

TPAC Report regarding MTCS conformity with TPAS

TPAC Fact-Finding Mission to
Malaysia, 23-25 November 2016

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1. Introduction

This report contains the advice of the Timber Procurement Assessment Committee (TPAC)¹ to the State Secretary for Infrastructure and the Environment regarding the Malaysian Timber Certification System (MTCS),² based upon the fact-finding mission to Malaysia undertaken between 23 and 25 November 2016 to observe the MTCS in operation.

The purpose of the mission was to answer the following question, as posed in the request for advice made to TPAC on 8 September 2015:

- ***To what extent have the outstanding issues relating to conversion, indigenous peoples and the availability of maps been resolved within the MTCS?***

Dutch delegation

Between 23 and 25 November 2016, a Dutch delegation undertook a fact-finding mission to observe the MTCS in operation. The delegation was led by Chris Kuijpers, Director-General of Environment and Climate at the Ministry of Infrastructure and the Environment, supported by one Policy Officer. The delegation's other members were two representatives of the Ministry of Economic Affairs and two TPAC members, aided by the Director of the Environmental Hallmark Foundation (SMK) in the role of interim TPAC Secretary. The Dutch Ambassador to Malaysia joined the delegation on several occasions.

Discussion partners in Malaysia

The delegation held meetings with the Malaysian Timber Certification Council (MTCC), the Forestry Department Peninsular Malaysia, NGOs representing indigenous peoples, environmental NGOs, and representatives of Orang Asli communities. A visit was made to the Kuala Pilah District Office of the Forestry Department of the state of Negeri Sembilan. The delegation also visited the Orang Asli village of Kampong Pabai, located near to one of the forest management units. (The mission programme forms Annex 1 to this report.)

Background

On 22 October 2010, in response to new information provided by NGOs, TPAC revised its initial approval of the MTCS, given in March 2010. After studying the new information, TPAC concluded that the MTCS did not fully conform to the criteria of the TPAS.³ In practice, the management of forests covered by the MTCS did not apparently conform to the TPAS criteria regarding the following:

- *Use rights of indigenous peoples*: the principle of free, prior and informed consent (FPIC) did not appear to be applied to all traditional use areas.
- *Conversion*: clear quantitative limitation of conversion was lacking.
- *Maps* were not available to stakeholders.

In November 2010, a ministerial-level agreement was made between the Netherlands and Malaysia, providing for resolution of the highlighted nonconformities within two years.

In August 2013, at the request of the State Secretary, TPAC reported on the degree to which the agreement had been fulfilled. TPAC concluded that the forest management criteria and implementation instructions had been improved, but that the issues remained unresolved in practice.

¹ TPAC assesses the conformity of certification systems to the Timber Procurement Criteria defined in the context of the Dutch government's Sustainable Procurement Policy.

² Malaysian Timber Certification System

³ Timber Procurement Assessment System

The mission described in this report was actuated by the statement to parliament by the State Secretary for Infrastructure and the Environment⁴. In her announcement, the State Secretary made reference to the motion of Van Veldhoven c.s., 30196-238, 20 February 2014. That motion reminded parliament that a review should be undertaken after two years by TPAC, partly on the basis of field study.

TPAC was not initially asked to undertake a field study, but a civil service mission and a political mission were organised with a view to gathering information about the workings of the MTCS. The first delegation, which included only the former TPAC Secretary, visited Malaysia in January 2015. The second delegation, led by State Secretary Sharon Dijksma, followed in July 2015.

On 30 October 2015, TPAC issued a new report, produced in response to a request made by the State Secretary on 8 September 2015. When preparing that report, TPAC requested access to the full audit reports, but was provided only with public summary reports, which provided insufficient information. In her letter to parliament of 25 January 2016, the State Secretary wrote:

In the autumn of 2015, TPAC reported on the status of the MTCS. The report confirmed that the improvements relating to conversion and indigenous peoples observed during visits to Malaysia are now adequately provided for in the certification system's documentation, but that no conclusions could be drawn as to how the system operates in practice without a field study. It is therefore proposed that TPAC should again be asked to undertake a field visit⁵ of the MTCS and to perform a final check, thus fulfilling the motion of Van Veldhoven c.s. 30196-238.

With its suggestion for a field visit, TPAC had envisaged a visit lasting approximately eight days and involving discussions with MTCC officials, Forestry Department personnel and representatives of the NGOs that had alerted TPAC to matters that appeared to be at odds with the requirements applicable to MTCS-certified forests. Detailed discussions with auditors and site visits to various forest management units were also foreseen, in order to be able to appreciate how the MTCS operates in practice. In March 2016, TPAC submitted a proposal to the Ministry of Infrastructure and the Environment regarding the organisation of such a visit.

Between January 2016 and late October 2016, frequent and detailed communication took place between TPAC/SMK⁶ and the Ministry of Infrastructure and the Environment.

In response to a proposal made by the ministry regarding the organisation of the mission, the TPAC Chair wrote on 12 August, setting out the conditions that, in TPAC's view, should be met in order for the mission to be of value.

From the ministry's contacts with Malaysian officials, it was apparent that the Malaysian government couldn't accept a mission of the kind envisaged by TPAC. Negotiations between the ministry and Malaysia ultimately led to agreement for a civil service delegation with TPAC representation to undertake a fact-finding mission lasting only three days. Circumstance prevented all but two TPAC members – the Vice-Chair and the indigenous peoples expert – from participating.

It had originally been intended that three or four TPAC members, including the Chair, would be included in the mission. Ultimately, however, that proved impossible, because other

⁴ General Meeting of 12 April 2014 and State Secretary's letter to the Lower House of Parliament dated 25 January 2016.

⁵ TPAC had not previously been asked to undertake a field study. Although the TPAC Secretary had been part of the civil service mission, the Secretary is not a TPAC member.

⁶ Environmental Hallmark Foundation

members of the Dutch delegation and various Malaysian officials had competing commitments.

2. Preparation

In preparation for the visit, TPAC again asked to view the most recent full audit reports on the forest management units. However, the MTCC remained unwilling or unable to comply with that request. Nevertheless, after prolonged pressure, TPAC did obtain extracts regarding the three focus issues (conversion, indigenous peoples and maps) from the full reports from early 2016 concerning the Johor, Pahang, Perak and Terengganu forest management units. The certificates issued to Kelantan and Johor have since been withdrawn due to breaching the 5 per cent conversion limit.

TPAC set out its analysis of the reports in a document. The reports were easy to follow and contained a good level of information regarding various topics. Notably, however, no reference was made to consultation with indigenous communities. Furthermore, three of the four reports contained no information regarding fulfilment of MTCS criterion 7.4, which stipulates that a summary of the management plan, with maps, must be available to the public.

On the basis of the reports, an analysis of the *Guidelines for Interpretation of Requirements in MC&I* and information provided by NGOs, TPAC submitted a number of questions to the auditors ahead of the visit, to facilitate constructive discussions in Malaysia. TPAC additionally prepared questions for all the scheduled discussion rounds, with a view to obtaining a good picture of the situation on the ground.

3. Findings

Generally speaking, the atmosphere at the discussions was cordial. The TPAC representatives did nevertheless feel uncomfortable on a handful of occasions when confronted by the evident frustration of Malaysian discussion partners at the presence of yet another mission.

The time limitations and the setting in which the discussions took place (with representatives of the government and the MTCC always in attendance, except for an ad hoc meeting with representatives of indigenous peoples arranged by Friends of the Earth, at which the government and the MTCC were not welcome) were not conducive to probing questioning or to the provision of detailed answers on sensitive topics.

This section of the report begins with some general information about forest management in Malaysia. That is followed by a summary of the additional information obtained by TPAC during the various meetings.

3.1 General information regarding forest management in Malaysia

Malaysia is made up of three federal territories: Peninsular Malaysia, Sarawak and Sabah. The federation is divided into thirteen states, of which eleven are on the peninsula. Eight of those have permanent forest management units. The three territories have their own laws and cultures, and differ considerably in terms of forest management.

Figure 1 States on Peninsular Malaysia. All the permanent forest in each state is certified as a single forest management unit. (NB: The certificates issued to Johor and Kelantan were withdrawn in January 2016 and March 2016, respectively.)



Forest land is divided into two broad categories: permanent reserved forests (PRF), i.e. forests that must be kept as forests, and state forest lands, i.e. forest lands that may be designated for other purposes. Land is sometimes moved from one category to the other by means of 'gazetting', i.e. addition to the PRF, and de-gazetting, i.e. removal from the PRF. The authority to (de-)gazette land lies with the state forestry departments. Malaysia has a total of 18.3 million hectares of forest, of which 14.5 million hectares (79 per cent) are PRF. Peninsular Malaysia has 5.8 million hectares of forest, of which 4.9 million hectares are PRF.

Of the PRF on Peninsular Malaysia, 40 per cent consists of various categories of 'protection forest', and 60 per cent is 'production forest'. In PRF areas, timber is harvested only from production forests, and the Forestry Department seeks to ensure the timber is harvested sustainably, in accordance with the MTCS criteria.

All PRF on Peninsular Malaysia used to be MTCS-certified. However, since March 2016, the certified area has been only 3.8 million hectares, due to the Johor forest management unit losing its certified status in January 2016 and the Kelantan forest management unit losing its certified status in March 2016. In Sabah and Sarawak, only a small proportion of the forest is MTCS-certified. Sabah has opted for FSC certification of all its natural forests, while forest management in Sarawak often receives negative publicity due to clear felling and corruption. Discussion is sometimes complicated by confusion as to whether people are referring to forest management in Malaysia generally or to MTCS-certified forest.

The Orang Asli population consists of various ethnic groups. The total Orang Asli population on Peninsular Malaysia was roughly 140,000 in 2006, of whom 37 per cent (52,000 people) lived in or near the forest. The interests of the Orang Asli are protected by the Aboriginal Peoples Act 1954 (amended in 1974). A special government department (JAKOA) has responsibility for the development of the Orang Asli.

3.2 Additional information about how the MTCS operates in practice

At the meetings with the MTCC and the Forestry Department, it was made clear that the MTCS has to operate in a complex setting, characterised by a variety of administrative and political structures, competencies, laws, responsibilities and social interests. In Malaysia, responsibility for forestry policy lies with the state governments, which are also the owners and managers of the forests. As such, it is the state governments that hold certificates issued through the MTCS and it is the state governments that must satisfy the MTCS criteria in order to secure or retain certified status.

The challenge for the MTCC and the Forestry Department Peninsular Malaysia is to persuade the managers of the permanent reserved forests that they should pursue forest management policies – in particular social management policies – that go beyond what is required by law. With a view on that challenge the *Guidelines for the Interpretation of Requirements in MC&I* state, "Forest certification requires the FMU manager to take actions that may go beyond the mandate of the federal, state and local laws." Under the National Forestry Act 1984, forest managers have full authority on forest management matters. It is they who decide, for example, where and when timber will be harvested. In order to secure certification, however, they must engage in effective discussions with indigenous population groups before harvesting timber, in the spirit of UNDRIP.⁷ They must also ensure that no more than 5 per cent of the certified forest is converted, whereas no limits apply to the conversion of non-certified forests.

The MTCC has provided information about the existence and interpretation of the Guidelines to auditors and forestry departments. Provision of specific information about the new *Guidelines* to indigenous peoples was not discussed, and it was not apparent to TPAC whether this information is available to indigenous peoples.

The Forestry Department Peninsular Malaysia indicated that willingness to undertake the additional activities required in the context of certified management would be greater if there were a material incentive. At present, the only incentive is access to environmentally and socially sensitive markets, such as the EU. There is little or no incentive in terms of the market value of the timber.

In the following subsections, the additional information obtained by TPAC at the various meetings is presented under three headings, corresponding to the three issues of concern, namely indigenous peoples, conversion and maps. In Annex 2, the information is tabulated alongside the corresponding findings from October 2010 and October 2015.

In Table 1 on pages 11-14, synopses of the previously unresolved issues and of the additional information obtained during the TPAC fact-finding mission are presented alongside each other. Comparison of the two provides the basis of TPAC's analysis and advice.

The significance of the additional information obtained by the fact-finding mission is considered below, by reference to Table 1.

3.2.1 *The rights of indigenous peoples*

In recent years, combinations of Dutch and Malaysian NGOs have repeatedly highlighted situations where they claim that, in practice, the rights of indigenous peoples have been disregarded. However, it has not always been clear to TPAC exactly what has happened or exactly where it happened (e.g. on MTCS-certified forest land or elsewhere).

Although publication of the *Guidelines for the Interpretation of Requirements in MC&I* in 2014 was a major step forward, scope still exists for interpretational differences. The way

⁷ United Nations Declaration on the Rights of Indigenous Peoples, September 13, 2007

that the requirements are interpreted in practice is therefore critical in relation to the question of whether the issues originally highlighted have been resolved.

The picture that emerged from the discussions with NGOs, indigenous peoples' representatives, the MTCC, the Forestry Department and, not least, the auditors and staff of the certification body, as well as from the visit to the Kuala Pilah district within the Negeri Sembilan forest management unit, was as follows:

- Generally speaking, there appears to be considerable mutual mistrust between, on the one hand, the indigenous peoples and NGOs and, on the other hand, the Forestry Department and the MTCC (the latter often being confused with the government).
- With regard to the cases highlighted by the NGOs, the auditors indicated that, in their view, the disputes in question had arisen either in areas that were not certified forest, or within the forest management units whose certificates have since been withdrawn.
- During the mission, TPAC was not able to determine whether the customary rights of the indigenous communities had been breached by the conversion of MTCS-certified forest lands.
- The auditors are not aware of any court cases relating to MTCS-certified forest. The court cases in progress relate to state forest lands.
- Before each recertification or surveillance audit, the auditors ask the NGOs and JAKOA whether the indigenous peoples have encountered any issues and, if so, where.
- In a number of cases, where disputes arose in periods between surveillance audits, certification bodies had been called in to witness alleged violations and, where appropriate, to resolve the disputes by mediation.
- Generally speaking, the definition of indigenous communities' traditional use areas and the continuation of traditional use do not provide problems. Hunting and gathering for subsistence and even with a view to generating a modest income are in practice permitted by forest managers. Under the law, the commercial trading of forest products requires a licence, for which a fee is payable.
- In MTCS-certified forests, the identification of trees for felling takes account of sites of special cultural, ecological, economic or religious significance for the indigenous peoples.
- Although the continuation of traditional use rarely gives rise to issues and timber is not harvested from sites of special significance, there is little or no tangible evidence of agreements having been reached between the Forestry Department and the indigenous communities. There is no protocol for securing FPIC and agreements are not recorded, apparently at the request of the indigenous peoples, who fear that the records will be used against them later.

3.2.2 *Conversion*

With regard to conversion, the MTCC has made improvements to its normative documentation. It is now stipulated that the total area converted to other forms of land use must not exceed 5 per cent of the forest management unit. Again, Dutch and Malaysian NGOs have in recent years repeatedly highlighted situations where they believe that the certification criteria have been infringed. However, because the NGOs often had no maps to a scale that permitted clear demarcation of the MTCS-certified forest area, it was not

always possible to establish whether the instances of conversion reported by the NGOs involved certified forests. It has also proved difficult to ascertain what areas were gazetted and de-gazetted, and when.

The way that the *Guidelines for Interpretation of Requirements in MC&I* are interpreted and applied by forest managers and certification bodies in practice is critical in relation to the question of whether the MTCS actually satisfies the TPAS criterion.

The picture that emerged from the mission's meetings with its Malaysian discussion partners was as follows:

- The basis for calculating conversion is the area of the MTCS-certified forest in 2012, as specified in the management plan and indicated on the associated map.
- De-gazetted forests (i.e. forests that no longer form part of the MTCS-certified forest area) do count towards the calculated conversion percentage.
- Areas of de-gazetted forest may be offset by gazetted forests (i.e. former state forest lands incorporated into the MTCS-certified forest area). Gazetting and de-gazetting are reasonably regular occurrences. It is not always clear to stakeholders what phase of the procedure the process is in (i.e. whether a change is currently proposed, approved or realised). When the de-gazetting of MTCS-certified forest is offset by the gazetting of PRF forest, although the certified area remains unchanged, the quality of the forest may be affected, e.g. if the gazetted forest is degraded.
- Audit reports state conversion areas.
- The certificates previously awarded to the Kelantan and Johor forest management units have recently been withdrawn due to the 5 per cent conversion limit⁸ having been exceeded. In the calculation of the conversion percentage, the converted area includes the converted area not (yet) withdrawn, the area designated for conversion and the de-gazetted area.

3.2.3 Maps

The provision of maps is not itself an objective, but serves to facilitate the assessment of conformance to the criteria regarding, for example, indigenous communities and conversion. NGOs regularly complain that they do not have access to good maps. The Forestry Department has stated that the district offices do have detailed, up-to-date maps. However, access to forest maps is controlled and they may not be copied freely. Whether a map is made available in response to a request depends on various considerations, such as the intended use.

MC&I Criterion 7.4 stipulates that a forest manager must provide a summary of the main elements of the management plan. That stipulation may cover maps that form part of the plan, but there is no explicit statement to that effect. It is also worth noting that neither the TPAS nor the PEFC specify what information should be shown on forest maps, or what is required in terms of the availability of such maps. The TPAS does not specify the scale of the required forest maps or what information is to be included on them. In its 2013 report, TPAC specified the purpose that forest maps should fulfil and the requirements that they should meet. Essentially, the required forest maps should be sufficient to clarify the management plan on the ground. The PEFC stipulates that a summary of the management plan should be made available, but does not explicitly refer to maps. By contrast, FSC indicator 7.5.1 does contain explicit requirements regarding the information to be shown on forest maps and regarding their availability.

⁸ Annex 4 considers the effects of the inclusion of a conversion criterion in a sustainable forest management standard and the application of that criterion.

The Forestry Department is responsible for the quality of forest maps and for keeping them up to date. The public availability of forest maps is also a matter of Forestry Department discretion, over which the MTCS has no control.

The picture that emerged from the discussions with NGOs, indigenous peoples' representatives, the MTCC, the Forestry Department, and the auditors and staff of the certification body, as well as from the visit to the Kuala Pilah district within the Negeri Sembilan forest management unit, was as follows:

- Forestry services have an advanced GIS system, which is used to produce thematic maps.
- At the Negeri Sembilan Forestry Department district office, there are various thematic maps to a scale of 1:350,000. The maps shown to the mission featured a compass arrow, a year number and a key (in Malaysian) indicating the categories of forest, villages, designated uses, etc. Hanging in the office there were also a number of larger-scale maps (1:70,000), including one showing the locations of recent, ongoing and planned logging operations. The mission saw another document relating to a village, which was accompanied by a 1:5,000 map.
- TPAC was not able to establish whether the quality of the maps in the district office visited by the mission was generally representative of the maps in all district offices.
- Generally speaking, the copying of maps is not permitted. The following arguments were put forward for the withholding of forest maps:
 - It would trigger a tsunami of land use applications.
 - It would facilitate poaching.
- The Forestry Department Peninsular Malaysia says that any person or organisation may request information, and that the request may or may not be granted, depending on the associated risks. Stakeholders such as NGOs and indigenous communities do not generally have access to maps of a kind that would be useful to them. Submitting requests for maps costs money and is time-consuming. Even auditors experience difficulties obtaining useful maps.

It is not possible to say why stakeholders have so little access to useful maps without knowing more about the Forestry Department's procedures and criteria for making maps available and about the relationship between requests granted and requests refused.

4. Conclusions

Despite the fact-finding mission's brevity and limitations, it did help to clarify how the MTCS operates in practice. However, TPAC did not have the opportunity to visit multiple sites or to hold detailed discussions with local stakeholders. A truly complete picture therefore remains elusive, and TPAC cannot judge whether what it saw accurately reflects general practice in MTCS-certified forests. Subject to that qualification, TPAC has reached the conclusions set out below.

General

The MTCS does in practice favour sustainable forest management in Malaysia. TPAC has confidence in the activities of the certification body's auditors, who assess forest management units' conformance to MTCS criteria.

Indigenous peoples

With regard to the rights of indigenous peoples, the normative documents, *MC&I 2012* and the *Guidelines for the Interpretation of Requirements in MC&I 2014* do conform to the relevant TPAS forest management criteria C2.1; C2.2; C2.3; and C2.5.

The documents' interpretation and the associated practices appear to be consistent with the spirit of those criteria. TPAC has not been able to establish whether the customary rights of indigenous communities have been infringed by the conversion of MTCS-certified forests. TPAC recommends drawing the attention of the MTCC to that point and to the importance of ensuring that indigenous communities are informed about the existence and application of the *Guidelines for Interpretation of Requirements in MC&I 2014*. Assuming that the MTCC takes appropriate action on those issues, TPAC believes that the MTCS does conform to the TPAS criteria regarding indigenous peoples.

Conversion

With regard to conversion, the normative documents, *MC&I 2012* and the *Guidelines for the Interpretation of Requirements in MC&I 2014* conform to the relevant TPAS forest management criterion C4.3. The documents' interpretation and the associated practices appear to be consistent with the spirit of that criterion. However, stakeholders' ability to form a clear picture of the extent of conversion is impaired by the frequency of de-gazetting (the removal of forest from the MTCS-certified forest area) and gazetting (the addition of state forest lands to the MTCS-certified forest area), and by lack of clarity as to the phase of the procedure that these processes have reached. On the basis of evidence such as the enforcement of the 5 per cent limit (e.g. by the recent withdrawal of certificates from two forest management units), TPAC believes that the MTCS does conform to the TPAS criterion regarding conversion.

Maps

With regard to maps, the normative documents, *MC&I 2012* and the *Guidelines for the Interpretation of Requirements in MC&I 2014* conform to the relevant TPAS forest management criterion C2.4. The TPAS makes no explicit, specific requirements regarding the scale of the maps used, nor regarding the information that they should show. However, the intention of the criterion in question is clearly that stakeholders should be able to obtain relevant information from the maps regarding the forest area.

The district offices have informative maps to various scales consistent with their purposes. In principle, any person or organisation may request access to relevant maps or ask to be provided with map material. In practice, however, the procedures and criteria applied by the Forestry Department seriously curtail access. TPAC considers the maps used in the context of the MTCS and the information on them to be of appropriate quality, but has observed that stakeholders do not have satisfactory access to the maps. TPAC therefore believes that the MTCS partially conforms to the relevant TPAS criterion.

5. Overall conclusion

In view of the above, TPAC's overall conclusion is that the picture prevails that the previously highlighted issues with the MTCS have been resolved to a satisfactory extent. TPAC attaches the following qualifications and recommendations to its conclusion:

- Sustainable forest management would be facilitated by the restoration of mutual trust between, on the one hand, the indigenous peoples and NGOs and, on the other hand, the Forestry Department and MTCC. In that context, it is desirable to increase the availability of information about gazetting and de-gazetting and to simplify the procedures for obtaining maps, at least for indigenous communities and auditors. It would also be helpful if the Forestry Department were to reveal the criteria used to decide whether a request should be granted or refused. It is also desirable that relevant map material is made available for consultation not only in the Forestry Department's offices, but also in the vicinity of the village communities.
- Although de-gazetting is sometimes partially offset by gazetting, so that conversion remains within the 5 per cent limit, there is a risk that the quality of the forest will be degraded.
- The rights of indigenous peoples should be respected in the context of conversion initiatives, regardless of whether the land in question is MTCS-certified forest or state forest land.

The Hague, 19 December 2016

Table 1 Synopses of previously unresolved issues and of additional information from the TPAC fact-finding mission

| TPAS 2014 criteria (IP, conversion and map criteria remain as in 2010.) | Synopsis of unresolved issues highlighted in the TPAC report of October 2015 | Synopsis of additional information from the TPAC fact-finding mission (see Annex 3 for details) |
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| Indigenous Peoples | | |
| <p>C 2.1. 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.</p> <p>C 2.2. Effective communication with and consultation and participation of stakeholders take place regarding the management of the forests.</p> <p><i>Guidance: A plan and reports on how and when communication with stakeholders takes place are considered to be indicators of effective communication.</i></p> <p>C 2.3. The local population 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</p> | <p><u>Issues originally highlighted in TPAC's revised assessment of 2010:</u></p> <ul style="list-style-type: none"> • Indigenous peoples have no rights and no say in the management of lands that they have traditionally used, on the basis of free, prior informed consent. • Usage rights are limited to statutorily designated and gazetted IP areas, which are relatively small areas around villages. • Social impact assessments were sometimes unsatisfactory, or their findings were not satisfactorily taken into account. <p><u>TPAC report of October 2015:</u></p> <p>The <i>Guidelines for the Interpretation of Requirements in MC&I</i> (the MTCS Forest management standard 2012), published in 2014, appear to be a major step forward.</p> <p>However, some phrases in the Guidelines could be interpreted as weakening the requirements. The way that the Guidelines are interpreted by forest managers and certification bodies in practice is therefore critical in relation to the question of whether the issues originally highlighted have been resolved.</p> | <p>There appears to be considerable mutual mistrust between, on the one hand, the indigenous peoples and NGOs and, on the other, the Forestry Department and the MTCC.</p> <p>Timber harvesting in traditional use areas does not generally give rise to problems.</p> <p>The definition of indigenous communities' traditional use areas gives rise to little or no discussion. Hunting and gathering for subsistence and even with a view to generating a modest income are in practice permitted by forest managers. That is not always the case where state forest lands are concerned, but such lands are not certified under the MTCS.</p> <p>The auditors are not aware of any court cases relating to MTCS-certified forest. Most court cases relate to state forest lands, which are not certified under the MTCS.</p> |

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| <p>property/use rights are at stake.</p> <p><i>Guidance: Free and informed consent is interpreted in the sense that the activity will not be undertaken before the relevant consent is given.</i></p> <p><i>Guidance: The local population and indigenous peoples can only prevent activities through withholding their consent where their property/use rights are at stake.</i></p> <p>C 2.5. Adequate mechanisms are in place for resolving disputes regarding forest management, property/usage rights, work conditions, or social services.</p> <p><i>Guidance: In case of a conflict of significant dimension, the BOSBEHEEREENHEID will not be certified.</i></p> | | |
| <p>Conversion</p> | | |
| <p>C 4.3. Conversion of forests in the BOSBEHEEREENHEID to other types of land use, including timber plantations, shall not occur unless in justified exceptional circumstances.</p> <p><i>Guidance: Exceptional circumstances are for example natural disasters. In addition conversion can take place if the area to be converted is insignificant, if it enables clear long</i></p> | <p><u>Issues originally highlighted in TPAC's revised assessment of 2010:</u></p> <p>Criterion 6.10 of the MTCS standard 2002 excludes conversion, with three exceptions. Conversion is permitted under the following circumstances:</p> <p>a) If a very small proportion of the forest management unit is involved. However, exception a) is negated by <i>Guideline MC&I 2/2002, which states</i> that provision 6.10 a) does not apply in the context of a forest management unit audit.</p> <p>c) If conversion provides clear, substantial, long-term</p> | <p>Audit reports state conversion areas.</p> <p>The basis for calculating conversion is the area of the MTCS-certified forest in 2012, as specified in the management plan and indicated on the associated map.</p> <p>De-gazetted forests do count towards the calculated</p> |

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| <p><i>term conservation benefits, or if it is based on undisputed governmental decisions.</i></p> <p><i>Guidance: The forest manager of a plantation should aspire to make clear how the plantation helps in relieving pressure from natural forests; for instance when the plantation is established on degraded land instead of by conversion of natural forests.</i></p> | <p>additional conservation benefits across the forest management unit. However, this exception is weakened by indicators 6.10.1 and 6.10.2, which refer to 'benefits' without mentioning 'conservation'.</p> <p><u>TPAC report of October 2015:</u> With regard to conversion too, the MTCC has improved its normative documentation, which now specifies that a total of no more than 5 per cent of the area of a forest management unit may be converted to other forms of land use.</p> <p>There is some discrepancy between the audit report summaries and the sources used by the stakeholders.</p> <p>The 2.5 per cent conversion limit may have been exceeded in four forest management units.</p> <p>The way that the Guidelines are interpreted by forest managers and certification bodies in practice is therefore critical in relation to the question of whether the issues originally highlighted have been resolved.</p> | <p>conversion percentage.</p> <p>Areas of de-gazetted forest may be offset by gazetted forests. However, while offsetting ensures that the certified area remains unchanged, the quality of the forest may be affected. Gazetting and de-gazetting are reasonably regular occurrences. It is not always clear to stakeholders what phase of the procedure this process is in (i.e. whether a change is currently proposed, approved or realised).</p> <p>The certificates previously awarded to the Kelantan and Johor forest management units have recently been withdrawn due to the 5 per cent conversion limit having been exceeded.</p> <p>Forest management units need to contribute to the exchequer. Low timber prices could lead to more harvesting, and to more conversion as people seek to maintain income levels. Conversion implies clear felling and the release of large quantities of timber onto the market. Because that can imply less timber harvesting from the permanent forest, conversion can to some degree make a positive contribution to conservation.</p> |
| <p>Maps</p> <p>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.</p> <p><i>Guidance: Public availability implies that if stakeholders should have</i></p> | <p><u>Issues originally highlighted in TPAC's revised assessment of 2010:</u></p> <p>Although forest managers have published summaries of their forest management plans, no detailed maps have been published.</p> <p><u>TPAC report of October 2015:</u> With regard to maps, the MTCC has not made any improvements that are verifiable by TPAC.</p> | <p>Maps of various types are used in the context of the MTCS and partially updated on an annual basis. Maps are produced using modern (GIS) techniques and show satisfactory detail.</p> <p>Information on maps is functional.</p> <p>In principle, any person or organisation may request access to relevant maps or ask to be provided with map material. In practice, however, the procedures</p> |

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| <p><i>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.</i></p> <p><i>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.</i></p> | <p>The situation with regard to map types and their availability is unclear. More information is therefore needed regarding map types and their availability in order to ascertain whether and how stakeholders may gain access to relevant map material.</p> | <p>and criteria applied by the Forestry Department seriously curtail access.</p> |
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Annex 2: Table aligning earlier findings and judgements with findings of fact-finding mission

| TPAS 2014 criteria | TPAC Judgment Oct. 2010 | TPAC Advisory Report, Oct. 2015 | Findings of TPAC fact-finding mission |
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| Indigenous peoples | | | |
| <p>C 2.1. 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.</p> | <p>Based on recent audit reports, TPAC concludes that there is an important difference in <u>interpretation of customary rights</u> 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 <u>traditional use</u>. The forest managers and CBs limit customary rights primarily to <u>formal</u> 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 (<u>RTUs</u>) are not <i>recognised</i> in MTCS certified forests, but are rather considered a <i>favour</i> to indigenous communities.</p> <p>In the practice of MTCS certification this means that:</p> <ul style="list-style-type: none"> - RTUs relating to ‘subsistence use’ are respected; - RTUs related to ‘commercial use’ are in most FMUs limited through a licensing system. The necessity for a licence as well as the stipulation that the licence is valid for a maximum of one year and can be renewed for a maximum of six months at a time can be a barrier for indigenous peoples (It is unknown to the Committee whether the necessity to pay a royalty is an additional barrier.) - 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 their traditional land in PRF. <p>In addition, several audit reports mention that the assessment of social impacts, which is important for the inventory of RTUs, was insufficient or its findings were insufficiently implemented.</p> | <p>With regard to the rights of indigenous peoples, the MTCC has made significant improvements to its normative documentation. The 2014 Guidelines state that forest managers should consult indigenous and local communities in the spirit of the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) and on the basis of free, prior and informed consent (FPIC). The change is a major step forward, whose significance should not be underestimated.</p> <p>However, some phrases in the Guidelines could be interpreted as weakening the requirements. The way that the Guidelines are interpreted by forest managers and certification bodies in practice is therefore critical. TPAC notes that the summarised audit reports made available usually state merely that no nonconformities or issues were observed. Such statements are too brief to allow TPAC to determine how the guidelines are applied in practice. That is significant in light of reports from other sources alluding to poor consultation and lack of FPIC.</p> | <p>General: From the various discussions, it is apparent that there is considerable mutual mistrust between, on the one hand, the indigenous peoples and NGOs and, on the other, the Forestry Department and the MTCC (the latter often being confused with the government).</p> <p>IP NGO POASM, which represents 32,000 Orang Asli members, reports the following: Timber harvesting in traditional use areas does not generally give rise to problems. Conversion is a problem, but mainly in state forest lands, which are not certified under the MTCS. Penetration into areas assigned to Orang Asli is another problem.</p> <p>Representatives of IP communities who participated in an IP rights workshop organised by Friends of the Earth highlighted a number of cases.</p> <ol style="list-style-type: none"> 1 Conversion in PRF Balah, Kelantan, April 2014: the rights of three villages were breached (dust, water pollution, and desecration of a burial site). 2. Concession in a wildlife reserve in Kelantan, October/November 2016. 3. Perak, September 2016: IP villages not shown on a logging map. Fruit trees destroyed. 4. Campong Terbol, Pahang, November 2016: discussions about consent for timber harvesting ongoing since 2014; finally, 'consent' obtained from a neighbouring village that is not directly affected. 5. Pahang, Ulujelai: logging permitted in exchange for a payment of 2000 ringgits per month. |

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| <p>C 2.2. Effective communication with and consultation and participation of stakeholders take place regarding the management of the forests.</p> <p><i>Guidance: A plan and reports on how and when communication with stakeholders takes place are considered to be indicators of effective communication.</i></p> <p>C 2.3. The local population 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.</p> <p><i>Guidance: Free and informed consent is interpreted in the sense that the activity will not be undertaken before the relevant consent is given.</i></p> <p><i>Guidance: The local population and indigenous peoples can only prevent activities through withholding their consent where their property/use rights are at stake.</i></p> | <p>Based on this information, the Committee concludes that TPAS C2.1 is inadequately addressed.</p> <p>Based on audit reports, the Committee concludes that rights based on traditional use (RTUs) are not <i>recognised</i> in MTCS certified forests, but are in some instances considered a <i>favour</i> to indigenous communities. This interpretation of rights will hamper communication with - and participation of indigenous communities.</p> <p>In addition, several audit reports mention that the assessment of social impacts was insufficient or its findings were insufficiently implemented.</p> <p>Based on this information the Committee concludes that TPAS C2.2 is partially addressed.</p> <p>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).</p> <p>As MTCS requirements C2.2, C3.1, C3.2 and C4.5 are in fact invalidated, TPAS criterion C2.3 is inadequately addressed.</p> | <p>In the reported cases, it was not always clear whether the events involved PRF or state forest lands.</p> <p>Orang Asli in Negeri Sembilan forest reserve The head of the Orang Asli village showed the mission various maps, including one showing the boundaries of the PRF. The boundaries mainly follow rivers and there are signs at access points. Some maps were made by the IP themselves.</p> <p>The definition of indigenous communities' traditional use areas gives rise to little or no discussionUse for hunting and gathering, and even with a view to generating a modest income are in practice permitted in certified forests.</p> <p>Sirim Quas Auditors (SGS is 'temporarily' without qualified auditors. However, it also appears unclear to MTCC whether SGS will ever undertake MTCS audits again.) Before each recertification or surveillance audit, the auditors ask the NGOs and JAKOA whether the indigenous peoples have encountered any issues and act accordingly. They may also be approached between audits; that happened three times in 2016. One case in Pahang involved failure to consult regarding a logging site. As a result of intervention by the auditor, the logging site was relocated. The other two cases did not involve MTCS-certified forests, but Malay grounds and state forest land.</p> <p>The auditors report that the use of forest for traditional purposes rarely gives rise to problems. Non-timber forest products (NTFPs) may be harvested for subsistence and often with a view to generating a modest income.</p> |
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| <p>C 2.5. Adequate mechanisms are in place for resolving disputes regarding forest management, property/usage rights, work conditions, or social services.</p> <p>Guidance: In case of a conflict of significant dimension, the FMU will not be certified.</p> | <p>Requirement C 2.5 is being met.</p> | | <p>The auditors are not aware of court cases relating to PRF. Most court cases relate to state forest lands, which are not certified under the MTCS.</p> <p>Most disputes between forestry departments and IP communities arise from conversion.</p> |
| Conversion | | | |
| <p>C 4.3. Conversion of forests in the FMU to other types of land use, including timber plantations, shall not occur unless in justified exceptional circumstances.</p> <p>Guidance: Exceptional circumstances are for example natural disasters. In addition conversion can take place if the area to be converted is insignificant, if it enables clear long term conservation benefits, or if it is based on undisputed governmental decisions.</p> <p>Guidance: The forest manager of a plantation should aspire to make clear how the plantation</p> | <p>TPAC makes the following observations:</p> <ol style="list-style-type: none"> 1. MTCS Criterion 6.10 defines three exceptions for conversion. Conversion is excepted if it: <ol style="list-style-type: none"> 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. <p>In addition, the Committee has been informed that:</p> | <p>With regard to conversion too, the MTCC has made improvements to its normative documentation. It is now stipulated that planned and realised conversion must not exceed 2.5% of the area of the forest management unit in the first three years from 1 July 2012. Furthermore, the total area converted to other forms of land use must not exceed 5 per cent of the forest management unit. Although the Guidelines state that the conversion limit may be revised in the context of periodic review of the standard, TPAC considers it unlikely that the limit will be relaxed, because its existence was one of the conditions for the re-endorsement of MTCS by the PEFC.</p> <p>Where conversion is concerned, there is again a degree of discrepancy between the summarised audit reports and the stakeholders' sources. Although the information from the stakeholders' sources does not appear to indicate that the 5 per cent conversion limit has been exceeded, the</p> | <p>Note: The TPAS and PEFC do not set hard conversion limits. They merely state that conversion must be limited to, respectively, a trivial area or a small percentage of the total forest area. The FSC cites a maximum of 5 per cent of the FMU, while the PEFC does not specify a maximum.</p> <p>FDPM points out that forest management units need to contribute to the exchequer. Low timber prices could lead to more harvesting, and to more conversion as people seek to maintain income levels. Conversion implies denudation and the release of large quantities of timber onto the market. Because that can imply less timber harvesting from the permanent forest, conversion can to some degree make a positive contribution to conservation.</p> <p>Auditors: The basis for calculating conversion is the area of</p> |

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| <p>helps in relieving pressure from natural forests; for instance when the plantation is established on degraded land instead of by conversion of natural forests.</p> | <ol style="list-style-type: none"> 1. The annulment of exception a) also pertains to conversion that is <i>planned</i> within the FMU. 2. An overview of planned conversion in certified FMUs is not made available to the Committee. <p>The Committee concludes that TPAS criterion 4.3 is inadequately addressed.</p> <p>TPAC does note that a <i>coding system</i> prevents that timber resulting from conversion enters the chain of custody as SFM certified.</p> | <p>2.5 per cent conversion limit for the period 1 July 2012 to summer 2015 may have been exceeded in four forest management units.¹</p> | <p>the PRF in 2012, as specified in the management plan and indicated on the associated map. De-gazetted forests do count towards the calculated conversion percentage.</p> <p>Audit reports state conversion areas.</p> <p>The certificates previously awarded to Kelantan and Johor have recently been withdrawn due to the 5 per cent conversion limit having been exceeded.</p> <p>NGOs report that they do not have sufficiently accurate maps at their disposal to enable them to monitor conversion adequately. Most disputes between forestry departments and IP communities arise from conversion.</p> <p>Areas of de-gazetted forest may be offset by gazetted forests. However, while offsetting ensures that the certified area remains unchanged, the quality of the forest may be affected, e.g. if the gazetted forest is degraded. Gazetting and de-gazetting are reasonably regular occurrences. It is not always clear to stakeholders what phase of the procedure the process is in (i.e. whether a change is currently proposed, approved or realised).</p> |
| <p>Maps</p> | | | |
| <p>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</p> | <p>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.</p> <p>The Committee underlines that the publication of detailed maps is the responsibility of the forest manager.</p> | <p>With regard to maps, the MTCC has not made any improvements that are verifiable by TPAC. Various sources, including State Secretary Dijkema in the report on her visit in July 2015, indicate that more openness is required where map material is concerned.</p> | <p>Note: The TPAS does not specify the scale of the forest maps that are to be made public, or what information is to be included on them. The PEFC stipulates that a summary of the management plan should be made available, but makes no explicit requirements regarding the</p> |

¹ WWF Malaysia, Analysis of deforestation in Malaysia 2001 - 2015

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| <p>business information.</p> <p>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.</p> <p>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.</p> | <p>Although forest managers have published summaries of their forest management plans, detailed maps were not published. The Committee therefore concludes that TPAS criterion 2.4 is partially addressed.</p> | | <p>availability of maps. By contrast, FSC indicator 7.5.1 does contain explicit requirements.</p> <p>During the civil service mission's visit in January 2015, the MTCC stated that maps could be viewed at the offices of the forestry departments. Generally speaking, the copying of maps is not permitted. The following arguments were put forward for the non-publication of forest maps:</p> <ul style="list-style-type: none"> - It would trigger a tsunami of land applications. - It would facilitate poaching. <p>FDPM</p> <p>The Deputy Director of the FDPM reiterated to the NL delegation that any person or organisation may request information, and that the request may or may not be granted, depending on the associated risks.</p> <p>At the Negeri Sembilan Forestry Department district office (in the state of Negeri Sembilan), various thematic maps to a scale of 1:350,000 were shown. All the maps had a key (in Malaysian) indicating the categories of forest, villages, designated uses, etc. The maps contained a variety of details, and the Head of the Forestry Department said that they were redrawn annually and revised to reflect the current situation. Requests to view the maps may be submitted to the Forestry Department. However, that involves a formal procedure and requests are not necessarily granted.</p> <p>Hanging in the office there were also a number of larger-scale maps (1:70,000), including one showing the locations of recent, ongoing and planned logging operations. The mission saw another document relating to a village, which was accompanied by a 1:5,000 map.</p> |
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| | | | <p>Auditors The auditors had also found the FDMP reluctant to provide maps.</p> |
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Annex 3: Conversion prevention criterion

TPAC advice

The withdrawal of the certificates previously issued to the Kelantan FMU (400,000 hectares) and the Johor FMU (320,000 hectares) due to the 5 per cent limit on forest conversion having been exceeded may have far-reaching adverse consequences for the management of the non-converted forest area.

The conversion of natural forest to other forms of land use, such as palm oil plantations, is placing great pressure on the extent of the forests in the tropics. Certification of sustainable forest management is a management tool, not a land use planning tool. Nevertheless, certification systems include conversion criteria to protect forest lands against being converted to other uses. The fact that the whole FMU loses its certified status as a consequence of the 5 per cent limit being exceeded actually has a negative impact on the quality of the management of the remaining forest. It is therefore desirable that land use planning precedes management measures, such as certification. Sustainable forest management is a serious matter. The object is permanent retention of forest on a given site. That is possible only if there is clear prior designation of forest areas. Forest that needs to remain forest can then be certified without the threat of conversion.

As long as land use planners are unable to prevent the conversion of certified forest, the negative impact of the existing 5 per cent rule on sustainable forest management is likely to exceed its positive impact. That requires a rethink of the way that the conversion criterion is applied within the sustainable forest management system.