

## **A single voice for multilateralism?**

Assessing the impact of the CFSP on the EU's performance in  
multilateral negotiations

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### 1 Introduction

The European Union (EU) has defined the promotion of a multilateral world order as a cornerstone of its common foreign policy. The 2003 European Security Strategy (ESS) asserts that “the development of a stronger international society, well functioning international institutions and a rule-based international order is our objective” (ESS, 2003: 9). This overarching objective entails a double commitment to “upholding and developing International Law” (ESS 2003: 9), that is, both to defending and enforcing existing multilateral rules and to *expanding* the global web of multilateral rules to new policy-areas and issues. In order to realise this latter aim, it is important for the EU to act as an *effective negotiator* in the multilateral fora where new global treaties and institutions are initiated and drafted. This is particularly critical in instances when the EU seeks to play the role of a “champion of

multilateralism” (Barroso, 2004) by promoting new multilateral initiatives vis-à-vis other, less multilaterally-minded actors.

This article evaluates the EU’s performance in multilateral treaty negotiations. More specifically, I ask how the institutional framework of the EU’s *Common Foreign and Security Policy* (CFSP) affects the EU’s capacity to negotiate effectively in multilateral settings: does the coordination of EU member state policies through CFSP help or hinder the EU’s stated aim of expanding the web of effective global multilateral institutions?

Why is this question worth asking? On the surface, the now conventional association of the EU’s common foreign policy with multilateralism could lead us to think that the more EU members coordinate their policies, the more multilateralism will result at the global level. As one analyst puts it:

“When the Union speaks with one voice in bilateral or multilateral trade negotiations, it is a powerful one, representing 350 million citizens with a combined GDP roughly similar to that of the United States. The Union could be as effective in other policy areas if it wanted to, simply by providing for a single representation.” (Cameron, 2003: 119)

So why question this popular view? The impetus for this study stems from an intriguing body of research that *has* sought to point out the limitations of the conventional wisdom, by showing how EU policy coordination can complicate and quite often obstruct the Union’ role as an effective international negotiator (Jupille, 1999; Meunier, 2000, 2005). The central insight of this literature is that policy coordination in the EU is in fact not always helpful, not from the perspective of EU members and not with regard to the issues at stake in international negotiations.

However, the applicability of these established theoretical arguments to many multilateral issues that the EU confronts today is severely limited by the exclusive focus of existing studies on international trade and environmental negotiations that fall under “community competence”, that is, the first of the EU’s three institutional

“pillars”. Yet multilateralism as a policy objective cuts across pillars. When EU representatives talk about the EU’s commitment to multilateralism, they often refer to important issues such as non-proliferation or the International Criminal Court (ICC) that are negotiated under the inter-governmental institutional framework of the CFSP (European Union, 2003: 4; Solana 2004; 2005). In this second pillar, the rules and mechanism of policy coordination differ considerably from negotiations under community competence. It is thus surprising that no study has thus far systematically investigated how the EU performs in multilateral treaty negotiations under the CFSP framework. While there is a lively theoretical debate about the dynamics of policy-making under CFSP, this strand of literature has not yet been linked to analyses of the EU’s international negotiating performance.

This is the “missing link” that this study seeks to provide. Drawing on existing arguments about the EU’s role as an international negotiator as well as on competing rationalist and constructivist theoretical arguments about policy-making under CFSP, I develop a set of hypotheses about the impact of the CFSP on four “performance indicators”: bargaining power vis-à-vis other actors, likelihood of negotiation and agreement, effect on the substance of outcomes, and winners and losers among EU member states. I test these hypotheses on three cases of multilateral treaty negotiations under CFSP competence: the Anti-Personnel Landmines Ban, the International Criminal Court, and the verification protocol to the Biological Weapons Convention.<sup>1</sup>

Since I am particularly interested in evaluating the EU’s ambition to act as a “champion of multilateralism” vis-à-vis others, I focus specifically on cases in which European proposals for new multilateral rules have met with the opposition of another

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<sup>1</sup> Cases were selected to cover different degrees of EU policy coordination under CFSP, as well as different issue-areas.

important actor, the United States. Such conflicts over multilateral agreements have frequently troubled the transatlantic partnership in recent years (Daalder 2001; Ikenberry 2003; Krause 2004; Risse 2003; Van Oudenaren 2003; 2004), and the widely criticized “unilateralist” tendencies in US foreign policy constitute a crucial reference point for the EU: if it wants to promote a multilateral world order, its main counterpart in negotiating this order is the US, as the global hegemon.<sup>2</sup>

Empirically, my study combines insights from existing case studies of CFSP decision-making with new research on all cases. In addition to official sources and published participant accounts, it is based on an extensive series of interviews with government and NGO participants and observers of the different negotiations.

In summary, my study makes a theoretical as well as empirical contribution. At a theoretical level, it links arguments about the EU’s role as an international negotiator to research on policy-making under CFSP. By evaluating the EU’s negotiating performance under CFSP, it enables us to draw comparisons with negotiations under community competence and thus contributes to the ongoing political debate about the pros and cons of curbing intergovernmentalism and strengthening community competences in the CFSP.

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<sup>2</sup> As Scheipers and Sicurelli (2007) have shown, the US constitutes the “Other” in much of the EU’s rhetorical self-representation as a “normative power” (Scheipers/Sicurelli, 2006).

## 2 Theoretical framework

### 2.1 *The EU as an international negotiator under Pillar 1*

A distinct body of theoretical literature about the EU's performance in negotiations with "outside" actors has evolved only recently (Elgström/Strömvik, 2005; Jupille, 1999; Meerts, 2004; Meunier, 2000, 2005; Smith 2000, 2005). Among these contributions, two stand out for tackling the issue in a particularly systematic manner: the seminal studies by Jupille (1999) and Meunier (2000, 2005) formulate and test a set of detailed theoretical hypotheses about the impact of EU policy coordination on the outcomes of international environmental and trade negotiations, respectively.

Since both of these areas are dealt with in the EU's first pillar, it is important to briefly recall the institutional rules that govern the EU's role as international negotiator in this sphere of community competence.<sup>3</sup> Article 300 of the Treaty of Nice regulates the roles of the Council and Commission for all international treaty negotiations under the first pillar.<sup>4</sup> A number of other articles specify the policy areas in which the community *has* a first pillar negotiating competence and the applicable voting rules in each area – unanimity or qualified majority voting (QMV).<sup>5</sup> As a rule, the same voting rules that apply to EU-internal decision-making on an issue also apply to EU decisions in international negotiations on this issue. In summary, in areas of community competence, EU member states have an obligation to formulate common negotiating positions, on the basis of either unanimity or majority voting, which are represented by the Commission vis-à-vis other countries.<sup>6</sup>

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<sup>3</sup> For a detailed overview of legal provisions and their implementation, see e.g. Delreux (2006).

<sup>4</sup> The Commission negotiates on behalf of the EU but under directions from the Council, which also has the final say about the ratification of negotiated agreements.

<sup>5</sup> Relevant provisions include Article 111 on financial and monetary policy, Article 113 on the international trade policy, Article 166 on research policy, Article 174 on environmental policy, Article 181 on development cooperation, and Article 310 on association agreements.

<sup>6</sup> Note that in some areas, such as environmental policy, the EU's negotiating competence is not *exclusive*, as member states retain the right to negotiate independently alongside the community. Here, the duty to coordinate only applies to the "community part" of the negotiation (Delreux, 2006; 242).

How does the coordination of EU member state policies under this framework affect the EU's performance as an international negotiator? Jupille's and Meunier's theoretical frameworks offer a range of propositions which link EU policy coordination to different dependent variables that can be thought of as "performance indicators": the EU's bargaining power vis-à-vis other actors; the likelihood of initiating and successfully concluding an international negotiation on a given issue; the "reformist" or "conservative" character of the international negotiation outcome; and the distribution of "winners" and "losers" within the EU.<sup>7</sup>

In the analytical context of my study, it is important to note that the impact of EU policy coordination on these performance variables differs according to the substantive orientation of EU policy *relative* to other actors. As Meunier argues, a "reformist" EU advocating more ambitious international rules than its counterparts faces different constraints than a conservative EU seeking to block other actors' reform initiatives. As my specific interest is in transatlantic conflicts where the EU acts as a reformist "champion of multilateralism", I will focus here on summarizing only those propositions that apply to a reformist EU negotiator.

A first important argument about the performance of a reformist EU negotiator is that coordination does *not* make a difference to negotiation outcome if decision-making at the *international* level is based on unanimity. In this case, the EU's conservative opponent can dictate the bottom line, and neither the EU's bargaining power nor the substance of the outcome are affected by whether or not EU members coordinate their policies (Jupille, 1999: 414; Meunier: 117).<sup>8</sup>

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These complex but quite common "mixed agreements" are, however, ignored by existing theoretical models of external negotiations under pillar 1, which focus on coordination under Article 300.

<sup>7</sup> Despite the two authors' slightly different analytical focus and choice of variables, there are broad overlaps between their arguments that allow me to collapse their frameworks in this section.

<sup>8</sup> In contrast to Jupille, Meunier's study focuses on bilateral negotiations where agreement is by definition always unanimous.

If international decision-making is by majority voting, however, EU coordination *can* affect the EU's performance. First, its *bargaining power* is strengthened by coordination because a common EU position carries greater (voting) weight than different uncoordinated member state positions (Jupille, 1999: 415).

Second, the *likelihood* of initiating and successfully concluding a multilateral negotiation on a given issue is rather reduced by EU coordination. If EU-internal decision-making is by unanimity, a single conservative EU member can effectively prevent all other EU members from advocating the reformist international positions that they would have pursued as "free agents" and can thus block any international negotiations on the issue (Jupille, 1999: 415; Meunier, 2000: 117). If, however, the EU manages to agree on a reformist position, this can make it too inflexible to come to any agreement at all with its more conservative opponent (Jupille, 1999: 415).

Third, the effect of coordination on the *substance of multilateral outcomes* depends on the EU's internal voting rules. Unanimity gives conservative members a veto, as argued above, and thus makes international outcomes more conservative than they would have been otherwise. Majority voting, by contrast, creates a reformist bias at the international level, as conservative EU members are forced to take a more reformist stance than they would have taken without coordination (Jupille, 1999: 415).

Lastly, these insights imply that the EU's negotiating performance will be evaluated differently by conservative and reformist EU members: Reformists benefit from coordination under EU QMV and conservatives under EU unanimity.

In summary, policy coordination under pillar 1 only affects the performance of a reformist EU negotiator if international decision-making is based on majority voting. In this case, coordination increases the EU's bargaining power but lowers the likelihood of initiating and concluding a multilateral negotiation. Depending on EU

internal voting rules, it can create a conservative or reformist bias for international outcomes and benefit reformists or conservatives within the EU.

## 2.2 *Extending the framework to negotiations under CFSP*

In adapting existing theoretical propositions to international negotiations under the EU's second pillar, the CFSP, we need to amend certain fundamental assumptions that underlie Jupille's and Meunier's frameworks. The first and most critical difference between negotiations in both pillars is that under CFSP, member states have an option but *no obligation* to coordinate their positions. Second, if they choose to coordinate in a particular negotiation, common positions can only be adopted *unanimously*, in line with CFSP rules of decision-making.<sup>9</sup> These rules imply that each individual EU member holds a veto both over whether or not the EU should coordinate and over the content of coordinated negotiating positions.

This change in underlying assumptions has profound implications for the impact of coordination on the EU's negotiating performance. I argue that if we extend existing propositions about the EU as an international negotiator to issues that fall under the CFSP framework, we should *not* expect coordination to have any – positive or negative – impact on the EU's negotiating performance. Why is this so?

Since coordination is not mandatory under CFSP, we have to establish, as a first step, the conditions under which it is likely to occur. As a general rule, we can expect that a rational EU member state will only agree to coordinate when it anticipates that this will not diminish its chances of realising its preferred outcome in the respective multilateral negotiation. In the preceding section, we have seen that the coordination

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<sup>9</sup>The three binding legal instruments of CFSP – Common Strategies, Joint Actions, and Common Positions – are all adopted unanimously. The only exception, which is not relevant to multilateral treaty negotiations, is the QMV rule for decisions implementing previously agreed Common Strategies (for an overview, see Keukeleire/MacNaughtan, 2008: 148-173). In addition to these formal instruments, the EU also uses Presidency declarations and demarches as well as position papers to state its common views in the context of multilateral negotiations. While there are no treaty rules governing the use of these more informal diplomatic tools, they cannot be employed against the will of a member state.

of EU policy preferences under community competence and unanimity rules can bias international outcomes in a conservative direction and can thus disproportionately benefit conservative EU member states. This suggests that under the CFSP, where decision-making is unanimous but coordination *not* mandatory, reformists within the EU will block coordination if it is expected to produce such a conservative bias.

Coordination under CFSP will thus occur only if it does *not* disproportionately benefit some member states over others. This is the case under three conditions: First, if member state preferences on an issue *converge* to a large extent, no member will gain an advantage over others through coordination. Second, if decision-making is unanimous at the international level, a reformist EU has no influence on international outcomes anyway. It is therefore not costly for reformist EU members to agree to a lowest-common-denominator EU position, or for conservative members to agree to a more reformist position. Third, the same holds under international majority voting if EU reformists or conservatives are in a clear international minority and expect to be outvoted anyway. These arguments about the likelihood of EU coordination under CFSP can be summarized in the following hypothesis:

*H1: The coordination of member state policies in multilateral negotiations under CFSP is likely if*

- (a) EU member state preferences converge.*
- (b) international decision-making is based on unanimity.*
- (c) reformists or conservatives are in a clear international minority.*

We now know under which conditions EU members are likely to coordinate their positions in a multilateral negotiation under the CFSP framework. But how does coordination, if it happens, affect the EU's negotiating performance? The short answer is that it does not.

First, in contrast to negotiations under pillar one, the EU's *bargaining power* will not be boosted by coordination. As was argued above, member states will only agree to coordinate if they are unlikely to affect international outcomes anyway (1b and 1c) or if their preferences converge (1a). If their preferences converge on a reformist position, the added voting power of the common EU position will be the same as the sum of uncoordinated member state positions.

Next, again in contrast to first pillar negotiations, the *likelihood* of negotiating or concluding a European-led reformist initiative should *not* be decreased by policy coordination under CFSP. Conservative EU members cannot prevent EU reformists from initiating an international negotiation, because the latter can always choose to do so on an individual, uncoordinated basis. Conversely, if EU members feel that a coordinated EU position would prevent them from concluding a desirable agreement with other actors, they can opt out of coordination. In short, whenever member states feel that coordination places too narrow constraints on their negotiating strategy, they can opt out of it.<sup>10</sup>

Concerning the *effect of coordination on the substance of international outcomes*, I have argued above that if member state preferences diverge, reformists within the EU would block any EU coordination that could introduce a conservative bias into international outcomes. If member state preferences *converge* on a reformist position, however, coordinating them will not make international outcomes more reformist than they would have been otherwise. As a result, neither conservatives nor reformists will profit disproportionately from CFSP coordination. We can hypothesize:

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<sup>10</sup> This does not rule out that EU members may find it useful to “tie their hands” through coordination in some situations to increase the pressure on an opponent. However, this strategy is less credible under CFSP than in first pillar negotiations.

*H2: The coordination of member state policies in multilateral negotiations under CFSP will not affect the EU's negotiating performance, compared to uncoordinated negotiations.*

### **2.3 Relaxing rationalist assumptions**

The argument as outlined thus far would lead us to expect that while member states may coordinate their positions in second pillar-negotiations under certain conditions, this should neither improve nor worsen the EU's negotiating performance. Yet this extension of existing theoretical frameworks to the CFSP leaves one question unanswered: Why should member states bother to undertake a cumbersome coordination process if there is nothing to gain from it? In this section, I argue that we can shed some light on this puzzle by relaxing the *rationalist assumptions* underlying previous studies of the EU's role as an international negotiator.

The theoretical arguments developed by Jupille and Meunier with respect to first pillar negotiations, which were extended above to the CFSP, are based on the assumption that EU member states are rational utility-maximizers pursuing their own national interest on an issue in any particular multilateral negotiation. These national interests are independent of the interests of other member states and are not assumed to change in the process of coordination. Member state preferences are aggregated through a bargaining process governed by the formal constraints of the Treaty of Nice. Under unanimity, the outcome will therefore necessarily be the lowest common denominator (LCD); under QMV, it will represent the majority's view. In addition to these rationalist assumptions about EU policy-making, which Jupille and Meunier share with other "intergovernmentalist" theorists of European integration (e.g. Moravcsik, 1993, 1998), their frameworks further assume that decision-making in multilateral negotiations follow an analogous logic: the preferences of all participating

states are fixed and are aggregated through bargaining in accordance with different international decision-making rules.

These rationalist assumptions about EU-internal and international bargaining have been challenged by *constructivist* theorists. Broadly speaking, constructivist approaches to international relations differ from rationalist approaches on two key assumptions: First, they do not conceive actors' preferences as exogenously given, but draw attention to social processes such as socialization, learning, and persuasion that can shape and change these preferences. Second, they hold that actors' choices do not always reflect a rational cost-benefit calculus but are often guided by social norms of appropriate conduct.

For the research question of this study, these broad constructivist assumptions have implications at different levels. Regarding the EU's internal decision-making procedures, constructivist perspectives on European integration (Checkel 2003; Jorgensen 1997; Risse-Kappen 1996: 68-72; Sandholtz 1996) suggest that member state preferences can *change* through participation in the EU policy-making process – through socialization, learning, and argumentation – and that CFSP decision-making in particular is governed by certain informal norms: the understanding that member states *should* seek to achieve common positions on key issues and the norm that all should compromise to achieve this aim (Juncos/Pomorska, 2006; Smith, 2004: 185; Tonra, 2003; Thomas, 2005: 15, 2009).

Similar arguments are made by constructivists with regard to multilateral negotiations above the EU-level. A growing strand of literature has sought to demonstrate that the outcomes of multilateral negotiations are shaped as much by arguing and persuasion as by rational bargaining and that actors' preferences change in such processes (e.g. Müller, 2004; Risse, 2000). Other scholars have argued that international negotiation

processes are governed by both substantive and procedural norms of fairness and “appropriate” diplomatic conduct (Albin, 2001; Wendt, 2001).

With regard to the specific research question of this paper, these arguments would lead us to amend three key assumptions underlying existing studies of the EU as an international negotiator. First, if there is a powerful social norm that EU member states should seek to develop a common position, policy coordination under CFSP may happen *even if* some member states perceive this as running counter to their own interests. The same social pressure will also prevent member states from defecting from an agreed common position.

Second, if coordination occurs, its outcome will not necessarily stand at the lowest common denominator, despite the formal unanimity rule in CFSP. Both the social norm of consensus-seeking within the EU and EU-internal processes of arguing and persuasion can lead preference “outliers” to shift their policies toward the EU median. In effect, these social pressures should produce an informal majoritarianism.

Third, similar pressure may also be at work at the international level. If processes of arguing and norms of “give and take” consensus diplomacy are prevalent in multilateral negotiating fora, the EU should profit from speaking with one voice not only because this allows for vote-pooling but also because it increases its persuasive power vis-à-vis other actors.

If we amend these three key assumptions as outlined above, this would lead us to expect that the coordination of negotiating positions under CFSP is more likely and has a greater effect on the EU’s negotiating performance than suggested by a rationalist perspective.

With regard to the likelihood of coordination, constructivist assumptions imply that member states will coordinate their positions in a negotiation under CFSP *not only* if

their preferences converge on a reformist position, but also if either conservative or reformist member states are in a clear minority position within the EU. In this case, the outliers would be susceptible to the social pressure of other member states not to block the adoption of a common EU position and to move toward the EU median in a search for consensus. In contrast to H1 based on rationalist assumptions, we should thus not expect coordination to depend on international voting rules.

*H3: The coordination of member state policies in multilateral negotiations under CFSP is likely if*

*(a) EU member state preferences converge.*

*(b) conservative or reformist member states have a clear majority in the EU.*

A constructivist perspective also challenges the rationalist hypothesis that policy coordination under the CFSP will not have any positive or negative impact on the EU's performance in multilateral negotiations.

The EU's bargaining power should be increased by coordination under CFSP, regardless of international decision-making mechanisms. Since there is always a possibility of using arguments and persuasion at the international level, the EU will have greater persuasive power by speaking with one voice.

The *likelihood* of negotiating and successfully concluding a European-led reformist initiative, on the other hand, can be decreased by policy coordination under CFSP, according to the constructivist logic. Since norms of consensus-seeking within the EU can amount to informal majoritarianism, a strong majority of conservative member states within the EU can prevent individual reformist members from initiating a reformist multilateral initiative on their own. Likewise, the social pressure not to break with a once agreed reformist common position can prevent an agreement with the EU's conservative negotiating opponent.

For similar reasons, constructivists would also expect coordination under CFSP to affect the *substance of multilateral outcomes*. Due to the social pressure to coordinate, conservative or reformist minorities within the EU will not necessarily block coordination and will move toward the majority's view. Therefore, if there is a clear reformist majority within the EU, this will make multilateral outcomes more reformist than without EU coordination. If there is a conservative EU-internal majority, this will create a conservative bias.<sup>11</sup>

Lastly, it follows from the arguments advanced above that whoever is in a minority position within the EU – reformists or conservatives – will “lose” from coordination under CFSP. However, an important caveat to this proposition is that EU-internal arguing and consensus-seeking may lead outliers to undertake a genuine re-evaluation of their preferences. In this case, they would no longer perceive the resulting outcomes as contrary to their national interest. In sum, we can hypothesize:

*H4: The coordination of member state policies in multilateral negotiations under CFSP will*

*(a) increase the EU's bargaining power.*

*(b) decrease the likelihood of an EU-led reform initiative if there is a majority of conservative member states within the EU, and decrease the likelihood of agreement with the EU's conservative negotiating opponent.*

*(c) make international outcomes more conservative if there is a majority of conservative member states within the EU and more reformist if there is a reformist majority.*

*(d) benefit those member states which are in a majority position within the EU.*

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<sup>11</sup> Again, this is independent of international decision-making rules.

### 3 Negotiating the Anti-Personnel Landmines Ban

#### 3.1 *The EU in the “Ottawa Process”*

The 1997 *Convention on the Prohibition of the Use, Stockpiling, Production, and Transfer of Anti-Personnel Landmines and on Their Destruction* (Ottawa Convention) is a case of weak EU policy coordination under CFSP.<sup>12</sup>

The treaty was the result of a Canadian initiative. Frustrated with the slow progress of attempts to restrict the use of anti-personnel mines under the *Convention on Certain Conventional Weapons* (CCW), Canada proposed in 1996 to negotiate a total ban on the weapons among interested “like-minded states” within the time frame of just one year (Tomlin, 1998).

The EU was initially deeply divided on this proposal, both on the unconventional like-minded format of the “Ottawa Process” and on its radical aim of a total ban on anti-personnel mines. While a minority of small European countries – led above all by Austria – immediately supported the Ottawa Process, the majority led by France and the UK was strongly opposed, favouring the alternative US proposal to negotiate the issue in the Geneva-based *Conference on Disarmament* (CD). In the course of the year 1997, this balance gradually shifted, with the reformist “Ottawa camp” gaining more and more ground. A critical turning point was the pro-Ottawa and pro-ban move of both France and the UK in the spring of 1997, following left-wing election victories in both countries (Long/Hindle, 1998: 249-60; Long, 2002: 433-6).

Despite these realignments, the EU-internal differences could never be bridged through CFSP coordination mechanisms. Although the mine ban question was soon taken up as a CFSP issue and was repeatedly debated in the Council working group on

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<sup>12</sup> The history of the mine ban negotiations is the subject of an extensive body of literature, which I draw on in this section (e.g. Cameron et al., 1998; Price, 1998; Rutherford, 2000; Short, 1999; Sigal, 2006). Particularly relevant to my question is Long’s study of CFSP policy coordination on landmines (2002), which does not focus on the EU’s performance in the multilateral negotiations but nevertheless provides important empirical details on the coordination process on landmines.

disarmament (CODUN), it proved impossible to agree a common EU position either in support of the Ottawa Process or in support of the alternative CD route. Neither could the EU agree on common positions or strategies for the final negotiating session of the Ottawa Process, which took place in Oslo in September 1997.

By the start of this final conference, Greece and Finland were the only EU members that still remained opposed to the process and the ban; the EU majority was solidly in the pro-camp.<sup>13</sup> However, one key player *outside* the EU now threatened to undermine the quest for a total ban. The United States reversed its earlier policy of boycotting the Ottawa Process and decided to attend the Oslo Conference, but asked for a number of special geographical and technical exceptions and transition periods to be included in the treaty.<sup>14</sup> EU reformists were thus faced with a choice of cutting holes in the proposed total ban or excluding a key player that could greatly boost the credibility of the new treaty (Fehl, 2008: 266-70).

Despite daily EU coordination meetings during the Oslo Conference, the EU could not agree on a common response to US demands. Some members, notably Germany, worked toward a compromise until the final hour, whereas long-standing Ottawa proponents such as Belgium and Austria remained intransigent.<sup>15</sup> In the end, the US failed to gain a majority for its proposed amendments and as a result, did not join the Ottawa Convention. By contrast, all EU members except Finland signed up to the ban treaty, which essentially reflected the reformist vision.

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<sup>13</sup> In the Finnish case, the main concern was the country's ability to protect its long border with Russia. For Greece, borders with the unstable Balkan region were critical (Long/Hindle, 1998: 260-2).

<sup>14</sup> US demands included an exception for US mine use in Korea, a redefinition of mines which would exclude US "mixed mines" combining anti-tank and anti-personnel mines, a nine year transition period, and a clause permitting withdrawal in armed conflict. On the development of the US position, see especially Sigal (2006) and Wareham (1998).

<sup>15</sup> Interviews with Austrian and Belgian delegation members, 10 October 2007 and 28 June 2006, and with a German NGO observer, 11 July 2006. Also see Maslen, 2004: 43.

It was only after the Oslo Conference that the EU agreed a formal “Joint Action” on landmines in December 1997. However, this Joint Action only prohibited the transfer and production of anti-personnel mines and fell short of full-scale support for the Ottawa Convention (Long, 2002: 436-7).

### ***3.2 Evaluating rationalist and constructivist hypotheses***

What does the story of the EU’s involvement in the Ottawa Process tell us about the validity of rationalist and constructivist hypotheses on the impact of CFSP coordination in multilateral negotiations?

Starting with competing hypotheses on the *likelihood* of CFSP coordination, the lack of a formal common EU position before the conclusion of the multilateral negotiations is well explained by rationalist arguments. Despite shifts in the reformist-conservative balance, the preferences of EU member states never fully converged. In addition, decision-making in the Ottawa Process was by majority voting, meaning that conservative members could not hope to hide behind veto players outside the EU if they agreed to a reformist EU position. Neither would it have been “cheap” for EU reformists to agree to a conservative EU position. Although reformists were initially a minority at the international level, the self-selection principle of the Ottawa Process – open only to like-minded supporters of a total ban – guaranteed that they could not be outvoted by conservative “laggards”. Given this preference distribution and international institutional context, it is in line with rationalist predictions that member states never agreed a common position on the Ottawa Process. As predicted, conservative EU members blocked any proposals for EU positions endorsing the Ottawa Process, while reformist EU members blocked efforts to throw the EU’s collective weight behind the CD alternative (Long 2002: 435).

While the rationalist perspective accounts for the lack of formal coordinated positions, the constructivist hypothesis that CFSP coordination can occur despite preference divergence and that it will not necessarily produce a lowest common denominator outcome also receives a degree of support in the case of the mine ban treaty. The very fact that the multilateral mine ban treaty was continuously discussed in the CODUN and that EU delegations held coordination meetings during Ottawa Process negotiating sessions testifies to member states' understanding that the EU *should* try to develop a common stance on this important issue. As Long argues, the initiative for the EU's 1997 Joint Action on landmines was born out of a strong feeling on the part of the Luxembourg EU Presidency that "the EU as a political player could not afford to have nothing to say regarding the Ottawa Process" (Long, 2002: 436).

While this feeling was not strong enough to produce a common EU position during the Oslo negotiations, it nevertheless created considerable social pressure on "hold-out" member states to shift toward a somewhat more ban-friendly stance. Both the eventual Greek decision to sign up to the Ottawa Convention and the Finnish support for the 1997 EU Joint Action are best explained by this informal EU consensus pressure (Long, 2002).<sup>16</sup> Moreover, the EU hold-outs took pains to maintain a stance of constructive abstention (Long, 2002: 439). Since they attended the Oslo Conference only as "observers" and never voiced their objections forcefully, delegates felt that the EU "appeared more or less as one" during the decisive final round of negotiations.<sup>17</sup>

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<sup>16</sup> Note, however, that the EU-internal consensus pressure on the Finnish and Greek hold-outs coincided with the domestic pressure of the strong transnational NGO campaign to ban landmines and with the broader "domino effect" of more and more states joining the Ottawa Process. These EU-external social pressures are more important in explaining why EU member states began to shift to a pro-ban stance at an *earlier* point in time, when ban proponents were still a minority within the EU.

<sup>17</sup> Interview with a Belgian delegation member, see note 15.

A constructivist argument about EU-internal coordination norms can thus help to explain why the EU managed to “paper over” its internal differences and to achieve at least an appearance of unity at the Oslo Conference. Nevertheless, there were clear limits to this social pressure in the landmines case. In the earlier stages of negotiations, when reformists were still an EU-internal minority, the conservative majority could not pressure or persuade reformists to soften their radical pro-ban stances. And even when majorities had shifted and the pressure was on the anti-ban hold-outs, the latter only agreed to a limited change of their positions.

Turning to the question of how CFSP coordination affected the EU’s performance in the mine ban negotiations, I again find stronger evidence for rationalist arguments.

First, there is little indication that the EU’s coordination efforts at Oslo substantially strengthened its *bargaining power*, either through vote-pooling or by making EU positions more persuasive. Apart from Greece, all EU members that supported the reformist treaty would have done so even without EU coordination. The EU’s ability to speak “more or less” with one voice also failed to convince the US and other conservative opponents to shift their stances.

Next, the constructivist prediction that CFSP coordination will decrease the *likelihood* of initiating a negotiation or of achieving agreement with the opponent receives only weak support in the landmines case. As expected by rationalists, the initial conservative majority within the EU could not prevent EU reformists from taking lead roles in new Ottawa initiative. Neither did EU coordination efforts at Oslo prevent Germany from drafting and promoting a special “annex” to the treaty that could have facilitated agreement with the US.<sup>18</sup> And yet, some European diplomats still felt that in the final instance, EU coordination mechanisms, combined with strong NGOs

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<sup>18</sup> Discussions on the annex were never publicized, but are known from NGO reports (Alt, 1997).

lobbying against “watering down” the ban treaty, did constrain Germany and other proponents of compromise to an extent. In an EU meeting convened to discuss a possible last-minute agreement with the US, Belgium made it clear to other member states that it would not budge. According to the Belgian delegate, “once other EU members saw that Belgium would go ahead, no-one else dared to compromise for fear of the public pressure.”<sup>19</sup>

This observation also suggests that contrary to rationalist hypotheses, CFSP coordination efforts made the *substantive outcome* of the overall multilateral process more reformist than it might have been otherwise and that CFSP coordination *benefited the EU-internal (reformist) majority* over the conservative minority.

Summarizing the preceding analysis, we can conclude that the rationalist perspective accounts well for many aspects of the EU’s role in the multilateral mine ban negotiations. The EU’s failure to agree on a formal common position as well as the high flexibility of both conservative and reformist in pursuing their preferred strategies at the multilateral level are in line with rationalist predictions. However, constructivist arguments also receive a limited degree of support. They can explain better than rationalist propositions why the EU informally achieved a relatively unified appearance at Oslo, which made agreement with the conservative US more difficult and thus contributed to the reformist outcome.

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<sup>19</sup> Interview with a Belgian delegation member, see note 15.

## 4 Negotiating the International Criminal Court

### 4.1 *The EU in the ICC negotiations*

The International Criminal Court, established in 2002 in The Hague to prosecute the gravest crimes against humankind, was the subject of protracted negotiations and of an at times acrimonious transatlantic controversy.<sup>20</sup> In the course of this conflict, the EU was able to achieve a more and more unified stance through CFSP coordination mechanisms.

While the call for an ICC dates back to the aftermath of World War I, serious negotiations did not get off the ground until after the end of the Cold War. Following a 1989 initiative by Trinidad and Tobago to revive the idea, the UN International Law Commission (ILC) produced a draft ICC statute which was subjected to complex and extended negotiations and eventually agreed at a diplomatic conference in Rome in 1998. During these negotiations, a split emerged between defenders of the rather conservative ILC draft statute – which tied the court’s jurisdiction to a constraining set of preconditions and accorded special privileges to the permanent members of the UN Security Council – and a growing group of “like-minded states” seeking to broaden the court’s jurisdiction and to strengthen its independence from the Security Council (Benedetti/Washburn, 1999; Kirsch/Robinson, 2002).

In this conflict, the EU found itself divided again. As permanent Security Council members, France and the UK were aligned with the US in the conservative camp, whereas the vast majority of EU members, led by Germany, held “like-minded” views. Although the UK joined the like-minded group shortly before the Rome Conference, the EU was again unable to enter the final round of negotiations with a common position. While the EU made several general statements in support of an effective

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<sup>20</sup> For overviews and analyses of the ICC negotiations and their prehistory, see e.g. Arsanjani, 1999; Benedetti/Washburn, 1999; Cassese et al. (2002), Hebel et al. 1999; Kaul, 1998; Kirsch/Holmes, 1998; Lee, 1999. On the EU’s role and the transatlantic conflict, see Deittelhoff/Burkard, 2005; Groenleer/Van Schaik, 2007; Thomas 2005.

court during the negotiations and held daily coordination meetings at Rome, it was unable to reach agreement on the most contested issues: the preconditions for ICC jurisdiction, the role of the Security Council, and the independence of the ICC prosecutor (Deitelhoff/Burkard 2005: 19-21).

As in the landmines negotiations, the reformist like-minded group at the Rome Conference was faced with a choice of making far-reaching concessions on these sticking points or creating a court without the support of the United States and other weighty players in the conservative group. And as in the landmines case, all attempts at a compromise eventually failed. The final compromise package tabled by the Conference Chairman, while incorporating many safeguards against political abuse of the court, failed to satisfy key US demands, prompting the United States to vote against the ICC statute at the end of the conference.<sup>21</sup> France, in contrast, reversed its stance at the last minute and – having succeeded in inserting a temporary “opt-out” clause on war crimes into the statute – joined the rest of the EU in voting for the court (Kirsch/Robinson, 2002: 85).

The French volte-face enabled the EU to take a much more unified stance on the ICC in the aftermath of the Rome Conference. In a series of Common Positions and “Action Plans” adopted between 2001 and 2004, the Union affirmed its support for the new court and detailed its plans to promote ICC membership vis-à-vis countries outside the EU.<sup>22</sup> CFSP coordination mechanisms – including a new ICC subgroup of the Council’s COJUR working group on international law – were also used successfully to formulate common responses to a series of new US challenges to the

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<sup>21</sup> For a detailed overview of the final compromise, see e.g. Arsanjani, 1999; Kirsch/Holmes, 1998. On the development and background of the US position, see e.g. Scharf, 1999; Scheffer, 1999; Sewall/Kaysen, 2000; Wedgwood, 1999.

<sup>22</sup> Council Common Positions on the International Criminal Court, 11 June 2001 (2001/443/CFSP), 20 June 2002 (2002/474/CFSP) and 16 June 2003 (2003/444/CFSP); Action Plan to Follow-up on the Common Position on the ICC, 15 May 2002 and 24 February 2004.

ICC. The Bush administration's withdrawal of Clinton's earlier signature of the ICC Statute and the passage of the "American Servicemembers Protection Act" (ASPA) by the US Congress in May and June 2002 were both openly criticized in statements and letters by the EU Presidency as well as in EU Council Conclusions.<sup>23</sup>

Most remarkable, however, was the EU's response to US requests for bilateral "non-surrender agreements".<sup>24</sup> In June 2002, the Bush administration began to approach countries worldwide, including its European allies, with the proposal to conclude such bilateral agreements, which would oblige both parties not to surrender each others' citizens to the ICC. Initially, reactions within the EU were divided: While Britain and Italy indicated their willingness to enter negotiations with the US, other EU members, notably Germany, strongly rejected the requests (Groenleer/Van Schaik 2007: 976-83; Thomas, 2005: 29-46). Despite this vast difference of opinions, the EU was able to negotiate a consensus position on non-surrender agreements through CFSP coordination mechanisms.<sup>25</sup> The September 2002 EU Council Conclusions rejected the US-proposed agreements as incompatible with the ICC statute, but allowed member states to conclude narrower agreements meeting a set of criteria.<sup>26</sup> However, none of the then 15 EU members ever concluded such a more limited agreement. The US bilateral agreement campaign was thus effectively rebuffed in Europe.<sup>27</sup>

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<sup>23</sup> Declaration by the EU on the Position of the US towards the International Criminal Court, Brussels and Madrid, 13 May 2002; General Affairs Council of the EU, Conclusions of 17 June 2002; Joint letter by the EU Presidency and Commission to the US Congress (House and Senate Appropriations Conferees). President Clinton had signed the Rome Statute in December 2000 before leaving office despite continued reservations. The ASPA legislation authorized the US President to use all necessary means necessary to protect US personnel from ICC Prosecution, including cutbacks in military and economic aid (Johansen, 2006).

<sup>24</sup> With regard to this episode, I draw on Thomas' detailed case study of CFSP decision-making on bilateral non-surrender agreements (2005).

<sup>25</sup> For details on these negotiations, see especially Thomas, 2005.

<sup>26</sup> Permissible agreements should oblige signatories to prosecute crimes domestically ("no impunity"), should not protect the nationals of ICC states parties ("no reciprocity") and should only cover US nationals "sent" in an official capacity (Human Rights Watch 2003).

<sup>27</sup> The EU also promoted its Guidelines – which were formalised and thus upgraded in a revised Common Position in 2003, vis-à-vis diplomatic demarches and as part of its enlargement process. As a

#### 4.2 *Evaluating rationalist and constructivist hypotheses*

In the case of the ICC, rationalist and constructivist hypotheses about the likelihood and impact of CFSP coordination can be tested on two different stages of the negotiations and the ensuing transatlantic controversy.

The EU's role in the negotiations over the ICC statute appears to be in line with rationalist predictions at first sight. In spite of a strong reformist majority within the EU, the French and initially also UK conservative stances prevented the adoption of a common position under CFSP until after the Rome Conference. As in the landmines case, the ICC negotiations were governed by majority voting rules, meaning that EU conservatives could not rely on countries outside the EU to block reformist proposals. Conversely, EU reformists stood good chances of realising their aims through the growing cross-regional coalition of like-minded states, making it too costly for them to agree to a lowest-common denominator EU position.

However, the rationalist perspective does not tell the whole story. As in the landmines case, ongoing EU consultations during negotiations illustrate member states' understanding that the EU *should* strive to develop a common position. More importantly, there was widespread agreement among diplomats and observers that the British and French "conversions" to the like-minded camp – which were much more central to the outcome of the multilateral negotiation than the Finnish and Greek positions on landmines – were heavily influenced by EU-internal consensus pressure. In the words of a French delegate, the other EU members were "very unhappy that we did not allow them to have an EU position". French EU membership meant that the pressure on France was even higher than on the US: "In a way, the US did not have as many problems with other EU countries because it was simply clear that they would

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result, only one candidate country which later acceded to the EU, Romania, and four other European countries concluded the US-proposed agreements (Deitelhoff/Burkard, 2005: 24; Johansen, 2006: 315, Thomas, 2005: 34).

not help. But they were very dismayed with us.”<sup>28</sup> The same pressure was also felt by the British. According to a UK delegate, “[t]here were times when the atmosphere in the EU consultations was so heated that any move toward the Americans was seen as somehow treachery toward the European cause.”<sup>29</sup>

Of course, the UK and French shifts were also related to domestic developments in the aftermath of left-wing election victories,<sup>30</sup> making it difficult to pinpoint the exact causal weight of the EU consensus pressure. According to French delegates, the various safeguards inserted into the statute, particularly the last minute compromise on a war-crimes opt-out, essentially fulfilled all key French demands,<sup>31</sup> suggesting that the eventual agreement of all EU member states on the Rome Statute did not go beyond the lowest common denominator. However, the French opt-out proposal, described as a mere “fig leave” by NGO observers,<sup>32</sup> already represented a step down from France’s earlier “head-on opposition” to the entire initiative.<sup>33</sup> It is unlikely that France would have adopted such a cautious strategy in the absence of EU pressure.

The account of EU consultations given by a British diplomat also lends greater support to constructivist arguments about normative pressure and argumentative processes than to a rationalist concept of die-hard bargaining:

“We did, as time went on, attach importance to the development of discussions within the European Union, bearing in mind particularly that we held the Presidency for the first half of the year and indeed the Conference. [...] We all had an opportunity to absorb points of view of others as well as put in our own, and our policy was adjusted accordingly as time went on”.<sup>34</sup>

In summary, the rationalist perspective can explain the EU’s failure to agree a formal common position prior to the Rome Conference, but fails to capture the important

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<sup>28</sup> Interview, 23 June 2006.

<sup>29</sup> Interview with a British delegation member, 2 February 2007.

<sup>30</sup> Interview with a French delegation member, 1 November 2007.

<sup>31</sup> Interviews with French delegation members, see notes 28 and 30.

<sup>32</sup> Interview Bill Pace, Convenor of the NGO Coalition for the ICC, 6 March 2007.

<sup>33</sup> Interview with a French delegation member, see note 28.

<sup>34</sup> Interview, see note 29.

EU-internal dynamics that led to the eventual agreement of all EU members to the Statute of Rome.

The second phase of the ICC controversy, the transatlantic conflict over bilateral immunity agreements, lends even stronger support to constructivist arguments. Given that some EU members were initially willing to accommodate US requests, their agreement to the Presidency Conclusions rejecting the US-proposed agreements is puzzling for rationalists. As Thomas shows in his detailed study of CFSP coordination on bilateral immunity agreements, the September 2002 EU Guidelines were not a lowest-common denominator agreement, but a hard-won compromise only grudgingly accepted by the UK and other “Atlanticists” under the combined pressure of other EU members and public opinion (Thomas, 2005: 29-46). Germany in particular sought to pressure the UK by leaking information on the EU-internal negotiation and by publishing its own “supportive interpretation” of the EU compromise. Only a constructivist perspective can account for the EU’s common stance on the bilateral agreements question.

How do rationalist and constructivist propositions fare in predicting the impact of CFSP coordination on the EU’s negotiating performance? With regard to the ICC Statute negotiations, the evidence suggests that in line with constructivist predictions, CFSP coordination efforts – even short of a formal common position – did make a difference to the outcome of negotiations. First, the EU’s *bargaining power* was strengthened. Although there was no official vote pooling, EU pressure was important in winning British and French support for reformist proposals. Without these two critical players on board, it would have been difficult, if not impossible, to push through the ambitious “final package” as it was eventually agreed, against conservative opposition. Furthermore, CFSP coordination also visibly narrowed the

*chances of agreement* with conservatives outside the EU.<sup>35</sup> This was most apparent in the US attempt to promote a new compromise package a few days before the end of the Rome Conference with the help of other P-5 members.<sup>36</sup> France and the UK reached an agreement with the US on the contents of this new proposal at a late-night private meeting in the Russian embassy. Yet they found it hard to sustain their support for the package in the following EU coordination meeting, where the proposal was attacked particularly by Germany (Kaul, 1998: 56-7). The US delegation leader was exasperated by the experience:

“They [France and the UK] were straddling – they were with us on Wednesday night, but once you took them into the EU setting, they became EU members, not P-5. It was easier for them to come back to us on Thursday evening and say: Sorry, we did not get the EU on board [...]. They can then walk away knowing that they have rejoined the EU group. That is just good politics for them, to be part of the EU and not to confront the rest of the EU over this, and at the end of the day they stand with the EU, not with the P-5.”<sup>37</sup>

As a result of these EU-internal dynamics described above, the outcome of the overall multilateral negotiation – the Rome Statute – was arguably more reformist than it would have been without CFSP coordination, benefitting the EU-internal reformist majority over the conservative minority.

Similar conclusions hold for the impact of CFSP coordination in the bilateral conflict with the US over non-surrender agreements. The coordinated EU position clearly prevented the UK and other countries that would have been willing to consider US requests from reaching an agreement with the US. Due to this lack of a final bilateral agreement, we cannot draw inferences about the impact of CFSP coordination on EU bargaining power or on the substance of international outcomes from this episode. However, it is clear that EU conservatives lost and reformists benefited from coordination.

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<sup>35</sup> Note that given the long-standing EU-internal reformist majority, neither rationalists nor constructivists would expect EU coordination to prevent EU reformists from *initiating* a reformist multilateral negotiation.

<sup>36</sup> On these final P-5 compromise proposals, see esp. Kaul, 1998 .

<sup>37</sup> Interview with David Scheffer, US delegation leader, 1 March 2007.

Summarizing the preceding analysis, we can conclude that constructivist hypotheses can explain the EU role in the ICC negotiations and the transatlantic controversy over the ICC better than rationalist arguments. While the rationalist perspective explains the lack of a formal common position until after the Rome Conference, the constructivist view better captures the informal dynamics that contributed to the French and UK position shifts at the end of the conference and made agreement with the US more difficult, and it explains why the EU agreed on a common response to the US quest for bilateral non-surrender agreements.

## **5 Negotiating Biological Weapons verification**

### ***5.1 The EU in the BWC Protocol negotiations***

In the negotiations over a verification protocol to the Biological Weapons Convention (BWC) that took place in Geneva in the years of 1994-2001, the EU was able to develop a highly unified stance through CFSP coordination mechanisms. The BWC had been plagued by enforcement problems ever since its inception in 1972, yet during the Cold War, member states could not agree on more than voluntary confidence building measures to prevent and detect clandestine biological warfare programmes. Only in 1994, the so-called “Ad Hoc Group” was tasked with negotiating a binding compliance protocol.<sup>38</sup>

There was broad agreement about the three central pillars of the future verification regime: declarations of commercial and military facilities capable of producing bioweapons, on-site visits to check the accuracy of declarations, and investigations in case of suspected violations. Yet beyond this minimal consensus, negotiating parties were split about the specific rules governing each of these elements. While issues such as export control and technical cooperation pitted Western states against the

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<sup>38</sup> On early efforts to strengthen the Convention and the history of the BWC Protocol negotiations, see Dando, 2002; Hunger, 2005; Leitenberg, 2004; Littlewood, 2005, Sims, 2001.

Non-Aligned Movement, other questions pertaining to the intrusiveness of verification measures caused deep rifts also within the ‘Western Group’.<sup>39</sup>

Among the EU members, Sweden, the Netherlands and in particular the UK were committed advocates of intrusive verification, which included low thresholds for declaring facilities and starting investigations as well as the proposal to check declarations through routine visits to randomly selected facilities.<sup>40</sup> Most other EU members were less active in the negotiations but willing to support the reformist vision. However, a minority of sceptics – France and above all Germany – initially feared that such intrusive measures would place a too heavy burden on their pharmaceutical and biotech industries. According to British diplomats, Germany up until the late 1990s was particularly “hostile” to the idea of routine visits.<sup>41</sup>

Despite these initially strong internal disagreements, the EU was able to develop a unified stance in support of an intrusive protocol through continued internal negotiations and discussions. As in other multilateral negotiations under CFSP, the EU sought to develop a common approach in the relevant Council working group, CODUN, and held daily coordination meetings during the Ad Hoc Group’s negotiating sessions in Geneva (Feakes, 2002).<sup>42</sup> Yet unlike in the landmines and ICC cases, it was successful in agreeing two formal Common Positions on the BWC Protocol negotiations in 1998 and 1999.<sup>43</sup> In addition, a sub-group of technical experts within CODUN drafted a total of 14 working and discussion papers that set out the

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<sup>39</sup> In line with the traditional structure of Geneva-based arms control negotiations, states met in three distinct groups – Western, Eastern, and Non-Aligned – to coordinate their positions.

<sup>40</sup> For details of state positions and negotiations on these proposals, see Littlewood, 2005: 65-137.

<sup>41</sup> Interview, 15 January 2007.

<sup>42</sup> Interview with a Belgian delegate, 28 June 2006.

<sup>43</sup> Council Common Position relating to progress towards a legally binding Protocol to strengthen compliance with the Biological and Toxin Weapons Convention (BTWC) and the intensification of work in the Ad Hoc Group to that end, 4 March 1998; Council Common Position relating to progress towards a legally binding Protocol to strengthen compliance with the Biological and Toxin Weapons Convention (BTWC), and with a view to the successful completion of substantive work in the *Ad Hoc* Group by the end of 1999, 17 March 1999.

EU's proposals in great detail and were submitted to the Ad Hoc Group on behalf of the EU. In contrast to other negotiations, the EU's Ad Hoc Group papers did not circumnavigate the key political sticking points. Particularly important was a July 1996 discussion paper detailing proposals for a robust process of routine visits.<sup>44</sup>

If the new-found unity of the EU made it the "driving force" of an intrusive verification protocol (Meier, 2001a), this brought it increasingly into conflict with the much more conservative position of the United States. The US had even stronger reservations than the Germans against routine visits and, in addition, sought to raise the thresholds for declaring military facilities and for launching investigations.<sup>45</sup>

Although it was all but isolated within the Western Group, most of its demands found their way into the final "Composite Text" of the Protocol tabled by the Ad Hoc Group's Chairman in March 2001. With regard to declarations and investigations, the Chairman's draft exactly followed US proposals. And although it did include routine visits, these were severely weakened by non-intrusive access rights for inspectors and lengthy notification periods, failing to meet the EU's criteria for robust visits as formulated in 1996. The EU was clearly disappointed but endorsed the compromise text, noting that it did not "meet all EU expectations" (Rissanen 2001). Arms control experts went even further in their criticism, deploring the "dilution" of the verification regime (Borrie, 2006: 19) and dismissing it as mere "bio-tourism" (Meier, 2001b).

But the worst was yet to come. When the Chairman submitted his draft, a new US administration had just come to office, but had yet to define its policy on BWC verification. When the policy review was completed few months later, the verdict was

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<sup>44</sup> European Union Discussion Paper regarding short notice non-challenge visits, Working Paper submitted by Ireland on behalf of the European Union, 16 July 1996 (BWC/AD HOC GROUP/WP.67).

<sup>45</sup> The US sought to restrict declarations of biodefence research laboratories to the largest facilities only and insisted that investigations be triggered by a time-consuming "green light" procedure (Littlewood, 2005: 71-2, 126-7). For discussions of US policy on the BWC Protocol, see Dando, 2002; Leitenberg 2004.

damning. At the August 2001 Ad Hoc Group session, US representative John Bolton rejected not only the Composite Text, but declared the whole approach of developing a legally binding verification protocol as failed. In the administration's view, such a protocol did not offer sufficient security gains to outweigh the risk to sensitive commercial and national security information.<sup>46</sup>

In response to the US announcement, some countries such as South Africa indicated their willingness to carry on with negotiations.<sup>47</sup> The EU, by contrast, quickly dismissed this option, instead signalling interest in the "alternative proposals" that the US promised to submit shortly (Hunger, 2005: 189). Within the EU, only Sweden and the Netherlands had sympathy for the idea of a rescue effort, but did not express this stance publicly.<sup>48</sup> The US rejection thus effectively buried the seven-year effort to devise a BWC verification regime.

## 5.2 *Evaluating rationalist and constructivist hypotheses*

Which theoretical perspective can account best for the EU's role in the BWC Protocol negotiations? The first step in the analysis, evaluating rationalist and constructivist hypotheses on the *likelihood* of CFSP coordination, is complicated by the fact that both perspectives would predict coordination in the BWC case. From a rationalist viewpoint, the EU's successful coordination efforts can be explained by the fact that the Ad Hoc Group negotiations were governed by a strict unanimity rule. It was therefore cost-free for conservative EU member states to accept a more reformist EU position if they could rely on laggards outside the EU – and the US in particular – to veto the most intrusive proposals. According to a constructivist argument, the German

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<sup>46</sup> For a discussion the Protocol's flaws from a US perspective, see Moodie (2001) and Ward (2004).

<sup>47</sup> Interview with a South African delegate, 4 October 2007.

<sup>48</sup> Interviews with Swedish and Dutch delegation members, 23 April and 22 August 2007.

acceptance of a relatively reformist EU position can be explained by the normative consensus pressure exerted within the CFSP context.

While both hypotheses are plausible on the surface, a closer look at the negotiating process lends more support to the constructivist view. First, the evidence suggests that Germany was under pressure from fellow EU members not to block the development of a reformist EU position. According to a British diplomat, the initial lack of German support for routine inspections was seen as “a big problem in the European context”, and was therefore repeatedly raised at ministerial level.<sup>49</sup> While the gradual softening of the German opposition to visits was also helped by talks held between the German governments and German industry representatives, the development of the first formal EU Common Position, initiated by the British EU Presidency, catalyzed and cemented this shift. On paper, the Common Position was a lowest common denominator compromise, as it was short and lacked the specifics set out in the earlier EU discussion paper on visits. Nevertheless, it constituted a clear political signal in support of intrusive visits. According to a UK diplomat, “the EU Common Position was used by the UK to enforce EU unity and to get Germany on board regarding visits”.<sup>50</sup> The second Common Position was agreed under the German EU Presidency, making it more difficult for Germany to articulate a divergent national view.

If EU-internal consensus pressure contributed to winning German support for intrusive visits, it is still conceivable that Germany was hoping to “hide” behind the US or other laggards outside the EU. Yet there is little evidence for this interpretation. When Germany consented to a detailed EU discussion paper on robust routine visits in 1996, it was still too early to be certain that these proposals would be vetoed by others outside the EU. According to a German negotiator, Germany was still not “completely

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<sup>49</sup> Interview, see note 41.

<sup>50</sup> Interview, see note 41.

convinced” of the visits concept after the EU compromise, but would have been willing to accept intrusive provisions. A more important German concern was to ensure that all major players on the pharmaceutical and biotechnology market would be part of an intrusive protocol, so that the burden of declarations and visits would not cause German companies a competitive disadvantage.<sup>51</sup>

With regard to the impact of CFSP coordination on the EU’s negotiating performance, I find stronger, but not exclusive evidence for rationalist arguments. First, if we take the Composite Text – the compromise draft closest to a negotiation outcome – as a yardstick, the EU’s *bargaining power* was very limited despite its ability to speak with one voice. In line with rationalist predictions, the US and other laggards were able to dictate the bottom line in the consensus-based Ad Hoc Group negotiations. Nevertheless, the fact that the EU scored at least a minor success in inserting the concept of routine visits into the text, as well as its performance on less politically sensitive points, was arguably helped by its unified stance. A UK diplomat observed that in the later Ad Hoc Group sessions, “as we got an EU position on something, as distinct from a national position, suddenly, in the negotiations, the US would come along.”<sup>52</sup> A Swedish diplomat concurred: “The only way to be a stronger partner with the US was through agreement in the EU”.<sup>53</sup>

With regard to the *likelihood of negotiation and agreement*, there is no indication that CFSP coordination constrained member states’ strategic flexibility to a point where it prevented either a European-led reformist initiative or an agreement with the EU’s conservative opponents. Although both UK and US diplomats complained about the

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<sup>51</sup> Interview with a German delegation member, 12 July 2006. This concern was fed by earlier German experiences with inspections under the Chemical Weapons Conventions, which had strongly affected German companies but which the US had declined to accept for its own companies (Interviews with German and British delegation members; Littlewood, 2005: 100).

<sup>52</sup> Interview, see note 41.

<sup>53</sup> Interview, telephone, see note 48.

inflexibility of the EU in amending its internally agreed positions,<sup>54</sup> individual member states were able to pursue compromise initiatives at different stages of the negotiations. Germany, for instance, submitted an important compromise paper on routine visits which was still in line with the relatively vague 1999 EU Common Position but represented a step back from the EU's 1996 discussion paper and did not have broad support within the EU (Littlewood, 2005: 101). But even the formal Common Position was thrown overboard after the United States' rejection of the Protocol when the UK attempted, in secret talks held with US and South African representatives, to redraft the whole Protocol and take the controversial visits completely out of the text. While the Common Position "became a problem" in these last-minute negotiations,<sup>55</sup> it was not the EU but the United States' unwillingness to reengage that led to their failure.

If CFSP coordination did thus not obstruct agreement with the US, it did not prevent the most reformist EU countries from going beyond the EU consensus either. Both Sweden and the Netherlands became part of a cross-regional coalition of like-minded states that formulated the most far-reaching proposals throughout the Ad Hoc Group negotiations, although they were "sometimes criticized within the EU for joining the cross-group coalition."<sup>56</sup> The social pressure of the EU majority on the front-runners was a somewhat stronger factor in the aftermath of the US rejection. Although Sweden and the Netherlands sympathized with a rescue effort, they felt pressured not to pursue such a rescue effort independently. As a Swedish delegate recounts:

"[A]t this point it was so important for the EU to have a common view, it was not up to Sweden or anyone else to have their own view. [...] There was so strong pressure to have an EU consensus [...] – one didn't want this kind of discussions. [...] Sweden, instead of being able to

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<sup>54</sup> Interviews with US delegation members, 13 and 14 March 2007, see note 41.

<sup>55</sup> Interviews with UK, South African and Dutch delegation members, see notes 41, 47, 48.

<sup>56</sup> Interview with a Dutch delegation member, see note 48.

work with some of the friends of the convention like Australia, New Zealand, or Canada, couldn't really do much because we were in the EU [...]."<sup>57</sup>

While these observations lend some support to constructivist arguments, it is nevertheless implausible that CFSP coordination ultimately made a real difference to the outcome. European diplomats widely agree that there were just too few countries outside the like-minded group that were open to continued negotiations.<sup>58</sup>

Turning to the third and fourth aspect of the CFSP's impact, its effect on negotiating outcomes and the distribution of winners and losers within the EU, there is again some limited support for constructivist arguments. As was argued above, EU coordination helped to shift the Composite text in a somewhat more reformist direction and thus benefited reformists within the EU more than conservatives, as constructivists would expect. And yet, the EU's coordinated stance could not prevent the ultimate failure of the entire BWC Protocol negotiation. In the face of the categorical US rejection of the Protocol, CFSP coordination did not make a difference to the outcome, in line with rationalist predictions.

In conclusion, the track record of rationalist and constructivist predictions is mixed in the BWC Protocol case. While constructivism provides a more plausible explanation of the EU's successful policy coordination in the Protocol negotiations, the limited impact of CFSP coordination on the multilateral negotiation outcome lends more support to the rationalist view. While CFSP coordination helped the EU to exert a modest influence on the Composite Text and thus benefited EU reformists, this positive effect was clearly constrained by US opposition and the consensus rules of the multilateral negotiating forum.

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<sup>57</sup> Interview, see note 48.

<sup>58</sup> Interviews with German, Dutch, Swedish, and UK delegation members, see notes 41, 48, 51.

## 6 Conclusion

The key finding that emerges from the preceding analysis is that a simple extension of existing rationalist theoretical frameworks is insufficient to capture the EU's role in multilateral treaty negotiations under CFSP. As I have shown, constructivist arguments about normative consensus pressure and argumentative processes can shed light both on the occurrence of CFSP coordination and on its effect on the EU's negotiating performance in the three multilateral negotiations studied in this paper. My analysis also shows, however, that the relative explanatory power of rationalist and constructivist hypotheses is *variable*. Rather than a black and white picture, the analysis shows a complex and changing mix of interest-based bargaining and normative dynamics.

With regard to the likelihood of EU policy coordination in multilateral negotiations falling under the CFSP, I find partial evidence both for rationalist and constructivist arguments. As would be expected by rationalists, the analysis shows that it is extremely difficult for the EU to agree on a *formal* coordinated position if member state preferences diverge. Common Positions proved impossible to achieve both in the landmines and (initial) ICC negotiations, and the EU's Common Positions in the BWC Protocol negotiations were rather short and lacked specifics. And yet, I found evidence that CFSP mechanisms generated considerable social pressure on conservative "hold-out" countries within the EU and thus helped to produce a degree of coordination *below* the level of formal Common Positions. This normative dynamic was strongest in the ICC case, as it contributed to the French and UK position shifts in the negotiations on the Rome Statute and, after Rome, even allowed the EU to formulate a common response to US requests for bilateral immunity agreements. In the BWC case, the EU achieved a consensus on intrusive verification measures which went clearly beyond a lowest common denominator, although this was not formalized

in a binding Common Position. In the landmines case, social pressure was also at work but ultimately not strong enough to produce full EU agreement on a common negotiating position.

Given this variable strength of normative consensus pressure, more research is needed to understand the conditions under which CFSP coordination can or cannot overcome EU-internal divisions. The simplest explanation would be that all depends on the respective *intensity* of preferences, on the part of both the majority and the hold-outs. Another possibility is that EU internal consensus seeking takes *time*, which could explain why it worked better in the seven year BWC negotiation than within the tight schedule of the Ottawa Process.

With regard to the impact of CFSP coordination on the EU's negotiating performance, findings on rationalist and constructivist hypotheses again vary across cases. The constructivist argument that CFSP coordination can make a difference to the EU's performance receives most support in the ICC case. Here, EU coordination was critical in shifting British and French positions and thus paved the way to the final reformist outcome of the negotiation. British and French efforts to find a compromise with the US were clearly constrained by EU coordination pressure, and on the whole EU reformists benefited from coordination. In the two other cases, the evidence is more mixed. In the BWC negotiations, the EU's ability to speak with one voice somewhat improved its bargaining power and thus made the treaty draft more reformist than it might have been otherwise. In the landmines case, coordination pressure complicated efforts by individual EU members to find a compromise with the US, equally contributing to the reformist outcome. And yet in both cases, this impact of CFSP coordination had clear limitations. Conservative and reformist EU members retained a high degree of flexibility in pursuing their preferred positions and

strategies. The US, as the EU's conservative negotiating opponent, was unmoved even by coordinated EU positions and in the BWC case, was able to dictate the bottom line of the overall negotiation.

The case of the BWC Protocol suggests that CFSP coordination is less likely to have an impact on the final outcome in a multilateral context where negotiations are based on unanimity. Yet this cannot explain difference between the ICC and landmines negotiations, both governed by majority rules of decision-making. Again, further research is needed to clarify the scope conditions for both rationalist and constructivist hypotheses.

One last interesting finding is that where CFSP coordination did have an impact on the EU's negotiating performance, it was exclusively in the direction of a more reformist – and not more conservative – outcome. One possible explanation for this observation could be that the EU's strong rhetorical commitment to multilateralism makes it easy for reformist majorities to put pressure on conservative hold-outs, but more difficult for conservative majorities to hold back vanguards seeking to promote more ambitious multilateral rules. Such an explanation, which remains to be tested by additional case studies, reinforces the general conclusion of this paper: The causal relationship between CFSP coordination mechanisms and the EU's performance in multilateral negotiations is a complex one that is not sufficiently captured by simple rationalist frameworks of two-level bargaining.

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