

# **The Legitimacy of Private Sector's Involvement in Global Environmental Regimes: The Case of the Convention on Biological Diversity<sup>1</sup>**

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## **ABSTRACT**

This paper analyses a research topic poorly considered by authors interested in the legitimacy of environmental governance, that is to say the dynamics created by its interpretation by private sector actors. In order to fill this gap, a recent decision of the Convention on Biological Diversity (CBD) –decision VIII/17 adopted in March 2006- to further involve the private sector in the activities of the Convention is considered. The legitimacy of decision VIII/17 is twofold. Its first dimension requires the consideration of the impact it has on private sector activities related to the CBD. A multi-dimensional definition of legitimacy – input and output- is used to cover the whole range of possible interactions. The second one is linked to the legitimisation processes it might create inside the business community. This second dimension is crucial as there is a risk to see the decision reinterpreted and bypassed by private actors.

The case study demonstrates the complexity of the mechanisms at stake in the involvement of the private sector as well as the diversity of topics that link business to environmental issues. More than outright incompatibility or a situation of domination by one actor over another, there is a whole complex of interactions that contribute to broader biodiversity governance.

**Keywords:** input/ output legitimacy, private sector interests, biodiversity governance

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## Introduction

Global environmental governance suffers from at least three deficits: the weakness and non-binding nature of global environmental regulations; the lack of representativeness in the adoption of environmental norms; and the difficult implementation of its established rules and principles (Haas, 2004). The Convention on Biological Diversity (CBD) is no exception to this “crisis” of environmental governance and its Secretariat continuously develops new initiatives to address these weaknesses. A new ruling – decision VIII/17 - requesting some further involvement of the private sector in the activities of the CBD is part of these developments. Many Parties to the Convention, like the government of Brazil or the United Kingdom (UK) welcomed the involvement of business actors in biodiversity governance, whereas other stakeholders such as some environmental non governmental organisations (ENGOs) warned the Parties about the “entry of the foxes in the henhouse”<sup>2</sup>.

The possible privatisation of global governance is at the core of the debates in global environmental governance studies. The legitimacy of the involvement of the private sector in the elaboration of norms intended for controlling its activities is strongly questioned. Environmental governance needs to establish precise rules to be followed by the private sector; but at the same time private sector representatives increasingly seem to be part of the solution to global environmental problems. Contributing to this debate, this paper examines the legitimacy of decision VIII/17 of the CBD<sup>3</sup>. This legitimacy is twofold: its first dimension requires the consideration of the content of decision VIII/17 and its impact on private sector activities related to the CBD. The second one is linked to the legitimisation processes it might create inside the business community. This second dimension is crucial as the CBD possesses no binding compliance mechanism. There is consequently a risk to see the decision reinterpreted and bypassed by private actors.

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<sup>2</sup> This widely used expression was quoted in plenary by an ENGO representative during the 8th meeting of the conferences of the Parties (COP) to the CBD in Curitiba, 27/03/2006.

<sup>3</sup> This paper proposes an empirical analysis of the legitimisation processes generated by this decision, and will use some literature on international relations, the documentation published by the CBD concerning decision VIII/17, fieldwork observations during the fourth meeting of the working group on Access and Benefit Sharing in February 2006 and COP 8 of the CBD in March 2006, as well as several interviews with key actors during these same meetings.

In order to analyse these two questions, the study uses a multi-dimensional definition of legitimacy based on its input and output dimensions. Input legitimacy refers to the responsibility of private actors towards environmental governance as well as the legitimacy of the decision processes they are involved in; output legitimacy assesses their participation in the implementation of global environmental regimes. The consideration of these multiple dimensions helps to evaluate the legitimisation processes at stake in the governance of the CBD. For each dimension of legitimacy considered, the text of decision VIII/17 and the reactions of private representatives towards such a text are assessed.

The paper proceeds as follows. The first part exposes the theoretical implications of the analysis. A short summary of the emergence of decision VIII/17 is then provided in order to contextualise the decision. Finally, the different dimensions of legitimacy are considered as well as the impact decision VIII/17 and its interpretation by private actors have on each of them. The study has some expected and unexpected results: on the one hand, some business representatives are trying to de-legitimise the CBD by ignoring its principles and lobbying against its institutional development; on the other hand, the growing involvement of business actors seem to formalise their interactions with the CBD governance system in a more constructive way. Some differences emerge among business representatives, which depend on the sectors involved, the origin of the companies as well as their internal governance and attitude towards CBD issues. In that perspective, some components of decision VIII/17 can be seen as potentially beneficial to a more effective implementation of the Convention whereas some others might be far more problematic.

### **1. Key propositions: the multi-dimensions of legitimacy and the “contested firm”**

International Relations’ studies got belatedly interested in the question of the legitimacy of international regimes. Such a concept requires indeed the consideration of regimes as independent sources of norms, the implementation of which isn’t based on coercion as a primary resource but on the free consent of the nation states that fall under their regulations. The discipline of International Relations has initially developed an understanding of international politics in terms of power relations, especially in the realist tradition, as well as in terms of economic interests, in the liberal tradition (Krasner, 1983). In both cases though, international organisations are primarily seen as agents of state’s interests. The development and persistence of regimes as international normative frameworks led however to an analysis

of international organisations as independent bodies regulating the global system of international governance (Biernman and Bauer, 2005). Inspired in part by constructivist approaches, and recognising this autonomy, several authors question the democratic character of international rule-making and currently centre their analyses on participation and deliberation in the negotiations' processes of regime formation (Risse, 2004).

These considerations intertwine with the work that has been done on the legitimacy of private actors' participation to international environmental regimes. Several authors considered the involvement of civil society in the elaboration of international conventions, a topic that rose in the 1990s, as a great novelty specific to the environmental realm (Bodansky, 1999; Humphrey et al., 2003). Some other studies centred their focus on the emergence of purely private regimes (Haufler, 2001). Implicitly, these studies tended to validate a one-dimensional definition of legitimacy. On the one hand, the involvement of civil society actors is legitimate as they represent the concerns and positions of common citizens; on the other hand, the involvement of private actors that control a wide range of material resources and are linked to powerful elites, is controversial. Soon, the overly simplistic character of this conception of legitimacy was recognised. Legitimacy isn't given *a priori* to the actors but has to be constructed and represents a powerful resource for political action. Instead of considering the question: "is the participation of the private sector fair?" in global environmental governance, what matters is how it is justified. The sociological dimension of legitimacy is therefore privileged over the normative dimension (Berstein, 2001)<sup>4</sup>.

In parallel to these developments on the legitimacy of private actors, recent studies in international relations (Backstrand, 2006; Risse, 2004) inspired by some European studies on legitimacy (Sharpf, 2001) propose to adopt an horizontal definition of the concept to assess the legitimacy of international institutions. This definition is declined in two dimensions: internal and external legitimacy. Internal legitimacy resides in the accountability of the actors themselves as well as in their involvement in the decision making process: to which extent does it create a balanced representation of all stakeholders in a favourable deliberative environment, and to which extent such participation enhances the transparency of information

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<sup>4</sup> But studying legitimacy requires some precaution. It is indeed nearly impossible not to introduce personal judgements while considering the question of legitimacy (Mulligan 2005). Without pretending to be completely neutral, the approach used in this paper has for aim to break down the concept and to demonstrate its varied dynamics thanks to a precise illustration of its claims through examples issued from the adoption of decision VIII/17.

exchanges. External legitimacy refers to the contribution made by the actors to the effectiveness of the norms adopted and declines itself into two different aspects: the question of the adaptation and adequateness of the involvement of private actors for the reinforcement of the institutional frame of the regime; the question of the implementation of environmental norms thanks to the engagement of private actors: are they fulfilling the initial environmental targets elaborated? These components of legitimacy are generally developed separately in the literature. On the contrary, it is their consideration as a whole and throughout the CBD development<sup>5</sup> that represents the major contribution of this paper.

This paper argues that to acknowledge the diversity of components of legitimacy is the first step towards a full understanding of the stakes linked to decision VIII/17. The impact of the decision on each dimension of the legitimacy of the CBD must be considered as well as its interpretation by private actors. Accepting such a definition as well as recognising the sociological dimension of the legitimacy of private actors allows the formulation of the hypothesis that different actors will develop and mobilise different kinds of arguments to justify and construct their legitimacy. This is true for different types of non-state actors, business representatives included. When studying corporations' involvement in environmental issues it seems indeed that many conflicts and social interactions can occur inside and outside the business realm. In a systematic and detailed analysis, these conflicts have been studied by the "business conflict school", an approach recognising that the so called "private sector" may include a wide variety of actors, the interests of which diverge when facing different issues (Falkner, 2001). These splits can separate industry representatives developing new environmental approaches from the ones focused on lobbying and "business-as-usual" activities; but it can also involve differences between sectors in terms of activity, size, or even origin. Some scholars noted also that, more than differences along the supply chain and economic choices, the origin of the companies and their lobbying styles can be of relevance in the construction of business political positions and actions (Levy, 2005; Coen, 2005: 211). Using Karl Polanyi's work on historical and contextual contingency of social action and its further developments in International Political Economy, Louise Amoore proposes to study in what she calls "the contested firm" the social relations when taking place within the corporation, across different corporations or between corporations and

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<sup>5</sup> Is it worth noting that there has been very few studies of the past and actual involvement of business actors in the CBD. This is particularly problematic to assess the potential consequences of decision VIII/17. This paper also tries to fill this gap by presenting the history of private sector involvement in the CBD as a starting point for each dimensions of legitimacy.

governments. This agenda seems to be of particular interest in the case of corporations' involvement in environmental issues such as the ones raised by the CBD. It also offers an interesting framework to bring together and further develop former attempts to tackle the issue of social and power relations among business representatives. As Amoore suggests, studying the actor's level in the construction of political action reinstates the importance of micro-social factors in the negotiation process as well as cultural specificity of private actors. The companies are no longer perceived as inherent political actors, rather it is the interactions between their economical and political natures that determine and constraint their actions. COP8's decision to further involve the private sector represents a precise and pertinent case study to analyse the engagement of private actors in international environmental governance. The context in which this decision emerged is important to study the role of private sectors' representatives towards its development. It is briefly assessed in the next section.

## **2. An overview of the emergence of decision VIII/17**

The CBD has always considered the potential for involving private sector's representatives in the protection of biodiversity. Article 10 (e) of the Convention text encourages the cooperation between governmental authorities and business actors for the sustainable use of genetic resources. Article 16 on access to and transfer of technology was elaborated with the aim that the private sector facilitates access, joint development and technology transfer. Progressively, these two articles were completed by several decisions aiming at studying the possibilities of collaboration with business<sup>6</sup>. Recently, point 4.4 of the strategic plan of the Convention recalled the importance of business actor's cooperation for the achievement of the 2010 targets. The "Business and Biodiversity" initiative emerges in January 2005 as a result of these developments and of the growing desire to further involve the private sector in biodiversity conservation. This "initiative B&B" developed in two meetings organised and sponsored by the Executive Secretary of the CBD, the Department for Environment, Food and Rural Affairs of the UK, the Brazilian Ministry of Environment, the World Conservation Union (IUCN), the Brazilian Business Council for Sustainable Development (CEBDS) and the company *Insight Investment*. The first two-day meeting in London in January 2005 considered several options to engage the private sector –mining, oil, seed, and pharmaceutical companies- into the 2010 targets. The second meeting, in Sao Paulo in November 2005,

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<sup>6</sup> In particular the decisions III/6, IV/12, V/11 and VI/16 of the CBD.

developed the question of the different possibilities to engage industry in biodiversity preservation and added two additional industrial sectors to its discussions: the financial sector and the corporations concerned with the use of genetic resources.

In parallel to the first and second B&B meetings, the Working Group on the Review of the Implementation of the Convention (WGRI-1), took place in September 2005 in Montreal and wrote several recommendations on the orientations and means to reinforce the involvement of the private sector. This working group used the results of the first “B&B” meeting as preparatory documents to its recommendations and supported the organisation of the second meeting in Sao Paulo. The final proposal for the decision VIII/17 presented at COP8 is therefore a combination of the recommendations of WGRI-1 as well as the outcome of the reports of the “B&B” meetings.

During the 8<sup>th</sup> conference of the Parties to the Convention, in addition to the presentation of the draft for decision VIII/17, the Secretariat (SCBD) nominated a representative as focal point for business so as to help enforcing the link between business and the objectives of the Convention. The Secretariat, as well as the Brazilian and British governments, also invited industry representatives to a breakfast with different ministries and stakeholders during the inter-ministerial section of the COP.

To assess the legitimacy of the decision it is important to understand which actors were involved in the B&B meetings. “Business and biodiversity” is the same name as a previous project conducted by IUCN in collaboration with the World Business Council for Sustainable Development (WBCSD). This first project seemed to be a solid basis for the development of a similar framework integrated to the CBD. The launch of the CBD B&B initiative originates in the efforts of a reduced number of people, who had identical expectations concerning biodiversity that resonated with the objectives of the Convention (interview with SCBD representative). Joaquim Machado, a private sector representative member of the CEBDS and at the origin of the CBD meetings, explains how his government got involved in the project when he joined efforts with one representative of the Brazilian Ministry of the Environment. He had worked with IUCN before and could network with the representatives of the Secretariat, notably the business focal point who used to be employed by IUCN (interview with industry representative). The London B&B meeting was organised as a first try to think about business and the CBD. The coalition of people attending B&B meetings then grew over

time – from 36 people in London to 96 in Sao Paulo. The selection of participants to the meetings is made by the organisers, taking into account the expertise and experience of the stakeholders, as well as regional origin.

### **3. Legitimacy of the private sector as an actor of global environmental governance**

The first component of legitimacy relates to the accountability of the private sector towards the CBD objectives. The question is to assess to what extent the decision VIII/17 can change existing patterns.

The first condition for business to act in a responsible way towards biodiversity would be that corporations recognise the different impacts they have on biodiversity. The B&B initiative proposed a possible classification of the direct or indirect impact corporations have on biodiversity. It therefore emphasises that addressing industries' impact on the environment could be a solution to make them aware of their responsibilities in that domain (Document b2010-01-03-en.pdf, 2005: 4). This is directly linked to the notion of corporate social responsibility (CSR), enlarged to the sustainable development agenda (Zerck, 2006). In this perspective, the responsibility in the implementation of multilateral regimes for sustainable development does not lie exclusively in the hands of governments; but also in those of the business and the civil society in a global collaborative effort. This is largely the view held by the B&B initiative (document b2010-01-03-en.pdf, 2005: 5) and the importance of the impact of industries on biodiversity is found in the text of decision VIII/17: "The daily activities of business and industry have major impacts on biodiversity". CSR is not utterly new and has often been perceived as industry's tactic to evade binding regulations<sup>7</sup> (Champion and Gendron, 2004). One of the ensuing problems is that CSR offers few enforcement measures and relies on the awareness and good will of industries<sup>8</sup>. The CBD has no coercive instruments to ensure compliance and corporations are therefore free to recognise/or not its recommendations.

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<sup>7</sup> Even if another interpretation could be that business is able to be ahead of regulations specially when it developed a new environmental product.

<sup>8</sup> Another "soft" mechanism in the decision is to ask for further actions to raise corporations' awareness of the importance of biodiversity for their activities. The purpose is to make them aware of the convention's topics, and to invite them to take implementation measures. Moreover point 4 of decision VIII/17 suggests to make the private sector as a target of CBD's outreach materials and to include it in the global initiative for Public Communication, Education and Awareness.

It is worth pointing out that, during COP8, the section of the text dealing with business' impacts on biodiversity has been the subject of intense lobbying by some business representatives who wanted this reference deleted<sup>9</sup>. A closer look at the history of the Convention would indeed reveal that corporations' concerns for the CBD's objectives are fairly recent. For instance, as late as at the opening of the Cartagena protocol's negotiations corporations such as Monsanto denied any possible impact of the GM (Genetic Modification) technology on biodiversity and maintained a strong position in favour of biotechnology. How can the differences and possible changes in corporate attitudes be explained?

Given the decentralised and flexible character of global environmental governance, it seems crucial to consider horizontal mechanisms of responsibility (Keohane and Nye, 2003). Decision-making during the enactment of international environmental regulations is made by Parties, which expose their positions publicly to all other participants to the debate. In global environmental governance, these can be governments Party to the CBD, ENGOs, media organisations, business, donors or other international organisations. For industry, as for other stakeholders, the confrontation with these different actors creates multiple dynamics of responsibility linked to their professional, reputational, market and financial positions. The participation of the private sector to the activities of the Convention improves its exposition to critiques and to the attention of civil society organisations. One risk for corporations underlined during the B&B meetings is to get "trapped" by CBD's obligations:

« 1. By engaging in discussions about achieving the CBD's objectives and by publicly committing to integrating biodiversity considerations into company policies and practices, companies may contribute to rising societal expectations regarding their contribution to biodiversity conservation and sustainable use. This may give rise to additional operating costs and could create risks if companies did not meet these expectations. Such costs and risks would need to be weighed against the short- and long-term business case for best practice in managing biodiversity. [...]» (document b2010-01-02-en, p7)

The private sector is more cautious when knowing the risks such as being blamed for its aggressive attitude<sup>10</sup> and for its environmental impact, and being accused of "green

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<sup>9</sup> Observation data during COP8.

<sup>10</sup> During fieldwork at CBD meetings, "aggressive" was the most recurrent adjective used by stakeholders to characterise business' initial behaviour at the beginning of the negotiations. Coupled with its alleged obstinacy

washing”<sup>11</sup>. This is reflected in the reactions of several business representatives during the discussion of decision VIII/17. One representative of a multinational oil company explained that his first concern was that whatever commitment the private sector was taking in the decision, it would have to implement it. Along the same line, a representative of the International Chamber of Commerce explained that reporting on private sector’s actions was as important as the actions themselves. Another private representative asked that the same kind of commitments contained in decision VIII/17 be undertaken by all other participants to the meeting in order to share the additional burden.

Vulnerability is particularly relevant for industries commercialising products that have an important impact on biodiversity or are directly derived from natural resources. These companies feel a particularly strong accountability to the market, with the threats of boycotts or campaigns against their products. One interesting example is that of products resulting from the use of genetic resources. The representatives of bioprospecting companies got less and less involved in the CBD debates, precisely because of the hostile atmosphere they were exposed to when attending the meetings and the consequences these protests had on their activities. Pressures by civil society have also had a huge impact on the commercialisation of products containing Genetically Modified Organisms (GMOs) (Kess and Sieta, 2004).

The financial component of horizontal accountability is also at the core of the legitimacy of industries as actors in international environmental regulations. Financial or insurance sectors’ mobilisation on biodiversity conservation would be of particular interest as these sectors present some potentialities to influence global economic trends (Levy and Newell, 2005: 249-274). Investments by such corporations regularly exceed the money nation-states invest in sustainable development. To impose some environmental conditionality to these financial flows would have a positive impact on biodiversity.

The first B&B meeting underlined the importance of the implication of the financial sector in the Convention. Its report listed the possible activities the Secretariat could carry out to further involve these companies. It was initially about integrating biodiversity into financial

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in opposing any CBD agreement, especially the Cartagena protocol, this gave a very bad reputation to private representatives as negotiators. The current behaviour of business representatives in the CBD meetings can be read as attempts to overcome this reputation.

<sup>11</sup> “Green washing” is a denunciation of the so-called “beneficial actions for the environment” undertaken by corporations while continuing in parallel their usual activities.

standards as well as into investment indexes such as the *Dow Jones sustainable index*. Asset manager *Insight investment* was among the organisers of the B&B meetings. The desire to engage the financial sector<sup>12</sup> on biodiversity conservation is reiterated in the WGRI-1 recommendation which invites the second B&B seminar to consider the question of the involvement of the financial and insurance sectors in biodiversity conservation. However, the conclusions of this second report do not include any mention of the importance of the financial sector, and the final decision VIII/17 only:

“Invites businesses and relevant organizations and partnerships, such as the Finance Initiative of the United Nations Environment Programme (UNEP), to develop and promote the business case for biodiversity, to develop and promote the wider use of good practice guidelines, benchmarks, certification schemes and reporting guidelines and standards, in particular performance standards in line with the 2010 indicators, to share information on biodiversity status and trends, and to prepare and communicate to the Conference of the Parties any voluntary commitments that will contribute to the 2010 target”.

The reference to the UNEP’s initiative is particularly interesting. This initiative dates back to 1991 and intends to favour the integration of the financial sector in the process and raise its awareness on sustainable development. This initiative is one important step towards the integration of the financial sector. However, in the case of climate change negotiations, for which it was initially elaborated, its limits became obvious. Part of the financial sector expressed its interests for the development of new market opportunities, oriented towards the adaptation to climatic disasters after having signed an agreement with UNEP for the implementation of the climate Convention (Jagers et al., 2005 ).

A further involvement of the private sector in the CBD could evolve towards an increasing accountability of corporations in some domains, but would be less visible in some others. The recognition of the impact corporations have on biodiversity found in decision VIII/17 generated diverse corporate reactions: some groups, as in the case of the B&B initiative, could understand that being opposed to the CBD did not serve their cause and were ready to

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<sup>12</sup> The last Business and Biodiversity Newsletter edited by the SCBD is on the banking sector.

engage constructively in its activities; whereas others tend to be less keen to collaborate<sup>13</sup>. This demonstrates that not all industrial sectors are ready to commit themselves to biodiversity conservation. The impact of the Convention in terms of market regulations are however affecting all corporations and the formalisation of the relations between the CBD and the industries could lead to a better visibility of the activities of all groups on the international scene. The final text of decision VIII/17 has however no reference to the financial sector.

After considering the legitimacy of private corporations' representatives as such, the legitimacy of the CBD decision-making dynamics is considered: participation on the one hand and transparency on the other hand.

#### **4. An improved representation for a constructive participation**

As mentioned above, CBD decisions are made by consensus among parties. However, the observatory status is granted to international organisations, scientific associations and non governmental organisations interested in the negotiations. Without the right to take part in the official agreement, they inform and advise state delegations on their positions. Sometimes, non-state actors can be integrated into these national delegations<sup>14</sup>.

The issue of participation has been at the core of the debates concerning environmental decision-making since the Rio Summit in 1992. A common assumption is that a broader participation would foster the implementation of environmental norms (Raines, 2003). Most of the criticisms focus on the exclusion of minorities - such as indigenous people or women - from the negotiations. Industry representatives are also directly interested by environmental

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<sup>13</sup> It is interesting to note that this category of actors is trying to dissociate itself from the usual reputation given to business groupings. Groups like the *Global Industry Coalition* for instance insist increasingly in their communication on the diversity of interests they represent so as to demystify their former identity as a North American, big corporations' organisation, strongly opposed to the CBD. Recently, the emergence of a scientific organisation called *Public Research and Regulation Initiative* partly linked to private interests might be a new strategy of biotechnology companies to have their views taken into account in the negotiations on biosafety.

<sup>14</sup> See the CBD Rules of Procedure, <http://www.cbd.int/convention/rules.shtml> Rule 7: 1. The Secretariat shall notify any body or agency, whether governmental or non-governmental, qualified in fields relating to the conservation and sustainable use of biological diversity, which has informed the Secretariat of its wish to be represented, of meetings of the Conference of the Parties so that they may be represented as observers unless at least one third of the Parties present at the meeting object. 2. Such observers may, upon invitation of the President, participate without the right to vote in the proceedings of any meeting in matters of direct concern to the body or agency they represent unless at least one third of the Parties present at the meeting object.

issues. In this respect, their participation to the negotiations should be seen as equally important. Decision VIII/17 therefore

“encourages national focal points, where appropriate, to include private sector representatives on national delegations to meetings of the Subsidiary Body on Science, Technical and Technological Advice, the Conference of the Parties, and other intergovernmental meetings”

and encourages businesses to participate in such meetings.

The critics of private sector involvement in the Convention would stress that, thanks to their financial, managerial and discursive resources, the interests of such actors are already overrepresented in international arenas (Levy and Newell, 2005: 75). During the COP8’s discussions on the decision, this point hasn’t been raised by any delegation. The Secretariat points out decision:

“Despite this background, and although most Convention processes permit private-sector participation, private-sector involvement in meetings of the Conference of the Parties, its subsidiary bodies, and the work of the Convention has been limited. Neither the Convention nor business has actively or consistently engaged one another at the global level, while engagement at the national level has varied widely across Parties. Cross-sectoral implementation remains one of the greatest challenges of the Convention and is becoming increasingly important as biodiversity continues to be lost” ( Document COP-08-25-Add.1-en.pdf, 2006:2).

The same conclusion arises from the discussions between industry representatives during the COP<sup>15</sup>. The appointment of a business focal point person within the SCBD helped the private sector to ponder the orientation and weaknesses of the CBD, and to stress the changes they would have liked to introduce in the process. For this purpose, several representatives prepared a list of the activities they would have liked to take part in as well as a list of the CBD texts where the private sector should have been mentioned and has not been. As the

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<sup>15</sup> This observation has been substantiated by a detailed analysis of the lists of participants to the negotiations.

representative of the ICC from an American biotechnology company explained during the “industry group meetings”<sup>16</sup>, industries can provide examples of where they would have liked to be invited to participate and have not been. On the same line of argument, a representative from an American association of biotechnology industries addressed the Secretariat about a project of global taxes on private sector activities that she heard about and that, according to her, proves that industries are perceived as “sources of financing” whereas indigenous people are seen as experts. Industry is sent back to the endnotes. When dealing with the business sector, the Secretariat recognises the accuracy of these claims since the private sector was poorly mobilised in Rio and often perceived as a “credit card”, but still claims that the CBD has seen some evolution one of which being the B&B meetings<sup>17</sup>. This meetings were precisely about substantive engagement of the private sector.

Yet, there is one difficulty when it comes to involving business in ongoing debates: as mentioned before, all corporations do not equally understand what “participation” means. Participation can mean the sharing of information, making compromises, as well as launching strong lobbying activities against all kind of decisions. The latter limits considerably the perspective of an improved deliberation.

Some industry representatives’ reactions during COP8 betray their main concerns, i.e. lobbying in defence of their economic interests. One of the first issues raised by the “industry group” to the Secretariat during the COP was the possibility to involve in the debates other departments than ministries of the environment in order to have more competent interlocutors to negotiate with<sup>18</sup>. One part of the group also prepared some amendments to the draft of the decision, which they submitted to governments asking for the reduction of demands for private sector accountability to the minimum. This does not mean that all industry representatives aligned on such positions. During the review of the draft by the “industry group”, one of the members representing a company specialised in environmental

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<sup>16</sup> During COP8, the “industry group” gathered several corporations involved in the negotiations of the convention. There is no strong unity among its members, which come from very different economic sectors, but these meetings are used as a way to gather and exchange information among industry representatives. It comprises industry groups such as the ICC or IPIECA –International Petroleum Industry Association- that have very few links with CEBSD and the B&B initiative.

<sup>17</sup> Observation of the “industry group” meeting on the 22nd March 2006. The fact that the private sector asks for participation demonstrates that it recognises the CBD as an important element in their environment and do not put its existence into question.

<sup>18</sup> Unless this is an attempt to engage other sectors in the conservation of biodiversity. See article 6(b) of the convention.

certification, signalled his scepticism on the approach chosen by his colleagues. Again, the corporations at the origin of the B&B initiative supported the adoption of the text in the Secretariat's version. Then, the difficulty with the decision resides in the fact that it refers to every industrial actor, without exception, and to all the themes covered by the Convention – including the Cartagena protocol for the transboundary movement of GMOs that is particularly criticised by biotechnology industries (Steffenhagen, 2001). Is there a risk then that the decision to further involve these industry groups be detrimental to the integrity of the Convention?

The Secretariat already addressed the issue and officially stated the risks the CBD would face in the case of adverse lobbying from the industry (Document b2010-01-02-en, p7). The organisers of the B&B initiative also recognised the urgent need to remedy to this situation in the way Joaquim Machado from Syngenta puts it:

“Assimilation of biodiversity concepts is still impeded by the traditional action of some lobbies in defence of private sector interests, often mistaking the concepts and actions related to biodiversity with those related with biosafety of transgenic organisms. This model requires urgent reform and updating” (Doc b2010-02-inf03-en.pdf, p 20).

In addition to this official position, the sponsors of the initiative also have personal views on the issue. It would be naive to think that the decision reinforces the negative behaviour of interest groups: they haven't been waiting for a COP decision to attend meetings and lobby through their governments. With or without decision VIII/17, these groups will always be active. On the contrary, their lack of formal integration into the negotiation processes might have led them to adopt a blocking attitude at the informal level. The purpose of the decision would be to change their attitude progressively (cf. interviews with CBD Secretariat and industry representative involved in the B&B initiative).

No fears concerning a too large participation of the private sector have been expressed during the negotiation of decision VIII/17. On the contrary, it is the involvement of the more controversial groups that is likely to allow a progress towards the objectives of the CBD. For

instance, in the Access and Benefit Sharing (ABS) debate<sup>19</sup>, there is an attempt by developed countries –mainly Europe and Canada- to mobilise former lobbying coalitions in the negotiations towards an international regime to help raising consumers’ awareness on the topic and encourage small and middle size bioprospecting and phyto-medicinal companies to implement the ABS principles. One aim of the decision is also to invite new groups that are currently absent from the discussions. Several actors regretted the lack of involvement of small and medium-size companies<sup>20</sup> as the main groups already present during the negotiations are big American or European companies. The fact that middle-size Brazilian companies have been involved in the B&B initiative is a promising development. Decision VIII/17 notes that “further work on ways and means of supporting small and medium-sized enterprises with environmentally sound products” is needed<sup>21</sup>.

## **5. Transparency: a problem for or an issue against the private sector?**

Transparency is another important element of legitimacy in decision-making processes. It translates into several characteristics: the openness of the debate, the production of detailed reports and the overall quality of communication and information. Transparency is a crucial parameter in the functioning of institutions as it helps building trust among the different stakeholders. It is even more important when dealing with the private sector, the actions of which are often perceived as non transparent.

All the documents elaborated at the B&B meetings – working documents and lists of participants- and the WGRI-1 are accessible through the CBD website. This is noteworthy as the lists of participants to CBD meetings are usually distributed only to those attending the meetings. During COP8, in addition to the debate on the draft decision, the Secretariat, the Brazilian government and the UK government convened a breakfast in order to discuss the different ways through which industry could contribute to the 2010 targets. This meeting gathered representatives of industry and different ministers and participation was on invitation basis. No report of these discussions was made available. This was also the case for

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<sup>19</sup> The CBD is currently negotiating an international regime under its banner so as to regulate the use of world’s genetic resources and ensure the fair and equitable sharing of the benefits arising from their commercialisation.

<sup>20</sup> Participation to CBD meetings requires several competences –in law, public relations, science- and resources that can be hard to mobilise for some business actors (interview with Brazilian bioprospecting company).

<sup>21</sup> The Secretariat as also been looking into community owned business e.g. through its participation in the UNDP Equator Prize, technical Advisory committee, [www.undp.org/equatorinitiative/equatorPrize2006/2006-advisory.htm](http://www.undp.org/equatorinitiative/equatorPrize2006/2006-advisory.htm).

the inter-ministerial segment of the COP, organised by the Brazilian ministry of environment around different workshops in which several industry groups participated, particularly Brazilian companies. The selection of participants by the organisers of both events renders the process relatively un-transparent; however, the industry groups that were present during COP8 had no particular link with Brazilian representatives. They were consequently not invited<sup>22</sup> and seemed affected by the lack of transparency in the procedure. Several industry representatives saw it as an occasion for Brazilian companies to show off since the COP was taking place in Brazil<sup>23</sup>. However, the B&B continues nowadays and gathers a wide range of industry sectors that produce regularly a review on their activities<sup>24</sup>. Overall, the aim of decision VIII/17 is to improve the exchange of information and views concerning business and biodiversity.

The external dimensions of legitimacy are now going to be considered: institutional effectiveness on the one hand, implementation of the Convention on the other hand.

## **6. Institutional effectiveness: from capture to rehabilitation**

The institutional effectiveness of the decision is linked to its relation to the enforcement of the existing rules within the CBD, leading ideally to the creation of new opportunities for capacity building. On this topic, the decision generates several criticisms which develop mainly in two directions. Firstly, the concern that environmental regulations would be weakened by actors abnormally influential in the debates and working in domains generally hostile to biodiversity. Secondly, the danger of the privatisation of global environmental governance with a shift in authority from the inter-national system to non-state actors. Generally, these criticisms merge into the denunciation of an evolution that, by involving actors strongly linked to market interests, neglects the environment and strengthens the dominant neo-liberal vision of globalisation processes (Levy and Newell, 2005: 75). In sustainable development, governance mechanisms based on private authority -private or semi-private regimes- play a significant role. The privatisation of environmental governance

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<sup>22</sup> This choice was a prerogative of the Brazilian government. The fact that the COP was taking place in Brazil is also a factor in explaining the wide participation of Brazilian companies.

<sup>23</sup> Brazil is the most active countries on the ABS issue asking for a legally binding agreement to be developed under the CBD and disclosure requirements under the TRIPS agreement for patents using genetic resources. It is also a key player in the biosafety negotiations as Brazil is one of the main European Union grain providers.

<sup>24</sup> Two special issues have already been published, issue 1 on the travel and tourism industry and issue 2 on Business, Biodiversity and Climate Change, see [www.cbd.int/business](http://www.cbd.int/business)

is therefore a central theme in environmental politics (Biersteker et al. 2002 ; Falkner 2003 ; Pattberg 2004). The opponents to such privatisation declare that Public/Private Partnerships and other forms of engagement with private actors underline a structural transformation in global political economy, towards more liberalisation, accumulation and imperialism (Levy and Newell, 2005 ; Elliot 2004 : 116-119). The biodiversity Convention recognises such a risk:

“Parties establish policy in the Convention process. In engaging the private sector this must always be born in mind: several companies are much bigger and more powerful than many of our Parties. It is one of the central obligations of the Secretariat to protect the integrity of the Convention process” (document b2010-01-02-en, p6).

The Secretariat insisted during COP8 that the decision won't change any current decision-making mechanisms within the Convention. It only aims at giving some recommendations to nation states on the reasons and the means and tools available to further engage with the private sector. No reference was indeed made to changes of procedure in decision VIII/17. This decision actually stands in the continuity of several initiatives to engage the private sector in international environmental governance. The creation of environmental agreements in the late 1980's has occurred principally at the initiative of well organised American ENGOs, supported initially by their government and latter by developing countries. Yet, as early as the 1992 Rio conference, the launch of agenda 21 recognises the importance to involve all international actors in order to reach sustainable development: ENGOs, Northern states, Southern states as well as representatives of the private sector. The will to involve industry was confirmed during the 2002 Johannesburg Summit with the launch of the “type II partnerships” aiming at bringing together non-state actors and nation states in sustainable development programmes. Type II initiatives were precisely targeting corporations and critics weren't long to denounce this perfect illustration of the progressive invasion of environmental governance by private interests (Elliot, 2004:119). However, an analysis of the current type II partnerships reveals that only a small minority involve private actors (Backstrand 2006, Norris 2005). As Backstrand puts it:

“There is both a lack of grassroots and local participation from the South as well as private sector involvement. The private sector leads only two percent,

and is involved in only twenty percent of partnerships. (...) It is noteworthy that the business sector is quite marginal in the partnership enterprise given the recurrent argument that partnerships pave the way for the privatization of governance “ (Backstrand, 2006: 10)

The current type II agreements do not introduce new actors and reflect the different power dynamics pre-existing before their adoption. One particular controversy around this proposal was its adoption in the very end of the Johannesburg Summit without a real discussion on its components. Despite the official explanation presenting the partnerships as a logical conclusion to prior discussions on the enforcement of environmental agreements, critics pointed a striking lack of transparency, and read it as evidence of informal transactions conducted between actors hardly committed to the protection of the environment. Several authors agree on a third possible explanation for the belated presentation of partnerships as an implementation solution. More than political crafting, the launch of the partnerships was a convenient exit door found by the organisers of the Johannesburg Summit to save their day and re-vitalise a meeting devoid of practical results (Backstrand, 2006). The real problem with the partnerships isn't that they represent an obscure private sector plot but, on the contrary, that their development has been incomplete because of the lack of proper consultations with business. They are also criticised for lacking links with the type I initiatives, defined as agreements between nation states.

“To sum up, the Johannesburg partnerships largely escape implementation review, partly because they, at their inception, were decoupled from global agreements on environment and development, such as the JPOI and Millennium Development Goals. A better definition of the substantial objectives of the partnerships is needed as well as clearer linkage to targets and norms set by the intergovernmental agenda”.

(Backstrand, 2006: 14)

Interestingly, the WBCSD announced, just before the Johannesburg Summit and in a completely different setting, the launch of 95 partnerships involving its members. These partnerships enable corporations to set their own rules outside the control of other organisations<sup>25</sup>. For Norris, in addition to the administrative burden and constraints type II

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<sup>25</sup> For instance, a current worrying initiative in the CBD and coming from agribusiness companies is their possible investment in the production of responsible GM soybeans that would take into account the risks for

partnerships generates, it is also their reputation as “green washing” initiatives that explains why they have been largely ignored by business representatives (Norris, 2005: 227).

However, the Secretariat notes that corporations are not the only “bad players” on environmental issues. States are also slow in complying with the CBD. Business’ ability to influence states could consequently be put to good use and help fostering environmental protection:

“Individual companies and industry associations can be highly influential on Governments and public opinion; thus, they have the potential to raise the profile of biodiversity and of the Convention itself” .

Institutional integrity is also strongly linked to the financial participation of corporations in conservation. Preparatory documents to decision VIII/17 clarify the spirit in which the involvement of companies could take place: the Convention should not accept any private funding to finance its main activities (Document b2010-01-02-en, p7) and would better benefit from a global effort from the business towards the conservation of biodiversity instead of a few financial contributions (Document b2010-01-02-en, 2006: 2). The CBD has been negotiated by a handful of convinced officials coming from environment departments. There are not ready to sell “their Convention” to careless corporations (interview with ENGO representative and SCBD representative).

## **7. Implementation and expertise on a case by case basis**

The last component of legitimacy resides in the benefits decision VIII/17 would bring for the preservation of global biodiversity in line with the CBD objectives. The concrete results of the Convention on biodiversity are difficult to assess: it covers lots of different domains that are characterised by complex dynamics and interactions. To add to this complexity, international environmental agreements usually define general norms and principles which consequences aren’t easily measurable.

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deforestation and working conditions. This certification would compete with the criteria of non-GM standard production.

The involvement of business is not perceived by the Secretariat as a “miracle” solution for the conservation of biodiversity. The 2010 target is difficult to achieve in any case. However, the involvement of business could be a necessary condition for some progress in the implementation of the CBD. If decision VIII/17 reaches parts of its objectives, such as a growing awareness among industries on biodiversity loss as well as their greater accountability, it would help to improve the outcomes of the Convention. The extensive expertise of the private sector is seen as a potential tool towards the limitation of biodiversity degradation (interview with CBD Secretariat). This last point is underlined in decision VIII/17:

“The private sector possesses biodiversity-relevant knowledge and technological resources, as well as more general management, research and communication skills, which, if mobilized, could facilitate the implementation of the Convention”

As such the decision

“Urges national focal points [...] to engage with such companies (companies operating within their jurisdiction) in the development of national biodiversity strategies and action plans”

and encourages national focal points

“To nominate them (private sector representatives) to participate in technical expert groups”.

Environmental policies are developing on the basis of two types of knowledge: scientific knowledge on the one hand; knowledge based on experience on the other hand (Corell and Sundqvist, 2003). Scientific knowledge has been the most widely used in the processes of environmental negotiations. It corresponds to the activities of fundamental research and laboratory experiments, and aims at establishing reports and predictions concerning environmental issues. Relying on this type of knowledge, epistemic communities, transnational coalitions of scientists sharing the same scientific commitments and relying on governments and international organisations, have helped for the development of

environmental regimes (Elliot 2004: 115). Considered for a long time as independent from the political process of decision-making, science was given the precedence to inform political choices. Expertise, as the practical arm of science, was seen more as a tool for implementation.

However, questions concerning the objectivity of science and expertise have been raised increasingly as more environmental agreements emerged (Elliot 2004: 114-116). First of all because science, that claimed to be neutral, could not escape the political trap. Every kind of “scientific” judgement is dependant on precise expectations and particular questions that are defined in a political way. Moreover, the activities of scientists are often linked to the decisions they defend. Finally, science is largely disconnected from economical, technical or social realities in society. Expertise, that requires field knowledge and should consequently achieve a better integration of all these questions, often stays away from social issues as well. Therefore an increasing number of groups, especially from civil society, claim to be experts very much like their government counterparts. They also stress the importance of local knowledge to complement science in a more balanced system of global norms (Gupta 2004).

According to the Secretariat, the idea is to benefit from business’ expertise and to involve corporations in concrete projects. Industries produce lots of data concerning environmental assessment. This is the case for mining industries that put in place biodiversity indicators. In other domains, business organisations can also provide interesting information on the applicability of environmental norms, e.g. the conditions under which seeds are currently transported internationally or the current contractual basis of bioprospecting agreements. Industrial representatives agreed on their potential role in advising legislators on sustainable development issues. Interestingly, some disagreements within the industry group emerged on the definition of that expertise: for instance one industry representative stated that ENGOs were coming to the negotiations to defend causes, whereas industries were there to make profit. This is where business expertise and skills lie. In the history of the Convention, several developments confirm his statement. Corporations tried several time to lobby for the notion of “accurate science” to protect their interests against claims of environmental degradation. This is particularly the case for biotechnology (Steffenhagen, 2001) where a large segment of research is controlled by the private sector. The adoption of the Cartagena protocol has been perceived by these companies as a major failure, since their aggressive positions did not convince the majority of participants (Bled, 2007). However, just after the adoption of the

treaty, these actors choose to launch several research programs to develop new GMO technology - including restricting technologies to have a better control on production-, as well as initiatives of biosafety capacity-building in the developing world. These measures aimed officially at mitigating the issues of potential transfer between GMOs and non GMOs and helping developing countries in their establishment of biosafety regulations. In reality, they served as a guarantee of a return on investment biotechnology firms had made in genetic engineering as well as a seduction strategy towards weak developing countries.

The expertise issue seems nevertheless to have to be considered on a case by case basis. Expertise is for instance currently at the core of the ABS regime, with discussions on an internationally recognised certificate indicating the origin of the natural resource components contained in products introduced on the market. In such case, business expertise can be crucial and several initiatives and lessons learned previously by biotechnology companies with the Cartagena protocol will probably help to promote a more constructive dialogue on this new issue.

To mention a middle-stance case in relation to the conservation of biological diversity, several initiatives of business organisations are in the periphery of what could be considered in line with the Convention's objectives. This is the case for a partnership presented during COP8 and involving the ENGO *Nature Conservancy* and the agribusiness corporation *Cargill*, involved in GMO production, both working with farmers to encourage better management practices and conservation opportunities for natural habitat of critical importance situated on private lands. This last example illustrates the danger to have private initiatives evolving at the margins of the CBD.

### **Conclusion: the plural dynamics of legitimacy**

Our analysis of decision VIII/17 of the CBD on the further involvement of the private sector in the Convention shed some light on the dynamics of legitimacy and legitimisation currently at stake within the CBD.

Going back to our initial proposition, the legitimacy of decision VIII/17 resides in several parameters, which consideration helps to identify the potential issues at stake. So far, the dynamics generated by decision VIII/17 do not seem to announce the privatisation of CBD

governance. New business groups can be involved in the deliberation processes and their accountability reinforced by the formalisation of their actions. However, the absence of clear references to the involvement of the financial sector and the lack of possible control concerning the expertise of the private sector may reduce the potential of the decision. Moreover, the undetermined character of the actual consequences of decision VIII/17 stands mainly in the novelty of the intervention of industry in the Convention's mechanisms.

As expected, different business actors mobilise different arguments concerning their involvement in the CBD. Some groups go to CBD meetings in order to present positive case studies which however are isolated from their mainstream activities while others are in denial of their impact on biodiversity and lobby forcefully to protect their economic interests. This illustrates how different dimensions of legitimacy- accountability, representation, transparency- are linked in different ways by corporate actors. These attitudes depend on the way corporations define their political role. This role is defined by the nature of the business actors involved –business associations, lobby groups, individual companies-, the sectors they belong to, as well as the political context in which their activities occur. Their history vs. the CBD process is as important as their sector or origin. Biotechnology firms for example arrived late and lobbied aggressively to stop the Cartagena negotiations which gave them a pretty bad reputation in the CBD process they are now trying to overcome. In another perspective, bioprospecting companies that were initially participating in ABS discussions faced some strong critics from several delegations and ENGOs and decided to leave the meetings. In both cases, the political environment in which they evolved did not fully integrate them into CBD discussions. To overcome this difficulty, some new initiatives such as the B&B initiative or the negotiations for an international regime on ABS are trying to bring business back in more constructive discussions.

*The case study consequently demonstrates the complexity of the mechanisms at stake in the involvement of the private sector as well as the diversity of topics that link business to environmental issues. More than outright incompatibility or a situation of domination by the private sector, there is a whole complex of interactions that contribute to broader environmental governance.*

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