

Constitutional Talk

Exploring Institutional Scope Conditions for Effective Arguing

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To the reader: This paper is part of a broader project on new modes of governance under the 6th Framework program (Contract No CIT1-CT-2004-506392). Its place within this project is to focus on scope conditions for soft, non-hierarchical modes of steering, and arguing in particular. Comments are most welcome.

INTRODUCTION

Arguing, understood as reason-giving, is all pervasive in international politics: Negotiating actors give reasons for their demands at almost any time, regardless of whether talks are conducted in public or behind closed doors. And yet, since negotiations have most often been conceived of as processes of bargaining in which actors seek to adjust their behavior through the exchange of threats and incentives, arguments have primarily been treated as rather epiphenomenal to strategic interaction. In this paper we argue that under certain circumstances arguments affect negotiating actors' preferences, and subsequently lead to outcomes that are not easily explained in pure bargaining terms. Arguing and bargaining as different modes of interaction, however, are not contending but rather complementing explanations. As a result, we have to ask which scope conditions are particularly conducive to enabling arguing to prevail in decentralized negotiations and, thus, to affect both process and outcome. In a structured-focused comparison of Intergovernmental Conferences (IGCs) with the European Convention we aim to unveil institutional factors that induce actors to take validity claims into account and change their preferences accordingly. At the example of negotiations on simplification and the single legal personality of the European Union we seek to demonstrate that the transparency of the debate in conjunction with a higher degree of uncertainty about appropriate behavior made arguing in the Convention particularly effective.

Brief overview of the debate: Where it started, where it went, and where it is now

Emanating from a controversy in the German International Relations quarterly *Zeitschrift für Internationale Beziehungen*,¹ the last decade witnessed an intensive debate on the role of arguing versus bargaining in multilateral negotiations. Several deficiencies of bargaining theory triggered the debate: First, arguing in the sense of reason-giving is all pervasive in public as well as private setting. However, if we conceive of negotiations narrowly as processes of policy adjustments through the exchange of threats and incentives, the use of arguments is rendered superfluous and therefore 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 withhold or exaggerate information about their preferences. And since they have to fear that other actors are behaving likewise, knowing that they know that they have incentives to distort information on preferences etc, the exchange of credible threats and

¹ (Müller 1994, 1995; Risse-Kappen 1995; Zangl and Zürn 1996; Schneider 1994; Keck 1995)

incentives, and, thus, an agreement is difficult, if not impossible to achieve among instrumental actors (Morrow 1994; Fearon 1998; Müller 2004). Third, processes of collective decisions often result in surprises, that is, in outcomes that could not be expected on the basis of the interests represented. Oftentimes the parties agree on creative solutions to the problem under discussion. They come up with rules and norms that suggest that some of them might have changed their preferences endogenously to the negotiation, and that the rationalist premise of exogenously given preferences stands on shaky grounds accordingly.

Informed by the Habermasian concept of communicative action, it was suggested that in cases of ill-defined situations where actors are uncertain about their appropriate behavior, they engage in seeking “a communicative consensus about their understanding of a situation as well as justifications for the principles and norms guiding their action“ (Risse 2000: 7). In this case, actors are prepared to be persuaded by better arguments, and relationships of power consequently recede in the background. Thus, the eventual rule is not a compromise between diverse interests, but rather reflects a reasoned consensus with which actors comply due to their insight in its legitimacy. Because it aims at achieving a reasoned consensus, this process is goal-oriented on the one hand. On the other hand, however, it endogenizes preferences over ends as well as derived preferences over the best means to arrive at those ends.² .

On the empirical ground

How do arguments affect actors' persuasions, and how can we observe this process empirically? In a first approach to this question, we started looking at the properties of arguing speech acts, and distinguished analytically between arguing and bargaining as communicative modes³. In the ideal-typical communicative mode arguing, actors assess arguing speech acts on the basis of an external authority (*Berufungsgrundlagen*) they refer to. Hence, arguing is triadic in structural respect. In bargaining, in contrast, it is merely information about the speaker's preferences and bargaining power that makes threats and incentives credible. Thus, bargaining features a dyadic structure (Ulbert et al. 2004). Empirically, however, arguing and bargaining as modes of interaction do not coincide with communicative modes. Communication never takes on these ideal-typical forms, and arguing and bargaining speech acts usually go together in reality (Deitelhoff and Müller 2005). Hence, when the quantitative distribution

² Also termed preferences over outcomes versus preferences over strategies. On this distinction see Elster (1998b: 7).

³ (Elster 1998b; Saretzki 1996). For this distinction see in greater detail (Risse 2004: 296-298)

of arguing speech acts does not affect their effectiveness, we need to deduce other observable implications that would lend credence to the expectation that arguing indeed induced an actor to take validity claims into account and change her preferences accordingly. One such implication is that effective arguing should lead to a particular type of outcome that is in many ways distinguishable from outcomes of processes of pure bargaining.⁴ Whereas pure bargaining can be expected to result in compromises, pure arguing should bring about a reasoned consensus that aims at solving the problem under discussion. In other words, the effectiveness of arguing should be observable indirectly on the basis of an outcome that approaches a reasoned consensus. Such a reasoned consensus can be detected when the result of a negotiation is surprising, i.e. a priori not expected on the basis of represented preferences and bargaining power; when we can rule out exogenous preference changes; and, above all, when actors give the same reasons for its achievement (Risse 2004: 301). Furthermore, a long shadow of the future can raise the transaction costs associated with bargaining as it gives further incentives to bargain even harder and to delay an agreement (Fearon 1998: 270). This deadlock is often only broken through package-deals that are usually a matter of last minute compromises between authorized actors (Scharpf 1997: 130). Thus, a surprisingly early agreement further hints to the effectiveness of arguing. Finally, since in processes of arguing asymmetric power should matter less than in pure bargaining, a disproportionately strong influence of materially weak actors would also suggest a reasoned consensus.

Operationalization of the Dependent Variable “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

The above described empirical challenges led to a reformulation of the research question that originally triggered the debate. When it is impossible to observe processes 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. We therefore arrive at our previously outlined research question and ask, *which institutional scope conditions are particularly conducive to enabling arguing to prevail in multilateral negotiating systems and, thus, to affect both process and outcome?* In so doing, we relax social action theoretic qualifications, and set aside the question of the motivation of actors engaged in argu-

⁴ To be sure, both interaction modes need not result in a settlement. Negotiations break down or sometimes lead to an informed agreement of disagree.

ing.⁵ In other words, the theoretically important question is how the deliberative setting can shape processes and outcomes independently of the motives of the participants.⁶

Methodological Approach

The particular difficulty in studying negotiations lies in the low availability of primary data on actors' "true" preferences on the one hand, and the idiosyncrasies of negotiations in dealing with different issues and in different negotiation settings on the other hand. Large- or Medium-N-studies are therefore unfeasible for our specific research question. But considering preferences as fix and inferring them ex post from negotiation outcomes cannot be the solution to the problem. We try to address this problem by multiplying the number of observations through generating several observable implications to which we have to pay particular attention in tracing the process.

Nonetheless, it is a stroke of luck for students of arguing that the European Union provided us what we might well call a natural experiment: After a decade of onerous and disappointing negotiations in a series of Intergovernmental Conferences (IGC), the Heads of State and Governments of the European Union sought to break the deadlock on institutional questions by conducting talks in a completely new setting: the European Convention. Even though the (same) 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, and broke the deadlock on many issues where preferences were originally regarded intense and stable. Despite their many similarities, however, the Convention differs in important ways from IGCs as this institutional setting varies exactly those factors that proponents of arguing have suggested being particularly conducive to its effectiveness: It encompasses a larger number and a greater variety of actors (with probable implications for uncertainty and the emergence of leadership), and it is more transparent than negotiations in IGCs. In other words, the Convention allows us to increase the homogeneity of our units, IGCs and the Convention, by keeping important alternative variables constant while varying many of the scope conditions under study.

⁵ (Risse 2002a: 603; Deitelhoff and Müller 2005: 176)

⁶ (Elster 1998a: 104). In this regard our endeavor is similar to that of the literature on the rational design of institutions, which, however, ignores asking for the role of reason-giving at all (Koremenos et al. 2001).

In this paper 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 treaty⁷ 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 uncertainties about the particular 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. Therefore, the main cleavages ran across integrationist countries arguing for a unified approach, and intergovernmentalist countries preferring to keep entities and treaties clearly separated. While this question had particularly but unsuccessfully been dealt with at the 1996-97 IGC in Amsterdam, this 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.

Triggers and Institutional Scope Conditions

On the basis of the Habermasian ideal speech situation, and procedural conceptions of deliberative democracy, explorative studies on arguing and persuasion in multilateral negotiations have studied several possible triggers for the prevalence of arguing in negotiations (Ulbert et al. 2004; Ulbert and Risse 2005). In order to explore how an institutional setting affects the effectiveness of arguing, we need to study how it weakens or strengthens these factors. Let us consider each in turn.

First, different types of *uncertainty* can be expected to be conducive to effective arguing. Uncertainty has many faces, however: First, uncertainty about other actors' behavior arises from

⁷ That is, the Treaty establishing the European Coal and Steel Community (ECSC) (1951), the Treaty establishing the European Atomic Energy Community (EURATOM) and the Treaty establishing the European Economic Community (EEC) (1957). IGCs culminated in the Single European Act (SEA, 1986), the Treaty of Maastricht (1992), Amsterdam (1997) and Nice (2000), which *inter alia* form the patchwork of the European Union's primary law. Whereas the negotiations of the SEA and the Treaty of Maastricht primarily dealt with the policy scope of the EC/EU and paved the way for the single market and monetary union, the Amsterdam and Nice IGCs focused mainly on the EU's constitutional character.

imperfect information about the actions taken by others. Second, uncertainty can also refer to incomplete information about other actors' preferences – a problem that is difficult to solve when cooperation entails distributive consequences as actors have incentives to withhold private information. Third, actors may be uncertain about future states of the world. In contrast to the first two types where actors hold private information, in this case all actors lack information about cause-effect relationships, and, thus, about possible consequences of cooperation (Koremenos et al. 2001 778-779).⁸ Fourth, in situations where different roles apply, actors may face another state of uncertainty about their appropriate behavior in an ill-defined situation. Particularly in these last two cases can we expect actors to deliberate cause-effect relationships on the one hand, and appropriate and normatively justifiable behavior on the other hand (Risse 2000: 19; Risse 2004: 294).

How does variation in the institutional setting affect the prevalence of arguing? Uncertainty about future states of the world is first and foremost a property of the issue-area in question, and does not vary with the institutional setting.⁹ In consequence, IGCs and the Convention will not differ with regard to the effectiveness of arguing. Uncertainty about other actor's preferences as well as about appropriate behavior, in contrast, should vary with the negotiation setting and with its composition in particular. While IGCs primarily encompass governmental representatives and some delegates from supranational institutions, the European Convention is composed of four components, namely representatives of the governments, the European Parliament, the National Parliaments and the European Commission. What makes this feature of the Convention particularly interesting is that institutional identities overlapped. A Member of the European Parliament, for instance, is a member of this particular European institution, a member of a European political group and a national party, as well as a citizen of her Member States *at the same time*. In consequence, some actors might become uncertain about their appropriate behavior on the one hand. On the other hand, their counterparts can never be sure about these actor's preferences.

This was well understood by the Chairman of the European Convention, Valéry Giscard D'Estaing. In order to avoid a rigidification of the Convention along national lines, the Con-

⁸ A commonly made distinction is often made between regulatory and distributive issues, and sometimes between problems of coordination and cooperation. These distinctions are not very useful as almost every regulatory issue as well as problems of coordination may have distributive consequences. It is thus more accurate to distinguish between the severity of the distribution problems as well as the uncertainty about distributive effects.

⁹ If cause-effect relationships are not well established, and the consequences of cooperation are less clear, we would expect states to seek third actors' advice and to open negotiations to policy experts and the like. This in turn clears the way for epistemic communities to substantively influence policy outcomes (Haas 1995).

ventionneers were seated in alphabetical order instead of components.¹⁰ Another procedural device the Chairman used was the decision-rule: While most multilateral negotiations are usually concluded by establishing a consensus, which is generally defined as the absence of disagreement, consensus in the context of the Convention meant the absence of significant disagreement. The exact threshold for a disagreement to be perceived as significant was, however, left open – and deliberately so. A single Conventioneer could therefore never be sure whether or not he was part of a significant majority or minority opinion, and was therefore forced to reveal her preferences and to form coalitions. These aspects were furthered by Giscard special emphasis on the Conventioneers' individuality.¹¹

Hypothesis 1: Overlapping identities increase uncertainty about appropriate behaviour and other actors' preferences and, thus, the likelihood of a prevalence of arguing.

Observable implications

- Different “cross-cutting” meetings prior and during the deliberation.
- Actors refer to interests of other components

Second, it is suggested that arguing in a *public sphere* affects the process and outcome of negotiations. According to Jon Elster, arguing in front of an audience has to be in line with constraints like imperfection, consistency and plausibility.¹² In other words, powerful social norms on procedures 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, speakers have to follow a coherent line of reasoning. Third, and related, their validity claims have to be plausible and maintain verification. The less certain actors are about which course the negotiation is likely to follow, the more would we expect these norms to affect their derived preferences (Elster 1998a: 104). Further, these constraining effects should increase the

¹⁰ On Giscard's leadership see (Kleine 2007).

¹¹ For instance when he snubbed the Commission alternate Paolo Ponzano: “Je voudrais juste rappeler un point d'éthique de la Convention, Monsieur Ponzano. Il ne s'agit pas d'une négociation entre les Institutions, le Parlement européen et les gouvernements. Chacun parle en son nom. Par exemple, en ce qui concerne les membres de la Commission, on sait qu'ils sont membres de la Commission lorsque Monsieur Barnier ou Monsieur Vitorino s'expriment. Mais ils n'expriment pas le point de vue de la Commission. La Commission s'exprime par des canaux appropriés en tant que telle. Nous sommes ici à une réunion de Conventionnels où chacun s'exprime en son nom comme va le faire à l'instant Monsieur Fischer“ (cited in Magnette 2003).

¹² That is, the speaker should show some impartiality and refer to the alleged common good. In addition, the arguments should be consistent in that they follow a coherent line of reasoning. Furthermore, the validity claims must be plausible and have to maintain verification.

more the consent of this audience is required.¹³ These factor varies with the overall transparency of the debate.

In contrast to IGCs where documents are usually not accessible for the public and negotiations are conducted behind closed doors, the Convention published every single document that was related to the deliberations, and also its discussions were open to the public. In other words, there was a permanent feeling of transparency within the Convention. Thus, and in combination with the higher degree of uncertainty about appropriate behavior in the Convention, we would expect the above mentioned procedural norms to affect behavior and preferences within the Convention to a considerable higher degree than in an IGC.

Hypothesis 2: A transparent negotiation setting is conducive to the prevalence of arguing.

Observable Implications

- In contrast to IGCs where actors are better able to switch between different lines of reasoning, we would expect Conventioneers to advance one coherent line of reasoning.
- If actors change their line of reasoning in a transparent setting, we would expect them to explicitly address this as a genuine preference change.

With reference to the Habermasian concept of a common lifeworld (Habermas 1981: 2: 209), a regularly voiced argument is that the density of institutional setting can make a difference as it provides the “external authority” that is required to enable the triadic structure of arguing to come into play. Yet, a common lifeworld is a necessary, but not a sufficient condition for the effectiveness of arguing (Müller 2004: 402). First, negotiating actors often construct their own common lifeworld, be it the common membership in an institution or analogies to previous encounters. Second, densely institutionalized settings may entail diverse and even contradictory arguments, analogies and frames, of which some are being used in the debate while others meet with no response. Thus, in order to establish a third angle in processes of arguing, norms have to be activated first (Ulbert and Risse 2005: 354).

This opens the way for individual or institutional actors to influence negotiation processes and outcomes. In that regard, studies on norm entrepreneurs or epistemic communities have come

¹³ In contrast to Elster, Jeffrey Checkel argues that negotiations in front of a public audience result in ritualistic rhetoric, and that deliberation behind closed doors is more effective in terms of 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; 2003: 222) alludes to attentive domestic audiences that expect its negotiators to pursue national interests.

up with a long list of factors that influence these actors' influence.¹⁴ With regard to arguing and persuasion, however, we focus more particular on the trustworthiness of a speaker and her authority. As argued above, rationalist studies that perceive of negotiating actors as instrumental remain unconvincing with regard to the exchange of information in strategic interaction. Trust, broadly defined as the subjective confidence in the expectation of not being exploited by the other side, may alleviate this problem as it affects the persuadee's readiness for assessing other's validity claims. Also, highly authoritative members of "in-groups" can be regarded as better able to activate norms as a common frame of reference, and to persuade other of a particular argument (Johnston 2001: 496-499). The crucial point here, however, is that these aspects, trustworthiness and authority, are not a matter of fact but should vary with the institutional context. First, centralized settings that pool tasks (NB: Not control!)¹⁵ establish authorities, whereas decentralized settings rather disperse authority. IGCs feature a low level of centralization: It is the Presidency of the Council that is granted a small degree of authority. In the Convention, in contrast, the Chairman, the triumvirate, and the Praesidium assumed a great degree of authority within the Convention as well as the individual Working Groups.

Hypothesis 3: The more centralized the negotiation setting, the more trustworthy leadership is conducive to the prevalence of arguing.

Observable Implications

- Centralized negotiating setting
- Single individual or institutional actors assume a prominent role in the negotiation.
- Their occurrence constitutes a "turning point".
- They are described as trustworthy or authorities.

¹⁴ Informed by the social psychologist literature on cognitive consistency, Cornelia Ulbert argues that arguments that resonate with individual beliefs and/or already agreed-upon principles and norms can be easier accommodated and adapted (Finnemore and Sikkink 1998: 897; Ulbert 1997). See also the literature on framing, e.g. (Rein and Schön 1991; Kohler-Koch 2000). On leadership in general see (Young 1991; Moravcsik 1999; Tallberg 2006). For a sociological/constructivist point of view see *inter alia* (Johnston 2001) and (Müller 2004). On transnational actors see (Risse 2002b).

¹⁵ Centralization is not to be confounded with control (Koremenos et al. 2001: 772). The first refers to a centralization of tasks whereas the latter relates to a centralization of formal power, which should be detrimental to processes of arguing.

Table: Hypotheses and Observable Implications

Convention	IGC
<i>Hypothesis 1: Overlapping identities increase uncertainty about appropriate behaviour and other actors' preferences and, thus, the likelihood of a prevalence of arguing.</i>	
<ul style="list-style-type: none"> - Cross-cutting cleavages. "Mixed" meetings prior and during the deliberation. - Actors refer to interests of other components. 	<ul style="list-style-type: none"> - Clear and rigid instead of cross-cutting cleavages. - Actors refer to the interests of their components solely.
<i>Hypothesis 2: A transparent negotiation setting is conducive to the prevalence of arguing.</i>	
<ul style="list-style-type: none"> - Conventioneers advance one coherent line of reasoning. - If actors change their line of reasoning in a transparent setting, we would expect them to explicitly address this as a genuine preference change. 	<ul style="list-style-type: none"> - Actors advance several lines of reasoning at the same time.
<i>Hypothesis 3: The more centralized the negotiation setting, the more trustworthy leadership is conducive to the prevalence of arguing</i>	
<ul style="list-style-type: none"> - Centralized negotiating setting - Single individual or institutional actors assume a prominent role in the negotiation. - Their occurrence constitutes a "turning point". - They are described as trustworthy or authorities. 	<ul style="list-style-type: none"> - Decentralized negotiating setting - Single individual or institutional actors do not assume a prominent role in the negotiation.

CASE STUDY: SINGLE LEGAL PERSONALITY

This chapter compares the negotiation processes on simplification and the single legal personality within the 1996-7 IGC and the European Convention. We begin, however, with a short primer on simplification and its legal and political intricacies.

Different Settings, different outcomes

In order to illustrate the rather complex structure of its unique legal order, textbooks on the EU often make use of the so-called "temple model."¹⁶ This wording implies an overarching role of the EU (as the roof of the temple) in relation to its three pillars: the European Commu-

¹⁶ The model draws on Art. 1 para 3 Treaty on European Union that states that the "Union shall be founded on the European Communities, supplemented by the policies and forms of cooperation established by this Treaty."

nity and the two intergovernmental policies outside the Community. From a legal point of view, however, this is not quite correct. Although “European Union” is commonly used as an all-encompassing term to refer to the actions of the “single institutional framework” (ToM Article C), the Union as such was never explicitly conferred legal personality. The EU’s status under international law and its relationship to the EC – in short: the very legal nature of the EU – is therefore unsettled at worst, and complex at best.¹⁷ What appears to be a curious intricacy at first is in fact the legacy of the 1990-91 IGC on Political Union in Maastricht and a compromise between two very different approaches to European integration. At that time the then Twelve were divided on the question whether or not to integrate new policies of foreign (Common Foreign and Security Policy, CFSP) and internal (Justice and Home Affairs, JHA) security into the framework of the existing communities.¹⁸ While more integrationist countries demanded to retain a unified treaty structure, this idea met the strong opposition more intergovernmentalist countries as the United Kingdom, France and Denmark (Agence Europe 01 June 1991). The main reason for their objection was the fear of a creeping communitarization of the newly created intergovernmental policies due to unforeseen legal consequences, and the quasi-constitutional character of such a document. The temple model that created new areas of intergovernmental cooperation outside the Community and outside the existing treaties therefore prevented the new policies from developing too quickly in a federal direction (Martial 1992). In return to the concession to agree on a separate treaty on European Union that established the “pillar structure” of the Union, integrationist countries insisted on the introduction of an “evolutionary clause” into the TEU that was meant to guarantee the ultimate integration of the now separate “pillars” into the Community. According to Article N ToA, a new IGC should be convened in 1996 in order to review the treaty structure as well as the functioning of the intergovernmental policies (Vanhoonacker 1992: 46).¹⁹ Since it would for the time being have consolidated the status quo, the Heads of State and Government explicitly refrained from conferring a legal personality to the new legal “creature” EU alongside that of the ECs. Its legal nature and its exact relationship to the ECs were thus deliberately left open and subject to further discussions. In short, with the decision to found a new Union outside the Community and its treaties, and to refrain from endowing it with legal

¹⁷ (Schroeder 2002, 2003; von Bogdandy and Nettesheim 1996; Wessel 2003)

¹⁸ (Vanhoonacker 1992; Laursen et al. 1992; Wester 1992a, 1992b, 1992c)

¹⁹ “(...) to maintain in full the “*acquis communautaire*” and built on it with a view to considering, through the procedure referred to in Article N (2) [the 1996 IGC, MK], to what extent the policies and forms of cooperation introduced by this treaty may need to be revised with the aim of ensuring the effectiveness of the mechanisms and institutions of the Community” (Article B).

personality, the Member States opted for a situation of internal and external legal complexity that constitutes a compromise between two very different approaches to European integration. For lawyers, the conferral of a single legal personality constituted the most conclusive way to simplify the existing primary law. Indeed, over the years primary law had turned from an *acquis communautaire* into what Franklin Dehousse coined the “*macquis communautaire*” (Dehousse 1997)²⁰ as Member States had in each treaty revision opted to amend the founding treaties. They were therefore never legally consolidated and codified into one instrument. The legal order consequently spread quite uncoordinatedly over a multiplicity of fundamental texts, a large number of legal acts, and in the meantime obsolete legal ruins.²¹ This barely comprehensible patchwork entailed from a legal point of view a high degree of legal uncertainty. And now it was added a new, legally undefined creature with new legislative procedures as well as opt-outs for certain countries in certain policies. Thus, the already existing debate in academia on simplification now involved the basic question of the relation of EU and ECs to each other. A real simplification, the argument went, would best be accomplished by drawing up a new single treaty that legally succeeded and repealed the patchwork primary law (Bieber and Amarelle 2000; Lipsius 1995). Such a treaty would further reorganize the Union’s law by identifying common elements of both the ECs and EU, and allow distinguishing between essential and non-essential primary law. The merger of the personalities was regarded as the “cherry on the top” in the exercise of simplification as it paved the way to a single legal instrument that would repeal the entire primary law and largely facilitate the reorganization of the European constitutional architecture. The result of such a far-reaching simplification exercise would be a legal document with a strong constitutional character.²² To

²⁰ See (Müller-Graff 2002; De Witte 2002; Obwexer 2004; Schmid 1998, 1999). In addition, the readability of primary law had suffered quite a bit because difficult negotiations had resulted in minutious and barely comprehensible provisions, whose subtleties, language, and translations were most often only understood by legal experts. Also, the primary texts did no longer reflect the existing legal practice, since this had more and more been refined by the jurisprudence of the ECJ through famous doctrines like supremacy, direct effect, to mention just a few. Finally, the treaties entailed a mixture of essential and non-essential provisions all subject to the same revision procedure. In short, primary law had slowly lost its systematic consistency.

²¹ These are among others the three treaties establishing the European Communities, the TEU, the treaties amending respectively revising these founding treaties as well as a large number of declarations and protocols annexed to them, the accession treaties, and some quasi treaties.

²² Just like the decision on simplification is necessarily mingled with the question of single legal personality, so is the merger of the legal personalities hardly realizable as a stand alone decision as it is often discussed in the context of external relations (Bribosia forthcoming). Although a merger of entities is in principle possible through an act of international law, it would largely put the existence of separate and unconsolidated versions of the treaties into question as such an exercise at first doubles and renders superfluous many provisions in the respective treaties. Especially a single legal personality (merger of EU and ECs) would largely aggravate the original problem: Because once the entities are merged and one entity supersedes the other, the distinction between the Union and the Communities cease to apply while the two terms EC and EU nonetheless remain in the treaties. Due to a plethora of cross-references in the treaties, an immense legal uncertainty would follow about the hierarchy of these provisions and the respective applicable procedures in daily politics. Thus, not only would

sum up, the legal debate regarded legal personality primarily as a means to simplify the treaties in order to achieve greater legal certainty. In political regards, however, every simplification exercise would possibly open Pandora's Box and evoke political debates on the EU's constitutional architecture.

In other words, its legal intricacies render the question of single legal personality a very complex and technical issue. Yet, as outlined above, its origins and implications are highly political. In particular in the context of discussions of substantial treaty reforms, the line between a simplification exercise and redrawing the existing institutional balance is only very thin (De Witte 2002). Hence, by broaching the issue of simplification and the merger of the entities the Member States would return exactly to the point that brought up the complexities in the first place: the question of a treaty with a substantial constitutional character. It is therefore not surprising that political arguments quickly prompted legal reasoning for and against the single legal personality during the 1996-7 IGC. In the highly politicized context of the European Convention in 2002-3, in contrast, it was mainly legal reasoning that prevailed in the deliberations, as a quote by one member of the Convention nicely illustrates:

“At one stage, some of us encouraged him [the chairman Giuliano Amato] to be less balanced and a little more political, but I reconsidered my stance because I think he was right. (...) This is not the first time that the question of legal personality for the European Union has been raised. Thus far the idea of a single legal personality has not enjoyed much success. In order to progress and be successful, it should be demystified and disentangled from the ideological layers involved in this matter.” (Szajer 03 October 2002)

While this question was tabled and eventually left undecided during the 1996-7 IGC, the single legal personality was the very first issue the Conventioneers agreed on in 2002. The far-reaching and immediate outcome took most Conventioneers and even the chairman of the respective Working Group entirely by surprise (Interview Amato, 04 November 2005).²³ The

the rationale for a separate TEU be initially removed. From this point of view the conferral of a single legal personality would necessarily need to be accompanied by a far-reaching reorganization of the treaties (Bribosia 2001).

²³ See Klaus Hänsch' intervention at the Plenary:

„(...) Wir wissen, dass wir einen noch schwierigen Weg vor uns haben (...) aber mit dem gestern vorgelegten Verfassungsentwurf wissen wir, dass da ein Weg ist, den wir gemeinsam gehen können. (...) (W)ir werden den Entwurf einer Verfassung für die Europäische Union ausarbeiten. Vor acht Monaten war das durchaus noch eine sehr umstrittene Frage. Dass wir uns darauf geeinigt haben, ist ein Erfolg der Arbeit, die wir in den vergangenen acht Monaten gemacht haben. (W)ir werden einen einheitlichen Vertrag haben, und ich unterstreiche nur einen einheitlichen Vertrag mit einem Verfassungsteil und einem operativen Teil. Das ist ein klares Bekenntnis zur Rechtssicherheit und zur Kontinuität. Vor acht Monaten lag das alles noch in weiter Ferne. (...) (W)ir werden der Union die Rechtspersönlichkeit zuerkennen. Das wird ihr erlauben, nach außen einheitlich vertreten zu sein und geschlossen aufzutreten. Vor acht Monaten war das noch außerhalb jeden Konsenses. Dass wir das geschafft haben, ist auch ein Erfolg der bisherigen Arbeit. (W)ir lösen die unsinnige und hinderliche Pfeilerstruktur der heutigen Verträge auf. Damit wird eine Forderung des Europäischen Parlaments, die wir seit Maastricht und Amsterdam immer wieder erhoben haben, erfüllt. (W)ir nähern uns mit dem

primary reason that almost every participant eventually gave for this smooth decision was a legal argument that constitutional lawyers had repeatedly advanced for already more than a decade, namely the simplification of the EU’s constitutional architecture.

<p>Outcome of the Amsterdam IGC: Compromise</p> <ul style="list-style-type: none"> - Lowest common denominator outcome - Agreement tabled until the end of the Conference - Different reasons for an against the outcome 	<p>Outcome of the Convention: Consensus</p> <ul style="list-style-type: none"> - Surprising outcome above the lowest common denominator - Early Agreement - Same Reasons for the Outcome
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In other words, IGC and Convention resulted in two very different outcomes. 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 give the same reasons for the decision, the agreement is obtained early in the negotiation process, and it is surprising as exogenous preference changes do not seem to provide a satisfactory explanation for these diverse outcomes. These indicators jointly point to endogenous preference changes due to effective arguing. We hypothesized that a higher degree of uncertainty, the transparency of the debate, and leadership in the context of the Convention is conducive to the prevalence of arguing. In the following we will focus more precisely on the negotiation process that led to the conclusion to the Amsterdam Treaty, and the Constitutional Treaty.

The 1996-97 IGC and the Treaty of Amsterdam

To the surprise of political elites, ratification of the ToM was fraught with serious difficulties as referenda resulted in a surprisingly low support for the treaty in France (with 51.05% in favor) and even its rejection in Denmark. The secrecy of the IGC was regarded as partly responsible for the debacle as they were “too far away from the citizens” as to be understandable for them (McDonagh 1998: 35). In June 1994, the European Council in Corfu therefore established a “Reflection Group” that, “in a spirit of democracy and openness” should examine and elaborate ideas for the revision of the Treaties (European Council 1994a).²⁴ Under the

Entwurf dem Ziel einen großen Schritt, nämlich der Union eine neue, straffere, einfachere und transparentere Grundlage zu geben. Das ist der Auftrag von Laeken, den wir zu erfüllen haben“ (Klaus Hänsch, 29.10.2002).

²⁴ In the run-up to these talks the European institutions issued their reports on the functioning of the treaties, which all underlined the necessity of reviewing and simplifying the legal architecture (Jacqué 1997). See (SN 5082/95); (Report of the Court of Justice on certain aspects of the application of the treaty on European Union,

aegis of the Council's Jurisconsult Jean-Claude Piris, the General Secretariat prepared a report on the simplification of the treaties (SN 513/95), which stressed the necessity of a single legal personality and the drafting of a simplified Treaty-Charter.²⁵ In its final report the Reflection Group recommended to include this issue in the IGC agenda²⁶ The IGC was officially convened in March 1996 at the European Council in Turin. Monthly meetings on the level of foreign ministers were prepared by weekly meetings on a working party level. In the light of the Reflection Group report, the Heads of State and Government asked the IGC *inter alia* "to consider whether it would be possible to simplify and consolidate the Treaties" (European Council 29 March 1996).

In their position papers to the IGC, some delegations outlined their preferences on the question of simplification. The Benelux (Benelux memorandum 7 March 1996), for instance, supported for simplification with a view to legibility, while Belgium more explicitly put forward the idea of recasting the present treaties (Note de politique du gouvernement au parlement concernant la Conférence Intergouvernementale de 1996, Octobre 1995). The UK, however, voiced its concerns with regard to a far-reaching stance to simplification and came out in favor of a more modest approach to the simplification exercise:

"The UK government favours simplifying the Treaty, and proposes the deletion of all its obsolete articles. It argues, nonetheless, that many of the proposals for simplification of the Treaty raise problems because they could, in some cases, change its substance or alter the institutional balance" (UK White Paper of 12 March 1996 on the IGC: "An association of nations").

In a preliminary report to the IGC (CONF 3831/96) the General Secretariat outlined three options: simplification (removing obsolete provisions), consolidation (merging the various existing Treaties and Protocols into one legal instrument without necessarily merging the entities), and reorganization (consolidation and subsequent reorganization of the Treaties, most probably on the basis of a single legal personality). The General Secretariat itself recommended the latter approach, and questioned the co-existence of the diverse legal entities since this circumstance was deemed "not conducive to public awareness of the European integration process." Because a thus simplified version would have to be put subject to ratification

Luxembourg, May 1995). See European Parliament, Resolution of 17 May 1995, paragraphs 2 and 14, European Commission Report paragraph 90.

²⁵ Parts of this report were later published under a Pseudonym (Lipsius 1995). At the same time, and at the request of the European Parliament, a group of lawyers at the University of Lausanne drafted a simplified version of the treaties (Agence Europe 09 November 1995). Later in the process, a group of legal experts at the European University Institute's Robert Schuman Centre in Florence, headed by Claus-Dieter Ehlermann, had come up with a draft treaty that merged as far as possible the existing treaties and thus demonstrated the feasibility of a simplification and parallel restructuring of the treaties while retaining the existing law.

²⁶ It identified three challenges the IGC should respond: "Bringing Europe closer to its citizens"; improving the institutions so as to allow the Union to function more effectively in the light of enlargement; and increasing the Union's capacity for external action (Final Report to Madrid Council, 05 December 1995).

again, the report anticipated possible concerns about ratification problems and outlined several ways as to ease national ratification. At the Florence summit in June 1996, the European Council then asked the incoming Irish Presidency to prepare a “general outline for a draft revision of the Treaties” and called “, and vaguely called on the IGC to seek all possible ways of simplifying the Treaties as to make the Union’s goals and operation easier for the public to understand” (European Council 1996).

In the second half of 1996 the debate focused shortly on the implications of a (single) legal personality for the EU’s capacity for external action. This question raised concerns in neutral countries and Denmark, in particular as these countries feared a “supranationalization” of the CFSP. In a second report to the IGC, the General Secretariat again tried to alleviate those fears and explicitly advocated a merger of the entities. 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. As this circumstance constituted a source of confusion to third countries, it was deemed detrimental to the coherence of the Union’s external policies (SN 3554/96; CONF 3876/96, CONF 3871/96). This debate on the impact of a single legal personality on external action brought up exactly the same concerns that had already been raised in Maastricht, namely implications for the division of competences among the European institutions. Again, the UK government and France feared unintended legal consequences for the “pillar structure”. But also the Commission hesitated: While its Commissioner Oreja favored a single legal personality and a far-reaching consolidation, parts of the Commission’s legal service feared – in contrast to the UK and France – a creeping intergovernmentalization of the community pillar (Interview with Giorgio Maganza, 27 January 2006, Interview with Jean-Claude Piris, 02 May 2005). In a non-paper (Non-Paper Piris, 16 October), the Jurisconsult Piris again very tried to remove those doubts and explicitly argued that neither a fourth legal personality (the conferral of legal personality to the EU alongside that of the ECs), nor a single legal personality would have no consequences at all for the distribution of competences and, thus, for the “pillar structure”:

“(…) les critiques formulées méconnaissent le fait que (...) [aucune] conséquences ne peut en être tirée quant au nombre, à la nature et à la portée des droits en cause, et encore moins quant aux modalités et aux procédures selon lesquelles ces droits pourraient être exercés.

(...) la fusion des personnalités juridiques en une seule n’interdirait pas d’octroyer des compétences différenciées selon les domaines et de soumettre l’exercice de ces compétences à des procédures décisionnelles radicalement différentes.

(...) Dès lors, il n’est pas exact de prétendre que la fusion des personnalités conduirait à l’abandon des caractéristiques actuelles des piliers. Il est juridiquement parfaitement possible d’atteindre les objectifs de clarté et de visibilité externe de l’Union sans y porter atteinte. “ (Piris 16 october 1996)

However, despite these clear attempts to remove doubts about unintended legal consequences, two big countries, France and GB, showed no signs of giving up their objections. Slowly it became apparent, however, that despite these efforts on part of the General Secretariat, neither the conferral of a fourth legal personality to the EU alongside the ECs, nor the merger of the entities into a single personality would reach unanimity (CONF/3979/96, CONF 3988/96: 8). From now on the discussion on simplification would take a lower stance and primarily focus on the merger of the treaties and a possible merger of the three European Communities solely. In order to guarantee that other simplification exercises that did not require the merger of the entities would not be affected by substantial negotiations on the *acquis*, the Conference established a special working group, the “friends of the presidency group on codification-simplification”. Its task was therefore described “technical in nature” (CONF 4100/1/97 REV 1).²⁷ Nonetheless, even the rather technical editing of several simplified treaties, ranging from versions of pure editorial surgery (such as renumbering of articles, simplifying wordings, deleting obsolete provisions) to versions that merged the treaties,²⁸ brought up political controversies. The issue of legal personality resurfaced in February when the Secretariat in a Non-Paper issued a proposal on 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 to raise this issue (CONF 3875/97) was primarily 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. But also the less ambitious proposal to merge the treaties while keeping the legal personalities separate met objections. In the end of April, the Dutch Presidency therefore demurred that neither a merger of the entities, nor a merger of the treaties was likely to gain enough support within the Conference (CONF 3901/97). Yet, since it was a large majority of Member States that had supported this exercise, the blockage by the UK and France was not considered the final word. The Presidency therefore suggested that

“this option (merger of the EC and EU Treaties) should be developed further, without prejudice to the decision to be taken in the Conference on whether the Union should be ascribed legal personality and, if appropriate, whether the legal personalities of the Union and the EC should be merged” (CONF 3901/97)

²⁷ It essentially consisted of members of the permanent representations to the EU as well as representatives from the Commission.

²⁸ See CONF 4107/97, CONF 4108/97, CONF 4109/97. In particular a version put forth by the Belgian delegation (CONF 4117/97), and that sought to underline the Community elements within the consolidated treaty, aroused new controversy. However, the majority of delegations declared their support for the Belgian approach (CONF 4114/07).

However, the opposition on part of France and the UK was insurmountable. Arguments that sought to remove doubts about unintended legal consequences from a single legal personality were dismissed, and proposals for facilitation of ratification rejected. Both delegations argued that

“(…) even in this case [no unintended consequences, and facilitation of ratification; MK], the solution adopted would cause them [the delegations, MK] ratification problems in national law, in particular by imposing a general reexamination of the Treaties” (CONF 4151/97)

Disappointed by the frustration of the unfinished work, and because they feared that this would put an end to future efforts of simplification, Portugal, Ireland, and Belgium, decided to take a stronger stance on the entire simplification exercise. The UK’s strong support for renumbering the articles was suspected to be a deliberate effort to put a stop to all future simplification exercises with the conclusion of this IGC (Schmid 1998). In the end, the IGC agreed on the least ambitious simplification option: The Treaty deleted a number of obsolete provisions and renumbered the articles.²⁹

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 (*Hypothesis 1*). Thus, 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 hypothesis on transparency (*Hypothesis 2*). This camp of opponents, however, advanced several lines of reasoning at the same time. From the outset it was argued that the merger of the entities would have unintended legal consequences, for external relations as well as for the inter-institutional balance of power in general. All efforts, by the General Secretariat in particular, to dissipate these doubts could not overcome these delegations’ opposition as they were able to switch from this line of reasoning to next: It was further argued that a single legal personality in conjunction with a consolidated treaty would cause ratification problems by imposing a general reexamination of the treaties. Both concerns were considered stubborn and legally unsubstantiated by the Belgian delegation. The main reason from this perspective was deemed to lie in a general intergovernmental stance to European integration:

²⁹ The Conference further agreed on Declaration 42 that asked the General Secretariat to further work on a codified version of the Treaties, which, however, would have “no legal value” (CONF 4000/97), but a commitment to continue the exercise in a group of experts or a new IGC was noticeably absent (Church and Phinnemore 2001; Schmid 1999).

“Une chose est sûre: les réticences soi-disant techniques sont en fait politiques“ (internal paper Belgian Delegation, n.d.) (see also Jacqué 1997).

The European Convention

Simplification after Amsterdam

Just like the Treaty of Maastricht the Treaty of Amsterdam contained provisions for its own revision. The protocol on the institutions annexed to the ToA stipulated that in the case of enlargement entailing the accession of not more than five countries, the Commission “shall comprise one national of each Member State, provided that, by that [accession] date, the weighting of the votes in the Council has been modified” (ToA). A looming “big bang” enlargement by much more than five states then brought up calls for urgent reform. The Cologne summit in June 1999 (European Council 1999) thus decided that a further IGC would have to be convened in early 2000 in order to take decisions on the so-called Amsterdam-leftovers: the voting weights in the Council, the composition of the Commission, and the extension of QMV. Although the Italian delegation put forward that the Conference could give instructions to a technical body to submit specific proposals (CONFER 4717/00 LIMITE), the simplification and the single legal personality was not put on the IGC agenda. Outside the Nice IGC, however, the idea of drawing up a constitutional treaty suddenly gained ground. On 12 May 2000 the German Foreign Minister Joschka Fischer gave a speech at the Humboldt-Universität Berlin where he called for a new foundation of the European Union. Thus, he was not so much concerned with the simplification of primary law, but explicitly demanded to go far beyond *droit constant* and to found a lean European Federation that would have to be “established a new with a constitution” (Fischer 2000). This speech initially met strong scepticism from other Member States such as the UK, France, and the Portuguese Presidency (Financial Times 29 May 2000), and only received support from pro-federalist countries as the Benelux countries, Germany, and Italy. What is more, this speech again aroused fears that the new simplification rhetoric was simply a disguise for federalist intentions to open a debate on the distribution of power among the European institutions, or the EU and the Member States, respectively. In a debate on the IGC the House of Commons’ European Scrutiny Committee in a meeting in the end of May, for instance, addressed this issue.

“One essential difficulty is that this proposed re-ordering would give, and is by its advocates intended to give, the founding Treaties the form and character of a constitution. (...) Both the EC and the EU remain, essentially, international organisations based on Treaties between sovereign States and their founding documents should reflect that essential characteristic” (House of Commons 25 May 2000: 152).

Fischer's speech provoked a wide range of responses, though. In June 2000 the French President Jacques Chirac delivered an address before the German Bundestag in which he objected Fischer's call for a new foundation of the EU on the one hand, but was favorable to addressing in the long run questions concerning the EU's finalité. In November, Blair took up the idea and proposed a kind of charter of competences – a statement of principles – that would be much simpler and more accessible to European citizens. He made clear, though, that such a basic text would not be legally binding, but only possess political character (Blair, Warsaw speech).

In the meantime institutional reforms had been discussed in the IGC, which was concluded in the so-called “night of the long knives” at the Nice summit. The negotiations among the Heads of State and Government were largely regarded as hostile and even inefficient, and their upshot, the Treaty of Nice, was commonly considered a disappointment. Pressures from pro-integrationist countries, notably Germany, led to the annexation of the Declaration No. 23 on the Future of the Union to this treaty. This Declaration encouraged a deeper and wider discussion on the future of the European Union, whose results should be taken up by a new IGC that would make the necessary changes to the treaties. Of particular importance was the discussion of a delimitation of powers between the EU and its Member States, the status of the Charter on Fundamental Rights, the role of national parliaments in the European architecture, and the “simplification of the treaties with a view of making them clearer and better understood *without changing their meaning*” (Declaration No 23, emphasis added). Thus, the simplification theme and, thus, the question of single legal personality, were put on the EU's reform agenda again. It was doubtful, though, if the Convention would be able to break the deadlock of Maastricht and Amsterdam.

“[A] real “constitution” requires the clarification of basic questions relating to its architecture and the objectives (political or not) of the Union. This is precisely why it is unlikely to happen, as the integration process is precisely based on ambiguous compromises (...)” (Bribosia 2001: 213).

On 15 December 2001 the Heads of State and Government therefore agreed on convening the “Convention on the Future of Europe” as the forum responsible for preparing the 2004 IGC (European Council 2001).³⁰ The Laeken Declaration set out the institutional provisions and

³⁰ It was composed of four main components: representatives of the national parliaments, the EP, representatives of the Member States, and the European Commission. Representatives of the candidate countries, both of the national parliaments and the governments, were put on almost equal footing with the Conventioneers, apart the fact that they were not allowed to prevent an emerging consensus. The Convention thus comprised 102 members plus their alternates plus the three presidents. Chaired by the president Giscard d'Estaing and his two vice presidents Amato and Dehaene, a Praesidium was meant to serve as a steering committee. It was supported by a versed Secretariat (headed by the British John Kerr) and represented each of the four components. In contrast to the IGCs, all deliberation and documents should be accessible to the public.

the mandate for the Convention. It consisted of more than 60 vague questions, so that in fact every issue could possibly become subject to the Convention's deliberation. Even the Convention's objective and its final result were left undecided. The mandate stated that its result should either be a catalogue of different opinions – among which the IGC would pick their favorites – or “recommendations if consensus is achieved”. Shortly after the Laeken Declaration, however, it became more and more obvious that the Convention would at least aim at elaborating a single text.

In sum, the “failure” of Amsterdam put to a stop all attempts to simplify the treaties, and to discuss conferring a single legal personality to the EU. In consequence, this issue was did not make it on the Nice agenda. Only in the context of the new constitutional debate was the question of simplification and legal personality again brought up and put on the new reform agenda. Surprisingly, however, the British governments suddenly gave up its objection to the term “constitution” if this implied a better comprehensible text in the form of a “statement of principles.” But this did not imply an agreement to a single legal personality and the merger of the treaties, as the British government representative, Peter Hain, was quick in downplaying the importance of terms (The Guardian 28 February 2002).

The Convention

In order to set the agenda for the next IGC and, thus, to increase the Convention's significance, the Chairman of the Convention, Giscard D'Estaing decided to aim at drafting a single text without loose ends (Valéry Giscard D'Estaing, 26 February 2002). Anticipating quarrels about the Convention's final result he created and further coined a neologism that would ease both Skeptics and federalists in the Convention.

“If we were to reach consensus on this point, we would thus open the way towards a Constitution for Europe. In order to avoid any disagreement over semantics, let us agree now to call it: a “constitutional treaty for Europe” (Ibid).

Through this approach the Convention began questioning the “inviolability” of the *acquis* – the Nice Treaty that would soon enter into force – and assumed the same task as an IGC. Nonetheless, the question of the actual format of the Convention's final outcome remained unaddressed until the Praesidium established a first wave of Working Groups. This first wave primarily addressed questions constitutional issues, namely Subsidiarity (WG I), the Status of the Charter of Fundamental Rights, and/or accession to the European Convention on Human Rights (WG II), the Legal Personality of the EU (WG III), and the role of the National Par-

liaments (WG IV). Specific policies were left to subsequent discussions in a next wave of WG.

In the beginning of June the WG on Legal personality assumed its work. It was chaired by Giuliano Amato, the former Prime Minister of Italy and a constitutional lawyer, who – in that position – had already headed a study group on the simplification of the treaties at the RSCAS in Florence. The WG comprised 28 Conventioneers, six of the MEPs, 13 MP, 7 representatives of the Member states, one member of the European Commission and one observer. Although discussions were not made public, the transparency of the Convention nevertheless also pervaded the proceedings in the WG as “there were always interested people in the room that we did not know, but that were not showed the door” (Interview Giuliano Amato, 04 November 2005). The level of expertise among the Conventioneers was very uneven, with some having absolutely no experience with European affairs and others being explicit experts of the question of legal personality. Ideological cleavages, however, resurfaced quickly at the beginning of the deliberation. Some Conventioneers from the UK and France were deemed particularly hesitant (Interview Giuliano Amato, 04 November 2005, Interview Ricardo Passos 26 January 2006, Interview Hervé Bribosia, 04 May 2005).

The WG’s mandate of the WG was drawn up by the Secretariat. In an introductory part it stressed that since the EU in external affairs already acted “as if”, and therefore possessed de facto legal personality, the WG would have to consider the consequences of a) making the EU’s legal personality explicit, and b) merging the legal personalities of the Union and of the EC (CONV 73/002). The document goes on

“(…) The working group also needs to consider the implications of explicit legal personality and merger for the issue of simplification of the treaties. The working group may wish to explore the extent to which merger would assist simplification, facilitating either a reduction in the number of instruments and procedures and/or fusion of the Treaties.” (Ibid)

In a working document submitted by the Chairman the interrelation between the merger of the entities and the pillar structure was addressed more explicitly.

“The issue of merging the legal personalities is related to the pillar structure of the Union. The reason accounting for this structure created by the Maastricht treaty was to make clear that the so-called second and third pillars would be operating according to methods radically different from the Community method. If the Union was given legal personality juxtaposed to that of the Communities, the pillar structure would be preserved. Conversely, if the legal personalities were to be merged, the pillar structure could be at stake.

(…) These questions were already considered during the IGC 1996. The Treaty of Amsterdam did not eventually adopt any provision on this matter (...). They should now be carefully examined by the working group, which may consider the advantages and the inconveniences to endowing the Union with full-fledged and single legal personality.

(…) Also it should be bear in mind that the question of merging the legal personality of the Union with that of the Communities is linked with the merger and simplification of the trea-

ties themselves. (...) However, if the organizations were merged, would not the simplification of the treaties be substantially facilitated?" (WG III, WD 01)

The first meeting was held on 18 June and started with a *tour de table*, in which every Conventioneer revealed his or her opinion to the issues under consideration. This provided the chairman and the Secretariat the opportunity to anticipate and prepare for counterarguments against a far-reaching simplification (Interview Giuliano Amato, 04 November 2005, Interview Ricardo Passos 26 January 2006, Interview Hervé Bribosia, 04 May 2005). In this session it was pointed out even more clearly that a decision on an explicit recognition of a legal personality for the Union (single or a fourth legal personality) implied changes of constitutional nature. The group would therefore have to discuss possible effects for 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 next meetings on 26 June and 10 July were held with the participation of the Jurisconsults of the Parliament (Gregorio Garzón Clariana), the Council (Jean-Claude Piris), and the Commission (Pieter-Jan Kuijper). All 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. Hence, the merger of the personalities would not ipso facto result in the dissolution of the pillar structure. According to participants, Piris' statement made the difference and constituted a first "turning point" (Interview Giuliano Amato, 04 November 2005, Interview Hervé Bribosia, 04 May 2005). The General Secretariat's Jurisconsult, who had fought so vehemently for a Single Legal Personality in Amsterdam that the government representatives even gave him a T-shirt with the caption "THE Single Legal Personality of the EU", was suddenly listened to. Just as already in Amsterdam, Piris pointed out that the EU indeed had already a de facto legal personality on the international scene, but it was desirable to recognize it explicitly. Preferably, however, the legal personalities would be merged for matters of transparency, visibility, efficiency, legal certainty, and because it would facilitate the simplification of the treaties.

"Un certain nombre de craintes ont été exprimés à l'égard des conséquences que pourrait avoir la reconnaissance expresse d'une personnalité juridique à l'Union :

- elle risquerait de porter aux compétences de la Communauté et/ou des EM [Etats-membres] ; (...)
- elle mettrait en cause la structure en « piliers » actuelle ainsi que « la méthode communautaire », qui serait « radicalement différente » des méthodes retenues par les titres V et VI du TUE [provisions on CFSP and police and judicial cooperation on criminal matters ToA] (...)

Ces craintes sont largement infondées car elles reposent sur des prémisses erronées. (...). Même dans le cas d'une fusion des personnalités juridiques de l'Union et de la CE, la répartition des compétences et des pouvoirs institutionnels ne s'en trouverait pas affectée et pourrait être maintenue à l'identique si on le souhaite. » (Working Group 3, Working Document 3 : 8-10)

Among the members of the WG slowly emerged the persuasion that 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, the French Euroskeptic Abitbol, objected (Working Group III, Working Document 10).

But the WG had not yet explicitly discussed the implications for the form of the treaties and the Convention's final product. In a new hearing of experts on 10 July Professor Jean-Victor Louis explicitly stressed the link to the merger of the treaties, which was subsequently taken up in a new Working document drawn up by the Secretariat.

“Once the Community no longer had any separate legal personality, the distinction between the Union and the Community would cease to apply. The merger of those two Treaties (and even the Euratom Treaty) would be a logical consequence of the merger of the Union and the Community and would help simplify the Treaties. It has already been pointed out during the proceedings that conferring a single legal personality on the Union would not in itself affect the nature of the pillar structure. The same holds true for the merger of the Treaties.” (Working Group III, Working Document 6: 2)

During the break a group of Conventioneers issued a motion that demanded a draft for a Constitutional Treaty as a reference for the Convention's discussions. The undersigned Conventioneers called for the preparation of a Constitutional Treaty by the European Commission by October, which should consist of two parts with fundamental and non-fundamental provision, merge the existing treaties and dissolve the pillar concept (European Convention 02-07-10). The Praesidium hesitated to augur the WG deliberation and unanimously agreed “that the proposal was unacceptable since it would imply that the Convention would shirk its own responsibilities” (European Convention 02-07-12). Indeed, some members still expressed their concerns, and demurred about the abstract legal debates in this WG, as for example the Swede Kenneth Kvist:

“I am prepared to give explicit legal personality to the Union and that this replaces the legal personality of the Communities under one condition. This must not affect the intergovernmental character of the second and the third “pillars” and must not shift the political balance from the Member States to the institutions of the Union. (...) It is stated that, from a “strict legal viewpoint”, explicit conferral of legal personality on the Union “per se” doesn't entail any amendment, either to the allocation of competencies between the Union and the Member states, or between the Union and the community, or to the pillar structure etc. To some extent this though seems to underestimate the problem. The shift from two or (three) different personalities to one single personality must in reality give rise to some changes” (Working Group III, Working Document 7: 2)

It was also criticized that the draft report did not devote enough space to “explain and justify the particular form we wish the merger to take” (Comments of Lord MacLennan of Rogart,

Working Group III, Working Document 12). Yet, the Secretariat and the Praesidium were not in agreement on that matter, with the Secretary-General Sir John Kerr favoring a “chapeau” treaty that would identify basic elements of both EC and EU, and the triumvirate favoring an all-encompassing single instrument. Shortly after the summer break, an internal Secretariat paper that argues in favor of an all-encompassing treaty on the basis of a single legal personality was accidentally sent to all Conventioneers. A single instrument, the argument went,

“(…) would replace the original treaties and the successive revisions (…) [and] should all be subject to a ratification procedure. For that reason, before embarking on that course, we should bear in mind the concerns of those who have misgivings about submitting to further ratification texts which may already have been accepted. However, given the new context, and the importance of the reforms planned, the result of holding a new ratification procedure for the “two-part” package would be to canvass the support of the Member States and their citizens for the future European project. It would, moreover, make the treaties easier to read in the eyes of European citizens, which is one of the main aims of the Convention” (Ibid: 17)

According to participants, the hearing of another expert, Prof Bruno De Witte, constituted a next turning point in the deliberations. De Witte made again clear that if the group was to decide the merge 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 (Working Group III, Working Document 27). In consequence, the group also “touched on a sensitive subject, i.e. what would happen if a Member State did not ratify the outcome of the IGC which would follow the Convention” (CONV 281/02). Shortly after this final hearing, Amato announced an emerging broad consensus for the attribution of single legal personality for the EU in Plenary. An explanatory note on that regard that was drawn up by the Secretariat lays out the reasons for the inclusion of that recommendation

“Bien qu’il soit concevable de fusionner les personnalités juridiques sans fusionner lesdits traités, le groupe a conclu sur ce point que la fusion de ces deux traités constituerait une suite logique de la fusion de l’Union et de la Communauté, et contribuerait de la sorte à simplifier traités. On a observé à cet égard que, dans la mesure où la Communauté n’aurait plus de personnalité juridique propre, la distinction entre un TUE et un TCE n’aurait plus de raison d’être, et constituerait une source de complication inutile. » (Working Group III, Working Document 16)

In sum, the negotiations on legal personality in the context of the Convention were subject to processes of arguing. In comparing the institutional settings, we find that several scope conditions were indeed conducive to that effect. In contrast to the Amsterdam IGC, cleavages were not clear and rigid, but cross-cutting and in flux as there were not clearly identifiable camps within the WG and the Convention in general (*Hypothesis 1*). We were able to observe differ-

ences between the Praesidium and the Secretariat, and hesitation on part of French, British and Swedish national parliamentarians instead of government officials.³¹

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 this case, however, the UK did never back out of their agreement to the term “constitution,” but consistently referred to the advantages of a single legal personality for the simplification of the treaties:

“The report is very convincing on an issue close to my heart: making the European Union easier for citizens to understand. The present distinction between the Community and the Union confuses most people, both those inside the European Union and those from outside who negotiate with us. It seems like complexity for complexity’s sake. (...) I am all for getting rid of the confusing complexity associated with the pillars, the Community and the Union.” (Peter Hain, 03 October 2002).

Finally, leadership appears to be particularly conducive to helping arguing prevail in the context of the Convention (*Hypothesis 3*). While all efforts by the General Secretariat to dissipate doubts with regard to unintended legal consequences and ratification problems were doomed to failure, exactly the same arguments suddenly 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:

“Mr. President, as a member of the legal personality working group, I would like to thank Vice-President Amato for helping us to achieve a balanced result. At one stage, some of us encouraged him to be less balanced and a little more political, but I reconsidered my stance because I think he was right. My first point is that the whole subject of legal personality has been demystified. This is not the first time that the question of legal personality for the European Union has been raised. Thus far the idea of a single legal personality has not enjoyed much success. In order to progress and be successful, it should be demystified and disentangled from the ideological layers involved in this matter.” (Szájer 03 October 2002)

Other more negative voices identified this atmosphere as the principal reason for this outcome too:

³¹ As for instance this quotation of Kirkhope illustrates:

“There is (...) one area of the report with which I fundamentally disagree, namely the notion that a single legal personality should go hand in hand with an abolition of the pillar structure of the EU. (...) This structure actually guarantees that the common foreign and security policy, and justice and home affairs, remain matters for intergovernmental negotiation rather than supranational governance. It is on the basis of that guarantee that the British people accepted the European Union developments in that matters and it is a guarantee on which future British involvement in these areas now stand. (...) In fact, I would go so far as to say that the pillar structure could theoretically be extended to new policy areas.” (Kirkhope 03 October 2002)

“C’était là [the single legal personality, MK] à mes yeux une question essentielle, ontologique en quelque sorte, à l’essence même de l’Union européenne (...) Hélas, je dois le dire devant Monsieur Amato, notre groupe de travail s’est saisi de cette question avec des pinnettes pour l’évacuer aussitôt, préférant se réfugier dans le huis-clos sémantique que lui a capitonné avec complaisance une procession d’experts-maison. » (Abitbol 03 October 2003)

Nonetheless, it was acknowledged that this was due to the particular set-up of the Convention as this final quote of the then Commissioner Michel Barnier illustrates

“Monsieur le Président, mon intervention n’est pas vraiment une question, mais plutôt une observation en forme d’hommage au travail de Monsieur Amato. En effet, j’ai un souvenir, comme d’autres ici, assez précis du temps qui a été consacré, par exemple avant la signature du Traité d’Amsterdam, dans un cercle qui n’était pas celui de la Convention et qui était un cercle purement diplomatique de négociations intergouvernementales. Je suis simplement amené à constater que c’est probablement une preuve supplémentaire qu’il fallait opérer autrement. Ainsi, cette Convention, telle que constituée, est un bon outil. En quatre séances de travail, ce groupe, sous l’autorité de Monsieur Amato, avec la présence des gouvernements mais d’autres aussi, a abouti à des propositions, que vient de présenter Monsieur Amato, extrêmement claires sur la nécessité, les avantages l’emportant sur les inconvénients, de doter l’Union d’une perspective juridique et même de fusionner des perspective juridiques. Je voulais juste observer que la méthode de la Convention me paraissait la bonne pour maintenir et pour l’avenir » (Michel Barnier, 12 September)

CONCLUSION

In this paper, we argued that a focus on 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 preferences accordingly. At the example of negotiations on simplification and the single legal personality of the European Union we demonstrated that the institutional set-up was indeed conducive to the prevalence of arguing in that the transparency of the debate in conjunction with a higher degree of uncertainty and leadership made it particularly effective.

One caveat is necessary. Even though we were able to compare two settings under quasi-experimental conditions, and to multiply the number of observations in our case study, our results are still hardly generalizable. In a second step we will therefore systematically vary some of our institutional factors through “within-case” comparisons. More specifically, we will compare the deliberations that led to the agreement on single legal personality with that on “Social Europe” – a WG that did not come up with a “reasoned consensus”.

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