Deliberation in negotiations
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ABSTRACT  The past decade witnessed a growing interest in theories of deliberation and their application at the international level. This article takes stock of the state of the art. It argues that the ‘deliberative turn’ has forced both rationalist and constructivist scholars to refine their arguments and reconsider their methodology. We argue that the new research frontier for constructivists is in assessing under which circumstances arguments affect negotiating actors’ preferences and subsequently lead to outcomes that are not easily explained in pure bargaining terms.

KEY WORDS  Arguing; bargaining; European Convention; intergovernmental conferences; negotiations.

INTRODUCTION
Arguing, understood as reason-giving, is all pervasive in international politics: negotiating actors give reasons for their position and demands at almost any time, regardless of whether talks are conducted in public or behind closed doors. In the past, orthodox negotiation theories often treated arguments as epiphenomenal to power and interests (see, however Odell 2010). The past decade, however, witnessed a growing interest in theories of deliberation and their empirical application at the international level. The thrust of this literature, emanating from normative democratic theories, is that for collective decision-making to be legitimate, it must provide for the opportunity to offer justifications and reach a consensus on a policy that is more consistent with the idea of a common good. The empirical question, then, is under which circumstances negotiating actors are able to attain such an outcome. This article takes stock of the state of the art. We argue that the ‘deliberative turn’ has forced both rationalist and constructivist scholars to refine their arguments and reconsider their methodology in studying international politics. The new research frontier for constructivists is in assessing under which circumstances arguments affect negotiating actors’ preferences, and subsequently lead to outcomes that are more than mere co-ordination on a policy outcome and, thus, not easily explained in bargaining terms. The article begins with an overview of the debate as it originated in the field of International Relations and has reached European Union (EU) studies in recent years. We then conceptualise ‘arguing’ as opposed to ‘bargaining’ and develop a set of hypotheses on the conditions under which arguing and reasoning matters in multilateral negotiations including the EU. We conclude with a brief empirical illustration of how one
can operationalize these assumptions, which is taken from a larger study on negotiations in the European Convention as compared to intergovernmental conferences.

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

Emanating from a controversy in the German quarterly Zeitschrift für Internationale Beziehungen (e.g., Keck 1995; Müller 1994; Risse-Kappen 1995; Schneider 1994; Zangl and Zürn 1996), the last decade witnessed an intensive debate on the role of arguing versus bargaining in multilateral negotiations. In the meantime, we have seen a veritable ‘deliberative turn’ in the study of such negotiations and of international politics in general. Several theoretical and empirical deficiencies of bargaining theories informed by rational choice triggered the debate. First, game-theoretic models of bargaining and learning assuming fixed preferences are inherently incomplete. Since problems of collective action almost always have multiple solutions that entail different distributive consequences for the parties involved, negotiating parties have incentives to misrepresent information about their preferences. Mutually beneficial agreements are therefore very difficult to achieve at all among purely instrumental actors when information remains disclosed or disbelieved (see Morrow 1994; Müller 2004). Second, empirical observations show that arguing in the sense of reason-giving and justifying one’s preferences on the basis of some commonly accepted principles and norms is all pervasive in public as well as in private settings. Yet, game-theoretic models often treat arguments such as, for example, justifications on moral grounds as merely epiphenomenal to interests, power or information about resolve. But if these sorts of arguments are superfluous for negotiation processes and outcomes, the mere fact that they are nonetheless used with vehemence still requires explanation. Third, multilateral negotiations often yield surprising results, which are not expected on the basis of the interests represented at the bargaining table and the give-and-take implied by pure interest-based bargaining. Actors come up with creative rules and norms suggesting that some of them might have changed their preferences endogenously to the negotiations and due to the arguments presented. Focusing on arguing and reason-giving then introduces an alternative mode of interaction different from bargaining based on fixed preferences and aimed at the mere co-ordination on policy choices.

In the meantime, the ‘deliberative turn’ (Neyer 2006) in International Relations has reached EU studies. We can distinguish three different strands of contributions to the study of argumentative discourse in the field of European integration. First, there are various normative contributions to deliberative democracy in the EU (e.g., Eriksen and Fossum 2000; Eriksen et al. 2004; Joerges 2000; Neyer 2006; Sabel and Dorf 2006). This group of authors is particularly concerned with the democratic or legitimacy deficit of the European Union. They promote institutional designs that enable deliberative
discourse, in which alternative viewpoints are represented on an equal footing. These institutional solutions resemble closely those identified by scholars approaching arguing and discourse from a more analytical and empirical angle (see below).

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

A third type of contributions has approached arguing and reason-giving from a rational choice perspective. Frank Schimmelfennig in particular has advanced the notion of ‘rhetorical action’ in this context (Schimmelfennig 2001, 2003, 2005). In his understanding, rhetoric action means using arguments and reasons for strategic purposes. Schimmelfennig’s concept is therefore situated precisely at the intersection of bargaining and arguing. While instrumentally motivated speakers use arguments and justifications to promote their given interests or to signal the intensity of their preferences, at least someone in the audience must be willing to listen and to adjust her behaviour or rethink her understanding of self-interest accordingly so that strategic actors can advance their interests. Schimmelfennig convincingly demonstrated his approach empirically with regard to the EU’s and the North Atlantic Treaty Organization’s (NATO) enlargement decisions.

ARGUING AND PERSUASION: CONCEPTUAL CLARIFICATIONS

Arguing as a mode of action and interaction implies that actors challenge the validity claims inherent in any causal or normative statement and seek a communicative consensus about their understanding of a situation, as well as justifications for the principles and norms guiding their action. As a logic of action, arguing means that the participants in a discourse are open to be persuaded by the better argument. Power and social hierarchies consequently recede in the background (Habermas 1981; 1992). Arguing is as goal-oriented as strategic interactions. The goal, however, is not to pursue one’s fixed preferences, but to seek a reasoned consensus (Verständigung). Actors’ interests, preferences and the perceptions of the situation are not fixed but subject to discursive challenges.
As communicative modes, arguing can be distinguished from bargaining through its triadic nature (Saretzki 1996). Bargaining actors assess the moves in negotiations solely based on their own utility functions including private information. In contrast, arguing necessarily involves references to a mutually accepted external authority to validate empirical or normative assertions. In international negotiations, such sources of authority can be previously negotiated and agreed-upon treaties, universally held norms, scientific evidence, other forms of consensual knowledge, or an audience that serves as adjudicators of the ‘better argument’.

Operationalizing deliberation and arguing presents challenging tasks. Early empirical studies including the ones mentioned above juxtaposed ‘arguing’ versus ‘bargaining’ in studying international negotiations. These studies yielded two important results. First, arguing and bargaining as modes of interaction do not entirely coincide with communicative modes, and arguing and bargaining speech acts usually go together in reality (Deitelhoff and Mueller 2005). As a result, we cannot simply infer from either bargaining or arguing speech acts which logic of action prevails, be it the logic of consequences or the logic of communicative rationality (‘arguing’).

Second, it turned out to be almost impossible to empirically observe actors’ motivations with any certainty. Third, persuasion actually occurs under circumstances in which one could safely assume that none of the speakers involved were truth-seeking (Ulbert and Risse 2005). Take a courtroom situation: irrespective of the motivations of the defence lawyers or the prosecutors, both sides have to engage in legal reasoning and discourse in order to persuade the audience of a third party – the judge and/or the jury – that their respective standpoint is correct. This is precisely why very elaborate procedures are in place to insure that judges and juries are open-minded and prepared to be persuaded. Jürgen Habermas concluded from these and other findings that we need to investigate the institutional scope conditions enabling communicative rationality so that arguing actually leads to persuasion and gives rise to outcomes that one would not have expected on the basis of pure bargaining. Deliberation is then conceived as an institutional as well as an interaction property.

This led to a reformulation of the research question that originally triggered the debate. If it is impossible to ascertain actors’ ‘true motivations’ with any certainty and to observe persuasion and the effects of arguing directly, and, yet, their importance for negotiation outcomes is staring us in the face, concentrating on the scope conditions for the attainment of reasoned consensus becomes essential: Which institutional scope conditions are conducive to arguing to prevail in multilateral negotiations and, thus, to affect both processes and outcomes? The prevalence of arguing, which involves a change in at least one of the actors’ strategies or preferences, will be referred to as ‘persuasion’. If one asks this question, the conceptual differences between the action modes ‘arguing’ as truth-seeking and ‘rhetorical action’ in Schimmelfennig’s sense of using reasons for strategic purposes recede in the background, because it becomes irrelevant whether
actors argue strategically or not, as long as this affects processes and outcomes of negotiations.

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

Empirical studies hence seek to unveil institutional scope conditions for endogenous changes in actors’ preferences resulting from persuasion. Given the still unsatisfactory state of knowledge about these scope conditions, empirical research strategies usually involve a mix of inductive and deductive reasoning.

**Outcome: reasoned consensus**

Before we engage in identifying potential institutional scope conditions for arguing leading to persuasion, we need to have some confidence in the fact that the outcome we are studying indeed entails elements of persuasion. One strategy is to focus on properties of the negotiation outcome, because effective arguing leads to a reasoned consensus, which is in many ways distinguishable from the compromises that typically result from processes of pure bargaining. For example, an outcome that is generally regarded as surprising, because it was not expected on the basis of represented preferences, initially suggests that actors might have engaged in arguing and changed their preferences endogenously to the negotiation. This interpretation is bolstered if actors give the same reason for reaching agreement. A surprisingly early agreement also hints at the effectiveness of arguing, since actors bargaining under a long shadow of the future and, thus, higher uncertainty about distributive effects, have incentives to bargain even harder and delay an agreement (Fearon 1998). Finally, a disproportionately strong influence of weak actors also suggests a reasoned consensus, since asymmetric power should matter less for negotiation outcomes in processes of arguing than in pure bargaining.

Indicators for a ‘reasoned consensus’:

- actors give same reasons for agreement
- agreement is surprising, often ‘problem-solving’ character above the lowest common denominator
- early agreement
- influence of weak actors

**Institutional settings conducive to persuasion**

A correlation between various institutional scope conditions and a particular negotiation outcome does not yet allow us to clearly identify the causal mechanism leading to a reasoned consensus. Studies on arguing and persuasion in multilateral negotiations have therefore identified several factors contributing
Different role identities can be expected to be conducive to effective arguing. In situations where different roles overlap, actors may be uncertain about their appropriate behaviour in ill-defined situations. As a consequence, their counterparts cannot be sure about the preferences of their negotiating partners, and therefore do not know which incentives to offer or threats to make in a bargaining situation. This should induce arguing insofar as speakers are then obliged to justify their claims on the basis of mutually accepted norms of appropriateness. At the same time, the audiences are equally uncertain about their role identities, as a result of which they are likely to be open to persuasion.

Take the EU’s comitology committees, for example, which are usually composed of member states’ representatives who, at the same time, are experts in the matters at stake. This institutional setting introduces uncertainty about the role identities of the actors, as a result of which speakers cannot take the interests of their counterparts for granted. If a comitology committee member simply acts as nothing but a member state representative, pursuing nothing but the ‘national interests,’ it is likely to be seen as behaving inappropriately in light of common expert knowledge.

Proposition 1: Institutional settings that favour overlapping role identities are likely to increase uncertainty about appropriate behaviour and other actors’ preferences and, thus, the likelihood that arguing leads to persuasion.

A second institutional scope condition concerns the degree of publicity of negotiations. According to Jon Elster, arguing in front of an audience has to be in line with powerful social norms of procedural democracy, including imperfection, consistency and plausibility; first, because a perfect coincidence between private interests and justifications for a position is considered suspicious, actors are pressured to act in a way that is perceived as impartial, not selfish; 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 verifiable. Coherent instead of constantly changing justifications for a position hint to the constraining effect of these norms. Moreover, the impact of these norms varies with the institutional setting: the more the consent of the audience is required, or the less certain speakers are about the preferences of their audiences — for instance, because they are very heterogeneous — the more we would expect these norms to affect their derived preferences (Elster 1998a, 1998b).

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

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 conducive to preference changes. The two claims are not mutually exclusive, 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) alludes to attentive domestic audiences that expect its negotiators to pursue national or otherwise given interests. In other words, once speakers are certain about the preferences of their individual audience whose consent they require, social norms lose their constraining effect. Negotiating actors do not need to argue, but can employ rhetorical devices to sway their constituencies. Under these conditions (of a principal–agent relationship), secrecy and negotiating behind closed doors might be the only way toward problem-solving, since it enables speakers to argue ‘out of the box’ and to work toward a reasoned consensus without having to fear that some principal in the audience might accuse her of ‘betraying the national interest’. A typical example for such an institutional setting in the EU is the Committee of Permanent Representatives (COREPER) (Lewis 2005; see also Lewis 2010).

**Proposition 2b**: Negotiations ‘behind closed doors’ are conducive to persuasion, the more actors know about the preferences of their audiences whose consent is required.

A final way in which the institutional setting can influence whether arguing is effective concerns the degree to which it privileges the emergence of ‘honest brokers’. Honest brokers – whose stakes in the outcome are common knowledge, are considered trustworthy by the opposing sides and who can therefore acquire authority to suggest innovative solutions – can shift negotiations toward a problem-solving mode (see Young (1991) for an early argument on this point). The crucial point here is that trustworthiness and authority are not only a matter of individual personality; they are also the result of a specific institutional context that privileges and legitimates authority in negotiations. Take the EU’s comitology once again, where rules of procedure privilege expertise and thus arguments based on knowledge rather than interest. In such a setting, authority may stem from the recognition of an actor’s superior expertise on a subject matter instead of his or her reputation or formal position. As a result, speakers that seek to affect the outcome have to frame their interests in a way consistent with recognized and consensual knowledge (on the role of knowledge in negotiations see Haas 1990).

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

**Proposition 3a**: The more the institutional norms and procedures privilege authority based on expertise and/or moral competence, the more arguing is likely to lead to persuasion.

**Proposition 3b**: The more institutional norms and procedures require neutral chairs of negotiations, the more leadership is conducive to arguing leading to persuasion.
A PLAUSIBILITY PROBE: EUROPEAN TREATY REVISIONS

The EU provided us with a natural experiment to test the propositions developed above. After a decade of onerous and disappointing negotiations in a series of intergovernmental conferences (IGC), the heads of state and governments decided to conduct negotiations in a new setting: the European Convention. Even though government representatives were present in both settings and could have always vetoed the final outcome, the Convention did, in many respects, achieve a surprising outcome which broke the deadlock on issues where preferences were originally regarded as intense and stable. Importantly, the move from IGC to Convention varied exactly those factors that scholars have suggested as being particularly conducive to the effectiveness of arguing: the Convention encompassed a larger number and a greater variety of actors (with implications for role identities and the emergence of leadership), and it was far more transparent than negotiations in IGCs. Comparing the IGCs with the Constitutional Convention thus allows us to vary those institutional scope conditions under investigation here while keeping many other factors constant. This is why there is now a rich literature on the differences between IGCs and the Convention and how they affected outcomes (e.g., Göler 2006; König and Slapin 2006; Magnette and Nicolaïdes 2004; Risse and Kleine 2007).

A specific puzzle

In the following, we focus on the differences between the Convention and IGCs by comparing negotiations on the single legal personality of the European Union. The question of merging the legal personalities of the different European Communities into one single entity based on one single treaty had occupied European decision-makers since the IGC on Political Union in 1990–91. As the question of single legal personality was intrinsically tied to the issue of treaty simplification, it caused controversies on multiple dimensions: in addition to the EU’s autonomy in foreign policy, possible legal effects of such a merger and concerns about ratification problems, it broached the age-old question of the European Union’s constitutional nature. The main conflicts emerged between integrationist countries arguing for a unified approach, and intergovernmentalist countries preferring to keep entities and treaties clearly separated. While this question had been addressed unsuccessfully at the 1996–97 Amsterdam IGC and had been deliberately excluded from the negotiations at the 2000 Nice IGC, it was the very first issue the Convention agreed on in late 2002. To the great surprise of the parties involved, the Convention’s Working Groups on Legal Personality recommended merging the legal personalities and, on that basis, a far-reaching simplification where the treaties and the ‘pillars’ would be collapsed into one single framework of the European Union.

In other words, IGC and Convention resulted in two different outcomes despite the fact that the initial preferences of the main actors involved in the various negotiations had not changed. While the IGC agreed on a lowest
common denominator outcome that basically left the status quo unchanged, the Convention’s agreement on single legal personality features all signs of a reasoned consensus: participants gave the same reasons for the decision and the agreement was obtained early in the negotiation process. The outcome was also surprising as experts expressed strong doubts about the prospects of reaching an agreement prior to the Convention. Thus, exogenous preference changes do not seem to provide a satisfactory explanation for these diverse outcomes. Instead, some negotiating actors appear to have changed their mind during the negotiation. How was this possible? Which institutional aspects were conducive to arguing to prevail in the Convention?

The 1996–97 IGC and the Treaty of Amsterdam: no agreement

Simplification of the EU’s complicated treaty structure including the question of a single legal personality had been on the IGC’s agendas for quite some time. In 1996, the heads of state and governments convened the IGC ‘to consider whether it would be possible to simplify and consolidate the Treaties’ (European Council 1996). In addition, a group of experts (‘friends of the Presidency’) was established alongside the IGC in order to consider various ways to simplify the treaties. The debate in the IGC initially focused on the implications of a (single) legal personality for the EU’s capacity for external action. In a report to the IGC, the Council General Secretariat explicitly advocated a single legal personality and the merger of the treaties. It argued that although the EU was not explicitly conferred legal personality, it had already developed various procedures to circumvent this obstacle, and therefore gained a de facto legal personality alongside the EC (Conference Intergouvernementale 1996; Conference of the Representatives of the Governments of the Member States 1996). Yet, the British and French governments feared unintended legal consequences for the ‘pillar structure’, arguing that the a single legal personality would ‘raise problems because they could, in some cases, change the substance or alter the institutional balance’ (United Kingdom 1996). The Secretariat’s legal advisor tried to remove those doubts and argued that a single legal personality would have no such consequences for the distribution of competences:

The critics misjudge the fact there are no consequences with regard to the number, nature and scope of rights, let alone the modality and procedures according to which these rights are exercised. The merger of the legal personalities [into a single legal personality] does not prevent the imposition of radically different competences and decision-making procedures. It is therefore plainly wrong to maintain that the merger of personalities implies relinquishing the special characteristics of the pillars. (Jurisconsulte 1996)

Despite this argument, France and Great Britain showed no signs of giving up their objections.

The issue of legal personality resurfaced in February 1997 when the Secretariat proposed an article on external action that endowed the EU with a
single personality (Conference of the Representatives of the Governments of the Member States 1997). This proposal and another attempt by the Dutch Presidency were immediately rejected by the UK (Interview with Jean-Paul Jacqué, 25 January 2006). Also arguments on part of the ‘friends of the Presidency’, which aimed at removing doubts about unintended legal consequences from a single legal personality were dismissed. The French and British (and Danish) opposition remained insurmountable. In the end, the IGC agreed on the least ambitious simplification option: the Treaty of Amsterdam deleted a number of obsolete provisions and renumbered the articles, but left the EU’s legal personality and the treaty structure unchanged.

In sum, the negotiations on legal personality in the context of the Amsterdam IGC were subject to processes of bargaining. Role identities and resulting preferences were not uncertain, but clear and rigid (Proposition 1). Negotiating parties were unmistakably divided in two camps: Belgium, backed by a majority of Member States, was the main spokesperson for the advocates of a merger of the entities, while the UK, backed by France, and Denmark, opposed the conferral of a single legal personality to the EU. They advanced changing or even no justifications for their positions, which indicates that their argumentation was not constrained by procedural norms as suggested in the proposition on transparency (Proposition 2a). All efforts by the General Secretariat to dissipate these doubts on the basis of expert knowledge failed to overcome the delegations’ opposition.

The European Convention

When the European Convention began in 2002, the prospects of achieving a single treaty based on a single legal personality were dim. As one of the Convention Secretariat’s experts had noted a few months earlier, it would require 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). Nonetheless, early on during the European Convention, its chairman, Valéry Giscard d’Estaing, suggested that the Convention should aim at drafting a single text without loose ends in order to increase the chances of this text of being adopted by the IGC without significant change. Once the Convention had accepted this approach, it began questioning the ‘inviolability’ of the acquis.

Very early on during the proceedings of the European Convention, the chairman established consensus as its decision rule, which one member of the presidium defined as the absence of ‘significant grousing’ (Klaus Hänsch, cited in Kleine 2007). Importantly, this definition deliberately left the conventioneers uncertain about who and what kind of objection was to be considered ‘significant’ (see also König and Slapin 2006). In addition, the vast majority of Conventioneers were members of parliaments, both European and national. As a result, speakers could never be sure whether their audiences held national
preferences, party preferences, European versus national ones, or simply personal preferences. Thus, when compared with ordinary IGCs, the institutional setting of the Convention introduced a large amount of uncertainty as to role identities (Proposition 1). This overlap of identities also implied that actors no longer conceived of themselves as agents to their national principals, which opened up the possibility of social norms to constrain argumentation in public (Proposition 2a).

In the beginning of June 2002, Working Group III on the Legal Personality began its work. It was chaired by Giuliano Amato, the former Prime Minister of Italy and a highly recognized constitutional lawyer. Although discussions were not public, the transparency of the Convention pervaded the proceedings in the WG as ‘there were always interested people in the room we did not know, but they were not showed the door’. The first meeting of the Working Group was held on 18 June 2002, and started with a tour de table, during which every conventioneer revealed his or her opinion on the issues under consideration. The chairman explicitly pointed out that a decision on recognition of a legal personality for the Union implied changes of constitutional nature. The group would therefore have to discuss possible effects for the current system of competences, the pillar structure, the procedures for the conclusion of international agreements and the overall simplification of the treaties (European Convention 2002j). The tour revealed that the level of expertise among the conventioneers was uneven, with some having no experience with European affairs and others being experts on the question of legal personality. Moreover, ideological cleavages resurfaced, with some conventioneers from the UK and France being particularly hesitant.

Amato, however, insisted on treating the question as a legal rather than a political issue. According to one participant, this allowed experts to articulate and participants to listen to legal opinions without prejudging them in terms of their political consequences (European Convention 2002b; see Proposition 3a). The next meetings on 26 June and 10 July were held with the participation of the legal advisors of the Parliament, the Council, and the Commission. Just as during the IGC, these experts were in almost complete agreement and emphasized what had been the legal majority opinion for years: that the explicit recognition of the legal personality of the Union as well as the merger of the entities was 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.

According to participants, the statement by Jean-Claude Piris, the General Secretariat’s legal advisor who had fought vehemently but unsuccessfully for a single legal personality in Amsterdam, constituted a first ‘turning point’. He pointed out that the EU indeed had already a de facto legal personality on the international scene, but that it was desirable to recognize it explicitly: ‘Skepticism is largely unfounded, because it is based on false premises. Even in the case of a merger of the legal personalities of that of the Union and of the Community, the allocation of competences and institutional powers will not be
affected and remains the same if one wishes so’ (European Convention 2002f). Interestingly, Piris did not use different arguments from those he had used during the Amsterdam IGC. But this time people listened to him. In the context of the Convention’s Working Group, the institutional context had changed: the WG members became slowly persuaded that a single entity would not necessarily entail unintended legal consequences and jeopardize the pillar structure (European Convention 2002g). In a first straw poll within the WG only one member, a French Eurosceptic, objected (European Convention 2002d).

Shortly after this preliminary decision, the Convention Secretariat began to raise questions about its political implications. Shortly before the summer break, a working document reminded the members of the WG of the fact that ‘[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 ... would be a logical consequence of the merger of the Union and the Community and would help simplify the Treaties.’ (European Convention 2002i). Another document made clear that a merged, single treaty that entailed the entire constitutional aquis could prove much more difficult to ratify than mere amendments to existing treaties (European Convention 2002h).

When the Working Group resumed its deliberations in the autumn of 2002, the Group consequently turned to the political implications. The hearing of another expert, Prof. Bruno De Witte, was considered the next turning point in the deliberations. De Witte again made it clear that if the group were to decide the merger of the entities, the merger of the treaties would be a logical consequence. In other words, a single legal personality would necessarily imply drawing up an all-encompassing treaty that would legally repeal the existing primary law (European Convention 2002e).

Shortly after this final hearing, Amato declared the emergence of a broad consensus for the attribution of a single legal personality and the merger of the treaties. In contrast to the previous IGC, where the same UK government under the leadership of Tony Blair had blocked this issue on various grounds and regardless of legal arguments in favour of this solution, it now publicly endorsed the conclusions reached by the Group. As the British government representative, Peter Hain, argued in the plenary debate: ‘The report is very convincing on an issue close to my heart: making the European Union easier for citizens to understand’ (European Convention 2002a). The European Convention then adopted this proposal by consensus, as a result of which drafting of the Constitutional Treaty could go ahead.11

According to conventioneers themselves, this outcome was a direct result of the Convention’s specific institutional design and Amato’s chairmanship:

Mister President, my intervention is not a question, but rather an observation in form of an appraisal of the work of Mister Amato. I recall, as others in this setting do as well, the time we spent right before the signing of the Treaty of
Amsterdam in an entirely diplomatic circle of intergovernmental negotiation. I am led to maintain that this is probably another proof that we need to change our procedures. This Convention is a useful instrument. In four working session under the authority of M. Amato and in presence of governments and other participants, this group arrived at several proposals, which are very clear about the necessity and advantages of conferring a legal personality on the Union and merging it with that of the Community. I would simply like to point out that the Convention Method should be maintained in the future. (European Convention 2002c)

The Constitutional Treaty established the single legal personality of the European Union and this provision survived the treaty’s failure after the French and Dutch referendums. Although it maintains separate treaties, the Treaty of Lisbon still establishes the EU’s single legal personality (Article 47).

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

First, in contrast to the Amsterdam IGC, cleavages in the Convention were not clear and rigid, but cross-cutting and in flux as there were no clearly identifiable camps within the Working Group and the Convention in general (Proposition 1). We were able to observe differences between the Presidium and the Secretariat, and hesitation on part of French, British and Swedish national parliamentarians in contrast to their government officials.

Second, in contrast to the IGC, we do not observe actors switching between different lines of reasoning. In Amsterdam, the UK and France brought up several different arguments, ranging from vague concerns about unintended legal consequences to more pronounced worries about implications of a single legal personality for external action, to distress about possible ratification problems. In the case of the Convention, however, British representatives never backed out of their agreement. Instead, and most likely constrained by the social norms of consistency and plausibility in a transparent negotiation setting, they consistently referred to the advantages of a single legal personality for the simplification of the treaties (e.g., Peter Hain, European Convention 2002a).

Third, leadership based on expert authority appeared to be particularly decisive to helping arguing prevail in the context of the Convention (Proposition 3b). During the Amsterdam IGC, all efforts by the European Council’s General Secretariat to dissipate doubts with regard to unintended legal consequences and ratification problems failed. Yet, exactly the same arguments put forward by the same legal advisor found fruitful ground in the Convention. According to the participants, this had less to do with the
arguments as such than with the problem-solving atmosphere the chairman had created, and the conventioneers’ readiness to consider other actors’ validity claims.

CONCLUSION

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

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

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NOTES

1. The literature is vast and growing fast. See, for example, Albert et al. (2008); Crawford (2002); Deitelhoff (2006); Deitelhoff and Mueller (2005); Diez and Steans (2005); Holzscheiter (2006); Lynch (2002); Mitzen (2005); Müller (2004); Niesen and Herboth (2007); Risse (2000); Ulbert and Risse (2005); Wessler (2008); special issue of Acta Politica 40(3) (2005). In addition, there is a growing literature on the subject matter in comparative politics and political psychology. Thompson (2008) provides a critical review of the normative and empirical literature. A collection of essays that brings theorists and empiricists together can be found in Rosenberg (2007). For a review of game-theoretic approaches, emphasizing the problem of sincerity, see Landa and Meirowitz (2009). For a review of social psychology and experimental literature, see, for example, Mendelberg (2002). We thank an anonymous reviewer for alerting us to this literature, which complements rather than differs from the respective studies in International Relations.

2. For an argument that transaction costs tend to be very low in international negotiations, see Moravcsik (1999).

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

4. We thank an anonymous reviewer for alerting us to this possibility. However, we still insist that arguing speech acts essentially consist of giving reasons or justifications. Whether arguing leads to ‘reasoning’ in the sense of exchanging arguments and transforming the nature of negotiations is a different question which we address below.

5. The following summarizes Risse (2000, 2004).

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

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

8. In International Relations theory, this phenomenon has led researchers to study ‘audience costs’ that accrue to leaders who act contrary to initial statements. See, for example, Fearon (1994).


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

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


