

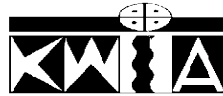
Bond Beter Leefmilieu
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11.11.11
VECHT MEE TEGEN ONRECHT



natuurpunt

FIAN
Food is a Human Right

voor
moederAarde
LID VAN FRIENDS OF THE EARTH INTERNATIONAL

natagora

Monsieur le Ministre Paul Magnette
Ministre du Climat et de l'Energie
Rue Bréderode, 9
1000 Bruxelles

CC: Madame la Ministre Hilde Crevits et Monsieur le Ministre Benoît Lutgen

Bruxelles, le 7 octobre 2008

Concerne: politique de l'Union européenne en matière d'agrocarburants (Conseil de l'Environnement du 20/10 et Conseil de l'énergie du 10/10)

Monsieur le Ministre,

Comme le prouvent de nombreuses études, les agrocarburants ont dans la majorité des cas un impact social et environnemental négatif. C'est pourquoi Greenpace, Vodo, IEW, BBL, Oxfam, 11.11.11, Friends of the Earth, Natuurpunt, Natagora et Fian conformément à l'avis rendu par le CFDD, **demandent aujourd'hui au gouvernement belge de s'opposer à l'objectif contraignant des 10%** d'énergies renouvelables dans le secteur du transport repris dans le projet de directive sur les énergies renouvelables.

Bien qu'il n'a pas remis en cause l'objectif des 10%, le Parlement européen a reconnu que des précautions supplémentaires étaient nécessaires en matière de promotion des agrocarburants. Les commissions environnement et industrie du Parlement ont en effet introduit d'importants amendements (détaillés ci-dessous) au niveau social et environnemental aux propositions de la Commission.

Même si, selon nous, les commissions du Parlement auraient dû aller plus loin encore, nous vous demandons pour le moins de défendre ces acquis lors des négociations sur la proposition de directive sur les énergies renouvelables.

Nous vous demandons d'accorder une attention particulière aux points suivants lors des négociations:

1. **Soutenir l'objectif contraignant des 20%** pour les énergies renouvelables pour 2020 en Europe et mettre en place des règles efficaces pour sa réalisation concrète.

2. **Réduire la part des agrocarburants** dans l'objectif énergie renouvelable du secteur transport. Nous continuons donc à croire que l'objectif des 10% prévu pour 2020 est trop élevé et ne peut se combiner avec une gestion durable des agrocarburants.

- La contribution des agrocarburants de première génération devrait être limitée.
- L'introduction de voitures électriques ou à hydrogène est importante et présente l'avantage de ne pas concurrencer le secteur de l'alimentation mais elle ne peut apporter de contribution sérieuse dans les délais prévus par la directive. De même la commercialisation des agrocarburants de seconde génération demeure incertaine. Elle rencontre des obstacles technologiques, environnementaux et économiques majeurs et parfois même insurmontables.
- De plus, le développement des agrocarburants demanderait d'importants subsides qui compromettraient les chances de développer des énergies renouvelables plus efficaces et plus durables. Il rendrait aussi plus difficile encore d'atteindre un objectif européen général de 20% d'énergie renouvelable pour 2020, diminuant les réserves de biomasse déjà limitées.

3. Assurer que les **impacts indirects** causés par le changement d'affectation des sols soient entièrement pris en compte dès que la Directive est mise en place. Ne pas tenir compte de l'augmentation des gaz à effet de serre causée par les changements d'affectation des sols (directs ou indirects) pourrait sérieusement compromettre l'objectif de l'Union européenne de réduire les gaz à effet de serre dans le secteur transport.

Nous vous demandons donc de prendre en considération les derniers développements scientifiques et d'inclure un facteur "changement de l'affectation des sols" dans le calcul de la balance des gaz à effet de serre. Des recherches scientifiques montrent que les impacts indirects de l'affectation des sols dus à la production d'agrocarburants peuvent causer des émissions allant de 25 à 110g CO₂/MJ ou plus.

4. Une **clause de révision** doit être incluse dans la directive stipulant qu'il est possible de modifier ou de supprimer l'objectif dans le cas où il aurait des conséquences néfastes pour l'environnement, la sécurité alimentaire dans les pays pauvres, importateurs ou producteurs, où s'il provoquait un changement d'affectation des sols ou la délocalisation d'indigènes.

5. La Commission doit recevoir pour mission de **faire un monitoring** régulier de l'impact de l'objectif des 10% sur la **sécurité alimentaire** dans les pays pauvres. L'objectif doit être annulé dans le cas d'impacts négatifs.

6. **Limiter au maximum la compétition entre production d'agrocarburants et production de nourriture.**

7. Prendre en compte les **standards sociaux** minimum dictés par le droit international des droits de l'homme. Selon certains, ces standards sociaux seraient incompatibles avec les règles de l'Organisation Mondiale du Commerce. Pourtant, selon l'avis recueilli par Oxfam et résumé en annexe, ceci n'est pas nécessairement le cas. La décision récente de la Suisse d'exonérer fiscalement les importations d'agrocarburants produits dans le respect des législations sur le travail ou des conventions de l'Organisation internationale du travail en est l'illustration.

8. Renforcer les précautions à prendre pour limiter l'impact du développement des agrocarburants sur la **biodiversité**.

Pour éviter un désastre environnemental et social, l'Union européenne se doit de montrer l'exemple sur la durabilité des agrocarburants. Nous espérons vivement avoir un entretien très prochainement, avec vous ou un de vos collaborateurs, afin d'aborder ces thèmes plus en profondeur.

Nous vous prions de croire, Monsieur le Ministre, à l'expression de nos salutations distinguées.

Marc-Olivier Herman, Directeur des campagnes Greenpeace Belgique

Leida Rijnhout, Directrice Vodo

Jean-Yves Saliez, Secrétaire général IEW

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Koen Van Bockstael, Directeur Oxfam-Wereldwinkels

Bogdan Vanden Berghe, Directeur 11.11.11

Koen Cornelis, Coördinator Friends Of the Earth

Co-signé par: Natuurpunt, kwia, Natagora et Fian.

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A note summarising expert legal opinion received by Oxfam pertaining to EU biofuel policy on social standards and WTO compliance

Executive Summary

It has been argued that the inclusion of social criteria within the EU's biofuel sustainability scheme is incompatible with WTO law. This note questions that view and provides details on how measures to protect human and labour rights in the production of biofuels may be justified.

Both the GATT and the TBT Agreement offer a number of possibilities for the EU to implement social PPM-based measures such as product standards based on existing human and labour rights.

It has also been argued that incorporating social criteria into a certification scheme will present too great an administrative burden. This is however not borne out by the experience of other sustainability schemes.

Introduction

The Council of the European Union as stipulated that the target of replacing 10% of transport energy with biofuels by 2020 must be reached sustainably. In its legislative proposal for the Renewable Energy Directive, the Commission interpreted this as including only environmental sustainability, however, this contradicts the more widely accepted definition of sustainability derived from the Brundtland Commission as encompassing social, economic and environmental pillars.

The Commission has argued that the inclusion of social sustainability criteria is impossible because a) it is incompatible with WTO law. This note explores this argument, and concludes that although there has been no specific jurisprudence on WTO members' ability to enact trade measures aimed at regulating labour or human rights standards associated with production of a particular product ("social PPM-based measures"), several WTO panel and Appellate Body decisions interpreting relevant WTO texts do indicate that countries may enact social PPM-based measures without violating WTO law.

Two WTO agreements are particularly relevant to the issue of social PPM-based measures:

- the General Agreement on Tariffs and Trade ("GATT")
- the Agreement on Technical Barriers to Trade ("TBT Agreement")

We consider each below.

“Like products” and non-discrimination under the GATT

Under the GATT, members have non-discrimination obligations which prevent them from treating products of foreign members less favourably than “like products” produced domestically or imported from other foreign members. It is often argued that all biofuels would likely be determined as “like” – given that they compete in purely economic terms -- therefore making any difference in treatment between them illegal. Yet, the Appellate Body has conceded that consumer preferences can make products “unlike”. Hence, if European consumers make a distinction

between sustainable and non-sustainable biofuels, these biofuels could be seen as “unlike”, thereby making any distinction between types of biofuels in an EC directive non-discriminatory (since differentiating between products that are not “like” in the first place). Moreover, even if all biofuels are considered “like”, that does not mean that a social PPM-based measure discriminating between biofuels will violate a member’s non-discrimination obligations: several WTO decisions have made clear that *different* treatment of “like products” does not necessarily constitute *nationality-based discrimination that is prohibited* under the GATT. Importantly, especially where “the differences in treatment derive from norms, criteria and methods widely accepted in the international community and which have been developed through broad consultation among diverse states, and take into account the variety of conditions in different countries, it should be considerably more difficult for the complainant to establish that there is an overall bias against imports as a group” in violation of the GATT.ⁱ Thus, if a social PPM-based measure is based on standards such as those developed by the International Labour Organization – an organization with nearly 180 developed and developing country members – and applied uniformly to domestic and foreign biofuel products, the argument could be made that such measure will not be found to violate the GATT’s non-discrimination obligations. Finally, even if a measure is found to be discriminatory in violation of the GATT, the measure might be justified under the GATT’s exceptions clauses.

The GATT and exception clauses

WTO case law holds that measures that differentiate products based on how they were produced are not *per se* prohibited under the GATT. This was made clear in the *US-Shrimp Turtle* case where the Appellate Body ultimately upheld a measure that banned the import of shrimp caught in a way that harmed sea turtlesⁱⁱ. The measure in question was ultimately justified under the GATT’s general exceptions clauses.

These clauses are set out in Article XX of the GATT, under which it is possible for members to implement measures that, among other things, discriminate between “like products”.

Article XX(a)

This clause permits measures “necessary to protect public morals”. The EU could argue that social standards are necessary to protect the “public morals” of its population by preventing the violation of human rights and labour rights offensive to its morality. A recent WTO decision in *US – Gambling*ⁱⁱⁱ interpreted the “public morals” exception broadly, and instructed that when assessing whether that exception will cover a particular measure, panels should be (1) sensitive to restricting members’ policy space and discretion to develop their own concepts of “public morals,” and (2) recognize that concepts of “public morals” are varied and evolving. The decision also notes that practices of other countries can be used to evidence what properly falls within the concept of “public morals”. Given the apparent flexibility of the “public morals” exception, and the universal recognition of certain human rights and labour rights that would be relevant to analysis of other countries’ practices, a country could quite possibly defend its social PPM-based measures under Article XX(a) of the GATT.

Indeed, the Commission appears to be well aware of this exception and is using it to justify its measures regarding biodiversity. Paragraph 39 of the preamble to the Renewable Energy Directive states that “the consumers in the Community would find it morally unacceptable that their increased use of biofuels could have the effect of detroying biodiverse lands.” There is an even stronger argument that their increased use of biofuels could result in slave or child labour for example.

Article XX(b)

This clause permits measures necessary to “protect human, animal or plant life or health.” The EU could therefore seek to justify a social PPM-based measure by arguing that it is in order to protect human life or health. Standards relating to health and safety are obvious candidates here, but it could also be possible to argue that more universal human rights, such as the right to organise and bargain collectively, are also related to improvements in working conditions, health and safety.

There is no language in the text of Article XX(b) limiting it to measures protecting domestic life or health. Moreover, it could be argued that a country is responsible for the impacts upon human and labour rights as a result of its domestic measures outside of its own territory. Although there may be territorial limits linked to the Article XX(b) health exception, a strong argument can be made that when the health and safety conditions reflect globally accepted standards (such as core labour standards), the concern becomes a global commons that affects all countries, including the importing country, thereby giving it the right to regulate at least imports produced in violation of such global standards. By implementing mandatory biofuel targets and necessitating the import of biofuels and biofuel feedstocks from overseas, the EU’s domestic policy impacts upon universal human rights and labour rights outside of its own borders, for which it should take responsibility.

Article XX(d)

This clause permits measures necessary to “secure compliance with laws or regulations...not inconsistent with some provision of the GATT 1994.”^{iv} The preamble to the WTO, of which the GATT is a part, explicitly states that trade should be conducted “in accordance with the objective of sustainable development”, so presumably making social sustainability consistent with the GATT. Therefore the EU could argue that it was implementing a social PPM-based measure to secure compliance with EU legislation on sustainability which is not, as such, in violation of GATT but rather the implementation of EU obligations under existing international human and labour rights conventions.

Furthermore, Article XX(d) allows members to take measures to protect against “deceptive practices”. Because the EU will be labelling relevant biofuels as “sustainable”, which is widely accepted to include social factors, it must apply social PPM-based measures in order to distinguish between sustainable and unsustainable biofuels so as not to deceive European consumers.

- i International Food & Agricultural Trade Policy Council, *WTO Disciplines and Biofuels: Opportunities and Constraints in the Creation of a Global Marketplace* (Oct. 2006), available at http://www.agritrade.org/Publications/DiscussionPapers/WTO_Disciplines_Biofuels.pdf.
- ii Appellate Body Report, *United States – Import Prohibition of Shrimp and Shrimp Products*, WT/DS58/R/AB, and panel report as modified by Appellate Body Report, WT/DS58/R (Nov. 6, 1998); Appellate Body Report, *United States – Import Prohibition of Shrimp and Shrimp Products – Recourse to Article 21.5*, WT/DS58/AB/RW and panel report as upheld by Appellate Body Report (Nov. 21, 2001)
- iii Panel Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/R (Nov. 10, 2004) (hereafter “*US Gambling*, Panel Report”).
- iv Appellate Body Report, *Mexico – Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/AB/R, ¶ 67, 68 (March 6, 2006) (hereafter “*Mexico – Soft Drinks*”) (quoting paragraph 157 of the Appellate Body report in *Korea – Various Measures on Beef*).