Arguing and Bargaining in the European Convention

Contribution to the State of the Art Report
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Abstract

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

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Introduction and Research Question

The European Convention

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

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

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1 The formal revision procedure rests upon Article 48 TEU.
2 The Convention method had already proved successful in elaborating the Charter of Fundamental Rights. The European Parliament and the Belgian presidency strongly supported the idea of a Convention as the IGC’s preparatory body (see also Duff 2003 and Magnette/Nicolaidis 2004).
3 The Convention comprised 105 members plus their alternates plus the three presidents. A Praesidium was meant to serve as a steering group. It was chaired by the president Giscard d’Estaing and his two vice presidents Amato and Dehaene and represented, albeit very unbalanced, each of the four components. The Convention secretariat supported its work. For a more detailed description of the Convention’s work see Maurer/Göler 2004.
the form of a questionnaire (divided in four themes: the division and definition of competences between the Community and its Member States; the simplification of the Union’s instruments; democracy, transparency and efficiency in the EU; questions regarding a constitution for the Union). The result of the Convention should be either a catalogue of different opinions, among which the IGC could pick some solutions, or a single proposal. In his introductory speech the Chairman Giscard d’Estaing pointed out that the Convention, if it was to be taken seriously, should elaborate a single text, leaving no single question unresolved. The Convention therefore adopted an “as if”-approach: the proposal should be formulated in a manner, as if it enters into force immediately. Thus, it assumed the same task as an IGC, being fully aware of the fact that “in the eyes of the public, our recommendation would carry considerable weight and authority if we could manage to achieve broad consensus on a single proposal which we could all present” (Giscard D’Estaing [26.02.2002]).

The Convention’s work was structured in three consecutive stages: the listening stage (Phase d’Écoute), the study stage (Phase d’Étude), and the proposal stage (Phase de Réflexion). The first stage endured longest and lasted eight months. It was supposed to contribute to a thorough examination of all visions on the purpose of the European Union. The succeeding stage started with the presentation of the “Skeleton”, the framework treaty, by Giscard. It already represented a broad consensus about the structure of the treaty and served as the point of reference for the study stage. During this stage eleven Working Groups were established aiming at attaining common proposals. The last stage began in February 2003. Here, the Conventioners proposed amendments for the articles presented by the Praesidium. However, the mandates of the Working Groups did not comprise institutional questions. For these issues the Praesidium chose a different negotiation setting. The discussions mainly took place in the Praesidium itself and were only subject to a few plenary debates.

A first single text was presented in June 2003. But institutional questions had not been settled yet. On request of the president, the European Council postponed the deadline for one month. On 18 July 2003, the Convention’s chairman presented a single text to the European Council – the “Draft treaty establishing a Constitution for Europe” (European Convention [18.07.2003]). Although especially institutional questions did not wholly survive the following IGC, the substance of this proposal is nevertheless surprising. For the first time in the semi-permanent institutional reform process, the negotiations did not produce any left-over. Not only could the four Post-Nice topics be settled. Moreover, the Convention exceeded the given mandate, dealt with a wide range of other topics and reorganized the whole primary law of the EU. In fact, the Treaty of Nice was renegotiated even before it had entered into force. Compared to the status quo, the single proposal can in most parts be considered as a sub-

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

5 See Giscard D’Estaing (18.07.2003): “The draft is a success because it is a finished product, with no loose end to be tied up, no options left open.”
stantial progress, representing a result well beyond the lowest common denominator. Worthy of men-
tion are e.g. the double majority, the single legal personality, the merging of the pillar structure and the
treaties, the generalization of the co-decision procedure, and the incorporation of the Charter of Fun-
damental Rights into the treaties. Topics, the representatives of the member states had so far not been
able to settle in an IGC. These agreements were reached while leaving the question of the very finalité
untouched – what becomes apparent in the amazing EU-speak neologism “Constitutional Treaty”.

Puzzle, Research Question, and State of the Art

According to Liberal Intergovernmentalism, which rests on the assumption of the analytical priority of
state preferences and tries to explain issue-specific transfers of sovereignty, final results of intergov-
ernmental bargains tend towards, but not quite at, the lowest common denominator. Agreements be-
yond the lowest common denominator can be achieved by issue-linkages resulting in package-deals,
and threats and incentives of exclusion or unilateral approaches (Moravcsik 1998). The modest out-
comes of the Amsterdam and the Nice IGCs are then attributed to the diverging preferences of Mem-
ber States, the lack of a clear focus of the negotiations and the uncertainty of institutional choice.6
Given the lack of a clear focus due to the exceeding of the mandate, and the broadening of the range of
intensities and nature of preferences through the inclusion of new actors, it seems not only puzzling
that the European Convention managed to adopt a single text. What is more, why is the end-result of
the following IGC, as compared to the Treaty of Nice, so well beyond the lowest common denomina-
tor? We assume that the institutional setting of the Convention had a considerable impact on arriving
at an agreement in that it provided preferable conditions for the effectiveness of arguing, “conditions
under which arguing leads to changes in actor’s persuasions and, thus, influences the process and the
outcome of negotiations” (Risse/Ulbert forthcoming: 1).

While most analysts consider the attainment of the Proposal as puzzling, there are different assess-
ments on whether this surprise can be ascribed to the Convention method as such. Paul Magnette and
Kalypso Nicolaïdis claim that the “shadow of the IGC” led to the dominance of state representatives,
so that “the Convention reproduced, by extension, the logic of intergovernmental bargains” (Mag-
nette/Nicolaïdis 2004: 381). The achievements in the single text are mainly explained by the initial
distribution and intensity of preferences as well as by the non-obligatory status of the Convention’s
proposal. Only on marginal constitutional issues concerning simplification, where the preferences of
the Conventionists “that mattered” were less intense and the agreements had less predictable conse-
quences, did deliberative dynamics play a role. But when it came to the crucial issues, the hands of the
member state representatives were strengthened and the pendulum “moved back to classic forms of

6 “Given its lack of a single, clear substantive focus, it is no surprise that Amsterdam, more than any Treaty of Rome revision
since 1957, became a melting pot of disparate measures lacking coherent vision of either substantive co-operation in a
particular area or future institutional structure of Europe. Given the lack of clear positive-sum gains, institutional reform
tended to get bogged down in zero-sum bargaining between large and small states, or more and less federalist ones”
(Moravcsik/Nicolaïdis 1998: 14).
diplomatic bargaining” (Ibid: 394). Hence, “despite the originality of its composition and procedures, the European Convention did not substantially differ from previous rounds of treaty reform in the EU, except in areas marked by a high level of formalism that could be fitted under the rubric of simplification” (Ibid: 399). Besides, the inclusion of the new actors is seen as the essential innovation of the Convention method. But this crucial innovation only came to play on “Convention-suitable” topics (Maurer/Göler 2004: 22). The dominance of state representatives in the last Convention phase automatically constrained the role and influence of the new actors on the debate and this key position of state representatives favoured the dominance of IGC-like bargaining (Ibid: 19). From a more normative point of view, it is also claimed that by the inclusion of parliamentarians and the openness of the debates, the Convention method constituted a forum that can be considered as more representative and legitimate because it deviates from pure intergovernmental bargaining (Maurer 2003: 131). Hence, the Convention is even seen as an alternative to IGCs and as a qualitative change in the constitutionalization of the EU (Pollack/Slominski 2004: 218).

These judgements implicitly or explicitly rest upon an Elsterian notion of Deliberation that assumes bargaining as being ontologically prior to arguing (see for a discussion Saretzki 1996: 24; Neyer/Everson 2004). Actors are perceived as acting according to the logic of expected consequences (March/Olsen 1998). Arguing as a form of communication, as speech acts, takes place due to external factors such as publicity (e.g. through the participation of new actors or public debates), that force actors to justify their arguments and align them to constraints like imperfection, consistency and plausibility (Elster 1998b: 104). According to this approach, arguing is not expected for negotiations on issues with uncertain distributive consequences. Unfortunately, the above mentioned analyses fall short from an accurate application of this approach and from discussing causal mechanisms that might have led to the effectiveness of arguing: Firstly, the prevalence of state representatives, i.e. the intergovernmentalisation of the Convention, must not be mixed-up with the notion of bargaining. The dominance of state representatives tells us little about the speech acts or even the effects of the communicative mode on the outcome. In these studies the intergovernmentalisation is implicitly equated with the logic of bargaining, in that the dominance of state representatives is seen as an indicator for the negotiation style and the logic of action (see esp. Maurer/Göler 2004). But not only is there empirical evidence that arguing does also play a role in multilateral and in-camera-settings (see e.g. Checkel 2001a and Risse/Ulbert forthcoming: 6). Moreover, the logic of negotiations might also be altered by other variables than the inclusion of new actors and the cruciality of the issues at stake. Hence, through the assumption of the ontological priority of bargaining, these researchers might fall into the trap of overemphasizing the effect of the above mentioned aspects while ignoring possible alternative explanations related to the institutional setting. Secondly, the cruciality or the “Convention-suitability” of an issue is not easy to predict. Magnette and Nicolaïdis define crucial issues as issue-areas where preferences are intense and consequences less predictable. But some of the achievements of the single proposal which they attribute to effects of deliberation, such as the binding character of
the Charter of Fundamental Rights, might very well have considerable consequences. Hence, the fact that something is perceived as crucial might be a social construction, and the definite ascription of the intensity of preferences and what is regarded as a crucial issue is only possible in an ex-post analysis. But then the definition itself runs the risk of becoming a tautology.

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

**Under what circumstances did arguing in the European Convention become effective?**

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

What is arguing, what is bargaining?

Pure arguing as a communicative mode (Saretzki 1996: 32) can be analytically distinguished from pure bargaining in modal, procedural and structural aspects. In respect to modal terms, arguing is characterized by the use of empirical and normative validity claims in contrast to pragmatic demands and threats. In procedural respect, processes of arguing can not be sequential but are reflexive, in that actors’ arguments and reasoning refer to prior statements and arguments. The validity claims on that the arguments are based are assessed upon specific criteria, which have to be commonly comprehensible. Validity claims thus refer to some external authority and are – in structural respect – triadic in nature. Hence, arguing and persuasion can be defined as non-manipulative reason-giving in order to alter actors’ choices and preferences irrespective of their consideration of other actors’ strategies (see Keohane 2001: 10). Defined in this way it is not presumed that arguing is more effective than bargaining or even naturally efficient and thus automatically leads to a reasoned consensus. But it is presumed that this communicative mode rather leads to a reasoned consensus than to a compromise without a change in the actor’s preferences, because actors are submitted to the better argument and may change their preferences accordingly. We will know a consensus when the result is a) surprising, b) beyond the lowest common denominator, and c) when actors give the same reasons for its achievement (Risse 2004: 302). However, first empirical studies have shown that although it is possible to analytically distinguish the speech acts, they usually go together in reality. Moreover, it is empirically impossible to ascertain the strategic orientation of the actor engaged in arguing and bargaining. That means that the simple occurrence of arguments tells us little about the influence of these arguments on the process and the outcome of the negotiations, nor about the strategic orientation of the actors (but see Müller 2004). But what has become clear is that under specific circumstances the social and institutional context can have such an influence and actually influences the process and outcome of the negotiations (Ibid. 299-300). In this project we therefore ask for the effectiveness of arguing as special types of speech acts. We will both deductively and inductively generate variables regarding the role of the institutional context in enhancing this effectiveness.

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

In order to make a statement about the effectiveness of arguing in the Convention as a special form of treaty negotiation in the European Union, and since we have only a limited amount of cases to construct a forward-looking research design, we start from behind and then trace the mechanisms that fostered an agreement. Our dependent variable (on that we will later chose our cases) is therefore the surprising achievement respectively the non-achievement of an agreement on an issue discussed. We will know an agreement when it was discussed in the Convention and found its way in the final text. It is “surprising” when it has already been discussed in an IGC, but no agreement could then be
achieved. We therefore assume that arguing could have played a role in achieving this agreement. A Non-agreement is then a discussed issue on that the actors only produce options or statements, but not a proposal that is going to be adopted in the final text.

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

The literature on arguing and bargaining in multilateral negotiations already offers us hypotheses about the effectiveness of arguing and the role of the social and institutional context. Fortunately, the European Union has now provided a “real life-experiment” in form of the European Convention. This Convention shows remarkable differences in the institutional context compared to IGCs, which allows us to systematically vary institutional features with respect to their role in enhancing the effectiveness of arguing. Moreover, the Convention itself has used different negotiation settings for different types of issues. We can therefore vary the institutional setting within the Convention in comparing the negotiations in the Working Groups and the Plenary with the top-down approach of the Praesidium on institutional issues.

The most obvious differences between the Convention and the IGC are the inclusion of more and new actors, the decision-making procedure of consensus, and the public character. All these features of the Convention do also play a role – albeit in different degrees – in the Praesidium strategy on institutional issues.

1. IGCs comprise representatives of the member states with binding instructions. They enter negotiations with more or less fixed preferences. In contrast, the vast majority of the Conventioners were parliamentarians, i.e. democratically elected members of the EP, MPs of parties in government as well as MPs of the opposition. They were neither constrained by binding decision of their sending institutions, nor by strict working methods. In addition to that, many of these new actors came from the accession candidate countries and were not familiar with European politics. Hence, the distribution, the intensity, and the nature of represented preferences are broader and therefore more ambiguous in the Convention than in an IGC.

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

3. Negotiations in IGCs take place behind closed doors. Documents are regularly exchanged between the negotiation parties, but are normally not accessible to the public. In contrast, the access to all negotiations and documents was considered as the crucial innovation and the standard of the Convention. However, the Praesidium did not meet in public but behind closed doors and did not produce any verbatim protocols. Nevertheless, every single component was represented by at least
Hypotheses: Arguing and Persuasion in the European Convention

In the following we will mainly draw on previous research with regard to hypotheses on the effectiveness of arguing. For each we will discuss whether the institutional settings of IGC and the Convention allow us for systematically testing them.

Degree of knowledge and uncertainty

Much of the rationalist literature assumes state preferences to be fix in the strategic interaction. Soft rationalists acknowledge the possibility of imperfect information and uncertainty about the nature of the issue and hence the own preferences over outcomes and strategies, and the preferences of other actors represented in the negotiations. On the one hand, it has been shown that these aspects play a role in IGCs and influence the course of integration (see the historical institutionalist account of European integration in Pierson 1996). On the other hand, the uncertainty about empirical facts, the preferences of other actors and therefore one’s own preferences should induce an interest in engaging in discussions on the facts and the preferences of other actors. Furthermore, psychological research regard imperfect information and uncertainty as preconditions for the acceptance of new arguments (Ulbert et al. 2004: 18). Hence, the degree of knowledge and uncertainty can improve the effectiveness of arguing.

This aspect can vary with the inclusion of new actors. Compared to the IGCs, the new actors in the European Convention broaden the distribution, intensity, and nature of represented preferences. The unusual and broad distribution of preferences intensifies the uncertainty of one’s own position in relation to that of the other actors and hence the nature and probability of a possible outcome. The broadening of the nature of preferences also leads to a proliferation of cleavages and identities. For example, a MEP represents the supranational institution, his group and his national faction within this group. It might be the case that the interests of these different constituencies get into conflict. Again, the uncertainty of the actors about their own preferences and that of the others increases.

H1: The inclusion of new actors increases the effectiveness of arguing.
Also the decision-making procedure can add to this aspect. In contrast to classic IGCs, the Convention did not decide by unanimity but by consensus. Formal voting in the Plenum was avoided throughout the whole process. In addition, the meaning of consensus, i.e. the amount or type of necessary consenting actors, was never defined. This means that, in contrast to the IGC, actors are always uncertain about the weight of their preferences and their position in relation to that of other actors. Hence, under the condition of consensus, outlier positions and the threat of putting a veto with a view to be compensated in another area (see Moravcsik 1993, 1998) are far less of value. Since outlier positions cannot be used as bargaining chips that are saved until the end of a bargain, the possibility for taking prealable decisions, i.e. decision that are prerequisites for further decisions, is enhanced. Furthermore, in order to have the own preferences taken into account, actors must align their preferences to the mainstream and/or build coalitions with other actors. Under the condition of uncertainty about the nature and intensity of preferences of new actors, mainstream preferences or coalition preferences cannot be identified by the exchange of threats and incentives. Mainstream positions are then held together by a line of reasoning and can be identified by the underlying arguments. So in order to align the own preferences to the mainstream and to present them as a part of it, one has to get involved in a mainstream argumentation. Majority voting, as used in the Praesidium strategy on institutional issues, can have a similar effect. Here, the uncertainty about the own preferences in relation to the others was enhanced by the majority voting on packages, and not on single questions. Thus, the decision-making procedure can have a considerable impact on the effectiveness of arguing. Whereas under the condition of unanimity all positions are accepted as equal, majority voting and especially consensus forces the actors to look out for mainstream positions and align to its argumentation.

H2: Arguing is more effective under conditions of consensus and majority voting than under the conditions of unanimity.

Publicity of the debate

The publicity of a debate points to the triadic structure of arguing. Validity claims refer to an external authority which allows assessing the arguments upon specific criteria. According to Elster (1998a, b), a public audience can be such an external authority. The publicity of a debate forces actors to act according to the imperfection, consistency and plausibility constraints. Powerful social norms induce an incentive for actors to act in a way that he is not perceived as selfish but as impartial and credible (Ibid: 104). However, this will play a greater role the more the consent of the audience is required. In contrast to Elster, Checkel (2001a) argues that negotiations in front of a public audience result in ritualistic rhetoric. The effectiveness of arguing is more likely behind closed doors and in-camera settings as actors risk to expose their interests or even identities. These claims differ with regard to the assumed logic of action, the intensity of underlying preferences and the alleged audience. Elster starts
from the assumptions of a logic of consequentialism and refers to an impartial and in a way coherent audience. Deliberation in front of this audience may affect the way a proposal is made or even the substance of the proposal, but he would not expect changes in fundamental preferences. Checkel, however, starts from a logic of appropriateness (Checkel 2001a: 52). When he refers to changes in identities and intense fundamental interests, the audience he has in mind is the attentive constituency (Checkel 2001a: 54, Checkel 2001b: 222). Then, however, the role of the domestic audience as an external authority is vanished. An audience can be assumed to serve as an external authority when its consent is required and the actors therefore have to address them. So both claims are not self-excluding but heavily dependent on the initial intensity of preferences, the certainty about the preferences of the actors, and the required consent of the listening audience they refer to.

As mentioned above, the public character of the Convention must be seen as all pervasive. Here, preferences are uncertain and the audience whose consent is required is the Plenary. On institutional issues, however, initial preferences can be assumed as more fixed since these questions concern the institutional equilibrium of the EU. The publicity of the debate is reduced by using mainly the Praesidium as the relevant forum for the discussions. The public character was nevertheless preserved as every component was represented in the Praesidium and the consent of the Plenary was still required. And as argued above, the uncertainty of preferences was artificially enhanced by voting on proposition packages and not on single questions. In contrast, the preferences in IGCs can be considered as fixed and certain. The negotiations take place behind closed doors and no audience is required for consent. So whereas the conditions for effective arguing in publicity hold true for the normal negotiations within the Convention, the conditions for effective arguing in in-camera settings are fulfilled within the IGCs.

**H3: Arguing in publicity is more effective when preferences are less fixed and the consent of the listening audience is required.**

**Institutionalization**

With regard to the triadic structure of arguing, the external authority must not be an audience whose consent is required. The triadic structure of arguing can also be enhanced by the density of predefined principles, norms, rules and procedures. Of course, this might be the case in the Convention as well as in an IGC. But in contrast to an IGC the Convention’s debates were explicitly divided in three consecutive stages: listening stage (Phase d’Écoute), study stage (Phase d’Étude), and the proposal stage (Phase de Réflexion). These stages resemble the stages of a negotiation process: Agenda-setting, problem-definition, negotiating an agreement. Especially the agenda-setting stage is characterized by open discussions and arguing speech acts. Unlike an IGC or other multilateral negotiations, these stages take place in the same institutional setting, with mainly the same actors and with a clear time
frame. The sequencing of the debate, i.e. the integration of the agenda-setting and problem-definition stage in the same institutional setting, adds to the reflexive character of arguing as it offered a forum for the expression of underlying reasoning and hence advanced the possibilities to later refer to these argumentations. A long listening phase might also improve the effectiveness of arguing by creating or providing what Habermas calls a “common lifeworld”. A common lifeworld can be the common membership in the same body. This is reflected in the early renaming of the “Convention on the Future of the European Union” in “European Convention” and the reformulation of the working methods (Hoffmann/Vergés-Bausili 2004). Such a common lifeworld determines the type of arguments and justification which are regarded as appropriate. For instance, in his first statement before the Convention, the representative of the German Länder, Erwin Teufel, demanded a catalogue for the delimitation of competences. This statement was perceived as inappropriate for a Convention as it was underpinned with the “wrong” arguments, i.e. with arguments that were not related to a common good.

H4: Arguing is more likely to be effective in a dense institutional setting.

The Shadow of Hierarchy

Since the Convention was created as a preparatory body for the IGC, the results are formally not binding. However, as mentioned above the Convention was totally aware of the fact that the as-if-approach, i.e. the elaboration of a single text would carry considerable weight in the eyes of the citizens. Changes on the text in the following IGC become more difficult when starting from a status quo and not from scratch. Yet, one has to take into account that the perception of the single text as status quo is a social construction and therefore dependent on intersubjective agreement. So the shadow of the IGC, i.e. the shadow of hierarchy (Scharpf 2000: chap. 9), forced the Convention – if it was to be taken seriously – to arrive at an agreement. Thus, the Conventioners had to spend more energy at listening to the arguments of other actors and to identify and construct mainstream positions. One has of course to confine this claim. Those actors with veto powers in the following ratification procedure, i.e. member states and some national parliamentarians, are less dependent on arriving at a consensus. On the contrary, the institutions with no formal veto power are particularly eager to reach a consensus. Especially in this Convention, the method as such and therefore the possibility of the European insti-

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7 A common lifeworld are collective interpretations about the world and of themselves, as provided by language, a common history, or culture. It can consist of a shared culture, a common system of norms and rules perceived as legitimate, and the social identity of actors being capable of communicating and acting (see Habermas 1981:2:209). For the possibility of a common lifeworld in international relations see Risse (2000: 12-14). This is the experience of the Convention on the Charter of Fundamental Rights. These Conventioners report of a “Convention spirit” and there desire to become a part of European integration history. This is reflected in the early renaming of the before “body” in the name “Convention”. Also the “European Convention” was first called “Convention on the Future of the European Union”. It was renamed to emphasize its character as a possible standard method of treaty revision.

8 This effect can be modelled by a rational-choice approach: Derek Beach (2004a) argues that the IGC didn’t start from scratch but had to consider the Convention’s proposal as the status quo (SQ). When voting is unanimity, as it is in the IGC, and when some parties prefer the status quo, as e.g. in the case Belgium and Germany, it is difficult to move away from the SQ. This is only possible when member states can credibly threaten to veto the whole project.
tutions to gain more influence in the formal treaty revision procedure was at stake (Duff 2003). In addition, for those member states preferring a change of the status quo, i.e. the Nice treaty, the achievement of a single text and therefore the intersubjective agreement on a new status quo was of high importance. Thus, the shadow of the IGC does not have an even influence on all actors.

**H5: The impact of the shadow of hierarchy with regard to the effectiveness of arguing is higher on actors with no formal veto-powers in the ensuing ratification procedure and on actors preferring a change in the status quo.**

**Credibility of the Speaker**

As case studies confirm, the credibility of a speaker plays a crucial role for the persuasiveness of their reasoning (Risse/Ulbert forthcoming: 8). First, the credibility of a speaker can be reflected in its reputation as an honest broker. Arguments are perceived as impartial and representing the common good. Neofunctionalists argue that supranational institutions (e.g. the Commission) possess such a reputation vis-à-vis the member states and can therefore effectively mediate among them (e.g. Lindberg 1963). Also the chair of the negotiations, e.g. (small) presidencies, can enjoy such a role. Another aspect of credibility is – second – the legitimacy of the speaker. For example, the European Court of Justice (Burley/Mattli 1993; Mattli/Slaughter 1998) or the European Parliament as the only directly and democratically elected institution can be regarded as representing the common good (Haas 1964: 119). Third, credibility can also stem from competence and expertise on complex matters (Lindberg 1963, Finnemore/Sikkink 1998: 899). This might especially be the case for the Commission and the Council respectively the Convention Secretariat (Beach 2004b, for a first assessment Deloche-Gaudez 2004). Finally, as Elster argues, the consistency in reasoning can also increase the credibility of the speaker.

Since the negotiation context (i.e. the formal role in the negotiations; the reputation vis-à-vis other participating actors) and the issue at stake are important intervening variables for the credibility (Beach 2004b, c), the speaker properties are not easily assessed in advance and therefore tend towards tautology (see the critique of Moravcsik 1999: 277). But we risk over-determining the impact of the negotiation context if we do not control for this aspect. In IGCs, supranational institutions do not “sit at the table”, i.e. they are not negotiation parties. Their credibility and hence their influence might stem from their reputation vis-à-vis the member states as honest and legitimate actors or technical experts. Also the presidency and the supporting Council Secretariat might possess a reputation as hon-

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9 For a discussion regarding the reputation as a resource for entrepreneurial leadership of bureaucratic agencies in treaty negotiations in the European Union see Moravcsik 1999. He argues that these aspects do not play any role since treaty negotiations must be considered as naturally efficient. Leadership resources of supranational institutions only stem from the ability to act as a two-level network manager, i.e. to help overcoming bottlenecks in the translation of domestic demands for cooperation into state preferences.
est broker or experts. In contrast, supranational institutions were negotiation parties in the Convention. Therefore the aspects “honest broker” and “legitimacy” decrease vis-à-vis the member states. So we can drop these aspects and focus on reputation as technical experts. This may especially hold true for the European Commission. For the Praesidium and the Convention Secretariat we must consider every aspect as relevant as it was – on the one hand – designed very heterogeneously and – on the other hand – mainly composed of bureaucrats.

\textit{H6: The more a speaker is perceived as credible, the more persuasive his argument will be.}

\textit{Alternative Explanations: Domestic Politics}

According to Moravcsik (1993, 1998), nature and intensity of the preferences in European interstate bargains reflect the preferences of the most powerful domestic actors. That means that preferences can change during the negotiation according to the underlying domestic factors for preference formation. In order to control for this external alternative explanation, we have to be attentive to changes in governments or party structure. An obvious indication for such changes is the replacement or the resignation of a Conventioneer.

\textit{Cases}

In selecting our cases on the dependent variable we have to take into account three important criteria: Firstly, an agreement must be a “surprise”, which means that in contrast to the preceding IGCs the Convention arrived at an agreement. Secondly, this surprising achievement cannot be attributed to a preference change due to a change in government. Thirdly, this agreement has survived the following IGC. A Non-agreement is then a discussed issue on that the actors only produce options or statements, but no a proposal that is going to be adopted in the final text.

1. For a surprising agreement we choose the single legal personality of the EU. The single legal personality has already been a subject in the negotiations in Amsterdam and Nice, but an agreement could not be achieved. The single legal personality is a very crucial issue as it is the prerequisite for the merging of the treaties and pillars, and crucial for the external policies of the EU. So we are able to compare the negotiations in an IGC with the negotiations in the Working Group “legal personality” in the Convention and therefore trace causal mechanisms that are peculiar to the Convention.

2. As a non-agreement we select social issues. These issues were first ignored in the Convention’s debates. Nevertheless, a large group of Conventioneers demanded a discussion on these issues and the establishment of a Working Group. The adopted report did not contain
any proposals but listed the discussed cleavages. This is a case for non-agreement. We will compare the discussions in the Working Group “Social Europe” with the discussions in the Working Group “legal personality”.

3. Finally, we will vary the degree of most of the institutional features of the Convention in order to study the importance of single mechanisms. Therefore we choose on the independent variables and compare the negotiations in the Convention and the IGCs with the special strategy of the Praesidium on institutional issues.

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

Methodology

Process tracing in order to avoid omitted variable bias. To be written!
References


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