THE HIDDEN EFFECTIVENESS OF MINIMAL RESULTS IN INTERNATIONAL NEGOTIATIONS

The Case of the WIPO

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Abstract

Classical theory on effectiveness in international negotiations predicts that countries take part in bargaining processes to achieve a Pareto-improvement through the resulting treaty. This does not appear to be feasible for the WIPO IGC in Geneva. However, in this paper we show that even in such an environment participation can be effective. To this purpose we introduce a two-player, single-issue negotiation model, within which we suggest the hidden effectiveness of minimal results to be one possible explanation of country participation. Our main assumption is that blocking states face loss-of-mandate costs should no visible sign of progress be achieved

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1 Introduction

Imagine sitting in a huge conference hall, in which delegates from more than 100 countries have ceremoniously convened to hold diplomatic discussions for one week. The agenda holds issues concerning the establishment of protection regimes in the realm of Genetic Resources, Traditional Knowledge and Folklore, supposedly intellectual property. Despite the seemingly high interest in these negotiations, time is more or less used up by reading out prefabricated statements of respective national positions that tend to be strongly opposed. Some delegates insist on protecting intellectual elements of their culture from misappropriation by outsiders. Other countries in demand of those cultural elements maintain to keep them in the public domain, which promises to secure substantial benefits. This stalemate leads to an ongoing exchange of interventions with apparently no space for reaching tangible progress.

This is the case of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (hereafter called IGC) at the World Intellectual Property Organization (WIPO) in Geneva. The IGC was established via mandate by the WIPO General Assembly in 2001 in order to hold focused discussions on these matters. In fact, since the beginning of these talks all results agreed upon have been minimal, such as to undertake fact finding missions or gap analyses, but nothing that would point towards the formulation of an international treaty or a comparable instrument. Consequently, for the outside observer negotiations seem to be highly ineffective.

Now, people acquainted with the dynamics of international lawmaking know that the process of finding consensus and arriving at an agreed upon international instrument usually is a slow one. The negotiations at the IGC may nevertheless be an extreme case.[1] This is probably why the recently elected Director General of the WIPO, Francis Gurry, made it one of his priorities to promote IGC negotiations in order to enhance their effectiveness. In his acceptance speech, directly referring to the IGC, he outlined that:

[1] Technically, the term *negotiation* only refers to government interactions taking place in a diplomatic conference during which countries try to establish an international treaty. The IGC may be seen as a preparatory discussion forum for a ministerial conference.

> *"it has become apparent that there is a need to recognize explicitly the contribution to human society of collectively generated and maintained innovation and creativity and to protect the artifacts of that innovation and creativity. The Organization has undertaken a long process of discussion and negotiation on the means of meeting this need. I believe that it is time to move this process to concrete outcomes that will see WIPO embrace a broader base of constituents and a more universal mission".*[2]

Apparently, not only outside observers see the need for concrete outcomes. The pledge for effectiveness, however, shows how unlikely it is for negotiations in the IGC to lead to tangible results.

So, why do countries participate although negotiations are known to be costly? Defensive estimates suggest that, on average, one country incurs direct participation costs of 13.600€ for only one week of IGC negotiations.[3] Overall, the international community is thus spending approximately 1.6 Mill €.[4] From an economic perspective this appears paradox. Would not everybody be better off when staying at home? In this paper we try to solve this puzzle by suggesting the hidden effectiveness of minimal results in international negotiations as one possible explanation for country participation. Hereby, we identify the costs of losing for the IGC the mandate as the basic functional principle.

This paper is organized as follows: In section 2 we offer a brief literature review as to how effectiveness of international negotiations is traditionally explained in the scholarly debate. Then, section 3 provides a simple two-player, single-issue negotiation model of minimal results, from which we derive implications. Finally, section 4 concludes and raises further questions for research.

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[2] Francis Gurry, WIPO Director General, acceptance speech at the WIPO General Assembly, 22 September 2008, see WIPO (2008b).

[3] This figure includes direct personnel costs for one IGC session, preparatory and post-processing time, as well as travel and accommodation costs. Ministerial overheads that could not be estimated are excluded. Figure is based on personal interviews with government representatives attending the IGC sessions.

[4] 1.43 Mill. € of this amount are direct costs incurred for all member states in connection with one IGC session including voluntary contributions (67.000€) to fund travel expenses for representatives of indigenous communities (see WIPO (2008a)). The WIPO secretariat approximately incurs direct costs of 0.18 Mill. € for their activities in support of one IGC session. This figure is based on a personal interview with Wend Wendland (WIPO, Head of Traditional Creativity, Cultural Expressions and Cultural Heritage Section, and Deputy Director of The Global IP Issues Division)

2 The Effectiveness of International Negotiations – a Literature Review

In general, effectiveness captures the achievement of appropriate results, regardless of their costs and thus regardless of whether the process of achieving them is efficient. Then, in terms of international negotiations effectiveness means that the participating parties achieve a result according to their specific interest.

Traditionally, it is assumed that countries take part in these negotiations because they mutually improve their status quo through the resulting treaty. So, a Pareto-improvement occurs, with the new agreement lying on the Pareto-frontier. The exact position may of course be biased towards states with a high bargaining power,[5] but in principal, each state enjoys utility gains relative to the status quo (Gruber 2000, pp. 27-32). Alternatively, Gruber suggests that there may also be cases, in which a treaty provides utility gains for one country but losses for the other. Initially, it may seem puzzling why a country would choose to be worse off than in the initial status quo. However, Gruber argues that when, say, player Y is able to unilaterally alter the status quo towards another status quo that is more beneficial for him but incurs losses to player X, he effectively removes 'non-cooperation' from the set of feasible alternatives of X. Hence, it would be rational for X to agree to a treaty that results in fewer losses than in the new status quo. Gruber calls this ability of Y, "Go-It-Alone-Power" (2000, pp. 38-43).[6]

As a result, participation in the negotiation process would be rational for each country, if the resulting treaties are effective for them inasmuch as that they ensure higher utility than in the initial or in the altered status quo. Typically, many studies treating the effectiveness of the negotiation process itself, more or less implicitly assume that such a welfare enhancing situation will be reached. Hence, the processes' effectiveness is only regarded in terms of reaching an agreement for treaty formulation,[7] disregarding other possible explanations for their effectiveness. The criterion of effectiveness is usually relied upon when, for instance,

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[5] For the influence of bargaining power on the distribution of treaty benefits, see for instance Hirschman (1945), Tollison and Willet (1979) or Hug (2008).

[6] It is also possible that Y threatens X with a considerable loss for both players so that X chooses to participate in an agreement with fewer losses. For this however, the threat must be credible, which as according to Gruber (2000, pp. 34-38) has often been criticized in theory. However, Braithwaite and Drahos (2000) for instance identify economic and military coercion a one major mechanism in international negotiation.

[7] Next to legally binding international instruments, other negotiation outcomes may include a non-binding normative international instrument, a high level political resolution, declaration or decision, strengthened international coordination through guidelines or model laws WIPO (2007).

international organizations review their performance. Exemplarily, this was done by the United Nations (UN 1980; Szasz 1989, pp. 915-916) and the WIPO itself where the secretariat identified long blockages in some of its standing committees (New 2009).

However, also in the scholarly debate most contributions focus on effectiveness of the negotiation process in terms of finding an agreement. Firstly, one such contribution is that of Szasz, who is of the opinion that despite their deficiencies, international negotiation processes are highly effective. In his view they have always resulted in outcomes whenever there was a clear need for a new international regime (Szasz 1992, pp. 42-43).

Secondly, in his contribution "Negotiation as a learning process", Cross modeled negotiation as a necessary interaction between bargainers in order to reach an agreement (Cross 1977, pp. 35). In his game-theoretic analysis, negotiation is simplified to a single-issue, two-person game, i.e. how to split a fixed sum of money between two parties. Here, each player chooses a bargaining strategy, S, being a function of an estimate of the other party's strategy, R, as well as uncertainty about the other party's strategy, V. The strategy is chosen in a way to maximize the expected benefits from negotiation, U_A (S_B, S_B). Because of strategic maneuvering (bluffing) with overly high payoff demands and thus high uncertainty, V, at the beginning of the negotiation, the estimates, R, are not accurate so that strategy choices are not optimal. However, during the course of the bargaining process, the players begin to adjust their estimates (R_A, R_B) according to the visible signals – i.e. formulated demands for the split of money – of the other player (r_A or r_B) consequently also making them adjust their bargaining strategies. As bargaining moves towards the expected agreement time, payoff demands will become more realistic, reducing uncertainty and allowing for more precise inferences of the other parties' strategies. In the end, this learning process guarantees that an agreement can be reached. Hence, Cross concludes that the process of negotiation is an essential and effective activity for reaching an agreement, because it triggers a fruitful learning process.

Taking the learning aspect of negotiations on board, Sjöstedt, Spector and Zartman (1994, pp. 13-16) devised a more encompassing, yet less formal model, of international negotiation processes, from which indirect insights into their effectiveness may be derived. Here, the authors stress the importance of flexibility as the precondition in moving from positional rigidity of delegates towards conciliation and cooperative problem solving. As to be seen in Figure 2.1, Sjöstedt et al. find flexibility invoked by an iterative adjustment process in issue reframing – with different issue understandings as one reason for divide between nations – and interest clarification. With the issue of negotiation becoming clearer during the course of deliberations,

the perception of national interest is adjusted, which in turn feeds back on the issue under debate. One possible outcome of this common learning experience may then be a mutually agreed-upon solution, as conflicting definitions of the issue and national interests may eventually converge. The development of this adjustment process crucially hinges on new information being brought into the negotiations, but also on national goals and objectives as well as on the national debate. Also, power and persuasive tactics may influence issue and interest understanding. Hence, the process of negotiation is seen as a crucial element and as effective to achieve convergence of views and agreement between the parties, as continuous issue and interest clarification lead the negotiators towards a common understanding of the basic problem and help to reveal the common ground for agreement.

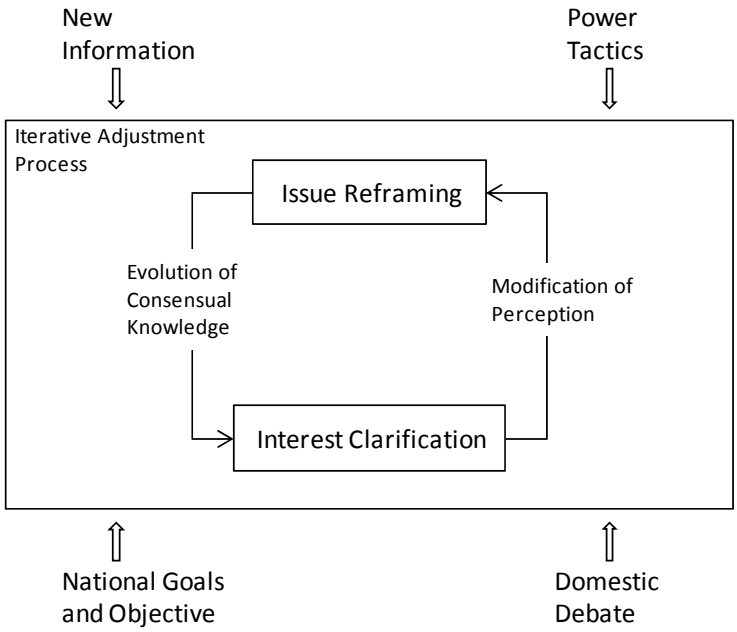

Figure 2.1 – The Iterative Dynamics of Issue Reframing and Interest Clarification
Source: Sjöstedt, Spector et al. (1994, p. 15)

Lastly, Druckman offers some insights into effectiveness of international negotiations, by highlighting the importance of turning points for reaching agreements – i.e. process departures marking passages from one negotiation stage to the next. In his analysis, he found that turning points in trade, environmental and policy issues are mainly triggered by precipitants endogenous to the process, suggesting that progress towards an agreement may be achieved by the delegates through substantive or procedural alterations in deliberations (Druckman 2001, pp. 537).

Despite the insights that all of these process models provide in terms of effectiveness through agreement, they can hardly explain country participation in the IGC. We contest that the criterion

of reaching an overall Pareto-improving treaty does not seem to be applicable at the moment. This is mainly due to the fact that the country-specific utility situations rather follow a zero-sum characteristic, in which one party's potential gains are the losses of the other. In terms of explaining participation, such a situation seems to be doomed from the outset. This however neglects that the negotiation process itself, regardless of utility consequences of a potential treaty, may be effective for each country. This is what we term the hidden effectiveness of minimal results in international negotiations.

3 A Model of Minimal Results in International Lawmaking

This section attempts to devise an economic model of understanding the process of international lawmaking within the IGC of the WIPO. It is to be noted, however, that we aim at working out basic functional principles that may be transferred to actual negotiations such as in the IGC of the WIPO. For this purpose we will briefly review the most important formal and informal rules of discussion within the IGC (Section 3.1). While the formal rules are conveyed on the webpage of the WIPO and are accessible to any interested party, the informal rules were investigated by attending the meetings of the 13th and 14th session of the IGC in October 2008 and July 2009, respectively, in Geneva. Based on these rules and on the resulting motivational disposition of the delegates we identify as the basic functional principle of international discussion and rule finding processes that some progress, however slight, must be made in order to prolong the mandate provided by the general assembly to the IGC.

3.1 Formal and Informal Negotiation Rules in the IGC

The IGC receives its mandate from the WIPO General Assembly for the duration of two years (WIPO 2000). Such mandates are rarely terminated completely but sometimes are suspended for some time. This is, in a way, the worst case scenario for delegates since a suspended renewal is a clear sign of insufficiency of the work done and the future prospects respectively. Delegates generally agree with each other that a renewal of a mandate should be attempted even if they are not interested in finding an agreement on the matter itself. They do so because most international lawmaking is a way of dispute resolution, and if a dispute loses its forum, countries interested in the issue will press for new or other existing forums. Even though this merely looks like buying time in fact this process provides a public good in the sense of a potential conflict resolution mechanism. There is, of course, no clear-cut criterion for providing a new mandate, but if no progress whatsoever can be achieved during two years it will be difficult to show how this will change during the next two years. We call this constraint the "minimal result". The IGC is under pressure to show such minimal results towards the end of its mandate.

The formal rules of procedure applicable in the IGC plenary are predominantly drawn from the WIPO general rules of procedure (WIPO 1998). These are procedural guidelines applicable to all subsidiary bodies or ad hoc committees of the WIPO. On the whole, they very strongly influence the way in which deliberations take place, as they specify issues such as membership, official languages, rights and competences of single actors and voting rules. As an example, contrary to NGOs, IGOs and observers to the IGC, only member states have the right to make proposals to

the plenary in order to introduce solutions on certain issues or to react to other delegations' proposals. These may concern substantial, but also procedural matters, as each sub-committee to the General Assembly is allowed to adopt special rules of procedures (WIPO 2001). The right to vote is only extended to member states, and one state has one vote. In contrast to the General Assembly where decisions are taken by a 2/3 majority, the IGC may officially decide with a simple majority of the votes cast. Nevertheless, with the *one state-one vote* rule, voting behaviour has informally shifted towards unanimity, as in almost every multilateral forum (Chrispeels 1998, pp. 132-133). An exact count of votes rarely happens and decisions are taken in case no delegation wishes to intervene. Also, it can be observed that countries build coalitions by forming groups, as it is the case in other international deliberations (Behnam 1998). In general, country groups are informal, politically motivated and voluntary formations according to homogenous characteristics that separate them from other countries. At the moment, there are six different country groups in the IGC: The African Group, representing all African member states of the IGC, the group of industrialised countries (Group B), the European Union, the Asian Group, the Group of East European and Baltic States and the Group of Latin American and Caribbean Countries (GRULAC). Taking these basic negotiation rules into consideration, we shall continue in the next section by modelling the minimal result negotiation game in the IGC.

3.2 Model Assumptions

Negotiations in the IGC are of multilateral and multi-issue nature and of course, a game theoretic analysis ought to take this into account. Yet, we are nevertheless of the opinion that important insights into the negotiation process may also be derived from a model that makes simplifying assumptions.

Firstly, we assume two-party negotiations on a single issue during one mandate period. The issue may be of substantial or procedural character and it may change from one mandate period to the next. Additionally, both players are assumed to be perfect representatives of a rationally acting country that wishes to maximize its utility of negotiation. Thus, the players do not have any personal motives. Country A is economically weak but rich in cultural property exploited by country B. A thus has an interest in improving its status quo. Hence, A is the mover. Conversely, country B is economically powerful and its economic interest in using cultural property of country A clearly outweighs the interest in protecting cultural property. B therefore wishes to secure the status quo, which is why we call him the blocker. Consequently, for the IGC we

assume that, although negotiations are of multilateral character, parties focus on the most extreme positions.

Secondly, both countries realize certain payoffs in the status quo ($P_{SQ}^{A}; P_{SQ}^{B}$), with $P_{SQ}^{B} > 0$. As figure 3 shows, these are assumed to be symmetric, so that $P_{SQ}^{A} = -P_{SQ}^{B}$, essentially saying that B's activities in the discussion field of the IGC generate gains at the expense of A. Interpreted as negative externalities for A, this symmetry in the status quo is the central reason why A has pressured B to establish the IGC as a negotiation forum. Accordingly, in this model zero payoff means that a distributional equal situation is reached in which neither player realizes gains at the expense of the other. It is then in A's interest to reach an agreement expectedly resulting in a payoff as close as possible to zero, while B wishes to protect the status quo.

Thirdly, we define the IGC to be one of many international negotiation forums. Thereby, we try to capture the interlinked nature of diplomatic negotiations and allow each player to assert influence on the other (Kaufmann 1998).

Fourthly, as indicated above, it is one of the basic incentives of delegates to the IGC to guard the mandate. We formalize this fact by introducing loss-of-mandate costs (LMC) into the model. Basically, we argue that should the IGC mandate not be extended by the General Assembly because A and B fail to agree on a visible signal of progress in any of the issues under discussion, B faces a reduction in his payoff P_{SQ}^{B} by costs of LMC^{B}. These costs are mainly determined by the following elements.

To begin with, the LMC^{B} reflect the bargaining power of A, i.e. to which extend A may pressure B to make concessions. Bargaining power may result from multiple causes, such as issue linkage (Tollison and Willet 1979). Since the forum is one of many international negotiation forums, A may have the power to link concessions in negotiation fields, which are in B' foremost interests, to move him to concessions in the current forum. Alternatively, should no agreement be reached, A may retaliate by blocking other negotiations. Also, as outlined in section 2, should A have what Gruber (2000) calls "Go-It-Alone-Power", he would be in a position to demand concessions from the status quo. Next, we argue that the loss-of-mandate costs comprise B's negotiation goals. These are for instance his normative views on distributional justice, which may be strongly influenced by political attention on the issue in question within each country (Trumbore 1998). Should matters on genetic resources, traditional knowledge and folklore take centre stage in the domestic public debate pressuring the government to make concessions to A, this will likely alter

B's negotiation goals and hence increase the LMC^B. What is more, the costs are also influenced by negotiation topics in other forums. Should another forum for instance start to discuss a similar topic, the costs for losing the mandate will be greatly reduced, as discussions may also be held there. Finally, the LMC^B comprise the loss of prestige in the international diplomatic community that B faces should he not show willingness to compromise.

In contrast to B, A does not incur any loss-of-mandate costs (LMC^A=0). Basically, this is due to the fact that A does not need to fear retaliation in other international arenas once negotiations come to a halt. Also, it is unlikely for him to lose prestige in the international diplomatic community and for him to be blamed for not having reached his policy goals. The worst that may happen to him in terms of payoffs is that he falls back to his initial status quo. Thus, cancellation of the mandate may not lower this initial payoff. In principle, this discrepancy in the LMC leaves A in a position to demand concessions from B, because A may always cancel negotiations and thus reduce B's payoffs, while his own remains unchanged.

Yet, we argue that within the context of the IGC, A has rather minimal leverage on B in terms of loss-of-mandate costs, which is mainly caused by his limited bargaining power. Due to his economically weak status, he does not have serious Go-it-Alone-Power and may not link issues in a way to demand considerable concessions from B. Also, B's domestic debate and the fear of losing international prestige are present but not very strong. Consequently, the LMC^B are positive at the moment, but small compared to what is at stake for B. This leads to minimal results that B is willing to agree to. Nevertheless, it can be subject to changes, if any of the elements described above change.

Figure 3.1 illustrates the payoff situations of both players in their status quo and when the mandate is dispensed, assuming constant LMC^B.

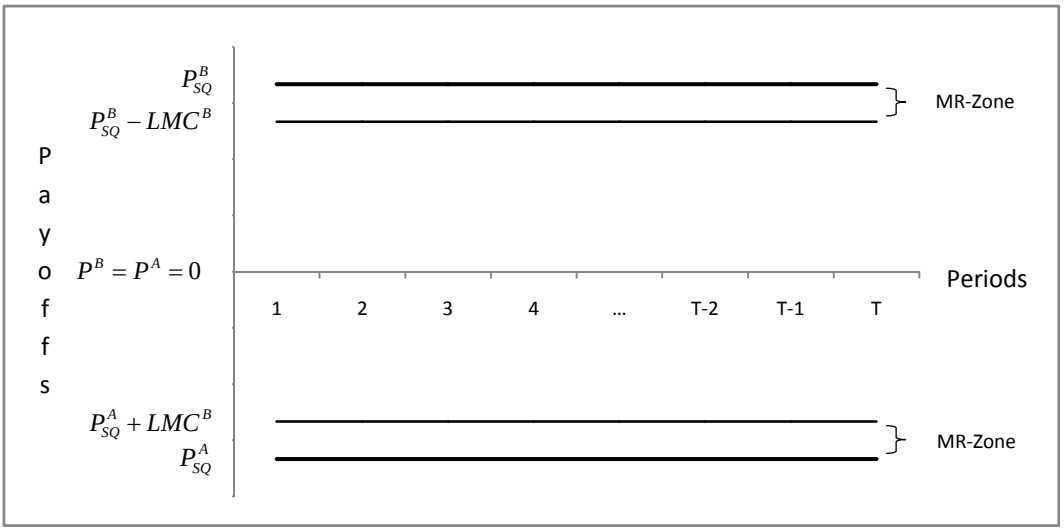

Figure 3.1 – Basic Payoffs in the Minimal Results Game

Then, within the limits of this model, a minimal result is the expectation that A's payoff in the status quo will be increased, and thus symmetrically, that P^B_{SQ} will be reduced, no matter how small a change. Yet, as mentioned above, the maximum concession B is willing to make is determined by LMC^B, as this is his maximum willingness to pay for keeping the mandate intact. Geometrically, this translates into a small corridor in which agreements in terms of payoff expectations may be achieved – the minimal results (MR) zone. Both players know that the least they have to agree to at the end of the mandate period is an agreement within this boundary in order to preserve the mandate. Having reached such a minimal agreement, negotiations will then be carried over into the next mandate, in which the same or a different issue of substantial or procedural character may be negotiated.

For now, let us stick to negotiations within the time span of one mandate. Here, the minimal result game has T periods, the exact amount of periods being unknown. In all periods prior to T, players can make proposals, which may be accepted, rejected and followed by a counter proposal or the other player may choose to quit negotiations. The game starts with a proposal made by A as it is in his interest to ameliorate the status quo. The identity of the last player is unknown a priori and will only be revealed in Period T, with no chance of prior knowledge. As T is the last period in the game before the mandate ends, players may then only accept the last proposal or quit negotiations. Figure 3.2 depicts these options available to both players in the course of the minimal results game, together with the according payoffs. While the payoffs in the status quo are known to both players, the exact amount of LMC^B is private information only known to B. It is

further assumed that both players do not know the exact consequences of proposals in terms of payoffs, but rather form payoff expectations ($P_t^A; P_t^B$) upon which decisions are based.[8] These are also modeled to be symmetric or zero sum, such that $P_t^B = -P_t^A$. Thus, a proposal made by A from which he would expect to ameliorate his status quo, will result in an equal expected reduction of B's status quo. Time preferences are neglected at this level of analysis.

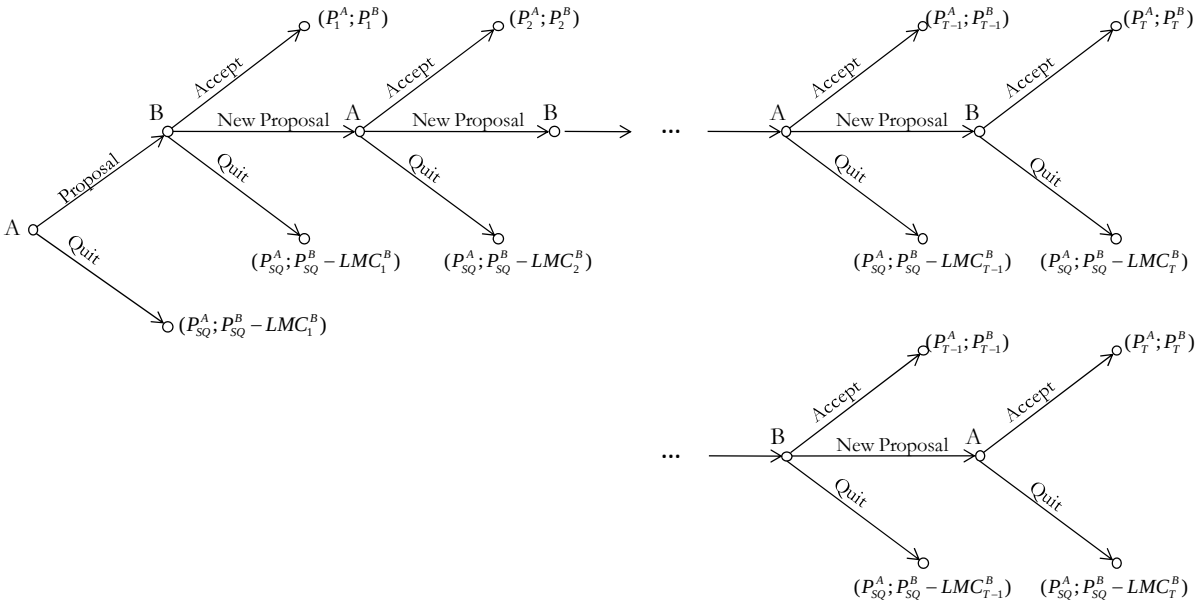

Figure 3.2 – Decision Tree in the Minimal Results Game with Payoffs

3.3 Negotiation Dynamics

Although both players are aware that they must at least agree to a minimal result, neither player knows who will make the last move. That is why the game may not be completely solved by backward induction. The following section shows how negotiations proceed in terms of expected payoffs. Insights shall then be used to derive implications for the motivation of countries to participate.

[8] Please note that our concept of payoff expectations differs from the traditional understanding of outcomes weighted with their probability of occurrence. Here we assume that countries do not know the exact outcomes of their proposals in terms of payoffs, so they form expectations about them.

3.3.1 Constant Loss-of-Mandate Costs

We begin our analysis by assuming that LMC^B remains constant in the course of the game and that B makes the last move. As both players would like to keep the mandate intact, they start their negotiations with the aim of reaching compromises, knowing that rigidly sticking to their goals will not ameliorate the status quo for A and result in LMC^B for B.

As outlined in the rules of the game, A will start negotiations, because it is in his national interest to reach an agreement, improving his P_{SQ}^A. Therefore, he suggests P_1^A, which is still expected to result in a negative payoff, but would mean a considerable improvement relative to his status quo. Because of the symmetry assumption, B would thus realize P_1^B, significantly reducing his status quo payoff. Knowing that in period T a minimal result ought to be reached, with expected payoff much higher than what is proposed by A, it is rational for B to reject. Quitting is neither an option, because the LMC^B are certainly higher than the costs expected in the minimal result.

In period 2, B will consequently table his own proposal, from which he expects to realize a payoff which is only infinitesimally smaller than his status quo ($P_2^B = P_{SQ}^B - \mu$). The reason why he cannot propose with the expectation of P_{SQ}^B is that A constantly threatens to quit negotiations (resulting in LMC^B) should B not signal willingness to cooperate. Although A expects an infinitesimal improvement of his status quo from B's proposal ($P_2^A = P_{SQ}^A + \mu$), he rejects. This is due to the fact that he expects to come closer to B's maximum willingness to pay for the mandate. In period 3, knowing that in order to preserve the mandate both players must agree to a proposal in the last period, A will show willingness to compromise. He then counter-proposes an offer with an expected payoff of P_3^A, with $P_3^A < P_1^A$. B, however, rejects again since A's proposal is still too demanding for what he is willing to maximally agree to.

It is clear now that the rules of the game set into motion a series of counterproposals, in which both players show some form of concessions. Neglecting, for now, the extent to which A will gradually depart from his original demands, B's proposal path is clearly determined. In each period, in which it is his turn he will move only infinitesimally away from his previous position, thus showing the willingness to make concessions and not giving A any reason to quit

negotiations.[9] Formally, in period T, B will thus propose with expected payoff of $P_T^B = P_{SQ}^B - \frac{T}{2}\mu$. Although this is only a minimal result for A, it is rational for him to accept, as B's proposal is expected to improve his situation, with $P_T^A = P_{SQ}^A + \frac{T}{2}\mu$. Figure 3.3 summarizes these propositions graphically. The zigzagged lines show the development of expected payoffs resulting from proposals made by each player. Due to the symmetry assumption, the positive part of the diagram shows B's and the negative part A's expected payoffs relative to the status quo.

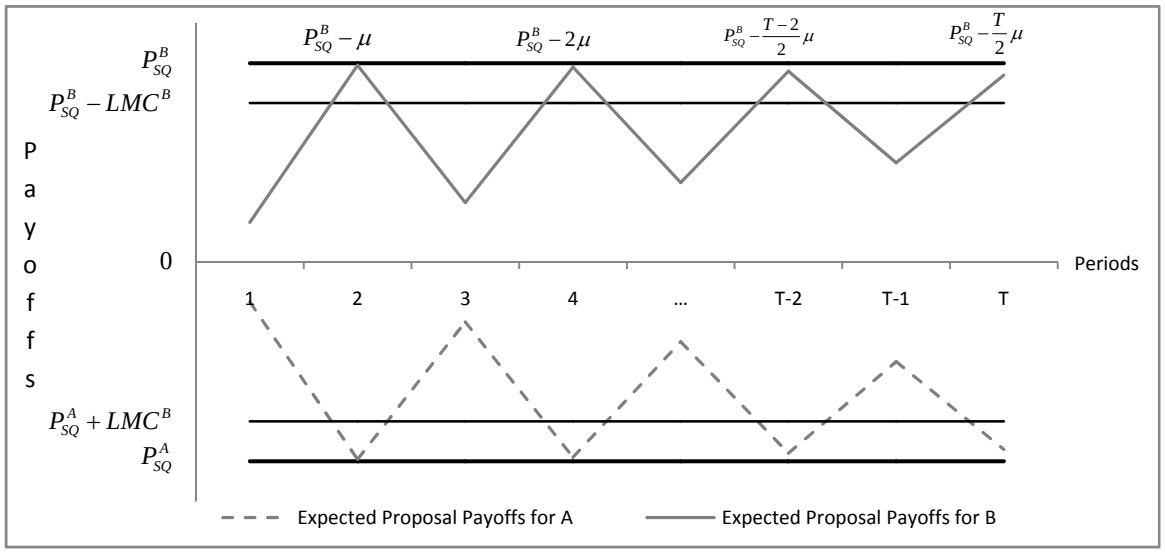

Figure 3.3 – Negotiation Dynamics with constant LMC_B and B as the Last Proposer

Now, what happens if A made the last move? The rules of the game clearly ascertain, that neither player may anticipate that it is A's turn in the end. Consequently, the game will proceed just as explained before, except for the last move, when it becomes clear that A's proposal is the last.

As to be seen in Figure 3.4, A, with his last proposal, would now be in a position to completely exhaust B's maximum willingness to pay $(P_{SQ}^B - (LMC^B + \mu))$. Should A be able to propose this, it would still be rational for B to accept. However, the exact amount of B's loss-of-mandate costs is private information unavailable to A. If A's proposal goes too far off, B will reject and thus

[9] It is to be noted that the increments (μ) must not be homogenously small, which is mainly due to communicational patterns in diplomatic discourse.

terminate negotiations. As a result, A will make sure to add only infinitesimally to what B proposed in T-1.

As a result, no matter who makes the last move in this game, all that can be agreed upon towards the end of a mandate is a minimal result. This is clearly determined by the assumption that A only has limited leverage on moving B, since the loss-of-mandate costs are very small and do not alter during the course of the game.

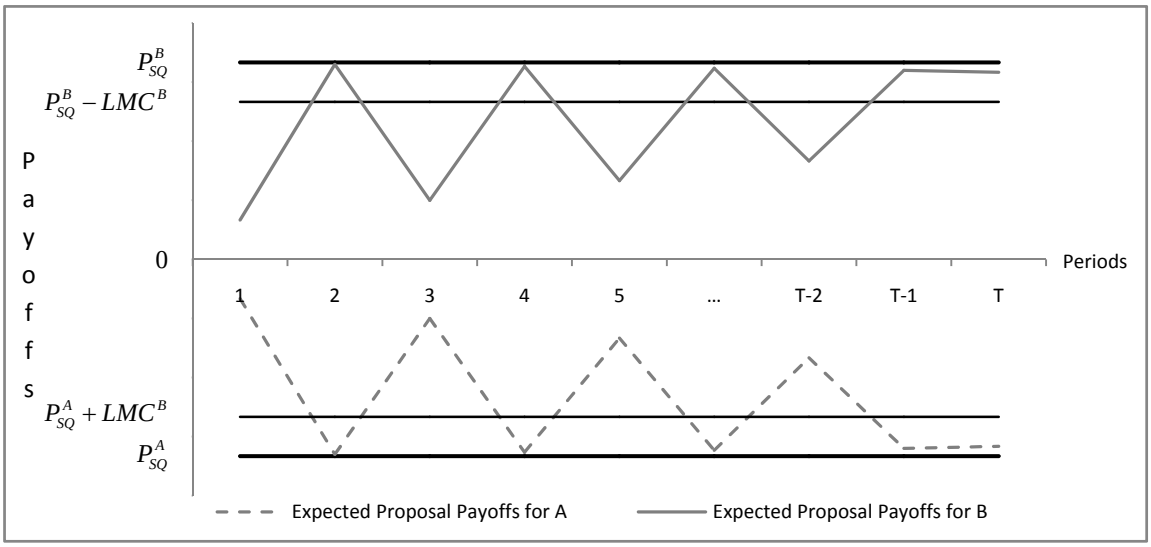

Figure 3.4 – Negotiation Dynamics with constant LMC_B and A as the Last Proposer

3.3.2 Increasing Loss-of-Mandate Costs

Accepting the classification from section 3.2, changes in the loss-of-mandate costs may be precipitated by factors exogenous as well as endogenous to the process. Exogenous factors include, for instance, leadership succession in the country of player B, substantively altering normative views on distributional justice. Conversely, negotiation output, such as the documents produced by the secretariat,[10] or negotiation behaviour may invoke the general public to get more informed about the situation. It is then probable that voters' interests shift towards reaching an equitable agreement pressuring B to grant more concessions.

[10] E.g. Fact Finding Missions or Gap Analyses on the existing legal protection of GRTKF.

Despite the fact that these changes may work in both directions, it seems conceivable that in the course of time – probably over multiple mandate periods – there might be a slight increase in loss-of-mandate costs, which is indicated by the increase in slope of the thin black loss-of-mandate lines in Figure 3.5.

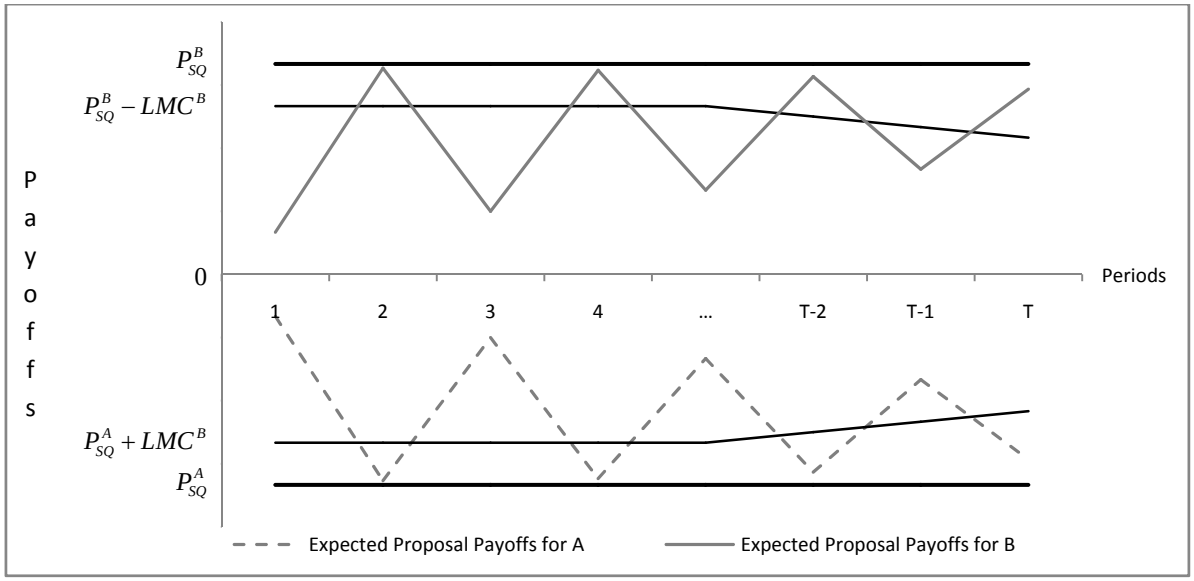

Figure 3.5 – Transformation of a Minimal Result Game towards possible Considerable Concessions

Here, in some period prior to T-2, the LMC^{B} are modelled to increase relative to the both players' status quo. The minimal-result zone thus opens up, making it rational for B to also accept proposals that are expected to reduce his payoff in the status quo by more than his previous maximum willingness to pay. Assuming that both players do not know about this development in advance, negotiations are likely to commence as outlined in the previous section. Upon the change, A's threat potential to quit negotiations induces B to make bigger concession increments. Yet, A's maximum result in terms of expected payoffs is attainable only if A knows the exact amount of B's maximum willingness to pay for the mandate. As this is assumed to be private information, however, some intermediate result seems likely, which will yet be expected to generate a higher payoff for A than under the assumption of constant loss-of-mandate costs.

3.4 Implications – The Hidden Effectiveness of Minimal Results

Having characterised the minimal results game under two variations, the answer to our research question is that countries engage in apparently ineffective international negotiations because some incur loss-of-mandate costs while others know about their existence but not their precise extent.

Let us start with a short run perspective on the present mandate period. As mentioned before, player A realizes a considerable negative payoff in the status quo, which is due to the effects of actions taken by B. It is thus in his interest to pressure for the establishment of a negotiation forum and keeping negotiations going on. And, even if only a minimal result is agreed upon, it is still expected to cause a marginal improvement of his status quo. Accepting that A is acting rationally, it is thus logical that he prefers minimal improvements to no improvements.

The reasons for B's participation on the other hand, are mainly motivated by the loss-of-mandate costs. Naturally, it is within his interest to secure his status quo payoffs. After all, any concession to A would equally lower them. Yet, not taking part in negotiations means that the mandate may not be extended which incurs costs of losing the mandate. These are negligible relative to the status quo, but high enough to opting for participation. So, participating is rational, because B expects the costs from the minimal result in one mandate to be less than those of being absent. Consequently, the difference in the expected costs between the minimal result and the total loss-of-mandate costs may also be interpreted as a negotiation rent for him. By taking part in negotiations of this kind, agreeing to a minimal result means a relative gain as he is not incurring higher costs. Formally, the rent B realizes at the end of the first mandate period may thus be expressed by the following formula,

(1) $$NR_{T_1}^{B} = LMC^{B} - (P_{SQ}^{B} - P_{T_1}^{B,MR}), \text{ with}$$

$NR_{T_1}^{B}$ = Negotiation rent B expects in the minimal result of the first mandate period T_1,
$P_{T_1}^{B,MR}$ = Payoff that B expects in the minimal result of the first mandate period T_1.

Extending our view to a medium run perspective across the boundary of one mandate period, we predict minimal results to occur at the end of each mandate period to follow ($P_{Ti}^{B,MR}$), given that the loss-of-mandate costs do not considerably increase. So, each period will generate a negotiation rent for B. Yet, the costs that B expects from these minimal agreements are assumed to accumulate. That is why the negotiation rents will decrease and approach zero with each new

mandate period. Consequently, in the medium run B's participation is mainly motivated by successively exploiting these diminishing negotiation rents. Formally, the development of these rents may be captured by formula 2, expressing the negotiation rent B realizes at the end of an individual mandate period T_i.

(2) $$NR^{B}_{Ti} = LMC^{B} - \sum_{j=1}^{Ti}(P^{B}_{SQ} - P^{B,MR}_{Tj})$$

NR^{B}_{Ti} = Negotiation rent B expects in the minimal result of mandate T_i, and
$P^{B,MR}_{T_j}$ = Payoff that B expects in the minimal result of the mandate at period T_j.

Eventually, the losses incurred through the minimal results will equal his loss-of-mandate costs. Then, according to the logic of the model, negotiations are bound to be terminated, as B's maximum willingness for concessions is exhausted. For such an event to occur the formal condition is:

(3) $$\sum_{j=1}^{Ti}(P^{B}_{SQ} - P^{B,MR}_{Tj}) = LMC^{B}$$

Turning to A, we have emphasized that he does not know the exact amount of B's loss-of-mandate costs. That is why he may not instantly take advantage of B's maximal possible concession. He may then take part in ongoing discussions to successively explore how much B is willing to give. This may be minimal – in case of constant loss-of-mandate costs – yet, as a rational player he will seek it. Additionally, A may expect that in keeping negotiations alive, exogenous or endogenous increases of the loss-of-mandate costs are possible, which may – over time – induce B to make greater concessions.

Summing up, taking into account the short as well as the medium run, both players may act rationally by taking part in negotiations that are of zero-sum character, because in the minimal result A can expect slight improvements of his status quo and B can capture negotiation rents. This insight hinges crucially on the assumption that A has a threat potential towards B in form of loss-of-mandate costs. Considering that this is not deductable from classical explanations of negotiation effectiveness as outlined in section 2, we term it the hidden effectiveness of minimal results in international negotiations.

4 Conclusion and Further Research

The 13th and 14th sessions of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore at the WIPO in Geneva, which we both attended, acted as the impulse to this paper. Since the committee's establishment in 2001 it has not generated any substantial results in terms of progress towards efforts of treaty formulation. On the contrary, only minimalistic steps have been taken. That is why this thesis aims at illuminating why countries choose to participate in costly negotiations that seem to be highly ineffective and for which, consequently, the classical explanation of participation does not seem to fit (see section 2).

In order to derive first solutions to this puzzle, we introduced a simple negotiation model. The key concept to the model is that the blocking countries face costs upon letting the mandate expire unrenewed if no progress is achieved. These are termed loss-of-mandate costs. The moving countries do not incur any of these costs, which leaves them in a position to demand concessions. Yet, we assumed the loss-of-mandate costs to be very small. Then, as to be seen in section 3.3, negotiations are bound to lead to minimal results only, which may be regarded as ineffective at first glance. Nevertheless, as we have shown in section 3.4, even negotiations of this type can still be considered effective. Although hidden for the unaware outside observer, player A expects small improvements of his status quo or possibly greater ones in the future, and B realizes negotiation rents because the costs expected in the minimal results are smaller than his loss-of-mandate costs. As a result, within the boundaries of this model, it is rational for both players, and thus for blocking and moving countries in the aggregate, to participate.

But, what can such a stylized model tell us about real world negotiations? We begin this assessment with the concept of loss-of-mandate costs, being the crucial assumption in this theory. It is based on field observations of delegates' behaviour in connection with the institutional negotiation setting. During the IGC negotiations, it became apparent that delegates of resisting countries, despite not being interested in substantial progress in the IGC, wish to keep the mandate. Consequently, the assumption that the loss of the mandate creates some sort of costs for them does not seem too farfetched. Renninger, for instance, describes these as political costs of breaking up negotiations (1989, p. 252). Moreover, he sustains that these costs are comparatively low for economically strong countries, as assumed in this model (1989, pp. 249-250), as he describes the inability of the global south to demand considerable concessions from the north on economic development cooperation in the 1970s to the 1980. The

negotiations took place in special sessions of the General Assembly of the United Nations. Accordingly, some slight sign of progress needs to be shown in order to preserve the mandate, that way generating fewer costs than the loss of the mandate. And indeed, Renninger's negotiation example may back the model prediction of minimal results, as he points out (1989, p. 252) that:

> *"The process has in some sense worked for the South in that certain concessions have been obtained and the issues of concern to the South have retained their prominent position on the international agenda."*

Secondly, we assumed negotiations to only take place between two countries on a single issue. To begin with, negotiations in the IGC are of multiple-issue character in the sense that multiple topics are negotiated within the same mandate. Then, each topic may have its own specific cost function for breaking up talks, so that it becomes necessary to further specify the now abstract construct of the loss-of-mandate costs. Nevertheless, we observed that towards the end of the current mandate, i.e. in the 14th session, delegates were essentially focussing on a single issue in trying to set the terms of the mandate renewal. Hence, this model assumption applies to a certain extend. Also, IGC negotiations are of multilateral nature. Evidently, there are some countries without a pronounced position on the matter that probably only sit on the fence. Nevertheless, we observed that countries form groups and broadly divide into supporters and rejecters of new protection regimes in the field of intellectual cultural property. In addition to this tendency, due to the informal unanimity in voting, the parties tend to focus on the strongest interests for or against the issues as these are the ones that need to be resolved first.[11] If a state does not support substantial progress, it will be difficult to leave it aside. So, all in all, the two-player model offers at least some insights into actual negotiations, although fine-tuned dynamics within and across country groups are not included.

Thirdly, the model assumes countries to be rational actors striving to maximize negotiation utility for their own country. Various authors such as Brams (1975), Snidal (1985) or Sykes (2004) have defended this position for game theoretic analyses. That is why it may be applicable here as well. We further assumed delegates to be perfect representatives of their country's interests. This is the

[11] McKelvey and Ordeshook (1984) for instance argue that in spite of formal majority requirements in committees, parties with strong interests often manage to circumvent these requirements suiting their own interest.

more problematic assumption, as selfish motives may very well influence international decision-making processes. In line with assumptions of the New Political Economy, Gygi (1990, pp. 12-13), for instance, models delegates in international negotiations as striving for a conflict-free life in public service with a high monetary and non-monetary income as well as for prestige. Most likely, they receive extra remuneration for travelling abroad, derive personal benefits from meeting friends and visiting a beautiful city, or even from circumventing stressful situations in their ministries. Accordingly, their selfish motivation alone could explain ongoing participation in apparently ineffective negotiations. Yet, such an explanatory approach may be criticized just as much. First of all, most delegates seem to coordinate their position in the IGC with their home country and read out pre-approved statements. Also, some state that before moving on an issue at hand they would have to check with their capital first. Accordingly, it is difficult to assume that they dispose of enough personal flexibility to prolong negotiations no matter at which costs. Additionally, if it was only for selfish motives we would have trouble explaining why negotiations sometimes keep going until late in the night. Normally, negotiations finish around 7 pm, because that is when the interpretation service stops. As a result, national interests must play a role in the behavior of the delegates, which supports the validity of this assumption and the predictions of our model.

All in all, despite some critical points, the minimal results model is very well able to give insights into the puzzle of why, in the aggregate, countries choose to participate in apparently ineffective negotiations. To extend this research, we think it is necessary to establish why countries associate themselves with the single positions of blocking and moving. Here for instance, it could be attempted to identify national characteristics that have a significant effect in explaining negotiation behavior at the international level in the IGC. These may include factors such as the proportion of indigenous people in a country, the size of the economy or the national political structure. The influence of these factors is not clear-cut, so that an econometric analysis seems advisable. Then, a comparison to the national level may be attempted, in order to explain the respective domestic measures in the protection of cultural phenomena econometrically. In the end, insights from both angles can be combined to identify a country-specific scale, indicating its pressure to establish an international protection for intellectual elements of cultural property. Moreover, we find it necessary to analyze the consequences of a possible international protection as envisaged by the WIPO from an economic perspective. For this purpose, we shall analyze existing sui generis model laws using an institutional economics approach in order to identify their local, national and international consequences.

References

Behnam, A. (1998). The Group System. Multilateral Diplomacy/ La Diplomatie Multilatérale; The United Nations System at Geneva/ Le Système des Nations Unies à Genève The United Nations; A Working Guide/ Guide de Travail. M. A. Boisard and E. M. Chossudovsky. The Hague, London, Boston, Kluwer Law International**:** 193-204.

Braithwaite, J. and P. Drahos (2000). Global Business Regulation. Cambridge, Cambridge University Press.

Brams, S. J. (1975). Game Theory and Politics. London, The Free Press.

Chrispeels, E. (1998). Procedures of multilateral conference diplomacy. Multilateral Diplomacy/ La Diplomatie Multilatérale; The United Nations System at Geneva/ Le Système des Nations Unies à Genève The United Nations; A Working Guide/ Guide de Travail. M. A. Boisard and E. M. Chossudovsky. The Hague, London, Boston, Kluwer Law International**:** 119-136.

Cross, J. G. (1977). Negotiation as a Learning Process. The Negotiation Process. Theories and Applications. I. W. Zartman. Beverly Hills, London, Sage Publications**:** 29-54.

Druckman, D. (2001). "Turning Points in International Negotiation." Journal of Conflict Resolution **45**: 519-544.

Gruber, L. (2000). Ruling the World : Power Politics & the Rise of Supranational Institutions. Princeton, New Jersey, Princeton University Press.

Gygi, B. (1990). Internationale Organisationen aus der Sicht der neuen Politischen Ökonomie. Heidelberg, Physica-Verlag.

Hirschman, A. (1945). National Power and the Structure of Foreign Trade. Berkeley, University of California Press.

Hug, S. (2008). Multilateral bargaining at the 2004 IGC and referendums: An empirical assessment. Direct democracy in and around Europe: Integration, Innovation, Illusion and Ideology. 2-4 October 2008. Centre for Research on Direct Democracy, Zentrum für Demokratie Aarau, University of Zürich.

Kaufmann, J. (1998). Some practical aspects of United Nations decision-making, tactics and interaction between delegates. Multilateral Diplomacy/ La Diplomatie Multilatérale; The United Nations System at Geneva/ Le Système des Nations Unies à Genève The United Nations; A Working Guide/ Guide de Travail. M. A. Boisard and E. M. Chossudovsky. The Hague, London, Boston, Kluwer Law International**:** 231-246.

McKelvey, R. D. and P. C. Ordeshook (1984). "An Experimental Study of the Effects of the Procedural Rules on Committee Behavior." The Journal of Politics **46**: 182-205.

New, W. (2009, 29.01.09). "WIPO Ponders New Negotiating Style; DDG Positions Opening; Patent Filings Falter." Retrieved 04.02.09, from http://www.ip-watch.org/weblog/index.php?p=1412.

Renninger, J. P. (1989). The Failure to Launch Global Negotiations at the 11th Special Session of the General Assembly. Effective Negotiation: Case Studies in Conference Diplomacy. J. Kaufmann. Dordrecht, Martinus Nijhoff Publishers**:** 231-254.

Sjöstedt, G., B. I. Spector, et al. (1994). The Dynamics of Regime-building Negotiations. Negotiating international Regimes. Lessons Learned from the United Nations

Conference on Environment and Development (UNCED). B. I. Spector, G. Sjöstedt and I. W. Zartman. London, Graham & Trotham 3-20.

Snidal, D. (1985). "The Game Theory of International Politics." World Politics **38**(1): 25-57.

Sykes, A. O. (2004). The Economics of Public International Law. JOHN M. OLIN LAW & ECONOMICS WORKING PAPER. Chicago, THE UNIVERSITY OF CHICAGO**:** 1-81.

Szasz, P. (1989). Reforming the Multilateral Treaty-Making Process: Opportunity Missed. International Law at a Time of Perplexity. Essays in Honour of Shabtai Rosenne. Y. Dinstein. Leiden, Martinus Nijhoff Publishers**:** 909-939.

Szasz, P. (1992). International Norm-Making. Environmental Change and International Law. E. Brown Weiss. Tokyo, United Nations University Press**:** 41-80.

Tollison, R. D. and T. D. Willet (1979). "An economic theory of mutually advantageous issue linkages in international negotiations." International Organization **33**(4): 425-449.

Trumbore, P. F. (1998). "Public Opinion as a Domestic Constraint in International Negotiations: Two-Level Games in the Anglo-Irish Peace Process." International Studies Quarterly **42**(3): 545-565.

UN (1980). Review on Multilateral Treaty-Making Process. United Nations.

WIPO (1998). General Rules of Procedure. World Intellectual Property Organization. 399 (FE) Rev. 3.

WIPO (2000). Matters Concerning Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore. World Intellectual Property Organization. WO/GA/26/6.

WIPO (2001). Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore; Rules of Procedure. World Intellectual Property Organization. WIPO/GRTKF/IC/1/2.

WIPO (2007). Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore; Summary of Options for the International Dimension of the Committee's Work. World Intellectual Property Organization. WIPO/GRTKF/IC/12/6.

WIPO (2008a). Voluntary Fund for Accredited Indigenous and Local Communities: Information Note on Contributions and Applications for Support. World Intellectual Property Organization. WIPO/GRTKF/IC/13/INF/4.

WIPO (2008b). "WIPO's new Director General outlines challenges and priorities." Retrieved 10.01.2009, from http://www.wipo.int/about-wipo/en/dgo/dg_gurry_acceptance_speech_2008.html.