

BINDING OPINION

The Board of Appeal of Stichting Milieukeur (SMK) of The Hague (the Netherlands), comprising Prof. G.M.F. Snijders, LL.M. (chairman), Prof. E.H. Hondius, LL.M. and Mr C.J.G.M. van der Weide, LL.M. (members), has issued – under the terms of the provisions of Article 10 paragraph 3 of the applicable SMK Complaints, Objection and Appeal Regulation: by way of a ‘binding opinion’ (in Dutch: ‘bindend advies’) the following judgment in the case of:

the MALAYSIAN TIMBER CERTIFICATION COUNCIL (MTCC),
with its registered office at Kuala Lumpur (Malaysia),
applicant,
lawyer: Sh. Satakuru–Granzella, LL.M.,

versus:

the TIMBER PROCUREMENT ASSESSMENT COMMITTEE (TPAC),
with its registered office at The Hague (the Netherlands),
defendant,

with stakeholders within the meaning of the SMK Complaints, Objection and Appeal Regulation:

1. the STICHTING GREENPEACE,
with its registered office at Amsterdam (the Netherlands),
2. the STICHTING NEDERLANDS CENTRUM VOOR INHEEMSE VOLKEN
(NETHERLANDS CENTRE FOR INDIGENOUS PEOPLES; NCIV),
with its registered office at Amsterdam (the Netherlands),
3. the INTERKERKELIJKE ORGANISATIE VOOR ONTWIKKELINGSSAMENWERKING
(DUTCH INTERCHURCH ORGANIZATION FOR DEVELOPMENT COOPERATION;
ICCO),
with its registered office at Utrecht (the Netherlands),
4. the VERENIGING MILIEUDEFENSIE (FRIENDS OF THE EARTH NETHERLANDS),
with its registered office at Amsterdam (the Netherlands),
5. the WERELD NATUUR FONDS (WWF NETHERLANDS),
with its registered office at Zeist (the Netherlands),

lawyer: Ph. van den Biesen, LL.M.

I. THE COURSE OF THE PROCEEDINGS

First Instance

1. On 24 February 2009 MTCC (as the National Governing Body of the Malaysian Timber Certification Scheme) submitted the Malaysian Timber Certification Scheme (MTCS) for evaluation by TPAC.
2. From 29 April to 4 June 2009 a Stakeholder Forum was held, of which forum TPAC published a Stakeholder Forum Report on 3 March 2010.
3. Also on 3 March 2010, TPAC issued its Final Judgment on MTCS. In this decision, TPAC decided that MTCS is in accordance with the Dutch Procurement Criteria.

Objection procedure

4. On 16 March 2010 Mr Van den Biesen, LL.M., on behalf of the stakeholders, hereinafter also referred to as 'Greenpeace et al', filed a Notice of Objection against TPAC's Final Judgment on MTCS dated 3 March 2010.
5. On 9 April 2010 Greenpeace et al put forward Additional Grounds for Objection.
6. On 10 June 2010 TPAC submitted written questions to MTCC and to Greenpeace et al. On 30 June 2010 both MTCC and Greenpeace et al replied to these questions in writing. Then TPAC submitted a second round of questions on 16 July 2010, to which the organizations concerned gave their written replies.
7. On 14 September 2010 a hearing took place in the presence of TPAC under the chairmanship of Mr Th. Drupsteen, LL.M.
8. Subsequently, on 22 October 2010, TPAC gave its Response to the Notice of Objection by Greenpeace et al. This response comprised a Revised Final Judgment, whereby TPAC concluded that MTCS does *not* comply with the Dutch Procurement Criteria.

Procedure in appeal

9. In its Notice of Appeal dated 2 December 2010, MTCC lodged an appeal against the Revised Final Judgment before the Board of Appeal. Presenting the grounds for appeal, MTCC demanded that the Revised Final Judgment be set aside and argued that TPAC should revert to its original decision that MTCS complies with the requirement of the TPAS and the Dutch Procurement Criteria.
10. In its Response to the Notice of Appeal dated 14 January 2011, TPAC submitted its written defence. TPAC demanded that the appeal be denied because it had correctly and properly arrived at its conclusion of 22 October 2010 that MTCS currently does not conform to the Dutch Procurement Criteria.
11. In its Observations re Notice of Appeal, also - conditional - Notice of Cross Appeal dated 14 January 2011, Greenpeace et al submitted a written defence, also appealing - albeit provisionally - against the Revised Final Judgment. Greenpeace et al demanded that the claim of MTCC on appeal be denied, whereas it - only in the event that the Board of Appeal were to honour the appeal of MTCC and therefore could not uphold the Revised Final Judgment in full - requested that the Board of Appeal upholds and confirms the Revised Final Judgment holding that MTCS is not in conformity with TPAS.
12. On 30 March 2011 TPAC submitted a Response to the Notice of Cross Appeal.
13. On 31 March 2011 MTCC submitted a Response to the Observations re Notice of Appeal also - conditional - Notice of Cross Appeal.
14. The Board of Appeal - eventually - set a date for the hearing on 5 August 2011. On 21 July 2011 Greenpeace et al sent in four documents, and then on 26 July 2011 a further three documents for the hearing.
15. On 29 July 2011 MTCC submitted four documents for the hearing, including a Counter Response to the Response to Notice of Appeal by TPAC.
16. On 5 August 2011 the aforesaid hearing took place in Utrecht before the Board of Appeal. During the hearing MTCC was represented by Ms Sheam Satakuru-Granzella, LL.M., TPAC by Prof. Helias Udo de Haas and Greenpeace et al by Mr Phon van den Biesen, LL.M. Each of them submitted written pleadings. At the hearing MTCC wished to submit to the proceedings an Expert's Opinion by Dr Ramy Bulan on 'Indigenous Peoples' Customary rights

in Malaysia'. After Mr Van den Biesen had lodged an objection to this on behalf of Greenpeace et al, the Board of Appeal rejected the request to submit the document at this stage of the proceedings. A number of exhibits were attached to the pleadings by TPAC. In answer to a question from the chairman of the Board of Appeal, both MTCC and Greenpeace et al declared that they had no objection to these documents being submitted to the proceedings.

II. THE FACTS

17. As argued on the one hand and not disputed, or not disputed sufficiently, on the other hand, as well as on the grounds of the applicable regulations and the documents submitted to the proceedings by the parties and Greenpeace et al and in so far as undisputed, the following facts have been established in this case:
 - 17.1 According to the Regulation Timber Procurement Assessment Committee (hereinafter: TPAC regulation) applicable to its work, one of the tasks of TPAC is to assess existing national and international certification systems against the Dutch Procurement Criteria for Timber and the process criteria for certification systems.
 - 17.2 Under Article 5 paragraph 1 of the TPAC regulation, it follows the procedure described in the TPAC User Manual when carrying out an assessment of certification systems.
 - 17.3 Under the same provision, stakeholders are offered the option of providing input before TPAC reaches its final opinion.
 - 17.4 With respect to the opinion on a certification system, under Article 5 paragraph 2 of the TPAC regulation TPAC is submitting an opinion to the Dutch Minister of Infrastructure and Environment. The Minister will then take an independent decision whether or not to accept a certification system for the Dutch Procurement Policy.
 - 17.5 When assessing the certification systems, TPAC uses an Assessment Matrix, which incorporates what are known as 'Principles'. These Principles are shown in the matrix with the letter P, followed by a figure (P 1 et seq). They are described in greater detail in Criteria, indicated with the letter C, followed by a combination of numbers (C 1.1 et seq). The Principles and the Criteria are

divided into three groups:

- Sustainable Forest Management (SFM),
- Chain of Custody (CoC), and
- Development, Application and Management (DAM).

17.6 The fact that TPAC, in its Revised Final Judgment of 22 October 2010, reached a different assessment of MTCS than the assessment TPAC reached in its Final Judgment of 3 March 2010, is due to the fact that following the objections put forward by Greenpeace et al three Principles of the Sustainable Forest Management (SFM) group were valued differently.

17.7 These were the following Principles:

- P2: The interests of directly and indirectly involved stakeholders shall be taken into account,
- P4: Biodiversity shall be maintained and where possibly enhanced, and
- P8: Sustainable forest management shall be realized through a management system.

17.8 With regard to Principle P 2, TPAC noted in the Assessment Matrix which formed the basis of the Revised Final Judgment:

17.8.1 *C 2.1: Criterion:*

The legal status of the management of the forest management unit and claims of the local population, including Indigenous peoples, in the property/tenure or use rights regarding the forest management unit or a portion thereof have been inventoried and are respected.

17.8.2 *C 2.1.: Assessment:*

Based on recent audit reports, TPAC concludes that there is an important difference in interpretation of customary rights between the Committee on the one hand and MTCS certified forest managers and certification bodies on the other. The Committee interprets customary rights as resulting from and/or based on traditional use. The forest managers and CBs limit

customary rights primarily to formal rights that have been granted to indigenous communities by the state. This difference in interpretation implies that rights resulting from and/or based on traditional use (RTUs) are not recognized in MTCS certified forests, but are rather considered a favour to indigenous communities.

(...)

Based on this information, the Committee concludes that TPAS C 2.1 is inadequately addressed.

The abbreviation CBs stands for certification bodies.

17.8.3 C 2.3: Criterion:

The local populations and indigenous peoples have a say in forest management on the basis of free and informed consent, and hold the right to grant or withhold permission and, if relevant, receive compensation where their property/use rights are at stake.

Guidance: Free and informed consent is interpreted in the sense that the activity will not be undertaken before the relevant consent is given.

Guidance: The local population and indigenous peoples can only prevent activities through withholding their consent where their property/use rights are at stake.

17.8.4 C 2.3: Assessment:

MTCS certified forest managers and accredited CBs consider the customary right to 'control' forest resources or the right to delegate that control with free and informed consent, not applicable in MTCS certified forests. The reason being that indigenous communities have not been granted the formal right by the state to control their traditional land in the PRF. (The Committee notes that the formal right to control traditional land is granted to indigenous communities in the Orang Asli reserves which by definition do not coincide with PRF).

As MTCS requirements C 2.2, C 3.1, C 3.2 and C. 4.5 are in fact invalidated, TPAS criterion C 2.3 is inadequately addressed.

The abbreviation PRF stands for Permanent Reserved Forest.

17.8.5 C 2.4: Criterion:

The forest management plan and accompanying maps, relevant monitoring results and information about the forest management measures to be applied are publicly available, except for strictly confidential business information.

Guidance: Public availability implies that if stakeholders should have limited access to certain media, the management plan is dispersed through other channels. Depending on the level of detail in the management plan, the full plan or a summary should be available.

Guidance: Wherever practical and necessary, information on the forest management can also be communicated to the people in the forest through in situ markings or information displays.

17.8.6 C 2.4: Assessment:

During the objection procedure concerns have been expressed by stakeholders that maps of the FMUs are not publically available, rendering it impossible for them to identify in the field a forest area as certified.

The Committee underlines that the publication of detailed maps is the responsibility of the forest manager. Although forest managers have published summaries of the forest management plans, detailed maps were not published. The Committee therefore concludes that TPAS criterion 2.4 is partially addressed.

The abbreviation FMU stands for Forest Management Unit; a clearly defined forest area, managed to a set of explicit objectives and according to a long-term management plan.

17.9 In respect of Principle P 4, TPAC noted:

17.9.1 C 4.1: Criterion:

Objects of high ecological value and representative areas of forest types that occur within the forest management unit are identified, inventoried and protected.

Guidance: 5% is considered to be a relevant proportion.

17.9.2 C. 4.1 Assessment:

Based on recent audit reports TPAC makes the following observations related to TPAS criterion 4.1:

1. *The MTCS criterion 6.1 requires the assessment of environmental impacts of forestry activities 'appropriate to the scale of forest management'. Such assessments are primarily performed by MTCS certified forest managers within the framework of a formal EIA at state/FMU level. It is unlikely that such an EIA is sufficiently detailed to provide the necessary and required information to be able to protect objects of high ecological value.*

2. *Objects of high ecological value and representative areas of forest ecosystems are protected in MTCS certified FMUs primarily through gazettelement of RPF area as 'protection forests' such as 'virgin jungle reserves' and 'water catchment forests'. The classifications for the gazettelement are described in Art. 10 of the National Forestry Act (1984). The Auditor General however recently concluded that the gazettelement of protection forests is (seriously) lagging behind in at least five MTCS certified states: Perak, Terengganu, Kedah, Negeri Sembilan and Johor. This renders it uncertain whether a sufficient basis for the required protection is available.*

The Committee concludes therefore that criterion 4.1 is partially addressed.

The abbreviation EIA stands for Environmental Impact Assessment.

17.9.3 C 4.3: Criterion:

Conversion of forests in the FMU to other types of land use, including timber plantations, shall not occur unless in justified exceptional circumstances.

(...)

17.9.4 C 4.3 Assessment:

TPAC makes the following observations:

1. *Criterion 6.10 defines three exceptions for conversion. Conversion is excepted [the Board of Appeal assumes that TPAC means 'accepted'] if it:*
 - a. *entails a very limited portion of the forest management unit; and*
 - b. *does not occur on high conservation value forest areas; and*
 - c. *will enable clear, substantial, additional, secure, long-term*

conservation benefits across the forest management unit.

2. Exception a) is currently annulled through guideline MC&I 2/2002. This guideline lists that 6.10 a) is not taken into account during the audit of an FMU. The guideline is valid until the revision of the standard has been concluded.

3. Exception c) is weakened through the indicators 6.10.1 and 6.10.2 which do not mention 'conservation' in relation to benefits.

In addition, the Committee has been informed that:

1. The annulment of exception a) also pertains to conversion that is planned within the FMU.

2. An overview of planned conversion in certified FMUs is not made available to the Committee.

The Committee concludes that TPAS criterion 4.3 is inadequately addressed.

(...)

To avoid any misunderstanding, the Board of Appeal notes that the aforesaid 'Criterion 6.10' does not refer to a Dutch criterion against which TPAC was required to make its assessment, but to Malaysian criteria laid down in the Malaysian Criteria and Indicators for Forest Management Certification (MC&I (2002)).

17.10 With respect to Principle P 8, the following was noted:

17.10.1 *C 8.4: Criterion:*

The implementation of the forest management plan and the ecological, social, and economic effects of forest management on the FMU and its surroundings are monitored periodically on the basis of adequate data.

17.10.2 *C 8.4: Assessment:*

The Malaysia Auditor General (AG) has published – per state – a comprehensive report including a section on forestry. The audits conducted by the AG are not specially focused on forestry, pertain to more than just the MTCS certified area and take the perspective of the specific laws and procedures in the state. Nonetheless, the reports provide information which

bears relevance for the assessment of MTCS against the Dutch Procurement Criteria. The AG reports give various - sometimes strong - recommendations relating to monitoring and enforcement for the states Perak, Terengganu, Pahang and Johor. For this reason the Committee concludes that TPAS criterion 8.4 cannot be fully addressed in practice. (...)

17.11 The assessments that were given in the Revised Final Judgment of Criteria 2.1, 2.3, 2.4, 4.1, and 8.4 of the Sustainable Forest Management (SFM) group differed from the assessments in the Final Judgment of 3 March 2010. The same also applies to Criteria 3.1 and 3.2 from the Development, Application and Management (DAM) group, which are not relevant in this case.

17.12 The differing assessments by the Sustainable Forest Management (SFM) group brought TPAC to the following conclusion in its Revised Final Judgment:

39. The Committee concludes that there is a fundamental difference in interpretation of customary rights between the Committee on the one hand and MTCS certified forest managers and certification bodies on the other. The Committee interprets customary rights as resulting from and/or based on traditional use. The forest managers and certification bodies limit the customary rights primarily to formal rights that have been granted to indigenous communities by the state. This difference in interpretation implies that rights resulting from and/or based on traditional use are not recognized in MTCS certified forests, and are therefore not at all times respected. This has led the Committee to conclude that Principle 2 (Interests of Stakeholders) of the Dutch Procurement Criteria is inadequately addressed by the MTCS.

40. Concerning Principle 4 (Biodiversity) of the Dutch Procurement Criteria, the Committee concludes that the protection of objects of high ecological value is not sufficiently taken care of within MTCS certified FMUs because environmental impact assessments are performed primarily on state level and because gazettelement of protection forests is lagging behind in (at least) five MTCS states.

41. The TPAS criterion on conversion is inadequately addressed by the MTCS, this conclusion was already drawn by the Committee in Final Judgment of March. The - in principle robust - MTCS Criterion 6.10 is seriously weakened through its indicators and through an annulment of 6.10a) which states that conversion is only permitted if it entails a very limited portion of the forest management unit (FMU). During the objection procedure the Committee learned that this annulment of 6.10a) not only pertains to conversion which has already been effectuated, but also to conversion which is planned within

the FMU. The Committee regrets that an overview of planned conversion within MTCS certified FMUs has not been made available. The Committee therefore cannot exclude the possibility that the planned conversion is extensive. The Committee argues that MTCS certified forest would greatly benefit from a low percentage cap for conversion and a redefinition of the boundaries of the FMUs, leaving out effectuated and planned conversion. The Committee concludes that based on its findings concerning the protection of objects of high ecological value and conversion, Principle 4 (Biodiversity) of the Dutch Procurement Criteria is inadequately addressed by the MTCS.

42. The overall conclusion is therefore that the Malaysian certification system MTCS – which is endorsed by PEFC International – is 'not conforming to the Dutch Procurement Criteria'.

III. THE ASSESSMENT OF THE DISPUTE

IIIa. The appeal lodged by MTCC

18. The Board of Appeal notes beforehand that its assessment of this case must be limited in its scope, in the sense that it is required to assess, based on the arguments put forward by the parties and stakeholders and the documents submitted in the proceedings, whether TPAC could in all reasonableness have reached its Revised Final Judgment.
19. The Board of Appeal assesses the case based on the regulations that were in force when TPAC gave its Revised Final Judgment, i.e. on 22 October 2010. Any regulations from after that date will not be considered. After all, an assessment based on newer regulations requires a substantive investigation, which does not come within the scope of these appeal proceedings in view of their limited nature.
20. The grounds for appeal put forward by MTCC against the Revised Final Judgment partly concern the procedure followed by TPAC. To start with, MTCC took the view in that context that the TPAC assessment of the MTCS deviated from the TPAC rules and regulations as contained within the TPAC User Manual, due to:

(i) TPAC not adhering to and indeed breaching its own procedures as set out in the User Manual. For example, in breach of the TPAC User Manual the one-week extension of the stakeholder forum was communicated on the website with no prior consultation with MTCC. In this connection it is noted that all comments received during the stakeholder forum on the MTCS were in fact submitted during the one-week extension. TPAC continued to consult the online stakeholder participant (Greenpeace) after the end of the consultation period without MTCC's knowledge. TPAC has not submitted/issued its assessment as required by the process but continued to request additional information from MTCC without having provided the assessment to the system manager. The TPAC letter dated 30 July 2009 did not make any reference to the TPAC assessment and the first review. The Chairman of TPAC participated in a media interview in the NRC Handelsblad newspaper on 15 April 2010, without prior consultation with the MTCC or the Dutch Ministry of the Environment. TPAC was at all times aware that NCIV was the Anonymous Party providing input to the stakeholders' forum, but did not communicate this knowledge to MTCC.

(ii) TPAC's method of carrying out its work was not transparent and not made known to MTCC. This lack of transparency was compounded by the fact that other than the User Manual, the documents related to the assessment were only available in the Dutch language. The relevant documents should have been officially translated into the English language and circulated to the schemes being assessed, since it was clear from the outset that the certification schemes operating in other countries would be assessed to the requirements of the TPAS;

(iii) MTCC has raised on more than one occasion its concern that it was being subjected to more intense scrutiny compared to other schemes assessed by TPAC and hence was not being treated fairly during this process in comparison to other schemes.

- 20.1 In response to the complaint referred to under (i), TPAC argued that this was resolved with a letter from the director of the Stichting Milieukeur (SMK) dated 28 August 2009, a copy of which it was supposed to have submitted in the proceedings as Annex VII to its Response to Notice of Appeal.
- 20.2 The reference is based on an apparent misunderstanding, since the letter of 28 August 2009, a copy of which TPAC submitted as Annex VII, concerns a different subject. Clearly TPAC intended to refer to a second letter of 28 August 2009, a copy of this letter being submitted in the proceedings by

MTCC as Appendix II to its Notice of Appeal.

- 20.3 In the latter letter, the director of SMK, having heard TPAC, acknowledged that the procedures prescribed in the applicable regulations were indeed deviated from on a number of points, whereas the User Manual was unclear and incomplete on a number of points (in which connection a revised version was being prepared). The director noted in this respect that on 20 May the secretariat had informed MTCC through a general email that the stakeholder forum was going to be extended because of the number of public holidays in the Netherlands in the month of May, and that TPAC's stakeholder fora for PEFC Belgium and PEFC Sweden also were extended by one week. It was also noted that the TPAC User Manual did not limit any contact with stakeholders, when deemed necessary by TPAC. The director also wrote that MTCC had correctly observed that a letter of 30 July failed to mention the TPAC assessment and First Review.
- 20.4 At the end of the letter, the director of SMK had promised that she would ensure that the remaining steps of the TPAC assessment would proceed in a timely and accurate manner, meaning that all deadlines agreed upon would be met, and that all assurances given in the letter would be delivered. The director also pointed out that MTCC, if it could not agree with this settlement, could file an appeal to the SMK Supervisory Board within six weeks.
- 20.5 The Board of Appeal establishes that MTCC did not make use of the opportunity to lodge an appeal before the SMK Supervisory Board. The Board of Appeal judges in this respect that the complaint referred to under (i) has in principle been resolved, but that this – taking into account the fact that TPAC itself, as has been acknowledged on its behalf, made some procedural errors – could be otherwise if it has to be said that parts of the complaint must be considered as fundamental shortcomings in the procedure which were expressed in the Revised Final Judgment.
- 20.6 In the opinion of the Board of Appeal, there were no fundamental shortcomings as referred to above. The Board of Appeal realizes in this respect that the letter of 28 August 2009 did not discuss the interview given by the Chairman of TPAC to NRC Handelsblad. The Board of Appeal endorses the view expressed by TPAC in its Response to Notice of Appeal that generally it is appropriate to refrain from public statements by a judging party, pending the objection procedure. On the other hand, it also endorses the fact that a decision to make a public statement does not necessarily require a consultation with MTCC or the Ministry of Environment. The Board of Appeal takes the view that MTCC has insufficiently explained, with reasons, which

statement by the Chairman in the interview would have exceeded the limits of what is permissible. Incidentally, Greenpeace et al rightly pointed out that complaint (i) concerns incidents which had already occurred before the Final Judgment of 3 March 2010 had been drawn up. Since there is no question of fundamental shortcomings, complaint (i), in so far as this cannot already be considered as resolved, must be rejected.

- 20.7 MTCC has no interest in the complaint referred to under (ii), since it has always had access to the English version of the User Manual which, as has already been considered under the terms of Article 5 paragraph 1 of the TPAC regulation, must be followed in the assessment of certification systems. Furthermore, MTCC has been able to obtain translations of all the required documents well before lodging appeal proceedings. Consequently it has been able to prepare sufficiently for the appeal proceedings on the basis of these translations. In so far as MTCC has in the first instance not had the opportunity to employ certain arguments because documents or their translations were not sent promptly, it still had the opportunity to do so on appeal.
- 20.8 Within the context of this complaint MTCC also argued that TPAC had exceeded its authority, since under the terms of the applicable TPAC regulation of 18 December 2007 it would not have been authorized to provide the Dutch Minister of the Environment with political advice on 3 March 2010. This authority would not have arisen until a later date, because three weeks prior to the hearing of 15 September 2010 TPAC changed the rules of the game. In its defence, TPAC argued that all committees of SMK, TPAC included, had been allowed since 1992 to offer unsolicited advice to the Minister, regardless of the fact that this advice can be politically interpreted. Because of the fact that MTCC on several occasions asked whether TPAC was allowed to give unsolicited public political advice to the Minister, this was made explicit in TPAC's regulations, when revised in August 2010; the objective of the revision being transparency and not retrospective justification. MTCC has not refuted this defence, at least not sufficiently.
- 20.9 In connection with that considered in the legal grounds 20.7 and 20.8, complaint (ii) must be rejected.
- 20.10 Within the context of the complaint referred to in (iii), MTCC argued, amongst other things, that it has been subjected to more detailed scrutiny compared to other schemes assessed by TPAC and hence is not being treated equally and non-discriminatorily during the process, which was evident from the early stages of the assessment process, based on the detailed nature of the

evidence and information sought by TPAC which was absent in the assessment of the other schemes. In particular, MTCC made a comparison with the procedures followed by TPAC with respect to FSC, FFCS, PEFC Austria, PEFC Belgium, PEFC Sweden, PEFC Germany and PEFC Finland. According to MTCC the MTCS is the only scheme where the criteria judged to be corresponding to the Dutch requirements are reproduced in full detail in a separate column and arranged alongside the Dutch requirements. Both the FFCS and PEFC Sweden were considered to have partially addressed criterion C 4.3 although their respective standards did not specifically prohibit conversion of forests, while MTCS was rated as having inadequately addressed TPAS criterion C 4.3 although Criterion 6.10 of the MTCS standard does prohibit conversion, except under certain circumstances. MTCC contends that the MTCS criterion 6.10 bodes well and falls within TPAS criterion C 4.3 Guidance on conversion. The MTCS criterion here would be similar to that of the FSC.

- 20.11 In its defence TPAC emphasized that it has treated MTCS equal to other certification schemes and that it has acted in a non-discriminatory and transparent way. With regard to the comparison with the procedures followed for the other certification schemes, TPAC has taken the view that MTCC could not rely on the viewpoints it had adopted, since MTCC is not aware of these procedures. It is not the case that a lighter approach was used with respect to other certification schemes; the assessment process of PEFC International took two and a half years, during which the PEFC Council and the Committee convened three times in Switzerland and the Netherlands. For the assessment of PEFC Belgium, the Committee not only convened with representatives of PEFC Belgium and the Walloon Ministry of Agriculture, Natural Resources and Environment, but also attended a forest audit in Wallonia.
- 20.12 TPAC also pointed out that the depth and the comprehensiveness of an assessment procedure depend to a large extent on the nature of the information that the Committee receives during the procedure. For MTCS the information on the Stakeholder Forum was more extensive and critical than for the systems assessed so far by TPAC. The Notice of Objection against TPAC's Final Judgment on MTCS, lodged in April 2010 by five Dutch NGOs, counted approximately 175 pages; TPAC was obliged to investigate all this information.
- 20.13 In this context, TPAC argued further that MTCC could not compare the matrix or its setup used with respect to MTCS with the matrices used with respect to other certification schemes, since these matrices were not published by TPAC. The documents relating to other schemes which were compared to the MTCS

matrix were evidently Public Summary Reports, and are therefore documents of a totally different nature. The assertion that the assessment reports of MTCC have been more detailed than the assessment reports of other certification systems assessed by TPAC is explicitly disputed by TPAC.

20.14 The Board of Appeal takes the view that the defence put forward by TPAC in response to complaint (iii) is sufficiently convincing to dismiss this complaint too. It finds no basis for the assumption that MTCS has been subjected to more detailed scrutiny compared with other schemes assessed by TPAC. A potentially more in-depth scrutiny can be reasonably explained by the fact that the information on the Stakeholder Forum was more extensive and critical than in other cases, while TPAC was obliged to investigate all the information given by Greenpeace et al in the Notice of Objection.

21. Subsequently, in its Notice of Appeal MTCC discussed the assessment by TPAC of MTCS against the Principles and Criteria listed in the Assessment Matrix. In this connection the Board of Appeal considers as follows.

22. *Principle P2: The interests of directly and indirectly involved stakeholders shall be taken into account.*

22.1 *C.2.1: Criterion:*

The legal status of the management of the forest management unit and claims of the local population, including indigenous peoples, in the property/tenure or use rights regarding the forest management unit or a portion thereof have been inventoried and are respected.

22.1.1 MTCC took the view that TPAC's decisions relating to land matters, such as land ownership and use, including conversion of the natural forests to other forms of land use, need to take into account the relevant State laws in Malaysia.

22.1.2 According to MTCC there is a need to differentiate between ownership rights and use rights. In case of permanent forests in Malaysia, the ownership rights of the indigenous communities are already taken into account before the external boundaries of these forests are determined and the forests are gazetted as permanent forests in compliance with the existing laws. These permanent forests are the forests currently certified under the MTCS and are State-owned.

- 22.1.3 Following this, MTCC argued that the opinion expressed by TPAC that 'this traditional use confers certain rights on the Orang Asli, such as the right to give permission to log timber and to receive compensation for logging activities where appropriate' would be tantamount to the indigenous communities being recognized as the owners of the permanent forests. In the view of MTCC this would contradict the prevailing laws in Malaysia under which the respective States own the permanent forests. The indigenous peoples residing in or adjacent to the permanent forests are able to continue exercising their traditional use rights in these forests.
- 22.1.4 In its Counter Response of 29 July 2011 MTCC has reiterated that TPAC's Interpretation of this requirement in the Malaysian context would be breaching the national laws concerned. The standpoint adopted by TPAC implies that the indigenous peoples are to be treated as the recognized owners of the permanent forest, whereas under the prevailing laws they are not the owners.
- 22.1.5 TPAC has defended itself extensively on this point. It has taken the view, amongst others, that it has taken into account the legislation of Malaysia, in particular the National Forestry Act (1984) and the Aborigines Peoples Act (1954), in as far as relevant and appropriate. Furthermore, it has disputed that it could anticipate that a voluntary certification system would be expected to avoid compliance with any law.
- 22.1.6 Furthermore, TPAC argued that recent MTCS audit reports show that MTCS-certified forests uphold an overly restrictive interpretation of the four MTCS criteria which relate to the right of indigenous people to have a say in forest management. According to this interpretation the Orang Asli supposedly only have a say in forest management in those areas where they are the legal owners of the land. By definition Orang Asli are not the legal owners of certified forest areas; they are only recognized as the legal owners of limited forest areas known as Orang Asli reserves, which are not certified. According to TPAC this means that although the MTCS standard requires, through the MTCS criteria 2.2, 3.1, 3.2 and 4.5, that the Orang Asli do have a say in forest management on the basis of free and informed consent, these criteria are not applied in MTCS-certified forests and are thus invalidated through the above restricted interpretation.
- 22.1.7 Greenpeace et al has taken the view that if respect for the Malaysian laws leads to the conclusion that it is legally not possible for MTCC's certification scheme to abide by the Dutch procurement criteria, it is not possible at all to declare MTCS in conformity with the Dutch criteria. It denies that the

ownership rights of the indigenous communities are already taken into account before the external boundaries of permanent forests are determined.

22.1.8 In the view of the Board of Appeal, TPAC has assessed MTCS in accordance with the task imposed on it against the criteria given in the Assessment Matrix. That which MTCC has argued in response serves merely to confirm the conclusion drawn up by TPAC within the context of the criterion discussed here, that there is an important difference in interpretation of customary rights between TPAC on the one hand and MTCS-certified forest managers and certification bodies on the other.

22.1.9 The Board of Appeal shares the view of TPAC that within the context of its assessment higher requirements may be demanded of a certification system than would arise from the relevant national laws and regulations. In its Counter Response MTCC incidentally did endorse this view too.

22.1.10 Taking all this into consideration, the Board of Appeal takes the view that TPAC could in all reasonableness have reached the decision that Criterion C 2.1 is inadequately addressed.

22.2 *Criterion C 2.3*

The local populations and indigenous peoples have a say in forest management on the basis of free and informed consent, and hold the right to grant or withhold permission and, if relevant, receive compensation where their property/use rights are at stake.

Guidance: Free and informed consent is interpreted in the sense that the activity will not be undertaken before the relevant consent is given.

Guidance: The local population and indigenous peoples can only prevent activities through withholding their consent where their property/use rights are at stake.

22.2.1 MTCC has disputed in this respect that the MTCS criteria C 2.2, C 3.1, C 3.2 and C 4.5 are invalidated. These criteria would only be intended for the audit of forests owned, controlled or set aside for the indigenous peoples, such as Orang Asli Reserves and Communal Forests.

22.2.2 TPAC stated that it is puzzled by this statement. As TPAC understands it, Orang Asli reserves are not part of the permanent Forest Reserve and

therefore not of the MTCS-certified area. Consequently, certification bodies performing audits in the context of MTCS certification will not assess whether Orang Asli reserves comply with MTCS criteria.

22.2.3 According to Greenpeace et al, the aforesaid dispute leads to the consequence that the aforesaid MTCS criteria are not relevant to the TPAC assessment and therefore should not have been dealt with in the context of the assessment in the first place. If this were to be the conclusion, then this would mean that no testing whatsoever is possible against the TPAS criteria C 2.1 and C 2.3.

22.2.4 In paragraph 27, point iii, of the Response to Notice of Objection TPAC has written: *RTUs relating to 'control over forest management' are considered not applicable in MTCS certified forests as indigenous communities have not been granted the formal right to control forest management activities for protection of other traditional uses in PRF.*

The abbreviation RTUs in the quote stands for Rights resulting from and/or based on traditional use.

MTCC takes the view that point (iii) applies equally to the MTCS and to any other certification scheme operating in Malaysia. In this connection, this point should also apply to the audit of state-owned and privately-owned forests in all the certification schemes assessed by TPAC.

22.2.5 TPAC takes the view in this connection that a comparison with FSC Malaysia is not the object of the present appeal procedure.

22.2.6 The Board of Appeal takes the view that TPAC could also have been able to decide in all reasonableness that C 2.3 has been inadequately addressed. After all, the positions taken by MTCC cannot be interpreted in any other way than that TPAC criterion C 2.3 has not been met with respect to local populations and indigenous peoples in MTCS-certified areas.

22.3 *Criterion C 2.4*

The forest management plan and accompanying maps, relevant monitoring results and information about the forest management measures to be applied are publicly available, except for strictly confidential business information.

Guidance: Public availability implies that if stakeholders should have limited access to certain media, the management plan is dispersed through other

channels. Depending on the level of detail in the management plan, the full plan or a summary should be available.

Guidance: Wherever practical and necessary, information on the forest management can also be communicated to the people in the forest through in situ markings or information displays.

22.3.1 Greenpeace et al takes the view that during the TPAC proceedings it has demonstrated that and why the availability of maps in the materials provided by MTCC is 'entirely inadequate'.

22.3.2 In its Notice of Appeal, MTCC argued that all relevant maps have been made available by the forest managers to the CBs and have been placed together with the summary of the audit reports on the websites of the respective CBs. To meet TPAC's requirement that such maps should also be made available on the website of the FMU manager, MTCC would take action to request the forest managers to take this action, through the CBs, within the next two months.

22.3.3 During the hearing of 5 August 2011, MTCC made it known that the required maps are so large that they cannot be placed on the internet. The maps are available in every office and may be viewed there. A copy of them cannot be taken away.

22.3.4 The only interpretation open to the Board of Appeal concerning what MTCC itself put forward regarding the assessment of Criterion C 2.4 is that it cannot be said that the maps were sufficiently publicly available. In this respect, TPAC could have been able to decide in all reasonableness that Criterion C 2.4 is partially addressed.

23. *Principle P4: Biodiversity shall be maintained and where possibly enhanced.*

23.1 *C 4.1: Criterion:*

Objects of high ecological value and representative areas of forest types that occur within the forest management unit are identified, inventoried and protected.

Guidance: 5% is considered to be a relevant proportion.

- 23.1.1 MTCC has taken the view that TPAC has erred in its conclusion that 'Only in exceptional cases is an EIA performed at landscape level.' TPAC also erred when it assumed that an EIA would not be able to identify and protect objects of high ecological value.
- 23.1.2 TPAC still holds the opinion that Environmental Impact Assessments (EIAs) are primarily performed by MTCS-certified forest managers at state/FMU level, and that it is unlikely that such an EIA is sufficiently detailed to provide the necessary information to be able to protect objects of high ecological value as is required by the Dutch Procurement Criteria.
- 23.1.3 Furthermore, MTCC discussed the gazettement process of a permanent reserved forest. In MTCC's view, TPAC appears not to be fully conversant with the gazettement process, particularly that it takes time because of the need to follow the due process as specified under sections 8 and 9 of the respective State Forest Rules. Referring to Table 1 on p. 10 of her Notice of Appeal MTCC has stated that, with the exception of two states (Johor and Kedah), the proportion of the proposed PRFs to the total PRFs at any time would be less than 1%.
- 23.1.4 TPAC fully stands by its argument that the gazettement of protection forests is (seriously) lagging behind, which renders it uncertain whether a sufficient basis for the required protection is available. The table MTCC has referred to only provides information about the progress of gazettement in general, whereas TPAC is particularly interested in the gazettement of 'protection forests' such as 'virgin jungle reserves' and 'water catchment forests'.
- 23.1.5 The Board of Appeal considers that MTCC has insufficiently refuted the assertion of TPAC, that it is unlikely that an EIA is sufficiently detailed to provide the necessary and required information to be able to protect objects of high ecological value. In this connection, it takes the view that TPAC was able in all reasonableness to reach the decision that Criterion C 4.1 is partially addressed.

23.2 *C 4.3: Criterion*

Conversion of forests in the FMU to other types of land use, including timber plantations, shall not occur unless in justified exceptional circumstances.

- 23.2.1 The Board of Appeal notes that the parties and stakeholders have discussed this criterion in detail, whereas its assessment in the Revised Final Judgment dated 22 October 2010 does not differ from the assessment in the original Final Judgment of 3 March 2010.
- 23.2.2 According to MTCC it is to be noted that the conversion of part of the natural forest to other forms of land use, such as forest plantations and other non-forest land uses, is deemed necessary for the socio-economic development of Malaysia. MTCC contends that TPAC has ignored the fact that MTCC clearly has no power or authority to restrict the State governments from making decisions to convert natural forests to other forms of land use. MTCC therefore cannot be held responsible or indeed be penalized for decisions made by the State governments on the use of their natural resources, including forest resources. If the MTCS is not recognized by the Dutch procurement policy, this will be seen as a strong demotivating market signal to forest owners and those opposed to certification that the additional costs incurred for forest certification is pointless on account of the Dutch market being closed to them.
- 23.2.3 MTCC believes that TPAC misinterpreted the information provided by MTCC during the hearing on 14 September 2010, leading to TPAC reaching a wrong conclusion. MTCC argues that (1) the converted areas and areas scheduled for conversion are excluded from the certified FMU, and (2) there is a cap on the conversion that is allowed in the MTCS-certified forest areas.
- 23.2.4 TPAC has emphasized that it is unlikely that the establishment of forest plantations will reduce Malaysia's reliance on the natural forest as a source of timber needed by the wood-based industries. It says to have recognized that decisions to convert natural forests are made at State level by the respective State Exco and that these decisions are outside the responsibility of the Forest Manager. But TPAC also sees a role for MTCC, precisely by declining the issuing of certificates (or the withdrawal of certificates) when there is no compliance with requirements against conversion. In response to the information supplied by MTCC concerning actual and planned conversion within certified FMUs, TPAC noted that the state of Kelantan shows a conversion of 9.2 % in a period of four years without any consequences for the certification status of the Permanent Reserved Forest. TPAC considers this to be a serious impediment to sustainable forestry.

23.2.5 TPAC contests that it has misinterpreted the information provided during the hearing. The interim guideline dated 7 April 2010 does not mention a cap for conversion nor does it exclude planned plantations from the FMU.

23.2.6 In its Counter Response, MTCC pointed out that it has referred in this respect to an interim guidance which entered into force on 16 February 2011. The Board of Appeal will not consider this interim guidance since, as considered in part 19 of this judgment, it judges this case on the basis of the regulations which were in force in October 2010.

23.2.7 The Board of Appeal holds that, based on the regulations applicable in October 2010, TPAC could have been able in all reasonableness to decide that Criterion C 4.3 is inadequately addressed.

24. The Board of Appeal establishes that MTCC has failed to challenge the assessment of Criterion 8.4 by TPAC.

25. Taking all the above into account, the final conclusion is that TPAC in its Revised Final Judgment of 22 October 2010 was able in all reasonableness to decide that MTCS is not conforming to the Dutch Procurement Criteria, so that the appeal lodged by MTCC must be dismissed.

IIIb. The provisional appeal lodged by Greenpeace et al

26. Greenpeace et al have lodged a conditional appeal, in the event that the Board of Appeal should allow the appeal by MTCC and for this reason the Revised Final Judgment cannot be upheld in full. The Board of Appeal has not allowed the appeal by MTCC, so that the conditional appeal does not need to be heard.

DECISION:

The Board of Appeal of the Stichting Milieukeur (SMK) of The Hague (the Netherlands) reaches its decision by way of a binding opinion as follows:

1. The appeal lodged by MTCC is dismissed.

2. MTCC, as the unsuccessful party, is ordered to pay the costs of hearing this case by the Board of Appeal, which have been estimated by the Board of Appeal at € 34.359,53.
3. Orders that this amount must have been paid into account number 12.51.83.860 (Rabobank) in the name of Stichting Derdengelden Wijn & Stael, Utrecht (the Netherlands), IBAN NL34 RABO 0125 1838 60, BIC RABONL2U within three weeks of the date of this judgment.

Utrecht, 19 October 2011

A handwritten signature in black ink, consisting of a series of loops and a long horizontal stroke at the end.

G.M.F. Snijders (chairman)