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Utrecht, 28 september 2012

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dossier : 49391 heu/mb (12-00102380)
inzake : SMK/beroep WWF i.z. PEFC International – secretaris

Geachte mevrouw Van der Sijp,

Bijgaand zend ik u (*) een exemplaar van de uitspraak van het College van Beroep in bovengenoemde zaak. Naar de inhoud hiervan mag ik u wel verwijzen.

Met vriendelijke groet,



Andrea van den Heuvel

BINDING OPINION

The Board of Appeal of Stichting Milieukeur (SMK) in The Hague, the Netherlands, comprising Mr 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 given – in accordance with the provisions of Section 10 (3) of the applicable SMK Complaints, Objection and Appeal Regulation – the following decision by way of a binding opinion in the case of:

1. WWF NETHERLANDS, with its registered office in Zeist,
2. GREENPEACE FOUNDATION, with its registered office in Amsterdam,
3. NETHERLANDS CENTER FOR INDIGENOUS PEOPLES, with its registered office in Amsterdam,
4. ICCO INTERCHURCH ORGANISATION FOR DEVELOPMENT COOPERATION, with its registered office in Utrecht,
5. FRIENDS OF THE EARTH NETHERLANDS, with its registered office in Amsterdam,

appellants,

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

versus

TIMBER PROCUREMENT ASSESSMENT COMMITTEE,
with its registered office in The Hague, the Netherlands,
respondent,

together with PEFC INTERNATIONAL as interested party within the meaning of Section 1 (d) of the Complaints, Objection and Appeal Regulation.

I. THE COURSE OF THE PROCEEDINGS

First instance

1. On 11 June 2010 the respondent (hereinafter referred to as TPAC) gave its Final Judgment on PEFC International. In this judgment, TPAC decided that PEFC International does conform to the Dutch Procurement Criteria for the Dutch Market.

Objection procedure

2. On 23 July 2010 Mr Van den Biesen, LL.M., on behalf of the appellants (hereinafter referred to as WWF et al.) submitted to TPAC a Notice of

Objection to the Final Judgment.

3. In October 2010 TPAC reviewed a decision in another case, that the Malaysian certification system MTSC was conforming to the Dutch market. In connection with this review, TPAC also amended its Final Judgment on PEFC International in October 2010. With effect from October 2010 the Final Judgment reads as follows: 'PEFC International – excluding MTCS – conforms to the Dutch Procurement Criteria for the Dutch Market'.
4. On 7 June 2011 TPAC gave its decision in its Response to the Notice of Objection. Although the committee did modify the scores of two criteria following the Notice of Objection, it concluded that there was no reason to revise its Final Judgment.

Proceedings in appeal

5. In its Notice of Appeal dated 14 July 2011, WWF et al. lodged an appeal before the Board of Appeal against the decision on the objection. Putting forward its grounds for appeal, WWF et al. claimed that the decision on the objection should be set aside and requested the Board of Appeal to rule that TPAC must amend the disputed decision in the way proposed in the Notice of Appeal or in a way that does justice to the arguments set out in the Notice of Appeal.
6. The grounds of WWF et al. relate to the umbrella nature of PEFC International and the method of qualified approval used by TPAC.
7. Within the context of this umbrella nature, WWF et al. argued that it is possible that a national system coming under the umbrella of PEFC International does not conform to the Dutch criteria. As a consequence, there is the risk that such a national system would be accepted for the Dutch Procurement Policy, even though it does not conform to the Dutch criteria. As an example, WWF et al. cites the national systems of AFS (Australia) and SFI ((North) America). There are complaints about these systems which are currently being investigated by TPAC. These systems do however come under the umbrella of PEFC International, so that they are deemed to conform to the Dutch criteria. WWF et al. have taken the view that this risk is not compatible with TPAC's view that the PEFC assessment model is sufficiently robust to be able to guarantee that approval by PEFC does indeed mean that the system in question satisfies the Dutch criteria.

8. Furthermore, WWF et al. took the view in its Notice of Appeal that positive inclusion – instead of qualified approval – is the right approach to deal with the consequences of allowing an umbrella system. By means of positive inclusion, according to WWF et al., the risk that a national system, which still needs to be investigated further, will already come under the umbrella of PEFC International, is avoided.
9. In its Response to the Notice of Appeal dated 20 September 2011, TPAC submitted a written defence, claiming that the appeal should be dismissed. In its Response to the Notice of Appeal, TPAC discussed the assessment procedure it had conducted and argued on this basis that PEFC International has been subjected to a thorough and comprehensive assessment procedure, appropriate for a meta-system. The conclusion of the assessment procedure is, according to TPAC, that PEFC International conforms to the Dutch Procurement criteria.
10. In response to the risk described by WWF et al., TPAC has argued in its Notice of Appeal that if certain national systems, which do come under the PEFC umbrella appear not to conform to the Dutch criteria, TPAC is at liberty to investigate any (perceived) evidence of non-compliance of national certification systems. If systemic failures are detected in a PEFC-endorsed national system and PEFC International does not take corrective methods promptly, TPAC has stated that it will withdraw its conclusions.
11. Concerning the systems of positive inclusion proposed by WWF, TPAC argued that positive inclusion would give out the wrong signal, namely that the PEFC endorsement system would not guarantee (sufficiently) that a system conforms to the Dutch Procurement criteria. This is contrary to the fact that TPAC has established, based on the PEM Principle amongst others, that the PEFC system does indeed offer sufficient safeguards.
12. The Board of Appeal set a date for the hearing on 28 June 2012. On 21 June 2012 WWF et al. submitted five documents for the hearing.
13. On 28 June 2012 the said hearing took place in Utrecht before the Board of Appeal, at which the parties provided a further explanation of their arguments.
14. On 26 June 2012 it became apparent that the office at which the chairman and the secretary work as lawyers has for some time been representing the Wereld Natuurfonds (WNF) in a specific type of case which has nothing whatsoever to do with the certification of wood. The parties and PEFC

International were informed of this the very same day, with the question whether as far as they were concerned this circumstance should prevent the chairman and the secretary from being involved in dealing with the case. They were explicitly invited to make any objections known, in which case the chairman and the secretary would withdraw from the case. None of the parties, nor PEFC International, objected to this. The Board of Appeal refers in this respect to the official report of the oral hearing, which was sent to the parties and PEFC International by email on 12 July 2012.

II. THE ESTABLISHED FACTS

15. As argued on the one hand and not or not sufficiently disputed on the other hand, as well as on the basis of the documents submitted by the one party to the proceedings and to this extent not disputed by the other party, the following has been established in this case:
- 15.1 According to the Timber Procurement Assessment Committee Regulation (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.
- 15.2 Under Article 5 paragraph 1 of the TPAC regulation, TPAC follows the procedure described in the TPAC User Manual when carrying out an assessment of certification systems.
- 15.3 Under the same provision, stakeholders are offered the option of providing input before TPAC reaches its final opinion.
- 15.4 With respect to the opinion on a certification system, under Article 5 paragraph 2 of the TPAC regulation TPAC submits 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.
- 15.4.1 When assessing the certification systems, TPAC uses an Assessment Matrix. This matrix incorporates the Dutch procurement criteria as well as process criteria for certification systems. The procurement criteria are divided into a set of criteria and principles for:
- Sustainable Forest Management (SFM);
 - Chain of Custody (CoC).

The process criteria are divided into a set of principles and criteria for:

- Development, Application and Management (DAM);
- Procedure on Endorsement of certification systems by a Meta-System (PEM).

15.5 The latter set (PEM) is only applicable to the testing of a meta-system, also known as an umbrella system.

15.6 PEFC International is a meta-system. TPAC's testing of PEFC International took place based on the four sets of criteria and principles set out above.

15.7 TPAC established the following based on the assessment matrix:

- SFM: 7 of the 9 principles are fully addressed, the remaining two are partially addressed;
- CoC: all principles are fully addressed;
- DAM: 4 of the 5 principles are fully addressed, the remaining one is partially addressed;
- PEM: the PEM principle is fully addressed.

III. THE ASSESSMENT OF THE DISPUTE

16. The Board of Appeal notes beforehand that its assessment of this case will necessarily be limited, in the sense that on the basis of the positions taken by the parties and other interested parties involved, as well as the documents submitted to the proceedings, it must assess whether TPAC could reasonably have made the decision on the objection.

17. The appeal does not address the assessment of one or more principles (or criteria) from the Assessment Matrix as such, therefore the correctness of these assessments will be assumed in these appeal proceedings.

18. To summarize, the appeal lodged by WWF et al. comes down to the fact that it objects to the risk that national systems which do not conform to the Dutch Procurement criteria are or will be approved under the PEFC umbrella. Such a national system can then be accepted for the Dutch Procurement Policy, even though it does not conform to the Dutch criteria.

19. TPAC has not disputed the possibility that non-conformities may arise in a national system. In its Response to the Notice of Appeal and at the hearing, TPAC argued in this respect that it is authorized to examine any potential

case of non-compliance with national systems based on the national TPAS criteria, and will do so if complaints reach it about national systems coming under PEFC. TPAC is conducting such an investigation, at least it will do so in 2012 concerning the complaints about the national systems of SFI and AFS.

20. TPAC argued that, if the complaints prove well-founded and there are systemic failures, it will draw the conclusions and take such action as it deems appropriate. According to TPAC, this could include calling upon national systems and/or PEFC International to solve the problems of the national system and, in the most extreme case, to review the approval of PEFC International.
21. The correctness of the aforesaid arguments and the claim by TPAC that it is adequately meeting the objections of WWF et al., has not or not sufficiently been disputed by WWF et al.
22. The Board agrees with TPAC in its argument that TPAC offers sufficient safeguards and guarantees, in the manner described in paragraphs 19 and 20, for the Dutch market that national systems coming under PEFC conform to the Dutch criteria.
23. The system adopted by TPAC of qualified approval of PEFC International instead of positive inclusion appears to the Board to be an understandable and justifiable way of dealing with the complexities of an umbrella system and the rejection of a national system.
24. Taking all the above into account, the conclusion is that TPAC, in its decision on the objection, could reasonably have decided that PEFC International – excluding MTCS – conforms to the Dutch Procurement criteria for the Dutch market, so that the appeal lodged by WWF et al. must be dismissed.

DECISION:

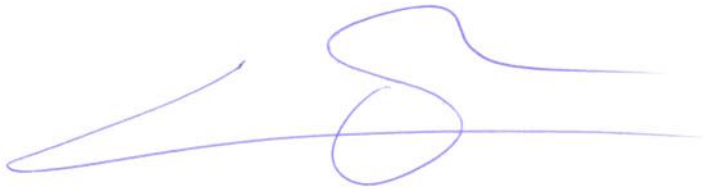
The Board of Appeal of Stichting Milieukeur (SMK) in The Hague, the Netherlands, rules by way of a binding opinion as follows:

1. The appeal lodged by WWF et al. is dismissed.
2. Both parties will bear their own costs.
3. The costs of hearing the case by the Board of Appeal, which the Board of Appeal has set at € 15,500, will be borne equally by both parties.

4. TPAC is to pay, within three weeks of the date of this decision, a sum of € 7,750 into account no. 12.51.83.860 (Rabobank) in the name of Stichting Dergengelden Wijn & Staal in Utrecht (the Netherlands), IBAN NL34 RABO 0125 1838 60, BIC RABONL2U.

5. WWF et al. is to pay, within three weeks of the date of this decision, a sum of € 7,750 into account no. 12.51.83.860 (Rabobank) in the name of Stichting Dergengelden Wijn & Staal in Utrecht (the Netherlands), IBAN NL34 RABO 0125 1838 60, BIC RABONL2U.

Utrecht, 28 September 2012

A handwritten signature in blue ink, consisting of a long horizontal stroke on the left, a large loop in the middle, and a smaller loop on the right, all connected by a thin line.

G.M.F. Snijders (chairman)