

The EU and the ‘Problem’ of Illegal Logging: the Case of the EU-Malaysia VPA

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Malaysia was the first country in Asia to start negotiations for a Voluntary Partnership Agreement (VPA) with the European Union (EU). These VPAs are the core of the EU’s external forest governance and stem from the 2003 Forest Legality Enforcement, Governance and Trade (FLEGT) Action Plan. Both aim to govern the ‘problem’ of illegal logging. This article presents two investigations. First, it looks at the process of problematization: what is the problem represented to be? In other words, how is the problem delineated and what assumptions underlie this representation? To this end, this article presents a thorough analysis of the FLEGT Action Plan, puts together the pieces of the problem, and links them to the coherence of the EU as a global actor. Second, the article delves into resistance to this governing in the case of Malaysia. In the VPA processes, the EU expects local actors to articulate their interests and streamline their knowledge to reach an optimal definition of legal logging. These expectations however obscure a history of diverging interests and legal battles in Malaysia. The second part of this article investigates how local actors such as indigenous peoples’ groups, timber producers and state-level politicians have come to resist the VPA and its governing in a series of opting-out and walking out.

1 INTRODUCTION

In May 2003, the European Union (EU) presented its Forest Law Enforcement Governance and Trade (FLEGT) Action Plan. The Plan embodies the efforts of the EU and its Member States to govern illegal logging in forests around the world and has an internal and an external component. The former went on to produce EU legislation to prevent illegally produced timber to be placed the EU market; the latter in Voluntary Partnership Agreements (VPAs).¹² A VPA

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¹ The European Timber Regulation (EUTR) prohibits the placement of illegally harvested timber on the EU market (Regulation (EU) No 995/2010).

² As of Jan. 2019, nine VPAs have been agreed and are in various stages of implementation (Cameroon, Central African Republic, Ghana, Liberia, Republic of the Congo, Indonesia, Guyana, Honduras, Vietnam), with six more being negotiated (Côte d’Ivoire, Democratic Republic of the Congo, Gabon, Laos, Malaysia, Thailand). In 2016 Indonesia became the first country to issue FLEGT licenses.

is a trade agreement that aims to ensure that the timber exported to the EU from the partner country in question is verified as compliant with local laws. It brings about a Timber Legality Assurance System (TLAS) that deals with a definition of legality, supply chain control, verification of compliance, licensing and an independent audit. The entire VPA process requires the structured participation of civil society in the four phases of preparation, negotiation, implementation and operation. Relevant stakeholders are those involved in the enforcement of forestry related legislation, operating in the forest sector or affected by forest operations. The end product of a VPA process is a FLEGT license: a label on log shipments that proves that they were obtained in accordance to local laws.

The VPA process with Malaysia specifically deserves our attention. The EU-Malaysia VPA negotiations, the first with a country in Southeast Asia, started in January 2007. Over a decade later, however, the talks have yet to produce an agreement. Discussions came to a halt over the walk out of a significant part of the civil society groups and the decision of the province of Sarawak – the largest producer of timber of the country – to not participate in the future VPA.

From a critical perspective, this article presents two related investigations into FLEGT and the EU-Malaysia VPA. Firstly, I approach the FLEGT initiative and EU external forest governance from the What is the Problem Represented to be? (WPR) approach for policy analysis.³ This approach looks at policies not as solutions for natural or objective problems waiting to be addressed, but rather as processes of producing problems of a specific kind. Such a view helps us better understand policy by tracing it back to underlying assumptions within problem representations. I assess what kind of problems the EU wants to address with FLEGT and the VPA, how certain issues are problematized while others are not, and link these to prior assumptions about the ‘place’ of forests, the ‘need’ for management and the ‘appropriate’ means to do so. Secondly, I view the EU-Malaysia VPA negotiations as a case of resistance to this governing and its problematizations or, in Foucauldian terms, counter-conduct. In short, Foucault studied power in modern forms of governing, or the ‘art of government’ (governmentality, see *infra*), and he emphasized how governing and resistance are mutually constitutive. This is not an analysis of mass protests, but rather an emphasis on the relational character of power. It is both a question of how those that resist governing do so, and a view on resistance as an essential part of and even potentially

³ C. Bacchi & S. Goodwin, *Poststructural Policy Analysis: A Guide to Practice* (Palgrave 2016).

reinforcing 'government'.⁴ The investigation into the counter-conduct in the case of the EU-Malaysia VPA reveals how local problematizations and those shaped by the EU interact.

This article contributes to our understanding of VPAs at a time when the forest governance debate within the EU is taking new forms. This shift might be set in motion with an action plan to combat deforestation rather than illegal logging. I will reflect more on this in the conclusions. The first contribution of this article is that it introduces a multifaceted Foucauldian understanding of power. As such, it contrasts the presentation of the EU as an 'interest-free' actor, a facilitator and provider of technical assistance. The article's second contribution is its investigation into resistance. It not only has an empirical focus on what 'does not work', rather than only on what 'works' in terms of policy output, but also theoretically engages with the concept of counter-conduct. It substantiates an understanding into how to not be governed from the Malaysian side rather than just how to govern from the EU side.

The empirical material in this article is a mix of written and oral sources. The former are key policy documents on FLEGT and VPAs, such as the 2003 Action Plan and the 2016 Evaluation, *Agence Europe* references⁵ and VPA Updates.⁶ Through the European Forest Institute (EFI) I obtained the exact dates for all events in the EU-Malaysia VPA negotiations (*see* Figure 2). Moreover, we conducted fourteen interviews with EU policy makers and both European and Malaysian civil society.⁷ Finally, for a period of three months I gathered a better understanding of VPA processes through participatory observation at the EU Delegation to the Lao PDR. Albeit not in Malaysia, I gained valuable first-hand experience with an active VPA process.

This article proceeds as follows. I will first elaborate on what entails a policy analysis with a focus on problematization and counter-conduct. The subsequent section deals with EU external forestry governance and the background on the EU-Malaysia VPA. This will provide evidence why FLEGT/VPAs are a good case for a study on problematizations, and the VPA process with Malaysia specifically for counter-conduct. The empirical sections will focus first on what kind of problems the EU's external forest governance aims to address and why. Secondly, they present the findings on counter-conduct

⁴ C. Death, *Counter-conducts: A Foucauldian Analytics of Protest*, 9(3) Soc. Mov. Stud. 235–51 (2010).

⁵ I manually gathered and structured all references to Malaysia in *Agence Europe* from 1996 to 2015.

⁶ Through LoggingOff.info, the VPA NGO network.

⁷ A number of these interviews were conducted together with my colleague Elke Verhaeghe.

in the context of the VPA process with Malaysia. The conclusions wrap up the contributions and discusses the implications of the findings.

2 A CONCEPTUAL FRAMEWORK FOR POLICY ANALYSIS

2.1 OF PROBLEM AND SOLUTIONS

The WPR (What is the Problem Represented to be?) approach is an analytic strategy that puts in question the common view that the role of government is to solve problems that sit outside them, waiting to be addressed. Rather, it considers how governmental practices produce ‘problems’ as particular kinds of problems in a process coined *problematization*. In this way policy can be understood not as an essence or something static to be evaluated at a given point in time, but rather as a process in which categories are made – and unmade – as objects (e.g. ‘forests’), subjects (e.g. ‘civil society’), or places (e.g. ‘the EU’). The *problematization* of illegal logging as I will discuss below produces illegality as a problem, the nation state as the guardian of this legality and a responsible civil society as a constructive part of the solution. The WPR approach holds several guiding questions,⁸ in my view not to be strictly answered one by one, but rather to steer policy analysis with new eyes:

1. what is the problem represented to be in a specific policy or policies?
2. what deep-seated presuppositions or assumptions underlie this problem representation?
3. how has this representation of the ‘problem’ come about?
4. what is left unproblematic in this problem representations? Where are the silences? Can the ‘problem’ be conceptualized differently?
5. what effects (discursive, subjectification, livid) are produced by this representation of the ‘problem’?
6. how and where has this representation of the ‘problem’ been produced, disseminated and defended? How has it been and/or how can it be disrupted and replaced?
7. apply this list of questions to your own problem representations.

The reference to governmental practices indicates the affiliation of the WPR approach, and thus this article, to the Foucauldian concept of governmentality and an understanding of discourse where knowledge production and power come together. In short, governmentality denotes a set of rationalities and techniques for the exercise of power which make governing possible. It brings together the practice of governing and the necessary rationality of government that makes

⁸ Bacchi & Goodwin, *supra* n. 3.

governing possible. Again, it is therefore not solely about how institutions 'do' policy and solve problems, but equally about the discourses that construct objects or subjects of governance.⁹ This links to where the WPR approach specifically focuses on what Rose & Miller called the problematics of government or the production of problems to be addressed.¹⁰

Importantly, as Tania Li pointed to in her great book 'The Will to Improve',¹¹ the identification of a problem is intimately linked to the availability of a solution. Rather than to perceive policy as a solution to a given problem, critical policy analysis investigates how a preconceived idea of an appropriate solution shapes what can be considered a problem. As the saying goes, if your main tool is a hammer then one tends to see nails everywhere. Or, more precisely, the believe that a hammer is the best approach to any problem brings into being the existence of nails. As I will discuss below, the format of the solution in a VPA as a trade agreement, produces problems represented as connected or barriers to this trade (e.g. lost revenues or unreliable verification). Problems and solutions are thus two sides of the same coin but often, more accurately, a catch-22.

2.2 COUNTER-CONDUCT

An important element of modern governing in general, and EU external policies specifically, are the technologies that make the subjects of policy accept a specific problem representation and enable them as allies in its network.¹² Therefore, the comprehensive engagement of local actors – policy makers, civil society and private sector – is often an essential part of the governing by the EU. However, the agency that lies with the EU, or any 'government', to articulate policies to address problems of a certain kind and to produce its subjects is not absolute.

As I briefly discussed above, resistance to governing is an essential part of the Foucauldian view on productive power that is multifaceted and relational: the capacity to bring things, objects and subjects into being. Resistance, or counter-conduct, is a crucial element of this capacity. This is not about grand gestures in terms of mass-protests or revolutions – as these are more related to other forms of

⁹ J. Joseph, *The Limits of Governmentality: Social Theory and the International*, 16(2) Eur. J. Int'l Rel. 223–46 (2010).

¹⁰ N. Rose & P. Miller, *Political Power Beyond the State: Problematics of Government*, 43(2) Brit. J. Soc. 173–205.

¹¹ T. M. Li, *The Will to Improve* (Duke University Press 2007).

¹² M. Merlingen, *From Governance to Governmentality in CSDP: Towards a Foucauldian Research Agenda*, 49(1) J. Com. Mkt. Stud. 149–69 (2011).

power – but the rather mundane, day-to-day challenging or disrupting of governing. It is a set of tactics that is ‘not necessarily spectacular nor ground-breaking’.¹³ Counter-conduct is about speaking truth about oneself: ‘counter-conducts practice freedom (to think and act otherwise) by bringing forth and questioning the regime of truth through which they are engaged as objects and subjects of government’.¹⁴ Resistance thus does not (have to) come in the form of working overtly against something but can take shape in openly embracing the assumptions of the governing as such.¹⁵

In sum, given the relational character of power, it is often by studying how people oppose a certain way of being governed that the productive power elements of this governing come to the fore. It is when a partner country of civil society is labelled, or ‘othered’, as non-cooperative or irresponsible that it becomes clear what is delineated as cooperative and responsible.¹⁶ This calls for analytics of protest to investigate ‘how protest and government are mutually constitutive, and thus how forms of resistance have the potential to reinforce and bolster, as well as and at the same time as, undermining and challenging dominant forms of global governance’.¹⁷

2.3 THE EU IN THE WORLD: GOVERNMENTALITIES AND RESISTANCE

With relation to EU external governance, several studies find policy to represent problems as local and solutions as a form of self-governance. Filip Ejdus brings this together in his discussion of local ownership.¹⁸ This is considered as the solution in the form of local capacity and participation, but equally identified as the key problem in any intervention. It is also about the empowerment of the right kind of subjects¹⁹ which is not to be mistaken for unconditional rights and opportunities for local populations. Beste İşleyen specifically, in her study on EU twinning projects in Egypt and Tunisia, critiques EU external governance as framing the local as a problem sphere rather than addressing the instrumental role of the EU and other international

¹³ D. Bulley, *Occupy Differently: Space, Community and Urban Counter-Conduct*, 30(2) *Glob. Soc.* 238–57 (2016). Emphasis in original.

¹⁴ L. Cadman, *How (Not) to be Governed: Foucault, Critique and the Political*, 28(3) *Env. & Plan Dev: Soc. & Space* 539–56 (2010).

¹⁵ H. Malmvig, *Free Us from Power: Governmentality, Counter-conduct, and Simulation in European Democracy and Reform Promotion in the Arab World*, 8(3) *Int'l Pol. Soc.* 293–310 (2014).

¹⁶ L. Odysseos, C. Death, & H. Malmvig, *Interrogating Michel Foucault's Counter-Conduct: Theorising the Subjects and Practices of Resistance in Global Politics*, 30(2) *Glob. Soc.* 151–56 (2016).

¹⁷ Death, *supra* n. 4.

¹⁸ F. Ejdus, *Local Ownership as International Governmentality: Evidence from the EU Mission in the Horn of Africa*, *Cont. Sec. Pol.* 1–23 (2017).

¹⁹ M. Kurki, *Governmentality and EU Democracy Promotion: The European Instrument for Democracy and Human Rights and the Construction of Democratic Civil Societies*, 5(4) *Int'l Pol. Soc.* 349–66 (2011).

organizations in the reform processes of both countries.²⁰ Jonathan Joseph studied how EU resilience building in the Horn of Africa as governance from a distance.²¹ The representation of the problem of food crises is one of local institutions, capacity and governance yet silences external conditions or the wider international environment. At the same time, the solution in such representation lies with the responsabilization of local actors through self-governance: they come to hold responsibility for their own resilience. Michael Merlingen describes this as making people 'complicit in their own governance'.²² He investigated the construction of countries as problem places in external security governance with the problem represented as shortfalls of the local (Macedonian) police. Moreover, he described the practice of fact-finding missions as knowledge producing practices in which the room for intervention was defined, yet certain questions not asked. The EU's governance finally also reconstitutes the subjectivities of local staff through mentoring to enrol them in their own governance.

Fairly recently, scholars started to investigate counter-conduct to EU external governing. Helle Malmvig provides the example of political reform in the context of EU democracy promotion towards the Arab World. Drawing on Baudrillard's insights on simulated reality, she argues that Arab countries subverted the logic of political reform by the EU by simulating it to the point where real reform could no longer be distinguished from the simulated variant. Simply put, the EU's governing was answered with resistance in the form of pretending to undertake reform.²³ Filip Ejodus provides additional examples as he investigates the EU Capacity Building Mission (EUCAP) in the Horn of Africa that deals with piracy and maritime security. He critically assesses the mentality of local ownership that is operationalized as responsabilization for externally designed objectives which he traces back to the principles of indirect rule in late colonialism. Such forms of governance, however, give rise to various forms of resistance both direct and indirect. This takes shape in the difficulty in obtaining the formal invitation letters for such an intervention given that several countries did not view piracy as their problem or in the complaints over underestimating local knowledge in Somaliland.²⁴ Other examples come from Ana Juncos in her analysis of EU security sector reform in Bosnia & Herzegovina. Local actors for example use

²⁰ B. İşleyen, *The European Union and Neoliberal Governmentality: Twinning in Tunisia and Egypt*, 21(3) Eur. J. Int'l Rel. 672–90 (2015).

²¹ J. Joseph, *The EU in the Horn of Africa: Building Resilience as a Distant Form of Governance*, 52(2) J. Com. Mkt. Stud. 285–301 (2014).

²² Merlingen, *supra* n. 12.

²³ Malmvig, *supra* n. 15.

²⁴ Ejodus, *supra* n. 18.

the vague terminology of the EU and the ‘promise’ of local contextualization to lower the bar for reforms and undermine the credibility of the EU. This does not eliminate responsiveness on the side of the EU, as it introduced minimum standards along the way.²⁵

3 CONTRIBUTION

In the following sections I will outline how exactly these investigations into problematization and counter-conduct contribute to the existing literature on forest governance and the VPAs. This literature is, roughly put, focused on the – considered innovative – design of the VPAs on the one hand and their impact on the other hand.²⁶ Moreover, I also introduce Malaysia here as an understudied case in this VPA literature.

As said above, the Voluntary Partnership Agreements (VPAs) are the external branch of FLEGT and considered part of an experimentalist transnational forest governance regime mainly because they are focused on the verification of legality.²⁷ Such VPAs produce FLEGT licenses as a guarantee for European importers that the timber they import complies with the national laws of the partner country. It is in the VPA design that lies a large part of the scholarly attention for the VPAs. They are indeed firstly different from non-governmental schemes such as the Forest Stewardship Council (FSC) that focus on sustainability. It secondly inserts renewed importance for the role of domestic government in forest governance given the failure of a multilateral forest governance regime.²⁸ In sum, the VPAs are coined an ‘innovative combination of demand and supply measures, public and private initiatives, and coordination between developed and developing countries’.²⁹ It is in this corner of the literature that it is opportune to take a step back and re-investigate the problematization of *illegal* logging via the guiding questions in the WPR approach.

Furthermore, a second preoccupation of the VPA literature is a study into the agreements’ impact in terms of trade, legal reforms, and social and ecological indicators. VPAs and the EU Timber Regulation (EUTR) for

²⁵ A. E. Juncos, *EU Security Sector Reform in Bosnia and Herzegovina: Reform or Resist?*, 39(1) *Contemp. Sec. Pol’y* 95–118 (2018).

²⁶ M. Deros & E. Verhaeghe, *When P stands for politics. The role of the EU in the VPAs: a research agenda*, 101(4) *For. Pol. & Econ.* 81–87 (2019).

²⁷ C. Overdevest & J. Zeitlin, *Experimentalism in Transnational Forest Governance: Implementing EU Forest Law Enforcement Governance and Trade (FLEGT) Voluntary Partnership Agreements in Indonesia and Ghana*, SSRN Research Paper (2016).

²⁸ C. L. McDermott, *REDDuced: From Sustainability to Legality to Units of Carbon – The Search for Common Interests in International Forest Governance*, 35 *Env. Sc. & Pol.* 12–19 (2014).

²⁹ Overdevest & Zeitlin, *supra* n. 26.

example may create a trade diversion of illegal timber rather than its elimination. While the amount of illegally sourced tropical timber on the EU market has dropped, China consolidated its position as dominant market for tropical timber without such strict rules.³⁰ Scholars are also critical of the benefits of a VPA for local people whose logging activities risk to be criminalized rather than formalized.³¹ Although this segment of the VPA literature puts much more scrutiny to the legality question and its impact, it is less comprehensive on its origins. A contextualized understanding of the problematization of illegal logging equally forms a contribution here. Moreover, I would like to view counter-conduct in the case of Malaysia in relation to such impact assessments.

Despite the few examples of studies into counter-conduct, there is a tendency in EU external governance scholarship to either ignore policy 'failures' or attribute resistance to ineffectiveness on the part of the EU policy in questions. To a large extent, resistance here eliminates a case as an appropriate case for the study of governing given that there is no case to investigate. If a policy initiative doesn't materialize it largely disappears from the radar. The literature on the VPAs for example has an overemphasis on the stories of the VPAs in Indonesia and Ghana. If the case does hold on to attention, resistance to EU governance is, put bluntly, often viewed as just protests or disagreements and translated into a variable that explains the EU's (lack of) effectiveness. These perspectives are arguably EU-centric (i.e. only the EU as actor) and Eurocentric (i.e. true agency lies with Europe).

I want to refocus on resistance as counter-conduct and present it as an essential part of making and remaking policy. Given the importance of Malaysia as a tropical timber producer, its central position in the palm oil discussion and the country's deforestation rate, it is surprising to see how scholars 'dropped out' after the VPA came to a premature, albeit informal, halt. It makes it a very interesting case where civil society, state-level authorities and part of the private sector came to resist the problematization of illegal logging from different angles.

³⁰ A. Giurca, R. Jonsson, F. Rinaldi, & H. Priyadi, *Ambiguity in Timber Trade Regarding Efforts to Combat Illegal Logging: Potential Impacts on Trade Between South-East Asia and Europe*, 4(4) *Forests* 730–50 (2013).

³¹ K. Buhman & I. Nathan, *Plentiful Forests, Happy People? The EU's FLEGT Approach and Its Impact on Human Rights and Private Forestry Sustainability Schemes*, 4(2) *Nor. Env. Law J.* 53–82 (2012); A. Setyowati & C. L. McDermott, *Commodifying Legality? Who and What Counts as Legal in the Indonesian Wood Trade*, 30(6) *Soc. & Nat. Res.* 750–64 (2017).

4 THE PROBLEM WITH ILLEGAL LOGGING

4.1 THE ACTION PLAN

In the following sections, I show how the problem of illegal logging was delineated in the FLEGT Action Plan. To delineate is the best word here: it holds the meaning of both describing with detail and the more physical demarcating of inside and outside. This means delineating what is part of the problem and what is not, but also delineating what is the best venue to address the problem and formulating solutions. All these depend on and reinforce certain assumptions about the ‘place’ of forests, the ‘need’ for management and the ‘appropriate’ means to do so. Whereas other EU actors have arguably further opened the external forest governance debate (most notably the Council in their 2003 Conclusions) they did so consistently in relation to legality. Therefore, the Action Plan takes centre stage in the first part of this analysis:

This document, the EU Action Plan for Forest Law Enforcement, Governance and Trade (FLEGT), sets out a process and a package of measures through which the European Commission proposes to address the growing problem of illegal logging and related trade.³²

The core of ‘the problem’ is *illegal* logging, defined as ‘when timber is harvested in violation of national laws’. It is stipulated that ‘the EU’s wider objective is to encourage sustainable forest management’ and forest governance is regarded as ‘an important step on the path to sustainable development’. The problem is multifaceted, and its sub-elements have different relationships to the core (see Figure 1). Illegal exploitation of natural resources and forests in the problem representation is closely associated to corruption, organized crime [1] and violent conflict [2], while undermined economic competitiveness [3], lost revenues [4], environmental damage [5] and the undermining of the EC’s development objectives [6] are all represented as consequences of illegal logging. Strong international demand for timber [7] on the other hand is considered a cause, or encouragement, of illegal logging.

³² European Commission, *Forest Law Enforcement, Governance and Trade (FLEGT) – Proposal for an EU Action Plan* (Brussels, 2003), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52003DC0251>.

The problem representation paints an overall bleak picture of timber-producing countries. The lost revenues could be spent on better healthcare, education and other public services. Moreover, illegal logging, environmental damage and the long term negative impact on the livelihood of forest-dependent people are mentioned together. This grouping not only hints that legal logging would not have such a negative impact, it also links it with environmental issues rather than the association with principles of democratic governance and respect for human rights.

Figure 1 The Representation of the Illegal Logging as the Problem



Whereas 'related trade' is connected to the core of the problem, it is at the same time at the centre of the solution. In the Action Plan, the solution consists of seven elements of which two (support to timber-producing countries and conflict timber) direct the supply of legal timber, the other five the demand side. The latter, among others, link export permits (the licensing scheme) to the benefit of importers, but also for participating countries in

terms of increased market confidence, increased revenues and additional enforcement tools. The supply side solutions indicate where timber-producing countries need support. As such, the part of the solutions that lay outside the EU represent more elements of the problem. The encouragement of greater transparency, for example, deals at the same time with the ‘problem’ (limited or lack of transparency) and the ‘solution’ (the encouragement by donors). Another sub-element of the ‘solution’ in terms of the supply side is capacity building as ‘[p]artner governments need donor support to implement broad governance reforms, for example in the judiciary, the police and the military.’ This at the same time problematizes the current state of governance in partner countries in these fields. The same goes for reliable verification systems and policy reforms as part of the solution.

The specifics of this problematization in the Action Plan hold specific silences, elements that are not part of the problem representation. The core problem *could* have been deforestation, or (unsustainable) palm oil production, but it is not. To have illegal logging at the centre of the problem representation largely closes the door for a thorough discussion on too much legal logging. As mentioned above, the link between illegal logging and deforestation is one where the former ‘can be a contributory factor’ to the latter. Overall, what is not problematized in the Action Plan is the legal framework for forestry, its fairness or justness. The problem lies with corrupt elements, illegal business activities and weak law enforcement. By identifying these problems, the solution in the form of a reliable system to distinguish legal from illegal production comes as natural.

4.2 DISCUSSION

Silences are rarely accidents. I argue they serve to sustain certain assumptions and produce a coherent story of the EU as a global actor. This does not refer to the academic debate on policy coherence, it be vertical or horizontal, nor is it about ‘testing’ the normative power of the Union. It is rather an inquiry in the productive power to bring into being a version of both the EU ‘self’ and the working of the world. The study of silences, through counterfactuals, allows to fully grasp the often-invisible assumptions of the problematization. It allows to see them not as policy decisions, but as incontestable pre-decisions.

A coherent story about the EU, and the assumptions that trickle through into the VPAs, is one of an actor that abides to multilateral trade rules. In this story there is the inevitable ‘need’ for trade-based solutions that conserves the

sovereignty of the partner country. Imagine the EU banning palm oil – its plantations arguably a source for deforestation – or even tropical timber altogether. This would trigger reaction from palm oil producing countries³³ in the form of bringing this before the WTO Dispute Settlement Mechanism. The 'decision' to focus on the legality of traded forestry products then is on the one hand an example of the EU abiding to WTO rules, yet on the other hand an example of how the EU wants to be an actor that is abiding to WTO rules. This means that the EU is not only driven by the institutional rules of the WTO (i.e. institutional power) but also the assumption that these rules are good (i.e. productive power). This highlights the trade-rules-based thinking of the EU that also drives the (later) design of the VPAs. It makes that the market-based solutions in the VPAs are not policy decisions that could have been otherwise, but rather that non-market-based solutions were off the table even before the launch of the FLEGT Action Plan.

These market-based solutions are also part of pre-defined assumptions of 'what works'. Again, these assumptions bound and delineate the problematization and the domain for intervention. In the FLEGT Action Plan, the format of the VPAs is still in a draft version: the name VPA is not even introduced yet. When the VPAs substantiated from 2007 onwards their market-based features took example from other forest conservation initiatives such as REDD+³⁴ which in turn were criticized for treating forest conservation and the future of our planet as market externalities.³⁵ REDD+ shows that the EU is not the only one to relate forestry questions to their market value, yet the FLEGT licenses also follow preceding assumptions within the EU about 'what works' in the realm of trade and sustainable development. The forestry – trade linkage, however, is not a first with the VPAs. Not only do contemporary EU Free Trade Agreements (FTAs) have a distinct chapter on sustainable development that, when relevant, mentions forestry products, there is EU precedent of linking trade in general to tropical wood. The GSP (Generalized System of Preferences) since late 1990s referred to special incentive arrangements that allowed for additional preferences if partner countries incorporate in their domestic law the standards of the International Tropical Timber Organization (ITTO):³⁶

³³ This is a reasonable assumption given various statements by Malaysia and Indonesia concerning the biofuel sustainability criteria in the promotion of renewable energies (2009/28/EC). Both countries stated they would monitor the implementation of the directive and assess if it forms a non-tariff barrier for the imports of palm oil into the EU.

³⁴ Given that deforestation and forest degradation account for over 10 % of CO₂ emissions, Reduced Emissions through Avoided Deforestation and Forest Degradation (REDD) aim to correct 'so-called market failure in sustainable forest management through ascribing monetary values to standing forest that would cover the opportunity costs of alternative land use and so make conservation more profitable than destruction', n. 37.

³⁵ R. Fletcher, W. Dressler, B. Büscher & Z. R. Anderson, *Questioning REDD+ and the Future of Market-Based Conservation*, 30(3) *Conser. Bio.* 673–75 (2016).

³⁶ Council of the European Union, *COUNCIL REGULATION (EC) No 2820/98 of 21 Dec. 1998 Applying a Multiannual Scheme of Generalised Tariff Preferences for the Period 1 July 1999 to 31 Dec. 2001* (Brussels 1998).

As from 1 January 1998 special incentive arrangements in the form of additional preferences may be granted to beneficiary countries covered by the scheme which request such arrangements in writing and provide proof that they have adopted and actually **apply domestic legal provisions incorporating the substance** of the standards laid down by the ITTO relating to the sustainable management of forests.

There was thus always the assumption that trade incentives ‘work’ when it comes to forestry. The VPA set-up thus (re)produces a story of the attractiveness of the EU market and the subsequent willingness for reforms that stems from it. Whether or not trade data can substantiate this attractiveness in terms of size is variable across cases yet overall what is more important is the (belief that the) credibility of the legal system relates to the possibility to export to the EU. This is not only a matter to test ex-post, but also what I argue as an important assumption within the EU ex-ante the set-up of the VPAs.

5 RESISTANCE IN MALAYSIA

5.1 A TIMELINE

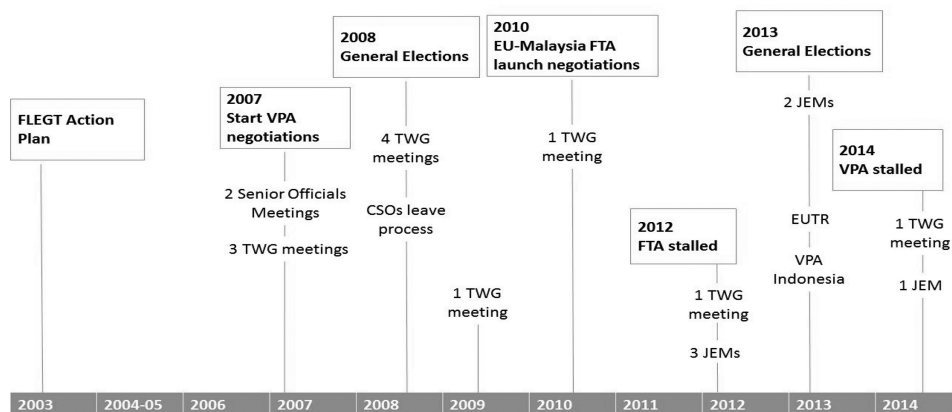
The EU-Malaysia VPA negotiations started in January 2007 (*see* Figure 2). Malaysia was considered a crucial country in the VPA story given its declining tropical forest cover. Credible licensing was assessed as being possible in the short term in Malaysia as national certification systems were already being considered at the time.³⁷ Ten years later, however, the talks are not close to an agreement as the involved actors disagreed on almost everything. Initially, enthusiasm reigned, and the Netherlands was the Member State to allocate a lot of resources to the process.³⁸ The process first cooled as indigenous peoples’ groups decided to leave in 2008. The re-launch of the talks in April 2012, however, was without the State of Sarawak. This proved to be a decisive hurdle and the negotiations stalled in 2014 in contrast to the successful conclusion the EU-Indonesia VPA. Malaysian exporters, however, had to find a way to prove due diligence as required by the EU Timber Regulation (*see infra*). Technical progress on the legality definitions in the VPA however continued throughout 2016–2017. For political impetus into the EU-Malaysia

³⁷ Interview 11.

³⁸ VPA processes are driven by the European Commission (DG ENVI for Asia, DG DEVCO for Africa) together with the European Forest Institute (EFI). In each of the processes however there also one of the Member States that gets involved. This was e.g. Germany in Cameroon and the UK in Ghana (interview 8).

VPA, the EU is looking at the new Malaysian government elected in May 2018.³⁹

Figure 2 Timeline of the EU-Malaysia VPA⁴⁰



A major hurdle was thus the decision by the province of Sarawak to not participate in a future VPA.⁴¹ In 2009, the Sarawak Timber Association (STA) had denounced some of the core elements of the FLEGT VPA with the EU: a common ground for the definition of legal timber *and* native rights over land. The Association stumbled over what it called restrictive import and export requirements, and conditionalities in a 'involuntary' Voluntary Partnership Agreement.⁴² The Sarawak regional political establishment was quick to follow the STA's position. Sarawak is the largest Malaysian state and is one of two (the other is Sabah) states on the island of Borneo (*see* Figure 3). As Malaysia is a federation, the state-level holds the power over, most relevant here, land concessions. The drop out of Sarawak undermines the entire VPA with the rest of Malaysia and limits the impact of the VPA as the province is the largest timber producing region of the country. Whereas there was ultimately 'a lot of agreed text, [there was] no agreement on how such a VPA would deal with Sarawak'.⁴³

³⁹ Interview 14.

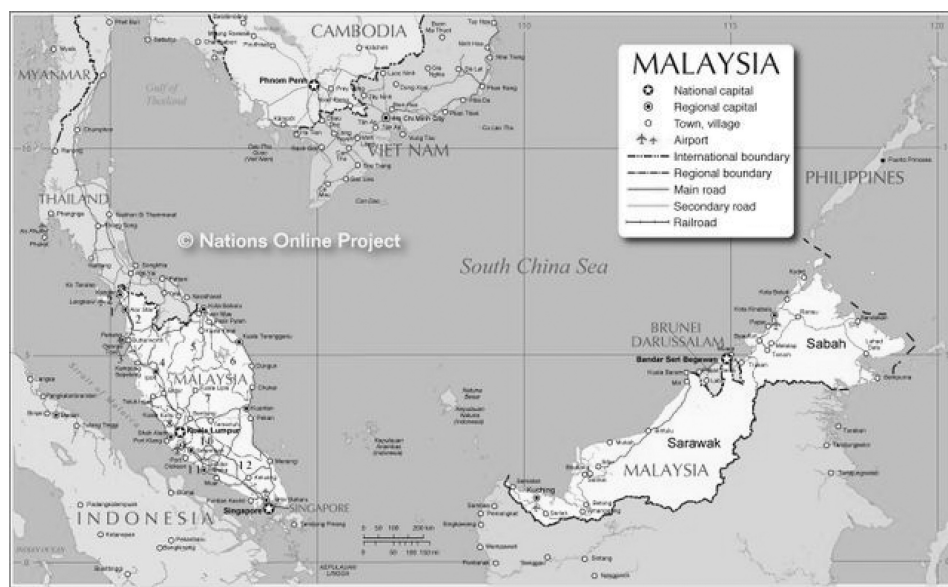
⁴⁰ Within this timeframe, the EU and Malaysia also negotiated on a Free Trade Agreement. These talks however stalled after seven rounds in 2012 (interview 1). Officially the government of Malaysia wanted to secure a stronger mandate in the 2013 elections, yet sensitive issues (access to the services market, access to public contracts, protection of intellectual property rights and sustainable development) blocked any further progress after that; *see* Agence Europe, *Possible resumption of free-trade talks early in 2015* (2014).

⁴¹ Interview 5.

⁴² Sarawak Timber Association, *Myth, Facts & Reality of EU FLEGT VPA: Sarawak's Perspective* (STA 2009).

⁴³ Interview 14.

Figure 3 Map of Malaysia



The other major issue during the negotiations has been the inclusion of civil society and local communities. From the beginning several groups were dismembered as their representatives were denied free movement within Malaysia. During the consultation process civil society groups were presented with (only) some of the texts but their comments were mostly discarded.⁴⁴ Neither the domestic steering or negotiating committee for the VPA process had representatives from civil society organizations or indigenous peoples' organizations included. By the 4th Technical Working Group meeting (in 2008) several organizations had decided to leave the process,⁴⁵ given that these experiences made several participants relive earlier struggles regarding forest certification in Malaysia since the late 1990s.⁴⁶ Overall, the groups denied legitimizing the consistent refusal by the Malaysian government to recognize the customary tenure rights of indigenous peoples.

⁴⁴ Interview 8; 10.

⁴⁵ L. Duffield, S. Ozinga, M. Richards, A. Bollen, & R. Kohnert, *Making Forestry Fairer: A Practical Guide for Civil Society Organisations Taking Part in FLEGT VPA negotiations*. (FERN 2014).

⁴⁶ Interview 9.

5.2 RESISTANCE

The VPA architecture activates civil society, as the representatives of the community, to partake in its own governing. The participation of non-governmental groups and the private sector is indeed viewed as an essential element in the legitimization of the solution of legality assurance. Significant elements of both groups in Malaysia, however, have resisted the EU's governing and the problem representation it holds by 'speaking truth' and non-participation in this self-governing.

The **Sarawak Timber Council** (STA) is one actor that has resisted the EU's problem representation. In October 2009, they published a booklet titled 'Myth, Facts and Reality of EU FLEGT VPA: Sarawak's Perspective'. This implies that:

- (1) there are elements of the FLEGT VPA (process) that are not real (not true),
- (2) 'Sarawak' is in the capacity to distinguish between what is real and what is not,
- (3) the STA represents the Sarawak perspective.

Directly from the preface onwards the STA distinguishes between the 'original intent' of FLEGT, namely differentiating between illegal and legal timber and preventing the former from entering the EU market, and the 'real intentions'. This is the myth from the title: the EU is here to prevent illegally logged timber (products) from entering its market yet the reality is that there are other intentions as well. STA contends the solution of the Action Plan: 'demand-side pressure for reform'. The STA is not convinced that the access to the EU market is sufficient as supply-side support. Given that the STA believes the legal framework for forestry-related activities in Sarawak is working properly, it is not convinced of the added value of setting up this licensing scheme. This is because:

- (1) the amount of exports from Sarawak to the EU is very low,
- (2) non-FLEGT timber would still be allowed to enter the EU market, and
- (3) the demand side is apparently not willing to pay a price premium for legal timber.

In addition, the STA takes issue with the broad problem construction of the Action Plan in terms of environmental issues, sustainable development, policy decisions and the livelihood of forest-dependent people. The STA picks up several elements of other discourses. Regarding the rights of natives, there is the link with the overall 'racial harmony' argument within Malaysia (i.e. very calculated distributive policies). The booklet also picks up the debate on diminishing policy

spaces for developing nations, with the specific meaning of ‘autonomy in determining how best to use and apply its natural resources’.⁴⁷ Moreover, the STA does not agree with the inclusion of ‘emotional issues’ such as native customary laws and native rights over land yet emphasizes what the timber industry has accomplished in terms of corporate social responsibility: ‘logging companies have repeatedly gone above and beyond the norm by enabling developmental conditions to improve the native’s quality of life. ... companies have undertaken this corporate social responsibility at their own great expense’. According to the STA, these broader objectives, poverty reduction, growth, and sustainable development, should be ‘separated from the licensing scheme as they cloud the original intent of the Action Plan to curb illegal logging and associated trade’.

The central argument of indigenous peoples represented by a consortium at the time called JOANGO HUTAN has been that their legal protection has not been adequate for their well-being. Indigenous peoples have access to the Courts to safeguard their land rights which is contained in the existing law system. However, they argue that they have been to the courts, and they have achieved rulings in their favor.⁴⁸ This does not take away that the logging of forests has been official state policy for decades and the legal protection of the rights of natives to establish Native Customary Rights has not been able to keep up with the issuing of licenses and leases for logging and plantations. JOANGO HUTAN does not share the problem-solution identification of the EU. The problem is not the lack of enforcement of forest law, the problem is not corrupt ‘elements’. The problem is an imbalance between those with power (state officials) and those without (natives). Therefore, these groups also don’t believe in the proposed solution of licensing:

‘I would say their main concern because the whole legality question is in a very static, in a very scientific ... , technical way. It doesn’t look into the substantive of what do they mean by customary land rights. [...] Legality for them means [...] from a very technical aspect which is written up in the paper [...] how they define legality. Whereas for the indigenous peoples’ groups and also for the NGOs supporting the indigenous peoples demands, legality itself cannot be seen from the technical point. It has to incorporate [...] the whole bigger picture of how land and forest are part and parcel of not just for economic value but also for the spiritual, for their [...] economic needs, for their social, for their governance as people who rely on that resources’.⁴⁹

Their response has been to re-politicize the entire process. The non-governmental organizations (NGOs) representing indigenous peoples have brought their demands for political change to the VPA table. They have not limited their

⁴⁷ Sarawak Timber Council, *supra* n. 42.

⁴⁸ C. Yong, *Forest Governance in Malaysia – An NGO Perspective* (JOANGO Hutan 2006).

⁴⁹ Interview 9.

input to a technical discussion of setting up a monitoring system for labels indicating legality but have questioned the value of legality for the overall protection of the livelihood of indigenous peoples. When they did not see progress in this regard, they left the process altogether. In the first half of 2008 JOANGO HUTAN, JOAS (another group in support of indigenous communities) and the Sarawak Indigenous Lawyers Association (SILA) left the multistakeholder consultations that supported the Technical Working Groups.

5.3 DISCUSSION

Both the STA and the indigenous peoples' groups resisted EU (external forest) governance by 'speaking truth', by contesting the problem representation produced by the EU. Of course, this is (also) a case of competing interests in which the STA and JOANGO HUTAN statements relate to the distinct governing of Sarawak vis-à-vis the Peninsular, a history of legal battles over native lands, and a system of extraction of natural resources that benefits those in power. However, the EU-Malaysia VPA episode is also one of resistance to the assumptions in the EU's problematizations. Their resistance challenges the coherence of the 'EU story' that draws on illegality and trade as 'inevitable' problems and solutions respectively. Both have taken part in the platform that is provided in the EU's governing and used it to 'speak truth'.

The STA engaged with the assumptions of the EU's problematizations, took them on and then challenged them. The Sarawak-based timber association rhetorically agrees that the legal system should be sustained, and that illegality is bad for business. They however challenge the EU's assumptions about its rules-based engagement (i.e. a hidden agenda) and the attractiveness of its market. The latter is a credible statement for Sarawak. Whereas the EU market makes for about 10% of the export earnings of timber and timber products from Malaysia (538 million USD for 2017) only 0.52% of these stems from Sarawak. Peninsular Malaysia exporters, who provide over 97% of all exports to the EU, found a way to comply with the EU Timber Regulation through MyTLAS: a legality verification system based on the draft TLAS from the VPA.⁵⁰ The system seems to override any need for further VPA engagement.⁵¹

By engaging in the multistakeholder platform in the first place, by, in part, acknowledging the EU as a legitimate actor to set up these fora for discussion, civil society actors are part of the production of the EU as a legitimate actor, and the

⁵⁰ Malaysian Timber Industry Board, *Malaysia: Country Progress on Timber Legality Assurance Efforts* (MTIB 2018).

⁵¹ Interview 10.

problems and solutions it puts forward. However, the groups I discussed above also resisted this production by offering their own knowledges about the role of forest (lands) and the problems at hand. Moreover, by refusing further engagement they were able to (re)produce themselves as a non-cooperative civil society, rather than the cooperative civil society the EU had aimed to bring into being as part of the legitimizing of its solution.

Whereas EU actors were largely supportive of the groups' response,⁵² there were questions on whether their leaving was a strategically good decision.⁵³ Moreover, the lack of inclusiveness did not automatically make the VPA process invalid⁵⁴ as it indeed did continue for years after these groups left. To some extent, the episode marks a process of how those that signal 'the problem' become 'the problem' especially by those that don't want to register the problem as such.⁵⁵ There was (and is) a strong emphasis on the capacity of civil society to deal with the issues in the VPAs. In short, signalling alternative views to illegality as the problem, gets often reinterpreted as lacking the capacity to understand legality. Such assumptions are strongly embedded in the EU funding for capacity-building in VPA processes⁵⁶ and even trickle through into the self-image of civil society groups:

'The other reason also because [...] in terms of capacity you must know [there was] nobody really to coordinate. Funding wasn't the problem because FERN was ever ready to [...] fund somebody to do the work [...]. So that was not a reason, but more capacity and also the issues were quite complicated for the different groups to take up because that among themselves they have also differences as well'.⁵⁷

6 CONCLUSIONS AND IMPLICATIONS

This article has first taken a step back from the assessments of EU external forest governance and investigated in depth the problematizations in the FLEGT Action Plan. The assumptions we found therein are an unwavering belief in illegality as the problem and licensing as the solution. Other EU actors have arguably widened the interpretation of the Action Plan – this could be an avenue for further research – but have kept the linkages to legality and trade-based solutions intact.

⁵² Interview 10; 14.

⁵³ Interview 6.

⁵⁴ Interview 5.

⁵⁵ See S. Ahmed, *Problems with Names* (2014), <https://feministkilljoys.com/2014/04/25/problems-with-names/>.

⁵⁶ Several NGOs attract EU funding for capacity-building projects in the VPA partner countries, of which FERN is best-known. This funding can stem from the governance pillar under the EIDHR, or, for Asian VPA countries, the Development Cooperation Instrument (DCI). Moreover, the EU FAO FLEGT Programme also covers support for local communities.

⁵⁷ Interview 9.

Secondly, this article discussed the case of the EU-Malaysia VPA not as a case of governance failure but rather as a case of counter-conduct. It studies the engagement of Malaysian actors with what the EU had produced as 'problems' and 'solutions'.

Theoretically, this article serves as a critique to what is taken-for-granted in the EU's external forest governance. It is an analysis:

that focuses on the grounds of the system's possibility. The critique reads backwards from what seems natural, obvious, self-evident, or universal to show that these things have their history, their reasons for being the way they are, their effects on what follows from them, and that the starting point is not a (natural) given but a (cultural) construct, usually blind to itself.⁵⁸

What I find is that the productive power that lies in the EU's governance truly is a relational power. The production of problems and solutions may originate from the FLEGT Action Plan, Malaysian actors equally put forward their alternative views and knowledges. The ultimate response of the actors we discussed has been the elusion from the process yet not without engaging with the EU's assumptions. This does not mean that the material effects of this power are the same. 'Business-as-usual' in the province of Sarawak means the continued extraction of natural resources to serve the Asian markets, whereas indigenous groups are confronted with MyTLAS that still largely excludes reference to customary land rights.

This does not mean that I advocate the exit by the EU in global forest governance. This article shows that EU is an important player in setting the scene and nourishing certain assumptions. This scene is one of confrontation and its deconstruction is not only an ex-post view on how power operates but also holds perspective and optimism.⁵⁹ This article shows that problems and solutions, and their assumptions are not absolute. The problem *can* be deforestation – as several actors in the EU setting would like to achieve – and the solution *can* consider more of the local knowledges.

Table 1 List of Interviews

1	23 January 2014	EU Delegation
2	03 February 2014	EU Commission
3	04 February 2014	Embassy Malaysia
4	27 January 2015	

⁵⁸ B. Johnson, *Translator's Introduction*, in *Dissemination* (J. Derrida, University of Chicago Press 1981); Bacchi & Goodwin, *supra* n. 3.

⁵⁹ B. Donegan, *Governmental Regionalism: Power/Knowledge and Neoliberal Regional Integration in Asia and Latin America*, 35(1) *Millennium* 23–51 (2006).

5	18 August 2015	FLEGT Facility
6	10 February 2017	Civil society EU
7	27 September 2017	Civil society EU
8	23 November 2017	Civil society EU
9	04 December 2018	Civil society Malaysia
10	05 December 2018	Civil society Malaysia
11	06 December 2018	Consultant
12	06 December 2018	European Commission
13	13 December 2018	European Commission
14	20 December 2018	European Commission
