

Formal complaint by Greenpeace
against SODEFOR's association with FSC

Complaints Panel Report

Albert Kwokwo Barume

Emmanuel Heuse

Saskia Ozinga

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Executive summary

On 13th of May 2011, a formal complaint has been put forward by Greenpeace International to FSC concerning (i) certificates which had just been awarded and subsequently withdrawn from the logging company SODEFOR operating in the Democratic Republic of Congo, (ii) FSC's association with SODEFOR, and (iii) the competence of the certification body SmartWood who had issued the certificates ⁽¹⁾.

In their complaint (page 1), Greenpeace makes it clear that their goal actually goes beyond the mere suspension of SODEFOR's certificates: "To avoid further damage to its reputation in the marketplace it is clear that FSC must move swiftly to disassociate with SODEFOR/NST and halt any further certification in the Congo Basin until the necessary preconditions for enabling credible certification are met."

Furthermore, Greenpeace demands FSC [iii] to suspend SmartWood from operating in DRC. "Given the extremely poor performance of SmartWood's assessment of SODEFOR's operations supplying controlled wood and subsequently managing and label FSC product under its CoC certificate, we recommend that FSC/ASI considers suspending SmartWood from operating in DRC" (page 6).

Based on the evidence gathered, although recognized as necessarily incomplete, the panel has come to the following position:

The panel shares Greenpeace's concerns over the efficiency of FSC certification in regions rife with governance weaknesses like Congo Basin. The panel also shares Greenpeace's concern about the certificate - prematurely - awarded to SODEFOR by SmartWood and the way SmartWood has operated. Last, the panel shares Greenpeace's concern about the human rights violations related to SODEFOR's operations and the company's knowledge of the Congolese Government's records on the issue. The panel could not, however, establish beyond reasonable doubt the company's responsibility in the alleged human rights violations.

The panel does not share Greenpeace's concern that FSC's reputation is being damaged by association with SODEFOR (without SODEFOR having a certificate) nor that all further FSC certification in the Congo Basin should be halted immediately.

Although the panel shares Greenpeace's concerns over FSC certification in regions without good governance, the panel believes that FSC certification can in principle, if executed in line with all FSC policies and procedures, be a force for good. The Congo Basin is not fundamentally different to other forest areas with severe governance problems.

In the very case of SODEFOR, limited – but not insignificant – FSC driven progress has been documented by several independent partners, as well as witnessed by one panel member,

⁽¹⁾ See annex 1 for Greenpeace formal complaint.

before and after the awarding and the suspension of certificates by SmartWood. Supporting documents illustrating this progress are supplied in the annexes of the report.

Although the panel did not have the time nor the resources to carry out extensive field investigations, the written evidence produced and anecdotal evidence gathered suggest there is no clear demand from local people or local NGOs for the halting of all SODEFOR's logging operations.

There is, however, a clear demand for SODEFOR to change its practices and fully respect local peoples' rights in line with FSC's Policy of Association. FSC is also perceived, at least by some, as a chance to ensure SODEFOR's practices will improve. This being said, granting COC and CW certificates to SODEFOR was certainly a premature decision, and this raises serious questions over the working of the Certification Body involved.

Instead of demanding FSC to completely disassociate itself with SODEFOR, the panel therefore believes that the outcome of the formal complaint should rather be to strengthen the changes recently initiated in SODEFOR's practices (see chapter 5), most notably through the full and effective implementation of all relevant FSC policies and standards.

Furthermore, considering the serious human rights abuses which took place in the context of SODEFOR operations and the ongoing conflicts with local people, the panel suggests the establishment of a process mediated preferably by local NGOs, or an independent actor chosen by all parties, to ensure SODEFOR discusses all grievances with local communities in or near its concession areas and come to an agreed and accepted way forward. Without such a process it is difficult to see SODEFOR ever regaining an FSC certificate.

The panel therefore recommends:

- (1) For the SODEFOR certificate to remain suspended until SODEFOR has fully met all FSC's requirements;
- (2) For FSC not to disassociate itself from SODEFOR at this stage but to start a process, involving local communities and DRC NGOs (with international support if needed) to bring about required changes to SODEFOR's practices to ensure SODEFOR will meet all requirements of FSC's Policy of Association;
- (3) For SmartWood to be suspended from operating in the DRC, and for FSC to look into the operations of SmartWood in the wider Congo Basin (see chapter 4).

1. The complaint

On 13th of May 2011, a formal complaint was put forward by Greenpeace International to FSC concerning (i) certificates which had just been awarded and subsequently withdrawn from the logging company SODEFOR operating in the Democratic Republic of Congo, (ii) FSC's association with SODEFOR, and (iii) the competence of the certification body SmartWood who had issued the certificates ⁽²⁾.

On the 26th of January 2011, SODEFOR had been awarded CoC and CW certificates by SmartWood for its timber sourced in its logging permits nr 22/03, 28/03 and 30/03 ⁽³⁾. In the prospect of the audit, SODEFOR had (on the 8th of August 2010) signed a license agreement with FSC through which it committed to respect the FSC values embodied, notably, in FSC Policy for the Association of Organizations ⁽⁴⁾.

In a corrective action request verification report issued on the 18th of April 2011, SmartWood estimated that some of the corrective action requests identified as minor during its October audit, published in December, were actually major ones, and that the certificates they had awarded SODEFOR less than 4 months before had therefore to be suspended ⁽⁵⁾.

Greenpeace International put forward their formal complaint to FSC on the 13th of May despite the suspension of the certificates. Informally, Greenpeace claims that SmartWood was informed of Greenpeace's intention to "denounce" the certificates and that SmartWood had therefore decided to suspend the certificates in a move to stave off critics.

In their complaint (page 1), Greenpeace makes it clear that their goal actually goes beyond the mere suspension of SODEFOR's certificates. The complaint indeed centers on SODEFOR's alleged breach of FSC's Policy of Association (see chapter 2), and on the lessons that should be learned from SODEFOR's case in the wider context of the Congo Basin (see chapter 3). According to Greenpeace: 'FSC must [1] move swiftly to disassociate with SODEFOR/NST and [2] halt any further certification in the Congo Basin until the necessary preconditions for enabling credible certification are met'.

Furthermore, Greenpeace also demands FSC to suspend SmartWood from operating in DRC. 'Given the extremely poor performance of SmartWood's assessment of SODEFOR's operations supplying controlled wood and subsequently managing and label FSC product under its CoC certificate, we recommend that FSC/ASI considers suspending SmartWood from operating in DRC' (page 6).

⁽²⁾ See annex 1 for Greenpeace formal complaint.

⁽³⁾ See a map of SODEFOR's logging permits in annex 2 and the audit report in annex 5.

⁽⁴⁾ See annex 3 for the license agreement between SODEFOR and FSC and annex 4 for the Policy of Association.

⁽⁵⁾ See the corrective action request verification report in annex 6.

2. Assessing SODEFOR's alleged breaches of FSC's Policy of Association

2.1 Grounds for Greenpeace complaint and panel's role

Greenpeace complaint centers on SODEFOR's alleged breaches of FSC's Policy of Association, which is a policy embodied in the license agreement signed between all applicants to the FSC scheme and FSC central offices in Bonn.

Any company willing to engage into a certification process with FSC must begin – before requesting an audit by a certification body – by signing such a license agreement with FSC. This agreement describes, among others, how the granting and maintenance of FSC trademark licenses is ruled, before a certificate is issued by a certification body, while a certificate is in force or after it has been suspended.

This license agreement is concluded for an unlimited duration. What is important is that through the signing of this agreement, the applicant commits to fully respect all FSC's requirements - which include those described in the FSC Policy for Association – even before being certified or after a certificate has been withdrawn.

The Policy of Association was developed in 2009 'to avoid FSC becoming associated with organizations or individuals that are involved in unacceptable forest related activities that could harm FSC's reputation and ultimately its ability to deliver on its mission'. According to this policy, FSC will only allow its association with organizations that are not directly or indirectly involved in the following unacceptable activities:

- a) Illegal logging or the trade in illegal wood or forest products
- b) Violation of traditional and human rights in forestry operations
- c) Destruction of high conservation values in forestry operations
- d) Significant conversion of forests to plantations or non-forest use
- e) Introduction of genetically modified organisms in forestry operations
- f) Violation of any of the ILO Core Conventions

As an initial step in its pursuit of FSC certification, SODEFOR concluded a license agreement with FSC on the 8th of August 2010. From then on, even prior to being granted an FSC certificate (controlled wood, chain of custody or sustainable forest management), SODEFOR was supposed to fully respect all the obligations referred to in the license agreement, including – and most notably - the requirements of the FSC Policy of Association listed above ⁽⁶⁾.

⁽⁶⁾ It must be noted however that these obligations are not explicitly spelled out in the license agreement signed by SODEFOR. The agreement just states that all FSC policies are part of the "certification requirements", and that these requirements are "deemed to be an integral part of the agreement" (art 5.1).

This lack of clarity concerning the obligations of the licensee even prior to the granting of any certificate are, to some extent, part of the problem. During discussions with a member of the panel in October 2011,

According to Greenpeace SODEFOR has repeatedly been in breach of three of the six unacceptable activities set by the policy: violation of traditional and human rights in forestry operations; destruction of high conservation values in forestry operations and violation of any of the core ILO conventions. Greenpeace has supplied its own evidences of cases of no compliance over a period of time ranging from 2006 to 2011, and demands that 'FSC should immediately disassociate itself from SODEFOR' (page 1).

According to FSC Guidelines for Panels Evaluating Complaints against the Policy for Association ⁽⁷⁾, the panel should be reviewing the original due diligence process, the formal complaint and the evidence presented; and contact the organisations to hear their position. The Guidance Note stipulates that: "The ultimate panel recommendation to disassociate should only be taken for high risk organizations with repeated instances of violations against the policy of association rather than in cases of isolated incidents. Flexibility should be built into the decision making process, i.e. timelines and conditions for rectifying violations should be proposed by the panel taking into account the seriousness of the violation' (page 5).

The guidelines further state that 'Together with the decision to disassociate, the FSC Board of Directors may specify a timeline and conditions for renewal of the association with FSC'.

In other words, the panel can recommend the FSC board to disassociate FSC from SODEFOR, which – if accepted by the board - may lead to a timeline and conditions for renewal of the company's association with FSC, which could be followed by certification. Or the panel can recommend the FSC Board not to disassociate FSC but to put clear recommendations and a timeline for improvements in place before re-issuing a certificate can be considered.

In the eyes of the panel there does not seem to be much difference between these two options. Hence, a decision one way or another way should be guided by expectations (or lack thereof) of SODEFOR's improvements and the reputational risks of SODEFOR's operations for the FSC.

The panel has therefore interpreted the guidelines in such a way that a decision for disassociation should not be taken lightly and only in those cases where there is a clear and imminent risk to the reputation of the FSC and/or in those cases where there is no reasonable reason to expect the company to improve its practices within a short time.

SODEFOR's certification officer said that he did not fully understand the requirements of the policy of association, let alone the possible consequences of non compliance and the possibility for third parties to "challenge" the association with FSC on that basis.

The obligation for certification bodies to check compliance with the requirements of the policy of association in the course of CoC audits only entered into force on October 1, 2011.

These important issues are discussed in the first section of the panel's recommendations.

⁽⁷⁾ See the guidelines in annex 7.

2.2 Evaluation of the claims and evidence presented by Greenpeace

The panel recognises that multiple (and sometimes dramatic) incidents have occurred concerning SODEFOR's operations in DRC. Some of these events – mostly linked to violations of traditional and human rights and violations of the core ILO Conventions – might involve SODEFOR's directly or indirectly, and could therefore be considered as breaches of FSC's Policy of Association.

In those cases, the core of the matter for the members of the panel has been to assess if SODEFOR's responsibility was clearly established in events singled out by Greenpeace, and if these events indeed resulted from deliberate decisions or actions by SODEFOR's management or staff.

It must be said that it is far from an easy task. Most – if not all – events and problems mentioned by the Greenpeace complaint have something to do with the complete impotence and unaccountability of state and public actors as witnessed across all social and economical activities in DRC. "Extracting" and evaluating SODEFOR's own responsibility in these events is therefore very difficult – if not impossible (see chapter 5). This indicates the problem of certification in failed or fragile states, further elaborated in chapter 3.

2.2.1 Violation of traditional and human rights in forestry operations

The events which took place in SODEFOR's logging site Mike 12 in January 2010 and their aftermath are presented by Greenpeace as the most striking evidence of SODEFOR's non compliance. These events have been extensively documented by four reports elaborated by Greenpeace (2 reports), by a coalition of NGOs led by WWF, and by SODEFOR ⁽⁸⁾. The facts include arrests and detention of a number of people, the death of Mr Georges NKAKA, and claims of traditional rights by community members over forest land exploited by SODEFOR.

A thorough analysis of these reports indicates that although SODEFOR is clearly to some extent implicated in these human rights abuses, the evidence is not sufficient to establish beyond reasonable doubt SODEFOR's responsibility and hence its breach of FSC's Policy of Association.

As a matter of fact, no other information or supporting documents than those provided in the four reports seem to be available. All spoken testimonies collected on the ground by one panel member in October 2011 refer to these reports, without providing any other evidence or proof. However, it is established that members of the Bakongo Groupement were arrested and detained for about 48 hours in a building (allegedly a container) belonging to SODEFOR under questionable conditions, for which several Congolese domestic laws could be of relevance ⁽⁹⁾.

⁽⁸⁾ See respectively annexes 8a, 8b, 9 and 10.

⁽⁹⁾ ORDONNANCE n° 344 du 17 septembre 1965 relatif au régime pénitentiaire. Article 48 states : 'Chaque prison, chaque camp de détention et chaque maison d'arrêt doit disposer d'installations hygiéniques' and ORDONNANCE 78-289 du 3 juillet 1978 relative à l'exercice des attributions d'officier et agents de police

The panel wishes to underscore and bring to the attention of FSC and SODEFOR, that even if the company may not have been directly responsible for the arrests and subsequent human rights violations, it should have been aware of the risks associated with providing means and resources to government officials with poor human rights records, as underlined by the Human Rights Council and by the UN General Secretary's Special Representative on Business and Human Rights.

The UN Special Representative underscores that a company must make sure that it does not "contribute to abuse through the relationships connected to their activities, such as with business partners, suppliers, State agencies, and other non-State actors" ⁽¹⁰⁾. In the same vein, the UN Special Representative indicates that "the corporate responsibility to respect human rights includes avoiding complicity... .. Complicity refers to indirect involvement by companies in human rights abuses - where the actual harm is committed by another party, including governments and non-State actors" ⁽¹¹⁾. He continues and underlines that "the legal interpretations of 'having knowledge' vary. When applied to companies, it might require that there be actual knowledge, or that the company 'should have known', that its actions or omissions would contribute to a human rights abuse. Knowledge may be inferred from both direct and circumstantial facts. The 'should have known' standard is what a company could reasonably be expected to know under the circumstances" ⁽¹²⁾.

There is no doubt that a number of human rights violations identified by Greenpeace have occurred and because of that, the Panel concludes that SODEFOR's operations should not have been certified in the first place.

Concerning the responsibility of SODEFOR in the human rights violations indicated above, the Panel is of the view that SODEFOR played a certain role in these conflicts and associated human rights violations. However, due to lack of enough evidence, the Panel is not in a position to say beyond reasonable doubt that the role played by SODEFOR in these human rights violations was sufficient enough to engage its legal responsibility, as provided for under international law and doctrine.

judiciaire près les juridictions de droit commun. Article 76 states : 'Les personnes gardées à vue ont le droit de se faire examiner par un médecin dès qu'elles en expriment le désir. Si le médecin constate qu'il a été exercé contre la personne gardée à vue des sévices ou mauvais traitements, il en fait rapport au procureur de la République'. The same law provides that 'l'officier de police judiciaire qui procède à une arrestation est tenu de prévenir immédiatement les membres de la famille de la personne arrêtée et doit veiller à ce que ses biens personnels soient en sûreté » and « les locaux de garde à vue doivent être salubres et suffisamment aérés'.

⁽¹⁰⁾ Human Rights Council, Protect, Respect and Remedy: a Framework for Business and Human Rights, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, Eighth Session, 7 April 2008, A/HRC/8/5, para. 57.

See <http://www2.ohchr.org/english/bodies/hrcouncil/8session/reports.htm>
or <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G08/128/61/PDF/G0812861.pdf?OpenElement>

⁽¹¹⁾ Idem, para 73.

⁽¹²⁾ Idem, para 79.

Chapter 5 illustrates the efforts carried out by SODEFOR in order to limit the occurrence and reduce the severity of conflicts with local communities. One could obviously assert that these efforts should be strengthened by SODEFOR (which is the opinion of the members of the panel).

2.2.2 Destruction of high conservation values in forestry operations

FSC's and Nepcon's own assessment states concerning DRC that 'currently it is not confirmed that a system is in place to ensure effective protection of the high conservation value forest areasand these areas can't be classified as a low risk'.

The Greenpeace complaint states that 'there is no evidence that SODEFOR is maintaining or enhancing HCVFs particularly if any precautionary approach framework is applied'. But documents provided to the panel by SODEFOR – which were not yet available by the time of the audit in October 2010, and were being elaborated when Greenpeace submitted their complaint – demonstrate that SODEFOR is taking the issue of HCVF in consideration (¹³).

To the knowledge of the panel, these documents constitute efforts towards the integration of HCVF in the management of logging operations. Although these documents could be strengthened, they show that SODEFOR is making an attempt in addressing this issue. This effort should be seen in the context of a country where very few companies are making an effort. Besides, SODEFOR has communicated it is eager to receive more guidance and advice on the additional practical steps it should take to better integrate the HCVF concept in their management and logging operations. A WWF workshop on that topic is expected to take place in Kinshasa in early 2012.

Therefore on this point, although the panel believes SODEFOR's practices do not allow for certification, there is no ground to call for FSC to disassociate itself from SODEFOR.

2.2.3 Violation of any of the core ILO conventions

Greenpeace's complaint refers to three 'major controversies relating to labour and workers rights'. The Panel understands that controversies concerning workers' claims over employment contracts, minimum wages and work conditions feature frequently in the DRC context. The panel could, however, not investigate these allegations and therefore could not assert whether or not the alleged accusations by workers reported by Greenpeace would amount to 'repeated instances of violations' of FSC's policy of association by SODEFOR.

2.2.4 Evidence of deliberate attempts to conceal violations

(¹³) See annexes 11a and 11b. See also the analysis of social and environmental impacts in annex 12 and the participatory mapping of HCVF in annex 20.

The FSC Guidelines for Panels Evaluating Complaints Against the Policy for Association further state that ‘evidence of deliberate attempts to conceal violations shall be grounds for consideration disassociation’. Greenpeace states that SODEFOR’s information about its registration is misleading as the company does not state it is registered in Lichtenstein, nor that Precious Woods has a minority stake in the company, nor that the Congolese State may be a minority shareholder.

The registration information provided by SODEFOR on its web site is indeed limited. But more detailed information is readily available to certification bodies and others (DRC administration, cooperation agencies, WWF, members of the panel...) ⁽¹⁴⁾.

Although it is true that no information is provided over the financial structure of the company (SODEFOR just mentions that it is owned by “foreign capital”), FSC requirements on this issue are not clear to the panel members. Clarifications on these requirements could usefully be integrated in the process leading to the license agreement (see recommendation n°6.2).

2.3 Conclusion

As mentioned above the panel has interpreted the FSC Guidelines in such a way that a decision for disassociation should not be taken lightly and only in those cases where there is a clear and imminent risk to the reputation of the FSC and/or in those cases where there is no reasonable reason to expect the company to improve its practices within a short time.

Taking into account the evidence available the panel believes the reputational risk for FSC is limited, in the absence of any certificate, and SODEFOR has indicated and shown willingness to improve its practices. There is therefore insufficient ground to call for disassociation.

⁽¹⁴⁾ See for instance annex 11b, page 4.

3. FSC certification in the Congo Basin

3.1. Limits of certification

Already in the beginning years of FSC the limits of certification as a tool to improve forest management were clearly recognised. The Certification Handbook by Steve Bass and Christopher Upton (1995) formulated these limitations quite clearly. It states that 'certification is a single-tool solution whose limitations should be recognized. The main limitations are (a) it cannot address policy and institutional failures; and (b) it cannot directly improve land-use decisions - it has to work within the scope of basic forest use and management decisions that have already been made. These limitations are a consequence of certification having to focus at the forest level. Hence certain policy requirements are, in effect prerequisites for certification to reach its full potential' (page 7).

The Congo Basin is a region where many of the policy requirements are not in place and hence where certification can never reach its full potential. In DRC specifically, many of the most basic policy and institutional requirements to make a state functional are missing. DRC is also a country with many and serious conflicts concerning land rights, which also has been apparent in this case. In that context industrial logging can easily aggravates these conflicts, as has also been apparent in this case. It is therefore not surprising that virtually all certificates that have been issued in the Congo Basin have been contested in one way or another. Furthermore after aiming to achieve certification in Cameroon in the late 90s, a team lead by WWF Belgium, concluded that certification was not possible in the absence of governance improvements first.

Any attempt towards certification should therefore be looked at carefully, assessed on whether the maximum possible impact would be sufficient to ever attain a certificate as well as limit the expectations of what certification can achieve, in line with the above.

The conclusion then has to be that only very committed companies, able and willing to act in a manner that goes against the 'normal' behavior of companies and able and willing to address endemic corruption in government institutions should be able to qualify for certification. Human rights abuses and lack of recognition of local peoples' tenure rights are a specifically widespread problem in the Congo Basin and any company aiming to get certified should first and foremost have a concrete plan and policies, developed in close cooperation with local communities how to ensure local people benefit from logging operations and have their rights recognised. International standards should always be a reference, as domestic laws and systems might be minimal or dysfunctional. This costs money and hence limits profits and hence makes certification even more difficult.

As Bass and Upton already noted, 'basic market, policy and institutional failures tend to either push groups into the forest, through marginalizing them in places outside the forest or to pull

groups into the forest, through attracting them into the forest by excess profits' (page 4). Therefore an increase in industrial logging in an environment without good governance, possibly spurred by certification could make an already bad situation worse. This is another reason to be very careful when assessing certification in the Congo Basin. Certification can and should never be a reason to increase industrial logging; certainly not in failed or fragile states.

Having said this, companies able and willing to make a difference should not be banned from trying to attain FSC certification. Therefore a blanket decision of no FSC certification in the Congo Basin, as argued by Greenpeace, is not considered helpful. Only if there were clear evidence that FSC certification in itself would lead to an increase in logging in countries with bad governance would such a position be justified.

In the case of the DRC, it is clear that only a limited number of logging companies are exposed to certification sensitive international markets. Furthermore there is a thriving informal logging sector which completely ignores sustainability and livelihoods. There is therefore no evidence that FSC certification in itself will lead to an increase in industrial logging.

3.2. Conclusion

The potential of certification in areas without good governance is very limited. FSC and its supporters, notably WWF, should clearly recognise this fact and not aim to dramatically increase the certified area in these regions nor pretend certification is a real solution towards improved forest management in these regions. This will only lead to more controversial certificates, further damage to FSC's reputation and further undermining the concept of certification.

Nonetheless, certification should remain a potential tool for companies that clearly stand out as wanting to change existing practices, that are able to recognise the governance failures around them and willing and able to address them – specifically concerning the problematic and contentious issues concerning land rights and benefit sharing with local communities. Therefore a blanket 'no FSC certification' in the Congo Basin is not helpful, but nor is the issuing of certificates to companies not meeting the FSC's standards as is currently the case.

4. Functioning of SmartWood

4.1. Lack of implementation of FSC's Controlled Wood Standard ⁽¹⁵⁾

As SODEFOR's certificate was a controlled wood certificate and a chain of custody certificate, FSC's Controlled Wood Standard and FSC's Chain of Custody Standard are of relevance. The Controlled Wood Standard states (Part 1. Section 1.1) that 'The company shall have a publicly available written policy commitment, endorsed by the most senior management level of the company, to implement its best efforts to avoid trading and sourcing wood or wood fiber (herein referred to as wood) from the following categories: a) Illegally harvested wood; b) Wood harvested in violation of traditional and civil rights; c) Wood harvested in forests where high conservation values are threatened by management activities; d) Wood harvested in forests being converted to plantations or non-forest use; e) Wood from forests in which genetically modified trees are planted'.

It is not clear to the panel that SODEFOR did have publicly available written policy commitments on these topics. We therefore assume they don't exist and hence, the company should not have been given a certificate. SmartWood should have pointed out the lack of these clear policy commitments.

Furthermore the standard states that (article2.1) 'The company shall have procedures and/or work instructions covering all the applicable elements specified in this standard'. Again these procedures have not been made available to the panel and it is unclear whether or not they exist from the SmartWood report. SmartWood should have pointed this out.

Last, the standard states (3.1 - 3.3) that the company should have specified the training requirements for all relevant staff as required to implement this standard and 'keep records of the training provided to staff in relation to implementation of this standard'. Considering the violations of the policy in terms of human rights abuses and possibly high conservation value forests that have occurred, it seems that staff was insufficiently trained to say the least. What the company requirements are to ensure there are no traditional and human rights violations, how they have trained staff to deal with human rights violations in their area, has not been provided to the panel. It has to be assumed from the SmartWood that such training has been minimal or even non-existent. Considering the existing conflicts in the area, this is a serious omission that should have been pointed out by SmartWood.

The new Chain of Custody Standard, which became operational in October 2011, has similar requirements laid out in Part One including 'all relevant staff shall demonstrate awareness of the organisation's procedures and 'competence in implementing the CoC management system' (1.1.2) as well as 'the organisation shall establish and implement a training plan, and keep records of training provided to staff' (1.3). This standard also states that the company shall

⁽¹⁵⁾ FSC-STD-40-005 (Version 2-1) EN

declare not to be directly *or indirectly* involved inviolation of traditional and human rights in forestry operations among others.

The panel concludes that SODEFOR has acted in clear violation of FSC's Controlled Wood Standard. Although the 2011 Chain of Custody Standard was not yet in force, if it had been, certification would have also be in violation of this standard. The panel concludes, as it has not seen any evidence by SmartWood that it has checked compliance against the Controlled Wood Standard that SmartWood's certification process is therefore not good enough. It is therefore a mystery to the panel how SmartWood could have provided SODEFOR with a CW and a COC certificate. This clearly does not reflect well on SmartWood's due diligence procedure.

4.2. Lack of understanding of the complicated situation in the Congo Basin

The audit report by Smartwood does not show any real understanding of the complications of the Congo Basin described above (see chapter 3) and does not show how SODEFOR is able to meet FSC standards in the absence of a functioning state.

4.3. Some peculiarities of the Smartwood audits

The SmartWood audit published on 20 December 2010 only finds minor corrective action requests, and notes that DAC 06/10 (referring to the Controlled Wood Standard's requirements) constitutes a minor corrective action request. However on the 18th of April, i.e. only four months later, a re-audit concluded that DAC 06/10 constitutes a major corrective action request and hence the certificate was withdrawn.

As there has been no change within that short period in the company's operations or policies (if anything the situation did improve not deteriorate) this points to a serious lack of quality of the original audit. There are also minor mistakes in the re-audit (e.g. referring to the previous audit of 10 to 12 December rather than 10 to 12 October), which indicate a focus on speed rather than accuracy. Last, the information in the audit report is minimal and does not allow a proper assessment of the scope and quality of SmartWood's audit process. It does, however, indicate a lack of understanding of the complicated political and social circumstances in DRC.

4.4. Different hats?

In the case of Smartwood DRC, one of the major bureau staff, who also participated in SODEFOR's audit with an "observer" status, is an influential member of the forest control administration(16). Although a highly skilled professional with unquestionable technical capacities (a rare occurrence in DRC administration), it is difficult to see how his double mandate would not rapidly lead to major conflicts of interests. More attention should therefore be paid to the professional profiles of CB staffs and auditors.

(¹⁶) Officier de Police Judiciaire (OPJ) de la Direction du Contrôle et des Vérifications Internes (DCVI) du Ministère de l'Environnement, Conservation de la Nature et Tourisme (MECNT).

4.5. Conclusion

For all the reasons listed above the panel believes that a suspension of SmartWood for further operations in DRC is called for. This could be extended, depending on further investigations, to the whole Congo Basin, as the panel believes the problems are fairly similar. In the eyes of the panel members this audit does not show SmartWood has a good grip on the problems of certification in failed or fragile states. The certificate was given too hastily without a full and thorough check if the company met all FSC requirements.

5. FSC driven progress in SODEFOR's logging concessions

SODEFOR's endeavor to reach FSC certification dates back to 2004. The first official commitment to FSC certification was actually made by SODEFOR's management in a letter sent to Greenpeace International on November 30th 2004 ⁽¹⁷⁾. That this commitment has taken six years to materialise into an FSC audit can arguably be put down (i) to the delays which characterized the participatory conversion process through which all the forest titles previously attributed in DRC were officially confirmed as legal (a process which lasted from 2005 to 2009), and (ii) to the slow pace of adoption of the application decrees necessary for the proper enforcement of sustainable forest management in accordance with the provisions of the 2002 forest code.

Regarding the later, the decree pertaining to the negotiation process and the share of logging benefits with local communities ⁽¹⁸⁾ was only adopted in June 2010, after being tested in one of SODEFOR's logging concessions. The choice of SODEFOR as a "pilot" case for the field testing of this last and important decree can be attributed to the fact that, for some of SODEFOR's concessions at least (notably concession 28/03, which was to be audited by Smartwood six months later), the management process is relatively advanced in comparison to other companies in DRC ⁽¹⁹⁾.

The implementation of the social provisions of SODEFOR's "plan de gestion" for concession 28/03 ⁽²⁰⁾ is arguably one of the most advanced process of its kind within the industrial logging sector in DRC. The process is closely monitored by WWF project C4CF ⁽²¹⁾, and has already brought about significant results with regard to school or health centers' constructions over the last twelve months. These achievements have been eye-witnessed by one of the panel members during a field mission in early November 2011 ⁽²²⁾. These activities do in no way justify certification or even association with FSC, but they do indicate that SODEFOR is willing to improve its practices. Furthermore, in answer to minor CAR n°06/10 requested by SmartWood's audit (annex 5), SODEFOR has been one of the first logging operators in DRC to elaborate, in March 2011, a policy concerning indigenous peoples within its logging concessions ⁽²³⁾. A major

⁽¹⁷⁾ See annex 13, page 3.

⁽¹⁸⁾ Arrêté Ministériel n°023/CAB/MIN/ECN-T/28/JEB/10 du 7 juin 2010 fixant le modèle de clause sociale du cahier des charges du contrat de concession forestière.

⁽¹⁹⁾ The "plan de gestion" for concession 28/003 is attached in annex 14. In DRC forest regulation, the "plan de gestion" is the initial version of the management plan, which describes in detail how the forest concession concerned will be sustainably managed during the 4-years period authorized between the date of attribution of the forest title and the validation of the full-fledged management plan, which covers the whole duration of the rotation period (25 years).

⁽²⁰⁾ The "clause sociale du cahier des charges" for concession 28/003, which details these social provisions for each local community claiming rights over the forest area concerned, has been revised in a new contract signed in March 2011 (4 months after Smartwood audit) in order to comply with the newly adopted regulation (see note 13 above). The document is available in annex 15.

⁽²¹⁾ See annexes 16 and 17.

⁽²²⁾ Photographic illustrations are presented in annex 18.

⁽²³⁾ See annex 19.

participative zoning effort has also been conducted during the first half of 2011 to identify the forest areas of SODEFOR's logging concessions where indigenous peoples live and/or claim traditional rights ⁽²⁴⁾.

That a lot remains to be done before SODEFOR's operations can objectively be described as sustainable and open for certification is beyond doubt. But significant progress is being recorded in the framework of SODEFOR's efforts to get certification in the near future.

Some argue that the social unrest which erupted in forest concessions neighboring 28/003 over the last two years may result from the fact that SODEFOR is now sticking to its promises regarding social investments: local communities (indigenous or not) are now able and willing to speak out. As there are conflicting claims concerning traditional rights over the forest areas among different communities and between communities these problems need mediation. With deficient public authorities, unable to arbitrate these conflicting claims of neighbor local communities, SODEFOR gets caught between a rock and a hard place ⁽²⁵⁾. Its activities can in theory contribute to solving these problems as well as aggravate these problems. This again highlights the problems related to certification in countries with land rights conflicts and a failing state and indicates how difficult it is to achieve FSC certification under these circumstances.

By the same token, FSC disassociating itself from SODEFOR because of such a complex situation could be seen as unfair, but could also be considered as leaving the local NGOs and local communities to solve the problems concerning tenure rights and benefit sharing on their own without any 'outside pressure'. As none of the communications from the communities we have seen asks for SODEFOR to stop all its logging activities, we think disassociation is not called for. What they demand is a moratorium of activities in certain concession areas and improvements in the way SODEFOR operates and recognition of their rights and solving of conflicts.

⁽²⁴⁾ See the report in annex 20.

⁽²⁵⁾ See annex 21 for a series of documents illustrating SODEFOR's efforts to clarify those conflicting claims and to receive support from public authorities to have these claims properly arbitrated.

6. Panel recommendations

1. No disassociation between FSC and SODEFOR

FSC should not disassociate itself from SODEFOR at this stage, but rather encourage a process, involving local communities and DRC NGOs (with international support if needed) to ensure SODEFOR meets all FSC requirements, including strengthening the changes recently initiated in SODEFOR's mediation practices. This would include clarification of local (customary) tenure rights, redefining benefit sharing agreements and ways of communicating. The TFT could possibly play a helpful role here.

2. Strengthening the process leading to the license agreement

As noted in section 2.1 above, the fact that the certification requirements – and most notably those deriving from FSC Policy of Association – are not explicitly spelled out in the license agreement signed by SODEFOR prior to the granting of any certificate are, to some extent, part of the problem.

During discussions with a member of the panel in October 2011, SODEFOR's certification officer said that he did not fully understand the requirements of the policy of association, let alone the possible consequences of non compliance and the possibility for third parties to “challenge” the association with FSC on that basis. This also reflects badly on the work of the certification body, which should have made this clear in its assessment of compliance with all relevant FSC policies.

The obligation for certification bodies to check compliance with the requirements of the FSC Policy of Association in the course of CoC audits has entered into force by October 1, 2011. This obligation will help to prevent that formal complaints “bypass” previously awarded certificates (²⁶), as experienced in the SODEFOR case.

The members of the panel are of the opinion, especially when considering certification processes in areas with little or no governance like the Congo Basin, that the signing of the license agreement with logging companies (the initial step of any certification process) should only take place with full consultation and participation of interested stakeholders, including local/indigenous communities, and after relevant supporting documents have been made public by the applicant (promotion of transparency).

(²⁶) According to representatives of the logging sector interviewed in the framework of this complaint, this possibility for third parties to “bypass” decisions made by certification bodies brings a source of uncertainty in the whole process, and is weakening the FSC scheme instead of strengthening it.

3. Screening certification bodies' operations (notably SmartWood)

FSC seems to be too dependent on the quality (or lack thereof) of the due diligence process of certification bodies. The panel therefore urges to re-assess how FSC can better control these CBs so they don't continue to certify the 'uncertifiable' in line with recommendations put to FSC by a number of NGOs and timber traders in October 2008 ⁽²⁷⁾.

The panel further recommends to suspend SmartWood from further operations in DRC and asks the FSC Board to investigate SmartWood practices in other Congo Basin countries (or other areas with bad forest governance) to ensure it meets FSC standards. This type of certificates only undermines the FSC.

4. FSC and certification in areas with little or no governance (e.g. the Congo Basin)

FSC, and its supporters, needs to take extreme care if certification takes place in states with poor governance records. Although it is not impossible to acquire certification in these areas it is extremely difficult and requires extra time and investment of companies which will have serious financial implications. It is therefore meaningless or even dangerous aiming for large expansions of the FSC certified area in these type of countries and unrealistic to think that FSC could be truly driving force to address serious governance problems.

5. Due diligence by complaints panels

To assess a complaint fully and in a just manner takes more time than is allowed by the FSC Complaints Policy. There is therefore a suggestion to expand the timeline to three months. Panel members should also be informed that researching a complaint will take a minimum of 5 to 10 days and possibly a field trip in cases where information and documents are not always available.

⁽²⁷⁾ <http://www.fern.org/sites/fern.org/files/changes%20the%20FSC%20needs%20to%20make.pdf>

Annexes

- Annex 1. GREENPEACE complaint to FSC (13 May 2011)
- Annex 2. Map of SODEFOR's logging permits
- Annex 3. SODEFOR licence agreement with FSC (8 August 2010)
- Annex 4. FSC Policy for the Association of Organizations
- Annex 5. CoC and CW certificates (January 26, 2011)
- Annex 6. Suspension of CoC and CW certificates (18 April 2011)
- Annex 7. Guidelines for complaints panels
- Annex 8a. Mike 12 events - Greenpeace - DRC NGO press release
- Annex 8b. Mike 12 events - Greenpeace - DRC NGO report
- Annex 9. Mike 12 events - WWF - DRC NGO press release
- Annex 10. Mike 12 events - SODEFOR report
- Annex 11a. Pre-study for the identification of HCVF
- Annex 11b. Identification and management of HCVF in SODEFOR's concessions
- Annex 12. Analysis of environmental and social impacts
- Annex 13. SODEFOR's first commitment to FSC
- Annex 14. Plan de gestion 28-03 (cahier des charges initial) - October 2010
- Annex 15. Clause sociale du cahier des charges - Rider March 2011
- Annex 16. WWF monitoring of SODEFOR's progress (June 2011)
- Annex 17. Follow up WWF (GFTN Action Plan - October 2011)
- Annex 18. Photographic illustrations
- Annex 19. SODEFOR policy for indigenous peoples
- Annex 20. Participative zoning report
- Annex 21. SODEFOR's efforts to clarify conflicting traditional rights