



**SAHABAT ALAM MALAYSIA
– FRIENDS OF THE EARTH MALAYSIA**

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**Forest Law Enforcement Governance and Trade - Voluntary Partnership
Agreement (FLEGT VPA):**

- (i) Background information**
- (ii) Status of negotiations**
- (iii) Outstanding issues on indigenous customary land rights**
- (iv) Unilateral issuance of MYTLAS Licence by Malaysia before the signing of the VPA.**

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WHAT IS FLEGT?

In 2003, the European Union established the **Forest Law Enforcement Governance and Trade (FLEGT) Action Plan** to set out a package of measures to address the growing problem of illegal logging and related trade. The two main elements of the FLEGT Action Plan are:

- (i) The **Voluntary Partnership Agreements (VPA)**; and
- (ii) The **European Union Timber Regulation No. 995/2010 (EUTR)**, an EU legislation which came into force in March 2013.

Both the VPA and the EUTR will be enforced by the ‘competent authority’ of the respective EU member countries i.e. the government agency deemed to be the most suitable to implement all the relevant responsibilities required by the legislation. For instance, in the UK, the National Measurement Office (NMO) has been selected to function as its EUTR competent authority.

IMPORTANT REQUIREMENT OF THE EUTR: DUE DILIGENCE¹

An important feature of the EUTR is its requirement for EU timber importers to:

- (i) conduct **risk assessment** procedures to evaluate the risk of placing illegal products on the market; and
- (ii) establish adequate and proportionate **risk mitigation** procedures to minimise the risk of placing illegal products on the market.

Together with the provision of accessible information by timber importers, this process is known as **due diligence**, which must take place before the products are purchased and even in cases where the products have been certified. Proof of due diligence is compulsory on all timber products listed by the legislation.

Under the EUTR, only timber products carrying a FLEGT VPA or a CITES (Convention on International Trade in Endangered Species of Wild Fauna and Flora) licences are to be recognised as legal timber. Everything else will have to have gone through a system of due diligence.

¹ An excellent summary of the EUTR can be found on the website of the *Timber Trade Federation*, which also includes the link to the full text of the legislation and other important documents at the bottom of the page – http://www.ttf.co.uk/Environment/EU_Legislation_.aspx. Apart from this, the European Commission has also established its own webpage to provide more information on the implementation of the legislation at http://ec.europa.eu/environment/eutr2013/index_en.htm.

WHAT IS A VPA?²

The VPA stands for the **Voluntary Partnership Agreement**, a bilateral undertaking between the EU and participating FLEGT Partner Countries.

The VPA sets out a **licensing process** for timber products originating from FLEGT Partner Countries that are destined for the EU market. The VPA licence essentially functions as an assurance that the timber products issued with the licence have been harvested and exported in compliance to all existing laws and regulations (as required under the EUTR). Once a VPA is signed, timber products from a FLEGT Partner Country will only be permitted to enter the EU market if it is accompanied by a VPA export licence.

WHAT IS VPA TIMBER LEGALITY ASSURANCE SYSTEM (TLAS)?

The VPA licensing system establishes a process to subject the timber products from a FLEGT Partner Country to a **Timber Legality Assurance System (TLAS)**.

The TLAS sets out the procedures that serve to provide verification that timber products falling under the scope of the VPA, have been harvested and exported in accordance to all existing laws and regulations in the FLEGT Partner Country concerned.

CURRENT STATUS OF THE MALAYSIAN-EU FLEGT VPA NEGOTIATIONS

In 2006, Malaysia became the first country which the EU commenced its FLEGT VPA negotiations with. The Ministry of Plantation Industries and Commodities (MPIC) is tasked to function as the focal point for the purpose of the negotiations as well as the coordination of a multi-stakeholder consultation process.

Since then, the EU has begun negotiations with many other timber producer countries in Asia and Africa. Some of these negotiations, including those held with Indonesia, have actually led to the signing of the VPAs.

Unfortunately however, despite the fact that Malaysia was the first country to commence negotiations with the EU, its VPA has yet to be signed. **It is widely believed that one of the outstanding issues that have prevented the VPA from being concluded is the failure of Malaysia to resolve matters related to indigenous customary land rights.**

Further, Sarawak has also been temporarily excluded from the VPA negotiations.

² For more information on the FLEGT VPA, please see the website of the *EFI FLEGT Facility* at <http://www.euflegt.efi.int/home>. The facility was established in 2007 to support EU and its FLEGT Partner Countries in implementing the EU FLEGT Action Plan and is managed by the *European Forest Institute (EFI)* <http://www.efi.int/portal/>. A website for the Malaysian VPA has also been established at <http://www.flegtvpamy.com/>, where the TLAS documents and other relevant information can be found.

WITHDRAWAL OF MALAYSIAN NGOS FROM THE CONSULTATION PROCESS

From 2006 onwards, SAM and other Malaysian civil society organisations began their participation in the FLEGT VPA multi-stakeholder consultation process organised by the MPIC. The purpose of the consultation process was for various stakeholders to provide feedback and comments to the draft TLAS, including its *Definition of Legal Timber*, **documents that have been prepared by the Government of Malaysia.**

However the consultations proved to be lacking in inclusiveness and a fair structure to manage the diversity of inputs and responses, at the expense of the various legitimate concerns of civil society groups. Inevitably, these flaws in process led to a series of flaws within the draft TLAS itself. Comments from SAM and its partners, which were largely centred on indigenous customary land rights, often ended up being rejected by the MPIC without sound justification.

Interestingly, in some FLEGT Partner Countries, civil society organisations were not only provided with a much more robust consultation process by their governments, their representatives had also been invited to participate in the drafting of the TLAS itself.

Consequently, as a result of the repeated failures of MPIC to address most of our criticisms on the consultation process and the content of the draft TLAS itself, in March 2008, two civil society coalitions, namely JOANGO Hutan (of which SAM is a member) and JOAS (Jaringan Orang Asal Se-Malaysia) finally decided to withdraw their participation in the consultation process.

Today, both coalitions have continued to withhold their support for the signing of the FLEGT VPA. Both coalitions are also opposed to the signing of the VPA without Sarawak, as the violations of indigenous customary land rights are a systemic national issue, and certainly not confined to Sarawak alone.

TLAS: FAILURE TO PROTECT INDIGENOUS CUSTOMARY LAND RIGHTS

Currently, the *Definition of Legal Timber* of the TLAS is highly inadequate for the purpose of according sufficient protection to indigenous customary land rights:

Timber harvested by licensed person from approved areas and timber and timber products exported in accordance with the laws, regulations and procedures pertaining to forestry, timber industry and trade of Malaysia.

This definition does not explicitly prevent 'legal timber' from being harvested from indigenous territories. Therefore, in order to ensure that legal timber is free from violating such lawful rights, at a minimum, JOANGO Hutan and JOAS have called for the definition to be incorporated with the following proviso:

...such timber and its products shall be free from indigenous customary claims and free from indigenous territorial boundaries...

This provision is highly critical since a significant bulk of the Malaysian logging operations tend to take place within indigenous territories without their consent.

Further, our proposed definition above is also in line with views asserted in FLEGT Briefing Notes Number 02:³

Definition of legally-produced timber should therefore incorporate laws that address the three pillars of sustainability – i.e., those aimed at economic, environmental and social objectives. These are likely to include:

- Granting of and compliance with rights to harvest timber within legally-gazetted boundaries;
- Compliance with requirements regarding forest management, including compliance with relevant environmental, labour and community welfare legislation;
- Compliance with requirements concerning taxes, import and export duties, royalties and fees directly related to timber harvesting and timber trade;
- Respect for tenure or use rights to land and resources that may be affected by timber harvest rights, where such rights exist;
- Compliance with requirements for trade and export procedures.

Apart from the *Definition of Legal Timber*, the draft TLAS is also marred by other serious failures to protect indigenous customary land rights. Most of these flaws have been repeatedly pointed out by JOANGOHutan and JOAS in the first three consultations to no avail.

LEGAL FICTIONS BY THE GOVERNMENT OF MALAYSIA

In responding to our comments on the draft TLAS, the MPIC has relied on several legal fictions to justify its decisions. Some of the legal justifications used by the MPIC during the consultations are in clear contradiction to various landmark judicial findings on indigenous customary land rights in Malaysia, including:

- (i) That the common law respects the pre-existing nature of indigenous customary land rights i.e. indigenous customary land rights do not owe their existence to modern statutes and legislation, but instead to traditional laws and customs.
- (ii) That indigenous customary land rights extend to the forested areas.

Additionally, several legal positions adopted by the MPIC are also indicative that it has failed to recognise indigenous customary land rights as a form of

³ The *FLEGT Briefing Notes* are a periodical publication, produced by an expert group convened by the European Commission and are intended to inform discussion of the EU FLEGT Action Plan. It can be found in the 'Publication' section of the EU FLEGT Facility website.

proprietary interest in the land, as has been confirmed by our Federal Court. As a matter of fact, the MPIC has also gone as far as to state the following [sic]:

Court judgements are based on case by case basis and therefore cannot be used as precedent in all court cases because conditions vary and therefore judgements in court cases cannot be included as indicators.⁴

TEMPORARY EXCLUSION OF SARAWAK IN THE VPA

In the last two years, Sarawak has been temporarily excluded from the VPA negotiations. Sarawak is believed to be the region least interested in the VPA, as the EU is not a major market for its timber products.

However, a VPA without Sarawak is not a permanent situation. The VPA will only be concluded after a plan for the phasing in of Sarawak is finalised. A clause in the VPA will therefore have to specify on the 'Sarawak review'.

This temporary exclusion of Sarawak will not affect the signing of the VPA, as the VPA will be a country-to-country process. The exclusion of Sarawak will only prevent timber exporters from the state from obtaining a VPA licence, blocking its timber products from entering the EU market.

If the VPA is signed without Sarawak, there needs to be an effective segregation system in place which can guarantee that timber consignments from Peninsula and Sabah are free from products originating from Sarawak.

Indonesia has reportedly expressed its strong opposition to this development, possibly due to concerns that it may promote Kalimantan timber smuggling into Sarawak.

THE UNILATERAL 'TRIAL RUN' OF THE TLAS BY MALAYSIA BEFORE THE CONCLUSION OF THE FLEGT VPA

Despite the fact that its VPA has yet to be concluded, in February 2013, Malaysia began to unilaterally undertake the 'trial run' of the TLAS licensing system for Peninsular Malaysia's timber exports. Participating timber exporters may now apply for the 'MYTLAS' permit from the Malaysian Timber Industry Board (MTIB) when exporting to the EU.

For the purpose of the trial run, the TLAS licence has been re-branded as **MYTLAS**, in order to make clear that the latter is not issued under the authority of the FLEGT VPA, although for all intents and purposes, the procedures under MYTLAS and TLAS are one and the same. The trial run also includes a process to

⁴ Ministry of Plantation Industries and Commodities. (2008). *Third Stakeholder Consultation of the Malaysia - European Commission on FLEGT and VPA – Responses to Comments/Submissions from Stakeholders*. Document distributed during the Fourth Stakeholder Consultation Meeting in Kuala Lumpur on March 17 & 18. February 15. Item 2-VI(f), p. 10.

verify that a licensed timber consignment does not contain products originating from Sarawak.

The purported objective of this unilateral decision is to allow timber exporters from Peninsular Malaysia to offer the MYTLAS licence as an interim effort to satisfy the due diligence requirements stipulated under the EUTR, until such time when the FLEGT VPA is signed.

Regulators in member countries and Brussels are reportedly taking a cautious approach on this unilateral exercise by Malaysia. We have been informed that this 'interim' effort has unsurprisingly caused some confusion in the EU. Member countries however have reportedly been advised to accept the MYTLAS until there is a directive from Brussels instructing otherwise.

Clearly, this unilateral decision presupposes that the VPA will eventually be signed. However, the fact remains that the agreement has not been signed – there has been no clear indication whether the negotiations will eventually be concluded or aborted.

This decision by Malaysia is not only unprecedented amongst FLEGT Partner Countries, but it may well create consequences for other FLEGT VPAs.

If the Malaysian VPA fails to be signed, the continued use of the MYTLAS for the purpose of showing compliance to the EUTR, may no longer fit to be described as an 'interim' measure.

More importantly, the continued use of the MYTLAS without the authority of a VPA may also eventually invite protests from other FLEGT Partner Countries which have laboured on the same negotiations process and signed their VPAs with the EU.