Treaty of Nice vs. Constitutional Treaty: 
How Efficient Are Intergovernmental Negotiations in the EU?

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Abstract

According to intergovernmental bargaining theory, all Intergovernmental Conferences (IGCs) in the European Union are equally efficient. Contrary to this prediction, we provide substantial evidence of variation in bargaining efficiency when comparing the far-reaching Constitutional Treaty (2004), resulting from the IGC of 2003-04, with the flawed Treaty of Nice (2001), which was the end product of the IGC of 2000. In search for an explanation of this variation, we argue that bargaining efficiency often suffers from negotiators’ pursuit of individual rather than collective gains. Two necessary conditions have to be fulfilled for governments to overcome this problem: effective preparation of the negotiations and effective mediation during the bargaining processes. In IGCs, although governments established procedures to achieve these conditions, lapses from negotiation efficiency occur whenever these procedures fail to accomplish their function. Systematic evidence from the IGCs of 2000 and of 2003-04 confirms the explanatory power of our argument.

Introduction

Ever since the creation of the European Economic Community in the 1950s, a series of “grand bargains” in the form of Intergovernmental Conferences (IGCs) has shaped the process of European integration. Especially over the past 20 years, the member states of the European Union (EU) have celebrated no fewer than six IGCs, which have resulted in profound changes in the EU’s founding treaties. Among these changes are the extension of qualified majority voting in the Council of Ministers to new issue areas, the introduction of a common currency, and the launch of a Common Foreign and Security Policy. Without doubt, these outcomes of IGCs are highly significant. But, are the agreements reached in intergovernmental negotiations in the EU always equally efficient? And, if the answer is no, which factors determine the degree of bargaining efficiency?

We tackle these questions in the following. To do so, we first provide ample evidence that demonstrates that there are differences in bargaining efficiency across IGCs. This variation in bargaining efficiency casts substantial doubt on Andrew Moravcsik’s (1998,
1999) intergovernmental bargaining theory, which maintains that IGCs always are equally efficient. In need of an alternative explanation, we argue that bargaining efficiency often suffers from negotiators’ pursuit of individual rather than collective gains. Given such distributional bargaining, for two reasons negotiators find it difficult to achieve efficient agreements. On the one hand, actors likely oppose the addition of an issue in an advanced state of the negotiations – even if this would enhance overall efficiency – when they have no clear idea of what the costs and benefits of an agreement in that area are. On the other hand, to maximize individual gains, all actors have an incentive to conceal their resistance points beyond which they will reject an agreement. By signalling strength to the other negotiating parties, they try to achieve an outcome as close as possible to their ideal points. In this situation, a proposal for compromise is conceived of as an indication of weakness. No party, consequently, is likely to go ahead with genuine proposals for how to narrow down a gap between parties’ negotiating positions.

We suggest that governments can still overcome these problems if they manage to provide for effective preparation of and effective mediation during a bargaining process. Preparation endows negotiators with the necessary information to consider issue linkages, while mediation is important to overcome parties’ reluctance to propose compromises. Based on this reasoning, we hypothesize that bargaining efficiency in IGCs varies according to the degree that effective preparation and mediation facilitate governments’ search for compromises. In the following, to establish the explanatory power of our argument, we first shortly outline the main tenets of intergovernmental bargaining theory before providing substantial evidence that counters that theory’s prediction of always equally efficient intergovernmental negotiations. Subsequently, we present our alternative explanation of the determinants of bargaining efficiency in IGCs. In the main part of the article, we use information gathered from some fifty qualitative interviews with experts, officials and politicians, official documents, newspaper reports, and secondary sources to provide for a
systematic analysis of our reasoning across the IGCs of 2000 and of 2003-04. We conclude by summarizing our argument and sketching out some implications.

**Intergovernmental Bargaining Theory and Bargaining Efficiency**

Intergovernmental bargaining theory is a crucial part of Moravcsik’s (1998, 1999) liberal intergovernmentalism. Conceptualizing of IGCs as bargaining games, Moravcsik distinguishes two dimensions of negotiation outcomes, namely efficiency and the distribution of gains. According to Moravcsik, the efficiency dimension is largely unproblematic, since the transaction costs of negotiations are not likely to exceed the possible gains from agreement even when governments engage in technical and multi-party negotiations. If still necessary, the most interested states can act as policy entrepreneurs that make sure that efficient agreements are reached. The task of these entrepreneurs is made easier by the fact that with information “plentiful and cheap”, national preferences can “be assumed to be common knowledge” (Moravcsik, 1998, 61). With efficiency guaranteed, and issue linkages only possible to a very limited extent, negotiators mainly concentrate on the distribution of the gains from cooperation. Formulated as a hypothesis, Moravcsik (1999) maintains that, unless there are domestic coordination problems, intergovernmental bargaining always results in as efficient outcomes as the convergence of the participants’ preferences allows.

How well does this prediction fare when exposed to empirical scrutiny? To respond to this question, in accordance with common usage (Underdahl, 1983; Moravcsik, 1998), we define efficiency as an overall measure that indicates whether a group manages to maximize joint utility – understood as the sum of the utilities of all participants in the negotiations – in an agreement. Following this definition, efficient agreements clear the negotiating table by linking issues together on which there is no individual set of feasible agreements because of the outlier preference of one or a few governments. Inefficient ones, in contrast, simply lead to the omission of issues, even if only one actor opposes their inclusion in a final agreement. Albeit stringent, the definition creates the problem that a direct measurement of efficiency is
impracticable. In the case of an IGC, such measurement would require information about the utility functions of all EU member states across all issues that possibly could be included in an agreement, an objective that can hardly be reached. As an alternative to direct measurement, we thus employ two proxies to establish the efficiency of IGCs. First, we deem an agreement less than efficient if it excludes issues on which a majority of participants expressed an expectation of gains from cooperation during the negotiations. Such issues – generally called “leftovers” – are mostly specified in the resulting treaty or listed in a protocol or a declaration added to the final settlement. Second, even if an issue is included in an agreement, it may reflect a lowest common denominator outcome. This is most likely reflected in a lack of stability of the agreement, requiring renegotiation before long. Together, these two proxies provide for a reasonable yardstick to evaluate bargaining efficiency.\textsuperscript{2}

Based on these criteria, we examine the efficiency of the two most recent IGCs, namely the ones of 2000 and of 2003-04. Our analysis suggests that the former was far less efficient that the latter. The Treaty of Nice postponed the decision concerning the composition of the European Commission to a vote by unanimity within the Council of Ministers after the EU would reach the number of 27 member states. In addition, in a declaration annexed to the Treaty of Nice, the governments agreed to leave four topics for a future IGC: the delimitation of powers between the EU and the member states, the legal status of the Charter of Fundamental Rights, the simplification of the Treaties, and the role of national parliaments in EU decision making. Moreover, although the negotiators achieved compromises on such issues as the reweighting of votes in the Council of Ministers after the accession of new member states, these compromises were not stable, and were already challenged at the time of the Treaty of Nice’s approval. The treaty itself states that the governments should continue with the institutional reforms achieved in Nice, with the aim of making an enlarged EU more efficient and democratic. As a result, of the 27 topics dealt with in the IGC of 2000, more than
half had to be renegotiated in the IGC of 2003-04, among them practically all those
concerning institutional reforms.

This evidence led many observers and participants in the negotiations to emphasize the
limitations of the “messy compromises” reached in Nice (Norman, 2003, 15). Only six
months after the conclusion of the negotiations, Pierre Vimont (2001, 159), President of the
Group of Representatives during the French Presidency in the second half of the IGC,
conceded: “Nice cannot be rescued and should be abandoned”. Along the same lines, the
German Foreign Minister Joschka Fischer characterized Nice as a “bad” and “insufficient”
treaty (Financial Times, 4 December 2003, 10). These reactions by key negotiators confirm
the inefficiency of the outcomes reached in the IGC of 2000.

In contrast, the Constitutional Treaty, which, after a failed attempt to conclude the
negotiations in the Brussels summit in December 2003, was approved in June 2004, does not
list leftovers. It proposes such important reforms as the creation of a unified treaty framework
for the EU, which would provide for an end to the existing pillar structure, and the inclusion
of the Charter of Fundamental Rights in this framework. The new treaty also establishes the
positions of President of the European Council and European Foreign Minister, and extends
the scope of qualified majority voting. Equally, the size and composition of the European
Commission, a question left unresolved in the Treaty of Nice, was at long last decided.
Finally, the governments of the member states agreed upon a series of initiatives to increase
the democratic legitimacy of the EU. Among them are a strengthening of the European
Parliament and the introduction of a citizens’ initiative allowing citizens to invite the
Commission to submit a proposal on a specific topic.

Not only the extent of the compromises found, but also the negotiators’ immediate
reactions indicate the IGC’s high efficiency in clearing the negotiating table and in producing
a lasting agreement. Illustratively, the Spanish Prime Minister Luis Rodriguez Zapatero
showed himself “very, very satisfied”, while the Austrian Chancellor Wolfgang Schüssel
declared that the result would be stable for a long time, “if not for decades” (*Agence Europe*, 20 June 2004, 3-6). In sum, the IGC of 2003-04 was substantially more efficient than the one of 2000, a result that casts considerable doubt on the explanatory power of intergovernmental bargaining theory. How can this variation in bargaining efficiency be explained?

**Preparation, Mediation, and Negotiating Efficiency**

We start our argument by characterizing IGCs as bargaining processes, in which all actors try to accomplish their goals by exchanging demands backed by credible promises, threats, or exit opportunities (Elster, 1986). In such bargaining, all participants have veto power over the outcome, and thus are unwilling to accept an agreement that makes them worse off than they would be with their best alternative to negotiated agreement. With regard to the final compromise, consequently, the win sets of all participants have to intersect. As many authors have pointed out, however, the same requirement does not apply to each individual issue included in the final agreement. Instead, a substantial literature convincingly shows that given different preference intensities across issues, linkages, which connect two or more issues in a common decision, can increase bargaining efficiency (Tollison and Wilett, 1979; Sebenius, 1983; Mayer, 1992; Martin, 1994; Davis, 2004). Even if on two issues separately considered there is no zone of possible agreement, linking the two may allow for a solution of both. Issue linkages thus can prevent deadlock in negotiations by allowing all participants to achieve mutually advantageous agreements.

Nevertheless, due to distributional bargaining, negotiators may find it difficult to realize issue linkages in multi-party negotiations such as the IGCs. Individual participants in a negotiation are concerned with the maximization of their proper gains rather than with overall gains. In this situation, efficiency is likely to suffer since each party prefers at least one outcome (but in general many) that is *not* located on the efficiency frontier, to a possible outcome on that frontier (except one that is already the ideal point of the party). In particular, two problems hinder linkages. First, actors likely oppose the addition of an issue in an
advanced state of the negotiations when they have no clear idea of what the costs and benefits of an agreement in that area are. They may lack the necessary information to identify issues that they can possibly trade, especially since, with monetary payments most often excluded, issues that can be linked tend to be lumpy (Mayer, 1992, 806). To be precise, not the size of the costs of acquiring the necessary information for linkages – as suggested by some authors (Young, 1991; Beach, 2005) – restricts efficient bargaining since costs generally tend to be low compared to benefits (Moravcsik, 1998, 61). Rather, we suggest that time constraints and limits on information processing ability (Tollison and Wilett, 1979, 438) may make it difficult for negotiators to link issues on which they have little prior knowledge.

Second, distributional bargaining gives each participant an incentive not only to conceal her resistance points, but even to signal firmness to attain a negotiating outcome as close to her ideal point as possible (Schelling, 1960). Proposing a compromise, however, results in just the opposite: it suggests weakness (Morrow, 1992). No party, consequently, is willing to make suggestions that could resolve conflicting issues.

Efficient agreements are still possible if effective preparation and mediation help governments overcome the problems produced by distributional bargaining. On the one hand, an extensive preparation can put enough issues on the negotiating table to allow for future issue linkages. Negotiators gain both expertise and knowledge of the tricky issues from the discussions during the preparatory phase. Moreover, preparation allows each actor to get a grasp of the direction of the preferences of other actors, even though the parties’ exact evaluation of different options remains private knowledge. On the other hand, mediation by a third party can resolve the problem of all participants concentrating on distributional bargaining rather than “value creation”, namely maximizing joint gains (for this terminology, see Lax and Sebenius, 1986). To be effective, the mediator has to have the possibility to make proposals and to set the agenda. In addition, the mediator needs to know the reservation points of all parties, that is the minimum value that each party has to achieve in order to reach
agreement. Only this information allows the mediator to construct package deals that provide for compromises that go beyond the lowest-common denominator. At the same time, the mediator’s ability to use her privileged position to pursue proper preferences in the negotiations has to be limited. In the absence of such a restriction, negotiators would be unwilling to reveal their resistance points to the mediator.6

In IGCs, governments try to attain both of these requirements for efficient bargaining. Preparatory phases that reveal those issues where negotiating positions are in stark conflict always precede the actual negotiations. The reports prepared by the preparatory groups also often already suggest some possibilities for how to link issues. Concerning mediation, the member state that occupies the Presidency of the Council of Ministers is supposed to assume the role of mediator.7 It disposes of a set of competences to facilitate agreement such as determining the calendar and the type of meetings (whether formal or informal), and establishing the agenda of each meeting. Together with the Council Secretariat, it also elaborates documents throughout the negotiations, and it presents the draft treaty according to which the detailed negotiations proceed.8 In addition, the Presidency controls which of the many proposals made by the member states are admitted to the negotiations. Finally, it has informal resources, such as the celebration of informal meetings, the tour des capitales, and the confessionaries, to get the necessary information on the member states’ resistance points to create the final package. At the same time, the neutrality norm restrains the Presidency’s ability to defend its proper interests (General Secretariat of the Council, 2001, 5). In sum, both the preparatory phases and the institution of the Presidency are designed to help member states achieve efficient agreements in IGCs.

Nevertheless, sometimes the two procedures fall short of accomplishing their functions. First, a preparatory phase may be less than effective in facilitating efficient agreements either because of lack of time or because the preparatory group oversteps the mandate it has received from member governments. Lack of time makes it implausible that a
preparatory phase can furnish negotiators with the necessary information to engage in bargaining on a broad agenda. Preparatory groups may exceed their mandate because governments, when putting together such a group, tend to appoint at least some members that are not directly representing government preferences to increase the pool of information. If too many such outside members participate, the result of a preparatory group’s deliberations may no longer be a good reflection of member state preferences, and the agent may engage in shirking. In sum, preparation is necessary for negotiation efficiency, but not all preparation is likely to be equally effective in helping governments achieve this objective. Second, the Presidency can be ineffective as a mediator if it feels compelled to defend outlier preferences despite the existence of the neutrality norm. In this case, other negotiating parties are reluctant to reveal their resistance points, and effective mediation is likely to be absent. The Presidency also may fail to structure the negotiations adequately due to lack of administrative capacity. Summarizing this reasoning, we hypothesize that if either the preparation of an IGC or the mediation provided by the Presidencies during the negotiations is less than effective in facilitating intergovernmental bargaining, lapses from negotiating efficiency become probable.

**Explaining Bargaining Efficiency in the IGCs of 2000 and of 2003-04**

In the following empirical analysis, we examine the explanatory power of our argument across the cases of the IGCs of 2000 and of 2003-04. The choice of the two cases is driven by the consideration that they differ with regard to outcomes, with the IGC of 2003-04 being more efficient than the IGC of 2000, but not with regard to the constellation of preferences. Within the short period of time between these IGCs, it is unlikely that national preferences on the issues under negotiation changed. This specific design of the study thus allows us to assume that the same potential bargaining range existed in the two cases. Whereas in the case of the IGC of 2000 governments did not manage to reach the efficiency frontier, they did so in the IGC of 2003-04.
In line with our argument, we suggest that the more effective preparation by the European Convention and the effective mediation provided by the Irish Presidency in the IGC of 2003-04 can explain this difference. Without doubt, contextual factors also had an influence on the negotiation dynamics in the two IGs. In the IGC of 2000, the imposition of sanctions against the Austrian government created a situation in which intergovernmental negotiations were hard to carry forward. In the IGC of 2003-04, the debate over the war in Iraq and the demands for a reform of the stability and growth pact detracted negotiators from their task of achieving a revision of the EU’s treaty framework. Nevertheless, we consider that these contextual influences – although important – cannot explain variation in efficiency across the two cases since they tend to obstruct bargaining to the same extent in all IGs.

**The IGC of 2000**

The preparation of the IGC of 2000 suffered from major problems. Feeling a need to accelerate the reform of the EU, governments decided to convene a new IGC earlier than originally planned, thus leaving little time for preparation. In addition, governments disagreed on the method they should use to prepare the negotiations. France and Germany, supported by the European Commission and the European Parliament, wanted to create a group of sages under the guidance of Jacques Delors, former President of the European Commission (Agence Europe, 31 May-1 June 1999, 6), while all other member states wanted to establish a group of member state representatives. These problems aggravated each other when the time constraint made it impossible for the two sides to reach a compromise beyond the lowest common denominator. The governments thus decided to have the Finnish Presidency prepare a report on its own, a procedure without precedence in the history of the IGs.

In major respects, the Finnish Presidency fell short of effectively preparing the following IGC. By simply concentrating on the Amsterdam leftovers, namely the reweighting of votes in the Council of Ministers, the composition and size of the Commission, and the
extension of qualified majority voting in the Council of Ministers, it failed to extend the agenda of the negotiations (Gray and Stubb, 2001, 9). The resulting narrow agenda of the IGC is best evidenced by the fact that it only covered 27 different issues, as compared to approximately 80 issues that were treated in the IGC of 2003-04. With most discussions limited to the Amsterdam leftovers, in the later negotiations few issue linkages could be found. As Francisco Seixas da Costa, the Portuguese representative in the IGC, affirmed, a less limited agenda could have facilitated the finding of a package deal and thus the achievement of consensus (Conselho Económico e Social, 2000, 85). The Finnish Presidency also failed to set out proposals for how to resolve blockages on tricky issues, and instead simply listed possible topics for the negotiations (Interview with Council Secretariat official, Brussels, April 2003).

In the view of a diplomat, therefore, the report prepared by the Finnish Presidency could “only serve as one of the support documents of the IGC” (Elorza, 2000, 46). Later, when the limited outcome of the IGC was already known, Agence Europe (13 December 2000, 3) wrote that given the ineffective preparation, nothing more than a “mediocre” reform of the EU’s institutional set-up could have been expected at the Nice summit. In December 1999, the European Council in Helsinki hardly discussed the Finnish report since several governments deemed it inadequate to structure the following negotiations (Interview with national civil servant, Brussels, April 2003). In sum, the preparation of the IGC of 2000 was largely ineffective.

Similarly, serious problems crippled the Presidencies’ mediation during the negotiations. Due to the failure of the preparatory phase, Portugal, the first Presidency in the IGC of 2000, still had to discuss the agenda of the ensuing IGC. The session of the European Council in Lisbon in late March 2000, and even the last ministerial meeting of the Portuguese Presidency in June 2000 were dedicated to the question of the inclusion of new topics to the agenda. Only in these meetings it was decided that the IGC should discuss such issues as the
common security and defence policy, the Charter of Fundamental Rights, and enhanced cooperation. Moreover, the Presidency lacked information on member state preferences even on the few issues that had been discussed in the preparatory phase. Consequently, it had to engage in preparatory contacts with all member states before starting multilateral negotiations (Agence Europe, 21 January 2000, 3). A large part of the negotiating resources thus had to be devoted to questions that should have been settled before the start of the actual IGC (Interview with national civil servant, Brussels, April 2003).

Although initially the Portuguese Presidency’s work in overcoming this problem was effective, soon problems arose due to the Presidency’s bias as regards some of the issues on the agenda. The Presidency’s partiality was most visible in its defence of the right for a commissioner for all member countries even in an enlarged EU. It followed two different strategies to achieve its objective on this issue. First, it delayed discussing the reform of the Commission to have this topic negotiated in the next semester, when it would be able to defend its interests more directly than when itself in the role of the Presidency (Interview with Council Secretariat official, Brussels, April 2003). Accordingly, the Portuguese Presidency hardly tackled the issues of the composition and internal organisation of the Commission (see figure 1). Second, in the three meetings in which the Portuguese Presidency still discussed the reform of the Commission, it clearly defended its own preference despite the neutrality norm. The Presidency, accordingly, proposed to limit the size of the Commission, but to maintain a Commissioner for every member state until the accession of new member states (CONFER 4744/00, 24 May 2000). Despite strong opposition especially from France, Portugal upheld this position even in its report to the European Council in Santa Maria de Feira at the end of June 2000. With the issue of the size and composition of the Commission tightly linked to the definition of qualified majority voting in the Council of Ministers, the Portuguese Presidency also simply expounded the main conflict lines on the latter issue (Best, 2000, 109-12). Observers of the negotiations heavily criticized this defence of proper interests (Agence
Europe, 26 April 2000, 3), prompting the Presidency to add a few meetings on this topic in the final month of its semester.

FIGURE 1 ABOUT HERE

The following French Presidency was even less effective as it both lacked internal coherence and failed to be an honest broker on many issues. Concerning coherence, political conflict between the Socialist Prime Minister, Lionel Jospin, and the conservative President, Jacques Chirac, strained the Presidency’s efforts (Costa et al., 2003, 128). With regard to neutrality, the French Presidency defended strong interests on practically all of the issues under negotiation (Tallberg, 2004, 1014; interview with Council Secretariat official, Brussels, October 2002). In the question of the definition of qualified majority voting, in particular, France was reluctant to accept fewer votes in the Council of Ministers than Germany, despite the difference in population sizes. One way of doing so was by simply ignoring the report prepared by the previous Portuguese Presidency (Gray and Stubb, 2001, 11). To develop an alternative, it dedicated substantial effort to this question in October and November, but when realizing that it could not achieve its preferred outcome, it decided to suspend the negotiations on this topic before the final meeting in Nice (see figure 1). Several member states, 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).

France also defended specific interests concerning the reform of the Commission, and the extension of qualified majority voting in the Council of Ministers. Against the position of the small and medium-sized member states, it pushed for a smaller Commission in which not all member states would be represented all the time (Smith, 2002, 176), thus undermining its credentials as an honest broker. In addition, France resisted the extension of majority decisions to such issues as the budget, trade in audiovisual services, immigration, and judicial cooperation (Galloway, 2001, 105). Despite 22 meetings among all member states during the French Presidency, ten of which at the level of foreign ministers, the negotiations on the key
issues thus were still little advanced when the Nice Summit started. Worse still, most European governments had lost their confidence in the neutrality of the French Presidency (Interview with Commission official, Brussels, October 2002), making the search for compromises in the final negotiations especially difficult.

Even during the summit, France continued to push its preferences. In a hopeless attempt, it proposed a solution to the questions concerning the size of the Commission and the definition of qualified majority voting in the Council of Ministers that strongly favoured the larger member countries, and therefore was rejected by the smaller and medium-sized countries. Only after making significant changes to this proposal, an agreement was possible. Not astonishingly, then, the French Presidency was heavily criticized for the “deplorable political balance of the summit in Nice” (Le Monde, 29 December 2000). An observer even talked of the “largest defeat of French diplomacy” when commenting the Treaty of Nice (Agence Europe, 21 December 2000, 3). The British Prime Minister Tony Blair, with regard to the Nice summit, concluded, “[W]e cannot do business like this in the future” (quoted in Church, 2001, 75). Even the French President Chirac conceded that the summit showed the need for changes in the procedures followed in future negotiations (Agence Europe, 11/12 December 2000, 3). In sum, based on this evidence it seems plausible to conclude that the ineffective preparation and the largely ineffective mediation by the Presidencies during the negotiations contributed to the low efficiency of the results of the IGC of 2000 outlined above.

The IGC of 2003-04

The preparation of the IGC of 2003-04 was far more effective than the one of the IGC of 2000, not least because it disposed of more time. The European Council of Nice in December 2000 already asked the following Swedish and Belgian Presidencies, in cooperation with the Commission and with the participation of the European Council, to start a debate on the future of Europe (Duff, 2001). Based on the results of the ensuing debate, in the European Council
in Laeken in December 2001, the member state governments, following the precedent of the preparation for the Charter of Fundamental Rights, decided to establish a European Convention with the objective of preparing a reform of the Treaty of Nice. In particular, the Convention should enable progress on the four major topics already singled out for renegotiation in that treaty.

Already soon after, the Convention, which encompassed representatives of the governments of the member states, of the national parliaments, and of the European institutions, started its work. The specificities of the Convention as compared to earlier preparatory groups had more advantages than disadvantages for the efficiency of the following negotiations. On the problematic side, the special composition of the Convention, with only 28 of its 105 members being representatives of the governments, created the danger of the group exceeding its mandate (Interview with Member of European Parliament, Brussels, December 2002). Indeed, the Convention immediately set itself the objective of presenting a draft for a constitutional treaty, a goal that went far beyond the limits set by the member states in Laeken. Rather than outlining several options of how to achieve an agreement, as favoured by various governments (Norman, 2003, 23), the Convention thus put forward a draft treaty containing only one proposal for each issue.

On its strong side, the Convention provided time for extensive discussions, helping governments to present their negotiating positions on a wide set of topics. This definitely facilitated later intergovernmental bargaining on the topics that were effectively prepared in working groups (Gray, 2004, 45). For the key institutional issues such as the future composition of the Commission and the definition and scope of qualified majority voting, however, Giscard d’Estaing as President of the Convention himself took important decisions (Norman, 2003, 223) rather than having these issues considered in a working group. In the absence of real discussion within the Convention, the effective preparation of these issues was not assured (Magnette and Nicolaïdis, 2004, 85). Nevertheless, after deliberating for 18
months d’Estaing was able to put forward a draft treaty in June 2003 on which most members of the Convention could agree upon. Equally, the European Council in Thessaloniki in June 2003 welcomed the result as a “good basis for starting negotiations” (Norman, 2003, 299). Despite the weaknesses mentioned, therefore, the preparation of the IGC of 2003-04 was far more effective than the one of the IGC of 2000.

Italy, the first Presidency to serve during this IGC, based its work on the Convention’s prior efforts, and even declared that the package deal proposed by the Convention should not be opened. Nevertheless, upon pressure from several member states (Agence Europe, 11 September 2003, 3), it soon became clear that some revisions to the draft treaty, especially as regards the definition of qualified majority voting and the composition of the Commission, would be necessary. Actually, the Slovenian government was the only one to announce that it could accept the draft Constitutional Treaty prepared by the Convention in its entirety (Agence Europe, 9 September 2003, 5). To respond to this demand for renegotiation, the Italian Presidency scheduled six meetings at the level of foreign ministers, and three among the heads of state and governments. In addition, it agreed to create a working group of IGC legal experts, which was to revise some parts of the draft treaty. The month of October consequently was one of intensive work on the controversial issues (see figure 2). Based on the proposals elaborated by the Italian Presidency, on many questions progress was visible by the time of the Naples conclave in November 2003 (Brown, 2004, 8), although with the important exceptions of the definition and scope of qualified majority voting and the composition of the Commission.

**FIGURE 2 ABOUT HERE**

Nevertheless, the Italian Presidency was not as effective as this discussion suggests. The Presidency’s main problem, rather than partiality on specific topics included in the negotiations, was ineptness. Illustratively, although the Spanish and Polish governments were very explicit about their dissatisfaction with the proposed changes in the decision-making
rules in the Council of Ministers (Cameron 2004, 374-75), the Italian Presidency failed to seriously consider their objections. The Luxembourg Prime Minister Jean-Claude Juncker thus asserted that the work of the Presidency “created more confusion than did it help to find an agreement” (quoted in Agence Europe, 17 October 2003, 5). Consequently, it was quite clear from the beginning that the “weakness of the Italian Presidency” (Le Monde, 8 October 2003) could cause substantial problems in agreeing upon a treaty. As predicted by these sources, the Italian Presidency fell short of adequately preparing the European Council of Brussels in December 2003 that was supposed to conclude the negotiations.

In the European Council, member state governments again were highly dissatisfied with the work of the Italian Presidency. In particular, they complained about the absence of veritable negotiations beyond confessionaries (there were only two plenary sessions), and the long waiting periods in between the negotiations (Le Monde, 20 December 2003). Facing chaotic negotiations without clear leadership, the French President Jacques Chirac went so far as to threaten with his early return to Paris even before the end of the summit. Especially the Italian Presidency’s claim to have a compromise formula available in the case that the other proposals for the definition of qualified majority voting in the Council of Ministers were not accepted (Agence Europe, 13 December 2003, 3), coupled with its incapacity to outline this alternative formula in the critical moment of the negotiations, irritated most governments. Since the Italian Presidency thus fell short of being a valuable mediator in the negotiations, and most member governments rejected a treaty with new “leftovers”, it is no wonder that the first attempt at concluding the Constitutional Treaty during the Brussels summit did not succeed.

Given the failures of the Italian Presidency, the following Irish Presidency resolved to start its semester with a round of consultations, in which Prime Minister Bertie Ahern directly engaged in informal talks and confidential meetings with his colleagues. At the multilateral level, hence, no high-level negotiations took place in the early months of 2004 (see figure 2).
With this strategy, the Irish Presidency managed to overcome the existing deadlock and to present a short document on the state of the negotiations with possible solutions for how to achieve a package deal by late March (CONFER 70/04, 24 March 2004). To settle the outstanding questions, it arranged three meetings at the level of foreign ministers before the final summit in Brussels in mid June. In parallel, the group of IGC legal experts created by the previous Italian Presidency continued its work.

Although the Irish government had outlier preferences on a series of issues such as the common defence policy, Justice and Home Affairs, the extension of qualified majority voting to the field of taxation, and the composition of the Commission, it managed to assume the role of honest broker throughout this phase. Essential for that was the Presidency’s neutrality concerning the definition of qualified majority voting in the Council of Ministers, with Ahern affirming: “If I had to depend on Ireland’s weighted vote to promote our interests in the Council, I wouldn’t bother to turn up” (quoted in Brown, 2004, 8). In its bilateral consultations, the Presidency could probe different solutions to this controversial issue (Cameron, 2004, 386-87), testing out the resistance points of different negotiating parties. In mid-June, consequently, the Presidency tabled precise proposals for how to resolve the outstanding questions (Agence Europe, 15 June 2004, 3), which only left few issues open for the final negotiations in Brussels on 18 and 19 June 2004. This allowed Anne Anderson, the Irish ambassador to the EU, to predict that there would be no repetition of the Nice Summit, referred to as the “five-shirt summit”, because it involved so many meetings (Financial Times, 17 June 2004, 9).

The day before the summit started, the Presidency presented two documents, one including compromises already agreed upon (CONFER 81/04, 16 June 2004), another with possible solutions for a few still outstanding questions, such as the reform of the Commission, but still excluding the issue of the definition of the qualified majority in the Council of Ministers (CONFER 82/04, 16 June 2004). This method allowed the Presidency to completely
focus the negotiations in the European Council on finding compromises for the topics on which the parties still disagreed. When it became clear that the decision on who should be the future President of the Commission had the potential to derail the negotiations on the Constitutional Treaty, Ahern even decided to postpone this issue to later talks. After a further series of bilateral talks between the Irish Prime Minister and the other heads of state and government, the Presidency finally managed to make even the most reluctant accept the necessary compromises.

In sum, as expected, the IGC of 2003-04 profited from more effective preparation and mediation than the IGC of 2000, thus explaining the more far-reaching compromises included in the Constitutional Treaty. In many aspects, such as the Council Presidency, the Minister of Foreign Affairs, the Common Foreign and Security Policy, and enhanced cooperation the final agreement reached even went beyond the draft treaty agreed upon by the European Convention (Grevi, 2004). This provides strong support for our argument about the importance of both preparation and mediation for far-reaching results from intergovernmental negotiations.

**Conclusions**

Using the cases of the IGCs of 2000 and of 2003-04, we have demonstrated that not all IGCs are equally efficient. To explain this variation, we have argued that bargaining efficiency depends on negotiators’ capacity to overcome the problem that distributional bargaining often goes to the detriment of overall efficiency. Negotiators have an incentive to conceal their resistance points to gain the most in distributional bargaining, making them reluctant to make moves that could signal weakness to other negotiators. This confirms the insight that the strategies of “value creation” and “value claiming” are highly interrelated (Lax and Sebenius, 1986). With effective preparation and mediation during the negotiations, however, governments manage to resolve this problem and achieve far-reaching compromises.
An analysis of the negotiating dynamics in two IGCs has buttressed our argument. More effective preparation and mediation explain the higher efficiency of the IGC of 2003-04 as compared to the IGC of 2000. The European Convention’s success in providing negotiators with ideas of how to link issues in a package deal starkly contrasts with the Finnish Presidency’s difficulties in settling on the agenda of the IGC of 2000. Similarly, the Irish Presidency was an effective mediator in the IGC of 2003-04 while the Portuguese and French Presidencies did not manage to assume this role because they were eager to defend proper interests in the negotiations.

The findings have notable implications for the scholarly understanding of IGCs by demonstrating the limitations of intergovernmental bargaining theory in explaining variation in bargaining efficiency. Moreover, the reasoning provides a new perspective on a long-standing debate in the field of International Relations between those who argue that the main problem for international cooperation is the reaching of the efficiency frontier (Keohane, 1984) and those who instead assert that international negotiations are only about the distribution of gains (Krasner, 1991). Our point, in contrast, is that distributional bargaining, by giving negotiators an incentive to overstate their demands, can lead to lapses from efficiency and thus exacerbate problems of cooperation. We suggest that the present interpretation has the potential to enhance our understanding of intergovernmental bargaining both within and outside the EU.

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2 Moravcsik (1998, 66, FN 91) suggests a similar criterion for efficiency, namely “that no participants complained that the outcomes were suboptimal and no participants or subsequent commentators identified significant gains ‘left on the table’ that a different process might have realized.” For our purpose of evaluating
the prediction of intergovernmental bargaining theory as regards bargaining efficiency, this similar operationalisation is crucial to avoid differences in measurement driving the results found.

3 A further problem, not so relevant in the context of IGCs, is the need to make linkages credible. See Martin 1994.

4 This assumption of incomplete information about each other’s resistance points is the most fundamental difference of our analysis as compared to Moravcsik. We think that our assumption is reasonable since in the presence of full information, bargaining would not be observable; agreements would be found without delay.

5 Of course, the agenda cannot be broadened infinitely: at one point the increasing costs from a broader agenda exceed the gains from having more issues that can be linked to each other. For the general literature on pre-negotiations, see Zartman, 1989.

6 The general literature on international negotiations has debated the question whether a biased entrepreneur or rather a disinterested mediator should guide interstate negotiations. See Carnevale and Arad, 1996. It seems, however, quite obvious that an actor that tries to influence bargaining outcomes to her advantage will no longer be accepted as mediator.

7 For studies on the EU’s Presidency, see Elgström, 2003; Tallberg, 2004. Christiansen (2002) and Beach (2005) stress that also the European Commission and the European Parliament may provide leadership in IGCs. The evidence concerning this influence, however, is at best ambiguous (Moravcsik, 1999), with Beach himself indicating that in the IGCs of 2000 and of 2003-04, these institutions only had a minor influence. This finding is not astonishing given the likely presence of principal-agent problems when supranational actors intervene in intergovernmental negotiations.

8 For the role of the Council Secretariat in IGCs, see Beach, 2004.

9 In a protocol to the Treaty of Amsterdam, the member states set a date for the start of the next IGC of at least one year before an enlargement that would lead to the EU having more than 20 member states.

10 Representatives of the 13 applicant countries were admitted to the meetings of the Convention, but without blocking capacity.

11 The change of government in Spain in spring 2004 also influenced the negotiations on this topic by softening the Spanish determination to maintain the Nice compromise.

References


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**Figure 1:** *Distribution of meetings by topic over time in the IGC of 2000*
Note: For all meetings held during the IGC, we established the agenda based on the documents prepared by the Presidency for these meetings (CONFER) and on summaries of the contents of the meetings contained in Agence Europe. Meetings dealing with other issues are not reported here.

Figure 2: Distribution of meetings by topic over time in the IGC of 2003-04

Note: see the note to figure 1.