

Informal Rules and the EU's Intergovernmental Conferences

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Institutions, understood as formal and informal rules, have been shown to be fundamental in organising political life. Although a large literature has gathered evidence from various negotiating forums, so far the implications of this finding for international negotiations have been neglected. In this paper, I hypothesize that informal institutions should play an important role in the EU's Intergovernmental Conferences (IGCs). I submit that they fulfil the functions of reducing transactions costs, information asymmetries, and establishing a mediator. Empirically, I first show that informal rules and procedures indeed exist in IGCs. I then discuss the probable functions of these rules, and then discuss the reasons for institutional change.

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Introduction

From the mid-1990s onwards, the European Union (EU) has celebrated six Intergovernmental Conferences (IGCs) with the objective of revising the communitarian treaties, namely the one preceding the Single European Act (1985), the ones on Economic and Monetary Union (1991) and on Political Union (1991) preceding the Treaty of Maastricht (1993), the ones preceding the Treaties of Amsterdam (1996-97) and Nice (2000), and the Constitutional Treaty (2003-04). These conferences have been centrally involved in the creation of the Single European Market, the establishment of a Common Foreign and Security Policy, the implementation of the European Monetary Union, and the changes in the communitarian institutions. Despite the IGCs evident importance, however, very little systematic research has been dedicated to an analysis of how states interact in this negotiating forum.

Currently, three different explanations for the outcomes resulting from IGCs exist. The first, intergovernmental bargaining theory, is a crucial part of Moravcsik's (1998, 1999) liberal intergovernmentalism. It concentrates on national preferences and the distribution of power among the major member countries to explain the results achieved in intergovernmental negotiations. The second, called supranational bargaining theory, stresses the importance of supranational actors in bargaining processes in the EU (Young, 1991, 1999; Dinan, 1997; Christiansen and Jørgensen, 1999; Christiansen, 2002; Beach, 2005). It maintains that such negotiations can only be efficient if supranational actors help states achieve compromises. The third, finally, which builds on the "garbage can" model of politics, comes to the conclusion that the results of IGCs are unexplainable (Mazey and Richardson, 1997; Smith, 2002; Stubb, 2002). In this view, preferences are instable and results unpredictable. All of these interpretations, however, treat negotiations as "black boxes" and only use the inputs to the negotiations to explain negotiation outcomes.

In contrast to these interpretations, this study directly analyses the processes of negotiation. The main argument is that the complexity of these multilateral and plurithematic negotiations requires the existence of a series of informal institutions, understood as informal rules and procedures, to guide negotiating processes. Building on the neo-institutionalist literature, the study shows that these rules not only exist but

also fulfil a function in the negotiations. Completely intergovernmental negotiations, as portrayed by the liberal intergovernmentalism of Andrew Moravcsik, or chaotic negotiations, as described by the garbage can model, could not have enabled the governments to overcome the “joint decision trap” (Scharpf 1988). Instead, this study argues that the institutionalisation of the IGCs, illustrated by the existence of always more articulate rules of procedure, influences the negotiations. Consequently, I challenge existing explanations by emphasising the necessity of analysing the processes of negotiations – the so-called “black box” – to better understand the results achieved in IGCs. At the same time, I stress the importance of institutional research for a better understanding of international negotiations more generally.

In the following, I first shortly outline the main tenets of my argument that fits into a broader literature that emphasises the role of institutions in political processes. Taking functional neo-institutionalism as my starting point, I argue that informal institutions exist because they serve a specific purpose. As soon as institutions lose their functionality, they will be changed. In the main part of the article, I provide empirical evidence to establish the explanatory power of my argument. In doing so, I follow three different steps: first, I show that informal rules actually exist in IGCs, then I illustrate the functions that these rules fulfil in the negotiations and, finally, I show that informal rules change when they lose their utility to member states. I use information gathered from some sixty qualitative interviews with experts, officials and politicians, official documents, newspaper reports, and secondary sources to provide for a systematic analysis. The empirical evidence mainly concentrates on the IGCs of 1996-97, of 2000 and of 2003-04.

The importance of informal rules in explaining political processes

IGCs have become a surprisingly frequent event on the EU’s political calendar, and the IGC of 2003-04 will be the sixth conference in less than twenty years. An IGC is, by definition, a “negotiation between governments outside of the framework of the Union’s procedures and institutions” (European Commission, 1997: 22). In the 1950s, the original six member states introduced three formal rules in the constitutive treaties regarding their own revision: the negotiations would be among the governments of the member states, the decisions would be approved by consensus, and all member states

would have to ratify the resulting treaty.² Until now, these formal rules form part of the communitarian treaties.

The consensus rule is particularly relevant for an explanation of the dynamics of IGCs. Scharpf (1997, 144) defines the consensus rule “as a mode of interaction in which discussion is continued until no one still insists on opposing a proposed solution”. While consensus decisions have the big advantage of enjoying high legitimacy and are an important tool to maintain acceptance of decisions by all members of a political community (Lijphart, 1999: 32), achieving consensus tends to be difficult. Consensus decisions thus suffer from one major deficiency: a lack of efficiency, namely a low capacity to produce swift decisions (Sartori, 1975; Scharpf, 1997; Tsebelis, 2002). High transaction costs and lowest common denominator decisions should cripple negotiations under the consensus principle. Over the last twenty years, these problems should have become more important as the number of governments that participate in the EU’s IGCs has increased from 10 to 25. As Fritz Scharpf (1997: 117) maintains, the transaction costs of negotiated agreements rise exponentially with the number of participants. Moreover, Giovanni Sartori (1975: 135) points out that with consensus decisions “the number of deciders stands in *direct relation* to the costs of decisions: they increase together.” How then were member states repeatedly able to reach far-reaching results in IGCs?

I provide a response to this question that fits in well with the neo-institutionalist literature, which has demonstrated the importance of institutions in shaping political behaviour (March and Olsen, 1989; Aspinwall and Schneider, 2001). According to this literature, institutional structures, decision-making processes, formal rules and informal routines are key elements in the political processes. Institutions “are the humanly devised constraints that structure human interaction. They are made up of formal constraints (e.g., rules, laws, constitutions), informal constraints (e.g., norms of behaviour, conventions, self-imposed codes of conduct) and their enforcements characteristics” (North, 1994: 360). Informal constraints or informal rules are the ones that, being not codified, are part of the shared understanding (Sandholtz, 1999: 81) and include practices, routines, conventions, values and symbols. Whereas formal rules tend to be enforced by a third party, informal ones have to be self-enforcing (Knight, 1992). Finally, such informal rules create

² See Article 48 of the Treaty of European Union.

expectations about behaviour and their violation can be accompanied by sanctions (Helmke and Levitsky, 2004: 727).

Based on a particular variant of neo-institutionalism, namely functional institutionalism, I propose that institutions exist because they serve a specific purpose in the political process (Williamson, 1975; Keohane, 1984; North, 1990). Several purposes of informal rules in political processes can be distinguished. For one, institutions often help to resolve problems of collective action. Formal institutions, such as agenda setting powers and committee structures, are also critical to remedy such problems as cycling majorities or a lack of expertise on behalf of decision makers. Similarly, informal institutions often help to enhance the utility of all actors (Helmke and Levitsky, 2004: 728; North, 1990; Sandholtz, 1999). Such informal rules exist as long as they are self-enforcing. Even if in the short-term they run counter an actor's self-interests they may survive for a while. As put by Robert Keohane (1984: 106), "For reasons of reputation, as well as fear of retaliation and concern about the effects of precedents, egoistic governments may follow the rules (...) even when myopic self-interest counsels them not to". If, however, they are out of line with actors' interests, institutions will be changed. Consequently, only in exceptional circumstances do informal institutions create unexpected consequences in the future.³

Informal institutions, according to this argument, exist because they help actors achieve efficient results in negotiations. As pointed out also by other scholars, the consensus rule, which gives the right of veto to all participants in a negotiating process, invites "the emergence of informal institutions to avoid deadlock situations" (Farrell and Héritier, 2003: 582). Such informal institutions emerge from repeated interactions (Farrell and Héritier, 2003: 580). In addition, actors may use informal institutions to complement formal rules in the absence of specific rules over the structure of the negotiations or as a "second best" strategy (Helmke and Levitsky, 2004: 731).

Applying these more general points to the specific case of IGCs, one can distinguish three major functions of informal institutions in IGCs: to reduce transaction costs, to minimise information asymmetries, and to establish the position of a mediator. First, as pointed out above, multilateral negotiations following the

³ For a different view see: Pierson (1996 and 2000).

consensus principle such as the IGCs are often crippled by transaction costs. Informal institutions, if working properly, can reduce transaction costs by assigning agenda setting powers to an actor and by limiting the number of decisions that have to be taken (Scharpf, 1997: 145). The existence of an agenda setter reduces the number of transactions, and consequently transaction costs, among negotiating parties. If N is the number of participants, in the absence of an agenda setter, all participants have to deal with all others, thus producing $N*(N-1)/2$ bilateral relationships. If an agenda setter exists, the number of relationships is reduced to N (or $N-1$ if the agenda setter is also a participant in the negotiations). Informal institutions also reduce the number of decisions that have to be taken because they establish practices that will be followed without further discussions.

Second, information is completely essential in negotiations. The absence of information “will lead to inefficient bargaining outcomes” (Muthoo, 2000: 162). Participants need information about the issues they are debating and about the preferences of the other negotiating parties. In fact, no negotiations would be observable if the resistance points of all participants would be common knowledge (Muthoo, 2000). The problem of asymmetric information is aggravated by the incentives facing all participants in negotiations: their need to maximise the own benefits from an agreement makes them engage in misinformation. They will lead them to exaggerate their resistance points, i.e. the point at which they are willing to accept an agreement, to gain as many concessions from other actors as possible. Whatever a party to a bargaining posits as being its resistance point, consequently, will be discounted by all others as “cheap talk”. In the language of game theory, the players in a bargaining situation tend to hide their true valuations of all options. Moreover, information on the issues to be debated may be undersupplied as collective action problems make participants reluctant to bear the costs of supplying the public good of information. Both problems will be aggravated as the number of participants in negotiations increases. In this situation, informal rules may establish ways of reducing these information asymmetries (North, 1990: 41). In the words of one author, “information rules authorize channels of information” between parties that assign “the obligation, permission, or prohibition to communicate to participants” (Ostrom, 2005: 206). Illustratively, informal rules may assign the role of providing information to a specific actor. Alternatively, they may create conditions under which actors can reveal

some information on their resistance points without facing punishment for doing so by way of a less favourable negotiation outcome.

Finally, negotiations often require a mediator to achieve efficient results, be it a specific party to the negotiations or a third party. With all parties to a negotiation concentrating on the distribution of benefits, an actor is needed who aims at creating additional value. Such a mediator should thus aim at enhancing the “common interest” of the negotiating parties, without engaging in agent “shirking”. A mediator provides a solution to the problem that all participants to a negotiation have incentives to hide their preferences. In the words of Scharpf (1997: 145), a mediator has a “facilitating role that could help the principal actors to discover the solution on which they might all be able to agree”. Informal rules may be important in establishing the position of a mediator that helps participants in negotiations overcome problems resulting from distributional bargaining (Dür and Mateo, 2006). To achieve this aim, rules have to assign certain rights and obligations to a specific actor. Among the rights are agenda setting powers, whereas among the obligations it is particularly important for the mediator to take a neutral stance in the negotiations.⁴ In the absence of formal rules to establish the position of such a mediator, informal rules should come into play.

In short, I predict the existence of informal rules that shape negotiating processes in IGCs. These informal rules are essential as few formal rules exist to deal with problems arising in multi-party negotiations that have to reach consensus decisions. The informal rules that should be observed are expected to fulfil specific functions in the negotiations. Finally, I provide some empirical evidence that demonstrates that when informal rules lose their functionality, they will be changed. The following empirical investigation will examine this argument.

Informal Rules in IGCs

As pointed out above, only three formal rules govern IGCs (governments of the member states as actors, consensus rule and ratification by all member states). Based on the argument just laid out, however, I expect that IGCs should be structured around a series of informal rules. In fact, in a first section below I provide substantial evidence to back this view. Secondly, I will discuss which functions these rules fulfil, namely whether their role is to reduce transaction costs, to minimise information

⁴ On the question whether a biased entrepreneur or rather a disinterested mediator should guide interstate negotiations, see Carnevale and Arad, 1996.

asymmetries, or to establish the position of a mediator. Finally, I will provide some evidence to back the view that informal institutions change when they lose their utility for member states.

Proving the existence of informal rules in IGCs

How do you recognise an informal rule when you meet it? Identifying informal institutions is tricky. In this study, I will draw on two indicators to identify informal rules. For one, regularities in behaviour indicate the existence of informal rules. As defined, informal rules create expectations about the behaviour of political actors in negotiation processes. As a result, certain regularities should become visible. Sometimes, however, informal rules are violated. These violations provide for a further indicator of the existence of informal rules. In this view, an informal rule is recognised when negotiators complain about the behaviour of a specific actor. Using these criteria, it is possible to distinguish a whole series of informal rules in IGCs. I provide an initial typology of them according to the actors affected: the Presidency, the General Secretariat, the member states, and the European Commission.

The Presidency

The role of the presidency in IGCs is defined by many informal rules. The Presidency has both rights and obligations. Concerning rights, it can establish the calendar, choose the type of meetings, and determine the agenda of meetings. In practically all cases, the presidency makes use of these rights. It tends to prepare two calendars during its semester, each of them covering a period of three months. These calendars are discussed by the member states. Although a right conferred upon the presidency, it has very little discretion in actually designing a calendar (Interview with a General Secretariat official, Brussels, 18 October 2002). It has to distribute the meetings among the different levels of negotiation in which the discussions have to be carried out, which are meetings between the group of member state representatives (one each week or every 14 days), the ministers of foreign affairs (one or two per month), and the Heads of State and Government in the European Councils (two per semester). Presidencies try to avoid introducing too many meetings in the agenda and/or to concentrate them at the end of the semester (Interview with Council Secretariat official, Brussels, 23 October 2002). The calendars include also the type of the meetings and the topics that they should deal with.

The Presidency has more options in determining the type of the meetings, which basically can be formal or informal. Informal meetings may be conclaves, Gyminch meetings, restricted and even super-restricted meetings. The main difference of the formal ones is the lack of assistants and the absence of documents in the negotiations. All Presidencies opt to insert some informal meetings in their calendars, because in the opinion of many negotiators these meetings have the virtue of propelling agreements due to their less formal environment (Interview with European Commission official, Brussels, 2 April 2003). Counting the number of informal meetings included in the calendars of the IGCs, some differences become apparent: in 1996-97 the Italian Presidency held 1 meeting, the Irish 2 and the Dutch 2; in 2000 the Portuguese held 6 and the French 10; and in 2003-04 the Italian held 2.

The Presidency also has the right to determine the agenda of all the meetings covering all the issues of the agenda of the IGC. In doing so, however, the Presidency has to respect the European Council's decisions about the agenda, and, at the same time, has to take into account the pending issues from the last Presidency and the new demands of the member states. Of high relevance is the presidency's right to control which of the many proposals made by the member states or the European institutions are introduced to the negotiations. Since member states can present a huge number of proposals during the process of negotiations, this right is considerable. The presidency is supposed to apply a criterium of efficacy in determining which of the documents should form part of the negotiations (McDonagh, 1998: 23). However, the presidency may still have some discretion in doing so.

Finally, the Presidency has the right to chair all meetings at the different levels of the negotiation, both formal and informal. The presidency should use this role to achieve agreement among the member countries. If doing so well, other countries tend to praise the presidency (Interview with a former Minister of Foreign Affairs, Barcelona, 7 January 2003). For example, the Irish Presidency in the IGC of 2003-04 has been considered an effective Presidency because it "managed to make even the most reluctant accept the necessary compromises" (Dür and Mateo, 2006). It used proposals and counterproposals (Norman, 2005: 393-94) and had constant contacts with the most reluctant member states (*Financial Times*, 18 October 2003: 2). In contrast, the Italian Presidency, in the same IGC, has been considered an ineffective one in chairing the negotiations as a consequence of the chaotic negotiations and the lack of leadership in the European Council in December 2003. In the middle of the

summit, when President Silvio Berlusconi had to confess that in fact he did not have the compromise formula in his pocket that he had boasted about before (*Agence Europe*, 13 December 2003: 3), many governments were extremely irritated. The Luxembourg Prime Minister Jean-Claude Juncker declared that the Italian Presidency “created more confusion than did it help to find an agreement” (quoted in *Agence Europe*, 17 October 2003: 5). In short, while all presidencies make use of these rights conferred upon them, within the limits set, not all do so equally efficiently.

With regard to obligations, the Presidency, together with the General Secretariat, has to elaborate documents throughout the negotiations (called Notes of the Presidency or CONFER) and the draft treaty which serves as basis for the final negotiations. All Presidencies follows a similar procedure in doing so: First, they make use of a questionnaire to get a first impression of the positions of the member states (Interview with Council Secretariat official, Brussels, 10 October 2002). Next, the Presidency goes-ahead with a “process of decantation” in the definition of its proposals (Interview with Council Secretariat official, Brussels, 1 April 2002). In the IGC of 1996-97, the Presidencies presented 136 documents in the negotiations, divided quite equally among the Italian Presidency (40), the Irish (44) and the Dutch (52). In the IGC of 2000, the Portuguese Presidency elaborated (24) and the French (34) documents. Finally, in the IGC of 2003-04, the Italian Presidency elaborated (15) and the Irish (13) documents. In the end game of the negotiations the presidency, support by the General Secretariat, also prepares the draft treaty (or, in fact, several draft treaties that are being circulated).

The arguably most important obligation on the presidency, however, is the requirement for it to be neutral. The neutrality rule restrains the Presidency’s ability to defend its proper interests in the negotiations (General Secretariat of the Council, 2001: 5). The fact that every six months a different state assumes the Presidency provides states with an incentive to comply with this norm. Here, the existence of an informal rule is mainly confirmed when other states complain about the lack of neutrality shown by a specific presidency. The most evident case is probably the IGC of 2000, in which the two Presidencies – the Portuguese and the French – defended strong preferences in the negotiations, and repeatedly violated the neutrality rule. The Portuguese Presidency stood up for the maintenance for a commissioner for all member states in an enlarged EU (Interview with Council Secretariat official, Brussels, 28 October 2002). To achieve its objective, the Presidency systematically

violated the rule of neutrality. It avoided discussing the reform of the Commission during the whole semester in which it was in the role of the Presidency (Interview with Council Secretariat official, Brussels, April 2003). The Portuguese Presidency also put its preferences into the documents that it presented in the negotiations (CONFER 4744/00, 24 May 2000 and its report to the European Council in Santa María de Feira in June 2000), although the General Secretariat reminded it of the need to remain neutral (Interview with Council Secretariat official, Brussels, 1 April 2002). Observers of the negotiations heavily criticized this defence of its own interests (*Agence Europe*, 26 April 2000: 3).

Similarly, the French Presidency defended its proper interests on practically all of the issues under negotiation (Tallberg, 2004, 1014; interview with Council Secretariat official, Brussels, 2 April 2002). In particular, the French Presidency tried to leave the reweighting of votes in the Council of Ministers open until the last moment in the European Council in Nice in mid-December 2000 (Interview with Council Secretariat official, Brussels, 2 October 2002). Some member states and observers, when witnessing the French Presidency's attempt to omit this question before Nice, accused the Presidency of violating the neutrality rule (*Financial Times*, 14 December 2000: 23; Smith, 2002: 176). In these cases of obligations upon the Presidency, therefore, observers' reactions to violations of informal rules help us identify these rules.

The Member States

Member states are expected to present written positions about the different issues that are on the agenda of the negotiations. Practically always member states live up to this informal rule (Interview with national civil servant, Brussels, 12 November 2002). Exceptionally, in the IGC of 2000 Belgium, Greece, France, Spain and Sweden declared that they saw no need to present written documents on their positions as the negotiation focused on the so-called "Amsterdam leftovers". Given that their positions had not changed since last discussing the issues, they felt that no new position paper was necessary (Interview with national civil servant, Brussels, 9 October 2002). However, by means of informal meetings with the presidency (*tour de capitales*, confessionaries, etc.), informal meetings with other member states, official discourses, and declarations these four countries also fulfilled the informal rule that asks them to clearly state their position prior to the negotiations.

Beyond this, member states are also expected to elaborate proposals on issues on the agenda (Interview with national civil servant, Brussels, 12 November 2002). Again, member states follow this rule (Interview with former Permanent Representative, Brussels, 3 October 2002). Illustratively, in the IGC of 1996-97 member states presented a total of 207 proposals, including 189 unilateral and 29 multilateral ones. In the IGC 2000, which had a more limited agenda, member states still elaborated 27 proposals, including 20 unilateral and 7 multilateral ones. Whenever a member state elaborates a proposal, the proposal is sent to the presidency, which then decides whether it will be taken into consideration in the negotiations.

The General Secretariat

The role of the General Secretariat in IGCs is defined by two obligations. The arguably most important obligation on the General Secretariat is the requirement for it to assist the Presidency in all regards. To comply with this requirement, in each IGC the General Secretariat creates a task force composed of ten members – five of them come directly from the Legal Service (Interview with Council Secretariat official, Brussels, 28 October 2002). This group has to offer permanent assistance to the Presidency in proportioning organizational and logistic support; in planning all the meetings; in giving systematically information about the state of the negotiations; in preparing the documents and correcting the text of the draft treaties; in offering legal advice; and, finally, in elaborating compromise proposals and helping to prepare the package deal (Interview with Council Secretariat official, Brussels, 1 April 2002). As the General Secretariat has extensive experience with conducting and guiding treaty reform processes (Beach, 2004: 415), the effectiveness of their assistance to the presidency during the whole process of negotiations is guaranteed. More significantly, as member states introduce new rules to the treaties and reorganize and reform existing ones in IGCs, the legal advice and assistance of the General Secretariat is essential to ensure legal accuracy (Interview with Council Secretariat official, Brussels, 23 April 2002).

The General Secretariat also has the obligation to distribute documents among the negotiators, ranging from the Notes of the Presidency (CONFER documents) to the calls for meetings and the *ordre du jour* of each meeting. The General Secretariat makes sure that all of this information is sent not only on time but also to all actors involved in the negotiations. The documents go to all member states, the European

Commission, and the European Parliament (although the last one does not receive all the documents). In general, the General Secretariat only acts upon permission from the Presidency. At least in one occasion, however, the General Secretariat violated this informal rule and distributed a document without the permission of the presidency (Interview with Council Secretariat official, Brussels, 1 April 2002). This happened during the negotiations in the IGC of 1996-97, when the General Secretariat prepared and sent a Note regarding the issue of enhanced cooperation without the permission of the Irish Presidency. It justified its action arguing that its objective had been to protect the institutional framework of the European Community (Interview with national civil servant, Brussels, 29 April 2003).⁵ However, the Presidency reacted by withdrawing the document from the negotiations, while the General Secretariat publicly apologised for not having respected this informal rule.

The European Commission

Informal rules give the European Commission two rights in IGCs. For one, the European Commission has the informal right to be present in all meetings (Beach, 2005). In practically all cases, the European Commission makes use of this right. The informal rule concerning Commission presence was started in the IGC of 1985, when member states “desired” the Commission’s assistance for its “institutional memory” (Dinan, 1997: 256). Since then, it has never been questioned (Interview with a European Commission servant, Brussels, 24 October 2002). The Commission is invited to be an observer in all meetings, including the ones that otherwise are solely open to Ministers of Foreign Affairs (Interview with a former European Commissioner, Madrid, 24 September 2002). In the European Council in Nice in December 2000, however, the European Commission was in practice excluded from the negotiations. In particular, the French Presidency did not count on the European Commission for the bilateral contacts and the confessions on the reweighting of votes in the Council of Ministers (Church: 2001: 87). The Commission’s reaction was to publicly accuse the French Presidency of violating this informal rule. Moreover, the European Commission has the right to present written and unwritten proposals during the whole process of negotiations (Dinan, 1997: 256). It tends to use this right in all IGCs, although not to an equal extent. In 1996-97, the Commission elaborated 16 proposals and in 2000 only 3 proposals.

⁵ SN/639/96, Non-paper, Enhanced Cooperation – Flexibility, 20 December 1996.

What function do informal rules fulfil in IGCs?

In the previous section, I provided substantial evidence that suggests that a series of informal rules and procedures exists in the IGCs. Based on the argument sketched out above, I expect these informal rules to have a specific function in the negotiations. In particular, I expect rules to serve the purposes of reducing transaction costs, of minimising information asymmetries, and of establishing the position of a mediator. Together, these functions can increase bargaining efficiency in the IGCs.

Reducing transaction costs

Several of the informal institutions discussed in the previous section seem to fulfil the function of reducing transaction costs in IGCs. In particular, some of the rules establish the Presidency – in collaboration with the General Secretariat – as an agenda setter, which, as discussed above, reduces the number of transactions necessary in negotiations. Important in this context are rules such as the Presidency’s right to determine the calendar and the type of meetings (whether formal or informal), and to establish the agenda of each meeting. In addition, the Presidency controls which of the many proposals made by the member states are admitted to the negotiations. By thus restricting the number of documents admitted to the negotiations, the Presidency also can reduce transaction costs. Informal rules reduce the number of decisions that have to be taken in a negotiation because they already establish the context of the negotiations. In one-off negotiations, everything from the order of seating around the table, to the order of speaking, and to the mix between bilateral and multilateral meetings has to be determined in pre-negotiations (Interview with General Secretariat official, Brussels, 24 October 2002). The institutionalisation of IGCs makes sure that informal rules exist on all these issues, allowing participants instead concentrate on the actual issues at stake in the negotiations.

Minimising information asymmetries

Among the informal rules mentioned above, several have the purpose of distributing information in IGCs.⁶ In particular, the rule that the Presidency elaborates documents throughout the negotiations makes sure that collective action problems do not limit the information available to the negotiating parties. In addition, the Presidency has the

⁶ It may be that only for the existence of these informal rules Moravcsik (1998: 61) can claim that in IGCs member states have “plentiful and cheap” information, and that national preferences can “be assumed to be common knowledge”.

right to engage in a series of informal bilateral and multilateral meetings to get detailed information on the “red lines” of member states. Moreover, the role of the General Secretariat is crucial in this context, as it makes sure that all parties to the negotiation receive the same information at the same time (Interview with General Secretariat official, Brussels, 10 October 2002). Since all negotiators trust in the effectiveness of the General Secretariat and its neutrality in carrying out its responsibilities, this is an efficient way of reducing information asymmetries. The Commission’s right to participate in the negotiations also helps increase the pool of information available (Interview with a former European Commissioner, Madrid, 24 September 2002). Finally, the informal rule that obliges all countries to present their position on all issues on the agenda of the negotiations also increases the information available to all participants. It makes sure that all member states have to put their cards on the table, even if only in a strategic manner.

Establishing the position of a mediator

As discussed above, the existence of a mediator can be essential for the success of multilateral negotiations. In IGCs, informal rules help more than one actor assume the role of mediator. Chief among them is the Presidency of the Council of Ministers, which is supposed to assume the role of mediator.⁷ For this objective, informal rules endow the Presidency with a substantial number of tools. In particular, the Presidency controls which of the many proposals made by the member states are admitted to the negotiations. Moreover, the Presidency has the right to chair all meetings at the different levels of the negotiation trying to get a final agreement. The Presidency also has the right to have bilateral and multilateral meetings with all member states, to make *tours de capitales* before the start and the end of the negotiations, and, finally, to hold “confessionaries” in the end game. In these meetings, member states may reveal their reservation point to the presidency. This information, in turn, allows the mediator to construct package deals that provide for compromises that go beyond the lowest-common denominator. It makes use of this information when it elaborates documents (together with the General Secretariat), and when it presents the draft treaty according to which the detailed negotiations proceed.

Undoubtedly, these resources offer the Presidency substantial control over the conduct of the negotiations. For that reason, the mediator’s ability to use her

⁷ For studies of the EU’s Presidency, see Elgström (2003); Tallberg (2004); Dür and Mateo (2006).

privileged position to pursue her own preferences in the negotiations has to be limited by the neutrality rule. In the absence of such a restriction, negotiators would be unwilling to reveal their resistance points to the mediator and negotiations could not go-ahead. As a result, whenever the presidency fails to be neutral, its ability to mediate is undermined, leading to difficulties in the negotiations. Nevertheless, in many circumstances the informal rules that define the role of the presidency help it assume the role of mediator in the negotiations.

Not only the Presidency, however, is the only actor that can act as mediator. Sometimes, the European Commission can act as a mediator (Christiansen, 2002; Beach, 2005). In the words of one author, the European Commission's "unique attributes as the Union's conscience, institutional memory, pace-setter, policy entrepreneur, think-tank, and guardian" explain why at several times its proposals have been essential for the achievement of agreements (Dinan, 1997: 210). The fact that the European Commission has a voice but not a vote in the negotiations may be particularly helpful in substituting or assisting the presidency in the role of mediator (Interview with European Commission official, Brussels, 2 April 2003). At other times, the impression that the Commission has a very specific stake in the negotiations undermines its ability to mediate in the negotiations.

When do informal rules change?

Although informal institutions are often characterized as "highly resistant to change" and as possessing "tenacious survival ability" (Helmke and Levitsky, 2004: 731), from a functional perspective, I have predicted that informal rules change when they lose their utility to member states. Over the last twenty years, however, to my knowledge only one of these informal rules has been changed substantially. This concerns the rule that the Presidency has the obligation to prepare the draft treaty. In the IGC of 2003-04, not the presidency but the European Convention presented a draft treaty. In the European Council of Laeken in December 2001 the member states governments decided to establish a European Convention with the objective of preparing a reform of the Treaty of Nice. Nevertheless, the Laeken Declaration was cautious with respect to the end product that should result from the negotiations in the Convention, simply stating the possibility that the revision of the treaties could "lead in the long run to the adoption of a constitutional text in the Union". The Convention, nevertheless, immediately set itself the ambitious objective of presenting a draft for a

constitutional treaty. It is the member states' acceptance of this decision that suggests a change in informal rules. What explains this change in practice?

In my view, member states realized that the former practice was no longer functional. In the IGCs of 1996-97 and of 2000, many provisions had been decided upon at the end of long meetings during the final summits. Even some of the more important institutional issues were agreed upon by the Heads of State and Government in the last moment. With issue linkages important in concluding these negotiations (Dür and Mateo 2004; 2006), other parts of the package were left open as well. In the summits, then, member states agreed on treaties that they had never seen in their entirety (Interview with former Prime Minister, Rome, 27 May 2002). It is no wonder that many legal problems had their origin in this practice. In both cases, the Committee of Representatives Affairs (COREPER) had to carry out a complete revision of the treaty after it had been signed (Interview with Council Secretariat official, Brussels, 1 April 2002). Individual countries even put into question major decisions taken. Ireland and the United Kingdom, for example, suddenly rejected the decisions concerning the extension of co-decision and their participation in the Schengen area after the Amsterdam summit in June 1997 (Boixareu and Carpi, 2000: 219). After Nice, some countries such as Austria, Finland and Ireland pointed out that the celebration of all European Councils in Brussels had been a proposal, but should not be incorporated in the treaty (*El País*, 22 December 2000: 2). In addition, the Nice summit had made mistakes with regard to the number of votes assigned to member states (*El País*, 19 December 2000: 8). Logically, such problems led to a reconsideration of the usefulness of prior practices.

Conclusions

I have stressed the importance of taking into account informal rules and procedures in an explanation of negotiating processes in IGCs. Since other studies on the IGCs have so far neglected this aspect, a direct analysis of the processes of negotiations adds to the existing literature on IGCs. My argument has been that multilateral and plurithematic negotiations need informal institutions to facilitate the achievement of agreements. In particular, by reducing transaction costs, minimising information asymmetries, and establishing the position of a mediator such informal rules serve an important purpose in the negotiations. This is not to say, however, that an analysis of the negotiating dynamics is sufficient for an explanation of IGCs. Without doubt, the

preferences of member states, the distribution of power, and idiosyncratic factors all play a role in the negotiations.

The paper has also emphasized the need for an institutional research paradigm for a better understanding of international negotiations more generally. With the growth of global interdependence, negotiations among states have become more relevant to solve problems in such areas as the environment, aid programmes, and international trade (Keohane, 2002: 10). Even within democracies, for several reasons consensus decisions may have become more important over time (Lijphart, 1999). Increasing the efficiency of consensus decisions by reducing the costs of negotiation, minimising asymmetries information, and establishing the position of a mediator, therefore, becomes ever more important. In IGCs, at least, informal rules seem to contribute to the greater efficiency of negotiations.

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