

Chapter 1

Introduction

This book is about the European Union as a negotiator in international environmental negotiations. More in particular, it looks at the internal political processes in the EU when the EU negotiates multilateral environmental agreements (MEAs). In international environmental negotiations, the EU is mostly represented by a (set of) EU negotiator(s). The EU is often seen as a single actor, as a unitary negotiation partner. However, it is not. Within the EU, member states and the European Commission determine how the EU is functioning at the international negotiation level. These internal EU processes are analysed in this book. It focuses on the interplay between negotiations at the EU and at the international level. How does the EU function when it operates as global actor in the field of international environmental politics? How and to what extent do member states pool their voices, delegate negotiation authority and aim to speak with a single voice at the international level? In which way is a common EU position established? How does the institutional context of the EU transform the aggregated preferences of the member states into bargaining power that can be played in international negotiations? By answering such questions, this book analyses the decision-making process within the European Union in order to gain a better understanding of, on the one hand, the way the EU operates during international negotiations, and, on the other hand, the internal balance of power between the various EU actors.

The EU is usually seen as an important player in global environmental governance and international environmental negotiations. It has been labelled a 'frontrunner' (Damro, 2006), a 'crucial actor' (Damro, Luaces, 2001), an 'influential global actor' (Rhinard, Kaeding, 2006), or a 'powerful global actor' (Jokela, 2002). Some scholars even portray the EU as an 'environmental leader' (Zito, 2005; Kelemen, 2010).¹ Because the EU is an important player in the

1 The claim that the EU shows leadership in international environmental negotiations is particularly made with regard to biotechnology (Tiberghien, Starrs, 2004; Falkner, 2007) and climate change (Yamin, 1998; Chagas, 2003; Cameron, 2004; Costa, 2006; Schreurs, Tiberghien, 2007; Oberthür, Roche Kelly, 2008; Schmidt, 2008). However, other scholars question the leadership role of the EU, stating that this claim is only made by the EU itself (Jokela, 2002; Bretherton, Vogler, 2003; Dessai, Schipper, 2003; Vogler, 2005), that the EU has not yet fulfilled its leadership potential (Liberatore, 1997; Ott, 2001), that the EU is not perceived as a leader by the negotiation partners (Elgström, 2006; Elgström, 2007), or even that the EU is characterized by a 'leadership deficiency' (Sjöstedt, 1998). Although scholars do not agree on the leadership character of the EU, there is a broad agreement in the literature that the EU is a key player in international environmental negotiations.

negotiations, the negotiation role, positions, strategy and bargaining power of the EU have to be taken into account in order to understand the process and the outcome of international negotiations leading to an MEA. To comprehend the political dynamics and events at the international level, understanding the processes at the level of the key players is important. Therefore, the political processes inside the EU need to be unravelled. In the current international relations literature, it is generally assumed that explaining the behaviour of a political actor negotiating at the international level requires taking into account the politics at its internal level (Moravcsik, 1993; Milner, 1997; Jupille, 1999). Such actors are not black boxes and their internal political dynamics matter. This claim is certainly true when analysing the EU as an international actor. The EU is not a state with a single domestic level, but a complex multi-level polity with its own institutional context in which the preferences of the future parties to the MEA are aggregated, and possibly formed and transformed.

In conceptual terms, two kinds of actors take a central place in EU decision-making processes with regard to international negotiations: member states and EU negotiators. The member states are often represented by one or more actors, negotiating on their behalf. I label these actors the 'EU negotiator(s)'. In practice, the EU negotiator is usually the Commission, the Presidency, one or more member state(s), or any combination of these. The EU decision-making processes studied in this book are thus characterized by the relation between actors who are represented (the member states) on the one hand, and actors who represent them (the EU negotiators) on the other hand.

The central concept, around which the analysis in this book is built, is 'discretion'. Discretion should be understood as the autonomy, the range of potential independent action or the degree of freedom enjoyed by the EU negotiator vis-à-vis the member states. The discretion enjoyed by the EU negotiator vis-à-vis the member states is crucial to understand the dynamics and the outcomes of the international negotiations. It determines the EU's flexibility with regard to reacting on proposals by the negotiation partners and it determines how far the EU negotiator can go along with the direction in which the international negotiation process and its outcome are moving. In other words, the EU negotiator's discretion defines whether the EU negotiator constantly needs to consult the member states or whether the EU negotiator can react with a certain degree of autonomy to the dynamics of the international negotiations. The extent to which the EU negotiator's hands are tied is thus decisive for his negotiation behaviour at the international level (Moravcsik, 1993; Meunier, 2005; Meunier, Nicolaidis, 2006).

1. Aim of the book

1.1. Research question

The aim of this book is to answer the following research question: *which conditions determine the EU negotiator's discretion vis-à-vis the member states during international negotiations leading to a multilateral environmental agreement?* In order to identify the conditions under which the EU negotiator enjoys a particular degree of discretion, this book goes beyond the single case study method, as it has been used in studies on the EU decision-making process with regard to other external policies of the EU (mostly in the trade policy domain). It analyses and compares the EU negotiator's discretion in eight international negotiations leading to an MEA: the UN Desertification Convention, the African-Eurasian Waterbirds Agreement, the Kyoto Protocol, the Aarhus Convention, the Rotterdam PIC Convention, the Cartagena Protocol, the Stockholm POPs Convention and the SEA Protocol.

By studying the EU negotiator's discretion, I focus on the core element of the EU decision-making process and of the relation between the representing and the represented actors: the balance of power in the EU. Do the member states still dominate the process or is the degree of discretion enjoyed by the EU negotiator so high that the latter rules the process? Which actors or which institutions are pulling the strings in the context of the EU as an actor in international environmental politics: those who delegate or those who represent, or – in the theoretical terms used in this study – the principals or the agent? In their overview and assessment of research dealing with similar questions in the area of the EU's external trade policy, Dür and Zimmermann mention that various authors come to different conclusions on the question whether the EU negotiator enjoys a high degree of discretion or not (Dür, Zimmermann, 2007).² This may indicate that the EU negotiator's discretion is not constant in every decision-making process and that the research focus should be shifted from explaining the EU negotiator's discretion in a single decision-making process towards identifying the scope conditions and causal mechanisms of discretion. This book takes the observation by Dür and Zimmermann as a starting point and aims to identify the conditions under which the EU negotiator enjoys a particular degree of discretion.

1.2. Puzzle

Studying EU decision-making processes with regard to negotiations leading to an MEA not only contributes to a better understanding of the EU's role in

2 As examples of studies demonstrating that the Commission dominates the process, Dür and Zimmermann mention Johnson, 1998; Coleman, Tangermann, 1999; and Woll, 2006. By contrast, examples of studies emphasizing member state dominance are Aggarwal, Fogarty, 2004; De Bièvre, Dür, 2005; Meunier, 2005; and van den Hoven, 2004.

international environmental politics. It is also particularly relevant and interesting from the perspective of EU politics because of a twofold reason. First, it teaches us something about the way the EU deals with so-called ‘mixed agreements’, which are an increasingly important component of the EU’s external relations. Second, the study of these decision-making processes fits in the framework of the general debate about the balance of power in the EU. Both the member states and the EU negotiators are faced with dilemmas. Their respective trade-offs do not only determine the way the EU negotiates at the international level, but also the internal balance of power within the EU. Let us have a deeper look at these two points.

1.2.1. Mixed agreements as an increasingly important component of the EU’s external relations

Most research on the EU as an international actor deals with either the Common Foreign and Security Policy (CFSP) or the EU’s external trade policy. These policy areas constitute the ends of the intergovernmental-supranational continuum of the EU’s external relations. CFSP is characterized by an intergovernmental dynamic, national competences and member states maintaining their sovereignty as international actor, although possibly represented by a common representative, such as the High Representative or previously the rotating Presidency. External trade policy, by contrast, has a more supranational character, based on EU competences, which mostly results in the Commission negotiating at the international level on behalf of the member states. While the CFSP is mainly member state driven, the Commission plays a key role in trade policy-making. The EU’s external environmental policy is situated somewhat in-between both ends of the continuum.

So far, less scholarly attention has been paid to what happens in the middle of this continuum. This might surprise as many issues in international politics are covered by the competences of both the EU and the member states. These are ‘shared competences’ and the international treaties touching upon this kind of competences are ‘mixed agreements’. Both the EU and the member states are a party to these agreements. Mixed agreements do not only occur in the environmental policy domain. Other well-known examples are the EU-US Open Skies Agreement, various Stabilization and Association Agreements with Balkan countries, or trade agreements including the so-called ‘new trade issues’³ (Meunier, Nicolaïdis, 2000; Leal-Arcas, 2003; De Bièvre, Dür, 2005; Billiet, 2006; Dür, Zimmermann, 2007). Nowadays, mixed agreements are thus part and

³ In the introduction to the special issue of Journal of Common Market Studies on the EU in international trade negotiations, Dür and Zimmermann mention that ‘the constant expansion of the scope of international trade created substantial tensions between the Council of Ministers and the Commission over how to negotiate and how to ratify international agreements on “behind the border” issues’ (Dür, Zimmermann, 2007, pp. 773-774). This puzzle, emerging the last decade in the international trade area, has been present in the EU decision-making processes with regard to international environmental negotiations since a long time.

parcel of the day-to-day practice in the external relations of the EU. Therefore, the limited attention in the political science literature for the way the European Union copes with (negotiations on) mixed agreements is striking. By contributing to the understanding of the functioning of the EU in this kind of international politics, this book aims to fill a significant gap in the existing literature.

As both the EU and the member states will become a party to an MEA, they are both present around the international negotiation table. The issues covered by EU competences should be negotiated by the European Commission, while the member states can formally negotiate the issues on which they still have competences. However, such a clear division between EU and national competences undermines the EU's ability to speak with a single voice, which is assumed to decrease its bargaining power (Frieden, 2004). Practice teaches us that the member states usually opt to pool their voices and to delegate negotiation authority to one or more EU negotiator(s). Question is then how the EU deals with the tension between the striving to be perceived as a strong negotiation bloc on the one hand and the legal situation, which suggest a division in the negotiation arrangement, on the other hand (Delreux, 2006). The EU decision-making process with regard to negotiations leading to a (mixed) MEA is a clear example of the hybrid nature of the EU: neither a state nor an international organization, neither completely supranational nor fully intergovernmental. It is intriguing to examine how the EU deals with this tension between supranationalism and intergovernmentalism, given the particular political international context of international environmental politics in which the EU strives to play an important role. In this respect, studying these processes goes to the heart of the EU's nature.

1.2.2. Balance of power in the EU: a dilemma for the member states and the EU negotiator

When MEAs are negotiated, both the member states and the EU negotiator are confronted with a political dilemma. This means that they have to make choices and that these choices determine their political behaviour in the EU decision-making process. One of the driving questions behind the study of the EU negotiating MEAs is how the member states and the EU negotiator cope with their dilemmas.

The dilemma for the member states departs from the assumption that member states want to influence MEAs. This is a plausible assumption because these international treaties affect to a large extent the costs and benefits of the domestic policies of their parties, including the EU member states. They need to be implemented, which influences policies in various domains, including agricultural, industrial, transport, external trade or food safety policy. Because of the deep and widespread effect on their domestic policies and political choices, national governments seek to influence the outcome of the international negotiations.

Aiming to influence the substance of an MEA, member states are confronted with a dilemma. On the one hand, a member state has to make sure that its preferences about the provisions of the MEA are presented at the international level, thereby aiming that the outcome of the negotiations moves in the direction

of that preference. This strategy requires that the preference of a member state is purely and clearly presented during the negotiation process. On the other hand, a member state has to make sure that its preference is presented as strongly as possible at the international level and that the negotiation partners take it into account. This strategy requires that the preference is backed by a large degree of bargaining power. In the context of the EU, this can be achieved by working via an EU negotiator, representing the member states jointly.

However, these two strategies are not fully compatible, which generates a dilemma for the member states. The first strategy is most adequately realized by negotiating on its own, without being hindered by the straitjacket of the EU and the common position resulting from the aggregation of the various member state preferences. Indeed, the aggregation of preferences with the other member states by definition entails compromising on one's own preference. To realize the second strategy, however, it is instrumental to develop a common EU position to be presented at the international level on behalf of the EU as a whole. It is clear that the cost of the one strategy is the benefit of the other, and vice-versa. The benefit of negotiating directly at the international level is that a member state is sure that its own preference is presented during the international negotiations, while its cost is that the relative bargaining power behind that preference may be very limited. This can be undone by negotiating via the EU and by delegating negotiation authority to an EU negotiator (benefit of negotiating via the EU level), although this implies that its preference can be distorted with these of the other EU actors (cost of negotiating via the EU level).

This dilemma and the constant trade-off that member states have to make is the key puzzle when looking at the EU decision-making process from the member states' point of view. Do the member states grant a large degree of autonomy to an actor who speaks on their behalf, do they limit his discretion or do they even preserve this power for themselves, given the costs and benefits of delegation to an EU negotiator? To what extent are national governments prepared to yield authority and power for negotiations that will affect the national policies they will have to execute and to sell to their constituents afterwards?

Not only the member states are confronted with a dilemma about the degree of negotiation autonomy they should grant to the EU negotiator. Also the EU negotiator faces a dilemma about the discretion he enjoys. Since the EU negotiator operates simultaneously at the international and the EU level, he is engaged in two negotiation contexts, generating different – and often contradictory – expectations about his behaviour. On the one hand, the EU negotiator has to represent the member states and their common position, which results from an aggregation of the various national preferences. In that sense, the EU negotiator's hands are tied by the member states (Meunier, 2005; Meunier, Nicolaïdis, 2006), although the degree of being bound can considerably vary. What matters is indeed that the EU negotiator ultimately has to get the approval of the member states on the internationally reached agreement. On the other hand, the EU negotiator is involved in the negotiation dynamics at the international level. At this level, the

EU negotiator experiences the pressure coming from negotiation partners to agree – and thus to compromise – on certain provisions of the MEA. Consequently, the EU negotiator faces a Janus-like role, as he is the actor connecting two political processes at different levels, which generate different expectations from him (Putnam, 1988; Patterson, 1997; Damro, Hardie, MacKenzie, 2008).

The key question is how far the EU negotiator is able to engage in the international negotiation process, while still reasonably expecting that the member states will not reject his international commitments afterwards. The delicate trade-off that he constantly has to make is to satisfy the international negotiation partners by making commitments in order to reach an international agreement, while assuring that the member states will not blow the whistle on him afterwards. How much additional autonomy can the EU negotiator conquer vis-à-vis the member states to negotiate at the international level until he will face a rejection at the EU level, causing a loss of face vis-à-vis the international negotiation partners?

1.3. Argument and data

This book sheds light on the EU decision-making process with regard to international environmental negotiations and aims to explain the discretion enjoyed by the EU negotiator in such processes. On the basis of comprehensive case studies and a formalized cross-case analysis, the following claims are made:

- the EU decision-making process can be modelled as a principal–agent relation that is extended in a threefold way: taking into account the international negotiation context, considering the mixed nature of MEAs, and incorporating dynamics that emphasize the possible cooperative nature of EU decision-making;
- the compellingness of the international negotiations, i.e. the pressure coming from the external negotiation partners to reach agreement, is a necessary condition for an EU negotiator enjoying discretion vis-à-vis the member states. However, more qualified explanations, stressing the role of institutional density, the level of politicization and the distribution of preferences and information, are needed to understand why the EU negotiator enjoys a particular degree of discretion;
- the relation between member states and their negotiator is characterized by an interplay of bidirectional cooperation and control;
- in practice, the EU decision-making process does not completely follow the path that can be expected from a legal point of view. Pragmatism is often more decisive than formal rules and the division of competences, both in determining how the EU negotiation arrangement is organized and how the decision-making process develops; and
- both the member states and the EU negotiator are able to find a balance in their respective dilemmas as sketched above, if they invest sufficient and appropriate political capabilities in the process.

The empirical data for this study is based on different and multiple sources. This triangulation allows me to strive for confirmation and completeness (Arksey, Knight, 1999): the different sources are used to check each other's reliability (confirmation) and to solve each other's shortcomings (completeness). Moreover, it allows me to apply the data collection strategy of 'process-tracing': I reconstruct the (decision-making) processes on the basis of various sources (Checkel, 2001; Pollack, 2002; Checkel, 2004; Niemann, 2004; Checkel, 2005a; Checkel, 2006). Five different sources of information are used.

First, the main source of information was *semi-structured interviews* that were conducted with officials from the member states and the Commission who were involved in the decision-making processes.⁴ My questions probed the respondents' evaluation of a certain decision-making situation. The questions did not deal with the interviewees' own positions or decision-making behaviour: they rather measured their assessment of the decision-making process as a whole.⁵

Second, *secondary literature* on the studied cases was consulted. Although there is a high degree of variation in the number of publications about the various EU decision-making processes and international environmental negotiations, a couple of articles were available on most of the cases.⁶

Third, *media and press reports*, covering the international negotiations, were checked. For information on the negotiations at the international level, *Earth Negotiation Bulletin* is an indispensable tool, since this online publication covers, on a daily basis, most global environmental negotiations.⁷ For following the decision-making process at the EU level, I used *Agence Europe* and *European Voice* as media sources.⁸

4 All interviews were conducted between June 2006 and January 2007. The affiliation of the 61 interviewees, their role in the decision-making process, and the details of the interview are included in appendix A.

5 In order to check whether my interpretation of the data corresponded to the reality of these decision-making processes, each of the case studies presented in Chapter 4 was read and reviewed by a couple of interviewees, who proposed corrections and supplementations if this was needed. This check allows me to claim a high degree of validity for my empirical data.

6 However, as the majority of these articles covered the substance, consequences or an evaluation of the MEAs, very few of them dealt with the negotiation process as such or with the role of the EU during these negotiations.

7 *Earth Negotiation Bulletin* is published by the International Institute for Sustainable Development. Its archive is available on <http://www.iisd.ca/voltoc.html>. From the negotiations that were studied in this research, the negotiations on UNCCD, the Kyoto Protocol, the Rotterdam Convention, the Cartagena Protocol and the Stockholm Convention were covered by *Earth Negotiation Bulletin*. The three 'less multilateral' negotiations (on AWEA, on the Aarhus Convention and on the SEA Protocol) were not covered.

8 However, the level of attention paid to the selected EU decision-making process was rather limited, even in these publications.

Fourth, I had the opportunity to investigate *informal and (semi-)confidential documents* with regard to the EU decision-making processes. Official EU documents on the studied decision-making processes only contain the official decisions to sign or to ratify the MEA. Neither the official reports of the Council meetings nor the official press releases provide detailed information on the variables used in this study. The real interesting information is often preserved in decision-makers' personal archives and informal, (semi-)confidential documents. For five cases, I could examine the personal archives of some of my interviewees. In this way, I collected personal notes and reports on the various negotiation sessions and the EU decision-making processes on the one hand, and confidential EU documents and notes on the other hand.

Fifth, *participatory observation* in both international environmental negotiations and EU decision-making processes with regard to these negotiations made my views and ideas about the EU as international environmental negotiator more concrete and it helped to contextualize my findings.⁹

2. Structure of the book

In order to answer the research question, a number of successive steps are taken. I begin with a legal perspective on the EU decision-making processes with regard to international environmental negotiations (Chapter 2). Starting from the research subject and research question, I then elaborate a theoretical model, on the basis of which the research design is developed (Chapter 3). The empirical part of this book consists of one descriptive and two analytical chapters (Chapters 4-6). Finally, the conclusion answers the research question and refers back to the theoretical insights (Chapter 7).¹⁰

9 As the selected cases all took place before my research started, I was not able to attend those EU decision-making processes. However, to get an insight in the structure and the dynamics of international environmental negotiations and EU decision-making processes with regard to them, I attended similar meetings, both at the EU and the international level.

10 Since some chapters draw on ideas that were previously published, I thank the respective publishers for allowing me to use these materials. Chapter 2 is based on my article 'The European Union in international environmental negotiations: a legal perspective on the internal decision-making process', *International Environmental Agreements*, 6(3), 2006, 231-248. The first part of Chapter 3 makes use of material first published in 'The EU as a negotiator in multilateral chemicals negotiations: multiple principals, different agents', *Journal of European Public Policy*, 15(7), 2008, 1069-1086. Sections of Chapter 4 have appeared in 'The European Union in International Environmental Negotiations: an Analysis of the Stockholm Convention Negotiations' in *Environmental Policy and Governance*, 19(1), 2009, 21-31 and in 'The EU in Environmental Negotiations in UNECE: An Analysis of its Role in the Aarhus Convention and the SEA Protocol Negotiations' in *Review of European Community and International Environmental Law*, 18(3), 2009, 328-337.

The current Chapter 1 revealed why the EU decision-making process with regard to international negotiations leading to an MEA is a relevant and challenging research topic. Studying this topic promises to provide interesting insights about both the processes in international environmental politics and about the political dynamics at the EU level. On the basis of these puzzles and the gaps in the existing literature, the research question was defined, emphasizing the quest for the conditions determining discretion enjoyed by the EU negotiator.

Chapter 2 describes the legal framework of the EU decision-making process with regard to mixed agreements. As a legal framework determines the basic rules of the game on the basis of which political actors engage in political processes, I start the examination of the EU negotiator's discretion by looking at what the Treaties and the rulings by the European Court of Justice (ECJ) say about the EU conducting international negotiations resulting in mixed agreements.

Chapter 3 translates the elements from the legal decision-making procedure into a theoretical framework. As the decision-making process is essentially about the delegation of negotiation authority from one set of political actors to another, I use the principal-agent model to theoretically frame the decision-making process. The member states are conceptualized as 'principals', the EU negotiator as 'agent'. After building the principal-agent model, I extend it in a threefold manner, allowing me to introduce the particular reality of international environmental negotiations into the model. First, the concepts 'private information for the principals', 'political cost of no agreement' and 'compellingness of the external environment' are introduced, and their expected effects on the agent's discretion are discussed. Second, I extend the model to grasp the mixed nature of MEAs. Third, I enrich the model with insights from sociological institutionalism. At the end of Chapter 3, I present the research design. On the one hand, the variables are selected in a theory-driven way. On the other hand, I argue why I analyse the eight selected cases: the EU decision-making processes with regard to the international negotiations leading to the UN Desertification Convention, the African-Eurasian Waterbirds Agreement, the Kyoto Protocol, the Aarhus Convention, the Rotterdam PIC Convention, the Cartagena Protocol, the Stockholm POPs Convention and the SEA Protocol.

Chapter 4 is the descriptive part of this book. The different aspects of the eight selected EU decision-making processes are presented. This chapter offers a descriptive and systematically structured overview of the cases. It provides the reader with eight stories of how different EU decision-making processes with regard to negotiations leading to MEAs worked in practice. Moreover, this chapter functions as a point of reference to consult the empirical data when the next analytical chapters are read.

Chapter 5 expands the findings published in 'The EU negotiates multilateral environmental agreements: explaining the agent's discretion' in *Journal of European Public Policy*, 16(5), 2009, 719-737, and some sections in Chapter 6 are based on 'Cooperation and Control in the European Union. The Case of the European Union as International Environmental Negotiator' in *Cooperation and Conflict*, 44(2), 2009, 189-208.

In Chapter 5, the data is analysed by means of Qualitative Comparative Analysis (QCA). By guiding the reader through the different steps of the empirical analysis, I show which combinations of conditions explain a particular degree of discretion enjoyed by an EU negotiator. Moreover, the QCA results are interpreted in the light of the empirical data, presented in the previous chapter, and the causal mechanisms behind the combinations of conditions and the outcome are identified. This allows me to combine the explanatory power of QCA with the empirical richness of my data.

Chapter 6 analyses the EU decision-making process with regard to international negotiations leading to an MEA from a more general point of view. Whereas the previous chapter took the case-specific characteristics of the decision-making processes into account, this chapter aims to make more generalizable claims about the way such EU decision-making processes work in practice. Therefore, this chapter returns to the variables. Going back and forth between theory and empirics, this chapter discusses the general organization and determinants of the EU negotiation arrangement and the various aspects in the relations among the actors involved in the decision-making process. I also evaluate the different steps and the outcomes of the decision-making process and I address the extent to which sociological institutionalist elements have to be taken into account to supplement the traditional rational choice inspired principal-agent perspective on delegation from the member states to an EU negotiator.

In Chapter 7, the conclusions of this book are presented. Taking into account the results of the empirical analysis, I return to each of the previous chapters and I formulate answers to the questions developed in these chapters. More in particular, I answer the research question, as presented in the current chapter, and I elaborate how the member states and the EU negotiator cope with the dilemmas identified above. Furthermore, the legal framework of the decision-making process is compared to the way the process is conducted in practice. The theoretical framework – both the basic principal-agent model and the three extensions – is evaluated and the assumptions and propositions are assessed. I also evaluate the QCA research approach.