

Single voice, single chair?

How to re-organise the EU in international negotiations under the Lisbon rules

Piotr Maciej Kaczyński

Introduction

The United Nations Climate Change Conference in Copenhagen last December taught many lessons to the participating stakeholders. The European Union learned that a choir of European leaders could not sing convincingly even with a single voice. These lessons are still being processed in many national capitals and in Brussels, especially in the context of the new legal framework provided for by the Treaty of Lisbon, which entered into force on 1 December 2009. It is important to recognise, however, that the new rules came into effect only after nine long years of negotiations and its application is being tested in a wholly different international environment than prevailed in the early 2000s.

For this reason, many questions are being re-examined in light of the new post-Copenhagen and post-Lisbon Treaty reality. This paper aims to explore the possibilities offered by the provisions *and* the 'spirit' of the new Treaty in the context of the complex internal political situation in the EU. First, we present the previous decision-making system, which many stakeholders would like to see preserved. It was an acceptable way for all partners (the European Commission, the Member States) to organise the Union in international negotiations. Second, we examine the relevant provisions of the Treaty of Lisbon. Third, we look at how the system can be reformed in order to improve the EU's leverage and effectiveness in international negotiations.

This paper does not examine the strategic and tactical choices made by the EU's negotiators in the global climate talks. Rather, the ambition is to look at the *institutional* and *organisational* arrangements of the process, which by themselves alone would not be sufficient to ensure success; but which are nevertheless necessary for success.

L'ancien régime

To illustrate the Union's preparations for and negotiations of international agreements in external dimensions to internal EU policies, it is best to examine a specific example that would be applicable in other areas, such as consumer protection, transport, freedom, security and justice or fisheries. This is the case of EU environment policy. Legislation in this area is the result of the co-decision process between the European Parliament and the Council of Ministers. Preparations for the EU mandate in international negotiations were managed primarily in the Council. Specific working parties prepared draft proposals, which then were adopted by Coreper I and the Environment Council. In extreme cases, when internal EU talks on the mandate provided for the negotiations would be of great complexity and importance, the issue would be referred to the European Council. This was the case of the Copenhagen EU mandate, which was adopted during the October 2009 European Council.¹

¹ See Presidency Conclusions, Brussels European Council, 29-30 October 2009 (para. 4-25).

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The EU-led negotiations themselves were managed by the EU Troika, which was composed of the EU rotating Presidency (in December 2009: Sweden), the incoming EU rotating Presidency (Spain), and the European Commission. The Troika was also assisted by the staff of the General Secretariat of the Council of the European Union.

A defining feature of the pre-Lisbon system was the fact, in addition to the official EU representation, individual EU stakeholders were still full participants in the negotiations as UN members. As a result, even in the absence of a cacophony of voices (single voice), there was still a problem with a multiplication of political representations, which had the effect of undermining of the official EU negotiators' position.

Agreeing on and preserving the single voice was never easy. When 27 diverse states agreed on a joint position, a certain degree of inflexibility was built into that very position. Limited trust among European leaders only contributed to the design of a negotiations mandate that included not only the objectives of the negotiations, but also a long list of restrictions on how they could be achieved. The same limited trust increased the inflexibility of the EU position. Any radical shift in negotiations would necessitate another informal gathering of European leaders who would ad hoc decide to change the EU joint position. In the meantime, other stakeholders could wait for the EU to agree... or not and pursue the process without the Europeans.

Multilateral international negotiations are managed at many levels simultaneously. The EU lacked a comprehensive set of instruments enabling it to manage those negotiations effectively. Each of the rotating presidencies relied on its national web of diplomatic missions and the Commission, on its network of delegations to third countries. In the UN climate change process, extra resources were also necessary. Hence some Member States' diplomats participated in activities aimed at building coalitions during the negotiations.

As a result, the system became quite complex; duplication of effort and shortcomings became unavoidable. For example, the EU negotiations with third parties became vulnerable to the dedication of national diplomats, many of whom had very little EU professional experience. Those activities were not centralised with the consequence that some EU Member States were reluctant to share with fellow EU states, including the Presidency, information gained through bilateral talks with third countries.

The system contained some positive characteristics, the most important ones deriving from the diversity of EU Member States and their diplomatic cultures. Certain EU Member States possess excellent knowledge about third states (in terms of

understanding their culture of negotiations), as a result of their former colonial possessions or through linguistic or religious proximity. Proper application of these unique skills could facilitate a solution favourable to the EU in the wider international context.

The Lisbon Changes

Article 47 TEU states: "The European Union shall have legal personality." This basic provision allows the Union to be represented in international negotiations. Before December 2009, there was a double explanation for the existence of Troikas. First, only the European Community had a legal international status and the Common Foreign and Security Policy was conducted outside of the legally binding framework. Hence the European Commission could not represent the foreign policy aspects of the international negotiations; this could be done only through the political representation of the Member States. Since 1 December 2009, this dualism of what the "Union" is has been removed as the European Union has a full legal personality.

The second explanation of Troikas is based on the fact that in most international negotiations the competence of the Union (legally, the Community) was shared between the Union (Community) and the individual Member States. Hence both sides of the system (the Commission, Member States) needed to be present at the table since all of them executed a shared competence. This issue has not changed in the context of climate change policy, which under the Lisbon Treaty remains a shared competence between the Union (now with a legal personality) and the members of the EU.

Nevertheless, the reasons for the Troika's existence can be challenged by the new institutional system introduced by the Lisbon Treaty. At the European Council level, the rotating presidency has been replaced by the permanent President; in foreign affairs at the Council of Ministers level, the rotating presidency has been replaced by the High Representative for Foreign and Security Policy. In matters of external representation, the treaties are now more explicit than before. The Commission "...shall ensure the Union's external representation (...)" with the exception of Common Foreign and Security Policy matters (here, this role lies with the High Representative).² It could mean that whenever the EU is to be represented it can be done only by the European Commission, High Representative or President of the European Council. No specific role for the rotating presidency is envisaged.

Henceforth, the external representation of the EU in international negotiations poses two fundamental

² Article 17 TEU.

questions: can and should the Troika remain? And if so, what is its composition and who should lead the way within it?

The provisions on how the Union negotiates international agreements have also been changed.³ In the case of non-foreign and security policy negotiations, the treaty provides for a procedure, that the Commission starts by sending a recommendation to the Council to open the talks. The Council then takes a formal decision to start the process and nominates a negotiator or the negotiating team's head. The negotiations are carried out by the team (or a single person), but the Council can give directions to the negotiators and appoint a special committee, whose advice must be heeded by the Union's negotiators. For the Council to conclude the agreement upon the negotiator(s) proposal, it needs to obtain the European Parliament's consent (i.e. in climate negotiations) or opinion. The legislature also needs to be kept up to date on progress during the entire process. With few exceptions (i.e. association agreements), the Council takes the final decision by qualified majority vote. The European Court of Justice keeps an oversight over any agreement's compatibility with the Treaties.

The new elements are the following:

- The negotiations are carried out by the negotiator or negotiating team, and not necessarily by the Commission.
- The European Parliament's right to consent to agreements has been significantly enlarged.
- The application of the majority vote in the Council has been widened.

The new Treaty also creates the European External Action Service,⁴ which should become the primary instrument for the Union negotiators to lead simultaneous bilateral negotiations with third partners. The way the national EU diplomacies are coordinated (previously by the rotating Presidency) would be determined by the High Representative.⁵

Political Reality Check

There are at least three different types of representation in external policies of the Union: 1) policies in which the Union has exclusive competence (e.g. trade), 2) external dimensions of internal Union policies and 3) the Common Foreign and Security Policy. The demarcation between the external dimension of an internal Union policy, on the one hand, and the foreign and security policy, on the other hand, however, is not always clear. For example, the climate change

negotiations within the UN could (and for many reasons, should) also be regarded as a foreign policy, where the representation and guiding rules of this policy could apply. An element of this approach could already be discerned in the letter to the Heads of State or Government by President of the European Council Herman Van Rompuy concerning the Informal meeting of 11 February 2010: the President indicated the need to “talk about the lessons to be drawn from Copenhagen for our relations with strategic partners”.⁶

Apart from the question of what kind of policy is being negotiated in the climate talks, there is also the issue of expectations of various stakeholders: the European Commission, the Member States and the new institutional actor – the European Parliament. The initial reaction in the national capitals in this respect was to agree to changes that are necessary, but not to move much further. Some states were also worried that taking a decision by a majority vote rather than by a consensus would limit their negotiating position within the Union.

On the European Commission side, the following questions need to be addressed:

- Is the Commission ready to take the lead in seeing that the EU's negotiators' mandate is broader than it has been in the past?
- Is the Commission willing to propose becoming the Union's sole negotiator (i.e. without the rotating Presidency and incoming Presidency)?
- If not, is the Commission willing to take the lead within the Troika in the negotiations (i.e. a shift from the rotating Presidency)?
- Who would be the Commission's representative in the process?
- If the Commission's representative would not be the High Representative, but a different Commissioner – what kind of relationship would there be between this Commissioner and the new External Action Service?

In principle, the Commission seeks to increase its role in negotiating all international agreements. Wherever and whenever it is possible to agree with the Member States for the Commission to be the only EU negotiator (without the Member States represented by the rotating Presidency), this most likely is going to be the Commission's objective.⁷ Among the arguments

³ Article 218 TFEU.

⁴ Art. 27 (3) TEU.

⁵ Art. 34 (1) TEU.

⁶ Invitation letter by Herman Van Rompuy, President of the European Council, for the Informal meeting of Heads of State or Government, Brussels, 8 February 2010, PCE 25/10

⁷ For example, in the ongoing mercury negotiations, the Commission would like to be the sole EU representative despite the fact there are elements of shared competence in the negotiating mandate (environment dossier). At the time of writing, no agreement has been reached in the Council on the EU's

(beyond the Treaties) the Commission can advance for such a move are the benefits of a single representation (i.e. efficiency). However, the obvious cost in those cases is usually a tighter negotiating mandate.

In cases where a unified representation in international negotiations is unacceptable for Member States, the Troikas shall remain, as already demonstrated in the UNFCCC process.⁸ Within the Troika, however, the Commission aspires to play the role of leader: “A stronger role for the Commission will help ensure that the EU speaks with one voice”.⁹

In 2009, the Commission’s representative in the climate talks was the Environment Commissioner Stavros Dimas, but within the new College (in office since February 2010) there is a new Commissioner for Climate Action. Her mandate is to play

...a central role in continuing EU leadership in fighting climate change and leading our [EU’s] negotiations on climate as well as helping the EU to deal with the consequences of climate change...¹⁰

Therefore if the responsibility now resides with the Commissioner on Climate Action, Connie Hedegaard, who is to have a central role for all the Union’s actions, there is a natural expectation on the part of the External Action Service to be at her disposal.

There are, however, two points that may make the Commission’s plan for action difficult. First, there is a potential reluctance among Member States to allow the Commission to play the central role in leading the Union’s efforts in climate negotiations (also in terms of physical presence in Cancun in November/December 2010). There might even be attempts to undermine Commissioner Hedegaard’s internal leadership in the process. A second problematic issue relates to the negotiators’ mandate. At the end of the day in Cancun, the Union may find itself in similar situation to that experienced in Copenhagen: the mandate given to the Union’s representatives might be too tight and might require the presence of additional EU leaders on the spot. In

representation. For more on the global mercury negotiations, see <http://www.worldwatch.org/node/6024>.

⁸ In an interview, a stakeholder indicated that the Commission proposed to keep the joint system of representation (Commission and Member States) in the UN climate negotiations, but the decision had not been taken at the time of writing.

⁹ Communication from the Commission, “International climate policy post-Copenhagen: Acting now to reinvigorate global action on climate change”, COM 2010 (86) final, Brussels, 9 March 2010, p. 5.

¹⁰ Commissioner Connie Hedegaard’s mandate provided by President Barroso on 27 November 2009 (http://ec.europa.eu/commission_2010-2014/hedegaard/about/mandate/hedegaard_climate_en.pdf).

the meantime, other global stakeholders might decide not to wait for the Europeans...

There is also a new internal EU stakeholder, the European Parliament. Members of the legislature are very interested in the UN climate process and will have a say in accepting any final accord. The parliamentarians have shown the ambition to enlarge their collective influence beyond the Treaty’s provisions. For example, in the context of international negotiations, they would like to have a say in the negotiators’ mandate. Additionally, the Commission envisages a role for the EP to “engage fully with parliamentarians from key partner countries.”¹¹

Two Options

There seems to be an expectation that the new Treaty of Lisbon can ensure greater efficiency of the Union’s actions and provide for increased leverage in international negotiations. For this to happen, however, two issues need to be examined. First is the question of the flexibility of the mandate of the EU negotiators. Second is the issue of EU representation at the next UN meetings.

The international climate negotiations remain a shared competence where there are roles to be played by the European Union and its Member States. It is important to remember that the latter have every right to participate in the UN process as UN members. Their activities at the global level, however, cannot be managed independently of the EU policy. The Union and its Member States need to cooperate closely “both in the process of negotiation and conclusion and in the fulfilment of the obligations entered into”.¹²

There can be various arrangements for organising that cooperation. In this regard, there are two main options on how to proceed with the organisation of the EU’s international negotiations on climate matters.

The first option is based on the logic of adapting the old system to the new rules by introducing only those changes that are unavoidable. The Treaty can be interpreted in a way that allows for a narrow adaptation as if there were no major changes. Therefore there would remain:

- Division of competences and labour between the Commission and the Member States; and
- Representation of the Member States provided by the rotating Presidency of the Council.

¹¹ Communication from the Commission, “International climate policy post-Copenhagen: Acting now to reinvigorate global action on climate change”, COM2010 (86) final, Brussels, 9 March 2010, p. 5.

¹² See Opinion 2/91 of 19 March 1993 of the European Court of Justice, para. 36.

This new system – favoured by some Member States – needs to be confronted with the latest political events. The single most important political development in this regard is the appearance of the Climate Action Commissioner in the European Commission, who would have the European External Action Service at her disposal to lead the process forward. Would the Member States provide Ms. Hedegaard with a limited mandate? Probably they would. Would they also challenge her leadership in the process? The answer to this question remains open.

As for the representation at the next UN meetings, the composition of the Troika would not change, but the role of the European Commission should become central in the process. It would, however, be advisable to limit the EU's representation. For example, there could be a joint Commission-rotating Presidency duo managing the negotiations on behalf of the European Union. Representation would therefore be limited to two actors and the incoming EU rotating Presidency would not be incorporated into the process. Within the duo the Commission would take the lead. This would limit the confusion experienced by many third parties' representatives and could allow for enhanced efficiency and possibly yield even greater leverage.

There would emerge, however, new problems of instability and discontinuity in the system by not having the incoming rotating presidencies engaged in the process. These can be addressed by delegating the negotiations of various international agreements to one Presidency over a period longer than six months (even an 18-month collaboration between trio-presidencies¹³ could be envisaged). This is already a standard procedure in other policies, e.g. states with no sea access often delegate management of international agreements in fisheries to other presidencies (incoming or outgoing).

At the summit level, the representation of the Union would still be provided by a set of EU and EU Member State leaders. It is important to remember that all EU Member States are UN members and have every right to be present if they wish to be there. More importantly, however, should the negotiations go beyond the given mandate, the presence of EU leaders on the spot can be extremely useful. The change in climate negotiations since Copenhagen in December 2009 should be that EU Member State leaders are not engaged at all in the negotiations and their role is primarily ceremonial; they would be present in case ad-hoc internal EU consultations were necessary. There would be no role for the German Chancellor, the

British Prime Minister or the French President – or any other EU Member State leader – to discuss with third partners. This self-limitation on the side of the EU's most prominent politicians could be a price worth paying. In exchange, the leverage of EU representation – provided at this level by Presidents Barroso and Van Rompuy (as a head of the European Council; hence a representative of 27 heads of state or government) – should increase. President Barroso would represent the Union in the negotiations at the highest level; President Van Rompuy's responsibility would be to consult with the Member States whenever necessary.

Under such an arrangement, both the efficiency and leverage of the Union are increased. It might not be enough to guarantee a final global agreement, but it might be sufficient to ensure that the EU has a say in the process at *each* stage of the negotiations.

The second option is to structure the EU's representation in climate affairs in a manner as similar as possible to that adopted in commercial negotiations. Trade is an exclusive EU competence – climate change is not. The EU-27 as a bloc is the world's largest trade actor; it does not rank among the world's largest emitters of greenhouse gases. Clearly, there are major differences in the EU position in trade talks and in climate negotiations. At the same time, in trade talks the leverage and effectiveness of the EU are much greater than in any other sectoral policy of the EU. Not only is no agreement possible without the Union supporting it, but there is virtually no way to sideline the EU in the process. Therefore, we must ask whether there are lessons to draw from the trade negotiations that could be applicable in the climate talks.

If the logic of the Union's climate negotiations was not bottom up (consensus among 27 taken to the global level), but rather top down (objective- and results-oriented), the post-Lisbon representation of the Union in the process *could* also look like this:

- A **broad** mandate provided for the Union's negotiator (Climate Action Commissioner) by the Council;
- Negotiations led by the negotiator under the control of the Council (through the special committee) and the Parliament (reporting);
- Negotiations with third countries managed **exclusively** through the External Action Service under the supervision of the Climate Action Commissioner;
- Representation at the highest level provided by the Commission President (as a non-CFSP and non-European Council issue) and no EU Member State leaders present (with the European Council President consulted by phone if necessary);

¹³ Trio-presidencies of the Council of Ministers are three consecutive rotating presidencies with a joint programme of action, i.e. between January 2010 and June 2011 the trio-presidency is composed of Spain (Jan-Jun 2010), Belgium (Jul-Dec 2010) and Hungary (Jan-Jul 2011).

- Real-life **possibility of rejecting** the agreement in the legislative process by the Council (by a majority vote) or the Parliament (consent); and
- Any new international law-binding instrument would still need to be agreed to and adhered to by all EU-27 Member States (as UN members) and the EU; effectively providing them with individual **veto power**. Possibly, even a similar solution as in the case of the EU's accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms could be envisaged.¹⁴

The primary problem in such a system is the applicability of its logic. It would be difficult for many Member States to agree not to tightly control the EU negotiators throughout the entire process. Why would a country give up an effective veto power (an expectation from the mandate to be adopted consensually) in exchange for an illusion of veto power (difficult to implement individually at the end of the process under a political pressure)? This kind of thinking plays into the limited trust that exists already between many of the Member States and the European Commission.

In this scenario the self-imposed limitations on the European leaders would be even more far-reaching than in the first scenario. It is simply unimaginable that leaders of UN Security Council member states would absent themselves from a gathering 100+ global leaders.

Conclusion

The Treaty of Lisbon provides for more clarity on how the EU can manage the negotiation of international treaties. The process should be led by the European Commission or the High Representative – not the Member State of the rotating Presidency. The European Parliament is also more engaged in the process; it could exert pressure on other EU institutions to allow for greater centralisation of the Union's representation in negotiating international agreements. The role of Member States should be supplementary, but still providing for full ownership of all EU members over the final product. The problems are well known. One is the unwillingness of Member States to step back and of certain leaders to refrain from trying to take the lead – the temptation of glory and the illusion of power are still there. Another concerns timing – the new EU institutions are only settling in; the new diplomatic corps will by no means be fully operational for a few years yet. Compounding these problems is the fact that the EU is becoming less relevant in climate negotiations because it is making a determined effort to cut its greenhouse gas emissions while other countries continue to increase theirs.

And the most significant question of all: Will the changes brought about by the Treaty of Lisbon be sufficient to allow the EU to reassert its relevance on the world stage? After all, perhaps the correct answer should be looked for not so much in the institutional design of the Union's representation in international talks, but more in the substance of what Union brings to the table.

¹⁴ For the EU to adhere to the ECHR there needs to be a decision by the Union and a ratification process in the Member States; see Art. 218 (8) TFEU.