How is the private sector responding ...

... the civil society outlook

How are business and industry responding to the Convention on Biological Diversity? One might well say that the answer is "not at all". And for a large part of the economy, if not the majority of it, this is undoubtedly true.

One reason for this is obvious: business and industry play a significant role in the destruction of biological diversity. This can perhaps be seen most clearly in the extraction of raw materials: where oil beckons, biological diversity is usually in the way. It is hacked down, contaminated and crushed into the ground. The failure to put an end to the trade in illegally felled timber in many areas speaks volumes about the relationship between business and ecology and what happens when their interests clash.

There are of course many companies that are committed to the conservation of biological diversity. Ecology and the economy can sometimes be reconciled. A drinks company recently promoted itself by advertising the fact that for each case of beer purchased, a contribution was made to the conservation of the rainforest. Let us not go into the question of the actual usefulness of such activities. Any deliberate link with the Convention is presumably not uppermost in people's minds.

Nevertheless, there are individual companies that are making a more direct contribution to the conservation of biological diversity. They include companies that recognise the importance of sustainable utilisation of a plant that is needed as a raw material for their products. One such company is Salus-Haus, which is committed to sustainable utilisation of the devil's claw plant found in southern Africa. The company is one of the leading manufacturers of a rheumatism remedy made from devil's claw. One could also cite the company Dr. Willmar Schwabe GmbH & Co KG, based in Karlsruhe in south-west Germany, which is supporting sustainable utilisation of the cape pelargonium. The problem here is that neither the San nor the Zulu receive a fair share of the benefits arising from the use of their traditional knowledge – for it is their knowledge of the effect of genetic resources that forms the basis of the company's products. This is referred to in Internet advertisements, which state: *"From the root extract of the cape pelargonium, which has been used for centuries by Zulu tribes, German plant researchers have developed the remedy UMCKALOABO®"*. Let it not be forgotten that the fair and equitable sharing of the benefits arising out of the utilisation of genetic resources and traditional knowledge is the third goal of the Convention.

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The business world has all sorts of problems with this third goal. Most companies adopt the simple solution of ignoring it. The only risk they face if access to a genetic resource is not based on prior informed consent and no access and benefit-sharing agreement is in place is that of being publicly accused by NGOs of biopiracy. That is clearly not enough to prevent biopiracy taking place.

The anti-ABS lobby

On the national and international stage business interests can be observed lobbying vociferously. Hand-in-hand with the USA, which is not a party to the Convention, representatives of trade and industry successfully put pressure on parties – most recently Australia – urging them to resist all progress in the negotiations for an international access and benefit-sharing regime. Their fear is that such a regime, once enshrined in international law, would definitively regulate fair and equitable benefit-sharing.

More recently, however, there have been signs that companies (or rather, the associations representing them) are publicly relinquishing their fundamental opposition to an international regime of fair and equitable benefit-sharing. Their goal is legal certainty, in the attainment of which they want to see two things avoided: over-regulation and a change in patent law. This is at least how the position of the International Chamber of Commerce and the pharmaceutical industry is to be understood.

Patent law, in particular, is put forward as a sacred cow that cannot be touched. The reason for this is simple. At present the Convention's call for fair and equitable benefit-sharing can simply be set aside by patent law: the patent holder is granted what is in effect a monopoly right. Even if genetic resources and traditional knowledge play a part in the development of the protected product or process, there is no requirement under patent law to comply with the provisions of the Convention on Biological Diversity. In the eyes of industry this state of affairs needs to be defended against the Convention's call for fair and equitable benefit-sharing. In short: the holder of a patent has the upper hand. The others – the developing countries and in particular indigenous peoples and local communities – have drawn the short straw.

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... to the Biodiversity Convention?

... the private sector perspective

The UN Convention on Biological Diversity (CBD) has been in force since 1992. It lays down an international framework for the utilisation of genetic resources and the fair and equitable sharing of the benefits arising from their use. But to see this issue primarily as a responsibility of the private industrial sector misses the point. The real issue here is the cross-border availability of mankind's biological treasures. Use of these valuable resources is governed by the relevant national and transnational legislation. The politically unresolved North-South conflict continues to stand in the way of this; moreover, not all countries have acceded to the Biodiversity Convention and not all member countries have yet set up a national system for implementation. Private sector companies cannot solve this problem until such time as the political system lays down binding regulations on benefit-sharing. In the meantime the private sector has no scope for action – its hands are tied.

No company that acts ethically can be active without legal certainty. To interpret this situation as deliberate lack of interest on the part of private sector companies is absurd. Any industry is interested in innovative products, whatever their origin. This is quite simply the foundation of the work that businesses do. The private sector has for this reason put a great deal of work into drawing up the necessary standardised implementation legislation ever since the CBD was ratified. In so doing it has repeatedly emphasised that it unreservedly supports the goals of the CBD. However, things must be kept in proportion. Well-known products that were freely available and in general use long before the Convention came into force have long been freely accessible for development and marketing purposes; they have been used all over the world without the intervention of private industry. Examples include some of the products of Chinese or African folk medicine, or the use of digitalis as a heart drug or of artemisia against malaria. How would benefit sharing be worked out retrospectively for these products? Who would receive the benefit? Similar applications which were well known long before the CBD came into force must therefore remain public property and be disregarded by any implementation and benefit sharing regulations of the CBD.

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The situation is different for new developments based on genetic material acquired after the CBD came into force. For industry it is self-evident that those who have made a significant contribution to the discovery, research and development of a new product should receive a fair share of the benefits arising out of its use – and this is in any case an internationally binding obligation under patent law. Here it should be borne in mind that making a usable product out of natural materials almost always involves an industrial development – i.e. application of the innovative power of a private or public organisation. It is thus important to consider how and to what extent a country of origin should be recompensed for permitting access to genetic material with unknown potential. It is very much in the interests of industry that this point should at long last be clarified.

Industry repudiates outright any form of misuse that could be classed as *unauthorised access to genetic resources* under the CBD. Insinuations to the contrary miss the point and are disingenuous – as are also the accusations of biopiracy made by a number of NGOs. They effectively hinder the drafting practical implementation rules. This process needs to be driven not by the prevention of misuse but by the attempt to set up a system of regulation that is simple for both the country of origin and the developer. Such regulation needs to be based wherever possible on legal practice that has already been proved to work at international level. German industry, in ongoing dialogue with policy-makers, has already proposed some solutions. It would be good if such suggestions could meet with greater readiness for objective dialogue on all sides, instead of the polemics and obstructive manoeuvring that are so often encountered.

The use of genetic resources is governed by national and transnational legislation.

Photo: Wilcke