The EU as an International Environmental Negotiator - External Representation and Internal Coordination

Adapted from a paper presented by Professor Tom Delreux* at the 2015 Governance Innovation Week, University of Pretoria, 1-5 June 2015

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Introduction
The EU is party to about 50 Multilateral Environmental Agreements (MEAs) and plays a key role in international negotiations on a broad range of environmental issues such as air, climate change, biodiversity and biosafety, chemicals, soil, water, sustainable development, forests or oceans. Some of these MEAs are global in nature, and negotiated under the auspices of the UN, while others are regional, and mostly negotiated under the auspices of the United Nations Economic Commission for Europe (UNECE). This policy brief opens the black box of the EU as international environmental negotiator. By focusing on how the EU functions internally when it acts externally, it discusses the legal framework of the EU’s external environmental competences and its formal status in international environmental negotiations, the way the EU is externally representation (who speaks for the EU?) and the way the internal coordination takes place (how is a EU position developed?).

1 European Commission. 2015. 'Multilateral environmental agreements to which the EU is a contracting party or a signatory'. Available online at: http://ec.europa.eu/environment/international_issues/pdf/agreements_en.pdf.
Status and external environmental competencies

The main instruments of international environmental politics, MEAs, are still state-based. Since the EU is not a state, it was initially unclear if, and how, the EU could fully participate in these instruments. It has not, therefore, been an easy task for the EU to be fully accepted by other countries as a negotiator of equal value, especially in the early days of the 1970s and 1980s. A reluctance to recognise the EU as an authoritative actor around the international negotiation table was related, among other things, to the complex and unclear divisions between European and national competencies and a lack of previous participation of actors without formal status in international negotiations. The situation, however, has changed and today the EU is fully recognised as an actor in international environmental negotiations by its international partners.

One of the main reasons for this acceptance is that the EU possesses international legal personality - in the form of a ‘Regional Economic Integration Organisation’ (REIO) - which legally enables it to become a party to environmental agreements. However, the EU’s legal status in environmental negotiations is more complicated. The EU is considered a normal negotiating partner during international environmental negotiation processes, for instance it is allowed to table proposals. However, many environmental negotiations take place in a UN context, where the EU is formally an observer, not a full member. An observer has no voting rights but for the most part this is not that important since international environmental negotiations are characterised by consensus logic and voting is very unusual. Moreover, the majority of today’s international environmental negotiations are conducted in Conference or Meetings of the Parties (COPs or MOPs), which are follow-up discussions but in many regimes represent the main decision making bodies. As the EU is usually a formal party to MEAs, under which COPs and MOPs are organised, they are granted the same rights as other parties. This means that in almost all international environmental negotiations, the EU de facto acts as a fully-fledged negotiation partner.

To be an actor in international environmental negotiations, the EU also needs external competences in the environmental field. The EU’s external competences can have two sources: either they are mentioned explicitly in the Treaty or they are established through
case law of the Court of Justice of the EU. The first are called ‘express powers’, the second
‘implied powers’. The Single European Act (1987) added express powers in the field of
external environmental policy. The Treaty of Lisbon (2009) reinforced this by adding a fourth
objective of EU environmental policy, which explicitly deals with the external dimension of
environmental policy stating the EU’s commitment to ‘promoting measures at international
level to deal with regional or worldwide environmental problems, and in particular
combating climate change’. The second source of competences through the Court of
Justice dates back to the 1970s when a series of cases broadened the scope of the EU’s
external environmental competencies. These cases created the doctrine of parallelism
between the internal and external EU competencies. This means that when the EU has
internal competencies on a particular issue, it is also allowed to conduct external relations in
that domain.

Importantly, the EU’s external environmental competencies are shared competences
between the EU and member states. Shared competencies still leave room for political
action by member states, which largely effects - and complicates - the external
representation of the EU in international environmental negotiations.

External representation

For the EU, MEAs are ‘mixed agreements’, as they are international treaties to which both
the EU and member states are party. The EU Treaties do not deal with how the EU and
member states should negotiate mixed agreements. A system of ‘dual representation’ has
developed as member states are represented by the rotating Presidency of the Council
while the European Commission represents the EU.

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2 Article 191, Treaty on the Functioning of the European Union.
The lack of clear stipulation in the Treaty on who represents the EU in the case of shared competences has repeatedly caused tensions between the Commission and the Council on the question of external representation. These tensions have come particularly to the forefront in the years after the entry into force of the Lisbon Treaty.

A negotiation arrangement based on dual representation is only applicable when the EU participates in international negotiations that are meant to result in legally binding treaties (here MEAs). However, even in such treaty negotiations, the political practice often deviates from the formal provisions. Moreover, the dual representation dynamic does not characterise the EU’s external representation in the majority of environmental negotiations that produce declarations, decisions and resolutions, which are seen as politically binding but not legally enforceable. This holds true for most COP and MOP decisions, as well as for results of high-level summits on sustainable development, such as Rio (1992), Johannesburg (2002) or Rio+20 (2012). In such negotiations, the European Treaties do not foresee a formal procedure to appoint an EU negotiator. Consequently, the dual representation arrangement does not necessarily hold and the formal negotiating role for the Commission is mostly limited. Practice shows that the EU negotiation arrangement is usually led by the rotating Presidency.

However, while formal representation structures exist, they are not always applied in practice and therefore when trying to understand the EU’s external representation legal competence is not sufficient. Because of the vagueness in the Treaty provisions and the complex distribution of competences, the EU negotiation arrangement in MEA negotiations is often an *ad hoc* one. The way the negotiations arrangement is precisely fleshed out depends on pragmatic considerations and the exact organisation of the EU representation varies from one negotiation session to another.

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Internal coordination

The position defended by the EU in international environmental negotiations is developed through internal coordination processes between the member states and the European Commission that take place at different levels. First, before the European negotiators leave Brussels, the Environmental Council conducts internal coordination meetings. The situation contrasts with the US where climate change negotiations are conducted by the State Department. Only in the beginning of 2015, did climate diplomacy appeared for the first time on the agenda of the EU Foreign Affairs Council (when the Ministers for Foreign Affairs adopted a Climate Diplomacy Action Plan).

The Council’s centre of gravity for the EU’s internal coordination remains, for the time being, the Working Party on International Environmental Issues, composed of national experts from the member states (with Commission officials attending). This working party convenes in various configurations and has different roles depending on the issue being discussed.

In salient and highly politicised negotiations, EU positions take the form of Council Conclusions, and in less salient negotiations the EU position is agreed by experts in the working party. However, when EU negotiators enter negotiations leading to legally binding agreements, the Commission receives a mandate from the Council that includes the main positions of the EU to be defended internationally. During the negotiations, meetings of the working group are organised every morning before the international negotiations start. As negotiations evolve and become increasingly intense, meetings are also held in the evening or during lunchtime or whenever it is considered necessary. During the ministerial segments of international negotiations, coordination is also organized at the level of environment ministers, or even at the level of heads of state and government in a few cases.

EU coordination meetings are very time-consuming. The time spent in internal coordination meetings – the so-called ‘EU bunker’\(^8\) – cannot be used for informal contacts with the negotiation partners, for instance to make the necessary package deals ‘in the corridors’.

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\(^8\) Afionis, S. 2011. ‘The European Union as a negotiator in the international climate change regime’ in International Environmental Agreements, 11(4): 341-360. (See page 346)
Indeed, this EU ‘navel-gazing’ is therefore often said to undermine its external effectiveness and performance. In international climate change negotiations, the lack of outreach to third parties and building strategic alliances with them is often seen as a major factor that explains the decreasing leadership of the EU.\(^9\) This not only seems to be the case in international climate – and more broadly environmental – negotiations, but it is equally applicable to EU external relations in other policy domains.\(^{10-11}\)

In these decision-making processes some member states usually remain inactive. They do not (or only very seldom) take the floor in working parties or coordination meetings and seem to acquiesce in the outcome of these meetings. Hence, EU decision-making is *de facto* driven by a limited number of member states, which have the capabilities and the necessary expertise to contribute, and – even more importantly – which are interested in or have an interest in these negotiations.\(^{12}\)

After a deal on a MEA has been reached at the international level, the agreement has to be ratified by the EU before its rights and duties become legally binding for the whole Union. The Council of the EU and the European Parliament are the bodies that ratify the agreements, and at this stage the document cannot be amended. Additionally, because MEAs are mixed agreements to which the EU and the member states are parties, the member states also need to ratify the agreement at the national level (generally with parliamentary approval).

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