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Summary

New modes of governance focus on the inclusion of non-state actors in the provision of common goods, on the one hand, and non-hierarchical modes of steering on the other. In this paper the focus is on the latter dimension of these modes, and on one particular form of non-hierarchical rule-making, namely arguing and persuasion. We ask, which institutional scope conditions are particularly conducive to enabling arguing to prevail in negotiations and, thus, to affect both their process and outcome. After briefly sketching out the state of the art and our research question, we will subsequently set out several preliminary conjectures on arguing and persuasion in governance. Considering European treaty revisions as a “laboratory” for probing those conjectures, we will then discuss how to observe the prevalence of arguing, and how to derive meaningful conclusions from our observation.

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Introduction

New modes of governance focus on the inclusion of non-state actors in the provision of common goods, on the one hand, and non-hierarchical modes of steering on the other. As the inclusion of non-state actors in processes of rule-making and implementation is, at least on a formal level, voluntary, both dimensions are necessarily mingled. New modes of governance cannot rely on hierarchical top-down enforcement mechanisms as legal sanctioning, but need to refer to processes of bargaining as well as arguing, socialization and learning. Our focus is on the latter dimension of these modes, and on one particular form of non-hierarchical rule-making, namely arguing and persuasion. We ask, which institutional scope conditions are particularly conducive to enabling arguing to prevail in a negotiation and, thus, to affect both its process and outcome. The paper is organized in two parts. First, in a conceptual part we try to elucidate the confusion in the use of the terms arguing and bargaining. The state of the art, our research question and several conjectures will subsequently be set out more precisely. Second, we claim that the treaty revision procedures in the European Union (EU) provide an excellent “laboratory” for probing prominent conjectures on arguing and persuasion in governance. We take some first findings of our case study on the single legal personality of the EU as an example for briefly discussing how to observe the prevalence of arguing, and how to derive meaningful conclusions from our observation.¹

Arguing and Bargaining as steering modes in governance

Research Question

What do we mean by referring to arguing and bargaining as steering modes? Ideal typically, these processes of rule-making and implementation can be distinguished by the dominant causal mechanisms that are expected to come into play during negotiations: they either rely on negative or positive incentives (*bargaining*) on the one hand, or persuasion and learning on the other (*arguing*) (cf. NewGov 2004; cf. Risse 2004). In the former case, actors are expected to be driven by a logic of consequentialism, i.e. they pursue their own preferences and evaluate possible consequences of their strategies, conscious that other actors are doing likewise (March and Olsen 1998: 309). Steering is meant to result from positive and negative incentives that subsequently induce new cost-benefit-calculations and incentive structures. Self-interest then entices individuals into the compliance with norms and rules. In ideal type arguing, in contrast, actors are primarily regarded as rule-followers driven by a logic of appropriateness (March and Olsen 1998: 311) that act according to a role evoked in a specific situation. In case of an ill-defined situation, however, actors may engage in communication, in which they “seek a communicative consensus about their understanding of a situation as well as justifications for the principles and norms guiding their action“ (Risse 2000: 7). Actors are then prepared to be persuaded by better arguments and relationships of power consequently recede in the background (Checkel 2001b; Habermas 1981; Müller 1994). The eventual rule does not represent a compromise of diverse interests, but a reasoned consensus, with which actors comply due to the insight of its legitimacy. While this process is as goal-oriented as the logic of consequentialism, because it aims at achieving a reasoned consensus, it nevertheless endogenises interests and preferences. Risse has thus suggested attributing to it a particular logic of action, the logic of arguing (Risse 2000).

¹ Treaty revision procedures in the EU are classic Intergovernmental Conferences (IGCs) that rest on Article 48 TEU, on the one hand, and the European Convention, on the other. Negotiations are defined as process of collective choice within a certain period of time.

Does the communication in these steering modes show particular features? In that regard, Saretzki (Elster 1998b; Saretzki 1996) refers to arguing and bargaining as communicative modes.² In the ideal-typical communicative mode arguing, the mutual assessment of arguing speech acts becomes crucial for decision-making (Eriksen and Weigard 1997). Their validity is assessed with regard to the external authority (*Berufungsgrundlagen*) they refer to. Arguing is thus triadic in structural respect. In bargaining, in contrast, it is merely the speaker's bargaining power that is decisive for the assessment of the speech acts' validity (dyadic nature of bargaining) (Ulbert et al. 2004).

However, although we can analytically distinguish pure arguing and pure bargaining as steering and communicative modes, and associate them with particular logics of action,³ it is empirically impossible to ascertain an actor's basic strategic orientation by watching out for arguing and bargaining speech acts.⁴ The steering modes arguing and bargaining are ideal-types that represent end points of a continuum. But communication in hybrid forms ubiquitously takes place in between them, for instance when arguing speech acts are used for strategic purposes (Schimmelfennig 1997; 2001; Zangl and Zürn 1996). Unsurprisingly, explorative studies have shown that arguing and bargaining speech acts are all-pervasive during multilateral negotiations and usually go together in reality. Hence, the respective speech acts are neither self-excluding, nor can we draw any conclusions from their quantitative distribution, so that they cannot serve as indicators for empirical research (cf. Deitelhoff and Müller 2005).

So why should we bother? To be sure, both steering modes arguing and bargaining need not to result in a settlement. But when an agreement is achieved, pure bargaining results in compromises, whereas pure arguing brings about a reasoned consensus, because actors take validity claims into account and may change their preferences accordingly. Provided that we can rule out an exogenous preference change (e.g. due to domestic or structural changes), it is possible to indirectly observe the effectiveness of arguing on the basis of its outcome. Agreements close to a reasoned consensus can therefore be detected when the result of a negotiation is surprising, i.e. a priori not expected according to the represented preferences and bargaining resources, and, above all, actors give the same reasons for its achievement (Risse 2004).⁵ Hence, something has happened during the negotiation that does not permit talking of pure bargaining. Consequently, processes and outcomes of negotiations can not regularly and simply be traced back to actor's preferences and their relative material bargaining power solely. From the preceding we derive our basic assumption that negotiations are social processes, whose dynamics require closer scrutiny. But when it is impossible to distinguish arguing and bargaining as steering modes empirically, and yet we have good reasons to assume that they make a difference, concentrating on the scope conditions for their effectiveness (*persuasion*) becomes essential. We therefore define arguing as reason-giving in order to alter actors' choices and preferences irrespective of their consideration of other actors' strategies (cf. Keo-

² See Holzinger 2001, Kratochwil 1989 and Searle 1971. It is essential to keep in mind the distinction between speech acts, communicative modes, and steering modes (also modes of interaction). Whereas the steering mode bargaining is compatible with the use of bargaining speech acts (promises and threats) and arguing speech acts (validity claims), because actors may use arguments strategically, the steering mode arguing is only compatible with arguing speech acts. See Müller 2004.

³ A discussion of the logics of action provides Müller 2004.

⁴ The following mainly draws on Ulbert et al. 2004.

⁵ Outcomes that cannot be traced back to the initial preferences represent anomalies, for which rationalist approaches cannot account satisfactorily (Müller 1994, Müller 1995). Although rationalists have tried to include communication in game-theoretical models (Keck 1995, Morrow 1994), they have trouble capturing more profound preference changes. An excellent discussion provides Deitelhoff 2004.

hane 2001: 10), 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?*⁶ In so doing, we relax social action theoretic qualifications, though, (Deitelhoff and Müller 2005: 176; Risse 2002: 603), and disregard the question of the motivation of an actor entering the negotiation.

Institutional Scope Conditions

Informed by the Habermasian theory of communicative action, explorative studies on arguing and persuasion in multilateral negotiations suggest that formal and social institutional contexts indeed leave their traces on the process and outcome of negotiations by furthering the prevalence of “better” arguments to different degrees (Ulbert et al. 2004).⁷ Indeed, multilateral negotiations are “hard cases” for the application of this theory, because international politics lacks the Habermasian ideal speech situation⁸ even more than democratic states in accordance with the rule of law. It has to be kept in mind, though, that this concept is an ideal type, whose elements may very well serve as heuristics in empirical research. To be sure, we do not conceive institutional contexts as triggers for mechanical processes leading directly to a reasoned consensus, but rather as conditions increasing or decreasing the likelihood of effective arguing. In the following we briefly summarize the state of the art (cf. Deitelhoff and Müller 2005; cf. Ulbert and Risse 2005) on different scope conditions that have so far proven to be conducive to arguing.

To begin with, it is suggested that deliberation in a public sphere affects the process and outcome of negotiations. According to Jon Elster, arguing in front of an audience should be in line with constraints like imperfection, consistency and plausibility (Elster 1998a; 1998b).⁹ Powerful social norms thus force actors to act in a way that she is not perceived as selfish, but as impartial and credible (Elster 1998a: 104). This effect should increase the more the consent of this audience is required, i.e. when it appears as a virtual third negotiation party and actors have an incentive to act according to these social norms. Yet, a more profound change in actors’ persuasions should be triggered the more the public sphere consists of an impartial and in a way coherent audience.¹⁰ This audience subsequently resembles an external authority that provides a common point of reference in a communication, which may enable the triadic structure of arguing to come into play.¹¹

⁶ We owe this formulation of our research question to a remark by Jürgen Habermas at a conference in Frankfurt in June 2005.

⁷ By formal institutional context we refer to formal rules of conduct for negotiation and decision-making, whereas the social institutional context is understood as shared understandings about the definition of a situation and underlying principles and norms guiding action.

⁸ See Habermas 1992: 391.

⁹ 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.

¹⁰ See also Schmalz-Bruns 1995.

¹¹ In contrast to Elster, Jeffrey Checkel (Checkel 2001b, Checkel 2001c) argues that negotiations in front of a public audience result in ritualistic rhetoric. Both claims are not self-excluding though, and heavily dependent on the kind of audience and its required consent. Elster refers to an impartial and in a way coherent audience, whereas Checkel alludes to negotiators that expect having other preferences than an audience. See Checkel 2001a, Checkel 2003. Private in-camera settings therefore prevent it from emerging as a virtual third negotiation party. Then, however, its role as an external authority vanishes.

Conjecture 1: A transnational public sphere increases the likelihood of the prevalence of arguing.

In various case studies uncertainty¹² has turned out to be conducive to effective arguing, because actors become interested in communicating over the facts in an ambiguous situation. It may stem from diverse sources.¹³ First, uncertainty arises from incomplete information about other actor's preferences, on the one hand, and the substantial content of an issue and its policy implications on the other (Lax and Sebenius 1986; Luce and Raiffa 1957). Second, information plethora may overstrain the decision-makers' information-processing capacities when calculating all possible outcomes of different available strategies.¹⁴ Third, games with repeated play most often have multiple equilibria, i.e. multiple outcomes that represent Pareto-improvements. Although actors are aware of the equal probabilities of these outcomes, this situation is nevertheless ambiguous as there are no objective criteria that further guide their choice (Keohane 1988).¹⁵ Fourth, if we relax the assumption of an ontological priority of actors and view him or her as a constitutive part of a social structure, we meet a fourth ambiguous state, in which a role-conflict yields uncertainty about an actor's appropriate behaviour in an ill-defined situation. Yet, it is important to underline that these states of uncertainty are not a matter of fact, but heavily dependent on the (formal) negotiation setting in which negotiations take place (e.g. Winham 1977; Zartman 1994a; 1994b).

Conjecture 2: Different states of uncertainty increase the likelihood of a prevalence of arguing.

A regularly voiced argument is that the institutionalization can make a difference. For one thing, the more densely institutionalized a setting is, the more we should observe a strong logic of appropriateness to prevail. Informed by the concept of the "common lifeworld" (Habermas 1981: 2: 209) it has further been argued that a dense institutionalized setting provides common points of reference that enable the triadic structure of arguing to come into play. Yet, this does not explain why we sometimes observe both processes of arguing and bargaining in the same institutional setting (Müller 2004: 402). What is more, negotiators tend to construct their own common lifeworld, be it the common membership in an institution or through analogies to previous encounters. Thus, in order to establish a third angle in processes of arguing, "norms (have) to be activated first" (Ulbert and Risse 2005: 354), both in weakly and densely institutionalized settings. In negotiations actors are surrounded by diverse and even contradictory arguments, analogies and frames, but some of them are chosen while others meet with no response. 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 (Finnemore and Sikkink 1998; Ulbert 1997) can be easier accommodated and adapted. In cases of repeated play, negotiators have the possibility to recur to previous situations. Furthermore, negotiation parties and third actors (Deitelhoff

¹² See Camerer and Weber 1992 and Hirshleifer and Riley 1992. Empirical evidences of uncertainty have given rise to the perspective of bounded rationality (Simon 1982), which is increasingly acknowledged by most soft rationalists (Odell 2002).

¹³ A game-theoretic terminology does not fully capture the following aspects of uncertainty. Cf. Koremenos et al. 2001. Also Sebenius 1992.

¹⁴ For instance due to gossip, tête-à-tête-lunches etc. In negotiation analysis this state of uncertainty due to imperfect information and cognitive limitations of decision-makers is most often subsumed under the term complexity. See Winham 1977 and Zartman 1994b.

¹⁵ In this context, scholars point to the pivotal role of ideas as shared beliefs, which may serve as focal points (Schelling 1960) around which the behaviour of actors converges. See Garrett and Weingast 1993, Goldstein and Keohane 1993.

2004; Ulbert 2005) may draw analogies to more general standards, or they frame respectively reframe an issue (Kohler-Koch 2000; Rein and Schön 1991).

Conjecture 3: Arguments that resonate increase the likelihood of a prevalence of arguing.

Also individuals can make a difference. Because why should actors consider arguing speech acts when they may fear that they are used for strategic purposes only?¹⁶ In that regard, many scholars point to the trustworthiness of a speaker. Trust, broadly defined as the subjective confidence in the expectation of not being exploited by the other side (Hardin 2002; Hoffman 2002), may affect the readiness to consider new ideas. It is thus important that a speaker is perceived impartial and dedicated to the pursuit of a common goal.¹⁷ Again, trustworthiness is not a matter of fact but dependent on institutional scope conditions. For instance, social contexts ascribe roles that entail trustworthiness, e.g. a judge in a court, or a nun,¹⁸ and its alteration may subsequently lead to a disproportionate empowerment of particular actors (Risse 2000: 33). Furthermore, the trustworthiness among the actors should increase with the precision of institutional and procedural rules (e.g. enforcement and monitoring rules), because they ought to promote trust by discouraging antisocial behaviour and reducing misunderstandings (Rothstein 2000). Also the prospect of future encounters and a relatively small number of parties might be conducive to trust-building (Leach and Sabatier 2005).

Conjecture 4: The trustworthiness of a speaker increases the likelihood of a prevalence of arguing.

In short, the institutional context may affect process and outcome of negotiations by furthering the effectiveness of arguing and persuasion to different degrees. This subsequently implies that variations in the institutional setting can account for differences in processes and outcomes. However, as argued above, we do not conceive those aspects as triggers for mechanical processes, but as factors increasing or decreasing the likelihood of a prevalence of arguing. Furthermore, in the manner described above they may potentiate one another, on the one hand, or be contradictory, on the other. For instance, while a large number of negotiation parties can be derogatory to building confidence, it might conversely increase the uncertainty of participating actors. The conjectures thus require refinement and precision – a task that now needs to be undertaken through systematic empirical application. In the following we argue that the treaty revisions in IGCs and the European Convention provide an excellent “real-life” experiment for this endeavour, because it allows for thoroughly studying the above mentioned conjectures.

European Treaty Revisions as a laboratory

The Way to the European Convention

Since the 1980s the European Community (EC) has been in a semi-permanent reform. Challenges of globalization, enlargement rounds, and the reunification of Germany gave rise to

¹⁶ From a rational-choice perspective, Kydd 2000 models trust in games of costly signalling. However, uncertainty about the credibility of information results in an infinite regress about the standards for credibility. See Johnston 2001 and Müller 2004.

¹⁷ See also the literature on leadership: Beach 2005, Kleine and Maignette forthcoming, Malnes 1995, Metcalfe 1998, Moravcsik 1999, Underdal 1994, Young 1991, Young 1999.

¹⁸ Accordingly, some scholars stress that bureaucracies, courts, and scientists possess a rational-legal authority that evokes trust in their competence and technical expertise on complex matters. See Barnett and Finnemore 1999, Burley and Mattli 1993, Mattli and Slaughter 1998.

demands for more efficient, effective and accountable European institutions. Five IGCs were convened in order to amend the founding treaties¹⁹ respectively to create new policy areas outside the Communities. These negotiations 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. Yet, fundamental disagreements about the *finalité* of Europe became more and more apparent (Moravcsik and Nicolaïdis 1998: 14). This became most obvious at the 2000 IGC. The hostile and intransparent negotiations could only be resolved after the "night of long knives" and led to a compromise that has overwhelmingly been considered as the lowest common denominator on institutional questions.

In response to the ensuing critique, the Heads of State and Government agreed that a more inclusive setting was needed. At the Laeken summit in December 2001, they decided on convening the "Convention on the Future of Europe" as the forum preparing the next IGC.²⁰ Despite some "safeguards" (Magnette and Nicolaïdis 2004) that were introduced by more sceptical Member States in order to maintain the control over the Convention's deliberation, this body came up with a Draft Constitutional Treaty (DCT). Since it was formulated in a manner as if it entered into force immediately, the Convention assumed the same task as an IGC, and thus emerged as a treaty revision procedure of its own kind. The DCT conferred a single legal personality to the European Union, merged the treaties, and subsequently reorganised, simplified and, perhaps, legally succeeds the whole patchwork primary law. Consequently, the distinct character of the Convention's outcome is reflected in the EU-speak neologism *Constitutional Treaty*. Such an outcome was neither foreseen (although not prevented) by the Laeken mandate, nor expected by the vast majority of experts in European affairs.²¹ What is more, the Conventioneers heavily stretched their mandate and renegotiated the Nice Treaty even before it had entered into force. And compared to this treaty, some elements of the DCT and the emanating Treaty Establishing a Constitution for Europe (TCE) indeed appear surprising.²² In short, despite some safeguards and despite comprising representatives of the Member States and negotiating "under the shadow of the IGC", which had the final say on the outcome, this body managed to some extent what previous treaty revisions failed to do.

¹⁹ 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).

²⁰ It was composed of four main components: representatives of the national parliaments, the EP, representatives of the member states, and the European Commission. The Convention's deliberation and documents were all accessible to the public. For a more detailed description of the Convention's work see Milton and Keller-Noëllet 2005 and Norman 2005.

²¹ Cf. Magnette and Nicolaïdis 2004. The Laeken Declaration – creating the European Convention, defining, though in vague terms, its mandate and the rules of the game – is a rather ambivalent document, which reflects the preferences of both supporters and critics of the Convention method. Its outcome should either be either a catalogue of different options, among which the IGC would choose, or some (sic!) consensual recommendations. The Declaration further asks, whether a possible "simplification and reorganisation might not lead in the long run (sic!) to the adoption of a constitutional text in the Union" (European Council 2001).

²² In that regard, one could point to the explicit conferral of a single legal personality, the definition of double majority, the inclusion of the Charter of Fundamental Rights, the partly communitarization of the "third pillar", the new rights of the EP in the budgetary procedure and the Common Agricultural Policy (CAP), and the new treaty revision procedure.

As argued above, it is suggested that the institutional context can be conducive to the occurrence of different steering modes, which in turn affect the likelihood of a preference change during an interaction and the attainment of a reasoned consensus. Some of the Convention's outcomes as well as first empirical insights indicate that arguing did indeed affect the deliberations.²³ And in fact, when we compare the Convention to classic IGCs, we can find remarkable variations with regard to the institutional setting, as for instance the transparency, the type of actors, and the decision-making mode. Therefore, we arrive at the educated guess that the treaty revision method indeed made a difference!

As we will claim below, one of the Convention's surprising outcomes, which was agreed on in one of the first Working Groups (WG), is the conferral of a single legal personality to the EU. But whereas this result is indeed puzzling and in need for an explanation, other outcomes and non-agreements of the Convention's deliberations have been considered disappointing. For instance, the Working Group "Social Europe" produced a report that was predominantly a list of points of disagreements. In international politics there are only few, if any, instances, where almost the same topics are subject to negotiations in different institutional settings, and thereupon bring about different outcomes. For previous studies there was hence nothing else for it but to draw upon single case studies. Therefore, the Convention provides an excellent "real life-experiment" that allows for systematically varying and probing variables both between IGC and Convention, as well as within the Convention. A thorough comparison of both institutional settings may furthermore hint to yet unnoticed aspects of effective arguing.

Dependent Variable: Persuasion vs. disagreement

Ascertaining in the first place that an outcome has been affected by arguing and persuasion represents one of the most difficult tasks in our endeavour. This holds especially true for multilateral negotiations, which are most often conducted in secrecy. Moreover, negotiators are reluctant to reveal their true preferences at the beginning of the encounter on the one hand, and to admit that they have been persuaded on the other. As mentioned above, a consensus indicates the effectiveness of arguing and persuasion. An outcome close to a reasoned consensus can be detected when the criteria, a) surprising agreements, and b) actors giving the same reasons for its achievement, hold. Since we mostly only observe the end result of negotiations and are kept in the dark about the process through which this result was achieved, only few agreements actually appear surprising in retrospect. At the end of the day they are most often referred back to vague statements of initial patterns of "real" preferences and preference intensities. One could object, though, that without an exact measurement of prior preferences, those interest-based explanations run tautological. Yet, this should not keep us from specifying our dependent variable.

In a first approximation, "surprising" agreements are those agreements, which had already been subject to prior negotiations, but no agreement could then be achieved. In addition, surprising agreements are those agreements that participants themselves claim not to have expected given the initial preferences of the actors involved. We furthermore need to control for exogenous preferences changes, i.e. due to an alteration of structural or domestic factors, taking place prior to or during the encounter.²⁴ Yet, we may not confuse negotiation surprises with evidence for "arguing" or persuasion as such. In a second step, we have to assess if the agreement is indeed different from a compromise, since the successful conclusion of a yet unsettled agreement might just as well have resulted from the inclusion of new issues and new

²³ See e.g. Göler 2005.

²⁴ We thank Michael Zürn for helping us clarifying this point.

opportunities for package-deals. As those package-deals are generally made in end-games, because only authorized actors are able to engage in negotiations spanning several policy areas (Scharpf 1997: 130), an early agreement should indicate the absence of such horse-trading. Also a disproportionate influence of materially weak actors may point to effective arguing. Finally, and most importantly, an outcome comes close to a consensus when actors give the same reasons for its achievement.

We claim that such a surprising consensual agreement can be found in the question of legal personality and, necessarily mingled with that, the question of the legal construction of the European institutional order.²⁵ These questions had already been subject to the negotiations in Amsterdam and Nice, but no agreement could then be achieved. In Amsterdam, the IGC established a special working group, the “friends of the presidency group on simplification-codification”, whose outcome clearly represented the lowest common denominator. The IGC only agreed on deleting some obsolete provision and subsequently renumbered the articles. Surprisingly, the single legal personality was one of the first issues on that the Convention reached consensus. In its report, which had to be approved by the Plenary, the Convention’s WG on Legal Personality not only recommended the explicit conferral of a single legal personality to the EU. They consequently agreed on striving for a fully-fledged constitutional treaty that should reorganize and legally succeed the EU’s whole primary law. Hence, whereas the IGC only agreed on the lowest common denominator, the Convention consensually decided on an outcome well beyond that. Exogenous preference changes cannot explain that outcome. There are only few indications that point to a minor preference change of one Member State prior to the Convention. However, interviews with participants of both the 1996-97 IGC in Amsterdam and the Convention as well as with national diplomats and experts from the European institution’s administrations all confirm that the early consensus on a single legal personality has indeed been astonishing. In addition, all interviewees reckon that to that point of time they would not have expected an IGC to agree on that question. Furthermore, as this had been one of the first results in the very beginning of the Convention, it is excluded that this agreement can be referred back to package-deals and side-payments. We thus assume that the treaty revision method indeed played a role by enabling arguing to prevail in the Convention.

In order to accommodate the quite diverse outcomes of the Convention in our research, we furthermore ask which aspects have distracted arguing from prevailing despite the same institutional scope conditions. In that regard, the outcome of the WG “Social Europe” depicts a counter-example to the single legal personality. Because it merely resulted in a list of points of disagreement and furthermore witnessed a splitting up in two camps, it is reasonable to assume that bargaining prevailed in that WG. Of course, with this case selection we neither intend to imply that bargaining brings about “bad” outcomes, nor do we assume that arguing always and necessarily results in an accord. However, since we first and foremost concentrate on the likelihood of the effectiveness of arguing, and do not ask for competing explanations for the success of either bargaining or arguing, it does not make any difference for our purpose whether we choose a disagreement or a compromise.

Methodology

As argued above, an analysis merely based upon speech acts will not give any insight in their effectiveness. Therefore, we apply the method of process-tracing (George and Bennett 2005: chap. 10) in order to identify intervening causal processes between the conjectures and our

²⁵ See for instance Bribosia 2001, De Witte 2002, Schröder 2002. On this WG cf. Kleine 2005.

dependent variable. This method is indispensable for theory-testing and –development, because it subsequently allows for a more precise amendment of the variables in the light of our knowledge. Unfortunately, neither the IGC nor the WG in the Convention produced any verbatim protocols. It is therefore indispensable to conduct interviews with participants and members of supporting secretariats. Those interviews have to be cross-checked with newspaper articles, background reports, and secondary literature.

In our analysis we have to be attentive to turning points and sudden dynamics, for instance when the discussions concentrate on a particular question or when one question is suddenly settled. Coming back to our example, we identified such a turning point in the Convention's WG in the hearing of a legal expert from the Council Secretariat.²⁶ In the eyes of our interviewees, he lifted the uncertainty of sceptical and intergovernmentalist Conventioneers, because he was seen as a representative from the Member States' institution. Although legal experts from other European institutions had brought forward the same arguments and drawn the same conclusions, it was the man from the Council who made the difference. It is astounding that the same person had already brought forward the same arguments in the 1996-97 IGC. However, at that point of time these arguments did not meet any response. According to our interviewees, in the 1996-97 the governments' representatives rather deemed this Council civil servant a representative of a supranational European institution. Hence, only in the Convention his arguments prevailed and, in the words of a Commission's civil servant, "the obvious [the single legal personality] became real". This anecdote is an instance for the importance of the trustworthiness of a speaker, which needs not to be a matter of fact, but might be entailed by roles ascribed by the social context.

Conclusion

In this paper, we have tried to elucidate some confusion in the use of the terms arguing and bargaining. Arguing and bargaining are regularly referred to in very diverse contexts and meanings. We have explained that although these distinctions are valid on an analytical level, researchers face immense difficulties when trying to verify arguing empirically. But since they are to be assumed behind diverse outcomes, which indirectly point to their effectiveness, we have specified our research question as follows: which institutional scope conditions are particularly conducive to enabling arguing prevail in multilateral negotiation systems and, thus, to affect both process and outcome. In the second part of this paper, we argued that the EU's treaty revision procedures provide an excellent real-life experiment for probing already established conjectures on the effectiveness of arguing. Exemplified by the case of the negotiations on the EU's (single) legal personality we have briefly presented a strategy for pragmatically coping with difficulties in the empirical analysis. Thereby we aimed at demonstrating that research on the emergence of arguing and persuasion as particular steering modes in governance is not only desirable from a theoretic point of view – it is also empirically feasible. Thus, further studies should follow.

²⁶ The following is based upon interviews we conducted with participants and administrative personnel of the 1996-97 IGC and the European Convention in May and September 2005.

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