

## Unanimity and exposure in the EU Council of Ministers – or how the Dutch won and lost the ICTY debate

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**Abstract.** How are unanimity negotiations commonly settled in the EU Council of Ministers? Important contributions have been made to our understanding of the ‘consensual’ decision-making dynamics in the Council, but most studies focus on explaining the sheer absence of votes in legislative decision making under the qualified majority rule. This study seeks to explain how vetoes are averted, or curtailed, in unanimity decision making. These unanimity negotiations are explained as attempts to induce or prevent high-level exposure. The degree of exposure in turn depends on the degree of lower level contestation. A process tracing analysis of one prolonged debate is performed from the perspective of one Member State – the Netherlands – which played a very prominent obstructing role. By analysing when, why and where (at what level) the Dutch won or lost, one can come closer to understanding the dynamic interplay between the different Council levels.

**Keywords:** Council of Ministers; EU negotiations; consensus; bargaining success; enlargement

This is how it usually works in the European Union. Bluntly saying ‘no’ to ideas or initiatives dear to others is out of the question. It simply does not work like that. At the end of the day, you will have to go with the flow. What you *can* do, is try to canalise the flow and build some dikes here and there. This is a way of scaling down the ambitions and trying to keep control of the process. But one cannot just say we do not want this and this is why it is not going to happen.<sup>1</sup>

### Introduction

On Wednesday, 16 March 2005, the General Affairs and External Relations Council (GAERC) came together to decide on opening accession negotiations with Croatia. It was the usual kind of ministerial ‘debate’ in which the Conclusions were written beforehand: the Council would not open the negotiations because of Croatia’s limited efforts to capture and apprehend General Ante Gotovina, charged with war crimes by the International Criminal Tribunal for the former Yugoslavia (ICTY). What was unusual about it was that the Luxembourg Presidency had nevertheless planned a *tour de table*. In preparatory Coreper meetings, ambassadors had been highly critical of this procedural approach. Positions were overly clear and it was very much against the Council’s code of conduct to force the ministers to engage in such a divisive debate with a predictable outcome.<sup>2</sup> What did the Presidency expect to gain from forcing the ministers to openly state their well-known positions?

The debate itself was indeed predictable as regards content, with some ministers stressing that Croatia was doing enough, while others felt that it should do more to placate ICTY General Prosecutor Carla Del Ponte.<sup>3</sup> What caused controversy were the Conclusions that were eventually adopted: ‘After deliberation by the Council and *in absence of a common agreement*, the opening of accession negotiations has been postponed.’<sup>4</sup>

In ten years of negotiations about the ICTY and EU accession of the Western Balkans, this was the only time the Council failed to reach a consensus. Of course, one can sometimes doubt the substantiality of this consensus – for instance, in April 2008, when the Council agreed to sign a Stabilisation and Association Agreement (SAA) with Serbia while simultaneously freezing the implementation of that agreement;<sup>5</sup> or in May 2006, when it decided to suspend negotiations with Serbia and set a target date for the conclusion of the negotiations it had just suspended.<sup>6</sup> But the Council’s tendency to play with words and play for time is well known (Avery 2009; Jegen & Mérand 2014). Pretty much unknown, if not unheard of, is its willingness to reveal the internal divisions.

This is obviously a deviant case for an institution that is known for its ‘preference for unanimity’ or ‘culture of consensus’ (Heisenberg 2005; Tsebelis 2013). Yet, the example is telling as regards the way in which such decisions are supposed to be reached. More often than not, what is called ‘consensus’ comes down to ‘plenary acquiescence’. A unanimous decision can be adopted if opposing ministers refrain from dedicating any of their interventions to the matter.

The real question is what induces ministers to stay silent when unfavourable decisions are put on the table? So far this question has been answered only for legislative decision making under the qualified majority voting (QMV) rule. Scholars have pointed to the shadow of a vote, which induces Member States to give in even before the voting stage is reached (Golub 1999). Consensus could also be explained as ‘the un-intended by-product of delegates’ desire to form a blocking minority’ (Häge 2013: 481; Tsebelis 2013). National delegates are not actually engaged in consensus-seeking behaviour, but rather strive to avoid individual marginalisation. Such marginalisation is dangerous because a non-blocking minority can eventually be out-voted.

However, as several studies have demonstrated, the same logic does not hold for decision making under the unanimity rule (König & Junge 2009; Novak 2013). The pace and style of negotiating are different here because each Member State can form a blocking minority on its own since there is no shadow of a vote and there is less time pressure due to the absence of a prescribed time schedule for reaching decisions. Moreover, under QMV, consensus behaviour would be the winning majority handing out unnecessary concessions to a non-blocking minority. Under unanimity, consensus behaviour would be a blocking minority that refrains from blocking. In the first situation the majority chooses to act ‘consensually’ towards the minority, whereas in the second it is the other way around (Naurin 2013).

For decision making under unanimity, the question thus becomes when and how does a blocking position become more or less tenable? In order to find an answer to this question, I perform a process tracing analysis of one particular debate, from the perspective of one particular Member State which played a prominent obstructing role in that debate. The issue for debate was the need for the Balkan countries to fully cooperate with the ICTY. The obstructing country – the Netherlands – tried to make ICTY cooperation a strict

condition for each and every step towards European Union membership. I have reconstructed the internal negotiations on the basis of unique data, consisting of participant observations by the author while working as a delegate to the Council Working Party on the Western Balkans (Coweb), insider reports of relevant Council meetings at all levels and in-depth interviews with more than 70 participants of these negotiations.<sup>7</sup>

I argue that it is the degree of exposure that explains when and how unanimity is reached. The underlying rationale is to raise the political costs by forcing ministers to openly take a position on an issue. This degree of exposure, in turn, depends on the amount of contestation that the different parties in the negotiations are able to create. I will begin by assessing the state of affairs in the ongoing debate about the culture of consensus. I will subsequently present a mechanism that links the degree of high-level exposure to the amount of lower level contestation. I then use this mechanism to account for the wins and losses of the Netherlands in the ICTY debate. In the conclusion, I seek to transcend the case-specific observations to arrive at general insights on how unanimity negotiations are commonly settled in the Council.

### **Theory: The puzzle of consensus decision making**

At the basis of all research into the consensus-reflex lie two related, but separate, observations (Heisenberg 2005; Mattila & Lane 2001; Tsebelis 2013). In areas where decisions could be taken by means of QMV, such voting happens ‘less often than expected’ (Hayes-Renshaw & Wallace 2006: 259). In areas where the unanimity rule applies, Member States often ‘refrain from using their veto power’ (König & Junge 2009: 510). Research showed that the Council is surprisingly effective in finding a way around contestation, often even before matters reach the formal decision-making stage (Thomson et al. 2006; Thomson 2011). Scholars have traditionally had difficulty explaining why the Council so often manages to reach decisions, when their models would predict deadlock (Sullivan & Selck 2007: 1151). Some even consider this a ‘rationalist puzzle’ (Aus 2008).

Explanations for this puzzling phenomenon were sought in norm-driven behaviour and standards of appropriateness. Some studies linked the consensus-reflex to cooperative negotiation styles and deliberative interactions (Lewis 2005; Risse & Kleine 2010). This view received impetus from the broader debate on socialisation, which focused on whether continued exposure to the Brussels way of doing business affected national delegates’ role-conceptions and dispositions (Checkel 2003; Juncos & Pomorska 2011). Others primarily looked at the costs of norm-violating behaviour and the related tendency to practice self-censorship (Aus 2008; Heisenberg 2005). Such explanations could be linked to processes of shaming or stigmatisation (Adler-Nissen 2014; Schimmelfennig 2003). The idea is that delegates share a ‘responsibility to come up with solutions and keep the process going’ (Lewis 2005: 949–950). It is therefore considered inappropriate, and consequently costly, to keep obstructing. In this way obstructers can be shamed into norm compliance by an ‘audience of normals’ (Adler-Nissen 2014: 152).

The socialisation literature tends to focus on internalised norms rather than behavioural implications. Such normative constraints are often treated as constants. Less effort is put into identifying ‘the mechanism through which norm-violating states may be socialized into

norm compliance' (Adler-Nissen 2014: 144). What is clear is that the costs of obstruction are related to the degree of exposure. Obstruction only becomes costly when it comes out into the open. Recent studies provide us with important clues on how this exposure mechanism might work (Cross 2011; Häge 2013; Novak 2013). Novak limits her attention to the ministerial level. She explains how consensus, redefined as an 'absence of explicit opposition', results from silencing (Novak 2013: 1094). A decision can be taken if ministers who are unhappy about it refrain from opposing it in plenary session. She suggests a mechanism of blame avoidance. Ministers choose to remain silent because they do not want to be blamed domestically for losing negotiations. However, this 'hiding behind a consensus' mechanism only works if both the press and the public are unaware of the actual negotiating position of their minister. In my study of the Netherlands, this was not the case as domestic audiences were well aware of when the minister had caved in on the ICTY dossier, irrespective of whether he chose to voice his opposition or not.

Others have argued that the pressure to remain silent will generally come from inside rather than outside the room. Internal negotiations are driven by the logic of 'if you oppose, you have to speak up' (Aus 2008: 115), which explains why many delegates are instructed by their capitals to oppose as long as they are not the only one opposing (Lewis 2005). Ministers, ambassadors and even working party delegates need to pick their battles (Bostock 2002). They cannot raise their flag on too many issues. This implies that if they are confronted on the same matter on multiple occasions, they might be induced to settle, which raises the question of what determines whether or not a Member State will be confronted. A pivotal role is played by the chair, who summarises the debate and can suggest moving towards a decision, thereby checking whether anyone objects to the suggested course of proceedings. In the preceding stage, the Council Presidency and European Commission will have been active in identifying and eliminating member specific concerns (Häge 2013; Tsebelis 2013). Where the non-involved or indifferent Member States support the institutional actors in their efforts, they thus create a critical mass committed to keeping the process going (Lempp & Altenschmidt 2008: 523). Member States are thus induced to voice their concerns early on in the process. They know that even a minister will have little chance to change a decision-making process in motion, let alone turn it around as he or she wishes (Puetter & Wiener 2007: 1085).

The informal rules and norms dictate not only when it is appropriate to object, but also how to object. The correct way to show opposition in the Council is by means of plenary interventions, rather than through vetoes or votes (Cross 2011). Council plenaries have been irreverently referred to as endless series of isolated interventions. Such interventions do not just serve to state one's (usually known) position and look for (equally known) allies. I argue that they should primarily be seen as investments. They serve to signal the commitment behind a position. Plenary interventions indicate how far, or more precisely how high up, Member States are willing to take matters. As Cross (2011: 51) rightly notes, 'making an intervention has costs associated with it, in terms of political capital'. Three factors determine these costs. The first factor is the level at which an intervention takes place: interventions by ministers weigh heavier than interventions by ambassadors or working party delegates. Second, there is the degree of support an intervention receives from others: those who are backed up by others who are like-minded have to invest less. The third – and for me the most important – factor is the degree to which interventions are

*anticipated*: interventions that can be foreseen from what happened in previous lower level debates are less costly. As the example in the introduction shows, this is because (part of) the blame for revealing the dissension can be shifted to those who put the issue on the table rather than those who oppose the decision.

To recapitulate, this study builds on previous attempts to explain the Council's consensus-reflex by means of the normative constraints that guide the internal proceedings. The literature has come a long way in explaining how norm-violating behaviour might be punished. It links constraints to costs and obstruction to exposure. In this article, I address the follow-up question of what determines the degree of exposure. In order to find the answer we need to take into account what happened before the issue reached the ministers. Specifically, I will look at the varying ability of lower level delegates to control movement to and from the ministers. In the next section, I present a mechanism that explains the interplay between the different levels. This mechanism allows me to explain when and under what conditions veto positions become more or less costly.

### **The mechanism behind internal Council debates**

EU negotiations are often depicted as two-party games between those who want to move forward and those who are more hesitant. Schneider and Cederman (1994) have conceptualised the debate about European integration as a battle between 'integrationists' and 'laggards'. Schimmelfennig (2003) considers the debate about the Eastern Enlargement as a battle between 'drivers' and 'brakemen'. Likewise, I conceptualise day-to-day interactions within the confines of the Justus Lipsius building as battles between drivers and brakemen, in which the goal is to keep issues (from) moving through the Council's decision-making machinery. The central element in the mechanism is the degree of contestation about an issue at a particular level, as it is displayed through the plenary interventions (cf. Thomson 2011). This degree of contestation determines whether debates will move up or down or remain at a certain level. Figure 1 visualises the different steps.

Drivers seek a swift decision, while brakemen want to avoid or delay that decision. Drivers strive to steer matters through the lower levels and up to the ministers so that a formal decision can be taken. The brakemen want to prevent this from happening. Brakemen prefer that the matter does not reach the ministers at all. They do not control the agenda, but via their plenary interventions they want to show the Presidency in particular that there is no point in taking matters higher up because there is still too much contestation at this level. Presidencies will generally want to avoid taking matters to the ministers too soon. When there is sufficient contestation, the matter will be sent back to Coreper or to the relevant working party. Obstructing Member States are thus given the opportunity to accommodate – under the assumption that they will be ready to settle in due time. These working methods are thus as much about showing solidarity as they are about applying pressure on the ones obstructing.<sup>8</sup>

The twin processes of *anticipation* and *orchestration* are crucial for understanding the interplay between the lower (working party and committee) and higher (Council) level. The first step is the lower level debates, as this is where issues normally enter the arena. Previous

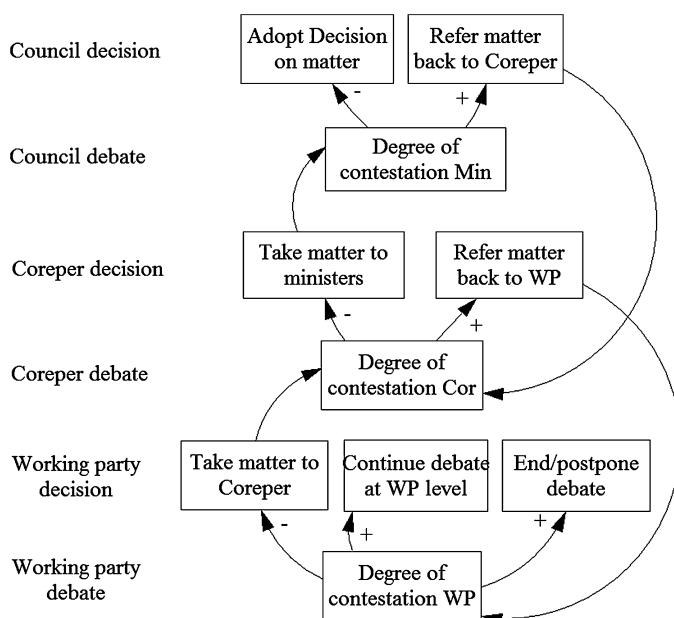


Figure 1. The mechanism behind Council debates.

studies have primarily focused on the degree to which decisions are already taken at these levels (Häge 2008; Van Schendelen 1996). I focus on their role in the overall process. In their initial interactions, these lower levels are already anticipating what their respective ministers would eventually be willing to accept (Westlake & Galloway 2004: 262–264). Their encounters thus serve to define the scope of the playing field and notify each other about salient points in the dossiers. Negotiations are to a large degree about deciding whether, when and how the political level will concern itself with a certain matter (Bostock 2002; Fouilleux et al. 2005). They serve to get an overview of who is seriously committed to playing this round. But even Coreper ambassadors are aware that the buck does not stop with them.

The logical follow-up question is how to be effective in these lower level debates. The only credible threat delegates have at their disposal is the threat of higher level support. What they want to convey to their peers is that, if needed, their ambassador or minister is willing to back them up. Whether delegates will indeed be backed up by the higher levels is something their counterparts do not (yet) know. They might be bluffing. Whether their intervention is effective depends on whether others – especially the Presidency – are willing to call their bluff. However, it does not necessarily have to come to a higher level debate. It can also be that all concerns are taken into account at the lower level, or higher level negotiators choose not to invest/intervene.

The lower levels are not only anticipating a potential ministerial debate; they are also setting the terms for that debate. The second step is these Council debates. As Gomez and Peterson (2001) note, these higher level meetings are to a certain degree orchestrated events. Ministers meet once a month to rush through their overloaded agenda. Delegates usually

have only a couple of minutes to brief their ministers on the positions of relevant others. Ministers are particularly interested in learning which colleague(s) might be inclined to intervene on relevant issues. During the plenary, many of the statements are declaratory. There is little room for replies or rebuttals, and often there is no need for them. The intervention will generally suffice to get that Member State's concerns noted and taken into account.

At Council level the game is different because ministers obviously cannot threaten with higher level support. Here, the goal is to avoid marginalisation. Ministers want to be backed up by those who are like-minded, and they do not want to waste interventions on lost causes (i.e., issues on which fellow ministers will make contrary interventions). Council debates are thus not only about picking battles, but also about avoiding interference in the battles picked by others. Under unanimity there is less need for such investments as long as one is not openly confronted.

The lower and higher level proceedings are of course connected. If the lower levels succeed in 'building dikes', the higher levels need not intervene that much. It might prove difficult to keep a matter off the agenda indefinitely. More often, the goal will be to keep these debates to a minimum. When it nevertheless comes to such a debate, success is about displaying the necessary amount of contestation with the least possible amount of interventions. A win can thus result from a lower level investment, a high-level investment or a combination of both. The analysis seeks to reveal the dynamics that result from these series of higher and lower level interventions.

### **Six rounds of ICTY debate**

In the previous section I presented a mechanism that explains unanimity (i.e., plenary acquiescence) by means of the interplay between the different Council levels. The mechanism focuses on the procedural rather than the substantive part of the debate, meaning the battles about taking issues up or down the organisational hierarchy. In this section I perform a process tracing analysis of the debate on ICTY. The analysis establishes the presence and adequate functioning of the mechanism and thereby upgrades (in a Bayesian sense) our confidence in the theoretical underpinnings of that mechanism (Beach & Pedersen 2013: 95). As is customary for this approach, I do not claim 'that the detected mechanism is sufficient to explain the outcome' (Beach & Pedersen 2013: 16). I claim that it is a *necessary* part of an explanation of the negotiation dynamics under unanimity. Because consensus behaviour can only be displayed by the minority, I analyse these negotiations from the perspective of that minority.

The ICTY debate spanned eight years and 16 Presidencies, focusing first on Croatia and subsequently on Serbia. This debate is necessarily reduced to six rounds. These were the pivotal moments when the Netherlands either won or lost. In the analyses I proceed from the same question: Why and where (at which level) did they win or lose this round? I explain how the Dutch were active at the different levels to get their concerns acknowledged while trying to avoid excessive exposure of their minister. Also, I show how the costs of exposure varied with the lower levels' ability to anticipate and orchestrate the higher level debates.

### *Round 1. Postponing negotiations with Croatia*

The March 2005 decision to postpone accession negotiations with Croatia was a victory for the Netherlands. This win came about by a combination of lower level and higher level investments.

The victory had been thoroughly prepared at the lower levels, particularly during the 2004 Dutch Presidency. At the time, the Council was still struggling on whether and how to link Croatia's inability/unwillingness to apprehend Gotovina to its European trajectory. At the outset of their Presidency, the Dutch had one clear goal: to avoid an open debate about the matter at Council or European Council level.<sup>9</sup> Their strategy was to make such a debate pointless by getting the lower levels to acknowledge Croatia's lacking cooperation. It had become customary from 2003 to invite the General Prosecutor to speak in one of the Autumn Council plenaries. To prepare for these debates, members of Carla Del Ponte's team were regularly invited to inform Coweb, while Del Ponte herself, incidentally, lunched with Coreper.<sup>10</sup> In these lower level debates the Netherlands (and other brakemen) could align themselves with the judgement of the ICTY, thereby creating sufficient contestation. The Presidency could subsequently invite Coweb to start preparing the Conclusions. Coreper meanwhile discussed when these Conclusions would be taken to the ministers. At Council level, the Dutch could count on Carla Del Ponte to provide the interventions for them.<sup>11</sup> This strategy apparently worked as the October 2004 Conclusions explicitly state that 'continued failure to cooperate would seriously jeopardize further movement towards the EU'.<sup>12</sup>

However, in this particular case, the lower level investments needed to be backed up by higher level ones. As we saw in the introduction, the Dutch were unable to prevent ministerial debates about the matter. The drivers convinced the 2005 Luxembourg Presidency to put it back on the agenda for January, February and March. But the brakemen needed few interventions in these debates, seeing that the Dutch Presidency had got the European Council to suggest 'opening the accession negotiations on 17 March 2005 provided that there is full cooperation with ICTY'.<sup>13</sup> While the brakemen could safely wait for Del Ponte's next (negative) assessment, the drivers had to explain why they were so keen on reliving the same debate. In short, because the lower levels had managed to orchestrate the debate, the higher levels needed little investment.

### *Round 2. Opening negotiations with Croatia*

The October 2005 decision to open accession negotiations with Croatia, *before* Gotovina was located and apprehended, constituted a clear loss for the Netherlands. This defeat was the result of a lower level defeat, which effectively precluded higher level investments.

The suspension was a victory for the Dutch, but at the same meeting the Council had decided to set up a task force, which was to monitor and support Croatia in its efforts to apprehend Gotovina. Coreper was to concern itself with the 'mandate and political assessment faculty' of this taskforce.<sup>14</sup> While the brakemen made sure that its formal competences were limited, what the drivers managed to achieve was (at least temporarily) to banish Del Ponte from the plenaries. Coreper decided, however, that she would present her views to the task force, which meant that at Council level the Dutch would have to start intervening themselves.

The coming about of the task force also meant that lower level debates were no longer considered useful, providing the brakemen with less opportunities to create the necessary contestation. The lower levels only concerned themselves with the planning. Essentially, the debate was about when to invite Del Ponte. After her critical assessment in March, the General Prosecutor suggested giving Croatia another three or four months to locate and apprehend Gotovina.<sup>15</sup> The Prosecutor and the Dutch did not really believe that a couple of months would suffice.<sup>16</sup> They were merely trying to get the file safely through the Luxembourg Presidency.

However, they failed. The issue reappeared on the agenda of the April, May, June and July Council meetings. The May Council wondered whether the task force should meet. The June Council noted Del Ponte's suggestion, but nevertheless decided to come back to the matter in July.<sup>17</sup> To avoid having the same debate at every meeting, the incoming United Kingdom Presidency decided that Del Ponte should brief the task force only on the day of the Council of 3 October – again, to prevent further lower level debates. Seeing that Croatia had failed to deliver Gotovina, the brakemen expected the General Prosecutor to be critical. Del Ponte's surprising assessment 'that Croatia had been cooperating fully for a couple of weeks now' was taken directly to the ministers.<sup>18</sup> The Council concluded that the outstanding condition had been met, while the Netherlands could only ask for this 'full cooperation to be maintained, until the last remaining indictee was in The Hague'.<sup>19</sup> The lower levels had no say in the matter; the higher levels were entrapped by Del Ponte's sudden satisfaction and thus could not credibly invest.

### *Round 3. Suspending negotiations with Serbia*

The May 2006 decision to suspend negotiations with Serbia because of its limited efforts to apprehend Bosnian-Serb General Ratko Mladic was a victory for the Netherlands. Moreover, this was a lower level win; limited high-level investments were needed.

The roots of that victory lay in the lower level debates that prepared the opening of SAA negotiations with Serbia. At that same October 2005 meeting, the Council agreed to open negotiations with Serbia, 'the pace and conclusion' of which would depend on full cooperation with the ICTY.<sup>20</sup> The Council had seemingly provided the Commission with an added competence – namely the ability to suspend further negotiations if necessary. The Commission was not too happy with this suspension clause.<sup>21</sup> The Dutch were effectively trying to bind the hands of the Commission: the second cooperation deteriorated, suspension would inevitably follow. Equally important, the clause meant that ICTY cooperation would again be a subject for working party debate. The United Kingdom Presidency decided to use the final Coweb meeting for another exchange of views with Del Ponte's team.<sup>22</sup> Del Ponte proposed, and Enlargement Commissioner Rehn endorsed, a deadline for the delivery of Mladic, which made it easier for the Netherlands to suggest a speedy suspension.<sup>23</sup> In fact, the only real issue for debate during the 2006 Austrian Presidency was when to suspend the negotiations.<sup>24</sup>

To the Austrians, it was clear that they were fighting a lost battle. The only thing this driver could do was to take the issue to the ministers to see whether they would back up the lower levels. This turned out to be the case. The January Council discussed the suspension. The February Council uttered an explicit warning: '[F]ull cooperation with the ICTY must

be achieved to ensure that . . . negotiations are not disrupted.<sup>25</sup> The proposed Mladic deadline did not make it into the Conclusions. The drivers scored a Pyrrhic victory by getting the Council to use the term ‘disruption’ instead of ‘suspension’. But after Serbia failed to meet the deadline, the suspension was a *fait accompli*. Meticulous lower level preparations had made higher level investments cheap and therefore effective.

#### *Round 4. Resuming negotiations with Serbia*

The June 2007 decision to resume negotiations with Serbia, even though that country had failed to deliver General Mladic, was a loss for the Netherlands. This loss came about in spite of lower level investments because higher level interventions were effectively curtailed.

The Dutch, in fact, started losing at the May 2006 meeting. As we saw in the introduction, the Austrian Presidency had scheduled a ministerial debate about setting a target date for the conclusion of the negotiations that had just been suspended.<sup>26</sup> The debate about resuming the negotiations thus started at that very same meeting. Lower level debates under the 2006 Finnish and 2007 German Presidencies were all about getting the resumption past the Netherlands. The Dutch negotiating strategy was plain and simple: there was no need to keep talking about Serbia as there was nothing new to discuss. However, the drivers made a smart move by urging Serbia to come up with an action plan (for apprehending Mladic).<sup>27</sup> Lower levels could thus be invited to discuss the details (and significance) of this plan. As had happened with Croatia, the brakemen were entrapped into discussing a plan they did not really care for in the first place. Meanwhile, the Presidency could get the Council to regularly reflect on these lower level discussions. Most important in this regard would be the anticipated Conclusions for the February 2007 meeting:

The Council welcomed the Commission’s readiness to resume negotiations . . . with a new government in Belgrade provided it shows clear commitment and takes concrete and effective action for full cooperation with the ICTY.<sup>28</sup>

The drivers had succeeded in changing the definition of full cooperation from achieving a result (the arrest and transfer of Mladic) to commitments and actions. The Dutch Working Party delegate fought hard for the acknowledgement that the arrest of Mladic would be a condition for signing the SAA.<sup>29</sup> The others did not want to be that explicit.

To get this verbal slackening past the higher level, other tactics were used. At the February 2007 Council meeting, the recalcitrant Dutch were put on the stand by a German Presidency set on making Serbia more forthcoming on Kosovo. At the May Council meeting, the Dutch minister was simply denied the floor.<sup>30</sup> At the ensuing Coreper, the Netherlands objected heavily to this procedural coup, while the Presidency claimed that there had simply been too little time for all the interventions. Moreover, it was not as if other Member States were unaware of the Dutch position in this regard. The resumption in June thus did not come as a surprise. The Dutch minister decided not to object. He settled for the explicit promise that the ‘Council and Commission will jointly review Serbia’s performance in these areas, before the decision to sign is taken by

the Council'.<sup>31</sup> The lower levels had not been able to prevent the matter being taken to the ministers. And in the Council debates, higher level investments were averted or curtailed.

#### *Round 5. Signing a (frozen) agreement with Serbia*

Counter-intuitively, the April 2008 decision to sign the SAA with Serbia was a victory for the Netherlands. After all, it was agreed that the actual implementation of that agreement would be frozen until Serbia cooperated fully with the ICTY. More importantly, the decision meant that the Netherlands would be off the hook for quite some time.

The lower level debates about signing the agreement (again) started directly after the negotiations had been resumed.<sup>32</sup> At the beginning of September 2007, Commissioner Rehn announced that there was agreement on the SAA. In 2008, the Netherlands were faced with a Slovene Presidency set on making progress. The Presidency boldly put the signing of the SAA as 'possible A-point' on the provisional agenda of the January Council.<sup>33</sup> To get the Dutch on board, the Slovenes proposed setting up a task force to assist Serbia in their quest for full cooperation.<sup>34</sup> The Netherlands were invited to take part in this task force but politely declined.

In the lower level debates, the Dutch then tried to distract the drivers with a side payment: the January 2008 Council could propose 'an interim political agreement on co-operation between the European Union and Serbia'.<sup>35</sup> But, while Coreper needlessly bothered itself with the content and meaning of this political agreement and Coweb was trying to figure out what the task force was supposed to do, Serbia already expressed its unwillingness to sign such an agreement.<sup>36</sup> Serbia felt confident that the drivers would be able to take the signing of the SAA to the ministers.<sup>37</sup> After all, it was clear that for the Netherlands all decisions on Serbia had become '*Chefsache*'.

The Slovene Presidency thus started looking for a creative solution and came up with separating the signing of the SAA from the start of the ratification process. The deal as such had been pre-cooked at an informal meeting of the Dutch and Slovene ministers in January,<sup>38</sup> but it still took nocturnal bickering to get it accepted as the Dutch minister wanted to publically express how unhappy he was about being pushed into the decision by his over-eager Slovenian colleague.<sup>39</sup> However, on 29 April 2008, the Council signed the agreement but *froze* its implementation. The Netherlands claimed to be particularly satisfied now that the political understanding on ICTY cooperation had been upgraded into 'an essential element of these Agreements'.<sup>40</sup> However, this victory was the result of substantial higher level investments, while at the lower levels the Dutch were losing ground.

#### *Round 6. Unfreezing the agreement with Serbia*

The December 2009 decision to unfreeze the agreement with Serbia was more than an isolated loss for the Netherlands. It was the beginning of the end. It started a trend in which the Council would regularly assess the situation, take the next step and look ahead to the next one.

The Dutch victory of April 2008 meant that even the arrest of one of the two most important remaining fugitives – Bosnian-Serb leader Radovan Karadzic – in June 2008 did

not induce a reaction from the Council. The 2009 Czech Presidency tried to put the matter back on the agenda, but was unable to find an occasion. At the lower levels, the drivers incidentally brought up the frozen agreement to see whether movement was possible,<sup>41</sup> but by now the role of the Working Party and Coreper was reduced to providing the bracketed text that could potentially be adopted by the ministers. The routine was always the same, with the ICTY noticing some signs of progress and the Netherlands noting that cooperation was still not ‘full’. Yet, during the course of 2009, insiders started to note a change in the internal debates.<sup>42</sup> There had been headcounts and *tour de tables* in which the score was 26 against one. More importantly, many felt there was nothing more to discuss. The matter could be taken directly to the ministers. The Dutch knew they would be confronted over and over again.

In the higher level debates, the Netherlands were also losing ground. At the February Council, Dutch exposure had become complete when Germany openly argued in favour of the unfreezing and Belgium did not intervene.<sup>43</sup> The Prosecutor’s assessments usually took place in the autumn, so the matter was off the agenda for a while, but after another similar assessment (improvement but still no full cooperation), the December Council agreed ‘that the Union will start implementing the Agreement’.<sup>44</sup> Six months later, the Council decided to start the ratification process. In October 2010, the Netherlands were confronted on what was the next step: asking the Commission for an avis on Serbia’s membership application.<sup>45</sup> The Dutch minister was again exposed and decided not to waste any more interventions. The official reason was rather down to earth: ‘We were isolated.’<sup>46</sup> Dutch delegates and Commission officials said that this was because the Dutch position on Serbia was costing them more and more points.<sup>47</sup> The underlying reasoning, I believe, is that lower level contestation could easily be circumvented, making continued ministerial investments necessary.

### **Conclusion: ‘Mention it, don’t insist’**

If we do not advance some causal mechanism as to why unanimous decisions are more frequent than one would expect, we cannot move further in our understanding of this particular institution. (Schneider 2008: 281)

My mechanism provides only a partial explanation. I have drawn attention to one often overlooked aspect of the game: the attempts to control what is and what isn’t moving inside the Council. I did this by tracing six rounds of negotiations in one, admittedly rather particular, issue area. There might be fewer opportunities for individual Member States to influence the pace of decision making in other issue areas, particularly in legislative decision making, where the Commission and European Parliament co-decide and where there are standardised procedures and deadlines. However, in less standardised EU negotiations – for instance, the current negotiations about deepening and strengthening the economic and monetary union – it pays to ask why some matters (banking union, fiscal union) keep moving, while others (economic union, political union) get stuck.<sup>48</sup> Generalisability, in the direct sense, might be limited to relatively similar issue areas under intergovernmental coordination. Yet, in a more indirect sense, the Dutch wins and losses tell us something important about the accommodative way in which national differences are supposed to be settled in Brussels.

The short answer is that the Netherlands lost the debate when the Dutch minister could be confronted on the matter over and over again.<sup>49</sup> The longer answer requires an explanation as to why the Netherlands were unable to avoid the continued exposure of their minister. For this, we need to take into account what was happening at the lower levels where success depends on the ability to anticipate and orchestrate higher level debates (see Table 1), as we saw in March 2005 when the Council only needed to endorse a decision reached at the lower level (to postpone negotiations with Croatia). If attempts to orchestrate fail, higher level investments/interventions become more risky. This was the case with the October 2005 decision to open negotiations with Croatia when the lower levels could not prepare the debate and the minister could not really intervene after committing to Del Ponte's judgement. This does not mean that higher level investments cannot be successful on their own. The April 2008 decision to sign a frozen agreement can be considered an unanticipated and un-orchestrated win. It just means that such a win requires a larger investment (i.e., comes at higher costs).

Generally speaking, the negotiating environment in the Council induces Member States to be risk-averse. They might prefer winning at the lower levels but, most of all, they strive to avoid losing at the higher level. The Netherlands managed to achieve such lower level success when the Council suspended negotiations with Serbia in May 2006, but similar lower level investments proved insufficient to prevent the resumption in June 2007. In spite of being marginalised in the debate, the Dutch minister could have used his veto. However, in such a situation, obstructing Member States will generally be inclined to count their losses with a chance to come back in the debate at a later point in time. This is because a higher level loss is more definitive. Higher level investments without lower level preparation result in increased exposure. Ministers need to fight their own battles rather than refer back to points already made in the lower level debates. The final loss of the Netherlands in December 2009 drives home this point. There was little the lower levels could do to prevent the matter from being taken to the ministers. This meant that at Council level, the Netherlands had to intervene more often.

I have sought in this article to give more content and meaning to prevalent, but still rather diffuse, ideas about the costs of norm-violating behaviour in the Council. I focused on the costs of obstruction, and argued that obstructing becomes politically costly when it results in excessive exposure. Lower level debates serve to procure or avoid such exposure. Drivers usually have limited abilities to change a brakeman's position on a matter. However, they can try to keep it on the table. This under the supposition that those who have to raise their flag too often and on too high a level will, at some point, become aware of the need to settle. A unanimous decision thus comes within reach when obstructers can no longer limit themselves to mentioning matters, but instead they need to insist on them.

## Acknowledgements

A previous version of this article was presented at the ECPR General Conference in Glasgow. The author would like to thank the editors and anonymous referees for their helpful comments and encouragement.

Table 1. Overview: When, why and where the Dutch won or lost the ICTY debate

Round	1	2	3	4	5	6
When	March 2005	October 2005	May 2006	June 2007	April 2008	December 2009
What	Postponing negotiations Croatia	Opening negotiations Croatia	Suspending negotiations Serbia	Resuming negotiations Serbia	Signing agreement Serbia	Unfreezing agreement Serbia
Result (for Dutch)	<b>Win</b> (both levels)	<b>Loss</b> (lower level)	<b>Win</b> (lower level)	<b>Loss</b> (lower level)	<b>Win</b> (high level)	<b>Loss</b> (high level)
Council level	High-level contestation	No high-level contestation (possible)	No high-level contestation (needed)	No high-level contestation (averted)	High-level contestation	High-level contestation
Committee & Working Party levels	Lower level contestation	No room for lower level contestation	Lower level contestation	Lower level contestation	Less room for lower level contestation	No room for lower level contestation

## Supporting information

Additional supporting information may be found in the online version of this article at the author's website ([www.ru.nl/fm/smeets](http://www.ru.nl/fm/smeets)) or at the publisher's web-site:

### Appendix I: Details of the research project. List of interviewees.

## Notes

1. Author's interview, Tom de Bruijn, Dutch Coreper Ambassador, Brussels 2010.
2. Coreper, 10 and 15 March 2005. Internal reports, Dutch Ministry of Foreign Affairs.
3. Council, 16 March 2005. Internal report, Dutch Ministry of Foreign Affairs.
4. 2649<sup>th</sup> General Affairs Council meeting, Brussels, 16 March 2005. Enlargement. Croatia. Emphasis in original.
5. 2864<sup>th</sup>/2865<sup>th</sup> GAERC Council meetings. Luxembourg, 29 April 2008. Western Balkans. Serbia.
6. 2728<sup>th</sup> External Relations Council Meeting, Brussels, 15 May 2006. Western Balkans.
7. More information on the methods for data collection and analysis can be found in the online appendix or on the author's website: [www.ru.nl/fm/smeets](http://www.ru.nl/fm/smeets).
8. Author's interview, Hans-Dietmar Schweisgut, Austrian Coreper Ambassador, Brussels, 28 September 2010.
9. Author's interviews, Coreper and Working Party level, 27 May 2010, 7 July 2010 and 14 July 2010.
10. Coweb, 24 September 2004, 8 October 2004; Coreper, 30 November 2004, 3 February 2005. Internal reports, Dutch Ministry of Foreign Affairs. Author's interviews, ICTY level, 15 November 2010.
11. Author's interview, Coreper level, 7 July 2010.
12. 2609<sup>th</sup> General Affairs Council meeting, Luxembourg, 11 October 2004. Western Balkans.
13. European Council meeting, Brussels, 16–17 December 2004. Enlargement. Croatia.
14. Coreper, 24 March 2005. Internal report, Dutch Ministry of Foreign Affairs.
15. *Agence Europe*, 9 June 2005, p. 7.
16. Author's interview, Carla Del Ponte, 14 June 2011.
17. 2667<sup>th</sup> General Affairs Council meeting, Luxembourg, 13 June 2005. Enlargement. Croatia.
18. *Agence Europe*, 4 October 2005, pp. 4–5.
19. 2678<sup>th</sup> General Affairs Council meeting, Luxembourg, 3 October 2005. Enlargement. Croatia. Gotovina would eventually be arrested in Tenerife on 7 December 2005.
20. 2679<sup>th</sup> External Relations Council meeting, Luxembourg, 3 October 2005. Western Balkans.
21. Author's interview, Commission (Serbia Unit) level, 4 June 2010.
22. Coweb, 19 December 2005, 12 January 2006. Internal reports, Dutch Ministry of Foreign Affairs.
23. *Agence Europe*, 24 February 2006, p. 4.
24. Author's interview, Working Party level (Austrian Presidency), 10 November 2010.
25. 2712<sup>th</sup> External Relations Council meeting, Brussels, 27 February 2006. Western Balkans. Author's interviews, Working Party level, 7 July 2010, 10 November 2010.
26. Coweb, 8 May 2006; Coreper, 11 May 2006. Internal reports, Dutch Ministry of Foreign Affairs.
27. Serbia to file new Mladic arrest plan, *EU Observer*, 26 June 2006.
28. 2780<sup>th</sup> External Relations Council meeting, Brussels, 12 February 2007. Western Balkans.
29. Coweb, 1 and 2 February 2007. Internal reports, Dutch Ministry of Foreign Affairs.
30. Council, 14 May 2007; Coreper, 15 May 2007. Internal reports, Dutch Ministry of Foreign Affairs.
31. 2809<sup>th</sup> External Relations Council meeting, Luxembourg, 18 June 2007. Western Balkans.
32. Coweb, 8 February 2007; Coreper, 17 October 2007. Internal reports, Dutch Ministry of Foreign Affairs.
33. *Agence Europe*, 5 January 2008, p. 3.
34. *Agence Europe*, 15/18 January 2008, p. 5.
35. 2845<sup>th</sup>/2846<sup>th</sup> General Affairs and External Relations Council meetings, Brussels, 28 January 2008.
36. The taskforce never met. Author's interview, Commission (Commissioner's Cabinet) level, 15 July 2010. Coweb, 6 February 2008; Coreper, 30 January 2008. Internal reports, Dutch Ministry of Foreign Affairs.

37. Author's interview, Serbia level, 7 July 2011.
38. Internal report, Dutch Ministry of Foreign Affairs, The Hague, 16 January 2008.
39. Author's interview, Maxime Verhagen, Dutch Minister of Foreign Affairs, The Hague, 28 June 2012.
40. 2864<sup>th</sup>/2865<sup>th</sup> General Affairs Council meetings, Luxembourg, 29 April 2008. Western Balkans. Serbia.
41. E.g., in preparation of the February Council in Coreper 18 and 19 February 2009. Internal report, Dutch Ministry of Foreign Affairs.
42. Coweb, 16 and 18 September 2009, 15 and 22 October 2009, 30 November 2009; Coreper, 4 December 2009. Internal reports, Dutch Ministry of Foreign Affairs.
43. Council, 23 February 2009. Internal report, Dutch Ministry of Foreign Affairs.
44. 2984<sup>th</sup> General Affairs Council meeting, Brussels, 7 December 2009. Enlargement/Stabilisation and Association Process Serbia: 40–41.
45. 3041<sup>st</sup> Foreign Affairs Council meeting, Luxembourg, 25 October 2010. Serbia.
46. EU-ministers akkoord over EU-lidmaatschap Servië, NRC, 25 October 2010, p. 1.
47. Author's interviews, Working Party and Commission (Serbia Unit) level, 27 May 2010, 4 June 2010, 14 July 2010.
48. Communication from the Commission: A blueprint for a deep and genuine economic and monetary union. Brussels, 28 November 2012.
49. At the Council meetings in January, April, July and December 2008; February, June and December 2009; June, September and October 2010. Internal reports, Dutch Ministry of Foreign Affairs.

## References

- Adler-Nissen, R. (2014). Stigma management in international relations: Transgressive identities, norms and order in international society. *International Organization* 68(4): 143–176.
- Aus, J.P. (2008). The mechanisms of consensus: Coming to agreement on community asylum policy. In D. Naurin & H. Wallace (eds), *Unveiling the Council of the European Union: Games governments play in Brussels*. Basingstoke: Palgrave Macmillan.
- Avery, G. (2009). Uses of time in the EU's enlargement process. *Journal of European Public Policy* 16(2): 256–269.
- Beach, D. & Pedersen, R.B. (2013). *Process tracing methods: Foundations and guidelines*. Ann Arbor, MI: University of Michigan Press.
- Bostock, D. (2002). Coreper revisited. *Journal of Common Market Studies* 40(2): 215–234.
- Checkel, J.T. (2003). 'Going native' in Europe? Theorizing social interaction in European institutions. *Comparative Political Studies* 36(1–2): 209–231.
- Cross, J.P. (2011). Interventions and negotiation in the Council of Ministers of the European Union. *European Union Politics* 13(1): 47–69.
- Fouilleux, E., de Maillard, J. & Smith, A. (2005). Technical or political? The working groups of the EU Council of Ministers. *Journal of European Public Policy* 12(4): 609–623.
- Golub, J. (1999). In the shadow of the vote? Decision-making in the European Community. *International Organization* 53(4): 733–764.
- Gomez, R. & Peterson, J. (2001). The EU's impossibly busy foreign affairs ministers: 'No one is in control'. *European Foreign Affairs Review* 6(1): 53–74.
- Häge, F.M. (2008). Who decides in the Council of the European Union. *Journal of Common Market Studies* 46(3): 533–558.
- Häge, F.M. (2013). Coalition building and consensus in the Council of Ministers. *British Journal of Political Science* 43(3): 481–501.
- Hayes-Renshaw, F. & Wallace, H. (2006). *The Council of Ministers*. New York: Palgrave Macmillan.
- Heisenberg, D. (2005). The institution of 'consensus' in the European Union: Formal versus informal decision-making in the Council. *European Journal of Political Research* 44(1): 65–90.
- Jegen, M. & Mérand, F. (2014). Constructive ambiguity: Comparing the EU's energy and defence policies. *West European Politics* 37(1): 182–203.

- Juncos, A.E. & Pomorska, K. (2011). Invisible and unaccountable? National representatives and Council officials in EU foreign policy. *Journal of European Public Policy* 18(8): 1096–1114.
- König, T. & Junge, D. (2009). Why don't veto players use their power? *European Union Politics* 10(4): 507–534.
- Lempp, L. & Altenschmidt, J. (2008). The prevention of deadlock through informal processes of 'supranationalization': The case of Coreper. *European Integration* 40(4): 511–526.
- Lewis, J. (2005). The Janus face of Brussels: Socialization and everyday decision making in the European Union. *International Organization* 59(4): 937–971.
- Mattila, M. & Lane, J. (2001). Why unanimity in the Council? A roll call analysis of Council voting. *European Union Politics* 2(1): 31–52.
- Naurin, D. (2013). Consensus Behaviour in International Negotiations: State Power, Institutions and Gender. Paper presented at the EUSA, Baltimore, MD.
- Novak, S. (2013). The silence of ministers: Consensus and blame avoidance in the Council of the European Union. *Journal of Common Market Studies* 51(6): 1091–1107.
- Puetter, U. & Wiener, A. (2007). Accommodating normative divergence in European foreign policy co-ordination: The example of the Iraq crisis. *Journal of Common Market Studies* 45(5): 1065–1088.
- Risse, T. & Kleine, M. (2010). Deliberation in negotiations. *Journal of European Public Policy* 17(5): 708–726.
- Schneider, G. (2008). Neither Goethe nor Bismarck. In D. Naurin & H. Wallace (eds), *Unveiling the Council of the European Union: Games governments play in Brussels*. Basingstoke: Palgrave Macmillan.
- Schneider, G. & Cederman, L. (1994). The change of tide in political cooperation: A limited information model of European integration. *International Organization* 48(4): 633–662.
- Schimmelfennig, F. (2003). *The EU, NATO and the integration of Europe: Rules and rhetoric*. Cambridge: Cambridge University Press.
- Sullivan, J. & Selck, T.J. (2007). Political preferences, revealed positions and strategic votes: Explaining decision-making in the EU Council. *Journal of European Public Policy* 14(7): 1150–1161.
- Thomson, R. (2011). *Resolving controversy in the European Union: Legislative decision-making before and after enlargement*. Cambridge: Cambridge University Press.
- Thomson, R. et al. (eds) (2006). *The European Union decides*. Cambridge: Cambridge University Press.
- Tsebelis, G. (2013). Bridging qualified majority and unanimity decision making in the EU. *Journal of European Public Policy* 20(8): 1083–1103.
- Van Schendelen, M.P.C.M. (1996). The Council decides: Does the Council decide? *Journal of Common Market Studies* 34(4): 531–548.
- Westlake, M. & Galloway, D. (2004). *The Council of the European Union*. London: John Harper.

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