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Tom Delreux

The EU as a negotiator in multilateral chemicals negotiations: multiple principals, different agents

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1. Introduction

This paper deals with the question how the European Union operates in international negotiations resulting in a multilateral environmental agreement (MEA). As the European Community (EC) does not have exclusive competences on environmental issues, MEAs are mixed agreements, meaning that both the EC and the member states are a party to it. As a result, the EC and the member states participate in the negotiations. While the EC participation is regulated in article 300 TEC, which appoints the Commission as the negotiator, there is no legal framework at the EU level for the member states part (Delreux T., 2006). However, practice learns that the member states often decide to pool their voices and delegate negotiation autonomy to the Presidency or another member state. From a legal perspective, this generates a hybrid situation in which the Commission should negotiate for issues falling under EC competences and the member states separately (or via the Presidency or a third member state, if they want) for the issues of national competence.

The two case studies in this paper on two negotiations on international chemicals management (PIC and POPs) point out that this hybrid situation is not always followed in practice. As speaking with a single voice is considered to increase the EU's bargaining power, the EU negotiation arrangement and the question 'who negotiates on behalf of the EU?' become particularly relevant. To frame this question theoretically, I rely on principal-agent theory.

The next section applies this model to the EU decision-making process during negotiations resulting in MEAs. Moreover, I extend the traditional model in a twofold way. Firstly, I introduce private information for the principals, the compellingness of the external environment and the cost of no agreement to understand this process. Secondly, I broaden the model for exclusive EC competences to shared competences and mixed agreements. In section 3, I apply this model on two international chemicals negotiations of the end of the 90s: the Rotterdam PIC Convention and the Stockholm POPs Convention. Section 4 summarizes the conclusions.

2. A principal-agent analysis of the EU decision-making process regarding MEAs

2.1. The basic model: a principal-agent analysis of article 300 TEC

In this section, I apply the principal-agent model on article 300 TEC. This theory is designed to understand situations in which one (set of) actor(s) is 'acting on behalf of' another (set of) actor(s) (Epstein D., O'Halloran S., 1999; Kassim H., Menon A., 2003; Shapiro S., 2005). In the case of the EU negotiating MEAs, a 'EU negotiator' (agent) is acting on behalf of the member states ('principals'). Principal-agent theory thus offers concepts and insights, which are relevant to frame relations between actors who are represented and actors who represent them.

Article 300 TEC regulates the internal decision-making process regarding international negotiations touching upon EC competences. It stipulates that in such a situation the Commission negotiates on behalf of the member states. So, the member states delegate negotiation autonomy to the Commission. Theoretically, I distinguish two levels, three stages and six control mechanisms.

2.1.1. Two levels

The article 300 decision-making process takes place at two levels: the international and the EU level. At the international level, the international agreement is negotiated. At the EU level, member states (the principals) decide on delegation and control. The EU negotiator, *i.e.* the agent, operates at both levels. Two-level-game scholars portray the agent's role as 'Janus-like' (Putnam R., 1988; Moravcsik A., 1993), as its strategy depends on both the international negotiation context, where its aim is to conduct an international agreement with the external partners, and on the expected behaviour of the principals at the EU level, from which the agent ultimately needs the ratification to fulfil its international commitments.

2.1.2. Three stages and six control mechanisms

The decision-making process can be analytically divided into three stages: the authorization (*before* the international negotiations), negotiation (*during* the international negotiations) and ratification stage (*after* the international negotiations) (Nicolaidis K., 1999; Meunier S., 2000; Meunier S., Nicolaidis K., 2000; Meunier S., 2005). In every stage, I define two control mechanisms that are at the principals' disposal¹, as a central claim of principal-agent theory is that delegation of negotiation autonomy is inextricably bound up with control.

[AUTHORIZATION STAGE] The authorization stage starts when the Commission initiates a proposal for an authorization decision and possibly a mandate to the Council. The first step in this decision-making process is exclusively reserved for the agent (Bendor J., Glazer A., Hammond T., 2001). However, the Commission has only formal agenda-setting power (Schmidt S., 2000; Pollack M., 2003), as it is especially undermined by pressure coming from the international level. When an international negotiation session is announced, the Commission *de facto* cannot refuse to initiate the process, if it does not want to remain absent during the negotiations. In the authorization stage, the member states can build two control mechanisms.

[CONTROL MECHANISM 1] On the one hand, they can contest the negotiation authority of the Commission and they are even able not to grant this authority to the agent. When the Council's decision on authorization is negative, the process ends here. So, non-delegation can be considered as

¹ These control mechanisms are indicated by a 'c' (in a little black box) in figure 1.

the ultimate control mechanism. This is the most powerful tool the Council can use: it reduces the Commission's autonomy to nil, as the Commission has no authorization to act at the international level. However, the cost for the member states to use this control mechanism is extremely large as well: they are not represented during the negotiation stage.

[CONTROL MECHANISM 2] On the other hand, following article 300 TEC, the member states may issue a mandate ('negotiation directives') in which they can lay down both substantial and procedural instructions for the Commission. Substantial instructions deal with the content of the future international agreement, procedural instructions with the rules of the game that the Commission has to respect in its relation with the principals during the negotiation stage. However, the mandate is not binding. It only gives the Commission an indication of the principals' preference on the future MEA. As I will indicate below, this indication is not absolute and it forms one of the strategic tools for the Commission.

[NEGOTIATION STAGE] In the negotiation stage, the Commission negotiates at the international level with the external partners. To conceptualize the control mechanisms of this stage, I use – besides the *ex ante* and the *ex post* control mechanisms, which are generally used in principal-agent literature – a third category: *ad locum* control mechanisms (Kerremans B., 2006).

[CONTROL MECHANISM 3] If the international negotiation's rules of procedures and the proceedings of the negotiations allow member states to attend the international negotiations, they are able to observe – and control – the negotiation behaviour of the Commission directly.

[CONTROL MECHANISM 4] According to article 300 TEC, a 'special committee appointed by the Council' has to be consulted by the Commission during the negotiation stage. This committee, which I call the 'EU coordination meeting', can be considered as an emanation of the Council (*i.e.* the principals) on the spot, in which the representatives of the member states meet during the negotiation stage (Johnson M., 1998; Macleod I., Hendry I., Hyett S., 1998; Bretherton C., Vogler J., 2003).

[RATIFICATION STAGE] In the ratification stage, the internationally negotiated agreement has to be ratified by the member states. This means that the agent has to get an approval by its principals on the agreement negotiated with the external partners. Without this ratification, the member states are not legally bound to the agreement. The ratification stage follows a 'take it or leave it' logic. The member states in the Council can only accept or reject the agreement: they are not able to amend it. In this third stage, member states have a fifth and a sixth control mechanism at their disposal.

[CONTROL MECHANISM 5] On the one hand, they can reject the agreement². In such situation, the Commission faces a so-called ‘involuntary defection’ (Putnam R., 1988; Moravcsik A., 1993) as it is not able to fulfil its commitments made vis-à-vis the international negotiation partners. Strictly speaking, involuntary defection means non-ratification in its formal sense, *i.e.* a failure of the ratification decision by the Council after the agreement is signed. However, in my model, I consider a non-acceptance of the political agreement at the end of the last negotiation session as an involuntary defection as well. Key element of an involuntary defection is that an agent is called back by its principals at the moment the agent has made a commitment vis-à-vis its external negotiation partners.

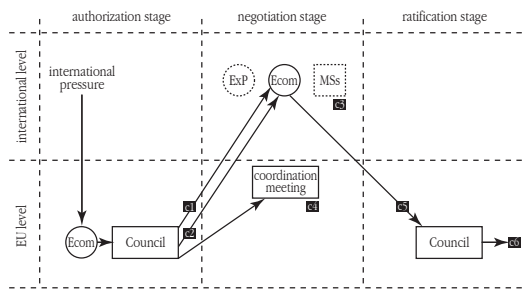
[CONTROL MECHANISM 6] On the other hand, in the ratification stage, principals can develop their preferences regarding future delegation in the ratification stage (Menon A., 2003; Kerremans B., 2004), as they can take their experience with the Commission as agent into account when the delegation question pops up for other negotiations. So, a situation of repeated/iterated delegation can be considered as a control mechanism.

A key element in understanding the EU decision-making process and the behaviour of agent and principals, is their anticipation on the future stages. The member states and the Commission base their behaviour on their expectation of what is going to happen in a next stage. This backward inductive reasoning determines the relation between principals and agents, as the negotiation behaviour of an agent in the negotiation stage will be linked to its assessment of the chance to get the international agreement ratified in the ratification stage (Milner H., 1997; Cutcher-Gershenfeld J., Watkins M., 1999; Meunier S., 2000; Hug S., König T., 2002; Kerremans B., 2004).

The left part of figure 1 brings together the two levels, three stages and six control mechanisms of the article 300 TEC decision-making process, modelled into principal-agent theory. The right part of the figure portrays my first extension, which will be dealt with in section 2.2, of the model: making it applicable to shared competences and thus mixed agreements.

² However, as there can be other reasons for non-ratification, Rasmussen indicates that a rejection does not necessarily mean that principals reject the negotiation behaviour of the agent (Rasmussen A., 2005).

Decision-making process for EC competences
(basic model)



Decision-making process for shared competences
(extension 1)

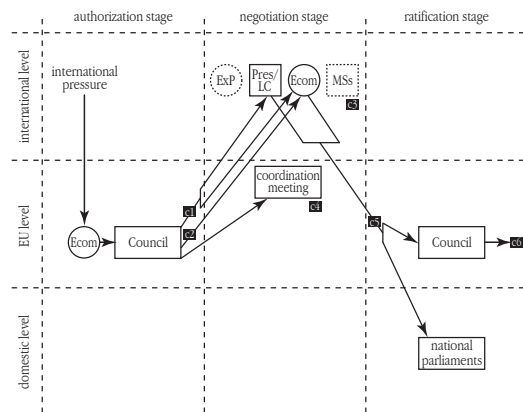


Figure 1: principal-agent model, applied to the decision-making process for external relations regarding EC competences (left) and shared competences (right) ['Ecom' = European Commission; 'Exp' = external negotiation partner; 'MSs' = member states; 'Pres' = Presidency; 'LC' = lead country; 'c' = control mechanism]

2.2. Extending the model (1): the EU decision-making process for mixed agreements

MEAs are mixed agreements, as the competences on environmental issues are shared between the EC and the member states. This has a twofold consequence for my model. Firstly, beside delegation to the Commission for issues falling under EC competences, a second delegation is needed if member states aim to express their pooled, common position at the international level (Frieden J., 2004). These pooled national competences are mostly delegated to the Presidency or another member state (a so-called 'lead country'). Secondly, as a mixed agreement also touches upon national competences, it has not only to be ratified at the EU level, but also at the level of each member state. As a result, negotiating mixed agreements creates an additional, third level in the model. Let me now examine these consequences in detail.

2.2.1. The Presidency or a lead country as agent

Deviating from Tallberg's argument that 'EU governments' engagement of the Presidency as their representative leads to a classic principal-agent problem' (Tallberg J., 2006, p. 141), I argue that delegation to the Presidency or a lead country does not follow the same logic as delegation to the Commission.

2.2.1.1. The Presidency as EU negotiator

Three characteristics of the Presidency make its role as EU negotiator is different than the Commission's. Firstly, when the Presidency takes the agent role, it still remains a principal as well. The effect of the situation where an agent is also part of the collective principal that grants negotiation authority to that agent, has not been studied in principal-agent theory yet. I expect that delegation to

a colleague-principal (being the Presidency or a lead country) will mitigate two assumed negative effects of delegation (Epstein D., O'Halloran S., 1999; Pollack M., 2003). On the one hand, it is plausible to expect that the preference heterogeneity between a collective principal and an agent being part of that principal will be smaller than the preference heterogeneity between a collective principal and an agent that is not part of it. *In casu*, the aggregated preferences of the member states in the Council, including the Presidency's, are theoretically more likely to be in line with the preferences of the Presidency than with the preferences of the Commission. On the other hand, the information about the international negotiation context will be less asymmetrical divided in favour of the agent when the Presidency is the EU negotiator than when the Commission takes this role. As a result, agency slack is less likely. This may have two different effects: either the principals will establish less – or less strict – control mechanisms, or if they do not, the Presidency would enjoy less discretion than the Commission would have.

Secondly, the Presidency that acts as EU negotiator is not only a member state taking the role of agent, it also has a particular institutional role. This institutional component generates expectations about the negotiation behaviour of the Presidency. Firstly, because of the institutional norms of impartiality and neutrality related to the Presidency's role, member states expect from the Presidency a loyal negotiation behaviour (Metcalf D., 1998). Secondly, the Presidency has a range of institutional tools at its disposal, which the Commission or a lead country do not have. By chairing the Council and coordination meetings, tabling proposals, having bilateral consultations with other member states and the right to determine a consensus or call for a vote, the Presidency as agent generates additional dynamics in comparison with the Commission or a lead country negotiating.

Thirdly, as the Presidency rotates sixmonthly, the chance on agency slack reduces as well. The shadow of the future generates a reciprocity-based principal-agent relation (Axelrod R., 1981; Elgström O., Jönsson C., 2000; Tallberg J., 2003). This means that the Presidency as EU negotiator is not expected to behave as opportunistically as an agent, which is not involved in a rotation system, would do. As the negotiations of a MEA mostly take multiple years, such agreement is never negotiated by one Presidency. Presidencies are aware that they will be a 'normal' principal in the next negotiation round. As they want to avoid a tit-for-tat logic by a future Presidency, they are likely to act loyally. Consequently, the rotation system of the Presidency makes the traditional slack problem less likely than it appears in a situation of the Commission negotiating. This argument is supported by research on the EU Presidency, arguing that member states holding the Presidency tend to put aside their national preferences during the course of their Presidency (Svensson A., 2000; Schout A., Vanhoonaeker S., 2006).

2.2.1.2. A lead country as EU negotiator

Granting negotiation autonomy to a lead country generates the same effect as I have mentioned above in the case of the Presidency: as a lead country negotiates while being a subset of the principals, diverging preferences between agent and principals and an information advantage for agent will be less likely. Moreover, delegation to a lead country implies an additional element in the authorization stage: the question to which member state negotiation authority will be delegated. Indeed, there is a pool of possible lead countries, meaning that screening and selection procedures become relevant (Kiewiet D., McCubbins M., 1991; Franchino F., 1999; Hawkins D., Jacoby W., 2006). So, the characteristics – both preferences and capabilities – of the potential agents are taken into account by the principals when they decide to authorize. As a result, the first control mechanism (the authorization) is supplemented by a selection aspect: a lead country is not only authorized, but also selected out of a pool of candidate-agents.

2.2.2. The domestic level as additional ratification level

As mixed agreements do not only touch upon EC competences but on national competences as well, they also have to be ratified at the level of each member state. This means that the model needs to be extended with the domestic level in the third stage, resulting in a three-level-game (Patterson L.A., 1997; Collinson S., 1999; Pollack M., 2003; Larsén M., 2004; Leal-Arcas R., 2004). The right part of figure 1 (see above) extends the principal-agent model for exclusive competences to a three-level-game for shared competences in which the Presidency and/or a lead country also act as EU negotiator.

It is plausible to expect that the addition of a third level makes it harder for the agent to take the ratification hurdle. As the number of veto players increases, the likelihood of ratification decreases (Tsebelis G., 2002). Moreover, the players on the domestic level are not directly involved in the negotiation processes at the international and the EU level. As a result, the transmission of compellingness of the external environment on the domestic players is minimal. Why this is important and which role this compellingness may play for actors in charge of ratification, is the subject of the next section.

2.3. Extending the model (2): private information for the principals, cost of no agreement and external compellingness

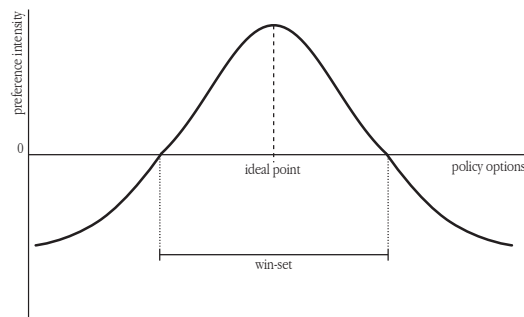
2.3.1. Preferences of the member states in the authorization stage and the ratification stage

I apply an assumption that is often used in political sciences: actors having single-peaked preferences. This means that preferences can be represented as Gauss curves (Bueno de Mesquita B., 1994;

Rasmussen A., 2000; Arregui J., Stokman F., Thomson R., 2004). Single-peaked preferences combine the benefits of two other conceptions of preferences. First, preferences as ideal points (Milner H., 1997; Ballmann A., Epstein D., O'Halloran S., 2002; Pajala A., Widgrén M., 2004) allow conceptualizing preference distances and indicating that an actor has one preference that maximizes its interest. Secondly, preferences as win-sets (Putnam R., 1988; Meunier S., 2000) allow referring to overlapping preferences. Moreover, it explains that an actor will not only accept an outcome that exactly corresponds to its preference, but also outcomes that are close to these preferences but (slightly) less desired. I present single-peaked preferences as in the left part of figure 2. On the X-axis I situate the different policy options, going from the status quo (left) to more maximalistic policy outcomes (right). The Y-axis displays the degree of preference intensity that a member state has for a particular policy option. This is the extent to which a member state is prepared to invest a particular cost in defending the corresponding policy option. The higher a point of the Gauss curve is situated above the X-axis (*i.e.* if preference intensity > 0), the more supportive a member state is towards that policy option. The lower a point of the Gauss curve is situated below the X-axis (*i.e.* if preference intensity < 0), the more obstructive a member state is towards that policy option.

The projection of the top of the Gauss curve on the X-axis the ideal point of that member state. Every outcome under the curve (the win-set, *i.e.* the projection of the curve on the X-axis) is acceptable. The win-set is composed of the various preferences, which have an intensity that decreases as the distance to the ideal point increases (Jupille J., 1999; Arregui J., Stokman F., Thomson R., 2004). The frontiers of the win-set are formed by the intersection of the Gauss curve and the X-axis where the preference intensity is zero. These are the policy options with a preference intensity of zero. Member states are indifferent regarding these policy options.

Member states' single-peaked preferences in the authorization stage



Member states' single-peaked preferences in the ratification stage

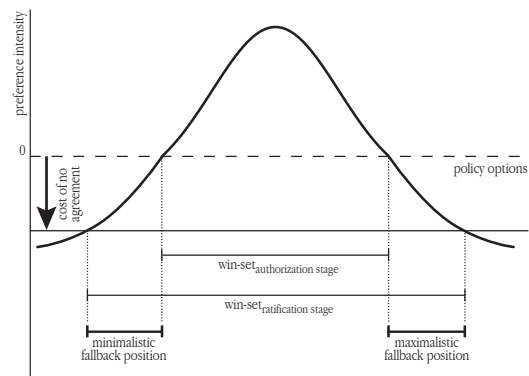


Figure 2: member state preferences in the authorization stage (left) and in the ratification stage (right)

The situation, as represented in the left part of figure 2, only occurs in the authorizing stage. In this stage, the principals make their preferences clear to each other and to the agent. However, a key element in my model is that a principal does not only have a preference, but also a fallback position. This creates a situation of asymmetrically divided information in favour of the principals. Indeed, the principal-agent model is not only characterized by an information benefit for the agent, but also by an information benefit for the principals. Member states are better informed about their final win-set, *i.e.* about the range of international agreements they will ultimately be able to ratify. I assume that member states always have some additional room outside their Gauss curve when it really comes to the crunch in the ratification stage.

Why would member states ultimately ratify an agreement outside their win-set and approve an agreement that is not covered by their Gauss curve? The answer is that causing an involuntary defection generates a political cost of no agreement (Moravcsik A., 1993; Collinson S., 1999). Besides the substantial costs and benefits of not ratifying a MEA, the political pressure not to jeopardize the negotiation process is enormous in a multilateral negotiation context. The ‘compellingness of the external environment (Kerremans B., 2003) thus generates a pressure not to be held responsible for a failure of the process. Indeed, a status-quo default condition *de facto* hinders the ultimate sanctioning of the agent (Pollack M., 2003). The compellingness of the external environment depends on the number of parties involved at the international level and their bargaining power (the more parties involved and the more bargaining power they have, the larger the degree of compellingness). In short, the reasoning I add to the traditional principal-agent framework goes as follows: a compelling external environment increases the cost of no agreement for a principal. This leads to principals revealing their private information on their fallback positions, which broadens the final win-set of the principal.

This means that in the ratification stage, the Gauss curves of the member states cover a broader range of policy options than they had indicated before. The parts that supplement the initial win-set are the fallback positions. So, in the final stage, the member states are forced by the compelling external environment to put all their cards on the table. I present this graphically in the right part of figure 2: the axis on which the Gauss curve is projected moves down, *i.e.* to a negative preference intensity. So, the outcome of the international negotiations is not evaluated anymore against the policy options to which a member state has a positive preference intensity. As a consequence, the Gauss curve extends and policy options with a certain negative preference intensity value will be ratified as well. The extent to which the axis on which the Gauss curve is projected moves down is a function of the cost of no agreement: the higher this cost, the more this axis moves down, and thus the more outcomes that will be ratifiable.

2.3.2. *Effect on the agent's discretion in the negotiation stage*

Until now, I have focussed on the preferences of the principal. However, a key element in principal-agent models are the agent's preferences – and more in particular the degree of heterogeneity between the preferences of principals and agent. The EU negotiator may have its own preferences and win-set. This means that the EU negotiator may negotiate at the international level with a double – and often ambiguous – purpose. On the one hand, the EU negotiator aims to reach an agreement with the external partners in accordance with its own preferences. On the other hand, the EU negotiator is concerned about the fact that the international agreement has to fall within the collective win-set of the Council to be ratified. This consideration makes the EU negotiator's negotiation behaviour and strategy very delicate. The agent is kept on a rubber band by the Council. The expected negotiation behaviour of the EU negotiator is to pull the rubber band sufficiently that the international outcome is covered by its own win-set, but simultaneously not too much that the rubber band does not snap and the international agreement keeps being covered by the Council's win-set.

How can the agent get the international agreement ratified by the principals? The key is transmission: the EU negotiator's strategy is to optimize the transmission of the compellingness from external environment to the EU level. By doing so, it maximizes the cost of no agreement in order to expand the final collective win-set of the principals. The coordination meeting is a crucial tool here. The EU negotiator has to let the representatives of the member states in the coordination meeting feel the external compellingness. It has to persuade the member states that the conducted agreement is the best possible option, *i.e.* the outcome that maximizes the member states' preferences, given the international negotiation context (Schmidt S., 2000).

What is the effect on the EU negotiator's negotiation behaviour at the international level? Figure 3 indicates that the agent's bargaining space *de facto* extends. I define its bargaining space as the overlap between its own win-set and the collective Council win-set, as established during the authorization stage. The EU negotiator is aware of the preference advantage of the principals and of their ability to ratify more outcomes than they have indicated in the authorization stage. Consequently, the EU negotiator is able to extend its bargaining space. The extended bargaining space of the EU negotiator consists of the overlap between its own win-set and the collective Council win-set, as it will be used during the ratification stage. The extension of the bargaining set will only occur on the side that is limited by the collective Council win-set from the authorizing stage (*i.e.* on the left of the bargaining space on figure 3). The bargaining space will not be extended further than the overlap with the Commission's win-set. Hence, on the other side of the bargaining space (*i.e.* on

the right side of the bargaining space on figure 3) an extension is improbable because in that case the Commission would agree with an outcome outside its own win-set.

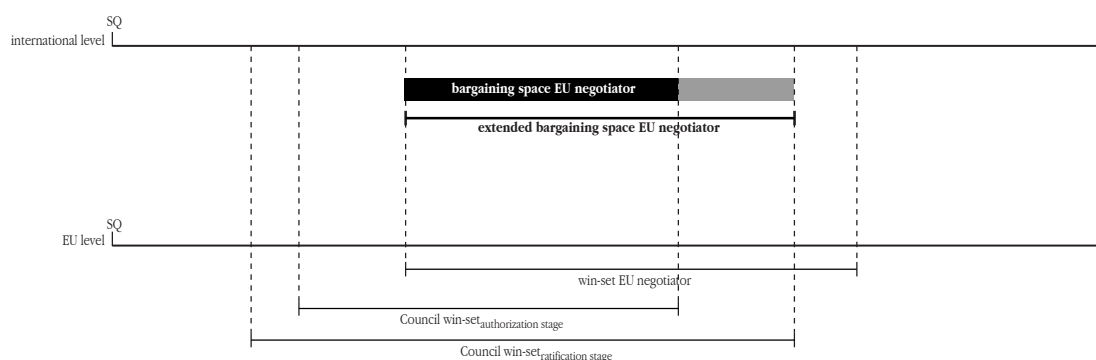


Figure 3: the extended bargaining space of the EU negotiator

3. The EU as a negotiator during the negotiations on the Stockholm POPs Convention and the Rotterdam PIC Convention

3.1. International chemicals negotiations at the end of the 90s

In the second half of the 90s, two MEAs on global chemicals management were negotiated: the 1998 Rotterdam Convention on PIC (Prior Informed Consent) and the 2000 Stockholm Convention on POPs (Persistent Organic Pollutants). The main purpose of both Conventions is to protect human health and the environment against hazardous chemicals (Kummer K., 1999). Whereas the Rotterdam Convention establishes a legally binding information procedure (the so-called 'PIC procedure') on the basis of which parties are able to take informed decisions on the import of industrial chemicals and pesticides, the Stockholm Convention stipulates the elimination or reduction of the production, use, import, export, emission and disposal of POPs³. Beside the elimination of 12 POPs (the 'dirty dozen') the Stockholm Convention foresees in a procedure to add new chemicals falling under its regulation (Strydom T., Stein R., Anastassiades A., 2001).

Both Conventions were negotiated in five Intergovernmental Negotiation Committees (INCs), each lasting one week: the PIC Convention from March 1996 to March 1998, the POPs Convention from June 1998 to December 2000. Almost all UN countries participated in the negotiations. Generally speaking, both negotiation processes were characterized by a cleavage between a group of industrialized countries led by the US on the one hand and the EU on the other hand. While the US group strived for limited conventions with a small scope, the EU took the most demanding position⁴. In the case of the Rotterdam Convention, the EU wanted almost at all cost a legally binding

³ Persistent Organic Pollutants are chemical substances that are highly toxic to humans and animals, remain intact in the environment for many years, can travel long distances and accumulate in human and animal bodies.

⁴ Another similarity between both negotiations was that the EU initially strived for a more far-reaching agreement (establishing a framework convention with a comprehensive chemicals policy in the Rotterdam negotiations; regulating 15 POPs in case of the Stockholm negotiations), but then opted for a pragmatic approach to ensure *an* agreement was reached at all.

agreement, as a PIC procedure was already in force at the EU level (EC regulation 2455/92/EEC). EC legislation also existed on POPs, as the ‘dirty dozen’ were already regulated in the EU (directives 79/117/EEC and 96/59/EC). As a result, for both negotiations the EC had competences and article 300 TEC was the appropriate basis for the external relations in these fields.

The data collection for the study of the EU decision-making processes regarding these chemicals conventions is based on a number of semi-structured interviews with officials who were closely involved in these negotiations⁵, document research (primary sources, specialized press reports, and semi-confidential and personal documents of decision-makers). My interpretation of the data is checked – and if necessary corrected or supplemented – by the interviewees.

3.2. Delegation: who negotiated on behalf of the EU?

From a theoretical and legal point of view, one should expect that the EU negotiation arrangement during both negotiations were similar: the Commission taking the floor for issues covered by EC competences, and the member states for the other issues. However, the way the EU was represented at the international level was different. Whilst during the PIC negotiations, the Commission was *de facto* the only EU negotiator, the POPs negotiations were initially conducted by the Presidency, but after some time also by the Commission and lead countries. The multiple principals (15 member states) were thus represented by different agents (Commission, Presidency, lead country) in a highly comparable negotiation process on international chemicals management. Let me go into detail about the EU representation, firstly, during the PIC negotiations and, secondly, during the POPs negotiations.

The PIC Convention was negotiated by the Commission. As it concerned mixed negotiations, member states were formally allowed to take the floor, but they have never done so. So, for negotiations in plenary, the main negotiating arena for PIC, the Commission was the only EU negotiator. The two main contact groups (the technical working group and the legal drafting group) were less formal and open for member states to take the floor. In the technical working group, most negotiating work was still done by the Commission. If the Presidency or other member states took the floor, they only did it to give additional arguments and to reinforce the EU position: they never diverged from the agreed EU line. In the legal drafting group, the Commission’s role was less prominent, as a couple of legal experts of the member states did a large part of the work. However, the legal working group can

⁵ On the PIC case, I interviewed 4 Commission officials and 4 member state representatives. On the POPs negotiations, 2 Commission officials and 7 member state (including Presidency and lead country) representatives were interviewed. The interviews took place between September 2006 and January 2007.

hardly be considered as a negotiating group, as this group's task was to put the texts coming from the technical experts into legal working.

The strong role for the Commission – *de facto* as the sole EU negotiator, the only agent – can be explained by five reasons. The combination of these reasons made the PIC negotiations, as a Commission representative described it, 'a very special case, which will never happen again'. Firstly, the PIC Convention largely deals with trade matters, and thus with exclusive Community competences. As the Commission is the formal EU negotiator for trade issues, it was also allowed to play a large role in these – nonetheless formally mixed – negotiations. Secondly, regulation 2455/92/EEC created the necessary competences for the Commission to act internationally as the EU spokesperson. However, even issues that were not covered by the regulation were *de facto* negotiated by the Commission. A member state representative formulated it like this: 'the Commission had competences on PIC, but if certain issues went beyond its competences, they were entrusted to the Commission as well'. Member states showed a pragmatic approach in granting the Commission a prominent role to increase the EU bargaining power, mainly vis-à-vis the US. Thirdly, the PIC negotiations took place under auspices of both UNEP and FAO. Contrary to its observer status in UNEP, the EC has full membership of FAO. This strengthened the Commission's claim to lead the EU during these negotiations. Fourthly, the experts from the member states came from their Designated National Authorities (DNA), responsible for the implementation of regulation 92/2455/EEC, and the Commission representatives were the Common Designated Authority. These technical people, who daily dealt with the chemical issues and who met very often in EU working groups and expert committees, had already established good relationships of personal trust. So, the technical nature of the PIC negotiations, in combination with the fact that the experts met regularly in Brussels the years before, strengthened the Commission's position. Fifthly, practical factors played a role as well. As the first INC, where the rules of procedure for the whole negotiation session were agreed, took place in Brussels, many Commission officials participated. Moreover, most third countries had sent negotiators from embassies in Brussels, who were familiar with the EU and who could accept more easily a role for the EC in the negotiations than representatives who would have come from the different capitals.

During the POPs INCs, the Presidency was the formal EU negotiator, leading the negotiations from EU side. However, the EU negotiation arrangement evolved during the two and a half years of negotiations, as a result of a varying degree of the various Presidencies' strengths.

In the first three INCs, the Presidency and the Commission (in INC 1 still on an informal basis) formed the EU negotiating team. Although POPs fall to a large extent under EC competences – especially the trade components –, the Commission failed to get a mandate for INC 1, when the rules of procedure

for the international negotiations were established. As the Commission was not authorized to negotiate for the EC by that time, it was not included as a negotiator in the UNEP rules of procedure. However, the Presidency provided the Commission the opportunity to speak in plenary on issues falling under EC competences: the Presidency officially asked the floor and passed it to the Commission. A member state representative described it like this: 'although the Presidency was the formal spokesperson for the EU, it did not mean that the Commission was a lame duck'. So, although the formal framework of the international negotiations did not allow the member states (Presidency) and the Commission to negotiate as the EU legal framework would suggest, in practice, they organized the division of labour following the internal division of competences. As member states did not make interventions in plenary during the first INCs, there has always been a single European line, coordinated internally.

The EU negotiation arrangement changed at INC 4, where the Presidency performed weakly⁶. As they could no longer rely on a well performing agent, various member states began to take the floor separately, which stood out against the 'single voice' strategy the EU had resolutely played in the previous INCs. The Commission then proposed a new negotiation arrangement based on a lead country approach. This basically meant that the different issues under negotiation – often the different articles of the draft Convention – were assigned to these member states that had most expertise and know-how on it and that wanted to take the lead in the international negotiations on behalf of the EU. In this new arrangement, individual member state experts took place next to the Presidency to negotiate on behalf of the EU on an issue they were specialized in. The Commission was sitting at the other side of the Presidency. So, when the EU took the floor in plenary, the Presidency immediately passed it either to the lead country expert or to a representative of the Commission. This system was also used during the last INC because all players admitted that this arrangement had worked very well. In the preparation of INC 5, teams of two or three member states (sometimes together with the Commission) were formed⁷. At that stage, the division between national and Community competences did not play a role anymore. Or as a Commission negotiator stated: 'you can be as fanatical about competences as you want, but if this leads to the fact that you are swept away at the international level, you have to be pragmatic'. These teams prepared EU position papers, took the lead in the coordination meetings and negotiated internationally for these issues.

Contrary to the plenary setting, where the European position was expressed with one voice (being the Presidency's, the Commission's or a lead country's), it was regarded useful that there would be

⁶ The main reason was that the expert of the member state holding the Presidency, who had conducted the negotiations in INC 1-3, was replaced by a diplomat, who had little experience with the POPs issues, for the time of the Presidency.

⁷ Examples of such teams were Portugal and the UK for the precautionary principle; Denmark, France and the UK for technical assistance and financial mechanisms; the Commission on dispute settlement and for the trade provisions; Belgium, Germany and the Commission for the waste issues; Sweden for liability; etc.

more than one negotiating voice in the various contact groups. So, member states were allowed to take the floor as well, but they had to respect the before agreed EU line. As contact groups by definition deal with specialized issues, the most experienced experts, from no matter which member state they came from, were recognized by every member state to speak on their behalf. In such settings, different European negotiators were reinforcing the common EU position by giving additional examples or arguments.

3.3. Control: how much power for the member states?

According to the principal-agent model, delegation of negotiation autonomy from the member states to the EU negotiator should go hand in hand with the establishment of control mechanisms. In this section, I check whether the six control mechanisms were used in the negotiations studied and how they worked in practice. For each control mechanism, I first elaborate its application in the PIC negotiations and then in the POPs negotiations.

[CONTROL MECHANISM 1: NO AUTHORIZATION] In both cases, the delegation of negotiation authority to the EU negotiator was not contested by the principals. So, this mechanism was not used as control. On the Commission's authority to negotiate the PIC Convention, a member state representative stated: 'for the technical people, who were involved in these negotiations and who worked together with the Commission for other things, it was normal that the Commission would negotiate'. It was taken for granted that the Commission, being the Common Designated Authority, having the competences on PIC and personally being trusted by the member states, would represent them. For the POPs negotiations, member state representatives admitted that 'it was never challenged that the EU would speak with one voice and that the Presidency would be the EU negotiator' or that 'it has never been an option that member states would do it separately'. So, neither in the POPs negotiations, this control mechanism was used.

[CONTROL MECHANISM 2: MANDATE] The Commission negotiated the PIC Convention on the basis of a mandate, which referred to the existing EC legislation. As a consequence, only the issues dealing with the PIC procedure as such – and e.g. not the idea of a framework convention or financial issues – were covered by the mandate.

The fact that the Commission did not have a mandate for INC 1 of the POPs negotiations may not be seen as *ex ante* control by the principals. The lack of mandate and authorization was caused by the Commission itself: it failed to initiate the proposal to the Council in time, probably due to practical problems (translation etc.) in the Commission. As for the formal EU negotiator, the Presidency, there

were no real negotiating directives (article 300 TEC only applies to the Commission as agent). The Council adopted a mandate for the Commission before INC 2.

[CONTROL MECHANISM 3: PRINCIPALS ATTENDING THE INTERNATIONAL NEGOTIATIONS] In both cases, member states were present during the international negotiations, both in plenary and in the contact groups, and they could control their negotiator. However, when the chairman of the PIC negotiations organized informal consultation meetings with the main players, not all EU member states participated, neither was it only the Commission representing the EU. In these meetings, which did not take place very frequently, a group of more involved and more interested member states could accompany the Commission. That group of member states grew naturally out of the process and also had more frequent and strong contacts with the Commission in the preparation for each INC. Only two or three times during the POPs negotiations, a limited negotiation setting was organized. In such a meeting, it was mostly the Presidency, accompanied by the Commission and the appropriate lead country, representing the EU.

[CONTROL MECHANISM 4: COORDINATION MEETINGS] EU coordination meetings took place every day – and often more than once a day – of the PIC and the POPs negotiations. During the PIC negotiations, member states also allowed the Commission to negotiate on their behalf on the idea of a framework convention and other issues that were not covered by regulation 92/2445/EEC *strictu sensu*. This ‘additional authorization’ happened in the regular coordination meetings on the spot. These meetings generated clear EU positions, always based on the existing internal legislation. In that sense, the member states granted a large room of manoeuvre to the Commission, although always within the clear boundaries of the regulation.

Also during the POPs negotiations, coordination meetings were held frequently. They were sometimes attended by the accession member states, if this was considered useful by the member states.

[CONTROL MECHANISM 5: INVOLUNTARY DEFECTION] During the PIC negotiating process, there was never a real threat of non-ratification by the EC or one of the member states. However, in the final hours of the negotiations, a member state representative, who was new in the process, threatened to block. This was quickly solved by the Commission. In the ratification stage in the Council, there was no discussion on the convention’s substance or on the question whether the EC should ratify it. However, the legal basis of the Community’s ratification decision became an issue under discussion, which generated tensions between Commission (agent) and the Council (principals). This dispute was solved by the Court of Justice in case C-94/03. This difficult ratification process may not be

considered as a sanctioning of the Commission by the member states because of the former's unfair negotiation behaviour or because of a dissatisfaction by the latter about the PIC Convention.

Neither during nor after the POPs negotiations, member states have threatened not to ratify the Stockholm Convention. The ratification decision as such was not a problem in the Council. However, there were some tensions among the member states on the implementation regulation that was proposed simultaneously by the Commission (e.g. on the internal EU procedure on how to propose new substances to be included on the Stockholm Convention).

[CONTROL MECHANISM 6: EFFECT ON FUTURE DELEGATION] Concerning the PIC negotiations, both member state and Commission officials stressed the fact that the situation of the Commission being the sole EU negotiator in environmental negotiations was unprecedented. The Commission aimed to avoid making a bad impression when they got for the first time a high degree of formal autonomy. Therefore, 'not to put in danger this whole experience', as stated by a Commission official, was an incentive for the Commission not to behave as an opportunistic agent. From this perspective, the Commission anticipated on this control mechanisms by which the principals could sanction the Commission in the future by not granting such a high degree of formal autonomy anymore.

I could not find such evidence for the POPs negotiations: neither member state representatives nor Commission officials state that they took into account the fact that after the INCs new delegation decisions could be taken on the basis of the POPs experiences.

As delegation minus control results in discretion, the EU negotiator's discretion in the PIC and the POPs negotiations can now be assessed. As in both cases the authorization decision was not difficult, the mandate relatively broad, and no real threat of an involuntary defection emerged, one can say that the member states granted a relatively large degree of autonomy to the EU negotiators. However, this was mitigated by an effective use of the control mechanisms in the negotiation stage (*i.e.* during the international negotiation sessions). The coordination meeting between agents and principals on the one hand, and the continuous presence of the principals around the international negotiation table on the other hand, reduced the agent's discretion enormously and made agency slack unlikely.

However, two elements point out that the Commission's discretion during the PIC negotiations can be considered larger than the discretion of the EU negotiator during the POPs negotiations. Firstly, whilst for the PIC negotiations, the scope of delegation to the Commission was broader in practice than stipulated in the mandate or than covered by EC competences, this was not the case during the POPs negotiations. Secondly, during the POPs INCs, the principals instructed their agents with comprehensive position documents including multiple tables with for every issue and for every article a EU position and a EU fallback position. Moreover, in the final stage of the POPs negotiations,

member states granted very little leeway with regard to some crucial points (e.g. as the precautionary principle or the link with the Basel Convention). I could not find evidence for such detailed and strict instructions for the EU negotiator in the PIC negotiations.

3.4. The compellingness of the external PIC and POPs negotiations

Let me now consider the compellingness of the external PIC and POPs negotiations and its effect on the ratification behaviour by the principals in the Council. The main argument is that in both cases, the degree of compellingness experienced by the member states was quite large and that the cost of no agreement was high for the EU and its member states.

As the EU took the most demanding positions in the PIC negotiations, it experienced the pressure from other countries and negotiation blocks, mainly led by the US, that wanted a less demanding convention. There was not only a pressure on the EU, but on the member states separately as well. A member state official expressed it as follows: ‘there was not only pressure on the Commission, but on the member states as well: we all wanted an agreement’. However, as there was little attention from the media, NGOs or public opinion for these negotiations, and as the subject of the negotiations (an information procedure) was not as urgent and as pressing as other environmental problems (e.g. POPs), the external compellingness was certainly present, yet not to an exceptionally high degree.

The external compellingness was even higher for the POPs negotiations. Member states were closely involved in the negotiations. Not only did five of the fifteen member states hold the EU Presidency – and, as a consequence, acted as EU negotiator in the course of the negotiation process –, but every member state could attend the plenary and the various contact group meetings. So, they were in an appropriate position to experience the pressure of the international negotiations. As the EU had a demanding preference at the international level, member states wanted to avoid blowing up the negotiation process, in particular at INC 5. The principals experienced, as noted by a member state official, a pressure in the sense of ‘we have to reach an agreement, we have started a process and we cannot stop it now’. That member states have reached consensus – and in particular that Denmark and Germany gave up their strong positions – in the final limited EU coordination meeting, was triggered by the compellingness of the international process. A Commission representative phrased this dynamic as follows: ‘the fact that Denmark did not stick to its position, is because of the pressure it felt. We told them: “if this really becomes a breaking point, it will be your responsibility”’. Ultimately, they found an agreement more important than having just that issue in the text’.

In such a setting with a high degree of external compellingness, member states, wanting to reach *a* Convention, rapidly came up with their private information about their final win-sets. So, the EU negotiator could base its bargaining space on the win-sets of the member states as would be used in

the ratification stage. For the PIC negotiations, the member states shared their information vis-à-vis the Commission regarding their positions and the range of possible agreements they were finally able to accept. The impression of the Commission that ‘member states were playing quite openly’ has been confirmed by the principals: ‘member states having hidden agendas or fallback positions vis-à-vis the Commission, that was not the case’.

The same holds for the POPs negotiations. An official from a member state holding the Presidency at an INC (*i.e.* an agent) stated: ‘nobody came with surprises. There were no hidden agendas or late indications of certain positions. It was in a quite good spirit and openness’. This was confirmed by other member state and Commission representatives, although one national official noted that ‘on the broad issues, we were all open, but when you come to the detailed issues, there can be fallback positions’.

4. Conclusions

Although both the PIC and the POPs Convention deal with international chemicals management, although both are mixed agreements with clear competences for the EC, and although both negotiation processes took place in a similar multilateral setting at the end of the 90s, the EU negotiation arrangement differed during both processes, as different agents negotiated on behalf of the EU. During the PIC INCs, the Commission acted as the only EU negotiator. On the contrary, the POPs Convention was formally negotiated by the Presidency, which was later accompanied by the Commission and lead countries as agents. Notwithstanding different actors took the agent role, both decision-making processes were characterized by three similar dynamics.

Firstly, in both negotiations, the EU managed to speak with one single voice. Although this voice was often expressed through several mouths (Cœuré B., Pisani-Ferry J., 2003), a single EU position could always be expressed. In plenary settings, the ‘single voice by a single agent mouth’ was used, whilst in contact and working groups, various EU actors mostly took the floor to present and reinforce the EU position.

Secondly, the practice of the EU negotiation arrangements in the two chemicals negotiations studied is often *ad hoc*. To be able to negotiate as efficiently as possible, practical arrangements are more decisive than formalities. This *ad hoc* approach was used both in the PIC and the POPs negotiations. The fact that the Commission was the only agent on PIC – also for issues falling under national competences – illustrates this point. On POPs, the *ad hoc* character of the EU negotiation arrangement is demonstrated by the negotiation role for the Commission, granted by the Presidency, in a situation where the Commission neither had a mandate nor it was considered as a negotiator in the international rules of procedure. The lead country approach, which was introduced on the spot, is also a manifestation of this dynamic: practical considerations play a much larger role than the legal

provisions of the decision-making process. From these two case studies, one can conclude that the division of competences in the EU does not play a crucial role in the way the EU negotiates, contrary to what would be expected from a legal and theoretical perspective.

Thirdly, from the six control mechanisms in the EU decision-making process I defined, the two mechanisms during the negotiation stage seem to be the most effective. As the authorization is not questioned, the mandate broad and the threat with an involuntary defection too politically costly, one would expect a high degree of autonomy for the EU negotiator. However, the two *ad locum* mechanisms, the member states attending the international negotiations on the one hand and the EU coordination meeting on the other hand, function very well. Moreover, they do not only have a control function, but a transmission function as well. The compellingness of the external environment is experienced by the member states during the negotiation sessions and transmitted to the ratification stage, where the cost of no agreement is too high to make use of the involuntary defection control mechanism of this stage.

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