental consequences of large hydropower projects. It emphasises corporate social responsibility, strong international guidelines and the involvement of affected communities.

2.2 Details of the enterprise

For more than 40 years, Bresser has been providing complete, innovative solutions for the relocation, jacking and reinforcement of foundations of a wide range of objects. From its corporate headquarters in the Netherlands, Bresser operates in several countries in Europe and Asia. Bresser's expertise and experience are deployed not only to solve foundation and infrastructure problems, but also to preserve cultural heritage for future generations.

2.3 The Dutch NCP procedure in this specific instance until the initial assessment

On 28 July 2017, the NCP received the notification.

On 24 August 2017, the NCP acknowledged receipt of this notification and informed Bresser.

On 14 September 2017, the NCP had a separate meeting with the complainants. On 6 October 2017, the NCP had a separate meeting with Bresser.

On 9 November 2017, the NCP sent the parties a draft version of its initial assessment with a request to submit any comments within two weeks.

On 9 January 2018, the NCP published its initial assessment on its website: www.oecdguidelines.nl. It concluded that the specific instance merited, in part, further consideration and offered its good offices to resolve the issue.

3. Summary of the notification

On 28 July 2017, the Dutch NCP received a notification from FIVAS, the Initiative to Keep Hasankeyf Alive and Hasankeyf Matters against Bresser.

The notification of the specific instance with respect to Bresser can be summarised as follows:

Bresser, in its capacity as contractor for Er-Bu İnşaat, supplied the technology and skills essential to the relocation of the Zeynel Bey

Tomb, a late 15th-century historic building. Until 12 May 2017, this building stood on the left bank of Tigris river at Hasankeyf, in southeastern Turkey. Er-Bu İnşaat is, in turn, a contractor for Turkey's State Hydraulic Works (DSI). The relocation of the tomb was a consequence of the planned inundation of the area, due to the filling of the Ilisu Dam Reservoir.

Bresser failed to consult the local population adequately before beginning the relocation of the tomb, or to meaningfully include the public in planning the tomb's conservation or relocation in Hasankeyf. Accordingly, the removal of the tomb constitutes a violation of human rights, and in particular of the human right to culture, as enshrined in the Convention for the Protection of the Architectural Heritage of Europe (CETS 121) and the OECD Guidelines for Multinational Enterprises. Specifically, the complainants state, it is a violation of chapter II. General Policies, article 2 of the OECD Guidelines, which requires firms to '[r]espect the internationally recognised human rights of those affected by their activities'.

The complainants state that the relocation of the tomb has significantly reduced its value as cultural heritage. Bresser's key role in the attempted relocation makes the company responsible for this adverse impact. The impairment of the tomb's cultural value should be recognised as an infringement of the human right to culture, and Bresser failed to consider the impact of the tomb's relocation on this human right.

Bresser did not conduct sufficient due diligence regarding the human rights impact of the relocation, or undertake action to prevent or mitigate adverse impacts stemming from the human rights violations that the project entailed. Nor did it raise these adverse impacts with its contracting partner.

The notification specifically concerns Bresser's alleged non-observance of articles 2, 10, 11, 13 and 14 of chapter II of the Guidelines (General Policies) and of chapter IV (Human Rights).

FIVAS et al. request from Bresser:

- To refrain, as a responsible company, from any activity causing violations of human rights, and to respect the OECD Guidelines.
- To carry out human rights due diligence to the standard set by the Guidelines for companies involved with projects, to try to avoid or at least mitigate adverse impacts, and to refrain from carrying out current or new projects if due diligence or other processes reveal probable human rights violations and it is unable to mitigate the projects' effects.
- To recognise the adverse impacts of projects and its responsibility for the impact of its operations, even when the company is acting under a contract, and to consider disengaging from projects where the above-mentioned concerns exist, as a means of both exercising leverage and ending its contribution to adverse impacts.

- To issue a statement on its assessment of risks associated with the project.
- To cease all work at Hasankeyf until there are proper consultations with the local population recognising the population's human right to culture, and plans in accordance with international agreements are made publicly available.
- To cease all work in Hasankeyf until the human rights violations have been assessed that have occurred as a direct result of its actions and inaction, and determination of measures to be implemented to ensure that these violations are rectified and do not recur. This assessment and these decisions should be based on substantive, documented and independently verified consultations with a cross-section of stakeholders, including professional experts and members of the general public who are representative of the local population of Hasankeyf and the southeastern region of Turkey.
- To make a policy on human rights publicly available, explaining how Bresser will fulfil its responsibility for human rights in its operations, as specified in the UN Guiding Principles on Business and Human Rights.
- work and returned home every day. Breakfast and lunch were provided by the main contractor (Er-Bu) and eaten together with the local staff. Compliance with the regulations for good working conditions was constantly monitored while the work was in progress, by Bresser among other parties. At no time was there any question of oppression or exploitation of local employees.

Moreover, Bresser informed the main contractor, Er-Bu, several times of the correspondence it received from the complainants. Er-Bu responded that DSI as the commissioning authority was responsible for all communications and accordingly for all consultations and discussions with organisations defending local interests. Bresser accepts the concept of chain responsibility, but is of the opinion that it would not be appropriate for a subcontractor like Bresser to intervene in local social and political discussions.

Finally, in April 2017 Bresser conducted a check through an internal control system, which showed that it was in compliance with the OECD Guidelines.

Bresser has concerns about the value of a dialogue between itself and the complainants, which are working for the conservation of the village of Hasankeyf and want to halt the operation of the Ilisu Dam. On the basis of its earlier experiences and contacts with the complainants, Bresser also has concerns about their adherence to the care and confidentiality required during and following such a procedure.

Bresser states that the complainants' exclusive focus in this case on Bresser, in isolation from the other parties involved in the project, serves a particular goal. The complainants presuppose (when it suits them) that if Bresser does not cooperate in the relocation of objects, no objects will be relocated, and the Turkish government will not pursue the operation of the Ilisu Dam. Bresser does not believe that this is realistic, because other relocation specialists could do the job as well. If objects of cultural value are not moved, they will simply disappear under water. They will then be lost and unavailable to future generations.

On the basis of the above considerations, Bresser considers the complaint unfounded.

4. Summary of Bresser's position

Bresser states that it is a reputable, internationally operating company and that all of its projects in the Netherlands and abroad have been carried out honourably and in good faith, in accordance with the OECD Guidelines. It illustrates this with the following three points.

- Bresser gathered information on the spot: in response to the very first request concerning the relocation of the tomb, a team from Bresser visited Hasankeyf and its immediate surroundings. During this visit, the team performed technical inspections of the tomb and talked to direct stakeholders and local residents without direct involvement in the project.
- Bresser's attitude towards cultural heritage is one of care and commitment: before and after the contract was signed, and before approval could be given to relocating the tomb, a process took place in which Bresser's plans had to be submitted and presented to several scientific committees and committees responsible for the conservation of historic buildings. In Bresser's eyes, this was a careful process, and the committees and their members showed great seriousness and expertise in considering the relocation and conservation of the tomb. Bresser chose a technical method for the relocation of the tomb that it has been using for several decades, which has never entailed any risk of endangering cultural heritage.
- Bresser ensures good working conditions for its local employees: most of the preparation and execution of the work was done by local, adult staff with a Turkish-Kurdish background. These people live near the project and came to

5. The NCP's assessment of the specific instance

5.1 Scope of the assessment

In its Initial Assessment the NCP observed that the Dutch company's activities in question have an impact in Turkey, rather than in the Netherlands, and that Turkey has an NCP. The NCP also

observes that the specific instance is against a small Dutch enterprise, a subcontractor of a Turkish contractor, operating in Turkey and abroad, in a project initiated as a consequence of the planned inundation of land by the Ilisu Dam megaproject.

The NCP noted that one of the notifying parties identifies itself as a coalition of local and regional activists, local authorities, professional organisations and NGOs struggling against the Ilisu Dam project and promoting social, cultural and ecological development in Hasankeyf and the Upper Tigris Valley. It noted that another notifying party states that it focuses on the destructive social and environmental consequences of large hydropower projects.

However, this complaint has been filed with the Dutch NCP, against a company based in the Netherlands. In deciding on the acceptance of a case, the NCP can and should only take into account the formal criteria set out in the Guidelines. For this reason, the NCP was of the opinion that this specific instance merited, in part, further consideration based on the criteria for further examination under the OECD Guidelines for Multinational Enterprises.

The NCP offered its good offices to the parties with the objective to bring the parties to an agreement on what is to be expected of the small subcontractor Bresser, operating in Turkey, under the OECD Guidelines' due diligence recommendations. This may help clarify the OECD due diligence recommendations for multinational enterprises regarding the human right to culture and/or the right to cultural heritage and conservation.

The complainants and Bresser have both accepted the NCP's good offices. The NCP has taken the necessary steps to guarantee a careful process, considering the company's concerns.

The Dutch NCP has shared the notification with the Turkish NCP, informed the Turkish NCP on the progress and shared the outcomes before publication.

5.2 Applicability of the Guidelines

The NCP observes that all Dutch companies that conduct business abroad are expected to adhere to the Guidelines. The Dutch government regards the Guidelines as the normative framework for responsible business conduct in an international context.

The notification concerns Bresser's alleged non-observance of OECD Guidelines Chapter II, General Policies and Chapter IV, Human Rights. The OECD Guidelines do not explicitly define what human rights are. However, the OECD Guidelines' chapter on Human Rights (commentary 36) does refer to and is in line with the UN Framework for Business and Human Rights and with the UN Guiding Principles. The Guiding Principles (commentary on article 12) state, 'An authoritative list of the core internationally recognized human rights is contained in the International Bill of

Human Rights (consisting of the Universal Declaration of Human Rights and the main instruments through which it has been codified: ... the International Covenant on Economic, Social and Cultural Rights (ICESCR) ...' (see also commentary 39 on the Guidelines).

ICESCR, article 15 (1) and (2) states: 'The States Parties to the present Covenant recognize the right of everyone ... To take part in cultural life.... The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture.'

Also relevant is the UNESCO Declaration concerning the Intentional Destruction of Cultural Heritage (2003), which states, referring to historic buildings, that 'cultural heritage is an important component of the cultural identity of communities, groups and individuals, and of social cohesion, so that its intentional destruction may have adverse consequences on human dignity and human rights'.

Until now, cultural rights as human rights have never been the subject of an NCP procedure. Nevertheless, the NCP concludes from the above that the right to culture and/or the right to cultural heritage and its conservation should be considered a human right under the OECD Guidelines.

6. The NCP's good offices

6.1 Course of the procedure

The NCP started its examination of the case by meeting with the parties separately, after they agreed the text of the Initial Assessment in December 2017. A meeting with the notifying parties took place on 20 December 2017, and the meeting with Bresser on 25 January 2018.

After these meetings, the NCP proposed a meeting for dialogue based on Terms of Reference to be agreed. On 26 March 2018 the parties agreed the Terms of Reference for this meeting, which took place on 4 April.

The goals of the dialogue (which defined its scope) were: to resolve the issue at hand by means of a dialogue between the parties facilitated by the NCP;

- to clarify what is to be expected of Bresser, operating in Turkey, under the OECD Guidelines' due diligence recommendations;
- to help clarify the OECD due diligence recommendations for multinational enterprises regarding the human right to culture and/or the right to cultural heritage and conservation.

6.2 The NCP's observations

The NCP welcomed Bresser's willingness to enter into dialogue with the objective of reaching an agreement on what in this specific case, Bresser's due diligence obligations are under the OECD Guidelines. The exchange of views during the dialogue meeting showed the ability of both parties to look at things from the perspective of the other party, but no agreement was reached on the issues raised.

After the dialogue meeting the NCP concluded that it was unlikely that another dialogue meeting would lead to an agreement and decided to issue a Final Statement and make recommendations.

6.3 The NCP's recommendations

The NCP observes that this case shows that Bresser, an SME, has not fully met the expectations and satisfy the due diligence criteria of the OECD Guidelines in practice. However, Chapter I (Concepts and Principles) of the Guidelines, under 6, while acknowledging that small and medium-sized enterprises may not have the same capacities as larger enterprises, states that SMEs should be encouraged to observe the Guidelines' recommendations to the fullest extent possible.

This includes carrying out risk-based due diligence (II, under 10). The nature and extent of due diligence depend on the circumstances of a particular situation and on the other hand on the severity of the risks. This means that the size of the enterprise does not affect its responsibility to conduct due diligence, but may affect its manner of carrying out due diligence.

The Commentary on Chapter II, under 14, states that due diligence can be included in broader enterprise risk management systems, provided that it goes beyond simply identifying and managing material risks to the enterprise itself, to include the risks of adverse impacts related to matters addressed by the Guidelines.

Chapter II of the Guidelines, under 14, states that enterprises should engage with relevant stakeholders in order to provide meaningful opportunities for their views to be taken into account in relation to the planning and decision-making for projects. This means that an enterprise should ensure, through proper due diligence, that procedures are in place that provide sufficient opportunities for stakeholders to participate in project development.

The NCP concludes that, in view of the size of the company and its position as a subcontractor, Bresser made some effort to carry out some due diligence in order to understand the circumstances of the inhabitants of Hasankeyf. According to Bresser, top management of Bresser staff gathered information on the spot, with the assistance of a Turkish-speaking Bresser employee, by talking informally with local people. Bresser stated that at the time, it did not receive information that showed resistance of the local community against the re-location project of the tomb.

The NCP recommends that Bresser adopt a more structured approach when consulting the local community before engaging in a project. The NCP is of the opinion that Bresser, in its contacts with the main contractor and/or DSI, should have used the leverage it had, as a supplier of essential technical knowledge and experience in the project of the removal of the tomb, to find out if meaningful stakeholder consultation had indeed taken place with all relevant stakeholders, including the local community.

According to Bresser, it informed the main contractor of the letters received from the complainants, and asked the contractor what stakeholder consultations had taken place in the past. The NCP is of the opinion that Bresser should have ensured more thoroughly with the main contractor and/or DSI, that procedures are in place providing sufficient opportunities for stakeholders to participate in project development and implementation.

The NCP recommends that Bresser include risks external to the company more explicitly in its risk-management system. The word 'risks' in the OECD Guidelines does not refer to risks to the enterprise itself, but to risks external to the enterprise: that is, the likelihood of adverse impacts on people, the natural environment and society.

Finally, the NCP recommends that Bresser publish information on its website on the key features of its risk management system, including risks within the meaning of the OECD Guidelines. This information should be available to Bresser's international clients.

6.4 Monitoring

The NCP recommends that one year after the publication of the Final Statement, in August 2019, an evaluation be conducted of the NCP's recommendations. The NCP will invite both parties to a meeting for this purpose.

The NCP anticipates a positive outcome of the steps taken by Bresser in following up the NCP's Final Statement. The evaluation will be published on the NCP's website.

The role of National Contact Points (NCPs) is to further the effectiveness of the OECD Guidelines. The Dutch government has chosen to establish an independent NCP, which is responsible for its own procedures and decisions, in accordance with the Procedural Guidance section of the Guidelines. In line with this, the Dutch NCP consists of four independent members, supported by four advisory government officials from the most relevant ministries. The NCP Secretariat is hosted by the Ministry of Foreign Affairs. The Minister for Foreign Trade and Development Cooperation is politically responsible for the functioning of the Dutch NCP. More information on the OECD Guidelines and the NCP can be found on www.oecdguidelines.nl.

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