

Arguing and Persuasion in the European Convention

Contribution to the State of the Art Report

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Comments most welcome

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Abstract

Why did the European Convention manage to adopt a single text that produced no left-overs? Against the background of permanent cleavages in the EU and the failure of the Amsterdam and Nice IGCs, the negotiation of the Conventional Treaty with its far-reaching revision of the EU's primary law is puzzling. First empirical studies that try to solve this puzzle emphasize the importance of the inclusion of new actors and of the issues at stake. They claim that the Convention facilitated deliberation, but when it came to the crucial issues, intergovernmental bargaining prevailed. However, these analyses tend to equate intergovernmentalism with the notion of bargaining and therefore risk overlooking important causal mechanisms for the effectiveness of arguing. We claim that a more structured comparison of the institutional settings might give important insights into the institutional conditions for the actual effectiveness of arguing as a steering mode in governance. Furthermore, it will improve our knowledge about the pros and cons of the Convention method.

Content

Introduction and Research Question

The Way to the Constitutional Treaty

Puzzle and Research Question

Arguing and Persuasion in the European Convention

What is Arguing, what is Bargaining?

Arguing and Persuasion in Multilateral Negotiations

The Institutional Settings: Intergovernmental Conferences and the Settings in the European Convention

Arguing and Persuasion in the European Convention

The dependent variable: Surprising Agreement and Non-Agreement in the European Convention

Methodology and Data

References

Introduction and Research Question

The Way to the Constitutional Treaty

Since the 1980s, the European Community (EC) respectively the European Union (EU) has been in a semi-permanent institutional reform. Challenges of globalization, enlargement rounds, and the reunification of Germany gave rise to demands for more efficient, effective and accountable European institutions. The reforms were negotiated in five Intergovernmental Conferences (IGCs)¹ and culminated in the Single European Act (SEA, 1986), the Treaty of Maastricht (1992), Amsterdam (1997) and Nice (2000). Whereas the negotiations for the SEA and the Treaty of Maastricht mainly focused on the scope of the EC/EU and yet paved the way for the single market and the monetary union, the Amsterdam and Nice IGCs were more about the constitutional character of the Union itself. Fundamental disagreements about the *finalité* of Europe became more and more apparent and caused rows about the reform of the European institutions (Moravcsik and Nicolaidis 1998: 14). The cleavages were not simply that of intergovernmentalists versus supranationalists, or pro-integrationists and “Eurosceptics”, but also between small, medium-sized, and large member states. This became most obvious at the Nice IGC: The negotiations could only be resolved after the “night of long knives” and have led to a compromise that clearly represents the lowest common denominator on institutional questions. Thus, each IGC produced *left-overs* on institutional issues – unresolved problems whose solution was postponed to the next IGC, so that the revised treaties already comprised provisions for their own revision.

The lack of transparency, the hostile bargaining style as well as the overwhelmingly as disappointing considered result of the Nice Treaty led to calls for a more efficient and transparent form of treaty negotiations. The annexed declaration No. 23 about the Future of the European Union listed four crucial *left-overs* that should be subject of a reform process, the Post-Nice-Process: The delimitation of competences, the status of the Charter of Fundamental Rights, the simplification of the treaties, and the role of National Parliaments. The reform process was structured in three consecutive parts: these issues should be discussed in a broad debate; a forum was foreseen in order to structure the debate and to translate the results in opinions; in consideration of these results, an IGC should finally negotiate a new treaty. At the Laeken summit in December 2001, the Heads of State and Government agreed on convening the “Convention on the Future of Europe” as a forum preparing the 2004 IGC (European Council

¹ The formal revision procedure rests upon Article 48 TEU.

2001a).² The adopted Laeken declaration set out the institutional provisions and the mandate of the Convention. It was composed of four main components: representatives of the national parliaments, the EP, representatives of the member states, and the European Commission.³ The agenda took the form of a questionnaire that was subdivided into four themes: the division and definition of competences between the Community and its Member States; the simplification of the Union's instruments; democracy, transparency and efficiency in the EU; questions regarding a constitution for the Union.

The result of the Convention should be either a catalogue of different opinions, among which the IGC could pick some solutions, or a single proposal. In his introductory speech the Chairman Giscard d'Estaing pointed out that the Convention – if it was to be taken seriously – should elaborate a single text, leaving no single question unresolved. The Convention therefore adopted an “as if”-approach: the proposal should be formulated in a manner, as if it enters into force immediately. Thus, it assumed the same task as an IGC,⁴ being fully aware of the fact that “in the eyes of the public, our recommendation would carry considerable weight and authority if we could manage to achieve broad consensus on a single proposal which we could all present” (Giscard D'Estaing [26.02.2002]). The IGC was expected to have more difficulties to change the single text when starting from an already agreed-upon status quo and not from scratch.⁵ So the shadow of the IGC forced the Convention – if it was to be taken seriously – to arrive at an agreement. Those institutions with no formal veto power and preferring a change in the status quo, i.e. the Nice treaty, were particularly eager to reach a single text by broad consensus so that it would not be untied again. Furthermore, the method as such and therefore the possibility of the European institutions to gain more influence in the formal treaty revision procedure was at stake (Duff 2003).

The Convention's work was sequenced in three consecutive stages: the listening stage (*Phase d'Écoute*), the study stage (*Phase d'Étude*), the proposal stage (*Phase de Réflexion*). The first stage was supposed to contribute to a thorough examination of all visions on the purpose of the

² The Convention method had already proved successful in elaborating the Charter of Fundamental Rights. The European Parliament and the Belgian presidency strongly supported the idea of a Convention as the IGC's preparatory body (see also Duff 2003 and Magnette and Nicolaidis 2004).

³ The Convention comprised 105 members plus their alternates plus the three presidents. A Praesidium was meant to serve as a steering group. It was chaired by the president Giscard d'Estaing and his two vice presidents Amato and Dehaene and represented, albeit very unbalanced, each of the four components. The Convention secretariat supported its work. For a more detailed description of the Convention's work see Maurer and Göler 2004.

⁴ For an overlook and analysis of the Reform of the Treaty Revision Procedures see Hoffmann and Vergés-Bausili (2004).

⁵ This effect can be modelled by a rational-choice approach: Derek Beach (2004a) argues that the IGC didn't start from scratch but had to consider the Convention's proposal as the status quo (SQ). When voting is unanimity, as it is in the IGC, and when some parties prefer the SQ, as e.g. in the case Belgium and Germany, it is difficult to move away from the SQ. This is only possible when member states can credibly threaten to veto the whole project. Yet, one has to take into account that under the condition of consensus the perception of the single text (and not e.g. the Treaty of Nice) as the status quo is a social construction and therefore dependent on intersubjective agreement.

European Union. This open exchange of ideas took mainly place in the Plenum and showed the range of conceptions about European integration. The transition to the succeeding stage started with the setting up of a first wave of Working Groups in June and was completed with the presentation of the “Skeleton” by Giscard. This framework treaty already represented a broad consensus about the structure of the treaty and served as the point of reference for the study stage. During this stage eleven Working Groups were established aiming at attaining common proposals to “flesh out the Skeleton”. The last stage began in February 2003. Here, the Conventioneers proposed amendments for the articles presented by the Praesidium. However, the mandates of the Working Groups did not comprise institutional questions. For these issues the Praesidium chose a different negotiation setting. The discussions mainly took place in the Praesidium itself and were only subject to a few plenary debates. A first single text was presented in June 2003. But institutional questions had not been settled yet. On request of the president, the European Council postponed the deadline for one month. On 18 July 2003, the Convention’s chairman presented a single text to the European Council – the “Draft treaty establishing a Constitution for Europe“ (European Convention [18.07.2003]).⁶

Although especially institutional questions did not wholly survive the following IGC, the substance of this proposal is nevertheless surprising.⁷ For the first time in the semi-permanent institutional reform process, the negotiations did not produce any *left-over*.⁸ Not only could the four Post-Nice topics be settled. Moreover, the Convention exceeded the given mandate, dealt with a wide range of other topics and reorganized the whole primary law of the EU. In fact, the Treaty of Nice was renegotiated even before it had entered into force. Compared to the status quo, the single proposal can in most parts be considered as a substantial progress, representing a result well beyond the lowest common denominator. Worthy of mention are e.g. the double majority, the single legal personality, the merging of the pillar structure and the treaties, the generalization of the co-decision procedure, and the incorporation of the Charter of Fundamental Rights into the treaties. Topics, the representatives of the member states had so far not been able to settle in an IGC. These agreements were reached while leaving the question of the very *finalité* untouched – what becomes apparent in the amazing EU-speak neologism “Constitutional Treaty”.

⁶ Some topics, especially those concerning the vertical and horizontal power distribution, did not survive the following IGC. Above all, the introduced double majority was vehemently rejected by the uncommon coalition of Poland and Spain. These quarrels led among other things to the collapse of the Rome summit in December 2003. Only after the change of government in Spain and due to the skilful intermediation of the Irish presidency, this contested issue could be resolved. In June 2004 the Heads of State and Government adopted the agreed on the Constitutional Treaty.

⁷ See Norman 2003: 4.

⁸ See Giscard D’Estaing (18.07.2003): “The draft is a success because it is a finished product, with no loose end to be tied up, no options left open.”

Puzzle and Research Question

According to Liberal Intergovernmentalism, which rests on the assumption of the analytical priority of state preferences and tries to explain issue-specific transfers of sovereignty, final results of intergovernmental bargains tend towards, but not quite at, the lowest common denominator. Agreements beyond the lowest common denominator can be achieved by issue-linkages resulting in package-deals, and threats and incentives of exclusion or unilateral approaches (Moravcsik 1998). The modest outcomes of the Amsterdam and the Nice IGCs are then attributed to the diverging preferences of Member States and the absence of a clear focus of the negotiations, which resulted in a lack of clear positive-sum gains (Moravcsik and Nicolaïdis 1998: 14). But given the lack of a clear focus and the broadening of the range of intensities and nature of preferences through the inclusion of new actors, it seems not only puzzling that the European Convention managed to adopt a single text. What is more, why is the end-result of the following IGC, as compared to the Treaty of Nice, so well beyond the lowest common denominator? We assume that the institutional setting of the Convention had a considerable impact on arriving at an agreement in that it provided preferable conditions for the effectiveness of arguing, “conditions under which arguing leads to changes in actor’s persuasions and, thus, influences the process and the outcome of negotiations” (Risse and Ulbert forthcoming: 1).

While most analysts consider the attainment of the Proposal as puzzling, there are different assessments on whether this surprise can be ascribed to the Convention method as such. In a very instructive article, Paul Maignette and Kalypso Nicolaïdis attribute some achievements of the single text to deliberation. But deliberative dynamics only played a role on marginal constitutional issues concerning simplification, where the initial preferences of the Conventioneers “that mattered” were less intense and the agreements had less predictable consequences. But when it came to the crucial issues, the hands of the member states’ representatives were strengthened and the pendulum “moved back to classic forms of diplomatic bargaining” (Maignette and Nicolaïdis 2004: 394). The “shadow of the IGC” hence led to the dominance of state representatives, so that “the Convention reproduced, by extension, the logic of intergovernmental bargains” (Ibid: 381). The results are therefore mainly explained by the initial distribution and intensity of preferences as well as by the non-obligatory status of the Convention’s proposal. So “despite the originality of its composition and procedures, the European Convention did not substantially differ from previous rounds of treaty reform in the EU, except in areas marked by a high level of formalism that could be fitted under the rubric of simplification” (Ibid: 399). Besides, Andreas Maurer and Daniel Göler regard the inclusion of the new actors as an essential innovation of the Convention method. But this crucial innovation only came to play on “Convention-suitable” topics (Maurer and Göler 2004: 22). The

dominance of state representatives in the last Convention phase automatically constrained the role and influence of the new actors on the debate and this key position of state representatives favoured the dominance of IGC-like bargaining (Ibid: 19). From a more normative point of view, it is also claimed that by the inclusion of parliamentarians and the openness of the debates, the Convention method constituted a forum that can be considered as more representative and legitimate because it deviates from pure intergovernmental bargaining (Maurer 2003a, b). The Convention is even seen as an alternative to IGCs and as a qualitative change in the constitutionalisation of the EU (Pollack and Slominski 2004: 218).

These judgements implicitly or explicitly rest upon an Elsterian notion of Deliberation that assumes bargaining as being ontologically prior to arguing (see for a discussion Saretzki 1996: 24; Neyer and Everson 2004). Actors are perceived as acting according to the logic of expected consequences (March and Olsen 1998). Arguing as a form of communication, as speech acts, takes place due to external factors such as publicity (e.g. through the participation of new actors or public debates), that force actors to justify their arguments and align them to constraints like the demand for imperfection of interests, consistency in reasoning and plausibility of the arguments used (Elster 1998b: 104). Through these assumptions researchers might fall into the trap of overemphasizing the effect of the above mentioned aspects and ignoring alternative explanations related to the institutional setting. Firstly, the prevalence of state representatives, i.e. the intergovernmentalisation of the Convention, must not be mixed-up with the notion of bargaining. The dominance of state representatives tells us little about the speech acts or even the effects of the communicative mode on the outcome. In these studies the intergovernmentalisation is implicitly equated with the logic of bargaining, in that the dominance of state representatives is seen as an indicator for the negotiation style and the logic of action (see esp. Maurer and Göler 2004). But not only is there empirical evidence that arguing does also play a role in multilateral settings (see e.g. Checkel 2001a). Moreover, the logic of negotiations might also be altered by other variables than the inclusion of new actors and the cruciality of the issues at stake. But such variables (like “constitutional ethos” and “role in history”. See Magnette and Nicolaïdis 2004) maintain underspecified and are only introduced in an ad-hoc manner. Secondly, the cruciality or the “Convention-suitability” of an issue is not easy to predict. Magnette and Nicolaïdis define crucial issues as issue-areas where preferences are intense and consequences are predictable. But the fact that something is perceived as crucial might be a social construction, and the definite ascription of the intensity of preferences and especially the predictability of possible consequences is only possible in an ex-post analysis. Without the careful analysis of preferences the definition runs the risk of becoming a tautology.

What the studies illustrate is that the Convention's achievements can not solely be attributed to pure bargaining, but must also be considered as the result of processes of arguing. They are underpinned with anecdotes and examples of success and failure of the Convention method. However, a systematic analysis is still lacking. And against the background of experiences with negotiations in the IGC, some achievements of the European Convention lead to the educated guess that the institutional setting of the Convention has had a considerable impact on arriving at an agreement. The question then arises, which structural features of the Convention have led to the prevalence of arguments. **Under what circumstances did arguing in the European Convention become effective?**

This research question is relevant in practical and in theoretical regards. Arguing is one important steering mode in European Governance. It is often argued that agreements on the basis of a reasoned consensus are perceived as more legitimate (see e.g. the assessments in Closa and Fossum 2004) and hence lead to a higher degree of effectiveness and compliance (Neyer 2004). An analysis of the causal mechanisms of persuasion can thus lead to practical recommendations for the usefulness of this steering mode in general, and for the design of succeeding treaty negotiations in particular. Especially as the Convention method is now laid down as the standard preparatory procedure for treaty negotiations in the European Union. With regard to theoretical aspects, the research question is related to a debate in International Relations about the role of material and ideational factors and the emergence of norms in international politics. Especially it ties up to studies that try to trace the causal mechanisms of arguing and bargaining in multilateral negotiations (see Müller 1994, Risse 2000, Checkel 2001c, Ulbert et al. 2004, Risse and Ulbert forthcoming). These studies try to integrate elements of social interaction and agency in the constructivist research program (see Checkel 2001b; for a critique see Moravcsik 2001a, b).

Arguing and Persuasion in the European Convention

*What is Arguing, what is Bargaining?*⁹

Pure arguing as a communicative mode (Saretzki 1996: 32) can be analytically distinguished from pure bargaining in modal, procedural and structural aspects. In respect to modal terms, arguing is characterized by the use of empirical and normative validity claims in contrast to pragmatic demands and threats. In procedural respect, processes of arguing can not be sequential but are reflexive, in that actors' arguments and reasoning refer to prior statements and arguments. The validity claims, on that the arguments are based, are assessed upon specific criteria, which have to be commonly comprehensible. Validity claims thus refer to some external authority and are – in structural respect – triadic in nature. On that basis *we define arguing and persuasion as non-manipulative reason-giving in order to alter actors' choices and preferences irrespective of their consideration of other actors' strategies* (see Keohane 2001: 10). Defined that way, it is not presumed that arguing is more effective than bargaining or even naturally efficient and, thus, automatically leads to a reasoned consensus. But it is presumed that this communicative mode rather leads to a reasoned consensus than to a compromise without a change in the actor's preferences, because actors are submitted to the better argument and may change their preferences accordingly. We will know a consensus when the result is a) surprising, b) beyond the lowest common denominator, and c) when actors give the same reasons for its achievement (Risse 2004: 302).

However, first empirical studies have shown that although it is possible to analytically distinguish the speech acts, they usually go together in reality. Moreover, it is empirically impossible to ascertain the strategic orientation of the actor engaged in arguing and bargaining. The simple occurrence of arguments tells us little about the influence of these arguments on the process and the outcome of the negotiations, nor about the strategic orientation of the actors. But what has become clear is that under specific circumstances the social and institutional context can have such an influence and actually affects the process and outcome of the negotiations. In this project we therefore ask for the *effectiveness* of arguing as special types of speech acts.

⁹ The next two paragraphs are mainly based on the results of a research project on "Arguing and Bargaining in Multilateral Negotiations". See Ulbert et al. 2004.

Arguing and Persuasion in Multilateral Negotiations

The literature on arguing and persuasion in multilateral negotiations already suggests variables on the effectiveness of arguing and accordingly the role of the social and institutional context. Fortunately, the European Union has now provided a “real life-experiment” in form of the European Convention. This Convention shows remarkable differences in the institutional settings compared to IGCs, which allows us to systematically vary institutional features with respect to their role in enhancing the effectiveness of arguing. We will first introduce uncertainty as the actor-specific prerequisite for persuasion. We then turn to the process of negotiations and present the resonance of an argument and the credibility of a speaker as important intervening variables. Finally, we will discuss how the institutional settings as context variables affect the quality and degree of the discussed variables, thereby having an impact on process and outcome of the negotiations. Nevertheless, we are not able to trace back all the suggested hypotheses. So, we concentrate on compiling an analytical model whose plausibility we intend to probe.

Prerequisite for Persuasion: Uncertainty about Preferences

Much of the rationalist literature is based upon the assumption of fixed preferences in strategic interaction. Weak rationalists, however, acknowledge constraints on the information-processing capacities of actors. They are bounded rational regarding their analytical skills to ascertain empirical facts and other actor’s preferences. This can result in uncertainty about the own preferences over outcomes and strategies, and, thus, the preferable solution to a complex situation.¹⁰ The uncertainty about one’s own preferences can induce an interest in engaging in discussions on the facts and the preferences of other actors (Keck 1995: 28). Of course, this might not go beyond the simple exchange of information (Morrow 1994) and still, these factors tell us little about the effectiveness of arguing and persuasion (Risse-Kappen 1995: 179). But it is important to point out that uncertainty is not a matter of course. It is heavily dependent on the context of the negotiations, which can provide a forum for the exchange of information (Keohane 1989: 117-121) with low and even negligible transaction costs (Moravcsik 1998: 66), and shared interpretations for meaningful messages. Thus, it might be possible to artificially vary this aspect by changing the negotiation setting.

¹⁰ It has been shown that these aspects play indeed a role in IGCs, and that they may affect the course of integration. See e.g. the historical institutionalist account of European integration in Pierson 1996, or Beach 2004b.

The Processes of Persuasion: Resonance of the Argument and Credibility of the Speaker

The cognitive consistency theory in psychology regards uncertainty as a precondition for the consideration of new arguments, but add that the acceptance of new claims is dependent on the type of the argument used (Chaiken, Wood, and Eagly 1996). Since negotiation parties are probably confronted with diverse and contesting claims, the “conditions under which specific ideas are selected and influence policies while other fall by the wayside” (Risse-Kappen 1994: 187) have to be specified. The constructivist literature shows that arguments that resonate with prior knowledge (Ulbert 1997) and/or commonly held worldviews and already agreed-upon principles and norms (Finnemore and Sikkink 1998), reduce the uncertainty in a problematic situation. This resonance is achieved by drawing analogies to previous situations, framing a problem in a way that it can easily be accommodated with the listeners’ prior normative principles, and by referring to already agreed-upon principles and norms (Ibid).

As case studies confirm, the credibility of a speaker also adds to the reduction of uncertainty and, thus, plays a crucial role for the persuasiveness of arguments (Risse and Ulbert forthcoming: 8).¹¹ The credibility of a speaker can be reflected in its reputation as an honest broker. Neofunctionalists argue that supranational institutions as the Commission possess such a reputation vis-à-vis the member states. They can therefore effectively mediate among them (e.g. Lindberg 1963). Another aspect of credibility is the legitimacy of the speaker. For example, the European Court of Justice (Burley and Mattli 1993; Mattli and Slaughter 1998) or the European Parliament as the only directly and democratically elected institution can be regarded as representing the common good (Haas 1964: 119). Credibility may also stem from competence and technical expertise on complex matters (Lindberg 1963; Finnemore and Sikkink 1998: 899). It is striking that these aspects are not easily assessed in advance and independent from the formal and social context. We will get back to this beneath.

Context Variables: Publicity of the Debate and Institutionalization

As arguing is triadic in structural respect (i.e. validity claims refer to an external authority, which allows assessing the arguments upon specific criteria), we need to turn our attention to the nature of that external authority. According to Jon Elster (1998a, b), a public audience can serve as such an external authority and therefore relate to the triadic structure of arguing. Arguing in a public sphere ensures that actors have to regularly explain and justify their behaviour in line with constraints like the imperfection, consistency and plausibility. The claims

¹¹ For a discussion see Moravcsik 1999.

should only show little match with the alleged common good, i.e. the speaker should show some impartiality. In addition, the arguments should be consistent, in that they follow one line of reasoning. Furthermore, the validity claims must be plausible and have to maintain verification. In short, powerful social norms induce an incentive to act in a way that she is not perceived as selfish, but as impartial and credible (Elster 1998b: 104). Publicity, thus, narrow the range of appropriate validity claims actors may use to underpin their justifications.

In contrast to Elster, Jeffrey Checkel (2001a) argues that negotiations in front of a public audience result in ritualistic rhetoric. The effectiveness of arguing is more likely behind closed doors and in-camera settings as actors risk to expose their interests or even identities. These claims differ with regard to the logic of action, the intensity of underlying preferences and the assumed audience. Elster starts from the assumptions of a logic of consequentialism and refers to an impartial and in a way coherent audience – i.e. an external authority. Deliberation in front of this audience may affect the way a proposal is made, or even the substance of the proposal. But he would not expect changes in fixed fundamental preferences. In contrast, Checkel starts from a logic of appropriateness (Checkel 2001a: 52). When he refers to changes in identities and intense fundamental interests, the audience he has in mind is the attentive constituency (Checkel 2001a: 54, Checkel 2001b: 222). Then, however, the role of the domestic audience as an external authority is vanished. It is already agreed-upon norms that assume the role of the external authority and, thus, define what has to be regarded as an appropriate speech act. So both claims are not self-excluding but heavily dependent on the certainty of preferences and the required consent of the listening audience they refer to. On that basis we can assume an audience to serve as an external authority when its consent is required and the actors therefore have to address it. It might add to the effectiveness of arguing when the actor's preferences are less fixed.

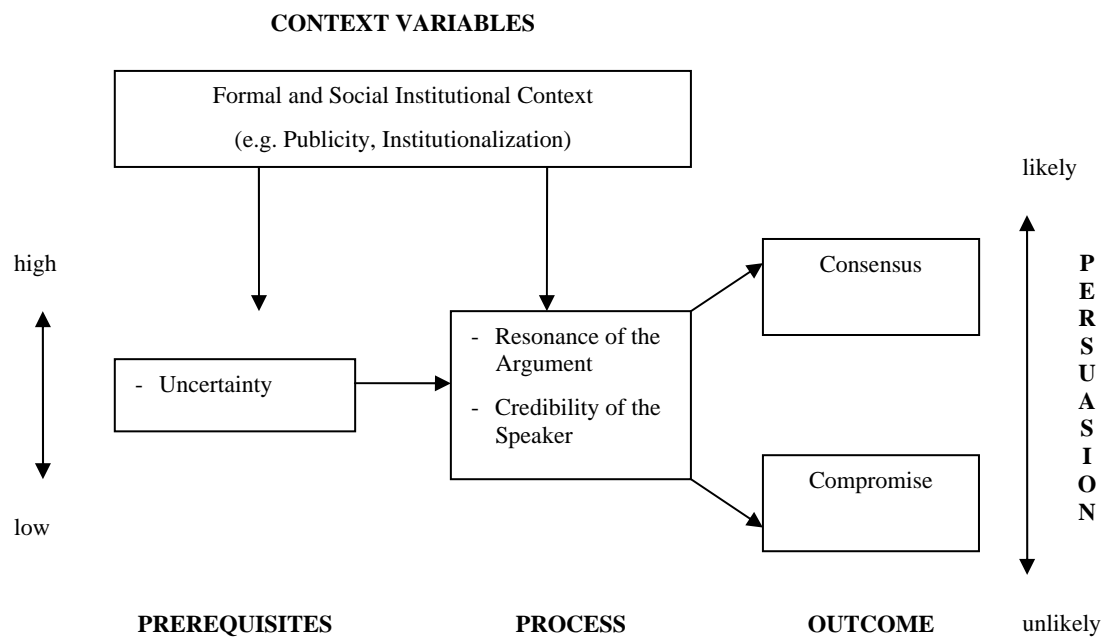
So, the triadic structure of arguing defines what has to be regarded as an appropriate validity claim and, thus, circumscribes the discourse. But the external authority, which the speakers address, need not be an audience whose consent is required. As indicated above, the triadic structure of arguing is also based on the institutionalization, i.e. the density¹² and substance of predefined principles, norms, rules and procedures, e.g. previously negotiated treaties. As said, the above introduced intervening variables, resonance and credibility, are not easily assessed in advance. They are not essential but relational, in that they all point to the process and the triadic

¹² This reflects what Habermas calls a “common lifeworld”. A common lifeworld is a collective interpretation about the world and of themselves, as provided by language, a common history, or culture. It can consist of a shared culture, a common system of norms and rules perceived as legitimate, and the social identity of actors being capable of communicating and acting (see Habermas 1981:2:209). It might at least be the common membership in the same body. For the possibility of a common lifeworld in international relations see Risse (2000: 12-14).

structure of arguing. The resonance of an argument with prior knowledge, commonly held worldviews and already agreed-upon principles and norms varies with the social context the negotiations are conducted in. The credibility of a speaker is also affected by commonly held views of legitimacy and impartiality. Furthermore, the expertise on a complex issue is dependent on the definition of the situation and therefore the kind of expertise needed (Müller 1995: 376). Hence, an alteration of negotiation context could lead to a disproportionate empowerment of materially weak actors (Risse 2000: 33).

In sum, the effectiveness of arguing is dependent on prerequisites and process variables. However, the substance and degree of these variables varies with the formal and social negotiation context. This is illustrated in the following figure.

Figure 1: The Process of Persuasion



The Institutional Settings: Intergovernmental Conferences and the Settings in the European Convention

As shown, the literature on arguing and bargaining in multilateral negotiations already offers us hypotheses about the effectiveness of arguing and the role of the social and institutional context. The “real life-experiment” shows remarkable differences in the institutional setting. Moreover, the Convention itself has used different negotiation settings for different types of issues. We can therefore vary the institutional setting within the Convention in comparing the negotiations in the Working Groups and the Plenary with the top-down approach of the Praesidium on institutional issues.

The most obvious differences between the negotiation settings in the Convention and the IGC are the participating actors, the decision-making procedure, the publicity, and the sequencing of the negotiations. Firstly, IGCs comprise representatives of the member states with binding instructions. They enter negotiations with more or less fixed preferences. In contrast, the Convention included new actors of which the vast majority of the Conventioneers were parliamentarians, i.e. democratically elected members of the EP, MPs of parties in government as well as MPs of the opposition. Their preferences were not easy to predict as they were neither constrained by binding decision of their sending institutions, nor by strict working methods. In addition to that, many of these new actors came from the accession candidate countries and were not familiar with European politics. Hence, the distribution, the intensity, and the nature of represented preferences are broader and therefore more ambiguous in the Convention than in an IGC.

Secondly, the decision-making procedure in the Convention was consensus and not unanimity. However, the meaning of “consensus” was never defined, and deliberately so. Only with regard to institutional issues and only in the Praesidium, decisions were taken by majority vote on proposal-packages. Nevertheless, these decisions were all subject to the plenary consensus.

Thirdly, negotiations in IGCs take place behind closed doors. Documents are regularly exchanged between the negotiation parties, but are normally not accessible to the public. In contrast, the access to all negotiations and documents was considered as a crucial innovation and the standard of the Convention. However, the Praesidium did not meet in public but behind closed doors and it did not produce any verbatim protocols. Nevertheless, every single component was represented by at least one actor, and this Conventioneer was meant to serve as a transmission belt into the components. Hence, whereas an IGC is a highly exclusive negotiation setting for which publicity must be considered as the exception, the public character of the debates in the Convention and in its Praesidium, albeit in different degrees, must be seen as all pervasive.

Fourthly, the negotiations in the Convention were deliberately sequenced in three phases with different purposes: the listening stage (Phase d'Écoute), the study stage (Phase d'Étude), and the proposal stage (Phase de Réflexion). They resemble the stages of a negotiation process: Agenda-setting, problem-definition, negotiating an agreement. Especially the agenda-setting and the problem-definition stages are characterized by open discussions. In the Convention, these stages take place in the same institutional setting, with mainly the same actors and with a clear time frame. In contrast, IGCs are neither concerned with agenda-setting, nor that much with problem-definition. They focus especially on the last stage, the negotiation of an agreement.

Arguing and Persuasion in the European Convention

So far, we have both deductively and inductively singled out uncertainty as an important prerequisite, and the resonance of the argument as well as the credibility of the speaker as process variables for effective arguing. As possible context variables regarding the institutional setting, we have identified publicity, institutionalization, the inclusion of new actors, the decision-making mode, and the sequencing of the debate. In the following we will discuss whether the institutional settings allow us for systematically varying the above introduced prerequisites and process variables.

Prerequisites for Persuasion

The uncertainty of an actor and her knowledge can vary with the inclusion of new actors. Compared to IGCs, the new actors in the European Convention broaden the distribution, intensity, and nature of represented preferences. Moreover, these new actors are mainly parliamentarians that are not bound to the preferences of their sending institutions, particularly when one compares them with government representatives in IGCs. This aspect was fostered by placing the Conventioneers in alphabetical order to prevent party or institutional affiliation. It was also possible that their affiliations (MEP, member of a faction, nationality) turn out to be mutually contradictory, thereby leaving the Conventioneer and the other actors uncertain about the own preferences (see also Hoffmann 2002: 7). The unusual and broad distribution of preferences leads to imperfect information about the preferences of other actors. It intensifies the uncertainty of one's own position in relation to that of the other actors and hence the number, nature and probability of possible outcomes.

The decision-making procedure can also add to this aspect. In contrast to IGCs, the Convention did not decide by unanimity, but by consensus. Formal voting in the Plenum was avoided throughout the whole process. In addition, the meaning of consensus, i.e. the amount or type of necessary consenting actors, was never defined. In contrast to IGCs, actors are more uncertain about the weight of their preferences and their position in relation to that of other actors. Majority voting, as used in the Praesidium strategy on institutional issues, can have a similar effect. Here, the uncertainty was enhanced by the majority voting on packages, and not on single questions. The decision-making procedure can have two further effects on the negotiation process: Firstly, under the condition of consensus, outlier positions as well as the threat of putting a veto with a view to be compensated in another area (see Moravcsik 1993, 1998) are far less of value. Since outlier positions cannot be used as bargaining chips that are saved until the end of a bargain, the possibility for taking prealable decisions, i.e. decision that are prerequisites for further decisions, is enhanced. Secondly, in order to have the own preferences taken into account, actors must align their preferences to the mainstream and/or build coalitions with other actors. So in order to present the own preferences, the actor is forced to align to or to distance oneself from other preferences.

In sum, the uncertainty aspect can be artificially varied by changing the institutional context. The inclusion of new actors, and in this context also the inclusion of parliamentarians, broadens the distribution of preferences with regard to their nature and intensity. Due to this fact, the actors are more uncertain about their own preferences. This is enhanced by the overlapping identities of the Conventioneers. In addition, the decision-making procedure might also have a considerable on this prerequisite. The decision to abstain from voting and to agree by consensus increases the uncertainty about the weight of my preferences in relation to that of others. Of course, these aspects are necessary, but not sufficient conditions for the effectiveness of arguing. They might just as well bring about bargaining processes that result in compromises or in a breakdown of negotiations. But we assume that they are prerequisites for persuasion, which need to be vitalized in the negotiation process, to which we now will turn now.

The Process of Persuasion

The effectiveness of arguing is dependent on the resonance of an argument and on the credibility of the speaker, because these aspects help reduce the uncertainty of an actor. However, these process variables are not essential, but relational. The formal and social institutional context provides an external authority that defines appropriateness of arguments,

and thereby circumscribes the range of the discourse. Furthermore, it ascribes certain roles to the actors, which affect the credibility of their argumentation.

The publicity of a debate forces actors to act according to the imperfection, consistency and plausibility constraint, which define the appropriateness of arguments in a negotiation. For instance, in his first statement before the Convention, the representative of the German Länder, Erwin Teufel, demanded a catalogue for the delimitation of competences. This statement was perceived as inappropriate for a Convention as it was underpinned with the “wrong” arguments, i.e. with arguments that were not related to a common good and therefore showed imperfection. Especially when the consent of the audience is required, it can serve as an external authority to which the actors must refer. And the imposed constraints might particularly be brought to bear when the actor is uncertain about her own preferences.

The public character of the Convention must be seen as all pervasive. Here, preferences are more uncertain, and the audience whose consent is required is the Plenary. On institutional issues, however, the negotiation setting was altered by the Praesidium’s top-down-approach. The publicity of the debate was reduced by using the Praesidium as the relevant forum for the discussions. Yet, the public character remained as every component was represented in the Praesidium, and the consent of the Plenary was still required. Since the discussed questions concerned the institutional equilibrium of the EU, initial preferences can be assumed as more fixed. However, the uncertainty of preferences was artificially enhanced by voting on proposition packages and not on single questions. In contrast to the settings in the Convention, the preferences in IGCs must be considered as relatively fixed and certain. Moreover, negotiations take place behind closed doors and no audience is required for consent. Here, it is arguable if the institutionalization could serve as an external authority. So whereas the conditions for effective arguing in publicity hold true for the normal negotiations within the Convention, the conditions for effective arguing in in-camera settings might be fulfilled within the IGCs.

H1: The less fixed preferences are and the more the consent of the audience is required, the more effective arguing in public will be.

The triadic structure of arguing can also be enhanced by the institutionalization, i.e. the density of predefined principles, norms, rules and procedures. This aspect can also be described

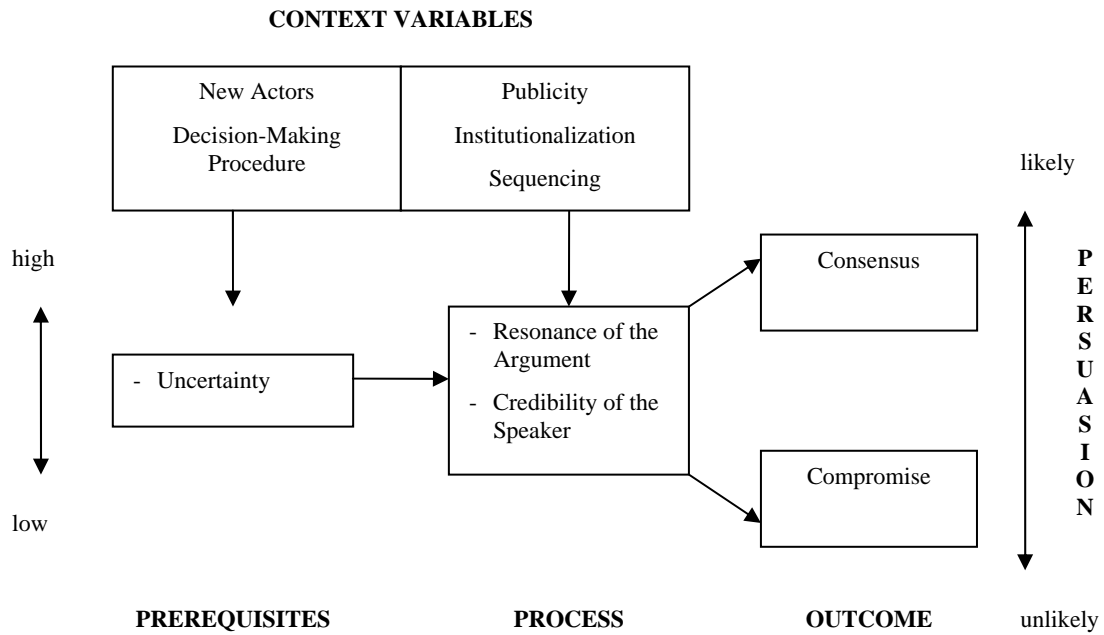
as a “common lifeworld”, which might be a set of already existing treaties, or at least the common membership in the same body. This is the experience of the Convention on the Charter of Fundamental Rights. These Conventioneers report of a “Convention spirit” and their desire for becoming a part of European integration history, what is reflected in the early renaming of the before “body” in the name “Convention”. Also the “European Convention” was first called “Convention on the Future of the European Union”. The Conventioneers renamed it to emphasize its character as a possible standard method of treaty revision. Of course, a common lifeworld might exist or emerge in the Convention as well as in an IGC. But in contrast to an IGC, the Convention’s debates were explicitly sequenced in three consecutive stages. These stages took place in the same institutional setting, with mainly the same actors and with a clear time frame. The Convention had a relatively long listening phase that was later on regarded as indispensable for creating a “Convention spirit”. The sequencing of the debate, i.e. the integration of the agenda-setting and problem-definition stage in the same institutional setting, might also add to the reflexive character of arguing as it offers a forum for the expression and the assessment of justifications. Furthermore, a long listening phase increases the uncertainty of actors, since the agenda is still discussable.

H2: Arguing is more effective in a sequenced negotiation setting.

The type of institutionalization not only points to the triadic nature of arguing. It also affects the credibility of a speaker in ascribing certain roles to them. In IGCs, supranational institutions do not “sit at the table”. Their credibility and hence their influence might stem from their reputation vis-à-vis the member states as honest and legitimate actors or technical experts. Also the presidency and the supporting Council Secretariat might possess such a reputation. In contrast, supranational institutions were negotiation parties in the Convention. Therefore the aspect “honest broker” decreases vis-à-vis the member states. Other roles might come to play. Briefly, a change in the organizational setting jumbles established roles by ascribing new ones to the actors. The institutionalization therefore leads to the disproportionate empowerment of actors in processes of persuasion. In the case of a stalemate, a change in the organizational setting rearranges the ability of specific actors to persuade others of their reasoning.

H3: In case of a stalemate, the redirection of the organizational setting increases the effectiveness of arguing.

Figure 2: Persuasion in the European Convention



Summing up, we assume that processes of persuasion have played a role in achieving the single text. And since the result of the Convention was surprising, in that it reached much more than previous IGCs, we further assume that the institutional setting of the Convention affected the negotiation processes by enhancing the likelihood of persuasion. The state of the art in International Relations provides us hypotheses on the effectiveness of arguing in multilateral negotiations. These hypotheses concern the prerequisites, the process and the condition variables for persuasion. If we compare the institutional settings of the IGC and the European Convention, these aspects show indeed variance. This is reflected in the above developed hypotheses 1 to 3. Yet, these hypotheses have to be brought out of the clouds and made applicable for the empirical analysis.

The dependent variable: Surprising Agreement and Non-Agreement in the European Convention

In order to make a statement about the effectiveness of arguing in the Convention as a special form of treaty negotiation in the European Union, and since we have only a limited amount of cases to construct a forward-looking research design, we start from behind and then trace the mechanisms that fostered an agreement. Our dependent variable on that we will choose our cases is therefore the surprising achievement respectively the non-achievement of an agreement on an issue discussed. A Non-agreement is then a discussed issue, on that the actors only produce options or statements, but not a proposal that is going to be adopted in the final text. We will know an agreement when it was discussed in the Convention and found its way in the final text. It is “surprising” when it has already been discussed in an IGC, but no agreement could then be achieved. We therefore assume arguing to have played a role in achieving this agreement. Moreover, the disproportionate empowerment of weak actors could also be an indicator for effective arguing. In a second step, we have to assess if the agreement is indeed a consensus, or if it is a compromise. Package-deals, side-payments and issue-linkages clearly point to compromises, whereas a consensus can be identified when actors give the same reasons for the achievement of the agreement. However, this need not be related to a process of persuasion. Preferences can also change due to a change in domestic factors for preference formation. In order to control for this alternative explanation, we have to be attentive to changes in governments or party structure. An obvious indication for such changes is the replacement or the resignation of a Conventioneer. It becomes apparent that this can only be achieved by carefully tracing the process and paying attention to alternative explanation (see also Payne 2001). So, in selecting our cases on the dependent variable we have to take into account three important criteria: Firstly, an agreement must be a “surprise”, which means that in contrast to the preceding IGCs the Convention arrived at an agreement. Secondly, this surprising achievement can neither be attributed to a preference change due to a change in government, nor to issue-linkages, package-deals or side-payments. Thirdly, this agreement has survived the following IGC. A Non-agreement is then a discussed issue on that the actors only produce options or statements, but not a proposal that is going to be adopted in the final text.

For a surprising agreement we choose the single legal personality of the EU. The single legal personality has already been subject in the negotiations in Amsterdam and Nice, but no agreement could then be achieved. A legal personality of the Union would allow for the establishment of a chapeau treaty. But a *single* legal personality would eventually lead to the merger of the treaties and therefore the possibility of the compilation of a constitutional treaty. The kind of legal personality is therefore a very crucial issue, because it was decisive for the

task of the convention and a prerequisite for the merging of the treaties and pillars. So we are able to compare the negotiations in an IGC with the negotiations in the Working Group “legal personality” in the Convention and therefore trace causal mechanisms that are peculiar to the Convention. As a non-agreement we select the Common Foreign and Security Policy of the European Union, especially the debate on the introduction of Qualified Majority Voting in the Council. In conjunction with the debate on the dissolution of the pillar structure and the communitarization of the last two intergovernmental policy fields, there appeared to be the possibility to introduce QMV in CFSP. Nevertheless, the Working Group could not agree on proposing this decision-making-procedure to the Convention. This is a case for non-agreement. We will then compare the discussions in the Working Group “External Action” with the discussions in the Working Group “Legal personality”. Finally, we will vary the degree of most of the institutional features of the Convention in order to study the importance of single mechanisms. Therefore we choose on the independent variables and compare the negotiations in the Convention and the IGCs with the special strategy of the Praesidium on institutional issues.

Since we have only a limited amount of cases, the results can hardly be general. We will not be able to explain all the debates in the Convention and every single achievement. But these case studies will allow us to gain important insights about the institutional variables that are conducive to processes of arguing.

Methodology and Data

In order to be attentive for alternative explanations and to avoid an omitted variable bias, the analysis requires careful process-tracing. After having elaborated the indicators for the dependent variable, we will now discuss how to explore the hypotheses in this kind of analysis. With regard to the actor-specific prerequisite, uncertainty, we should assume an actor uncertain when his communicative utterances are rather vague than well determined. It should be possible to explore these aspects by relying on speeches and position papers of the Conventioneers and the representatives in the IGCs. As to the process variable “credibility of the speaker”, we have to study attentively the utterances of the negotiation parties to receive their impression of their colleagues. This impression should change due to the negotiation setting under consideration. Therefore it seems essential to conduct guided interviews. Finally, the resonance of an argument can be traced by paying attention to analogues and frames. If these refer to already agreed-upon norms and principles, the argument is made resonate.

The relevant data can for the most part be found in the documents of the Convention and the IGCs. They have to be cross-checked with newspaper interviews and background reports. Moreover, there is already secondary literature, on the IGCs and more and more on the Convention. However, we have to complement the available empirical data with guided interviews with the negotiation parties and experts.

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