



**GREENPEACE**



## **Did MTCC implement the Netherlands-Malaysian agreement dated 17 November 2010?**



**"Senoi boy sees logging truck passing through his village Tohoi, 28 April 2011  
(anonymous photographer)"**

**11 July 2013**

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## About Aidenvironment

Aidenvironment was founded in 1988 as an independent, not-for-profit consultancy that focuses on sustainable development, forestry, agriculture, water management, climate change and land use. We advise our clients on the basis of extensive expertise, research and networks. We have offices in the Netherlands, Malaysia and Indonesia.

## About RESCU

Resource Stewardship Consultants Sdn Bhd (RESCU) is a scientific research and environmental consultancy company passionately committed to taking on challenges that matter to our clients and our world. Founded in 2004, we have deep and functional expertise in the spheres of forestry, wildlife and climate legislation.

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## Executive summary

The question addressed in this report is: Did MTCC implement the Netherlands-Malaysia agreement dated 17 November 2010?

Our review leads us to conclude that MTCC has not embraced the content and spirit of the Netherlands – Malaysia agreement and that part of the agreement itself was not in conformity with the Dutch Procurement Criteria for Timber. Insofar there is implementation, the agreed expectations on the Dutch side are not being met. The issues and concerns raised in TPAC's previous assessment of MTCS remain unresolved and in some instances, the agreement has had negative material impact on the MTCS standard and audit practice:

- There is no evidence that demonstrates that the Netherlands - Malaysia agreement has led to MTCC's explicit recognition of indigenous peoples' (Orang Asli) rights and claims over forestland and forest products, including their right to exercise free, prior and informed consent (FPIC) in forestry operations. In MTCC's narrow interpretation, FPIC applies only to formally or duly recognized customary (use) rights of Orang Asli. We estimate that over half of all forest reserves in Peninsula Malaysia may be subject to Orang Asli customary rights claims, but only a minute portion (0.37%) of this carries official recognition. The recently leaked Suhakam land rights inquiry report presents an unavoidable and damning perspective on the absence of government and industry recognition of indigenous peoples' rights.
- The manner in which the agreement and MTCC have addressed the problem of forest conversion of certified forests is entirely against the Dutch Procurement Criteria for Timber. Under the new MTCS standard, forest conversion will now be allowed. The caps on conversion rates can easily be circumvented and are thus ineffective. Worse still, stakeholders have now lost all leverage within MTCS to challenge forest conversion decisions. The natural forest area will continue to decline while its management is illogically marketed as "sustainable". There are many cases of forest conversion in certified reserves that certification bodies fail to report on.
- Following the Netherlands – Malaysia agreement, MTCC would request the forest managers to make relevant maps available on their websites. Furthermore, the Netherlands expected that more detailed information would be made available regarding the boundaries of the certified areas and areas traditionally used by the Orang Asli. A review of the maps published by Forest Managers and Certifying bodies after February 2011 shows that no significant improvements have been introduced: maps do not show the actual natural forests certified under the MTCS standard, do not provide information about the Orang Asli and they are usually of technically poor quality.

As early as October 1992 the Minister of Primary Industries of Malaysia and the Minister for Foreign Trade of The Netherlands agreed to continue the dialogue between both countries on the important subject of sustainable forest management and trade aspects. The Netherlands has attempted to assist Malaysia with introducing sustainable forestry for more than twenty years now. On several occasions, the Netherlands government and timber trade have bilaterally attempted to entice Malaysia to adopt better standards and practices. Each time, such political bartering resulted in paper improvements that were never seriously adopted by Malaysia, but enabled market access for Malaysian timber products under the Keurhout label and the likes. The broadly agreed Dutch Procurement Criteria for Timber must now be firmly upheld by The Netherlands.

## Introduction

On 6 May 2013 the Dutch Deputy-Minister for Infrastructure and Environment asked the Netherlands Timber Procurement Assessment Committee (TPAC) for an assessment of the implementation of the agreement of 17 November 2010 between the previous Deputy-Minister and the Minister of Plantation Industries and Commodities of Malaysia regarding the Malaysian Timber Certification System (MTCS MC&I (2002)).<sup>1</sup> This bilateral political agreement provides for requirements additional to the existing MTCS MC&I (2002) standard after TPAC assessed this standard as being not in conformity with the Dutch Procurement Criteria for Timber in that same year. Only on 21 May 2013 Greenpeace Netherlands and NCIV were informed about this request to TPAC in a meeting with the ministry. Earlier, in a letter of 11 April 2013, they had asked the Deputy-Minister to do a full assessment of the new MTCS standard MC&I (Natural Forest) of 2012 against the Dutch Criteria instead of assessing the implementation of the bilateral agreement related to the old standard.

Greenpeace Netherlands, NCIV, WWF Netherlands, ICCO and Friends of the Earth Netherlands, were closely involved as stakeholders in establishing the Dutch Procurement Criteria for Timber in the period 2004-2008. They were also actively participating in the formal assessment by TPAC of MC&I (2002) in the period 2009-2010 which resulted in a formal judgment that this standard was not in conformity with the Dutch Criteria.<sup>2</sup> The appeal against this judgment, submitted by the Malaysian Timber Certification Council (MTCC), was rejected in 2011, while the judgment was confirmed.<sup>3</sup>

This report is commissioned by Greenpeace Netherlands, WWF Netherlands and NCIV to provide TPAC with background information and an update about the way MTCS has handled with respect to the agreement since it was made. This report is provided to TPAC with the understanding that the current assessment of TPAC cannot be the basis for a revised judgment on MTCS as it does not have the depth of the research needed at providing a judgment and since it does not apply the regular procedural safeguards.<sup>4</sup>

From the perspective of the Dutch NGOs, the agreement covered three concerns as summarized below:

- 1) Whether indigenous peoples are given the opportunity to exercise their right to free, prior and informed consent (FPIC) to forest management decisions within the certified Forest Management Unit;
- 2) Whether forest conversion (excision of forestland and clearing of natural forest) is taken out of the certified natural forest area;
- 3) Whether informative maps of the certified FMUs are made available to enable third parties to verify MTCS-based sustainability claims.

This report is limited to these three issues. It should however be noted that there are many criteria that were assessed by TPAC in 2010 as being equivalent with TPAS while Greenpeace c.s. were of the opinion that a different assessment should have been made. An overview of all issues of concern regarding MTCS, as well as a brief history on the many Dutch attempts to encourage sustainable forest management in Malaysia since 1992, was presented in the 'Factsheet Maleisisch houtkeurmerk MTCS' dated 27 January 2011.

The agreement became effective on 16 February 2011 through the issuance of two MTCC guidelines: one on free, prior and informed consent (FPIC) and one on conversion (see **Annex I and II**). Regarding maps, no separate guideline was published by MTCC.

On 13 January 2012 the Malaysian Timber Certification Council published a new standard, MC&I (Natural Forest), to replace the previous standard MC&I (2002) that was judged by TPAC. This standard

entered into force on 1 July 2012<sup>5</sup> and is mandatory to be used for the certification of natural forests under the MTCS beginning 1 January 2013.<sup>6</sup>

### **Research and methodology for this report**

Aidenvironment conducted a quick scope of the implementation of 'the Netherlands – Malaysia agreement' by assessing auditor (surveillance) reports under the old standard since March 2011 as audit reports under the new standard were not yet available. In addition, Aidenvironment compared some of the planned forest conversions reported in the auditor reports with observations based on recent satellite imagery. To answer the question whether the availability and quality of maps of the certified FMUs has improved, the maps presented in the auditor reports and the FMU managers' websites after February 2011 were reviewed by Aidenvironment and compared with maps presented previously in order to determine if there has been significant improvement.

RESCU prepared a brief overview and update on the status of indigenous peoples claims to land in MTCS-certified areas in permanent forest reserves in Peninsular Malaysia. In order to estimate the extent of the land claims RESCU carried out a preliminary GIS exercise using published maps of traditional territories of Orang Asli combined with recent forest cover data. This exercise allowed for a calculation to estimate the extent of the original claims as well as to make an estimate of the current extent of claims. This information is crucial to understand the scope of the MTCS standard in relation to indigenous peoples and their internationally recognized right to exercising free prior and informed consent (FPIC). In addition, RESCU provided some recent examples of forest clearance on land claimed by Orang Asli inside MTCS certified forest reserves.

WOLF compared the new MTCS standard MC&I(Natural Forest) with the old standard MC&I(2002) and the final judgment of TPAC on the old standard regarding the issues of free prior and informed consent, conversion and availability of maps. This analysis was made to assess to what extent the new standard addresses the concerns of TPAC with the old standard.

### **Reader's guide to this report**

This report focuses on the three concerns free, prior and informed consent (FPIC), forest conversion and the availability of informative maps.

The executive summary provides the overall conclusions of this report.

Chapter one serves as an introduction to the report and reaches unavoidable conclusions about the status of indigenous peoples land claims in Peninsular Malaysia and on the process of 'gazetting' and 'degazetting' Permanent Forest Reserves and Orang Asli reserves.

Chapter two provides some general findings on the new MTCS standard compared to the old standard, while specific findings related to the three topics of this report are presented in chapters 3, 4 and 5. This chapter also answers the question in which Forest Management Units (FMUs) this new MTCS standard is currently applied and if audit reports for this new standard are available (period of research was May 2013).

Chapter three addresses the question whether MTCC and its auditors have implemented the 'Netherlands Malaysian agreement' since November 2010 and if it fulfilled the Netherlands criteria on the recognition of the right of indigenous peoples to free prior and informed consent (FPIC). This analysis includes the MTCC guideline on FPIC issued on 16 February 2011, surveillance reports since March 2011 and the new MTCS standard. Furthermore information is given on specific cases of forest conversion in Orang Asli claimed territories inside MTCS certified areas.

Chapter four queries whether MTCC and its auditors implemented the 'Netherlands Malaysian agreement' since November 2010 and queries if they fulfilled the Netherlands criteria on the issue of preventing forest conversion. This analysis includes the MTCC guideline on conversion issued on 16 February 2011, looks at surveillance reports since March 2011 and the new MTCS standard. Besides this, a comparison is made of some of the planned forest conversions reported in the audit reports with observations based on recent satellite imagery.

Chapter five reviews whether MTCC and its auditors have fulfilled the 'Netherlands -Malaysian agreement' since November 2010 and if they fulfilled the Netherlands criteria on the availability and quality of maps. This includes an analysis of the new guideline (2011) of MTCC on forest conversion, the new standard MC&I (natural forest) and of the maps presented in the auditor reports and the FMU managers' websites after February 2011.

# 1. MTCS, forest reserves and indigenous peoples' land claims

## 1.1 MTCS Forest Management Units (FMUs)



**Figure 1.** The states and territories of Malaysia

Malaysia is a federation of 13 states and three federal territories (**Figure 1**). Each of the states has its own state forestry department which is responsible for the management of all commercial timber production in the state. All commercial logging, whether on private land, state land or inside forest reserves is required to be licensed by the state forestry department.

In Peninsular Malaysia, the forest management of each state is governed by a state-level forest management plan which guides the activities of the state forestry department over 10-year periods. Each of the states of Peninsular Malaysia is thus considered to be a separate forest management unit (FMU). MTCS FMUs in Peninsular Malaysia thus refer to the *whole* of the state. Confusion arises because MTCS then subdivides the FMUs into certified and uncertified portions, which have not been clearly defined or delineated. In this report we will therefore use the terms MTCS FMUs and MTCS-certified MFUs for the whole of the state. In East Malaysia, on the island of Borneo, the situation is different. In Sarawak and Sabah FMUs are certifiable at corporate level and most FMUs are logged by sub-contractors of the lease holders. Leases/concessions are often valid for the short term (3 months to 1-2 years only).

Since 2001 eight of the peninsular states have been certified under the MTCS scheme. The large states of Sabah and Sarawak, on the island of Borneo, have several smaller FMUs within their boundaries. Some of these FMUs have also entered the MTCS scheme. However, only one of them remains certified and the focus of the present report is on the certified FMUs in Peninsular Malaysia (**Table 1**).

**MTCS FMUs in Peninsular Malaysia refer to the *whole* of the state. Confusion arises because MTCS then subdivides the FMUs into certified and uncertified portions, which have not been clearly defined or delineated.**

**Table 1.** Forest Management Units in Peninsular Malaysia that have been certified under the Malaysian Timber Certification Scheme

FMU	Certificate No.
Johor	SGS-MTCS/FM-0102
Kedah	FMC 003
Kelantan	FMC 005
Negeri Sembilan	FMC 002
Pahang	SGS-MTCS/FM-0104
Perak	FMC 004
Selangor	SGS-MTCS/FM-0105
Terengganu	SGS-MTCS/FM-0103

Source: PEFC Council Information Register (Information updated on 31/05/2013) <www.pefcregs.info>

## 1.2 Orang Asli land claims in Peninsular Malaysia

The various tribes of Orang Asli once occupied most of Peninsular Malaysia as their native customary land. However the Orang Asli have been gradually pushed out of the most productive agricultural land in the lowlands and now are mostly confined to the forests of the interior and the coastal mangrove forests (**Figure 2**). The official figure for the population of Orang Asli is 178,197 comprising three main groups spread over nine states in Peninsular Malaysia. Of these nine states, eight are MTCS-certified FMUs (**Table 2**). Most of these people continue to have a close relationship with the forest and almost all of the remaining forest in MTCS FMUs is considered to be part of the native customary territory of the Orang Asli.

**Table 2.** Population of Orang Asli in MTCS-certified FMUs in Peninsular Malaysia

FMU	Negrito	Senoi	Proto-Malay	Total
Johor	1	55	13083	13139
Kedah	251	19	0	270
Kelantan	1381	12047	29	13457
Negeri Sembilan	0	96	10435	10531
Pahang	925	29439	37142	67506
Perak	2413	50281	605	53299
Selangor	3	5073	12511	17587
Terengganu	34	818	41	893

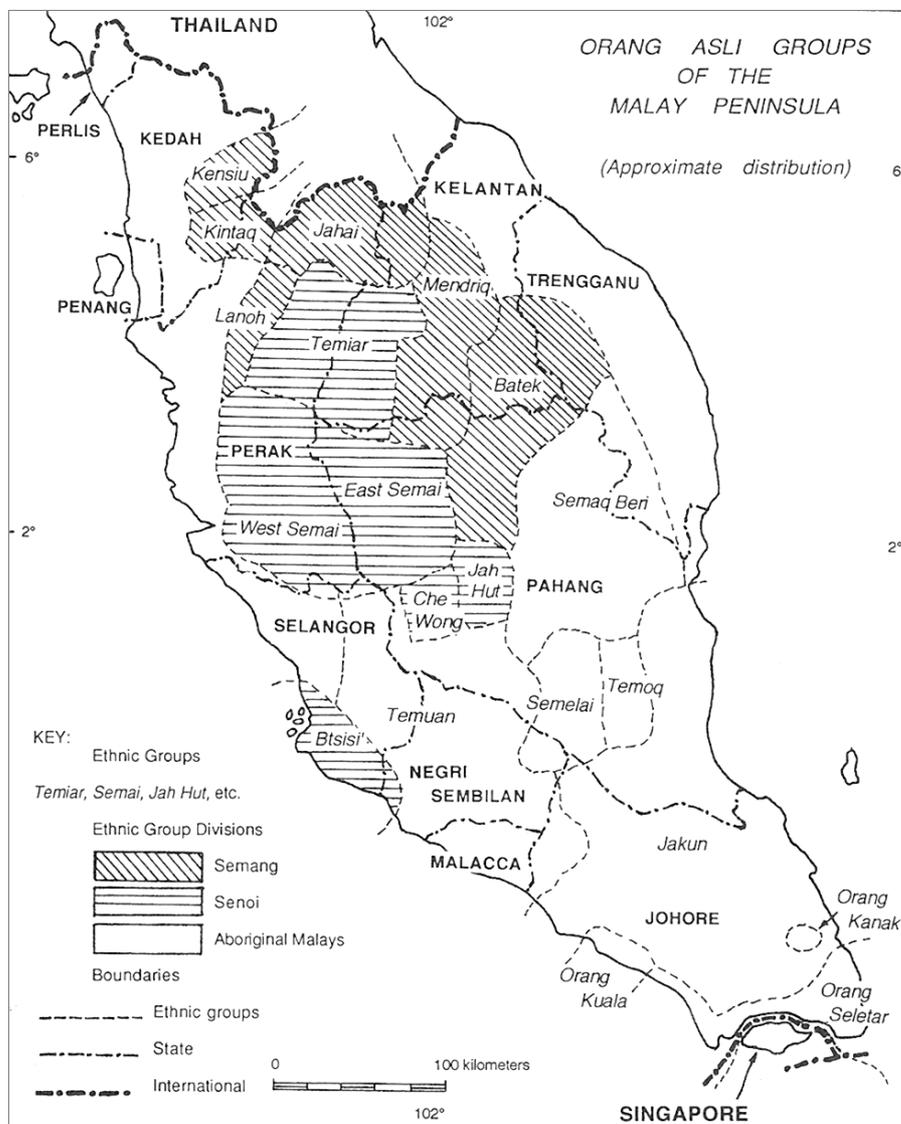
Source: Pelan Strategik Kemajuan Orang Asli 2011-2015 (Sistem Maklumat e-Damak JAKOA, 31 December 2010), Jabatan Kemajuan Orang Asli Malaysia.

More than one third of Peninsular Malaysia is still covered by forests, with some MTCS FMUs having more than 50% forest cover (**Table 3**). These remaining forests are the areas where Orang Asli's continued presence comes most starkly into conflict with other interests such as logging and plantation development. Most of these forests are still actively used by the Orang Asli for collecting forest products, fishing, hunting and are important water catchment areas for Orang Asli communities. Exceptions include the FMUs of Kedah and Terengganu where there are very few Orang Asli groups.

**Table 3.** Forest Cover in MTCS FMUs in Peninsular Malaysia (hectares) and Numbers of Orang Asli Groups Present in the FMU

FMU	Land Area	Forested	% Forested	OA Groups
Johor	1901600	466792	25%	46
Kedah	942500	344871	37%	1
Kelantan	1510500	812196	54%	47
Negeri Sembilan	665709	157298	24%	50
Pahang	3596500	2068605	58%	207
Perak	2102200	1030530	49%	176
Selangor	793020	250860	32%	54
Terengganu	1295600	619714	48%	3

Source: Forestry Department Peninsular Malaysia Annual Report 2011; Pelan Strategik Kemajuan Orang Asli 2011-2015 (Sistem Maklumat e-Damak JAKOA, 31 December 2010), Jabatan Kemajuan Orang Asli Malaysia.



**Figure 2.** Extent of occurrence of Orang Asli groups in Peninsular Malaysian in the 1970s (based on a detailed map produced in 1981)<sup>7</sup>

### 1.3 Land reservation in Malaysia

During the British colonial period the state governments of Malaysia have set aside some land for special purposes. There have been many laws used for this reservation of land. Land to be kept under forest cover have been declared as “forest reserves” under the state forestry enactments (for the purposes of either “timber production forest” or “forest protection”). Some lands were set aside for the use of indigenous peoples (in particular the Orang Asli of Peninsular Malaysia) and were reserved as Aboriginal Reserves. The process by which this was done and on what basis could be subjected to academic study but there is no doubt that most Orang Asli communities did not see their customary rights lands recognized during the colonial and post-colonial eras.

The process of officially reserving land for these various purposes depends on the law used for the reservation. However, ultimately the ruler of the state needs to give his official consent to the reservation and a notification of the consent is published in the official state government gazette. This process is known as “gazettement”, “land reservation” and the “constitution of a reserve”.

At present the key laws for the constitution of reserves related to forests and indigenous peoples in Peninsular Malaysia are the National Forestry Act 1984 (Act 313) (and the state enactments under this act); the Aboriginal Peoples Act 1954 (Act 134); and the National Land Code 1965 (which is also the law governing the issuance of land titles to individuals).

**Despite most of the remaining forest in Peninsular Malaysia being claimed as the traditional land of the Orang Asli, only 24,435 hectares (0.4%) have been set aside specifically for aboriginal peoples.**

The vast majority of reserves in Peninsular Malaysia are forest reserves. To date a total of 4 794 407 hectares of land have been gazetted as forest reserves<sup>8</sup> under the forest laws. Some of the gazette notifications of the forest reserve specify rights and privileges of local communities inside these reserves.

In contrast, only 24 435 hectares (0.4%) of the *remaining forest in Peninsular Malaysia* have been set aside specifically for aboriginal peoples. This includes 20 670 hectares that have been gazetted as aboriginal reserves under the aboriginal peoples laws<sup>9</sup>; 2341 have been gazetted as aboriginal reserves under the National Land Code 1965;<sup>10</sup> and 1424 hectares have been granted to aboriginal peoples through the issuance of private land titles<sup>11</sup>.

The bulk of the remaining forest in MTCS FMUs has been gazetted as PRFs. However, only a very small portion of *MTCS FMUs* have been gazetted as Orang Asli reserves (**Table 4**). Furthermore, the forest in much of the gazetted Orang Asli reserves has been cleared for oil palm and rubber plantations under federal government schemes designed to give Orang Asli a monthly cash dividend. The Orang Asli themselves are often not given the opportunity to work in such plantations – it is common for the schemes instead to employ migrant labourers from Indonesia. The Orang Asli continue to rely on forest outside of their reserves.

**Table 4.** Land in MTCS FMUs that has been gazetted under the National Forestry Act 1984 (Act 313) and the Aboriginal Peoples Act 1954 (Act 134) (in hectares)

FMU	Forest Cover	Act 313	Act 134
Johor	466792	351301	4842
Kedah	344871	307046	173
Kelantan <sup>12</sup>	812196	623849	0
N. Sembilan	157298	153459	3324
Pahang	2068605	1562902	4101
Perak	1030530	986141	5375
Selangor	250860	250129	1254
Terengganu	619714	538974	1370

Source: Pelan Strategik Kemajuan Orang Asli 2011-2015 (Sistem Maklumat e-Damak JAKOA, 31 December 2010), Jabatan Kemajuan Orang Asli Malaysia.

At present the MTCS scheme addresses only areas that have been declared to be PRFs. Timber from forest on private land or state land forest that has yet to be reserved are not considered to be certified. Even though the timber may be from a forest inside an MTCS FMU it is only considered to be certified if it is from a forest that has been declared to be a PRF. In addition, MTCS has declared that timber from clear-felling of natural forest is also not considered to be certified. Timber from a clear-felling operation, even clear-felling inside a PRF in a MTCS-certified FMU is not considered to be certified under the MTCS scheme.

#### 1.4 Procedures for gazettement land

The procedures for constituting new forest reserves are contained in the state forest rules that come under the National Forestry Act 1984. Each state has its own forest rules<sup>13</sup> but they each give provisions for the constitution of “permanent reserved forests” (e.g. Pt III, Pahang State Forest Rules 1987 (Phg.P.U. 20/87)). This involves the following procedure<sup>14</sup>:

- (i) The State Director of Forestry submits a proposal to constitute a permanent reserved forest to the State Director of Lands and Mines ;
- (ii) Within 30 days the State Director of Lands and Mines refers to other relevant departments and agencies for comments on the proposal;
- (iii) After 60 days the State Director of Lands and Mines prepares a paper on the proposal and submits the same to the State Authority within 30 days; and
- (iv) The State Authority decides whether or not to support the proposal and if in favour determines the date the permanent reserved forest is to be gazetted by public notification.

The procedure does not require the consultation of any local communities prior to the gazettement of the land as a forest reserve. In particular the procedure does not include any enquiry as to whether the land is claimed to be native customary land of the Orang Asli. The National Forestry Act 1984 and its subsidiary legislation does not even acknowledge the possibility of the existence of native customary conflict when creating new forest reserves.

This procedural deficiency has not always been the case. In the past some of the previous state forest laws (which have since been repealed) gave explicit consideration of the existence of native customary rights in the constitution of forest reserves. For example, the constitution of forest reserves under the Federated Malay States Forest Enactment 1918 (F.M.S. En. 34/1918) included the following steps:

- (i) The Resident of the State (i.e. the British colonial administrator) publishes a proposal in the *Gazette*;
- (ii) The District Officer (the DO) publishes a proclamation in English and Malay to ensure that the local inhabitant of the area are aware of the proposal and its consequences as well as to give them the opportunity to claim any rights to the land;
- (iii) The DO makes an enquiry into all claims made;
- (iv) The DO prepares a report on the results of the enquiry and forwards the report to the Resident who consults with the Conservator of Forests and then makes an order admitting or rejecting all claims “as shall seem to him right”;
- (v) The Resident, with the approval of the Chief Secretary of the Government, publishes a notification in the *Gazette* declaring the area to be reserved and mentioning the rights and privileges recognized and conceded in respect thereof.

Due to this procedure, many of the older gazette notifications included explicit provisions recognizing the rights of local communities inside forest reserves. For example, in 1927 the Selangor State Authority constituted an area of land in that state as the Kuala Langat North Forest Reserve (now part of the MTCS-certified Selangor FMU) via *Gazette* Notification No. 2578-27 (**Annex IV** of this report). The notification states that the following rights are admitted and privileges conceded within the reserve:

**Table 5.** Statement of Rights and Privileges In Kuala Langat North Forest Reserve

Particulars of holders:	Particulars of rights and privileges:
The Sakais [i.e. Orang Asli villagers of the Temuan tribe] Jinang Lanchang of Bukit Prah and Pulau Kempas, and Jinang Lijah of Bukit Kemandol to the extent of six and four households respectively.	(i) The right to the fruit from the dusuns [orchards] of which they are the holders; (ii) The privilege of cultivating foodcrops in old clearings formerly cultivated by them or their ancestors; (iii) The privilege of living in the reserve at a place or places approved by the Deputy Conservator of Forests; (iv) The right to water from the streams for domestic and agricultural purposes; (v) The right to timber and bark of Class II trees [i.e. not the prime commercial species], bamboos, canes, attaps, honey, wax, wood-oil, jungle fruits, roots, vegetables, leaves and fibres in sufficient quantities for the erection and maintenance of their huts and for their own domestic use, but not for sale or barter. (vi) The privilege of hunting, shooting and fishing to supply food for themselves and their families but not for purposes of trade or barter, subject to such rules and restrictions as may for the time being be enforced generally and in reserved forests.
The inhabitants of the Labohan Dagang Malay Reservation to the number of 150 households.	The right to rotan, attaps, and timber of Class II from that portion of the reserve which lies between the Banting-Bangi road and the Langat river as if that part of the reserve were State land subject to section 27 of “The Forest Enactment, 1918” [i.e. right to harvest without licence for their own domestic use]

Source: Selangor State Government Gazette 1927

Unfortunately none of the existing forestry enactments in Peninsular Malaysia continue to require that any steps are made to identify rights and privileges with respect to land being constituted as new forest reserves.

While the procedure for gazetting new forest reserves is administratively straightforward, the procedure for gazetting new Orang Asli reserves under Act 313 is hardly functioning. In theory the procedure is for a community to apply to the Department of Orang Asli Development (JAKOA). JAKOA then applies to the executive council of the state. The state executive then approves the application and with the consent of the ruler a notification is subsequently published in the gazette. However, in practice, many applications have been held up at JAKOA, at the executive and even stuck at the post-approval pre-gazette stage for many decades (**Table 6**).

**Table 6.** Status of Orang Asli Land Claims

Status	Hectares
Land gazetted by the state authorities as Orang Asli Areas and Orang Asli Reserves under Act 134	20 671
Land approved by the state executives for reservation but not yet gazetted by the state authorities <sup>15</sup>	26 288
Land applied for by JAKOA but not yet approved by the state executives	85 987
Titled land for housing	147
Titled land for agriculture	1 277
Occupied land without formal application (agricultural land)	6 643
Roaming area without formal application <sup>16</sup>	4 791 347

Source: JHEOA 2010 Annual Report (unless otherwise specified)

Between 1996 and 2009 there has been some progress in the gazettelement of Orang Asli Reserves and Orang Asli Areas under the Aboriginal Peoples Act 1954 (**Table 7**). In the eight MTCS FMUs the area of land so gazetted increased 12% over that period. However the Kelantan FMU de-gazetted (excised) its Orang Asli Reserves and the Selangor FMU also excised a significant portion.

**In practice, many applications for Orang Asli reserves have been held up at JAKOA [...] for many decades.**

In the case of the Selangor FMU the area excised (Bukit Lanjan Orang Asli Reserve) was developed and the forest was cleared to make way for a residential and commercial area in a suburb of the federal capital, Kuala Lumpur. 158 families of the Temuan tribe were resettled into a housing estate, with each family being given a title to a small bungalow.

**Table 7.** Progress in gazettelement Aboriginal Peoples Act 1954

FMU	1996	2009	Increase
Johor	3859.16	4842.09	25%
Kedah	173.38	173.38	0%
Kelantan	0.16	0	-100%
Negeri Sembilan	2336.05	3324.35	42%
Pahang	4013.62	4100.8	2%
Perak	5189.41	5375.46	4%
Selangor	1586.91	1253.73	-21%
Terengganu	1312.6	1370.37	4%
<b>Total</b>	<b>18471.29</b>	<b>20643.58</b>	<b>12%</b>

**However, the total of the areas where Orang Asli land rights are recognized by the state inside MTCS FMUs is still a very small portion (0,37 %) of the FMUs (Table 8).**

**Table 8.** Proportion of MTCS FMUs where Orang Asli land rights are recognized by the state

<b>FMU</b>	<b>Total Area</b>	<b>Recognised*</b>	<b>Percent</b>
Johor	1901600	5319	0.28%
Kedah	942500	173	0.02%
Kelantan	1510500	2678	0.18%
Negeri Sembilan	665709	5043	0.76%
Pahang	3596500	17788	0.49%
Perak	2102200	12516	0.60%
Selangor	793020	2657	0.34%
Terengganu	1295600	1577	0.12%
<b>Total**</b>	<b>12807629</b>	<b>47752</b>	<b>0.37%</b>

\*Includes areas gazetted under the Act 313 and under the Land Code, private lots as well as areas approved by the state executive for gazettement, but not yet gazetted.

\*\*If the states of Kedah and Terengganu are excluded the total percent recognised is 0.45%

### **1.5 Preliminary mapping of the extent of Orang Asli land claims in MTCS Forest Management Units**

There have been numerous press reports and studies done on land claims by Orang Asli in Peninsular Malaysia. Most recently the SUHAKAM report gives a comprehensive overview of the extent of these claims and confirms that they cover all of the MTCS-certified FMUs (**Annex III**). However, there is little quantified data on the overall extent of the claims (in terms of hectares) and there has been no published map showing the extent of the claims as a whole.

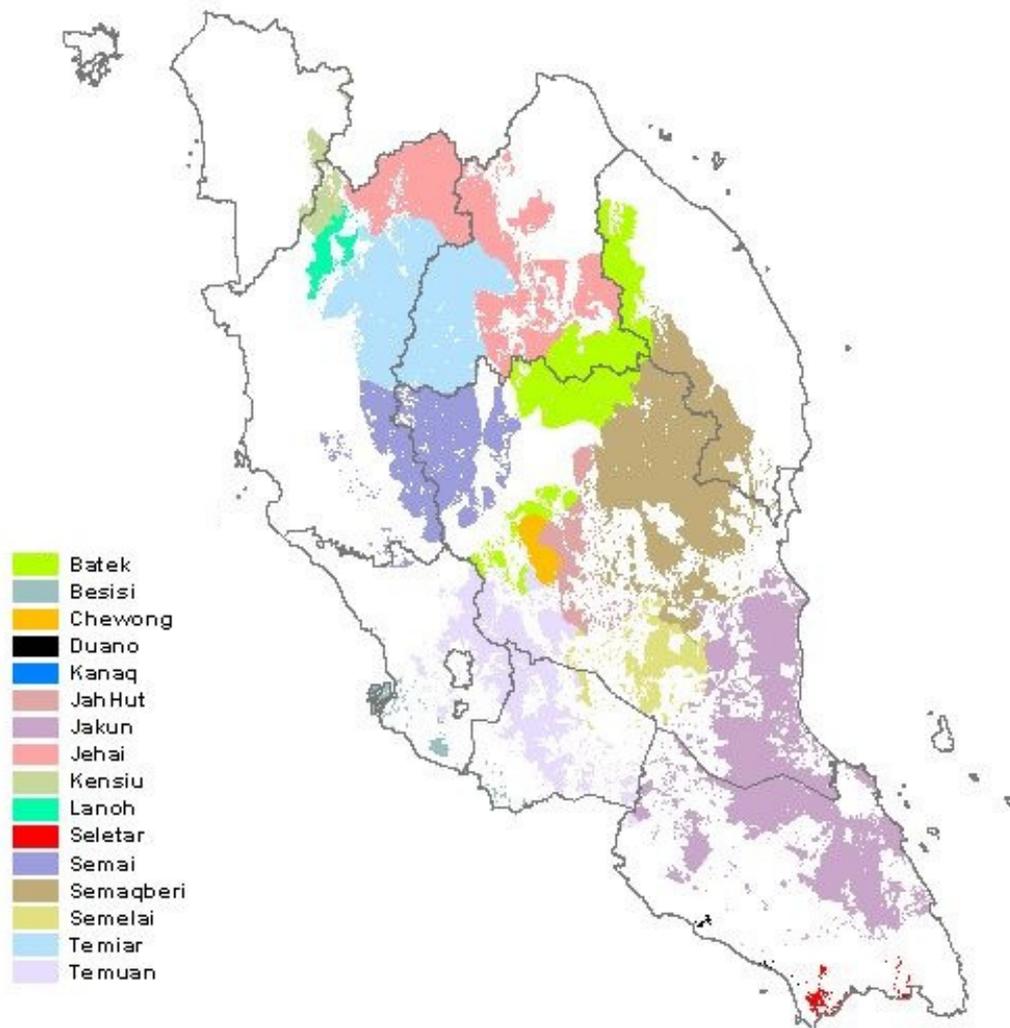
In order to estimate the extent of the claims RESCU has carried out a preliminary GIS exercise using published maps of traditional territories<sup>17</sup> combined with recent forest cover data<sup>18</sup>. This exercise allowed the extent of the original claims to be calculated and an estimate made of the current extent of potential claims. The estimate was done based on the assumption that all the originally claimed area that was occupied in c. 1980 and was still covered by forest in 2006 is still being claimed.

**Based on the above assumptions, it was found that 51.4% of the original area claimed inside MTCS FMUs is still being claimed by Orang Asli (Table 9)**

**Table 9** Extent of Area Claimed by Orang Asli in MTCS FMUs (in hectares)

<b>FMU</b>	<b>Original</b>	<b>Current</b>	<b>%</b>
Johor	1,500,696	562,315	37.5%
Kedah	445,472	26,590	6.0%
Kelantan	1,024,424	847,984	82.8%
N. Sembilan	665,907	227,526	34.2%
Pahang	3,514,845	2,130,074	60.6%
Perak	1,865,718	898,487	48.2%
Selangor	665,573	165,420	24.9%
Terengganu	404,743	326,141	80.6%
<b>Total</b>	<b>10,087,378</b>	<b>5,184,538</b>	<b>51.4%</b>

Some of the groups are very small and may only occupy a small portion of an FMU. Other groups are more widespread with the extent of the land claimed stretching across more than one FMU (see **Figure 3**). Some groups, such as the Kensiu of Kedah, once occupied a large area but have since been extirpated from most of their original range. The history of Malaysia contains many instances where the Orang Asli were forcibly removed from their land and the destruction of their native forest land continues to this day.



**Figure 3.** Extent of Orang Asli Land Claims in MTCS-FMUs

**Table 10** Current extent of forest in MTCS-certified FMUs claimed by Orang Asli groups (ha)

<b>Group</b>	<b>Johor</b>	<b>Kedah</b>	<b>Kelantan</b>	<b>N. Sembilan</b>	<b>Pahang</b>	<b>Perak</b>	<b>Selangor</b>	<b>Terengganu</b>
Batek	-	-	122,301	-	252,770	-	1,790	118,900
Besisi	-	-	-	6,933	-	-	38,331	-
Chewong	-	-	-	-	58,379	-	-	-
Duano	3,886	-	-	-	-	-	-	-
JahHut	-	-	-	-	128,612	-	-	-
Jakun	493,835	-	-	556	461,729	-	-	-
Jehai	-	-	371,321	-	-	289,900	-	-
Kanaq	5,096	-	-	-	-	-	-	-
Kensiu	-	24,569	-	-	-	49,642	-	-
Lanoh	-	-	-	-	-	54,489	-	-
Seletar	18,104	-	-	-	-	-	-	-
Semai	-	-	3,143	-	295,376	166,832	5,194	-
Semaqberi	-	-	-	-	664,210	-	-	207,240
Semelai	74	-	-	14,550	138,167	-	-	-
Temiar	-	-	340,431	-	2,638	337,597	-	-
Temuan	4,261	-	-	205,290	128,540	-	117,423	-
<b>Total</b>	<b>525,257</b>	<b>24,569</b>	<b>837,197</b>	<b>227,330</b>	<b>2,130,420</b>	<b>898,459</b>	<b>162,738</b>	<b>326,141</b>

## 1.6 Procedures for de-gazetting (excising) Forest Reserves

The National Forestry Act 1984 designates forest reserves as “permanent reserved forests” (PRFs). However, in practice, a PRF or a part of a PRF may be excised if the state authority (i.e. the state executive council) is satisfied that any land in a PRF is no longer required for the purpose for which it was reserved and is required “for economic use higher than that for which it is being utilized”.

The procedure for excision is straightforward: the State Authority shall cause to be published in the Gazette a notification (a) specifying the situation and extent of the land; and (b) declaring that such land shall cease to be a permanent reserved forest from a date fixed by the notification. From that date, such land shall cease to be a permanent reserved forest.

There is no requirement to consult or even to inform local communities prior to the excision of a PRF. The procedure does not even require giving notice to the holders of rights and privileges inside the forest reserve prior to the excision. All interested parties are deemed to have been duly informed by the publication of the official notice in the gazette (even though the notice is usually issued *after* the decision was made).

For example, on 22 July 2010 the Selangor state government issued a gazette notification (G.N. 2262-10) that excised 63.54 ha from the Kuala Langat North Forest Reserve (the same reserve that had been created in 1927). Both the Orang Asli villages and the Kampung Labohan Dagang Malay village still exist but no attempt was made to consult the villagers or even to inform them prior to that excision of the forest reserve.

MTCS certified Forestry department officials have explicitly denied the existence of any special rights or privileges for Orang Asli inside forest reserves<sup>19</sup> (Annex V). The MTCS scheme does not explicitly require the state forestry departments to take into account the provisions of the gazette notifications with regard to the rights and privileges of local communities.

**There is no requirement to consult or even to inform local communities prior to the excision of a PRF**

## 1.7 Forest Conversion

The National Forestry Act 1984 (s 12) notes that when a PRF is excised the standard procedure is for it to be replaced:

“Where any land is excised under section 11 the State Authority shall, wherever possible and if it is satisfied that it is in the national interest so to do having regard to- (a) the need for soil and water conservation, biodiversity and other environmental consideration; (b) the need to sustain timber production in the State in order to meet the requirements of the forest industry; (c) the economic development of the State; and (d) the availability of suitable land, constitute in accordance with section 7 an approximately equal area of land a permanent reserved forest.”

**Table 11.** Changes to the PRF in MTCS FMUs (2001-2005) (in hectares)

FMU	Addition	Excision	Net Gain (Loss)
Johor	6,945.5600	7,429.4170	(483.8570)
Kedah	-	166.3600	(166.3600)
Kelantan	-	1,466.2280	(1,466.2280)
Negeri Sembilan	179.6460	8,957.8543	(8,778.2083)
Pahang	29,481.8690	2,917.5330	26,564.3360
Perak	301.4300	12,170.4585	(11,869.0285)
Selangor	-	2,026.8560	(2,026.8560)
Terengganu	1,864.5000	4,009.3270	(2,144.8270)
Total P. Malaysia	38,773.0050	40,469.7038	(1,696.6988)

Source: T.W. Lim and S. Suksuwan (2007). An Assessment of the Status of Permanent Reserved Forests in Peninsular Malaysia, 2001-2005. WWF-Malaysia Discussion Paper.

In practice it is often not the case that PRFs are replaced. A study of MTCS FMUs in Peninsular Malaysia found that over a five-year period seven FMUs experienced a net loss and only one FMU experienced a net gain (**Table 11**).

The excision and lack of replacement of PRFs is one matter. However, of more concern to many Orang Asli communities is the clearance of natural forest inside forest reserves (while the PRF legal status is maintained). This is allowed as long as the land is turned into a timber plantation. By 2011 the area of permanent reserved forest in Peninsular Malaysia officially designated for the establishment of these plantations had increased to 185,794 ha, with all MTCS FMUs having designated some area for conversion (see **Table 12**).<sup>20</sup>

**Table 12.** Areas zoned for "Forest Plantations" (in hectares) inside Permanent Reserved Forest in MTCS FMUs in Peninsular Malaysia<sup>21</sup>

FMU	<i>Designated</i>		<i>Licensed for Harvesting</i>	
	2010	2011	2010	2011
Johor	43,859	43,859	1,429	128
Kedah	3,100	3,100	-	2,950
Kelantan	13,890	91,040	11,349	1,566
Negeri Sembilan	3,000	3,000	-	-
Pahang	24,043	24,043	1,519	1,585
Perak	4,818	4,818	-	346
Selangor	11,381	11,381	-	-
Terengganu	3,860	3,860	-	-

In addition to the above, the Forestry Department has announced that there are proposals to expand the area of timber plantations to 439,189 ha – for example, in the Kelantan FMU 199,000 ha of the PRF are planned for conversion to Timber Latex Clone (TLC) rubber plantations<sup>22</sup>.

**Of more concern is the clearance of natural forest inside forest reserves (while the PRF legal status is maintained).**

## **2. The new standard MC&I (Natural Forest)**

### **2.1 Brief general overview of the new standard**

#### **Name and applicability of the standard**

The Malaysian Criteria and Indicators for Forest Management Certification (Natural Forest): MC&I(Natural Forest); Malaysian Timber Certification Scheme, Normative Document, was published on 13 January 2012. The application date (Date of entry into force) is 1 July 2012. The new standard is mandatory to be used for the certification of natural forests under the MTCS beginning 1 January 2013.

#### **Standard setting still does not genuinely represent social and environmental stakeholders**

The review process for this new standard started in April 2009. The representation in Standard Review Committee (SRC) as displayed in Appendix I of the standard seems to show that representation is fairly spread but a previous report of Greenpeace et al. scrutiny of the names shows that many critical social and environmental organizations are not fairly represented. do not genuinely represent social stakes or indigenous people.<sup>23</sup> Therefore, this representation does still not meet TPAS criteria.

#### **The new standard in general not very different from old standard**

An assessment of the Principles, Criteria and Verifiers of the new standard, MC&I (Natural Forest), shows that they are almost unchanged compared to the previous standard, MC&I(2002). The table in **Annex VIII** shows that most of the changes are minor. Except for criterion 6.10 all is a bit updated but basically unchanged. The new standard does not provide any solution to the shortcomings determined by TPAC's final judgement on MTCS in 2010, neither does it address the Netherlands - Malaysia agreement. Besides not adequately addressing the issues of representation of stakeholders and transparency it also, for example, does not provide new demands for performing environmental impact assessments or for implementing the right to free, prior and informed consent. It should also be noted, as the procedure of Greenpeace c.s. against TPAC's initial judgement of MTCS made clear, that on top of the problems caused by the standard itself or the wording in the P&Cs of the MC&I(2002) many problems with MTCC certification are also caused by its implementation procedures and by the extent to which CBs take MTCC's instructions seriously.

#### **Applicability**

In the introduction the MC&I (Natural Forest) mentions that:

“The Malaysian Criteria and Indicators for Forest Management Certification (Natural Forest) [or in short the MC&I(Natural Forest)] supersedes the Malaysian Criteria and Indicators for Forest Management Certification [or in short the MC&I(2002)], as the standard to be used for forest management certification of natural forests at the forest management unit (FMU) level in Malaysia.”

On paper this is an improvement compared to the previous standard. This new standard refers consistently to natural forests at the FMU level throughout all P&Cs, whereas the MC&I 2002-standard had all kind of references to PRFs and FMUs while it was unclear that both were the same.

### **2.2 Has the new standard already been implemented?**

According to the PEFC website (May 2013), nine FMUs are certified under the MTCS MC&I with a total forest area of 4,595,485 ha and an Annual Allowable Cut of 40,294 ha over the period 2011-2015 (see the table below). Whether its figure on the acreage of total certified natural forest is reliable remains in question for it is not clear what is included and what is excluded.

All current certificates are based on MC&I 2002 and hence, none of the FMUs are presently certified against the new MC&I (2012) standard.

The consultants approached the CBs by phone and by email to inquire about progress with the new standard in April 2013. As of July 2013, none of the main assessors have responded to the inquiry which highlighted that the Netherlands was looking into the implementation of the Netherlands - Malaysia agreement. This lack of willingness to be transparent towards third parties must be taken into account in TPAC's pending review. The current certificates of seven FMUs are about to expire before September 2013. New certifications based on the 2012 standard are therefore to be expected.

FMU	Johor	Kedah	Kelantan	Negeri Sembilan	Pahang	Perak	Segaliud-Lokan	Selangor	Terengganu
Area certified	351,302	307,046	424,497	154,577	1,562,496	991,436	57,247	230,187	516,697
Annual Allowable Cut (AAC)	2,940	2,850	5,910	2,251	13,610	6,990	n/a	690	5,053
Certificate No.:	SGS-MTCS/FM-0102	FMC 003	FMC 005	FMC 002	SGS-MTCS/FM-0104	FMC 004	FMC 001	SGS-MTCS/FM-0105	SGS-MTCS/FM-0103
Expiry date:	31.3.2016	6.8.2013	2.8.2014	31.5.2013	4.7.2013	6.7.2013	31.5.2013	31.8.2013	31.5.2013
Certification body:	SGS (MY)	SIRIM	SIRIM	SIRIM	SGS (MY)	SIRIM	SIRIM	SGS (MY)	SGS (MY)
PEFC logo licence No.:	-	-	-	-	PEFC/34-23/003	PEFC/34-23-004	PEFC/34-23-001	-	-
Certificate status:	valid	Valid	valid	valid	valid	valid	valid	valid	valid

Data derived from the PEFC International website (status as of 1 May 2013), except the AACs which were derived from an MTCC presentation.<sup>24</sup>

The consultants furthermore observed that the MTCS audit reports have become less accessible than they were previously when MTCC posted them on their website. MTCC currently no longer publishes new audit reports on its website (the old ones are 'hidden' and can be found through Internet search) and the PEFC International website merely presents core data. Audit reports are 'buried deeply' on the SIRIM website, although the dataset appears to be complete. The audit reports cannot at all be traced on the SGS Malaysia website. To identify an SGS audit report, one is required to search the reports with an Internet Search Engine. Through this manner, the complete dataset can be compiled so long as one is familiar with the names of certified FMUs. We conclude that MTCC and its CBs have demonstrated a trend towards reduced public transparency since the Netherlands - Malaysia agreement was concluded.

### **3. Indigenous peoples and free, prior and informed consent**

To determine how MTCC implemented the 'Netherlands Malaysian agreement' since November 2010 and answer the question if it fulfilled the Netherlands criteria on the recognition of the right of indigenous peoples to free prior and informed consent (FPIC), an analysis is made of: the new guideline of MTCC on FPIC (section 3.1), the implementation of this guideline by the auditors (section 3.2), the new MC&I (Natural Forest) standard (section 3.3) and available information on violations of rights of Orang Asli in MTCS certified MFU's since March 2011 (section 3.4).

#### **3.1 New guidelines of MTCC on Interpretation of the Term 'Free and Informed Consent' under the MC&I (2002) of 16 February 2011 (MC&I 3/2011)<sup>25</sup>**

In the first place the 'new normative document' (for full text see **Annex I**) shows that the translation of the 'agreements' made with the Netherlands Deputy Minister contains a restriction making the value of the agreements made marginal. After all, paragraph 2.2. provides:

"Since the MTCS only covers the certification of permanent forests, where the ownership claims by the indigenous peoples have been legally defined, the issue of 'free and informed consent' as specified in Criteria 2.2, 3.1 and Indicator 3.2 does not arise. 'Free and informed consent' is however applicable for Criterion 3.4."

This means that the new document relates only to claims of indigenous peoples within certified areas who have received a formal acknowledgment. However, as demonstrated in chapter 1, in particular table 8, the states only recognize such ownership rights over a very small percentage (0,37 %) of the FMUs, while most of the forests inside the FMUs are still actively used by the Orang Asli for collecting forest produce, fishing, hunting and the forests also are important water catchment areas for Orang Asli communities. The preliminary mapping exercise in chapter 1 estimates that 51.4% of the current area of MTCS FMUs are claimed by Orang Asli (table 9). With that, the scope and thus the relevance of the 'new normative document' is extremely restricted.

In its final evaluation of the MTCS dated 22 October 2010 the Netherlands Deputy Minister has established that there is a fundamental difference in interpretation of the term customary rights, in that MTCC uses a very restrictive interpretation of this term too (see points 26 up to and concluding 28 of the final evaluation dated 22 October 2010). In the 'new normative document' this difference of opinion has not been addressed, let alone solved. The interpretation of Deputy Minister which, for that matter, must also be accepted as the only right one (in view of the relevant international law) therefore still stands, including its conclusion that the MCTS is thus not meeting the Netherlands criteria. The fact that indigenous peoples must in some cases apply for a permit to use land to which they are entitled through traditional usage, and for which they must pay the competent authorities – a permit which only has a period of validity of six months and does not necessarily have to be renewed - is also something that clearly violates the Netherlands criteria (in particular Principle 2), also in the opinion of Deputy Minister. This issue has not at all been solved with 'the agreements' of the Deputy Minister.

The conclusion must therefore be that the 'agreements' made by the Netherlands Deputy Minister only constitute a formalized consolidation of the violation of the Netherlands criteria.

### 3.2 Implementation of the new guideline by the auditors

The following surveillance reports under the old MC&I (2002) standard, published after 16 February 2011, were identified and reviewed:

- Terengganu, SGS, 2nd surveillance 4-7 July 2011 (report available)
- Selangor, SGS, 2nd surveillance 15-17 November 2011 (report available)
- Johor, SGS, 2nd surveillance 20-23 June 2011 (report available)
- Pahang, SGS, 2nd surveillance 31-October – 4 November 2011 (report available)
- Perak, SIRIM, 2nd surveillance 21-24 November 2011 (report available)
- Segaliud-Lokan, SIRIM, 19-22 July 2011 (report available)
- Kelantan, SIRIM, audit report 27 May 2011 and 1st surveillance 20-23 June 2011 (reports available)
- Kedah, SIRIM, 1st surveillance 14-17 November 2011 (report available)
- Negeri Sembilan, SIRIM, 1st surveillance 13-15 July 2011 (report available)

SIRIM and SGS have different approaches to structuring their surveillance reports. SIRIM publishes individual reports, often much shorter than the Main Assessment (MA) report so that one is required to refer to the MA for background. SGS integrates surveillance reports with the main findings of their MA report. The latter approach enables more insight in progress made.

In this quick scan, the relevant surveillance reports were screened against the Netherlands - Malaysian agreement. . Related to indigenous peoples the main questions are:

- Did the forest manager identify indigenous peoples within the FMU?
- Did the forest manager confer and agree on what areas indigenous peoples traditionally use, including sites of significant importance to them?
- Did the forest manager and indigenous peoples interact and agree on how these sites are to be managed, both by the community and forest manager?
- Does this lead to respect for customary rights in practice, even though those rights are not formally recognized?

These questions were reviewed against the relevant<sup>26</sup> surveillance reports but not against the information provided in previous surveillance reports and main assessment reports (see **Annex VII**). The assessment led to the following general observations:

- All except one of SIRIM's surveillance reports ignored the guidelines; coverage of the questions listed above is implied at best. SGS has taken the new guidelines more seriously but their interpretation is not consistent across all surveillance reports.
- Both auditors appear to be struggling to determine a methodology to consistently address the new guidelines. For FPIC, this is complex: who is to establish that customary rights are respected in practice, and how?
- Regarding FPIC, SGS addresses this concern in more detail than does SIRIM. It remains unclear, however, to what extent the Orang Asli themselves would agree that the relevant concerns and questions are addressed.
- In view of the conceptual complexity of the Netherlands – Malaysia agreement with regards to customary rights and FPIC, the MTCC interpretation thereof and considering that relevant information is scattered throughout ten auditor reports, it is recommended to look into this issue in further detail.
- In May 2013, MTCC published on its website guidelines and procedures for social impact assessment and monitoring of forest management operations (Peninsular Malaysia), dated

April 2012.<sup>27</sup> Two SIRIM reports state that SIAs have been performed. Two SGS reports refer to SIAs which in both cases have not been performed (Selangor, Pahang). In none of the analyzed surveillance reports reference is made to these SIA guidelines and it is therefore unclear whether these guidelines have been used in these assessments. These guidelines, although dated April 2012, do not once make reference to the document "MTCC guideline on the interpretation of the term free, prior and informed consent (FPIC) in the MC&I (2002)" dated 16 February 2011 and do not in any instance make reference to "FPIC."

### **3.3 The new MC&I (Natural Forests) standard on indigenous peoples and FPIC**

#### **MC&I (Natural Forest) still does not recognize FPIC as a right**

Under the new standard MC&I (Natural Forest) the definition for FPIC is unchanged. MTCS still uses a definition comparable to the old 1996 FSC standard. FSC changed their FPIC definition to reflect evolving UN norms. This is the old FSC definition and the old and current MC&I definition:

Free, prior and informed consent: A decision-making process that does not involve coercion/undue influence/manipulation (free), is made before activities are undertaken (prior), is founded upon a clear understanding (informed), and involves granting or withholding consent (saying 'yes' or 'no') to an activity, programme or policy (consent).

To compare, the revised FSC standard uses a revised FPIC definition which is sourced from the UN:<sup>28</sup>

Free, Prior, and Informed Consent: A legal condition whereby a person or community can be said to have given consent to an action prior to its commencement, based upon a clear appreciation and understanding of the facts, implications and future consequences of that action, and the possession of all relevant facts at the time when consent is given. Free, prior and informed consent includes the right to grant, modify, withhold or withdraw approval.

The key difference between these two definitions is that when it originally was seen as a decision making process led by the forest manager whereas today, the concept is understood as a right beholden by the targeted/affected party.<sup>29</sup> The difference is evidently fundamental. It can be concluded that MTCS continues to use an outdated FPIC definition that does not characterize FPIC as a right and offers no new guidance on how to implement it.

#### **MTCS only recognizes duly recognized legal or customary tenure or use rights**

The most problematic element of the new standard regarding indigenous peoples and free prior and informed consent is indicator 2.2.2, which states:

2.2.2 Forest managers shall recognise, respect and collaborate with holders of duly recognised legal or customary tenure or use rights within relevant federal, state and local laws, in activities that may affect such rights. [emphasis added].

This text is unchanged compared to the previous standard, but from this indicator we can conclude that MTCC still limits the scope of the new standard to 'duly recognized' rights of Orang Asli. which is only the case for less than 0,37 % of the FMUs (Table 8) while most of the land inside the FMUs are claimed by the Orang Asli and most of the forest is still actively used by the Orang Asli (Table 9).

The conclusion is that with the new standard MTCC still does not conform with principle 2 of the Netherlands criteria.

### **3.4 Examples of violations of rights of Orang Asli in MTCS certified MFU's since March 2011**

From chapter 1 it is clear that the current PRF gazettement procedure ignores the rights of Orang Asli. From the previous sections of this chapter it is clear that the MTCS scheme assumes that there is no legal basis for claims to land inside forest reserves and only recognizes Orang Asli areas that have been gazetted under Act 134. In this section recent examples are given which demonstrate that in practice this leads to the violation of customary Orang Asli rights inside MTCS certified areas.

#### **Ignoring the rights of the Orang Asli in the case of the creation of a new forest reserve**

One recent example of ignoring the rights of the Orang Asli is the case of the creation of a new forest reserve in the MTCS-certified Perak FMU. On 6 March 2013 a notification was published in the state gazette (G.N. 786-13) that an area of 18,866 hectares was declared to be Amanjaya Permanent Reserved Forest (**Annex VI** of this report). The area gazetted falls within the native customary territory of the Jahai tribe of Orang Asli a group that relies on the forest<sup>30</sup> but no rights or privileges were granted to this group in the gazette notification and there was no mention of any consultation with them prior to the gazettement.

The Orang Asli in this area have previously been resettled in the Air Banun regroupment scheme and this settlement area is recognized by the state executive and is excluded from the new PRF. However, studies have found that the Jahai still use the forest outside the resettlement area. One sociologist notes the following:

“the Jahai community moves from place to place, unlike the Temiar and the Semai who practise sedentary agricultural subsistence economy. The Jahai frequently moves around in the forest searching for food. This type of livelihood covers a wide area, sometimes moving into the neighboring forest in Thailand... The Orang Asli in Air Banun cannot find adequate forest resources from the surrounding environment to sustain their livelihood.”<sup>31</sup>

#### **Clearance of natural forest on Orang Asli territory inside MTCS certified FMUs**

Another great concern to many Orang Asli communities is the clearance of natural forest inside MTCS certified FMUs (while the PRF legal status is maintained). This is allowed as long as the land is turned into a timber plantation, although the MTCS natural forest certification status may be revoked without further consequence to the forest manager.

Between 2010 and 2013 the clearance of natural forest for plantations in the Kelantan and Johor FMUs has been the source of substantial conflict between forest communities and the state authorities. In 2012 the Orang Asli of the Temiar tribe in Gua Musang (Kelantan) staged several protests against forest clearance and set up a blockade on a logging road leading to their land.<sup>32</sup>

In the MTCS-certified Johor FMU, there has been extensive destruction of natural forest for TLC plantations since 2010. The following are the main areas:

- development of forest plantation on 2,023ha at Sembrong Forest Reserve by Hamid Sawmill Sdn Bhd;
- timber latex clone plantation on 2,023ha at Sembrong Forest Reserve by Setindan Sdn. Bhd;
- rubber forest plantation on about 1,784ha at Labis Forest Reserve (Extension) in Mukim Sembrong by Jasa Wibawa Sdn. Bhd;

- rubber forest plantation in Mukim Sembrong, Mersing on 2,090ha at Labis Forest Reserve (extension) by PPPL Plantations Sdn Bhd;
- forest rubber plantation on 6,116ha of state land in Mukim Ulu Sg Johor, Daerah Kota Tinggi by J. Biotech Sdn Bhd.<sup>33</sup>

Most of the above projects are taking place inside the Endau-Kluang Wildlife Reserve which is also part of the area claimed by the Jakun tribe.<sup>34</sup> Local communities fear that the clearance of the forest will result in increased conflict with wildlife. In Kampung Orang Asli Punan, which is adjacent to the clearance, a resident was recently trampled to death by an elephant.<sup>35</sup>

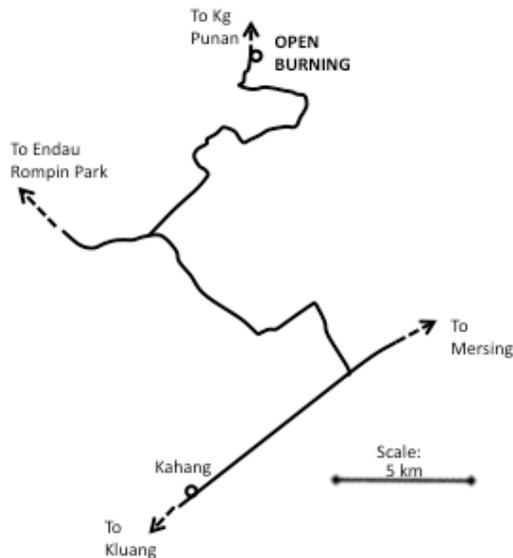
In addition to clearance for timber plantations there is widespread ongoing forest clearance for open-cast mining, road construction and even vegetable farming (see compilation of press clippings in **Annex VII** and photograph below). As mentioned above, such natural forest clearings are (theoretically) excluded from MTCS certification as a result of the Netherlands - Malaysia agreement, although there are many reasons to believe that many natural forest clearances do not lead to actual revision of the certified forest area.

**Photograph of open burning inside FR being cleared for TLC plantation in Johor FMU**

Photo taken on 16 March 2013 inside forest reserve north of Kahang, Johor, GPS location N2 21.166 E103 32.938



### Map showing location of open burning



In many cases the forest reserves are not excised to make way for these developments and still keep their official status as “Permanent Reserved Forest” and thus remain certified under the MC&I. There is no reason to believe that timber from such conversions does not enter the chain of custody as originating from certified sustainable forestry. A recent example of mining inside forest reserves is the case of a Temiar village downstream of an open cast iron-ore mine inside a forest reserve in Gua Musang (part of the MTCS-certified Kelantan FMU).<sup>36</sup> A highway was constructed through Kanching Forest Reserve in the Selangor FMU, destroying part of a population of a critically endangered tree species.<sup>37</sup>

### Recent land rights study of the Malaysian Human Rights Commission SUHAKAM highlights ignoring Orang Asli rights by Forest Departments

A recently leaked study of the Malaysian Human Rights Commission SUHAKAM affirmed that as of 2010, there are still many pending applications for Orang Asli reserves in peninsula Malaysia. It further noted many examples that Forest Departments ignore the rights of Orang Asli’s, some of which are quoted below (emphasis added, see also Annex III).

“8.96 **Loggers/foresters/administrators also declared that they were unfamiliar with or not informed of the nature of Orang Asli traditional markers** (eg. graves, orchards, old village sites, sacred sites). Such a situation had resulted in the properties and sacred sites of the Orang Asli being destroyed by logging activities. However, in response, UPEN-Perak stated that Orang Asli traditional territories were neither fenced nor marked by boundaries on the ground, and hence not visible or identifiable to the loggers.

8.97 **Most state Forest Departments dismiss claims of Orang Asli rights to land within forest reserve, even if Orang Asli settlements are older than the forest reserve itself.** In Kelantan for instance, the State Forestry Department had insisted that the Forestry Act does not recognise Orang Asli territories within Forest Reserves as stated by the witness from the Department, Mr Yusup Bin Abdul Rahaman (W19) during the Public Hearing. “Firstly, the Forestry Law does not mention or define traditional territories. Secondly, other than Orang Asli inhabited areas, the State Forest Department does not have any record showing Orang Asli settlements within forest reserves in the State. **Most of the areas inhabited by the Orang Asli are within permanent forest reserves.** While the Department understands that the Orang Asli have the right to remain on areas they have long inhabited in forest reserves, the Orang Asli are still bound by the Forestry Law.”

8.98 At the Inquiry, **the Forestry Department of Pahang acknowledged that it did not apply the principle**

**of free, prior and informed consent (FPIC)** as stipulated by the UNDRIP when granting logging licence in areas where Orang Asli resided. He also said that he felt that the department did not need to obtain the consent of the Orang Asli, even though **he was aware that failure to do so contradicted Principle 2.2 of the Malaysian Criteria and Indicators of the Malaysian Timber Certification Scheme for Natural Forests.**

## 4. Forest conversion

To determine if MTCC has improved on the issue of forest conversion an analysis is presented of: the new guideline of MTCC on forest conversion (section 4.1), the implementation of this guideline by the auditors (section 4.2), the new standard MC&I (Natural Forest) (section 4.3) and recent satellite imagery which show significant forestland conversions in MTCS certified FMU's since February 2011 (section 4.4).

### 4.1 The new guidelines of MTCC on Interpretation of Criterion 6.10 of the MC&I (2002) of 16 February 2011 (MC&I 2/2011)38

The 'new normative document' dated 16 February 2011 on conversion, to the extent that it is relevant here, reads (for full text see **Annex II**):

“3.1 The scope of certification against the requirements of the MC&I(2002) shall be confined to only the natural forest located in the PRFs of the FMU and shall exclude any forest plantations and any planned conversion in the PRFs. The external boundaries of the natural forests located in the PRFs will be redrawn on relevant maps, prior to certification.

3.2 In situations where forest plantations are established in the PRFs, during the audit under the MC&I(2002): a) the forest manager shall be required to provide information and statistics with regard to the extent of the forest plantations as well as any planned conversion in the PRFs to forest plantations and/or non-forest land uses. Such information and statistics provided by the forest manager shall be included in the audit report; and b) the FMU shall be assessed for compliance in relation to Criterion 6.10(b) which requires that the conversion does not occur on high conservation value forest areas; and Criterion 6.10(c) which requires that conversion will enable clear, substantial, additional, secure, long-term conservation benefits across the forest management unit.

3.3 Such established forest plantations and areas planned for conversion in the PRFs should be managed in a responsible manner and undergo forest management certification against the MC&I(Forest Plantations) under the MCTS.

3.4 Logs harvested from areas in the PRFs converted to forest plantations and/or non-forest land uses shall not be claimed as certified logs under the MCTS.

3.5 In addition, the forest manager shall not make any claims associating such converted areas with the MTCS-certified FMU.

3.6 If during the subsequent surveillance audit, the CB finds that in addition to the areas that have been reported earlier under paragraph 3.2(a) above, there are new areas of the natural forest in the certified FMU which have been converted or planned for conversion since the last audit, a major noncompliance will be issued by the CB which could result in the suspension and subsequent withdrawal of the MTCS certificate.

3.7 All CBs shall ensure that the forest manager of the FMU undergoing the audit is assessed for compliance with the above requirements and that the audit findings are reflected in the audit report and related public summary.”

In the first place the question must be raised how bilateral agreements between the Netherlands and MTCC affect the interests of the other stakeholders in this matter. This does not only concern states and institutions that may have acknowledged the MC&I(2002) and now face a change pending this acknowledgement, but also stakeholders who must be consulted in accordance with the Netherlands criteria (see Principle 2 of the Netherlands criteria in particular). By making the 'agreements', the Netherlands Deputy Minister has violated the Netherlands criteria, which, for that matter means – in relation to MTCC – that this Principle is inadequately addressed. With this violation the Deputy Minister has created a new basis for the conclusion that MTCC is not meeting the Netherlands criteria. After all, it has been established beyond doubt that no consultations whatsoever have been held with any stakeholders on the above-mentioned change in the interpretation of a crucial part of the MTCS standard.

Important in this regard of course is that due to the addition made by MTCC to the 'normative document' quoted above (read: the 'agreements' with the Deputy Minister), the MTCS MC&I (2002) standard has become dramatically less strict. After all, to begin with it concerns a 'general pardon' and this time it is even given during the currency of the certificate: what the arrangement comes down to is that deforestation (conversion) which has taken place despite the granted certificate does not result in the withdrawal of the certificate, but simply to a downsizing of the certified area. And while the agreement is actually aimed at combating deforestation and guaranteeing sustainability, deforestation in violation of the issued certificate is 'whitewashed' here by placing it beyond the scope of the certificate, without any further consequence to the forest manager or MTCC. It will be clear that this directly and seriously undermines the credibility of the MTCS certificate. In this context the decrease in the certified forested area of the Kelantan certificate is of particular importance. Without any further explanation well over 1/3rd of the surface of the certificate has been withdrawn and this practice, and the remaining forest, are being certified as 'sustainable management' or 'sustainably managed'.

However, the arrangement not only 'whitewashes' forest already converted in violation of the certificate, but also gives a blank cheque for further deforestation (conversion), because the 'whitewash' also extends to planned and ad hoc conversion. A decision to excise a forest reserve can be taken by a State Executive Council overnight. At the time the Netherlands Deputy Minister made these 'agreements', he probably had no idea of the nature and size of this planned conversion, for the simple reason that there is no overview of it. Nor is there for example something like a register set up under Malaysian law in which intended conversions must be entered, and certainly not conversions beyond the official de-gazettement (this de-gazettement is, for that matter, also always a direct violation of the Netherlands criteria according to the cooperating organizations, because it is not restricted to exceptional cases clearly restricted in size). It therefore goes without saying that the volume of deforestation that will eventually take place under this category is unlimited, in any case from a legislative perspective.

This thought is all the more justified now that the 'arrangements' were immediately announced, as appears from the Deputy Minister's letter, but they can and will be effectuated only when it is time for the next audit round. For the one certified area this could be next month, while for the other area this could be the case after a number of years. In practice most of the certificates were issued in 2010 and will be valid for a period of 3 years. The next audits will therefore only take place in 2012 and 2013. The arrangement does not make it clear whether the term planned conversion means 'planned on 16 February 2011' or 'planned at the time the next audit will take place'. Apparently, the Deputy Minister has not demanded this clarity, the result being that the entire arrangement (apart from all its other deficiencies) is very insecure on its outcomes.

If, in addition to the 'whitewashing' of effectuated deforestation on the one hand and planned deforestation on the other, even further conversion takes place, then, according to the normative document '[this] could result in the suspension and subsequent withdrawal of the MTCS certificate (see part 3.6, quoted above, italics added). Thus in the new arrangement another variant of the 'blank

cheque' has been added, because the arrangement does still not provide for a quantitative limitation of the permitted deforestation, which means that the authorities who are competent to decide on the withdrawal of the certificate have obtained an unlimited freedom of decision.

The conclusion must therefore be that by making these agreements the Netherlands Deputy Minister has fully undermined the non-conversion principle of the Netherlands criteria (C4.3) and thereby over twenty years of Dutch tropical forest policy. This in itself is a reason for concluding that the MTCS should not be accepted within the Dutch government procurement. But the harmful effect of the Deputy Minister's actions is not only limited to a violation of the Netherlands criteria, but also means that the sustainability requirements which the MTCS certificate is supposed to guarantee have been very drastically eroded worldwide. After all, Malaysia also exports its timber to other countries under this certificate, where this certificate is accepted and for which countries its deterioration in quality is now also becoming reality. Moreover, recognition of MTCS will lead to it being considered equivalent to other schemes that set much higher certification standards. Recognition of MTCS would thus lead to a lowering of sustainability standards across the board, merely to satisfy some actors in the Malaysian government and timber industry.

#### **4.2 Quick scan of surveillance reports against the guidelines**

The Netherlands – Malaysia agreement of 17 November 2010, effective 16 February 2011, resulted in two new MTCC guidelines for assessors/auditors. In this quick scan, we assessed the surveillance reports against the substance of the Netherlands-Malaysia agreement. Related to forest conversion the main questions are:

- Are areas scheduled for conversion excluded from the FMU?
- Will additional conversion lead to suspension or withdrawal of the certificate?

These questions were reviewed against the relevant<sup>39</sup> surveillance reports (see **Annex IX**). The assessment led to the following general observations:

- All except one of SIRIM's surveillance reports ignored the guidelines; coverage of the questions listed above is implied at best. SGS has taken the new guidelines more seriously but their interpretation is not consistent across all surveillance reports.
- Both auditors appear to struggle to determine a methodology to consistently address the new guidelines. For forest conversion, this is merely a technical question.
- On forest conversion, both SGS and SIRIM adjusted the certified forest area in some cases, while in most cases they have not. Essentially, it remains unknown to external stakeholders (and probably also the auditors) how much natural forest is actually certified as sustainably managed under MTCS.
- The surveillance reports do not stipulate that additional conversion lead to suspension or withdrawal of the certificate.
- Based on the MTCC forest conversion guidance, auditors now blatantly dismiss stakeholder concerns about the environmental and social impacts of excisions of forest areas for conversion into plantations. This is a serious negative impact of the Netherlands – Malaysia agreement.

### 4.3 The new standard MC&I (Natural Forest) on forest conversion

#### **New rules allow conversion and provide no cap for future conversion**

Crucial in this assessment of the provisions of the new standard is criterion 6.10 which states:

6.10.1 The forest manager shall ensure that conversion from natural forest to forest plantations or non-forest use:

- a) Shall not include any High Conservation Value Forest areas; and
- b) Covers a very limited portion\* of the FMU and shall enable clear, substantial, additional, secure, long term conservation, economic and social benefits across the FMU

\*“A limited portion” is defined as:

- not more than 2.5% of the total area of the FMU in the first 3 years;
- not more than 1.5% for the subsequent 2 years; and
- not more than 1% for the next subsequent 2 years.

This definition may be modified in the next review process of this standard.

This criterion shows that the standard’s new rules allow conversion, which as such is contrary to the basic principles of sustainable forest management, which is to harvest in a way that the resources are sustained. The standard gives three conditions.

The first condition is that the conversion enables clear, substantial, additional, secure, long-term conservation, economic and social benefits across the forest management unit. This makes no sense, conversion of natural forest is highly unlikely to have benefits for the conservation across the FMU, especially if that benefit must be “substantial”, “additional”, “secure”, and “long term”. And, more so, the scheme does not produce assessments that research or evaluate the outcome or impact – the indicators do not require such an assessment and MTCC has as of yet never delivered one to the stakeholders.

The second condition is that HCVFs are not converted. Again, no assessment is required and of all the conversions in the past, MTCC or its shareholders have not produced a proof that this condition is met.

The third condition is new. It says that the conversion “entails a very limited portion of the FMU”. And it further defines “a limited portion”. This allows 5% conversion in 7 years. Remarkably, the standard further mentions that “this definition may be modified in the next review”, implying that more conversion may/will be allowed in the next period. This provides no guarantee whatsoever that the certified forest will still be forest in the future. In the event that the currently adopted rate were to be maintained then within two generations, or fifty years, a certified natural forest can lose up to 35%, or one-third, of its area.

It must be concluded that the first two conditions are very weak and have so far been poorly implemented. First, the forest managers are not obliged to produce an objective assessment of the impact which makes it impossible for stakeholders to understand and judge what is going on in the FMU. Second, similar conditions existed in the previous standard since 2002 and while conversions happened all over the place Greenpeace c.s. have not found a single case where proof was produced that these conditions were met.<sup>40</sup>

Extrapolating experiences from the past, one has to ask whether not fulfilling criterion 6.10 will be judged as a Minor CAR or a Major CAR. In other words, when will the forest manager lose the certificate? These rules are not provided in this new MTCS standard.

Another conclusion is that the third condition, the allowed rate of conversion, contradicts with the basic principle of sustainability or sustainable forest management. 5% in 7 years is not sustainable. Besides this it should be noted that this percentage gives the impression of certainty and some level of control. But as explained in section 2.2 under the heading ‘Transparency’ and below under ‘Forest plantations’ this is not at all the case. Finally, there are no guarantees that no more conversion will be allowed in the future. The explicit stipulation that the annual allowable cuts may be modified in the next review process of this standard rather suggests the opposite.

#### **The new standard for plantations allows certification of converted forests**

One of the completely new things is the MTCC standard for plantations, The MC&I(Forest Plantations). The mere use of the term “forest plantations” instead of “plantations” throughout the whole document suggests that with the two new standards, MTCC establishes a new way to certify conversion. When MTCC started in the 90s, the state governments managed the natural forests, decided to convert parts of it into plantations themselves and got it all certified against their own criteria and under their own control. No one knew how large the areas of natural forest were – no maps existed - and how much was converted, but whatever remained defined as natural forest remained certified.

In the new situation this practice has not fundamentally changed. The information provided by MTCC does not make it possible to verify how large the natural forests are at this moment and which sites exactly are certified (see also chapter 5 on availability and quality of maps). Some level of conversion (5% in 7 years) is legitimized through criterion 6.10, as explained above, and even though no baseline and no transparency exist, areas converted into plantations beyond these limits can now be certified under the standard for plantations.<sup>41</sup>

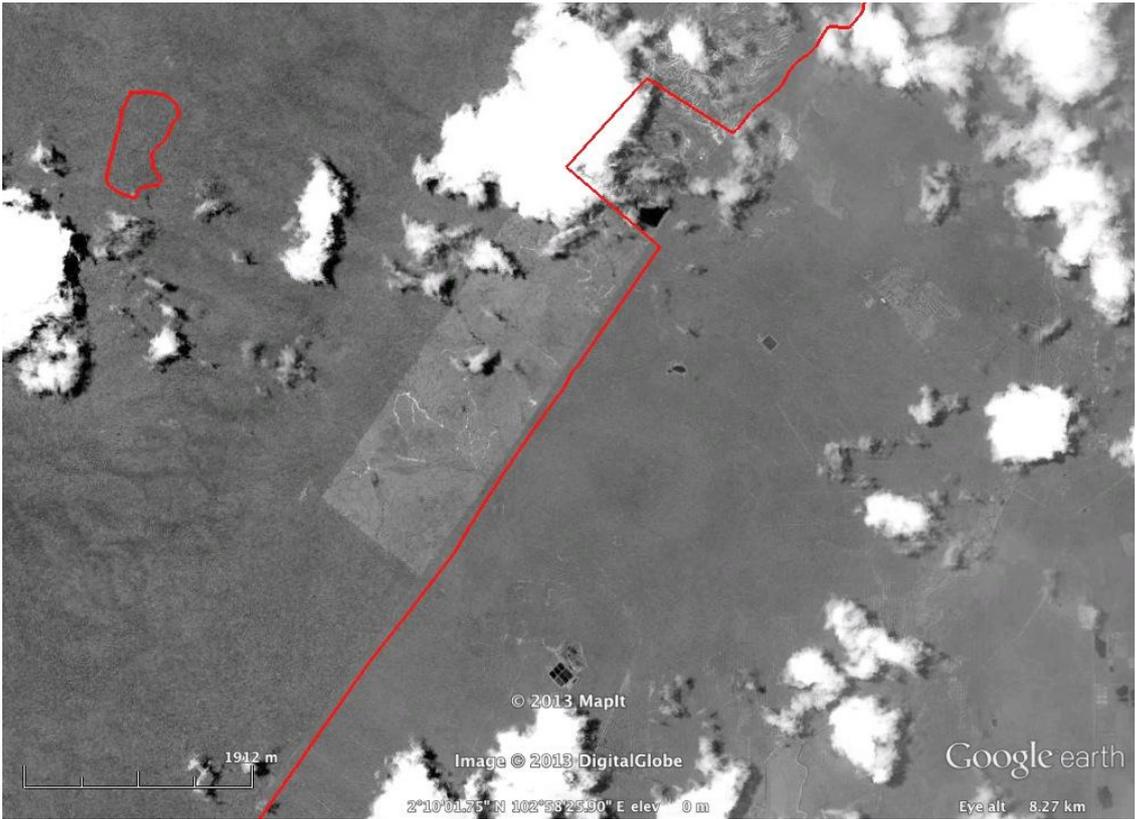
It can be concluded that the risk of non-transparency has grown. In the absence of maps, clear boundaries of concessions, lack of availability of audits and certificates it seems that MTCC can now certify any area and site, either under one standard, MC&I(Natural Forest), and after conversion under the other, MC&I(Forest Plantations).

#### **4.4 Recent satellite imagery show significant forestland conversions**

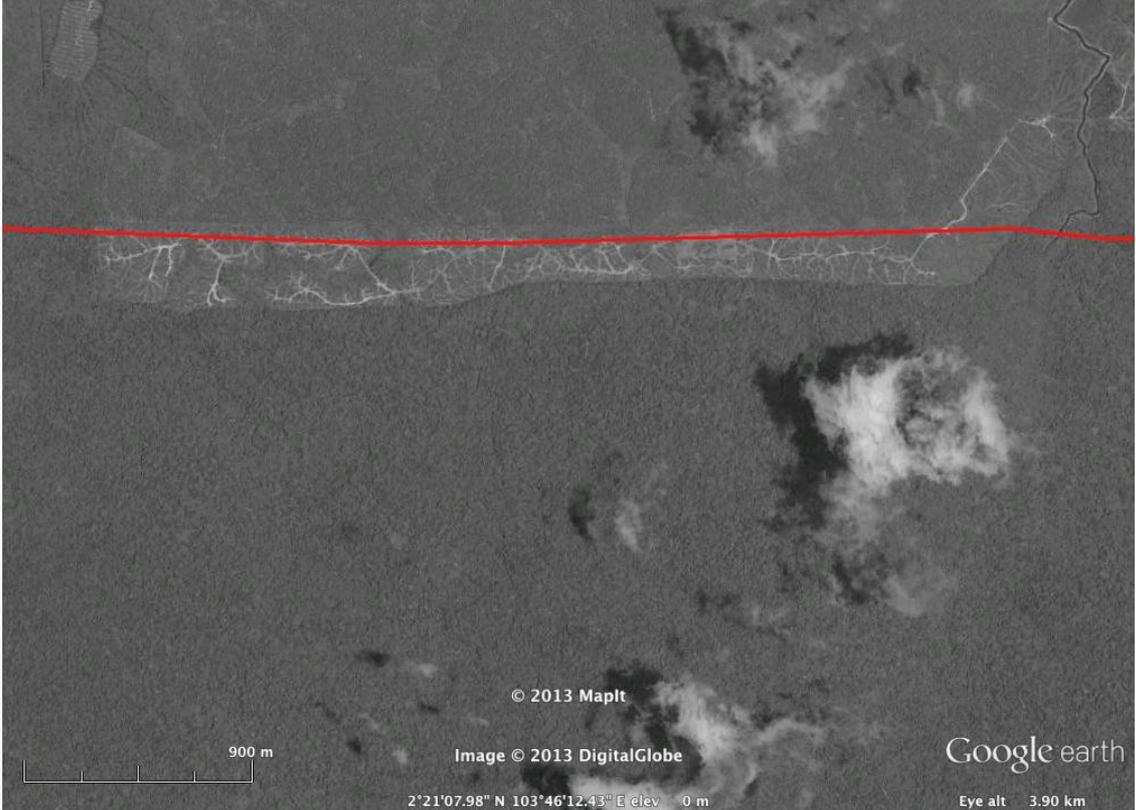
As updating the previous Sarvision satellite imagery interpretation is time and resource consuming, analyzing images uploaded at Google Earth were deemed sufficient for this report. Google Earth has uploaded some very high resolution imagery that is relevant to the discussion about the Netherlands – Malaysian agreement. In so far imagery is available, it demonstrates that the natural forests within the MTCS certified FMUs is being encroached into in many locations. Most of these encroachments are evidently driven by plantation projects and the CB reports do not seem to have detected these.

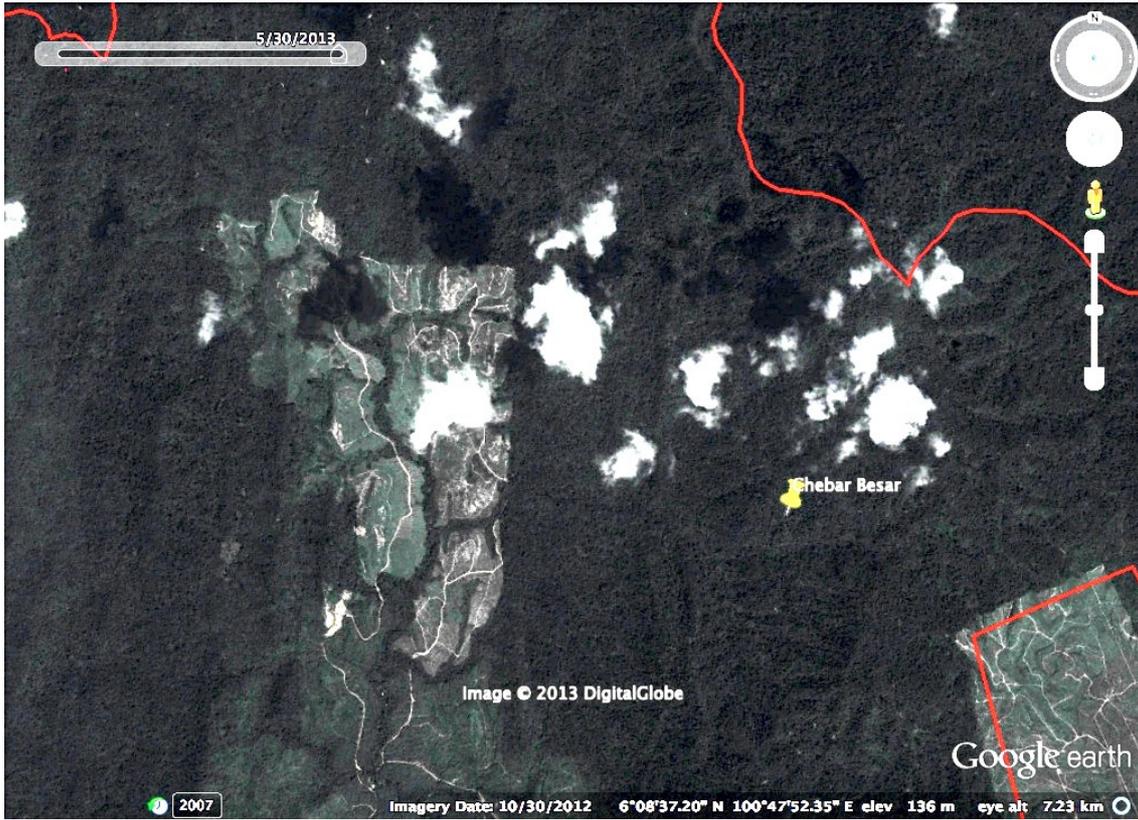
#### **Image (next page): approximately 400 ha of forest conversion within the Maokil forest reserve in Johor.**

This clearing is almost ten times more than the planned conversion for a federal road (45ha) mentioned in the SGS Surveillance Report of June 2011. Satellite image: 2012.



**Image:** almost certain oil palm encroachment within the boundaries of Mersing forest reserve (Johor). Image 2012.





Images above and below: Recent forest conversion in MTCS certified natural forests in Kedah. The auditor (SIRIM) did not address these conversions in its 2011 surveillance report.



Based on the Kedah Forestry Department map presented in the audit report, the areas cleared are water catchment forests. One of the cleared areas appears to be mapped as HCVF but the resolution of the map presented by SIRIM is of too low quality to know for sure. (see **pictures below**).



## 5. The availability and quality of maps

Following the Netherlands – Malaysia agreement, MTCC would request the forest managers to make relevant maps available on their websites. Furthermore, it was expected that more detailed information would be made available regarding the boundaries of the certified areas and areas traditionally used by the Orang Asli.

To determine if MTCC has improved on the availability and quality of maps of the certified FMUs an analysis is presented of: the new guideline of MTCC on forest conversion (section 5.1), the new standard MC&I (Natural Forest), (section 5.2) and maps presented in the auditor reports and the FMU managers' websites after February 2011 (section 5.3).

### 5.1 The new guidelines of MTCC on Interpretation of Criterion 6.10 of the MC&I (2002) of 16 February 2011 (MC&I 2/2011)<sup>42</sup>

MTCC has translated this part of the Netherlands – Malaysian agreement in its 'new normative document on conversion' of 16 February 2011 as follows:

*"3.1 The scope of certification against the requirements of the MC&I(2002) shall be confined to only the natural forests located in the PRFs of the FMU and shall exclude any forest plantations and any planned conversion in the PRFs. The external boundaries of the natural forests located in the PRFs will be redrawn on relevant maps, prior to certification."*

From this stipulation can be concluded that the agreement claimed by the Netherlands Deputy Minister has not been included in the new MTCS guidelines at all and has therefore not become part of the MC&I(2002) either. After all, the agreement apparently means that the forest managers must immediately produce detailed maps *and* make them available to stakeholders, while MTCC now stipulates that the boundaries of natural forests must be re-drawn, not on *detailed maps* but on *relevant maps*, and not now, but *prior to certification*. In its implementation the agreement made has the opposite effect of what it intends to do; not only has MTCC failed to include the agreement in its own documents, but it may use it to 'whitewash' everything that will appear to have been deforested in due course.

### 5.2 The new MTCS standard MC&I(Natural Forest) on maps and transparency

Already during the previous assessment of MTCS much has been said about the lack of transparency under the management of MTCC. One striking example is the fact that the boundaries and the size of certified FMUs is unclear and uncontrollable and that every single certificate or audit report for a specific site mentions a different size of that site. This new standard does not develop new rules or improvements that would set a new structure or demand a different practice regarding availability and quality of maps (see **Annex VIII**). The practice has actually worsened as the current MTCC website does not give names of certification holders anymore but now refers to the PEFC website. Unfortunately, the PEFC database offers no respite. For example, the most recent MTCS certificate could not be found which made it impossible to check whether certification under the reviewed standard has already taken place.

### 5.3. Maps presented in the auditor reports and the FMU managers' websites after February 2011

In order to determine if MTCC has improved on the availability and quality of maps of the certified FMUs, maps presented in the auditor reports and the FMU managers' websites after February 2011 were reviewed and compared with maps presented previously in order to determine if there has been significant incremental improvement. Results of this exercise are presented in the table below:

FMU	Auditor surveillance reports after 17-2-2012 and other sources
Terengganu	<p><b>SGS Malaysia:</b> Main assessment (1-6 November 2009) and 1<sup>st</sup> Surveillance (23-26 August 2010): Low-resolution un-scaled map shows forest reserves by name. No other details provided. 2<sup>nd</sup> Surveillance audit (4-7 July 2011): same map as MA and 1<sup>st</sup> SA</p> <p><b>FMU manager (Terengganu) State Forestry Department website (May 2013):</b> Low-resolution un-scaled map shows forestland uses.</p> <p><b>Conclusion:</b> no change.</p>
Pahang	<p><b>SGS Malaysia:</b> Main assessment (9-19 November 2009): Un-scaled map shows districts and FMU with approximate reserve names. 1<sup>st</sup> Surveillance (4-8 October 2010): same map as MA but in lower resolution.  2<sup>nd</sup> Surveillance audit (31 October – 4 November 2011): same map as MA and 1<sup>st</sup> SA, in low resolution.</p> <p><b>FMU Manager (Pahang) State Forestry Department website (May 2013):</b> Low resolution, un-scaled map shows districts and FMU with approximate reserve names.</p> <p><b>Conclusion:</b> negative improvement.</p>
Johor	<p><b>SGS Malaysia:</b> Main assessment (22-26 June 2009): Low resolution map (1:125,000) showing four forest types and compartments. 1<sup>st</sup> Surveillance (27-30 July 2010): Low-resolution map (1: 350,000) shows forest reserves by name. No other details provided. 2<sup>nd</sup> Surveillance audit (20-23 June 2011): same map as 1<sup>st</sup> SA</p> <p><b>FMU Manager (Johor) State Forestry Department website (May 2013):</b>  The Johor Forestry Department website presents a dated scaled (1:250,000) map of fairly high resolution. It shows compartments, forestland use categories, HCVF etc. No information on Orang Asli.</p> <p><b>Conclusion:</b> FMU manager has made better but unsatisfactory map publicly available.</p>
Selangor	<p><b>SGS Malaysia:</b></p>

	<p>Main assessment (14-17 December 2009): Map shows forest types inside and outside the FMU, but no reserve names. No other information presented (no new map since 2010).</p> <p>1<sup>st</sup> Surveillance audit: report could not be found online.</p> <p>2<sup>nd</sup> Surveillance audit (15-17 November 2011): Same map as the MA. The audit report does not refer to maps of any kind.</p> <p><b>FMU Manager (Selangor) State Forestry Department website (May 2013):</b> One map was identified in the forestry department's annual report 2009 (1:200,000). This map shows forestland use categories and compartments, including HCVF. The legend is barely readable and the reserve names are unreadable due to low resolution.</p> <p><b>Conclusion:</b> the appropriate map is not made available by the auditor.</p>
Perak	<p><b>SIRIM:</b></p> <p>Main audit (21 July 2010): undated map of the FMU and compartments. Forest reserve names are barely readable.</p> <p>First Surveillance Audit (8-12 November 2010): no map</p> <p>Second Surveillance Audit (21-24 November 2011): Same map as in the main audit report but in lower resolution.</p> <p><b>FMU Manager (Perak) State Forestry Department website (May 2013):</b> The Perak Forestry Department website presents a dated (December 2012) and scaled map with forestland uses. Individual forest reserves are not delineated. No information about Orang Asli areas.</p> <p><b>Conclusion:</b> FMU manager has made better (but unsatisfactory) map publicly available.</p>
Segaliud-Lokan	<p><b>SIRIM:</b></p> <p>Main audit (14 December 2009): low resolution scaled black and white map with FMU, compartment boundaries, roads and surrounding plantation estates (image is a copy of a fax). No coordinates.</p> <p>Surveillance audit (19-22 July 2011): an undated scaled (1:400,000) map with coordinates, however in low resolution. It shows compartments, major rivers, roads and surrounding forests and oil palm plantations. Legend is unreadable.</p> <p><b>FMU manager (KTS) website (May 2013):</b> Some maps are presented in the company's public HCVF assessment report.</p> <p><b>Conclusion:</b> technical improvement but no significant insight provided.</p>
Kelantan	<p><b>SIRIM:</b></p> <p>Main audit (27 May 2011)</p> <p>Picture of a hardcopy scaled map showing forestland use categories. The image is low resolution. Scale and legend are not/only partially readable.</p> <p>1<sup>st</sup> Surveillance report (20 - 23 June 2011): a dated (1:750,000) map showing forestland uses. The exact date of the map, the legend and reserve names are unreadable due to the low-resolution image.</p>

	<p><b>FMU manager (Kelantan) State Forestry Department website (May 2013):</b> The website has not been accessible for a long time.</p> <p><b>Conclusion:</b> no improvement.</p>
Kedah	<p><b>SIRIM:</b> Main assessment (30 June 2010): an undated (1:1,000,000) map in low resolution. The map shows forestland use categories, including a category conversion forest (<i>hutan pengeluaran</i>) but it is impossible to distinguish which areas fall under this category. A site is referred to as Orang Asli location but it is not clear whether this is inside or outside the FMU. 1<sup>st</sup> Surveillance report (1 - 4 November 2010): no map 2<sup>nd</sup> Surveillance report (14-17 November 2011): same map as the MA report but presented in lower resolution.</p> <p><b>FMU manager (Kedah) State Forestry Department website (May 2013):</b> One overall map (1:1,000,000) of Kedah and three maps of different regions in Kedah are presented (1:500,000) showing forest reserve compartments.</p> <p><b>Conclusion:</b> FMU manager has made better (but unsatisfactory) map publicly available. The auditor has the appropriate map but does not publish this in a workable format.</p>
Negeri Sembilan	<p><b>SIRIM:</b> Main assessment (11 January 2010): undated map without coordinates showing the FMU compartments and approximate forest reserve names. 1<sup>st</sup> Surveillance audit (21-23 July 2010): no map 2<sup>nd</sup> Surveillance report (13-15 July 2011): undated map without scale. The ratio height to width is skewed in the PDF file. The map shows forestland use categories and logging compartments.</p> <p><b>FMU manager (N. Sembilan) State Forestry Department website (May 2013):</b> Scaled (1:200,000) map shows forest reserve names.</p> <p><b>Conclusion:</b> some improvement on content but technically flawed presentation.</p>

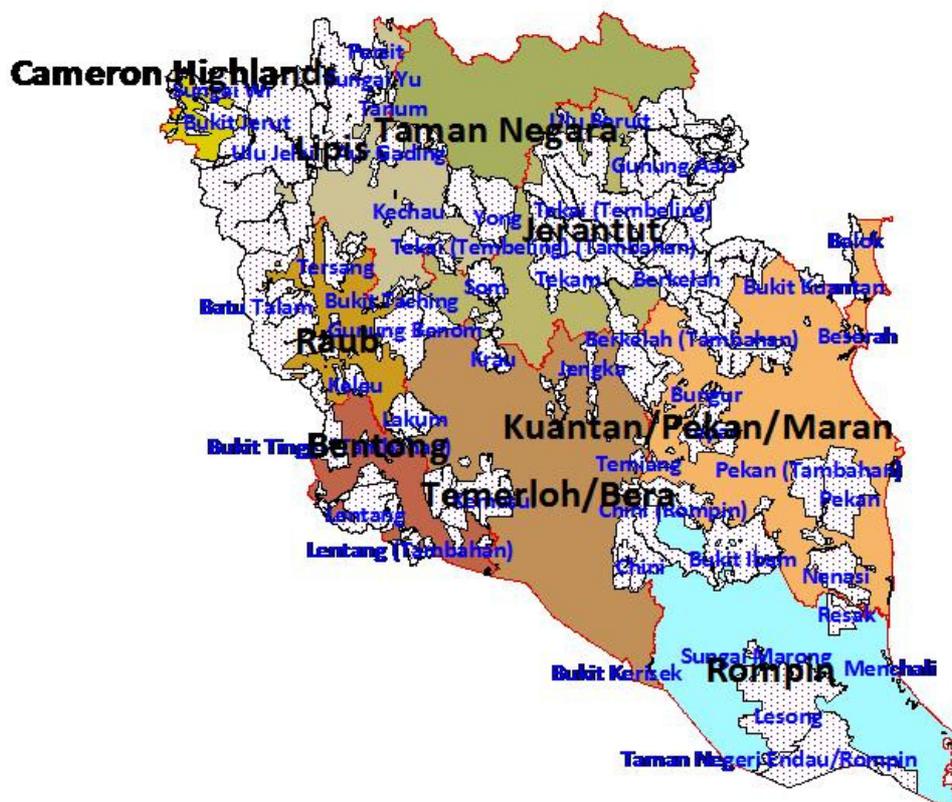
With regards to map availability and quality, our findings are the following:

- None of the newly published maps shows which natural forests are certified under MTCS.
- There is no evidence that there has been an organized effort (by MTCC, the auditors or FMU managers) to address the concern from the Netherlands with regard to maps;
- Although all FMU holders are certified under the same certification standard, there is no consistency in the format and content of maps presented by the auditors and the forest managers.
- In some instances better maps have become available but in many instances, the maps presented are the same as those presented previously. In some instances, maps of worse quality were presented. Most maps are presented in such low resolution that their legend, scale and other details are unreadable.

- Good maps show forestland use types and forest reserve names and are geo-referenced. It is evident that the FMU managers have such maps and that the auditors can review these maps, but in spite of the Netherlands – Malaysian agreement, these maps are not made publicly available in a useful format.
- Only the map of Kedah, as presented on the FMU holder website, makes (vague) reference to an Orang Asli settlement.
- Conversion forest could only be identified on the Kedah map (SIRIM version). Most maps are not adjusted for forestland excisions and conversion of natural forests.
- The impression emerges that, within MTCS certification context, maps are considered mere illustrations to written text whereas good maps are crucial tools for verification of claims versus reality.
- Not a single audit report suggests that MTCC's auditors themselves use maps and satellite imagery to verify their clients' compliance with the MC&I, or that they check whether the FMU managers apply such techniques.<sup>43</sup>
- The quality of maps presented under the MTCS system is internationally substandard. It prohibits independent third parties to monitor and verify MTCC's sustainable forest management claims.

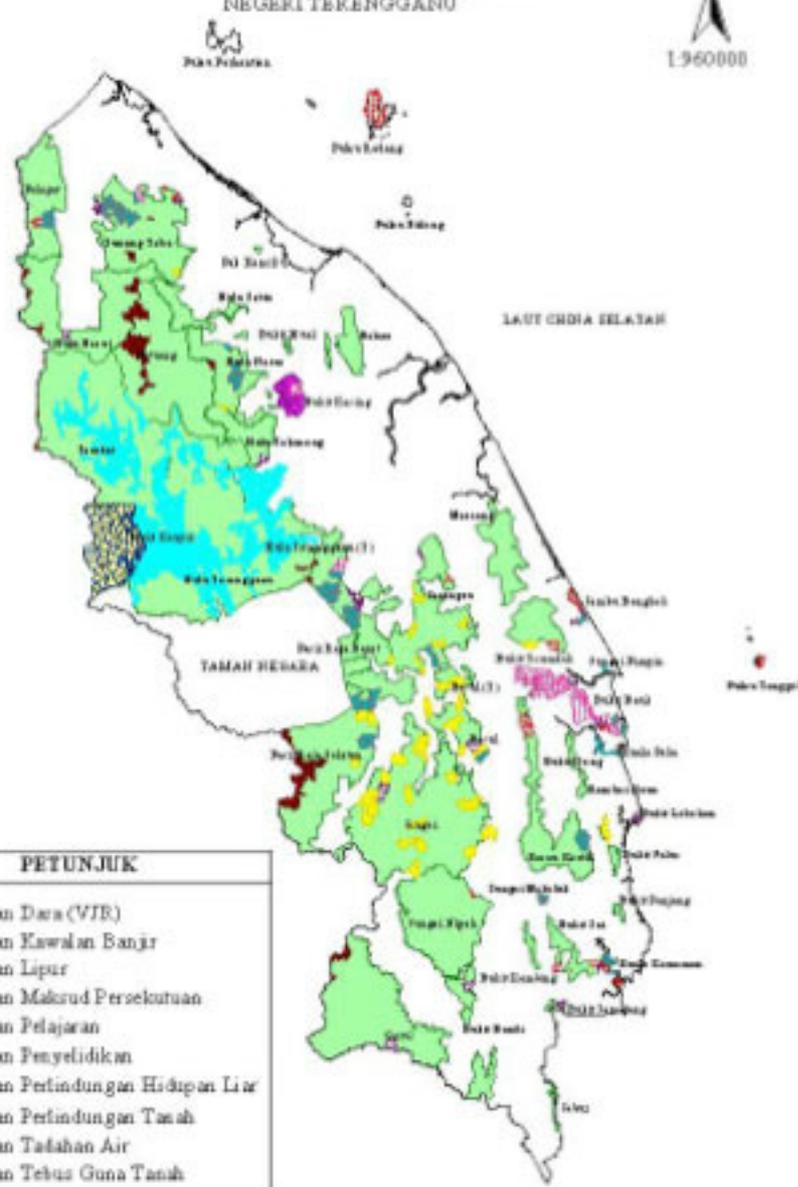
### Map samples

Worst maps (from the Pahang Forest Department and Terengganu websites) and best maps available (from Perak Forest and Johor Department websites) [next pages]



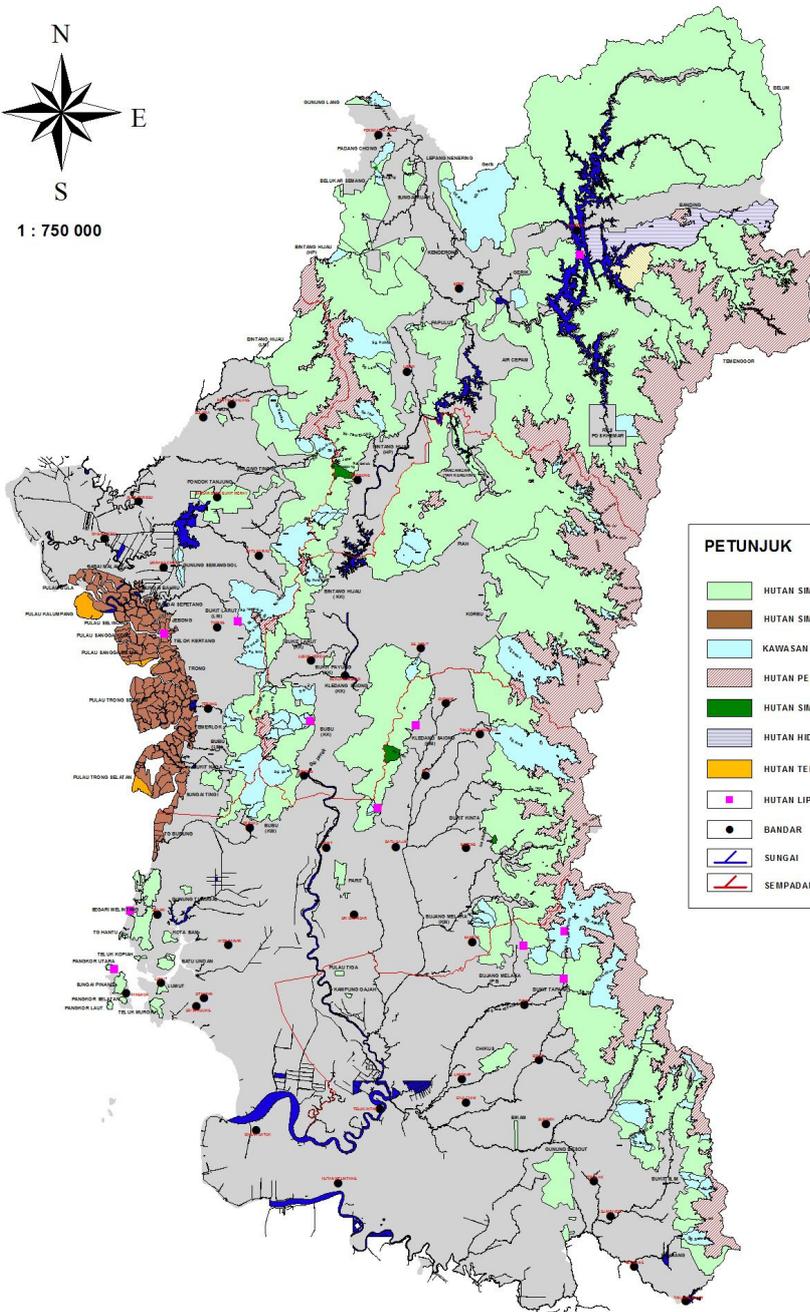
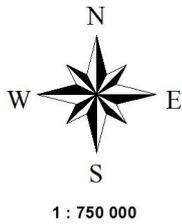
FELAN WARTA  
 PENGELASAN HUTAN SDMPANAN KEKAL  
 SEKSYEN 10 (I) (a)  
 HUTAN PERLINDUNGAN 11 KELAS  
 NEGERI TERENGGANU

N  
 1:960000



PETUNJUK	
	Hutan Dara (VTR)
	Hutan Kawalan Banjir
	Hutan Lipur
	Hutan Makrud Perselutuan
	Hutan Pelajaran
	Hutan Penyelidikan
	Hutan Perlindungan Hidupan Liar
	Hutan Perlindungan Tanah
	Hutan Tadahan Air
	Hutan Teras Guna Tanah

**PETA PENGKELASAN HUTAN SIMPANAN KEKAL  
BAGI NEGERI PERAK DARUL RIDZUAN**



**PETUNJUK**

- HUTAN SIMPANAN KEKAL ( HUTAN DARAT )
- HUTAN SIMPANAN KEKAL ( HUTAN PAYA LAUT )
- KAWASAN TADAHAN AIR YANG DIWARTA
- HUTAN PERLINDINGAN TANAH ( > 1000 M )
- HUTAN SIMPANAN HUTAN DARAT ( V.J.R )
- HUTAN HIDUPAN LIAR / HUTAN PELAJARAN
- HUTAN TEBUS GUNA TANAH
- HUTAN LIPUR
- BANDAR
- SUNGAI
- SEMPADAN PENTADBIRAN DAERAH HUTAN

\* Dikemaskini pada Disember 2012

40 0 40 80 Kilometers



## Annex I: MTCC guidelines on the Term 'free and Informed Consent' under the MC&I (2002)

Interpretation of the Term 'Free and Informed Consent' under the MC&I(2002)	16 February 2011	MC&I 3/2011
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### INTERPRETATION OF THE TERM 'FREE AND INFORMED CONSENT' IN THE MC&I(2002)

#### 1. Objective

The objective of these Guidelines is to provide guidance on the interpretation of the term 'free and informed consent' which is specified in several criteria and indicators in the *Malaysian Criteria and Indicators for Forest Management Certification [MC&I(2002)]*, the forest management standard for natural forest used under the Malaysian Timber Certification Scheme (MTCS).

#### 2. Background

- 2.1 The term 'free and informed consent' is specified in Criteria 2.2, 3.1 and 3.4, as well as Indicator 3.1.2, in the MC&I(2002), in relation to the requirement to obtain the free and informed consent of the indigenous peoples regarding any forest management activities that affect the forests owned by the indigenous peoples (Criteria 2.2 and 3.1, and Indicator 3.1.2), and any compensation for the application of their traditional knowledge regarding the use of forest species or management systems in forest operations (Criterion 3.4).
- 2.2 Since the MTCS only covers the certification of permanent forests, where the ownership claims by the indigenous peoples have been legally defined, the issue of 'free and informed consent' as specified in Criteria 2.2, 3.1 and Indicator 3.1.2 does not arise. 'Free and informed consent' is however applicable for Criterion 3.4.

#### 3. Interpretation of the Term "Free and Informed Consent"

- 3.1 The term 'free and informed consent' is described as a decision-making process where **consent** (involving granting or withholding consent, saying 'yes' or 'no' to an activity, programme or policy) is given or withheld following a process that is **free** (does not involve coercion or manipulation) and **informed** (is founded upon an understanding of the activity, programme or policy).
- 3.2 Therefore any consent given by the indigenous peoples in connection with Criterion 3.4 shall be on the basis of the indigenous peoples being given the full information and implications of the compensation proposed. In addition, the consent shall be freely given by the indigenous peoples without any pressure or coercion.

- 3.3 Several other criteria and indicators in the *MC&I(2002)* recognize the traditional use of the permanent forests by the indigenous peoples (i.e. Criteria 3.2, 3.3, 4.4, 4.5, 9.1 and 9.2). While 'free and informed consent' is not specifically mentioned in these criteria and indicators, in order to ensure that the indigenous peoples are able to continue their traditional use of the forest, the forest manager is required to identify the presence and location of indigenous peoples in and adjacent to the FMU, to confer and agree on what areas they traditionally use, including sites of significant importance to them (e.g. cultivated areas, water sources, burial sites, sacred sites, forest plants, etc). In doing so, the forest manager and indigenous peoples have to interact and agree on how these sites are to be managed, both by the indigenous peoples themselves and by the forest manager.
- 3.4 Under Criterion 3.2, the forest manager shall ensure that the forest management practices shall not threaten or diminish the indigenous peoples' resources or tenure rights, while under Criterion 3.3, sites of special cultural, ecological, economic or religious significance to the indigenous peoples shall be clearly identified in cooperation with such peoples, and shall be recognized and protected by the forest manager.
- 3.5 Under Criteria 4.4 and 4.5, where the indigenous peoples are living in or adjacent to the forest, the forest manager shall consult with the indigenous peoples to evaluate the dependence of these peoples on the forests involved and the potential social impacts of the forest operations on these peoples, prior to the commencement of the operations. The forest manager shall incorporate the results of such evaluations into the forest planning and management process so as to prevent loss or damage affecting the indigenous peoples' customary rights, property, resources, or their livelihoods. Where loss or damage affecting the indigenous peoples' customary rights, property, resources or their livelihoods has been caused by the forest operations, appropriate mechanisms within relevant federal and state laws shall be employed to resolve the grievances and provide fair compensation.
- 3.6 In addition, under Criteria 9.1 and 9.2, the forest manager shall consult the affected indigenous peoples and other relevant stakeholders to assess the attributes consistent with high conservation value (HCV) which are found in the FMU. In the case of the indigenous peoples, the HCV areas may be areas fundamental to meeting the basic needs of these peoples and/or critical to their traditional cultural identity. The forest manager has to demonstrate that steps have been taken to protect these HCV areas, including marking these areas on maps and having management prescriptions in the Forest Management Plan to maintain and/or enhance the HCV attributes. The forest manager is also required to conduct annual monitoring to assess the effectiveness of the measures employed to maintain and/or enhance the HCV attributes, and incorporate the results of the monitoring into the implementation and revision of the Forest Management Plan.
- 3.7 All Certification Bodies shall ensure that the forest manager of the FMU undergoing the audit is assessed for compliance with the above requirements, and that the audit findings are reflected in the audit report and related public summary.

#### 4. Effective Date

These Guidelines shall apply with **immediate effect** for the audits of the FMUs for forest management certification under the MTCS.

## Annex II: MTCC Normative Document on the Interpretation of Criterion 6.10 of the MC&I (2002)

<i>Normative Document</i>		
<b>Interpretation of Criterion 6.10 of the MC&amp;I(2002)</b>	16 February 2011	MC&I 2/2011

### INTERPRETATION OF CRITERION 6.10 OF THE MC&I(2002)

#### 1. Objective

The objective of this Normative Document is to ensure a clear interpretation of Criterion 6.10 in the *Malaysian Criteria and Indicators for Forest Management Certification [MC&I(2002)]*, the forest management standard for natural forests used under the Malaysian Timber Certification Scheme (MTCS).

#### 2. Background

- 2.1 Under Criterion 6.10 in the *MC&I(2002)*, restrictions are imposed on the extent to which the permanent reserved forests (PRFs) in a Forest Management Unit (FMU) can be converted to forest plantations or non-forest land uses. Criterion 6.10 stipulates that:

*"Forest conversion to plantations or non-forest land uses shall not occur, except in circumstances where conversion:-*

- 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."*

- 2.2 To address the concern that the allowable threshold for conversion of PRFs to forest plantations and non-forest land uses stipulated in Criterion 6.10, entailing "a very limited portion of the FMU" is currently not quantified, this document is adopted for the interpretation of Criterion 6.10, pending the conclusion of the ongoing review of the *MC&I(2002)*.

#### 3. Interpretation of Criterion 6.10

The interpretation of Criterion 6.10 by the accredited Certification Bodies (CBs) under the MTCS when conducting forest management audits of FMUs shall be as follows:

- 3.1 The scope of certification against the requirements of the *MC&I(2002)* shall be confined to **only** the natural forests located in the PRFs of the FMU and shall **exclude** any forest plantations and any planned conversion in the PRFs. The external boundaries of the natural forests located in the PRFs will be redrawn on relevant maps, prior to certification.

- 3.2 In situations where forest plantations are established in the PRFs, during the audit under the *MC&I(2002)*:
- a) the forest manager shall be required to provide information and statistics with regard to the extent of the forest plantations as well as any planned conversion in the PRFs to forest plantations and/or non-forest land uses. Such information and statistics provided by the forest manager shall be included in the audit report; and
  - b) the FMU shall be assessed for compliance in relation to Criterion 6.10(b) which requires that the conversion *does not occur on high conservation value forest areas*; and Criterion 6.10(c) which requires that the conversion *will enable clear, substantial, additional, secure, long-term conservation benefits across the forest management unit*.
- 3.3 Such established forest plantations and areas planned for conversion in the PRFs should be managed in a responsible manner and undergo forest management certification against the *MC&I(Forest Plantations)* under the MTCS.
- 3.4 Logs harvested from areas in the PRFs converted to forest plantations and/or non-forest land uses shall not be claimed as certified logs under the MTCS.
- 3.5 In addition, the forest manager shall not make any claims associating such converted areas with the MTCS-certified FMU.
- 3.6 If during the subsequent surveillance audit, the CB finds that in addition to the areas that have been reported earlier under paragraph 3.2(a) above, there are new areas of the natural forest in the certified FMU which have been converted or planned for conversion since the last audit, a major non-compliance will be issued by the CB which could result in the suspension and subsequent withdrawal of the MTCS certificate.
- 3.7 All CBs shall ensure that the forest manager of the FMU undergoing the audit is assessed for compliance with the above requirements, and that the audit findings are reflected in the audit report and related public summary.

#### 4. Effective Date

This Normative Document shall apply with immediate effect for the audits of the FMUs under the MTCS.

## Annex III: Key sections of the leaked SUHAKAM report

Full report available at: <http://sarawakreport.org/suhakam/suhakam-chapter8.html>

### Gazetting of Orang Asli lands

Status of Land (hectares)	1990	2010	Change	% change
Gazetted Orang Asli Reserves	20,666.96	20,670.83	3.87	0.02
Approved but not gazetted	36,076.33	26,288.47	(9,787.86)	(27.13)
Applied for gazetting but not approved	67,019.46	85,987.34	18,967.88	28.30
Total	123,762.65	132,946.64	9,183.99	7.42

### Logging and Forest Reserves (Emphasis added)

8.91 The Forestry Department informed the Inquiry that all forest products were under the jurisdiction of the Department, including the fruit trees planted by the Orang Asli such as the durian and petai, which are important economic crops for the Orang Asli.

8.92 Witnesses from the Forest Department told the Inquiry that they had not heard of the decision in *Koperasi Kijang Mas v Perak State Government*, in which the court ruled that, in keeping with the provisions of the Aboriginal Peoples Act, the Orang Asli had prior rights to forest produce, including, timber, in their aboriginal areas. The officers, however, held the view that there was no exception for Orang Asli under the Forestry Act and that the Forestry Act took precedence.

8.93 Many Orang Asli witnesses, whose villages were included in logging concession areas within forest reserves testified that in addition to the destruction of the forest as their source of sustenance, logging licensees had destroyed their sacred areas and old grave sites that had existed for generations, thus, eliminating evidence of their continued occupation in the area.

8.94 In case A272, the Temuan community living within Hutan Simpan Angsi in Negeri Sembilan told the Inquiry that the Gemenchuh Forestry Department has marked a number of their fruit and rubber trees, supposedly to be logged. They have also been asked to move from the forest reserve. Because of this and their lack of control over outsiders who come to their village, Mr Mohsin Bin Jani (W42), as a representative of his village appealed to the authorities to gazette their lands as an Orang Asli Reserve.

8.95 In case A285, Orang Asli complained about their crops being cut down to make way for Acacia plantations. The land they have been subsisting on was declared a forest reserve in 1996. JAKOA only put in an application for the 160 acres of land to be gazetted in June 2011, while the remaining 330 acres are within the Rantau Panjang Forest Reserve. It appears that once an Orang Asli customary land has been declared a forest reserve, it becomes more difficult for these areas to be gazetted as Orang Asli reserves. The case of A286 where the application for Kg Orang Asli Bukit Perisak to be declared as an Orang Asli reserve has been rejected is a case in point.

8.96 **Loggers/foresters/administrators also declared that they were unfamiliar with or not informed of the nature of Orang Asli traditional markers** (eg. graves, orchards, old village sites, sacred sites). Such a situation had resulted in the properties and sacred sites of the Orang Asli being destroyed by logging activities. However, in response, UPEN-Perak stated that Orang Asli traditional territories were neither fenced nor marked by boundaries on the ground, and hence not visible or identifiable to the loggers.

8.97 **Most state Forest Departments dismiss claims of Orang Asli rights to land within forest reserve, even if Orang Asli settlements are older than the forest reserve itself.** In Kelantan for instance, the State Forestry Department had insisted that the Forestry Act does not recognise Orang Asli territories within Forest Reserves as stated by the witness from the Department, Mr Yusup Bin Abdul Rahaman (W19) during the

Public Hearing. “Firstly, the Forestry Law does not mention or define traditional territories. Secondly, other than Orang Asli inhabited areas, the State Forest Department does not have any record showing Orang Asli settlements within forest reserves in the State. **Most of the areas inhabited by the Orang Asli are within permanent forest reserves.** While the Department understands that the Orang Asli have the right to remain on areas they have long inhabited in forest reserves, the Orang Asli are still bound by the Forestry Law.”

8.98 At the Inquiry, **the Forestry Department of Pahang acknowledged that it did not apply the principle of free, prior and informed consent (FPIC)** as stipulated by the UNDRIP when granting logging licence in areas where Orang Asli resided. He also said that he felt that the department did not need to obtain the consent of the Orang Asli, even though **he was aware that failure to do so contradicted Principle 2.2 of the Malaysian Criteria and Indicators of the Malaysian Timber Certification Scheme for Natural Forests.**

8.99 In case A186, the claims of Mr Ramli b Harun’s (W47) – **that logging within the Krau Forest Reserve has affected their livelihood, bulldozed graves and destroyed the environment and catchment areas – were simply dismissed by the Pahang Forestry Department.** W47 claimed that his village of Kg Penderas in Pahang was included within the 8399.47 ha gazetted as a Forest Reserve in 1992 (GN74). In case A137, involving land claimed by the Semai community of Kg Simoi Lama, in Kuala Lipis, Pahang, the involvement of individuals with influential connections and close to the loggers can also make the Orang Asli feel powerless. In another case in Pahang, the complaints of A198 about the logging in the vicinity of Kg Jibau, Muadzam Shah were also dismissed by the Pahang Forestry Department saying that only mature trees are logged and cutting of petai, setul and other useful trees are prohibited.

8.100 In case A90, the Menriq people of Kg Kuala Lah in Gua Musang, Kelantan told the Inquiry about the significance of Batu Janggut found within their traditional territories. They also complained about the Report of the National Inquiry into the Land Rights of Indigenous Peoples impact of logging on their source of livelihood and their life. However to the Forestry Department, there are no grounds for complaint since the company obtained the logging concession legally. He also said that the location of Batu Janggut is within state land, which means that everyone should have access to the area.

8.101 **Many of the Forest Reserves in Peninsular Malaysia were established in early 1930s to 1960s, but the boundaries were never marked on the ground.** Orang Asli who were already living in the area were not aware of the existence of the Forest Reserve. In case A29 in Kg Kuala Woh in Tapah, the witness from the Perak Forestry Department, Mr Mohd Shahril Bin Abd Rashid (W38) admitted this and thus the reason why the department has been lenient to the Orang Asli who live and forage within the forest reserve. However, collection of forest products for commercial purposes is prohibited. This was the reason why a man from Gerik was arrested while carrying one ton of rattan.

**8.102 Although all states testified that they applied the Malaysian Timber Certification Council’s Criteria and Indicators (MC&I) for all their logging concessions, Orang Asli complainants asserted that the loggers and the Forestry Department did not seek their consent when entering their customary lands, which is contrary to the requirements of the MC&I.**

8.103 Mr Mohd Yusof Bin Muda (W29) of the Selangor Forestry Department said “forest management is a dynamic process which adapts according to weaknesses that have been identified. Even though the laws on forest management are strict, the Forestry Department upholds humanitarian principles when it comes to issues involving local communities”. Nevertheless, it is evident that the concept of co-management of forest has not been adopted or developed in Malaysia, and that **the Forest Department has yet to take a human rights approach in its dealings.**

# Annex IV Federated Malays States Government Gazette 1927

May 13]

F.M.S. GOVERNMENT GAZETTE

691

"THE FOREST ENACTMENT, 1918"—(cont.).

DECLARATIONS OF FOREST RESERVES—(cont.).

No. 2578.—In exercise of the powers vested in him by section 3 of "The Forest Enactment, 1918," and in pursuance of section 12 thereof, the Resident of Selangor, with the approval of the State Council, proclaims that, with effect from the 1st July, 1927, the land described below and delineated on survey sheets C100, D100, A108, B108, A109, D108, C109, A116, B116, A117, C117 and D117, in the office of the Superintendent of Revenue Surveys, Selangor, shall be reserved forest to be known henceforth as the Kuala Langat North Forest Reserve.

Dated at Kuala Lumpur, this 19th day of April, 1927.  
[Sel. 3674/22.]

L. A. ALLEN,  
Acting Secretary to Resident, Selangor.

DESCRIPTION.

KUALA LANGAT NORTH FOREST RESERVE.

State—Selangor.

District—Kuala Langat.

Mukim—Tanjong Duablas.

Approximate area—17,900 acres.

Boundaries—

NORTH—The Klang district eastwards from the north-eastern corner of portion 1,095.

EAST—The Ulu Langat district.

SOUTH—The Langat river down stream to the drain reserve east of Labohan Dagang Malay Reservation.

SOUTH-WEST—The said drain reserve northwards for about 69 chains; thence a demarcated line running approximately north-westwards to a pipe on the southern edge of the Banting-Bangi road reserve near the 35th mile-post; thence a line running approximately north-west by north across the said road reserve to a pipe on its northern edge; and thence a demarcated line running approximately north-north-westwards for about 94 chains, and approximately westwards for about 322 chains.

WEST—A demarcated line running approximately north-westwards for about 195 chains to the eastern extremity of portion 1,723; thence portion 1,723 and portion 1,715 to its northern corner; thence a demarcated line running approximately eastwards for about 217 chains and approximately north-north-westwards for about 445 chains to the south-eastern corner of portion 1,095; and thence portion 1,095 to the starting point.

SCHEDULE II.

The following rights are admitted and privileges conceded within the reserve, but the exercise thereof shall be subject to the control of the Conservator and to such orders as he may make with the approval of the Resident to regulate the local limits within which, and the mode in which the produce referred to may be taken or received within the reserve:

STATEMENT OF RIGHTS AND PRIVILEGES.

Particulars of holders.	Particulars of rights and privileges.
The Sakais Jinang Lanchang of Bukit Prah and Pulau Kempas, and Jinang Lijah of Bukit Kemandol to the extent of six and four households respectively.	<ul style="list-style-type: none"> <li>(i) The right to the fruit from the dusuns of which they are the holders, and to maintain in good order the said dusuns.</li> <li>(ii) The privilege of cultivating foodcrops in old clearings formerly cultivated by them or their ancestors.</li> <li>(iii) The privilege of living in the reserve at a place or places approved by the Deputy Conservator of Forests.</li> <li>(iv) The right to water from the streams for domestic and agricultural purposes.</li> <li>(v) The right to timber and bark of Class II trees (as defined in the Forest Rules for the time being in force), bamboos, canes, attaps, honey, wax, wood-oil, jungle fruits, roots, vegetables, leaves and fibres in sufficient quantities for the erection and maintenance of their huts and for their own domestic use, but not for sale or barter.</li> <li>(vi) The privilege of hunting, shooting and fishing to supply food for themselves and their families but not for purposes of trade or barter, subject to such rules and restrictions as may for the time being be enforced generally and in reserved forests.</li> <li>(vii) The right of way for the purpose of exercising the above rights and privileges.</li> </ul>
The inhabitants of the Labohan Dagang Malay Reservation to the number of 150 households.	The right to rotan, attaps, and timber of Class II from that portion of the reserve which lies between the Banting-Bangi road and the Langat river as if that part of the reserve were State land subject to section 27 of "The Forest Enactment, 1918."



## Annex VI Perak State Government Gazette 9 May 2013

AKTA PERHUTANAN NEGARA 1984 (PEMAKAIAN) 1985  
(AKTA 313)

NATIONAL FORESTRY ACT 1984 (ADOPTION) 1985  
(ACT 13)

No. 786.

PENGISYTIHARAN HUTAN SIMPANAN  
KEKAL AMANJAYA

DECLARATION OF AMANJAYA PERMANENT  
RESERVED FOREST

Pada menjalankan kuasa yang diberikan oleh seksyen 7 Akta Perhutanan Negara 1984 [*Akta 313*], Pihak Berkuasa Negeri dengan ini mengisytiharkan bahawa kawasan yang dinyatakan dalam Jadual hendaklah menjadi Hutan Simpanan Kekal yang dikenali sebagai Hutan Simpanan Kekal Amanjaya, mulai dari tarikh penyiaran Pemberitahuan ini dalam *Warta Kerajaan Negeri Perak*.

## JADUAL

Kawasan seluas 18,866 hektar dalam Mukim Belum dan Temenggor, Daerah Hulu Perak bergarisan tepi warna kelabu pada P.W. 2112 yang tersimpan di Pejabat Pengarah Ukur dan Pemetaan, Perak.

Bertarikh 6 Mac 2013  
[PPN.PK. 143/3 Jld. 2;  
PU.PK. 67/71-47 Jld. 4]

RUMAIZI BIN BAHARIN @ MD. DAUD  
*Setiausaha*  
*Majlis Mesyuarat Kerajaan*  
*Perak Darul Ridzuan*

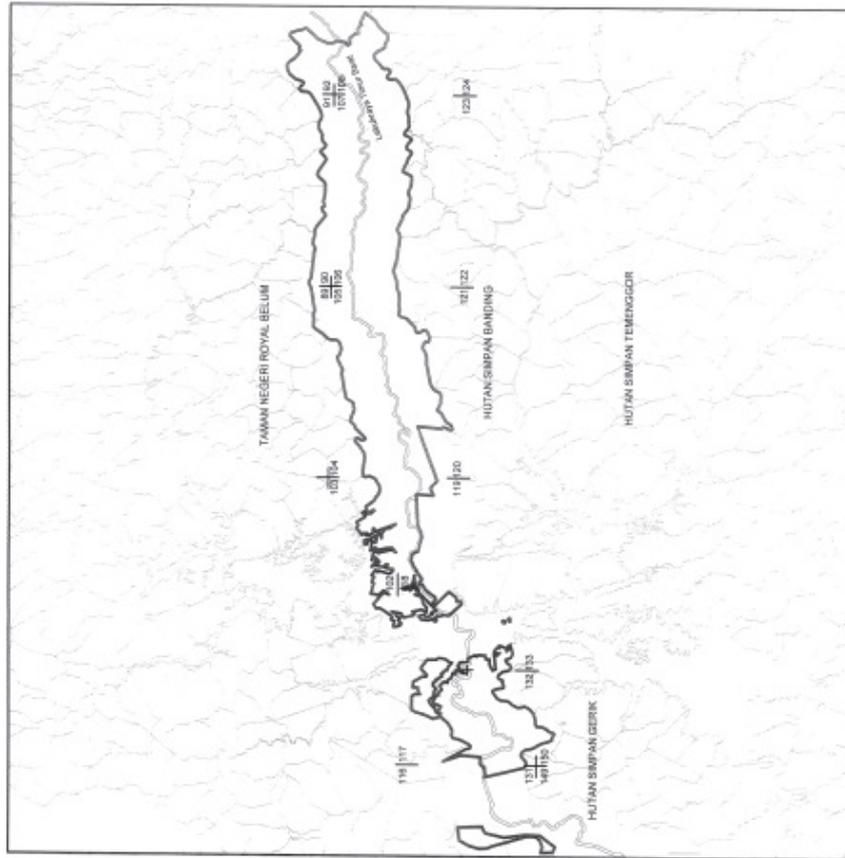
In exercise of the powers conferred by section 7 of the National Forestry Act 1984 [*Act 313*], the State Authority hereby declares that, the area described in the Schedule to be Permanent Reserved Forest to be known as Amanjaya Permanent Reserved Forest, with effect from the date of publication of this Notification in the Perak Government *Gazette*.

## SCHEDULE

The area of 18,866 hectares in the Mukim Belum and Temenggor District of Hulu Perak, outlined in grey on P.W. 2112 deposited in the Office of the Director of Survey and Mapping, Perak.

Dated 6 March 2013  
[PPN.PK. 143/3 Jld. 2;  
PU.PK. 67/71-47 Jld. 4]

RUMAIZI BIN BAHARIN @ MD. DAUD  
*Secretary*  
*State Executive Council*  
*Perak Darul Ridzuan*



PELAN MENUNJUKKAN SUATU PENGISYTIHARAN  
 HUTAN SIMPAN KEKAL SEBAGAI  
 HUTAN SIMPAN AMANJAYA  
 SELUAS KIRA-KIRA 18,866 HEKTAR  
 DAERAH HULU PERAK  
 NEGERI PERAK  
 LEMBAR PIWAI 89, 90, 91, 92, 102, 103, 104, 105,  
 106, 107, 108, 116, 117, 118, 119,  
 120, 121, 122, 123, 124, 131, 132,  
 133, 149 & 150  
 SKALA 1: 180,000

PURNOVI\_2013  
 Disedia oleh *Nor Fariza BT BD ISHAQ*  
 (NORFARIZA BT BD ISHAQ)  
 Diperkas oleh *Hidayatul Ashikin Kujon Sinti Abdullahi*  
 (HIDAYATUL ASHIKH-KUJON SINTI ABDULLAH)

Ditulis dibawah seliaan 410 Jaj. Kemun Tanah Negeri  
 dan di bawah pengawasan dan pengendalian  
 oleh Pegawai Teknikal dan Penyelidikan  
 sebagai Hutan Simpan Amanjaya  
 (Sempadan danglungi warna kelabu)

(JAWI BIN A RAHMAN) 7.5.2013  
 PENGARAH UKUR DAN PEMETAAN  
 PERAK

PW 2112

## **Annex VII Some recent press clipping relevant to the MTCS FMUs**

MTCS Pahang FMU]

**The Star, Thursday December 20, 2012**

**Court: Land belongs to orang asli**

**By ONG HAN SEAN**

TEMERLOH: The High Court has ordered portions of a Malay reserve land encroaching into more than 2,000ha of Orang Asli customary land in the Bera district to be degazetted. At the same time, Justice Akhtar Tahir directed the Pahang land and mines office to gazette the whole area as Orang Asli customary land within a year.

In what the lawyers for the Orang Asli people called a landmark decision, the judge ruled that the reserve land was subservient to Orang Asli rights as they were the earliest inhabitants.

He also ruled that a Felcra development project in the Bukit Rok and Kampung Ibam areas was illegal and had to be removed.

"The rights were accrued when the Semelai people inhabited the land even before other inhabitants, including the Malays, arrived.

"Both the Felcra and Malay reserve land are subject to the rights of the Orang Asli," Justice Akhtar said in his summarised judgment yesterday.

Bukit Rok tok batin (community head) Mohamad Nohing and five others had filed the claim in 2007 against the state land and mines office director, the state government, the Orang Asli Development Department director-general and the Malaysian Government. Justice Akhtar said the court recognised the Semelai people through early writings and remnants of their existence.

He said their instinct to roam and live through the forest was inbuilt.

"Like fishermen, the Orang Asli's instincts cannot be extinguished by providing them with better living," the judge said.

He, however, dismissed the Orang Asli's claim for damages and ordered costs to be borne by the respondents.

He advised the Government to keep proper land records as the search for documents itself had taken a number of years, adding that witnesses called were uninterested and not conversant on the matter at hand.

"I hope these can be rectified," said the judge.

The Orang Asli group was represented by Lim Heng Seng, Fara Nadia Hashim, S.

Yogeswaran and Datuk M. Ramachelvam while senior federal counsel Kamal Azira Hassan and Nor Hisham Ismail appeared for the respondents.

[MTCS Selangor FMU]

**Selangor govt fails to set aside Temuan Orang Asli suit**

Malay Mail, Monday, June 18, 2012

by Bernama

Location: SHAH ALAM

**THE** Selangor government and two other's application to set aside the Temuan Orang Asli's suit in relation to commercial activities, including logging and sand mining, in Mukim Tanjung Duabelas, Kuala Langat has been rejected by the High Court here today.

Judge Dr Prasad Sandosham Abraham concluded the matter in chambers after hearing submissions from both parties.

Mohamed Haniff Khatri Abdulla, who represented the Orang Asli, told reporters outside the court that the judge found there was sufficient reason for a full trial and it was not safe to set aside the suit without first hearing the testimonies of witnesses.

Trial dates would be set later, he added.

The Selangor government, Kuala Langat District and Land Office, and sand mining company Kumpulan Semesta Sdn Bhd, filed the application in March.

In July 2011, Temuan village head, Malam anak Gerchang, 68, and his sons, Dewi, 52, and Jafrin, 41, filed the writ on behalf of about 4,000 Orang Asli in Mukim Tanjung Duabelas, seeking among others a declaration that the land belonged to the Temuan community.

The plaintiffs, who were also represented by Serene Tan, applied for an interlocutory injunction for the defendants to halt all commercial activities on the said land.

The plaintiffs statement of claim stated that the Tanjung Duabelas district was declared as the North Kuala Langat Forest Reserve in May 1927, which conferred them with special rights.

They claimed that the 7,160 hectare land was allocated as Orang Asli reserve land and bequeathed to the over 4,000 Temuan inhabitants as their heritage dating back 200 years. The Orang Asli claimed that the land has been the subject of dispute between several parties with logging and sand mining being carried out causing environmental pollution, loss of livelihood, water and food sources.

The Selangor government and Kuala Langat District and Land Office were represented by senior federal counsel Nik Haizie Azlin Nabidin, while Fida Izrina Izhar appeared for Kumpulan Semesta.

[MTCS Kelantan FMU]

### **Orang Asli landmark legal battle with K'tan gov't soon**

**Nigel Aw, Malaysiakini, Thursday, Jan 10, 2013**

After over a year of memorandums, protests and blockades for recognition of Orang Asli lands in Gua Musang failed to get a response, the community is now preparing to take their woes to court in what could be a landmark legal battle in Kelantan. This, local villager Awer Awi (left) said, was after Kelantan Menteri Besar Nik Abdul Aziz Nik Mat shut the door on them by declaring that it was outsiders who incited the lobbying and the lands belonged to the state so long as titles are not issued.

"We are very angry, sometimes we weep that our state government would treat us like this, so we have resorted to this," he said when met in Gua Musang, pointing to a large hand drawn map of the traditional territory claimed by Kampung Depak, under the Kuala Betis Regroupment Plan cluster of villages. "We are documenting our history, our territorial borders and then we will use this evidence in court, the answer is now in court", adding that they are also conducting GPS mapping with the aid of Bar Council researchers. Awer, 24, conceded that going against the establishment comes across as alien for the Orang Asli community, especially for the elderly. "When we started this, many of our elders said we were outsiders attempting to incite the community, but we tried to convince them that Orang Asli really do have rights, that this is spelled out in the United Nations Declaration on the Rights of Indigenous Peoples, only then did they start believing us," he said.

Similarly, on Damak Angah's office wall, the village chief of Kampung Angek which is in the same cluster, was a map pinpointing nearby villages, their water reservoir and various streams, complete with coordinates. "We have already mapped out everything, we have even done our GPS mapping," said Damak.

'Cases to be filed soon' When contacted, Bar Council Committee on Orang Asli Rights member Siti Zabedah Kasim said it will be assisting the Gua Musang Orang Asli community file a series of lawsuits against the Kelantan government with a target of early this year. "Pos Belatim, Pos Hau, Pos Gob, Pos Bihai, Pos Tohoi, all these clusters of villages are all interested in taking their case to court," she said, adding that Kampung Depak will be the first to file its case.

She added that the series of lawsuits will be the first of its kind in Kelantan. "There have been two previous cases involving Orang Asli land in Kelantan, one involving a Church demolition and another an injunction against a plantation, but I believe there has never been a full claim of Orang Asli territory in the state before," she said.

Siti said the mooted cases were taking time because other than mapping out Orang Asli territory, the locals must also take on the arduous task of gathering evidence to prove their claim. "If they say somewhere is their ancestral land, they must document the folk story about the area of the elder people living there.

"For example, the ancient names of the rivers there, old graveyard sites or where they roam for herbs," he said. The Malaysian Courts had in several rulings recognised the customary lands of the Orang Asli with the most recent coming from the Temerloh High Court last month, which declared plantations in the customary land of a Semelai community illegal and the land be returned to them.

However, Kelantan exco member Nik Amar Nik Abdullah had reportedly said this right only applied to Sabah and Sarawak and the state government was prepared to face any legal action. The Gua Musang Orang Asli had almost exactly a year ago, launched a blockade against logging trucks entering their territory, a first in peninsula Malaysia. This was followed by another blockade in the same month as well at a protest at Nik Aziz's residence in April for recognition of their lands, but to no avail.

[MTCS Negeri Sembilan FMU]

### **MB defends logging in Johol**

Zefry Dahalan

Free Malaysia Today, April 18, 2013

SEREMBAN: Menteri Besar Mohamad Hasan today rejected an allegation about illegal logging in Negeri Sembilan, accusing PAS of raising the issue out of ignorance.

"PAS does not understand what we are doing," he said in response to claims by the party and some members of the Orang Asli community that loggers were felling trees in the Miku forest reserve.

Mohamad then disclosed some details about the state-approved "timber latex clone" project that he said would improve the economy of the Orang Asli.

He admitted that he was referring to the Johol forest reserve but said PAS made the allegation on Tuesday at a press conference held in Johol, not Miku.

During that press conference, Negeri Sembilan PAS chief Mohd Taufek Abdul Ghani accused Mohamad of trying to blame the local Orang Asli community for illegal logging in Miku.

According to Taufek, Mohamad spoke about illegal logging during at a state assembly session in August 2012. He said the culprits in Miku were Orang Asli, Taufek added. PAS President Abdul Hadi Awang, who was at Tuesday's press conference, said it was doubtful that the Orang Asli had the resources to carry out the large-scale logging going on in Miku.

Speaking about the clone project in the Johol reserve, Mohamad said it would increase the income of Orang Asli in Kampung Bari and Kampung Charik. More than 200 families were expected to benefit, he added.

"The project is in accordance with 68th National Land Council decision, which allows 5% of the permanent forest reserve to be developed for forest plantation projects," he said.

"The logging was done legally and the license was given to the contractor and approval was given to the Negeri Sembilan Orang Asli Development Department as the responsible agency.

"The project involves 410 hectares out of 155, 000 hectares of forest reserve. In fact the party developing the project is the Orang Asli Cooperative."

The conversion of natural forests to latex-timber clone plantations is a controversial issue. Environmentalists say it destroys an area's natural biodiversity and ecology and could wipe out endemic species.

[MTCS Johor FMU]

### **Seletar tribe files class action suit over land encroachment**

**Malaysiakini, Friday, Dec 28, 2012**

One hundred and eighty-eight Orang Asli from the Seletar tribe have started a class action suit against the state of Johor and 12 other parties to stop encroachment on their native customary land. They filed their originating summons at the Johor Baru High Court on Wednesday.

"Our native customary land that we live on since generations has and is being encroached upon by many irresponsible parties. Even after years of complaining to the state government, their oral promises to us remain unfulfilled in black and white," lamented the group in a statement.

Among the parties named were the Iskandar Region Development Authority and the Johor Land and Minerals Office. The Seletar tribe was represented by Salim Palon (Kg Sg Temun chief), Mat Inder (Kg Bakar Batu representative) and Edy Salim (Kg Sg Temun representative).

Legal counsel K Mohan from K Mohan & Co acted on their behalf. The group said that the class action suit was done as a last resort since their repeated complaints to the authorities have gone not only unheeded, but they had seen more encroachment into their lands.

Despite being promised action to stop their land from being encroached upon, they accused the state of not only doing nothing to stop it but of transferring parcels of native land to third parties without the tribe's knowledge.

[MTCS Perak FMU]

### **Lenggong orang asli want timber harvesting stopped**

Malay Mail, Wednesday, March 20, 2013

by Reena Raj

Location:

IPOH

**STOP LOGGING:** Villagers from Kampung Air Bah Sawa protest to end timber harvesting activities. Kampung Air Bah Sawa residents in the Bintang Hijau forest reserve claimed the timber harvesting activities had affected their livelihood and food supply.

A total of 42 villagers of the Lanok sub-group handed a memorandum to the menteri besar's special officer in charge of orang asli matters, Panjang Ali, at the state secretariat yesterday.

Their spokesman, Adnan Panjang, said a private company started logging the area early this month after being given a permit by the state government.

"There are 250 people in our village and since logging started, our income and food supply have been effected," said Adnan.

He said they had also sent a memorandum to Prime Minister Datuk Seri Najib Razak in 2011 requesting the land be gazetted as a "native territory" but had not received a reply.

"The logging was allowed without taking into consideration of our well-being or consultation." Adnan said the Perak Forestry Department only called the community and state Orang Asli Development Department (Jakoa) to discuss the matter after villagers complained.

"We seek the state government to stop the logging project for the sake of our well-being."

When contacted, state forestry director Datuk Roslan Ariffin said the state government had acted within the law and issued the logging permit as the area was a gazetted production area.

He said the site was located far from the village and the logging activities did not affect the residents' roaming area.

## Annex VIII Overview of main differences between MC&I(2002) and MC&I(Natural Forest)

### Introduction

The table below compares the relevant P&Cs of MTCS (MC&I 2002) with the relevant P&Cs of the MTCS (Natural Forest) with regard to the issues: indigenous peoples and local communities (and the related issue of stakeholder involvement in the standard development), conversion and maps. The table further compares these relevant P&Cs of the MTCS (Natural Forest) with the relevant TPAS criterion and TPAC's assessment of the corresponding MTCS MC&I(2002) criteria. Both analyses are presented in the last column (in different colors).

### Further explanation of the table

- The Netherlands TPAS criteria are more general in nature and they apply to several MTCS criteria. In order to be complete, in the first row all those MTCS criteria that were assessed by TPAC as being relevant under the same TPAS criterion are included.
  - o When these criteria are unchanged in the MC&I(Natural Forest) they are not repeated in the second row.
- To be even more complete all those criteria that were assessed as not equivalent by TPAC are also included in the first row.
  - o When these criteria are unchanged in the MC&I(Natural Forest) they are not repeated in the second row.

Three types of structural improvements in the new standard are not reflected in the table. These are:

1. The wording **shall respect** is changed throughout the whole new standard into **shall comply**, which is a stronger wording.
2. The word **should** is replaced by **shall** throughout the whole new standard.
3. Many criteria in the old standard had three lists of verifiers, one for each of the three Malaysian states. These differences between the Malaysian states are taken away throughout the whole new standard.

MC&I(2002)	MC&I(Natural Forest)	TPAC		Comments and analysis
		TPAC's assessment of the MC&I(2002) criterion: = : Equivalent ≈ : Partially equivalent ≠ : Not equivalent 0 : Not present		<ul style="list-style-type: none"> <li>- <i>Comment to the change from MC&amp;I(2002) to MC&amp;I(Natural Forest)</i></li> <li>- <b>Analysis of MC&amp;I(Natural Forest) criterion against TPAC Assessment</b></li> </ul>
RIGHTS OF INDIGENOUS PEOPLES AND LOCAL COMMUNITIES				
1.1 Forest management shall respect all national and local laws and administrative requirements  1.3 [List per state: no UNDRIP]	1.1 Forest management shall comply with all applicable federal, state and local laws and administrative requirements.  1.3 [List for all 3 states: including UNDRIP]  <i>Verifier added:</i> Record and outcome of interview with Forest Manager on their awareness on forest related binding international agreements	C 1.3. Legal and regulatory obligations that apply to the forest management unit, including international agreements, are fulfilled. <i>Guidance: International Agreements pertain in particular [CBD, CITES,, ILO and the UNDRIP]</i>	=	<i>UNDRIP is added to the list of agreements that must be fulfilled.</i>  <i>The added verifier is a minor improvement: Makes the link between international agreements and FM tangible</i>  <b>Conclusion: TPAC has no reason to change judgment on this criterion.</b>
2.2 Local communities with legal or customary tenure or use rights shall maintain control, to the extent necessary to protect their rights or resources, over forest operations unless they delegate control with free and informed consent to other agencies.	2.2 Local communities with legal or customary tenure or use rights shall maintain control, to the extent necessary to protect their rights or resources, over forest operations unless they delegate control with free, prior and informed consent to other parties.	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.	≠	<i>Improvement: "free, <b>prior</b> and informed consent"</i>  This is one of the criteria-level assessments that TPAC revised during the appeal process. TPAC referred to 'recent audit reports' and 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
2.1. Clear evidence of long-term forest use rights to the land (e.g. land title, customary rights, or leased	(unchanged)			

<p>agreements) shall be demonstrated.</p> <p>4.4 Management planning and operations shall incorporate the results of evaluations of social impact. Consultations shall be maintained with people and groups directly affected by management operations.</p> <p>4.4.1 Forest managers should evaluate, through consultations, social impact of forest operations directly affecting communities, and the people and groups directly affected by the forest operations should have access to information on the results of the social impact evaluations.</p> <p>4.4.2 Forest planning and management practices should consider and incorporate the results of such evaluations.</p>				<p>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 recognised in MTCS certified forests, but are rather considered a favour to indigenous communities.” After an assessment of the licensing system (RTUs) TPAC makes the following final comment: “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><b>Conclusion: This is a crucial assessment of TPAC. The fact that the word ‘prior’ is added to the standard should not change the assessment. Relevant is: How is the TPAC interpretation now being implemented? Is there a change in the practice? What do audit/surveillance reports say? What do IPs say?</b></p>
<p>2.2. Local communities with legal or customary tenure or use rights shall maintain control, to the extent necessary to protect their rights or resources, over forest operations unless they delegate control with free and informed consent to other agencies.</p> <p>3.1. Indigenous peoples shall control</p>	(unchanged)	<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</i></p>	≈	<p>TPAC mentioned here: “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</p>

<p>forest management on their lands and territories unless they delegate control with free and informed consent to other agencies.</p> <p>4.4. Management planning and operations shall incorporate the results of evaluations of social impact. Consultations shall be maintained with people and groups directly affected by management operations.</p> <p>4.4.1: Forest managers should evaluate, through consultations, social impact of forest operations directly affecting communities, and the people and groups directly affected by the forest operations should have access to information on the results of the social impact evaluations.</p> <p>4.4.2: Forest planning and management practices should consider and incorporate the results of such evaluations.</p>		<p><i>communication with stakeholders takes place are considered to be indicators of effective communication.</i></p>		<p>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><b>Conclusion: Regarding this assessment it is important how SIAs are now being implemented. The NGOs believed that the assessment should have been: ≠ (not equivalent)</b></p>
<p>2.2. Local communities with legal or customary tenure or use rights shall maintain control, to the extent necessary to protect their rights or resources, over forest operations unless they delegate control with free and informed consent to other agencies.</p> <p>2.2.2 Forest managers should collaborate with holders of duly recognised legal or customary tenure or use rights within relevant federal, state and local laws, in activities that may affect such rights.</p> <p>3.1. Indigenous peoples shall control forest management on their lands and</p>	<p>2.2.2 Forest managers shall recognise, respect and collaborate with holders of duly recognised legal or customary tenure or use rights within relevant federal, state and local laws, in activities that may affect such rights.</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>≠</p>	<p>This was TPAC’s assessment in 2010: “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 C2.2, C3.1, C3.2</p>

<p>territories unless they delegate control with free and informed consent to other agencies.</p> <p>3.2. Forest management shall not threaten or diminish, either directly or indirectly, the resources or tenure rights of indigenous peoples.</p> <p>4.5. Appropriate mechanisms shall be employed for resolving grievances and for providing fair compensation in the case of loss or damage affecting the legal or customary rights, property, resources, or livelihoods of local peoples. Measures shall be taken to avoid such loss or damage.</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>and C4.5 are in fact invalidated, TPAS criterion C2.3 is inadequately addressed.”</p> <p>Indicator 2.2.2 still requires that customary rights are <u>duly recognized</u>. This suggests that MTCS still only applies to Orang Asli with a formally granted right by the state to control their traditional land .</p> <p><b>Conclusion: MTCS requirements are not changed. The question is if this is now treated differently in practice.</b></p>
<p>2.3.1 “Records of all disputes over tenure and use rights are maintained..”</p>	<p><i>(MTCC deleted this provision)</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 FMU will not be certified.</i></p>	<p>=</p>	<p><i>This indicator is deleted. The new standard is therefore weaker.</i>  <i>→ Reminder: the practice already did not adequately address conflicts.</i></p> <p><b>Conclusion: Unfortunately TPAC assessed criterion 2.3 as being equivalent, without any comments, probably because they did not investigate how disputes were handled in practice and the NGOs did not provide specific proof on this issue. This negative change could be used as extra argument that this criterion is not fulfilled.</b></p>
<p>3.1.2 Management of such lands is controlled by indigenous peoples unless they delegate control with free and informed consent to other agencies.</p>	<p>3.1.2 Management <b>and use</b> of such lands <b>and resources</b> are controlled by indigenous peoples unless they delegate control with free, <b>prior</b> and informed consent to other <b>parties</b>.</p>	<p>C 2.2 and C 2.3 (see above)</p>		<p><i>4 minor improvements</i></p> <p><b>Conclusion: These do not appear to be relevant since it all still depends on the recognition of the customary rights of Orang Asli.</b></p>
<p>4.5.2 Appropriate mechanisms within</p>	<p>4.5.2 Appropriate</p>			<p><i>Minor changes, In MC&amp;I(2002) the</i></p>

<p>national and regional legal frameworks are employed to resolve grievances involving loss or damage affecting the local people's legal or customary rights, property, resources, or their livelihoods, caused by forest operations</p>	<p>mechanisms are employed to expeditiously resolve grievances, and provide fair and equitable compensation for any loss or damage affecting the local communities' legal or customary rights, property, resources, or their livelihoods, caused by forest operations.</p>			<p>grievance mechanisms had to be <b>within national or regional legal frameworks</b>.</p> <p><b>Conclusion: This does not appear to be relevant since it all still depends on the recognition of the customary rights of Orang Asli and on the implementation of grievance mechanisms.</b></p>
<p><b>CONVERSION</b></p>				
<p>6.10.1 Conversion of forest area to plantations, consistent with the provisions of relevant national and regional legal frameworks and policies, should provide substantial, additional, secure and long term benefits across the forest management unit.</p> <p>6.10.2 Conversion of forest area to non-forest land uses, consistent with the provisions of relevant national and regional legal frameworks and policies, should provide higher economic values as compared to its original use, in the overall context of the need for socio-economic development of the country.</p> <p>MC&amp;I 2/2010 3.2 In situations where forest plantations are established within the FMU, during the audit under the MC&amp;I(2002):</p> <p>a) the FMU shall be required to provide information and statistics</p>	<p>6.10.1 The forest manager shall ensure that conversion from natural forest to forest plantations or non-forest use:</p> <p>a) Shall not include any High Conservation Value Forest areas; and</p> <p>b) Covers a very limited portion* of the FMU and shall enable clear, substantial, additional, secure, long term conservation, economic and social benefits across the FMU</p> <p>*"A limited portion" is defined as:</p> <ul style="list-style-type: none"> <li>• not more than 2.5% of the total area of the FMU in the first 3 years;</li> <li>• not more than 1.5% for the subsequent 2 years; and</li> <li>• not more than 1% for the next subsequent 2 years.</li> </ul> <p>This definition may be modified in the next review process of this standard.</p>	<p>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><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 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 forest.</i></p>	<p>≠</p>	<p>The most important change is the definition of what is considered acceptable conversion, whereas before this was very unclear. But the definition can be changed which makes it again unclear for the future.</p> <p>The allowed conversion is in itself not in conformity with TPAS as it does not mention justified exceptional circumstances. It simply allows 5% conversion in the first 7 years.</p> <p>There are no EIAs or SIAs available from MTCC which demonstrate that 'conversion provides or enables substantial, additional, secure and long term benefits across the forest management unit'.</p> <ul style="list-style-type: none"> <li>• It should be reminded that in practice conversion has always taken place in MTCS certified forests but could not very well be monitored because of a lack of transparency. The NGO report <i>Rubbery certification</i> (April 2010)</li> </ul>

<p>with regard to the extent of the forest plantations as well as any plans for future conversion of the PRF within the FMU to forest plantations and/or non-forest land uses. Such information and statistics provided by the FMU shall be included in the audit report; and</p> <p>b) the FMU shall be assessed for compliance in relation to Criterion 6.10 (b) which requires that the conversion does not occur on high conservation value forest areas; and Criterion 6.10 (c) which requires that the conversion will enable clear, substantial, additional, secure, long-term conservation benefits across the forest management unit.</p>	<p>6.10.2 The forest manager shall have evidence of necessary approval for the conversion, in line with applicable laws and policies.</p>		<p>included a long list of well-researched conversion-cases.</p> <ul style="list-style-type: none"> <li>• In 2009/10, MTCC started to use the argument that de-gazettement is not conversion because it is not the forest manager's fault. TPAC accepted this argument in the first instance, but rejected it in the revised judgment.</li> <li>• MY Minister for Plantations, Mr. Dompok, said in his meeting with Deputy-Minister Atsma on 17 November 2010 "that conversion decisions were made by the respective State authorities, and that the MTCS is not in a position to prevent such conversion (..)". The Deputy-Minister then made agreement that conversion areas should be excluded from the certified forests (which is not in conformity with TPAS criterion!)</li> </ul> <p><b>Conclusion:</b></p> <ul style="list-style-type: none"> <li>• <b>New standard should in itself be a reason for TPAC to continue the same judgment on this criterion.</b></li> <li>• <b>TPAC should also argue that the Netherlands Malaysian agreement on this point was not in conformity with the TPAS criterion.</b></li> </ul>
<p><b>Additional remark: In its revised final assessment "TPAC does note that a <i>coding system</i> prevents that timber resulting from conversion enters the chain of custody as SFM certified." This coding system is a direct response from MTCC to concerns from TPAC in 2009. But MTCC has never</b></p>			

delivered any proof that this coding system does in fact work.				
MAPS				
<p>7.4. While respecting the confidentiality of information, forest managers shall make publicly available a summary of the primary elements of the management plan, including those listed in Criterion 7.1.</p> <p>7.1. The management plan and supporting documents shall provide:-</p> <ul style="list-style-type: none"> <li>a. Management objectives.</li> <li>b. Description of the forest resources to be managed, environmental limitations, land use and ownership status, socio-economic conditions, and a profile of adjacent lands.</li> <li>c. Description of silvicultural and/or other management system, based on the ecology of the forest in question and information gathered through resource inventories.</li> <li>d. Rationale for rate of annual harvest and species selection.</li> <li>e. Provisions for monitoring of forest growth and dynamics.</li> <li>f. Environmental safeguards based on environmental assessments.</li> <li>g. Plans for the identification and protection of rare, threatened and endangered species.</li> <li>h. Maps describing the forest resource base including protected areas, planned management activities and land ownership.</li> <li>i. Description and justification of harvesting techniques and equipment to be used.</li> </ul> <p>8.5. While respecting the</p>	(unchanged)	<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 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>This was TPAC’s assessment in 2010: “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. 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>Remind that MTCC repeated in the MY-NL meeting on 17 November 2010 that “all relevant maps (criterion 2.4) 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.”</p> <p><b>Conclusion: The standard did not change on this point. In the appeal procedure it became clear that MTCC then still did not fulfil this part of the Netherlands Malaysian agreement. The question is if MTCC</b></p>

<p>confidentiality of information, forest managers shall make publicly available a summary of the results of monitoring indicators, including those listed in Criterion 8.2.</p> <p>8.2. Forest management should include the research and data collection needed to monitor, at a minimum, the following indicators:</p> <p>a. Yield of all forest products harvested.</p> <p>b. Growth rates, regeneration and condition of the forest.</p> <p>c. Composition and observed changes in the flora and fauna.</p> <p>d. Environmental and social impacts of harvesting and other operations.</p> <p>e. Costs, productivity, and efficiency of forest management.</p>				<p><b>now made relevant maps publicly available.</b></p>
<p><b>STANDARD DEVELOPMENT AND APPLICATION</b></p>				
		<p>Stakeholder input: C 1.2. The standard development body comprises the relevant interested groups that serve the economic, social and environmental interests without undue dominance of one interest.</p>	<p>≈</p>	<p>TPAC's assessment in 2010 re. C1.2 was: "TPAC concludes that the criterion is not fully addressed as the majority of the Orang Asli organisations have not participated in the standard setting process that started in 2001 and led to the currently used standard MC&amp;I(2002). The Committee does note that the Orang Asli organisations have been invited and participated the first part of the standard setting process."</p>
		<p>C 1.4. The development of the standard takes place with input of the relevant stakeholders. Potential limitations for certain groups such as indigenous peoples and small forest owners to contribute directly are taken into account.</p>	<p>≈</p>	<p>TPAC's assessment in 2010 re. C1.4 was: "Limitations of certain groups such as indigenous peoples are not specifically taken into account."</p> <p>The development of the MC&amp;I(Natural</p>

				<p>Forest) standard again failed to include relevant stakeholders as demonstrated in the NGO report: <i>Analysis of representation in present Malaysian Timber Certification Scheme (MTCS) Review Panel, 30 June 2010.</i></p> <p><b>Conclusion: This should be reason for TPAC to judge this now as non-conform TPAS.</b></p>
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## Annex IX: quick review of key concerns coverage in surveillance reports

(Based on auditor surveillance reports since February 2011)

Question	Terengganu	Pahang	Johor	Selangor	Perak	Kelantan	Kedah	N. Sembilan
1. Did the forest manager identify Orang Asli within the FMU?	Yes. "Reserves and villages located in the fringes of the FMU"	Yes	Yes (in or outside FMU not clear)	Not clear	Not clear	Not clear	Not clear	Not clear
2. Did the forest manager confer and agree on what areas they traditionally use, including sites of significant importance to them?	Yes. FD now mapped all significant sites. "there is room for more surveys"	Regular consultations	Inconsistency triggers minor CAR; new procedure requires social impact survey prior to logging	Regular formal and informal consultations	Not clear. OFI 'records of consultation not kept'	Not clear	Not clear	Not clear
3. Did the forest manager and indigenous peoples interact and agree on how these sites are to be managed, both by the community and forest manager?	Examples of interaction given; OA are allowed to collect NTFPs for subsistence. Commercial extraction is subject to a license and fees/taxes	Yes, but sites are only partially mapped	See Terengganu	Not clear	Not clear	Not clear	Not clear	Not clear

4. Does this lead to respect for customary rights in practice, even though those rights are not formally recognized?	It is claimed so. "The issue of free and informed consent with regard to management of PRF does not arise"	Unclear. This report states that (in one case) Pahang Forestry had failed to oversee logging contractors that did not abide by the free, prior and informed consent criteria	Minor CAR for inconsistent identification of special sites	Not clear	Not clear	Not clear	Not clear	Not clear
5. Are areas scheduled for conversion excluded from the FMU?	No. Total conversion: 22,536 ha (exotic tree plantations and a dam reservoir)	Yes. Total conversion 38,075 ha (tree plantations). Net reduction of FMU size: 1,525ha	Yes. 43,859 ha tree plantations. Report also gives data for 2 minor excisions	Yes. Planned conversion prior to the guidance: 11,381ha excluded	No	Yes (one-quarter of FMU removed from certified area)	No	No
	Area certified in 2010: 521,582 ha	Area certified in 2010: 1,562,496 ha	Area certified in 2010: 397,392 ha	Area certified in 2010: 130,640 ha	Area certified in 2010: 991,436 ha	Area certified in 2009: 623,849 ha	Area certified in 2010: 307,046 ha	Area certified in 2010: 155,531 ha
	Area certified in 2011: 521,582 ha	Area certified in 2011: 1,524,827 ha	Area certified in 2011: 351,771 ha	Area certified in 2011: 238,747 ha	Area certified in 2011: 991,433 ha	Area certified in 2011: 424,497 ha.	Area certified in 2011: 307,046 ha	Area certified in 2011: 155,531 ha

## Notes

- <sup>1</sup> Letter of ministry of Infrastructure and Environment to SMK dd 6 May 2013
- <sup>2</sup> For more information on this judgment see: <http://indigenouspeoples.nl/our-issues/timber/more-info>
- <sup>3</sup> <http://www.smk.nl/Public/TPAC%20press%20releases/Board%20of%20Appeal%20decides%20on%20appeal%20MTCS-NL.pdf>
- <sup>4</sup> The view and concerns of Greenpeace c.s. regarding this advice request have been expressed in a letter of Van den Biesen Klooststra advocaten to Deputy-Minister Mansveld, dated 30 May 2013.
- <sup>5</sup> MC&I (Natural Forest); Intro; p.i
- <sup>6</sup> Letter MTCC to SRC member Mr. Yeap; 09 January 2012.
- <sup>7</sup> G. Benjamin and D. Bradley (1981). Peninsular Malaysia, Andaman and Nicobar Islands. In: Wurm, S.A. and S. Hattori, (Eds.): Language Atlas of the Pacific Area. Australian Academy of the Humanities, Canberra.
- <sup>8</sup> Forestry Department Peninsular Malaysia Annual Report 2011
- <sup>9</sup> Department of Aboriginal Peoples Affairs Peninsular Malaysia Annual Report 2010
- <sup>10</sup> Government of Perak Gazette 7 March 2012
- <sup>11</sup> Department of Aboriginal Peoples Affairs Peninsular Malaysia Annual Report 2010
- <sup>12</sup> Previous reports stated that Kelantan had 0.16 ha reserved under Act 134.
- <sup>13</sup> Forest Rules 1987 (J.P.U. 18/88); Forest Rules 1989 (K.P.U. 8/89, 10/89), Forest Rules: Miscellaneous Fees (K.P.U. 9/90); Forest Rules 1986 (Kn.P.U. 17/87); Forest Rules (Negeri Sembilan) 1992 (N.S.P.U. 21/92); Forest Rules 1987 (Phg.P.U. 20/87); Forest Rules 1988 (Pk.P.U. 39/89); Perlis Forest Rules 1994 (Ps.P.U. 5/95), Forest (State Park) Rules (Perlis) 2003; Forest Rules 1988 (Sel.P.U. 29/88); Forest Rules 1988 (Tr.P.U. 5/88).
- <sup>14</sup> This section is paraphrased, the original reads as follows:-  
Part III THE CONSTITUTION OF PERMANENT RESERVED FORESTS
- <sup>8</sup>. For the purposes of constituting any land a permanent reserved forest under section 7 of the Act, the following procedure shall be followed:¶ (a) the Director shall submit to the Director of Lands and Mines the proposal to constitute a permanent reserved forest which shall contain a short description of the area together with the relevant plans showing the external boundaries of the area;¶ (b) the Director of Lands and Mines upon receipt of the proposal from the Director under paragraph (a), shall within 30 days thereof refer the proposal to the relevant departments and agencies concerned for their comments and require that such comments be submitted to him within 60 days;¶ (c) the Director of Lands and Mines shall within 30 days of the receipt of all comments required under paragraph (b) prepare and submit a report on the proposal to the State Authority;¶ (d) the State Authority shall then consider the proposal referred to it and if it accepts the proposal, it shall accordingly constitute such land a permanent reserved forest by publishing in the Gazette a notification thereto.
- <sup>15</sup> Probably includes 2341 ha gazetted under the National Land Code in March 2012
- <sup>16</sup> Rough estimate based on the total area of forest (JPSM 2011 Annual Report) in states occupied by significant numbers of Orang Asli. The states of Terengganu, Kedah, Perlis and Penang are excluded since there are few Orang Asli claims in these states.
- <sup>17</sup> G. Benjamin and D. Bradley (1981). Peninsular Malaysia, Andaman and Nicobar Islands. In: Wurm, S.A. and S. Hattori, (Eds.): Language Atlas of the Pacific Area. Australian Academy of the Humanities, Canberra.
- <sup>18</sup> State Structure Plans (c. 2006), Department of Town and Country Planning, Peninsular Malaysia.
- <sup>19</sup> Letter from Forestry Department Peninsular Malaysia to Department for Orang Asli Development dated 12 April 2012 (Ref: JH(S) 460 Jld.2(14)).
- <sup>20</sup> FDP (2012)
- <sup>21</sup> Ibid.
- <sup>22</sup> Kelantan State Forestry Department, 2011 (quoted on 3 November 2012 by the RubberForests blog, <http://rubberforests.wordpress.com/>)
- <sup>23</sup> See report: Analysis of representation in present Malaysian Timber Certification Scheme (MTCS) Review Panel 30 June 2010.
- <sup>24</sup> Source: <http://www.pefcregs.info/> (search function applied); AAC data: <http://www.mtcc.com.my/wp-content/uploads/2013/02/Certification-Workshop-2013-Responsible-Procurement-and-Purchasing-in-Asia.pdf>
- <sup>25</sup> These guidelines are still referred to on the MTCC website as "Certification standard document" but it should be noted that the guidelines refer to the MC&I 2002 and not to the MC&I (Natural Forest) standard. The analysis presented here is largely based on the analysis previously published in: MTCC, Conversion and Indigenous Peoples, memorandum by Greenpeace, Netherlands Centre for Indigenous Peoples, ICCO, Vereniging Milieudefensie and Wereld Natuur Fonds, 10 June 2011, p. 14-15
- <sup>26</sup> Excluding the FMU in Sabah.
- <sup>27</sup> Institute of Tropical Forestry and Forest Products (2012) *Guidelines and Procedures for Social Impact Assessment and Monitoring of Forest Management Operations (Peninsular Malaysia)*, Universiti Putra Malaysia
- <sup>28</sup> "Based on the Preliminary working paper on the principle of Free, Prior and Informed Consent of Indigenous Peoples (...) (E/CN.4/Sub.2/AC.4/2004/4 8 July 2004) of the 22nd Session of the United Nations Commission on Human Rights, Sub-commission on the Promotion and Protection of Human Rights, Working Group on Indigenous Populations, 19-23 July 2004."
- <sup>29</sup> Please see for an up-to-date reflection on this issue, the new FSC FPIC Guideline: FSC guidelines for the implementation of the right to free, prior and informed consent (FPIC); Version 1, 30 October 2012: <https://ic.fsc.org/guides-manuals.343.htm>
- <sup>30</sup> Lim Hin Fui et al. (2002). Management of human settlement in Air Banun Regroupment Scheme in Hulu Perak. In: Jamaluddin, M.J. et al. (Eds.) Proceedings of the international conference on environmental management: ten years after Rio. Universiti Kebangsaan Malaysia.
- <sup>31</sup> Lim Hin Fui et al. (2002). Management of human settlement in Air Banun Regroupment Scheme in Hulu Perak. In: Jamaluddin, M.J. et al. (Eds.) Proceedings of the international conference on environmental management: ten years after Rio. Universiti Kebangsaan Malaysia.

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- <sup>32</sup> Lai, I. (2012) "Orang asli in dire straits", The Star (Malaysia), 28 December.
- <sup>33</sup> S.M. Mohamed Idris (2012). "An Alarming Practice". Letter to the Editor. The Star (Malaysia), 31 August.
- <sup>34</sup> SUHAKAM (2013). Report on Indigenous Rights in Malaysia. Human Rights Commission of Malaysia (SUHAKAM). <http://sarawakreport.org/suhakam/suhakam-chapter8.html>
- <sup>35</sup> Rizalman Hammim (2012). Trampled to death. New Straits Times (Malaysia), 28 November.
- <sup>36</sup> Aw, N. (2013). Orang Asli dept: No control over logging, pollution. Malaysiakini, 7 January.
- <sup>37</sup> Cheng, N. and Foo, N. (2012). Templer Park under threat. The Star (Malaysia), November 20.
- <sup>38</sup> These guidelines are still referred to on the MTCC website as "Certification standard document" but it should be noted that the guidelines refer to the MC&I 2002 and not to the MC&I(Natural Forest) standard. The analysis presented here was previously published in: MTCC, Conversion and Indigenous Peoples, memorandum by Greenpeace, Netherlands Centre for Indigenous Peoples, ICCO, Vereniging Milieudefensie and Wereld Natuur Fonds, 10 June 2011, p. 10-13.
- <sup>39</sup> Excluding the FMU in Sabah.
- <sup>40</sup> Conditions in MC&I(2002): "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, longterm conservation benefits across the forest management unit."
- <sup>41</sup> 'Forest plantations' are 'tree plantations' or 'planted forests'. This includes rubber but not – yet – oil palm.
- <sup>42</sup> These guidelines are still referred to on the MTCC website as "Certification standard document" but it should be noted that the guidelines refer to the MC&I 2002 and not to the MC&I(Natural Forest) standard. The analysis presented here was previously published in: MTCC, Conversion and Indigenous Peoples, memorandum by Greenpeace, Netherlands Centre for Indigenous Peoples, ICCO, Vereniging Milieudefensie and Wereld Natuur Fonds, 10 June 2011, p. 13
- <sup>43</sup> In the SIRIM Kelantan Surveillance report, a comment was made about how NGOs use satellite imagery. The auditors not only confused concern over planned forest conversion with "encroachment", the comment also suggests a subtle level of hostility to third party monitoring of FMU management: "there was still a need to have a more effective monitoring system in place to control encroachment activities. Many NGOs who were concerned with illegal encroachment and loss of forest lands had been using satellite data for more efficient monitoring. Therefore, the KSFJ should also be using more effective approaches of controlling encroachment through periodic monitoring such as using satellite imagery. Such an approach would also be useful in countering negative reports by external NGOs by providing a more accurate account on changes of the forest resources based on satellite data."