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ABSTRACT

Global concern on illegal logging has led to the imposition of binding trade related environmental measures on trade of timber and timber products by developed countries like the US, EU and Australia. This dissertation examines the effect of the binding measures on Peninsular Malaysia's forest sector and timber trade. Putnam's two-level game theory is applied, to demonstrate the interdependence of politics at the international level with the domestic level. There is a need to have a "win-set" between the international and domestic levels whereby an agreement reached by stakeholders at Level II (discussions at the domestic level) will help to make the bargaining at Level I a success (bargaining between negotiators which leads to a tentative agreement). In the case of Peninsular Malaysia's forest sector and timber trade, it has been acknowledged that the measures imposed by the EU through FLEGT VPA/EUTR and to a lesser extent by Australia through its ILPA/ILPAR as well as the US with its Lacey Act amendments, have brought about changes in policy and administration.

Thus, the Federal Government of Malaysia, specifically in the FLEGT VPA negotiations have an important task in managing domestic stakeholders' demands for development, taking into account the unique Federal-State relations on land and forest matters as well as managing its international commitments to ensure trade in sustainable and/or legal timber. The policy reaction of the Federal Government of Malaysia to the measures imposed was analysed using Schoppa's analysis of the concept of "synergistic linkages" and "reverberation". On this note, case studies were conducted on Peninsular Malaysia's forest sector and timber industry as well as the binding measures with specific focus on EU FLEGT VPA/EUTR. To substantiate the findings of the case studies, empirical evidence were gathered from primary interviews with experts from government or agency officials, Timber Industry Associations, environmental and social NGOs and international organizations. Further, focus group discussions were held with four states in Peninsular Malaysia to understand the position of the states. The findings show that it is important for the Federal Government to gain the support and commitment of State Governments on

such measures. Therefore, the demands of State Governments for extra funding, resources, equipment and manpower to implement the sustainable and/or legal commitments need to be addressed. Furthermore, NGO criticism about not being properly consulted or given an effective role in government initiatives or meetings, also needs to be taken into account. There is also a need for greater political will by the Malaysian Government, to ensure the success of any negotiations or binding measures imposed. This dissertation indicates the importance of a Level II agreement to ensure the success of a Level I agreement of current negotiations pertaining to Peninsular Malaysia's forest sector and timber trade.

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"Appa, I decided to embark on this PHD journey because of you and it is heart breaking that you are no longer around when I have completed my journey. I have kept my promise to you and this doctorate is especially dedicated to you. Appa, I know you would have been a very proud man to see your daughter's success. I believe you are watching from above and smiling at my success.

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ABBREVIATIONS

ALF	Alienated Land Forest
AMAF	ASEAN Ministers Agriculture and Forestry Meeting
APEC	Asia Pacific Economic Cooperation
APFC	Asia Pacific Forestry Conference
APF	Asia Partnership Forest
APHIS	Department of Agriculture's Animal and Plant Health Inspection Service
ASCC	ASEAN Socio Cultural Community
ASEAN	Association of Southeast Asian Nations
ASOF	ASEAN Senior Officials on Forestry
ASOEN	ASEAN Senior Officials on Environment
BCJ	Builder's Carpentry and Joinery
CB	Certification Body
CBD	Convention on Biological Diversity
CCD	Convention on Combat Desertification
CITES	Convention on International Trade and Endangered Species of Wild Fauna and Flora
CO ₂	Carbon Dioxide
CoC	Chain -of-Custody
COFO	Committee on Forestry
CSG	Country Specific Guideline
CTE	Committee on Trade and Environment
DAFF	Department of Agriculture, Fisheries and Forestry
EC	European Commission
EFI	European Forest Institute

EKC	Environmental Kuznets Curve
EPU	Economic Planning Unit
EQA	Environmental Quality Act
EU	European Union
EUTR	European Union Timber Regulation
FAO	Food and Agricultural Organisation
FDI	Foreign Direct Investment
FDPM	Forest Department Peninsular Malaysia
FLEGT	Forest Law Enforcement Governance and Trade
FLEGT VPA	Forest Law Enforcement Governance and Trade Voluntary Partnership Agreement
FELDA	Federal Land Development Authority
FMUs	Forest Management Units
FRIM	Forest Research Institute of Malaysia
FSC	Forest Stewardship Council
FTA	Free Trade Agreement
FWS	Fish and Wildlife Service
GATT	General Agreement on Tariffs and Trade
GATS	General Agreement on Trade in Services
GDP	Gross Domestic Product
IACC	Implementing Agency Coordination Committee
IFF	Intergovernmental Forum on Forests
IFM	Institute of Foresters Malaysia
ILPA	Illegal Logging Prohibition Act
ILPAR	Illegal Logging Prohibition Amended Regulation
IMM	Independent Market Monitor
IMP	Industrial Master Plan

IPF	Intergovernmental Panel on Forests
ITTA	International Tropical Timber Agreement
ITTO	International Tropical Timber Organisation
IUCN	International Union for Conservation of Nature
JEC	Joint Experts Committee
JEM	Joint Experts Meeting
JIC	Joint Implementation Committee
JOANGO	<i>Jaringan Orang Asal & NGO tentang Isu-Isu Hutan/</i> Network of Indigenous Peoples & Non-Governmental Organisations on Forest Issues
JOAS	<i>Jaringan Orang Asal SeMalaysia /</i> The Indigenous Peoples' Network of Malaysia
MC&I	Malaysian Criteria and Indicators
MCSG	Malaysian Country Specific Guideline
MDF	Medium Density Fibre Board
MEA	Multilateral Environmental Agreement
MFEA	Malaysian Furniture Entrepreneur Association
MFPC	Malaysian Furniture Promotion Council
MITI	Ministry of International Trade and Industry
MNRE	Ministry of Natural Resources and Environment
MoF	Ministry of Finance
MPIC	Ministry of Plantation Industries and Commodities
MPMA	Malaysian Panel Product Manufacturers' Association
MTC	Malaysian Timber Council
MTCC	Malaysian Timber Certification Council
MTCS	Malaysian Timber Certification Scheme
MTIB	Malaysian Timber Industry Board
MYTLAS	Malaysian Timber Legality Assurance System

MWIA	Malaysian Wood Industries Association (MWIA)
NAFTA	North American Free Trade Agreement
NAP	National Agricultural Policy
NATIP	National Timber Industrial Policy
NCR	Native Customary Rights
NEP	New Economic Policy
NGB	National Governing Body
NGO	Non Governmental Organisation
NFA	National Forestry Act
NFC	National Forestry Council
NFP	National Forestry Policy
NLC	National Land Council
NSC	National Steering Committee
NTM	Non tariff Measures
OECD	Organization for Economic Cooperation and Development
OPP2	Second Outline Perspective Plan
PEFC	Programme for the Endorsement of the Forest Certification
PFE	Permanent Forest Estate
PRF	Permanent Reserved Forest
RB	Reporting Body
RCOC	Requirements for Chain-of-Custody Certification
RTA	Regional Trading Agreement
RWE	Round Wood Equivalent
SAM	<i>Sahabat Alam Malaysia</i>
SCM	Subsidies and Countervailing Measures

SFC	Sarawak Forestry Cooperation
SFM	Sustainable Forest Management
SFMLA	Sustainable Forest Management License Agreement
SII	Structural Impediments Initiatives
SLF	State Land Forest
SOM	Senior Officials Meeting
SPS	Agreements on Agriculture, Sanitary and Phytosanitary Measures
STIDC	Sarawak Timber Industry Development Corporation
TAG	TLAS Advisory Group
TBT	Technical Barriers to Trade
TEAM	Timber Exporters' Association of Malaysia
TFAP	Tropical Forestry Action Plan
TLAS	Timber Legality Assurance System
TPM	Third Party Monitor
TRAFFIC	Wildlife Trade News
TRIPS	Trade- Related Aspects of Intellectual Property Rights
TPPA	Trans-Pacific Partnership Agreement
TWG	Technical Working Group
UN	United Nations
UNCED	United Nations Conference on Environment and Development
UNCHE	United Nations Conference on Human Environment
UNCSD	United Nations Conference on Sustainable Development
UNECE	United Nations Economic Commission for Europe
UNEP	United Nations Environment Program
UNFCCC	United Nations Framework Convention on Climate Change

UNFF	United Nations Forum on Forests
UK	United Kingdom
UK DFID	UK Department for International Development
US	United States
VLC	Verification of Legal Compliance
VLO	Verification of Legal Origin
WCED	World Commission on Environment and Development
WCS	World Conservation Strategy
WSSD	World Summit on Sustainable Development
WTO	World Trade Organisation
WWF	World Wide Fund

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CHAPTER 1

INTRODUCTION: WHY STUDY PENINSULAR MALAYSIA'S FOREST SECTOR AND TIMBER TRADE?

1.1 BACKGROUND OF THE RESEARCH

Over the years, the tropical timber trade has been increasingly linked with illegal logging and its associated illegal trade. This is because illegal logging is said to cause rapid deforestation, environmental concerns (i.e. climate change, loss of biodiversity) and other social concerns. Forests that are cleared or degraded for the purposes of settlement, agriculture, shifting cultivation or for timber trade, release carbon dioxide (CO₂) and greenhouse gases such as methane into the atmosphere. Accordingly, tropical forests that are degraded releases 1-2 billion tonnes of carbon per year over the past 20 years and this contributes to 20 per cent (%) of overall greenhouse gas emissions (ITTO¹ Report, 2011).

In this regard, Caswell et al. (2014) stressed that there is a strong need for developing countries to reduce emissions from deforestation and forest degradation, which accounts for an estimated 20% of annual carbon emissions and to invest in low-carbon pathways to sustainable development. This is because forests in general are of vital importance for the protection of freshwater resources, soils against erosion, nutrient loss and sustaining the lives and livelihood of forest dependent people. Apart from that, illegal logging is said to cause government losses of billions of dollars in revenue; it undermines the rule of law, promotes corruption, creates and increases armed conflicts and depresses world timber prices as much as 16% while distorting global markets and undermining legal operations².

¹ International Tropical Timber Organization

² See Lawson and MacFaul (2010) study on "Illegal logging and related trade, indicators of the global response". This study was prepared for Chatham House (The Royal Institute of International Affairs), which is an independent body that promotes rigorous studies on international issues.

In addition, a specific study by the World Wide Fund (WWF) in 2008—on illegal timber entering the European Union (EU) market—indicated that 16% to 19% of timbers that entered the EU market were from illegal sources. This consisted of exporters from Russia, exporting 10.4 million m³ of Round Wood Equivalent (RWE); Indonesia (4.2 million m³); China (3.7 million m³); Brazil (2.8 million m³); Belarus (1.5 million m³); Ukraine (1.5 million m³); Bosnia (1.2 million m³); Cameroon (0.645 million m³); and Gabon (0.590 million m³). Malaysia was reported to export around 0.28 million m³ of RWE, equivalent to 1.4% of the total illegal timber that entered the EU market. Although Malaysia's export of illegal timber was small, it still attracted attention as Malaysia's tropical forests are well-known for its rich biodiversity. It is home for at least 15,000 flowering plant and tree species, 600 bird species, 286 mammal species, 140 snake species and 80 lizard species and is recognized as one of the twelve mega diverse countries in the world (Mohanlall, 2004). Also, there are various groups of indigenous people living in Malaysian forests whose livelihood depends on the forest.

Thus, such concerns have led to an intense debate on illegal logging and its linkage to international trade of timber and timber products. It is recognized that population growth together with agricultural expansion and development causes massive forest land clearing. Nonetheless, Brack (2002) was of the opinion that enterprises do enjoy substantial profits arising from illegal activities and the rate of destruction of forest resources has increased significantly due to illegal activities. Therefore, it is felt that banning the illegal products from being traded at the international market would compel the enforcement agencies in consumer countries to mobilise their resources to take action against such activities and bring about external pressure to take action against illegal loggers for forest crimes. Meanwhile, Simula (1999) argued that trade has direct and indirect influences on the environment and is considered as an agent affecting sustainable management of natural resources. Trade liberalization and macroeconomic policies have led to expanded exports by developing countries, particularly in commodity trades and there is evidence pointing to negative impact of such policies to the

environment. Bourke (1995) stated that the negative impacts of deforestation on the environment occur in the forest (excessive harvesting) and outside the forest (transport and processing); the concern about such negative impacts has directly or indirectly spilled over onto international trade. Therefore, international trade affects the environment while environmental action affects trade. According to Tarasofsky et al. (2001)³, trade alone does not cause forest destruction but in combination with poor management, it can be an important driver for deforestation. He also explained that the impact of increased international trade in forest products includes among others, namely: (1) over-exploitation of tree species, (2) pressure to convert natural forests to plantations, (3) damage to rivers and streams in forests, (4) increased soil erosion in forests and economic costs arising out of providing infrastructure and (5) harm to traditional communities through loss of forest biodiversity.

Therefore, even though trade in some cases may not be a direct cause of forest exploitation, it has become inevitable that it is linked to international trade of timber and timber products. This is because of the increasing number of illegal logging cases and its associated trade and also the impact of such actions on forests and its environment as a whole. The UNEP/Interpol (2012) study on illegal logging had estimated that the economic value of global illegal logging, which includes processing, is estimated to be valued between US\$ 30 billion and US\$ 100 billion (10% to

³ Richard G. Tarasofsky and Dr. Stefanie Pfahl, Ecologic from the Institute for International and European Environmental Policy (Berlin) conducted the study on "Trading away the last ancient forest: The threat to forest from trade liberalisation under the WTO" with contributions from Steven Shrybman (Ottawa) and Hedwig Friedrich (Munich) on behalf of Greenpeace International. The statement was made to explain how WTO measures affect trade where they believe that the WTO rules stand in the way of efforts to control trade-induced deforestation and do not ensure that trade supports sustainable forest management. Accordingly under certain circumstances, trade can also be an incentive that enhances SFM. In their paper they have been very critical on their opinions on the dangers of the forests from liberalisation measures under WTO. Accordingly, among others, the WTO rules currently interfere with efforts to conserve and sustainably use the world's forests. Also the lack of certainty on the relationship between WTO rules and MEAs threaten to undermine the full effectiveness of MEA rules aimed at forests. Despite the commitment to sustainable development and environmental protection in the Preamble of the Agreement Establishing the WTO, the WTO does not contain rules that ensure that trade policy supports the conservation and sustainable use of forests.

30%) of global wood trade. In addition to environmental damage, the loss of revenue and tax income from illegally harvested wood is estimated to be at least US\$ 10 billion per year⁴.

1.2 PROBLEM STATEMENT

Realising the importance of forests—specifically tropical forests—and to curb the increase in illegal logging and its associated trade, developed countries especially through the G-8 forum were pressured to develop measures to tackle illegal logging. As such, under the umbrella of ‘green’⁵ or environmental concerns, developed countries have undertaken various timber trade related environmental measures to combat illegal logging through exports and procurement practices. This is to ensure that trade of timber and timber products are either from sustainable and/or legal sources. For example, countries like Japan, New Zealand, Norway, United Kingdom (UK) and the Netherlands demand sustainable timber or some minimal requirement of legal timber through their public procurement policies for government projects. These countries require proof through certification or legality verification systems which is a voluntary form of action undertaken by exporters for such purposes.

On the other hand, there are also non-binding measures imposed through Free Trade Agreements (FTAs) where the trend is to discuss a separate chapter on trade and environment or sustainable development. It may not be binding, but indirectly, developing countries are pressured to comply with such requirements as there will be future reviews on the level of cooperation

⁴ This report is a collaboration by United Nations Environmental Programme (UNEP) and Interpol, “Green carbon, black trade: Illegal logging, tax fraud and laundering in the worlds tropical forests” that deals mainly with illegal logging and its impacts on the lives of poor people in the world. This report focuses on the increasingly sophisticated tactics being deployed to launder illegal logs through a web of palm oil plantations, road networks and saw mills. It estimates 15% to 30% of the volume of wood traded globally has been obtained illegally.

⁵ ‘Green’ for the purpose of this dissertation has been referred to as the binding requirements imposed by developed countries i.e. Australia, the EU and the US through agreement, acts or regulations for trade of legal timber into their markets.

between the parties in the agreement. Apart from that, the recent trend is for some developed countries to impose, through binding instruments, a minimal requirement of legality for imports of timber and timber products into their markets. Such binding measures are required upon realising that: (1) the voluntary certification measures adopted by the industry members are slow in progress, (2) sustainability is a long term goal embracing a comprehensive set of criteria and indicators and is very demanding for a developing country to immediately adhere to and (3) there is an urgent need to curb illegal logging and its illegal trade.

Thus, the United States (US) amended its Lacey Act to include protection to plants (including trees from natural or planted forest) where a declaration of legality of products (i.e. scientific name, value, quantity and country of origin) is required for imports into the US. The EU started off with negotiating a Forest Law Enforcement, Governance and Trade, Voluntary Partnership Agreement (FLEGT VPA) with producer or exporter countries for a timber legality assurance system to be developed. Subsequently, the EU implemented its EU Timber Regulation (EUTR) in 2013 where 'due diligence'⁶ is required to minimise the risk of illegal timber entering the EU market. The Australians, meanwhile, imposed their Illegal Logging Prohibition Act (ILPA) 2012 and Illegal Logging Prohibition Amendment Regulation (ILPAR) 2013 where 'due diligence' is also required to ensure trade in legal timber. The Australian Government is currently negotiating a legality assurance system or a country specific guideline with producer or exporter countries to obtain information on the laws in effect in the country of harvest.

As such, tropical timber countries that depend on these developed markets for exports of their timber and timber products are now directly pressured to cooperate and prove that their exports are at least from a legal source. This is because the importers or consumers now require assurance of legality of

⁶ The due diligence requirement for both the EU and Australia will be discussed in detail in Chapter Six.

the products that they purchase from their exporters. According to Jinnah (2011), environmental provisions in trade agreements have evolved from weak statements of no derogation (i.e. commitments to enforce existing laws) to strong mechanisms of transnational policy influence. This is certainly a big step in imposing environmental rights on developing and less developed countries. However, such measures by the above developed countries can be argued to go against the very nature of 'free trade' advocated by the World Trade Organization (WTO), where it is recognized that contribution to expansion of world trade may be made by closer integration between economies. This explains why countries in this era of globalization, be it developed or developing, eagerly enter into regional and bilateral trade agreements to reap the benefits of free trade.

Nevertheless, it should be noted that the WTO preamble as per the Marrakesh Agreement has set guidelines on protection of the environment and also the General Agreement on Tariffs and Trade (GATT) 1947, allows for protection of plant life and for conservation of exhaustible natural resources under General Exception to GATT obligations in Article XX(b) and (g), respectively. This may provide grounds for these developed countries to argue for such protectionism measures. However, a fundamental issue in this debate concerns the use of trade barriers by one country to induce changes in the environmental policies of another. The WTO Report (2004) states that even though WTO members are free to adopt national environmental protection policies, they should not discriminate between imported and domestically produced like products (national treatment principle), or like products imported from different trading partners (most-favored-nation clause). Realizing this, developed countries imposing trade-related environmental measures have made it compulsory that timbers harvested or produced domestically also have to be from at least a legal and/or sustainable source.

Therefore, it is timely to study the above situation, noting: (1) the world's overwhelming interest in tropical timber trade, (2) the constant debate on its linkage with environmental and social concerns, (3) the pressure on developed consumer countries to come up with some form of binding measures, (4) the slowly increasing number of agreements, acts, regulations or policies whether in terms of direct trade interventions, barriers or supporting environment-related trade provisions and (5) the pressure to comply and the implication of such binding requirements on timber producer or exporter countries. In the case of a developing country like Malaysia, it is important to ensure that international trade for tropical timber and timber products continues without hindrance, as the timber industry contributes to 2.9% of the gross domestic product (GDP) and provides employment opportunities to about 200,000 workers. Also, the acceptance of Malaysia's timber and timber products in the world market is vital, as over the years, the industry has transformed itself from a producer of tropical timber to an exporter of high value-added timber products. Developed countries, especially those within the EU, cater and pay well for high value-added products.

However, this dissertation focuses only on Peninsular Malaysia's forest sector and timber trade and not Malaysia as a whole (Malaysia consists of Peninsular Malaysia, Sabah and Sarawak) in view of several reasons: (1) the differences in historical evolution of policies in the three regions, (2) constitutional rights for State Governments over forest and land matters. It is important to note that only the states in Peninsular Malaysia have adopted the National Forestry Policy (NFP) 1978 and the National Forestry Act (NFA) 1984 (both amended in 1993), which deal with the uniformity of laws within the states for administration, management and conservation of forests. Sabah and Sarawak have their own enactments and ordinances, (3) differences in policies and developmental status of forest management and timber industry in the three regions, (4) Peninsular Malaysia's exports of timber and timber products represent more than 50% of Malaysia's total

exports of these products⁷ and (5) the binding trade related environmental measures imposed by developed countries have a higher degree of impact on Peninsular Malaysia's forest sector and timber trade as the exports are mainly to these developed markets that impose said measures. In 2014, Peninsular Malaysia's export to the EU was 16.9%, followed by US (19.9%) and Australia (7.2%). Meanwhile, Sabah's export to these markets was rather small—with the EU recorded at 5.14%, US (5.8%) and Australia (1.3%) whereas for Sarawak, its export was rather insignificant—with the EU recorded only at 0.28%, US (0.66%) and Australia (0.86%). This may be because Sarawak exports mainly logs and plywood, and their export markets are Japan (38.9%) and India (17.96%). Thus, this explains the importance of the EU, the US and the Australian markets for Peninsular Malaysia compared to Sabah and Sarawak (the details of the differences among the three regions will be explained in Chapter Five).

1.3 RESEARCH QUESTION

In dealing with the issues above, this dissertation will explore the following research question, which is ***“How do timber trade related environmental measures imposed by developed countries affect Peninsular Malaysia's forest sector and timber trade?”*** However, before further answering the research question, it is important to first understand the meaning or description of the different terms used in the Question—to fulfill the purpose of this dissertation.

1.3.1 Meaning or Description of the Terms

By ***‘Timber Trade Related Environmental Measures’***, this dissertation seeks to explain the ‘Environmental Related Non-Tariff Measures’ imposed on the timber trade by some developed countries in the form of agreements,

⁷ In 2014, Malaysia's total export of timber and timber products recorded at RM 20.5 billion. Peninsular Malaysia's export itself recorded more than 50% of the total trade (55.5%) and was valued at RM 11.384 billion. While Sabah's export compared to Malaysia's total trade was valued at RM 1.82 billion (8.87%) and Sarawak at RM 7.32 billion (35.7%).

acts and/or regulations. This is in line with the term Non-Tariff Measures (NTMs) by Asia Pacific Economic Cooperation (APEC), which refers to government laws, regulations, policies and practices that either protect domestically produced goods from the full weight of foreign competition or artificially stimulate exports of certain products (APEC, 1999). Also, according to the Food and Agriculture Organisation (FAO), environmentally motivated NTMs include among other things, subsidies for afforestation or reforestation, direct harvesting restrictions and requirements for the certification and labelling of wood products. However, it is important to note that under the WTO, although its main objective is to encourage international trade and open markets, its rules do permit its members to take trade-restricting measures to protect their environment under specific conditions, nevertheless it should not be a disguised form of protectionism. Therefore, it is important that under the GATT 1947, the international trade rules of National Treatment (*Article 3 - measures imposed should be applied on goods imported and also produced domestically*) and Most Favoured Nation (*Article 1 - trade measure should not be discriminatory*) are applicable. Also, the GATT allows for conservation of exhaustible natural resources under the General Exception to GATT obligations in Article XX(b) and (g). As such, by following the WTO rules, this may provide grounds for developed countries to argue for such measures. In this regard, environmental measures in the case of the timber trade may be imposed by some developed countries under the umbrella of 'green' or environmental concerns. However, it should also be noted that if there is a dispute on the aim of such imposition by developed countries, which may be a form of disguised protectionism, then developing countries can refer the case to the WTO Dispute Settlement Mechanism.

Meanwhile, the term '**developed countries**' in this dissertation will specifically explain about the US and its Lacey Act, the EU and its FLEGT VPA/EUTR, and the Australians with their ILPA 2012/ILPAR 2103. These developed countries are chosen because their markets are currently imposing such binding trade related environmental measures in the form of acts and/or regulations that requires proof of imports of at least legal timber.

Apart from that, they are also among the main timber importing countries for Peninsular Malaysia's timber and timber products. The timber trade for Peninsular Malaysia to the above mentioned countries accounts for nearly half of its total trade in 2014, specifically the EU, amounting to 16.9% of the total trade, followed by US (19.9%) and Australia (7.2%).

As for the term '*imposed*', it is deciphered as a measure that is directly forced upon exports of timber and timber products to the above mentioned markets that require at least legal timber. As mentioned earlier, these are done through negotiations of an agreement or imposition through acts and/or regulations. In other words, countries exporting to these developed markets have to prove that their timber is from a legal source through either a legality verification system or labeling of products. It is important to note that the markets of the developed countries like the US and the EU are actually markets for high value and value-added products that pay well for certain timber product specification. Loss of such markets may have serious implications to the socio-economic benefits of an exporting country like Malaysia, as other markets do not pay as high and may not import high value or value-added products.

In terms of how such measures '*affect*' the timber trade, this dissertation seeks to explain the pressure for change and the demand for legal timber through binding trade related environmental measures imposed by developed countries and its implications on the following:

- (a) government policies and regulations on forest management and timber trade with specific focus on Peninsular Malaysia
- (b) market share and market access i.e. ability to continue to export to these green developed markets

- (c) the level of stakeholder involvement especially those from environmental and social groups, i.e. their reception and response to the trade and environmental issues concerning and affecting Malaysia
- (d) issues and opportunities for forest and timber institutions and administration i.e. forest enforcement intensification to ensure full compliance of all relevant legislations and
- (e) Malaysia's international image or role in terms of forest management and timber trade.

The areas of '**affect**' for the purpose of this dissertation are chosen by taking into account previous studies that have been conducted on the trade of forest products and its effect on the environment as follows:

- (a) WTO Secretariat study (2004), on "*Trade and Environment at the WTO*", which looked into the effect of the trade related environmental measures on market access and also environmental product requirements including standards and technical regulations, packaging and labelling
- (b) Bechtel (2009), "*Changing Economic Openness for Environmental Policy Convergence: When Can Bilateral Trade Agreements Induce Convergence of Environmental Regulation?*" – looks into trade agreement's influence on national regulatory policies, problems of non-enforcements in low regulatory countries, cost of implementation and the cost of reputation
- (c) Simula (1999), "*Trade and Environmental Issues In Forest Production*" – looks into the lack of consideration on the impact of non-tariff barriers imposed on market access and forest management, possible certification impact on trade flow and consumption, reflects on the need for policy support, for example, on national support monitoring and structural adjustment programs on forest management

- (d) Fripp (2004), *"FLEGT and Trade, What will the impact be"* – possible impacts identified are market substitution and product substitution. The important role of the private sector was also reflected in the study.

The '**Peninsular Malaysia Forest Sector**' refers to the forest and management in the region. There are three different types of forests, which are Dry Inland Forest including lowland and hill dipterocarps, Mangrove Forest and Peat Swamp as well as Freshwater Swamp Forest. Meanwhile, there are also three major classifications of forest resources, which are Permanent Reserved Forest (PRF), State Land Forest (SLF) and Alienated Land Forest (ALF), that accounts for 5.89 million hectares (44.7% of the country's land area). Out of which, 3.22 million hectares has been allocated for forest production purposes (54.7%) to be managed sustainably while 2.67 million hectares (45.3%) has been identified as Totally Protected Areas. It is important to note that a total of nine Certificates for Forest Management have been issued to Forest Management Units (FMUs), covering 4.65 million hectares or 32% of the total PRFs in Malaysia and eight of the nine certified FMUs are in Peninsular Malaysia. Also, it is important to note that Article 74 of the Federal Constitution of Malaysia provides the states with autonomy over matters relating to land, water resources, forests, local government and town and country planning. Thus, this confers power to the states to independently enact laws or formulate policies in relation to forest and land matters. However, the NFP 1978 and NFA 1984 (both amended in 1992) that deal with the uniformity of laws and policies within the states have been adopted by all the states in Peninsular Malaysia.

Lastly, '**Peninsular Malaysia Timber Trade**' refers to the timber industry in Peninsular Malaysia that deals with: (1) the transportation of timber from the forest to the mill, (2) processing of both primary and secondary products, (3) marketing and exports of these products and (4) the industry's ability, capacity and commitment to address 'green' issues or demands. The timber

industry in Peninsular Malaysia has transformed from a producer of tropical timber to an exporter of high value-added timber products, which is in line with the National Timber Industrial Policy (NATIP, 2009-2020) that provides the policy direction for the industry until 2020—to remain sustainable and competitive in a challenging global environment. Meanwhile, trade of timber and timber products includes wood and wood products, paper products and furniture fixtures. The wood and wood products are further classified into 10 subsectors which are logs, plywood, sawn timber, wooden furniture, medium density fibre board (MDF), BCJ, mouldings, veneer and other timbers. Exports of these products in 2014 were valued at RM 11.384 billion (55.5% of the total Malaysian export of these products), consisting mainly of furniture valued at RM 6.26 billion (54.9%), sawn timber (RM 1.59 billion, 13.9%), builders, joinery and carpentry-BCJ (RM 0.838 billion, 7.36%), fibreboard (RM 0.747 billion, 6.56%), mouldings (0.602 billion, 5.28%) and plywood (RM 0.378 billion – 3.32%).

1.3.2 Sub-Questions

As such, based on the above research question and the meaning of its specific terms, this dissertation seeks to specifically examine the following sub-questions. Firstly, ***“What are the domestic and international policies and practices (past and current) that have influenced and shaped the forest sector and timber trade in Peninsular Malaysia?”*** Here, the focus of discussion will be on trade and environmental issues, reflecting specifically on the demands for legal timber, pressure for change and its effect on the tropical forest and timber trade. Next, discussions are focused on the theoretical perspectives of free trade and environmental measures and how Malaysia, as a developing country (with specific reference to Peninsular Malaysia), is in a dilemma in handling international demands and pressure for change as well as the needs of its domestic stakeholders aside from the country’s economic development. Lastly, the focus of discussion will converge on the historical along with current policies and practices of Malaysia’s tropical forest and timber trade with specific reference to

Peninsular Malaysia's forest sector and timber trade. This question will be discussed in detail in Chapters Two, Three and Five of the dissertation.

Next this dissertation seeks to answer ***“What are the challenges, effects and influences of the binding timber trade related environmental measures on Peninsular Malaysia's forest sector and timber trade?”*** To answer this question, there will be an in-depth study of the binding timber trade related environmental measures as mentioned above i.e. the US Lacey Act, the EU FLEGT VPA negotiations/EUTR and the Australian ILPA/ILPAR and its country specific guideline negotiations to reflect the demand for legal timber and the pressure for change and its effect on Peninsular Malaysia's forest sector and timber trade (Chapter Six). However, the focus of discussion would mainly be on FLEGT VPA negotiations between Malaysia and the EU taking into account that Malaysia has been involved in formal negotiations since 2006 with the EU, which has entailed very comprehensive legality conditions, requirements and measures on the part of the timber production as well as the importing country. Also, the experience and lessons during negotiations by the EU with the timber producing countries have led to the imposition of its EUTR.

Lastly by answering the above questions, this dissertation will be able to address ***“How to sustain or improve the growth of Peninsular Malaysia's forest sector and timber trade in line with international standards and demands?”*** Here the focus is first on the method to obtain information, views and comments from experts on the issue of trade and environment in addition to how to sustain and improve the growth of Peninsular Malaysia's forest sector and timber trade (Chapter Four); secondly to analyse and interpret the findings or reasons of the demand for legal timber and pressure for change as well as the importance of ensuring that there is a balance between meeting international legal requirements and the needs and development of stakeholders in a country (Chapters Seven and Eight).

1.4 OBJECTIVES OF THE STUDY

The findings of this main research question and sub-questions will be able to address the objectives of this dissertation, which are to:

- (a) Identify and review international concerns and debates on illegal logging and its illegal trade as well as policies and practices on Sustainable Forest Management (SFM) that have:
 - (i) Led to conflicting interests between developed and developing countries on tackling such issues
 - (ii) Augmented the heated debate between Neoliberal Institutionalists⁸ and Green Environmentalists on the imposition of trade related environmental measures and
 - (iii) Influenced policies and practices of Malaysia's forest sector and timber trade especially in Peninsular Malaysia while maintaining its unique Federal-State system.
- (b) Highlight and examine international pressure and demands for change as well as domestic concerns through the lens of Putnam's⁹ (1988) two-level game theory that:
 - (i) Explains the debate between Neoliberal Institutionalists and Green Environmentalists on the position of trade related environmental measures with specific emphasis on Malaysia's Federal-State system in relation to land and forest matters and

⁸.Neoliberal Institutionalists belief that international trade would enhance economic growth and the growth will eventually address environmental problems.

⁹ Robert Putnam introduced this two-level game theory to explain international negotiations; how politics at the international and domestic level are fundamentally interdependent, and this would eventually shape the results of the cooperative endeavor between two or more nations. For further details see Putnam, R. (1988). Diplomacy and domestic politics: The logic of two-level games. *International Organization*, Vol. 42, No. 3, (Summer, 1988), pp. 427-460; The MIT Press.

- (ii) Examines the intricacy of applicable trade related environmental measures in the form of FLEGT VPA negotiations and the acts and/or regulations that may pressure and influence change of policies and practices in the forest sector and timber trade in Peninsular Malaysia.
- (iii) Identify the best possible means to improve SFM and to sustain or improve the growth of Peninsular Malaysia's forest sector and timber industry in line with international standards and requirements.

1.5 THEORETICAL FRAMEWORK

This dissertation seeks to answer the above key research question and its sub-questions by examining the debate between Neoliberal Institutionalists and Green Environmentalists along with employing Putnam's two-level game theory to explain how the market forces influence or are constrained and are adjusted in situations of negotiations involving Federal-State relations. Further to this, Schoppa's (1993) analysis of Putnam's two-level game theory will also be examined to provide an understanding or to reflect on the situation in Peninsular Malaysia, its domestic stakeholders' demands as well as the international pressure for legal timber through a binding instrument. The theory and concept will be able to explain how such pressure and demands for legal timber products influence the approach and policies of the Federal Government of Malaysia on the forest sector and timber trade. The domestic stakeholders in this case would mainly be the State Governments in Peninsular Malaysia, its industry members and also Non Governmental Organisations (NGOs).

Putnam in his two-level game theory argued that at the national level, domestic groups pursue their interests by pressuring the government to adopt favourable policies while politicians seek power by constructing coalitions among these groups. Meanwhile, at the international level, national

governments seek to maximize their own ability to satisfy domestic pressures, thus minimizing the adverse consequences of foreign developments. As such, Putnam stated that neither of the two games can be ignored by central decision-makers, so long as their countries remain interdependent, yet sovereign. He also divided the two-level games into **Level I** (bargaining between negotiators on an agreement) and **Level II** (separate discussions within each group in its constituency on whether to ratify the agreement) to stress the importance of a “win-set” concept between these two levels. He believes that an agreement reached at Level II i.e. with domestic stakeholders will make it more likely for a successful bargaining at Level I i.e. with international negotiators on an agreement. On this note, Schoppa (1993) was of the opinion that although Putnam’s two-level game theory explains at the surface the dilemma faced by a country in managing its international and domestic needs, Putnam failed in explaining in detail his concepts of ‘synergistic linkages’ and ‘reverberation’. Accordingly, Putnam did not go on further to explain how a chief negotiator is able to change the domestic political game that his counterpart is facing and when the synergistic strategies can be used by the negotiator to produce positive results, enabling possible cooperation as well as winning a larger concession from his counterpart (Chapter Three will argue in detail Putnam’s two-level game theory and Schoppa’s concept in relation to the pressure and demands for change).

In this regard, it is important to note that a key challenge for Malaysia in addressing environmental issues such as land degradation and SFM is the Federal-State system. Under the Malaysian Federal Constitution, Article 74 provides states with autonomy over matters relating to land, water resources, forests, local government and town and country planning. Thus, this confers power to the states to independently enact laws or formulate policies in relation to forest and land matters. On the other hand, under the Ninth Schedule (Articles 74 and 77) of List 1 of the Federal List, Federal Constitution, negotiations and implementation of international treaties or conventions are under the purview of the Federal Government. Therefore,

even though treaties or conventions related to trade, commerce, industry or environment (i.e. environment protection, pollution prevention and abatement) are the responsibility of the Federal Government, nevertheless, the Federal Government still needs to get the concurrence of the State Governments when it comes to issues related to the management or trade of timber and timber products. This poses a challenge to get all states to agree where even within the states in Peninsular Malaysia that are bound by the NFP 1978 (amended in 1992), there can still be instances where consensus may pose a challenge (the details will be explained in Chapter Five). It can be even worse in the case of the three regions of Peninsular Malaysia, Sabah and Sarawak taking into account the different policies, interests and management in place. A good example would be the challenges faced in the negotiations with the EU on a FLEGT VPA, which (based on the researcher's own experience as a member of the concerned secretariat) is taking a long time to be concluded because the Federal Government finds it difficult to get the consensus of all the states on some issues that the states find as infringements of their territorial rights i.e. the role to be played by a Third Party Monitor (TPM) on auditing the Timber Legality Assurance System (details of the issues are explained in Chapter Six).

However, it should be noted that Malaysia, as mentioned above, is dependent on its timber trade as part of its GDP and employment, as such, the difficulties faced by Malaysia in balancing its domestic and international demands during negotiations can be very challenging. Nonetheless, according to Putnam (1998), all this can certainly come to an end as international pressure is a necessary condition for policy shifts (The details of the argument are in Chapter Three).

Therefore in the case of a negotiation involving trade related environmental measures, Putnam's two-level game theory, explains how a developing country like Malaysia handles the pressure imposed through such measures taking into account market influence and demands as well as domestic

constraints in acceptance of such measures. Nonetheless, it is important as mentioned above to also look into the divergent views of Neo Liberal Institutionalists and Green Environmentalists taking into account that Malaysia is active in trade liberalization¹¹ and the green measures imposed can affect its trade. Neoliberal Institutionalists believes that acts and/or regulations are not important as the market will solve environmental problems while on the other hand, Green Environmentalists believes that acts and/or regulations are important to solve environmental problems as the market will not be able to handle environmental issues.

According to Neoliberal Institutionalists, international trade enhances economic growth and the growth will eventually address environmental problems. In this era of globalization, there is a growing interdependence of trade among countries and a need for greater cross border movement of goods, services and investment. As such, international cooperation through bilateral, intra-regional, and cross-regional trade and investment agreements, apart from the WTO has become a trend. In this regard, countries enter into FTAs realizing the comparative advantage they possess. As such, Lall (2003) is of the opinion that the present globalization period sees a very pro-trade liberalization approach being undertaken either by the developed or developing country due to the growing interdependence of trade among countries and a need for greater cross border movement of goods, services and investment.

Thus, this dissertation will explore the position of Neoliberal Institutionalists where states are important actors in policy formulation and great emphasis is given to international interdependence for trade growth and demand for cooperative forms of interaction facilitated by regimes and international organizations. Meanwhile, the Prisoner's Dilemma model will be used to explain situations of collective action problems, which may arise due to the

¹¹ Malaysia's position on trade liberalization is explained in detail in Chapter Five.

structure of the international system, where Neoliberal Institutionalists believe that international institutions will be able to help states overcome the dilemma of willingness to cooperate.

As such, the Neoliberal Institutional approach is that, international regimes are prospective solutions to common environmental problems because regimes make it possible for states to cooperate or collaborate with each other to promote common good. This approach can be argued to have been adopted by the EU in handling timber trade and environmental issues where the EU negotiates with consumer countries on a FLEGT VPA to ensure that only legal timber enters the EU market. Further, the Environmental Kuznets Curve (EKC) explains the relationship between economic growth and environmental degradation which is an inverted U—where demands for better environmental quality increases with increasing '*per capita*' income. Thus, when the economic growth of a developing country reaches a certain threshold, the country will eventually take steps to raise its own environmental standards. Therefore, through free trade liberalisation efforts, it is expected that the income per capita of a country will increase and countries that enjoy economic growth may eventually work towards reducing the severity of environmental problems. Singapore has been quoted as an example where the country adopted its own eco-labelling scheme, the 'Green Label' in 1992. Previously eco-labelling schemes were only used in developed western countries to protect the environment. Eco-labelling is issued as a method to influence market forces and to encourage them to promote a more environmentally friendly type of production. Meanwhile, Malaysia can also be considered to have raised its own environmental standards in terms of timber certification with the establishment of the Malaysian Timber Certification Scheme (MTCS) which certifies timber from sustainably managed FMUs. Even though this initiative is voluntary, it is certainly a big step for a developing country like Malaysia. As such, Neoliberal Institutionalists believe that the market is able to solve environmental problems.

On the other hand, Green Environmentalists are of the opinion that environmental measures through trade agreements, acts and/or regulations are important to address the issues of illegal logging and its associated trade. This is due to the growing concern on environment-related issues such as forest protection, ozone depletion, hazardous wastes and global climate change. As argued earlier, it may be debatable whether trade affects the environment, but it has become inevitable that environmental issues are linked to trade as it is seen as a means by certain parties to stop environmental damage and its consequences. This is especially so in the case of forests—taking into account that forests and their related timber trade have become a global concern as rapid deforestation and illegal logging are said to be part of the cause for drastic changes in the climate and loss of biodiversity. Therefore, developed countries like the US have imposed binding trade related environmental measures to ensure that forest harvesting and its related timber trade are done in a sustainable and/or legal manner. This can be argued to be in line with the basic requirements of green theory i.e. to reduce ecological risks across the board and to prevent unfair externalization or displacement on innocent third parties through space and time.

Thus, this dissertation will also highlight that in line with green requirements, developed countries are pressured to impose some form of regulation or policy to curb activities that have negative impacts on the environment. Therefore, international trade has been identified as an important tool to control such activities. Meanwhile, countries especially developing states may be pressured to adapt to such requirements (pressure for change) if they require the market of the developed countries that impose such binding measures. Even though the imposition of the binding acts and/or regulations may be argued to be against the very nature of trade liberalization as per the neoliberal institutionalism approach, such measures are practised by these developed countries after taking into account that the WTO allows its members to adopt national environmental protection policies (WTO, 2004).

In this regard, it can be argued that some form of regulation is found necessary by developed countries to ensure that at least only legal timber is exported into their countries. However, on the other side of the coin, because of such regulations, there is the fear that the market may be distorted as consumers may need to pay higher prices (possible due to lack of supply of legal timber) and there may be reduction of market access for producing or exporting countries. All this may eventually lead to the loss of employment and related social problems. In the case of Peninsular Malaysia, as mentioned earlier, countries like the EU and the US cater for high value and value-added products and are also willing to pay well for such products. Thus, the binding acts and/or regulations imposed can affect Peninsular Malaysia's market as there will be loss of market for high value products because the other less-stringent 'green' markets do not cater for such products.

There is also the fear by developing countries that environmental requirements can negatively affect their export competitiveness. It is believed that the unilateral imposition of environmental measures through the US Lacey Act will affect trade or indirectly exert pressure for change. Also, developed countries are fearful that the Lacey Act may allow for indiscriminate use of fines or trade measures to promote environmental measures as it gives the US government the power to fine and jail individuals and companies who deal illegally harvested or trafficked wood products. Therefore, all these theories and beliefs are certainly debatable and this will be explained in detail in Chapter Three. Nonetheless, Putnam's two-level game theory and Schoppa's concept of 'synergistic linkages' and 'reverberation' would be able to explain Peninsular Malaysia's position with regard to FLEGT VPA negotiations and the binding trade related environmental measures as well as the policies and practices adopted for its forest sector and timber trade.

1.6 RESEARCH METHODOLOGY

To address the identified research question and objectives, this dissertation will rely on qualitative research methods, involving a case study of Peninsular Malaysia's forest sector and timber trade. There will also be case studies on the measures imposed by the developed countries i.e. the US Lacey Act, the EU FLEGT VPA negotiations and its EUTR and Australia's ILPA/ILPAR and its specific guideline. These measures will be assessed to see how they will affect the forest sector and timber trade in Peninsular Malaysia. According to Yin (2003), multiple case studies allow for exploration of the differences within and between cases. The goal is to replicate findings across the cases in addition to predicting similar results across the cases as comparisons will be drawn or predicted based on theory.

It is also important to note that a few recent research outputs using mainly quantitative methods relating to Peninsular Malaysia's timber trade have been undertaken such as "*Trade Barriers in Forest Trade*" (Zakaria, 2011); "*Impacts of Trade Barrier to Timber Trade in Malaysia*" (Islam, 2010); "*Impacts of Tropical Market Developments*" (Islam, 2010); "*Trade and Environment: Towards Sustainable Forest Management*" (Islam, 2010); "*The Impact of Timber Certification on Tropical Timber Trade in Malaysia*" (Islam, 2009); "*The Link between Trade and Environment, the Development of Timber Certification*" (Islam, 2009) and "*Study on the Progress of Timber Procurement Policies: Malaysia a Case Study*" (Baharudin, 2009). However, this dissertation is unique and different from the other studies as it is totally qualitative in its method and focuses on the effect of FLEGT VPA, acts and/or regulations on Peninsular Malaysia's forest sector and timber trade. According to Mayoux (2001), qualitative research is useful to: (1) understand what is happening (i.e. to explore issues with '*more complex and sensitive impacts*' especially in situations where research through quantification may be not be viable, too time-consuming or even costly), (2) determine who is affected in which ways (to ensure that the most disadvantaged group are also heard where in normal situations it may not be possible due to "*public and consensual nature of participatory methods*"), (3) ascertain why

particular impacts are occurring (allows for in-depth study on the relationship between the contexts, aspirations, strategies, structures of institutions and involvement of enterprises) and (4) assess how policies can be improved (to do an in-depth study on issues that are complex and sensitive so that the objective of the proposals from participatory workshops are easily understood and met).

Therefore, in the case of Peninsular Malaysia, it would be interesting to investigate through qualitative methods on expert opinions or organisational views of various stakeholders on issues related to Peninsular Malaysia's forest sector and timber trade specifically on regulations and policies that are in place, current and expected level of stakeholder participation in such policy formulations, timber market share and access aside from the current global pressure and also the demand for trade related environment measures that require exports of at least legal timber and timber products. It is expected that some of the stakeholders may be critical of the current trade related environment policies on forest management and timber trade in place and generally on the whole situation. However, it is anticipated that these stakeholders will be able to provide some form of feasible proposals to improve the forest sector and timber trade in Peninsular Malaysia.

Hence, in other words, in this dissertation, the case study will be a tool where there will be: (1) an in-depth collection on the information pertaining to Peninsular Malaysia's forest sector and timber industry, (2) an understanding of the basis for trade related environmental measures imposed through agreements, acts and/or regulations and (3) a method for implementation and the effects of such measures on the forest sector and timber trade. Case studies are the preferred tool of research as the primary research question, which is "How do timber trade related environmental measures imposed by developed countries affect Peninsular Malaysia's forest sector and timber trade", requires a holistic and in-depth investigation to understand the forest sector and timber trade situation in Peninsular Malaysia and how it is affected

specifically by these measures. According to Yin (1994), “*case studies are the preferred strategy when ‘how’ or ‘why’ questions are being posed*” and when the investigator has little control over the events, and also when the focus is on a contemporary phenomenon within some real-life context.

Meanwhile, information from these case studies will be validated and strengthened by primary data gathering through semi structured interviews, focus group discussions, observation and written feedback from Malaysian officials dealing directly or indirectly with trade and timber related issues i.e. government ministries or agencies, NGOs and industry members. Also, semi structured interviews and email feedbacks as well as exchange of views are obtained from international officials directly involved with the negotiations of the FLEGT VPA or drafting of the acts and/or regulations i.e. Directorate General of Environment, Brussels and European Forest Institute to understand the reasoning, underlying implications and its impact on trade. The reason for the wide range of interviewees is to ensure that the views and comments of all these officials related directly or indirectly with the Malaysian forest sector and trade of legal and/or sustainable timber are all taken into account. It is also important to note that the interviewees that are selected and interviewed are mainly those who have very wide experiences in dealing with forestry and timber trade related activities in their respective fields. The questions asked are specifically on their expertise, experience and thoughts on the area of research. Through these interviews, it is anticipated that there will be inputs and views on the best possible ways to improve SFM and to sustain or improve the growth of Peninsular Malaysia's timber industry in line with international standards and requirements.

Furthermore, to ensure that the information obtained is rich and reflects the Federal-State affairs with regard to land and forest matters as explained above, focus group discussions are also held with State Forest Administrators and Implementers as well as State Timber Industry members.

In this regard, a purposeful¹² sampling has been applied where four states in Peninsular Malaysia were selected (i.e. Perak, Pahang, Selangor and Johor) on the basis that they cover the North, East, West and South of Peninsular Malaysia. What is also interesting here is that three of the states (Perak, Pahang and Johor) represent the current ruling political party while Selangor represents the opposition party. Therefore, this dissertation also looks into the possible different political perspectives on issues related to the forest sector and timber trade of Peninsular Malaysia after taking into account that land and forest are under the purview of state governments. Additionally, prior to the discussions, a briefing was held by the Chairman of Malaysian Timber Certification Council (MTCC) to brief the State Forest Administrators and Implementers as well as State Timber Industry members on the latest updates on FLEGT VPA and other related issues where the researcher sat in as an observer. However, it is acknowledged that there are limitations on the dissertation as some of the officials interviewed stipulated that they should not be quoted for some of the information given. As such, to protect the anonymity of the participants, their comments, views and opinions would be combined and highlighted based on their job scope and sector rather than an individual perception. The detail of the research methodology that is adopted for the purpose of this dissertation will be explained in Chapter Four.

1.7 ORIGINAL CONTRIBUTION OF THE STUDY

This dissertation contributes to the literature on forest sectors and timber trades of Peninsular Malaysia, trade related environmental measures imposed by developed countries and the linkage between trade and environment, in general. In particular, the above contributions are in line with the four main aspects of the dissertation.

¹² Purposeful sampling focuses on characteristics of particular subgroups of interest and thus facilitates comparisons. According to Patton (1990) purposive sampling refers to selection of information-rich cases for in-depth study. The size and specific cases depend on study purpose. For more details see Patton, M. (1990). Qualitative evaluation and research methods. (pp. 169-186). Beverly Hills, CA: Sage.

First, this dissertation is an in-depth study conducted on the effects of the trade related environmental measures on Peninsular Malaysia's forest sector and timber trade using primary interview data of stakeholders related to the forest sector and timber trade i.e. from the government, industry, NGOs and international representatives. The stakeholders include the main negotiators of the FLEGT VPA from Malaysia as well as the EU, the policy makers, forest administrators and implementers as well as the top industry players and individuals representing non-governmental bodies who have been directly following or involved in the issues related to the measures.

Second, this thesis is the first to use the two-level game theory (in the context of Malaysia) to explain the dilemma faced by the Federal Government of Malaysia, to handle international pressure and demand for change as well as the domestic stakeholders pressure and demand for development. The two-level game together with Schoppa's analysis of the theory will be able to explain the stance of the Federal Government in relation to the measures and the possible direction undertaken to address the dilemma.

Third, this dissertation is the first to address the issue of the three binding measures imposed by the US, EU and Australia together with special attention given to the domestic political dynamics underlying the Federal-State relations in Peninsular Malaysia, particularly on land and forest matters.

Fourth, this dissertation will be helpful for the Federal Government of Malaysia to gauge the actual scenario on the ground, the thoughts of the wide group of stakeholders and how these measures will affect Peninsular Malaysia's forest sector and timber trade as well as the country's image as a whole.

1.8 OUTLINE OF THE RESEARCH

As stated earlier, the dissertation seeks to answer “How do timber trade related environmental measures imposed by developed countries affect Peninsular Malaysia’s forest sector and timber trade?” In this relation, the dissertation will focus on the following nine chapters:

- Chapter 1: Introduction: Why study Peninsular Malaysia’s forest and timber trade?
- Chapter 2: International Pressure and Demands on The Tropical Forest and Timber Trade - A Sustainable and/or Legal Requirement
- Chapter 3: Theoretical Perspective of Free Trade and Environmental Demands
- Chapter 4: Methodological Approach to Address the Research Problem
- Chapter 5: Evolution of Malaysia’s Policies and Practices - A Move Towards International Practices
- Chapter 6: Trade Related Environmental Measures and Their Effect on Peninsular Malaysia’s Forest Sector and Timber Trade
- Chapter 7: Comments, Views and Criticisms by Experts – An Analysis Based on Putnam’s Two-Level Game Theory
- Chapter 8: Conclusion

CHAPTER 2

INTERNATIONAL PRESSURE AND DEMANDS ON THE TROPICAL FOREST AND TIMBER TRADE – A SUSTAINABLE AND/OR LEGAL REQUIREMENT

2.1 INTRODUCTION

The Stockholm Conference in 1972 paved the way for the debate linking trade and environmental measures as well as the importance of sustainable development. Meanwhile, the rise of climate change issues and global warming in the 1990s laid the foundation for extensive debates and development in the literature surrounding such concerns. Therefore, this chapter outlines the evolution of the debate with specific reference to the tropical forest sector and timber trade. It argues that the recent growing pressure and demands for SFM and trade of sustainable and/or legal timber and timber products imposed by developed countries through agreements, acts, regulations and/or policies have become an inevitable trend in the last few years. This chapter further explores the importance of research on timber trade related environmental measures imposed by some developed countries on the forest sector and timber trade in Peninsular Malaysia.

2.2 ENVIRONMENTAL AWARENESS – A SUSTAINABLE DEVELOPMENT REQUIREMENT

2.2.1 The North-South Dilemma on Trade Related Environmental Issues

Trade and environment emerged as issues of academic debate and became a public concern especially in the early 1970s, due to growing international awareness of the impacts of economic growth on social development and the environment¹³. This is with specific emphasis on the effect of pollution led by

¹³ According to O'Brien & Williams, (2002) there are different approaches in classifying issues of environmental concerns: (1) physical changes such as atmospheric pollution and ozone depletion, (2) development activities such as energy production and use, agriculture production and (3) human condition and well being such as population growth, health and security. Another classification differentiates between problems arising directly from human activities (i.e. deforestation, top soil erosion) and problems arising from indirect consequences of the waste (for example green house

industrialization and its related ozone depletion. As a result, in 1972, the United Nations Conference on Human Environment (UNCHE) was held in Stockholm and according to Taib (1997), the UNCHE was a distinctive event, as it was the first time in the history of United Nations (UN) that environment was specifically introduced into its program. Apart from that, the Conference was also recognized as the *“beginning of modern political and public awareness of global environmental problems”* as it garnered two distinct features which became the characteristics of future UN special conferences i.e. firstly, the extensive media interest and coverage and secondly the involvement of NGOs (Taib, 1997¹⁴; Baylis, 2005; Waas, et al., 2011).

Nonetheless, it is noted that the conference did not manage to garner much support from developing countries for several reasons. The developing countries believed that discussions on environmental and developmental problems should not be treated as one issue and it lacks the sense of integration and shared problems between developing and developed or industrialized countries. The developing countries were also of the view that the main environmental problems for their countries did not arise from pollution—as argued by developed countries—but mainly from poverty, disease, hunger and exposure to natural disaster. This ultimately led to the conference agenda being widened to include discussions on poverty and also financial aid. Apart from that, developing countries saw the ideas put forward during the conference i.e. global resources management, as an attempt to take away control of their natural resources. Also, they believed that, since industrialized countries are the ones that actually contributed to most of the pollution, developing countries should not be the only ones compelled to pay for the consequences of pollution (Taib, 1997; Adams, 2009). As such, this can be said to be the start of the differences in opinions between developed and developing countries on issues related to the

gas emission). The direct consequences are accordingly relatively localized and the indirect consequences are direct global reach. Therefore, the focus of this dissertation is mainly on second classification.

¹⁴ Accordingly, the UNCHE was a ‘special one-off conference which provides a new dimension on environmental issues where the main concern back then was the pollution and the disruption of the natural system caused by high level of industrialization’.

environment and trade. However, hypothetically—although at the surface only—it may seem that there was not much support for the idea of sustainable development put forward during the conference by developing countries, nevertheless in practice, major changes were seen in the international system i.e. (1) governments have given due recognition to environmental issues as a basic human right in national policies, (2) within a short time frame (1971-1975), the Organization for Economic Cooperation and Development (OECD) countries passed 31 major national environmental laws and (3) from 1972 to 1982, the number of Ministries and Departments related to the environment has tremendously increased from 10 to 110 Ministries and Departments (The UNEP Report on Global Environment Outlook 3)¹⁵.

Meanwhile, the concept and issue of sustainable development was continuously pondered and debated upon by scholars and policy makers. The World Conservation Strategy (WCS) report launched in 1980 by International Union for Conservation of Nature (IUCN) took into account the importance of sustainable development, where it was recognized that long-term effort and integration of environmental and developmental objectives are required to tackle environmental related issues. In 1982, the 'Stockholm plus ten' conference was held in Nairobi, where as a result, the World Commission on Environment and Development (WCED) was established in 1983. This led WCED to develop a long-term environmental strategy to achieve sustainable development and this consequently led to the publication of the famous 'Brundtland Commission Report 1987'. It can be stressed that this report, also known as "*Our Common Future*" was the turning point in actually popularizing the term sustainable development to the world. It highlighted that developed and developing countries should define their

¹⁵ It was reported that the governments and other stakeholders recorded qualified successes in the 1970s in the area of wildlife conservation where there is a combination of legal actions at the global level that are enforced at the national level effectively in the form of multilateral environmental agreements such as the 1971 Convention on Wetlands of International Importance Especially as Waterfowl Habitat (Ramsar); 1972 Convention Concerning the Protection of the World Cultural and Natural Heritage (World Heritage); 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES); and 1979 Convention on the Conservation of Migratory Species of Wild Animals (CMS) - The UNEP Report on Global Environment Outlook 3

economic and social development goals by taking sustainability into account. The definition that the Commission proposed was *“development that meets the needs of the present without compromising the ability of future generations to meet their own needs”* (Waas et al., 2011). Subsequently, the term sustainable development began to receive extensive attention in the 1990s, as at that time, the issue of climate change became a major concern. This was mainly because its impact on the weather was significantly felt by the world’s population.

As such, during the United Nations Conference on Environment and Development (UNCED or also known as the Earth Summit) in June 1992, the concept of sustainable development was discussed in more detail, as a consequence, several documents and agreements emerged during the summit i.e. (1) The Agreement on the Framework Convention on Climate Change, (2) The Rio Declaration and its 27 Principles for Sustainable Development, (3) Agenda 21’s Document to Promote Non Mandatory Actions on Sustainability and (4) a Non-Legally Binding Authoritative Statement of Principles of a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forest i.e. also known as The Forest Principles. Also, a major success of the conference was that the Convention on Biological Diversity was signed and this was seen by the world as a big step towards international cooperation on environmental issues. Thus, the Rio Summit can be applauded to have succeeded in gaining support and cooperation of developed and developing countries on several environmental related issues like bio-diversity and bringing about intense discussions on the concept of sustainable development and its measures. Taib (1997) stated that it also saw a significant involvement of big corporations in the process, which is seen by many as responsible for shaping the UNCED agenda and influencing its outcome. Also, it is notable that the UN Framework Convention on Climate Change led to the adoption of the Kyoto Protocol in 1997 where industrialized nations representing 90% of the world’s economic output, committed themselves to reduce greenhouse gas emissions. The Protocol came into force in 2005 where 191 states and

the EU ratified the Agreement. The US initially signed the Agreement but exited the Protocol in 2001. The Protocol which represents the world's global scale reduction of GHG emissions was not successful as expected due to non-compliance by biggest emission perpetrators such as China and the US that together accounts for 40% of global emissions. In 2012, an extension of the Protocol was agreed where the commitment period runs from 2013 to 2020. Member countries are now expected to reduce green house gases from 25% to 40% and to voluntarily tighten up their goals without the need for time consuming procedures. Despite the extension period, the protocol is still not a success as countries like Japan and Russia exited the Protocol and the remaining parties now accounts for only 15 percent of the global green house gas emission.¹⁶

Nonetheless, just like the Stockholm Conference, the UNCED also saw the rise of tension among developed and developing countries, again, due to differences on the focus of the main environment related problems. The developed or industrialized countries focused more on global atmospheric change and tropical deforestation issues while developing countries were more concerned with issues of poverty and its related problems. Once again, developing countries feared that developed countries would use international agreements that deal with issues such as climate change to limit their efforts on industrialization. They also feared that the issues focused by developed countries like tropical deforestation would constrain the usage of their natural resources for their country's development. Apart from that, the fact that developed countries have already become wealthy by giving less regard to their environment through clearance of a big portion of their forest cover and by allowing industries to develop and operate with minimal consideration for environmental externalities, caused immense dissatisfaction among developing countries on the unfair constraints imposed on the usage of their own natural resources.

¹⁶ Information obtained from unknown author of an Article entitled "Looking Beyond the Kyoto Protocol", February 2015. Available at <http://phys.org/news/2015-02-kyoto-protocol.html>

In this regard, due to such concerns, it was not surprising that the Rio Declaration did not contain strong wordings as its 27 principles constituted “*a bland declaration that provides something for everybody*” (Holmberg et al., 1993, p. 7 as cited in Adams, 2009). Therefore, the Rio Declaration principles are of a voluntary nature and not controversial, in particular Principle 12 talks merely on cooperation, where states are requested to co-operate to promote an “*open international economic system that would lead to economic growth and sustainable development in all countries*” and “*trade policy measures for environmental purposes should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade*”. Furthermore, UNCED failed to gain financial support or commitment from its participating countries and in this regard, Upton (2002) stated that 90% of issues identified in Agenda 21 have difficulty in implementation due to financial constraints. In this regard also, Adams (2009) comments came as no surprise that, although the “*UNCED left a legacy of solid achievements*” in areas such as development of international law as well as international institutions and in obtaining international consensus about environment and development, he stressed that the significance of any achievement reached are indeed doubted by many analyst.

Nevertheless, the term sustainable development continued to warrant the world's attention even after the summit where various conferences discussed some of the issues identified i.e. The World Summit on Social Development in Copenhagen (1995), The World Conference on Women in Beijing (1995) and The World Food Summit in Rome (1996). In this regard, Scoones (2007) argued that by the year 2000, the loose movement, promoting sustainable development were ‘*more muted, more fractured and perhaps a little more realistic*’. However, ten years later, global commitments on sustainable development were again revisited and this time through The World Summit on Sustainable Development 2002 held in Johannesburg. It was Johannesburg Declaration that saw the renewal of previous commitments of Stockholm Conference 1972, the Rio Summit 1992 as well as the Millennium Development Goals. Nevertheless, what was interesting and different in the

outcome of this summit was that there were strong sentiments and dissents created on certain environmental issues. In this regard, Wapner (2003) observed that there were strong areas of dissents on the issue of Genetically Modified Crops and what was interesting was that anti-Genetically Modified activists and social movements seem to be leaning against corporations that had re-branded themselves as committed to “*sustainable agriculture*” globally. Also, he was of the opinion that there were heated debates on the idea of sustainable development, whether the needs of business and global capital had been sold out or whether the dialogues with corporations were seen as a means to obtain corporate responsibility on sustainability issues. Nonetheless, just like the previous predecessors, this summit also saw no strong commitments on sustainable development as a whole, apart from selected issues.

Another ten years later, the world once again saw the re-emergence of global commitments on sustainable development and this time through the United Nations Conference on Sustainable Development (UNCSD), also known as Rio+20 or Earth Summit 2012. This summit was held as a means to revisit previous economic and environmental goals of the global community as agreed during UNCED 1992. The UNCSD was also held to secure renewed political commitments on sustainable development goals focusing on its three main pillars i.e. economic growth, social improvement and environmental protection¹⁷. As such, the main idea or theme of ‘green economy’¹⁸ was mooted during the conference but it remained an idea as most developing countries saw it as a means of colonization by wealthy developed nations—the imposition of a “*one-mode-fits-all*” model (Pisano et al., 2012).

¹⁷ Information obtained from the Newsletter of the UNCED, Rio + 20 : Make it Happen, Volume 3, issue 4, Available at http://www.uncsd2012.org/content/documents/43Vol3_Issue4.pdf

¹⁸ According to the UNEP, green economy is about: “*growth in income and employment which is driven by public and private investments that reduce carbon emissions and pollutions; enhance energy and resource efficiency; and prevent the loss of biodiversity and ecosystem services. These investments need to be catalyzed and supported by targeted public expenditure, policy reforms and regulatory changes*”. See further details on <http://www.unep.org/greeneconomy>.

Apart from that, the summit was considered a disappointment by many as important Heads of State like Barack Obama (US) and David Cameron (UK) did not participate and according to The Guardian,¹⁹ the leaders “*have snubbed the talks*” and this has “*dismayed the architects of global sustainability governance*”. As such, according to Pisano et al., (2012)²⁰ the UNCSD registered a “*poor score*” in terms of political will due to the lack of leadership and absenteeism of certain important Heads of State in Rio and that the main outcome document of the summit “*The Future We Want*” has no target, timeline and binding commitments. Nevertheless, despite several failures and disappointments, the UN Conferences as a whole can be applauded as being successful for (1) giving recognition and popularizing the term sustainable development, (2) providing a forum for discussions in the international arena not only for government officials but also NGOs on environmental issues, (3) agenda setting and (4) gaining political support and seeing substantial changes in the environmental governance (Haas, 2002).

On the other hand, the warnings and implications contained in the Stern Report (2006) on global warming can also be said to be the turning point in making the world realise the severity of human actions on the environment that affects climate change and the importance of sustainable development. In this regard, the report stated that to prevent a tragic climate change, the global average temperature rise must not be more than 2 degrees centigrade. Emission reductions are needed across all relevant sectors such as land use in forests and agriculture as well as from fossil energy or industrial sources. Furthermore, it was argued that reducing the risk of climate change requires collective action, which is cooperation between countries for the achievement of shared goals, through international frameworks. Although some economists were very critical of the report (Byatt et al., 2006; Nordhaus, 2007), others were more favourable as follows: (1) it

¹⁹ The Guardian, “Rio+20 Earth summit: pressure for deal – but will leaders hold their nerves”, 20 June 2012

²⁰ The Author together with two others (Andreas Endl and Gerard Berger) prepared a Report on behalf of the ESDN titled “The Rio+ 20 Conference 2012: Objectives, Processes and Outcomes”, published soon after the Conference. The Report provides a broad picture of the ‘road to the Rio+20’ and its outcome.

was adopted as a “*gospel truth*” by the public taking into account their mood when it was published—at the time where environment was a great concern, (2) the politicians endorsed it as it was a “*vote-winning message*”, (3) the media’s excitement with their story on global warming selling well in newspapers and (4) environmentalists were happy that their concerns were now known to the world²¹.

2.2.2 The Trade and Environment Linkage

Therefore, as one of the measures to reduce damage to the environment, the trend to link trade with environmental issues, especially by developed countries, in any discussion of a trade agreement has become inevitable as trade is seen as a “*cylinder that propels the engine of growth*”²² and the growth at certain instances can bring about destruction to the environment. This view is authenticated by the OECD, where in its 1994 report, it was indicated that there are five types of physical and economic impacts on the environment and development due to trade flows and trade liberalization, which are: (1) product trade flows (product effects), (2) technology trade flows (technology effects), (3) level of trade or of economic activity (scale effects), (4) pattern of economic activity (structural effects) or (5) legal instruments (regulatory effects)²³. Meanwhile, Panayatou (2000) is of the view that, apart from the five impacts, there is another form of trade-induced impact on the environment, which is income effects, i.e. the willingness to pay with increased personal income due to growth induced trade. As such, the close linkage between trade and environment is something that is recognised or has become inevitable and is also something that is constantly disputed by scholars either in favour of or against such linkage (Grossman & Krueger, 1993; Bhagwati, (1993, 1998,1999, 2000, 2002); Daly, 1993(a) and 1993(b); Beghin et al., 1994; Cooper, 1994; Esty, 1994 and 2001; Copeland, Brian & Taylor, 1994, 1999 and 2004; Crooper & Griffiths, 1994; Lopez,

²¹ Statement from the Global Warming Policy Foundation (GWPF) Report 9 on What is Wrong With Stern: The Failings of the Stern Review of the Economics of Climate Change by Peter Lilley, MP in 2012.

²² Nordstom, H., and Vaughan, S. (1999). Trade and Environment. *WTO Special Studies 4*.

²³ See Methodologies for Environmental and Trade Reviews, Paris: OECD, 1994. Available at <http://search.oecd.org/officialdocuments/displaydocumentpdf>; 12 May 2012

1994; Simula, 1999; Mumme, 1999; Deere & Esty, 2002; and Mani & Jha, 2006) See Table 2.1 for details of some of the views by scholars on the linkage between trade and environment.

Table 2.1: Examples of Views by Scholars on the Linkage between Trade and Environment

Simula (1999)	There are direct and indirect negative trade effects on the environment. Environmental policies and regulations also influence individual producers, thereby influencing trade flows. Trade is also considered as an agent affecting sustainable management of natural resources as trade liberalization and macroeconomic policies have led to expanded exports by developing countries, particularly in commodities trade
Esty (2001)	Linkage between trade and environment is a matter of fact and there is no choice on whether to address the linkage. The only choice is whether policies will be <i>“designed openly, explicitly and thoughtfully, with an eye for economic and political logic—or implicitly and without systematic attention to the demands of good policy-making”</i> .
Beghin. J. et al., (1994)	Trade policies may not be a suitable instrument to address domestic environmental policies but can be used to further promote international cooperation in trans-boundary cases by encouraging cooperation or by taking action against those who do not comply with the agreement once signed.

Mani and Jha, (2006)	The linkage between trade and environment is mainly due to the following concerns: (1) countries may tend to produce, export or invest in commodities that are pollution-intensive or in resource intensive sectors with weak environmental policies (2) environmental standards could be affected by trade liberalization where there is a possibility of a situation of 'Race to the Bottom' due to competition and (3) environmental tariffs may be imposed on trading partners due to inadequate environmental standards (investment in pollution heavy industries) and these could be used by domestic firms as a disguised protection.
Bhagwati (1998, 1999, 2000, 2002) and Cooper (1994)	Though recognizing the linkage between trade and environment, these scholars are not agreeable on such linkage. They constantly emphasized that pollution control and natural resource management issues should not be part of a trade policy-making process. This is because such linkage may lead to several environmentalists bringing in their own environmental agenda into the trading system where they might want to impose their personal ethical preferences either through sanctions or coercion.
Coyler (2003)	Environmental issues should not be linked to trade related agreements but left to separate domestic policies and multilateral environmental agreements which do not restrict or prevent benefits of free trade

As such, the linkage between trade and environmental issues may be seen as going against the nature of free trade as promoted by GATT/WTO since 1994. As we are aware, due to globalization, there is a growing interdependence of trade among countries and a requirement for greater cross border movement of goods, services and investment. Through the WTO, member countries became committed to reduce tariffs and non-tariff barriers and what is important is that the non-discrimination rules i.e. Most Favoured Nation and National Treatment rules are designed in such a way to ensure that fair conditions of trade applies to all members. Furthermore, to ensure member countries gain the most benefits through trade and noting the fact that WTO processes are slow, member countries are allowed to forge Regional Trading Agreements (RTAs) i.e. customs union or free trade areas as per Article XXIV of GATT. In this regard, in the early 1990s, there was an increase in countries, be it developed or developing, entering into regional or bilateral trade agreements in order to gain easier and cheaper market access for their goods and services and also for investment opportunities²⁴.

However, despite the above situation, it would not be fair to state that the WTO is only concerned about expansion of trade, services and investment, as there is also due recognition given to trade related environmental issues through various sources. The WTO preamble as per the Marrakech Agreement has set guidelines²⁵ that mention the importance of sustainable development and the need to preserve the environment. Apart from the preamble, as mentioned in Chapter One, WTO/GATT 1947 also allows for

²⁴ WTO database indicates that it has received as of 7 April 2015, around 612 notifications of Regional Trade Agreements which includes goods, services and accession, out of which 406 were in force. Obtained from WTO website: http://www.wto.org/english/tratop_e/region_e/region_e.htm; retrieved 16 July 2013

²⁵ The Guidelines of the Preamble of Marrakech Agreement as follows:

- *trade and economic endeavor should be conducted with a view of raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development; and*
- *need for positive efforts designed to ensure that developing countries and especially the least developed countries secure a share in the growth of international trade commensurate with the needs of their economic development.*

conservation of exhaustible natural resources under General Exception to GATT obligations in Article XX(b) and (g). This actually provides the ground for developed countries to argue for such protectionism measures where as long as member countries do not discriminate between imported and domestically produced like products (national treatment principle), or between like products imported from different trading partners (most-favoured-nation clause), they are allowed to adopt measures necessary “to protect public morals” or “to protect human, animal or plant life, or health” (2004 WTO Report).

Furthermore, the WTO Working Group on Trade and Environment had established a Committee on Trade and Environment (CTE). The Committee that consists of all members of WTO had been mandated to identify the relationship between trade and environmental measures and they are tasked to encourage sustainable development. Another important feature is that during the Uruguay Round negotiations from 1986 to 1993, some environmental issues were already addressed in the General Agreement on Trade in Services - GATS, the Agreement on Agriculture, Sanitary and Phytosanitary Measures-SPS, Subsidies and Countervailing Measures-SCM, and Trade-Related Aspects of Intellectual Property Rights-TRIPS (WTO, 2004).

Nevertheless, despite all the efforts above, environmental issues remain a major concern especially by developed countries as the GATT/WTO's effective role in addressing trade related environmental measures are questionable. This is clearly explained by Pope (2002) who stated that industries in most countries that are export-driven such as those in the area of agriculture, logging, mining, energy production and fisheries are the main cause for environmental damage²⁶. Thus, he was of the opinion that these

²⁶ This is in line with the study of Homer-Dixon (1991), where he is of the opinion that there are seven major environmental concerns identified namely; green house gas warming, stratospheric ozone depletion, acid deposition, deforestation, degradation of agricultural land, overuse and pollution of water supplies and depletion of fish stocks.

industries, under the current WTO rules, are implicitly allowed subsidies in the form of environmental degradation although explicitly subsidies are prohibited to exports in the form of financial aid. He further explained himself by using Canada as an example. Although Canada does not provide economic assistance to its timber industry in the form of replanting subsidies, it allows logging without replanting and this type of incentives would not encourage an environmentally sound policy but instead lowers the environmental standards. The usage of Article XX GATT/WTO in protecting the environment has also been subjected to dispute under the Dispute Resolution Panel of GATT/WTO, where WTO is seen to be in favour of trade and less emphasis is given to the protection of environment especially those under the category of global commons such as explained in the cases below in Table 2.2.

Table 2.2: Cases Subjected to Dispute Resolution Panel of GATT/WTO

Case	Decision	View/Argument
<p>US-Mexico Tuna-Dolphin</p> <p>The proposed US Marine Mammal Protection Act, requires for yellow tuna exporting countries especially Mexico to show that there exist a tuna fishing regulatory programs. Dolphins taken incidentally by the exporting tuna</p>	<p>GATT dispute panel ruled against US stating that such Act was not required for the protection of animal life within the exception of the Article. It had violated Article III (National Treatment) which prohibits discrimination of imported products on basis of process and production methods (PPMs), in</p>	<p>If a country tries to ban imports on products that hurt another country's environment or a global common area, it would be illegal under GATT. Article XX does not take into account or fails to reduce the damage done by international trade to global commons as it only allows a country to ban imports that will harm its own domestic environment (Brack 1995).</p>

<p>fishing boats should be no greater than 1.25 times of the US rate. This is because the Mexican tuna fishing techniques results in 30,000 dolphins being caught and killed a year which is more than the rate. The US used Article XX(b) to argue the general exception under GATT WTO which allows for such actions to be taken.</p>	<p>this case the controversial fishing method. The US was only allowed under GATT ruling to implement a 'dolphin safe' labelling scheme on tuna cans so as to inform their consumers of the different practices between Mexican and American fisherman.</p>	
<p>US shrimp-turtle case with Malaysia, India, Pakistan and Thailand</p> <p>The US proposed a regulation that requires all shrimp exporting countries to declare that their shrimp was harvested in a manner that does not affect sea turtles. Affected countries such as India, Malaysia, Pakistan</p>	<p>The Appellate court ruled against the US on its discriminatory implementation of the Act. However, they did recognise the validity of the Act where they mentioned that WTO member countries can and should adopt effective measure to protect endangered species, such as sea turtles.</p>	<p>The ruling brought about different sentiments: (a) trade bureaucrats' use free trade to sacrifice legitimate environmental concerns "<i>beyond the reach of democratic control</i>"; (b) trade measures are allowed to be used for "<i>extra-territorial</i>" environmental objectives which would eventually undermine the WTO's multilateral trading system (Nordstrom, H., & Vaughan, S., 1999).</p>

and Thailand challenged the regulation which accordingly was inconsistent with the WTO/GATT 1947.		
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However, according to Guruswamy (1998), there are four international treaties that are said to offend or run foul of free trade rules of GATT WTO, where trade sanctions were applied to ensure environmental protection as seen in Table 2.3.

Table 2.3: International Treaties Against Free Trade Rules

Treaty	Objective
The Montreal Protocol on Substances that Deplete the Ozone Layer	A mandatory timetable for the phasing out of ozone depleting substances and it is reviewed regularly. The phased out dates are accelerated in accordance with scientific understanding and technological advances. Developed and developing countries are bonded by progressive phase out obligations for all major ozone depleting substances, including CFCs and less damaging transitional chemicals such as HCFCs. (http://www.ozone.unep.org)

<p>The Convention on International Trade and Endangered Species of Wild Fauna and Flora (CITES)</p>	<p>To ensure that international trade in specimens of wild animals and plants do not threaten their survival. CITES was conceived in the spirit of international cooperation to safeguard certain species from over-exploitation because of trade in wild animals and plants, crosses borders between countries. It accords varying degrees of protection to more than 35,000 species of animals and plants, whether they are traded as live specimens, fur coats or dried herbs. Timber has been included in the CITES list as of 2008 (http://www.cites.org)</p>
<p>The Basel Convention on Control of Trans-boundary Movement of Hazardous Waste and their Disposal</p>	<p>To protect human health and the environment against adverse effect of hazardous wastes. It aims to: (i) reduce hazardous waste generation and promote environmentally sound management of hazardous wastes, wherever the place of disposal, (ii) restrict trans-boundary movements of hazardous wastes except where it is perceived to be in accordance with the principles of environmentally sound management and (iii) have a regulatory system applying to cases where trans-boundary movements are permissible (http://www.basel.int)</p>

<p>The Convention of the Prohibition of Fishing with Long Driftnets in the South Pacific</p>	<p>To restrict and prohibit usage of drift nets in the South Pacific region to conserve marine living resources. The parties to the Convention agreed to take measures not to encourage the use of drift nets by prohibiting their use and the transshipment of such catches.</p>
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On the other hand, it can be counter argued that these four agreements have been agreed upon by countries who are parties to these agreements and as such it may pass through any legal challenges if the trade is between those countries. It may only pose a challenge for trade between parties to the agreements with those not parties of the agreements (Elliot, 1998). As such, in a nutshell, it can be stated that, though recognition is given by WTO to trade related environmental issues, free trade is still the fundamental aim of WTO, where any barrier to trade should not exist apart from the reasons provided above and even so, it can be subjected to dispute and interpretation in favour of trade. Moreover, WTO is not an environmental related organization, thus explaining its emphasis and priority for trade enhancement³⁴.

So at the end of the day, with the WTO focusing on trade enhancement, it is not surprising that developed countries may choose to include trade related environmental concerns in trade agreements as means to pursue the environmental agenda. According to Vogel (1997), such concerns have been endorsed mainly due to the pressure from domestic firms that want to have a

³⁴ See Trade and Environment at the WTO - A paper prepared by the WTO Secretariat, April 2004 as a background document to assist public understanding of the trade and environment debate in the WTO.

scenario of *“level playing field by imposing additional costs on their international competitors”*, and the combination of environmental groups that wants *“to use trade as leverage to improve environmental practices”*. It started off with the North American Free Trade Agreement (NAFTA), a multilateral trade agreement, which is the first example where environmental measures became an integral part of the agreement by signing of a separate side agreement i.e. North American Agreement on Environmental Cooperation in 1994. Mumme (1999) stated that *“NAFTA is a first step in the direction of bridging the policy gap between trade and environment”*. He further believed that future trade agreements should emulate the environmental initiatives under NAFTA. Thus, NAFTA led the trend for other trade agreements to have environmental measures incorporated, either as a side agreement or part of the body of the main agreement itself. In this regard, the US-Jordan FTA is the first free trade agreement to include enforceable environmental obligations in the body of its main agreement³⁵. This trend can also be seen in most of the free trade agreement negotiations that developed countries like the US or the EU are negotiating or have signed with other countries. This can also be seen in the case of the abandoned Malaysia-EU Free Trade negotiations, where there was a specific chapter negotiating on Trade and Sustainable Development.

Furthermore, this trend to link trade and the environment can be clearly seen in the forest sector and timber trade based on trade related agreements and policies negotiated or imposed by certain developed countries. Such agreements and policies now require SFM to be practiced in the forest for proof that timber and timber products exported to these developed countries are from a sustainable and/or legal source.

³⁵ Refer to US Environmental Protection Agency website at <http://www.epa.gov/international/trade/geninfo.html>

2.3 THE FOREST SECTOR AND TIMBER TRADE - THE LINKAGE **CONTINUES**

In recent years, the forest sector and timber trade have been the centre of attention in various trade and environmental debates. This is because as mentioned in Chapter One, the forests from which timber and timber products are derived have a vital role in the fight against global warming, in particular, climate change. Forests that are cleared or degraded for the purposes of settlement, agriculture, shifting cultivation or for timber trade, released CO₂ and greenhouse gases such as methane into the atmosphere. Meanwhile, land-use changes are estimated to be responsible for 18% of emissions with deforestation accounting for most of the emissions. Also as mentioned in Chapter One, tropical forests that are degraded released 1-2 billion tonnes of carbon per year over the past 20 years. This contributes to 20% of overall greenhouse gas emission (ITTO Report, 2011). It is also important to note that forests are critical not only in protecting the atmosphere but also in preserving earth's biodiversity and genetic heritage, protection of freshwater resources and sustaining the lives and livelihoods of forest dependant people.

Meanwhile, forests in general, are considered to be a global public good or part of global commons. However, this is not in terms of ownership, but in terms of the outcome of deforestation that can be tangible to the environment or common heritage for mankind (Kaul, 1999). In this regard, deforestation which is a major concern has warranted various studies on the causes and implications of such an action. Scholars have argued that there are various reasons for deforestation, which are deliberated below. However, they can be grouped into two mainstream views: (1) as a direct cause of shifting cultivation for forest produce and (2) the underlying driving forces in which economic factors, national policies, institutional factors, technological factors, cultural and demographic factors plays important roles in the deforestation (Allen & Barnes, 1985; Myers, 1992 & 1993; Cropper and Griffiths, 1994; Bourke, 1995; Rudel & Roper, 1997; Wibowo & Byron, 1999; Geist & Lambin, 2001; Tarasofsky et al., 2001; Elias, 2012).

As such, due to the important aspects of forests, its depletion concerns the world as a whole. This is especially so in the case of tropical forests which are rich in bio-diversity and valuable for different forms of lives that occupy the forest and also for its timber and other non-timber products. Furthermore, tropical forests in the world that are estimated at 1.6 billion hectares are said to be continuously deforested at more than 11 million hectares annually. The area currently under management is only about 22.7 million hectares, which has been certified as being sustainably managed (ITTO 2011). Of major concern are illegal logging and its associated trade which is reported to be rampant and an important cause of deforestation and forest degradation in many developing countries. Also, as mentioned in Chapter One, it is estimated that economic value of global illegal logging (which includes processing) is valued between US\$ 30 billion and US\$ 100 billion (10% to 30%) of global wood trade. In addition to environmental damage, the loss of revenue and tax income from illegally harvested wood is estimated to be at least US\$ 10 billion per year (UNEP/Interpol, 2012).

According to Elias (2012)³⁶, illegal logging and its related trade includes: (1) cutting of trees illegally or cutting of protected species, (2) removing trees from protected areas or more than quota allocated or without a license or with false intentions, (3) stealing wood from forests owners, (4) misrepresenting of false documents and label, (5) avoidance or underpaying taxes or fees for wood or wood products and (6) laundering illegal material (by false declarations of origin and/or species). She further stated that even though there is a market for trade of illegal wood products, weak governance and poor policies facilitate its operation. Meanwhile, Brown (2010) is of the opinion that wood is easily obtained and traded illegally because it: (1) comes from areas that are sparsely populated and far away from enforcement, (2) is a product that is easily replaced as it is fungible which makes it easy to launder, (3) provides opportunities for corruption in the many points of its

³⁶ Patricia (Pipa) Elias is a consultant to the Tropical Forest and Climate Initiative at the Union of Concerned Scientists (UCS), and is a former analyst/advocate in the program. The UCS is the leading science-based non-profit organisation analyzes and promotes ways to cut global warming pollution by reducing tropical deforestation.

long global supply chain and (4) is a trillion dollar industry and the demand for wood products provides a strong incentive for logging. In this regard also, Lawson and MacFaul (2010) were of the view that efforts to implement sustainable production through legislation and sustainable consumption through certification in the past two decades have been a disappointment due to illegal logging and the unregulated international trade in cheap and illegally sourced timber. Also, efforts to build confidence on the benefits of the sale of timber and timber products certified as sustainable have been obstructed by competition from much cheaper products made from illegal wood.

Therefore, in view of the vital importance of tropical forests and the importance of addressing illegal logging and its illegal trade, the crisis is on the international agenda for urgent action including the agenda of G-8 countries. Accordingly, the G-8 countries are committed to retain forest-related issues at high level domestic and international agendas and to combat illegal logging aside from the use of illegally harvested timber and related products. These concerns have also been discussed in various other timber trade and forest related forums, where the issues concerned have become part of their main agenda as well. Countries from the East Asian region and other regions had participated in the Forest Law Enforcement and Governance Ministerial Conference in Bali in 2001 to establish a framework for countries (be it producer or consumer countries) to work together to tackle illegal activities. The ministers had agreed to *“take immediate action to intensify national efforts and to strengthen bilateral, regional and multilateral collaboration to address violations of forest law and forest crime, in particular illegal logging, associated illegal trade and corruption and their negative effects on the rule of law”*.

Also as mentioned earlier, in 1992 itself, UNCED had reached an agreement on the Forest Principles. Accordingly³⁷, the Forest Principles can be considered as a code of good stewardship, which is applicable to all forests in terms of respect for national sovereignty over forests. There is also a request for all countries to adopt sustainable patterns of production and consumption. Mersmann (2004) stated that the Ad Hoc Intergovernmental Panel on Forests (IPF) and the Intergovernmental Forum on Forests (IFF) are of the view that trade can have positive and negative impacts on SFM. As such, during these forums, it was proposed that countries should monitor closely the effects of trade policies. Also, it is notable that the World Summit on Sustainable Development (WSSD) committed to act immediately on the forest law enforcement on the domestic front and also on the illegal trade in forest products in the international arena. Meanwhile, other forums such as ITTO, United Nations Forum on Forests (UNFF), FAO's Committee on Forestry (COFO) and Regional Forestry Commission also discuss and monitor SFM and other timber trade related issues.

Therefore, as mentioned earlier, trade, especially of products of natural resources and in this case timber and timber products have been inevitably linked to environmental issues. According to Robalino and Herrera (2009)³⁸, it is likely that higher trade will lead to higher production of agricultural goods in net exporter countries. In this regard, countries like Brazil, most of the Andean countries, Central America, Canada, Indonesia and Malaysia will most likely suffer higher deforestation rates with increased trade. Conditions are already set in these countries for the development of agriculture and land cover where forests are relatively abundant. Meanwhile, Bourke (1995)

³⁷ FAO Corporate Document Repository: State of the World Forest (1995); Part 1, Evolution of forest policies and future directions. The Forest principles also highlights on the multiple functions and uses of forests and the need for a balanced view of the issues and opportunities for their conservation and development. Meanwhile, it is also highlighted that Chapter 11 of Agenda 21 also focuses on deforestation. Accordingly forestry is an important element in other chapters dealing with desertification and drought, sustainable mountain development and the conservation of biodiversity.

³⁸ Paper by Juan Robalino and Luis Diego Herrera (2009). Trade and deforestation: A literature review. *Economic Research and Statistics Division*, WTO. Appears in the WTO working paper series as commissioned background analysis for the World Trade Report 2010 on "Trade in Natural Resources: Challenges in Global Governance"

stated that negative impacts of forestry on environment: (1) occurs at the forest level i.e. destruction or damage due to poorly planned and executed silviculture or excessive harvesting and the potential consequences on biological diversity, local communities and global climate change and (2) are from the effects of transport, processing and consumption including pollution from processing plants, use of polluting materials in the production of forest products, energy requirements for processing, excessive or uncontrolled consumption and waste disposal. As such, concerns about such negative impacts have both directly and indirectly spilled over to trade, particularly international trade. Therefore, he also believed that international trade has effects on the environment and environmental action affects trade. Meanwhile, Brown (2000) had, in summary, mentioned that the causes of deforestation and forest degradation includes among others population increase, migration, land tenure provisions, forest products trade, fuel-wood demand, corruption, infrastructure development and government policies including provision of subsidies.

From another perspective, there are views that trade alone is not the cause of forest destruction which directly or indirectly have an impact on the environment. According to Tarasofsky et al. (2001), trade alone does not cause forest destruction but in combination with poor management it can be an important driver to deforestation. He stated that the impact of increased international trade in forest products includes among others: (1) overexploitation of tree species, (2) pressure to convert natural forest to plantation, (3) damage to rivers and streams in forests, (4) increased soil erosion in forests and economic cost arising out of providing infrastructure and (5) harm to traditional communities through loss of forest biodiversity. Meanwhile, in the case of Sub-Saharan Africa, it is also argued that trade is not the main cause of deforestation rather due to human activities, where, which is forests are degraded mainly for fuel wood, agricultural purposes and building materials for its country side (FAO Documentary Repository Report, 1995). As such, even though trade in some cases mentioned above may not be the direct link for forest exploitation, nevertheless it is unavoidable that it

was linked to trade. This is because of the increasing number of cases of illegal logging and its associated trade and the impact of such actions on forests and the environment as a whole.

Thus, the importance of ensuring that timber trade is from either a sustainably managed forest or from a legal source has clearly become a significant agenda for discussion. It should be noted that there is no universally agreed definition of SFM but the most referred to is the definition by the UNFF. The UNFF defines SFM as *“a dynamic and evolving concept that aims to maintain and enhance the economic, social and environmental value of all types of forests, for the benefit of present and future generations.”* Meanwhile ITTO defines SFM as *“the process of managing permanent forest land to achieve one or more clearly specified objectives of management with regard to the production of a continuous flow of desired forest products and services without undue reduction in its inherent values and future productivity and without undue undesirable effects on the physical and social environments”*.

However, there is a realization by developed countries that SFM for tropical forests is a long term goal as they are aware of its complex ecosystems and the fact that SFM embraces social, environmental and economic dimensions. Consequently, desiring an SFM strategy will not be an easy task for a country that is still developing. It requires strong institutions, knowledge, skills and resources both in human and financial terms³⁹. Such awareness, in the meantime, has directed short term efforts to combat illegal logging and its associated trade instead, which is reportedly rampant in many developing

³⁹ The FLEGT Action Plan 2003 clearly indicates that its current aim is to address the question of legality and not the wider and more complex questions concerning the sustainability of forest exploitation. Accordingly, the important difference between legal and sustainable timber are: legal timber can be harvested in an unsustainable manner, for example through authorised land clearance and illegal timber can come from sustainable sources, for example, timber harvested under indigenous management systems which are sustainable but don't comply with formal legal requirements. However, it is also stressed that the wider objective of the EU is at the end of the day is to encourage SFM. For further information can refer to the FLEGT Action Plan 2003, Pg 5 at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2003:0251:FIN:EN:PDF>

countries. The severity of illegal logging and its impact on the environment is worrisome and according to the European Commission (EC)⁴⁰, illegal logging's various impacts can be experienced where: (1) in economic terms, it will result in loss of revenue and other foregone benefits, (2) in environmental terms it is associated with deforestation, climate change and loss of biodiversity and (3) in social terms, it is linked to conflicts over land and resources, disempowerment of local and indigenous communities, corruption and armed conflicts.

In this regard, taking into account the severity of illegal logging and the fact that there is no common definition of legal timber, as such, the definition of legal timber based on the legal framework of a country is accepted as a major milestone to achieve SFM by most developed countries. This is clearly seen in the definition of legality provided by the EU in their FLEGT Briefing Note No. 2, which states that the practical definition of legally-produced timber is basically adhering to all laws applicable to a country's forest sector. However, considerations should be given to *“practicality of assessment, its impact on achieving definition's goals, consistency between laws, and equity in relation to all forest stakeholders' rights”*⁴¹.

As such, it comes as no surprise that markets and public procurement policies in some developed countries now demand legal timber to be assured through 'due diligence' or a credible verification system apart from the certified sustainable timber. It is also seen that such requirements imposed are actually in line with the principle of G-8 Environment and Development Ministers in 2005 where they have committed themselves to a range of different actions to combat illegal logging through: (1) cooperation with partner countries (supporting forest law enforcement and governance, enhancing transparency and access to information as well as sharing technical knowledge and tools), (2) trade-related measures (halting the

⁴⁰ Refer to EC website at http://ec.europa.eu/environment/forests/illegal_logging.htm

⁴¹ Refer to European Forest Institute website at <http://www.euflegt.efi.int>

import and marketing of illegally logged timber, taking action through bilateral and regional trade-related arrangements as well as promoting public timber procurement policies) and (3) engaging the public (working with the private sector and informing consumers)⁴².

For the reasons above, according to Lawson and Mc Faul (2010), international responses to the issue of illegal logging have been focused on improving the understanding of the problem and its potential solutions. This is done mainly through expert discussions, research and raising awareness among governments, traders and general public by increasing the political will of governments and providing frameworks for different governments to work together. Meanwhile, actions undertaken to reduce the scale and severity of illegal logging and volume of illegal timber traded include capacity-building for enforcement agents and customs officers, as well as regulatory changes and public-private sector procurement policies. As such, it is not surprising that a number of systems have been developed for licensing and tracking legal timber, while more key consuming countries have begun developing or implementing legislation that is designed to reduce and eventually prevent the import and sales of illegally sourced wood products.

In this regard, if we look at a broader sense, agreements under the WTO, which may not be specific to forests such as the Agreement on the Technical Barriers to Trade (TBT) and SPS Agreement, have, to a certain extent, an influence on how WTO member countries regulate trade and services of forest products. Meanwhile, Multilateral Environmental Agreements (MEAs) such as CITES, Convention on Biological Diversity (CBD), International Tropical Timber Agreement (ITTA) also have implications for timber trade either directly or indirectly. According to Mulliken (2009), the international community generally accepts that compliance with CITES constitutes a trade limitation for forest products listed in the agreement's Annexes. Meanwhile,

⁴²See G-8 Forest Experts' Report on Illegal Logging, 2008 at www.mofa.go.jp/policy/environment/forest/report0805.pdf

according to Mersmann (2004), ITTA is a bit different from other MEAs as it combines aspects of a commodity agreement (trade and industry concerns) with those of an environmental agreement (sustainable management of natural resources and forest conservation).

Apart from MEAs, the trend to impose environmental standards is now seen in bilateral trade agreements or through legislation or national policies of developed countries. These measures which are slowly becoming a growing trend have been adopted by developed countries mainly to curb illegal logging and its related illegal trade. Some of these measures are in the form of legally binding instruments such as the EUTR, the US Lacey Act and the Australian ILPA/ILPAR. On the other hand, developed countries such as those within the EU context (i.e. UK, Netherlands, Belgium, Denmark, France, Germany, Netherlands, Luxembourg), Switzerland and Japan have come up with public procurement policies in their respective countries for imports of timber and timber products. Such policies require imports of timber and timber products from either sustainably managed forests and/or legally verified and/or other forms of legal origin certification that is in accordance to international standards. In this regard, various studies have been conducted by individual scholars and also policy makers (Baharuddin et al., 1994, 1996, 1998; Brack, 2002, 2010; Chen, 2006; Simula, 2006; Islam & Siwar, 2010) based on a country's requirements and/or for related institutional or organizational bodies such as the UNEP, EC, ITTO, UK Department for International Development (UK DFID), Chatham House, European Forest Institute (EFI), World Wide Fund and Tropenbos International on the timber trade related environmental initiatives or measures, which require SFM or trade in either sustainable and/or legal timber.

These studies indicate among other things that: (1) a number of regional, national and global initiatives have emerged due to concerns on environment mainly because of trade activities, (2) the range of initiatives imposed by some developed countries reflects the increasing commitment from a large

variety of stakeholders who are willing and committed to address the issue of illegal logging and its illegal trade, (3) the most common method of providing evidence of legality or sustainability of forest products is forest certification and (4) there is a growing recognition that enhancing the legality of production and trade of timber is an essential requirement to achieve SFM. As such, this explains the slow but steady increase of the number of developed countries as indicated above requesting through voluntary or binding requirements for trade in sustainable and/or legal timber.

The trend to impose binding or voluntary requirements by developed countries can also be argued as the “Californian effect”⁴³, where nations are increasingly adopting standards of their richer, greener trading partners. In this case, apart from states in the US adopting the strict Californian standard, these standards have also been adopted by other countries like the EU, Japan and Korea. As such, producer countries with weaker domestic standards have no choice but to design products that meet the requirements of nations with strict product standards or otherwise they are denied market access into countries with such strict requirements (Vogel, 1997).

Specifically, studies by scholars like Islam and Siwar (2010) indicate that forest certification is a very controversial instrument because it is a trade related instrument which could influence a state’s competitiveness and market access. As such, these forms of measures are argued to be protectionist⁴⁴, where in order to trade timber and timber products,

⁴³ “Californian Effect” is explained based on the history of American automobile emission standards where the 1970 Clean Air Act Amendments specifically permitted California to enact stricter emissions standards than the rest of the US. Meanwhile, in 1990, the American Congress gave other states the option of choosing either national or California standards. In 1994, twelve eastern states adopted the Californian new standards. Thus, automobile states with lesser emission standards have now adopted stricter emission standards and California is said to have helped to make the American mobile emissions standards steadily stronger. Accordingly, there is now a strong incentive to produce vehicles that comply with the California’s stricter standards for continued market access for large and important markets.

⁴⁴ Marcelo Ostria (2013) stated that “under the guise of protecting the world’s forest from unsustainable logging practices, proponents of protectionist trade policies have successfully lobbied for so-called green measures”

regulations or acts or policies now require either legal and/or sustainable timber to be imported. Meanwhile, the study conducted by Brack, et.al.⁴⁵ (2002) indicated that there are various ways that a consumer country can reduce or end market shares for illegal timber and timber products. The main way would be to put a condition on the sales or import of such products as illegal. This can be done through a new legislation that either adopts a definition of illegality based on the producer country's laws like the US Lacey Act or establishes some form of external internationally agreed standards such as independently verified chain-of-custody. Also, there is a need to introduce a "*non-coercive means*" to promote markets for legal timber through industry sourcing, tariff preferences and government procurement policies. Another important aspect stressed in the study is that bilateral agreements can be seen as stepping-stones to wider regional and ultimately multilateral agreements. Currently, there is no specific multilateral agreement that touches on illegal logging and there is no specific definition on what constitutes as illegal timber.

2.4 SUMMARY

It is noted that a considerable amount of literature has been published where discussions as indicated above were reflected on: (1) the link of timber trade and the environment, (2) illegal logging and its illegal trade, (3) market access for tropical timber, (4) SFM and certification and (5) developed countries public procurement policies and/or regulations imposed, which is considered or seen as a form of protectionism. Specifically in the case of Malaysia, although research on the aspect of trade and environment of its forest sector and timber trade is limited or countable, there have been studies conducted on the links between timber trade and the environment, illegal logging and its illegal trade as well as SFM and certification (Woon & Haron, 2002; Thang, 2002; Kamaruzaman & Dahlan, 2008; Islam, 2009; Murad & Mazumder, (2009); Islam & Siwar, 2010, Zakaria, 2011). However, there is yet to be an in-depth study conducted on the effects of binding trade related

⁴⁵ Study conducted for the UK DFID entitled Controlling the International Trade in illegal Logged Timber and Wood Products

environmental measures through negotiations, acts and/or regulations on Peninsular Malaysia's forest sector and timber trade. So far, there is only one research done in 2009 on the EU FLEGT VPA (*Myth, Facts and Reality of EU FLEGT VPA: Sarawak's Perspective*) but the study was based on Sarawak region's perspective of the on-going negotiations and not on the EUTR. As such, it is important for a study to be conducted on the effect of binding trade related environmental measures, in this case, a combination of the EU FLEGT VPA/EUTR, the US Lacey Act and the Australian ILPA/ILPAR on Peninsular Malaysia's forest sector and timber trade (the details of the policies and practices of the Peninsular Malaysia's forest sector and timber trade will be explained in Chapter Five).

This is taking into account that: (1) these are the only markets currently imposing such binding requirements, (2) the importance of these developed markets to Peninsular Malaysia's timber industry, (3) the world's overwhelming interest in tropical timber trade and in particular Malaysia's forests which are rich in biodiversity, (4) the constant debate on timber trade linkage with environmental concerns and (5) the increasing pressure for other developed countries to impose environmental related trade acts and/or regulations whether in terms of direct trade interventions or barriers or supporting environmental related trade provisions. The EUTR and Australian ILPA/ILPAR are at their initial stage of implementation (the Lacey Act was implemented since 2008), however due to the fact that the EU has been negotiating a FLEGT VPA with Malaysia formally since 2007 and that the market awareness and green requirements for timber exports have been in existence for many years, it would be interesting to see its immediate effect on Peninsular Malaysia's forest sector and timber trade. However, it is important to note that the WTO⁴⁶ recognized and expressed concerns on the importance of the effect of trade related environmental measures on the trade itself. It's Committee on Trade and Environment has been instructed to look into the effect of trade related environmental measures on market

⁴⁶ See Paragraph 32(i) and (iii) of the Doha Ministerial Declaration, 2001.

access especially in relation to developing and least developed countries and also the labeling requirements for environmental purposes.

Thus, it is important for a developing country like Malaysia to understand the requirements imposed through such agreements, acts and/or regulations and take necessary actions to deal with the problem at an early stage to ensure that economic development of its timber industry is not jeopardized by the pressure or demands for sustainable and/or legal timber. As such, there is a need to have a balance of both to ensure the survivability of Peninsular Malaysia's timber industry. It is for this reason that this dissertation examines the impact of trade related environmental measures imposed by developed countries on the forest sector and timber trade in Peninsular Malaysia.

CHAPTER THREE

THEORETICAL PERSPECTIVE OF FREE TRADE AND ENVIRONMENTAL DEMANDS

3.1 INTRODUCTION

Understanding the scholarly and policy debate as well as the concerns on the relationship between trade and environment (Chapter Two) that resulted in developed countries imposing trade related environmental measures, it is now important to relate it to the relevant applicable International Political Economic theories that explain such phenomena. Since the debate revolves around the imposition of trade related environmental measures, this chapter underlines two opposing theoretical views i.e. Neoliberal Institutionalism on the importance of the role of market in addressing environmental concerns and Green Environmentalism on the importance of trade related environmental measures imposed through acts and/or regulations. Neoliberal Institutionalists believe in the importance of the role of the market where the market will eventually be able to address any trade related environmental issues, supported by the relevant international institutions. The Green Environmentalist meanwhile is of the view that protectionism measures in the form of agreements, acts and/or regulations are important in addressing environmental issues as they believe that the market will not be able to address environmental problems.

As such, it is important to understand that this debate between the Neoliberal Institutionalists and Green Environmentalists actually resulted from the focus of the concept of environmentalism⁴⁷ itself, where it has been divided into two main ideologies i.e. techno-centric and eco-centric positions. Sachs (1993) was of the opinion that techno-centric refers to the 'development-side' of

⁴⁷ There are also other terms used to distinguish the ideology of environmentalism such as 'light green' and 'dark green' perspectives or 'environmentalism' and 'ecologism' or anthropocentric or ecocentric

sustainable development where it is believed that technical sophistication and development is important to address social and environmental issues. Meanwhile, eco-centric is related to 'conservative-nurturing world view' which is also seen as the 'sustainability-side' of sustainable development where importance is placed on the need for behavioural change in humankind to support a sustainable life style. Therefore, for a developing country like Malaysia, there is a need to ensure balance exists between economic gains through trade and environmental sustainability. In this study, the researcher will argue that this is determined by the significant role played by the states in balancing their domestic demand with international demand as examined in Putnam's two-level game theory. It is important to understand that international and domestic cross pressures that are faced both by countries that are imposing such measures and also producer or exporter countries in handling such measures are real and influence a state's decision. Meanwhile, Schoppa's (1993) elaboration of the two-level game theory will explain further in detail the state's behaviour and level of acceptance of an international agreement or act or regulation or policy.

3.2 FREE TRADE ENHANCES ECONOMIC GROWTH AND THE GROWTH WILL EVENTUALLY ADDRESS ENVIRONMENTAL PROBLEMS

Economists in general believes that free trade will be able to boost efficiency and specialization of certain sectors that will eventually lead to economic growth, higher income levels and trade as well as investment competitiveness. This concept was first coined by Smith (1776)⁴⁸ in his Absolute Advantage Theory where he was of the opinion that countries should specialize in production of goods for which they have an absolute advantage in the international division of labor and then trade these goods for other goods produced by another country. As such, to him, social well-being would be best served if individuals are left to deal with their own interests in a

⁴⁸ For more information see Smith, (2005). An electronic version: An inquiry into the nature and causes of the wealth nations. Retrieved from <http://www2.hn.psu.edu/faculty/jmanis/adam-smith/wealth-nations.pdf>

free market. He further stated that the freedom of exchange would be economically advantageous for the individual and the society as a whole and this would be known as a “*natural system of perfect liberty and justice*”. In this regard, he stressed that the government’s role should be restricted to only facilitating free trade and by removing all the hindrances or disincentives for private businesses⁴⁹.

Meanwhile, Ricardo (1817) who took into account Smith’s concept further argued that even if a country has absolute advantage in production of two commodities, it is however beneficial for that country to specialise in the production of a commodity in which it has a greater comparative advantage. As such, he asserted that a country will also gain in trade if it has a comparative advantage of a particular commodity where the opportunity cost in producing that commodity is less than the opportunity cost for another country to produce the same commodity. In this regard, he also emphasised the market’s role and activities in enhancing production and consumption of individual goods and services. This free trade concept both by Smith and Ricardo was argued by Sen (2005) as to be able to achieve production efficiency at a global level⁵⁰. Meanwhile, according to Krugman (1987), Ricardo’s comparative advantage model assumes “*perfect competition*,” which is based on a system of a large quantity of small consumers who take prices as a given and who cannot unilaterally affect market prices. Thus, this type of competitive market that is perfect would be efficient as it generates market-clearing prices that equalize supply and demand. However, he further went on to say that this type of model is based on economic theory logic and not on an exact political arena situation⁵¹.

⁴⁹ Reflecting Smith’s concept, Mejia (2011) is of the opinion that Smith had suggested ‘specialization, division of labour and international exchange, will increase the welfare and growth of a nation’.

⁵⁰ The standard Heckscher-Ohlin model agrees that trade will enhance the welfare and growth of a nation and a country trades due to the differences of the availability of their factors of production.

⁵¹ This idea of perfect competition has been counter argued by various other scholars but this will not be dealt with further for the purpose of this dissertation as it is sufficient to have a basic understanding of the concept of free trade.

Therefore, rationale of free trade provides the basis for countries to actively pursue free trade arrangements to increase their competitiveness by reduction of tariffs and non-tariff barriers and also to specialize in sectors in which they have comparative advantage compared to other countries. Such arrangements are facilitated by the WTO, which provides the forum for members to negotiate reductions in tariff and non-tariff barriers where its Most Favoured Nation and National Treatment rules ensure that fair conditions of trade applies to all members. Furthermore, member countries are also given the leeway to forge RTAs i.e. custom unions or free trade areas as per Article XXIV of the GATT because the WTO⁵² believes that trade agreements encourage countries to cooperate with each other instead of taking unilateral action on any issues. This explains why countries, especially in the 1980s onwards including Malaysia, started to practice a more open market approach by actively participating in various regional and bilateral forums and negotiations to further enhance and gain from trade and also to take advantage of investment and services opportunities provided under such arrangements.

In this regard, Neoliberal Institutionalists believe in cooperative forms of interaction facilitated by regimes and international organisations where a state plays an important role as actors in policy formulation with strong emphasis given to international interdependence for trade growth. Consequently, in situations of collective action problems, which may arise due to the structure of the international system, they believe that international institutions will be able to help the states to overcome such problems (Grieco, 1995; Martin, 1992; Keohane, 1982, 1984, 1989; Oye, 1985a; Stein, 1982). Thus, Neoliberals often employ game theory using the Prisoner's Dilemma model to explain collective action problems and the reasons whether a state is willing to cooperate or not, which is usually explained based on the possibility of mutual benefits or gains. In this game, there are two players. Each player is given two choices i.e. whether to 'cooperate' or to 'defect'. Each player is then asked without knowing the others' response as

⁵² WTO (2011)

follows: (1) if both players defect they will both get \$1, (2) if both players cooperate, they will both get \$3 and (3) if one player defects but the other cooperates, the defector gets \$5 while the cooperating player gets zero. Therefore, the defection seems to be more attractive and if one player cooperates it will pay for the other to defect (getting \$5 rather than \$3). So in general, it may seem that it is best to defect but the dilemma is that if both players defected, both would do worse than if both players had cooperated (\$1 instead of \$3). So in such a situation, it is best if both players cooperate—to have a win-win situation. Grieco (1988) stated that Neoliberals believe that the Prisoner's Dilemma can be solved due to countervailing forces that exist, which indirectly force a state to keep to its promise. This is because a state may cooperate on a conditional basis, based on a strategy of 'tit-for-tat' where it will keep to its promise as long as the other maintains its promise. Therefore, states are more likely to adopt mutual cooperation as their long term strategy. Also, scholars like Keohane (1984) are of the opinion that international cooperation through regimes is a rational move as it lowers the risk of being "*double-crossed*". Meanwhile, Axelrod (1984) is of the opinion that even though there are situations (based on the Prisoner's Dilemma argument) where a state may defect due to unavailability of central authority, nevertheless the countervailing forces will usually ensure a state keeps its promise, thus resolving the dilemma that the prisoners are in.

In the case of Malaysia, it can be argued to have adopted a Neoliberal Institutionalist approach, which the WTO's report on Malaysia's Fifth Trade Policy Review (Geneva, 2010) tends to confirm. The report stated that the rule based multilateral trading system is important to Malaysia. Malaysia's trade objective now reflects its government's efforts to relax barriers for trade in services and to reduce its dependence on manufactured exports. Also, the other major trade objectives for Malaysia are "*improving market access for goods and services, promoting the global competitiveness of Malaysian exports, expanding and diversifying trade with existing partners, and exploring new markets*". Apart from being active in trade forums such as WTO, Association of Southeast Asian Nations (ASEAN) and APEC—to name

a few—Malaysia has thus far signed seven bilateral FTAs with Turkey, Pakistan, Japan, New Zealand, Chile, India and Australia. Malaysia is also actively involved in negotiations of the Trans Pacific Partnership Agreement, an FTA initiative involving ten other countries i.e. Australia, Brunei, Canada, Chile, Mexico, New Zealand, Peru, Singapore, US and Vietnam. Malaysia was in negotiations with the EU; however the negotiations had been abandoned due to various differences in the areas of negotiation.

Consequently, in relation to environmental issues, Neoliberal Institutionalists are of the view that free trade benefits that can be achieved through trade arrangements, will eventually lead to environmental improvements. It is strongly believed that environmental improvements can occur as economic gains will raise the living standards of citizens who will then be able to pay for the higher costs of environmental practices (Grossman & Kruger, 1995). The WTO is also of the opinion that free trade will lead to environmental sustainability through economic development, increase in income and innovation, institutional stability and efficient resource allocation (WTO, 2006). Also, trade openness is expected to encourage cleaner manufacturing as it is stated that protectionist countries have a tendency to shelter pollution-intensive heavy industries (World Bank, 2000). Meanwhile, Panagariya (2003) is of the view that although forces of trade can affect the global environment, there are also benefits in terms of trade openings to the environment. He further explained that trade protectionism can bring along environmental costs where he quoted the example of the US imposing quotas on Japanese small car imports in the 1980s. He believed that the policy not only disadvantaged the consumers in the US but also harmed the environment by reducing access to lower pollution vehicles. He further stated that, just as a government should not subsidize trade to help the environment; neither should they restrict trade to avoid harming the environment. In this regard also, Haas et al. (1993) believed that international institutions can contribute to global environmental protection by targeting an issue, obtaining attention on that issue and getting public commitments, where national groups such as environmental NGOs and private corporations

have been able to hold their government accountable for their public commitments.

As such, the Neoliberal Institutional approach is that international regimes are prospective solutions to common environmental problems because regimes make it possible for the states to cooperate or collaborate with each other to promote a common good. This approach can be argued to be adopted by the EU in handling timber trade and environmental issues where the EU negotiates with consumer countries on a FLEGT VPA to ensure that only legal timber enters the EU market⁵⁴. In this regard, Domask (1997)⁵⁵ explained that different strategies and mechanisms are employed at different levels (bilateral, multilateral or globally) of political cooperation in approaching international environmental problems and this depends on whether the problems are global or sub-global. Therefore, he believes that to handle all types of international environmental problems, it is necessary to practice collective cooperation. Also according to him, the ultimate goal of international cooperation is to improve the quality of the regional or global environment without forgoing development and economic prosperity. Meanwhile, Young (1990) was also of the opinion that international institutions or regimes will be able to solve environmental degradation problems which are collective action problems. He believes the need for sustained international cooperation which is an important response to global environmental change.

Further, such assertions by Neoliberal Institutionalists are best explained using the EKC's argument. EKC explains the relationship between economic growth with environmental degradation, which is an inverted U where

⁵⁴ It is important to note that EU has imposed the Timber Regulation 2013 which now requires it's importers to prove that the timber imported is either from a legal and/or sustainable source. In other words, exporting countries no longer have a choice but to prove that its timber is harvested and produced in a legal or sustainable manner.

⁵⁵ Quoted from Joseph Jeffrey Domask's PHD dissertation, University of Miami, entitled A Holistic systems approach to International Environmental Politics and IR Theory: A case study of Brazil and Amazonia, Pg 37.

demand for better environmental quality increases with increasing middle income level at a per capita GDP of about US\$ 5000 to US\$ 8000 (Grossman & Krueger, 1993). Thus, it is believed that when economic growth of a developing country reaches a threshold, the country will eventually take steps to raise its own environmental standards. Therefore, as mentioned in Chapter One, free trade can be argued to reduce, rather than increase the severity of environmental problems. The eco-labelling scheme adopted by Singapore and other developed countries known as the 'Green Label' is issued to influence market forces and to encourage promotion of a more environmental friendly type of production.

On the other hand, it has been argued by Esty and Ivanova (2004) that free market can create *“an efficient and welfare-enhancing level of resource use, production, consumption, and environmental protection”* provided that the social costs and benefits of the resource used is part of the price of the resources, goods and services. However, when the private cost, which is a basis for the market decision, fails to include social cost, then market failure will occur and this is known as the *'hallmark for environmental domain'*. They also asserted that critical resources i.e. water and timber are underpriced while ecosystem services such as carbon sequestration services are usually un-priced and since these resources are overexploited, this part of environmental cost is often ignored. Thus, they stressed that globalisation may increase such resources and also cause environmental degradation resulting from the increase of such resources. Meanwhile, Grossman and Krueger (1992) have also argued that trade openness may lead to a rise in market demand and accordingly, international market price rarely includes any estimation of environmental damage. Therefore, information about the true cost of production is usually not given as environmental degradation is not included as part of the price of production.

Meanwhile, according to Esty (2001), the Environmentalist concerns on EKC are that: (1) societies are living through growth accompanied by environmental degradation. He believes that to gain Environmentalists' support, economists should ensure that there are ways to reduce the duration and intensity of environmental deterioration as low-income countries become middle income countries, (2) the rise of wealth or increase of population when both growth and environmental quality are improving, will drive up consumption and this may undermine prospects for sustainable development. He stated that economists should demonstrate that poverty alleviation is critical for population control which in turn offers significant potential environmental benefits and (3) certain environmental harms such as CO₂ emissions do not lessen with the increase in income.

Despite such concerns by Green Environmentalists, Neoliberal Institutionalists continue to believe that the markets by FTAs are able to solve environmental problems. In this regard, Murad and Mazumder (2009)⁵⁶ had stated that transfer of more efficient cleaner production technology and consumer goods through foreign direct investment and import as well as the trend for transmission of higher environmental standards through import requirements by large markets are a positive impact for free trade arrangements. However, this view has been criticised by Green Environmentalists as they believe that the market will not be able to solve environmental problems and there needs to be some form of legal or compulsory environmental measures to ensure that the environment is protected. This is especially so in the case of the forest sector and timber trade as there is an urgent need to address the issue of illegal logging and illegal trade, which has an impact on the environment.

⁵⁶ Cited from the opinion of Ivanova. (1998). *Free trade and environment*. Tijuana: Abril-Junio.

3.3 ENVIRONMENTAL MEASURES THROUGH BINDING MEASURES ARE IMPORTANT TO ADDRESS THE ISSUES OF ILLEGAL LOGGING AND ITS ASSOCIATED TRADE

As we are aware, there is a growing global concern on environment-related issues such as forest protection, ozone depletion, hazardous waste and global climate change. This is mainly due to the growing awareness of the impact of human activity on the environment which often focused on the use and misuse of natural resources and nature by humans. Such environmental concerns, as argued in Chapter Two, have been linked to trade and this is especially so in the case of forests, given that timber trade has become a global concern, as rapid deforestation and illegal logging is said to contribute to the drastic changes in climate. As such, most Green Environmentalists⁵⁷ are of the view that it is important to provide for environmental protection in trade agreements to ensure sustainable production. According to Kegley and Witkoff (2006), Environmentalists view such linkage as a useful instrument for correcting market failures such as market inability to compensate for externalities of environmental exploitation like atmospheric pollution by chemical companies.

Therefore, Green Environmentalists⁵⁸ in general, believes that: (1) trade has a negative direct and indirect effect on the environment, (2) FTAs can be biased against issues of environmental protection, (3) in cases of trade related environmental disputes, MEAs are not effective in protecting the environment and have lost in most cases to the importance given to trade and (4) developing countries environmental regulations are found to be weak and this may attract polluting industries (Coyler, 2003 quoted Deery & Esty, 2002). On this note, Audley (1997) had mentioned that the majority of

⁵⁷ There is also the extreme view by environmentalist that favours the deliberate reversal of industrialization so as to reduce market-measured income below current levels in order to save the environment. However, the 1960s onwards saw a more moderate view as the mainstream environmentalist believe that a clean environment and economic growth are desirable and there can be a combination of both through sustainable development.

⁵⁸ See also Daly & Goodland (1994); Bourke (1995); Simula (1999); Mani & Wheeler (1998); Esty (2001); Deere & Esty (2002); and Mani & Jha (2006).

Environmentalists will support free trade that takes into account sustainable development. In this regard, NAFTA was quoted as an example where the congressional vote in favour of the agreement was mainly due to huge supports of environmental groups who were in favour of the agreement, thus leading to political support of the agreement as a whole.

However, it is important to note that Environmentalists in general fear that free trade may lead to a 'Race to the Bottom' situation and also create a 'Pollution Haven'. This is because there are situations where important industrial leaders and their unions have pressured their governments into minimizing the burden of environmental regulations, which may impact their businesses due to concerns from competitions abroad. They actually fear that strict environmental regulations may raise their costs of production and this will eventually lead to loss of sales, employment and investment. This has been argued to be a form of political pressure imposed on governments (Frankel, 2009).

In this regard, various studies have been conducted on both situations. On the concept of 'Race to the Bottom', there is a notion that trade may lead to a shift of polluting industry from rich to poor countries that lack strong environmental policies. Thus, environmentalism calls for harmonization of pollution control regulations at stringent levels, the imposition of "*eco-duties on those with subpar rules*", or other policy interventions to "*level the playing field*" (Esty, 2001). However, Grossman and Krueger (1993) in their study on the environmental impacts of NAFTA, found no evidence that comparative advantage was created by environmental regulations that are lenient in Mexico. Meanwhile, Wheeler (2001) is of the opinion that in today's realistic view of the world, it is unlikely that there exists a 'Race to the Bottom' situation. He believed that the bottom rises with economic growth where the poorest society will improve their environmental quality as investment increases employment and income. Also, there will be an increasing pressure for pollution control as a society develops due to the "*mutually reinforcing*

feedback mechanisms at local, national and international level". On the other hand, Daly and Goodland (1994) are of the opinion that countries, be it developed or developing, in pursuit of trade liberalization and in order to attract investments are prone to lower their environmental standards. This would indirectly pressure other countries to do the same. This view has been endorsed by a study done on the trade and environment relationship in India where it was indicated that exports and foreign direct investments actually increased during pre-liberalization and post-liberalization periods for sectors that are more polluted (i.e. increase in water and air pollution) compared to those with less polluting sectors (Gamper-Rabindran et al., 2004). However this may not be the case for developing countries like Malaysia that emphasises on sustainable development in its policies related to the forestry sector and timber trade. Chapter Five will further emphasis the argument.

A similar situation can be seen in a case study of Vietnam's trade and environment relationship where it was suggested that trade liberalization has not only promoted economic growth in Vietnam but also led to some potentially adverse environmental consequences due to lack of environmental policies. It was indicated that there is a strong need for improvements in environmental standards of specific growth industries that are important to the country such as iron and steel, non-ferrous metals, industrial chemicals, rubber and leather products. These sectors are considered significant contributors of water and toxic pollution. Accordingly, export of products such as leather and rubber products have increased 49% and 26% respectively. Meanwhile, textile exports which have increased dramatically to 91% is said to have also fuelled an instantaneous increase in industrial chemicals as the textile industry is a large consumer of industrial chemicals. Thus, it is argued that further improvements in environmental standards for these identified specific growing industries are vital to ensure that natural assets and also public health are protected. The standards should also include corporate responsibility for foreign investors to adhere to and this is important for the future development of industrial and agricultural sectors (Mani and Jha, 2006).

Meanwhile, the 'Pollution Haven' hypothesis indicates that due to the lack of or weaker environmental standards, some countries may be major recipients of pollution while other countries can enjoy the benefits of producing environmentally un-friendly products without suffering from any cost. Mani and Wheeler (1998) found a pattern of evidence of a cross-country analysis, which is consistent with the 'Pollution Haven' hypothesis. They stressed that in OECD countries, pollution-intensive output as a percentage of total manufacturing fell consistently but rose steadily in developing countries. Furthermore, there was a co-incidental period of rapid increase in net exports of pollution intensive products from developing countries with the cost of pollution abated in OECD economies. Apart from that, they also suggested based on evidence that there is no significance of pollution haven effects as: (1) developing countries have a low consumption or production ratio for dirty-sector products, (2) dirty-sector production share increases in developing countries mainly due to a high income-elastic demand for basic industrial products, however such demand will decrease with income growth, (3) international adjustment may be due to energy price shock and developing countries insistence for energy subsidies and (4) increase in environmental regulation due to increase in income plays a role in the shift from a dirty to a cleaner sector. As such, they stressed that *"economic growth brings countervailing pressure to bear on polluters through increased regulation, technical expertise, and clean sector production"*.

However, on the other hand, according to Frankel, (2009), there is little empirical evidence to support a hypothesis that states of rich countries that have particularly high demands for environmental quality, specializes in products that are produced cleanly, while letting poorer countries bear the burden of producing and selling polluted products. He also stated that this hypothesis is not applicable to a rich country like Sweden as it is a net exporter of energy-intensive and carbon-intensive goods (Frankel, 2009 cites Kander and Lindmark, 2006). As such, pollution haven effects clearly depend on how much emphasis a country places on sustainable development of its forestry sector and timber trade. Nonetheless, due to the fear of trade impact

on the environment and concerns about the 'Race to the Bottom' and 'Pollution Haven' hypotheses, environmental groups have consistently pressured countries especially those in the developed categories to enforce some form of trade related environmental measures to address such concerns. As a result of such pressure, developed countries, especially through the G-8 forum have pledged to take a lead role for timber trade, in ensuring that forest harvesting and its related timber trade are done in a sustainable and/or legal manner to reduce its impact on climate change. Thus, as mentioned in Chapter Two, it is not surprising that certain developed countries now enforce measures designed to ensure their suppliers produce legal timber. As such, the US has extended its Lacey Act requirements to the exports of timber; the EU does so with its FLEGT VPA/EUTR while the Australians with their ILPA/ILPAR. In this regard, according to Vogel (1997), environmental standards are better and strongly enforced in rich nations that have influential green pressure groups as such standards are mainly determined by domestic political preferences and interests. Also, he stated that there is no evidence that these rich nations have increased their domestic producers' competitiveness by lowering their existing environmental standards, "*though international economic pressures may have reduced the rate at which they have been strengthened*".

Therefore, even though the imposition of acts and/or regulations may be argued to go against the very nature of trade liberalization as per the Neoliberal Institutionalists approach, it is however argued to be in line with the WTO requirements. This is because WTO allows its members to adopt national environmental protection policies, which do not discriminate between imported and domestically produced like products (national treatment principle) or between like products imported from different trading partners (most-favoured-nation clause) (WTO Report, 2004). Thus, this 'escape' clause is currently argued by some developed countries to avoid any conflicts under the WTO. According to Eckersley (2004), green economists expect a state at the macroeconomic level to reverse privatization of benefits and socialization of costs that characterizes market economy and this includes:

(1) breaking down monopolies and “*excessive bigness*”, (2) providing public goods and services which are not provided by the market, (3) avoiding or redressing negative externalities, (4) redressing regional and macroeconomic imbalances, (5) redistributing wealth via guaranteed income scheme and (6) ensuring an appropriate scale of macroeconomic activity relative to the ecosystem and biosphere.

On the other hand, due to such measures, developing countries fear that environmental requirements may negatively affect their export competitiveness. There is a concern that unilateral imposition of environmental measures like the US Lacey Act may affect trade or indirectly exert pressure for change. There is also a concern about the possibility of indiscriminate use of fines or trade measures to promote environmental measures as the Lacey Act gives the US government the power to fine and jail individuals and companies who deal in illegally harvested or trafficked wood products. As such, there is a fear that the market may be distorted as consumers may need to pay higher prices (possibly due to the lack of supply of legal and/or sustainable timber) and there may be reduction of market access for producers or exporting countries. All this may eventually lead to loss of employment and social problems. In the case of Peninsular Malaysia, as mentioned earlier in Chapter One, large markets like the EU and the US cater for high value and value-added products and these markets are also willing to pay well for such products. Thus, these developed countries’ agreements, acts and/or regulations or even green policies imposed have clear potential to affect Malaysia’s exports as they could lead to loss of high value product markets whereby other less stringent green markets do not cater for such products.

3.4 THE TWO-LEVEL GAME THEORY: A PRACTICAL SOLUTION ON THE DILEMMA OF TRADE RELATED ENVIRONMENTAL MEASURES

The differences of opinion between Neoliberal Institutionalists and Green Environmentalists on how trade related environmental issues should be resolved can be best explained through the role that a state plays in handling such a situation. In this regard, the two-level game theory by Putnam can be used to explain such a situation as to: (1) the reasons why developed countries have imposed protectionism measures in the form of agreements, acts and/or regulations or policies that can hinder free trade of timber and timber products and (2) Malaysia specifically Peninsular Malaysia's possible reaction to such imposition after taking into account the importance of trade and the need to have sustainable development of its forest sector and timber trade. On the surface, it may seem that the two-level game theory may not be directly applicable to explain the US unilateral imposition of its Lacey Act. However, the element of domestic influence or pressure for change, which resulted in the imposition of an international unilateral measure, certainly exists. Nonetheless, it is certainly more applicable in the case of EU FLEGT VPA and its subsequent EUTR and the Australian ILPA/ILPAR, where there are elements of negotiation as well as domestic and international pressure for change. Meanwhile, according to Kegley and Witkopf (2006), the application of a two-level game theory is favourable to explain the situation above because many states may be inclined to play the two-level game and may succumb to domestic lobbying pressures to introduce trade barriers to protect their domestic market. As a result, such a move may lead to sacrifice of benefits of free trade in which otherwise could be beneficial to both states. On this note, Thakur and Lee (2000)⁵⁹ have mentioned that *"trade may be global" but "politics is still local"*.

Thus, based on the two-level game theory, Putnam argued that at the national level, domestic groups will pursue their interests by pressuring their

⁵⁹ Statement made in the International Herald Tribune. 'Defining New Goals for Diplomacy in the Twenty First Century' (2000)

government to adopt policies that are favourable to them, while politicians will seek power by constructing coalitions among these groups. Meanwhile, at the international level, national governments will seek to maximize their own ability to satisfy domestic pressure, while minimizing any adverse consequences in foreign developments. As a result, he stated that neither of the two games can be ignored by central decision-makers, so long as their country remains interdependent, yet sovereign. As such, Putnam divided the two-level games into **Level I and Level II** respectively. **Level I** touches on bargaining between negotiators, that leads to a tentative agreement while **Level II** is about separate discussions within each group in its constituency (bureaucratic agencies, interest group, social classes and/or public in general) on whether to ratify the agreement. In this regard, Putnam stressed the importance of a “win-set” concept between these two levels where he mentioned that an agreement reached at Level II will make it more likely to achieve a successful bargaining at Level I. Therefore, it is important that domestic stakeholders favour the agreements or policies negotiated internationally so that they will eventually agree on their endorsement or implementation. To this end, Putnam also went on to explain that this theory signifies certain important linkages between diplomacy and domestic politics, which include among others: (1) the “*synergistic issue linkage*” where it is believed that a move that is strategic at one end may result in a sudden alliance at the other table, (2) a perception that international bargaining positions may be weakened because of institutional arrangements that strengthens decision-makers domestically, (3) important to target “*international threats, offers, and side-payments*” by taking into account domestic incidences at home and internationally and (4) the possible “*reverberation*” of international pressure domestically.

In this regard, if we take into account the EU’s situation while succumbing to international calls and commitments for legal and/or sustainable timber, it can be argued that their domestic stakeholders’ pressure and support for green timber trade played an important role in ensuring that the EU actually implemented its 2003 FLEGT Action Plan. This plan consequently required a

FLEGT VPA negotiation with timber producing countries to ensure that only legal timber enters the EU market through legality assurance systems to be developed according to agreed principles and criteria by both the EU and the timber producing countries. Such a development on the part of the EU adheres to Schoppa's concept of 'reverberation'. Eventually due to concerns by stakeholders that the FLEGT VPA and development of a system alone will not be able to ensure only legal timber enters the EU market as countries not party to FLEGT will still be able to export non-legal timber; the EU was pressured to impose its EUTR in March 2013. As such, this regulation requires EU importers to only import legal timber through a 'due diligence' assessment (the details of FLEGT VPA/EUTR and its 'due diligence' assessment will be explained further in Chapter Six). Therefore, pressure and support from mainly its domestic stakeholders and also international stakeholders have led the EU to undertake actions to curb illegal logging and its illegal trade and in this regard, Bernstein and Cashore (2012) had stated that *"the EU's efforts on illegal logging a decade ago can be seen as a reaction to the market pressure (including attempted boycotts) exerted by NGOs"*. Meanwhile, Fripp (2004) was also of the opinion that the civil society has been *"a key driver"* in compelling the EU, its member states and also the timber trade as a whole to react and take actions on SFM and also legality issues related to forest governance, monitoring and transparency.

On the other hand, in comparison to the situation in Japan, another major consumer of timber products, the pressure by domestic stakeholders works in a different manner. Despite international pressure and calls for Japan to tackle illegal logging and its illegal trade, there have been no strong actions like the EU or the US undertaken by the country to tackle illegal logging. Its Green Public procurement policy 'GOHO Wood' is very weak in tackling illegal logging as a whole. This is because according to Powers and Wong (2011), Japan's initiative to include all forestry goods and services purchased by its state, which are harvested legally and come from a sustainable source, in its Green Procurement Law failed due to its inability to obtain buy-in from its private timber-purchasing industry groups. In the case of FLEGT, the EU

had managed to compel 73 of its major private companies and industry groups including IKEA (Sweden), Chartered Institute of Builders (UK) and Timber Trade Federation (UK) to commit to its principles. As such, domestic stakeholders play an important role in any action that their government will undertake as seen in the case of EU and Japan.

Meanwhile, in Malaysia's situation, as mentioned in Chapter One, the key challenge for addressing environmental issues is the Federal-State system. Article 74 of the Malaysian Federal Constitution provides states with autonomy over matters relating to land, water resources, forests, local government and towns as well as country planning. Meanwhile, the Ninth Schedule (Article 74 and 77) of List 1 of the Federal List, Federal Constitution of Malaysia provides the Federal Government the right to negotiate and implement international treaties or conventions. Nonetheless, for any international negotiations, the Federal Government still needs to obtain the concurrence of state governments on issues related to management or trade of timber and timber products. This poses a challenge as to get all the states to agree after taking into account different policies, interests and management in place in Peninsular Malaysia, Sabah and Sarawak. FLEGT VPA (based on the researcher's experience as part of the MPIC⁶⁰ secretariat), is a good example of such challenge faced by the Federal Government where the Federal Government found it difficult to get the consensus of the states on several issues that the states regard as infringements of their territorial rights i.e. the role to be played by a TPM on auditing the timber legality assurance system.

As such, it is noted that the difficulty faced by Malaysia is in balancing its domestic and international demands for legal and/or sustainable timber, which is very challenging and requires strong political support and commitments from the states. Nonetheless, if we take into account the argument by Putnam, all this can certainly come to an end as international

⁶⁰ Ministry of Plantation, Industries and Commodities (MPIC)

pressure is a necessary condition for policy shift. He argued by using an example of a package deal, eventually agreed upon by three locomotive economies, the US, Japan and Germany while recovering from oil shock in the 1970s during the Bonn Summit Conference in 1978. In this regard, he was of the opinion that the key governments during the Bonn Summit only agreed to policies⁶¹ proposed due to international negotiations by which otherwise they would not have pursued on their own. As such, an agreement is only made possible due to the fact that a *“powerful minority within each government actually favoured on domestic grounds the policy being demanded internationally”*. He further explained his point by stating that in the case of Germany even though Chancellor Helmut Schmidt portrayed himself publically as being against the policies negotiated in Bonn, according to his close political aides, he actually favoured it and thus allowed himself to be ‘pushed’ to agree with such policies that would have been costly and difficult to implement without the summit’s package deal. In the case of Japan, despite its Ministry of Finance (MoF) not agreeing to the Bonn package, its Ministry of Trade and Industry, the Economic Planning Agency and some expansion minded politicians in the Liberal Democratic Party used the pressure from the US to push their agenda through against the powerful MoF.

Therefore, based on the above, Putnam stated that without domestic resonance, international forces would not have sufficed to produce results during the summit despite its attractive overall package. He further argued that in a negotiation, such resonance makes a leader believe that a favourable outcome for the international proposal is in the best interest of his nation or in his own political interest. However, without international pressure, policy changes may not have been possible. At the end, he stated that such a deal has successfully *“entwined the pressures both domestically and*

⁶¹ In this regard, Germany agreed to an additional fiscal stimulus amounting to 1% of GNP, US committed itself to decontrol domestic oil prices by end of 1980 and to fight inflation. Meanwhile, Japan pledged to reach a 7% growth rate as well as fostering import growth and restraining exports. However, due to international pressure a comprehensive package deal was agreed that produced a balanced agreement of “unparalleled breadth and specificity” which was eventually implemented by all.

internationally". Apart from that, scholars like Katzenstein (1976) stressed the importance of state strength where any decision must take into account both domestic and international pressures. He is of the opinion that "*the main purpose of all strategies of foreign economic policy is to make domestic policies compatible with international political economy*". As such, it can be argued that domestic political pressure plays an important role in any decision undertaken with regard to the forest sector and timber trade. Therefore, in Peninsular Malaysia's situation, it is important to understand the dilemma caused by international pressure for change on environmental issues and the states' needs for developments. Specifically in this case, through imposition of binding regulatory measures, it is important to understand the direct or indirect effect that these trade related environmental measures would have, especially on the forest sector and timber trade.

Nonetheless, it is interesting to note that Schoppa (1993), who analysed further Putnam's two-level game theory, was of the opinion that Putnam's theory was a "*superior way of examining international bargaining*"; however Putnam's concept of 'synergistic linkages' and 'reverberation' was underdeveloped. Schoppa believed that both concepts failed to capture how a chief negotiator is able to change the domestic political game that his counterpart is facing. Accordingly, this can be done by "*expanding the level of participation in the decision making process and by specifying alternatives for consideration within his domestic policy process*". Also Schoppa was of the opinion that Putnam failed to explain when the synergistic strategies can be used by the negotiator to produce positive results that enable possible cooperation as well as winning a larger concession from his counterpart. Schoppa based his argument on a case study of the US-Japan negotiations known as the Structural Impediments Initiatives (SII)⁶². He stated that the US

⁶² Schoppa stated that his study is based on a case study method; however since it involves single pair of nations, there is no identification of condition specific to the US-Japan relationship that may influence the degree on how a nation can employ successfully 'synergistic linkages'. However, he strongly believes that the set of negotiations carried out in the SII negotiations enables identifications of conditions within a given relationship that influences the strategies to produce a positive result. Therefore he is of the opinion that Putnam's two-level game theory is certainly applicable in the early stages of development however it requires an empirical analysis as a step towards developing a stronger theoretical base as in the case of SII. For further details see Lenoard J

had exerted a lot of pressure on Japan to implement reforms on five areas that the US considered as structural barriers to their exports to Japan i.e. (1) macroeconomic policies affecting Japan's saving–investment balance, (2) its distribution system, (3) land policy, (4) exclusionary business practices and (5) uncompetitive relations between firms in keiretsu groups.

Despite the overall package being positively accepted by both sides, the degree of compromise on the five areas from the Japanese side varied greatly. The US is said to have achieved more on the first three areas compared to the last two areas. As such, the question here was how and why the Americans achieved more on the three areas compared to the other two despite strong initial oppositions from the Japanese side on the entire request made by the Americans. In this regard, to analyze such a situation, Schoppa argued that Putnam's theory lacked the focus on the conditions that made possible the positive application of the 'synergistic linkages' as in the case of SII. Furthermore, according to him, it does not capture the synergistic strategies that he calls 'participation expansion' and 'alternative specification'. On the 'participation expansion' strategy, Schoppa stated that although Putnam's model talks about all significant actors being involved in domestic policy making and that the deal negotiated by the chief negotiator must be accepted at the domestic level, the possibility of certain actors creating additional synergistic strategies has been overshadowed. For example, in the case of the US, it is the general thinking that policy decisions are made by privileged elites. However, empirical evidence shows that many decisions are actually made by sub-governments – *"a small group of political actors, both governmental and non-governmental, that specialize in specific issue areas."* (Schoppa cited Ripley and Franklin, 1984).

Therefore, Schoppa believes that a policy outcome depends on: (1) which potential actors are motivated and allowed to participate, (2) whether the

decisions on issues are made in isolation or publically known, (3) which proposals for dealing with a given problem are on the table and (4) whether international negotiators have an opportunity to influence all of the processes. In the case of SII, he found that the pressure imposed by the US had expanded the elite level participants who were previously uninvolved on such issues i.e. the bureaucratic agencies, senior party leadership and some interested groups. Also, all the focus given by the media had increased public awareness on the issues discussed and served as a *“rallying point for the unorganized and ignored general public”*. For example, in the area of public investment, by turning the issue into a broader US-Japanese agenda, it has led to the involvement of other actors who are supportive of increased spending. As such, public awareness was raised on Japan’s shortcomings in social infrastructure, which indirectly forced policymakers to consider public opinion. Meanwhile, on the ‘alternative specification’ strategy, he believed that it will be successful when an issue discussed is already on the agenda in search of solutions. For example, the land policy issue was something considered by the Japanese government since 1987 even before the American raise it under the SII negotiations. Therefore, he was of the opinion that the Americans were able to add some credence to the Japanese government’s previous idea to get them enacted.

Apart from Schoppa’s argument and application of Putnam’s two-level game theory, used to explain Malaysia’s unique Federal-State system, nonetheless, it would also be very interesting to note other scholars’ applications of Putnam’s theory in their own context. Knopf (1993) argued that Putnam in his framework of the two-level game theory did not give consideration to the three possible forms of domestic and international interactions. He based his study on the intermediate range of nuclear forces negotiations between the US and the Soviet Union where he argued that the three types of cross-boundary interactions will have different impacts on interstate bargaining. The three interactions are: (1) trans-governmental interactions involving government officials, (2) transnational interactions involving actors apart from government officials and (3) cross-level

exchanges involving two different types of actors i.e. alliance relationships (please note that (1) & (2) are in line with Putnam's theory). As such, Knopf came up with a three-to-three game model based on Putnam's original two-level game. Meanwhile, Hira (2002) applied Putnam's theory to explain the negotiating process of the Free Trade Area of the Americas (FTAA) i.e. the relative bargaining strength and key issues for the most important economies in the hemisphere (the US, Canada, Brazil, and Mexico). Hira recognised that although there is a wide asymmetry of power variables between the FTAA negotiating countries, nonetheless there are many factors that could create potential coalitions, including common sectoral concerns, anti-imperialistic political traditions and domestic constituencies, regional rivalries and commonalities (i.e. the border dispute between Ecuador and Peru, both members of the Andean Pact). Thus, he asserted that domestic leaders apart from influencing negotiating partners' positions, will also work towards shaping their own domestic 'win-sets'.

On the other hand, Li (2005), apart from applying Putnam's two-level game theory, also applied Knopf's three-to-three game model theory as well as the issue of politicization to show the ambiguous and evasive approach undertaken by its newly elected President in his dealings with mainland China and also his frequently shifted positions in handling issues. The frequently shifted positions is said to be due to the constraint of the President's pro-independence constituents and a vigilant, anti-independence Beijing. Another notable application of Putnam's theory would be that of Daugbjerg (2007) who argued based on the 'win-set' application to explain the dispute between Europe and the US on agricultural liberalization. Daugbjerg explained how a win-set influences the operational and ideational aspects of trade negotiations where it is shown that although Europe had a smaller win-set compared to the US, Europe managed to obtain most concessions in negotiating the specific commitments of the agreement (the operational layer). Nevertheless, even though the US had to give these concessions, it had the decisive say on the ideational framework of the Uruguay Round Agreement of Agriculture (URAA). Apart from the above

scholars, it is also very interesting to note how Quayle (2013) used Putnam's two-level game theory to explain the national and regional dilemma within ASEAN on its cooperation abilities. The two-level game theory was used to highlight the regional-national interface within the ASEAN Socio Cultural Community (ASCC), taking into account case studies of migrant workers, haze and disaster preparedness along with their related proposed Agreements. It is noted that the difficulties in aligning national and regional obligations for ASEAN member countries are not due solely to "*recalcitrance or bad faith or institutional inadequacy*". It is argued that more attention is focused on political problems i.e. (1) convincing stakeholders at the domestic level on what is the aspiration at the regional level and (2) to implement or manoeuvre at the regional level on what has been disagreed to at the national level. Accordingly, the case study on migrant workers and haze showed that there were significant holdouts by majority stakeholders due to the domestic climate. Meanwhile, in the case of disaster preparedness which was not much of an issue domestically, there was no problem for the government to negotiate and rectify its related agreement.

3.5 SUMMARY

Therefore, in the case of Peninsular Malaysia's forest sector and timber trade, with specific attention on the FLEGT VPA negotiations, Putnam's two-level game theory will be a useful analytical tool to explain the dilemma faced by the Federal Government of Malaysia in managing international pressure for trade of sustainable and/or legal timber and its domestic stakeholders' interests for development. This theory which Putnam elaborates using **Level I** (bargaining between negotiators) **and Level II** (separate discussions with domestic groups), in addition to the importance of a win-set concept will be able to explain the effect of the binding timber trade related environmental measures on Peninsular Malaysia's forest sector and timber trade taking into account the unique Federal-State relations on land and forest matters. As such, it is important to take into account the interest of domestic stakeholders that will be able to determine the success of any agreements or policies negotiated internationally in order to be endorsed or implemented

domestically. This is because, as explained by Putnam, an agreement reached at Level II will make it more likely to achieve a successful bargaining at Level I. Meanwhile, Schoppa's concept of 'synergistic linkages' and 'reverberation' will be used to analyze the dynamics of decision-making at the Federal Government level and add insight to certain decisions taken specifically on the FLEGT VPA negotiations, as well as the importance of the involvement of certain group of stakeholders to ensure acceptance and success of the implementation of the Agreement. This will be discussed in detail in Chapters Seven and Eight respectively.

CHAPTER FOUR

METHODOLOGICAL APPROACH TO ADDRESS THE RESEARCH PROBLEM

4.1 INTRODUCTION

The purpose of this chapter is to further introduce in detail the research methodology and strategy undertaken to study Peninsular Malaysia's forest sector and timber trade as well as the methods and techniques applied to conduct the research. Saunders et al. (2003) stated that methodology is the theory of how research should be undertaken and this includes the theoretical and philosophical assumptions on which the research is based and its implications for the method or methods adopted. Since the theoretical framework has been explained in detail in Chapter Three, this chapter will focus solely on the qualitative method selected, to obtain rich resourceful in-depth primary data on why and how Peninsular Malaysia's forest sector and timber trade will be affected by trade related environmental measures imposed by developed markets. According to Flick (2002, pg. 229), the combination of multiple methodological practices in a qualitative research "*adds rigor, breadth complexity, richness, and depth to any inquiry*". Thus, this chapter is divided into three sections. Firstly, the research philosophy and approach are briefly examined; secondly the research strategy i.e. the case-study on the acts and/or regulations and finally the research methods that cover the reasons for selecting data sources and participants for the purpose of understanding the impact of the acts and/or regulations on the Peninsular Malaysia forest sector and timber trade.

4.2 RESEARCH PHILOSOPHY AND APPROACH

There have been various debates on the types of research philosophy, but in recent years, the two most prominent research philosophies are the interpretivist and the positivist approaches (Tien, 2009; Weber, 2004). The

interpretivist approach concerns mainly the collection of qualitative data where the interpretivist believes that it is important to analyze how humans would interpret an activity and this can be achieved through methods such as unstructured interviews and focus group discussions. According to Orlikowski and Baroudi (1991), an interpretivist would make an effort to understand a phenomenon by accessing the meanings a participant assigns to them. This is because it is assumed that people create and associate their own “*subjective and inter-subjective meanings*” during their interaction with the world around them. As such, the goal of interpretivism in the view point of Hudson and Ozanne (1988) is to understand and interpret human behavior instead of generalizing and predicting causes and effects. It is important to understand motives, meanings, reasons and other subjective experiences, which are time and context bound.

On the other hand, a positivist looks at things objectively and uses rational and logical approaches to research (Carson et al., 2001). Unlike interpretivists, they tend to create a distance between themselves and the objects of research by remaining emotionally neutral to allow for clear distinctions between reasoning and feelings as well as between science and personal experience. Therefore, the main method of research would be based on statistical and mathematical techniques that are highly organized, measurable and based on approaches taken by the scientific community involved in the research. Taking into account both the approaches, Carson et al. (2001, pg. 9) are of the opinion that the criteria that differentiates the two approaches are: (1) a positivist researcher is independent, while an interpretivist researcher is involved, (2) large samples may be used in the case of positivism whereas interpretivist research uses small numbers and (3) testing theories predominate in positivism whereas interpretivist research focuses on generating theories or ‘theory building’. However, it is interesting to note that scholars like Weber (2004) are of the opinion that the “*differences between both approaches lie in the choice of research methods rather than any substantive differences at a meta-theoretical level*”. Therefore, Weber believes that instead of debating on the positivist or

interpretivist approach, it is best to understand why different researchers choose different research methods and how they justify the knowledge claims that were made for the methods chosen.

As such, for the purpose of this dissertation an interpretivist qualitative research approach has been chosen taking into account that the focus of this dissertation is on the effect of trade related environmental measures imposed by developed countries on Peninsular Malaysia's forest sector and timber trade. Therefore, it is useful to investigate and understand through qualitative methods expert opinions and/or organisational views of various stakeholders on the history behind such agreements or acts or regulations, the reasons for such impositions and how it will affect Peninsular Malaysia's forest sector and timber trade. This is specifically important for Peninsular Malaysia in relation to its current regulations and policies in place, current and expected level of stakeholder participation in such policy formulation, timber production and market share and also current global pressure and demands for trade related environmental measures that require exports of sustainable and/or legal timber products. In this regard, the interpretation that actors and stakeholders have about the motives for such agreements, acts or regulations, together with their perceptions of their own interests, will be pivotal in determining the outcome of the negotiations. Consequently, it is crucial to understand these motives and interpretivism is the best way to achieve that. According to Cohen and Mannion (1994, p.36), appreciating the world of human experience is the main endeavour in an interpretivist paradigm. They further stated that *"to retain the integrity of the phenomena being investigated, efforts are made to get inside the person and to understand from within"*. Furthermore as explained in Chapter One, there is still no in-depth study done on the effect of the agreements/acts/regulations using a qualitative approach on Peninsular Malaysia's forest sector and timber trade.

Nonetheless, scholars like Shenton (2004) stated that positivists often question the trustworthiness of qualitative research. He is of the opinion that this is probably because the concepts of validity and reliability cannot be addressed in the same way as in naturalistic work. However, such concerns have been considered previously by scholars like Lincoln and Guba (1985), who explained the importance of trustworthiness based on four constructs that correspond to the criteria employed by positivists i.e. (a) credibility compared to positivist internal validity, (b) dependability (reliability), (c) transferability (external validity) and (d) conformability (presentation).

(a) *Credibility*

For the purpose of this dissertation, ensuring credibility has been given importance where different methods, which form a major strategy for qualitative research data collection, are used such as observations during Timber Trade related Conferences and Meetings, Focus Group discussions with State Foresters and Implementers and Timber Industry Members and individual semi structured interviews that take into account the views and opinions of stakeholders from the government, industry, NGOs and also international organisations. However, prior to the above methods being conducted, the culture of the participating organisations and the individuals to be interviewed were studied, mainly through preliminary inquiry with colleagues or website research of the organisations and individuals to be interviewed. It is important to understand the organisational culture and individual's position to gauge their early position on the timber trade and environmental issues. Apart from that, before any interviews are conducted, participants are informed of the importance of their willingness to be interviewed and to offer data freely for the purpose of this dissertation. They are also given a choice to be named based on their personal capacity or organisational capacity or to remain anonymous. Thus, the participants are asked to sign a 'Written Consent Form' on their agreement to be interviewed, to be identified and for the interviews to be recorded (A blank consent form is attached as Appendix A). However, there have

been cases where the participants, though willing to be interviewed, had expressed reservations to have their conversation recorded and such request is taken into account. Also member checks are conducted to ensure accuracy of their data on the spot, in the course of and at the end of the interviews.

(b) *Transferability*

The question of transferability arises to determine whether the results of a certain work at hand can be applied to a wider population. As such, for the purpose of this dissertation, the number of organisations and participants was identified from the start; mainly, based on their vast experience and deep involvement on timber trade and environment related issues. In other words, a work plan was developed to ensure data collection is done according to: (i) areas or chapters of research as well as questions based on semi structured interviews and focus group discussions, (ii) individuals and organisations that are identified to be interviewed individually or to provide written feedbacks, (iii) states that are identified to conduct focus group discussions with their foresters and industry members and (iv) stipulated time frame on how the research will be conducted.

(c) *Dependability*

To address the issue of dependability, the research design, operational data and reflective appraisal of the project is highlighted throughout this chapter.

(d) *Conformability*

It is important that steps are undertaken to ensure that the results of the findings are based on the experiences and ideas of the interviewees or informants, rather than the characteristics and preferences of the researcher. In other words, for the purpose of this dissertation, methodological triangulation was taken into account where more than one research method was used to gather data, i.e. observations, focus group discussions and semi structured interviews. Therefore, it can be safely assumed that all the concerns about the qualitative research approach raised by positivists are taken into account and this will also be further explained in detail below.

4.3 RESEARCH STRATEGY – CASE STUDY

The case study approach, even though not always interpretative as it can be used as a method of inquiry using a positivist approach, it is normally associated with qualitative research. As such, in this qualitative scenario, the case study approach is known as an empirical investigation that looks into the current trend within a real life situation, especially so, if the current trend and its context are not clearly defined. Therefore, through a case study, the investigation will be able to retain characteristics of real life events that are holistic and meaningful. Such characteristics include *“individual life cycles, organisational and managerial processes, neighbourhood change, international relations and the maturation of industries”* (Yin, 1994). For the purpose of this dissertation, case study is the chosen research strategy, where there would be in-depth collection and extensive information gathered on Peninsular Malaysia’s forest sector and timber trade, the basis for developed countries’ trade related environmental measures through agreements or acts or regulations and their implementation method as well as its effect on Peninsular Malaysia’s forest sector and timber trade. Case study is the preferred tool of research as the primary research question is *“How do timber trade related environmental measures imposed by developed countries affect Peninsular Malaysia’s forest sector and timber trade”* and

requires a holistic and in-depth investigation to understand the forest sector and timber trade in Peninsular Malaysia and how it is affected specifically by the FLEGT VPA negotiations and the binding timber trade related environmental measures.

Scholars like Benbasat et al. (1987) considered case studies to be viable as: (1) it is necessary to study the phenomenon in its natural setting, (2) it enables a researcher to ask 'how' and 'why' questions, so as to understand the nature and complexity of the processes that are taking place and (3) research is being conducted in an area where few, if any, previous studies have been undertaken. Such views have been substantiated by Yin (1994) as mentioned in Chapter One; case studies are the preferred strategy when 'how' or 'why' questions are being posed and when the investigator has little control over the events and also when the focus is on a contemporary phenomenon within some real-life context.

However, case studies have been criticised by some scholars as being non-representative and lacking statistical 'generalisability'. It can also be potentially "*researcher bias*" (Conford and Smithson, 1996). In this regard, Darke et al. (1998) was of the view that bias can be recognized in two forms: (1) how a researcher affects an event and participants behaviour at the site of a case study and (2) there may not exist satisfactory investigation and consideration of possible differing data due to the researcher's own beliefs, values and prior assumption and this would unduly influence the analysis of the case study evidence. Nonetheless, previously, Miles and Huberman (1984) were of the view that such bias in terms of collection and analysis of case data can be overcome by using evidence from multiple sources or known as triangulation of data to provide multiple instances from different sources. Based on this notion, the number of cases to be studied in the view point of Darke et al. (1998) depends on the focus of the research question. Accordingly, a single case study provides the researcher with rich description and in-depth investigation whilst multiple case studies provides for literal or

theoretical replication and cross case comparison. As such, for the purpose of this dissertation, multiple case studies will be conducted on the Trade Regimes that are currently enforced by the US, the EU and Australia to enable comparison to be done on the differences and similarities and the kind of effect they have on Peninsular Malaysia's forest sector and timber trade.

Also, it is important to note that there are three types of case studies according to Yin (1993): (1) causal case studies that focus on the cause-and-effect relationships and search for explanatory theories of an event, (2) exploratory case studies where data is collected before theories or specific research questions are formulated and later analysed and (3) descriptive case studies where there will be a theory to guide the collection of data. This theory will be declared in the beginning and later it will be subjected to review and debate. This dissertation has taken the approach of a descriptive case study where Putnam's theory of the two-level game will be used to interpret the data collected especially through semi structured interviews and focus group discussions at the state level. Apart from that, noting that case studies can also be single or multiple according to their numbers, this dissertation has adopted a multiple case studies approach i.e. the variant impacts of the US, the EU and the Australian Trade Regimes on Peninsular Malaysia's forest sector and timber trade. Therefore, it is not surprising that scholars like Yin (1994, p.55) are of the opinion that case studies can be quite demanding where the demands of a case study compared to other research strategies are much greater on a "*person's intellect, ego and emotions*".

4.4 RESEARCH METHOD

To address the identified research questions, this dissertation will rely on qualitative research methods, mainly documentary analysis and primary data gathered through semi-structured interviews, focus group discussions and observations. The semi structured interviews are conducted with experts in

tropical forest and timber trade while focus group discussions are held with foresters and industry members from four different states in Peninsular Malaysia as mentioned in Chapter One. Meanwhile, observations are conducted during various timber trade related conferences and forums to gather the insights and information from various experts all over the world on their views and comments about forest and timber trade related issues. The data collected from semi structured interviews, focus group discussions and observations are used to complement the documentary analysis of the US Lacey Act, EU FLEGT VPA and its Timber Regulation and the Australian ILPA/ILPAR with a specific focus on their impacts on Peninsular Malaysia's forest sector and timber trade. The documentary analysis of Peninsular Malaysia's forest sector and timber trade as well as the agreements or acts or regulations are presented in Chapter Five and Chapter Six respectively, while the findings and analysis based on the qualitative methods are reflected in Chapters Seven and Eight respectively.

4.4.1 *Documentary Analysis*

To understand a developed country's position on trade and environmental issues with specific regard to illegal logging and its illegal trade, primary and secondary documents are analysed. Using primary documents, the research undertook a documentary analysis of the US Lacey Act, EU FLEGT Action Plan/VPA requirements and its EUTR, the draft Malaysia-EU FLEGT VPA and TLAS for Peninsular Malaysia as well as the Australian ILPA/ILPAR and its CSG. The analysis is done to interpret and understand the language used in the agreement, act and/or regulations to comprehend the concerns and positions of developed countries on the issue of illegal logging and its illegal trade. Apart from that, to understand better Malaysia's forest sector and timber trade with particular reference to the situation in Peninsular Malaysia; various acts, regulations and policies directly or indirectly related to the forest sector and timber trade are analysed such as the: (1) Federal Constitution of Malaysia, (2) National Forestry Act, (3) Malaysian Plans I to X and (4) NATIP, 2009-2020.

On the other hand, secondary documents are also utilised to help put into perspective the primary resources above and to get a clear understanding of a developed country's position on illegal logging and its illegal trade as well as Malaysia's position and current ability to address such issues. These documents include: (1) published official national and international organizational reports and analyses on trade and environmental issues with specific reference to illegal logging and its illegal trade. Among the consulted reports are those related to WTO, ITTO, EFI, FAO, World Bank, OECD and Chatham House, (2) scholarly writings on the topics of trade and environment with specific focus on illegal logging and its illegal trade, (3) statistical data sources from the World Bank, United Nations Conference On Trade and Development (UNCTAD), Ministry Of International Trade and Industry (MITI), MPIC and Malaysian Timber Industrial Board (MTIB), (4) reports including published national and international documents, interviews, press releases and comments by forest sector officials, timber trade officials, negotiators, governments, businesses and NGOs on the topic of trade and environment, (5) national and international governments' websites and (6) published reports including annual reports from business associations.

4.4.2 Semi Structured Interviews

Interviews according to DeMarrais (2004) are a process where a researcher and participants engage in a conversation focused on questions related to a research study. Meanwhile, Dexter (1970) is of the opinion that interviews are defined as a *“conversation with a purpose”*. Merriam (2009) stated that it is necessary to conduct interviews if *“we cannot observe behavior, feelings or how people interpret the world around them”*. She further stated that there are three types of interview structures: (1) highly structured or standardized, (2) semi structured and (3) unstructured or informal (Appendix B provides explanation of the three types of interview structure continuum).

For the purpose of this dissertation, semi structured interviews were conducted with high level representatives from organizations or officers who are directly or indirectly involved with policy and implementation aspects of Peninsular Malaysia's forest sector and timber trade. The researcher's network—established as a secretariat of the FLEGT VPA negotiations—has allowed privileged access to key negotiators of the FLEGT VPA both at the Malaysian and the EU sides and also high level officials either from the government, industry or NGOs who are involved directly or indirectly with measures imposed by developed countries. Semi structured interviews were conducted starting from August 2012 until October 2014. Later, follow up discussions were held with some of the experts interviewed earlier to obtain the latest development on their area of expertise. As such, to obtain the Malaysian government's perspective, officials from Ministry of Natural Resources and Environment-MNRE (1), MPIC (2), MTIB (1), PROTEM Secretariat for FLEGT VPA (1) and Forest Department Peninsular Malaysia-FDPM (2) have been interviewed. Meanwhile, to obtain the industry's perspective, officials from the Malaysian Timber Council-MTC (2), Timber Trade Association Members (4), certification bodies like MTCC (4) and Sirim Quality Assurance Standard (1) were interviewed. Also various NGO group members i.e. WWF (1), Wildlife Trade News-TRAFFIC (1), Friends of Earth (1), Transparency International (1) and Malaysian Forest Institute (1) were interviewed to obtain the social and environmental aspects of the issues at hand. The interviews with the Malaysian officials, industry members and NGOs give a better understanding of the domestic political dynamics of a developing country like Malaysia in pursuing trade liberalisation while taking into account environmental and social concerns in relation to the forest sector and timber trade.

Apart from that, to obtain an international perspective on the reasons for imposition of trade related environmental measures by developed countries, semi structured interviews were also conducted with international trade and environmental experts from the EC in Brussels (2), European Delegation in Malaysia (1) European Forest Institute in Malaysia (2), ITTO official (1) and

official from the Ministry of Forestry, Ghana (1). These interviews were conducted according to ethical requirements as mentioned above through face to face interviews, skype and also email feedbacks. As such, feedbacks from a total of 30 respondents were obtained mainly from face to face semi structured interviews while a small number were through email taking into account that they are situated overseas. In this regard, Merriam (2009) was of the view that the semi structured interview format allows a researcher to respond to a current situation as well as the respondents emerging worldview and new ideas on the topic.

It is important to note that other questions on the topic of interest were also asked to probe further discussions, where necessary, although there was a set of semi-structured questions prepared for the interviews. Apart from that, further discussions were held or follow-up emails were sent to the interviewees to get more clarification if gaps were seen when writing the subsequent chapters. This enables a richer and deeper understanding on the issues discussed. Also, taking into account that a vast group of people from different backgrounds were interviewed, where some were vocal on the issues while others were cautious on their opinion and some shared sensitive information; the collected data is represented as a composite perspective rather than an individual perception to protect the anonymity of some of the participants. As such, to maintain confidentiality of the participants, codes were used to identify them based on four main categories – Government or Agency officials, Timber Industry Association members, NGO representatives and International Organization officials. Identification through the coding system enables the information provided to be put in context. Table 4.1 shows the coding assigned to the participants.

Table 4.1: Codes for Participant Identification

Categories of interviewed participants	Code
Government/ Agency Officials Policy Administrator (MPIC, NRE) Forest Administrators (FDPM) Legal Advisor (MPIC) MTIB MTCC MTC Protem Secretariat Sirim Quality Assurance Standard	PA(1), PA(2) FA(1), FA(2) LA A(1) A(2a), A(2b), A(2c), A(2d) A(3a), A(3b) PS CB
Timber Industry Association Members Timber Exporters Association of Malaysia (TEAM) Malaysian Wood Industries Association (MWIA) Malaysian Panel Product Manufacturers' Association (MPMA) Malaysian Furniture Entrepreneur Association (MFEA)	IM(1) IM(2) IM(3) IM(4)
NGO Representatives TRAFFIC WWF Transparency International Friends of Earth- <i>Sahabat Alam Malaysia</i> Institute of Foresters Malaysia	NGO(1) NGO(2) NGO(3) NGO(4) NGO(5)
International Organization Officials EU Commission (Brussels) European Delegation in Malaysia European Forest Institute (EFI) ITTO Forestry Commission of Ghana	EU(1), EU(2) ED EFI(1), EFI(2) ITTO GH
Total	30 officials

4.4.3 Focus Group Discussions

Focus group discussions were held to ensure that the information obtained is rich and reflect the variations in the Federal-State affairs on land and forest matters aside from reflecting Putnam's two-level game theory; they are basically interviews done in a group, involving people of similar backgrounds and experiences on issues that affect them (Patton, 1990). These focus group discussions were held with State Forest Administrators and Implementers as well as State Timber Industry members. The discussions are important to understand the level of awareness at the state level pertaining to FLEGT VPA and the acts and/or regulations imposed by the

developed countries and its effect on state forestry and timber industry. As explained in Chapter One, forest and land matters fall under the jurisdiction of State Governments in Malaysia. Therefore, it will be the states' responsibility to ensure successful implementation of any systems that will provide credibility to their forest and timber produce according to sustainable and/or legal requirements. Meanwhile, the State Timber Industries also have the same responsibility to ensure that the timber products exported are legal. Prior to the discussions, a briefing was held by the Chairman of MTCC to inform the State Forest Administrators and Implementers and State Timber Industry members on the latest update of the FLEGT VPA negotiations and other related issues where the researcher sat in as an observer.

For the purpose of focus group discussions, four states in Peninsular Malaysia were identified using the purposive sampling method i.e. Perak, Pahang, Selangor and Johor on the basis that these states cover the north, east, west and south of Peninsular Malaysia. This is to ensure a balanced representation of all the states in Peninsular Malaysia and to get a general understanding of the states' level of involvement and position on the FLEGT VPA negotiations and the binding acts and/or regulations.

4.4.4 Observation

According to Merriam (2009), observation is a *“research tool when it is systematic, when it addresses a specific research question and when it is subject to the checks and balances in producing trustworthy results”*. However, since observation involves human perception, it has been often criticized as unreliable. However, observation allows for firsthand information through known knowledge and expertise of what is observed. In this regard, the following were observed—the physical setting of a forum, the background of the participants involved and the main activities, interactions as well as conversations on the related issues. At all the forums such as The International Conference on Market Requirements for Timber and Timber

Products 2012, The PEFC⁶⁴ Stakeholder Consultation Dialogue 2013 and The EU Stakeholder Consultation 2014, the researcher's activities of observation were made known to the organizers and also the participants. According to Merriam (2009), such an observation method will allow the researcher to have access to many people and a wide range of information and their participation in the group is secondary to the role of information gathering. This is true, where during the EU Stakeholder Consultation 2014, the researcher met a lot of stakeholders especially from the social and environmental circle and managed to speak to a few of them about their thoughts on the issues of FLEGT, which will be reflected further in Chapter Seven.

4.5 SUMMARY

In this regard, based on the explanation above, it is believed that a qualitative approach through case study method is the best way to obtain rich information on why and how the FLEGT VPA, acts and/or regulations imposed by developed countries can affect Peninsular Malaysia's forest sector and timber trade. Also, it enables examining in detail the different stances and motivations of the many forces involved in the negotiations over agreements such as the FLEGT VPA. As such, knowledge and experience of experts in the field of forest sector and timber trade are obtained and analyzed through qualitative methods of semi structured interviews, email feedbacks and focus group discussions. In addition, observations allow for the study of the natural settings of an event and its purpose while allowing for the interpretation of a situation based on discussions. Thus, in the case of Peninsular Malaysia's forest sector and timber trade, qualitative research method will allow for the researcher to: (1) gain first-hand knowledge and understanding of the experience of relevant stakeholders, (2) personally be involved in the collection of the data and its analysis and (3) be involved in the inductive process that provides a rich descriptive data.

⁶⁴ Programme for the Endorsement of the Forest Certification Scheme (PEFC)

CHAPTER FIVE

EVOLUTION OF MALAYSIA'S POLICIES AND PRACTICES - A MOVE TOWARDS INTERNATIONAL PRACTICES

5.1 INTRODUCTION

Understanding the overall debate and theoretical linkage between trade and environment as well as the international pressure and demands for sustainable and/or legal timber as explained in Chapter Two and Chapter Three, this chapter now provides readers with a detailed description of Malaysia's forest sector and timber industry. The reader is thus brought through a journey of the evolution of Malaysian policies and practices in line with its history and formation, the need for development versus the preservation of forests and environment and also its move toward international practices based on pressure and demands for sustainable and/or legal timber. This chapter will provide a clear understanding of Malaysia's unique Federal-State relations and its current state of affairs with regard to the forest sector and timber trade.

As such, discussion will first focus on the general laws, regulations and policies applicable for the forest sector and timber trade in Malaysia. Discussions are then turned to related policies to explain the country's developmental agenda and environmental stance as a developing country. It is also important to understand that this chapter will have specific discussions on forest and timber related laws, regulations and policies based on the three main regions in Malaysia, i.e. Peninsular Malaysia, Sabah and Sarawak, to get an overall picture of the Malaysian situation. Although as mentioned earlier in Chapters One and Two, the research focuses specifically on the effects of trade related environmental measures on Peninsular Malaysia's forest sector and timber trade; it is nevertheless important to also understand briefly the situation in Sabah and Sarawak. This is due to the uniqueness of Malaysia's situation where the Federal Constitution of Malaysia provides the

states with ownership or control over land and forestry issues. This dictates the evolution and applicable laws, regulations and policies that lead to SFM practices in the three regions. This will also provide the basis on why the dissertation is focused only on Peninsular Malaysia. It is also important to note that the eleven states in Peninsular Malaysia have adopted the NFP and the NFA and as such, there is harmonisation of laws within these states.

Meanwhile, discussions are also focused on Malaysia's efforts in promoting SFM, certification and/or legality of its timber, internationally, based on environmental pressure imposed on the forest sector and timber trade. Malaysia, like any other tropical country is constantly subjected to criticisms of forest exploitation and exports of illegal or unsustainable timber as explained in Chapter Two. This chapter will also discuss briefly the FLEGT VPA negotiations to reflect the development and implementation of the MYTLAS. The details of the FLEGT VPA negotiations and the binding acts and/or regulations imposed by the US, the EU and Australia will be examined in Chapter Six instead.

5.2 A GENERAL PERSPECTIVE OF MALAYSIA'S FOREST SECTOR AND TIMBER TRADE

Malaysia is a Federation of thirteen states and three Federal Territories (Kuala Lumpur, Putrajaya and Labuan) with a total land mass of 32.83 million hectares. Eleven states and the Federal Territories of Kuala Lumpur and Putrajaya are situated in Peninsular Malaysia, covering 13.16 million hectares of the total land mass. Meanwhile, the states of Sabah, Sarawak and the Federal Territory of Labuan are situated in Borneo Islands (East Malaysia) with Sabah and Labuan covering a land mass of 7.37 million hectares while Sarawak, 12.3 million hectares (refer Figure 5.1 on Malaysia's map indicating its total forest cover).

Figure 5.1: Malaysia's Total Forest Cover



Source FDPM

In terms of nature, Malaysia is a country that is blessed with tropical rain forests and rich with biodiversity. Its rainforest is of many different types including lowland and hill dipterocarps (dryland areas), mangrove, peat swamp and freshwater swamp forests (wetland areas). Also, Malaysia is recognised as one of the twelve mega bio-diverse countries in the world as its forests is home for at least 15,000 species of flowering plants and trees, 600 species of birds, 286 species of mammals, 140 species of snakes and 80 species of lizards (Mohanlall, 2004:2). Malaysia's forests are also rich and valuable for inhabiting different life-forms aside from assuming the role as a source of timber and other products i.e. rattan, medicinal plants, resins, food and fertiliser. Meanwhile, it is important to note that forests in general are important for the following: (1) to protect freshwater resources and soils against erosion and nutrient losses, (2) to regulate local climate, (3) to serve as carbon sinks, (4) as a natural laboratory for research and (5) an attraction for visitors and tourists.

5.2.1 Federal-State Relations

5.2.1(a) State Government's Power over Land and Forest

Article 74 of the Federal Constitution of Malaysia provides the states with autonomy over matters relating to land, water resources, forests, local government as well as town and country planning. Thus, this confers the states the power to independently enact laws or formulate policies in relation to forests and land matters. In this regard, Jaria (2005) argued that state laws on matters relating to soil, water or forestry often lack uniformity due to divergence of the law's origins as some of the laws were based on either the Federated Malay States Enactments or Straits Settlements Ordinances or the amalgamation of both. She further argued that states are unlikely to give up their powers regarding land and forest matters. In this regard, a state has the power to decide on the use and allocation of its forests either for development or to accrue revenue through its forest land by issuing logging permits and collecting royalties and premium. It is important to note that the revenue collected is a significant source of income and tends to be used for the state's development. As such, in this case, if we take into account Putnam's two-level game theory, it can be argued that domestic stakeholders i.e. State Government may be a deterrent factor by allowing the Federal Government to have control over forestry issues and from making any decisions in line with international standards for forestry especially if it is not in favour of the state's development. Based on Putnam's analysis of the Bonn Summit's successful negotiations (details in Chapter Three), there is a strong need for political blessing from the states and a strong interest for change on the part of at least some pertinent stakeholders in the state in order for such standards to be accepted for the benefit of the states and the nation as a whole.

In addition, Malaysia's National Land Code 1965 (Act 56) further strengthens the position of states where all un-alienated state land is vested under State Authority, which has the rights to reserve and dispose of such lands. If the Federal Government wishes to acquire either the un-alienated or reserved

state land for any purpose, it must apply to the State Government for approval. Meanwhile, in the case of alienated land, the Federal Government must purchase it from its owner or request the State Government to acquire it through compulsory purchase (Aiken, 1986). It can be argued that the Federal Constitution's structure on the power of the states with regard to land and forestry matters can hamper efforts to unify and intensify development of related environmental policies. In this relation, it was stated that in Malaysia, the interaction between design and process and also between competing interests defines strong centre-state relations in the states where the central government candidate is able to form the State Government and implement central government policies (Jaria, 2005 cited Safruddin, 1998).

5.2.1(b) Federal Government's Power over Land and Forest

The Federal Government, under Article 94(1) of Federal Constitution, is empowered to formulate necessary forestry legislation to promote uniformity between two or more states and to deal with matters like forestry research, training and technical assistance to the State Governments. As such, noting the differences in management practices and the self economic interest of each state, the Federal Government realised the need for a common ground of certain practices for the benefit of the environment, which merits the states to act for the nation and benefit of its people. In 1958, based on the provision of Article 94(1), the National Land Council (NLC) was formed to coordinate State-Federal policies and objectives on land use, mining, forestry, agriculture and formulating a national policy for promotion and control of the utilisation of land throughout the Federation. This was done in consultation with the Federal Government, State Governments and National Finance Council (Kathirithamby-Wells, 2005:267). The NLC then established the National Forestry Council (NFC) in 1971, for harmonisation of policies between the Federal Government and State Governments, especially with regard to SFM. The NFC is chaired by the Deputy Prime Minister and its membership comprised of Chief Ministers of the thirteen states, Heads of Forestry Departments in the three regions, and Federal Ministers responsible for natural resources and environment, finance, trade, agriculture and agro-

based industries, plantation industries and commodities, science as well as technology and innovation. In this regard, all decisions of the NFC were endorsed by the NLC. Meanwhile, Sabah and Sarawak became members of the NFC with an observer status.

What is interesting is that despite Sabah and Sarawak not being obliged to comply with any of the policies adopted by NFC, the two states are involved in the forum of discussion between Federal and Peninsular Malaysia's State Governments. This forum is important as it discusses and resolves common problems and issues on forestry policies, administration and management as well as encourages cooperation to ensure a coordinated approach in implementation of forestry policies and programs. However, in 2010, the NFC was dissolved as the Federal Government decided that all matters related to forestry should be directly handled by the NLC instead. It can be argued that the dissolution of NFC could be considered as unfortunate due to the fact that Sabah and Sarawak are not members of the NLC and therefore there is no obligation now on their part to even look into any of the policies or programs related to forestry agreed by the NLC⁶⁵. Furthermore, another disadvantage is that the NLC does not only concentrate on forestry issues like the NFC but also on other issues related to mining and land. Therefore, the forestry sector may be at the losing end in terms of division of issues and time for discussion allocated for forestry issues. However, **PA(2)**⁶⁶ was of the view that even though some people may prefer for issues on forestry to be dealt with by the NFC, it is felt that the NLC is a more powerful forum as the decisions made will be followed through by the states in Peninsular Malaysia.

Apart from the above, to further put things in order, the Federal Government, in 2004, through its Cabinet, set up the MNRE to oversee the forest sector (upstream) and MPIC for the development of wood-based industries, trade in

⁶⁵ FA(1) who is representing the Forest Department had confirmed the point that under the NLC, Sarawak and Sabah are not members but only act as observers while under the NFC they are members that have a voice and are allowed to vote.

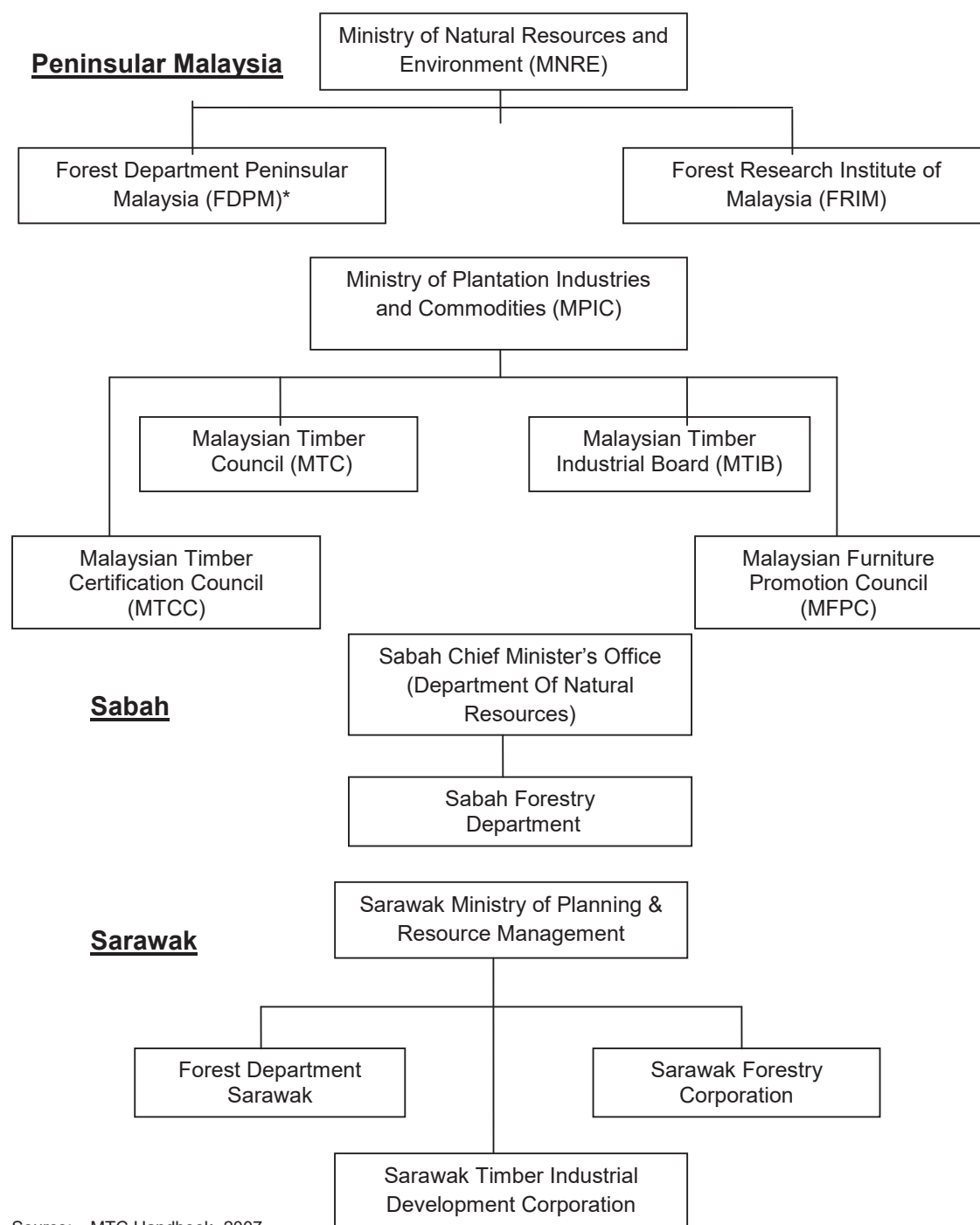
⁶⁶ PA(2) represents the MNRE and is heading a senior position in the Ministry.

timber and timber products and forest plantations (downstream). Previously, both the administration and the development of forest sector and timber trade (upstream and downstream) were under one Ministry that was the Ministry of Primary Industries. Nevertheless, due to the structure of Malaysia with thirteen states that have constitutional rights over forest and land matters, unavoidably, there exist many institutions and agencies responsible for forest management and timber industry development either at the Federal, State or local government levels. This is especially so with the division of responsibilities on forest matters clearly seen between Peninsular Malaysia, Sabah and Sarawak that have evolved independently, however with a strong common goal of SFM. Thus, Forest Departments were established in each state to manage its forest resources. In Sarawak, the situation differs slightly as Sarawak Forestry Cooperation (SFC) was established to manage its forest resources while its Forest Department deals only with forest policy planning, statutory and regulatory matters.

Meanwhile, MTIB is held responsible for the regulation, development and training of wood-based industries and trade in Peninsular Malaysia. MTIB is accountable to issue export licences and collect export taxes aside from acting as an enforcement agency with limited power. In the case of Sabah, its Forestry Department is responsible for the regulation, development and training of wood-based industries and trade within the state. Meanwhile in Sarawak, a similar responsibility lies with Sarawak Timber Industry Development Corporation (STIDC). Thus, harmonisation of all these policies and procedures were made through, the then NFC, now NLC, where possible, with the agreement of the states (refer to Table 5.1 below for other agencies involved in the management of the timber and timber products). Another important policy to note is that the Federal Government, under the Ninth Schedule (Article 74 and Article 77) of List 1 of the Federal List, Federal Constitution of Malaysia, has been given the negotiation rights in relation to trade, commerce and industry matters for products including timber and timber produce. Nevertheless, it can be argued that such rights

confer on the Federal Government the power to decide on trade related issues for timber and timber produce without the states approval.

Table 5.1: Forestry and Timber Agencies in Malaysia



Source: MTC Handbook 2007

* State Departments in Peninsular Malaysia reports to FDPM

5.2.1(c) Conflicts between Federal Government and State Government on Land and Forest Matters

According to Awang (2008), the role of the Federal Government to centralize issues related to forest and land matters and to drive towards its uniformity, has inevitably created conflict between the Federal Government and State Governments on land matters. The 1977 Endau-Rompin case of conflict between development and preservation of nature is a good example where despite both the Federal Government and the Pahang State Government being of the same political party, they were at 'logger heads' on logging rights of State Government in the wilderness area. Initially, the Federal Government together with Johor and Pahang State Governments were in favour for Endau-Rompin being preserved as a national park due to its exceptional ecological, scientific, recreational, aesthetic and intrinsic values. Nevertheless, the Pahang State Government went against its informal agreement and conferred logging rights in its area (Aiken, 1986). In this case, it is interesting to note that, although being at 'logger heads', such a situation does not warrant the Federal Government's direct interference on the state's decision due to political sensitivities and the limitation provided under the Federal Constitution over forest and land matters.

According to Jomo (2004:226), despite the Federal Government's official acknowledgement of such situations, there is hardly any sign that there is political will to directly tackle issues of forest abuse. However, what is important is that the public via pressure groups played an important role in halting logging. Public awareness on environmental importance and constant pressure against logging managed to stop logging in the area. Another notable case of public intervention on logging would be the Ulu Muda Forest Reserve, an area important for water catchment supplying fresh water for domestic, industrial and agriculture sectors for the states of Kedah, Penang and Perlis.

Despite the above situation, it is important to note that there are common grounds of shared interest and objectives of forest management between State Governments and the Federal Government on land and forestry issues. In this regard, Awang (2008) mentioned that seriousness of any conflict can be mitigated by different forms of *“co-operative federalism and can be avoided by political allegiance”*. Therefore he stated that the constitutional significance of conflict can be lessened by the political dimension. However, on the other hand, he noted that if the political allegiance between the states and Federal Government breaks down, conflict will assume its constitutional dimension and resurface. This concept of political dimension will be further analyzed in the case of the FLEGT VPA negotiations in Chapters Six, Seven and Eight.

5.2.2 Progress of Development in the Land and Forest Sector

Noting the importance of Malaysia's rain forest and its rich biodiversity, it is also essential to understand that Malaysia is a developing country, where developmental related policies are pursued aggressively for its economic and social growth. Hence, since independence, Malaysia had embarked on various policies aggressively to sustain growth, restructure society and reduce poverty and unemployment as well as to address other socio-economic imbalances. This is particularly so, noting that Malaysia has a diverse ethnic background with different lifestyles and levels of development. Historically, during the British colonial days, different ethnic groups were given different roles and economic responsibilities in the country's development. The Malays were mostly farmers and fishermen in rural areas, the Indians worked in plantations and the Chinese were traders in urban areas. In this regard, the government realised the urgency of restructuring these ethnic groups to remove ethnicity identification with economic function, to ensure a balanced development level, to unify and to eradicate poverty and income level disparities.

Thus, early plans were laid out under the comprehensive Outline Perspective Plans⁶⁷, which included detailed Five-Year Malaysia Plans⁶⁸ and strategic policy initiatives that sought to eradicate poverty, restructure society, sustain growth and maintain national unity. However, it is noted that the pursuit of socio-economic progress had caused a high rate of change in Malaysia's natural environment. When Malaysia attained its independence in 1957⁶⁹ (Sabah and Sarawak became part of Malaysia on 13th September 1963), its economy was fundamentally commodity-based with heavy dependence on rubber and tin. According to the Economic Planning Unit (EPU), both the commodities contributed to about 70% of its total export earnings, 28% of government revenue and 36% of total employment. However, the depletion of tin and the volatility of rubber prices became a concern as these commodities continue to serve as the engine of economic growth. Therefore, realising the need to diversify and modernize the agricultural sector that serves as a good potential for economic growth and to emphasize rural development, Malaysia embarked on economic initiatives through economic related policies such as the New Economic Policy (NEP) and National Agricultural Policy (NAP)⁷⁰.

As a result, between the 1970s and 1980s, through economic transformation and agricultural diversification, palm oil and timber also emerged as important export commodities. The NAP, first implemented in 1984, became

⁶⁷ The First Outline Perspective Plan was initiated from 1971-1990: The Second Outline Perspective Plan, 1991-2000: Third Outline Perspective Plan, 2001-2010

⁶⁸ The First Malaysia Plan was drafted from 1966-1970; Second Malaysia Plan, 1971-1975; Third Malaysia Plan, 1976-1980; Fourth Malaysia Plan, 1981-1985; Fifth Malaysia Plan, 1986-1990; Sixth Malaysia Plan, 1990-1995; Seventh Malaysia Plan, 1996-2000; Eighth Malaysia Plan, 2001-2005; Ninth Malaysia Plan, 2006-2010; Tenth Malaysia Plan, 2011-2015.

⁶⁹ Before 1963, Malaysia was known as Tanah Malaya when it gained its independence in 1957 from the British occupation. Malaysia formally came into being on 16th September 1963, consisting of Malaya, North Borneo, Sarawak, and Singapore. However, Singapore withdrew from Malaysia to be an independent country in 1965.

⁷⁰ The first NAP was implemented from 1984-1991, emphasised on the development of the commodity sector (palm oil, timber, cocoa, rubber and pepper) focusing on export growth, reducing the incidence of rural poverty and increasing the income of the smallholders through optimum utilisation of resources; the second NAP from 1992-1997 focused on efforts to increase productivity and efficiency, implementing sustainable management in agriculture and promoting downstream processing activities; while the third NAP 1998-2010 was implemented to enhance the competitiveness of the agriculture sector, implementing food security initiative, developing new sources of growth and increasing involvement of the private sector in agriculture.

the framework for the agriculture sector transformation including the plantation, industry and commodities sectors from being just producers of raw materials to producers of high value-added and market-oriented products. This was in line with the policy adopted in the late 1980s due to economic recession, where Malaysia re-strategized its economic plan to focus more on industrialization and privatisation for economic growth. Also, noting the importance of a commodity sector to economic growth, a National Commodities Policy was formulated in 2011, specifically to strengthen the role and contribution of the plantation industries and commodities to the economy, in order to make them more dynamic and competitive by 2020.

On the other hand, the concentration on agriculture and rural development particularly in the 1970s, led to substantial land clearing for conversion to agriculture in the country, especially so for oil palm and rubber plantations. According to Aiken (1998), two key processes of forest clearance and modification in the post colonial period were land development and selective logging of hardwoods, mainly by the Federal Land Development Authority (FELDA), whereby from the year 1971 to 1985, some 1.3×10^6 ha of predominantly forested land were cleared for agriculture and settlement. FELDA is the main agent of change responsible for land conversion in Peninsular Malaysia, especially to rubber plantations and had converted more than 100,000 ha of forested land by 1965 (Hezri, 2006 cited Goh, 1982). FELDA's preferential rights are clearly provided under the First Malaysian Plan (1961-1965) where new land development was targeted at 400,000 to 450,000 acres in West Malaysia as such FELDA was given the right to develop 141,000 acres. The remaining 150,000 acres were developed through other public sector schemes while 110,000 to 160,000 acres by private sector schemes.

Consequently, large scale clearance and conversion of land especially in plantations have led to a considerable forest cover reduction in Malaysia. In 1966, around 9 million hectares (68%) out of 13.3 million hectares of land

area in Peninsular Malaysia was under forest cover but by 1977, this declined to 7.2 million hectares, a total of 55% of land area—3 million to 4 million has been logged (Hezri, 2006 cited Goh, 1982 & Ooi, 1976). This was because at that time, timber was extensively harvested by State Governments as it was a major source of revenue. According to Jomo (2004:186) the estimated average of state budget derived from timber (1970s to 1997) varied from 35% to 70% depending on timber value at that time. In the 1970s and the year 1980, there was a notable increase in timber output and exports where an average of 70,000 hectares was cut in Malaysia, annually, in the early 1970s. Meanwhile, in 1975, export of raw logs amounted to RM 670 million collected from the 8.5 million (45%) of the 19.2 million cubic metres logged. In the early 1980s, when timber price increased, the logging rate also tripled to 240,000 ha per annum, yielding over 30 million cubic metres of log annually, out of which 60% were exported. Nevertheless, despite all the criticisms on forest cover reduction, the country as of 2012 has 63.5%⁷¹ of the total land area under forest cover—in line with the International Union for Conservation of Nature, where at least 50% of total land area should be under forest cover (see Appendix C). Forested areas in Malaysia are divided into PRF, 14.5 million hectares; National Parks/Wildlife Sanctuaries, 1.85 million hectares and SLF, 4.6 million hectares apart from small areas of ALF. It is important to understand that Malaysia's domestic timbers are harvested from three categories of land, namely PRF, SLF and ALF. The PRF and SLF are state-owned while ALF is mainly privately owned⁷². Specifically in terms of Peninsular Malaysia, in 2013, a total of 5.83

⁷¹ This data was obtained from MNRE and accordingly used for the forest resource assessment (FRA) 2015 reporting to FAO.

⁷² Due to differences in terms used in the regions, these categories are defined on a regional basis. For the purpose of Peninsular Malaysia,

- a) PRF refers to Permanent Reserved Forest as defined under the NFA 1984, which means *“any land constituted or deemed to have been constituted a Permanent Reserved Forest under this Act”*.
- b) SLF is defined as *“all land in the State..... other than :*
 - *alienated land*
 - *reserved land*
 - *mining land*
 - *any land which under the provision of any law relating to forests (whether passed before or after the commencement of this Act) is for the time being reserved forests”*.

million hectares of its land is under forest cover (44.2% of Peninsular Malaysia's land area of 13.18 mil hectares). Out of this, 4.93 million hectares is under PRF, 0.31 million hectares is under SLF and ALF while 0.59 million hectares is under National Parks/Wildlife and Bird Sanctuaries.

Nevertheless, as previously argued, the connection between the increase of trade due to increase in logging rate is one of the main reasons why international focus is on the timber trade and the possibility of associated promotion of forest depletion and degradation. This has been made worse with cases of illegal logging and illegal timber trade being reported as rampant especially in tropical countries, which also implicated Malaysia's timber trade as explained in Chapter Two. Eventually, this has led to a difficult situation as Malaysia is a developing country that depends on its trade to further contribute to the enhancement of its economy with timber trade being part of this contribution. MITI Report 2013 indicated that Malaysia, under a steadily recovering global economy, had driven its economic progress by engaging actively in trade with countries across the regions. Accordingly, Malaysia continues to liberalise trade by participating in *"milestone talks and negotiations"* in important FTAs such as the Trans-Pacific Partnership Agreement (TPPA) and the Regional Comprehensive Economic Partnership Agreement.

In 2014, Malaysia's trade grew by 5.9% amounting to RM 1.45 trillion from RM 1.37 trillion in 2013. Specifically exports grew by 6.4% to RM 766.13 billion surpassing the forecasted export growth of 6% in the 2014/2015 Economic Report, while imports increased by 5.3% to RM 683.02 billion. Major trading partners that contributed to the growth in trade were: (i) ASEAN that grew by RM 14.54 billion or 3.9%, (ii) the EU (RM 8.35 billion or 6.2%),

c) ALF defined under the National Land Code, 1965, means *"any land (including any parcel of a sub-divided building) in respect of which a registered title for the time being subsists, whether final or qualified, whether in perpetuity or for a term of years, and whether granted by the State Authority under this Act or in the exercise of powers conferred by any previous land law, but does not include mining land."*

(iii) the USA (RM 8.01 billion or 7.4%), (iv) Australia (RM7.48 billion or 16.4%), (v) Hong Kong (RM6.05 billion or 14.5%), (vi) Taiwan (RM5.94 billion or 11.2%) and (vii) China (RM4.54 billion or <2.2%). Meanwhile, it is interesting to note that the trade with the FTA partner countries has increased by 3.9% to RM906.6 billion with exports expanding 4.7% to RM491.35 billion and imports growing at 2.9% to RM415.25 billion. The increase in exports of liquefied natural gas, petroleum products, electrical and electronic products, crude petroleum as well as chemical exports have actually contributed to the increase in exports to FTA partner countries, which is 64.1% of Malaysia's total exports in 2014. Further, it was estimated that close to 49% of exports to FTA partner countries were through preferential access⁷³. It is also important to note that the emphasis on trade is in line with Malaysia's Vision 2020 where it is stated that Malaysia should continue with export-led growth despite global slowdown, the rise of protectionism, trade blocs and managed trade (refer to Chapter Three for the theoretical arguments i.e. neoliberal institutionalists and environmentalists on trade and protectionist measures).

Nonetheless, in relation to trade of timber and timber products, Malaysia is still one of the leading exporters of tropical hardwood products (logs, sawn timber, plywood, medium density fibre board, veneer and other panel products; mouldings, builders' carpentry and joinery as well as wooden furniture). According to UN⁷⁴, Malaysia ranked as the seventh (7th) major world exporter of timber and timber products (Chapter 44), accounting for 4% (USD\$ 4.4 billion) of the world's total timber trade (USD\$ 117.9 billion) in 2012. The details of Malaysia's ranking compared to other countries are as in Appendix D. With regard to furniture and parts (Chapter 9403), Malaysia ranked eight (8th), accounting for 2.6% (USD\$ 2 billion) of the world's furniture export share (USD\$ 78.9 billion).

⁷³ Information obtained from MATRADE – "Malaysia External Trade Statistics -Trade Performance for the Year of 2014 and the Month of December 2014"

⁷⁴ Latest figures obtained from UN as of 2012.

Meanwhile according to MTIB⁷⁵, exports of timber and timber products which included furniture and parts in 2014 were valued at RM20.5 billion, an increase of 3.5% from 19.5 billion in 2013. The main export items are furniture (30.8%- RM 6.32 billion), plywood (25.3% - RM 5.19 billion) and sawn timber (12.4% - RM 2.51 billion). These products are mainly exported to Japan (20.2% - RM 4.15 billion), US (11.8% - RM 2.4 billion), EU (9.8% - RM 2.01 billion) and India (7.5% - RM 1.53 billion); see Appendix E for details of Malaysia's export of its timber and timber products for the year 2014. The overall contribution of export of these products compared to Malaysia's total export in 2014 was 2.9% of the GDP or RM 702.1 billion. Meanwhile, the industry also contributed to its domestic market amounting to RM 13.0 billion and to its workforce estimated to be around 200,000 workers.

Thus, the Malaysian timber industry is among one of the major commodity contributors to the country's economy and has transformed from a producer of tropical timber to an exporter of high value-added timber products. This is in line with NATIP, which provides the policy direction for the timber industry until 2020 to remain sustainable and competitive in today's challenging global environment. Also, NATIP took into account the importance of adequate and reliable supply of raw materials, which is crucial to the development of the timber industry in Malaysia and therefore the government has encouraged greater commercial investments in forest plantation. This would eventually, in the long term, reduce the dependency on natural forests. Further, attention was given to research and development activities that use alternative raw materials such as oil palm bio mass, kenaf and non-wood composites. Of course to the above, importance has also been put on capacity building in terms of manpower and also technical know-how and technologies. Apart from NATIP, the Industrial Master Plan (IMP)⁷⁶, specifically IMP3 (2006-

⁷⁵ There is a difference on the type of products categorized as timber and timber products for the UN and MTIB statistics. For MTIB, trade of products under Chapter 44 and Chapter 9403 are categorized together as timber and timber products.

⁷⁶ Thus far three IMPs have been drafted; the first being IMP1 launched in 1986, IMP2 from 1996-2005 and IMP3, 2009-2020. During the IMP2 period it was reported that the output of the industry has expanded in tandem with the growing external demand. At the same period also the timber industry had expanded into higher value added products such as moulding, builders' joinery and carpentry, panel products and furniture.

2020) also provides the direction for the wood based industry to continue to be a major contributor for value-added, export earnings and employment in the manufacturing sector. The IMP3 states that the wood based industry is expected to substantively contribute to the production of timber products made from raw materials sourced from Malaysia's sustainable forest. It was targeted that the total investment for the industry during this period should be RM 25.4 billion or RM 1.7 billion per annum. Meanwhile, exports are targeted to reach RM 53 billion by 2020, at an annual rate of 6.4% per annum (for further details see Appendix F).

To achieve the above status, it should be noted that the timber industry had gone through a long and difficult journey and this will continue with constant international focus on timber trade specifically on tropical timber. Historically, timber logging first started in Sabah in the 1900s where logging was the stronghold of the economy and in 1941 Sabah became the third largest exporter for the British Empire. For Sarawak, timber was the major export item in the 1920s and 1930s while for Peninsular Malaysia, the industry started off only in 1945. By the 1960s and early 1970s, Malaysia had become an important international player i.e. exporter of tropical hardwoods (Mohanlal, 2004:141).

5.3 EVOLUTION OF LEGISLATION AND POLICIES RELATED TO ENVIRONMENT – SPECIFICALLY PERTAINING TO MALAYSIA'S FOREST SECTOR AND TIMBER TRADE

Tropical deforestation has become an international concern especially in the 1970s due to increasing awareness of the importance of forests in general to the environment and mankind and specifically on the rich biodiversity of tropical forests. Malaysia in particular, has always been concerned on the impact of human action to the environment, particularly forests; this concern was prevalent even before independence, where there were efforts to address natural resources depletion including the forest on a case-to-case

basis. The 1894 Straits Settlement Ordinance No.3 was first enacted to protect several species of wild birds and this was followed by related laws such as the Waters Enactment 1920, (Act 418)⁷⁷; The Forest Enactment and Rules, 1930⁷⁸ and The Interim Forest Policy for the Federation of Malaya, 1952⁷⁹.

Meanwhile after independence, as Malaysia started to build its economic foundation, environmental concerns were also taken into account especially those related to land and forest matters. Apart from the previous legislation or policies developed on a case-to-case basis, the concern on environment is reflected in the enactment of Environmental Quality Act (EQA), 1974 and the Third Malaysia Plan (1976-1980). The EQA marked the beginning of the Malaysian government's commitment to prevent pollution and degradation of natural resources and was later amended in 1994 to ensure that Environmental Impact Assessment becomes a tool to safeguard resources and to compensate negative consequences of development. To ensure effective enforcement of the EQA, consequently the Department of Environment—responsible for the prevention, control and abatement of pollution—was established in 1975. Meanwhile, the Third Malaysia Plan has a separate chapter on Development and Environment (Chapter X1).

Prior to the Third Malaysia Plan, it should be noted that even though environment was not the main focus, there had been mere mentions of environmental concerns such as recognising forest conservation needs to avoid climate changes, safeguarding of water supplies and soil fertility and prevention of flooding and erosion (First Malaysia Plan, 1961). This was because at that time, the focus was on economic development, particularly

⁷⁷ This Act had been revised in 1989 and was designed specifically to control and prohibit acts that tantamount to disruption of rivers in Peninsular Malaysia. The Act also provides for restriction of discharges of specific substances into the river that might be detrimental to the beneficial use of the river waters.

⁷⁸ The enactment was for the purpose of forest management and adopted by all states in Peninsular Malaysia, however it was found to be weak in areas of forest conservation and management planning and in forest renewal operations that are vital for SFM.

⁷⁹ This policy that was formulated in 1952 was adopted by Peninsular Malaysia as the NFP in 1978

growth through export promotion and diversification. Meanwhile, the Second Malaysia Plan focused attention on social integration and equitable distribution of income and opportunities in line with the NEP. As such, it can be argued that the drafted Malaysia Plans reflected the need and situation of the country at the time of drafting. According to Aiken (1998), it was not surprising that there had been no mentions of the environment in the earlier plans, because at that time, the availability of land and timber seemed unlimited and the environmental movements were still confined to rich nations.

However, since the world became more aware on the impact of mankind to the environment, it was not surprising that the Malaysian government began to take more serious measures to address such issues and this was reflected in the Third Malaysia Plan. During this time, as argued in Chapter Two, there were international pressures to address the effect of pollution due to industrialization that led to ozone depletion. Therefore, in the plan, a separate chapter was drafted, aimed to balance the goals of socio-economic development and maintain sound environmental conditions. Such a situation bears out Putnam's theory where he is of the opinion that international pressure is a necessary condition for policy shift; however, it is important to note any policy shift due to such pressure is only made possible if there is domestic awareness and acceptance of such a policy (see Chapter Three for details of Putnam's argument). Therefore the need to maintain a healthy environment for human habitation, preserve natural heritage and impact of population growth and industrialisation was laid out.

Since then, the Malaysia Plans continued to consider environmental concerns and protection but at different levels of environmental emphasis. Although the Fourth Malaysia Plan hardly mentioned environmental requirements, the Fifth Malaysia Plan (1986-1990) recognised the following: (1) the need to minimise the impact of human activities related to deforestation, urbanisation and tourism, (2) the importance of prevention

through conservation instead of curative measures and (3) the need to incorporate environmental planning in development projects. The Sixth Malaysia Plan (1991-1995) and the Seventh Malaysia Plan (1996-2000) also focused on environmental and sustainable development goals, where the importance of natural resources was acknowledged and it was stated that achievement of economic growth should not be at the expense of further environmental degradation. Both plans were drafted in line with the Second Outline Perspective Plan (1991-2000) where one of its four principles is focused on environmental protection of any kind, particularly on maintenance of a clean and healthy environment with ecological and climatic stability. However, it is inevitable that exploitation of natural resources will continue for economic purposes but it is important that such exploitation is done in a sustainable manner for future needs. In the Eighth (2001-2005), Ninth (2006-2010) and Tenth Malaysia Plans (2011-2015), the government continued to stress on the importance of sustainable economic growth taking into account the environment and its natural resources.

Thus, environmental focus is now an integral part of Malaysia's policy where Chapter Six of the Tenth Malaysia Plan dedicated a specific write up on "*Valuing the Nation's Environmental Endowments*". It mainly focuses on the development roadmap for resilient climate growth and enhancing conservation of the nation's ecological assets including climate adaptation and mitigation, energy efficiency use, improving solid waste management, conserving forest, enhancing forest and wildlife conservation efforts while ensuring equitable and sustainable utilisation of resources. As stated by Ambali (2011), even though policy makers stress on economic development in policy drafting, environmental considerations are increasingly integrated into sectoral policies to ensure simultaneous sustainable economic and social development. He also stated that environmental and resources management was guided by the National Action Plan, aimed at promoting economic, social and cultural progress through environmentally sound and sustainable development. Nevertheless, Jaria (2005) had argued that priority is mainly in accordance to economic development instead of promoting

environmental protection. Therefore, nothing much is done to reassess outdated colonial laws or establish a systematic management of environmental protection. Hence, based on the scope of environmental protection in the Malaysia's Plans as discussed above, it can be safely argued that it reflects the current scenario, demands and policy of the country.

Apart from the Malaysia Plans, it should also be noted that Malaysia's long term policy objective i.e. Vision 2020 drafted in 1991, stresses environmental importance in ensuring the existence of valuable natural resources so that land remains productive and fertile, the atmosphere clear and clean, the water unpolluted and the forest resources capable of regeneration and yield the needs of national development. In addition, the National Policy on Environment (2002) is also another important policy that should be given due recognition for promoting sustainable development as it integrates the three elements of sustainable development i.e., economy, social and environment, and focuses on continuous improvement in quality of the environment and sustainable use of natural resources including forests.

5.4 FOREST AND TIMBER ACTS / LEGISLATIONS / POLICIES

Specifically on the forest and timber legislation as well as policies, as mentioned previously, its formation evolution in the states in Malaysia differs due to the influence of the British colonial masters in each state, the historical formation of Malaysia in 1963 (Peninsular Malaysia, Sabah and Sarawak) and the power provided by Article 74 of the Federal Constitution. It was also mentioned that taking into account such differences, the NFC, now the NLC facilitated the adoption of a coordinated and common approach to forestry matters between Federal and the State Governments.

In 1978, a NFP (amended in 1992) was formulated and approved by the NFC. It was adopted and implemented by all the states in Peninsular Malaysia whereas only the Policy Objectives were implemented in Sabah. Meanwhile, in Sarawak, although the Policy was not adopted, its own Forest Policy 1954 has similar provisions to the NFP, which remains the basis for forestry practices. In this regard, the NFP requires the establishment of PRF to be categorized as Protection Forest, Production Forest, Amenity Forest and Research and Education Forest. The other principle includes SFM i.e. forest harvesting, regeneration and rehabilitation and the establishment of downstream processing industries based on the availability of raw material from PRF (Wells, 2008). The Policy was later revised in 1992 to reflect the Earth Summit's concerns on the importance of biological diversity conservation and sustainable utilisation of genetic resources and also the ITTO agreement where Malaysia is one of the founding members (Woon & Haron, 2002).

Also, the then NFC, in line with the NFP, worked towards uniformity of laws within the states for the administration, management and conservation of forests. As such, the NFA was passed in 1984 taking into account previous related enactments and ordinances. However, the NFA was only adopted by the states in Peninsular Malaysia, as Sabah and Sarawak continued with their own enactments and ordinances as agreed during their accession into Malaysia. As a result, different legislations apply in these three regions i.e. Peninsular Malaysia, the National Forestry Act 1984 (amended in 1993); Sabah, the Sabah Forest Enactment 1968 (amended 1992) and Forest Rules 1969 and Sarawak, the Sarawak Forest Ordinance 1954 (amended 1999). According to Wells (2008), the differences between these three regions are seen in the organizational structure of the forestry agencies and its empowerment level, duration of concession licenses, role of State Forestry Departments (SFD) in forest management and control, aboriginal and native rights, regulations, timber administration and production chain traceability. To further understand the laws, regulations and policies between the three regions, they will be reflected separately, as below.

5.4.1 *Peninsular Malaysia*

Recognition of the forest and its related issues began as early as the 1900s where there was a greater awareness of the increased pressure on forest resources due to the expansion of rubber plantations and tin mining. In 1901, a Forest Department was established to combine the forest service of the then Strait Settlements and Federated Malay States under one management. The first Chief Forester Officer, A. M Burn Murdoch was appointed to oversee the overall management of the forest in all states. Since then, the forest policies began to evolve and according to Hammond (1997) the first official statement of forest policy in 1922 declared that the properly managed forests are an asset of increasing value and the government attaches the greatest importance to their maintenance, not only for revenue, but also for other benefits accruing from its possession.

In the 1930s, Forest Enactment and Rules were enacted for managing and harmonizing scientific terms as well as to control forest productivity and protective functions. However, it was not acceptable and criticised as the Rules followed mainly the forest situation in India. As such, in 1952, the Interim Forest Policy for the Federation of Malaya was developed where it laid the basis for Protective Reserves, with an even distribution in local self-reliance. Also, a proportion of revenue from Productive Reserves was to be reinvested in the form of silvicultural operations for cultivating fresh timber (Hammond, 1997). In this regard, it is important to understand that forest revenue collected by the various State Governments in Peninsular Malaysia are in the forms of royalties, premium, cess for forest development, fines, compensations and charges/fees. Meanwhile in 1978, the Interim Forestry Policy was officially adopted as the NFP, which as mentioned earlier was revised in 1992, taking into account international concerns and obligations.

Apart from that, the Forest Enactment and Rules of the 1930s were also replaced by the NFA 1984 and the Wood-Based Industries Act 1984, which is

applicable to all States in Peninsular Malaysia. This NFA was also amended in 1993 to enable effective dealings with forest encroachment and illegal logging. For example, the forest offence penalty has been increased to RM 500,000 and imprisonment up to 20 years and mandatory one year imprisonment instead of RM 10,000 and imprisonment of three years. The other related laws applicable include the Land Conservation Act 1960, Environmental Quality Act 1974, National Parks Act 1980, Protection of Wildlife Act 1972, National Land Code 1965, Aboriginal Peoples Act 1954, Occupational Safety and Health Act 1994 and Forest Rules 1985.

In terms of concession licences, the NFA provides the use of forests through issuance of licences and permits as practised by the states. Only those with permission and/or a licence are allowed to enter and extract forest produce and these licences may be revoked if a licensee acts in contravention of the NFA or conditions set in the licence. In this regard, according to Woon & Haron (2002), in Peninsular Malaysia, concessions are categorized by size, each with its own length of tenure. As such, concessions between 0-1000 hectares are allocated for one to two years, 1001-2000 hectares for one to five years, 2001-20,000 hectares for ten to thirty years and exceeding 20,001 hectares for twenty to thirty years. Meanwhile, the government is of the view that the longer the concessions are granted, the more responsible the concessioners are towards SFM. Thus, Forest Management Plans are prepared for each FMU covering a ten year period to be reviewed in the fifth year. Also, to ensure effective enforcement, legal officers have been appointed to provide advice to SFDs and to investigate any forest offences as well as to conduct prosecution in accordance with the Malaysian Criminal Procedure Code. This is with the aim of protecting public and national interest to ensure that criminals are punished according to the law.

5.4.2 Sarawak

Forest appreciation began in the era of Brooke, where according to Kaur (2005), right of sovereignty was focused on demonstrating the power to regulate land use and in classifying forests as ecological reserves, productive forest, waste lands available for allocation to foreign capitalists for mining, commercial agriculture, and commercial timber exploitation. The Land Code of 1842 also automatically allowed for government control over all unoccupied and waste lands, which includes restrictions on clearing forests for agricultural expansion without prior permission from authorities. It is interesting to note that during this era, monopoly for logging concession was awarded to western companies and the British Borneo Company in 1886 was given monopoly for timber extraction and logging. The Sarawak Oilfields was also permitted to log timber in its concession, principally for its own use in the second half of the twentieth century. However, with the demand of land for agriculture, rights of natives over land and migrants need for land, things began to change whereby the British during the third Brooke⁸⁰ administration decided there was a need of regulated forest and land administration (Kaur, 2005).

Thus, the first Forest Department was established in 1919 with Mr. J.P. Mead as the first Conservator of Forests in Sarawak. The role of the department was to manage and protect the forest, utilize forest resources efficiently and effectively as well as to preserve and conserve the flora and fauna in the state. As such, in order to do so, the Forest Rules 1920 was gazetted while licensing and collection of royalties were introduced for extraction of timber, firewood, charcoal and other forest products. Apart from that, the rules of demarcation, felling, tapping and revenue collections were established. Moreover, the Forest Reservation Order 1920 was introduced immediately hence providing the process for the constitution and maintenance of reserve forests. Later in 1934, it was replaced by the Forest Order 1934 where the concept of Permanent Forest or Protected Forest was introduced. The Order

⁸⁰ Sarawak was under the administration of three Brooke or better known as the three Rajah's from 1841-1946. The third Brooke, Charles Vyner Brooke ruled Sarawak from 1917-1946

was later amended a few times, in 1935, 1936 and 1940. However, the amendment in 1940 was said to be notable as it included the introduction of Communal Forests where native rights to collect forest products and timber for their own use was then recognised. Later, the Forests Ordinance and Forest Rules 1954 was introduced (Smythies, 1962), with four important criteria including: (1) reservation of permanent forest land for ecological reasons, (2) management of forests to obtain highest revenue compatible with sustained yield, (3) promotion of detailed and economical utilization of forest products for land that are not Permanent Forest Estate (PFE) and (4) promotion of a profitable trade in forest products. Thus, there now exists two major categories of forests in Sarawak i.e. PFE (Forest Reserves, Protected Forest and Communal Forest) and State Land Forest. Accordingly, the Land Code 1958 was enacted to take into account native tenure and land rights and to supplement the Ordinance which was later amended in 1979, 1987 and 2001, which is in line with the current local and global needs (Kaur, 2005).

It is also important to understand that the forest in Sarawak after independence was also mainly cleared for the expansion of agriculture activities or settlements. Consequently, with the increase in global demand for forest products, it became an important source of profitable revenue and investment where development projects specializing in wood-processing and trade in pulp were established and more local entrepreneurs became occupied in profit-seeking ventures. However, to ensure sustainable management of the forest was implemented, a number of ordinances and rules have been enacted or amended over the years such as the National Parks and Nature Reserves Ordinance (1998), Wild Life Protection Ordinance (1998), Wild Life Protection Rules (1998), Wild Life (Edible Bird's Nests) Rules (1998), Sarawak Biodiversity Centre Ordinance (1997), Natural Resource and Environment Act (1994) and the Forests (Planted Forests) Rules (1997). These ordinances and rules provide the legal basis for effective implementation of the state's forestry policy, conservation and forest management plans. Meanwhile, in terms of forest concessions, it is important

to note that Sarawak grants a concession for 25 years and each concession has its own forest management plan—a legal document and an integral part of the forest timber license. Its management plan provides for harvesting methods i.e. species to be removed, minimum diameter cutting limit, annual harvest areas, volume of timber to be extracted from concession area and penalties for damage on residual trees.

5.4.3 Sabah

Sabah's Forest Department was formed in 1914 under the British North Borneo (Chartered) Company, taking into account conservation of forests and its timber industry. Even prior to its formation, the timber industry in Sabah (then the British North Borneo) had begun operations internationally in the 1880s where the first shipment of felled timber was headed for Australia in 1885. Meanwhile by the 1930s, Sandakan, a State in Sabah was reported to be one of the major timber ports of the world. As such, by 1941, Sabah became the third-largest timber exporter in the British Empire with markets in Hong Kong, Japan, Britain and Australia (Yong, 2006). With regard to regulation, after the establishment of a forest department, Sabah introduced Ordinance No. 11, 'Timber and Jungle Produce' where the concept of 'forest reserve' was defined. This led to the establishment of the first forest reserve in Sabah in 1920 known as Tuaran Timber Reserve. By 1930, there were about 30,066.8 ha of forest reserves, which amount to 0.37% of the total area of Sabah. In 1935, forest reserves were classified by the Sabah Forest Department into four categories of forests i.e. Protection, Production, Domestic and Amenity. This was mainly done to protect timber from forest exploitation, for purposes of preservation of natural forest types and for protection against soil erosion and water catchments.

Meanwhile in 1948, Sabah adopted the 'sustained yield' forest to constitute at least 10% of the total land area of Sabah under forest reserves (Sabah Annual Report 2007). Today, the principle legislation applicable for Sabah on

forest matters is the Forest Enactment 1968 and its subsidiary legislation of Forest Rules 1969 (revised in 1984 and 1992), which provides for the gazetting of forest reserves, its use and management as well as control and cutting of forest produce from state land. Accordingly, forest reserves may be declared on any state land that is not already reserved under law into the categories of Protection, Domestic, Commercial, Amenity, Mangrove Forest or Virgin Jungle Reserve. However as of 1984, the legislation was revised to include Wildlife Reserve category where 132,653 hectares of land was designated under this category and to provide principles of forest management in the form of prohibitions against conducting most activities in forest reserves without authorization⁸¹. Further in 1992, the enactment was again amended to incorporate provisions for SFM and development, including requirements for preparation of forest management and harvesting plans and establishment of a rehabilitation fund and program.

Thus in 1997, Sabah introduced the Sustainable Forest Management License Agreement (SFMLA), which provides the right to *'plant, rehabilitate and harvest forest under principles of SFM for a time period of 100 years in a certain Forest Reserve'* of approximately 100,000 hectares (Woon & Haron, 2002). As such, through the SFMLA, forest management is aimed at encouraging sustainability of resource base. Under this concept, the SFMLA holders need to manage the forest areas sustainably, prepare long-term forest management plans, employ eco-friendly harvesting plans and undertake enrichment planting, forest rehabilitation and silviculture. The SFMLA was introduced based on the success of the SFM implementation at the Deramakot Forest Reserve. This forest reserve in Sabah is the sole forest reserve area in Malaysia that has been certified under both the Forest Stewardship Council (FSC)⁸² and the Malaysian Criteria and Indicators Standard in Sabah. It is also important to note that Sabah's Forest Policy, adopted in 2005, ensures SFM of its forest resources and also incorporates

⁸¹ Information obtained from Sabah Forestry Department website: www.forest.sabah.gov.my

⁸² FSC is an internationally recognized certification developed by the NGOs. Its details are in Chapter Six.

the objectives adopted from the National Forest Policy 1978, which is currently applicable only to the states in Peninsular Malaysia. Apart from the above, other legislations relevant for protection and management of forests include the Parks Enactment (1984), Wild Life Conservation Enactment (1997), Conservation of Environment Enactment (1998), Water Resource Enactment (1998), Cultural Heritage (Conservation) Enactment (1997) and State Biodiversity Enactment (2000).

5.5 MALAYSIA'S INTERNATIONAL COMMITMENT – A SUSTAINABLE AND/OR LEGAL TIMBER

Various laws, policies and practices have evolved over the years based on history and practices in the three regions of Malaysia. As explained previously, under the Federal Constitution, negotiations and implementation of international treaties or convention is under the purview of the Federal Government while land and natural resource management, local government and local or state development planning is under the purview of respective states in Malaysia. Therefore, any treaties or conventions related to trade, commerce, industry or environment (i.e. environment protection, pollution prevention and abatement) is the responsibility of the Federal Government. Nevertheless, the Federal Government still needs to get the agreement of State Governments when it comes to issues related to management or trade of timber and timber products. As explained earlier, timber harvesting activities contribute revenue to the states for development; stringent requirements imposed under the quest for sustainable and/or legal timber may not be readily acceptable by State Governments if it is considered as an infringement of their rights.

Thus, the key challenge for Malaysia in addressing environmental issues such as land degradation, SFM, sustainability or legality of timber trade is the Federal-State system. Such complexity is made worse for a developing country like Malaysia with the constant international notion of tropical timber

as being exploited and deforested in an unsustainable manner. This is especially so with the strong drive for environmentalism by constituencies like the EU which demands sustainable and/or legal timber. As such, it is important to examine the effect of trade related environmental measures with specific reference to the FLEGT VPA negotiations and the binding acts and/or regulations on the forest sector and timber trade, especially by taking into account the dilemma faced by the Federal Government with regard to land and forest matters.

In this regard, Putnam's two-level game theory sheds light on the Malaysian situation where there is a strong need for the Federal Government to take into account, on one hand domestic stakeholders' needs for development while on the other, international demands with regard to timber and timber products. However, it is important to note again that the argument as mentioned in the previous chapters will focus only on the effect of trade related environmental measures on Peninsular Malaysia's forest sector and timber trade with special attention given to the states of Selangor, Pahang, Perak and Johor. As such, in this case, the State Governments would prefer fewer requirements to be imposed on the states' forest and timber activities as the revenue collected from these activities is an important source of income for the state's development. For the year 2013, the overall forest revenue (premium, royalty, cess and other charges) collected for the states in Peninsular Malaysia amounted to RM 333.66 million with Selangor amounting to RM 32.23 million; Pahang, RM 81.43 million; Perak, RM 57.04 million and Johor, RM 17.96 million. In the same year, the overall operating (emolument, services and supplies assets, etc.) and development expenditures for the states in Peninsular Malaysia amounts to RM 261.93 million. Specifically, the overall expenditure for the state of Selangor amounts to RM 21.39 million; Pahang, RM 43.22 million; Perak, RM 46.36 million and Johor, 18.31 million. As such, it can be safely assumed that the overall forest revenue collected, specifically by the four mentioned states, can easily cover

the overall expenditure of the respective states. Thus, this indicates the importance of the revenue collected from the forest for the states.⁸³

Meanwhile, the Federal Government as well as some stakeholders who support 'green' initiatives would be inclined towards international demands; noting the importance of such demands for SFM, the country's reputation as well as the future of markets for timber and timber products (Chapter Six will further explain in detail the importance of the markets that have imposed binding measures to Malaysia's timber industry). Therefore, the Federal Government needs to strike a balance between a state's needs for development and adherence to international demands as required by 'green' markets for the import of these products.

Nonetheless, it is important to note that even before binding measures were imposed by developed countries through acts and/or regulations, it can be argued that the Federal Government had managed to strike a balance between domestic needs and international initiatives by taking into account environmental concerns and demands by embarking on various voluntary initiatives such as certification and actively participating in the world's SFM initiatives. Therefore, it is important to note that such initiatives—though voluntary on the part of the Government of Malaysia—will not be possible if there is no political will on the part of the Federal Government, the State Governments as well as some stakeholders like the timber industry to ensure that the timber and timber products exported are either from a sustainable and/or legal source. On the other hand, such initiatives cannot be summarily dismissed in the face of international demands and pressure for sustainable and/or legal timber.

⁸³ Information obtained from the Annual Report 2013 of the Forestry Department Peninsular Malaysia

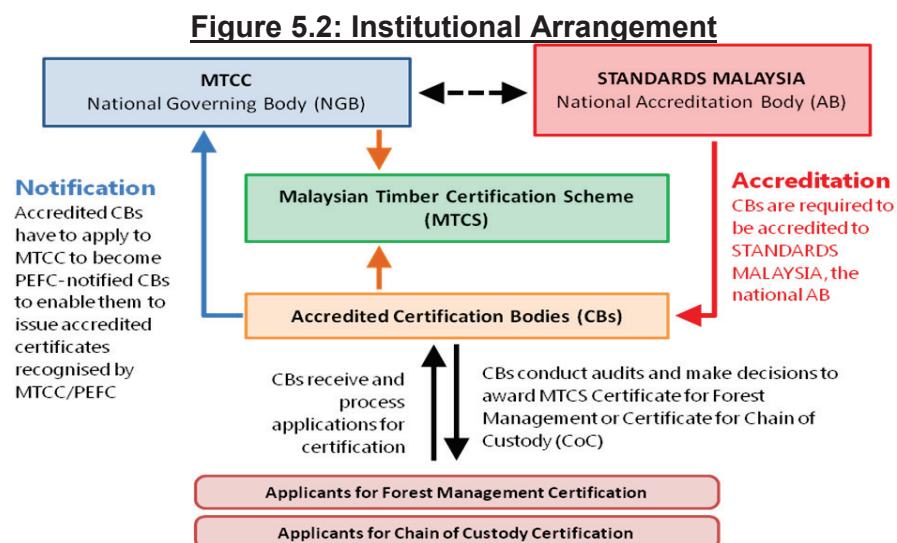
5.5.1 Certification Initiatives

Recognizing the importance and need to implement timber certification in order to encourage SFM, as mentioned in the previous chapters, the MTCC, initiated by the Malaysian government was formed in 1998 as an independent organization with the objective of establishing and operating an independent voluntary national timber certification scheme known as the MTCS. It is governed by a board of trustees, which consists of representatives from the timber industry, academic and research institutions, NGOs and government agencies; it is financed by an endowment fund. MTCC is basically an independent body but rather unique such that upon looking at Table 5.1 (Forestry and Timber Agencies in Malaysia) above, it falls under the purview of MPIC on the organizational chart. As such, its extent as an independent voluntary body from any form of government intervention is questionable. In this regard, Wells et al. (2008) stated that MTCC, although an independent organization under the Companies Act 1965, remains under the authority of MPIC. This is because it receives funding to cover its initial cost of operations from the ministry upon its establishment. He further stipulated that it now operates on the interest generated by the endowment provided by the ministry from the collection of export levies on timber and timber products.

MTCC started operating its MTCS in October 2001 using a phased approach to cope with the then new challenges and difficulties faced in managing tropical forests. At that time, the standard used for forest management certification was the '*Malaysian Criteria, Indicators, Activities and Standards of Performance for Forest Management Certification* [MC&I (2001)]', which was based on ITTO's '*Criteria and Indicators for Sustainable Management of Natural Tropical Forest*'. Consequently, for the next phase of MTCS that started in December 2005, MTCC used the MC&I (2002) that was developed through multi-stakeholder consultations, based on the principles and criteria of the FSC as its template. For chain-of-custody certification, MTCC used a document entitled '*Requirements for Chain-of-Custody Certification-RCOC*' where compliance with the RCOC will qualify timber product manufacturers

or exporters for the *Certificate for Chain-of-Custody-CoC*. Later in July 2012, the MC&I (2002) was reviewed and the '*Malaysian Criteria and Indicators for Forest Management Certification (Natural Forest) [MC&I(Natural Forest)]*' was adopted.

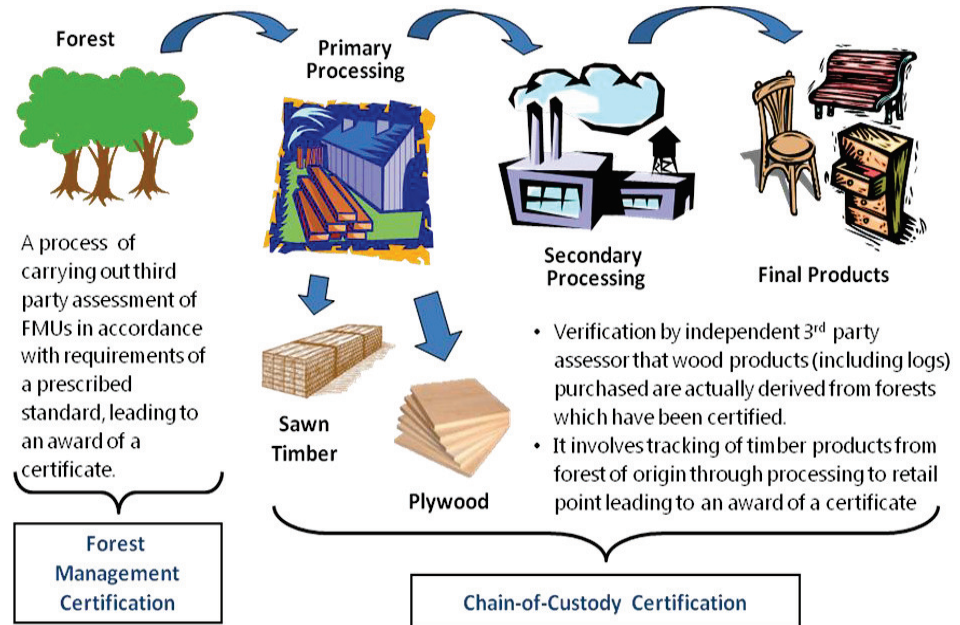
Nonetheless, it should be noted that in July 2008, MTCC implemented a new institutional arrangement for MTCS in which MTCC will continue to be the National Governing Body (NGB) but the roles of receiving applications, conducting assessments and issuing the certificates have been taken over by Certification Bodies (CBs) accredited to the Department of Standards Malaysia, the National Accreditation Body. The implementation of the new arrangement was done to further strengthen the MTCS and its acceptance in the international market. As such, under this scheme, two types of certificates are issued i.e. the Certificate for Forest Management and Certificate for CoC. Figure 5.2 reflects the Institutional Arrangements for certification under MTCS. In this regard, Thang (2002) stated that the Certificate for Forest Management is issued to confirm whether the PRFs in FMUs comply with forest management standard requirements and the Certificate for CoC is issued when manufacturers or exporters comply with the CoC standard used in the MTCS.



Source: MTCC

The MTCS is the first tropical timber certification scheme in the Asia Pacific region and according to Thang (2002), it was established to demonstrate Malaysia's commitments to UNCED Forest Principles and ITTO Objectives 2000; this signifies an important and historic milestone for the success of SFM practices in Malaysia. The statement above once again demonstrates the relevance of Putnam's theory such that international pressure is a necessary condition for policy shifts where Malaysia has aligned itself to international changes and requirements of SFM under UNCED and later the ITTO. As it shall be seen in Chapters Six and Seven, the international pressure coincides with pressure from domestic NGOs in Malaysia thus putting pressure on the Federal Government to make environmental changes but there is still the issue of the position of states in Peninsular Malaysia and the timber industry that also needs to be addressed. Figure 5.3 below reflects the operation of MTCS in detail.

Figure 5.3: Operation of MTCS

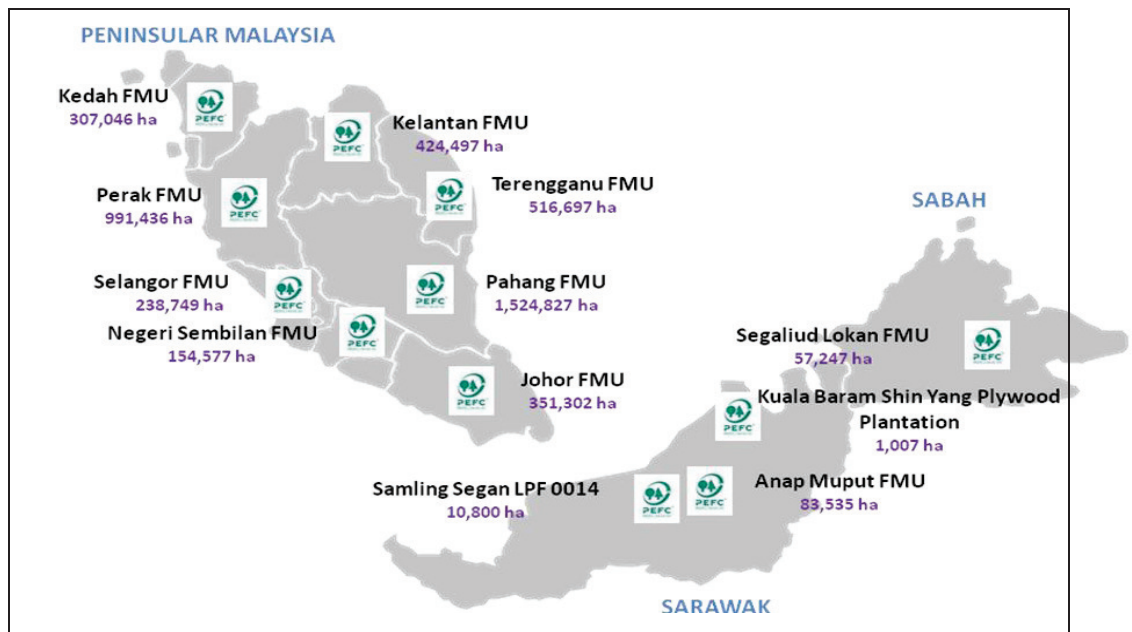


Source: MTCC

It is also important to note that there are two international forestry schemes that are recognised and accepted worldwide. First the FSC, established in 1993 largely by environmental NGOs in which principles and criteria of the MC&I (2002) as mentioned above is based upon. Second is the PEFC Scheme that was established in 1999 with the support of international forest industry and trade organizations and associations consisting mainly of Europe woodland owners. Although both the certification schemes have adopted different approaches mainly due to their origin of establishment, their objective is the same i.e. certification of forests to credible, independently verified standards of forest management (The details of the FSC and PEFC Schemes will be explained in Chapter Six). Therefore, to make sure that MTCS is acceptable worldwide without going through evaluation per consignment basis into the importing countries, MTCC managed to get the scheme endorsed by PEFC.

As such, MTCC became a member of PEFC's International Scheme since November 2002, and effective 1st May 2009, MTCS was endorsed by PEFC for a period of five years, representing more than 200 million ha of certified forests worldwide. In July 2014, MTCS received its second endorsement again for another period of five years. It is also worth noting that MTCS is the second in the world, after the Gabonese Forest Certification Scheme, to be endorsed by the PEFC. Therefore, PEFC endorsement enables MTCS to be recognized internationally and eventually allows mutual recognition with 35 other PEFC endorsed schemes around the world. As a result, MTCS-certified products are now allowed to use the PEFC logo. As of 11th August 2014, there are twelve FMUs holding a valid PEFC Certificate for Forest Management, covering 4.66 million ha under MTCS (ten FMUs and two Forest Plantation Management Units). Figure 5.4 provides the details on the PEFC certified FMUs. Later, as of November 2014, a total of 304 timber companies have been issued with PEFC CoC Certificates.

Figure 5.4: PEFC Certified FMUs



Source: MTCC

However, in September 2014, Malaysia's total certified timber products exported under MTCS amounted to 11,702.09 m³, consisting mainly of sawn timber (8,545.97m³), plywood (2,851.73 m³) and mouldings (304.38 m³). The major destinations are Netherlands (2,643.45 m³), UK (2,489.15 m³) and China (1,127.38 m³). Since July 2002, Malaysia has a cumulative total of 947,431.57 m³ of certified timber products mainly sawn timber, plywood and moulding under MTCS that were exported to 38 countries. These certifications serve as a tool to confirm that the timber products purchased by importing countries are produced from raw materials obtained from sustainable or legal sources. As such, Malaysia continues to work towards the betterment of the certification scheme by taking into account—whenever possible—the comments of its stakeholders that are in line with ongoing international demands. Thus, this is a good example to once again show the relevance of Putnam's theory where the Federal Government's understanding of the needs of its domestic stakeholders i.e. the timber industry, provides assistance through the MTIB Levy Fund for them to comply with international sustainable and legal initiatives. This is done upon realising the importance of constantly meeting the international requirements

for change to ensure continued market access for Malaysia's timber and timber products.

As a PEFC endorsed scheme, it is important to note that MTCS has been given recognition by a number of countries such as Denmark, UK, Germany, Finland, Belgium, Switzerland, France and New Zealand under their national timber procurement policies. In addition, a number of authorities and organizations in Malaysia's key markets, especially for timber products have also accepted MTCS where: (1) Japan has listed MTCS as one of the certification schemes in its Guideline for Verification on Legality & Sustainability of Wood & Wood Products by its Forestry Agency, Ministry of Agriculture, Forestry & Fisheries, Japan., (2) Danish Ministry of Environment has included MTCS as one of the accepted certification schemes in its document entitled Purchasing Tropical Timber-Environmental Guidelines that describes MTCC certificates as providing a good guarantee for legal forest management and on its way towards becoming sustainable, (3) The Central Point of Expertise on Timber, an expert group appointed by the Department for Environment Food & Rural Affairs, UK had concluded that MTCS provides assurance of legally harvested timber, (4) The Royal Horticultural Society of UK has also listed MTCS as one of the seven recognised certification schemes in its Conservation and Environment Guidelines, (5) Ministry of Agriculture and Forestry, New Zealand has listed MTCS as one of the seven certification schemes in its Timber and Timber Products Procurement Policy Guidelines and (6) The French Ministry of Environment and Sustainable Development and the Ministry of Agriculture, Food and Rural Affairs have listed MTCS as one of the acceptable certification schemes in the French Policy on Public Procurement of Timber and Wood Products entitled the French National Timber Procurement Policy.

In Germany, the City of Hamburg had already recognised MTCS for a two-year period beginning June 2006 under the MTCC-Hamburg joint project and following the conclusion of the project, has decided to fully continue

accepting MTCS-certified products under its procurement guideline for public construction projects. Also as a PEFC endorsed scheme, MTCS is now also recognized under several green building schemes such as in Australia, Italy, Netherlands, UK, Canada, Japan, Abu Dhabi and United Arab Emirates. In addition, the MTCS is recognized by the Green Building Index in Malaysia under its Sustainable Timber criteria.

5.5.2 *Legality Verification*

Currently, there are already efforts undertaken to prove legality of timber products through the process of Verification of Legal Origin (VLO) or Verification of Legal Compliance (VLC) and the CoC. However, these initiatives, just like other certification efforts are voluntary in nature and are also part of the effort undertaken through MTCS/PEFC and FSC certification processes. As such, recognising the fact that sustainability is a long term goal and not all companies in Malaysia are able to comply with such high standards and demands of developed markets on certification requirement, the Malaysian government for the overall benefit of its industry, agreed to embark on a government to government level of negotiation with the EU on a FLEGT VPA. The VPA includes an agreement for Malaysia to develop a Timber Legality Assurance System (TLAS) to curb exportation of illegal timber into the EU by the issuance of a FLEGT licence and having an independent monitoring over the system to ensure its credibility. The TLAS will be developed based on existing laws and regulations and there is no requirement for amendments of any existing or new laws that need to be enacted.

To this end, through the VPA negotiation process, Malaysia has developed its TLAS on a regional basis to reflect the differences in each region's existing laws, procedures and current licensing system for log harvesting, timber processing and import/export. Furthermore, the scope of forests where timber is harvested is much wider than the voluntary certification

process where it not only covers timber harvested from PRF but also SL and AL. Furthermore, there are capacity building and technical assistance provided by the EU to help the industry and the forest sector—where necessary—in the implementation of TLAS. Therefore, it is expected that a FLEGT- licensed timber are able to enter the EU market through a “green lane” under the EUTR.

However to date, the negotiations have yet to be concluded mainly because of the complexity of the Federal rights to negotiate and a state’s constitutional powers over forest and land matters which poses a big challenge for such negotiations (the details of the Malaysia-EU FLEGT VPA negotiations, the TLAS developed and the requirements of the EUTR will be elaborated in Chapter Six). Thus as a step forward, pending conclusion from consultations with State Governments and negotiations with the EU and in support of the EUTR, Malaysia launched its own Malaysian Timber Legality Assurance System (MYTLAS) on 1st February 2013 as a system that will prove the legality of timber exports through the due diligence process. The MYTLAS, even though developed together with the EU, was launched as a purely Malaysian initiative. It covers timber and timber products derived from logs harvested from natural forests and plantation forests that are either from PRF, SLF or ALF. It also includes rubberwood from replanting operations and imported timber that complies with Malaysia’s import regulations.

For the purpose of MYTLAS, legal timber has been defined as being in compliance with all relevant laws and procedures in Malaysia governing the entire supply chain from the forest, the processing mills and finally to the export points. In this regard, the laws are clustered under six principles (i.e. Right to Harvest, Forest Operations, Statutory Charges, Other Users’ Rights, Mill Operations, and Trade and Customs) and 24 criteria. The system will be subjected to annual third party compliance auditing, internal control mechanisms by the implementing agencies and supported by an effective governance structure. In developing the TLAS/MYTLAS, the Malaysian

government had consulted stakeholders comprising of environmental and social groups, the industry, workers unions, academicians and research organisations among others, from which the inputs were received and incorporated wherever possible.

In this regard, implementation of MYTLAS will involve close coordination between the Licensing Authority and Implementing Agencies such as Forest Departments, Customs Department and MTIB. Noting the difficulties that may be faced by the implementation of MYTLAS, an Implementing Agency Coordination Committee (IACC) has been established comprising all the relevant implementing agencies to facilitate coordination, information flow and enforcement activities of the Implementing Agencies to the Licensing Authority. This committee will meet regularly to coordinate, monitor and consider reports on the enforcement activities of the Implementing Agencies while recommending remedial actions and other necessary measures to effectively implement MYTLAS. Also, a TLAS Advisory Group (TAG) had been established to meet regularly for the purposes of transparency and good governance. This group, which comprises of members from the civil society, industry, technical experts and representatives from key implementing agencies will meet to discuss reports submitted by the IACC on the overall implementation of MYTLAS including non-compliances, remedial actions taken, concerns and feedback from stakeholders, annual reports by third party auditors and also reports on the enforcement activities of the Implementing Agencies.

Since MYTLAS is still in the early stages of implementation, its level of acceptance in the international market especially the EU is yet to be clearly determined. Furthermore, it is important to note that MYTLAS is not an EU endorsed system as negotiations are still ongoing hence currently, only implemented by Peninsular Malaysia. It is expected that upon conclusion of the FLEGT VPA, MYTLAS will be converted to become FLEGT licensed TLAS. According to MTIB, since the issuance of MYTLAS in February 2013,

a total of 10,075 MYTLAS licenses had been issued in the year 2013. Meanwhile a total of 12,061 MYTLAS licenses had been issued from January 2014 to November 2014. Of the total licenses issued thus far for 2014, the highest number recorded is for sawn timber (5,961) followed by moulding (2,678), furniture (1,762), BJC (1,036), plywood (577), fibreboard/chipboard (38), wooden frame (10) and veneer (5).

5.5.3 *International Involvements*

Apart from certification and legality initiatives, it is also important to note that Malaysia is active in multilateral and regional timber trade related initiatives and dialogues, not only because the demand for sustainable and/or legal timber or to ensure continued market access for its timber and timber products, but according to **A2(a)**⁸⁴, because it is a country that is concerned about the environment and the future of its forests for the benefit of its future generation. As such, it is not surprising that Malaysia is a party to various international environmental related multilateral agreements that are directly or indirectly related to forestry issues such as the CITES, CBD, Convention on Combat Desertification (CCD), United Nations Framework Convention on Climate Change (UNFCCC), Convention on Wetland of International Importance especially Waterfowl Habitat (Ramsar), ITTA and the UNFF.

In relation to its active participation in various forums, Malaysia can be said to be playing an active role in ITTO, whereby as mentioned earlier, Malaysia is a founding member of ITTO and complies with ITTO Objectives 2000. Malaysia is also an active participant of the Pan ASEAN Timber Certification Initiatives on the development of the ASEAN Criteria and Indicators for Legality of Timber, ASEAN Guideline on Phased Approach to Forest Certification and Chain of Custody Guidelines for Legal Timber and Sustainable Timber. Apart from that, Malaysia is also involved in the EU FLEGT Timber Trade Action Plan, a private sector initiative for sourcing of

⁸⁴ A(2a) is an expert from MTCC.

legal timber, which was undertaken on a voluntary business to business basis. Apart from that, Malaysia is also active in other forums such as the Asia Pacific Forestry Conference (APFC), Asia Partnership Forest (APF) & the Committee on Forest and the East Asian FLEG Process. Malaysia is also active in forestry related meetings like the ASEAN Ministers Agriculture and Forestry Meeting (AMAF), ASEAN Senior Officials on Forestry (ASOF), ASEAN Senior Officials on Environment (ASOEN) and Forest Law and Enforcement and Governance.

5.6 SUMMARY

As such, Malaysia's initiatives, involvement and participation on SFM and trade in sustainable and/or legal timber is currently towards ensuring that international demands are met and the market access into the developed countries are not affected. This is due to the strong demands by constituencies like the EU for sustainable and/or legal timber. Putnam's two-level game theory can be invoked here where at the national level, the Federal Government needs to ensure that favourable policies are adopted for the domestic interest while also satisfying international pressure for SFM, certification and/or legality. Thus, the Federal Government cannot ignore the two games to ensure that a balance exists for the benefit of the nation as a whole. Apart from that, Malaysia has an image of a forefront tropical country that is active and concerned for the forest and the impact of illegal logging and deforestation on the environment, climate and loss of biodiversity. Nonetheless, despite such efforts and action taken by Malaysia, tropical timber as a whole has been linked to various environmental issues resulting in imposition of binding trade related environmental measures by developed countries. This is mainly due to the demands or pressure for change by stakeholders in developed countries on green issues; meanwhile developing countries are put in a position of inability to resist change. According to an expert from **ITTO**, tropical timber trade has constantly been in the limelight as being unsustainable or not legal because: (1) SFM have really only begun to develop in the tropics over the past 30 years or so and there have been many obvious examples of poor management and illegal practices in many

countries in the past although these have been decreasing steadily, (2) many NGOs have had extremely effective fund-raising campaigns that focus on tropical forests and the evils of deforestation (often linked, rightly or wrongly, with timber production and trade) and (3) the forest sector in some developed countries have lobbied their governments successfully to focus on this issue to reduce competitive pressures from tropical forest products.

Meanwhile, **A(2a)** is of the opinion that the focus was because of the history of logging in tropical forests where previously, there was not much control by government authorities, as such there was excessive logging and also damages to the forest eco-system. Therefore, the focus on tropical forest was because: (1) it is rich in biodiversity, which has emerged as a very important asset of the wealth of the world that needs to be protected whereby Malaysia is one of the twelve mega biodiversity countries in the world, (2) not all the trees in tropical forests are of commercial importance, as such there is a need to do selective logging thus resulting in a tendency for depletion of certain species or group of species, (3) the tropical forest trees are very big hence there is a need to use big and powerful machines to drag out all these big logs—a procedure that can cause damage to the soil, leading to erosion as well as damage young trees and arrest regeneration and (4) local communities i.e. people who live in and around the forest and in many developing tropical countries; these communities depend a lot on the forest i.e. to collect food, medicine, fish from the rivers and also as a source of water. All these things would be damaged unless logging is controlled and done in a sustainable manner.

In addition, also according to **A2(a)**, there is a new dimension of climate change where deforestation and degradation causes emissions that increase greenhouse gasses. Further, NGOs are imparting a great deal of awareness and concern about tropical forests and their activities. Thus, it is important to study the effects of the EU FLEGT VPA negotiations and the binding measures in the form of the US's Lacey Act, the EUTR and the Australian

ILPA/ILPAR as such measures may have an immediate effect on the management of the forest sector and survivability of timber trade (Chapter Six). It is also equally important to understand whether such measures have an influence on the policies and practices of Peninsular Malaysia's forestry sector and timber trade while taking into account the unique Federal-State system.

CHAPTER 6

TRADE RELATED ENVIRONMENTAL MEASURES AND THEIR EFFECT ON PENINSULAR MALAYSIA'S FOREST SECTOR AND TIMBER TRADE

6.1 INTRODUCTION

This chapter discusses in detail the market requirements for certified sustainable and/or legal timber that are currently voluntary private sector measures adopted by producer or exporter countries. It is important to recognise the growing market sentiments and demands for sustainably and/or legally produced timber and timber products. This is because retailers, investors, communities, governments, concerned consumers and other interested parties especially in developed countries today require some form of credible assurance that they are buying and consuming timber products that are not produced in a socially and environmentally detrimental manner. There will be discussions, generally on international co-operation on binding and non-binding related agreements that have effects on the timber trade and then the pressure and demand for credible and transparent standards to ensure sustainable and/or legal timber trade. In this regard, there will also be discussions on the types of certification⁸⁵ recognised in international markets, its acceptance worldwide and the demands and challenges faced.

Nevertheless, as argued in Chapters Two and Five, SFM and certification are long term goals which require lots of commitment and resources on the part of producer or exporter countries to implement; as such, legality is recognised and accepted as a strategic milestone towards achieving SFM in

⁸⁵ According to Baharuddin & Simula (1994), timber certification is a process that results in a written statement (a certificate) attesting to the origin of raw wood material and its status and/or qualifications, often following validation by an independent third party. As such, participants through the certification can measure their forest management practices against agreed standards and to show compliance of such standards. He further stated that this certification can be used for the purpose of validation of any type of environmental claim made by a producer or to provide information on the timber products and their forest of origin, which are often confidential and not disclosed by the producer or manufacturer.

the long term. Therefore, demands for legal timber are seen as a short term measure to curb illegal logging and its illegal trade. Thus, developed consumer or importer countries through negotiations of an agreement or imposition of binding acts and/or regulations allow only imports of legal timber by declaration of legality or code of conduct or with a credible verification system. This chapter will explore in detail the demands for legal timber imposed by the US, the EU and Australia through binding trade related environmental measures, respectively. The reason for focusing on these three markets are as mentioned in the previous chapters i.e. these are currently the only markets imposing such binding measures and also these are important markets for Peninsular Malaysia's timber industry. Although these binding measures are considered by some scholars as NTMs, their existence has been argued to be justified under the General Exceptions of GATT/WTO for environmental reasons. This chapter will therefore discuss the history cum formation of the US Lacey Act, Malaysia-EU FLEGT VPA negotiations and the EUTR and Australian ILPA/ILPAR and the negotiations with Malaysia on a CSG, its current scenario of the measures and possible implications on Peninsular Malaysia's forest sector and timber trade after taking into account its requirements.

6.2 INTERNATIONAL COOPERATION AND CERTIFICATION REQUIREMENTS

As mentioned in Chapter Two, the concern over management of the forest, trade of its products and also its linkage to social and environmental issues have led to an extensive debate on the pressure and demands for trade of sustainable and/or legal timber and timber products. Even as early as the 1960s, it was felt that international cooperation and assistance were required for conservation of certain endangered species of wild life and plants as their trade crosses borders between countries. The effort to regulate such transactions was important through international cooperation to protect certain species from being over exploited. In this regard, the CITES was developed and came into force in 1973. As to date, the convention provides various degrees of protection for more than 35,000 species of animals and

plants that are traded either as live specimens, fur coats or dried herbs.⁸⁶ In this regard, the species covered by the convention have been included in one of its three appendices. For example, species under *Appendix I* have been determined by CITES Parties to be threatened with extinction and affected or possibly affected by international trade (nearly 900 species) and its trade are prohibited under CITES. Timber species such as *Alerce Fitzroya cupressoides* have been included under this appendix. Meanwhile, *Appendix II* includes species (nearly 32,500 species) that are considered as not necessarily threatened with extinction, but likely to become so, unless trade is closely controlled. As such, trade of products under *Appendix II* is allowed, provided that its trade will not cause detriment to the survival of the listed species or its role in the ecosystem in which it occurs and is legal in origin. To this end, a CITES permit will be issued. Lastly, *Appendix III* (nearly 300 species) includes species that are already protected under national law in at least one CITES Party (the Party requesting the listing) for which assistance is called from other parties in order to help control international trade.

In this regard, Mulliken (2009)⁸⁷ stated that in the early 1990s, there were proposals to include some commercially important timber species in CITES' *Appendix II*, which included Merbau *Intsia* spp., Ramin *Gonystylus bancanus*, *Entandrophragma* spp. and *Khaya* spp. However, these proposals were either rejected or withdrawn as some countries and their industry members were concerned on the impact of CITES listings on future trade and market of these products. Also, these countries were concerned about the fact that CITES is widely associated with trade of endangered species and trade bans, instead of SFM, and this would likely result in a decline for demand of such listed species. However, it can now be argued that countries began to see the importance of the role of CITES in controlling international timber trade when there were agreements to include commercial timber species such as Big-leaf Mahogany and Ramin in *Appendix II* during the 12th and 13th

⁸⁶ Information obtain from CITES website, www.cites.org, downloaded on 24 November 2013.

⁸⁷ Views obtained from Mulliken (2009). The role of CITES in controlling the international trade in forest products, implications for SFM for the non-wood forest products. *Working Document under FAO*.

meeting of the Conference of the Parties to CITES in 2002 and 2004, respectively. Meanwhile, according to Pettenella & Santi (2004)⁸⁸, CITES is the only worldwide mechanism that can be used to control international trade of illegally sourced wood. Through this convention, governments are pressured to address illegal trade of certain endangered species.

Another important international timber trade agreement that has a significant role on timber trade—although it does not play the direct role like CITES in controlling timber trade due to the lack of an enforcement mechanism—is the ITTA. In 1983, 36 timber producer countries and 34 consumer countries under ITTO agreed on an ITTA following the growing debate on problems of substantial degradation and destruction of world's forests. This agreement came into effect in 1985 (revised in 1994 and 2006) with the main objective of promoting growth and diversification of international trade in tropical timber. It also encourages member countries to develop and implement proper forest management systems for the purpose of tropical forest conservation. According to Simula (1999), ITTA is significant in terms of bringing consumers and producers together for policy work and development. In this regard, there are common positions established for sustainable development of forests and the targets, set accordingly, are instrumental in focusing efforts both at the international and national levels. Also, the FAO Tropical Forestry Action Plan (TFAP), operational since 1987, was created as a framework to develop national forest programs for developing countries with development assistance for the forest sector. Apart from CITES and ITTA, there are also other international agreements that were agreed upon which have indirect effects on timber trade such as the CBD adopted during the Earth Rio Summit in 1992 and the UNFCCC and its successors, for example, the ongoing Kyoto process.

⁸⁸ The authors were cited in the FAO Repository Paper 145, "*Best practices for improving law compliance in the forestry sector (2005)*".

Thus, this concept of mutual collaboration among nations can be argued to be in line with Neo-Liberal Institutional theory in which it is argued that mutual collaboration is important to resolve collective action problems and provide mutual goods by enhancing reciprocity and certainty about future interactions (Keohane; 1984; Keohane et al., 1989; Haas et al., 1993). Ostrom (1990), meanwhile, is of the view that communal forests that are common-pool resources can be managed by common property regimes if they are properly designed. However, according to Gulbrandsen (2008), for standard organizations to form, actors must be able to see for themselves that such collaboration serves their interests and any benefits obtained, be it individual or collective are dependent upon mutual action.

As such, it is not surprising that, despite all pressure and demands, the above agreements are basically the only binding international agreements that were agreed upon in the case of forest sector and timber trade. Except for CITES, the other agreements have non-coercive (no enforcement) requirements to ensure environmental protection, conservation and control on illegal logging. This is because reaching a binding agreement between developed and developing countries proved futile due to differences in priorities⁸⁹. Developing countries remained cautious about developed countries' intention in arguing for '*global responsibility*' and were more concerned themselves with '*sovereign discretion*' (Pattberg, 2005).⁹⁰ In this regard, Porter & Welsh (1996) were of the opinion that developing countries are fearful for the developed countries' possible intention of dictating how the forests within jurisdiction of developing countries should be managed. Therefore, during the Rio Summit, in the absence of a binding forest convention, states only agreed to a set of non-legally binding Forest Principles, which can be regarded as guidelines for management and the use of forests that relates to both environmental and developmental concerns. To this end, Gulbrandsen & Humphrey (2006) were of the view that the Forest Principles agreement is "*legally and politically weak*". They further stated that

⁸⁹ See Taib (1997), Pisano et al. (2012). For further details see Chapter Two.

⁹⁰ Refer Chapter Two for detailed arguments on the conflict between developed and developing countries on trade related environmental measures.

although it is the first global agreement that touches on management, utilisation and development of all types of forests, it does not touch on illegal logging or explain how to balance conservation and utilisation of forests.

As a consequence, due to the differences above for an internationally binding agreement, the NGOs who were in favour for boycott of trade of tropical timber and timber products decided to work towards an immediate response for growing sustainable 'green' demands. Also during that time, forest product retailers such as B&Q in the UK, IKEA in Sweden, and Home Depot in the US began to pay more attention to the source of their fibre and whether products purchased are harvested in an environmentally friendly manner (Cashore, Auld & Newsom, 2004). Meanwhile, according to Humphreys (1996), NGOs like WWF, back in the 1980s, were already in favour of developing a labelling system through private initiatives as they were frustrated with the failure of ITTO to promote tropical forest protection by establishing such a system.

However, it is interesting to note that even though the Rio Earth Summit did not produce legally binding commitments on forest management, it did however provide a forum for many NGOs to get together and support an innovative idea of a non-governmental, independent and international forest certification scheme. Such a situation has been argued by Bernstein & Cashore (2000) as an internalization process where in order to gain support for any commitments on forest management, market-based boycott campaigns were often used to force upward governmental and firm-level environmental protection. Such an internalization process is a means to influence domestic and international business-dominated policy networks. It is basically about the power of using market forces to shape policy responses.

As such, in 1993, the FSC certification, a non-state effort, was founded by mainly a group of environmental organisations and it was seen as the 'saviour' to such demands. According to Gulbrandsen (2004), this non-state forest certification is seen to *have "emerged in the shape of powerful market driven governance and rule-making systems"*. Cashore & Stone (2012) were also of the same opinion that since this certification was developed by an alliance of non-governmental actors, it is called a process of *"non-state market-driven global governance"*. Thus, FSC certification is seen as a tool that is able to boost credibility of exports of timber and timber products for producer or exporter countries. This is because the FSC ensures that timber and timber products are derived from well managed forests that provide environmental, social and economic benefits according to principles and criteria agreed upon before certifications are issued.

However, as mentioned in Chapter Five, the FSC is only one of the two main internationally recognised and accepted forestry schemes; the other is the PEFC Scheme, established in 1999 by largely European based international forest industry and trade organizations and associations. Although both schemes have the same objective of achieving certification of forests, based on credible and independently verified standards for forest management, one overriding difference between the two is that FSC works towards a single global standard, while PEFC, an industry led scheme, recognizes national characteristics by certifying existing national schemes through mutual recognition. Damette & Delacote (2011) were of the opinion that even though both the schemes take into account environmental, social and economic impacts of timber harvesting, their objectives are still different as *"PEFC is susceptible to give more voice to business issues, while FSC may focus more on environmental and social issues"*. They also commented that there are differences in the guidelines of the schemes where FSC is more performance-based and focuses on the outcome of the code of good conduct for forestry operations whereas the PEFC is more system-based that takes into account criteria in designing forest management to reach environmental performances.

Of course, there are other notable certification schemes developed upon the FSC that are being established apart from the PEFC, i.e. the American Forest and Paper Associations and Sustainable Forestry Initiative program in the US and the Canadian Standards Association program by the Canadian Sustainable Forestry Certification Coalition. However, these schemes are more home grown and are not practiced in other countries outside the region. In this regard, Bernstein and Cashore (2007) argued that these new non-state forestry schemes represent main areas of forestry related issues where a wide range of stakeholders discuss and agree upon rules and governance mechanisms. Meanwhile, Cashore (2002) is of the view that since these schemes are created and governed by non-state actors and voluntary, there is no legal coercion to insist that producers of timber and timber products adopt these schemes. However, it is interesting to note that these certification schemes have gained popularity whereby many industry associations in individual countries encourage their producers and exporters of timber and timber products to adopt these schemes voluntarily. Currently 10% of the world's forests are certified where 2% of the forest is certified in the Asian region (UNECE⁹¹/FAO 2013). Meanwhile, specific to the certification programs of FSC and PEFC, as of May 2013, it was reported by UNECE that the global area of certified forest endorsed by FSC and PEFC amounted to 417 million hectares, up by 8.5% (32.8 million hectares) since May 2012. Also, the world's total certified forest area has topped the 10% mark in terms of the proportion of total forest area for the first time⁹².

In this regard, it was argued that industry associations often develop industry standards or codes of conduct to show high level of responsibility adopted in their operations, to provide credible information as requested and basically to protect their reputation. This is because it is believed that environmental and social reputation reflects on the industry as a whole (Gulbrandsen, 2008 cited Gunningham & Rees, 1997 and Spar, 1998). On the other hand, it can also

⁹¹ United Nations Economic Commission for Europe.

⁹² See UNECE/FAO Forest Products Annual Market Review, 2012-2013 for further details. Retrieved from http://www.unece.org/fileadmin/DAM/timber/publications/FPAMR_2013.pdf

be argued that such voluntary acts could be attributed to the pressure to comply with 'green' requirements applied by such non-state actors: (1) by NGOs and other pressure groups that have campaigned to boycott tropical timber that are not from sustainable and/or legal sources and (2) the rising awareness of consumers demanding sustainable and/or legal timber. This is in line with Gulbrandsen (2008)'s opinion that NGOs pressure companies into adopting voluntarily certification schemes by using the combination of *"carrots (i.e. reputational or economic benefits) and sticks (i.e. threats of boycott campaigns)"*. As such, without such pressure it may be difficult to coerce companies to adopt certification schemes as these schemes require companies to undertake changes that will increase their costs of production (Cashore, Auld & Newsom, 2004). Therefore, it can be argued that the proponents of the FSC and PEFC scheme have adopted the Green Environmentalist approach of trade related environmental measures to address environmental problems related to the forest sector and timber trade.

Additionally, these voluntary certification schemes are argued to have received favourable support from the public sector either in the form of direct or indirect subsidies and also through public procurement policies of developed countries like the UK, Netherland and Sweden (Hinrichs & Van Helden, 2012). There have also been instances where governments, recognising the importance of certified or legal timber, have cooperated with non-state actors to come up with national schemes for the overall benefit of its timber industry. In this instance, the government plays a role in setting out policies and institutional framework, and in some cases, they are the forest owners and also buyers of wood products for government projects. They also contribute to capacity building, provide financial support, moderate between competing schemes and provide guarantees of a level playing field in both international trade and domestic markets⁹³. In this regard, it is not surprising

⁹³A government's role in a certification scheme was elaborated in the Geneva Forest Discussion Paper 44 prepared for the Timber Section of the UNECE/FAO. This paper entitled *"Forest Certification – Do Governments Have a Role?"* is the proceedings and summary of the discussions from the *"Policy Forum: Forest Certification – Do governments Have a Role?"* held in September 2005 during the Timber Committee's annual session. This paper captures the essence of the discussions, and incorporates all available expert papers and presentations.

that there are various national schemes all around the world that have been endorsed under the PEFC Scheme such as those from countries like Argentina, Australia, Brazil, Canada, China, Gabon, Malaysia and Russia. In the case of Malaysia, as mentioned in Chapter Five, the MTCC was set up and funded by its government with the main aim to develop and operate a voluntary and independent national timber certification scheme⁹⁴ (for details of the MTCS, refer to Chapter Five).

Therefore in this instance, Putnam's two-level game theory can be used to explain the case of MTCS where the Federal Government plays a role in ensuring that its timber is recognised in international markets by encouraging adoption of international standards and requirements by its timber industry and also playing the role of a mediator for its different groups of stakeholders with different interests. This is especially so after taking into account that forest and land matters come under the jurisdiction of states as explained in Chapter Five. It is important to ensure that there is a balance between the needs of each state and its industry together with the needs of other stakeholders who may be affected in the process of timber extraction, production and exportation. Therefore, timber certification is seen as a way to ensure such a balance exists. In this regard, Burger et al. (2005) is of the opinion that a lot of attention is given to standards, compliance and accreditation of testers in describing and comparing certification systems while hardly any attention is given to its implementation strategies. He therefore stressed the importance of quality in communication of a certification system. There is a task of: (1) convincing producers to show compliance with a specific certification system by showing them the rules for production to be complied with, requirements for conformity testing and informing the direct and indirect benefits of standards conformity and (2) persuading actors to reward benefits which they obtain directly or indirectly from producers compliance with standards i.e. through raising the prospect of

⁹⁴ The Malaysian government role in timber certification was mentioned by Mr. Sing Khaw Tham, who was the then Director of Malaysian Timber Council, London, United Kingdom at the UNECE Timber Committee's Annual Session on behalf of Malaysia.

aid for changes or incentives or sanctions and/or play a decisive role in the effectiveness of the certification system's implementation strategy.

6.2.1 Forest Stewardship Council (FSC)

The FSC, which is the first internationally accepted non-governmental regulatory scheme, is a tool of sustainable standards verification that has been developed and supported by NGOs (primarily initiated by WWF USA with a group of Northern American environmentalists)⁹⁵ who have been advocating the boycott of tropical timber and its associated trade. It was actually during a meeting of a group of timber users, traders and representatives of environmental and human rights organizations in the US in 1990, that the idea for a credible system to verify a well managed forest and its sustainable products was introduced.

As such, it took two years of intensive consultations to agree on a credible worldwide certification and accreditation system covering all types of forest indifference to issue of ownership and geographic location. In this regard, Patterberg (2005) is of the view that the boycott by NGOs on tropical timber had increased the pressure on tropical forests. As a result, the decline in returns for timber harvesting had indirectly increased other land use forms, especially conversion of forest into plantations and agriculture land use, which was found to be more economically viable. Consequently, such actions have back fired on the NGOs, who eventually lost their credibility among the general public and also consumers. Therefore, he stressed that the FSC Scheme "*offered something for everyone*" as it has social and environmental standards that a wide group of NGOs support and that the FSC certificate for timber and timber products will help keep companies that comply with such standards away from the "*firing line*".

⁹⁵ Apart from WWF, the other founding members are, Greenpeace, Friends of the Earth, retailers, trade unions and indigenous interest groups.

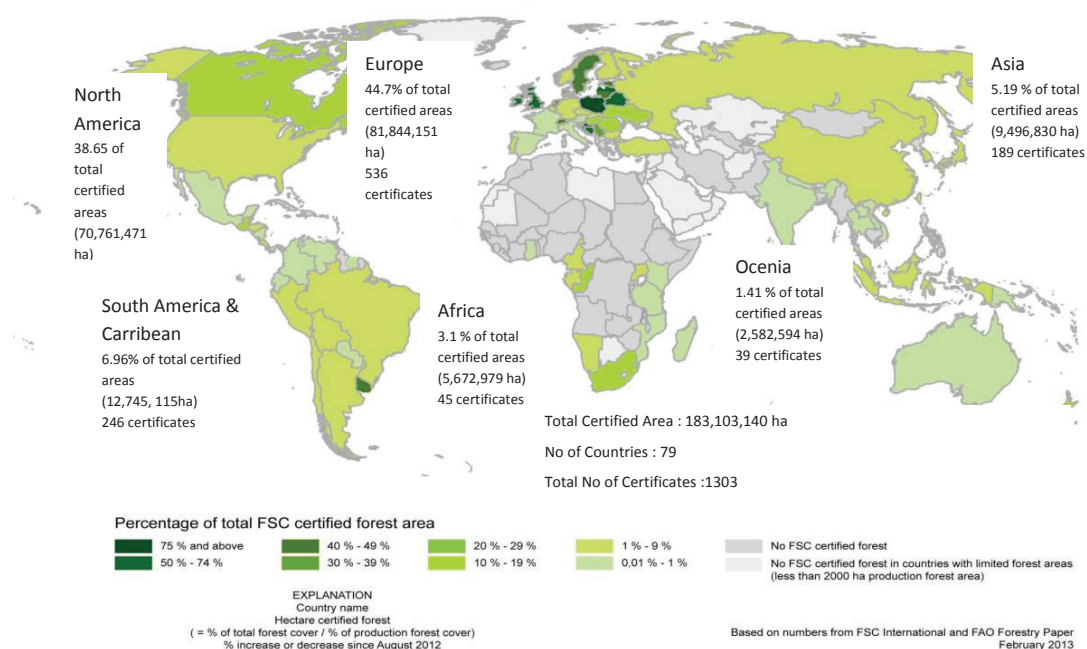
In this regard, the FSC programme is expected to promote sustainable forest practices and encourage traders and consumers to support such practices by buying certified forest products. This is because FSC principles and criteria embraces: (1) tenure, user rights and responsibilities, (2) indigenous people and workers' rights, (3) use of forest products and services to maximize economic viability, environmental and social benefits, (4) maintenance of forests with high conservation value, (5) environmental impact, monitoring and assessment and (6) planning and management of plantations. It is important to note that its standard-setting procedure involves consultations with relevant stakeholders. Furthermore, its provisions are clearly defined; as such it allows all stakeholders including those marginalized to actively participate in the development of the standards to ensure that their interests are taken into account. Therefore, in order to issue FSC certification, all principles and criteria (in total 10) that go through a third party compliance auditing and are applicable to all types of forest must be fulfilled by an FMU. Furthermore, they are not specific to any particular country or region and are based on a global system.

Apart from that, it is argued that FSC is based on a non-state market driven governance, which sees its private certification programmes as forcing upward SFM standards. Thus, its tripartite governance structure is an important factor that takes into account the economic, social and environmental actors, who will be able to ensure that such standards are met. This is because each category of actor has equal voting rights in the FSC General Assembly as well as equal representation between the Northern and Southern stakeholders (Cashore, Auld & Newsom, 2004 cited Domask, 2003). Meanwhile, according to Gulbrandsen (2008), FSC principles and criteria are not linked to any internationally agreed-upon forest policy mainly because they were developed in opposition to intergovernmental cooperation on forests and as such prohibit government's participation in any of its standards development processes. To this end, Cashore (2002) had mentioned that such practices to exclude government participation do not mean that governmental agencies and actors are not

important. He stated that there are conditions where a government can also act as an “*external audience*” where accordingly the government can use its sovereign authority to force compliance. Therefore, it is stated that the FSC may be considered as the example for private governance in the field of global forest politics because of: (1) its general and specific sustainable forest standards, (2) the ability to guarantee compliance and ensure constant improvement of rules through procedures that are institutionalized and (3) “*it regulates a distinct transnational space, which is neither fully incorporated in national nor international regulative systems*” (Pattberg, 2005).

As of November 2014, around 183.103 million hectares of forests worldwide in 79 countries were reported to be managed according to FSC standards with 1,282 certificates issued. Europe records the highest number of FSC forest certified area amounting to 81.84 million hectares (44.7% of the total certified area) with 536 certificates issued. Meanwhile, certificates for CoC have been issued to 112 countries with a total of 28,248 certificates. The number of other FSC certified areas by region can be seen in Figure 6.1. Although FSC has made a difference in initiating, developing and creating the demand for a private sector initiated certification scheme, many forest owners and companies were not happy with the scheme mainly because it is a product of environmental NGOs and its environment and social standards were considered too stringent and inflexible. Furthermore, many of the tropical forests are publically owned. Therefore, it was not surprising that this led to the establishment of alternative certification schemes that do not have very stringent environmental and social standards like the FSC by forest owners and industry associations especially in Europe, the US and Canada. One good example is the PEFC (Gulbrandsen, 2008).

Figure 6.1: FSC Certified Forest Area, by Region



Source: FSC paper on Global FSC certificates: type and distribution

6.2.2 Programs for the Endorsement of the Forest Certification Scheme (PEFC)

The PEFC, formerly known as the Pan European Forestry Certification provides a framework for development and assessment of independent third party certification for forests that are environmentally, socially and economically well managed. It also provides an international evaluation and mutual recognition framework through its council for national forest certification schemes with the condition such that schemes are developed in an open and transparent process with a balanced multi-stakeholder representation. The PEFC was developed in 1999 mainly by forest owners and the timber industry as an umbrella scheme for national forestry standards and also a reaction to the success and public perception of the FSC (Pattberg, 2005).

As mentioned earlier, the PEFC endorses on a voluntary basis national forestry certification system, which includes SFM and CoC standards. Therefore, these national standards that were developed in line with the PEFC requirements through a National Governing Body can apply for endorsement by PEFC International to gain global recognition and market access. In this regard, the ITTO/ITC Report (2002) explained that such an umbrella scheme is important, taking into account the diverse nature of ecological zones and economic conditions in different parts of the world where a global system for all types of forests may not be a viable solution. Therefore, PEFC can be a scheme that recognises the legitimacy of individual countries with their own national schemes. However, it was further argued in the report that such schemes must go through an international certification standard assessment to assure credibility and to avoid discriminatory trade practices for wood products coming from different certification schemes.

As such, for a national scheme to be endorsed under the PEFC scheme by its council, it has to go through a thorough assessment process where there will be public consultations and assessments by independent consultants and all these will be made available publicly. As a result, the PEFC Council has a role to: (1) define minimum requirements for development of national or sub-national forest certification schemes, (2) assess and endorse schemes through mutual recognition, (3) administer PEFC Logo usage rights and (4) promote PEFC forest certification and SFM as a whole. (Gunneberg & Scholz in Burger et al., 2005). As of November 2014, there are 39 national members and 36 endorsed national certification systems under the PEFC umbrella where about 264 million hectares of forest area are managed under PEFC's internationally acceptable sustainable standards. The details of the certified forest area by country can be seen in Table 6.1. Meanwhile, around 16,000 companies and organizations have achieved PEFC CoC certification. In this regard, two thirds of all certified forests globally are certified under the PEFC Scheme and the area certified is said to be equivalent to the size of the

whole of Kazakhstan, or Finland, France, Germany, Italy, Spain, Sweden and UK combined together⁹⁶.

Table 6.1: PEFC Certified Forest Area by Country (November 2014)

COUNTRY	CERTIFIED AREA	COUNTRY	CERTIFIED AREA
Australia	10,398,358	Latvia	1,683,641
Austria	2,807,792	Luxembourg	31,659
Belarus	8,842,618	Malaysia	4,650,009
Belgium	299,208	Norway	9,142,702
Brazil	2,265,618	Poland	7,287,169
Canada (CSA)	39,449,763	Portugal	250,013
Canada (SFI)	83,659,266	Russia	2,757,942
Chile	1,905,186	Slovak Republic	1,242,760
Czech Republic	1,845,321	Slovenia	16,213
Denmark	255,631	Spain	1,449,509
Estonia	1,836,259	Sweden	9,812,789
Finland	20,619,716	Switzerland	205,974
France	8,082,654	UK	1,351,505
Germany	7,358,108	USA (ATFS)	9,074,663
Ireland	376,108	USA (SFI)	25,070,726
Italy	820,341	Total	264,849,221

6.3 **LEGALITY REQUIREMENTS**

6.3.1 ***Voluntary Legality Requirements***

Noting that certification is a voluntary measure that was developed by non-state actors and that obtaining certification can be a long and difficult process especially for developing countries, some developed countries have imposed binding requirements for imports of at least legal timber through acts and/or regulations mainly to tackle the immediate concern of illegal logging. To this

⁹⁶ Information obtained from the official homepage of PEFC at www.pefc.org

end, Hinrichs and Van Helden (2012)⁹⁷, were of the view that although the development of voluntary certification was mainly triggered by the concern for tropical forests management, its implementation in tropical countries has been slow. This is because of specific difficulties of tropical forest management and the need for a step-wise approach towards sustainable certification with legality at its entry point. As such, they stressed that today, various voluntary legality verification initiatives were developed based on market demands and these initiatives are now part of the rules of certification schemes, which allow for mixing of timber from non-certified but verified “controlled” or “non-controversial” sources. Among the voluntary initiatives to ensure legality as mentioned above are through the process of VLO or VLC and the CoC⁹⁸. Meanwhile, Brown and Bird (2007) were of the view that certification efforts did not materialise quickly in tropical natural forests due to the significant constraints (i.e. designed with a very broad goal of SFM and involves high cost of compliance) that forest management faces in terms of economic, ecological and social goals in these environments. Also, these constraints cannot be easily addressed based on experience shown over the last decade.

However, in the recent years, due to the growing concern of rapid deforestation and forest degradation, especially related to illegal logging and its illegal trade in the tropics, there were strong pressure and demands specifically by green environmentalists, for some form of regulatory approach for forest management. According to the UNECE/FAO (2009), there is relatively slow progress in voluntary measures such as forest certification and SFM labelling in the tropical countries as they cover only 8% of certified

⁹⁷ Alexander Hinrichs is a regional advisor to the EU FLEGT Asia support program of EFI’s EU FLEGT Facility and an advisor to the German Development Cooperation in Forestry while Flip van Helden is policy coordinator at the European Affairs Directorate of the Netherlands Ministry of Economic Affairs, Agriculture and Innovation.

⁹⁸ VLO is only able to determine which particular forest concession that a timber originates from and whether the company that has the logging rights complies with harvesting regulations and procedures. Meanwhile, VLC involves field inspections of actual logging operations. Overall all the assessment involves assessing each company’s CoC procedures, which are meant to ensure that verified and unverified woods are kept separate. For CoC certificated products, the sourcing and transportation/processing can be verified through the entire supply chain.

forest. As such, it is believed that the legally binding nature of regulatory instruments and their universal scope gives forest management a greater impact than voluntary initiatives (Hinrichs & Van Helden, 2012). In fact, according to Brack (2010), importing countries previously had no legal mechanisms to exclude illegal timber (apart from the exception under CITES) from being imported even though it can be detected. Thus, some developed countries that are in submission to demand for legal timber and in line with their commitments under G-8 to tackle illegal logging and its illegal trade, have recently made it binding in the form of acts and/or regulations to ensure that only legal timber enters their market. It is important to note that previously, governments in developed countries had already included their public procurement policies, a regulatory requirement for purchase of sustainable and/or legal timber and timber products according to internationally accepted standards as mentioned above. However, such regulatory measures were only for government projects and not for the timber trade as a whole.

6.3.2 *Binding Legality Requirements*

Thus, some developed countries have made it binding through acts and/or regulations to prohibit trade in illegally harvested timber, by encouraging traders to minimize the risk of trading illegal timber. In this regard, countries such as: (1) the US amended its Lacey Act in 2008 to include trees as part of its definition for plants, (2) the EU started off negotiating a bilateral FLEGT VPA with producer or exporter countries on an accepted FLEGT TLAS, however subsequently imposed its EUTR in 2013 and (3) Australia imposed its ILPA 2012 and ILPAR 2013 and have started negotiating with producer or exporter countries on an acceptable legality code of conduct. Nonetheless, it is interesting to note that the US, the EU and Australia, despite adopting binding measures either through acts and/or regulations with the same objective to ensure that only legal timber enters their markets, have taken different approaches in tackling the issue of demand side measures for legal timber.

The US amendment of its Lacey Act in 2008 was a unilateral move undertaken by its government to address the problem of illegal logging. However, to enable producer countries to cope with such a drastic move, the US allowed for a phased approach of declaration by exporter countries for wood and wood products. For example, declaration for wood and wood products such as fuel wood, logs, sawn timber, veneer and moulding was enforceable beginning 1st April 2009. Declaration for wood products such as musical instruments, furniture and bedding was only required beginning 1st April 2010. Nevertheless, what is interesting is that the act provided the US government the power to fine and jail individuals and companies who trafficked in illegally harvested wood products. In this regard, the US government is allowed to impose penalties in the form of civil administration, forfeiture of the trafficked goods, criminal fines or imprisonment on individuals and companies that do not undertake 'due care' that the wood they imported is from an illegal source. As such, all parties are now liable under the law and not just the first placer of timber products into the US market.

Meanwhile, the EU, unlike the US took a softer approach by deciding to negotiate first with producer or exporter countries for a bilateral FLEGT VPA with the main aim for these countries to develop a binding TLAS. With this system, producer or exporter countries with capacity building assistance from the EU would be able to export legal timber to the EU market. However, due to dissatisfactions that such an approach may not totally deter illegal timber from non-VPA countries entering the EU market, the EU later adopted the EUTR in 2013. In this regard, Brack (2010) argued that although FLEGT VPA will be able to tackle the issue of illegal logging, the approach undertaken to negotiate a FLEGT licence system with individual countries renders it *"vulnerable to evasion"*, where he stated further that illegal wood products may still enter the EU market via transshipment through non-VPA partner countries. As such, the EUTR is expected to prohibit the placement of illegally harvested timber and timber products in the EU market as the EU traders now need to exercise 'due diligence' for the placement of timber products on the EU market for the first time. Meanwhile, other traders further

down the supply chain are also required to keep records of their suppliers and customers. Just like the Lacey Act, the EUTR applies to nearly all timber products whether imported or produced within the EU. However, what differs here is that the Lacey Act does not require certification or verification of legal origin and makes it a general offence for handling illegal timber. While there may be situations that individual buyers in the US may demand certification as a means to reduce the risk of buying illegally logged timber, it is not a requirement of the US Government's law but more of a private market initiative. According to Goetzl & Ekström (2007), in the US, certified woods were increasingly attracting attention where among the importers, there is a view that certification may help to secure and legitimize trade in certain tropical species.

The Australian ILPA meanwhile, has similarities with the EUTR features where there is a requirement to exercise 'due diligence' to assess risk and employ adequate and proportionate measures and systems to minimize risk of sourcing or trading illegal timber. Where else, the Lacey Act only requires 'due care' to be exercised in the efforts to reduce the risk of legal violation by providing declaration of legality of product. On the other hand, the IPLA does have similarity with the Lacey Act in terms of requirement of special customs declaration for imports of timber and timber products. In this regard, according to van Dam & Savenije (2011), Australia intends to complement the work of the US under the Lacey Act and the EU by requiring verification of the legal origin of wood. The details of the US Lacey Act, EU FLEGT VPA and its EUTR and the Australian ILPA/ILPAR will be explained separately below taking into account their historical and current backgrounds as well as their requirements and impact on Peninsular Malaysia's forest sector and timber trade.

It is interesting to note that according to Brack et al., (2002), there are two main weaknesses in terms of imposition of unilateral measures: (1) the measure imposed may not have a strong effect in influencing changes in

terms of behaviour among producers or exporters. Changes, if any will depend on the size of the market of the country imposing such requirements. Also, without cooperation of a producer or exporter country, it will be difficult to establish a system that is able to guarantee legality of production. Cooperation is especially important in terms of receiving capacity building assistance from the government. However, it was further argued that unilateral action can be a fall-back option if negotiations on international agreements fail or do not proceed fast. Nevertheless, there were views that the move towards legality should not overlap with certification efforts as they are two different entities (Brown & Bird, 2007). In this regard, concerns have been raised on the possible overlap in standards development, high implementation and enforcement costs involved in obtaining both legality verification and certification for sustainability and the assumption that legality lowers the threshold of sustainability standards. However, Hinrichs and van Helden (2012) are of the opinion that in practice, many timber producing countries have already incorporated significant requirements for SFM in their legal frameworks such as forest management plans. They stressed that for the EU, there is lack of evidence that its members will permanently accept legality as “*sufficient proof of sound forest management*”. As such, at the end of the day, SFM is still the end goal and legality is a stepping stone towards that achievement. As mentioned previously, it is also important to note that many large retailers (such as B&Q in the UK and IKEA in Sweden), despite regulation being passed for legality requirements, continue to require sustainability certification as part of their corporate social responsibility policy despite accepting legality in the form of FLEGT VPA licence as a requirement.

6.3.2.1 US LACEY ACT

(a) Historical and Current Perspective

The US Lacey Act is the country's oldest wildlife protection statute, which was first enacted in the year 1900 to combat the impact of hunting for supply of commercial markets, interstate shipment of unlawfully killed game and

introduction of harmful exotic species and killing of birds for the feather trade. It is a tool used to combat trafficking of illegal wildlife, fish or plants and products thereof and as of the 1981 and 1988 amendments, it covered all wild animals. However in terms of plants, it was defined to include only those both native and protected by the US. Nonetheless as of May 2008, with immediate effect, *The Food, Conservation and Energy Act (Section 8204) Prevention of Illegal Logging Practices* expanded the Lacey Act protection to include a broader range of plants and introduced a new declaration requirement relating to plant products. A plant is now defined as “*any wild member of the plant kingdom, including roots, seeds, parts or product thereof*”, and “*trees from either natural or planted forest stands*”.

As such, the amended Lacey Act, is said to be an important tool that will help the US to minimize its market for illegal plants and support the efforts of its own states and other countries to combat illegal trade in plants, particularly illegal logging. The amendments are also recognised as the world’s first-ever law prohibiting trade of illegally logged wood products. In this regard, illegal logging comprises of: (1) theft of timber, including those obtained from parks and protected area, (2) harvesting without permission, (3) failure to comply with harvesting regulations and (4) failure to pay royalties, taxes or fees⁹⁹. Meanwhile, the determination of whether a product is legal is based on the relevant laws in the country where the timber was harvested. To enforce and implement the Lacey Act, a few primary agencies have been selected to perform the task to ensure that only legal timber enters the US market i.e. The US Department of Agriculture’s Animal and Plant Health Inspection Service (APHIS) and the Fish and Wildlife Service (FWS). Although APHIS is responsible for processing import declarations, the department is also responsible for investigating violations together with FWS. Other agencies involved are Department of Homeland Security and its Customs and Border

⁹⁹ Statement made by US official , Ms Elinor Colbourn, Senior Trial Attorney, from the Environmental Crimes Section, Environment and Natural Resources Division, U.S. Department of Justice during a briefing on Lacey Act Amendments of 2008 on Trade in Timber and Timber Products to the Malaysian timber industry on 9th December 2008 in Kuala Lumpur.

Protection Staff, the Department of Justice, the Department of State and the US Agency for International Development.

(b) Lacey Act Requirements

The Lacey Act now makes it unlawful to import, export, transport, sell, receive, acquire, or purchase in interstate or foreign commerce any plant with some limited exceptions, taken or traded in violation of the laws of a US State, or most foreign laws. It is also now unlawful to make or submit any false record, account or label for, or any false identification of, any plant or to import any covered plant or plant product without a declaration. Therefore, importers are required to declare at time of importation the scientific name of a plant (including genus & species), value of importation, quantity of the plant and name of the country in which the plant was harvested. Meanwhile, for paper and paperboard products with recycled content, importers are required to indicate the average percentage of recycled content without regard to species or country of harvest. However, there are certain exceptions given where, if the species of a plant varies and is unknown, exporters are required to declare the name of each species that may have been used to produce the product. Anyway, if the species is commonly harvested in more than one country and the country is unknown, they would need to declare the name of each country from which the plant may have been harvested. In this regard, this new amendment gives the US government the power to fine and even jail individuals and companies who traffic in illegally harvested wood products. The severity of the penalties imposed actually depends on the defendant's state of knowledge of the illegality where the defendant is supposed to exercise 'due care' such that a reasonable prudent person would exercise in the same or similar situation.

The US government can even use the Lacey Act to impose significant penalties on individuals and companies who do not realize that their wood is tainted. The penalties for violation include civil penalties (monetary fines),

criminal penalties (monetary fines and imprisonment) and forfeiture of the goods. Therefore, for civil penalties the maximum penalty is a US\$ 10,000 fine where a defendant in the exercise of due care, should have known that the product was illegal. In the case of criminal penalties, felonies are punishable by 5 years in prison and a US\$ 250,000 fine or twice the gross gain or loss (US\$ 500,000 for corporations) for knowing of the violation (knowledge of facts and illegality, not specific law violated) and import or export or commercial conduct with plant value of more than US\$ 350. Meanwhile, misdemeanors are punishable by 1 year in prison and a fine of US\$ 100,000 or twice the gross gain or loss (US\$ 200,000 for corporations) where in the exercise of due care they should have known that the plant was illegally taken, possessed, transported or sold; or knew, but did not involve import or export or commercial conduct with plant value of more than US\$ 350. Apart from that, for forfeiture, a defendant has strict liability, which does not depend on a defendant's knowledge of illegality. Therefore, according to Elias (2012), the Lacey Act through imposition of criminal penalties for breaking the law and closing the market for illegal wood and wood products have reduced financial incentives for such activities and if properly enforced would certainly create a disincentive for participating in such activities.

To date, the Gibson Guitar case (2012) has been the first major case involving criminal penalties that was imposed under the Lacey Act. In this case, the company, Gibson Guitar Corp., was said to have violated the Lacey Act by purchasing and importing illegally harvested wood materials into the US from Madagascar and India. However, since the company had voluntarily disclosed facts and co-operated with the government on its investigation, there were no criminal charges imposed upon the company. The government instead through the Department of Justice signed a Criminal Enforcement Agreement¹⁰⁰ where no criminal action will be taken but only imposition of criminal tax violation in the form of: (1) penalty of \$300,000, (2) community

¹⁰⁰ For further details see the Letter by the U.S. Department of Justice to Mr. Donald A. Carr, Esq and Mr. William M. Sullivan Jr. Esq on behalf of the Gibson Company dated July 27 2012. Retrieved from <http://legaltimes.typepad.com/files/gibson.pdf>

service payment of \$50,000 to the National Fish and Wildlife Foundation for funding research projects or promotion activities for “*conservation, identification and/or propagation of protected tree species used in the musical instrument industry as well as the forest in which these species are found*” and (3) further strengthen compliance, control and procedures.

However, prior to the Gibson case, there was another case investigated under the Lacey Act for importation of illegal wood i.e. Peruvian Tropical Hardwood in July 2012. This case was considered a low profile case as the US FWS seized three pallets of tropical hardwood containing numerous species of decorative woods, such as tigrillo (*Swartzia arborescens*), palisangre (*Brosimum rubescens*) and tigre caspi (*Zygia cataractae*) as they entered the Port of Tampa, Florida from Iquitos, Peru. The wood was confiscated on the basis that the shipment violated the Lacey Act’s declaration requirement as there was evidence that the exporter declared using stolen and forged documents. Apart from the two cases, there was another investigation as of September 2013 involving violations of Lacey Act that were brought to the media’s attention concerning the largest specialty retailer of hardwood flooring in the US—Liquidators Holdings, Inc. There was a search warrant executed by the US’s Federal Authorities on the company’s two Virginia facilities relating to its importation of certain wood flooring products. However, to date there is yet to be any update on the investigation.

(c) *Impact of the Act on Peninsular Malaysia’s Forest Sector and Timber Trade*

(i) **Trade and Market Access**

The US is the main export destination for Peninsular Malaysia’s timber and timber products. Although the years 2010 and 2014 specifically shows increase in trade relatively from previous years, nonetheless Table 6.2 below shows a declining trend of exports since 2007 by 6.97% from RM 2.438 billion to RM 2.268 billion in 2014.

Table 6.2: Peninsular Malaysia's Export of Timber and Timber Products to the US 2007- 2014 (RM bil)

Grand Total	2007	2008	2009	2010	2011	2012	2013	2014
	11.70	11.81	10.22	10.939	10.865	11.18	10.38	11.38
USA	2.438	2.340	2.165	2.317	2.023	2.232	2.153	2.268
JAPAN	0.981	1.002	1.047	0.936	1.189	1.023	0.883	0.851
SINGAPORE	0.511	0.644	0.602	0.698	0.741	0.815	0.793	0.891
AUSTRALIA	0.842	0.793	0.686	0.685	0.762	0.771	0.766	0.818

Source: MTIB

The reasons for the decline are not clearly known but could be attributable to the global economic slowdown especially in 2009 and also the strict requirements for declaration of legality of 'plants', which includes wood and wood products exported into the US market as per the Lacey Act amendments in 2008. Under the Lacey Act, companies that export to the US market are required to provide information to their importers—the scientific name of the plant, which includes genus and the country of harvest. It is important to note that in the initial stages of enforcement of the Lacey Act, Peninsular Malaysia's timber industry was fearful that the amendments to the act to include 'plants' would affect its market access to the U.S. This concern was brought to the attention of the Embassy of the United States in Malaysia by the MTC on behalf of its industry members¹⁰¹. Among the concerns raised were that: (1) the act brings about "*uneasiness and significant uncertainty*" for the industries in the US that are dependent on imports of tropical timber and timber products as it is difficult to describe or know the actual origin and species of all the materials for certain types of wood products that have a complex progeny (i.e. wood products constituted from wood waste such as MDF and particleboards), (2) the civil and criminal penalties imposed under the act may hinder exports of tropical timber and timber products and (3) specification of each and every single timber species is too burdensome for a developing country due to shortage of scientists and lack of resources for research and development, documentation, monitoring, implementation etc.

¹⁰¹ Concerns raised by MTC in its letter (obtained a hard copy from MTC) dated 11 December 2008 to the Embassy of US in Malaysia on U.S. Lacey Act Amendment of 2008.

Meanwhile, the increase in exports to the US by 5.13% for the year 2014 (RM 2.268 billion) from RM 2.153 billion in 2013, could be attributed to the fact that the Timber Industry Association members¹⁰² have stated that Peninsular Malaysia's timber exporter does not have any difficulties in exporting into the US market. This is because they are able to declare the legality of their timber exports according to the Lacey Act requirements.

(ii) Government policies

There is no policy change required for Peninsular Malaysia's forestry sector and timber trade due to the Lacey Act. Malaysian exporters are only required to declare, at the time of exportation, the scientific name of the plants harvested (including genus & species), its value and quantity imported. Nonetheless, this can be burdensome for products that have already been manufactured like furniture, in the sense that every detail of the genus and species of the plant used in the manufacturing has to be indicated in the declaration form.

(iii) Level of Stakeholder Involvement

The Lacey Act is a unilateral imposition on the part of the US Government. As such, there was no requirement for stakeholder consultations with partner countries (exporters) in the process of amending the act to include timber and timber products. However, it is important to note that the US Government, in response to the dissatisfaction of exporter countries on the amendments, allowed for a phased in approach of timber and timber products to comply with the Lacey Act requirement as mentioned above. Anyway, with the Lacey Act being enforced, Malaysian stakeholders can participate in the implementation by getting involved in providing feedback on any suspicion or proof of illegal act of declaration of the requirements for the export of timber and timber products on behalf of the Malaysian exporters.

¹⁰² IM1, IM2, IM3 and IM4

6.3.2.2 EU FLEGT VPA / TIMBER REGULATION

(a) Historical and Current Perspectives

In 2002, the EU launched its FLEGT Action Plan to combat illegal logging and its associated trade and also to promote forest sector governance. This plan is considered as Europe's immediate response to the growing problem of illegal logging and its illegal trade where the plan was aimed to ensure that only legal timber enters the EU market. A key component of the Action Plan is the conclusion of a bilateral VPA to be signed between EU and timber producing or exporting countries (also known as partner countries). Through the VPA, it is expected that: (1) forest governance and market access for timber and timber products within the EU from partner countries will be improved, (2) there will be increase in collection of revenues as well as support and development for partner countries and (3) implementation of a more effective enforcement tools and improvement in the foundation for SFM (EU FLEGT Briefing Notes, Briefing Note Number 1).

As such, with the VPA, only FLEGT licensed products will be allowed entry into the EU through a 'green lane'. Meanwhile, to assist partner countries in developing a system and to improve enforcement, the EU through the VPA also provides for capacity building assistance in the form of monetary and/or technical expertise. Although there is no existing model on how a VPA is to be developed, the VPA includes requirements to improve forest governance including strengthening the tenure rights of locals, providing assurances to EU consumers about the legality of imported timber through a legality assurance system while insisting on a multi-stakeholder process and approach. It is important to note that even though the agreement is labelled as 'voluntary', it actually becomes official and binding once the EU signs a VPA agreement with its partner country. Therefore, it is important to note that 'voluntary' here only refers to willingness of the partner countries to negotiate and conclude an agreement with the EU.

In this regard, the first country to sign a VPA with the EU was Ghana in 2008, followed by the Republic of Congo in 2009, Cameroon (2010), Central African Republic (2010), Liberia (2011) and Indonesia (2011). So far only Ghana, Congo, Cameroon and Central African Republic have ratified the agreements. Even so, all these countries are now in the stage of developing a system that is needed to verify and control legal timber. In the case of Indonesia, a system known as “*Sistem Verifikasi Legal Klasifikasi*” had been developed and is now being tested under FLEGT as proof of legality. Meanwhile negotiations are ongoing with Cote d’Ivoire, Democratic Republic of Congo, Gabon, Guyana, Honduras, Laos, Malaysia, Thailand and Vietnam. In the case of Malaysia, as mentioned previously, the negotiations have been on-going since 2007; however, due to various internal concerns, it is yet to be concluded. However, to date, there is already a system of verification developed, known as MYTLAS (specifically for Peninsular Malaysia) where its implementation commenced on 1st February 2013 and is now being promoted in the international arena as a system that is able to prove the legality of timber and timber products exported from Malaysia. It is important to note, as mentioned in Chapter Five, that this system was first developed together with the EU during the on-going FLEGT VPA negotiations. Nevertheless, since the negotiations have yet to be concluded, Malaysia took a step further to promote the TLAS (MYTLAS) for Peninsular Malaysia by first taking into account market developments for legal timber and the importance of the US, the EU and the Australian markets for the exporters in Peninsular Malaysia (please note that for the FLEGT VPA negotiations the TLAS is developed on a regional basis. Also, refer to Chapter Five for details on MYTLAS).

In view of the fact that the VPA negotiations are slow and not all producer or exporter countries have indicated their interest to negotiate a VPA, the EU, on 3rd March 2013 had implemented its Timber Regulation (*Regulation (EU) No 995/2010 of the European Parliament and of the Council of 20th October 2010*) with the aim to minimise the risk of illegally harvested timber and timber products entering the EU market. The EUTR is now applicable to all

listed products from countries with or without a VPA and also its own EU member states. In this regard, Heeswijk & Turnhout (2013) were of the view that since the VPAs are voluntary and not all timber producing countries see the benefits or incentives for signing a VPA, they may not see it as a feasible agreement. Therefore, the EUTR is an additional complementary measure undertaken by the EU, noting the weaknesses of the VPA approach to ensure that only legal timber enters its market. Experts interviewed¹⁰³ have confirmed that the EUTR complements the VPA to ensure trade in legal timber and to minimise illegal timber entering the EU market from non VPA countries. To this end, **EFI (1)** mentioned that:

“As you would recall in 2003, the EU came out with the FLEGT Action Plan. And the centre piece was the VPA negotiations with producing countries. And then I think Malaysia plus all the other stakeholders said that if you ask us to tie our house down with a VPA, other countries without a VPA will continue to be able to sell to the EU without being able to abide by these criteria and procedures. So how do you make sure that there is no discrimination. Under a lot of pressure and also because the US came up with the Lacey Act amendment, the EU was also encouraged to come up with some form of regulation to level the playing field, so to speak, so to make it just as difficult for non VPA countries to enter the EU. So there will be no more free riders”.

Meanwhile, during the EU Stakeholder Consultation on FLEGT VPA held on 22nd May 2014 in Kuala Lumpur, the EU lead negotiator Mr Hugo Schally confirmed that although the EUTR is not part of the Action Plan, it was still considered upon review of the plan, taking into account the immediate need to address illegal logging and its illegal trade and as a measure to stop illegal timber entering into the EU, especially from non-VPA member countries.

Consequently, with the EUTR, the obligation will now be on the operators to exercise due diligence through a system of measures and procedures that

¹⁰³ Please refer to Chapter Four on the details of the coding. The experts views here are referred to views from EFI(1) and EFI(2), representing the European Forest Institute.

will give them sufficient guarantee with regards to legality of imported timber. This is because the EUTR requires its operators to ensure that the timber products that they place on the EU market come from a verified legal source. In this regard, legally produced timber is defined as *“timber products produced from domestic timber that was legally imported into a partner country in accordance with national laws, determined by that partner country, as set out in the Partnership Agreement” (Council Regulation (EC) No 2173/2005)*. In other words, legal timber must be produced in compliance with national laws of the country where it is harvested.

(b) VPA and Timber Regulation Requirements

For a VPA to exist between the EU and a partner country there is a need for a series of negotiations to establish not only a legality assurance system but also the definition of legality, requirements and measures for legality as well as the needs for reform, if any. As such, the process to negotiate a VPA involves a series of mandatory consultations with relevant stakeholders at all levels to allow for an inclusive, participatory and transparent process of development of the VPA and its Annexes (which includes the TLAS). Meanwhile, negotiations on the part of a partner country are usually led by a government ministry or agency that is responsible for the forest sector and timber industry. On behalf of the EU's 28 member countries, the EC in Brussels was given the power to negotiate the VPA legal text and its annexes with partner countries. It is also important to understand that even before negotiations, there are already prior exchanges of preliminary information on the partner country's forestry sector and timber industry and also assessment of the relevance of an agreement between both countries. For Malaysia, informal negotiations began as early as 2003 while formal negotiations began in 2007. MPIC was appointed by the Federal Government to be the lead negotiator for the Malaysia-EU FLEGT VPA negotiations on behalf of Malaysia. To facilitate the VPA negotiation between Malaysia and the EU, a Technical Working Group (TWG) was established to discuss the VPA Legal Text, TLAS as well as market benefits and capacity building respectively. The TWG was established to support the work of the Senior Officials Meeting

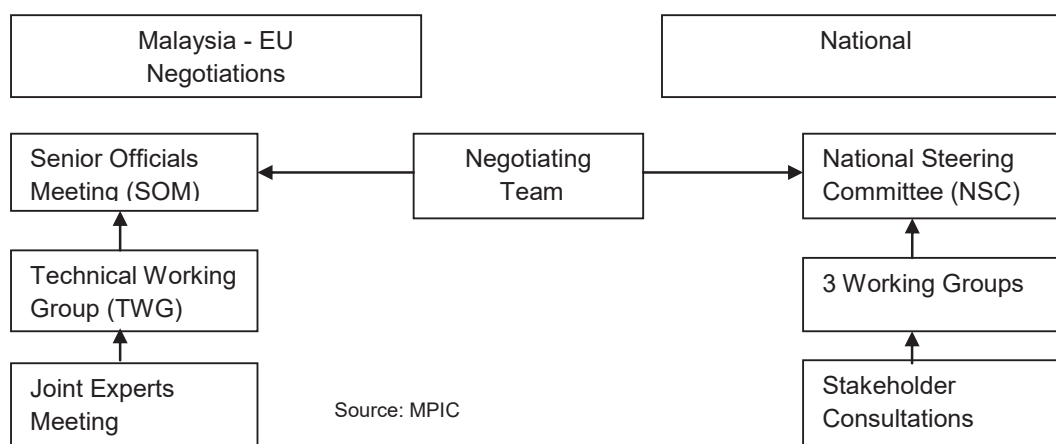
(SOM). Also, to discuss details of technical issues related to TLAS, experts have been appointed from both sides to sit at the Joint Experts Meeting (JEM) and the outcome of the discussions will be reported to TWG for further actions. At the national level, Malaysia established three Working Groups comprising of relevant ministries or agencies from Peninsular Malaysia, Sabah and Sarawak to deal with the legal text, TLAS as well as the market incentives and capacity building accordingly. These groups report to the National Steering Committee (NSC), chaired by the Secretary General of MPIC, from which the Malaysian negotiating team receives its mandate on the issues discussed. Stakeholder consultations are also held to obtain views and comments on issues that will be discussed with the EU.

Under the FLEGT VPA negotiations, stakeholder consultations are a pre-requisite requirement where the EU Council Conclusions on FLEGT (2003/C 268/01) Note provides that VPAs should, *“instigate forest sector governance reforms, more specifically they should strengthen effective participation of all stakeholders, notably of non-state actors and indigenous peoples, in policy-making and implementation”*. Moreover the EU FLEGT Briefing Note 6 (2007)¹⁰⁴ expressly stated that there should be regular consultations with stakeholders during the design and implementation of VPAs. In the case of Malaysia, to further enhance the design and procedure of its stakeholder consultations, during the Second Stakeholder Consultation held on 22nd June 2007, a proposal paper was prepared together by stakeholders providing the outline of the process and structure for the conduct of stakeholder consultations in the framework of Malaysia-EU FLEGT VPA¹⁰⁵. The structure of the negotiations is as in Table 6.3.

¹⁰⁴ COUNCIL CONCLUSIONS, Forest Law Enforcement, Governance and Trade (FLEGT) - (2003/C 268/01), Official Journal of the EU. Retrieved from <http://eur-ex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2003:268:0001:0002:EN:PDF>

¹⁰⁵ See further details on the Second Stakeholder Report on Malaysia-EU FLEGT VPA website. Report available at: http://www.flegtvpamy.com/c/document_library

Table 6.3: Structure of Malaysia-EU FLEGT VPA Negotiations



Meanwhile, the definition of legal timber requires incorporation of laws that address the three pillars of sustainability i.e. economic, social and environment. Therefore, according to the EU, for timber to be considered as legal, it is important that the following exist: (1) rights to harvest within legally gazetted boundaries, (2) compliance with forest management requirements on environment, labour and community welfare that is required by law, (3) compliance with timber harvesting and timber trade related taxes, import and export duties, royalties and fees, (4) user rights and tenure rights and (5) compliance with trade and export procedures¹⁰⁶. As such, through the FLEGT licence, custom officers can now monitor the timber products covered under this agreement at the point of export for producer countries and at the point of import into EU. The EUTR meanwhile, puts the obligation on the operators who place timber and timber products on the market for the first time to exercise ‘due diligence’. What is meant here is that under ‘due diligence’, the operators are required to keep records of their suppliers and customers and also the origin of the timber (i.e. species, volume, country of harvest and information on compliance with national legislation). Meanwhile, the burden is on the operator to assess the risk of illegal timber in his supply chain based on the information given and taking into account the criteria set out in the regulation. This is known as risk assessment and if it is shown during the assessment that risk can be mitigated by requirement of additional information and verification from a supplier of timber and timber products,

¹⁰⁶See details in EU Briefing Note No 2.

then it is up to the operator to ensure appropriate action is taken¹⁰⁷. Therefore, under this system, timber and timber products that are accompanied by a FLEGT license are considered to have been harvested legally and accepted as legal by the EUTR. In this regard, the EUTR is legally binding on all 28 EU Member States where they are responsible to enforce the regulation and to impose effective penalties for any default. This is a requirement, despite each EU member country having its own public procurement policies that require either sustainable and/or legal timber. Apart from that, there is also a requirement for 'Monitoring Organizations' which are private entities and recognized by the EC to provide EU operators with operational due diligence systems and it is up to the operator to use the system developed by the monitoring organizations or to develop a system of their own.

(c) Malaysia's Negotiations with the EU

In the case of Malaysia, discussions on EU FLEGT Action Plan as mentioned above began as early as May 2003 when the then Minister of Primary Industries, Dato' Seri Dr. Lim Keng Yaik met with the European Commissioner for Environment, Mrs. Margot Wallstrom in Brussels. Later in May 2004, together with the EC in Kuala Lumpur, a delegation of EU Member States discussed a proposal for a VPA with Malaysia. However, the announcement to start formal negotiations on a FLEGT VPA between Malaysia and the EC was only made in September 2006 during a Minister of Plantation Industries and Commodities, Economic and Technical Mission to Europe, where a joint statement on a FLEGT VPA between Malaysia and the EU was issued to let the world know that both sides have agreed to start formal negotiations. The first formal meeting between the EU and Malaysia on a FLEGT VPA started in January 2007. It is important to note that according to MPIC, during informal consultations, both Malaysia and EU agreed that: (1) a legal definition of timber would not involve new or amendment of existing legislation, (2) a TLAS would be built upon the current

¹⁰⁷See the EC website for more details on the Timber Regulation at http://ec.europa.eu/environment/forests/timber_regulation.htm#diligence

Malaysian timber licensing system and (3) the EU would provide market benefits and assistance for capacity building¹⁰⁸. To this end, various meetings have been held and to date, three SOMs, eleven TWGs and six JEM meetings were held between both parties to discuss issues related to the FLEGT VPA, specifically TLAS.

There were also several video conferences held to deal with important issues that need discussions and agreement before a formal meeting is held. Apart from the meetings, which involve only government officials who are directly or indirectly involved in the forest sector and timber trade, several stakeholder consultations, industry briefings and discussions with NGOs were held to ensure that the FLEGT process is fully participatory and transparent with inputs from all stakeholders. So far, eleven stakeholder consultations (see Table 6.4 for further details) and several industry briefings as well as discussions with NGOs were held to discuss and to receive views and comments on areas of discussion with the EU such as the definition of legality, TLAS and stakeholder consultation procedures. In this regard, among the areas that have been discussed and agreed with the EU through meetings, consultations and also discussions¹⁰⁹ are the TLAS and draft FLEGT VPA legal text, which will be explained in detail below.

¹⁰⁸ This statement has been provided many times by MPIC officials during briefing and consultations to stakeholders on FLEGT VPA

¹⁰⁹ Information obtained from Reports of Stakeholder Consultations (1-11) from the official website of MPIC on Malaysia –EU FLEGT VPA negotiations. Retrieved from <http://www.flegtvp.my/reports>

Table 6.4: Stakeholder Consultations on FLEGT VPA

No	Date	Venue	Moderator	No of Participant	Agenda
1	6/3/07	Putrajaya	Datu Dr Michael Lunjew	45	Inform stakeholders about EU FLEGT VPA and Malaysia's intention to commence negotiations. Also to discuss issues that need to be addressed
2	22/6/07	Kota Kinabalu	Datu Dr Michael Lunjew	76	i) Process and structure for stakeholder consultation ii) Definition and upstream issues on timber trade and licensing system; and iii) similar issues in (ii) but for downstream
3.	15/11/07	Kuching	Dato' Dr Freezailah Che Yeom	104	Definition of legal timber. Principles and criteria for legal timber, details of Control Procedures for TLAS
4	17/03/08 to 18/03/08	Kuala Lumpur	Datuk. M Supperamaniam	124	Follow-up discussion on 3 rd Consultation in Kuching on TLAS
5	11/08/08 to 12/08/08	Kuala Lumpur	Dr. Sanath Kumaran	89	Update for VPA negotiations, Independent Market Monitor for TLAS and issue related to market access. Discussion on TLAS, Technical evaluation of TLAS
6	08/07/11	Kuala Lumpur	Emeritus Prof. Dato' Dr. Abdul Latif Muhamad	99	Update on VPA negotiations, EU Timber Regulation and TLAS
7	26/04/12	Kuala Lumpur	Emeritus Prof. Dato' Dr. Abdul Latif Muhamad	99	Update on VPA negotiations and outstanding issues; update on TLAS; study on "Mechanisms to strengthen coordination for the implementation of Malaysian TLAS"
8	31/07/12	Kuala Lumpur	Emeritus Prof. Dato' Dr. Abdul Latif Muhamad	114	i. Product scope ii. TLAS for expanded product scope iii. Information for public disclosure
9	14/01/13 to 15/01/13	Kota Kinabalu	Dr John Tay	76	To discuss on the TLAS for Sabah
10	27/02/13	Kota Kinabalu	Frederick Kugan	73	To discuss the TLAS of Sabah, revised according to the discussion with the EU at the 4 th JEM
11	28/03/13	Kuala Lumpur	Emeritus Prof. Dato' Dr. Abdul Latif Muhamad	153	To discuss the TLAS for both Peninsular Malaysia and Sabah which were revised based on the discussion with EU expert's at the 5 th JEM

Source:MPIC

Timber Legality Assurance System (TLAS)

It has been agreed generally between Malaysia and the EU that the principles of TLAS will focus on legality and not sustainability and will be based on Malaysia's existing laws and procedures governing forest

harvesting, mill processing and trade of timber and timber products. Meanwhile the definition of legality has been agreed as follows:

“Timber harvested by a 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.” sitc

Furthermore, the TLAS contains six agreed principles and various criteria which are formatted in a tabulated form detailing the Principle, Criteria, Legislative Reference, Responsibility, Verification Procedures and Output (Appendix G provides the definition of each element in a tabulated form). The six Principles are Right to Harvest, Forest Operations, Statutory Charges, Other Users’ Rights, Mill Operations, Trade and Customs. In determining whether timber and timber products produced and exported from Malaysia meet the Principles and Criteria of Legal Timber as outlined in Annex B of the TLAS, verification procedures which are described in the various tables for each of the three regions in Malaysia, will apply. Specifically for Peninsular Malaysia, there are 24 tables¹¹⁰, with principles and criteria that need to be complied, starting from harvesting to processing and exporting the timber and timber products. Table 6.5 indicates an example of a table in Peninsular Malaysia’s TLAS¹¹¹.

¹¹⁰ Sabah has 18 tables while Sarawak has yet to finalize a TLAS.

¹¹¹ The details of the TLAS can be obtained from the Protem Secretariat Malaysia’s website i.e. [http:// www.protemsec.org](http://www.protemsec.org)

Table 6.5: Example of Table 2 of Peninsular Malaysia's TLAS

Region	PENINSULAR MALAYSIA	Sources of timber	PF, SL & AL
Principle 1	Right to harvest		
Criterion	<p>Issuance of harvesting licence</p> <ul style="list-style-type: none"> Any company or person wishing to take or remove forest produces from a forest area need to have a valid harvesting licence. The issuance of a harvesting licence is subject to: <ul style="list-style-type: none"> Approval of forest harvesting area (Table 1 and Table 16) Approved EIA study (Table 4 and Table 5), if applicable Approved Forest Harvesting Plan (Table 6) Demarcation of harvesting area (Table 7) Pre-F inventory (Table 8), or Pre-F Assessment (Table 9) Tree marking (Table 10) Payment for premium and other fees imposed (Table 15) 		
Legislative Reference	<ul style="list-style-type: none"> National Forestry Act 1984 (Section 19) State Forest Rules (Rule 11) Forestry Manual 2003, Volume II 		
Responsibility	State Forestry Department (SFD) – issuance of harvesting licence		
Verification Procedure	<ul style="list-style-type: none"> i. SFD checks that the applicant or the forest area has met all the necessary requirements described under this Criterion ii. If all the conditions are met, SFD issues the harvesting license <p>Frequency: The verification procedure applies each time when a harvesting license is issued.</p>		
Output	Harvesting licence		
ISO Reference	-		

Source: Protem Secretariat

As such, these principles and criteria apply to the three categories of land in Malaysia where logs are harvested i.e. PRF, SL and AL. It is important to understand that since 80% of Malaysia's total log production are harvested from uncertified PRF, SL & AL, there is a need for a TLAS to assure legality of logs harvested from SL, AL and uncertified PRF. Thus, through a VPA, Malaysian timber from uncertified PRF, SL and AL will also be recognised as legal. This is an important feature of TLAS as certification through MTCS/PEFC or FSC for SFM only applies to PRF. Furthermore, unlike TLAS, certification covers principles and criteria that go beyond what is

required by the law as it also includes principles and criteria of forest sustainability based on forest management plan (the differences between certified and legal timber is as in Appendix H).

Also, taking into account that land and forests are under jurisdiction of each state in Malaysia and the regional differences in legislation and related procedures for forest and timber trade for Peninsular Malaysia, Sabah and Sarawak (see Chapter Five for further details), TLAS has been developed on a regional basis. Noting the fact that the three different regions have different issues and concerns with regard to TLAS, Malaysia had decided that the implementation of TLAS will be in phases with Peninsular and Sabah in the first phase followed by Sarawak in the second phase (date of submission and implementation of TLAS to be confirmed once ready). However, this dissertation, as mentioned in Chapter One will only focus on the developments and effect of the forest sector and timber trade of Peninsular Malaysia. Also, to ensure the credibility and acceptability of TLAS, not only in the national but also in the international arena, both parties have agreed on the importance of a TPM to monitor the compliance of the TLAS throughout its supply chain of exported timber and timber products.

Of course, various concerns and views¹¹² were raised by stakeholders throughout the process of development of a definition of legality, TLAS as well as other areas of the FLEGT VPA negotiations. Specifically some industry members felt that the laws, regulations and procedures in TLAS are too excessive and burdensome while some NGOs were of the view that it was not adequate to reflect social and environmental issues. Among the areas of disagreement are:

¹¹² Issues and concerns listed are obtained during the stakeholder consultations, briefings and dialogues, where I attended as a part of the MPIC Secretariat for the FLEGT VPA negotiations and at the later stages as an observer.

- (i) Concern raised by NGOs in general on the consultation process i.e. lack of communication, improper documentation and lack of transparency as well as participation of non-governmental stakeholders throughout the process
- (ii) NGOs in general stressed the need for more laws related to environment, labour and workers safety and health to be included in TLAS
- (iii) Definition of legality according to social NGOs should take into account native or aboriginal territorial boundaries and claims (land claims) as well as other environmental and social legal framework
- (iv) TLAS according to social NGOs should also include the ruling of Federal Constitution, common law and the principles of natural justice in relation to Native and Aboriginal rights. This includes timber harvested from areas that are subjected to their claim to be declared as illegal
- (v) Industry views the demands of social NGOs as too superfluous to be included in TLAS as it goes beyond the issue of legality i.e. native and aboriginal rights and for more laws related to environment, labour and workers, safety and health issues
- (vi) Some industry members felt that the TPM will be undermining the integrity of Malaysia's sovereignty and therefore Malaysia should not be subjected to any checks on its practices of forest management and
- (vii) Industry is of the opinion that since the implementation of TLAS will incur additional costs; green premium should be awarded for FLEGT licensed timber.

In this regard on the concerns and views raised, MPIC as the lead negotiator has responded that¹¹³:

- (i) By taking into account stakeholders comments on the consultative process, the Ministry had gradually improved the whole process through: (1) announcement and invitation to meetings, (2) financial support to facilitate participation with EU funds, (3) choice of independent moderator, (4) circulation of draft record of meetings and (5) adequate time to receive comments after which amendments are made, where appropriate
- (ii) The VPA process is not the right forum to articulate views and to make decisions on native or aboriginal territorial boundaries and claims as any changes to the laws or procedures should be decided at appropriate forums and by relevant State Authorities who are the custodian of land and forest issues
- (iii) TPM is necessary for credibility purposes and furthermore such an auditing practice has always been an accepted principle in forest management, and is also an integral component of the certification process under MTCS/PEFC
- (iv) Laws and procedures in TLAS are currently based on those that are being practiced from the moment the licence is issued, timber is harvested and right through export and
- (v) Additional costs on the implementation of TLAS should not be incurred if industry has been operating according to the stipulated rules and procedures.

¹¹³ *ibid*

In this regard, to assess the auditability, adequacy and workability of the legislation and regulations listed in the TLAS, a joint technical evaluation was conducted on the TLAS by three international & three Malaysian consultants from 2nd September 2008 till 9th October 2008. The purpose of the evaluation was to look into capacity building needs in order to ensure effective implementation of the TLAS, effectiveness of the TPM and also cost implications for the implementation of the TLAS as a whole. As such, the consultants in general had identified several issues that required action to be taken by Malaysia and on this basis, discussions were held with the EU. According to MTIB¹¹⁴, most of the issues have been resolved with appropriate amendments being made to the TLAS. However, certain issues identified require more time and resources to be resolved such as: (1) data reconciliation, (2) linkage between verification procedures and the issuing of the FLEGT licence and (3) procedure for designating land use and issues related to timber import.

FLEGT VPA legal text

The legal text discussion revolves basically on issues related to commitments by both Malaysia and the EU to ensure effective implementation of legality and in the long term sustainability of Malaysian forest sector and timber trade. Among the commitments are:

- (i) Agreement towards long term commitments on SFM and indigenous people (responsibility of Malaysia)
- (ii) Implementation of a TLAS to verify that timber products for shipment have been legally-produced and that only shipments verified through a FLEGT licence are exported to the EU market (responsibility of Malaysia)

¹¹⁴ Inputs obtained from the presentation slide by MTIB on 'Update on the Malaysia TLAS' during the 6th Stakeholder Consultation in Kuala Lumpur, 8th July 2011.

- (iii) Regular stakeholder involvement in the implementation of the agreement (responsibility of Malaysia)
- (iv) A TPM shall be appointed to monitor the TLAS, so as to provide independent assurance to all interested parties that the TLAS is functioning in accordance with the provisions set out in the agreement (responsibility of Malaysia)
- (v) There is a need to identify areas for technical and financial resources in order to implement the Agreement (responsibility of both Malaysia and EU)
- (vi) To provide market assistance to promote the marketing of FLEGT timber in the EU market (responsibility of EU)
- (vii) Upon Malaysia's request, the EU has agreed to an Independent Market Monitor (IMM) to assess the anticipated market benefit performance of Malaysia's FLEGT-licensed timber in the EU market (responsibility of EU)
- (viii) A Joint Implementation Committee (JIC) will be established after the signing of the VPA to monitor the overall progress of the implementation of VPA. There will also be a Reporting Body (RB) established to coordinate and monitor the work of the TLAS, TPM and IMM. The RB will assume an advisory role and will report directly to the JIC, which will be the decision making body (responsibility of both Malaysia and EU) and
- (ix) Working of JIC should be made as transparent as possible where a yearly report should be issued publicly; listing among others information on quantities of timber products exported and cases of non-compliance with the FLEGT Licensing Scheme (responsibility of both Malaysia and EU).

(d) Current Status of the Malaysia-EU Negotiation

Despite the above progress and eight years of formal intensive negotiations with the EU, as well as several stakeholder consultations, negotiations on FLEGT VPA have yet to be concluded. MPIC had mentioned that during several occasions of stakeholder consultation or briefings, negotiations are now in the final stage of being concluded. However, to date, there is yet to be any sign of it being concluded. On this issue specifically, **PA(1)**¹¹⁵ mentioned that the delay is mainly due to the long consultation process with State Governments that need to be convinced that their rights over the forest will not be affected and the extra measures and cost, if any, will not be burdensome to the states. If we take into account Peninsular Malaysia itself, the Federal Government needs to convince eleven State Governments and this will take a long and tedious process. There is a need to go through various briefings, consultations and meetings with the State Governments, the implementers on the ground i.e. the Forest Department officials, then the State EXCO members and finally the Chief Ministers with the blessing of the Heads of the States. According to **A(2a)**¹¹⁶, currently Selangor State poses a challenge to the FLEGT VPA negotiations as they decided not to accept the whole process (important to note that there is no more logging in the state), while the other states in Peninsular Malaysia have given their blessings on the conclusion and signing of the agreement provided that they are given capacity building. Therefore, this requires another round of consultation to convince the Selangor State of the benefits of the agreement to the state and the country as a whole.

Meanwhile on the part of the EU¹¹⁷, it was felt that the delay was mainly due to the lack of political will, complicated internal Malaysian structure and also the organisation of stakeholder consultations as well as the lack of firmness on the part of the EU in negotiations. **ED** stated that the long negotiation

¹¹⁵ Please refer to Chapter Four on the details of the coding. PA(1) refers to government official from MPIC involved in the policy administration and negotiation of FLEGT VPA.

¹¹⁶ A(2a) refers to government official from MTCC.

¹¹⁷ Statement by EU officials: (1) ED refers to expert that was previously from the European Delegation in Malaysia who was involved with the Malaysia-EU FLEGT VPA negotiations and (2) EU(1) refers to the lead negotiator of the FLEGT VPA from the EC in Brussels.

process had diminished the credibility of the whole FLEGT VPA process. It is believed that what was lacking on the Malaysian side was maybe a stronger push from the government, the political will to conclude this agreement despite the possibly negative (political) consequences from certain quarters in Malaysia. Therefore, it was stressed that negotiations of any bilateral agreement, be it a VPA, FTA or any other similar agreements, which may change to a profound extent the local practices and legislation, will never be an easy process but it is the responsibility of the government to show strength and will when it is in the best interest of its people, business and nature. To this end also, **EU(1)** had this to say:

I think what we perceived to be the biggest challenge on the Malaysian side and on our side was the organisation of the stakeholder consultation. And I think that it took a very long time for Malaysia and ourselves to work on the common understanding on what that should be. I think that certainly was difficult. From our side, it was certainly a challenge to deal with the complicated internal Malaysian structures and I think that it was for us as we gradually came in. ...understanding those things was really difficult and what probably was missing or was lacking was the common understanding on what we were actually trying to achieve because for a very long time Malaysia saw the negotiations exclusively as a sectoral trade deal and I think for them—for our partners—it was not obvious (but) that for us—for the EU—the trade component was a driver for such an agreement but not necessarily the whole result. Well, I think perhaps we were not talking about the same thing for some time. And we probably didn't have, for the first 2, 2 1/2 or 3 years, a very clear and transparent relationship in the negotiations between us and that doesn't help. I think it was not out of bad will but it is that we needed a very long time to get to the bottom of our cause.

Nonetheless, currently intensive discussions are held with Forestry Departments in each state in Peninsular Malaysia and also with each State Government, taking into account that land and forest issues are under State Government. According to MTIB¹¹⁸, discussions with State Governments focus on the objectives of the Malaysia-EU FLEGT VPA

¹¹⁸ See MTIB website for further details ; www.mtib.gov.my

process, its economic benefits especially to the timber industry, the role of states in implementation of the TLAS and capacity building needs and benefits of the implementation of TLAS. Such intensive consultations are held possibly because in implementing the FLEGT VPA, serious commitments and resources are required by all states to ensure its effectiveness and strong political commitments are also required from political leaders in each state. Furthermore, out of the 24 tables of principle and criteria under TLAS, 16 tables are under the purview of State Forest Departments.

As such, it is important that Federal Government through MPIC obtain commitments from the states and strike a balance between the interests of all stakeholders by having continuous discussions especially on TLAS. This is in accordance with Putnam's analysis that stresses the importance of striking a balance between groups that pursue their interests by pressuring the government to adopt favourable policies and in Malaysia's case, the State Governments, the timber industry and the NGOs each have their own agenda. Thus, apart from satisfying domestic stakeholder pressure, the Federal Government needs to find ways to meet the international demands for legal and/or sustainable timber while minimizing the adverse consequences of such demands on all relevant stakeholders. Therefore, at the end of the day, it is not surprising that negotiations are taking a long time and as mentioned in Chapter Five, the Government of Malaysia had decided to implement the TLAS as MYTLAS, beginning 1st February 2013, purely as Malaysia's own initiative in order to meet the EUTR requirements of 'due diligence' solely for Peninsular Malaysia (refer to Chapter Five for the details on MYTLAS). The strong dissonance on the FLEGT VPA negotiations between both parties and its main cause will be further discussed in Chapters Seven and Eight. On the implementation of MYTLAS, **A(3b)**¹¹⁹ who is an expert of the European market stated that:

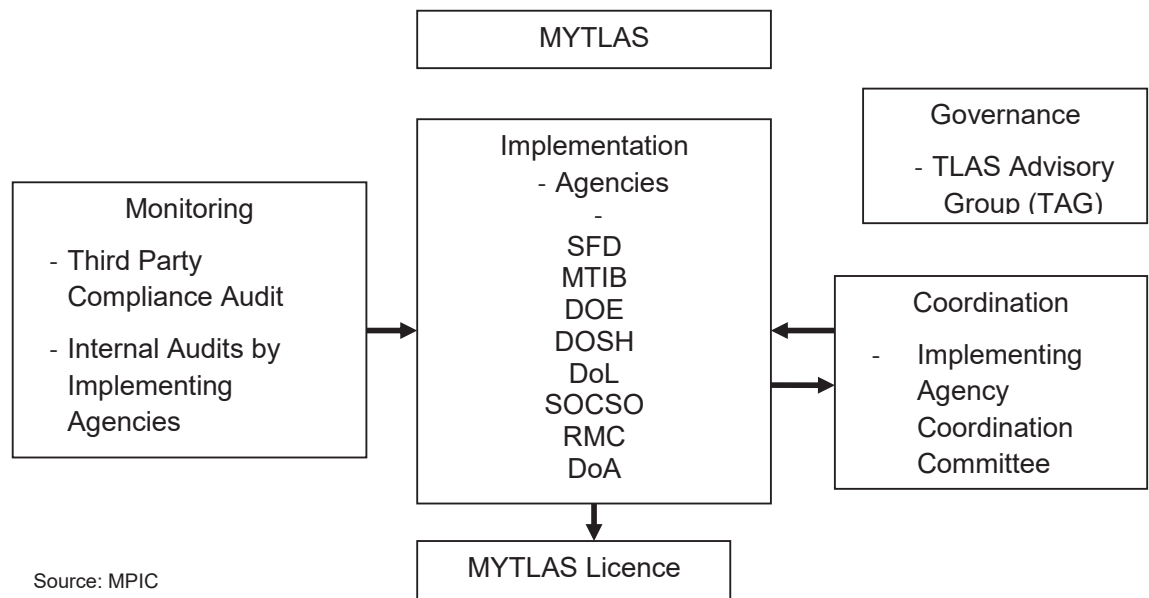
¹¹⁹ A(3b) is referred to as an official from MTC and is currently attached to the London MTC office and is in-charge of the Europe desk for timber

“Naturally, industry supporters and European buyers would wish to see Malaysia finalising the VPA so that it gives them the unfettered right to continue purchasing from (preferably) the whole of Malaysia. They are also however, aware of the internal political complications and are very sympathetic to our cause. The anticipatory implementation of the MYTLAS (or to be politically correct, the TLAS on Peninsular Malaysia) was very welcomed by the European industry as a much needed and critical tool to assist them in meeting their Due Diligence requirements under the EUTR”.

Meanwhile, to support the implementation of MYTLAS, an IACC and TAG have been established. The IACC, which is chaired by MPIC, comprises members from eight implementing agencies listed in the TLAS¹²⁰ while the TAG, which has an advisory and governance role, comprises of members from NGOs (social and environment), industry groups as well as forest experts. Also, to ensure robustness of the TLAS, a Compliance Audit based on a set of established checklists and guidelines developed by another independent consultant was conducted in March 2013 by an independent third party auditor (SIRIM QAS). In this regard, the report of the Compliance Audit according to MPIC demonstrated a high level of compliance of the criteria in the 24 tables of the TLAS. The implementation of the TLAS that involves agencies under five Ministries i.e. MPIC, MNRE, Ministry of Finance (MoF), Ministry of Agriculture and Agro Based Industry and Ministry of Human Resources is in Table 6.6 below.

¹²⁰ The agencies are State Forestry Departments, Malaysian Timber Industrial Board (MTIB), Department of Environment (DoE), Department of Occupational, Safety and Health (DOSH), Department of Labor (DoL), Department of Agriculture (DoA), Social Security Organization (SOCSO) and Royal Malaysian Customs (RMC)

Table 6.6: Implementation Structure of TLAS



(e) Implication for Peninsular Malaysia's Forest Sector and Timber Trade

(i) Trade and Market Access

Peninsular Malaysia's exports of timber and timber products to the European market have seen a declining trend over the years (refer Table 6.7 below) from RM3.06 billion in 2007 to RM 2.036 billion in 2014, a significant decrease of 33.46%. Currently the UK, Netherlands, Germany, Belgium and France are the main export markets for Peninsular Malaysia's timber and timber products. Even though UK remained as the main EU export destination for Peninsular Malaysia's timber and timber products over the years, there has also been a declining trend of trade from RM 0.88 billion in 2007 to RM 0.73 billion in 2014 and this trend is the same for the other major export markets.

**Table 6.7: Peninsular Malaysia's Export of Timber and Timber products
to the Major EU Countries; 2007- 2014 (RM billion)**

Destination	2007	2008	2009	2010	2011	2012	2013	2014
Grand Total	3.06	2.89	2.36	2.33	2.03	1.90	1.66	2.036
UNITED KINGDOM	0.878	0.901	0.824	0.822	0.662	0.719	0.615	0.729
NETHERLANDS	0.610	0.589	0.433	0.414	0.393	0.288	0.281	0.372
GERMANY	0.285	0.281	0.238	0.227	0.210	0.228	0.162	0.192
BELGIUM	0.201	0.182	0.167	0.163	0.175	0.175	0.158	0.168
FRANCE	0.227	0.153	0.138	0.156	0.157	0.140	0.138	0.124
DENMARK	0.09	0.09	0.067	0.063	0.058	0.056	0.052	0.046
POLAND	0.046	0.069	0.049	0.053	0.05	0.042	0.041	0.047
SWEDEN	0.039	0.047	0.038	0.044	0.037	0.036	0.029	0.029
ITALY	0.117	0.153	0.106	0.097	0.078	0.047	0.028	0.28
IRELAND	0.100	0.075	0.049	0.04	0.023	0.022	0.024	0.28
SPAIN	0.112	0.098	0.064	0.068	0.043	0.029	0.024	0.028
FINLAND	0.048	0.062	0.036	0.034	0.023	0.020	0.019	0.021
LITHUANIA	0.0098	0.0169	0.0076	0.0082	0.0013	0.0017	0.0018	0.017
LATVIA	0.012	0.021	0.014	0.015	0.018	0.022	0.015	0.02
GREECE	0.057	0.052	0.037	0.029	0.020	0.016	0.015	0.019

Source :MTIB

Such a declining trend for the exports to the European market could be caused by factors such as the global economic slowdown in 2009 and the euro crisis that erupted in Greece in 2012. However, one important reason could be that Europe has always been a sensitive market that is concerned with the source of timber and the production process of timber products that enters its market and as such, demands some form of certification or verification of sustainability and/or legality. Such demands for sustainable and/or legal certification pose a challenge for Malaysia's export of timber and timber products into the European market as certification or verification itself can be a costly affair. For example, the cost for assessment of forest management and CoC ranges from RM 48,000 to RM 124,400. Apart from that, it cost about RM 26,600 to RM 45,000 for surveillance audit by an FMU to ensure continuous compliance with certification standards. Meanwhile, the professional fees for assessment conducted may vary from RM 1,200 to RM 2,260 per man per day. Also, it costs about RM 4,000 to RM 6,000 for a CoC Certification and RM 3,000 for its surveillance audit (Wong, 2004). Apart from that, legality verification also requires mandatory compliance of forestry and

timber related laws or regulation of harvesting countries and this also has costs implication that needs to be adhered to.

According to Baharuddin (2010)¹²¹, the Malaysian forestry sector would likely face financial burden by fulfilling the VPA in terms of meeting the documentation requirements of a new reporting system, institutional restructuring mainly for increasing the security of forest resources and strengthening enforcement i.e. human resource and facilities. However, it is interesting to note that specifically for the year 2014, the overall export to the EU as well as to individual major markets have recorded an increase from the previous year, 2013. According to **A(2a)**¹²², this could be attributed the fact that the European importers are receptive to the MYTLAS issued by the Malaysian authorities since February 2013 which provides the required information on the legality of the exports (refer to Chapter Five for details of the MYTLAS).

(ii) **Government policies**

There are no policy changes required for Peninsular Malaysia's forest sector and timber trade due to the FLEGT VPA negotiations. This is because according to MPIC¹²³ who is the lead negotiator for Malaysia, the legality definition under FLEGT VPA does not involve enactment of new laws or amendments to existing legislations. Therefore, Malaysia's definition of legality and its legality assurance system have been developed based on its existing laws and regulations. In this regard, the definition of legality for the Malaysia-EU FLEGT VPA has been proposed by MPIC to be as follows:

¹²¹ An article submitted for the purposes of ITTO Tropical Forest Update Volume 19 No 3, a newsletter that is published quarterly to promote conservation and sustainable development of tropical forests.

¹²² A(2a) is part of the Malaysian FLEGT VPA negotiating team. Views were obtained during informal discussion in April 2015.

¹²³ Statement made by MPIC during its consultation with the Malaysian Timber Industries on 27th September 2012.

“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”- sitc

However, it is important to note that this may not be the same in the case of other EU partner countries as the development of a VPA depends on the negotiation stance and sustainable development progress of each partner country. For example in the case of Cameroon, it was stated that to implement a timber tracking system, there is a need for legal amendments prior to the enforcement of the FLEGT-VPA (ITTO Tropical Forest Update 22/2, 2013). Malaysia, upon agreeing to negotiate a VPA in 2006, had clearly mentioned to the EU that its legality definition and legality assurance system will be based on its current and existing laws and regulations, which are said to be sufficient to prove legality of the exports of its timber. Furthermore, in terms of SFM, Malaysia has always been advocating such practices in its forests. This is clearly indicated in its laws and regulations as mentioned in Chapter Five. Specifically for Peninsular Malaysia, the NFP 1978 (revised 1992) has two main objectives i.e. to conserve and manage the nation's forests based on the principles of SFM and to protect the environment as well as to conserve biological diversity, genetic resources and enhancing research and education. Section 10 of the NFA allows for PRF to be classified into twelve forests functional classes (such as Timber Production Forest under sustained yield and Soil Protection Forest) for effective contribution to livelihood and to further promote SFM taking into the multifunctional roles or uses of forests. In this regard, according to the Director General of Peninsular Malaysia's Forest Department, the ITTO definition¹²⁴ of SFM has been adopted and practiced in Peninsular Malaysia in terms of Permanent Reserved Forests (4.92 million ha), which are managed sustainably for purposes of production and also protection. Therefore, under the FLEGT VPA negotiations, Peninsular Malaysia specifically has always maintained that its PRF is managed sustainably and

¹²⁴ See Chapter 2, Pg 41 for definition of SFM under ITTO

its timber and timber products are produced legally where the laws and regulations provide for such practices.

However, for the FLEGT VPA and its TLAS purposes, all that is required is to list relevant laws and regulations through a system such as the TLAS in order to be more transparent as well as to cater for timber that is harvested from uncertified PRF, SL and AL, which is not part of SFM management. As mentioned above, since the FLEGT VPA negotiations are taking a long time to be concluded, corresponding with the EUTR being enforced as of March 2013, Malaysia had decided to launch the TLAS developed with EU as MYTLAS.

(iii) Level of Stakeholder Involvement

Just like the timber certification process for standard setting under MTCS, the FLEGT VPA also requires involvement of all relevant stakeholders in its negotiation process and also at the later stage of its implementation. It is important to understand that this is part of the condition laid down by the EU as one of the main criteria of the FLEGT VPA process (EU Council Conclusions on FLEGT-2003/C268/01). According to Ozingka (2011), the nature of a multi-stakeholder process under FLEGT VPA negotiations is what makes it unique. It is understood that the negotiations between the EU and Malaysia although at a government to government level, still require the approval of national stakeholders, including NGOs, forest dependent communities, indigenous people and the timber industry. As such, in the case of Malaysia, to ensure an open, participatory and transparent process during its FLEGT VPA negotiations, stakeholders (i.e. environmental and social NGOs, academicians, industrial groups, government ministries or agencies and worker unions) have been briefed and consulted regularly on issues related to the FLEGT VPA negotiations and specifically on the development of TLAS. However, this may be subjected to dispute by the NGOs, as will be explained in detail in Chapter Seven.

In fact, during the Second Stakeholder Consultation, the procedures for consultation as mentioned above have been laid down and Malaysia had also obtained from the EU funding for the stakeholders to attend consultations or briefings. Thus far, there have been eleven Stakeholder Consultations and several briefings with government officials, industry members and NGOs held since the start of formal negotiations in 2007. Apart from that, stakeholders are also given access to other forums to provide views and/or comments or to even criticise the FLEGT VPA issues or process through written submissions or memorandums, dialogues with the Minister of Plantation Industries and Commodities and other informal meetings. Also, during the Joint Technical Evaluation of TLAS in 2008, consultants appointed to conduct the evaluation are given the opportunity to consult stakeholders to obtain their views on the implementation of the TLAS.

Meanwhile, stakeholders are invited based on past experiences involving consultations on various forums at regional and national levels, including the development of MTCS/PEFC certification standards in Malaysia. These consultations, briefings and dialogues have been held on a rotational basis within the three regions to ensure broad participation of stakeholders. Apart from the national level stakeholder consultations, smaller consultations were also held to develop project proposals on capacity building with relevant stakeholders together with focused consultations of different interest groups on specific matters. Furthermore, during the implementation of the VPA, stakeholders will be given the opportunity to voice their concerns or views to the Reporting Body (RB) that will be established to monitor the implementation of the VPA. The RB will report to the JIC to be represented by both the Malaysian and the EU officials

Nonetheless, although there are forums provided for stakeholders to be involved in the FLEGT VPA process, some stakeholders had expressed their dissatisfaction on the FLEGT VPA negotiations. Specifically, during the Fourth Stakeholder Consultation (17-18 March 2008) in Kuala Lumpur, the

NGO coalition (*JOANGOHutan- Jaringan Orang Asal & NGO tentang Isu-Isu Hutan/Network of Indigenous Peoples & NGOs on Forest Issues and JOAS - Jaringan Orang Asal SeMalaysia / The Indigenous Peoples' Network of Malaysia*) staged a walkout due to dissatisfaction of being marginalised by the way the Native Customary Rights (NCR) issues were handled. They later submitted a memorandum to both the Malaysian and EU officials stating their dissatisfaction with the whole negotiation process and specifically on the refusal to discuss NCR as part of the FLEGT VPA process¹²⁵.

It is important to understand that each stakeholder has their own agenda to address i.e. the environmental NGOs will certainly stress on environmental issues, the social NGOs will stress on social issues while the industry will focus on economic benefits. MPIC as mentioned above had stated that it is important to ensure that a balance is struck on the economic, social and environmental issues so that the rights of all parties are taken into account. Also according to MPIC, the FLEGT VPA is not the right forum to articulate NCR issues. It is important that the rights of all stakeholders be taken into account where there is need for a balanced approach. However, to date, the above NGO Coalition has yet to join any of the subsequent stakeholder consultations since the Fourth Consultation despite invitations issued and information on progress provided. Nonetheless, they have, in memorandums and various forums (national or international), continued to express their dissatisfaction on the Malaysian-EU FLEGT VPA process. The details will be explained in Chapter Seven. However it is important to note that the rest of the environmental and social NGOs such as the WWF, Malaysian Nature Society and Peninsular Malaysia Orang Asli Association still continue to participate in the subsequent consultations.

What is also interesting here is that each consultation requires and demands constant improvement to its future processes and this is according to MPIC,

¹²⁵ Further details of the dissatisfaction can be obtained from the NGO Coalitions submission entitled "STATEMENT ON THE SIGNING OF THE FLEGT VPA".

which is taken into account. For example moderators who were once appointed from the government circle are now appointed from the NGO circle to ensure transparency and credibility of the whole process. Also to ensure more issues are covered and to allocate more time for deliberation and discussions among stakeholders, the consultations have been extended to two-days rather than a one-day event.

(d) Issues and Opportunities for Forest and Timber Institutions and Administration

The FLEGT VPA process has provided various opportunities for improvement of institutions and administration of the Malaysian forest sector and timber trade especially in terms of the implementation of TLAS. Baharuddin (2010) is of the view that the support program funded by the EU enables partner countries to strengthen their *“forest administration such as by upgrading enforcement capacity, increasing field monitoring and improving governance and transparency”*, which is the main incentive on why tropical timber producer or exporter countries agree to enter into a FLEGT VPA negotiation¹²⁶.

Therefore, in the case of Malaysia, the EU had provided support in the form of the German-Netherlands Fund (made available from 2008-2011) and the EU FLEGT Support (to be made available upon signing of the agreement).

(i) *German-Netherlands Fund*

In support of the on-going FLEGT negotiations, the EU had provided support for capacity building in terms of technical assistance and also funding (available until 2011) through the joint finance of the Federal Republic of Germany (Federal Ministry for Economic Cooperation and Development) and the Government of Netherlands (Ministry of Agriculture, Nature and Food Quality and the Ministry of Foreign

¹²⁶ Baharuddin Ghazali (2010); Malaysia and the VPA; ITTO Tropical Forest Update (19/3).

Affairs). This fund was managed and disbursed jointly by the German Technical Cooperation on the EU side and the MTC on the Malaysian side. MTC was appointed by MPIC as the Executing Agency not only to co-manage the fund but also to coordinate the programs on the Malaysian side.

The projects¹²⁷ that were approved for funding are: (i) FLEGT VPA Stakeholder Consultations, (ii) establishment of the PROTEM Secretariat—an initial phase, (iii) Sabah Independent Auditing of SFMLA, (iv) Capacity Building towards OSH Management System Implementation in the Logging and Primary Wood Based Industries in Sabah, (v) Establishment of a FLEGT Unit in Sabah Forestry Department, (vi) Enhancing Environmental Management by Way of Strengthening the Compliance of Logging Operators to the Environmental Conditions in Sabah and (vii) Cost Analysis in the Implementation of Tagging and Scaling of Trees in Forested State Land and Alienated Forest Land in Peninsular Malaysia.

Specifically on the stakeholder consultations, through this funding, various stakeholder consultations were held to consult stakeholders on the key elements of the VPA and other related issues to promote FLEGT VPA from March 2008 to December 2011. Apart from that, there were also funds made available for stakeholder participation where financial assistance was given for transportation and accommodation of stakeholders to attend the consultation. Meanwhile, the PROTEM Secretariat was established to prepare and develop institutional structures that are necessary for the successful implementation of TLAS and the EU-Malaysia FLEGT VPA. The fund was only made available until 2011 where after that, the Government of Malaysia through MTIB has taken over the overall funding and management of

¹²⁷ See further details of projects MTC Newsletter Vol 1, June 2010 – Capacity Building Projects in Malaysia under the FLEGT VPA German-Netherlands Support Program. Retrieved from www.mtc.com.my/issues/images/stories/flegt-newsletter-vol1.pdf

the project. Before that, MTIB had provided only one executive, supporting staff, office space and equipment, meeting organisation and secretariat facilities and documentation as well as information exchange. As such, the PROTEM Secretariat is basically an interim arrangement as it is expected to function as the RB upon signing of the FLEGT VPA. It is anticipated that the RB will report to the JIC and provide administrative and technical support, coordinate with the verification bodies and enforcement agencies, receive reports from the TPM and IMM and to communicate, where appropriate, to the public.

(ii) *EU FLEGT Support*

The EU had previously allocated a EURO 4 million fund for capacity building projects upon the signing of the VPA. However, since negotiations between Malaysia and the EU have been on-going for a long time, the fund is now no longer available for Malaysia as the EU budget procedure does not allow for extension any longer.

(iii) *European Forest Institute (EFI) funded project*

The EFI, FLEGT Asia Regional Program based in Malaysia, aims to promote good forest governance, contribute to poverty eradication and sustainable management of natural resources in Asia, through direct support of the implementation of the EU's FLEGT Action Plan. This Institute has provided funds to the Malaysian stakeholders to conduct research on the Malaysian Stakeholder Consultations and also on the TLAS. As a consequence, two studies have been published i.e. the Mapping of Forest and Forest Related Stakeholder Consultations and Mechanisms to Strengthen Coordination for the Implementation of Malaysia's TLAS.

6.3.2.3 THE AUSTRALIAN ILLEGAL LOGGING PROHIBITION ACT /REGULATION

(a) *Historical and Current Perspective*

In 2005, a study on the “*Overview of Illegal Logging*” done for the Australian Government (Department of Agriculture, Fisheries and Forestry–DAFF) had indicated that the potential volume of illegally sourced forest and wood products is around AUD\$400 million annually (9% of the total import) and it consist mainly of wooden furniture, miscellaneous wood products (doors, moulding), paper and paper boards, sawn timber and wood based panels¹²⁸. In 2007, the Australian Labor party during its election campaign had pledged to restrict imports of illegally logged timber into Australia and illegally logged domestic timber. Meanwhile, during the 2010 election, there were commitments made to introduce legislation to make it an offence to import or process timber that has been illegally logged. Thus, according to the Australian DAFF¹²⁹, following the 2007 election, a research was commissioned to address the issue of illegal logging and for policy development. Following that, on 9th December 2010, a framework on how to implement the policy to combat illegal logging was announced by the Minister for Agriculture, Fisheries and Forestry, the Honorable Joe Ludwig. Therefore, after intensive consultations with their stakeholders and taking into account the commitments to legislation, an Illegal Logging Prohibition Bill was introduced in Parliament in March 2011.

The main purpose of the bill was: (1) to prohibit imports of all illegally logged timber and timber products and also processing of illegally harvested domestic timber, (2) for importers to undertake due diligence to mitigate the risk of products containing illegally logged timber and (3) the need for a monitoring, investigation and enforcement regime to ensure compliance with all elements of the bill. The bill was passed by the House of Representatives

¹²⁸ JP Management Consulting (Asia Pacific) Pty Ltd, 2005, *Overview of Illegal Logging: A report* prepared for the Australian Government, Melbourne, Australia. Retrieved from http://www.daff.gov.au/__data/assets/pdf_file/0004/785065/illegal_logging_report.pdf

¹²⁹ For further details see Australian DoA website at <http://www.daff.gov.au/forestry/policies/illegal-logging/background>

on 20th August 2012 and passed by the Senate on 19th November 2012. As such, the bill became law in Australia after receiving Royal Assent on 28th November 2012. The ILPA 2012 came into effect on 29th November 2012. This act prohibits the import of illegally logged timber and timber products and processing of Australian grown raw logs that have been illegally logged. Thus, it is a criminal offence to “*intentionally, knowingly or recklessly import into Australia or process*” illegally logged timber or timber products. This act was enacted mainly to support trade in legally harvested forest products as well as to enhance international efforts to combat illegal logging similar to the measures undertaken by the EU and the US.

Meanwhile, the ILPAR 2013, a law that came into effect on 30th November 2014, was developed with stakeholders and tabled in the Australian Parliament on 3rd June 2013. It sets out the requirement for Australian importers and domestic processors to assess and manage the risk, through a process known as ‘due diligence’ so that their imported regulated timber or processed domestically grown raw logs is not from a source that is illegally logged. A regulated timber product is the timber or timber products that are listed under Schedule 1 of the ILPAR 2013 and are identified using customs tariff codes, that are based on the Harmonized Commodity Description and Coding System (Chapters 44, 47, 48 and 94 of the tariff codes and relate to specific wood products, pulp, paper and furniture products). Therefore, an importer will also be asked to declare to customs their ‘due diligence’ compliance for their import of the timber products.

It is important to note that in the process of developing its regulation, the Australian government had continuously consulted its stakeholders and this process gives the importers or processors of the Australian raw logs, the time required to establish ‘due diligence’ systems and processes before the regulation came into force in November 2014. However, understanding the difficulties that the businesses may have in adjusting to the ‘due diligence’ process, the Australian Government had agreed to focus on helping

importers or processors to comply with the 'due diligence' requirements; following 18 months upon commencement of the regulation.

(b) *Australian ILPA and ILPAR Requirements*

Under the act, timber products are regulated at the border if they are imported whereas at timber processing plants for domestically sourced raw logs that are processed for the first time. Thus, it is now a criminal offence if importers or processors are suspected to have imported or processed intentionally, knowingly or recklessly, illegally logged timber products. What is meant here is that, the penalties will be imposed if the importers or processors: (1) know that the timber or timber products are illegally sourced, or (2) believe that the timber or timber products are illegally sourced, or (3) are aware that there is a substantial risk that the timber or timber products are illegally sourced. It is important to note that unlike the EUTR, the Australian ILPA does not require a TPM to audit the timber legality assurance system (TLAS) or the country specific guideline (CSG). However, just like the EUTR, the burden is on the importers or processors of timber products in Australia to conduct a 'due diligence' and all that is required from trading partners or suppliers is the additional information to minimize the risk of sourcing illegal timber that is placed on the Australian market.

As such, if the importers and processors are found guilty of importing or processing illegal logs, a maximum penalty of five years imprisonment and/or penalty of AUD \$85,000 for individuals or AUD\$ 425,000 for a corporation or body corporate can be imposed. Meanwhile, the act defines illegal timber as *'harvested in contravention of laws enforced in the place (whether or not in Australia) where the timber was harvested'*. Apart from that, the amended regulation requires the Australian importers and processors to conduct 'due diligence' to minimise the risk of illegally logged timber being imported or processed. Among the 'due diligence' requirements are: (1) information gathering i.e. description of the product, timber type, country of harvest

and/or manufacture, quantity (expressed in volume, weight or number of units), names and addresses of the supplier and proof of compliance with laws in the country of harvest or rules or processes established or accredited by an industry or certifying body or established operational processes, (2) to obtain information through a TLAS Framework for Importers or Processors or CSG or State Specific Guideline; the TLAS Framework includes FSC/PEFC Certification or FLEGT Licensed Timber. Meanwhile, a CSG that is to be developed by the Australian Government together with its partner country will allow Australian importers to recognize what is meant by legality in their partner country, (3) process to enable importers to identify and assess potential risks of a product containing illegally logged timber. This includes level of completeness, accuracy and reliability of the information, level of compliance with applicable laws enforced in the country of harvest, robustness of the forest law enforcement and governance practices within the country of harvest, value of the timber product based on current market prices, and the complexity of product and supply chain and (4) importers to undertake measures and procedures that are adequate and proportionate to mitigate that risk such as obtaining evidence on the laws or processes of another country, rules or processes established or accredited by an industry or certifying body and established operational process.

(c) Malaysia's role in the ILPA and ILPAR

Malaysia has been actively participating in the development of the Australian Illegal Logging Prohibition Bill. According to MPIC, Malaysia had sent three submissions¹³⁰ to the Australian government indicating Malaysia's concerns and position on the bill that was debated at that time in the Parliament. The first submission was submitted on 14th December 2011, where Malaysia stressed the importance of the Australian market for Malaysia's timber trade as well as the SFM practices and the progress of timber certification in Malaysia. Further, Malaysia also shared its experiences gained on the

¹³⁰ Information on the comments and views provided on the three submissions was obtained during a presentation made by MPIC on 27th September 2012 to update the Malaysian timber industries on the Australian Illegal Logging Prohibition Bill.

implementation of the Lacey Act and FLEGT VPA negotiations. Meanwhile, specifically on the bill, Malaysia had indicated its concerns on the lack of clarity and the coverage of the bill and had requested that Malaysia to also be consulted in the development of the associated regulations.

In the second submission dated 9th May 2012, Malaysia had commented on the Definition of Legality in the bill in which accordingly is vague and broad. Also, Malaysia requested Australia to recognize MYTLAS as a tool to fulfill the requirements of legal timber and the MTCS/PEFC certified timber as fulfilling the due diligence process. Further, Malaysia stressed that due recognition should be given to countries managing forest resources in a sustainable manner in accordance with national laws and international obligations. Once again Malaysia offered to work closely with the Australian Government in the development of associated regulations of the ILPA which was yet to be enforced at that time. The third submission dated 17th August 2012, apart from stressing the comments raised in the previous submission on issues such as MYTLAS and MTCS/PEFC, had focused on the Draft of Australian Due Diligence Principles. Concerns were raised on the procedures that should not be too burdensome to the industry and any allegations should not be considered as evidence or reason to delay release of consignments due to further investigation. The principle of “innocent until proven guilty” should apply. Specifically, there were concerns raised on the List of Regulated Timber Products such as a clear method to determine legality for complex materials or finished products.

Upon commencement of the act, Malaysia started working together with the Australians on a CSG based on the Australian DAFF's template. The CSG is drafted to assist an Australian importer of regulated timber products from Malaysia to comply with the 'due diligence' requirements of the ILPAR 2013. In this regard, several stakeholder consultations involving related domestic Government Agencies and Industry Members were held to gather inputs to draft the CSG. It is important to note here that the NGOs were not involved in

the discussions of the Malaysian Country Specific Guideline (MCSG) unlike the FLEGT VPA TLAS which involved all stakeholders. Anyway just like the TLAS, the MCSG also refers to existing laws and regulations and is regional based. The MCSG provides among others: (1) legal requirements for timber harvesting, (2) requirements for retention of species as provided for by the SFDs, (3) provisions on statutory charges for harvesting and exports, (4) special provisions for indigenous people, (5) status of rubber wood as complying with legality requirement, (6) explanation on laws that relate to timber processing and exports, (7) laws related to timber processing i.e. for timber and timber products, furniture and pulp and paper products, which have separate laws and regulations, (8) laws related to the export of timber and timber products clustered according to their HS Codes, (9) requirements of CITES, (10) information on the mechanisms that are in place for harvesting, removal of logs from forest as well as extraction of rubber wood logs, (11) provisions on licensing for operation of mills and (12) compliance with export or import requirements are specified¹³¹. Therefore just like TLAS, the export licenses will also be issued by MTIB (Peninsular Malaysia), Forestry Department (Sabah) and STIDC (Sarawak). Also, Malaysian exporters can also provide the MTCS/PEFC as a method of complying the 'due diligence' requirements, under the Timber Legality Framework recognized by the Australian Government. However, it is important to note that a major difference between the Australian MCSG and the EU TLAS is that there is no TPM required to monitor the MCSG. The TPM requirement under TLAS has become a major concern by certain stakeholders and the debate on this issue itself has caused delay in the FLEGT VPA negotiations.

(d) Implication for Peninsular Malaysia's Forest Sector and Timber Trade

(i) Trade and Market Access

Australia is the fourth main export destination for Peninsular Malaysia's timber and timber products where exports amounted to RM 0.81 billion in

¹³¹ Information obtained from MPIC.

2014. Although Table 6.8 indicates a declining trend of exports to Australia from 2007 to 2010 by 3.8%, it is noted that since 2011, exports to Australia began to increase from RM 0.762 billion to RM 0.818 billion in 2014. The decrease in the early stages could possibly be related to the fact that the Australian consumers or importers were then exposed to timber trade related issues and measures where its Labor party in 2007 had pledged to restrict imports of illegally logged timber into Australia and illegally logged domestic timber. However, the increase could possibly be related to ILPA/ILPAR, which was passed in 2012 and 2013 and could have brought more certainty on what is expected from the consumers or importers. Also, Malaysia's MYTLAS is promoted as a tool to prove legality of timber exported to Australian market and could be a factor to the increase.

Table 6.8: Peninsular Malaysia's Export of Timber and Timber Products to Australia 2007- 2014 (RM billion)

Grand Total	2007	2008	2009	2010	2011	2012	2013	2014
	11.702	11.809	10.220	10.939	10.865	11.176	10.377	11.384
USA	2.439	2.340	2.165	2.317	2.022	2.232	2.053	2.268
JAPAN	0.981	1.002	1.047	0.936	1.189	1.023	0.883	0.851
SINGAPORE	0.511	0.644	0.602	0.698	0.741	0.815	0.793	0.891
AUSTRALIA	0.842	0.793	0.686	0.685	0.762	0.771	0.766	0.818

Source: MTIB

(ii) Government policies

Just like the EU FLEGT VPA/EUTR, there are no policy changes required for Peninsular Malaysia's forestry sector and timber trade because of the ILPA/ILPAR. The ILPA does not require enactment of new laws or amendments to existing legislation as its definition of legality is wide and touches on the harvesting in accordance to laws enforced in the place (whether or not in Australia). As mentioned above, Malaysia's submission to the Australian government on the bill stressed that Malaysia is practising SFM and that Malaysia would also like to promote MYTLAS as its proof of legality and MTCS/PEFC sustainable certification.

(iii) Level of Stakeholder Involvement

The stakeholder involvement in the case of the Australian Act/Regulation is different compared to the EU FLEGT VPA. Under the FLEGT VPA negotiation process, stakeholder consultation is a mandatory part of the process where the development of the TLAS specifically requires intensive consultation with stakeholders. In the case of Australia, its government has made commitments to consult stakeholders throughout the development of its legislation and regulations. This is done through formation of working groups comprising of representatives from the industry, civil society and interested economies. The Australian Government had also consulted with trading partners through existing bilateral arrangements and has held working group meetings comprised of industry, NGOs and most recently with key trading partners. Specifically for Malaysia, MPIC has formed its own working group to coordinate Malaysia's input in drafting of the legislation or regulation. However, it is important to note that discussions on the part of Malaysia through its own Malaysian Working Group (MWG) comprises only of representatives from government agencies or departments and timber trade associations from the three regions. Through the MWG, Malaysia's position is articulated and tabled at the Workshops or Working Group meetings with Australia.

6.4 SUMMARY

Therefore, taking into account the growing strong sentiment towards legal timber through binding trade related environmental measures as well as the challenges in implementing certification as explained above, it is not surprising that developed countries like the US, the EU and Australia have imposed binding measures for imports of legal timber. These measures that were imposed in the form of acts and/or regulations require legal declaration and/or a legal verification system to prove the legality of timber and timber products imported into their markets. According to Powers and Wong (2011), the EUTR and the Lacey Act are used to create clear market signals indicating that trade in illegal timber is no longer acceptable. The consumers

in the developed countries now require assurance of legality for the timber products that they purchase. It is important for them to demonstrate that they have requested and received adequate evidence of legality by exercising 'due care' and will not be liable for criminal prosecution as in the case of the US Lacey Act. **PS** is of the opinion that although the developed countries impose legislative requirements to eradicate trade in illegal timber, they are also indirectly forcing the supplying countries to take actions to ensure that they only supply legal timber. As such, even though **PS** supports the nobility of the intention of the developed countries to eradicate illegal timber, the expert believes that such actions or change should not be forced upon the developing countries through legislations but be brought about through time and negotiation. This is because the developing country's timber industry is not at the same level on the playing field with the developed country's industry which is 20 years or more in advance. Moreover, to meet such legal requirements involves a lot of investments and financial obligation on the part of the developing countries whose industries basically consist of SMIs.

However, given that the US, the EU and the Australian markets are important markets for Peninsular Malaysia's timber trade, the FLEGT VPA negotiations and the imposition of the acts and/or regulations is bound to have an effect on Peninsular Malaysia's forest sector and timber trade in the following ways: (1) in the form of trade and market access, (2) the level of stakeholder involvement and (3) opportunities for improvement of timber institutions and administration. Otherwise, in terms of government policies, there is no change required as the current laws and regulations related to the forest sector and timber trade are applicable. This has been made clear even in the FLEGT VPA negotiations. Chapter Seven further assesses and analyses the significance of such effects based on views, comments and feedback provided by experts in the field of forest sector and timber trade obtained during semi structured interviews, emails and focus group discussions. The findings will show that the FLEGT VPA negotiations and the acts and/or regulations have directly or indirectly affected the forest sector and timber trade of Peninsular Malaysia based on the areas identified even to the extent

of analyzing and reviewing the current government policies and legislations. To this end, Putnam's two-level game theory has been applied to explain the significance of international pressure and domestic resonance in shaping the effect of the agreements, acts or regulations on Peninsular Malaysia's forest sector and timber trade.

CHAPTER 7: COMMENTS, VIEWS AND CRITICISMS BY EXPERTS – AN ANALYSIS BASED ON PUTNAM'S TWO LEVEL GAME THEORY

7.1 INTRODUCTION

This chapter will discuss and analyze the comments, views and criticisms of experts in the field of forest management and timber trade using Putnam's two-level game theory by focusing on: (1) trade and related environmental issues, (2) the on-going negotiations to conclude a FLEGT VPA and its impact on the forestry sector and timber trade in Peninsular Malaysia, (3) the impact of the legally binding acts and/or regulations imposed by developed consumer countries on the exports of timber products from Peninsular Malaysia, (4) indirect issues and concerns that have emerged resulting from (3) above and (5) possible areas or measures for improvement. Semi structured interviews (face to face, skype and e-mails) were conducted with individuals representing various organizations to gather information and their view points on the matters above. These issues as mentioned in Chapter One have been found through literature review to affect directly or indirectly on agreements, acts or regulations imposed by developed countries. Apart from that, two new areas that have emerged from the interviews mainly due to the FLEGT VPA negotiations i.e. lack of political will as well as social and indigenous people's issues will be discussed. In addition, the comments, views and criticisms based on focus group discussions with experts from the State Forest Departments and Industry Members from Pahang, Perak, Selangor and Johor are also reflected.²²¹

Therefore Putnam's two-level game theory is used to analyze whether in the case of Peninsular Malaysia's forest sector and timber trade, the politics at the international level and at the domestic level are in essence interdependent of each other. For this purpose, it is important to determine the possible influence of the measures used by developed countries like the

²²¹ Please refer to Chapter Four for the basis of choosing the four states and how the focus group discussions were held.

EU to bring about policy changes in the producer or exporter country's forest sector and timber trade. Also, it is necessary to determine the success of such measures by analyzing the reaction, direction and action of the Federal Government of Malaysia on such measures by taking into account: (1) the Federal-State relations on forest and land matters, (2) the politics involved on forest and land matters at the federal and state level, (3) the different demands of stakeholders i.e. NGOs and Timber Industry in Peninsular Malaysia and (4) the importance of complying with SFM to ensure trade of sustainable and/or legal timber. Apart from that, Schoppa's analysis of Putnam's two-level game theory will explain the importance of the concept of 'synergistic linkages' and 'reverberation'. The concepts determine how chief negotiators (in this case the EC and MPIC) are able to change the domestic political game that their counterpart is facing and when exactly synergistic strategies can be used by a negotiator to produce positive results enabling possible cooperation as well as winning a larger concession from their counterpart.

However, it is important to note that most of the comments are related to the Malaysia-EU FLEGT VPA negotiations due to the: (1) intensity of the debate on the issues discussed, (2) stringency of TLAS as well as the time taken to negotiate an agreement, (3) unilaterally enacted Lacey Act by the US without consultations with timber exporting countries by which there has been little discussion on this matter locally and the industry is left with no choice but to comply and, (4) Australian ILPA/ILPAR, which seems to have a softer and less stringent approach; at least, at this stage compared to the EU FLEGT VPA and its associated TLAS (see Chapter Six for details of the EU FLEGT VPA/EUTR, US Lacey Act and the Australian ILPA/ILPAR).

7.2 THE EFFECT OF THE BINDING TRADE RELATED ENVIRONMENTAL MEASURES: THE VIEWPOINT OF EXPERTS

7.2.1 An Overview of the Findings

As mentioned in Chapter Four, experts have been identified based on coding to maintain their confidentiality. Government Officials are reflected as Policy Administrators from MPIC and MNRE as PA(1) and PA(2), Forest Administrators from FDPM (2 officials) as FA(1) and FA(2), Legal Advisor from MPIC as LA, Agency Officials from MTIB as A(1), MTCC (4 officials) as A(2a), A(2b), A(2c) and A(2d), MTC (2 officials) as A(3a) and A(3b), PROTEM Secretariat Official as PS while the official from SIRIM QAS certification body is coded as CB. Meanwhile, Industry Association Members from TEAM, MWIA, MPMA and MFEA have been identified as IM(1), IM(2), IM(3) and IM(4), respectively. NGO Representatives from TRAFFIC, WWF, TI, SAM and IFM have been identified as NGO(1), NGO(2), NGO(3), NGO(4) and NGO(5), respectively. Apart from that, International Organization Officials interviewed such as from the EC Brussels (2 officials) have been identified as EU(1) and EU(2), European Delegation Official in Malaysia as ED, European Forest Institute Officials (2 officials) based in Malaysia as EFI(1) and EFI(2), ITTO Official as ITTO itself and an official from the Forestry Commission of Ghana as GH.

To ensure appreciation and understanding of the findings and analysis of the areas mentioned above, it will be reflected with respect to four main groupings of experts: (1) Government or Agency Officials, (2) Timber Industry Association Members, (3) NGO Representatives and (4) International Organization Officials. Meanwhile, focus group discussions in the four states i.e. Pahang, Perak, Selangor and Johor will be reflected based on two groupings: (1) State Forest Administrators and Implementers and (2) State Timber Industry Members.

7.2.1.1 Government / Agency Officials

7.2.1.1(a) Government Policies and Regulations

In general, government officials are of the view that government policies and regulations in Malaysia are sufficient in ensuring sustainable forestry practices as well as the trade of sustainable and/or legal timber. It is believed that Malaysia has very good laws, regulations and policies in place for its forestry sector and timber trade. Furthermore, they are internationally acceptable²²². Particularly for Peninsular Malaysia, there are the NFP 1978 and NFA 1984, both amended in 1993, in line with international developments and that deal with the administration, management and conservation of forests. Meanwhile, NATIP that applies for all three regions has been developed to provide policy direction for the industry to remain sustainable and competitive in a challenging global environment until 2020. According to **PS**, since the 1990s, the global market began to focus on issues related to products that are environmentally friendly instead of just on packaging, prices, shipment and delivery. Therefore, when NATIP was formulated, its strategic thrust for marketing and promotion was angled towards environment, to ensure the supply of sustainable and/or legal timber products²²³.

Apart from that, Malaysia has always been active in the international arena on promoting good forest governance. The MTCS, endorsed by the PEFC, is proof of Malaysia's success in implementing SFM. As mentioned in Chapter Five, there are twelve PFE FMUs certified under MTCS/PEFC and out of those, all eight FMUs from Peninsular Malaysia have been certified. Also on

²²² This is the sentiment shared generally by officials who deal with policy development i.e. PA(1), PA(2), FA(1), FA(2), A(1), A(2a), A(2c), A(2d) and A(3a). On this note, PA(2) specifically mentioned that the Malaysian government provides funding for the development of forest plantation which will be implemented in a 15-year period for 375 000 hectares. This is to ensure a sustained supply of timber species of fast growing timber species for the timber industry.

²²³ The information given by PS was based on the expert's previous position as the Chairman for the Working Group to draft the chapter on Marketing and Promotion for NATIP.

this note, **A(2d)**²²⁴ specifically mentioned that ITTO has recognized Malaysia as one of the few countries, in fact, one of the leading countries that actually practices SFM. Accordingly, Malaysia has done well on SFM despite all the challenges and pressure imposed on tropical forestry. Similarly, **A(2a)**²²⁵ was also of the opinion that Malaysia has advanced in tropical forestry despite the negative perception given to the world by the NGOs on its sustainable forestry efforts. It is felt that the NGOs are constantly attacking Malaysia's efforts because it is hoped that with such pressure Malaysia will continue to move towards greener efforts. As such, it can be argued that there is a tendency for Malaysia to adopt policies based on international trends and demands in relation to the forest sector and timber trade.

Nonetheless, the revision of a policy like the NFP in 1992 to reflect the Earth Summit's concern and the adoption of MTCS in 2001 was made possible due to acceptance by all the states in Peninsular Malaysia as well as other domestic stakeholders. **A(2d)** stated that the MTCS standard is based on internationally recognised practices and is developed together with all the stakeholders i.e. the environmental and social NGOs, government and the industry. It is important to get the 'buy in' of all stakeholders to ensure the success of any international policy initiatives to be applicable at the domestic arena. Therefore, to successfully negotiate an international agreement like the FLEGT VPA or adopting the measures required by the developed countries, it would depend on the acceptance of domestic stakeholders. Therefore, Putnam's two-level game theory is applicable in explaining Malaysia's efforts towards sustainable forestry. Putnam argued that policies and regulations will be amended to meet international demands for sustainable and/or legal timber while there are some complementarities with domestic stakeholder's needs, which will be explained in detail below.

²²⁴ Interview was held with A(2d) who is an expert on certification and timber trade related issues at the MTCC Office in Kuala Lumpur on 30th October 2012.

²²⁵ Interview with A(2a) was conducted on 17th June 2014 at the PROTEM Secretariat's office in Kuala Lumpur. The expert, who has vast knowledge and expertise in forestry and timber trade issues, is also one of the main Malaysian negotiators for the FLEGT VPA negotiations. A(2a) is also an expert in certification efforts especially MTCS/PEFC and has been actively representing Malaysia in various international forums on forestry and timber trade related issues. Consequent informal meetings or discussions were also held with A(2a) from June 2014 to April 2015 to obtain latest updates on the FLEGT VPA negotiations and also on other timber trade issues.

However, there are also views on the unsuccessful attempts of the Federal Government in promoting, managing or implementing their policies related to the forest sector and timber trade. An important obstacle identified, as mentioned in Chapter Five, is the State Governments' power over land and forest matters provided under Article 74 of the Federal Constitution. Also, as explained earlier in Chapter Five, the states generate revenue from their forests and such revenue is a major contribution to a state's development expenditures. **A(2a)** confirmed that for states in deficit, forestry is a main source of revenue. Accordingly, a state has the right to decrease or increase its annual coupe²²⁶ even though there are guidelines provided under the former NFC. SFM may also be linked to the financial status of a State Government hence it is important to get the state's 'blessings' on any initiatives. On the other hand, to overcome such a situation, **A(2a)** also believes that the Federal Government is responsible for the overall environmental health of the country and should provide some incentives and assistances to the states for their SFM efforts i.e. (1) in the management of the forests itself, or (2) in terms of relaxing export duties for timber from sustainable resources, or (3) compensating for areas where there is no logging or areas of national park like Ulu Muda where logging is not allowed.

A(2d) meanwhile is of the similar view that SFM has at times been linked to the financial status of a state. It was stressed that the SFD is trying its best to sustainably manage the forest and to sustain their revenue or income from managing the forest. However, it is believed that it becomes uneconomical for a state to manage its forest sustainably if: (1) there are too many stringent requirements imposed by developed countries that increases work load, (2)

²²⁶ Annual coupe according to FAO Model Code (for harvesting practices) is also referred to the Annual Allowable Cut (AAC) which specifies the volume of timber that may be harvested from a particular area of forest in any one year. From the industrial forestry perspective, the AAC should be set at a level that provides the maximum harvest volume while ensuring that the prospects for future harvests do not deteriorate. When the impact of timber harvest on Forest Management Plan is considered, the AAC will be reduced in most cases, in comparison with a situation in which timber production is the sole consideration. This will depend upon the degree to which the timber harvest complements or competes with the production of the Forest Management Plan. Similarly, consideration of the value of the forest's environmental and service functions will tend to reduce the AAC. Apart from that the Annual Coupe is also sometimes referred to a specific area of land that is scheduled to be harvested within a specified period of time (often, but not always, one year). For further reference see <http://www.fao.org/docrep/v6530e/v6530e12.htm>

there is no capacity to handle the increase and (3) the revenue coming out from the forest is becoming less for the State Government. Therefore, if there is no revenue from the forest, then the State Government will resort to other ways to manage the land more economically such as converting the forest to timber or palm oil plantations. In the long run, this could be detrimental to the global community as there may no longer be an economic push or incentive to maintain the forest as a forest anymore. Also, the situation is made worse when there is not much of an incentive for environmental services given by the developed countries. Therefore, at the end of the day, it is not surprising that much of the forest land is being cleared for plantations as in the short term it is more beneficial socially and economically, compared to maintaining the forest²²⁷.

It is also important to note that the Federal Government, under Article 94 of the Federal Constitution is given the power to negotiate on trade matters for the nation as a whole. Nonetheless, due to the power vested on State Governments over land and forest, this has precipitated serious concerns by States to the Federal conduct of the negotiations. A good example would be the FLEGT VPA negotiation which is taking a long time to conclude. If we focus on a regional basis, Sarawak is a major concern for the EU as it has not given a time frame to develop and implement TLAS although it is committed to the EU FLEGT VPA. The lead negotiator from the EC during the EU stakeholder consultation in KL²²⁸ specifically mentioned that due to the phased approach taken by Malaysia in its implementation of TLAS (Peninsular Malaysia and Sabah to immediately implement upon signing and Sarawak at a later date), it is very important that Sarawak indicates its time frame for developing and implementing its TLAS. Without such a commitment, the EU will have difficulties in concluding a FLEGT VPA with Malaysia. Meanwhile, specifically related to Peninsular Malaysia, which is the focus of this dissertation, a similar situation has also risen where according to

²²⁷ Similar view shared by A(2a).

²²⁸ Informed by Mr Hugo Schally, the lead EU negotiator for the Malaysia-EU FLEGT VPA negotiations during the EU Stakeholder Consultation on FLEGT VPA held on 22nd May 2014 in Kuala Lumpur.

PS²²⁹, Selangor State is the first state in Peninsular Malaysia that does not agree to the FLEGT VPA. The reasons for objection are not given but it is important to note that there is no logging in the state. If so, such a position may be misguided as the state has a large export-oriented timber industry. Whether it will change its stand in the future is another issue but the current stance can also affect the Federal Government's ability to conclude the negotiations.

Apart from the State Governments' situation, the ability to conclude the FLEGT VPA negotiations were adversely affected when the furniture industry in Peninsular Malaysia decided to pull out furniture from the scope of negotiations in early 2013²³⁰. However, it was felt²³¹ that the problems faced by the furniture industry can be overcome as there is a system already in place for issuance of licenses under MTIB. **PS** meanwhile, sees the FLEGT VPA as a good opportunity for the small group of the Furniture Small and Medium Industries (SMIs) to be developed and organised. Currently, most of the SMIs are considered backyard operators with no proper organisation, production planning or marketing. It is important for the production to be organized so that the industry will be able to look further into designs and branding to increase the quality of its products. Thus, to obtain quality, the production has to be organised. To be organised, the basics have to exist i.e. the factory must be legal and their workers must be trained and able to adhere to proper safety and health standards.

However, given the scenario that the Federal Government—despite objections from its stakeholders—decides to go ahead and sign the FLEGT

²²⁹ Interview with PS was held at the PROTEM office in Kuala Lumpur on 2nd July 2014. PS who has vast knowledge and expertise on international timber trade issues or marketing for Peninsular Malaysia is the main coordinator for the PROTEM Secretariat which is the interim body established to serve as a secretariat for Malaysia-EU FLEGT VPA issues. The expert previously was the coordinator for the TLAS negotiations. PS has also been actively involved in the FLEGT VPA negotiation since its start.

²³⁰ Previously the furniture industry in Peninsular Malaysia has been supportive of the FLEGT VPA initiative. However several requirements that they have to comply with under the TLAS changed their stand on the initiative.

²³¹ Similar view shared by PS and A(2a).

VPA (based on its constitutional rights), **PS** was of the view that this may cause problems to the implementation of the agreement. As stated, the extent and the nature of the problem may not presently be known, but it is important for policy makers to envisage whether Malaysia is able to deliver, when it comes to the implementation of the agreement. The details of the situation in State Governments will be further analyzed below by taking into account the feedback obtained from the forest and industry experts in the states of Perak, Pahang, Selangor and Johor (see Chapter Four for details on how and why these states are chosen as salient cases in Peninsular Malaysia).

Nonetheless, some officials do acknowledge that good policies may be ineffective at times due to lack of capacity and inadequate enforcement, linked to the following factors:

- (i) Lack of funding; **PS** had this to say on NATIP:

“NATIP has actually pinpointed the right focus in terms of what needs to be done. It’s just a problem in terms of implementation i.e. funding because (for) a lot of the programs, in the case of Peninsular Malaysia, MTIB doesn’t have the funding to implement it”

- (ii) Lack of policies enforcement²³²; **LA**²³³ was of the view that:

“There is nothing wrong with our laws; it’s just the enforcement that is lacking and this is not only in the forestry sector, it is a prevalent problem throughout all legal enforcement aspects of Malaysia. So, if there is a stronger enforcement by the authorities, specifically in this case—the Forest Department—I believe that the NGOs and all the other lobbying groups will see that Malaysia’s intent is clear (such) that it wants to be very strict on this aspect”.

²³² All the government officials interviewed agreed that the lack of implementation of policies is mainly due to the lack of enforcement on the part of the government - PA(1), PA(2), FA(1), FA(2), A(2a), A(2d), A(3a), PS and LA.

²³³ Interview conducted with LA who was the MPIC legal adviser for the FLEGT VPA negotiations at MPIC Office on 4th September 2012.

Nevertheless, the inadequacy of enforcement especially by State Forest Departments has been identified²³⁴ to be mainly due to the lack of manpower, expertise, training, funds and equipment. To this end, **A(3b)**²³⁵ stated that the Malaysian forestry sector definitely needs further investments in terms of increase in wages and manpower, upgraded technology to enhance efficiency, good training and standard forestry practice for the whole country. Furthermore, the fact that states have total autonomy over forests makes it difficult for standard practices to be introduced or documented. Meanwhile, **A(2d)** who is also of similar opinion stated that:

“The SFD is funded by the state and they have limited resources to run the department. So, the state has to allocate more money if they want to get more people to manage an area sustainably. It’s just not economical and the State Forest Department officials are expected to be experts in everything i.e. wildlife, ecology, river systems and indigenous people. They also have to be social workers and they have to do everything. So, the public has to respect that they are under a lot of pressure from all sides, including the Federal Government. They are of course pressured by the State Government because they work for the state and that is where they get their salary from. People can say there is lack of implementation. So, why are there not enough officers? It is because they can’t afford to get more officers and who will pay for these officers? I have seen how they work; it is really challenging and not easy. If you ask the public who wants to work in the forest....it’s not a glamorous job, they don’t get paid very well and there is a lot of risk where you might bump into wildlife or indigenous people become angry with you or even the environment itself can be dangerous. So, you really have to appreciate that. I mean, how many people are willing to work in the forest? People say there is no implementation but where are the resources for the implementation?”

- (iii) Overlapping duties and lack of coordination between ministries and agencies do exist. Government officials²³⁶ have voiced their concern

²³⁴ These are problems generally identified by those who are directly or indirectly involved in the management of the forest or the certification process i.e. FA(1), A(2a), A(2b), A(2d), A3(b).

²³⁵ A(3b) who is based in London, has a wide knowledge and expertise in forestry and timber trade issues, especially those concerning the EU. Information from the expert was obtained through email based on the questions prepared, dated 1st March 2014.

²³⁶ FA(1), FA(2), A(1), A(2a), A(3b), PS.

over the existence of two ministries i.e. the MNRE and MPIC that handle the forest sector and related timber trade respectively. Although the job scope has been defined, with MNRE handling the forest while MPIC handles the trade aspects of the forest produce, this has led to various issues such as segmentation of duties, working in isolation (i.e. without coordination), overlapping of duties and unhappiness over funding distribution, etc²³⁷.

7.2.1.1(b) Level of Stakeholder Involvement

Officials involved in the FLEGT VPA negotiations²³⁸ in general are of the view that stakeholders are well consulted and the consultation processes are done according to requirements while noting that there may be room for improvements based on feedback from the stakeholders. Specifically, **PA(1)**²³⁹ mentioned that the process of engagement is still on-going in addressing issues arising from the negotiations. **PA(1)** further stated that Malaysia has a peculiar system i.e. three different systems on timber regulations for Peninsular Malaysia, Sabah and Sarawak, respectively. As such, apart from the regular stakeholder consultations held with government officials, industry, NGOs, academicians, worker unions and other interested parties, there is a need to work around State Governments and State Authorities in all the three regions. Specifically for Peninsular Malaysia, there is a need to consult all eleven State Governments in addressing some of the issues raised by NGOs and it is an on-going effort that is done continuously. It was noted that the development of Annexes for the FLEGT VPA i.e. the TLAS involves explanation of its components and getting feedback on the weaknesses and areas to be strengthened. Therefore, it is important that a

²³⁷ It is important to note that the issues of illegal logging and its illegal timber trade involve the jurisdiction of both ministries.

²³⁸ PA(1), A(2a).

²³⁹ PA(1) is a high level officer at MPIC who has vast knowledge and experience on timber trade related policies and issues. The expert has been involved in the Malaysia-EU FLEGT VPA negotiations since the early stages of its negotiation. The first interview was conducted at the expert's office in MPIC on 24th August 2012. Consequently, a second interview was conducted to obtain the latest development on the FLEGT VPA negotiation and also the Australian CSG guidelines, also at the expert's office in MPIC on 29th August 2014. Informal discussions were also held in March 2015 to get the latest updates on FLEGT VPA negotiations and the Australian CSG.

balanced view is achieved in the FLEGT VPA negotiations that take into account the interests of all parties. Also, it was stressed that not all issues raised especially on the NCR are within the scope of the negotiations. In addition, **A(2a)** stated that although the Federal Government's on-going consultation process can be further improved, the EU should not expect Malaysia to follow through or to implement all proposals raised by stakeholders and also by the EU itself, taking into account Malaysia's status as a developing country.

Nonetheless, it was acknowledged by some officials that there are differences in the consultation processes held by different ministries. Accordingly, NGOs are more actively consulted in MNRE's environment policy consultations compared to MPIC's FLEGT VPA consultations. To this end, **A(2d)** informed that:

"You can see that MNRE is really engaging the NGOs to help them with a number of things. For example, MNRE is working together closely with WWF on MYCAT. MYCAT is creating awareness, reaching out to all the stakeholders who are involved."

In fact, **PA(2)**'s²⁴⁰ statement below confirms that MNRE has been constantly engaging the NGOs in policy development:

"There is a directive issued by the former Public Service Chief Secretary General where we have to engage stakeholders and put the draft procedures on the website. For example, on changing of the EIA procedures, we have put it up at the DOSH website to receive comments from stakeholders. On the FTAs, we have forums with the NGOs—just the main points of the FTA, which issues change every time—so we can discuss the draft text. Thus, MNRE follows the directive to engage stakeholders."

²⁴⁰ P(A)2 is a high level officer in MNRE who has vast knowledge and experience in forestry related policies and issues especially in Peninsular Malaysia. Interview with the expert was conducted at Pullman Hotel, Putrajaya on 26th June 2014.

Furthermore, it has been acknowledged by **PS** that the FLEGT VPA consultations, to a certain extent have been said to create lack of trust on the part of its stakeholders on MPIC's efforts, due to the lack of transparency on the issues discussed, which are identified by the ministry itself. This is because the stakeholders are not sure what is expected or required from them or what their role is. This will eventually lead to suspicion of the whole process.

In this regard, some officials²⁴¹ were of the view that the government could consider a more active role for NGOs in the development of policies and also to be part of the Malaysian delegation for some important meetings overseas. It is believed that if NGOs are ignored, they tend to voice their discontent to the media and through foreign channels. On the other hand, some officials²⁴² were of the opinion that the NGOs themselves should not be too aggressive in their approach. They also need to understand the difficulties faced by the government and as a whole should have national interest at heart by building up an attitude to work together rather than being against each other. **A(2a)** specifically mentioned that currently some of the NGOs are singing the same tune as international NGOs and are less appreciative of the local problems faced by the government and the industry. It is felt that this may be because most local NGOs are funded by developed countries²⁴³. Furthermore, they have their own agenda to meet and this is especially felt in the case of FLEGT VPA negotiations where some of the NGOs are said to raise issues outside the scope of the negotiations, like the issue of land ownership under NCR. Thus, it can be argued that, in line with Putnam's theory, the

²⁴¹ A(1), A(2a), PS.

²⁴² PA(1), A(2a), FA(2).

²⁴³ A study was conducted by Dr Mike Nahan to examine the funding links between US philanthropic foundations and Malaysian NGOs. Accordingly, between the year 1998 to 2001, 30 organizations received grants from US based foundation worth Ringgit 17.2 million. Among the recipients are Third World Network (TWN) that advocates among others issues related to trade and environment with a total funding of US\$ 1,155,000. Meanwhile, a number of environmental NGOs received relatively small grants in the form of Global Green grants including Sahabat Alam Malaysia (US\$14,000 and Indigenous Peoples Development Center (US\$12,000).

cooperation to ensure the success of FLEGT VPA negotiations will only be possible if there is a powerful group of domestic stakeholders that actually favor the policies that are being demanded internationally. Currently, for the FLEGT VPA negotiations, there is no strong political voice pushing for its conclusion. In fact, conversely, there is a strong voice against its conclusion by certain NGOs and also the lack of commitment by certain State Governments, which may be the cause of the delay (this will be discussed in detail below).

7.2.1.1(c) Market Share and Market Access of Forest Products

PS was of the opinion that the timber industry in Peninsular Malaysia is very export dependant as the domestic market is still not big enough to cater for the current amount of production. Thus, it is important that the industry complies with the market demands to continue to remain at the fore-front of the international market. However, some officials²⁴⁴ were of the view that there is a shift of market preferences from countries that are imposing trade related environmental measures to countries that have no or less stringent measures. This is especially so for producers or exporters that do not consider the US, the EU or Australia as their major export markets. On this note, **A(3b)** had this to say on market preferences:

“Industry members that view the developed countries as key markets will take every effort to ensure compliance with the policies introduced to maintain their market access and share. Those who don’t will supply to alternative markets where consumption patterns are larger and are not hindered by such requirements i.e. less environmentally conscious countries such as China and India”.

On the other hand, it is important to note that some officials²⁴⁵ have expressed their concern that such shifts cannot be solely blamed on the pressure imposed by developed countries, as there has been an economic

²⁴⁴ A(2a), A(3b).

²⁴⁵ A(3a), A(3b).

slowdown especially in the EU and the US. As such, a situation of market inability to buy arose due to financial difficulties in these markets. In this regard, **A(3b)** had this to say:

“The world slump in economic growth and financial difficulties experienced over the last 4 years has shown that main consumer markets such as Europe and the US are in negative consumption patterns (due to negative growth, negative construction and severely decreased purchasing power). It is then obvious that imports or consumption in these markets will remain low no matter what pressure both markets place on producing countries. Producing countries who rely on timber or wood product exports as a major source of revenue will definitely seek consuming markets that purchase significant volumes to ensure economic returns; hence China, the Middle East and India spring to mind. All these markets do not have resources of their own and rely on imports to fulfil their market needs. We see Africa, North America as well as European countries (and even Malaysia) increasing their supply of raw materials to all these markets because of healthy consumption or processing capacities. It would not be right to assume that such market shifts were purely due to pressure from developed markets on producing countries although it could be said that such pressure played a part in encouraging the shifts due to very subdued demand in developed country markets.”

Nevertheless, given the scenario that the US, the EU and Australia are traditional markets for certain timber exporters in Peninsular Malaysia as mentioned by **A(3b)**, it is highly unlikely that there will be a shift of market preferences as these developed markets pay better prices for value added products and for certain species of wood²⁴⁶. Meanwhile, an interesting observation was made by **PS** on the issue of ‘shift of market’ where the expert believes that there is a shift of market but only temporary. The trend to impose acts and/or regulations to ensure sustainability and/or legality of timber products purchased is now global and even more widespread than the anti-tropical campaign, which is still very focused in Europe, Australia and to a lesser extent, the US. However, it was stressed that the legal requirements are also spreading in New Zealand and even China, which is establishing

²⁴⁶ This view is similarly shared by IM(2) and EFI(2).

itself as a trading nation. Similarly, Japan is also pressured to come up with some form of stringent requirement. These markets are major importers for timber and timber products. However, it was noted that in the case of India it may be different because India caters for their own domestic markets and is not involved in exports. So, any country that deals with international trade will eventually demand such requirements. It is a chain reaction and will be a global trend in years to come. It is also important to note that the argument by **PS** on the strong influence of the binding acts and/or regulations on other countries, its chain reaction and possibility of it becoming a global trend warrants reference to the arguments made by Finnemore and Sikkink (1998) of a norm influence. Accordingly, a norm influence can be understood as a three stage process: (1) norm emergence where norm entrepreneurs will attempt to convince a critical mass of states (norm leaders) to embrace new norms, (2) norm acceptance where the norm leaders will try to socialize other states to become norm followers and (3) internalization where a norm becomes a taken for granted quality and is no longer a publicly debated matter. Thus, the observation made by **PS** is suggestive that the changes referred to may constitute a norm influence and this may be an area for future research.

On the other hand, there is a particular view that such imposition is seen as 'pressure' to comply with the acts and/or regulations to retain the current market share or access that was previously enjoyed in these developed markets. **A(2d)** was of the opinion that despite such pressure, business men will always find ways to sustain their business. It was stressed that there are a few examples of good companies in the timber industry that have—on their own—obtained FSC certification and imported all FSC timber as required by the international market. As such, it is important that the timber industry takes its own initiative to change according to these requirements i.e. green building index and green technology. It is believed that the industry cannot work on the principle of 'business as usual' anymore, because things change according to the current global situation and environment and so the timber industry should also adapt to such changes.

A(2b)²⁴⁷ went further to say that the Timber Trade Associations should have a ‘code of conduct’ for their members to demonstrate their commitment that they comply with certain conducts, thereby assuring that the traded timber is either from a sustainable and/or legal source. It is believed that since the industry is benefiting from the forest, they should also be responsible to ensure its environment is not damaged and the forest communities are not adversely affected. Therefore, the Timber Trade Associations through a ‘code of conduct’ can help to ensure that its members—those who do not comply with its code—are subject to sanctions i.e. fined or even expelled. Even though this may not be an immediate solution to the problem, it can be effective in the future. There are also views²⁴⁸ that suggest that despite the implementation of acts and/or regulations, it will not cause a problem for the Malaysian timber industry specifically from Peninsular Malaysia to comply with the measures imposed by these developed countries. This is because Malaysia has the advantage of already being active in its certification and legality efforts. As mentioned in Chapter Five, all the FMUs in Peninsular Malaysia are already certified under the PEFC scheme. In this regard, **A(3b)** stated that:

“Such green developments have already affected and will continue to affect countries like Malaysia in the foreseeable future. However, Malaysia stands at an advantage because: (1) the industry in Peninsular Malaysia is in a position to meet the requirements for sustainable and/or legal timber and with some effort, both Sabah and Sarawak should be able to enjoy the same privilege, (2) Malaysia is fortunate that the maturity of the regulatory and legislative process over the years has allowed for regulation of the forests or industry although the country lacks on enforcement and (3) to reach an acceptable level of evidence of at least legality across the country as a whole will require significant human, financial and capacity resources. Several developing countries are not in the same advantageous category as Malaysia.”

²⁴⁷ A(2b) is a high level expert in his organization and was very active in MTCS/PEFC certification efforts and also FLEGT VPA negotiations. Interview was conducted at the expert’s office in Kuala Lumpur before his retirement on 12th October 2012.

²⁴⁸ A(2d),A(3a), A(3b),PS and LA

Meanwhile, **A(1)**²⁴⁹ who represents the agency that is in charge of the issuance of FLEGT licenses also has the same point of view as **A(3b)**. **A(1)** mentioned that:

"I do not see that this is going to severely affect Malaysia because we have already established a timber certification scheme, the MTCS which is actually one step higher than legality. To meet the requirements of legality is actually (of) a slightly lower requirement. Of course, there are some differences but I do not see it as something that will affect the timber trade. However, initially in complying with the requirements, industry is a bit concerned. They express these concerns in dialogues. They are not too sure how this is going to affect them, whether the Government will impose any new requirements. So the concerns are bound to be voiced in the initial stages but once it is implemented, there should not be much problem. I think our trade will continue and we may in fact be at an advantage over other countries. With our ability we can supply legal timber and verify it for legality. Supposing the other countries that are exporting to the EU are unable to comply with these requirements, we may actually take advantage of what you might call the gap in demand created by such a request."

From another perspective, it is also interesting to note that **A(2a)** was of the opinion that it would be good if developed countries encourage through their public procurement policies for developing countries like Malaysia to willingly adopt practices of trade in sustainable or legal timber by giving some form of a premium for the tropical timber trade. This way, it is argued that the consumers in developed countries will be more appreciative of tropical timber and pay the prices that their government is paying for tropical timber in the public procurement policies.

²⁴⁹ A(1) is an expert in timber licensing and is involved with the FLEGT licensing efforts. Interview was conducted at the expert's office in Kuala Lumpur on 1st November 2012.

7.2.1.1(d) Issues and Opportunities for Forest and Timber Institutions and Administration

To fulfill the sustainable and/or legal requirements for timber trade, experts were of the view (to be deliberated below) that the forest and timber institutions and its administration have to be strengthened in terms of human resources, equipment and expertise on several environmental related issues, training needs, funding and coordination and institutional arrangements.

(i) Human resources, equipment and expertise

Due to the ever increasing global forest related issues being raised such as climate change and carbon stock assessment, there is an urgent need to have more expertise on such issues. The forestry administrators with their limited work force and forest knowledge now have to deal with all the issues which may not be under their purview or expertise. **A(2b)** mentioned that the foresters now not only require expertise of the forest and its environment but also various other environmental related issues such as climate change, carbon stock assessment and REDD plus. As such, there is a strong need for more expert workforces especially in the Forest Departments either at the Federal or State level to handle the emerging forest and timber trade related issues. Furthermore, with MTCS/PEFC, TLAS and other legality requirements, foresters have to ensure that these requirements are implemented according to the principles and criteria identified. Thus, the workforce that is currently limited needs to be strengthened in terms of manpower and expertise. Furthermore, there is also an urgent need for more equipment, mainly for the purpose of transportation in the forest to ensure effective enforcement²⁵⁰.

²⁵⁰ Views expressed by stakeholders dealing with policy and its administration - PA(1), P(A)2, FA(1), FA(2), PS, LA, A(2a), A(2b), A(2c), A(2d).

(ii) Increase in training need.

With the TLAS requirement, be it under FLEGT VPA or MYTLAS, the officers handling its implementation need to be trained to ensure its effective implementation. This is as explained in Chapter Six such that it involves the role of various Government Agencies. **CB**²⁵¹ stated that there is a need to train more people as certain systems take time for people to learn and for the operator to be familiar with it to get through the process. Basically, to be able to do a good audit, a fairly broad experience is needed. All these require a steep learning curve.

(iii) Increase in fund allocation

This is an issue that is of concern to all stakeholders where in order to intensify the level of enforcement especially in relation to TLAS, lack of funding has been identified as a contributing factor. The state enforcement team of the Forestry Department is asking for an increase in funds from the Federal Government to ensure effective implementation and enforcement of activities in the forest. Currently, funds are limited as the Forest Department in a state is dependent on the State Government's allocation, which in turn depends on the state's financial ability. The Levy Fund, which is currently under the purview of MTIB/MPIC, has been identified as an important source of funds for the Forest Department to increase its ability to ensure effective implementation and enforcement of forest related activities²⁵². However, since MTIB/MPIC has control over the Levy Fund, they decide on the allocation of its funds for certain identified projects. The Forest Department/ MNRE meanwhile, have no control over the allocation of funds and this has led to some dissatisfaction on the part of the Forest Department as it has a major role in ensuring sustainability and legality of the forest produce. Thus, the issue of the control over the Levy Fund and its allocation for projects are currently being discussed between

²⁵¹ Interview with CB who is an expert in the issuance of certification was conducted in Damansara on 8th July 2013

²⁵² This is a view shared mainly by the experts in the Forest Departments.

MNRE and MPIC under the established Joint Committee between both Ministries²⁵³.

(iv) Lack of coordination

The implementation of TLAS requires coordination among the agencies identified for its effective implementation. In this regard, **PS** stated that coordination is a very technical and difficult issue but is nonetheless important for the successful implementation of TLAS that involves agencies under five ministries. As such, under the FLEGT VPA negotiation as mentioned in Chapter Six, it has been proposed that an IACC comprising of various forestry and timber trade related ministries or agencies be established to coordinate all issues related to the TLAS implementation. However, concerns were expressed on the challenges in coordination i.e. the information to be reported and its level of details. The IACC is expected to face challenges in terms of obtaining information involving various ministries or agencies, which will not be easy especially in terms of resources as it may involve the establishment of a system of electronic networks. On another note, **A(1)** argued that the segregation of agencies under MNRE or MPIC has led to the problem of coordination of issues. For example, it is believed that the FRIM, which is under the purview of MNRE concentrates more on research involving upstream activities of the forest rather than downstream activities that are under the purview of MPIC. Therefore, it was stressed that it will be good if these agencies were put under one ministry as was previously the case under the Ministry of Primary Industries as segregation has caused a lot of problems especially in terms of coordination.

²⁵³ Not much is said on this issue by the government policy and forest administrators interviewed possibly due to the sensitivity of the issue; however this is the general sentiment that is gathered from my discussion with them.

7.2.1.1(e) *Malaysia's International Role and Image*

Government officials²⁵⁴ do acknowledge that the FLEGT VPA negotiations and the acts and/or regulations imposed by the developed countries can impact Malaysia's international role and image, either in a positive or negative sense. If Malaysia is able to export legal timber through the EUTR requirements or the Australian CSG or the US Lacey Act Declaration then this will eventually increase Malaysia's credentials as a responsible player in the international community. **PA(1)** stated that these are our major markets and by complying with their requirements, it will increase Malaysia's credentials internationally as a supplier of tropical timber from sustained or legal sources.

However, given the worst case scenario, if Malaysia is not able to comply with the requirements imposed by these developed markets then Malaysia will be in the limelight for a negative reason. This will be made worse if the FLEGT VPA negotiations fail as then Malaysia will be branded as a country that cannot comply with such requirements and this will cause a chain reaction effect that will also affect Malaysia's ability to export to other markets. This will even be so despite Malaysia's ability to comply with the Australian CSG or US Lacey Act declaration. To this end, **PS** mentioned that it will damage Malaysia's trade and reputation. There will be an impression implanted in the minds of the importer that things are not legal in Malaysia and that is why Malaysia cannot sign the FLEGT VPA. **A(2d)** stated that it is a risk if the FLEGT VPA is not signed i.e. the world will have a negative perception about Malaysia's ability to deliver legal timber. **A(2a)** meanwhile stated that the industry will be further burdened as their timber products will not be able to enter through a green lane with a FLEGT License but need to be verified based on consignments through the 'due diligence' process. In such a situation, NGO allegations will appear more credible if they state that Malaysia is not able to sign as there is illegal logging in the country.

²⁵⁴ PA(1), PS, A(2a), A(2d), (A3b)

7.2.1.1(f) Increased Awareness and Demands on the Social and Indigenous People's Issues

Some government officials²⁵⁵ are of the view that the government needs to adopt a balanced approach in ensuring that the interests of all stakeholders are taken into account. On this note, to ensure that the rights of indigenous peoples especially in Peninsular Malaysia are taken care of, there is a Joint Committee (between the Forestry Departments in Peninsular Malaysia and *Orang Asli* Affairs Department) established to handle issues related to the indigenous peoples at the Federal level. According to **FA(2)**²⁵⁶, contractors or loggers will ensure that the rights of indigenous groups in the logging vicinity are observed before any logging is done. It was stressed that to obtain a PEFC certification, there are certain criteria and indicators that the Forest Department needs to ensure compliance in relation to the rights of indigenous peoples, for example, the protection of their heritage and burial sites. Also in Peninsular Malaysia, any issues arising in relation to indigenous peoples' rights are handled by the *Orang Asli* Affairs Department that has been established specifically to take into account their rights and concerns.

From another perspective, after taking into account the claims by indigenous peoples for forest land, **A(2d)** questioned the ability of indigenous peoples to maintain the land as forest land²⁵⁷. Based on the expert's knowledge, many of the indigenous peoples' lands have been converted to rubber or palm oil plantation thus defeating the purpose of maintaining forest land. To this end, **PA(1)** stated that the government wants to make sure whatever land that is alienated or provided to indigenous peoples remains with them and is not immediately sold to a third party. It was stressed that this happens very frequently in Sabah and Sarawak because the indigenous peoples do not know the market value of their land. As such, it is important to make sure that

²⁵⁵ Views shared by PA(1), A(2a), FA(2).

²⁵⁶ Interview with FA(2) who is a high level officer that deals with forest related policies and administration was held at the Peninsular Forest Department in Kuala Lumpur on 10th October 2012.

²⁵⁷ There is no concrete proof on this issue. Only comments made by government officials who are worried that the indigenous people may be influenced by third parties.

whatever benefits accrued to them remain with them and the land is not being sold to a third party²⁵⁸.

Summary

As such, it can be argued that in general, government officials are supportive of the developed countries sustainable and/or legal initiatives such as the TLAS. However, they do acknowledge that there is weakness with regard to the implementation and/or enforcement of existing laws, policies and regulations related to the forest sector and timber trade that need to be addressed first to ensure successful implementation of the TLAS. Such weaknesses are found to be attributed to the lack of manpower, experts, training, funds and equipment. Apart from that, it is noted that the challenges faced in terms of Federal-State relations on land and forest matters can be a hindrance to the acceptance or effective implementation of any legal initiatives. On the other hand, government officials are also aware of the grievances of certain groups of stakeholders on the government's initiatives, policies or processes. However, it was argued that there is a need for a balanced approach by the government to ensure that the country's development needs are taken into account without compromising its social or even environmental aspects. Nonetheless, it is acknowledged that several improvements may need to be undertaken on the approach, manner and/or process of engaging stakeholders and addressing their needs, especially the NGOs.

²⁵⁸ NGO(3) has also confirmed this point where the expert informed that in Peninsular Malaysia, the indigenous people are often used by other parties to actually extract forest resources. They are indirectly used for access to certain areas and harvesting. Furthermore, it is a problem that is already accelerated in Sarawak.

7.2.1.2 Industry Association Members

7.2.1.2(a) Government Policies and Regulations

The Industry Association Members²⁵⁹ in general are of the view that the government process involves excessive bureaucracy and this causes delay. As such, there is a need to reduce the red tape in the implementation of government policies. Also, they have complained that some of the policies imposed, especially those related to labor are not industry friendly. They believe that in order to comply with the sustainable and/or legal requirements and the increasing work load, there is a need to obtain more foreign workers. However, the government does not make it easy to obtain foreign workers as there are too many conditions imposed and too much bureaucracy involved. IM(1)²⁶⁰ informed that:

“The industry will certainly face more and more challenges and its future is not that bright. In order for the industry to survive they have to restructure, where there is a need to diversify the market and also the products. Currently the industry is faced by a shortage of logs. The government’s target through NATIP to reach 53 billion in 2020 is certainly impossible to meet. So there is a need to diversify. The three main components of raw material, labor and marketing is very important. The industry has all the infrastructure, technical know-how, factories and plants to produce but lacks foreign workers, raw materials and marketing.”

IM(2)²⁶¹ on the other hand was of the opinion that certain government policies are too ambitious thus not implementable. On this note, the expert had this to say in reference to NATIP:

“Now, we are talking about NATIP’s 53 billion²⁶², which I think is too far-reaching. I don’t know who is the one who set that target, it’s too far to

²⁵⁹ IM(1), IM(2), IM(3), IM(4).

²⁶⁰ Interview was conducted with IM(1) who is a timber industry expert and also an important representative of the Peninsular Malaysia timber exporters at the expert’s office in Kuala Lumpur on 22nd October 2012.

²⁶¹ Interview was conducted with IM(2) who is an expert on timber industry and also an important representative for the Malaysian Wood Industries in Kuala Lumpur on 10th September 2012.

reach. You want to have (the) so called 53 billion but you have not given the infrastructure for the industry to achieve it; instead they are bogged down with all the restrictions and policy, so how do you expect the industry to achieve it”.

In addition, there were also concerns raised on the existence of two ministries i.e. MNRE and MPIC, in handling the forest sector and timber trade, respectively. To this end, **IM(3)**²⁶³ informed that the industry faces a lot of problems when there are different ministries in charge of forest and timber trade issues such as illegal logging. MNRE is dealing with conservation, management and the annual coupe while MPIC is in-charge of the industry dealing with business, trade, etc., while MITI deals with the furniture industry. Therefore, it was stressed that the industry has to deal with three different ministries and it is onerous on the industry as each ministry has their own different agenda resulting from different politicians having different ways, styles and directions in handling an issue. **IM(3)** went on further to say that MPMA members have mentioned the need for more coordination between ministries or agencies with the Malaysian Embassy/Agency Attachés overseas on timber trade related issues. It was stressed that currently there is no spirit of coordination and togetherness when it involves issues that are not embassy or attaché related. Thus, the Timber Association members find it difficult to get valuable information on the timber industry and its trade related issues overseas. It was suggested that perhaps MPIC/MTIB should consider having a Memorandum of Understanding with the Ministry of Foreign Affairs and/or Ministry of International Trade and Industry as well as the Ministry of Tourism which have attachés’ all over the world to ensure that they provide useful information for the timber industry, to analyze and provide feedback as well as to promote Malaysia’s timber trade in other countries. On this note, it was stated that Malaysian plywood exports to Japan are booming as the then Ambassador of Japan, Y. Bhg Tan Sri Marzuki Mohd Noor in

²⁶² The target of RM 53 billion with a 6.4% of annual growth for exports of timber and timber products by 2020 was set by the Government of Malaysia in consultation with the timber industry members. However the ability to reach the target is questionable as over the years, since the launch of NATIP, exports have remained stagnant within the range of RM 20 billion to RM 21 billion.

²⁶³ Interview was conducted with IM(3) who is an expert on timber industry and is an important representative for the Malaysian Plywood Manufacturers in Kuala Lumpur on 14th September 2012.

early 2000 made it possible by working together with MPMA to aggressively promote the plywood trade in Japan.

Conversely, the furniture industry representative (IM4)²⁶⁴ was of the opinion that it is not necessary for the government to negotiate a FLEGT VPA to facilitate their trade with the EU. Accordingly, there will be no problem for the furniture industry to comply with the 'due diligence' requirement under the EUTR on exports of their products. Therefore, there is no need for TLAS under the FLEGT VPA to prove legality of furniture exported to the EU market as the TLAS implementation involves a lot of bureaucracy and will only cause delay for their exports. It is important to note that with the TLAS, one of the requirements is that the furniture industry now has to apply for an export license under MTIB where previously there were no such requirements. Thus, this requirement under TLAS will involve more paperwork, time and handling costs for the furniture industry.

7.2.1.2(b) Level of Stakeholder Involvement

In general, the Industry Association Members have no qualms over the stakeholder consultations and its process held by the government. However IM(1) was of the opinion that it would be good if the government was clearly seen cooperating with NGOs. On this note, it was stated that:

“On illegal logging, the government has spent a lot of money to address the issue especially the negative ones raised by the NGOs. The MTC funds journalists to write good things about our forests but it is not good enough. I believe the government should be less confrontational with the NGOs.”

²⁶⁴ Interview with IM(4) who is an expert of the timber industry and also an important representative of the furniture industry was held at the Protam Secretariat office in Kuala Lumpur on 21st July 2014.

7.2.1.2(c) Market Share and Market Access of Forest Products

IM(1) was of the opinion that the acts and/or regulations will certainly have an impact especially in terms of competitiveness and market share of Malaysia's exports to the markets of countries that are imposing such requirements. However, to what extent the impact affects the market still remains a question as the acts and/or regulations are relatively new. The expert also informed that Malaysian exporters are afraid and still unsure of how their EU buyers will react to the imposition of EUTR and also their expectations. The situation is made worse as the EU timber market has been affected over the past few years. To overcome the situation, Timber Exporters Association members, on their own initiative, had met with their EU counterparts to discuss EUTR as they are still in the dark on its requirements and effects. On this note, it was stressed that the association members are very disappointed that the FLEGT VPA, which was supposed to promote trade between Malaysia and the EU, has yet to be signed²⁶⁵. To this end, it was mentioned that:

"Overall, the industry in Peninsular Malaysia is frustrated as the country did not even sign the FLEGT VPA yet. 70% of exports of our products are to the EU market. So it is very frustrating for the industry."

It was also confirmed by all the association's experts²⁶⁶ that the imposition of the acts and/or regulations with specific focus to EUTR has caused a shift of market preferences from countries that are imposing trade related environmental measures to countries that have less stringent measures. This is especially so for exporters who do not consider the US, the EU or Australia as their major export markets. On this note, **IM(2)** was of the opinion that for industry members who are not prepared to change, they would consider the acts and/or regulations imposed as NTMs, which are a 'hassle' and costly to implement. They will then tend to look for markets that are not sensitive to environmental needs. On the other hand, it was also argued that for those who look at it as an opportunity, they will work towards satisfying the

²⁶⁵ This sentiment is also shared by IM(2) and IM(3).

²⁶⁶ IM(1), IM(2), IM(3) and IM(4)

requirement and if they are able to comply, they will be at an advantage because they stand to gain in terms of better market access. This is because countries that are not able to comply with the measures will not be able to export their timber products to these developed markets. As such, this will eliminate some of Peninsular Malaysia's competitors from such markets.

On the other hand, it was also stressed by **IM(1)**, **IM(2)** and **IM(3)** that markets like the EU are traditional niche markets for certain timber exporters in Peninsular Malaysia where 70% of their products are exported. These niche markets pay well for value added products compared to other markets with less stringent environmental measures like the Middle East. As such, timber exporters that export high value added products are under pressure to comply with the requirements imposed or they will risk losing the markets. Therefore, this implies that the timber industry will find ways to comply with trade related environmental measures imposed on their products if the markets that impose such requirements are markets of importance for their exports. Apart from that, it is interesting to also note **IM(2)**'s argument on the importance of such high value markets to the timber industry. It was argued that Peninsular Malaysia's timber industry has come to a stage that it has to revolutionize to keep up with the changes required by the world market. This is because Peninsular Malaysia's timber industry lacks raw material and there is a need to maximise the limited raw material that is available. Accordingly, it is better to give priority to the value of exports rather than volume of exports. Therefore, Putnam's analysis of the two-level game is applicable in the case of Peninsular Malaysia's timber industry. International pressure was a necessary condition for the shift of policy in the timber industry where most of them have either willingly or unwillingly adapted to such sustainable and/or legal requirements.

7.2.1.2(d) Issues and Opportunities for Forests and Timber Institutions and Administration

A major issue identified by **IM(2)** is that lack of funding has been one of the main obstacles for the Timber Associations to carry out activities for the overall benefit of its industry members. The associations do not have the financial capacity or manpower to carry out these programs. As such, it was highlighted that the associations have asked for an endowment fund from the Federal Government so that they are able to handle their own programs. However, the government did not entertain their request and they were instead asked to obtain funds from government bodies like MTIB/MTC. It was argued that obtaining funds through government channeled bodies is difficult as it involves a lot of red tape that causes delay in obtaining the funds. The expert stressed that the industry is very robust and needs to move fast according to current global issues or trends. The delay in obtaining funds would not be helpful for the industry to adapt or change immediately according to the current trend. Furthermore, such delays may lead to additional cost incurred by the industry. Thus, the industry cannot wait for the agencies to obtain approval and endorsement, which is usually a long process.

Apart from that, **IM(2)** also highlighted that the fragmentation within ministries or agencies together with high turnover of officers have also affected the ability of the industry to obtain information easily. Also, this has led to the lack of experts within the area of timber trade in the government sector. Things are made worse when the officers only concentrate on their own portfolio and are not even aware of the world developments in the timber industry. It is also interesting to note that in reference to the TLAS/FLEGT VPA, **IM(2)** had also mentioned that there is a need for smooth flow of information on what is actually needed from the industry to comply with any acts and/or regulations. Only then will the associations be able to provide information to their members such that they understand what it is necessary for them to do to comply with such measures. This is because it is found that the road-shows conducted by government agencies on TLAS are not effective. It is

conducted in either English or Malay language, which has been proven to be difficult for the system to be understood for a number of traders who are mainly Chinese speaking. They were not able to grasp the information easily and ended up depending on the association once again to brief and provide them with proper information.

7.2.1.2(e) Lack of Political Will

Some industry experts²⁶⁷ have voiced their concerns that the Federal Government lacks the political will to ensure the success of the FLEGT VPA negotiation. It was mentioned that Malaysia was the first to agree to negotiate the agreement with the EU but then Malaysia has yet to sign the agreement.

Summary

As such, in a nutshell, it can be argued that any sustainable and/or legal initiatives imposed by developed countries will eventually be adhered to by industry members that find it necessary or important to ensure continuous market access or shares to the developed markets that are imposing such measures. To this end, the industry members would applaud the government's efforts to negotiate a FLEGT VPA/Australian CSG. On the other hand, if these developed markets are not of much importance to the industry's exports and their measures are found to be burdensome, there is a tendency for the industry members to shift their market to countries that have less stringent environmental requirements.

²⁶⁷ IM(1) and (IM(3)

7.2.1.3 Non Governmental Organisation (NGO) Representatives

7.2.1.3(a) Government Policies and Regulations

NGO(5)²⁶⁸ strongly expressed the importance for State Governments to be more conservative in forest management approaches by having more stringent policies on allocation of areas for logging before it is open for bidding. Currently, according to the expert, the bidding is done first, which is already time consuming and only then is the area prepared where the necessary arrangements are taken for logging to commence. It is believed that the long period of waiting for the area to be prepared may lead to a lot of problems, even possible corruption. So the expert suggested for the State Governments to prepare the area as much as possible first, such that the waiting period will not take too long—maybe only 6 months. At present, the waiting period can even be up to 3 years. Therefore, it was stated that although the area can be prepared only after the loggers bid and win an area, the procedures like tree marking, boundary demarcation and buffer zone marking could be done even before the area is open for tender. In fact, the expert stressed that it is much better that way because when the officers (foresters) do that, they do not know which logger would be successful in their bid. So there will be less tendency for the officers to be disturbed or coerced by interested parties to expedite the work, possibly in an unprofessional manner²⁶⁹. Also, the expert was of the opinion that any shortage in man-power can be complemented by out-sourcing the work to foresters who retired early and can be paid on a contractual basis, which is more cost efficient than employing new foresters that need to be trained.

²⁶⁸ NGO(5) represents the Institute of Foresters Malaysia and is an ex-forester who is actively involved in various international forums on issues related to forestry and timber trade. Interview with the expert was held at the Protem Secretariat in Kuala Lumpur on 10th October 2012.

²⁶⁹ The same concern was raised by Transparency International Malaysia in their Forest Governance Integrity Report on Peninsular Malaysia (2011) where it was stated that “...licensed areas are to be fully prepared and made ready for immediate entry upon acceptance of tenders. The costs of preparations e.g. boundary survey and demarcation of licensed areas, working blocks, buffer zones and other protection areas, pre-felling inventory and tree marking, road alignment, etc. will all have been covered in the tender bids. The current system means that the licensed areas are only prepared for logging once payment is made. This means that after having paid for the licence, the winning bidder has to wait for several months before the area is ready for entry. This is costly to operators who may then resort to bribery to speed up the preparatory process.”

There are also views by some experts²⁷⁰ that certain policies are too far-reaching and overlapping thus becoming redundant and unimplementable. According to **NGO(2)**²⁷¹, the Town and Country Planning Act 1976 (amendments up to 2006) that deals with pure conservation clashes with NATIP (2009-2020) which touches on timber production from natural or plantation forests while the NFP 1978 (amended in 1992) concerns for conservation of trees and flora. It is believed that these policies are formulated without much reference or consideration given to any similarities or contradictions that may exist in previous legislation. If we look at the classification of production forests for Peninsular Malaysia, the NFP deals with managing natural forests for production of tropical timber while NATIP promotes forest plantations that include rubber and acacia and to a certain degree, oil palm or as interpreted by some, parts of it. In this regard, it becomes a concern when forest plantations are established in PFEs, which is supposed to remain as natural forest. Therefore, it is felt that the terms forests, natural forests and trees are very confusing. Meanwhile, **NGO(3)**²⁷² also stated that some of the domestic policies, regulations or procedures are out of date and have become redundant in which there is a need for a review based on the current global economic, environmental and social situation. The expert cited the Land Cover Classification System (LCCS) and the Environmental Impact Assessment (EIA) as examples of some of the documents that need to be reviewed. For example, the EIA is only required for areas of more than 500 hectares of land. It was stressed that there is a need for EIA even for smaller concessions of land to avoid any abuse to the environment.

²⁷⁰ NGO(2) and NGO(3).

²⁷¹ Interview with NGO(2) was held at the expert's office in Petaling Jaya, Selangor on 28th September 2012. The expert has vast knowledge and expertise on environment related issues especially on those related to the forest and timber trade. The expert has been actively involved in international forums representing Malaysia on environmental issues and was also actively involved in the FLEGT VPA stakeholder consultations held by the government.

²⁷² Interview with the expert, NGO(3) who represents Transparency International Malaysia was held at the expert's office in Petaling Jaya, Selangor on 28th October 2012. The expert has also been actively involved in the Malaysian EU-FLEGT VPA stakeholder consultations.

Apart from the above, it is interesting to note that **NGO(4)**²⁷³ has a different perspective of Malaysia's policies on forest management and timber trade where the expert is of the opinion that they are not in line with international requirements. This is because it is believed that in particular the policies and laws on the rights of indigenous peoples' to their customary land, be it at federal or state level, have failed to live up to the United Nations' Declaration of the Rights of Indigenous Peoples (UNDRIP), which Malaysia is a signatory to. In addition, both the Federal and State Authorities have also generally failed to heed the recommendations proposed by the studies that have been published by SUHAKAM²⁷⁴ on the violations of indigenous customary land rights. It was stressed that SUHAKAM often bases their proposals on well-known international standards.

Nonetheless, just like the government experts interviewed, a number of NGO experts²⁷⁵ were also of the view that the good policies in place are not implementable due to lack of enforcement on the part of the government. Specifically, **NGO(1)**²⁷⁶ stated that:

"We say we have got good laws and we are proud of our laws on SFM and legality but why is the negative spotlight still on tropical countries like Malaysia. So, at the end, we have not shown the result, the confidence, the verification and the proof required for SFM and legality, thus all these create problems. Then people don't trust us and will start questioning".

To this end, **NGO(2)** also mentioned that even though the three regions in Malaysia have three different policies related to the forest sector, all of these

²⁷³ NGO(4) is an expert on social related issues and have represented the country in various international forums especially on the issues related to the rights of indigenous peoples. The expert has also been involved in the early stages of the FLEGT VPA consultations and has through various channels on behalf of organization provided comments on the whole negotiation process. Views from the expert were obtained through email on 8th September 2014.

²⁷⁴ SUHAKAM the abbreviation for 'Suruhanjaya Hak Asasi Malaysia' is The Human Rights Commission of Malaysia

²⁷⁵ NGO(1), NGO(2), NGO(3) and NGO(5)

²⁷⁶ NGO(1) is also an expert on environment related issues and is actively involved in various environmental issues in domestic and international forums. The expert has also been actively involved in the Malaysian EU-FLEGT VPA stakeholder consultations. Interview with the expert was held at the expert's office in Petaling Jaya, Selangor on 12th October 2012.

policies deal with SFM. However, it is believed that the gap is in the interpretation, rolling out and implementation of that policy. Even though Malaysia has good laws, it is always the implementation or enforcement of those laws that causes Malaysia to suffer setbacks. Conversely, it is also interesting to note that **NGO(1)** had a different perspective on the reason for the lack of implementation or enforcement of policies that is the strong link between the government and the industry. This is a trend found not only in Malaysia but also in many other countries. It was stressed that the government is listening more to the voices and concerns of the industry on their difficulties in implementation of certain rules and regulation related to forestry. In his own words, the expert stated that:

“The government sometimes reflects the anxiety of the industry and not, of their own because the laws are there. So why should the government be anxious about it? Why should they worry if they got the US Lacey Act or the EU FLEGT VPA right? The laws are here, you follow the sovereign laws of the country. So why should the government ministries or agencies be affected, be anxious. It is because they are reflecting the anxiety of the industry. That’s how I see it.”

Meanwhile, a number of experts²⁷⁷ have voiced their concern over the existence of two ministries i.e. the MNRE and MPIC that handle the forest sector and related timber trade respectively. Although the job scope has been defined with MNRE handling the forest while MPIC handles timber trade, this has led to various issues such as segmentation of duties, working in isolation i.e. without coordination, overlapping of duties and unhappiness over funding distribution etc. **NGO(1)** was of the opinion that things were made worse when different ministries or agencies look at policies and issues related to the forestry sector and timber trade from different angles. Politicians in respective ministries will look at it from their own political angle while officials in other ministries or agencies look at it based on their relevant job scope (either environment or trade). Therefore, it was stressed that Malaysia is still very compartmentalized in looking at issues. There is a need

²⁷⁷ NGO(1), NGO(2), NGO(5).

to look at the policy and legislative frameworks from an overall perspective and see how things are being operated on the ground to assess their real impact.

7.2.1.3(b) Level of Stakeholder Involvement

Some of the experts²⁷⁸ are of the view that the stakeholder consultations do not take into account the view points of stakeholders. In particular, **NGO(4)** believes that the role of NGOS in the development of forest and timber trade related policies like FLEGT VPA can be better articulated if there are greater efforts on the part of the Malaysian authorities to integrate NGOs recommendations and inputs. In fact, it was stressed that the experience within the FLEGT VPA processes has even seen the withdrawal of coalitions such as JOANGOHutan and JOAS due to the failures of such processes to establish effective policies and legal reforms that were suggested by them in ensuring that the customary land rights of indigenous peoples in the country i.e. in the granting of timber harvesting rights are fully respected.

In this regard, there were comparisons done between the consultations held by MPIC on FLEGT VPA with those conducted by MNRE on the forestry and timber trade related issues. Comparatively, the consultations held by MNRE are said to be more NGO-inclusive. On this matter, **NGO(2)** stated that both MNRE and MPIC see the NGO's role differently. MNRE is very NGO-inclusive in developing their policies whereas MPIC is rather less engaging. In fact, the expert stressed that the last report by MNRE on the CBD reflects the NGOs' progress on the subject matter and their toolkit was featured as Malaysia's achievement to address the conservation forests and the Bio-diversity component. With MPIC, the expert is not sure on how they will be engaged. It is felt that NGOs are not included in most negotiations especially those dealing with environmental and social issues because the government

²⁷⁸ NGO(1),NGO(2)

does not encourage their participation. In this regard, **NGO(1)** was of the opinion that:

In Malaysia, we don't have too many NGOs that look into environmental issues. I am not very sure actually why. Maybe it is because the way we are brought up, our culture and lack of freedom, so there is only a handful. Meanwhile, many of the NGOs that are active are actually funded by foreign sources. Obviously because there is no way of getting money from the Malaysian government. If we depend on Malaysian generosity, we will not get anywhere. The government is not willing to invest on environmental issues possibly because it is felt that the government will be scrutinized even more by environmental NGOs.

Meanwhile, some experts²⁷⁹ are of the opinion that the FLEGT VPA consultations lack transparency as they are only held for limited issues that have been identified by the ministry. Full information on the entire process and issues discussed in the negotiations with the EU is not disclosed especially to NGOs. This has led to the lack of trust on the part of stakeholders on the ministry's efforts as they are not sure what is expected or required from them or what is their role leading to suspicion of the whole process. In particular, **NGO(2)** was of the opinion that the government to date may seem, at the surface, to be more open to inputs from civil society. However, based on experience, it is believed that there are still a lot of civil servants who are of the view that academicians or NGOs should not be involved in policy formulation, discussions or recommendations. As such, the expert stressed that there is a need for change of such mindsets.

Consequently, a number of experts²⁸⁰ have voiced their hopes that the government would consider a more active role for the NGOs in the development of policies and include them in Malaysia's delegation for some important meetings overseas. **NGO(1)** believes that the NGOs can play an active role as they are also experts in dealing with environmental or social

²⁷⁹ NGO(1), NGO(4)

²⁸⁰ NGO (1), NGO(3).

issues. It was stressed that government officials may not have the same in-depth knowledge as the NGOs on particular issues taking into account their various portfolios. This is because most NGOs are specialized in certain areas with experience working in the field. As such, the expert also stated that although the NGO's counsel may be seen as unpalatable at times by the government however what is suggested is nevertheless patriotic, equitable and objectively developed for future generations.

7.2.1.3(c) *Market Share and Market Access of Forest Products*

NGO(4) stated that the efforts to procure sustainable and/or legal tropical timber products on the part of timber importing countries must not be viewed as a form of pressure. It should be seen as a complement to the efforts of timber producing countries in ensuring sustainable and/or legal harvesting of timber resources and overall sustainable management of their forests²⁸¹.

7.2.1.3(d) *Issues and Opportunities for Forest and Timber Institutions and Administration*

NGO(5) shared his experience on the difficulty faced by a government official in obtaining information that are not under the purview of the official's ministry during a (FAO) meeting overseas. The unwillingness to share information by other ministries on policies or issues has made it difficult for Malaysia to articulate its position at the meeting.

²⁸¹ Currently some tropical timber producing countries like Malaysia and Indonesia have invested a lot of time and money to come up with their own national certification schemes like the MTCS and SLVK respectively, which is endorsed by the internationally accepted PEFC Scheme.

7.2.1.3(e) Increased Awareness and Demands on the Social and Indigenous People's Issues

Certain experts²⁸² raised their concerns on the rights of indigenous peoples, also known as the NCR, as not being adequately recognised in Malaysia. According to **NGO(1)**, it is undeniable that there are laws for indigenous peoples' rights in Malaysia that are being complied to the 'letter of the law'. What is lacking is the 'spirit of the law' which is not adhered to. It was stressed that there is no proper communication between the government representatives and the indigenous peoples to understand the real problems faced by the latter. For example, the government, in drawing the boundaries for PFE or during issuance of licences to timber companies, does not consult the indigenous peoples on their 'area of rights'. It is important to know what is required by these indigenous peoples, before any license is issued. This is because they are living in the forest and are dependent on forest produce for their livelihood. Therefore, their area of land should be respected by means of taking into account their burial sites and areas for hunting and collecting forest produce. Meanwhile, **NGO(4)** stressed that there is lack of transparency and accountability and other key mechanisms of good governance in Malaysia. It is believed that the policies and laws on the rights of indigenous peoples to their customary land have failed to live up to the UNDRIP. As such, it has been proposed for the government to:

- (a) establish a National Policy on the Rights of Indigenous Peoples through a participatory and transparent multi-stakeholder process, using the UNDRIP as a guiding document
- (b) introduce policy and statutory reforms by both federal and regional authorities to ensure that judicial decisions on indigenous customary land rights are fully respected
- (c) establish a participatory and consultative process for boundary delineation and mapping process for indigenous territories based on

²⁸² NGO1, NGO2, NGO4

their customary laws and practices for the purpose of granting full legal recognition on them

- (d) acknowledge the need for a Free, Prior and Informed Consent mechanism for land, forestry and natural resource-related issues and processes that may affect indigenous communities, in order to ensure that all industrial and construction activities may only take place in indigenous territories with the communities' explicit permission.

Conversely, NGO(3) was also of the view that the indigenous peoples are often used by third parties for their own benefit. It was confirmed that in Peninsular Malaysia, the indigenous communities are used by other parties such as loggers to actually extract forest resources illegally. They are also indirectly used for access to certain areas for harvesting. Furthermore, the expert was of the view that it is a problem that is already widespread in Sarawak.

Summary

Therefore, overall the NGOs have argued that some of the government policies are either old or redundant or overlapping and need to be reviewed. The social NGOs even argued that the current laws especially on NCR are not internationally acceptable. Meanwhile, there are some who felt that even though some of the current laws, regulations or policies are sufficient or acceptable, it lacks enforcement on the part of the government. Apart from that, in general, the NGOs are not happy with the approach or manner they are being engaged by the government on any policies or initiatives especially related to the forest sector and timber trade. They are of the opinion that they are not properly consulted or given an effective role in the government initiatives.

7.2.1.4 International Organisations

7.2.1.4(a) Government Policies and Regulations

EU(1)²⁸³ is of the opinion that transparency is the key to effectively implement any laws. As such, the expert believes that if Malaysia is transparent in the management of its forest resources and practices, it would create a lot of good will. Currently, the expert was informed by stakeholders and NGOs in the EU that Malaysia lacks transparency. Thus, the perceived lack of transparency creates mistrust that leads to the perception of inappropriate conduct that gives a bad name to the product.

7.2.1.4(b) Level of Stakeholder Involvement

The EU FLEGT VPA and the Australian ILPA/ILPAR require the involvement of stakeholders in negotiations and developments of TLAS/CSG respectively. In this regard, **EFI(2)**²⁸⁴ mentioned that civil societies in Malaysia are not active and need capacity building. Previously in the 1990s, based on the expert's observation, the Malaysian government used to view civil societies with a lot of suspicion. However, to date although the government's perception has changed and there are more NGOs involved in policy discussions, the expert believes that the NGOs themselves do not have the capacity to bring up issues or manpower to attend such discussions unless they are well funded. As such, there is a need for a bigger spread and stronger set of NGOs in Malaysia.

²⁸³ EU(1) has vast knowledge and expertise on environmental issues and represents the Directorate General of Environment EC in Brussels. The expert is also the lead negotiator for the FLEGT VPA on behalf of the EC and feedback was obtained from the expert based on an interview through skype on 29th November 2012. Follow up discussion was also held with the expert during the expert's participation for the EU FLEGT VPA consultations held in Kuala Lumpur on 22nd May 2014.

²⁸⁴ EFI(2) is very knowledgeable on the Malaysian forestry and timber trade related issues and has been previously attached with the Malaysian government. The expert has also been actively involved in the FLEGT VPA negotiation. The expert is currently representing the EFI and is actively involved in the timber trade issues related to the EU. Interview was held at the expert's office in Kuala Lumpur on 2nd October 2012.

With specific reference to the FLEGT VPA consultations, **EU(1)** believes that organizing stakeholder consultations was the biggest challenge for both the EU and Malaysia. It took a long time for the EU and Malaysia to work on a common understanding of what is a stakeholder consultation. On the EU's side, the expert stressed that it was a challenge to deal with the complicated internal Malaysian structures. There was no clear understanding on the complexity of the Federal-State relations on land and forest matters. Furthermore, the expert was of the opinion that for a long time, Malaysia saw the negotiations exclusively as a sectoral trade agreement. Meanwhile for the EU, the trade component was a driver for such an agreement but it was not the main reason for the agreement.

As such, based on the reasons above, it was believed that both the EU and Malaysia were not talking about the same issues during the early years of negotiation, which had not been a clear and transparent relationship. On another note, it is interesting to observe that according to **GH**²⁸⁵, Ghana's approach to a successful FLEGT VPA negotiation with the EU involved a strong stakeholder engagement. The stakeholders included were the Forestry Commission, Ministry of Land and Natural Resources, timber industry and private sector, land owners or traditional authorities, District Assemblies, media, chainsaw operators and civil societies. They were also part of the VPA Steering Committee and the Ghana negotiation team²⁸⁶.

²⁸⁵ Feedback from GH who is a forest expert in the Government of Republic of Ghana was obtained through email on 22nd October 2012. The expert has been actively involved in the FLEGT VPA negotiation between Ghana and the EU.

²⁸⁶ GH's comments can be supported by the view of a group of NGOs from the European and timber producing countries through their website 'Logging Off' which is an online resource for information on VPAs. They mentioned in their brief "A civil society counter-brief on the Republic of Ghana-EU VPA-June 2010" that the civil society organisations and the Government of Ghana perceived the initial and ratification of a FLEGT VPA as a success. They further stated that Ghana's multi-stakeholder processes are an example that should be followed by other countries. Nonetheless, they believe that at the implementation stage of the FLEGT VPA, there is a need to continue and deepen the multi-stakeholder processes. Furthermore, among the stakeholder there is a need for improvement in terms of mutual respect and trust. Also, to enable stakeholders to engage and contribute meaningfully to the implementation of the agreement, there is a continuous need for donors and other interested bodies to provide for capacity building among all stakeholders. Further details are available at: <http://www.loggingoff.info>

7.2.1.4(c) Market Share and Market Access of Forest Products

Just like some of the government and industry experts, **EFI(1)**²⁸⁷ and **ITTO**²⁸⁸ have also confirmed that there is a shift of market preference for timber exports whereby it is mainly to China, India and Thailand. However, **ITTO**²⁸⁹ went on further to say that despite such a situation, the ‘smart’ developing countries are engaging with the ‘green’ developed countries to try and guide evolution of legality and/or sustainability requirements as it is believed that these requirements may come to be precursors for other products such as palm oil.

Nevertheless, **EFI(2)** specifically mentioned that the timber industry cannot shift markets overnight as over the years they have developed certain markets. As such, they will usually stay with the market that they have developed and their current trading partners. **EFI(2)** further stressed that for those who have been in the industry for some time, they will stay with the EU market because it is a premier market that requires quality tropical timber and pays well. Therefore, in a way the companies that depend on the US, the EU or the Australian markets will have to comply with the requirements imposed by these markets.

²⁸⁷ Interview with EFI(1) was conducted at the expert’s office in Kuala Lumpur on 2nd October 2012. EFI(1) was actively involved in the FLEGT VPA negotiation and previously represented the European Delegation in Malaysia in the early stages of the FLEGT VPA negotiations. The expert now represents the EFI based in Kuala Lumpur.

²⁸⁸ The feedback was obtained from ITTO who is an official, actively involved with tropical timber trade related issues based in Japan through email dated 25th September 2012.

²⁸⁹ This view has also been confirmed in the ITTO Report prepared for the 48th International Tropical Timber Council Meeting in Yokohama (3-8 November 2014) - Draft Report on Analysis of the Economic Impact of Governmental Procurement Policies on Tropical Timber Markets where it is stated that China has become the top importer of HS 44 products (primary and secondary wood products) and also a leading exporter of HS 44 products while India has become the 13th largest importer of HS 44 products and it is also a growing exporter. Meanwhile the EU28, USA, Japan and Korea remain large and important markets for HS 44 products but the share of ITTO producers in these mature economies has declined and the share of China has increased prominently. For further details see www.itto.int/direct/topics/topics_pdf_download/topics

7.2.1.4(d) Malaysia's International Role and Image.

Some of the experts²⁹⁰ are of the view that the acts and/or regulations imposed by developed countries will have an impact on Malaysia's international role and image. In this regard, **EU(2)**²⁹¹ specifically mentioned that:

The FLEGT VPA will help Malaysia to demonstrate the legality of its production process, improve its image, enhance market position in discerning markets and give it a competitive edge in the international market place. Through the VPA, Malaysia could also get access to new ideas, innovations and possibly financial and technical support to make the necessary changes.

7.2.1.4(e) Lack of Political Will

Some experts²⁹² were of the opinion that the implementation of the binding trade related environmental measures have revealed the lack of political will on the part of Malaysia, as a whole, to ensure its success and acceptance of such measures. It is also believed that the political divide between the three regions in Malaysia has worsened the situation where each of the regions concentrates on their own political agenda. Thus, environmental issues are not given priority for the country. This statement was made in specific reference to the FLEGT VPA negotiation between Malaysia and the EU. On this note, **ED**²⁹³ had stated that:

What was lacking on the Malaysian side was maybe a stronger push from the government—the political will to conclude this agreement—despite the possibly negative (political) consequences from certain quarters in Malaysia. Negotiating such a bilateral agreement, be it a VPA, FTA or any others, which changes to such a profound extent (of) the local practices and legislation, is never an easy process but it is the

²⁹⁰ EU(1), EU(2), ED.

²⁹¹ Feedback from EU(2) was obtained through email dated 17th September 2012. EU(2) was formerly the main coordinator for the FLEGT VPA negotiation on behalf of the EC.

²⁹² EFI(2) and ED.

²⁹³ Information was obtained from ED through email dated 7th January 2013. The expert was formerly an official attached to the European Delegation in Malaysia and was actively involved in the FLEGT VPA negotiation between Malaysia and the EU.

responsibility of the government to show strength and will when it's in the best interest of its people, business and nature in this case.

On the other hand, **EFI(2)** had mentioned that the FLEGT VPA negotiations could have been more successful if the EU had from the start obtained a commitment at the highest level i.e. from the Prime Minister of Malaysia himself to negotiate the agreement. The commitment to negotiate was only made at the Federal Government level by the MPIC Minister and negotiation involves senior officials from various ministries or agencies. Despite the Malaysian Cabinet (comprised of the Prime Minister and his deputy, Ministers and Senators) agreeing to the MPIC Minister taking the lead to negotiate the agreement, the expert believes strongly that if the EU had dealt directly with the Prime Minister of Malaysia then eventually the Ministers and officials at the Federal Government and State Government levels would also have been committed in ensuring the success of the negotiations. As such, in a nutshell it can be argued that if the Prime Minister's commitment to the agreement could have been obtained directly, this would have been a powerful sign to domestic interests that there was a commitment to the FLEGT at the top and this might have discouraged any opposition and helped rally support, or at least acceptance amongst domestic interests.

On this note, for comparison purposes, it can be argued that for both the Malaysia-Turkey FTA and Malaysia-Chile FTA, the role played by the Prime Ministers of the respective countries is crucial in bringing about a successful conclusion of the FTA negotiations. This is because the highest level of commitment eventually leads to the follow-up on the issues and issuance of official statements on the progress of negotiations during the visits of the Prime Ministers to each respective country. Meanwhile, Putnam, in his two-level game theory, had mentioned that it is important that domestic stakeholders agree to endorse or implement any policy negotiated internationally; based on the argument above, such endorsements could have been possible if the agreement to negotiate was done at the highest level to influence the outcome of the negotiations. Also, such a move can be

argued to be within Schoppa's argument of synergistic strategies that can be used by the negotiator (in this case the EU) to produce positive results that enable possible cooperation as well as winning a larger concession from his counterpart, by obtaining of the Malaysian Prime Minister's commitments on the negotiations.

7.2.1.4(f) Increased Awareness and Demands on the Social and Indigenous People's Issues

It is interesting to note **EU(2)**'s view on the rights and issues of the indigenous peoples in Malaysia where the expert believes that these issues are not solely reserved to tropical countries. Even developed countries like the US, Canada, New Zealand, Australia and Finland have similar problems with their own indigenous groups. The expert stated that the government has to move away from speaking on behalf or over the heads of locals and indigenous communities and start talking to them as partners in the process. Accordingly, it takes a dedicated government with a long term view and emphasis on participatory decision-making, benefit sharing and conflict resolution to handle this issue thoroughly. On this note also, **ITTO** was of the opinion that it is important to include indigenous peoples and local communities in discussions and decisions related to their future and the future of the resources they depend on. There is a need to make sure that an agreed share of benefits from exploitation of important resources for such people is compensated back to them, either directly or through development projects that they require i.e. schools and hospitals.

Summary

Therefore, in a nutshell, some of the experts from international organizations are of the view that there is a lack of political will on the part of the Malaysian Government in ensuring the success of initiatives such as the FLEGT VPA. A FLEGT VPA will help Malaysia to demonstrate the legality of its timber product and overall enhance its market position for timber products, improve

its image and provide a competitive edge for its product in the international market place. It is also felt that any initiatives undertaken by a country must adhere to the element of transparency, effective stakeholder engagement and participatory decision-making, in order to be successful.

7.2.2 Comments and Views of Experts in States

As mentioned in Chapter Four, discussions were held with State Forest Administrators and Implementers as well as State Timber Industry Members from four states in Peninsular Malaysia i.e. Perak (17th October 2012), Johor (22nd January 2014), Pahang (17th March 2014) and Selangor (15th August 2014), respectively using the focus group discussion method. The discussions with the experts in the states are important to understand the level of awareness or involvement at the state level of the acts and/or regulations imposed by the developed countries and its effect on the state's forestry and timber industry. This is because the forest comes under the purview of the states where, at the end of the day, states are responsible to ensure successful implementation or enforcement of any system that will provide credibility for forests or timber produce according to sustainable and/or legal requirements. Meanwhile, prior to focus group discussions, a briefing was held by the Chairman of MTCC on FLEGT VPA and other related issues where the researcher sat in as an observer. Thus, information on the effect of the FLEGT VPA negotiations and the acts and/or regulations on State Forestry and Timber Industry was first obtained during the researcher's observation and followed by the researcher asking questions to obtain in-depth understanding of the effect during the specific focus group discussions held respectively with the State Forest Administrators and Implementers and State Timber Industry.

7.2.2.1 State Forest Administrators and Implementers

During the briefings and focus group discussions with the State Forest Administrators and Implementers, the understanding obtained was:

- a) The higher level forest officials (State Directors, Deputy Directors and to an extent Assistant Directors) at the headquarters (HQ) of the State Forest Departments have a sense of awareness of the acts and/or regulations imposed by the developed countries. They are also aware of the responsibilities that will come along with the implementation of TLAS. Thus, various concerns on the lack of finance, manpower, equipment and also training on the part of Forest Department officials to ensure successful implementation of the TLAS were highlighted. Nevertheless, there seems to be inadequate awareness on these issues by other officials especially the implementers on the ground. The lack of awareness on the FLEGT VPA/TLAS could possibly be attributable to the fact that the FLEGT VPA is still being negotiated by the Federal Government with the EU and the TLAS not yet fully implemented. However, for certification efforts under MTCS/PEFC, there seems to be a very clear understanding about the efforts and the role that is played by the SFD officials. In fact, as mentioned in Chapter Five, all the FMUs in the states in Peninsular Malaysia have been certified under MTCS/PEFC.
- b) The SFDs have to convince the State Governments on the benefits of such acts and/or regulations to the state as any initiatives undertaken on forestry matters needs to get the State Executive Council's (i.e. State EXCO) approval as land and forest comes under the purview of the State Governments. It is important to note that forestry is one of the main sources of revenue for most states therefore it will be difficult to convince State Governments if they are to be burdened with additional costs to implement the TLAS. It is important to note that the SFDs are funded by State Governments and limited resources are allocated to the departments. As such, any additional commitments are considered burdensome to the Forest Departments as they have very limited resources to run the department. In fact, the benefits of the TLAS for the states have been questioned as it was highlighted that the export and import tax collection goes to the Federal Government and is not shared with the State Governments. The state only gains revenue in terms of royalty and premium from timber harvesting operations.

- c) TLAS is considered as an additional and burdensome responsibility as the SFD officials are already bogged down with a lot of internal and external audits i.e. International Standards Organization (ISO) standards to ensure quality and safety of the timber harvested and MC&I standards for SFM certification. These audits are time consuming and affect their daily job scope. In fact, the forest officers during the interview also questioned the dual tasks that they have to undertake i.e. certification under MTCS/PEFC and legality under TLAS. Apart from that, it is felt that the focus on legality may diminish the efforts on sustainability. As such, it was suggested that for PRF, the same Audit Report done for MC&I for SFM be used for FLEGT TLAS purposes to avoid double audit and waste of manpower and resources. The resources instead should be used for auditing of the State Land and Alienated Land.

- d) The Forest Departments lack adequate manpower and expertise on issues which are beyond their present job scope of forest management. This is because their job scope has expanded to cover issues such as climate change and biodiversity as well as other environmental and social issues that are frequently raised in relation to tropical forest. Their officers are now expected to know and respond to all the related issues.

- e) To ensure effective implementation of the TLAS that meet the requirements of the FLEGT VPA, the following needs to be taken into account:
 - (i) Appropriate financial assistance or allocation from the Federal Government due to increase in work load and to ensure effective implementation according to the principles and criteria identified under the Table (18) of the TLAS for Peninsular Malaysia

 - (ii) Training to ensure staff are sufficiently skilled to handle the required operational methods under the tables of TLAS some of which are new elements such as certain issues related to NCR

- (iii) More equipment or transportation. Currently most of the vehicles are old and there is a need to visit logging areas and wood processing mills more regularly to ensure compliance with the TLAS tables and budget constraints prevent field staffs doing their work effectively
 - (iv) Increase in manpower to ensure constant monitoring on the ground. Performing their existing work scope currently leaves no capacity for the staff to undertake extra work that is necessary to ensure compliance with all the TLAS tables.
- f) At present as mentioned in Chapter Six, only the Selangor State Government in Peninsular Malaysia has stated its refusal to support the FLEGT VPA/TLAS efforts. However, discussion with some of the officials outside the focus group led to the understanding that refusal is not due to political reasons i.e. Selangor is ruled by the Opposition but possibly due to the fact that there is no logging in Selangor and the lack of understanding of the whole purpose of the FLEGT VPA/TLAS and its benefits to the country as a whole. Nevertheless, the researcher was informed that there are efforts now undertaken by the Selangor Forest Department to once again convince the Selangor State EXCO on the importance of such legal initiatives to the country as a whole especially when there are many wood processing mills in the state that export their wood products to Europe.
- g) Implementation of the TLAS may affect the reputation of the SFDs as they have no control over the whole system to ensure legality of the timber products unlike the SFM Certification for FMUs under MC&I. This is because some of the principles of the TLAS tables, which are under the responsibility of the Forest Department, have criteria that involve cooperation of other agencies to ensure success of its implementation. For example, Principle 2, Forest Operations has a table with a criterion for Workers Safety and Health. This criterion requires the involvement

of agencies such as DOSH, DoL and SOCSO²⁹⁴. As such, it is stressed that any non-compliance of such criteria by other agencies for tables under the Forest Department's control will also directly or indirectly affect the reputation of the Forest Department. This is because the auditors will seek a report from the Forest Department to ensure the compliance of the Workers Safety and Health. Therefore, the importance of coordination and providing proper information sharing among agencies is stressed as vital to ensure success of the forest operations.

- (h) At the state level, there is constant communication and good working relations with the NGOs. For example, the Perak Forest Department stated that they are working together with the Malaysian Nature Society on a bird sanctuary project and there is scheduled patrolling to prevent poaching and illegal felling together with the World Conservation Society. Specifically, the forestry expert from the Pahang State Government mentioned that they have a dedicated enforcement officer to work closely with Transparency International on its Forest Watch project that also involves NGOs such as MNS, REACH and WWF. There is also a close relationship with the local communities where the Forest Departments work together with them through the State Joint Committee every two months. At the district level, there is a Technical Committee to discuss any problems or issues related to the local communities. However, the major concern raised here is the interference of a 'middle person'²⁹⁵ that creates problems for the Forest Department through the local communities. It is important to note that the term of 'interference of middle person' by the Forest Department may be debatable as some NGOs like **NGO(4)** feel that there is lack of transparency and accountability on the part of the Government of Malaysia when it involves indigenous peoples or local communities'

²⁹⁴ See the details of Table 14 and other Tables under the TLAS at <http://www.protem.gov.my>.

²⁹⁵ The understanding obtained from the interview is that 'middle person' here refers to either social workers or groups that meet the indigenous people or local communities and influences their thoughts on issues related to their rights in the forest

rights to the forest. It was stated that there is no: (1) transparent process for issuance of timber license, (2) guaranteed public access to information and (3) participatory decision-making and the Free, Prior and Informed Consent process of affected communities. Meanwhile, **NGO(3)** was of the view that the younger generations of the indigenous community (approximately 170,000 people) in Peninsular Malaysia are more educated and aware of their rights. Thus, they have become more vocal on these issues. It was stressed that if the government does not do more for the indigenous people's rights, then they will start demanding their rights through various channels. The expert further mentioned that since there is not much of a response from the government, the indigenous community has even started doing their own community mapping, involving substantial area of lands based on ancestral boundaries of lands they have occupied.

- (i) On the timber industry within the states, the Forest Department officials were of the opinion that eventually the industry will comply with any acts and/or regulations that are necessary for continuous access to the markets that are imposing the enactments.

From the foregoing it must be noted that the SFDs have a very crucial role to play in ensuring success of any sustainable and/or legal efforts undertaken by the Federal Government. The SFD has to ensure the effective implementation of any proposed system for legality and/or sustainability while convincing the benefits of such system to the State Governments. Nonetheless, in order to enable the SFDs to play an effective role, the Federal Government needs to assist the SFDs to be administratively, financially and technologically equipped. As such, viewing this in terms of Putnam's two-level game theory, it can be argued that the Federal Government in ensuring successful negotiations of the EU FLEGT VPA and the Australian CSG for a legality assurance system/CSG, will have to seek the cooperation of the State Governments via the Forest Departments to agree to the negotiations and to effectively implement such measures.

However, if we analyze the situation further (based on Schoppa's argument about Putnam's 'synergistic linkages'), acceptance at the State Government's level is only possible by taking into account their concerns and interests especially those of the SFD by providing the required administrative, financial and technological assistance apart from adequate manpower.

7.2.2.2 State Timber Industry Members

During the briefings and focus group discussions with the Timber Industry Members from Pahang, Perak, Selangor and Johor, the understanding obtained was:

- (a) Currently the timber industry is not affected by the acts and/or regulations imposed by the developed countries and 'business is still as usual'. Accordingly, there is no problem in relation to exports of timber products to the US as the exporters are able to provide all the required legality declarations under the Lacey Act. The same goes for exports to Australia as there is no specific requirement despite the ILPA/ILPAR being implemented as all that is required for the exporters is to show documents to prove legality of the exports. Meanwhile, although the exporters have given their support for the FLEGT VPA to be signed as soon as possible, they are of the opinion that their industry can still survive with the EUTR's 'Due Diligence' by proof of relevant documentation on the legality of the exports of their timber products per consignment basis. So far, there has not been any problem in the exports to the EU with the EUTR being enforced since March 2013. However, they did note that there are a lot of uncertainties on the 'due diligence' requirement as even their importers in the EU are not clear on what to expect from the regulation once it is fully enforced by the EU (it is important to note that the EU side has yet to fully implement the EUTR regulation as they are still working on establishing the proper enforcement mechanisms). Apart from that, there was also dissatisfaction by some exporters whose traditional market is the EU that the FLEGT VPA negotiation is taking a lot of time to conclude. Thus, it is felt that eventually exporters may be content to comply with

the 'due diligence' requirement for a legality declaration based on consignments instead of using the TLAS license under FLEGT VPA for their exports (please refer to Chapter Six for the 'due diligence' declaration requirement).

- (b) The industry members will eventually comply with any acts and/or regulations if the market imposes such measures, which is important for exports of their timber products. For example, the EU market is an important market for high value Red Meranti timber, thus exporters who value the EU market will need to comply with the EUTR. Anyway, it was felt that since the industry in Peninsular Malaysia is already complying with MTCS/PEFC, it would be easier if there is one recognized world standard for the exports of timber products. Currently, there are demands for different export standard requirements for different regions such as PEFC, FSC, Chain of Custody, TLAS, CSG and this is burdensome and not cost effective for the industry.
- (c) If exporters find the acts and/or regulations too burdensome and there are other markets with lesser stringent environmental measures willing to buy and pay well for their timber products, there is a tendency for them to shift their markets. Furthermore, the low demands for wood products such as *Seraya* and *Kapor* and the inability for the EU to pay well due to the economic situation in the region have encouraged a shift of markets to other countries like India, Middle East, South Africa, China and Thailand. In addition, the industry states that China pays well for *Merbau* wood.
- (d) The industry members are of the opinion that the government can assist the industry on:
 - (i) Relaxing the rules on the number of foreign workers for the industry. The timber sector is a labor intensive sector and needs a lot of workers specifically in the production site. Currently the government allows a ratio of one local worker to three (1:3)

foreigners. The industry request for an increase of one local worker to six (1:6) foreigners and

- (ii) Diversify market opportunities and increase timber promotion through trade shows to markets like China and Middle East.

- (e) The industry members also felt that there should be more publicity and promotion for the green efforts done by the industry as it has been given a very bad image by local NGOs.²⁹⁶ The industry members stressed that the indigenous peoples are actually well taken care of by arguing that there are schools built for their children and they even have paid digital television service (Astro)²⁹⁷ facilities. It is actually the people outside who are the ones causing trouble and tarnishing the image of the industry by stating that the industry is only interested in making money and not taking care of the environment and local communities.

Therefore, as a whole it can be argued that the industry in Peninsular Malaysia may not have problems to comply with the legality requirements imposed by the US, the EU and Australia if they require those markets for their exports. Furthermore, they are already complying with a higher standard of certification under MTCS/PEFC to export timber products to the developed markets that require such proof. Nonetheless, for exporters who find such measures burdensome and have alternative markets for their timber products, they will certainly shift their markets or find new ones.

²⁹⁶ It was mentioned in the Borneo Online, 21 December 2014 that the timber industry “*despite its substantial and significant socio-economic contributions to the state, is often seen as a ‘big bully’ and an unscrupulous business venture both on the local and international scenes.*” More information is available at : <http://www.theborneopost.com/2014/12/21/timber-industry-a-public-enemy/#ixzz3rkyIWgP3>

²⁹⁷ Astro is a leading integrated consumer media entertainment group in Malaysia & Southeast Asia with operations in pay-TV, radio, publications & digital media. Projects like schools and basic facilities are usually done as part of the timber companies’ social responsibility upon obtaining license to harvest.

7.3 ANALYZING THE EFFECT OF THE BINDING TRADE RELATED ENVIRONMENTAL MEASURES ON PENINSULAR MALAYSIA'S FOREST SECTOR AND TIMBER TRADE

7.3.1 An Overview

The history of the Peninsular Malaysia's forest sector and timber trade as explained in Chapter Five indicates that there is a tendency for Malaysia to adopt policies based on international trends and demands in relation to the forest sector and timber trade. Nonetheless, the revision of a policy like the NFP in 1992 to reflect the Earth Summit's concern and the adoption of MTCS in 2001 was made possible due to acceptance by all the states in Peninsular Malaysia as well as other domestic stakeholders. **A(2d)** stated that the MTCS standard is based on internationally recognised practices and is developed together with all the stakeholders i.e. the environmental and social NGOs, government and the industry. It is important to get the 'buy in' of all stakeholders to ensure the success of any international policy initiatives to be applicable at the domestic arena. Therefore, the success of any trade related environmental measures imposed by developed countries on developing countries like Malaysia would depend on the acceptance of its domestic stakeholders.

7.3.1.1 US Lacey Act

The US undertook a unilateral action to amend its Lacey Act in 2008 to address the problem of illegal logging. According to Prestemon (2015), the imposition of the Lacey Act has successfully restricted illegal timber from South America and Asia from entering its market. This is because the lumber and hardwood plywood prices for imports that are from suspected illegal wood source countries have increased and the volumes have fallen since the Act was implemented in 2008²⁹⁸. However, since the imposition of the Lacey Act was a unilateral action, there was not much room for a full debate on the part of the producer or exporter countries. It did not require feedback and

²⁹⁸ Study by US Forest Service economist, Prestemon was published online by the Journal of Forest Policy and Economics and is based on monthly import data from 1989 to 2013.

was unilaterally forced upon producer or exporter countries to comply if they want to export timber and timber products into the US. Thus, there were no negotiations for a system or guideline as in the case of the EU or Australia that involves stakeholders' participation in the development of the system or guideline. All that is required is a declaration of legality. According to the Peninsular Malaysia's Timber Industry Associations²⁹⁹, the industry does not face any problem in complying with the Lacey Act as the companies that are exporting to the US are able to provide the legality declaration required by their buyers in the US and for them, business is as usual. Therefore, for Peninsular Malaysia, the Lacey Act does not require or influence changes in the existing procedures; however exporters have to declare legality of their products.

7.3.1.2 Australian ILPA/ILPAR

The Australian ILPA/ILPAR also calls for declaration of legality just like the Lacey Act for exports of timber and timber products into the Australian market. However, what differs is that the Australians negotiate with producer or exporting countries for a CSG to facilitate exports of legal timber into their markets. For Malaysia, the negotiation was on a CSG as a proof of legality. This guideline has been developed jointly to assist the Australian importers in understanding the regulated timber products in Malaysia in order for them to carry out their 'due diligence' under the ILPAR. The CSG will provide information to trace the supply chain of the timber i.e. control of timber harvesting and export in Malaysia and what constitutes legal timber for the three regions in Malaysia. Also, there is a commitment by the Australian government to consult stakeholders throughout the development of the legislation and regulation and that was done through formation of Working Groups comprising of representatives from the industry, civil society and interested economies. As such, the development of the CSG with the Australians like the EU FLEGT VPA also requires stakeholder consultations as part of the negotiation process. However, it is important to understand that in the case of Malaysia, the development of the CSG involved only related

²⁹⁹ IM(1), IM(2), IM(3) and IM(4).

government ministries or agencies in consultation with the timber industry³⁰⁰. The Director General of MTIB during his key opening speech at the 'Briefing on the Australian ILPA and the CSG of Peninsular Malaysia' in June 2014 has also mentioned that Peninsular Malaysia's CSG was drafted by its Task Force where it was subjected to several consultations with the related ministries or agencies and Timber Trade Associations of Peninsular Malaysia. As mentioned in Chapter Six, the Malaysian CSG has been agreed upon and submitted to the Australians. Therefore, the lack of contention on the development of the Malaysian CSG could be attributed to the fact that it only required documentation of laws, regulations and procedures to trace legal timber and was not subjected to consultation by stakeholders with different backgrounds and interests like the FLEGT VPA/TLAS. Nevertheless, the ILPA/ILPAR can be argued to have an influence in the domestic policy as it had warranted negotiations with the Malaysian Government for a CSG to document the tracing process of legal timber respectively for the three regions in Malaysia. Therefore, as Putnam stated, without international pressure and in this case the Australian ILPA/ILPAR, the CSG negotiation would not have taken place.

7.3.1.3 EU FLEGT VPA/EUTR

The EU FLEGT Action Plan requirement for a FLEGT VPA negotiation with producer or exporter countries and the development of a TLAS has influenced VPA negotiating countries including Malaysia to review its laws, policies and regulations for inclusion in the TLAS in accordance with the agreed principles and criteria. This is because there are principles and criteria that need to be met before the VPA agreement and the TLAS can be accepted by the EU (see details of the FLEGT VPA principles or criteria and negotiation in Chapter Six). The requirement for stakeholder consultations involving all relevant stakeholders by the EU have also subjected the Malaysian laws, regulations, policies and procedures on the forest sector and

³⁰⁰ Information confirmed by PA(1) who is involved in the development of the CSG on 12th March 2015 during a short discussion. The expert further stated that the Malaysian CSG has been finalized and forwarded to the Australians.

timber trade to review and comment on their strength and weaknesses by the stakeholders. The VPA requires a series of mandatory consultations with a wide group of stakeholders to allow for an inclusive, participatory and transparent process of development of the VPA and its Annexes (which includes TLAS). On this note, Malaysia has had twelve stakeholder consultations with domestic stakeholders involving government officials, industry members, NGOs, social groups, trade unions and other interested parties on mainly the TLAS and also the VPA and its other Annexes. Also, there were several briefings conducted with the industry members and the NGOs to inform them on the progress of the FLEGT VPA/TLAS. It is now important to understand in detail whether such measures warrant any policy shift with regard to Peninsular Malaysia's laws, regulations, policies and procedures. It is also important to determine whether the negotiators are able to ensure the success of the FLEGT VPA negotiation and whether relevant stakeholders were consulted. As such, without international pressure from the EU, reviews of the current laws, regulations, policies and procedures as needed for stakeholder consultations would not have been possible.

It is important to note that the negotiation with the EU on a FLEGT VPA had led to the development of a TLAS which in normal circumstances would not have been necessary if not for being part of the requirements under the VPA. Also on another note, the launching and implementation of a MYTLAS as solely a Malaysian initiative would not have taken place if not for the FLEGT VPA still being in the negotiation stage and the EUTR is already coming into force. Therefore, due to international demands for legal timber through bilateral negotiations, it can be argued that the Federal Government of Malaysia had agreed to negotiate a FLEGT VPA/TLAS with the EU. **PA(1)** stated that the Malaysian government is pursuing the VPA because it will ensure and strengthen the timber industry's market share in the EU market, thus promoting Malaysia's green credentials and Malaysia to be recognized as a tropical timber exporting country that subscribes to the principles of legality and/or sustainability. Meanwhile, **LA(1)** stated that the requirements of FLEGT are not an issue for the Malaysian government to fulfil especially

for Peninsular Malaysia and Sabah. As long as the requirements are manageable, the government will take the necessary steps to comply with it. This is because the market is consumer-based where the demands of the consumers have to be met by the seller. So, in relation to such measures, the demands of a developed country would be met by an exporting country if their industry depends on such markets for their exports.

However, on the other hand these measures have also brought into focus the challenges and even weaknesses of several areas that need improvement by Malaysia, especially in Peninsular Malaysia, in terms of sustainable forestry and timber trade practices. **A(2a)** was of the view that measures like the EU FLEGT VPA/TLAS will have an effect as all the laws and regulations in the TLAS have to be complied with for the industry to remain in business. So, there is a need to enhance or intensify enforcement activities so that there are no surprises when the independent auditors audit the system. It is a known fact that the enforcement agencies particularly the SFDs are in need of assistance due to the lack of resources and manpower. They also need more training to enforce all the laws and legislation to the extent that when a TPM or auditor audits the TLAS, there will be no significant non-compliances. Meanwhile, **NGO(4)** mentioned that the FLEGT consultation process has seen the withdrawal of certain NGOs such as JOANGOHutan and JOAS, mainly due to the failure of such processes to establish effective policy and legal reforms to ensure that customary land rights of indigenous peoples in the country are fully respected by timber harvesting activities. **EU(1)** was of the opinion that the FLEGT VPA negotiation process that requires the establishment of a system that provides for legality assurance is very helpful as it generates awareness for national authorities to reflect on where they stand with regard to legality. So the expert believes that it is a positive driver in assessing the performance of the governance structure. Also, regardless of the end result, whether a FLEGT license for exports is possible, the expert stressed that it still has a positive impact because all market participants and stakeholders will become more conscious of certain needs of the process.

On this note also, it was stated³⁰¹ that the FLEGT VPA initiative has brought changes to the producer or exporter countries where corruption is addressed, transparency is increased and access is provided to local communities and civil society in the decision making process.

Apart from that, the FLEGT VPA negotiation has also seen several difficulties in convincing some of the stakeholders on the benefits of signing the agreement. Taking into account the above concerns and difficulties identified by the experts, it is important to relate them to Putnam's two-level game theory. Putnam stressed that the acceptance of any international policy or any cooperation is contingent on the support of a powerful group of domestic stakeholders that actually favors on domestic grounds the policies being demanded internationally. As Putnam rightly pointed out, politics at the international and domestic levels are in essence interdependent and this shapes the results or outcome of the cooperative endeavor between two or more nations. In this regard, the demands and needs of domestic stakeholders particularly in Peninsular Malaysia should be addressed first.

As mentioned in the previous chapters, the Federal Government's and the State Government's relationship on land and forest matters is complex. The Federal Government has the right to negotiate international agreements. However the state's approval is necessary on any initiative related to the forest sector as the states have jurisdiction over the land and forest. As such, on a regional basis, it is important that Peninsular Malaysia, Sabah and Sarawak agree on the FLEGT VPA being negotiated, signed and its TLAS to be implemented. Meanwhile, in the case of the eleven State Governments in Peninsular Malaysia, it is also important to get each of the states to agree to the FLEGT VPA. This is because the states are the ones who are

³⁰¹Information obtained (online) from the interview by award winning Sierra Leonean journalist Sorious Samura with Ozingka of Fern in the "Stories from the ground". The stories include interviews with forestry and timber stakeholders and civil society representatives in Guyana, Ghana, Vietnam, Liberia, Laos, Indonesia and Malaysia. Available at <http://gtf-info.com/news/market-legality-requirements/1881-stakeholders-worldwide-give-their-views-on-value-of-flegt>

responsible to ensure successful implementation of the TLAS. As mentioned above, Sarawak State Government is unable to commit the exact date to deliver a TLAS. The Selangor State Government, on the other hand, has objected to the FLEGT VPA/TLAS. The other State Governments meanwhile are agreeable on the condition that they are provided with financial and administrative support as well as capacity building assistance to implement the systems proposed. In this regard, the State Forestry experts in Peninsular Malaysia have mentioned that the SFD has an important role in convincing the State Governments on the importance and benefits of agreeing to the FLEGT VPA negotiations and in complying with its TLAS. This is because the implementation of any new measures in addition to the currently practiced SFM through MTCS/PEFC is considered burdensome and costly for the states. The situation is made worse with the SFD having insufficient manpower and expertise on issues that are beyond their normal job scope of forest management. Furthermore, the experts reiterated that to ensure effective implementation of the TLAS, there is a need for: (i) appropriate financial assistance or allocation from the Federal Government, (ii) training to ensure staffs have sufficient knowledge and skills on the systems to be adopted, (iii) adequate equipment or transportation and (iv) increase in manpower to ensure constant monitoring on the ground.

Meanwhile the industry members, be it the Timber Associations at the Federal Government level or State Industry Members, are concerned about their market share and market access for their timber and timber products. Therefore, the understanding is that they will comply with any measures required to ensure continuous market access for premier markets that pay well for their timber and timber products. As such, understanding the need to accommodate global demands, the industry requests the government to facilitate their trade for example by relaxing the domestic rules on the number of foreign worker applications and to diversify market opportunities as well as increase in timber promotion. The State Industry respondents even mentioned that there is a need for more publicity and promotion about 'green' initiatives launched by the industry. With the exception of the furniture

industry, all other industry members are unhappy that the government is taking too long to conclude a FLEGT VPA that is supposed to ease their trade with the EU through a 'green lane' and to gain an instant reputation for their timber exports as legal.

The NGOs in general are requesting for active participation in policy making and to be recognised as also contributing to the interests of the nation. Therefore, they believe that the government should facilitate their participation and inputs on important policies and negotiations. They also demand recognition for certain issues such as the NCR to be in accordance with international laws and regulations.

As such, due to issues such as the above that led to the slow progress of the FLEGT VPA negotiations between producer or exporter countries³⁰² as well as the importance of curbing illegal timber from entering the EU market, the EU decided to implement its Timber Regulation. As mentioned by Brack et al. (2002) unilateral action can be a fall-back option if negotiations on international agreements fail or do not proceed quickly enough. In this regard, although some experts have expressed dismay³⁰³ on the delay in the FLEGT VPA negotiations, the timber industry especially those in the furniture sector have mentioned that it will not be a problem for them to comply with the 'due diligence' requirement under the EUTR by providing documents to show proof of legality of their exports³⁰⁴. Furthermore, since most of the big industry players in Peninsular Malaysia have gained MTCS/PEFC and CoC certification for exports of their timber and timber products, it would not be difficult for them to comply with the EUTR requirements through certification.

³⁰² To date, Malaysia has yet to conclude negotiations on a FLEGT VPA with the EU. Negotiations started formally in 2007.

³⁰³ IM(1), IM(2), IM(3).

³⁰⁴ See further comments by Furniture Industry representative in Chapter Seven, pg 239-240.

On this note, **A(2a)** was of the opinion that some of the industry members, in particular the furniture industry who are not supportive of the FLEGT VPA/TLAS negotiation are not aware of the implications of the EUTR. The expert is of the opinion that the industry may feel that it is simpler for them to comply with the 'due diligence' requirement as they assume that the requirement is less stringent than the requirement for FLEGT licensing. However, they are not aware that without a FLEGT license, their exports through the 'due diligence' requirement is more cumbersome and expensive because it will be done on a per consignment basis. So the expert believes that the industry members are somewhat misled by the ease with which they have been able to comply with the US Lacey Act by just filling one form providing legality declaration. Further, according to Saunders (2014), the 'due diligence' requirement has not seen an impact yet as after a year of enforcement, only a small handful of seizures are seen across northern Europe. This is due to weak enforcement on the part of the EU.

Therefore, it can be argued that the timber industry will eventually adapt to changes to find methods to prove the legality of their exports as required by the developed markets to continuously enjoy their market share and market access with or without government support. Meanwhile, without international pressure through requirements for bilateral negotiations³⁰⁵ like the FLEGT VPA, governments will usually leave it to their industry to manage their markets as in the case of the US Lacey Act. As such, the development of a system or guideline might not have been necessary but for the requirements imposed by these developed countries through negotiations. The development of a system like the EU's TLAS or even MYTLAS due to international pressure for such a system to prove legality of timber exported can be argued to integrate what Putnam had mentioned in his analysis of the Bonn Summit. Putnam stated that key countries in the summit adopted policies different from those that they would have pursued in the absence of international negotiations. Therefore, it can be argued that for Malaysia, agreeing to negotiate a FLEGT VPA with the EU is mainly due to

³⁰⁵ Refer to Brack Duncan et al. (2002)

international demands for legal timber as the EU market is of importance for Peninsular Malaysia's timber trade.

7.4 AN ANALYSIS OF FLEGT VPA/EUTR: PUTNAM'S TWO-LEVEL GAME EXPLAINED

Therefore, taking into account the importance of the FLEGT VPA negotiations and its impact on the Peninsular Malaysia forest sector and timber trade, it is now important to understand whether:

- (1) the EC on behalf of the EU is able to ensure the success of the FLEGT VPA with Malaysia and
- (2) MPIC on behalf of Malaysia will be able to sign the FLEGT VPA and deliver legal timber through the TLAS and how the MPIC will handle or address domestic demands for development and implementation of the TLAS.

7.4.1 The EC on behalf of the EU

In this regard, as mentioned, the FLEGT VPA negotiations have been on-going formally since 2007, and it has been 8 years of intense negotiations without certainty as to their conclusion. It is believed³⁰⁶ that there was lack of understanding on the purpose of the agreement as Malaysia saw it as a sectoral trade agreement while the EU saw the trade component only as a driver to the whole agreement. Also, the EU had underestimated the challenges and complexity of the internal structure of the Malaysian system on land and forests which leads to delay in the negotiations. In addition, the enormous challenges faced by Malaysia to implement the FLEGT VPA and the TLAS had also been underestimated by both parties.

³⁰⁶ Views from EU(1) and EU(2) who are experts involved in the negotiations, representing the EC

Also, it is believed that there is lack of a strong political commitment or will on the part of Malaysia to ensure the success of the FLEGT VPA. On this note, it was mentioned³⁰⁷ that the FLEGT VPA initiative has brought positive changes to issues such as corruption, transparency and decision making. However without a political will to address these issues, the VPA will not go far. As such, the lack of a strong political leader with a will to ensure the success of the negotiation is said to be a deterrent factor for its success and the reason why the negotiation is taking so long to be concluded. **EFI(2)** mentioned that perhaps the commitment at the highest level of the political chain i.e. the Prime Minister of Malaysia, should have been obtained at the start of the negotiation to ensure the success of the FLEGT VPA. Specifically, **ED** mentioned that the Malaysian government lacked the political will to conclude the FLEGT VPA as it is the responsibility of the government to show strength and its will when it is in the best interest of its people, business and nature in this case.

Further, the political divide between the three regions in Malaysia is seen as a barrier for the FLEGT VPA to be signed. Although the EU had agreed to the proposal by Malaysia on a phased approach of the TLAS implementation where Peninsular Malaysia and Sabah will be in the first phase while Sarawak in the second phase; it is very important for Sarawak to indicate its time frame for developing a timber legality assurance system and its implementation. Without such a commitment, the EU will not be able to sign an agreement with Malaysia as they will not be able to convince their stakeholders and the EU Parliament to ratify the Malaysia-EU FLEGT VPA and its TLAS. Therefore, realizing the difficulties arising in the VPA negotiations, its slow progress and the need to immediately curb illegal logging, the EUTR was implemented in 2013. As such, based on the two-level game theory, it can be argued that EU negotiators while understanding

³⁰⁷ Refer to interview by Sorious Samura in the “Stories from the ground”. Available at <http://gtf-info.com/news/market-legality-requirements/1881-stakeholders-worldwide-give-their-views-on-value-of-flegt>

the potential benefits of the agreement, especially in obtaining the cooperation of producer or exporter countries to export legal timber, had failed to grasp the difficulties that their domestic counterparts faced in trying to realize such an agreement. Such failure to understand the complexity of the Malaysian internal political structure and other constraints has led to the delay in negotiations and the inability to convince or compel their partner to sign the agreement.

7.4.2 MPIC on behalf of Malaysia

As mentioned above, Malaysia has been negotiating with the EU for a phased approach of TLAS. Therefore, in the case of Peninsular Malaysia, for a FLEGT VPA to be successful, it needs to get the cooperation of the implementing agencies on the ground i.e. the eleven State Governments through their Forest Departments as the body responsible to ensure the legality of the products harvested and their industry members as the body responsible to ensure legality of the processed and exported products. The current objection of the Selangor State and the furniture industry will eventually break the chain of legality that the Federal Government aspires to have for the purpose of assuring the legality of the timber exports to the EU for Peninsular Malaysia. The flow of the supply chain of legality for exports will be in doubt and questioned by the EU if it includes any timber components produced in the factories in Selangor (it is important to note that Selangor no longer has logging in its state). Such doubts of legality will also be applicable to furniture exports as a whole since furniture is removed from the product scope in the TLAS. Apart from that, the inability of a particular region in Malaysia i.e. Sarawak to deliver legal timber upon signing of the agreement has also led to a negative consequence to the ability of Malaysia as a whole to deliver legal timber although there is special control in the TLAS to ensure that Sarawak timber entering Peninsular Malaysia is excluded from the exports to the EU. The situation became worse when Sarawak was not able to provide the exact date for the implementation of its TLAS. Although this dissertation concentrates only on the effect of the trade related environmental measures on Peninsular Malaysia's forest sector and timber

trade, it is inescapable that Sarawak's inability to be part of the FLEGT VPA/TLAS would affect the conclusion of the negotiations. As mentioned earlier, without such a commitment, the EU will not be able to sign an agreement with Malaysia. Therefore, in hindsight it can be argued that this domestic constraint will not result in a bargaining success for the Federal Government. Putnam in his analysis of the Bonn Summit had mentioned that an agreement reached at the Bonn Summit was only made possible because a powerful minority within each government actually favored on domestic grounds the policy being demanded internationally. In the case of Malaysia, although a big group of stakeholders (Sabah and ten states in Peninsular Malaysia as well as the industry members with the exception of the furniture industry) has agreed to the FLEGT VPA being signed however there is no sign of the agreement being signed in the near future. Therefore, such a situation indicates power friction within the (1) three regions in general, (2) eleven states in Peninsular Malaysia and (3) timber industry.

Consequently, MPIC has an enormous task ahead to address the various stakeholder concerns with specific attention to be given to the complexity of the Malaysian land and forest jurisdictions. Also, as mentioned in the previous chapters, the FLEGT VPA includes clauses requiring certain environmental and social commitments to be met by the producer or importing country and the TLAS specifically has environmental and social principles and criteria embodied in it. However, such provisions have been disputed by some stakeholders especially the NGOs as either ineffective for SFM implementation or conversely by stakeholders like the industry as too environmentally or socially demanding that they might disrupt trade. In this regard, for the FLEGT VPA to be successful, as mentioned by Putnam in his two-level game theory, it is important that a negotiator (in this case MPIC), must believe that the outcome of a negotiation is for the benefit of the nation and serves his own interests even though not all his aides or all domestic interests (in this case the State Governments, social NGOs or the furniture industry) may agree to it. Therefore, the negotiator needs to find ways to convince stakeholders on the benefits of the agreement for them as a whole.

It is important to take into account this domestic resonance in any international negotiation.

If one takes into account the MTCS, although it is a voluntary private sector certification initiative that requires proof of sustainable timber, it was successfully implemented compared to the EU FLEGT VPA/TLAS initiative that only requires proof of legal timber. Under the MTCS, there are twelve FMUs/FMPUs currently certified under the MTCS/PEFC. The success could have been attributed to the fact that the Federal Government (also through MPIC) had actually initiated the whole process on behalf of the private sector. Furthermore, MPIC has also provided the endowment fund for MTCC to run the whole certification program³⁰⁸. Additionally, the fact that its development also involved inputs and participation of all related stakeholders including the NGOs has made it successful. So, in the case of MTCS, it can be argued that there was a drive to ensure its success where MPIC not only played an important role in establishing the MTCC but also by monitoring the progress of the scheme (MTCC reports to MPIC) and providing the necessary financial support. As a result the: (1) NGOs supported it through their active participation on the development of the standards, (2) industry supported the scheme to ensure market acceptance and share and (3) State Governments supported the scheme as they were given the necessary financial assistances by the Federal Government to ensure its successful implementation upon their forests. The TLAS instead has received various criticisms especially by NGOs who are not happy with their lack of participation in its development and it is not a voluntary scheme but a binding instrument once signed.

On the other hand, since Putnam's model does not dwell on the conditions for how a leader can manage a situation such as the above, it will also be important to look into Schoppa's (1993) analysis of Putnam's two-level game

³⁰⁸ According to Baharuddin (2009), MTCC is a fully independent national governing body for forest management certification and it operates on an endowment fund provided by MPIC.

theory. Schoppa argued that Putnam's concepts of 'synergistic linkages' and 'reverberation' was underdeveloped (see Chapter Three for details of the argument). Schoppa believes that through such analysis, the situation faced by the Federal Government can be changed if there is "*expansion of the level of participation in the decision making process and by specifying alternatives for consideration within the domestic policy process*". In this regard, Schoppa had mentioned that any policy outcome would depend among others on the potential actors who are motivated and allowed to participate, decisions whether made in isolation or publically known and whether the proposals that deal with a given problem are on the table. Therefore, in the case of the FLEGT VPA negotiations, based on the experts' comments, it can be gathered that from the start the NGOs especially those from the social grouping have been against the whole process. As mentioned in Chapter Six, there was even a staged walkout by this social group at the Fourth Stakeholder Consultation on FLEGT VPA. This was because they felt that the NGOs have not been adequately consulted, heard or even allowed to participate actively in the whole FLEGT VPA process by the Government of Malaysia. Even the environmental NGOs have mentioned the lack of transparency in the issues negotiated and the lack of active NGOs participation as a setback for the whole negotiation process.

Therefore, it can be argued that based on Schoppa's argument, it is important that: (1) there exist transparency of issues discussed at the FLEGT VPA negotiations, (2) the NGOs are given an opportunity to participate and be heard in the whole FLEGT VPA process not only during the stakeholder consultations and (3) the NGOs are given the assurance that issues such as the NCR, which has been argued earlier as not falling under the purview of FLEGT VPA negotiations, be addressed or heard possibly at different forums by relevant parties. This is because apart from the acceptance of implementers on the TLAS, the NGOs play a role in creating positive reverberation domestically for any international policy to be accepted. In comparison, the MTCS was a success because of the acceptance of all stakeholders inclusive of the NGOs. The active participation of NGOs in the

development of the MTCS compared to TLAS could possibly be linked to the fact that the NGOs (i.e WWF) are the ones that actually developed the certification scheme and the industry members and state government did not object to their participation it was only a voluntary scheme that does not compel the State Government or the industry members to implement if disagreeable (see Chapter Six for further details).

Apart from that, it is also important for the MPIC to gain the support and commitment of the State Governments on forestry and timber trade issues, taking into account that forestry comes under the purview of State Governments. In this regard, the demands of the State Governments for extra funding, resources, equipment and manpower to implement the commitments under the TLAS also needs to be addressed by the Federal Government just like what was done for the MTCS. Meanwhile, in the case of the Selangor State Government that is currently against the whole FLEGT VPA process, MPIC needs to further convince the State on the importance of such an agreement and its benefits to the nation as a whole. Apart from that, issues such as the NCR need to be addressed by relevant State Governments together with the NGOs and as such it is also important for the Federal Government to obtain the cooperation of the State Governments to deal with such issues. At the end of the day if the issues above are addressed by the Federal Government with the cooperation of State Governments, it would possibly make a difference in the outcome of the FLEGT VPA negotiations. This is because Putnam in his two-level game theory had mentioned that it is important to get the support of the domestic stakeholders (Level II) so that the negotiator would be able to negotiate the international agreement successfully (Level I).

7.5 SUMMARY

The experts through their comments, views and opinions have confirmed that the trade related environmental measures imposed by developed countries

affect Peninsular Malaysia's forest sector and timber trade. The FLEGT VPA negotiations and the implementation of the acts and/or regulations had provided the basis for the stakeholders to question, ponder and review the: (1) effectiveness of the current government policies and regulations, (2) level of stakeholders (especially the NGOs) involvement on developments of government policies, (3) current market share and market access of forest products to the developed countries and also the need for other market opportunities, (4) issues and opportunities for forest and timber institutions and administration and (5) Malaysia's international role and image if the FLEGT VPA is not signed. Apart from that, what also surfaced from the experts on the effect was the lack of political will on the part of Malaysia to sign the FLEGT VPA and the increase in the focus given to issues related to indigenous peoples and local communities. Therefore, taking into account the realisation and issues that have arisen at the national and state levels due to the FLEGT VPA/TLAS negotiation as well as the imposition of the binding acts and/or regulations, it is important for the Federal Government to understand the importance of the issues raised and address them accordingly. For any international measure to be agreed upon there is a need for domestic acceptance and support of the measures so that it could be successfully implemented. Taking into account Putnam's two-level game theory and also Schoppa's analysis of Putnam's 'synergistic linkages' and 'reverberation', the Federal Government of Malaysia plays an important role in balancing the needs of the domestic stakeholders while taking into account international pressure and demands for sustainable and/or legal timber. Consequently, the Federal Government has a major role in addressing the needs and demands of stakeholders especially the State Governments and the NGOs, and in convincing them on the importance of the FLEGT VPA and the effects of not signing the agreement as a whole. One way is to motivate them by addressing their immediate concerns and needs such as providing financial and administrative support, by allowing active participation in the policies and regulations and by constantly keeping them abreast of developments.

As such, at the end of the day, it can be argued that the imposition of the trade related environmental measures through acts and/or regulation such as the US Lacey Act, EUTR and Australian ILPA/ILPAR is not much of a concern as it is a matter of being able to meet the requirements especially for the industry members. The industry as argued above will comply with any measures and do what is necessary for them to maintain market access or finding an alternative solution. Industry members who are willing to change and take the necessary steps to ensure SFM and legality of their trade will eventually survive such measures. The Australian CSG meanwhile was not much of a controversy as mentioned above, as it involved only the listing of relevant laws and regulations to prove legality of exports, which did not go through an intense stakeholder consultation like the FLEGT VPA. However, the objection is on the FLEGT VPA negotiations, the issues discussed and the fact that producer or exporter countries are required to develop a TLAS, which needs to be agreed by both parties and monitored by a TPM. The expectation and requirements of a developed country is certainly different from those of a developing country like Malaysia. To strike a balance is not an easy task. Although the EU might argue that it is a voluntary agreement to be negotiated willingly by producer or exporter countries, the intensity of the issues negotiated based on the researcher's observation was underestimated by both parties.

The complexity of the Federal-State relations in Malaysia on land and forest matters was overlooked also by both parties. Therefore, eventually the delay in completion of the negotiations for both the VPA and the TLAS is understandable, especially so if certain parties in the domestic arena feel that their rights are threatened by the imposition and implementation of the TLAS and the FLEGT Agreement as a whole. On the other hand, NGOs such as JOANGOHutan used the FLEGT VPA stakeholder consultation process to voice out their concerns on issues of land ownership which is out of the scope the FLEGT VPA (see Chapter Six for further details). This is understandable given the fact that they feel that they are not being heard in other forums. It may not be the right forum but it is felt that at least their

concerns are being heard by the public domestically and internationally in the hope that some changes will occur. Therefore, the Federal Government has a major task in tackling all these issues to satisfy its domestic forces with different grievances before the FLEGT VPA can be signed in order to meet its international obligations.

The various comments, views and opinions of the experts interviewed and the researcher's observations in various forums related to FLEGT VPA issues, are conducive to the view that the FLEGT VPA negotiations will only be successful if there exists a strong political will to complete them, shown by the Federal Government. It has been argued that the Federal Government is constrained by Federal-State relations where land and forest are under the jurisdiction of the states. However, the researcher made a comparison with MTCS which was successful, because of the role played by the Federal Government³⁰⁹. The Federal Government not only provided funds for its implementation but also managed to address the concerns of stakeholders where full support from the State Forestry Departments, Timber Industry and the NGOs were successfully obtained. This is despite the fact that the standards used for certification under the MTCS are more stringent than the requirements of TLAS.

However in the case of the FLEGT VPA negotiations, the Federal Government seems to lack the political will to push for the success of the FLEGT VPA. This could partly be attributed to Peninsular Malaysia's timber industry not being totally supportive of the agreement. Its industry is currently fragmented where the furniture industry has withdrawn its support from the FLEGT VPA. The situation became worse when in the regional context Sarawak's timber industry voiced a strong objection against the legality verification efforts under MYTLAS (this may be attributable to the fact that the EU, US and Australia are not markets of importance and India has become a

³⁰⁹ See Chapter Six, pg 155 on the comments by expert on the role of the Federal Government.

major importer of Sarawak's timber and timber products). As such, there is no strong push or concerted effort by the timber industry towards the conclusion and signing of the FLEGT VPA. In addition, even though most of the NGOs are supportive of green initiatives such as the FLEGT VPA, there is no strong 'push' for conclusion of the agreement by the NGOs. This may be due to several social NGOs being against the FLEGT VPA because of issues such as ownership rights over land. This is despite the fact that such issues are beyond the scope of FLEGT VPA and such demands will involve enactment of new legislation or amendment of existing laws. Thus, neither the industry nor NGOs are motivated to push for the success of the FLEGT VPA unlike in the developed countries (see Chapter Six for the role of NGOs in ensuring the success of binding measures in developed countries). Therefore, in the case of the Malaysia-EU FLEGT VPA negotiations, the political factionalism within the: (1) three regions in Malaysia, (2) states in Peninsular Malaysia and (3) timber industry for various reasons mentioned above, is the main cause that the FLEGT VPA agreement has yet to be signed. In this regard, Putnam's two level game theory can be used to explain such a situation where without the support of these domestic entities, although minority in their own entities, the agreement cannot be signed. For an agreement to succeed, there is a need for a "win-set" between the two-level of games mentioned by Putnam. In conclusion, it is important to note that the failure to sign the FLEGT VPA Agreement could lead to negative repercussions on sustainability or legality efforts undertaken by Malaysia thus far. This would affect Malaysia's reputation as a responsible member of the international community in promoting and undertaking 'green' efforts.

CHAPTER 8

CONCLUSION

8.1 INTRODUCTION

The concerns for illegal logging and its trade have influenced importers and consumers in developed countries to demand only legal and/or sustainable timber. Such demands, previously through voluntary certification schemes or legality verification systems are now imposed through legally binding agreements, acts and/or regulations. Putnam's two-level game theory is able to explain the challenges faced by the Federal Government of Malaysia, specifically in the FLEGT VPA negotiations in managing its domestic stakeholder's demands for development or reforms, taking into account the unique Federal-State relations on land and forest matters as well as managing its international commitments to ensure trade in sustainable and/or legal timber. This chapter puts together the findings and analysis in Chapter Seven to the three research objectives of this dissertation. In addition, understanding the effects of the binding measures on Peninsular Malaysia's forest sector and timber trade enables the main research question that is ***"How do timber trade related environmental measures imposed by developed countries affect Peninsular Malaysia's forest sector and timber trade?"*** to be answered.

8.2 RESEARCH OBJECTIVES REVISITED

8.2.1 Research Objective One: Identify and review international concerns and debates on illegal logging and its illegal trade as well as policies and practices on SFM

The importance of tropical forests to the environment has warranted various measures to be undertaken by developed countries to ensure trade in sustainable and/or legal trade. Chapter Two has highlighted the growing international awareness of the impact of economic growth on the

environment and social development focusing specifically on tropical forests and its related timber trade. This has led to governments supporting binding trade related environmental measures in preference to NGO or private sector supported voluntary certification schemes. Such measures as indicated in Chapter Three are seen to be in line with the green environmentalist approach where it is believed that protectionist measures in the form of acts and/or regulations are important to address environmental issues as the market on its own will not be able to do so. However, noting that the tropical forests are mainly in developing countries and trade is an important factor for a developing country's GDP, such measures are deemed as NTMs and are against the spirit of free trade. Therefore, Neoliberal Institutionalists are against such protectionist measures. They believe that trade cooperation will address environmental problems resulting in environmental improvements as economic gains will raise the living standards of citizens who will then be able to pay for the higher costs of environmental practices (Haas et al., 1993; Grossman & Kruger, 1995; Panagariya, 2003; WTO, 2006).

Nonetheless, the researcher has also highlighted in Chapter Five that previously, even non-binding measures have directly or indirectly influenced the policies and practices of a country like Malaysia, with specific attention focused on Peninsular Malaysia's forest sector and timber trade. There were various measures undertaken in line with the international pressure and demands for SFM. The NFP 1978 and the NFA 1984 (adopted by the States in Peninsular Malaysia) were both amended in 1993 to take into account the Earth Summit's decision on the importance of biological diversity conservation and sustainable utilisation of genetic resources. Also, taking into account the unique Federal-State relations on land and forest matters under the Federal Constitution, the researcher has also highlighted the differences in the laws, regulations, policies and practices in the three regions in Malaysia as well as within the eleven states in Peninsular Malaysia. These differences have brought about various challenges to the efforts of harmonising the laws, regulations or policies in the three regions and within Peninsular Malaysia. This is mainly because timber is an

important source of revenue for the states. On the other hand, Malaysia's timber policies and practices, adopted in line with the ITTO Objective 2000 to include SFM as a national commitment, have enhanced Malaysia's credentials as a country that adheres to sustainable forestry requirements. To this end, MTCS/PEFC is a symbol of Malaysia's success especially so with all the FMUs in Peninsular Malaysia being certified.

8.2.2 Research Objective Two: Highlight and examine international pressure and demands for change as well as domestic concerns through the lens of Robert Putnam's (1988) two-level game theory

The binding measures imposed by developed countries have brought about challenges to the Federal Government in handling international pressure and demands for legal and/or sustainable timber as well as domestic stakeholders' developmental needs. The application of Putnam's two-level game theory explains the dilemma faced by the Federal Government of Malaysia in trying to: (1) satisfy the demands by domestic stakeholders i.e. the State Governments, Timber Industry and the NGOs' needs and demands economically, socially and environmentally and (2) minimize the adverse consequences of the binding measures to Peninsular Malaysia's forest sector and timber trade. According to Putnam, at the national level, domestic groups will pursue their interests by pressuring the Federal Government to adopt policies that are favorable to them, while politicians tend to seek solutions or power by constructing coalitions among these groups. As such, the researcher has highlighted (Chapters Six and Seven) the scenario on the challenges faced by the Federal Government due to the pressure and demands of the domestic stakeholders, as summarized below:

- (1) Unilateral measures such as the US Lacey Act and to certain extent the imposition of the Australian ILPA/ILPAR as well as the EUTR have a strong implication on the industry's ability to export sustainable and/or legal timber. This is because the burden would be on the industry to

comply with such requirements if they consider the US, the EU and Australia as important markets for their exports

- (2) The requirements for negotiations for a FLEGT VPA and its related TLAS by the EU and a CSG by Australia have created various challenges for the Federal Government in managing its stakeholders' interests and needs that have emerged resulting from such requirements as indicated in Chapter Seven. In the case of the EU, it involved the development of a TLAS, which has to be independently audited by a TPM. Furthermore, the FLEGT VPA and its TLAS negotiations also involved mandatory consultations with a wide group of stakeholders with different backgrounds, interests and needs. As such, the interest and needs of various stakeholders raised during the negotiations have created a situation of uncertainty and difficulty on the issues discussed. Nonetheless, although some of the interests or needs that were raised have been identified as not within the scope of the FLEGT VPA negotiations, it has created an atmosphere of uneasiness within the group of stakeholders, which has led to the delay in the FLEGT VPA negotiations. On the other hand, it is important to note that the Australian ILPA/ILPAR provokes less contention as the CSG negotiations between the Australian Government (through DAFF) and the Malaysian Federal Government (through MPIC) only requires the listing of relevant laws, regulations and policies for Australian importers to identify legal timber from the three regions in Malaysia. In this case, MPIC has managed to obtain the domestic stakeholders consent easily as CSG negotiations only involves the timber industry apart from the government or agency officials.

Therefore, the researcher has highlighted through literature review (Chapter Two) and experts' comments, opinions and views (Chapter Seven) that the binding measures imposed and specifically the EU-Malaysia FLEGT VPA and TLAS negotiations have led to the identification of seven specific areas as affecting Peninsular Malaysia's forest sector and timber trade. The experts' comments, opinions and views were obtained through qualitative

research method i.e. semi structured interviews, focus group discussions and observations, as discussed in Chapter Four. The areas identified are:

- (1) Strength or deficiencies of the current laws, regulations and policies related to the forest sector and timber trade in Peninsular Malaysia
- (2) Engagement of stakeholders, especially the NGOs in policy formulation and decision making in the negotiations
- (3) Importance of market share or access for timber products
- (4) Strength and weaknesses of the current forest administration and timber institutions
- (5) Effect of not signing the FLEGT VPA agreement on the country's image as a whole
- (6) Lack of political will and
- (7) Awareness on social and indigenous peoples' issues.

As mentioned in the previous chapters, the first five areas have been identified mainly through literature review as the possible effects of the measures on the forest sector and timber trade. Meanwhile, the findings based on the semi structured interviews; focus group discussions and observations have confirmed the five previously identified effects. However, it is important to note that the last two new areas (6 and 7) emerged during the interviews. As such, the need to address these concerns are imperative, as according to Putnam, there is a need for a bigger win-set at the domestic level to ensure success of a negotiation like the FLEGT VPA at the international level.

In a nutshell, the findings (in Chapter Seven) indicates that: (1) government officials are supportive of the sustainable and/or legal initiatives but

acknowledge the weakness (lack of manpower, experts, training, funds and equipment) on the implementation and/or enforcement of existing laws, policies and regulations in the forest sector and timber trade. Further, the Federal-State relations on land and forest matters are identified to be an obstacle to the acceptance or effective implementation of any legal initiatives. Also, the grievances of stakeholders on the government's initiatives, policies and processes need to be addressed in a balanced manner to ensure that the country's developmental needs are taken into account without compromising its social or environmental needs, (2) the Timber Industry will eventually support initiatives like FLEGT VPA or comply with any acts or regulations if they find it important to ensure continued market access or share in these developed markets. However, there is a tendency for the industry members to shift market to countries that have less stringent environmental requirements, unless these developed markets that are imposing such requirements are markets of importance, (3) in general the NGOs are unhappy with the way in which they are being engaged by the government on development of policies or initiatives related to the forest sector and timber trade. They argue that they are not properly consulted or given a meaningful effective role in the government initiatives or meetings and (4) international organizational experts are of the view that there is a lack of political will on the part of the Malaysian government to ensure the success of the FLEGT VPA negotiations. They believe that there is a strong need for transparency, effective stakeholder engagement and participatory decision-making on the part of Malaysia for the FLEGT VPA to be successful.

Meanwhile, it is also important to note that the focus group discussions at the state level have confirmed the views, opinions and criticisms of experts at the Federal level especially on the FLEGT VPA and its related TLAS negotiations as well as its impact on Peninsular Malaysia's forest sector and timber trade. In this regard, it was stressed that to ensure the effective implementation of any proposed system for legality and/or sustainability, the state's agreement has to be obtained. Further, it was highlighted that the State Forest Departments in order to play an effective role have to be administratively,

financially and technologically equipped. Apart from that, the State Timber Industry members just like the Timber Associations have mentioned that they will comply with the legality requirements imposed by Australia, the EU and the US, if these markets are of importance for their timber exports. As such, Putnam's two-level game theory applies in demonstrating that domestic concerns above (Level II) have to be addressed in order for the FLEGT VPA negotiations to conclude between Malaysia and EU (Level 1). This is because as indicated by Putnam and as is applicable in the context of Peninsular Malaysia's forest sector and timber trade, if an agreement is reached at Level II it is more likely that a successful bargain can be achieved in the FLEGT VPA negotiations at Level I. Furthermore, it is important to understand that the unhappiness of NGOs at not being properly consulted or given an effective role in the FLEGT VPA negotiations as well as the call for more transparency in the negotiations by most stakeholders have also influenced the negotiation process, causing delay in concluding the agreement. As Schoppa mentioned it is important to ensure that potential actors are motivated and allowed to participate and decisions discussed are publically known (this will be deliberated further below).

8.2.3 Research Objective Three: Identify the best possible means to improve SFM and to sustain / improve the growth of Peninsular Malaysia's forest sector and timber industry in line with international standards and requirements

The researcher has highlighted that it is important for the FLEGT VPA to be concluded as inability to do so would affect Peninsular Malaysia's timber trade and the country's reputation and SFM efforts undertaken thus far³¹⁰ (Seven). It will create negativity and doubt on Malaysia's SFM initiatives especially on the MTCS/PEFC certification efforts. Further, it will impact on Malaysia's current ability to export legal timber through MYTLAS as its legality will be questioned upon failure to sign and implement a Malaysia-EU

³¹⁰ PA(1) had mentioned that the FLEGT VPA will promote Malaysia's green credentials and as a major tropical timber exporting country Malaysia must show to the world that it subscribe to principles of sustainability and/or legality.

TLAS. In this regard, **A(2a)**³¹¹ had stated that Malaysia's inability to sign the agreement will be linked to its purported inability to control illegal logging, adversely affecting the reputation of the country. Thus, as identified in Chapter Seven, for a negotiation like the FLEGT VPA to be concluded, it is important that the Federal Government understands the needs (as indicated above) of its stakeholders and addresses them as much as possible. This is because, as mentioned by Putnam and as mentioned above, for any international initiative to be successful, it would require the acceptance and support of the domestic stakeholders. The MTCS/PEFC is an example of such success due to the acceptance of domestic stakeholders (refer Chapter Seven for the reasons of its success). Thus, the delay in concluding the FLEGT VPA and its related TLAS negotiations are identified based on Putnam's two-level game theory and is attributable to the:

Level (1)

- (1) **EU's inability** to influence the Malaysian side to conclude an agreement, which is mainly due to the lack of understanding from the start of the Malaysian system pertaining to the land and forest. The complexity of the states' rights either regionally or within the context of Peninsular Malaysia over forest and land matters have been underestimated. Meanwhile, regionally, Sarawak's inability to indicate a time frame for TLAS implementation has created a doubt on the part of the EU stakeholders on Malaysia's SFM efforts as a whole and has caused uncertainty about Malaysia's ability to implement an effective TLAS. Another reason may be that the EU did not garner support from the highest level i.e. the Prime Minister of Malaysia to agree to negotiate the agreement. Most successfully negotiated and signed FTAs have been a success due to the support of the Prime Minister being obtained at an initial stage.³¹² In a nutshell, the EU has underestimated the complexities, difficulties, issues and concerns that a developing country like Malaysia will face in ensuring trade in legal and/or sustainable timber.

³¹¹ PS is also of the same opinion.

³¹² Refer to the comments of ED and EFl(2) as well as the example of successful FTAs in Chapter Eight on the lack of support from the highest level i.e. the Prime Minister of Malaysia.

- (2) **The Federal Government of Malaysia** from the start had underestimated the: (1) agenda of the EU for a long term trade in sustainable timber and the issue involved in adhering to such an agenda, (2) complexity of the issues and demands related to the FLEGT VPA negotiations, (3) Federal-State relations on the land and forest matters especially related to the needs and demands of the States of Sarawak and Selangor and (4) demands of other stakeholders related to the forest sector and timber industry in Peninsular Malaysia. Thus, this has led to the inability of the Federal Government to influence the states regionally and within Peninsular Malaysia on the benefits of a FLEGT VPA which has caused the delay in the negotiations. Also there is lack of strong political will on the part of the Federal Government to ensure success of the FLEGT VPA negotiations. A strong political will on the part of the Federal Government could possibly make a difference in the outcome of the FLEGT VPA negotiations just like in the case of the MTCS/PEFC. A strong mandate by the political leaders in the three regions to ensure the success of the negotiations is important. Sarawak State Government's commitment especially to indicate a time frame in its TLAS implementation is vital for the EU to agree on Malaysia's FLEGT VPA.

Level II

- (3) **NGOs**, especially those from the social groupings, where from the start of the FLEGT VPA negotiations have been highly critical of the whole process. In fact, the walk out by certain social NGO groups at the Fourth FLEGT VPA Stakeholder Consultation, accordingly due to not being adequately consulted, heard or even allowed to participate actively, portrayed a negative image of Malaysia's efforts. Further, the NGOs, concern on the lack of transparency in the FLEGT VPA issues negotiated and the lack of active NGO participation in the whole process which was voiced in various forums (national and international), is a setback for the whole negotiation process. Also, issues like the NCR, raised during the consultations, should be given priority to be

heard, although not through the FLEGT VPA process but in other forums set by the Federal/State Governments.

- (4) **State Governments**, where it is important that the State Governments support the FLEGT VPA initiatives on forestry and timber trade taking into account that forestry comes under its jurisdiction. On this note, there are two possible scenarios, where on a regional level, Sarawak's inability to commit to a time-frame on the TLAS implementation is seen as a drawback to the negotiations and Malaysia's ability to deliver legal timber. It is important for the Federal Government to urge the Sarawak State Government to indicate a time frame for their TLAS implementation in order to sign the Agreement. Meanwhile, at the Peninsular Malaysia level, apart from convincing the Selangor State on the importance of the FLEGT VPA initiatives, the demands of the State Governments for extra funding, resources, equipment and manpower for capacity building in order to implement the commitments under the TLAS need to be addressed by the Federal Government. There is a need for each of the State Governments to be convinced on the benefits of the agreement to its State as a whole and their concerns addressed. Apart from that, it is also important for the Federal Government to obtain the cooperation of the State Governments to deal with the NCR issues to get the buy in from the NGOs.

- (5) **The furniture industry's** decision to exclude furniture from the FLEGT VPA negotiations will affect Malaysia's credibility in supplying legal timber. Their refusal will be linked to the industry's ability to supply legal timber. This will eventually affect the supply chain of legal timber for Peninsular Malaysia's trade of timber and timber products.

8.3 SUMMARY

Therefore as mentioned by Putnam in his analysis of the two-level game theory, it is important to have a “win-set” between these two levels of the game; however an agreement reached at Level II (discussions at the domestic level) will make it more likely for a successful bargaining at Level I (bargaining between negotiators which leads to a tentative agreement). The Level 1 negotiation has seen the demand for a time frame be indicated by the Sarawak Government to implement its TLAS. Without such commitments the EU Parliament will not be able to ratify Malaysia’s FLEGT VPA/TLAS as a whole. Level II has brought about separate concerns by different stakeholders that require time, money, resources and changes in policies in order for it to be successful. As such, this dissertation has enabled the two-level game theory to be applied to explain the dilemma faced by the Federal Government of Malaysia in handling trade related environmental measures imposed by the developed countries. Therefore, without taking into account the domestic concerns detailed above, it is highly unlikely that the FLEGT VPA can be signed and successfully implemented by the Malaysian Government. In addition, as explained in Seven, the lack of political will on the part of the Federal Government also does not envisage a successful signing and implementation of the FLEGT VPA/TLAS. As a consequence on the long run it is expected that any legal or sustainable initiatives currently being practiced related to the forest sector and timber trade may be questioned and doubted upon in the international circle. It may also adversely affect Malaysia’s green credentials with repercussions in other sectors of the economy in view of the wave of green consumerism spreading round the world.

In this regard, as mentioned above and in Chapter Seven, it would be important for the Federal Government of Malaysia to address the needs and concerns of its domestic stakeholders, where possible. An international agreement will not be possible without the support of its domestic stakeholders and without the political will of the government to see its success. Therefore there is an urgent need for the Government of Malaysia

to understand the political friction that exists within the three regions in Malaysia, the states in Peninsular Malaysia and the timber industry itself. Some of the issues like those raised by the social NGOs on land ownership may not be within the scope of the FLEGT VPA negotiations however it could be addressed in an appropriate forum. To do so the Federal Government need to be politically strong and motivated in making it possible noting the fact that land and forest are within the jurisdiction of the states.

Appendix A: Written Consent Form

WRITTEN CONSENT FORM

I, agree to participate in the interview conducted by the researcher Ms.Sugumari Shanmugam at for the period of not more than two hours.

I understand that the session will be recorded, and that I may request that the recorder be turned off at any time, for any reason.

I agree to be identified according to my name, designation and organisation that I represent. However, I understand that the interview can be anonymous and a pseudonym can be assigned. If required, I will inform the interviewer accordingly. Nevertheless, in such a situation, I realise the need for the participant to be identified according to his/her role such as desk officer, government officer, industrial expert, industry representative, technical expert, NGO representative or subject expert.

I am aware of the fact that this interview will be only for the purpose of the researcher's PhD thesis. Nevertheless, the findings based on the interview will be analysed to provide recommendations that will help to improve the Peninsular Malaysia timber industry in terms of sustainable forest management and also to sustain or improve the growth of its timber industry in line with international standards.

Signature of participant:	Signature of researcher:
Date:	Date:

Appendix B: Interview Structure Continuum

Highly Structured/ Standardized	Semi Structured	Unstructured / Informal
<ul style="list-style-type: none">• Wording of questions predetermined• Order of questions is predetermined• Interview is oral form or a written survey• In qualitative studies, usually used to obtain demographic data (age, gender, ethnicity, education, etc)• Examples : US Census Bureau survey, marketing surveys	<ul style="list-style-type: none">• Interview guide includes a mix of more and less structured interview questions• All questions used flexibility• Usually specific data required from all respondents• Largest part of the Interview is guided by list of questions or issues to be explored• No predetermined wording or order	<ul style="list-style-type: none">• Open-ended questions• Flexible, exploratory• More like a conversation• Used when a researcher does not know enough about a phenomenon to ask relevant questions• Goal is learning from this interview to formulate questions for later interviews• Used primarily in ethnography, participant observation, and case study.

Source: Merriam, S.B. (2009), pg. 89

Appendix C: Forest Land Use in Malaysia 2012 (Million Ha)

National 2015 Categories	Area (1000 Hectares)
	2012
(a) Permanent Reserved Forest (PRF)/PFE	
- Peninsular Malaysia	4,894
- Sabah	3,609
- Sarawak	6,000
Total PRF/PFE	14,503
(b) State Land Forest	4,656
(c) National Parks and Wildlife & Bird Sanctuary	1,859
Total Forested Area (a+b+c)	21,019
Total area for country	33,080

Source: MNRE

Appendix D: Export of Wood Product under Chapter 44

Value: USD'000

Rank	Country	2010	2011	2012
	World	107,066,306	121,606,272	119,713,125
1	China	9,651,542	11,354,387	12,317,237
2	Canada	8,494,124	9,159,830	10,015,877
3	Germany	8,849,585	9,366,216	8,377,608
4	United States of America	7,048,265	7,886,230	7,866,181
5	Russian Federation	6,093,699	6,973,753	6,731,569
6	Austria	4,908,321	5,551,075	4,861,474
7	Malaysia	4,318,518	4,489,345	4,372,106
8	Sweden	4,371,223	4,548,960	4,277,626
9	Indonesia	2,935,951	3,374,910	3,448,545
10	Poland	3,060,818	3,458,441	3,274,659

Source: UN statistic

Appendix E: Malaysia's Export of Major Timber Products (2014)

PRODUCTS	2014 (RM)
Grand Total	20,519,663,879
Wooden Furniture	6,328,334,275
Plywood	5,199,944,311
Sawn timber	2,545,034,149
Logs	2,073,230,432
Builders Joinery & Carpentry	1,000,302,605
Fibreboard	995,038,817
Other Products	870,266,303
Mouldings	711,243,080
Chipboard/Particleboard	333,367,351
Veneer	304,008,721
Wooden Frame	123,743,956
Rattan Furniture	35,149,879

Source: MTIB

Appendix F: Projections for the Wood-Based Industry

	2006-2010	2011-2015	2016-2020	2006-2020	2006-2020
	RM Million				Average Annual Growth (%)
Investments	6.9	8.5	10.0	25.4	4.8
Investments per year	1.4	1.7	2.0	1.7	n.a
Exports (end period)	29.5	40.1	53.0	53.0	6.4

Source: MITI, IMP3

Appendix G: Definition of Elements in the Tabulated Form of TLAS

Element	Meaning
Region	Indicates to which region the table applies
Sources of timber	Defines the legal status (Annex A) of forested land from which timber is sourced
Principle	The definition of legality is governed by 6 principles, encompassing 24 criteria
Criterion	The criterion outlines the requirement(s) that must be met in order to achieve compliance with specific principles
Legislative Reference	The legislative reference specifies the laws and regulations that form the legal basis for each criterion
Responsibility	Lists the relevant government agency (ies) responsible for the enforcement of the legal requirement
Verification Procedure	Provides a description of procedures undertaken by responsible agency (ies) to demonstrate that compliance with a criterion that has been met through the checking of documents, field inspection and consultation. Verification procedures also highlight the frequency of verification with respect of a criterion
Output:	Lists key documents or evidence to demonstrate compliance
ISO Reference	Where applicable, an ISO reference to the relevant verification procedure is indicated

Source: Protem Secretariat (Annex C of TLAS)

Appendix H: Difference between Certified and Legal Timber

	Legal Timber	Sustainable Timber
Principles & Criteria (P&C)	P&C on social, environmental & economic issues required by law	P&C on social, environmental & economic issues required by law & forest sustainability
Scope	All forest lands	Permanent Reserved Forests
Status	Governmental	Non-governmental
Development Process	Government-led	Stakeholders-led
Issuance of Compliance Document	Government Licensing Authority	Certification Body
Institutional Arrangements	Joint Implementation Committee (JIC) between EU and Malaysia	NGB (MTCC)

Source: MPIC

SHANMUGAM, SUGUMARI (2015) THE EFFECT OF TRADE RELATED ENVIRONMENTAL MEASURES ON THE FOREST SECTOR AND TIMBER TRADE OF PENINSULAR MALAYSIA. PhD thesis, University of Nottingham.

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ii. **Minutes of Meeting/ Records of Discussion/Letters/Note/Official Presentation/Reports**

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