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Playing two-level games in Berlin and Brussels: Maintaining control of asylum policies?

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INTRODUCTION

EU asylum policy can be regarded as one of the most dynamic areas of European integration. At the constitutional level, it has shifted from an intergovernmental regime outside the Treaty framework, in which only a handful of member states participated, towards an almost fully communitarised EU policy area in less than 15 years. At the EU legislative level – even though negotiations were often cumbersome and usually reflected the "minimum standards" stipulated in the Amsterdam Treaty – output in quantitative terms has been remarkable.[1] This dynamic process at the EU level could be taken as evidence that member states increasingly lose national control over policies – including the highly sensitive area of internal security – and policy-making. Our paper suggests, however, that member governments have been successful in retaining control over policy processes and outcomes both at home and in Brussels by making use of several instruments, most importantly by playing two-level games.

In this paper we primarily make use of the concept of two-level games to explain how successive German governments headed by the Chancellory and the Interior Ministry (that has responsibility for asylum policy in Germany), have been able to stay in charge of the policy-making process and realise their preferences. We will illustrate and substantiate our case by concentrating our analysis on the so-called 'safe third country' concept[2] in domestic and EU/European asylum policy. In 1993 Germany changed its constitution (*Grundgesetz* (GG)) and sharpened its until then very liberal asylum system based on a constitutionally guaranteed right to asylum in article 16(2) GG. Among other measures the reform introduced a very restrictive version of the safe third country concept. There is already substantive research on this constitutional change – often referred to as the Europeanisation[3] of (German) asylum policy.[4] Europeanisation is commonly understood as a top-down process whereby

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[1] Since 1999 the Council has adopted on average each month ten new texts on JHA issues, many of which are on asylum policy. Jörg Monar, Specific factors, typology and development trends of modes of governance in the EU Justice and Home Affairs domain (NEWGOV, ref.no. 1/D17, 2004), 4.

[2] According to the safe third country rule, "an asylum seeker is denied access to substantive refugee determination procedures, on the ground that he could or should have requested and if qualified, would actually have been granted refugee protection in another country". Eva Kjaergaard, The Concept of 'Safe Third Country' in Contemporary European Refugee Law, in International Journal of Refugee Law, 6:4, 1994, 652.

[3] Europeanisation is here understood as the process of change in the domestic arena resulting from the European level of governance. However, Europeanisation may be viewed not just as a unidirectional but as a two-way-process, which develops both top-down and bottom-up. Top-down ('downloading') perspectives largely emphasise vertical developments from the European to the domestic level. Robert Ladrech, Europeanisation of Domestic Politics and Institutions: The Case of France, in: Journal of Common Market Studies 32:1, 1994, 69-88; Vivien Schmidt, Europeanization and the Mechanics of Economic Policy Adjustments, in: Journal of European Public Policy, 9, 2002, 894-912. Bottom-up ('uploading') accounts stress the national influence concerning European-level developments (which in turn feeds back into the domestic realm). This perspective highlights that member states may shape policies and institutions at the European level in ways that suit their national interests to reduce adjustment costs at a later stage. Tanja Börzel, Member State Responses to Europeanization, in: Journal of Common Market Studies, 40:2, 2002, 193-214.

[4] Sandra Lavenex, The Europeanization of Refugee Policies, in Journal of Common Market Studies 39:5, 2001, 701-721; Eiko Thielemann, The 'Soft' Europeanisation of Migration Policy: European Integration and Domestic Policy Change (Paper Presented at the 2002 ECPR Session of Workshops, Turin, 22-27 March) 2002; Susan Schwarze, Das Arenen-Verhandlungsmodell – Deutsche Asylpolitik im europäischen Kontext von 1989 bis 1993, FU Dissertationen online, 2001, http://www.diss.fu-

EU rules, practices, norms and policy frames are transferred to the national level.[5] In this paper we will however focus on Europeanisation as a process of 'uploading', which refers to member states' ability to export national policies to the EU level in order to avoid high adaptation costs, only to download EU policies into the national arena at a later stage. Through several instruments of 'uploading' Germany was able to transfer the 'safe third country' concept into the EU's 2005 asylum procedures directive.[6] This 'bottom-up' perspective highlights the fact that member states are more than just passive receivers of European-level pressures. They seek to shape policies and institutions at the European level in ways that suit their national interests in order to reduce adjustment costs at the domestic implementation stage.[7] Member governments are thus eager to 'upload' their national policies to the EU level or alternatively import policy solutions that suit their domestic interests.[8]

Our paper is linked to the (wider) debate on whether Europeanization restricts or enhances governments' scope for manoeuvre.[9] While demonstrating that the German government has retained and employed important gate-keeping functions in the process, we analyse the significance of two-level games in that process. Subsidiary objectives of this paper include a (tentative) exploration of the conditions conducive to a successful pursuit of two-level games, and an investigation into the role of important actors other than the government, such as opposition parties and the *Länder*, in two-level games at the nexus of German politics and EU governance in the field of asylum policy. In terms of the main research question of the edited volume – exploring the assumption that the main protagonists in the area of justice and home affairs act as "arch-rationalists", motivated by a self-interested search for autonomy – our analysis adds an interesting aspect to the discussion: we stress the influence of 'soft' factors, such as language and discourse, on rational actors in their pursuit of two-level games. Two-level games can be exaggerated or diminished by the strategic use of language, and two-level games' credibility are partly conditioned by (enabling or limiting) discourses, as the subsequent analysis will further indicate.

CONCEPTUAL UNDERPINNINGS: THE TWO-LEVEL GAME APPROACH (AND BEYOND)

Our main conceptual underpinning is Putnam's two-level game approach.[10] This concept understands the outcome of international negotiations as a function of incentives and constraints at two policy-making levels: on the international level, it highlights international developments and events as well as the relevant preferences, interests, power and strategies of other governments; on the domestic level, the preferences and political resources of domestic veto-players are stressed. Governments, acting simultaneously in the domestic and international arenas, have to conciliate domestic demands with international pressures. In so doing, governments can act as gatekeepers between the two levels. (National) policy-makers can refer to domestic constraints in order to strengthen their negotiating position at the international level. Furthermore, two-level games can be played the other way round: national policy-makers can draw on the international/European level in order to bring about policy changes in the domestic arena, which they would not have been able to produce without indirect 'support' or legitimacy from constraints at the international level. The win-set of a government covers all positions at the international level where the government is able to generate sufficient domestic

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berlin.de/diss/servlets/MCRSearchServlet;jsessionid=92C1E58FAB888F36639ACA5774556E00?mode=results &id=pp518x20ja7gfnkec6qo&numPerPage=10 (accessed November 11, 2008).

[5] Tanja Börzel, Shaping and Taking EU Policies: Member States' Responses to Europeanisation, Queen's Papers on Europeanisation 2, 2003.

[6] Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, O.J. L 326/13.

[7] Tanja Börzel, Member State Responses to Europeanization, in Journal of Common Market Studies, 40:2, 2002, 193-214.

[8] John Peterson and Elizabeth Bomberg, Decision-Making in the European Union (Houndmills, New York: Palgrave MacMillan, 1999).

[9] E.g. Eiko Thielemann, The 'Soft' Europeanisation of Migration Policy: European Integration and Domestic Policy Change (Paper Presented at the 2002 ECPR Session of Workshops, Turin, 22-27 March) 2002.

[10] Robert D. Putnam, Diplomacy and Domestic Politics: The Logic of Two-Level Games, in International Organization 42:3, 1988, 427-460.

support. Win-sets affect governments' flexibility and negotiating power at the international level. Large domestic win-sets widen governments' room for manoeuvre at the international level, while smaller win-sets impose stricter limits on governmental action. These small win-sets increase the government's credibility should it refuse a compromise, and thus enhance its bargaining power.[11] However, win-sets are not simply imposed upon governments. Governments can shape them by drawing on different instruments such as issue-linkages and side payments or by making use of the informational asymmetries between a government (as the gatekeepers from the national to the international level) and their negotiation partners or domestic players.

Yet, two-level games cannot be viewed in isolation. We argue that they should be seen in a broader institutional and discursive context. While trying to change their respective win-sets, governments operate in a certain formal or informal institutional context at both the international and domestic levels. The institutional framework enables or facilitates the appearance of certain actors and (thus also) discourses, while excluding or hampering others. This may happen, as the institutional composition tends to reinforce the position of a particular interest group, thereby fostering the implementation of its promoted policy.[12] In other words, the institutional structure shapes actors' access to the decision-making arena, which in turn favours the development of certain policy lines or discourses over others. In the case of asylum policy, until 2005 when qualified majority voting (QMV) became the norm for Council negotiations, the unanimity rule as well as the limited role of the supranational institutions gave the member-state governments a strong position both at the European and domestic level. Moreover, a complex network of other informal intergovernmental groups, such as the Group of 5 (G5 later G6)[13], has developed outside the EU institutional framework and provides governments with new fora when playing two-level games. Governments thus become not only gatekeepers between the domestic and European levels but also between different fora at the European level. This produces a 'multiple-level game within the EU',[14] providing a limited number of EU governments a setting from which to advocate and persuade other governments of their domestic policy solutions with the aim of later including them into EU policies. In the end, such a game may stir rivalry between the 'insiders' and 'outsiders' of such informal settings, and thus undermine mutual trust among EU member states.[15] At the domestic German level, the division of powers of governmental departments, such as the Chancellery, the Federal Foreign Office and the Ministry of the Interior, and between the federal (*Bund*) and regional state (*Länder*) level widens or limits the position of the government. The *Bundesrat*, which is the upper house of the German parliament, representing the 16 *Länder* has shared competence with the *Bund* on matters concerning immigration. As Germany has a proportional electoral system, governmental power is therefore normally shared by at least two parties. So within German governments there is also a division of power that might lead to further conflicts. Since migration is a very multidisciplinary topic, different ministries as well as Germany's Chancellery have competed for power in that policy field.[16]

Two-level games are played out within a discursive framework. Discourses have been described as institutions (here broadly defined) in their own right that shape actors' "boundaries of the possible"[17] and "guide political action by denoting appropriate or plausible behaviour in light of an agreed environment"[18]. However "discourses do not exist 'out there' in the world; rather, they are

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[11] ibid.:, 435ff.

[12] Sandra Lavenex, The Europeanization of Refugee Policies, in Journal of Common Market Studies 39:5, 2001, 701-721.

[13] The G5 is made up of the Interior Ministers of the largest EU members: Germany, France, Great Britain, Italy, and Spain. Recently, Poland also became a member so that the group is now the Group of 6.

[14] Thierry Balzacq, et.al., Security and the Two-Level Game: The Treaty of Prüm, the EU and the Management of Threats (CEPS Working Documents, 2006), 1.

[15] Thierry Balzacq, et.al., Security and the Two-Level Game: The Treaty of Prüm, the EU and the Management of Threats.

[16] The Chancellor sets the overall guidelines (*Richtlinienkompetenz*) while the ministers are responsible for their respective ministry. In practice there is competition between the Chancellery and the federal ministries. See Ellwein und Hesse (1987), p. 319.

[17] Markus Jachtenfuchs, Conceptualizing European Governance, in Reflective Approaches to European Governance, ed. K.E. Jørgensen (Basingstoke: Macmillan, 1997), 47.

[18] Ben Rosamond, Theories of European Integration (New York: Palgrave, 2000), 120.

structures that are actualized in their regular use by people of discursively ordered relationships."[19]
The terms assigned to specific issues draw attention to certain elements and lead to the neglect of
others. Put differently, "discursive interventions contribute towards establishing a particular structure
of meaning-in-use which works as a cognitive roadmap [...]."[20] Such structures create pressure for
adaptation on all actors involved. Discourse hence interprets events happening in the real world and
thereby provides a structure along which actors at both levels formulate their preferences and develop
their negotiation positions.

In EU negotiations, domestic discourse may act as a constraint on national negotiators, as it, to
some extent, shapes agents' scope for manoeuvre by privileging certain courses of action, while
foreclosing others. Thus, only some courses of action remain viable under the dominant domestic
discourse. These discursive constraints can (positively) affect the credibility of a government when
playing two-level games because the government can refer to important domestic 'constituencies' that
are likely to veto EU-level outcomes. In the field of asylum policy, and EU politics more generally,
governmental agents act as transmitters between the European level and the domestic arena. They are
able more than any other actor to provide other players in the game with a policy frame and thereby
determine the relative salience of an issue.[21] Meta-discourses, which provide a general policy frame,
may (already) privilege one policy option over another. In the case of asylum policy for example the
term 'foreigner' or 'migrant' has a certain negative connotation as such, which de-legitimises a more
favourable stance towards asylum seekers as brought forward by NGOs or church groups in the
political debate.

Language and discourse may be useful in another sense: two-level games may be played by
actors exploiting informational asymmetries in order to exaggerate or diminish constraints, and thus
alter perceptions of the size of their win-sets. Actors (usually governmental ones) can use discursive
strategies – e.g. draw on discourses selectively – or exaggerate certain factual circumstances to
enhance their bargaining position. Such rhetorical/strategic two-level games may help to legitimate
certain policies in situations of high political uncertainty or intense political struggle.

THE EUROPEANISATION OF GERMAN ASYLUM POLICY AND THE GERMAN CONSTITUTIONAL REFORMS OF 1993

Since there is an elaborate body of literature on the process of Europeanisation undergone by German
asylum policy and on the German constitutional reforms of article 16 GG, we will be brief here.[22] An
understanding of the developments and arguments brought forward in the German debate on the 1993
constitutional reforms is important to make sense of the German position in the EU negotiations on the
asylum procedures directive. At the same time, this case constitutes a formidable illustration of how
governments can exploit their prominent position as gatekeepers between the international and
domestic levels to expand their domestic win-sets.

In the early 1990s, the members of the Schengen Group[23] and the Ad Hoc Group on Immigration[24]
adopted the Schengen Implementing Convention (SIC) and the Dublin Convention, respectively. Both

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[19] Jennifer Milliken, The Study of Discourse in International Relations: A Critique of Research and Methods, in
European Journal of International Relations, 5:2, 231.

[20] Antje Wiener, Contested Compliance: Interventions on the Normative Structure of World Politics, in
European Journal of International Relations, 10:2, 201.

[21] David Bosold and Kai Oppermann, Talking win-sets: combining two-level games and discourse analysis, 56th
PSA Annual Conference, Reading, April 3-6, 2006, 7.

[22] See e.g. Lavenex, Sandra 2001a: The Europeanisation of Refugee Policies: Between Human Rights and
Internal Security, Burlington: Ashgate.

[23] In 1985 France, Germany and the Benelux countries signed the Schengen Agreement which foresaw that by
January 1, 1990 border controls on both goods and persons should be abolished. Later other EU member states
became contracting parties to the Schengen Agreement. Following the Agreement the so-called 'Schengen
Group' was set up to draw up 'compensating measures' for the removal of borders covering asylum, a common
visa regime, illegal immigration, cross-border police competences, and a common computerized system for the
exchange of personal data (Schengen Information System, SIS). These measures were set out in the SIC.

[24] In 1986 the Ad Hoc Group was established among all EU member states to elaborate measures against the
misuse of asylum law. Rocio Fungueirino-Lorenzo Visa-, Asyl- und Einwanderungspolitik vor und nach dem

instruments introduced burden-sharing mechanisms allowing explicitly for the use of the safe third country rule, but did not lay down any common criteria for the definition or application of the rule. Common standards for the functioning of the safe third country rule were encompassed in the so-called (non-binding) London Resolutions of 1992. These measures contributed to the increasing securitisation[25] of the asylum policy frame at the European level as they limited the access of asylum seekers to status determination procedures and the territory of the community, putting into question international refugee standards, such as the principle of *non-refoulement*.[26]

However, these security-oriented European measures did not come out of the blue. They can instead be traced back to the beginning of cooperation between European governments in various informal fora such as the TREVI Group.[27] While European integration in the field of migration was first determined by the Federal Chancellery which negotiated the Schengen Agreement in 1985 in cooperation with the Foreign Ministry, there was a gradual shift of influence towards the Federal Ministry of the Interior. This was due to the fact that civil servants of this ministry, and in particular of the police department in the ministry, became more and more involved in the negotiations at the working group level in Brussels.[28] The institutional context of these groups favoured civil servants at the ministries of the interior whose primary responsibility is to uphold security. They are therefore generally geared towards security issues. The institutional framework at the EU level gave these officials a new forum to bring forward security-oriented policies.[29] In this institutional context (security-oriented) officials at the German Ministry of Interior were a driving force in adopting the restrictive measures at the EU level. Simultaneously, these same officials used the London Resolutions as an argument in the domestic arena to win support for restricting the constitutional right to asylum.[30] They were thus able to ensure that the resolutions were compatible with national developments, while presenting advances at the European level as a necessity for the constitutional change in the German discourse.

In Germany the London Resolutions served those who were in favour of a restriction of the constitutionally guaranteed right to seek asylum, functioning as instruments to legitimise their demands.[31] Politicians of the *Christlich Demokratische Union* (CDU)/*Christlich Soziale Union* (CSU) had for a long time advocated a change of Article 16(2) GG limiting the liberal asylum regime set forth there. This Article afforded persons persecuted on political grounds a right to seek asylum, enforceable before German courts. Following the agreement on the SIC and Dublin Convention, CDU/CSU members referred to the 'inherent necessities' stemming from the EU level to advance their

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Amsterdamer Vertrag. Entwicklung der gemeinschaftlichen Kompetenzen in Visa-, Asyl- und Einwanderungspolitik (Frankfurt: Peter Lang, 2002), 16

[25] Securitization is a concept first established by the "Copenhagen School of Thought". It is defined as "the staging of existential issues in politics to lift them above politics. In security discourses, an issue is dramatized and presented as an issue of supreme priority; thus by labeling it as security, and an agent claims a need for and a right to treat it by extraordinary means". Barry Buzan et.al., Security: a new framework for analysis (Boulder: Lynne Rienner Publishers, 1998), p. 26.

[26] Eva Kjaergaard, The Concept of 'Safe Third Country' in Contemporary European Refugee Law, 653-654. The principle *of non-refoulement* that stipulates that no person is allowed to be sent back to a country where his or her life or freedom are threatened or he or she fears inhuman or degrading treatment or punishment on defined grounds. The principle thus reflects the humanitarian commitment of the states and puts the individual before the state's sovereignty to decide who to admit to its territory. Guy Goodwin-Gill, The Refugee in International Law (Oxford: Clarendon Press, 1996).

[27] Didier Bigo, Polices en réseaux: l'expérience européen, Paris: Presses de Science Po, 1996.

[28] Bösche, Monika 2006: Trapped Inside the European Fortress? Germany and European Union Asylum and Refugee Policy, in: Hellmann, Gunther: Germany's EU Policy in Asylum and Defence, Houndmills, Basingstoke 2006, p. 20.

[29] Virginie Guiraudon, European Integration and Migration Policy: Vertical Policy making as Venue Shopping, in Journal for Common Market Studies 38:2, 2000.

[30] Susan Schwarze, Das Arenen-Verhandlungsmodell – Deutsche Asylpolitik im europäischen Kontext von 1989 bis 1993, 164-165; Eiko Thielemann, The 'Soft' Europeanisation of Migration Policy: European Integration and Domestic Policy Change.

[31] Susan Schwarze, Das Arenen-Verhandlungsmodell – Deutsche Asylpolitik im europäischen Kontext von 1989 bis 1993, 211.

policy objective and to add legitimacy to their preference for a constitutional change.[32] In this context CDU/CSU politicians played a number of two-level games. In the domestic debate CDU/CSU members linked the SIC's ratification to their demand to restrict the constitutionally guaranteed right to seek asylum. They argued that, without a change of Article 16(2) GG, Germany would only be a 'limping participant' in the Schengen regime, able to fulfil its duties, but unable to make use of its rights of transferring asylum claimants to other countries.[33] Hence, Germany would be unable to benefit from an effective European burden-sharing system as established under the Schengen/Dublin regime and deemed necessary to avoid "regulatory competition" among member states. Interior Minister Rudolf Seiters warned that a limited participation of Germany in the Schengen/Dublin system would mean that Germany turned into Europe's *Reserveasylland*, carrying a disproportionate burden among the member states.[34] Going one step up on the 'bargaining ladder' of the two-level game, the head of the CDU parliamentary group, Wolfgang Schäuble, threatened to advise the CDU parliamentary group not to ratify the SIC, unless Article 16 (2) GG was 'supplemented'.[35]

By playing the 'European card', the CDU/CSU managed to influence decisively the German political discourse that framed the constitutional change as a requirement for Germany's effective participation in a European asylum policy. This resonated well with the strong normative appeal of European integration across all German political parties. By drawing legitimacy from pursuing domestic policy in the name of European integration, the dictum of a constitutional change as a means to enable Germany to participate in a European asylum policy gradually developed into the dominant discourse among the German political elites. Politicians favouring the reform referred, above all, to the need for a common European asylum approach, requiring Germany to bring its asylum legislation in line with a more restrictive approach taken by most of its European partners and at the European level.[36]

This discourse restricted the room of manoeuvre open to domestic veto players, in particular the *Freie Demokratische Partei* (FDP) and the *Sozialdemokratische Partei Deutschlands* (SPD), so that both parties abandoned their opposition. However, at the same time, the 'European argument' also provided a means for legitimising their agreement to a constitutional reform (*Asylkompromiss*[37]) to their electorate. Gerhard Schröder (SPD), for example, stated that, "we want [further] European integration, in good times and in bad times. Hence, we need European asylum [legislation] because refugee streams are a European problem. [...] For this reason – and only for this reason – do we want to supplement the Basic Law".[38]

The constitutional changes were also driven by the specific German situation and domestic discourse. External migratory pressures intensified with the high influx of refugees, asylum seekers as well as *Aussiedler*[39] in the 1980s and early 1990s. The German population felt increasingly overburdened by the numbers of migrants and mistrusted the politicians' ability to control migration, and to end the worst wave of xenophobic violence since the end of the Third Reich. As a result, politicians were eager to demonstrate their ability to address the problems.[40]

In May 1993 the Bundestag adopted the asylum reform. The newly inserted Article 16a GG now sets forth three restrictions upon the right to seek asylum: first when an applicant enters from another EU member state, second when an applicant enters through a 'safe third country' and third when an applicant comes from a 'safe country of origin'.

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[32] Since the 1980s some *Länder*, in particular Bavaria and Baden-Württemberg were pushing for a limitation of the constitutional right to asylum. Ursula Münch, Asylpolitik in der Bundesrepublik Deutschland – Entwicklung und Alternativen (Opladen: Leske + Budrich, 1993).

[33] Deutscher Bundestag, Plenarprotokoll 12/2453, 23 April, 1992, 7299.

[34] Deutscher Bundestag, Plenarprotokoll 12/2453, 23 April, 1992, 7299.

[35] Deutscher Bundestag, Plenarprotokoll 12/2453, 23 April, 1992, 7313.

[36] Jörg Monar, The Dynamics of Justice and Home Affairs: Laboratories, Driving Factors and Costs, in Journal of Common Market Studies, 39:4, 2001, 757.

[37] The *Asylkompromiss* was a compromise between the CDU/FDP coalition government and the social democratic opposition on the reform of the right asylum.

[38] Quoted in Gerhard Greiner, Westeuropa schottet sich ab, in Blätter der deutschen und internationalen Politik 3, 271, author's translation.

[39] Aussiedler are ethnic Germans in accordance with Article 116 GG.

[40] Bade, Klaus, 1994: Ausländer – Aussiedler – Asyl: eine Bestandsaufnahme, München: Beck.

Together with the safe country of origin, the safe third country concept was portrayed as the essential means to achieve this goal. In the parliamentary debate, the Minister of the Interior, Rudolf Seiters, contended that "whoever wants to untie the safe third country regulation again, touches the core of the *Asylkompromiss*".[41] Hence, the safe third country rule was seen as a means to re-establish popular confidence in politics and to uphold national security and democracy while at the same time making Germany fit for the European asylum system.[42] This illustrates the importance of the safe third country concept for German politicians. And it helps to explain why upholding the German version of the concept became a central demand of the German delegation. As one interview partner put it, to a certain extent a derogation of the concept of safe third countries was seen as derogation from the *Asylkompromiss*.[43]

THE "GERMANISATION" OF EU ASYLUM POLICY: THE NEGOTIATIONS OF THE ASYLUM PROCEDURE DIRECTIVE

The Treaty of Amsterdam of 1999 prescribed that, within a period of five years, binding minimum standards on the reception of asylum seekers, on asylum procedures, a common refugee definition, and a mechanism for a burden-sharing system replacing the Dublin Convention were to be adopted.[44] Following the entry into force of the Treaty and the 1999 Tampere Conclusions the Commission took a lead-role in initiating directives in the area of asylum, including a proposal for a directive on common asylum procedures.[45] Contrary to the specific German version of the safe third country rule, the principle of the safe third country rule in the Commission's first proposal foresaw an individual assessment of the safety of a third country for a particular applicant and did not allow for border guards to immediately return an applicant to his or her country-of-transit or -origin (border procedure). Following harsh criticism of the proposal by member states in the Council, the Commission issued a revised proposal in 2002.[46]

These developments form the background to our analysis of the process of 'uploading', whereby member states seek to 'export' their policies to the EU level in order to avoid costly change at the national level. We will show in this section that Germany was very successful in the process of 'uploading' by using different instruments, including playing two-level games. First, we will address Germany's negotiation preferences and constraints, including the German discourse. Thereafter, we will take a look at the European discourse, as a means of de-legitimising human rights claims and legitimising a restrictive migration policy agenda. Finally, we analyse the negotiations at EU level.

Germany's negotiation preferences and constraints

The German discourse: the rationale for exporting the "German" version of the safe-third country concept

The well-established and long-standing securitised asylum discourse in Germany provides an understanding of the reasons why the Social Democratic-Green coalition government, which came into government in 1998, insisted on the inclusion of an article that emulated the German safe third country concept in the negotiations on the EU asylum procedure directive starting in 2000. Even though the first Commission proposal[47] allowed for member states to uphold national lists of safe third

[41] Deutscher Bundestag, Plenarprotokoll 12/160, 23 May 1993, 13521-13522.
[42] Frankfurter Allgemeine Zeitung, May 27 1993.
[43] Interview-3, Brussels, 2007.
[44] Article 63 Treaty of Amsterdam.
[45] European Commission, Proposal for a Council directive on minimum standards on procedures in Member States for granting and withdrawing refugee status, COM/2000/578 final, 2000.
[46] European Commission, Proposal for a Council directive on minimum standards on procedures in Member States for granting and withdrawing refugee status, COM/2000/578 final, 2000.
[47] European Commission, Proposal for a Council directive on minimum standards on procedures in Member States for granting and withdrawing refugee status, COM/2000/578 final, 2000.

countries, Germany expressed its unhappiness with the situation. Instead, it pushed for 'its' version of the safe third country concept to be transplanted into the directive, and eventually succeeded in bringing the wording of the directive into line with its domestic asylum legislation. Functionalist explanations or explanations concentrating on (material) benefits/utility leave us in the dark here. The German safe third country provision in Article 16a GG included Poland, the Czech Republic, Switzerland, Island and Norway as safe third countries. All these countries were at the time of the negotiations either part of the Schengen area or were in the process of accession to the European Union. Hence, the concept actually brings 'virtually no practical benefits' for Germany any longer.[48] Moreover, the safe third country concept had not proved its worth as a policy tool: it constituted only a rather small element in the decrease of asylum applications after 1993, not least because its implementation depends on the third countries' readiness to take a non-national applicant back.[49] We show that the discourse since the 1990s, in which the safe third country rule was defined as an essential instrument for reducing refugee flows, and thus re-establishing and upholding social peace in Germany, chiefly influenced and circumcised the negotiating position of the German government. It thus adds to understandings of the reasons why Germany insisted on a concept that had lost its material benefits for reducing the number of asylum seekers.

When the Green-SPD coalition government took power in 1998, there were signs that a change of orthodoxy was taking place in the German immigration debate. The government's Green Card initiative[50] for IT specialists in 2000 provoked a general debate on immigration among different interest groups as well as political parties. Most importantly, the government set up an expert Commission involving different stakeholders (experts, churches, economy and unions) – the so-called 'Süssmuth Commission' – which tabled a report on the possibilities and chances for the first German immigration law.[51]

Despite this more liberal debate on labour migration (with its special focus on highly-skilled migrants), the general German discourse on domestic and European asylum policies continued along the lines of the highly securitised discourse of the early 1990s. Immigration was still seen to be a burden for a country that had reached the 'limits of resilience'.[52] Rhetorically, politicians still portrayed asylum seekers as an economic and cultural threat for society.[53] The social democratic Interior Minister, Otto Schily argued that of 100,000 refugees only three percent are worthy of asylum. The others are *Wirtschaftsflüchtlinge* (economic refugees) whose aim was to receive social benefits while appealing the negative asylum decisions.[54]

With a view to the EU harmonisation process, the CDU/CSU and the Interior Minister, Otto Schily (SPD), were in favour of a 'transfer' of German standards to the EU level. The CDU/CSU rejected the Commission proposal because of its suggestion for an individual assessment of the safety of a third country for every asylum seeker. Such a provision would in turn annul the German list-based safe third country concept and would surely mean an amplification of migration towards Germany.[55] A 'transfer' of the German safe third country concept, including border procedures and a list of safe third countries, to other member states, especially to those with EU external borders, was therefore considered necessary.[56] Greens and parts of the SPD thought that the Commission's proposal went in

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[48] Interview-3, Brussels, 2007; Frankfurter Allgemeine Zeitung, July 3, 2003.
[49] Interview-3, Brussels, 2007.
[50] Die Green Card Initiative was an immediate action program by the government to cover labour supply shortages in the IT sector.
[51] Unabhängige Kommission ‚Zuwanderung', 2001, Zuwanderung gestalten Integration fördern, 4. Juli 2001, http://www.bmi.bund.de/cln_012/nn_165090/Internet/Content/Common/Anlagen/Themen/ZuwanderungIntegrat ion/DatenundFakten/Zuwanderungsbericht__pdf,templateId=raw,property=publicationFile.pdf/Zuwanderungsbe richt_pdf.pdf, (acessed November 22,2008).
[52] Die Zeit 44/1999, author's translation
[53] Süddeutsche Zeitung, August 3, 2001.
[54] Berliner Zeitung, November 8, 1999.
[55] CDU/CSU Fraktion, Strobl: EU-Asylpolitik muss auch deutsche Interesse wahren, http://www.presseportal.de/print.htx?nr=496108 (accessed November 21, 2008).
[56] CDU/CSU Fraktion, Stobl: EU-Asylpolitik muss auch deutsche Interesse wahren, http://www.presseportal.de/print.htx?nr=496108 (accessed November 21, 2008).

the right direction. In particular, the Greens favoured the idea of a safe third country concept based on an individual assessment.[57]

At the same time, the political discourse led by the CDU/CSU still claimed that Germany was taking on a disproportionate burden among EU member states, although the number of asylum claims had dramatically diminished in the 1990s.[58] Jürgen Rüttgers (CDU) linked this burden to Germany's ample social benefits and generous asylum law.[59] A motion by a group of CDU/CSU politicians argued in a similar vein, suggesting that most immigrants were coming to Germany because the "German welfare state ensures social care in an extent that they [migrants] cannot even reach if they work."[60] In light of the continuing regulatory competition between EU member states, any proposition by the government to liberalise German standards was framed to be a "gamble with the social peace in Germany".[61] The implementation of the restrictive German safe third country rule – together with the *Flughafenverfahren* (accelerated airport procedures) and safe country of origin rule – was seen to be the 'fundamental pillar' of the *Asylkompromiss*, and any derogation from it (at the domestic and/or EU level) would "inflict damage on Germany and Europe."[62] Thus, this influential, if not dominant, discourse drew a parallel between the restrictive safe third country concept and the *Asylkompromiss*. Any derogation from the domestic version of the concept was seen as derogation from the *Asylkompromiss*. In Brussels the Interior Minister Otto Schily made clear that Germany could only agree to a European policy if it included the German safe third country concept. Higher European standards, coupled with the German generous right to asylum, would mean that Germany ended up offering "super maximum standards" (*Supermaximalstandards*) with corresponding negative consequences as regards asylum numbers.[63]

Domestic institutional constraints and win-sets

Based as it is on proportional representation, the German political and electoral system favours coalition governments. This in turn requires the governing parties to find compromises on salient issues and weakens the Executive's power to push through their policies. Within the coalition government, Greens and Social Democrats had different views regarding labour migration as well as the harmonisation of EU standards. Most Social Democrat politicians had long been sceptical about the creation of a law allowing for legal immigration: they represented an electorate which felt threatened by immigrants, particularly with regard to their economic situation.[64] A central demand of the Greens had always been the establishment of a modern immigration policy.[65] As for asylum policy, there was a heated debate between Social Democrats and Greens on the need for a broader refugee definition including non-state and gender-related persecution. The Social Democratic Minister of the Interior, Otto Schily, advised against a wider refugee definition in conjunction with a constitutional right to asylum because this would lead to a proliferation of claims ("*Ausuferung*")[66]. These different

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[57] Deutscher Bundestag, Plenarprotokoll 14/171 18.05.2001 S. 16734B-16746C, 16740.

[58] Bundesamt für Migration und Flüchtlinge, Migration, Asyl und Integration in Zahlen, 14th edition, 2006, http://www.bamf.de/cln_092/nn_441702/SharedDocs/Anlagen/DE/DasBAMF/Publikationen/broschuere-statistik-2005,templateId=raw,property=publicationFile.pdf/broschuere-statistik-2005.pdf (accessed 15 November , 2008)

[59] Deutscher Bundestag, Plenarprotokoll 14/63, 28 October 1999, 5575.

[60] Deutscher Bundestag, Antrag der Abgeordneten Wolfgang Bosbach, Hartmunt Koschyk et.al., Europäische Ausländer-, Asyl- und Zuwanderungspolitik transparent machen, Drs. 15/655, March 17, 2003, 4 (authors' translation)

[61] Deutscher Bundesrat, Plenarprotokoll 771, 20 December 2001, 727.

[62] Deutscher Bundestag, Antrag der Abgeordneten Wolfgang Bosbach, Hartmunt Koschyk et.al., Europäische Ausländer-, Asyl- und Zuwanderungspolitik transparent machen, Drs. 15/655, March 17, 2003, 11 (authors' translation).

[63] Berliner Zeitung, December 2, 2000.

[64] Die Zeit, 44/1999.

[65] BÜNDNIS 90/DIE GRÜNEN, Beschluss 23. ordentlicher Parteirat BÜNDNIS 90/DIE GRÜNEN, Berlin, 3. September 2001, Beschluss Einwanderungspolitik, (accessed November 22, 2008), http://archiv.gruene-partei.de/gremien/PR/PR010903/PR010903_Einwanderung.pdf

[66] Die Zeit, 44/1999.

positions were fostered during the election campaign in 2002 as both governing parties had to serve the interests of different voter groups.[67]

The CDU/CSU continued to oppose any compromise on the domestic Immigration Bill (which was negotiated in the German parliament between 2001 and 2004) by using its majority in the *Bundesrat*. It argued that the government should base its negotiating position in Brussels on its draft immigration bill rather than on applicable German asylum law. Thus it would use the negotiations at the EU level to circumvent domestic opposition against a liberal immigration law and to predetermine the substance at the EU level, resulting in unrestricted immigration and an abolition of the safe third country concept.[68] By exposing the potential consequences of a two-level game played by the government – regardless of whether this was likely or not – the CDU opposition publicly flagged the issue, limited the government's scope for manoeuvre at the EU level, and increased the pressure on the government in the domestic arena to accommodate its demands on the immigration bill.[69] One could also argue that the CDU/CSU not merely anticipated and prevented the governments' potential use of a two-level game, but played a two-level game itself, albeit in ways stretching the original definition of two-level games: rather than drawing on the European level to bring about policy changes in the domestic arena by using indirect legitimacy from European constraints, the Conservative Opposition drew on the European level to maintain the status quo by citing potential European constraints. Consequently, the government was only able to seriously engage in negotiations at the EU level after agreement on the Immigration Bill in 2003. Hence, the domestic CDU/CSU opposition was able to play the European card in order to enhance its negotiation position in the domestic arena. This shows that national parliamentarians are increasingly aware of the European dimension and that they can use it strategically.

Considering that the *Länder* share competences with the *Bund* in the area of asylum and immigration policy, the *Bund* has to take the opinions and decisions of the *Länder* into account when negotiating at the EU level. As the *Länder* and communities had also benefited from the declining number of asylum applications, the *Bundesrat* resisted any EU agreement that would lead to lower protection standards in Germany. To this end they asked the government to counter the Commission's proposal. In its statement on the amended Commission proposal the *Bundesrat* put forward that the safe third country rule should be rejected as it diverged from the German legal position, in that it required an individual assessment of the safety of an applicant in a third country. Such an (undesired) assessment, the *Bundesrat* argued, would even be necessary if the German *Bundestag* determined the country from which the person entered as "safe". Second, the *Bundesrat* thought it was dissatisfactory from the point of view of the *Länder* that an applicant evidently entering from a designated safe third country and intercepted by the police before actually making a claim for asylum cannot be sent back immediately to the third country as practiced by *Länder* police in the case of "*Großschleusungsfällen*" (major cases of human trafficking)[70]. The *Länder*, in particular Bavaria, also used the European level to press the government to cede to their demands – especially with regard to security-oriented measures. The Bavarian interior minister, Günther Beckstein (CSU), made clear that any concessions at the European level especially concerning the *Asylkompromiss* could not be sold as part of the "European-level negotiating realities" and would cost the government in the negotiations at the national level.[71] Again, the CDU/CSU, this time through the *Länder*, anticipated the (potential) danger of the Social Democratic-Green coalition government making use of two-level games. This possibility was (successfully) countered by highlighting this possibility and by threatening consequences if the government narrowed the domestic room of manoeuvre through EU level agreements.

In sum, it can be argued, that there was general agreement among Social Democrats and Conservatives as well as between *Bund* and *Länder* that the achievements of the *Asylkompromiss*, in particular the safe third country concept, were not to be impaired by the European integration process.

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[67] Süddeutsche Zeitung, „Schily-Entwurf: Leises Murren", 14.8.2001.

[68] Deutscher Bundestag, Antrag, Europäische Ausländer-, Asyl- und Zuwanderungspolitik transparent machen, Drucksachen 15/655, March 17, 2003.
[69] Interview-3, Brussels, 2007.
[70] Deutscher Bundesrat, Empfehlung der Ausschüsse, Vorschlag über eine Richtlinie des Rates über Mindestnormen für Verfahren in den Mitgliedsstaaten zur Zuerkennung oder Aberkennung der Flüchtlingseigenschaft, Bundesrat-Drs. 886/02, December 9, 2002.
[71] Interview-3 Brussels, 2007.

The European discourse: de-legitimising human rights claims and legitimising a restrictive migration policy agenda

The Tampere Conclusions, adopted by the European Council in 1999, envisioned the establishment of an "open and secure European Union, fully committed to the obligations of the Geneva Refugee Convention, and other relevant human rights instruments, and able to respond to humanitarian needs on the basis of solidarity".[72] At the same time, the Treaty of Amsterdam had given the Commission shared right of initiative providing human rights and refugee organisations an access point to the decision-making process at the EU level. However, the policy-making process in particular with regard to the asylum procedures directive illustrated that such access is often merely *ad hoc* and informal.[73] Consequently, the Commission widely consulted with the United Nation High Commissioner for Refugees (UNHCR) and several refugee and human rights NGOs before drafting the proposals emanating from the Amsterdam Treaty and Tampere European Council.[74] The Commission viewed the consultation with civil society also as a means enhancing its proposal's legitimacy through public scrutiny.[75] The Commission took some of the NGOs demands (in particular regarding procedural standards) into account. The first Commission proposal for the procedures directive in 2000 was ambitious both in terms of its minimum standards (including several standards that would exceed national practices) and its degree of harmonization. The safe third country rule was based on an individual assessment, not allowing for the automatic return of an applicant at the border. But it did allow for member states such as Germany to uphold national lists of safe third countries (European Commission 2000a). However, UNHCR's and NGOs' humanitarian ideas did not find the support of the member states and were seen as "unrealistic" in light of an evolving political discourse centred around security issues that was increasingly preoccupied with control of immigration (see House of Lords 2001), especially after the terrorist attacks of 9/11 2001.[76] Due to the relatively unequal power distribution among Community institutions under the Amsterdam Treaty (shared right to initiative between member states and Commission, right to consultation for the European Parliament) the Council remained the viable decision-maker. Regarding the asylum procedures directive, member states were able to exploit their relative power *vis-à-vis* the Commission to pressure the latter to issue a revised proposal which to a large extent entertained their demands for more restrictive measures including a list-based safe third country rule. NGOs and UNHCR had no possibility to advocate their concerns since the Commission and Council's decision-making remained largely sealed off from any public scrutiny and without any formal access for civil society.[77]

Apart from the institutional restraints, the discourse following the 9/11 attacks embedded migration as a cross-border phenomenon in a broader security discourse. This made it even more difficult for NGOs to promote a more liberal and rights-based asylum policy. Within this discourse the referent object shifted from state sovereignty to goods such as democracy, freedom and the rule of law (Buzan et al. 1998: 153). The European Council defined the attacks "as an assault on our open democratic, tolerant and multicultural societies" (European Council 2001b). Through this shift the foreigner, who

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[72] European Council, 1999: Presidency Conclusions, Tampere 16 October 1999, 200/1/99, para 4.

[73] Emek M. Uçarer, Keeping Tabs and Moving Forward: NGOs and the European Union in Justice and Home Affairs, Prepared for the Annual Conference of International Studies Association San Diego, California, March 22-25, 2006, 18.

[74] ECRE (European Council on Refugees and Exiles), ECRE's Recommendations to the Justice and Home Affairs Council on the 'Safe Third Country Concept'at its meeting January 22-23,2004, AD1/01/2004/EXT/MTGB, http://www.ecre.org/resources/ECRE_actions/304 (accessed 22 Novembere 2004).

[75] Emek M. Uçarer, Keeping Tabs and Moving Forward: NGOs and the European Union in Justice and Home Affairs, Prepared for the Annual Conference of International Studies Association San Diego, California, March 22-25, 2006, 15.

[76] Emek M. Ucarer, Keeping Tabs and Moving Forward: NGOs and the European Union in Justice and Home Affairs, Prepared for the Annual Conference of International Studies Association San Diego, California, March 22-25, 2006, 14.

[77] Emek M. Uçarer, Keeping Tabs and Moving Forward: NGOs and the European Union in Justice and Home Affairs, Prepared for the Annual Conference of International Studies Association San Diego, California, March 22-25, 2006,

in the case of terrorism became the "carrier of death", was now framed as an existential threat to the stability of social order, legitimating "politics of exception"[78] (cf. Faist 2002: 10).

The post-9/11 discourse drew a clear link between terrorism and migration, merging terrorism and migration into one continuum. It was argued, for instance by Tony Blair that the anti-terrorist legislation will "increase our ability to exclude and remove those whom we suspect of terrorism and who are seeking to abuse our asylum procedures" (cited in Huysmans and Buonfino 2006, 11). And the Laeken European Council of December 2001 declared that "better management of the Union's external border controls will help in the fight against terrorism, illegal immigration and the trafficking of human beings" (European Council 2001a). As many refugees have to enter the EU illegally due to strict visa requirements and enhanced border controls, they also became depicted as potential security threats.

This increasingly-securitised European discourse narrowed down the range of available policy-options. It de-legitimised the liberal and rights-based NGO/UNHCR claims – thus darkening the prospects for a safe third country rule based on an individual assessment, including a right to rebut a expulsion decision.[79]

The negotiations at EU level: two-level games and the uploading of the German safe third country concept

When the Commission tabled its first proposal for a directive on asylum procedures, it was aware of the fact that the unanimity rule in the Council would not allow for a far reaching harmonisation of standards. It thus took a two-step approach: first, minimum standards which would hardly interfere with national rules were to be adopted; second, a process of genuine harmonisation was to be commenced. Already in the early stages of the negotiations it became clear that the ambitious Commission proposal could not be upheld in the Council.[80] Asylum policy touched the heart of state sovereignty, entailing great public sentiments and "strong national principles and views", making any compromise in the Council difficult.[81]

It was also the first attempt at the European level to harmonise procedural law, demanding an approximation of administrative rules and procedures which are strongly embedded in national traditions and peculiarities. At the same time, implementation inconsistent with the directive would (indeed did) become more easily detectable by the affected individuals and the EU bodies responsible for overseeing the implementation of the directive, thus raising the stakes for agreeing on its content.[82] Moreover, the unanimity rule in the Council enhanced the possibility for member states to block aspects of the proposal that were incompatible with their own laws and proposed laws, and increased their scope to play credible two-level games and hence to uphold specific domestic procedures (see below). All member states were eager to preserve their asylum standards and their established national instruments: they were keen to avoid adaptation costs and to uphold their "competitive advantages" (as regards asylum numbers) compared to states with higher standards.[83] Moreover, throughout the negotiations several member states, including Germany, the UK, France, the Netherlands, and Austria were reforming their relevant national legislation, aiming at more restrictive domestic policies. As a

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[78] "Politics of exception" refers to situations where an issue is portrayed as an existential threat, lifting it above normal politics (Ole Weaver, European Security Identities, Journal of Common Market Studies, Vol. 34, No. 1, 1996, pp. 103-132).

[79] UNHCR, Aide Memoire: Directive on Minimum Standards on Procedures for Granting and Withdrawing Refugee Status, November 18, 2003, http://www.unhcr.org/refworld/type,COMMENTARY,,,402a2d6e4,0.html (accessed 22 November 2008);.ECRE (European Council on Refugees and Exiles), ECRE's Recommendations to the Justice and Home Affairs Council on the 'Safe Third Country Concept' at its meeting January 22-23,2004, AD1/01/2004/EXT/MTGB, http://www.ecre.org/resources/ECRE_actions/304 (accessed 22 Novembere 2008).

[80] Interview-1, Brussels, 2007.

[81] Financial Times 25 November, 2003, 8.

[82] Jens Vedsted-Hansen, Common EU Standards on Asylum optional Harmonisation and Exclusive Procedures, in European Journal of Migration and Law 7, 2005, 369-376.

[83] UNHCR News Stories, Lubbers warns of deteriorating standards in EU asylum directive, 24.11.2003. http://www.unhcr.ch/cgi-bin/texis/vtx/news/opendoc.htm?tbl=NEWS&page=home&id=3fc20ed57 (accessed November 22, 2008).

result, the respective positions of these states were shifting, which made the negotiations particularly difficult.[84] Member states were merely agreeing on the general aim of a harmonisation process: to ensure "efficiency" and "rapidity" of the examination procedures to prevent asylum shopping.[85] Disagreement, however, prevailed until 2004 with regard to instruments, including the notion of safe third country.

During the negotiations on the procedures directive, the German government's main aim was twofold: first, to establish relatively high procedural standards – a demand by the Ministry of Justice – in particular concerning appeals; second, to have its specific rules as specified in the *Asylkompromiss*, most importantly the safe third country concept, replicated at the EU level. While the idea of sending asylum applicants back to a third country – that could be considered safe and to which the applicant had a link – had spread throughout Europe and the world during the 1990s, the German approach remained unique in two aspects: first it was the German *Bundestag* that had adopted a list of safe third countries which was incontestable for an individual applicant. Second, the relevant German procedural law allowed the authorities to refuse an applicant's entry at the border and to send him or her back to a designated safe third country without any consideration of the case.

Although the Commission proposals would not necessarily or even probably require domestic constitutional changes, the German Interior Minister Schily was not satisfied with its first proposal. He questioned whether it would allow Germany to uphold its well-established safe third country rule.[86] Instead, therefore, Germany insisted on a formulation that reflected its own law with regard to the designation of the safe third countries and the possibility to retain its border procedures, although in its amended proposal the Commission had introduced the idea of border procedures and upheld the possibility for member states to establish lists of safe third countries.

In October 2003 the German delegation came forward with a proposal for an Article 35a, (closely) resembling the German legislation.[87] This proposal allowed a member state to deny access to its territory if an applicant entered from a safe third country and if it was obvious that s/he was safe from persecution in another third country or posed a threat to the general public.[88]

This proposal proved rather controversial in the Council and was met with (considerable) reservations by several other member states (among others Finland, Portugal the Netherlands, Sweden), the European Parliament and the Commission because it did not give any guarantees (even regarding legal certainty) to those seeking asylum at the border.[89] In their criticism these delegations were supported by UNHCR.[90] The High Commissioner intervened during the negotiations, writing a letter to Silvio Berlusconi, holder of the EU Presidency at the time, to express his concerns regarding the directive.[91] He warned that the proposed directive would undermine international refugee law and provide for insufficient harmonization. One of his major concerns was the newly introduced border procedures under Article 35a. Several NGOs demanded a withdrawal of the directive in case of the inclusion of such a "super safe third country rule".[92] Thus, the final outcome on Article 35a, which very largely followed the German proposal, cannot be accounted for through a lack of disagreement with the German initiative.

The outcome cannot be adequately explained by the unanimity rule either. Although it increases the possibility for member states to block provisions and, in the extreme case, to veto an agreement,

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[84] Ackers, Dode, The Negotiations on the Asylum Procedure Directive, in European Journal of Migration and Law, 7, 2005, 1-33.
[85] Council of the European Union, 2002: Draft Statement on Safe Third Countries, 14666/02.
[86] Heute im Bundestag Meldung, June 28, 2001,
http://webarchiv.bundestag.de/cgi/show.php?fileToLoad=469&id=1065 (accessed November 23, 2008).
[87] See Article 16, 2 (a) Basic Law (*Grundgesetz*) and § 18 (2) Asylum Procedure Law.
[88] Council of the European Union, 2003: Outcome of proceedings of the Asylum Working Party, 12734/1/03 Rev. 1, 26.
[89] Council of the European Union, 2003: Outcome of proceedings of the Asylum Working Party, 12734/1/03 Rev. 1, 24.
[90] UNHCR News Stories, Lubbers warns of deteriorating standards in EU asylum directive, 24.11.2003. http://www.unhcr.ch/cgi-bin/texis/vtx/news/opendoc.htm?tbl=NEWS&page=home&id=3fc20ed57 (accessed November 22, 2008).
[91] ibid.
[92] ECRE, 2004: Call for withdrawal of the Asylum Procedures Directive, Letter to Mr. Antonio Vitorino – Member of the European Commission, 22 March 2004.

the negotiating realities in the Council are somewhat different due to cooperative norms in the Council.[93] There are limits to how much can be blocked, resisted or pushed through, without providing credible rationales, or skilful (non-coercive) negotiation.[94] As one official noted with regard to the negotiations on the Procedure Directive, 'we had to stretch ourselves in the Council framework to get our [safe third country] concept through. We couldn't just say "this is negotiated under unanimity: please clear the way, here we come"'.[95]

We argue that the German delegation used several instruments for successfully *uploading* its preferences onto the EU level and eventually export its version of the safe third country concept. Helped by the unanimity rule, the German government made use of the following mechanisms and instruments: (1) two-level games; (2) linking expertise and constructive engagement in the negotiations with winning the understanding of the Commission; (3) good timing of its own proposals/interventions; and (4) building/cultivating support through informal groupings.

Two-level games

With regard to upholding the safe third country concept, the German government had considerable scope for playing two-level games. It could plausibly maintain during the negotiations that its capacity to compromise was very limited due to constraints at the domestic level – most importantly those entailed by the ongoing negotiations on the Immigration Bill as well as the applicable constitutional law.[96] With respect to the Immigration Bill, the German delegation communicated from the start of the negotiations that it would only be able to present a unitary position and make concessions after a compromise on the Immigration Bill was reached between the *Bund* and *Länder* in the Conciliation Committee. Although the asylum procedures directive only marginally touched the Immigration Bill in substance, there was a political link between the two: the CDU/CSU opposition was prepared to use any concessions made by the German government at the EU level, in relation to the terms of the earlier *Asylkompromiss* to demand a trade off in the negotiations between *Bund* and *Länder* on the Immigration Bill.[97] In this regard the Opposition indicated that it was not prepared to agree to a widening of the refugee definition to include non-state and gender-specific persecution, as foreseen by the EU qualification directive[98], at the national level if the *Asylkompromiss* (concerning the safe third country rule) was not upheld in the EU negotiations. Since the widening of the refugee definition was a long-standing demand of the Green coalition partner and was also common practice in a majority of EU states, the government was eager to successfully implement the wider refugee definition in the new Immigration Bill. Hence, on the one hand the government was under considerable pressure to entertain the demands of the opposition, but on the other hand, it was able to credibly refer to the threats by the CDU/CSU opposition in the negotiations at the European level to push through its safe third country concept.

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[93] Helen Wallace, 'An institutional anatomy and five policy modes', in Wallace, H., Wallace, W. and Pollack, M.A., *Policy-Making in the European Union*, 5th Edition (Oxford: Oxford University Press, 2005), pp. 49-90.
[94] Cf. Jeffrey Lewis, 'The Janus Face of Brussels: Socialization and Everyday Decision Making in the European Union', International Organization , Vol. 59, No. 4, 2005.

[95] Interview-3, Brussels, 2007.

[96] House of Lords, 2004: Select Committee on the European Union: Minutes of Evidence given by Mr Iain Walsh, Caroline Flint MP and Mr Andrew Jackson. Proposed Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status, Wednesday 21 April, 2004. Available at http://www.publications.parliament.uk/pa/ld200304/ ldselect/ldeucom/999/eue2104.pdf (accessed November 23, 2008).
[97] Interview-3, Brussels, 2007.

[98] The Qualification Directive proposal included non-state and gender-specific persecution as asylum grounds. The government, particularly the Greens, was in favour of including a similar provision in the new immigration bill. This was however opposed by the CDU/CSU and the *Bundesrat*. In the national debate on the Immigration Law the government increased the legitimacy of its "case" by referring to the EU Qualification directive and the fact that all other member states had not voiced any concerns regarding the inclusion of non-state and gender related persecution to push through a domestic clause on non-state and gender specific persecution. Without the Qualification directive – and the reverse two-level game played by the German government back-home – it would have been unlikely that a similar provision would have been included in the Immigration Bill (Interview-3, Brussels 2007).

Second, the government referred to (alleged) constitutional constraints. Any agreement, which did not allow Germany to keep its version of the safe third country concept, would require a change of the Basic Law, so the argument went. And this was to be avoided given that a 2/3 parliamentary majority was necessary for such as change. Legally speaking, the need for a constitutional change is at least contested, if not unlikely. Hence, this aspect of the two-level game was mainly strategically framed. Third, the CDU-dominated *Bundesrat* would not have supported any European concept derogating from the German standards. Hence, overall the German government could credibly refer to domestic constraints making it politically imperative to have the German safe third country concept recognised at the European level.[99]

Linking expertise and constructive engagement in the negotiations with winning the understanding of the Commission

Throughout the 1990s Germany had advocated a European solution to the problem of burden-sharing among the member states. At the same time it had been successful in directly and indirectly transferring its regulatory concepts – notably the safe third country concept – to other European countries and the candidate countries in Central and Eastern Europe.[100] Germany had thus played a leading role in the Europeanisation of asylum policies during the 1990s. The other member states and the Commission hence regarded Germany as a trove of expertise in the negotiations. Following its full engagement in the negotiations Germany took on a leading role and became a reliable and 'realistic' partner for the Commission, especially with regard to the German delegation's good technical (legal) know-how. As opposed to other delegations, which had problems with the Commission proposal(s), notably the UK, the German delegation helped to work constructively on (common) solutions.[101] Not least due to such constructive engagement, as the negotiations evolved, the Commission acknowledged the German particularities regarding its constitutional constraints and JHA Commissioner Vitorino "promised" the German Interior Minister Otto Schily that the German regulation would remain untouched by European law.[102]

Timing of proposals/interventions

The German proposal (on the safe third country rule) came at the right time. During 2002/03 there was a heavy debate among member states on the possibility of a common list of safe countries and of border procedures allowing refugees to be sent back without any consideration of their claim and any right to review of their case. The Austrian delegation had been a driving force on this issue. The delegation proposed a common list approach in 2002 based on an EU regulation in order to fully harmonise the application of the concept and thus to ensure the proper functioning of the EU asylum policy.[103] However, the Austrian proposal did not find sufficient support, as a regulation would not have provided for sufficient flexibility demanded by Germany.[104] In contrast, the German proposal/intervention was well timed because it was brought into the negotiations at the technical level when there was a stalemate in the negotiations concerning the determination of safe third countries and the inclusion of border procedures. It provided fresh impetus and was thus a regarded as a good approach to overcome the deadlock.[105]

Building and cultivating support through informal groupings

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[99] Interview-2, Brussels, 2007.
[100] Sandra Lavenex, EU enlargement and the challenge of policy transfer, Journal of Ethnic and Migration Studies, 28 (4), 2002, 701-721.
[101] Interview-1, Brussels, 2007.
[102] Interview-1, Brussels, 2007.
[103] Council, Note from the Austrian Delegation, Common European list of safe third countries, 1245/02, Brussels, October 4, 2002.
[104] Europe Intelligence Wire, October 16, 2002
[105] Interview-1, Brussels, 2007.

Finally, discussion in informal groupings facilitated the process. The German proposal, concerning safe third countries and the notion of the safe country of origin was first informally elaborated at the political level during a G5 meeting in October 2003. There Germany presented its version of the safe third country concept as an effective measure to prevent mass influx of refugees.[106] Germany thus used this informal intergovernmental setting to promote its ideas and was able to convince the other members, in particular the French minister of the interior, Sarkozy, of a list-based approach to both the safe country of origin and safe third country concept.[107] Airing its ideas during informal discussions in the G5 helped the German delegation build support in a smaller forum. As one official said with reference to the G5 forum and broad initial acceptance of German wishes and policy constraints concerning the safe third country concept, 'this sort of occasional but recurrent informal exchange and get-togethers can inject a powerful dynamic into the process'.[108] Given the importance of its constituent countries in EU policy-making, the G5's consensus fostered agreement along such lines in the Council framework. As Wallace[109] has pointed out, agreement is facilitated when there are fewer positions or options.

In the end, the Council agreed on a safe third country concept allowing Germany to maintain its national list.[110] However it goes beyond this. Article 35a of the directive explicitly provides for the establishment of a European list of third countries. Such a list is to be drawn up by the Council after (only) consulting the European Parliament.[111] Thus, the member states' ministers of the interior can establish a list of countries without any real democratic control. In the German context, no control through the *Bundestag* is required by Article 16 (3) GG.[112] The German act implementing the EU directive now sets forth that an asylum seeker can be sent back at the border when there is an indication that another state is responsible for processing the claim on the grounds of EU legislation or international agreements.[113] It can thus be argued that Germany in the end successfully exported its safe third country concept. And the executive, namely the ministry of the interior, has acquired new competences to negotiate a list of safe third countries at the EU and international level without explicit consent of the Bundestag.[114]

CONCLUSIONS

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[106] Interview-1, Interview-2, Brussels 2007.

[107] France regarded a common list as the best means to constrain German influence (Council 2003; Interview-2, Brussels, 2007). While Germany was not opposed to a common list, it made a reservation to ensure that it could keep its national list until the Council would decide on a common list (Ackers 2005).

[108] Interview-3, Brussels, 2007.

[109] Helen Wallace, 'An institutional anatomy and five policy modes', in Wallace, H., Wallace, W. and Pollack, M.A., *Policy-Making in the European Union*, 5th Edition (Oxford: Oxford University Press, 2005), pp. 49-90.

[110] Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status.

[111] The European Parliament brought an action to annul the parts of the Asylum Procedure Directive concerning the establishment of a list of safe countries of origin and safe third countries. It argued that the procedure for drawing up the list breached Article 67 (5) EC which provides for the transfer of asylum matter under co-decision procedures following the adoption of legislation defining common rules and basic principles. In May 2008 the European Court of Justice annulled the respective articles because the Council exceeded its powers by referring through secondary legislation (directive) to itself „the right to legislate". European Court of Justice, Judgement of the Court, Parliament v Council C-133/06, May 6, 2008.

[112] Deutsches Institut für Menschenrechte, Stellungnahme für die Anhörung „EU-Richtlinienumsetzungsgesetz" des Innenausschusses des Deutschen Bundestages am 21. Mai 2007 zu BT-Drs. 16/5065 und anderen Gesetzesentwürfen, Berlin, 2007, http://files.institut-fuer-menschenrechte.de/437/Stellungnahme_BT-Anhoerung_EU_Asylrichtlinien_052007.pdf (November 22, 2008).

[113] Gesetzentwurf eines Gesetzes zur Umsetzung aufenthalts- und asylrechtlicher Richtlinien der Europäischen Union, 38.

[114] The Europeanisation of the German safe third country rule, as laid down in the directive, thus also means an "externalisation" of migratory pressure to neighbouring countries (FAZ, 25.10.2004, 5.). At the same time, it questiones the *non-refoulement* principle and thus the international refugee regime. The European asylum regime hence moved further away from the liberal post-war refugee regime.

A number of conclusions can be drawn as regards the role and significance of the two-level games metaphor at the nexus of German politics and EU governance in the area of asylum policy. First, two-level games have been crucial elements in explaining both the 1993 constitutional reforms in Germany and the success of the German proposal during the negotiations of the EU Asylum Procedure Directive. Without drawing on two-level games, an explanation of the two cases would have been incomplete. Second, and closely linked to the first point, two-level games alone cannot sufficiently explain the two processes that have been investigated here. Complementary factors are necessary to get the whole picture. In the first case these are, above all, the discourse and exogenous pressures, while in the second case the discourse and a number of additional methods of uploading provide the missing parts.

This brings us to a third point. Under which conditions do two-level games become possible and salient? The minimum condition is clear: governments have to act simultaneously on the domestic and international/European level. But our (limited) investigation points to other conditions which further specify when governments can successfully exploit two-level games. One such condition is tied to the institutional context, i.e. the principle of unanimity in Council. Unanimity raises governments' power to play (credible) two-level games in Brussels. This is because severe domestic constraints become more problematic bringing, as they do, the risk of non-agreement and leading to the failure of EU level negotiations, as the case of the asylum procedures directive has indicated.[115]

Another enabling mechanism for two-level games can be discourse that narrows policy options by legitimising some actors and de-legitimising others. This discourse thus increases (domestic) constraints for EU negotiations because only certain courses of action remain viable under the "defined boundaries of the possible" (i.e. dominant discourse, here the one centred around securitisation). Our analysis of the negotiations concerning the asylum procedures directive has shown that increased domestic constraints, resulting from the securitised discourse, (positively) widened the possibility for the government to play credible two-level-games in Brussels because important domestic "constituencies" (here including the CDU opposition and the *Bundesrat*) would have otherwise vetoed EU level outcomes.

Fourth, our analysis has shown that two-level games can be exaggerated or diminished by the strategic use of language. Constraints or necessities at the European or domestic level may be exaggerated or strategically and rhetorically constructed by (governmental) actors in order to increase their bargaining power on the other level. This has happened in both of our cases, for example, with regard to the (alleged) legal necessity of a constitutional change in 1993. Legally speaking, it seems that neither the Schengen and Dublin Conventions (and non-binding London Resolutions), nor the 2000 Commission proposal would have required a change to the Basic Law. Yet, actors (purposefully) exaggerated the likelihood of such changes in order to add legitimacy to their line of argumentation. While the two-level game literature does talk about the strategic manipulation of win-sets, most attention is directed at efforts to enlarge (domestic) win-sets to allow for the conclusion of an international agreement. Here instead we have a case of the German government strategically reducing the domestic win-set to increase its negotiating power in Brussels. This scenario is both somewhat under-researched[116] and also cautiously rejected as a successful strategy in international negotiations.[117] Interestingly, the only case of successful pursuit of such strategy in the Evans *et al*. 1993 volume is one of cooperation among close allies.[118]

The last two aspects are also related to the overarching research question of the edited volume, i.e. exploring the assumption that the main protagonists in the area of justice and home affairs act as staunch rationalists, motivated by clear cost benefit calculations in their search for autonomy. Our

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[115] For the "inverse" two-level game QMV may provide at least as much potential for playing two-level games. With QMV there is the danger of being outvoted in Brussels which should provide even more "support" for changing countervailing domestic stances, i.e. for enlarging the domestic win-set.

[116] Evans, Peter, Jacobson, Harold and Putman, Robert (eds) (1993), Double Edged Diplomacy: International Bargaining and Domestic Politics, Berkeley: University of California Press.

[117] Putnam, Robert, 1993: Diplomacy and Domestic Politics: The Logic of Two-Level Games, in: Evans, Peter, Jacobson, Harold and Putman, Robert (eds), Double Edged Diplomacy: International Bargaining and Domestic Politics, Berkeley: University of California Press.

[118] Eichenberg, Richard, 1993: 'Dual Track and double Trouble: The Two-Level Politics of INF, in: Evans, Peter, Jacobson, Harold and Putman, Robert (eds), Double Edged Diplomacy: International Bargaining and Domestic Politics, Berkeley: University of California Press.

analysis adds an interesting aspect to the debate by emphasizing the influence of 'soft' factors, such as language and discourse, on rational actors in their pursuit of two-level games.

Finally, there is the larger question of whether the process of Europeanisation (of asylum policy) restricts or enhances governments' scope for manoeuvre. Here, our analysis suggests that Germany has been successful in retaining control over policy processes and outcomes both at home and in Brussels by making use of several instruments, most importantly by playing two-level games. It seems that the network of informal intergovernmental groups, such as the Group of 5, which has developed outside the EU institutional framework, provides governments with new fora when playing (two-level) games. Governments thus not only become gatekeepers between the domestic and European level but also between different fora at the European level.

Ultimately, while we have indicated how governments can make use of two-level games in order to maintain substantial leverage in the Europeanisation process, our analysis also suggests that opposition parties can anticipate governments' potential two-level games – i.e. governments (strategically) reducing international win-sets as a means for gaining domestic leeway – and (as the second case has shown) successfully counteract such games. Regarding the second case, one can also argue that opposition parties and the *Länder* can play two-level games themselves, as they become involved in the process of balancing the international and domestic realms, here (in the second case) by manipulating the governments' international/European win-set.[119] Generally speaking, it seems that gate-keeping powers are not exclusively in the hands of (federal) governments, and that opposition parties and the *Länder* can also exercise a gate-keeping role, in particular in defining political discourse. The prominent involvement of some of the German *Länder*, such as Bavaria and Baden-Württemberg, even seems to provide the possibility of framing the above analysis in terms of three-level rather than two-level games, something that will, as it currently stands, have to remain subject to more extensive analysis as part of future research.

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[119] The difference here is that while two level games are usually associated with change, the Conservative opposition acted in the second case in order to maintain the status quo.

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