IGC Issues: Summary and Bibliography

Research Paper 96/73

17 June 1996

This paper provides a bibliography of documents and commentary on the current EU Intergovernmental Conference (IGC), with an introductory note on the background, agenda and recent documents.

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Contents

Page

Part I: Summary

Introduction

The purpose of this bibliographic paper is to record the main issues that seem likely to be considered by the IGC, and to point to sources explaining the questions raised and the position of the British and other governments. Obviously there is a huge documentation on subjects to be dealt with by the IGC, some of it extending back for years. These introductory notes point out some of the more recent and general sources giving an overview of the issues facing the IGC, and some of the most recent sources on particular subjects. The main body of the paper then gives a more extensive list of sources. This is organised by type of document or originating body; but in most cases the title will indicate the subject matter. Library Research Papers so far published dealing with issues at the IGC are also listed.

I Purpose of the IGC

An intergovernmental conference (IGC) of all member states of the European Union provides the mechanism for agreeing unanimously on amendments to the basic treaties on which the European Communities and the Union rest. The treaties also have to be amended by unanimous agreement when the Union is enlarged to take in new members. But an IGC deals with amendments to be negotiated among existing members. The specific IGC that opened in Turin in March 1996 was provided for under the Maastricht Treaty, which laid down that it should consider:

> "to what extent the policies and forms of co-operation introduced by this Treaty may need to be revised with the aim of ensuring the effectiveness of the mechanisms and institutions of the Community."[1]

The role and previous history of IGCs are described in Library Research Paper 96/41 *Towards the IGC: Approaching Turin.*

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[1] Article B. The date of the IGC is established by Article N(2) - see *European Union: The Treaty on European Union; The Treaty establishing the European Community*, Cm 3151, pp 10, 22

II Maastricht and After

The context in which 'European' affairs are considered has changed considerably since Maastricht, and is still developing. Some new factors, including those of particular interest to the United Kingdom, are summarised below.

The move from the former European Community to the European Union set up at Maastricht is itself the major change. The 1991-92 IGC that culminated at Maastricht had to consider how and how far to extend the procedures, power and competences of the European Community and its institutions. Very roughly, there were two alternative approaches open. One was to extend the areas of policy covered by the European Community (perhaps to include foreign policy, defence, justice and police matters), and the powers of the European Community institutions relative to the member states (eg by increasing qualified majority voting, and perhaps the role of the European Parliament). This approach was associated with an explicit acknowledgement of the 'federal' goal of the European Community. It corresponded to what the recent White Paper *A Partnership of Nations* describes as the 'classic approach of many politicians on the continent ... to press for "more Europe"'.[2] The other approach was to make any new arrangements so far as possible intergovernmental, and to emphasise the sovereign role of national governments. This of course was and remains very much the preferred approach of the UK government.

A. The Three Pillars

The outcome at Maastricht was a compromise, but leant toward the intergovernmental model. The new and ambitious European Union was not simply an extension of the European Community. Instead, the original EC, based on the Treaties of Paris and Rome, as subsequently amended and enlarged, became one of the three pillars of the new European Union. The other two pillars, dealing with foreign and security policy and with justice and home affairs, rest on the Maastricht Treaty. They are intergovernmental in character, rather than European Community arrangements and they are not subject to the jurisdiction of the European Court of Justice; but they do incorporate some Community practices, and give a formal co-ordinating role to the European Commission. The 'pillars' (the word is not actually used in the Treaty) thus make up the Union and can not be treated as entirely separate. One purpose of the 1996 IGC is to consider the working of this new three pillar structure.

Maastricht Treaty on European Union (TEU) provisions for the two intergovernmental pillars are:

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[2] Cm 3181, p.4, para 5

- ***Common foreign and security policy*** **[Title V - Article J - "second pillar"]**

  to operate under guidelines from the European Council (the heads of state or government); Council of Ministers decide unanimously whether to take 'joint action', and whether any matters might be decided by qualified majority - to include at least 10 member states and not to apply to defence issues; states may take and report back urgent national measures with regard to a joint action; eventual framing of common defence policy, which might in time lead to common defence; Western European Union to be 'an integral part of the development of the Union'; proposals under this pillar to be submitted by any member state or the Commission, which is 'fully associated' with this area, but without the special or exclusive rights of initiative found in the EC treaties.[3]

- ***Co-operation in justice and home affairs*** **[Title VI - Article K - "third pillar"]**

  subjects covered include: asylum, border crossing at the EC frontier, immigration and movement of third country nationals within the EC; civil judicial co-operation, and co-operation over drugs, crime and terrorism. The Council may adopt positions, and recommend conventions for adoption by member states; it is to act unanimously, but with similar provisions for majority voting and Commission participation as for foreign policy (but states only to take initiatives over crime); this pillar operates in the context of Maastricht Treaty provisions for common 'Union citizenship' of all EC nationals, giving rights of movement, residence, and voting and standing in municipal and European Parliament elections throughout the EC; but each member state determines who shall be its nationals.[4]

The British Government has emphasised the importance of the fact that the two intergovernmental pillars of Maastricht are outside the jurisdiction of the European Court of Justice. British commentators tend to feel that the Court, as an EC institution, gives undue weight to its interpretation of the purposes of EC law rather than the stricter construction they would prefer.[5]

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[3] See also Bibliography: section I

[4] See also Bibliography: Section J

[5] See *IGC Issues: The European Court of Justice*, Research Paper 96/57

B. The Two British Opt-Outs

The other innovation at Maastricht of particular significance for the United Kingdom was the agreement that *within* the EC pillar of the Union the UK be exempted from the Social Chapter introduced at Maastricht, and be given the option whether or not to participate in the arrangements provided for economic and monetary union (EMU) and a single currency. These 'opt-outs', while providing a special position for the United Kingdom, are themselves European Community arrangements.

The other eleven member states at that time wished to build into the Union Treaty a 'social chapter' empowering and obliging the Community to introduce binding measures to implement the objectives of the declaratory Social Charter of 1989 (which the British Government had refused to endorse). In order to meet the British Government's objections the substance of the Social Chapter was annexed to a Protocol to the Treaty. In the Protocol all the member states accepted the Agreement. In itself, however, the Agreement applies only to the member states other than Britain - originally eleven, now fourteen. It provides for them to implement the objectives of the Social Charter, by the powers given in the 'social chapter', as Community policies in the normal way, except that the UK does not take part in, and is not bound by, these activities of the Community.[6] Adjusted qualified majorities apply, and where unanimity is provided for this means the Fourteen only.

As regards EMU, the following special provisions apply to the UK:

- it is not obliged to move to the third stage without a separate decision by its government and parliament (the European Communities (Amendment) Act 1993 provides that there must be an Act of Parliament).

- HMG is to notify the Council whether it intends to move to the third stage before the Council's first assessment of member states' readiness; if the Council does not set a date for Stage III the UK may notify its intention to participate before 1 January 1998 (ie when the starting date automatically becomes 1 January 1999).

If the UK decides against participation, it is not included in the majority required or procedures prescribed for moving to and setting the date of Stage III.

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[6] See *The Social Chapter*, Research Paper 95/92

The UK may however move to Stage III as a full participant any time after the start, subject to the convergence conditions.

The EMU project is underpinned by a Protocol in which all parties 'declare the irreversible character' of the move to Stage III and that 'no member state shall prevent it'.[7]

C. Subsidiarity

This concept has been transferred from its earlier use in Catholic social teaching, where it meant very roughly that in civil society higher authorities should not unnecessarily take over the functions of smaller, subordinate or local bodies. Reapplied to EC matters, where it has now come to be treated as an important principle, it can obviously be given very various interpretations.

Maastricht gave 'subsidiarity' an EC treaty definition, as a new Article 3(b), which could be invoked before the European Court of Justice, providing that:

> "In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community."

This Maastricht formula seems to combine stronger and weaker definitions of when action should be left to member states: on the one hand the Community may act where objectives can not be 'sufficiently' achieved by them; on the other - but in these circumstances only - Community action is justified because the objectives can be 'better' achieved by it. This might seem to leave open, or at least disputable, situations where state action was 'sufficient' but Community action might be 'better'. However, HMG has particularly favoured subsidiarity, which it interprets very much as a protection for national governments against encroachments by the Community, and is seeking to entrench it further in the Treaty.[8]

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7 See *Economic and Monetary Union*, Research Paper 96/33

8 Cm 3181, para 20a. For the implementation of subsidiarity since Maastricht, see *Progress in the implementation of subsidiarity*, Research Paper 95/36

D. Enlargement

The EU has been enlarged from 12 to 15 members with the accession of Austria, Finland and Sweden from January 1995. The EU is already committed to considering applications from Malta and Cyprus after the IGC and ten states of Central and Eastern Europe have been granted association agreements which refer to the aim of eventual full membership of the EU.[9] The prospect of further enlargement raises for the IGC constitutional questions, in particular future qualified majority voting (QMV) weightings, and the size of the European Commission (ie should each member country continue to supply at least one Commissioner).

The continuing enlargement of the EU, in particular as it affects the EC pillar, also feeds into the issues of the future of the Common Agricultural Policy and of EC financing. These again are not subjects on the agenda of the IGC (so far) but form part of the context of its deliberations. On the one hand enlargement could be expected to lead to a looser, more intergovernmental Community. The British government has been generally favourable to enlargement - in keeping with its preference for an 'intergovernmental' Community. On the other hand, a Community of twenty seven or more states in which unanimity was widely required for action could become unmanageable. This could be put as an argument for more majority voting and a tightening up of the EC system. There is thus a traditional Community tension between 'widening' and 'deepening', which seems likely to continue in the European Union.

III The Agenda for the IGC

The agenda of an IGC can be only loosely controlled, as participants may put forward items at any stage. However, some subjects are prescribed in the Maastricht Treaty; a preparatory 'Reflection Group' of representatives of member states reported in December 1995 suggesting 'options' for discussion;[10] there have been proposals from national governments (including HMG's White Paper);[11] and the Turin European Council's Presidency conclusions (29 March 1996) set out a list of issues to be considered by the IGC. The points in the Presidency's conclusions are stated in general terms and with varying emphasis, but since they have to take account of all member governments they can reasonably be taken as a minimum 'agenda'.

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[9] Poland, Hungary, the Czech Republic, Slovakia, Bulgaria, Romania, Estonia, Latvia, Lithuania and Slovenia

[10] See Bibliography: Section D

[11] Cm 3181

Not on any agenda so far, as HMG have pointed out, are Economic and Monetary Union (EMU) and a single currency. However, the Turin presidency conclusions do refer in their preamble to 'a union firmly committed to the full implementation of the treaties, including its *(sic)* provisions on economic and monetary union'.

The fullest summary of the various ideas put forward by member governments is provided by the Reflection Group report; they are given there without attribution, but several of the references to the dissenting view of 'one member' - not all - are recognisable descriptions of the British Government's position (eg §35 on the Social Agreement; §39, non-discrimination: 'such rights were best secured in a national context'). As well as in the White Paper, HMG has put forward its views in ministerial evidence and memoranda to the House of Commons Select Committees on Foreign Affairs and on European legislation, and to the House of Lords Committee on the European Communities, and in governmental replies to reports on the forthcoming IGC from each of those committees. Most recently, the Foreign Secretary gave evidence to the Foreign Affairs Committee on the eve of the Turin European Council[12] and is due to do so again on 18 June. Several other governments have issued statements or reports on matters to be considered at the IGC.[13]

The British Government has made clear the subjects on which it is making proposals and would like to see progress and indicated also where it is unsympathetic or opposed to changes likely to be proposed by other governments. The British Government's approach is summed up in the title of the White Paper, *A Partnership of Nations*, with its echo of the slogan of *Europe des Patries.*[14] HMG favours the intergovernmental approach: by preserving the 'pillars' system of Maastricht; by emphasising the inter-governmental process within the European Community pillar, ie the actions of the Council of Ministers and European Council; and by opposing extensions of EC competence, of the powers of the Commission and European Parliament, and of qualified majority voting (QMV). The 'opt-outs' over the Social Chapter and EMU also form an important component of the UK stance and policy within the EU.

The White Paper lists 18 subjects which the British Government expects to be the 'main issues' at the IGC. Comparison with the Presidency conclusions of the Turin Council suggests the Council did not record many items beyond those on the British Government's list. However, subjects for consideration by the IGC mentioned in the Turin conclusions and not listed as 'main issues' in the White Paper were 'the status of outermost regions' and 'environmental protection'.

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[12] HC 306-i 1995/96, 18 March 1996

[13] These are described in Research Paper 96/41. See also Bibliography: Section F

[14] Traditionally attributed to General de Gaulle, but actually, it appears, coined by Michel Debre. De Gaulle's own expression was the less inspiring *Europe des états*. See Charles Williams, "The last great Frenchman", 1993, p.8 *n*

From the British government's viewpoint there are items on which it is pressing for new measures, those where it would prefer little or no change, and areas where it is generally recognised some action has to be taken but there are differing views as to what direction this should take. Its list of expected 'main issues' (para 18 of the White Paper) can be rearranged according to these categories, to read as follows:

HMG is opposed to substantial change, or to ideas that have been put forward:

The powers and procedures of the European Parliament
Employment and the Social Protocol
New Community competences

HMG is pressing for changes (but other governments may not agree):

The legislative process including such issues as subsidiarity and Commission accountability
The role of national parliaments
The European Court of Justice
Fraud and financial management
The Common Fisheries Policy
Animal welfare

This leaves the largest category, of areas where HMG and other states recognise circumstances require changes, but may disagree over what these should be:

Qualified majority voting
The Presidency system
The number of Commissioners
The Common Foreign and Security Policy: general review
The Common Foreign and Security Policy: defence issues
The operation of the Justice and Home Affairs pillar
European citizenship, human rights and non-discrimination
Openness and transparency
Budgetary provisions

IV National Parliaments and sovereignty

The basic constitutional relationship of the EC to its member states has remained the same since its foundation. But over time the balance of power has shifted from national parliaments to the EC institutions in the following ways:

- By the **cumulative effect** of more EC legislation, in areas of EC competence, which takes precedence over national law and therefore restricts the legislative freedom of national parliaments

- By **European Court of Justice decisions** on the application of EC law, though it could be argued these simply elucidate what is already implicit

- By **extension** of EC competence to new subjects

- By **increased qualified majority voting** in the EC council

- By new powers for the **European Parliament**

The first two processes go on all the time. The other three require changes in the EC treaties - the ground rules for its operation - and these need the assent of all member governments and their Parliaments. Changes of this kind were introduced by the Single European Act which took effect from July 1987, and again by the Maastricht Treaty on European Union of 1992.

Such changes affect the power of the UK Parliament relative to the EC institutions both directly through the extent of EC competence - the subjects it covers - and indirectly through the position of the British government within the EC structure - how far qualified majority voting is used in the Council and, more recently, the extent to which the European Parliament can influence or block EC legislation.

The UK government may be able to stop unwelcome EC legislation subject to unanimity, or by assembling a blocking minority where qualified majority voting applies. But once an EC law has been adopted, any attempt to reverse or amend it may run into similar opposition from other member states: so a ratchet effect applies to the growth of EC law.

Since the UK first joined the EC it has been agreed as important that Parliament should be able to 'scrutinize' major EC legislation (ie Council legislation) before it was adopted. Both Houses have therefore established committees to scrutinise EC legislation in draft and

recommend whether it be debated or otherwise further considered. From 1991 the House reformed its scrutiny procedure to provide that such further consideration should normally be undertaken by one of the two European Standing Committees, rather than on the floor of the House. Successive British governments for their part have accepted the constraints of a resolution of the House that where a proposal was recommended for further consideration (or has not yet been scrutinised by the Committee) the Minister concerned should not finally assent to it in the Council until the scrutiny process was completed, subject to certain exceptions for urgent business. Other member state governments also place what is known as a 'scrutiny reserve' on decisions to be made in the Council of Ministers if national parliamentary procedures have not been satisfactorily completed.

In Declaration No 13 attached to the Maastricht Treaty, EC governments undertook to ensure national parliaments received proposals for EC legislation in good time and to support greater involvement of national parliaments in the Union. The European Council at Birmingham, 16 October 1992, reaffirmed that 'national parliaments should be more closely involved in the Community's activities'.

HMG declare in the White Paper that 'the Government is keen to develop this role [of national parliaments] and is considering a range of ideas' including making elements of Declaration 13 legally binding, setting a minimum period for parliamentary scrutiny of Community documents, and a greater role in the Justice and Home Affairs pillar. The Turin Council agreed the IGC should 'examine how and to what extent national parliaments could, also collectively, better contribute to the Union's tasks'.

The fullest attention is given to this subject in the European Legislation Committee Report and in the Government's reply.[15] The Committee recorded dissatisfaction with the application of Declaration 13, and recommended: a minimum notice period for scrutiny of EC documents; making the Declaration legally binding; and extending it to all documents with legislative significance. The Committee did not favour a revival of the assembly of national parliaments or *'assises'*, as held in 1990; and it emphasised the problems surrounding any proposals for an EC second chamber or 'Senate'.

National parliamentary **scrutiny** of proposed EC legislation does not in itself have any legal effect on the legislation as eventually adopted; any control has to be exercised by holding Ministers to account for agreements reached in the Council.

Traditionally in the British view of the EC/EU the defence of sovereignty is bound up with the concept of the 'veto'. The White Paper makes clear the Government's opposition to any

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[15] HC 1994-95, 239-I, paras 58-171, and 106-137; Cm 3051

significant extension of qualified majority voting (QMV) to remaining areas still subject to unanimity. Furthermore, the account of QMV itself opens by declaring it 'works against the background of a political agreement, known as the Luxembourg compromise', which there 'is no question of weakening' (para 22). This 'Luxembourg compromise' dates from the EEC 'crisis' of 1965-66, when General de Gaulle refused to accept the first transition to qualified majority voting provided for in the Rome Treaty. The crisis was resolved by the 'compromise' reached at Luxembourg in February 1966. France maintained that where 'very important interests' were at stake, no matter what the treaties said, discussion should continue until unanimous agreement was reached. The Six noted there was 'a divergence of views' on what to do if agreement could not be reached. However, they agreed to disagree and carry on Community work. In effect, a 'veto' was conceded. And this was enthusiastically endorsed by the UK and other new members, and in due course by the original Five also.

V Ratification of a New Treaty

If the IGC is able to reach a unanimous conclusion then the result will be a new amending treaty which will have to be ratified by all 15 member states according to their respective constitutional requirements if it is to enter into force.

In the UK the central requirement would be for Parliament to approve the necessary further amendments to the European Communities Act 1972 (the ECA). When the UK joined the EC, not only did all existing EC law have to be made applicable (the *acquis communautaire* as the body of EC law at any time is known), and UK domestic law brought into conformity, but provision had to be made in advance for *future* EC legislation issued by the Council of Ministers and the Commission to be applicable to the UK, and payments due to the EC to be made, 'without further enactment'. This is provided for by the ECA (sections 2(2) and (3)).

As the EC treaties have been subsequently amended and further treaties added the new texts have had to be brought within the scope of the ECA. Relatively minor or routine EC treaties are added by a positive Order, under provisions in the ECA itself [Section 1(3)]. But for major changes in the EC treaties it is appropriate to amend the ECA by primary legislation. This was the procedure followed in 1986 to make the Single European Act applicable to the UK, and it was repeated for the Maastricht Treaty (insofar as it amended the EC treaties) in 1992-3. This procedure would again be followed for a new amending treaty after the IGC. The Treaty as such would not be open to amendment by Parliament. But HMG could not carry out the Treaty - or at least its provisions for the EC pillar - without the amending legislation, so although the proceedings are not technically a parliamentary 'ratification' of the Treaty they have much the same effect.

As in 1992-3, some sections of a new treaty might not require amendments to the ECA. In particular, this would apply to any changes to the second and third pillars, provided that these remain predominantly intergovernmental and separate from EC law. These sections of the treaty would be subject to the 'Ponsonby Rule', ie the practice of laying international treaties before Parliament at least 21 days before ratification in order to provide an opportunity for parliamentary debate. In practice, the whole treaty would probably receive parliamentary consideration on the proceedings to amend the European Communities Act but, as the proceedings of 1992-3 showed, the distinction between the various sections of the treaty might have political and procedural implications.

A further constitutional requirement in the UK would be that any increase in the powers granted to the European Parliament should be explicitly approved by the implementing legislation. This arises from a provision in the European Parliament (Elections) Act 1978 which specifies that any such increase must be approved by Act of Parliament.

Once all of these procedures had been completed, the UK government would be free to ratify the new treaty by executive act. For some EU states such constitutional change may require or be open to a national referendum. The position and experience of other EU states concerning such a constitutional referendum is described in Research Paper 96/41, pp 19-21.

VI EC Law and 'Continuing Assent'

Recent controversies over the EU have revived interest in the legal bases of UK membership and subjection to EC law. When the then British government sought support for continued EC membership in the referendum of 1975 their official statement to the electors declared that:

> "The British Parliament in Westminster retains the final right to repeal the Act which took us into the Market on January 1, 1973. Thus our continued membership will depend on the continuing assent of Parliament."

There can be argument over how correct or how realistic this assertion was. There is no provision in EC law for member states unilaterally to reverse EC legislation once adopted, or to take back powers once ceded, or to withdraw from EC treaties altogether. And some commentators have argued that the EC constitutes a new legal order which takes precedence over UK (or other) parliamentary authority and therefore does not depend on 'continuing assent'. This is an extreme view that would not be generally accepted in the UK and by UK parliamentarians. However, it has been accepted by legal authorities that if conflict is discovered between a UK Act of Parliament and previous EC law, the Act is invalid, even

if it is passed *after* the EC Law. It seems therefore to follow that for the UK to reject any EC law, it would be necessary for Parliament to take an explicit, conscious decision to do so - perhaps by excepting that particular EC instrument from the effect of the ECA. This would be a breach of international obligations under the Treaty; but the consequent crisis would presumably have to be dealt with by political rather than legal means.[16]

The Treaty on European Union has been concluded for an unlimited period (Article Q) and, as noted above, there is no provision for withdrawal, suspension or expulsion of a Member State. Under international law there is normally no right of unilateral denunciation of a treaty, unless this is stated or implied by the text. There is no evidence that the Member States intended that there should be an implied right of unilateral denunciation of the EC treaties. Since there is already a precedent for negotiated withdrawal by mutual agreement (the Danish crown territory of Greenland), there is a strong presumption that any future withdrawal would also be by mutual agreement, in which case a new treaty would be concluded to replace the existing ones and to make all the consequential changes. Such a treaty would be subject to ratification by all of the member states and could be blocked by any of them in theory, but this may seem an improbable scenario. What is certain is that withdrawal would be a lengthy and complicated matter; the political will to see the process through would have to be sustained through a prolonged period of negotiations and ratification.

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[16] The British policy of non-cooperation announced on 21 May 1996 is examined in Research Paper 96/74, *The Policy of Non-Cooperation with the European Union* of 18 June 1996

Part II: Bibliography

All the sources listed are held in the library, but not all are available for loan. Please ask staff of the International Affairs and Defence Section if you wish to consult any item. The current text of the Treaty on European Union is in Cm 3151, which is available from the Vote Office.

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D. The Work of the Reflection Group

The Declaration of the Informal Meeting of Foreign Ministers in Ioannina, 26 and 27 March 1994 included a reference to the fact that the Corfu Summit would decide upon the creation of a Committee instructed with studying institutional questions in the light of the 1996 Conference. The Reflection Group was subsequently established and its mandate laid down by the European Council meeting in Corfu, 24-25 June 1994, with a view to preparing for the IGC. It was launched by an opening session with the Foreign Ministers on 2 June 1995 in Messina. It consisted of Representatives of the Ministers of Foreign Affairs of the Member States and Representatives from the European Parliament and the Commission and was chaired by Carlos Westendorp (Spain).

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