

I INTRODUCTION

We are responding to this public consultation exercise initiated by the Commission with much caution as we find the the scope of issues raised on biofuels by the Commission for the purpose of the new EU legislation on the promotion of renewable energy is severely limited and narrow, and has failed to put the appropriate stress on the most urgent challenges at hand.

We are focusing the bulk of our comments on Questions 1, 2 and 3, in that order, and many of these comments are tied to the same weaknesses and problems. Amongst them are the lack of attention paid to indigenous communities rights to their land and the well-being of other marginalised and vulnerable economies, the artificial separation between environmental and social issues – at the expense of the latter which are categorically absent from the document, the superficial categorisation of ecologically important and sensitive areas into carbon-stocked areas and areas of exceptional biodiversity and the absence of discussions on other important implications of the wide-scale imports of biofuels into EU from smaller and more vulnerable economies such as food security, economic stability and diversity of the agricultural output of such economies.

Bearing this in mind, we would like to recommend that the following inputs be taken into greater consideration in the design of the legislation, in particular of the sustainability system.

II COMMENTS

Our key position is that the EU must first labour on reducing its energy use, which must be guided by comprehensively spelt out measures, commitments and targets and that it must make explicit commitments to source out its renewable energies from local or regional sources and must not attempt to solve its energy issues by externalising their environmental and social costs unto other economies.

The legislation must make expressed recognition that the world's energy crisis and the accompanying adverse environmental impacts of our current energy consumption is caused by both the wrong kind of fuels and the unsustainable levels of global energy consumption, in particular by advanced economies like that of the EU. Without such a recognition, the EU's commitment to combat climate change may not only be ineffective but it may further exacerbate the current global environmental crisis.

1. How should a biofuel sustainability system be designed?

General questions

Question 1.1:

Do you think the "possible way forward" described above is feasible?

The feasibility of the 'possible way forward' must focus more on instituting a system which is thoroughly meaningful besides ensuring its technical applicability and replication. In our view, the most urgent problem of the proposed system does not lie with its lack of feasibility per se, but rather its potentially inherent inability in ensuring sustainability in the first place.

This is caused by its failure to adequately address core ecological, social and economic issues on the ground caused by the development of large biocrop monocultures in countries like Malaysia that are dedicated to supply energy to advanced economies like the EU, as well as the absence of any explicit commitments to design the system to prioritise the sourcing out of biofuels from local and regional sources.

The following points to our more specific concerns on the matter.

a. Reorienting the implications which the system aims to discourage

Firstly, the system makes no specific mention of addressing the social implications of biocrop cultivation in producing countries, in particular if they are dedicated for export to the EU, which have been the major concern of numerous communities and civil society groups in countries like Malaysia and Indonesia. This will certainly render the system to be ineffective and lacking in its value in addressing sustainability concerns, despite the feasibility of the implementation of its other concerns.

As such, in our view, the commitment of the system to discourage 'the conversion of land with high biodiversity value for the purpose of cultivating biofuel feedstocks' and 'the use of environmentally harmful systems for biofuel production' has good intentions but can only be described as superficial at best as it will not be able to accord sufficient ecological, economic and social

protection where and when it matters most.

We are gravely concerned on how high biodiversity value land can be best defined. In the absence of a comprehensive definition system across different countries, the system may have to rely on existing local legislation with all of its flaws and weaknesses, which are in serious need of a meaningful reform. This may point towards gazetted *Totally Protected Areas* which in Malaysia may consist of less than 10 percent of its total land area currently and have been the subject of controversy.

As such, the system's focus on areas of exceptional biodiversity may in fact be at the expense of areas which may be excluded from the definition of high biodiversity areas, although in reality they are not low in biodiversity and ecological importance and can in fact be ecologically sensitive. In addition, local legislation and policies may be exploited to argue that logged over forests may not fit into the definition of a high- biodiversity areas, which will render most forested areas in states like Sarawak and Sabah as highly vulnerable to conversions into biocrop plantations.

To avoid the perpetuation of such a flawed policy and governance framework at local levels, the EU must obtain an accurate picture on the state of forests and the legal frameworks which govern them, in countries where it seeks to procure bio-energy from. Such information must also be gathered from diverse stakeholder groups.

However, we do believe it is feasible for the system to discourage forest conversions and harmful land use changes altogether, and to enlist all rainforest and other similar ecologically sensitive zones as regions of high biodiversity areas, to prevent its bio-energy from being sourced out from conversions of such zones.

The second emphasis on avoiding the use of environmentally harmful systems for biofuel production must also make equal argument in rejecting socially harmful systems in biocrop cultivation. Such systems are those which choose to ignore native customary rights of indigenous peoples on ancestral domains which cover both forests and farmlands. In countries such as Malaysia, the lack of security of indigenous land tenure is caused by multiple factors from the ambiguity of legislation on forest and land combined, conflicts between modern state legislation and native laws, the lack of political will to accord them sufficient protection when and where the law accords them and the lack of political and governance transparency as a whole. The present proposal to limit itself to being involved solely in “environmentally harmful systems” will not be able

to discourage encroachments of biofuel plantations into land where native customary rights are exercised when in most cases, the protection of native customary rights will result in biodiversity protection.

Subsequently, the two emphases above combined will also not be able to meaningfully distinguish sustainable systems from unsustainable ones. The emphasis on environmental well-being is undertaken without associating it with social well-being, severing the links between communities and their forests. Despite the well recognised fact of indigenous communities' expertise in managing their ancestral forests sustainably, the sole environmental focus of the system may in fact render that more sustainable biocrop plantations managed by local communities, be they indigenous or small-scale farmers, will not be distinguished and preferred from unsustainable monocultures run by large corporations, which are environmentally and socially harmful and may infringe upon the rights of local communities to their traditional land.

Finally, the system focus is also unable to address one of the most important implications of biocrop cultivation i.e. the competition between land for food production and land for energy. The issue of economic sustainability of exporting countries is of urgent concern here, as the push for biocrops will increase the price of oils, foods and other essentials, in addition to its potential of reducing the diversity of our agricultural output, which will be severely detrimental to the national and local economies of producing countries. The discussion to address the problem of the pricing controls of such biocrop output is entirely missing in the proposed system.

We recommend that more studies must be done by the EU on the legal and social conditions on the ground of potential producing countries, by way of information gathering from different stakeholders to provide its policy makers the ability to make more informed decisions on the realities of instituting such a sustainability system for biofuels.

b. Reorienting the proposed criteria

The one-sided emphasis on environmental sustainability may render the system ineffective as it is unlikely be able to recognise:

- the link between ecological conservation and communities rights and well-being
- the livelihood protection and economic enhancement of vulnerable and marginalised communities

- the value of forest and land rehabilitation works as opposed to their conversions
- the ecological, economic and social values and functions of forests besides protecting biodiversity and preserving carbon stocks i.e. water catchment functions, income and livelihood to local communities, spiritual grounds etc.
- the promotion of a more rational and sustainable use of land and forest resources
- the difference between small-scale biocrop farms cultivated by local farmers and the development of environmentally harmful and socially disruptive large monocultures
- the promotion of available agricultural resources and/or residues as a viable biofuel source
- the link between environmentally and socially harmful practices in the local forestry or land management sectors with the lack of political, legal and governance transparency and effective policy and legal enforcement, in addition to corruption and other unlawful practices.

The artificial separation between environmental and social values of the proposed sustainability criteria, at the expense of the latter which is explicitly missing, in our opinion, is most glaring weakness of the proposed system.

One must note that the trend in the new expansion of oil palm plantations in forested areas in countries such as Malaysia is directly linked to the unsustainable nature of past and present logging operations in the country, which in turn is linked to the flawed and non-transparent forest policies and governance framework. As such the way forward for such countries is to rehabilitate and improve its forest management policies and governance as well as strengthening the recognition given to native customary rights, and not to convert such areas for other land uses into uses that do not meaningfully benefit local communities. The conversions of such forests into biocrop plantations, and the inability of the system to prevent biocrops from such conversions from entering into the EU market, will not make good on any sustainability claims and will not contribute towards combating climate change.

For Criterion 1, the achievement of a minimum level of greenhouse gas savings must factor in the ecological costs of the mileage of the biofuels concerned, in addition to its greenhouse emissions per se and in relation to fossil fuels. This will allow local or regional biocrops be prioritised over those which are imported. In addition, Criterion 1 must also recognise the benefits of improving fuel efficiency and the use of existing agricultural residues instead of specific dedicated biocrop plantations, if the development of the former will contribute to better emission reductions and do not inflict more ecological damage.

Criterion 2 and 3 both deal with avoiding land use change and avoiding the release of carbon stocks. We however caution against the artificial separation of the two values i.e. high carbon stocks and high diversity areas. In almost all cases, these areas are one. The artificial separation could thus potentially give rise to future confusion, conflicts and abuse. For example, an area defined to contain high carbon stocks by the EU may be low in biodiversity as compared to other biological classes of land/forest areas in producing countries and are thus not duly and legally protected by their laws. In fact, most environmental and land legislation in many countries do not provide a governance framework from which 'high carbon stocked areas' can be defined. Legislation of such definition may well create unnecessary overlaps with the country's existing governance framework on the protection of ecologically sensitive areas be they forest or not. It is wiser that the two criteria be combined. [Please note our more elaborate comments on high-value biodiversity areas below.]

We also believe it is imperative to improve the strictness of these criteria and avoid any introduction of any related mechanisms to 'compensate' or 'counterbalance' such losses by allowing their eventual conversions e.g. by developing carbon stocks replacement mechanisms or the compromise of replacing a high biodiversity area destined for conversions into biocrop plantations with the total protection of another similar area by manipulating legal categorisation of land use patterns on the part of producing countries.

c. Inadequacies of the proposed criteria

We note that the criteria for the following issues are absent in the proposed system.

i. Attaining an acceptable level of social sustainability

There is no specific criterion which makes mention of the respect towards indigenous people's customary land rights and their free, prior and informed consent (FPIC). Such issues have been for many years the most critical issue triggered by the expansion of oil palm plantations by large corporations into native customary land, which in the case of Sarawak in Malaysia is mostly led by transnational logging business groups. The process of ensuring that a good FPIC system is in place in producing countries before the system is finalised is very much possible, in order to ensure that the system is indeed sustainable.

ii Ensuring food security and economic stability of producing countries despite the advent of

biocrop plantations and exports

We are very concerned that biofuel exports to advanced economies like the EU may skew food prices, reduce the diversity of agriculture output and compromise the economic well-being and human security in producing nations, and in particular its marginalised and poorer communities. There is a total absence of these concerns in the proposed system, which is extremely unacceptable to us.

iii The prioritisation of local biocrops as a key criterion for sustainability

The EU must make explicit commitments to prioritise the sourcing of domestic biocrops over imported biocrops. This is in fact one of the most important criterion in ensuring environmental sustainability. To burden smaller and more vulnerable economies of southern nations to provide the EU with the energy it demands, is an action of externalising the EU's environmental responsibilities and passing them over to other economies. This will only turn the proposed system into a superficial system and will not be able to correctly address climate change concerns and all the related environmental issues which the world is facing.

Question 1.3

Please give your general comments on the "possible way forward", and on how it could be implemented. Does it give an adequate level of assurance that biofuels will be sustainably produced? If you think the problem should be tackled in a different way, please say how, giving details of the procedures that would be used.

In terms of feasibility alone, the 'possible way forward', items *a* to *c* will not provide an adequate level of assurance that biofuels will be sustainably produced if the system does not institute a *specifically designed* multi-stakeholder forum comprising members from both importing and exporting countries in addition to allowing official inputs and objections from stakeholders be accepted and recognised by the process on a continuous and transparent basis. If such a process is not put in place, the system may be subject to misinformation, exploitation and other errors and will lose much access to the most up to date ground information in addition to being unable to continuously improve itself by instituting effective corrective mechanism and decision-making re-evaluation procedures.

The level of sustainability assurance will also be tremendously improved if the voice of small scale

farmers and poor communities are given priority in the process and financial support is designed towards this end.

Specific questions

Question 1.4

Carbon stock differences between land uses would be taken into account under criterion 2. Should they also be taken into account under criterion 1? If so, what method should be used to determine how the land in question would have been used if it had not been used to produce raw material for biofuels?

[Please see our comments above on the need to not make artificial separation between criteria for high-biodiversity and carbon stocked areas.]

We believe for the purpose of the proposed system, the crucial criteria which must be developed here is to avoid conversions areas of high-biodiversity, high-carbon stocks and *those which serve other ecological and social functions to local communities for the purpose of biocrop plantations*. As such, how the land would have been used or converted in the future, according to national policies and plans, no matter how flawed they are, should not be used to justify sourcing biocrops from such areas under the pretext that such areas would have been destined to be converted in any case. The thrust of the system should not to be involved in and encourage such conversions, and to ensure that the biofuels imported into the EU are not sourced from such areas.

Question 1.5

As described in the "possible way forward", criterion 3 focuses on land uses associated with exceptional biodiversity. Should the criterion be extended to apply to land that is adjacent to land uses associated with exceptional biodiversity? If so, why? How could this land be defined?

Careful considerations must be made on buffer zone management. Please see our further comments on the definition of "exceptional biodiversity".

Question 1.6

How could the term "exceptional biodiversity" (in criterion 3) be defined in a way that is scientifically based, transparent and non-discriminatory?

The prohibition on exceptional biodiversity areas will only be meaningful if it is also supported by additional criteria to prevent land of important social and other ecological values from being converted to produce biocrops. Without such complementing support, the sustainability system will accord only minimal protection to the environment and will be defeating its own purpose. It is rather counter-productive to artificially limit ecological systems in this way since ecological systems work by way of their functions, services and links to human, flora and fauna. If approached simplistically, such definitions may open the system to bureaucratic confusion, procedural conflicts, political manipulation and other abuses.

In the case of Malaysia, there exists legislation for the establishment of *Totally Protected Areas* which is already providing some protection to specific forests and ecological niches. However, what is also at stake is the large forested areas which although of exceptional biodiversity, are legally, production forests, despite their misnomers as protected forests or forest reserves. In addition, many of such areas, especially in Sabah and Sarawak have in fact been logged over.

As such, how can all such forests be legally administered vis-a-vis the proposed system definitions which seek to distinguish them by their 'exceptional' or 'mediocre' biodiversity?

It is thus best to focus on the prevention of allowing biofuels originating from converted land and forests from being accepted by the system. This will be a much more practical system and will effectively contribute towards combating climate change, which is the purpose of the EU new energy policy and similar initiatives in the first place.

2. How should overall effects on land use be monitored?

Question 2.1:

Please give your comments on the "possible way forward" described above. If you think the problem should be tackled in a different way, please say how.

Question 2.2

Do you think it is possible to link indirect land use effects to individual consignments of biofuel? If so, please say how.

We believe the 'possible way forward' must utilise a multi-stakeholder approach (please see the comments above). Further, besides limiting the monitoring issues above to just land use trends, it is imperative that the monitoring of the impacts of increased biofuel imports by the EU from specific producing countries is extended into human security and economic stability concerns, in particular if they affect marginalised and vulnerable communities which will include, but are not limited to, their impacts on commodity prices, food security and diversity of agricultural output of producing nations.

3. How should the use of second-generation biofuels be encouraged?

The definition of second-generation biofuels must be based on their improved environmental efficiencies as well as other efficiencies which will not be at the expense of the former. To this end, the efficient utilisation of available agricultural residues is highly desirable, if it is able to provide a higher energy efficiency output and does not lead to more ecological damages e.g. soil and nutrient erosion. As such, the development of second-generation biofuels must be supported by policies and legislation that promote the maximisation of existing agricultural and natural resources and the minimisation of the need to develop dedicated new plantations.

Second-generation biofuels must be cleaner at all cost and be able to prevent irrational land use patterns, the skewing of food and commodity prices and the interferences of existing agricultural and conservation commitments by producing countries.