DELIBERATION IN NEGOTIATIONS

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Abstract: Arguments are all pervasive in negotiations; and yet, conventional negotiation theories often treat them as merely epiphenomenal to power and interests. The past decade, however, witnessed a growing interest in theories of deliberation and their application at the international level. This article takes stock of the state of the art. It argues that the "deliberative turn" has forced both rationalist and constructivist scholars to refine their arguments and reconsider their methodology. We argue that the new research frontier for constructivists is in assessing under which circumstances arguments affect negotiating actors' preferences, and subsequently lead to outcomes that are not easily explained in pure bargaining terms.

Keywords: Arguing, Bargaining, Negotiations, European Convention, Intergovernmental Conferences

INTRODUCTION

Arguing, understood as reason-giving, is all pervasive in international politics: Negotiating actors give reasons for their position and demands at almost any time, regardless of whether talks are conducted in public or behind closed doors. Negotiation theories often treat arguments as epiphenomenal to power and interests (see, however, John Odell's contribution to this volume). The past decade, however, witnessed a growing interest in theories of deliberation and their application at the international level. This article takes stock of the state of the art. We argue that the "deliberative turn" has forced both rationalist and constructivist scholars to refine their arguments and reconsider their methodology. We argue that the new research frontier for constructivists is in assessing under which circumstances arguments affect negotiating actors' preferences, and subsequently lead to outcomes that are not easily explained in pure bargaining terms. The article begins with an overview of the debate as it originated in the field of International Relations and has reached EU studies in recent years. We then conceptualize "arguing" as opposed to "bargaining" and develop a set of hypotheses on the conditions under which arguing and reasoning matters in multilateral negotiations including the EU. We conclude with a very brief empirical illustration on how one can operationalize these assumptions which is taken from a larger study on negotiations in the European Convention as compared to Intergovernmental Conferences.[1]

THE DEBATE: WHERE IT STARTED, HOW IT REACHED EU STUDIES, AND WHERE IT IS NOW

Emanating from a controversy in the German quarterly *Zeitschrift für Internationale Beziehungen* (e.g. Keck 1995; Müller 1994; Risse-Kappen 1995; Schneider 1994; Zangl and Zürn 1996), the last decade witnessed an intensive debate on the role of arguing versus bargaining in multilateral negotiations. In the meantime, we have seen a veritable "deliberative turn" in

the study of such negotiations and of international politics in general.[2] Several deficiencies of bargaining theory informed by rational choice triggered the debate: First, arguing in the sense of reason-giving is all pervasive in public as well as private setting, and yet they are often treated as merely epiphenomenal to interests and power. But if they are superfluous for negotiation processes and outcomes, the mere fact that they are nonetheless used with vehemence is in need of explanation. Second, bargaining theories are inherently contradictory: Since problems of collective actions almost always have multiple solutions that entail different distributive consequences for the parties involved, negotiating parties have incentives to misrepresent information about their preferences. Agreements are therefore very difficult to achieve among instrumental actors (see Fearon 1998; Morrow 1994; Müller 2004). Third, multilateral negotiations often yield surprising results, which are not expected on the basis of the interests represented at the bargaining table. They come up with creative rules and norms that suggest that some of them might have changed their preferences endogenously to the negotiations. In other words, negotiations often matter for outcomes, as any negotiation theorist would readily admit (see John Odell's contribution). Focusing on arguing and reason-giving introduces an alternative mode of action and interaction different from bargaining moves based on fixed preferences and the mere exchange of information.

In the meantime, the "deliberative turn" (Neyer 2006) in International Relations has reached EU studies. We can distinguish three different strands of contributions to the study of argumentative discourse in the field of European integration.[3] First, there are various normative contributions to deliberative democracy in the EU (see e.g. Eriksen and Fossum 2000; Eriksen et al. 2004; Sabel and Dorf 2006; Joerges 2000; Neyer 2006). This group of authors is particularly concerned with the democratic or legitimacy deficit of the European Union. They promote institutional designs that enable deliberative discourse in which alternative viewpoints are represented on an equal footing. The proposed institutional solutions resemble

closely those identified by scholars approaching arguing and discourse from a more empirical angle (see below).

A second group of authors approaches arguing and deliberation with an empirical rather than normative focus. Christian Joerges and Jürgen Neyer, for example, have studied the EU's comitology as deliberative bodies (Joerges and Neyer 1997a, b). Their particular focus was on the role of expert knowledge in these bodies devoted to implementing EU decisions. Arne Niemann studied arguing and bargaining with regard to the EU's external trade negotiations (Niemann 2004; Niemann 2006), while Jeffrey Checkel looked at persuasion in the context of compliance with the Council of Europe's human rights provisions (Checkel 2001). Finally, there has been quite some recent work on the EU's constitutional processes, from the negotiations leading up to the single market (Gehring and Kerler 2008) to the Constitutional Convention (Göler 2006; Panke 2006). The contribution of these and other authors consists of specifying scope conditions under which deliberation actually matters in terms of influencing outcomes in EU negotiation settings.

A third type of contributions has approached arguing and reason-giving from a rational choice perspective. Frank Schimmelfennig in particular has advanced the notion of "rhetorical action" in this context (Schimmelfennig 2001, 2003, 2005). In his understanding, rhetoric action means using arguments and reasons for strategic purposes. Schimmelfennig's concept is therefore situated precisely at the intersection of bargaining and arguing. While instrumentally motivated speakers use arguments and justifications to promote their given interests, at least someone in the audience must be open to persuasion so that strategic actors can advance their interests. Schimmelfennig convincingly demonstrated his approach empirically with regard to the EU's and NATO's enlargement decisions.

ARGUING AND PERSUASION: CONCEPTUAL CLARIFICATIONS[4]

When actors deliberate, they try to figure out in a collective communicative process

- whether their assumptions about the world and about cause-effect relationships in the world are correct (the realm of theoretical discourses), or

- whether and which norms of appropriate behaviour can be justified under given circumstances (the realm of practical or moral discourses).

Arguing implies that actors challenge the validity claims inherent in any causal or normative statement and seek a communicative consensus about their understanding of a situation as well as justifications for the principles and norms guiding their action. Argumentative rationality also means that the participants in a discourse are open to be persuaded by the better argument. Power and social hierarchies consequently recede in the background (Habermas 1981; Habermas 1992). Argumentative and deliberative behaviour is as goal-oriented as strategic interactions. The goal, however, is not to pursue one's fixed preferences, but to seek a reasoned consensus (*Verständigung*). Actors' interests, preferences, and the perceptions of the situation are not fixed, but subject to discursive challenges.[5]

Argumentative rationality in this Habermasian sense is based on several ideal-typical pre-conditions. First, argumentative consensus-seeking requires the ability to empathize, i.e., to see things with the eyes of the interaction partner. Second, actors need to share a "common lifeworld" (*gemeinsame Lebenswelt)*, a supply of collective interpretations of the world and of themselves, which provides arguing actors with a repertoire of collective understandings to which they can refer when making truth claims. Third, actors need to recognize each other as equals and need to have equal access to the discourse, which must also be open to other participants and public in nature. In this sense then, relationships of power, force, and coercion are assumed to recede in the background when argumentative consensus is sought.

In structural terms, arguing can be distinguished from bargaining through its triadic nature (Saretzki 1996). Bargaining actors assess the moves in negotiations solely based on

their own utility functions including private information. In contrast, arguing always involves references to a mutually accepted external authority to validate empirical or normative assertions. In international negotiations, such sources of authority (*Berufungsgrundlagen*) can be previously negotiated and agreed-upon treaties, universally held norms, scientific evidence, other forms of consensual knowledge, or an audience that serves as adjudicators of the 'better argument.'

Operationalizing these pre-conditions presents a challenging task. Early empirical studies including the ones mentioned above then juxtaposed "arguing" versus "bargaining" in studying international negotiations. These studies yielded two results. First, arguing and bargaining as modes of interaction do not entirely coincide with communicative modes, and arguing and bargaining speech acts usually go together in reality (Deitelhoff and Müller 2005). As a result, we cannot simply infer from either bargaining or arguing speech acts which logic of action prevails, be it the logic of consequences or the logic of communicative rationality ("arguing"). Second, it is almost impossible to empirically observe actors' motivations with any certainty, and, third, persuasion actually occurs under circumstances in which one could safely assume that none of the actors involved were truth-seeking (for a discussion see Ulbert and Risse 2005). Take a courtroom situation: Irrespective of the motivations of the defense lawyers or the prosecutors, both sides have to engage in legal reasoning and discourse in order to persuade a third party – the judge and/or the jury – that their respective standpoint is correct. This is precisely why very elaborate procedures are in place to insure that judges and juries are open-minded and prepared to be persuaded. Jürgen Habermas concluded from these and other findings that we need to investigate the institutional scope conditions enabling communicative rationality so that arguing actually leads to persuasion.[6]

This led to a reformulation of the research question that originally triggered the debate. If it is impossible to ascertain actors' motivations and to observe persuasion and the effects of arguing directly, and, yet, their importance for negotiation outcomes is staring us in the face,

concentrating on the *scope conditions* for the attainment of reasoned consensus becomes essential: *Which institutional scope conditions are conducive to enable arguing to prevail in multilateral negotiating systems and, thus, to affect both processes and outcomes?* In asking this question, one can set aside the question of the motivation of actors engaged in arguing (Deitelhoff and Müller 2005: 176; Risse 2002: 603). Moreover, the conceptual differences between "arguing" as truth-seeking and "rhetorical action" in Schimmelfennig's sense of using reasons for strategic purposes recede in the background.

OPERATIONALIZING PROCESSES OF PERSUASION: HOW DO WE KNOW IT WHEN WE SEE IT?

Empirical studies hence seek to unveil institutional scope conditions for endogenous preference changes. Empirical studies therefore typically select their cases on the dependent variable, usually a surprising negotiation outcome, and subsequently trace the effect of institutional scope conditions on the process leading to this outcome.

Outcome: Reasoned Consensus

Selecting cases on the dependent variable is difficult for two reasons: First, we need to have some confidence in the fact that the outcome we are studying indeed entails elements of persuasion. Second, in order to make causal inferences about institutional scope conditions, we need to ensure variation on the dependent variable while holding actors' preferences constant. Nicole Deitelhoff, for instance, studied processes of persuasion using the example of the negotiations leading to the establishment of the International Criminal Court (Deitelhoff 2006, 2008). By identifying and operationalizing various rationalist theories of institutional negotiation and design, she assessed the counterfactual at each turning point in the negotiation process by controlling for these alternative explanations. The present authors study processes

of persuasion at a natural experiment, the European Convention. To the surprise of everybody involved, this particular negotiation setting resulted in an outcome that broke the deadlock on many contentious issues only a few months after the previous Intergovernmental Conference (IGC) had come up with a very unsatisfying outcome. The Convention *inter alia* comprised the same actors (member states) as the IGC, on the one hand, but altered exactly those institutional scope conditions that are generally regarded as conducive to arguing (see below), on the other hand. It thus constituted an ideal laboratory for studying processes of persuasion while at the same time holding actors' preferences constant.

More generally, we can discriminate between traces of arguing and bargaining in negotiation outcomes, because effective arguing leads to a reasoned consensus, which is in many ways distinguishable from the compromises that typically result from processes of pure bargaining.[7] An outcome that is generally regarded as surprising, because it was not expected on the basis of represented preferences, initially suggests that actors might have engaged in arguing. In addition, if actors give the same reason for such an achievement, this leads to suggest that some actors indeed changed their preferences endogenously to the negotiation. What is more, since actors bargaining under a long shadow of the future and, thus, higher uncertainty about distributive effects have incentives to bargain even harder and delay an agreement (Fearon 1998), a surprisingly early agreement furthermore hints to the effectiveness of arguing. Finally, a disproportionately strong influence of weak actors also suggests a reasoned consensus, since asymmetric power should matter less for negotiation outcomes in processes of arguing than in pure bargaining.

Operationalization of "reasoned consensus":

- actors give same reasons for its achievement

- agreement is surprising, often "problem-solving" character above the lowest common denominator

- early agreement

- influence of "weak" actors

Propositions on Institutional Settings Conducive to Arguing

A correlation between various institutional scope conditions and a particular negotiation outcome does not yet allow us to clearly identify the causal mechanism leading to a reasoned consensus. Studies on arguing and persuasion in multilateral negotiations have therefore identified several factors possibly contributing to the prevalence of arguing in negotiations (see Ulbert and Risse 2005; Deitelhoff 2006), and explored the way they affect the negotiation process. Let us consider each in turn.

Different types of *uncertainty* can be expected to be conducive to effective arguing. First, actors may lack information about cause-effect relationships that determine possible ways and consequences of cooperation (Koremenos et al. 2001). Second, in situations where different roles apply, actors may be uncertain about their appropriate behavior in an ill-defined situation. While uncertainty about future states of the world is first and foremost a property of the issue-area and should vary accordingly, uncertainty about one's appropriate behavior can be expected to vary with the negotiation setting and with its composition, in particular. When institutional identities of negotiators overlap, actors become uncertain about their appropriate behavior. As a consequence, their counterparts can never be sure about their negotiating partners' preferences. This should induce arguing. Take the EU's comitology, for example: These committees are usually composed of member states' representatives who, at

the same time, are experts in the matters at stake. As a result, the institutional setting intro-duces uncertainty about the role identities of the actors as a result of which speakers cannot take the interests of their audience for granted. Inconsistency in statements, for instance, and actors identifying themselves with different constituencies are observable implications of this process.

Proposition 1: Institutional settings that favour overlapping role identities are likely to in-crease uncertainty about appropriate behaviour and other actors' preferences and, thus, the likelihood that arguing prevails.

A second institutional scope condition concerns the *degree of publicity* of negotiations. According to Jon Elster, arguing in front of an audience has to be in line with constraints like imperfection, consistency and plausibility. In other words, powerful social norms on proce-dural democracy are constraining in that actors are, first, forced to act in a way that she is not perceived as selfish, but as impartial and credible. Second, in order to remain credible, speak-ers have to follow a coherent line of reasoning. Third, and related, their validity claims have to be plausible and maintain verification. Coherent justifications for demands hint to the effect of this norm. It moreover varies with the institutional setting: The less certain speakers are about the preferences of their audiences, for instance, because it is very heterogeneous, the more we would expect these norms affect their derived preferences (Elster 1998). Further, these constraining effects should increase the more the consent of the audience is required.

Proposition 2: A transparent negotiation setting is conducive to persuasion, the more actors are uncertain about the preferences of their audiences whose consent is required.

In contrast to Elster, Jeffrey Checkel argues that negotiations in front of a public audi-ence result in ritualistic rhetoric, and that deliberation behind closed doors is more conducive

to preference changes. Both claims are not self-excluding, but heavily dependent on the kind of audience and its required consent. Elster refers to procedural norms of an otherwise neutral audience, whereas Checkel (2001: 54; : 222) alludes to attentive domestic audiences that expect its negotiators to pursue national interests. Once speakers know the preferences of their audience whose consent is required, they do not need to argue, but can employ rhetorical devices to sway their audience. Under these conditions (of a principal-agent relationship), secrecy and negotiating behind closed doors might be the only way toward problem-solving, since it enables speakers to argue "out of the box" and to work toward a reasoned consensus without having to fear that some principal in the audience might accuse her of "betraying the national interest." A typical example for such an institutional setting in the EU is COREPER, the Committee of Permanent Representatives (Lewis 2005; see also Jeffrey Lewis' contribution in this volume).

Proposition 3: Negotiations "behind closed doors" are conducive to persuasion, the more actors know the preferences of their audiences whose consent is required.

A final way in which the institutional setting can influence whether arguing is effective concerns the degree to which it privileges the emergence of "honest brokers." Honest brokers, who are considered trustworthy by the opposing sides and who can acquire authority to suggest innovative solutions, can shift negotiations toward a problem-solving mode (see Young 1991 for an early argument on this point). Actors referring to the broker's proposals suggest the effectiveness of this process. The crucial point here is that trustworthiness and authority are not only a matter of individual personality solely; they are the result of a specific institutional context that privileges and legitimates negotiating authority and leadership. Take the EU's comitology, once again: Its rules of procedure privilege expertise and, thus, arguments based on knowledge rather than interest. At least, speakers have to frame their interests

in a way consistent with recognized and consensual knowledge (on the role of knowledge in negotiations see Haas 1990).

The above discussion suggests that there are at least two ways in which institutional settings may privilege leadership and authority:

Proposition 4a: The more the institutional norms and procedures privilege authority based on expertise and/or moral competence, the more arguing is likely to lead to persuasion.

Proposition 4b: The more institutional norms and procedures require neutral chairs of negotiations in centralized settings, the more leadership is conducive to the prevalence of arguing.

A PLAUSIBILITY PROBE: EUROPEAN TREATY REVISIONS

As argued above, the EU provided us with a natural experiment. After a decade of onerous and disappointing negotiations in a series of Intergovernmental Conferences (IGC), the Heads of State and Governments decided to conduct negotiations in a new setting: the European Convention. Even though government representatives were present in both settings, and could have always vetoed the final outcome, the Convention did in many regards achieve a surprising outcome, which broke the deadlock on many issues where preferences were originally regarded intense and stable. Importantly, the Convention varied exactly those factors that proponents of arguing have suggested being particularly conducive to its effectiveness: It encompassed a larger number and a greater variety of actors (with implications for uncertainty and the emergence of leadership), and it was far more transparent than negotiations in IGCs. In other words, comparing the IGCs with the Constitutional Convention allows us to vary exactly those institutional scope conditions under investigation here while keeping many other factors constant. No wonder that there is now a rich literature on the differences between IGCs

and the Convention and how they affected outcomes (see e.g. Göler 2006; Magnette and Nicolaides 2004; König and Slapin 2006; Risse and Kleine 2007).

A Specific Puzzle

In the following we focus on the differences between the Convention and IGCs by comparing negotiations on the Single Legal Personality of the European Union. The question of merging the legal personalities of the different European Communities into one single entity based on one single treaty had occupied European decision-makers since the IGC on Political Union in 1991-92. As the question of single legal personality was intrinsically tied to the issue of treaty simplification, it generally caused controversies on multiple dimensions: Apart from the possible legal effects of such a merger, and concerns about ratification problems, it further broached the age-old question of the European Union's constitutional nature. The main conflicts emerged between integrationist countries arguing for a unified approach, and intergovernmentalist countries preferring to keep entities and treaties clearly separated. While this question had unsuccessfully been dealt with at the 1996-97 Amsterdam IGC and had been deliberately excluded from the negotiations at the 2000 Nice IGC, it was the very first issue the Convention agreed on in late 2002. To the great surprise of the parties involved, the Convention's Working Groups on Legal Personality recommended merging the legal personalities and subsequently agreed on a far-reaching simplification where the treaties and the "pillars" would be collapsed into one single framework of the European Union.

In other words, IGC and Convention resulted in two very different outcomes despite the fact that preferences had remained stable. While the IGC agreed on a lowest common denominator outcome that basically left the status quo unchanged, the Convention's agreement on single legal personality features all signs of a reasoned consensus: participants gave the same reasons for the decision, the agreement was obtained early in the negotiation

process, and it was surprising as exogenous preference changes do not seem to provide a satisfactory explanation for these diverse outcomes.

The 1996-97 IGC and the Treaty of Amsterdam: No Agreement

Simplification of the EU's complicated treaty structure including the question of a single legal personality had been on the IGC's agendas for quite some time. In 1996, the Heads of State and Government asked the IGC "to consider whether it would be possible to simplify and consolidate the Treaties" (European Council 29 March 1996). The debate then focused on the implications of a (single) legal personality for the EU's capacity for external action. In a report to the IGC, the Council General Secretariat tried to alleviate those fears and explicitly advocated a merger of the treaties. It argued that although the EU was not explicitly conferred legal personality, it had already developed various procedures as to circumvent this obstacle, and therefore gained a *de facto* legal personality alongside the EC (SN 3554/96; CONF 3876/96, CONF 3871/96). Yet, the British government and France feared unintended legal consequences for the "pillar structure". The Secretariat's legal advisor tried to remove those doubts and argued that a single legal personality would have no consequences for the distribution of competences (Non-Paper Piris, 16 October). However, France and Great Britain showed no signs of giving up their objections.

The issue of legal personality resurfaced in February 1997 when the Secretariat proposed an article on external action that endowed the EU with a single personality (CONF 3829/97). This proposal as well as another attempt by the Dutch Presidency was immediately rejected by the UK and Denmark (Interview with Jean-Paul Jacqué, 25 January 2006). A far-reaching simplification on the basis of a single legal personality thus seemed to be out of reach. Arguments on part of the "friends of the presidency" that sought to remove doubts about unintended legal consequences from a single legal personality were dismissed, and pro-

posals for facilitation of ratification rejected. But the French and British (and Danish) opposition remained insurmountable. In the end, the IGC agreed on the least ambitious simplification option: The Treaty of Amsterdam deleted a number of obsolete provisions and renumbered the articles, but the issue of legal personality was left unchanged.

In sum, the negotiations on legal personality in the context of the Amsterdam IGC were subject to processes of bargaining. Preferences were not uncertain, but clear and rigid (*Proposition 1*). Negotiating parties were unmistakably divided in two camps: Belgium, backed by a majority of Member States, was the main spokesperson for the advocates of a merger of the entities, while the UK, backed by France, and Denmark, opposed the conferral of a single legal personality to the EU. Their argumentation was not constrained by procedural norms as suggested in the proposition on transparency (*Proposition 2*) as this camp of opponents advanced several lines of reasoning at the same time. All efforts by the General Secretariat to dissipate these doubts on the basis of their expert knowledge could not overcome the delegations' opposition.

The European Convention

Early on during the European Convention, its chairman, Valéry Giscard D'Estaing, suggested that the Convention should aim at drafting a single text without loose ends in order to maximize its influence on the subsequent IGC. Once the Convention had accepted this approach, it began questioning the "inviolability" of the *acquis* and thus assumed the same task as an IGC. Nonetheless, the question of the actual format of the Convention's final outcome remained unaddressed until the Convention's presidium established a number of Working Groups including one on the Legal Personality of the EU (WG III).

Very early on during the proceedings of the European Convention, the chairman established consensus as its decision rule. Importantly, he deliberately begged the question what it

meant precisely (for a detailed discussion see König and Slapin 2006). A second uncertainty resulted from fact that the vast majority of Conventioneers were members of parliaments, both European and national. As a result, speakers could never be sure whether their audiences held national preferences, party preferences, European versus national ones, or simply personal preferences. Thus, the institutional settings of the Convention and its decision rules introduced a large amount of uncertainty, at least as compared with ordinary IGCs (*proposition 1*).

In the beginning of June 2002, Working Group III on the Legal Personality assumed its work. It was chaired by Giuliano Amato, the former Prime Minister of Italy and a highly recognized constitutional lawyer. Although discussions were not public, the transparency of the Convention also pervaded the proceedings in the WG as "there were always interested people in the room we did not know, but who were not showed the door.[8]"

The first meeting of the Working Group was held on 18 June, 2002, and started with a *tour de table*, during which every Conventioneer revealed his or her opinion to the issues under consideration. The chairman pointed out that a decision on an explicit recognition of a legal personality for the Union implied changes of constitutional nature. The group would therefore have to discuss possible effects for the current system of competences, the pillar structure, the procedures for the conclusion of international agreements and the overall simplification of the treaties (CONV 132/02). The *tour* revealed that the level of expertise among the Conventioneers was uneven, with some having no experience with European affairs and others being experts on the question of legal personality. Moreover, ideological cleavages resurfaced, since some Conventioneers from the UK and France were particularly hesitant.[9]

The next meetings on 26 June and 10 July were held with the participation of the legal advisors of the Parliament, the Council, and the Commission. Just as during the IGC, these experts were in almost complete agreement and emphasized what had been the legal majority

opinion for years: that the explicit recognition of the legal personality of the Union as well as the merger of the entities were desirable for reasons of transparency and efficiency, and furthermore, from a legal point of view, distinct from the question of the allocation of competences and the institutional balance (*proposition 4a)*. According to participants, the statement by Jean-Claude Piris made the difference and constituted a first "turning point". The General Secretariat's legal advisor, who had fought vehemently, but unsuccessfully for a Single Legal Personality in Amsterdam, was suddenly listened to. He pointed out again that the EU indeed had already a de facto legal personality on the international scene, but that it was desirable to recognize it explicitly (Working Group 3, Working Document 3: 8-10).

Piris did not use different arguments from those he had used during the Amsterdam IGC, but people listened to him this time. In the context of the Convention's Working Group, the institutional context had changed: The WG members became slowly persuaded that a single entity would not necessarily entail unintended legal consequences and jeopardize the pillar structure (CONV 170/02). In a first straw poll within the WG only one member, a French Euroskeptic, objected (WG III, WD 10).

But the WG had not yet explicitly discussed the implications for the form of the treaties and the Convention's final product. When the Working Group resumed its deliberations in the fall of 2002, the hearing of another expert, Prof. Bruno De Witte, constituted the next turning point in the deliberations. De Witte made again clear that if the group was to decide the merger of the entities, the merger of the treaties would be a logical consequence. In other words, a single legal personality would necessarily imply drawing up an all-encompassing treaty that would legally repeal the existing primary law (WG III, WD 27). Shortly after this final hearing, Amato announced an emerging broad consensus for the attribution of a single legal personality for the EU during a Plenary Session of the Convention. The European Convention then adopted this proposal by consensus as a result of which drafting of the Constitu-

tional Treaty could go ahead.[10] The Constitutional Treaty established the single legal personality of the European Union and this provision actually survived the treaty's failure after the French and Dutch referendums. The Treaty of Lisbon still establishes the single legal personality (Art. 47) while keeping the treaties separate.

In sum, we conclude that the negotiations on legal personality in the context of the Convention feature traces of arguing leading to persuasion. In comparing the institutional settings, we find that several scope conditions were indeed conducive to that effect. It was not so much the reasons given per se that produced the result, but the difference in institutional settings between the Amsterdam IGC and the European Convention and its Working Groups which enabled arguing to prevail.

First, in contrast to the Amsterdam IGC, cleavages in the Convention were not clear and rigid, but cross-cutting and in flux as there were not clearly identifiable camps within the Working Group and the Convention in general (*proposition 1*). We were able to observe differences between the Presidium and the Secretariat, and hesitation on part of French, British and Swedish national parliamentarians instead of government officials.

Second, in contrast to the IGC, we do not observe actors switching between different lines of reasoning. In Amsterdam, the UK and France brought up several different arguments ranging from vague concerns about unintended legal consequences, to more pronounced worries about implications of a single legal personality for external action, to distress about possible ratification problems. In the case of the Convention, however, British representative never backed out of their agreement, but consistently referred to the advantages of a single legal personality for the simplification of the treaties (e.g. Peter Hain, 03 October 2002).

Third, leadership appeared to be particularly decisive to helping arguing prevail in the context of the Convention (*proposition 4b*). During the Amsterdam IGC, all efforts by the European Council's General Secretariat to dissipate doubts with regard to unintended legal

consequences and ratification problems failed. Exactly the same arguments put forward by the same legal advisor found fruitful ground in the Convention. According to the participants, this had less to do with the arguments as such, but rather with the problem-solving atmosphere the Chairman had created, and the Conventioneers readiness to consider other actors' validity claims.

CONCLUSION

We argued in this article that focusing on the institutional scope conditions for the effectiveness of arguing is imperative for a thorough understanding of negotiation processes and outcomes as different institutional factors induce actors to take validity claims into account and change their policy preferences accordingly. We identified three such conditions, namely the degree to which the institutional setting induces uncertainty about the preferences of the actors involved, the transparency of the process, and the extent to which the institutional setting enables leadership and competent authority to influence the process. We then used the example of the negotiations on the EU's single legal personality at the 1996-97 Amsterdam IGC as compared to the European Convention to demonstrate that differences in the institutional setting largely explains the difference in outcomes as well as the effects of arguing on persuasion.

At this point, we do not have sufficient evidence to demonstrate which of the three institutional conditions tends to be the most important. This is where future research should follow up on. We need to know more about both the design and the effects deliberative institutions. Why are some negotiation settings more transparent than others? Why do some settings establish formal leadership while others are more decentralized? Why are some negotiations more inclusive than others? And how do these institutional features affect negotiation processes and outcomes?

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Notes

[1] The empirical findings are based on research carried out in the framework of the Integrated Project "New Modes of European Governance" (NEWGOV), funded in the EU's 6th Framework Program on Socio-Economic Research (*Contract No CIT1-CT-2004-506392*). For comments on this article, we thank Andreas Duer, Gemma Mateo, and Daniel Thomas, as well as participants at the workshop on Negotation Theory and the EU at the University College Dublin, Nov. 14-15, 2008.

[2] The literature is vast and fastly growing. See e.g. Risse 2000; Crawford 2002; Lynch 2002; Müller 2004; Deitelhoff 2006; Niesen and Herborth 2007; Ulbert and Risse 2005; Holzscheiter 2006; special issue of *Acta Politica*, 2005.

[3] A fourth contribution to the study of discourse focuses on the "power of discourse" and is heavily influenced by the works of Michel Foucault, Jacques Derrida, Ernesto Laclau, and Chantal Mouffe. See e.g. Diez 2001; Fierke and Wiener 1999. See also "critical discourse analysis" as developed by Norman Fairclough and Ruth Wodak (Fairclough and Wodak 1997) which has also been applied to the EU recently (e.g. Oberhuber et al. 2005; Wodak 2004). In the following, however, we focus on arguing and reason-giving in the Habermasian meaning of discourse which is more suitable for a special issue devoted to negotiation theory.

[4] The following summarizes Risse 2000, 2004.

[5] Habermas introduces behaviour oriented toward reaching a common understanding (*verständigungsorientiertes Handeln*) as follows: "I speak of *communicative* actions when the action orientations of the participating actors are not coordinated via egocentric calculations of success, but through acts of understanding. Participants are not primarily oriented toward their own success in communicative action; they pursue their individual goals under the condition that they can co-ordinate their action plans on the basis of shared definitions of the

situation" (Habermas 1981, vol. 1, 385; our translation). The goal of such communicative action is to seek a reasoned consensus (*Verständigung*).

[6] At a conference in Frankfurt/Main in June 2006. See Habermas 2007; also Deitelhoff 2007.

[7] To be sure, both interaction modes need not result in a settlement. Negotiations break down or sometimes lead to an informed agreement of disagree.

[8] Interview Giuliano Amato, 4 November 2005.

[9] This and the following information is taken from interviews with Giuliano Amato, 4 November 2005; Ricardo Passos 26 January 2006; and Hervé Bribosia, 4 May 2005.

[10] Note that an agreement on the single legal personality had to precede any drafting of treaty documents. Had any of the Conventioneers used this issue as a bargaining chip to extract other concessions later on, the whole exercise of drafting a single treaty would have failed. We owe this insight to a meeting with Dr. Meyer-Landrut.